State of Iowa

1970

THIRTY-EIGHTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1970

RICHARD C. TURNER
Attorney General

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ATTORNEYS GENERAL OF IOWA
1853-1970

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 1953-1967; State Senator from Pottawattamie County 1960-1964; Ass't. Pottawattamie County Attorney 1954-1956; Avoca Town Clerk 1953-1960; Elected Attorney General 1966, 1968 and 1970.

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; resigned 1969.

DAVID A. ELDERKIN ..... Special 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. 1966, App't. Special Ass't. Atty. Gen. 1970.

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, resigned 1970.

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, resigned 1970.

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.

JAMES F. PETERSEN ..... Special 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, App't. Special Ass't. Atty. Gen. 1970.

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. 1969.

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, resigned 1969.

JOHN E. BEAMER ..... Assistant Attorney General
B. September 23, 1939, Abilene, Texas; B.A. Cornell College; J.D., S.U.I.; Agent F. B. I., 1964-1970; married, one child; App't. Ass't. Atty. Gen. 1970.

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, resigned 1969.

JAMES E. BOBENHOUSE ..... Assistant Attorney General
B. March 19, 1945, Des Moines, Iowa; B.S., S.U.I.; J.D., Drake University; single; App't. Ass't. Atty. Gen. 1970.

DOUGLAS R. CARLSON ..... Assistant Attorney General
B. December 3, 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, resigned 1969.

ROXANNE BARTON CONLIN ..... Assistant Attorney General
B. June 30, 1944, Huron, South Dakota; B.A., J.D., Drake University; married, two children; private practice 1966; Deputy Industrial Commissioner 1966-1968; App't. Ass't. Atty. Gen. 1969.

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.

JAMES C. DAVIS ..... Assistant Attorney General
B. February 23, 1937, Bloomington, Indiana; Oregon State College 2 years; Greenville College 1 year; B.A., J.D., S.U.I.; married, one child; private practice 1962-1970; Justice of the Peace 1967-1970; App't. Ass't. Atty. Gen. 1970.

G. DOUGLAS ESSY ..... Assistant Attorney General
B. October 14, 1942, Des Moines, Iowa; undergraduate, J.D., Creighton University; single; private practice 1966-1967; Trial Counsel, United States Navy 1967-1969; App't. Ass't. Atty. Gen. 1970.

WILLIAM W. GARRETSON ..... Assistant Attorney General
B. July 1, 1935, Oklahoma City, Oklahoma; B.A. Iowa Wesleyan College; J.D., The George Washington University Law School; married, three children; U. S. Treasury Department, D. C. 1957-1959; U. S. Labor Department, D. C., 1959-1961; private practice 1961-1969; appointed Ass't. Atty. Gen. 1969.

ROBERT W. GOODWIN ..... Assistant Attorney General
B. June 25, 1943, Indianola, Iowa; B.S., J.D., Drake University; married, two children; App't. Ass't. Atty. Gen. 1970.

MAX A. GORS ..... Assistant Attorney General
B. January 21, 1945, Viborg, South Dakota; B.A., Augustana College; J.D., Drake University; married; App't. Ass't. Atty. Gen. 1970.

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. Ass'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; resigned 1969.

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.

DONALD L. HOEGER ..... Assistant Attorney General
B. December 7, 1937, Luxemburg, Iowa; B.A., Loras College; J.D., S.U.I.; married, one child; App't. Ass't. Atty. Gen. 1970.

JAMES W. HUGHES ..... Assistant Attorney General
B. February 11, 1944, Des Moines, Iowa; single; B.A., Grinnell College, J.D., Drake University; App't. Ass't. Atty. Gen. 1969.

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.

MICHAEL J. LAUGHLIN ..... Assistant Attorney General
B. February 27, 1944, Des Moines, Iowa; married; B.S.B.A., J.D., Drake University; private practice 1969; App't. Ass't. Atty. Gen. 1969.

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; Atty. U. S. Army Corps of Engineers, 1959-1965; App't. Ass't. Atty. Gen. 1966, 1967, resigned 1970.

JEROME F. LUNDGREN ..... Assistant Attorney General
B. May 16, 1929, Chicago, Illinois; B.S., J.D., Drake University; married, four children; private practice 1968-1969; App't. Ass't. Atty. Gen. 1969.

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, resigned 1970.

RICHARD C. McLAUGHLIN ..... Assistant Attorney General
B. March 5, 1925, Sibley, Iowa; B.A., Morningside College; L.L.B., University of Michigan; App't. Ass't. Atty. Gen. 1967, resigned 1969.

CLAYTON C. MOWERS ..... Assistant Attorney General
B. September 2, 1946, Algona, Iowa; married; B.A., J.D., Drake University; App't. Ass't. Atty. Gen. 1970.

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.

RICHARD J. NOLAN ..... Assistant Attorney General
B. November 8, 1939, Iowa City, Iowa; A.B., J.D., Creighton University; married, one child; App't. Ass't. Atty. Gen. 1970.

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.

STEPHEN J. PETOSA ..... Assistant Attorney General
B. April 24, 1943, Fort Wayne, Indiana; B.S., Regis College; J.D., S.U.I.; App't. Ass't. Atty. Gen. 1968, resigned 1971.

DAVID S. SATHER ..... Assistant Attorney General
B. September 17, 1943, Chicago, Illinois; B.S., J.D., Drake University; married, two children; App't. Ass't. Atty. Gen. 1967, resigned 1970.

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, resigned 1969.

FRANKLIN W. SAUER ..... Assistant Attorney General
B. February 16, 1941, Central City, Iowa; B.A., J.D., S.U.I.; single; private practice, 1966; U. S. Army, 1966-1968; App't. Ass't. Atty. Gen. 1970.

ASHER E. SCHROEDER ..... Assistant Attorney General
B. May 12, 1925, Maquoketa, Iowa; married, three children; B.A.; J.D., S.U.I., App't. Ass't. Atty. Gen. 1969.

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, resigned 1970.

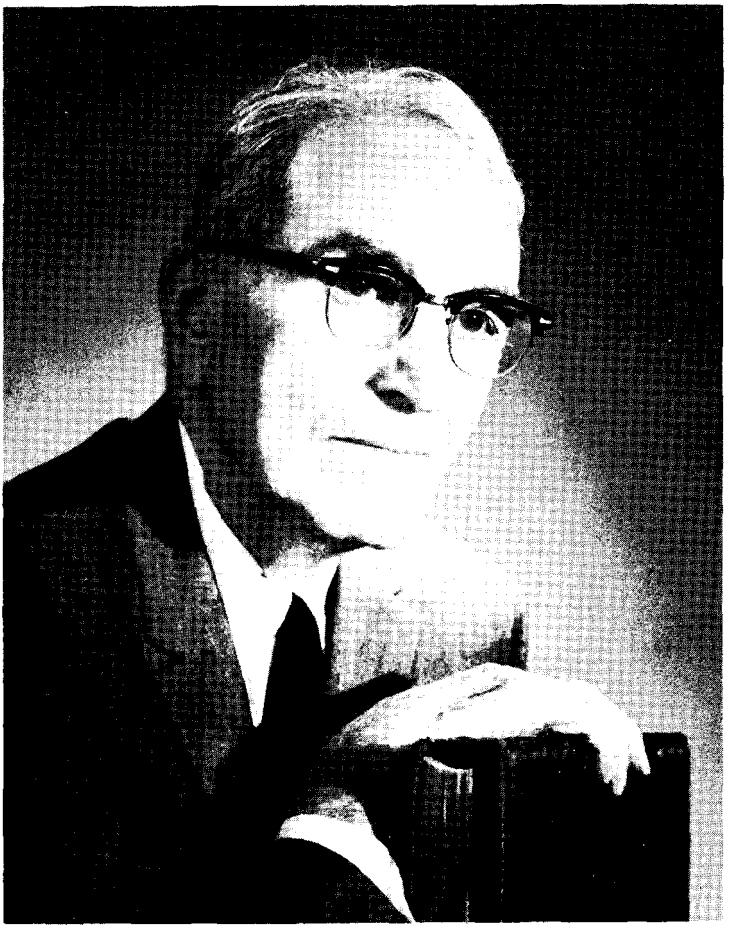
RICHARD N. WINDERS ..... Assistant Attorney General
B. April 13, 1945, Milwaukee, Wisconsin; single; B.A., J.D., Drake University; App't. Ass't. Atty. Gen. 1970.

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, resigned 1969.

SARA A. CANADA ..... Executive Secretary

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

March 23, 1971

The Honorable Robert D. Ray
Governor of Iowa

Dear Governor Ray:

In accordance with §§13.2(6) and 17.6, Code of Iowa, 1971, I am privileged to submit the following report of the condition of the office of Attorney General, opinions rendered and business transacted of public interest.

OPINIONS

During 1969 and 1970, the Iowa Department of Justice prepared for various state officers and county attorneys requesting the same, pursuant to §13.2(6), Code of Iowa, 1971, 443 written legal opinions. During the preceding two years, 607 opinions were issued.

The preparation and furnishing of these opinions constitutes one of the more important and time consuming functions which the Attorney General is required to perform. With the advent of annual sessions and as our government grows in size and complexity, it can be expected that the writing of Attorney General's opinions will occupy an increasing portion of Department of Justice staff resources.

CONSUMER PROTECTION

In the area of consumer protection, the 1969-1970 biennium saw a tremendous increase in the activities of this office despite the fact that there has been no increase in staff size over the previous two-year period. Both the number of complaints handled and the amount of litigation engaged in have increased.

During 1969 this division received 1,085 new complaints and in 1970 it received 1,883. This compares with 523 for 1967 and 703 in 1968. It can be seen that the figure for 1970 is more than double the 1968 figure. During 1969 and 1970 respectively, 781 and 1,671 complaints were closed.

During the year 1969, the consumer fraud division of this office recovered a total of $126,751.91 for citizens of Iowa. The figure for 1970 was $324,881.20. For 1968 the comparable figure was $48,493.73.

During 1969 this office was involved in 24 consumer fraud lawsuits and in 1970 the figure had jumped to 40. For 1967 and 1968 the comparable figures are 7 and 16 lawsuits respectively. As of December 31, 1970, the consumer protection di-

vision of the Attorney General's Office had been successful in every lawsuit filed, having never lost a case.

This litigation involved such matters as:

1. Referral sale schemes
2. Deceptive bait-and-switch advertisements
3. Deceptive sales of encyclopedia sets
4. Pyramid or multilevel distributorship schemes
5. Deceptive sales of magazines
6. Turning back of automobile odometers
7. Out-of-state land companies
8. Aluminum siding sales
9. Furnace repairs
10. Lottery punchboards
11. Correspondence courses
12. Furniture sales
13. Automobile repairs, and
14. Lawsuits to force reluctant defendants to furnish information and answer questions regarding their activities within the state.

The consumer protection division of the attorney general's office has been very active in the field of consumer education. Weekly bulletins have been sent to the news media and other interested persons and agencies warning of schemes then currently active in the state. Also personnel of this office have appeared before school and service groups, and other interested organizations to explain the role of the Attorney General in the area of consumer fraud, the kind of schemes that have been encountered and the protection which the law affords the consumer.

My office also sponsored and was instrumental in the passage by the Iowa legislature of three amendments to Iowa's Consumer Fraud Law. These amendments outlawed referral sales schemes, provided for immunity to a witness for criminal prosecution where that witness is forced to testify against himself, and the elimination of a cumbersome notice provision which was included in the original law. Other legislation was drafted and proposed but was not acted upon by the 63rd General Assembly.

The next biennium will almost certainly see a further increase in the number of complaints received by this office. Further legislation is needed in this area and we have drafted and proposed to the current legislature an omnibus consumer protection bill. This measure, if enacted, would strengthen law enforcement in the consumer protection area by enabling any persons contracting or purchasing consumer goods or services, solicited by a seller at the home of the buyer, to rescind the contract or purchase within three days after the contract

or purchase is made; eliminating the privileged position that the law has given to holders of negotiable instruments made in connection with the sale of consumer goods or services, who otherwise could claim to take the instruments without knowledge of any defenses that might be asserted; limiting the right of certain persons to file mechanics liens; and eliminating certain exemptions to the application of Chapter 713A regarding courses of instruction. It also calls for amending §713.24 by striking certain notice provisions, by providing for the recovery of costs of investigation which result in court action, providing for penalties for the violation of injunctions or court orders, and providing that injunctions and other orders remain in effect during an appeal.

It is expected that the dramatic increase in the workload of this division during the past two years will be matched by a similar or greater increase in the workload in the next biennium.

TAXATION

The Iowa 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.

In the past two years, there were 44 administrative hearings before the Iowa Director of Revenue. During the last two years, 19 taxpayer appeals were taken to the State Board of Tax Review from decisions of the Director of Revenue. Ten of these appeals were disposed of by the state board in favor of the Director of Revenue, two were decided adversely to him, and seven such appeals are pending. Iowa district courts decided 25 tax cases in favor of the department of revenue and seven such cases were decided adversely to the state. A total of 27 district court cases were settled. Ten cases are awaiting trial and two cases are pending decision in the district courts. The Iowa Supreme Court upheld the state in all of the six tax cases decided by it. One case is presently pending in the Supreme Court.

Several of the cases are very significant. In April of 1969, for the first time in the State of Iowa, a property tax equalization case was tried on its merits. *Dale Riediger et al v. W. H. Forst,* Equity No. 21660, Plymouth County District Court. This case upheld the director of revenue's method of equalization of agricultural property valuation. In February of 1970, another equalization case, *Lester Flanders, et al v. W. H. Forst et al,* Equity No. 25879-56-469 was decided by the Mahaska County District Court in favor of the director of revenue's method of equalization. The inheritance tax case of *Estate of Cecil A. Noe* is on appeal to the Iowa Supreme Court from a

judgment rendered in favor of the department of revenue. The Supreme Court's decision in this case will definitely affect the rules for abatement of a surviving spouse's share in many estates and should be of guidance to the revenue department as well as to all attorneys who probate estates.

On December 15, 1970, the Iowa Supreme Court handed down its decision in the case of *American College Testing Program, Inc. v. W. H. Forst, et al,* 1970, Iowa , 182 N. W. 2d 826. The favorable decision in this case cleared up many of the problems in attempting to define what "educational institutions" qualify for the sales and use tax exemption, and saved the State of Iowa thousands of dollars. On February 1, 1971, the Iowa Supreme Court decided the case of *Isaacson v. Iowa State Tax Commission, et al.* The court sustained the revenue department's attempt to collect Iowa income tax from nonresident share holders of Iowa Subchapter S corporations. This case is the first of its kind decided by any state court in the United States. In fact, research has disclosed that many states taxing agencies did not even attempt to collect their income taxes in such situations and it is expected that these states will now change their rules. The decision in case saved the State of Iowa thousands of dollars.

With the present emphasis by the 64th General Assembly on tax legislation, and due to the fact that 1971 is a property tax equalization year, the tax activities of the department of justice in all of the areas heretofore mentioned will certainly increase.

HIGHWAY COMMISSION

The attorney general's staff assigned to the highway commission has had a continuing increase in work load due to an expanding acquisition program and new federal and state legislation in such areas as relocation assistance for persons displaced by highway improvements, and the complete revision of the Iowa eminent domain procedure, which has resulted in an increasing number of appeals to the district court.

Condemnations and condemnation appeals comprise the larger part of the legal work of the staff; however, other types of litigation such as, contractor's suits, retained percentage cases, certiorari actions and mandamus actions have also been increasing. In addition to the above, the staff provided advisory opinions and legal counsel to the commission, drafted proposed legislation, prepared rules and regulations, aided in the implementation of new legislation, and furnished other miscellaneous legal services.

In the biennium the staff processed 738 condemnations, (not including a large number which were dismissed prior to the sheriff's jury award) for which the sheriff's juries returned awards totaling $8,089,035.71. Of these 738 condemnations held during the biennium, 223 were appealed to the district

courts. There were 107 condemnation appeals pending at the beginning of the biennium on January 1, 1969. Consequently, during the biennium the staff was involved with a total of 330 condemnation appeals, including the 107 condemnation appeals pending at the beginning of the biennium. Thirty-three of these condemnations were disposed of by district court trials, 122 cases were settled, and 21 cases were dismissed, leaving 154 condemnation appeals pending as of January 1, 1971. Thus, the staff disposed of 176 condemnation appeals during the biennium, as compared to 134 for the previous biennium. This represents an increase of over 30% in condemnation appeals disposed of during the biennium as compared to the previous biennium

In other types of litigation involving the highway commission, there were 34 cases pending as of January 1, 1969. Another 71 cases were filed in district court during the biennium, bringing the total number of such cases to 105. Of these cases, 71 were disposed of during the biennium, and the remaining 34 were pending as of January 1, 1971. The total number of such cases disposed of during the previous biennium was 55. Thus, the staff disposed of 16 more cases this biennium than the last biennium, an increase of over 29%.

During the biennium 25 highway commission cases were on appeal to the Supreme Court. The commission prevailed in three cases, failed in five and four were settled and dismissed. There are 13 Supreme Court appeals now pending.

CRIMINAL APPEALS

In the years 1969-70 the criminal appeals division of the Attorney General's office has participated in 318 criminal appeals taken to the Iowa Supreme Court from the district and municipal courts of this state. The state prevailed in 288 of these appeals, failed in ten and 20 cases were remanded for further proceedings.

Before the Iowa Supreme Court the state defended the denial by Iowa district courts, of 14 habeas corpus petitions and was sustained by the Supreme Court in all of these cases. In the United States district courts the state was upheld in 18 cases, and failed in five cases; five of these rulings were appealed to the United States Court of Appeals for the Eighth Circuit. The court of appeals upheld the state in two cases, ruled against it in two, and one case was remanded for further proceedings. Of the 23 cases taken to the Supreme Court of the United States on writ of certiorari from various state and federal criminal and habeas corpus decisions the state prevailed in all 23.

In the first part of 1970, extradition matters were transferred to the criminal appeals division of the Attorney Gener-

al's office and in the year 1970, 67 extradition cases were disposed of by this division.

ENVIRONMENTAL PROTECTION

The Attorney General's staff assigned to environmental protection agencies has experienced a sharply rising workload over the last biennium due chiefly to the enactment of new regulatory statutes. This division represents the state conservation commission, natural resources council, department of soil conservation, air pollution control commission, water pollution control commission and real estate commission.

During the biennium, abstracts of title to more than 100 tracts of land purchased by the conservation commission for park and wildlife purposes were reviewed and approved. In addition, condemnation actions were undertaken with regard to 15 other tracts and appeals were taken from 11 of the awards made by the condemnation commission. Four of these appeals have been settled and seven remain pending.

Much time has been required by cases involving boundary disputes along the Missouri River and other meandered streams and lakes, and particularly by *Nebraska v. Iowa,* which has been finally submitted to a Special Master appointed by the U. S. Supreme Court, and by a U. S. condemnation suit filed in 1970 involving land claimed by the Winnebago Tribe of Indians and various private individuals as well as the State of Iowa.

Orders of the water pollution control commission were enforced in 19 district court actions, all of which were won or successfully negotiated to effect enforcement of the orders. Sixty-four contracts for state grants for construction of sewage treatment works totaling $3,634,270 were reviewed and approved.

Three violations of orders of the air pollution control commission were successfully prosecuted in administrative hearings before the commission and a district court suit seeking penalties and a permanent injunction with regard to violation of open burning rules was won.

Three cases involving the department of soil conservation were in process of litigation during the biennium as were some seven cases involving flood plain activities regulated by the natural resources council.

While this litigation comprised a large part of the workload, even more time was spent in counseling and advising the various agencies with regard to proposed legislation, rules and regulations, implementation and enforcement of new environmental protection laws, and general agency functions.

The need for implementation of enforcement procedures and for counseling services in these areas of new emphasis and public awareness can be expected to materially increase over the foreseeable future as technical and administrative staffs are assembled by the agencies, new administrative rules become effective, and deadlines for compliance with rules and orders of the agencies are not met.

RECIPROCITY

During the past two years the department of justice handled 330 claims filed by interstate motor vehicle carriers for refunds of overpayment of registration fees paid during the years 1960-68. These refund claims were based on the Iowa Supreme Court's decisions in *Consolidated Freightways Corp. v. Nicholas,* 258 Iowa 115, 137 N. W. 2d 900; and *General Expressways, Inc. v. Iowa Reciprocity Board,* 163 N. W. 2d 413. The refunds for the 1968 through 1970 period total over three and one-half million dollars.

PUBLIC SAFETY

During the 1969-70 period the Attorney General's office represented the department of public safety in 418 district court lawsuits involving driver's license suspensions. In this two-year period, 354 of these cases were disposed of, 321 in the state's favor, with driver's licenses being restored in 33 cases. In 1970, five motorists further appealed their loss of license from district court to the Supreme Court. Two of these cases have been dismissed in the state's favor and one was lost.

In addition to furnishing legal counsel and representation to the department of public safety in various other court suits, the Attorney General's office has participated in numerous consultations and other matters pertaining to public safety.

TORT CLAIMS

In 1969 the tort claims division of the department of justice handled before the state appeal board 84 tort claims totaling $1,628,942.62. In 1970, 139 such claims involving a total asking of $3,722,763.52 were handled. Upon the recommendation and approval of the special assistant attorney general assigned to the division, the appeal board in 1969 and 1970 paid out $39,787.73 and $35,450.63 on said claims. The division also in 1969 handled before the appeal board 810 general, non-reciprocity, claims amounting, in the aggregate to $209,179.81. In 1970, 907 such claims involved a total asking of $298,089.13. Pursuant to the recommendation of the special assistant attorney general, the appeal board paid 1969 claims in the amount of $161,338.90 and 1970 claims in the amount of $238,534.22.

Tort claimants instituted a large number of lawsuits in the

Iowa district courts during the past two years. During 1969 three judgments were entered against the state amounting in total to $203,021.54 and in 1970 two judgments were entered totaling $53,000.00. Three of these cases are now on appeal to the Supreme Court of Iowa. Currently, the division is handling 69 district court lawsuits involving a total of $4,307,045.-55. In addition, the division is maintaining an action in the amount of $137,000.00 on behalf of the State of Iowa aganst singer Ed Ames for failure to perform at the 1968 Iowa State Fair.

Attorneys assigned to the tort claims division have at various times also handled or assisted in handling state institution construction contract appeals, public contract appeals and school board budget appeals.

SCHOOLS

During the last biennium the major questions arising in connection with schools were concerned mainly with the apportionment of state aid to area colleges and school districts. Other matters of interest included application of the one-man one-vote principle to the election of school district directors, the use of agreements between school districts and merged areas for the joint use of services and library materials, amplification of teacher's contracts and the application of IPERS to area school employees, liability of schools for finance charges and deficit plans other than stamped warrants. Much time was devoted to questions raised in connection with educational television, e.g., the right to make purchases without executive council approval and preparation of leases for the expansion of TV Channels 11 and 12 and review of construction contracts. In *Adams v. Ft. Madison Community School District,* my office prepared and submitted an amicus brief in support of the 60% vote requirement in bond elections.

REGENTS

Opinions dealing with the state's obligation with respect to the acquisition of land for an institution of higher learning in Western Iowa, open meetings of the board of regents and boards of athletics, the need for contract negotiation powers, the constitutionality of establishing black culture centers on university campuses, were among those of some interest. In addition, the following cases were successfully concluded: *In re Maude Leber Lamp;* 1969, Iowa , 172 N. W. 2d 254, involved the construction of a will establishing a charitable trust for the school of veterinary medicine at Iowa State University and College of Medicine at the State University of Iowa. *Stump v. Clay Stapleton, et al,* involving a claim against the university and athletic director was a Story County dis-

trict court case decided in September, 1970, brought by a former student to recover the value of a football scholarship.

ESCHEATS

In the area of escheats approximately $76,749 was obtained from various estates for the school fund. Applications for escheats have been filed in a number of other estates and are still pending.

My office also advised and assisted with procedures for the closing of insolvent Prairie City Bank, hearing on the financial stability of three other banks and on the suspension of small loan licenses for unauthorized sale of credit and liability insurance.

INSURANCE

The department of justice reviewed and certified the amendments to articles of numerous insurance companies as required by Code §§508.2, 510.4, 515.2 and 518.2 and sat as a commissioner to hear petitions for consolidation and reinsurance pursuant to §521.5.

SOCIAL SERVICE

The attorney general performs legal services for the department of social services pursuant to a specific statute requiring a special assistant attorney general to be appointed to serve in such capacity.

Among the services which this office provides to the department of social services are: (1) furnishing consultations and advice with respect to statutes, judicial decisions and state and federal regulations; (2) advising with regard to proposed regulations, proposed legislation and manual materials; (3) defending suits brought against the commissioner or employees of the department of social services in state and federal courts; (4) inspecting and approving contracts and leases, and handling real estate matters involving the department; (5) referring to county attorneys' various suspected welfare fraud matters in the federal categorical programs, as well as matters connected with uniform reciprocal support actions and habeas corpus and other juvenile delinquency, dependency and neglect cases commenced at the county level; (6) representing the State of Iowa, and Iowa department of social services before the supreme court in matters which had been handled by the county attorneys at the district court level; (7) researching and preparing drafts of proposed attorney general opinions; (8) representing the department of social services in all estates of decedents to protect liens on real estate and conservatorships and to recover money on claims for old age assistance and medical assistance; (9) representing the department in appeals to the district courts from administrative hearings.

Since the merger of the former boards of control and welfare, additional legal problems have been referred to this office concerning mental health and the state institutions.

Much of the litigation centered around questions of constitutional law. In *Dimery v. Department of Social Services*, 1970, ... U. S. ....., 26 L. Ed. 2d 265, 90 S. Ct. ....., the United States Supreme Court reversed the decision of a three-judge United States District Court panel which had held the Iowa Medical Assistance Act invalid. In the *Pletka* case the Federal District Court for the Northern District of Iowa in an order dated August 31, 1970, approving a stipulation held that the Iowa residency (legal settlement) statute is not a condition precedent to the obtaining of general relief, and thus does not offend the federal constitution. A case now pending in the United States District Court for the Southern District of Iowa challenges the constitutionality of the Iowa statutes for commitments to hospitals for mental health and another case involves the constitutional rights of inmates of the Iowa Penitentiary relating to mailing privileges. In two appeals the constitutional rights of juveniles were before the Iowa Supreme Court.

In appropriate instances objections to final reports were filed, liens were foreclosed, real estate was sold, or in some cases partitioned or condemned. In one case a devise was claimed on behalf of the department. As a result of the appearances of this office in such legal matters during the years 1969-1970 a total of $351,315.53 was recovered for the state.

In addition, this office handled the real estate contract and other legal matters connected with the gift of approximately $175,000.00 for the Sanford Day Care Center in Sioux City, Iowa and the gift of $90,000.00 for the Peck Day Care Center in Newton, Iowa.

REAPPORTIONMENT

The Attorney General and members of his staff undertook to defend Chapter 89, 63rd G. A., First Session, the legislative reapportionment act, enacted by the general assembly in 1969 against an attack challenging the constitutionality of the measure under current U. S. Supreme Court one-man, one-vote principles. Evidence was presented and testimony taken before a special master appointed by the Iowa Supreme Court. Thereafter briefs were submitted and oral arguments presented to the Supreme Court. In its decision handed down February 10, 1970, the court concluded that the plan of reapportionment found in Chapter 89 did not pass constitutional muster but allowed it to stand for the 1970 elections because of the limited time remaining for candidates to file for the 1970 primary and in view of the fact that reapportionment would have to be made in 1971 because of the 1970 census.

ANTITRUST

Activity in antitrust has increased substantially in the last biennium. The asphalt price fixing suit filed in December, 1966, against twenty-two major oil companies was settled after commencement of the trial in January, 1970, in the U. S. District Court for the Southern District of Iowa. By way of settlement the companies paid the State of Iowa two hundred fifty thousand dollars, an amount equal to approximately one-half of the annual budget for the entire department of justice.

The price fixing case against five major drug manufacturers on account of price fixing of certain broad spectrum antibiotic drugs has also been settled, and it is anticipated that the State of Iowa will recover approximately 1.8 million dollars as a result of this litigation. The antitrust case against certain manufacturers of brass tubing products has also been settled and while the amount of Iowa's share of the settlement is as yet undetermined it is expected that it will be substantial. The antitrust suit commenced in November of 1968 against seven major plumbing fixture manufacturers because of price fixing is still pending. Depositions of certain officers and former employees of the defendants have been held, and settlement negotiations are presently under way.

In November, 1970, this office sought leave to intervene before the Federal Power Commission in a proceeding to approve the consolidation of Iowa Power and Light Company and Iowa-Illinois Gas and Electric Company. It was alleged by this office that the evidence submitted by the companies in support of their application for approval of their consolidation is false and invalid and the consolidation is contrary to the public interest. Litigation in this matter is in progress at the present time.

In addition to the above litigation, the attorney general's office has conducted and continues to conduct investigations into the trade practices of certain road contractors and suppliers of heavy road machinery, particularly in respect to purchases made by certain county governments.

The office has also commenced action in the Supreme Court of the United States against the three major automobile manufacturers for conspiracy to prevent the development and manufacture of effective anti-air pollution devices. Briefs have been filed and oral arguments will be heard in the near future.

Another case has been filed against the major automobile manufacturers for cancellation of fleet discounts.

This office joined other states in a suit against the manufacturers and distributors of the drug "Ampicillin" for antitrust and patent violations. The case is pending in the District Court of Washington, D. C.

CRIMINAL LAW AND LAW ENFORCEMENT

In February, 1969, this office commenced a grand jury investigation into the activities of the business agent of Local 69 of the Iron Workers Union located in Des Moines. As a result of the investigation the Polk County Grand Jury returned perjury indictments against two associates of the business agent and indicted the agent himself for conspiracy to injure and destroy property of certain contractors by use of dynamite. All three individuals were subsequently found guilty by Polk County District Court juries. The jury's verdict in one case was set aside by order of the Polk County District Court, which order is now being appealed by this office to the Supreme Court of Iowa.

The Attorney General and members of his staff responded immediately to the law enforcement crisis created by the rock festival at Wadena in Northeast Iowa. Working closely with the Fayette County Attorney as well as state and local law enforcement officials, the department of justice took prompt steps in an effort to halt the event. This office continues to work with local law enforcement officials to see that the promoters are punished and that similar "festivals" do not occur except under carefully controlled circumstances.

Numerous legislative proposals designed to strengthen law enforcement have been prepared and submitted to the legislature. These include measures dealing with witness immunity, joint trials, state grand jury, wiretap, explosives control, district attorneys, criminal trespass, false reporting of crimes and rock festivals.

In addition to the foregoing, the Attorney General and the staff of the department of justice have been active in their cooperation with other law enforcement agencies in different levels of government. They have conducted cooperative research, given speeches and participated in conferences. The Attorney General and his representatives have taken an active part in the affairs of the law enforcement academy council and the Iowa crime commission.

The present Attorney General has served as chairman of the midwest conference of the national association of attorneys general and is presently a member of the executive committee of the national association of attorneys general. In addition, he has been chairman of and served on several committees of both associations.

The crisis presented by the spiraling crime rate is a problem to which the department of justice has given top priority and to which it will continue to devote maximum effort.

CIVIL RIGHTS

This office, on behalf of the Iowa civil rights commission has brought to public hearing approximately ten complaints. One is now pending in the supreme court. Four are pending in district court, three out of state. The rest are still pending before the commission. In addition, members of this department regularly participate in studies and seminars on civil rights.

CONCLUSION

A recent article, Beatty, *Iowa Supreme Court Survey,* 19 Drake L. Rev. 342 (1970), reported a survey which covered the period November, 1965 through March, 1969. The survey showed that one-fourth of all cases argued before the Iowa supreme court were represented on one side by the office of the attorney general. Moreover, under the present administration the state was upheld in eighty-eight percent of its appeals. The study also shows that seven leading private law firms prevailed in forty-two percent of the cases they presented to the supreme court.

The record of the Iowa department of justice in handling its enormous workload was in no small part made possible by the excellent cooperation and support we received from you, the members of the general assemply and the fine people at all levels of government with whom we have been privileged to deal.

State of Iowa

1970

THIRTY-EIGHTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1970

RICHARD C. TURNER
Attorney General

Published by
THE STATE OF IOWA
Des Moines
D-7831

ATTORNEYS GENERAL OF IOWA
1853-1970

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 1953-1967; State Senator from Pottawattamie County 1960-1964; Ass't. Pottawattamie County Attorney 1954-1956; Avoca Town Clerk 1953-1960; Elected Attorney General 1966, 1968 and 1970.

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; resigned 1969.

DAVID A. ELDERKIN ..... Special 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. 1966, App't. Special Ass't. Atty. Gen. 1970.

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, resigned 1970.

ROGER H. IVIE ..... Special Assistant Attorney General
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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.

JAMES F. PETERSEN ..... Special 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, App't. Special Ass't. Atty. Gen. 1970.

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. 1969.

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, resigned 1969.

JOHN E. BEAMER ..... Assistant Attorney General
B. September 23, 1939, Abilene, Texas; B.A. Cornell College; J.D., S.U.I.; Agent F. B. I., 1964-1970; married, one child; App't. Ass't. Atty. Gen. 1970.

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, resigned 1969.

JAMES E. BOBENHOUSE ..... Assistant Attorney General
B. March 19, 1945, Des Moines, Iowa; B.S., S.U.I.; J.D., Drake University; single; App't. Ass't. Atty. Gen. 1970.

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B. December 3, 1942, Des Moines, Iowa; B.A., J.D., Drake University; single; App't. Ass't. Atty. Gen. 1968.

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B. October 4, 1939, Moline, Illinois; B.A., L.L.B., S.U.I.; married, one child; App't. Ass't. Atty. Gen. 1967, resigned 1969.

ROXANNE BARTON CONLIN ..... Assistant Attorney General
B. June 30, 1944, Huron, South Dakota; B.A., J.D., Drake University; married, two children; private practice 1966; Deputy Industrial Commissioner 1966-1968; App't. Ass't. Atty. Gen. 1969.

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.

JAMES C. DAVIS ..... Assistant Attorney General
B. February 23, 1937, Bloomington, Indiana; Oregon State College 2 years; Greenville College 1 year; B.A., J.D., S.U.I.; married, one child; private practice 1962-1970; Justice of the Peace 1967-1970; App't. Ass't. Atty. Gen. 1970.

G. DOUGLAS ESSY ..... Assistant Attorney General
B. October 14, 1942, Des Moines, Iowa; undergraduate, J.D., Creighton University; single; private practice 1966-1967; Trial Counsel, United States Navy 1967-1969; App't. Ass't. Atty. Gen. 1970.

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B. July 1, 1935, Oklahoma City, Oklahoma; B.A. Iowa Wesleyan College; J.D., The George Washington University Law School; married, three children; U. S. Treasury Department, D. C. 1957-1959; U. S. Labor Department, D. C., 1959-1961; private practice 1961-1969; appointed Ass't. Atty. Gen. 1969.

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

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MICHAEL J. LAUGHLIN ..... Assistant Attorney General
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JEROME F. LUNDGREN ..... Assistant Attorney General
B. May 16, 1929, Chicago, Illinois; B.S., J.D., Drake University; married, four children; private practice 1968-1969; App't. Ass't. Atty. Gen. 1969.

JAMES R. MARTIN ..... Assistant Attorney General
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B. March 5, 1925, Sibley, Iowa; B.A., Morningside College; L.L.B., University of Michigan; App't. Ass't. Atty. Gen. 1967, resigned 1969.

CLAYTON C. MOWERS ..... Assistant Attorney General
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ASHER E. SCHROEDER ..... Assistant Attorney General
B. May 12, 1925, Maquoketa, Iowa; married, three children; B.A.; J.D., S.U.I., App't. Ass't. Atty. Gen. 1969.

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, resigned 1970.

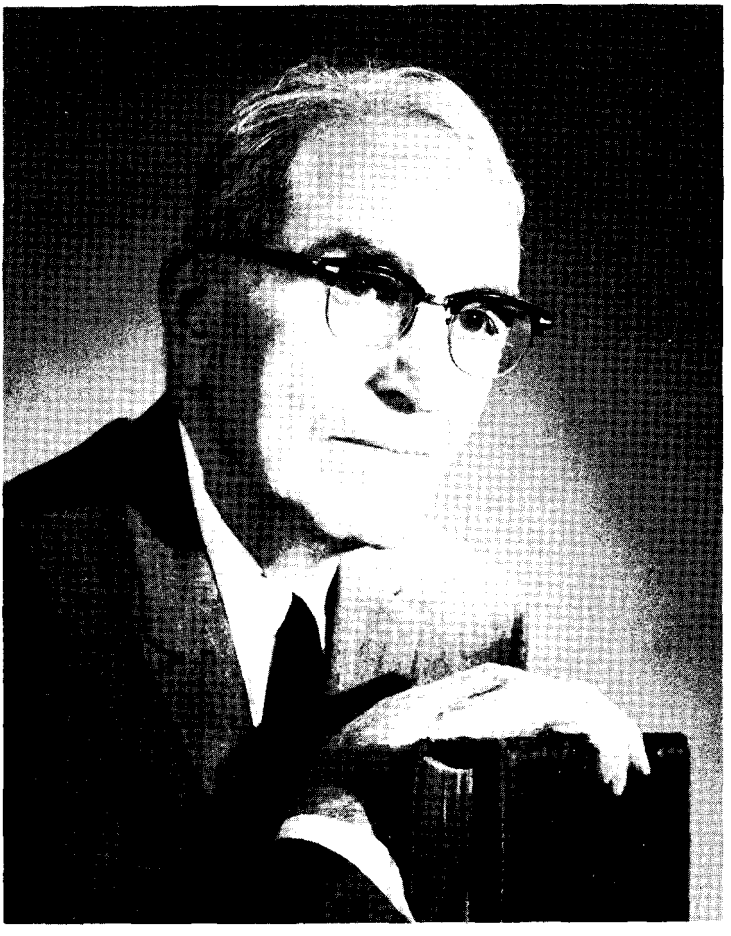
RICHARD N. WINDERS ..... Assistant Attorney General
B. April 13, 1945, Milwaukee, Wisconsin; single; B.A., J.D., Drake University; App't. Ass't. Atty. Gen. 1970.

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, resigned 1969.

SARA A. CANADA ..... Executive Secretary

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
1969-1970

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January 3, 1969

BOARD OF REGENTS: Ch. 6, §4, Acts of 62nd G. A. Contracts. The state cannot pay communities providing information used for selection of prime site for institution of higher learning in western Iowa when the obligation was incurred by the town without expectation of reimbursement. (Nolan to Richey, Exec. Sec., Board of Regents, 1/3/69) #69-1-1

Mr. R. Wayne Richey, Executive Secretary, State Board of Regents: This replies to your letter of December 18, 1968 setting out the following request:

"This is a request for an opinion as to whether the Board of Regents may legally pay costs incurred by western Iowa communities for topographic surveys, options, soil analyses and land appraisals done in connection with the selection of a site for a proposed new institution of higher education in western Iowa.

"The selection of such a site was directed by the 62nd General Assembly, and the Board of Regents was allocated an appropriation of $500,000 'to be used to carry out the study, planning and establishment of this institution of higher education to be established in western Iowa.' (Chapter 6, Section 4, Acts of the 62nd G. A.)

"After due study and deliberation, the site at Atlantic, Iowa was selected by the Board as the prime site, with those at Harlan and Carroll chosen as second and third respectively. All three of these sites were named by the Board in August, 1968 as the three principal contenders, and all other possible sites were eliminated from consideration. The Board's architects, Perkins and Will, Architects, were then directed to make an intensive evaluation of all three sites. The extent of this evaluation is indicated by the report of Perkins and Will attached hereto. The evaluation included sub-surface soil anaylses, topographic surveys and land appraisals, the recovery of which costs is now being sought by the City of Harlan as explained below.

"At its December 12, 1968 meeting, the Board considered a request from Harlan for reimbursement in the amount of $3,744.35 to cover costs of the type mentioned above and as specifically detailed on the attachments hereto. The action of the Board was to refer the matter to the Attorney General for an opinion on the legality of the Board's honoring such requests. That opinion is now sought.

"In connection with the rendering of such an opinion, certain pertinent facts should be pointed out:

"1. The Board's architects, Perkins and Will, informed the communities concerned that costs of the type here involved would be borne by the communities and that the communities could not expect reimbursement. Whether this premise was legitimate may be open to question in view of (2) below.

"2. The Board's contract with Perkins and Will provides that 'The Architect shall provide professional architectural and engineering services . . . for the final evaluation of two to four sites.' The contract further provides under Article 3 (Reimbursables) that 'Information on site boundary, topography, and soil conditions will either be furnished by the Board to the architect for analysis and evaluation, or the Board will direct the architect to secure such information and will reimburse the architect therefor.'

"3. In view of (2) above, had these costs been billed to the architect rather than the communities, the Board would undoubtedly have reimbursed the architect. This can still be done, and the cost can be accurately determine, as indicated in the Perkins and Will letter attached hereto.

"4. Your ruling in the case of Harlan should also apply to Atlantic, Carroll and Denison.

"It might be argued that, while promotional costs are legitimately the obligations of the community incurring them, the costs here involved are of a technical and engineering nature essential to completion of the site selection mandated by the Legislature and for which the Legislature provided funding."

From the letter submitted by the City claiming reimbursement for its expenditure for technical information used by the consultants to determine the prime site, it is clear that there was no expectation by such community at the time the information was gathered that the expenditures would be reimbursed. See letter of Donald G. Mathiasen to Mr. Stanley F. Redeker, Chairman of the State Board of Regents, dated November 19, 1968. It appears that the consultants in requesting such information gave no indication to such communities that they might expect reimbursement. Apparently, only the hope of being selected the prime site for the new state institution and good will sufficed when the community undertook the responsibility of providing topography surveys, options, soil analyses and land appraisals. Consequently, there appears to be no basis upon which such items can now be made a contractual obligation of either the architects or the Board of Regents. Without benefit of such direct contract provision, the state is now prohibited by Article VII, §1 of the Constitution of Iowa, from assuming or becoming responsible for the debts or liabilities thus incurred by the community seeking to be selected as the site for the new school.

January 3, 1969

TAXATION: Special fuel user's licenses — §§324.34, 324.36, Code of Iowa, 1966, as amended by Ch. 287, §§16, 18, Acts of the 62nd General Assembly (1967). The state department of agriculture must meter, inspect, test for accuracy, seal and license the pumps of persons who desire to become licensed as special fuel users and until they have done so, the department of revenue must refuse to issue a special fuel user's license or if the license has already been issued, must revoke it. (Beebe to Fullmer, Dir., Motor Vehicle Fuel Tax Division, 1/3/69) #69-1-2

Mr. Wayne J. Fullmer, Director, Motor Vehicle Fuel Tax Division: In your letter dated April 18, 1968, you requested an opinion of the Attorney General on the following three questions:

1. Legally, can this office continue in force a special fuel user license when the pumps of the licensee have not been, nor will be, inspected, tested for accuracy, *sealed* and *licensed* by the state department of agriculture?

2. Legally, can this office issue a special fuel user license to anyone whose pumps have not, nor will be, inspected, tested for accuracy, *sealed* and *licensed* by the state department of agriculture?

3. Must the department of agriculture meet the provisions of the statute as set out, namely, inspect, test for accuracy, seal and license the pumps of persons licensed as special fuel users and those persons who desire to become licensed as special fuel users?

The third paragraph of §324.34, Code of Iowa, 1966, as amended by Chapter 287, §16, Acts of the 62nd General Assembly (1967), states as follows:

"*The department of revenue* shall make reasonable rules and regula-

tions governing the dispensing of special fuel at retail service stations and licensed special fuel user locations and *shall require* that all pumps located at said stations and special fuel user locations through which fuel oil can be dispensed, be metered, inspected, tested for accuracy, sealed and licensed by the state department of agriculture, and *that special fuel delivered into the fuel supply tanks of any motor vehicle shall be dispensed only through these pumps.*" (Emphasis supplied)

Provisions relating to the issuance of special fuel users' licenses are found in §324.36, Code of Iowa, 1966, as amended by Chapter 287, §18, Acts of the 62nd General Assembly (1967), which states in part:

"1. Required. It shall be unlawful for any person to act as a special fuel dealer in this state unless he holds an uncanceled special fuel dealer's license issued to him by the department of revenue. Except for special fuel which is delivered by a special fuel dealer into a fuel supply tank of any motor vehicle in this state, the use (as herein defined) of special fuel in this state by any person shall be unlawful unless he holds an uncanceled special fuel user's license issued to him by the department of revenue.

"5. Issuance. Upon receipt of the application and bond in proper form, the department of revenue shall issue to the applicant a license to act as a special fuel dealer or a special fuel user; provided, however, the department of revenue may refuse to issue a special fuel dealer's license or a special fuel user's license to any person: (a) who formerly held either type of license and which has been revoked for cause; or (b) who is a subterfuge for the real party in interest whose license has been revoked for cause; or (c) upon other sufficient cause being shown. Before refusal, the department of revenue shall grant the applicant a hearing and give him at least fifteen days' written notice of the time and place thereof."

At first glance it would appear that there is nothing within the provisions of §324.36(5) pertaining to the issuance of special fuel user's licenses which would require the department of revenue to refuse issuance of a new license or to revoke an existing license if the pumps located at the special fuel user locations are not metered, inspected, tested for accuracy, sealed and licensed by the state department of agriculture as required by §324.34. However, it is a cardinal principle of statutory construction that intent is to be gleaned from the whole statute or statutes relating to the same subject matter, i.e., hose statutes which are in *pari materia*, and not from any particular part, with due consideration for the object to be attained. *France v. Benter*, 256 Iowa 534, 128 N. W. 2d 268 (1964); *City of Nevada v. Slemmons*, 244 Iowa 1068, 59 N. W. 2d 793 (1953). A reading of §324.36(5) in conjunction with §§324.36(1) and 324.34 thus requires that your first two questions must be answered in the negative.

§324.36(1) makes the possession of an uncanceled special fuel user's license issued by the department of revenue a requisite for the use of special fuel by a person unless the special fuel is delivered by a special fuel dealer. It follows that any person who holds an uncanceled special fuel user's license can use special fuel in Iowa. §324.34 provides in part:

"The department of revenue . . . shall require . . . that special fuel delivered into the fuel supply tank of any motor vehicle shall be dispensed only through these pumps."

"These pumps" has reference to those pumps which have been metered, inspected, tested for accuracy, sealed and licensed by the state depart-

ment for agriculture. Thus, if a person, whose pumps had not been metered, inspected, tested for accuracy, sealed and licensed by the state department of agriculture were given a special fuel user's license, he could, by the terms of §324.36(1), use special fuel in Iowa but §324.34 would prohibit special fuel from being dispensed through his pumps. It is obviously absurd to contend that a person could use special fuel when it could not be dispensed through his pumps. It cannot be assumed that the Legislature would intend to enact a futile and ineffectual law or one which would lead to absurd consequences. *Graham v. Worthington,* 146 N. W. 2d 626 (Iowa 1966); *Egy v. Winterset Motor Co.,* 231 Iowa 680, 2 N. W. 2d 93 (1942).

If a person were given a license and thereby became entitled to use special fuel oil even though his pumps had not been metered, inspected, tested for accuracy, sealed and licensed by the state department of agriculture, it would, of necessity, follow that the portion of §324-34 prohibiting the use of such pumps would be rendered meaningless.

It will not be presumed that useless and meaningless words are used in legislative enactments, and a construction holding that the Legislature enacted a meaningless provision should be avoided if possible. *State ex rel. Fenton v. Downing,* 155 N. W. 2d 517 (Iowa 1968); *Holzhouser v. Iowa State Tax Commission,* 245 Iowa 525, 62 N. W. 2d 229 (1954).

It follows that if a user's pumps have not been metered, inspected, tested for accuracy, sealed and licensed by the state department of agriculture, his license must be refused or revoked as the case might be.

Your third question asks whether the state department of agriculture must meet the following provisions of §324.34:

"The department of revenue . . . *shall require* that all pumps located at . . . special fuel user locations through which fuel oil can be dispensed, be metered, inspected, tested for accuracy, sealed and licensed by the state department of agriculture . . ." (Emphasis supplied)

In the opinion of this office, the duties enumerated therein are mandatory upon the department of agriculture and thus your question must be answered in the affirmative. The statute states that the department of revenue "shall require" that certain acts be performed by the state department of agriculture. When a statute uses the word "shall" in directing a public body to do certain acts, the word is to be construed as mandatory, not permissive, and it excludes the idea of discretion. *Gibson v. Winterset Community School Dist.,* 258 Iowa 440, 138 N. W. 2d 112 (1965); *Consolidated Freightways Corp. of Del. v. Nicholas,* 258 Iowa 115, 137 N. W. 2d 900 (1965). Thus, it is mandatory that the department of revenue require the department of agriculture to meter, inspect, test for accuracy, seal and license the pumps. To state that the department of revenue must require the department of agriculture to perform certain acts and to then hold that the department of agriculture need only perform these acts at its discretion would create an absurdity and render part of the statute meaningless, which, as previously enunciated, is contrary to established rules of statutory construction.

January 8, 1969

HIGHWAYS: Advisory opinion re Iowa State Highway Commission rules and regulations concerning oversize vehicles — Chapter 285, Acts of the 62nd General Assembly. Departmental rules submitted pursuant to Chapter 17A, Code of Iowa, 1966, by the Iowa State Highway Commission are approved except that rule which would limit the issuance of annual permits to Iowa base licensed vehicles only since such a rule would unconstitutionally discriminate against movers in interstate commerce. (Turner to Iowa State Highway Comm., 1/8/69) #69-1-6.

Iowa State Highway Commission: Advisory Opinion re Iowa State Highway Commission rules and regulations concerning the operation and movement of vehicles and loads of excess size and weights — Chapter 285 of the Acts of the 62nd General Assembly:

On December 19 and 20, 1968, pursuant to the provisions of Chapter 17A, Code of Iowa, 1966, you submitted for approval of the Attorney General, certain rules and regulations pertaining to the operation and movement of vehicles and loads of excess size and weight on the primary and interstate highway systems of Iowa, which are hereby approved subject to the following:

1. Your enacting clause purports to rescind all the rules appearing in 1966 IDR at pages 300-307. Yet I note that page 300 contains rules concerning the control of access as well as rules concerning the operation and movement of vehicles of excess size and weight. Similarly, page 307 contains a rule concerning the Highway Commission's manual on uniform traffic control devices as well as rules concerning the operation and movement of vehicles of excess size and weight. Since I assume it was not your intention to rescind rules concerning access and traffic control devices, I suggest you add to your enacting clause after the words "pages 300-307" the words "concerning the operation and movement of vehicles of excess size and weight."

2. Rule 2.3(g) states: "Annual permits shall be issued to Iowa base licensed vehicles only." This rule has the effect of denying nonresidents or movers in interstate commerce the right to an annual permit. The Iowa Supreme Court in *Borden vs. Selden*, 259 Iowa 808, 146 N. W. 2d 306 (1966), concerned itself with the familiar rule that a state may not materially abridge or impair the equality of commercial privileges secured by the United States Constitution. The court held that supposed closer identity with community and state of resident landowners as opposed to nonresident landowners, was not a valid reason for making a distinction between them in a statute allowing agricultural land tax credit only to land owned by residents of the state. No reason other than those offered in the *Borden* case, appears to distinguish the proposed regulation from the rule of that case. It is, therefore, my opinion that Rule 2.3(g) is an unconstitutional discrimination against such movers in interstate commerce. I, therefore, advise the same be stricken.

3. With the exception of the foregoing, all of the rules adopted with reference to operation and movement of vehicles and loads of excess size and weight appear to have been properly adopted by the highway commission within the guidelines provided by Chapter 285, Acts of the 62nd General Assembly, and in accordance with previous attorney general

opinions with reference thereto, and which are hereby listed as follows:

Graham to Representative Weldon — 6/28/68
Graham to Representative Weldon — 7/12/68
Graham to Representative Fisher — 6/28/68
Graham to Representative Fisher — 7/ 9/68
Graham to McLean — 6/28/68
Graham to Pelzer — 4/28/68
Nolan to Gray — 5/22/68
Haesemeyer to Knoke — 10/4/67

Accordingly, and except as stated, the same are hereby approved as to form and legality.

It should be noted that in approving these rules and regulations, no consideration is given by the Attorney General to the wisdom of either the rules or the statutory delegation under which same were adopted. The wisdom of the law is for the legislature and the findings of facts, such as safety to the travelling public and whether the oversize vehicles will damage the highways, are for the highway commission, as an administrative body, to determine within the guidelines specified by the Act.

In 1965, the 61st General Assembly adopted Senate Files 335 and 641 delegating to the highway commission, and to local authorites, power "in their discretion" to issue special permits authorizing the operation and movement of oversize vehicles upon the highway. In an opinion to the Governor, dated June 29, 1965, the Attorney General said these Acts were an unconstitutional delegation of legislative power because they omitted standards or guidelines, citing *Lewis Consolidated School District vs. Johnston*, 1964, 256 Iowa 236, 127 N. W. 2d 118. As a consequence, the Governor vetoed those Acts. But the law now under consideration does delegate the power to the highway commission, with adequate guidelines and limitations and these rules have been adopted within those guidelines. See *Danner vs. Hass*, 257 Iowa 654, 134 N. W. 2d 534.

Section 16 of Chapter 285, Acts of the 62nd General Assembly, requires that no rule or regulation be adopted without prior notice to city, town and county officials and without a public hearing on the proposed rules or regulations. I am informed that only one commissioner appeared at the first hearing and none at the second, to personally listen to the evidence presented both for and against the proposed rules and regulations. Transcripts of these hearings and of the evidence therein adduced, were made and it is presumed were considered by the commissioners. *Hinrichs vs. Iowa State Highway Commission*, 1967, ...Iowa....., 152 N. W. 2d 248, authorizes the commission to delegate its hearing, but not decision making, powers.

4. These rules have been approved as to form and legality by the U. S. Department of Transportation and the Bureau of Public Roads.

January 10, 1969

STATE OFFICERS AND DEPARTMENTS: Members of the General Assembly, conflict of interest — Chapter 107, Acts of the 62nd General Assembly. A nursing home is engaged primarily in the furnishing of services. Hence it would not be a violation of the law for a corporation, one-ninth of which is owned by a legislator to receive more than $500

for welfare cases without competitive bidding. (Haesemeyer to Bailey, State Representative, 1/10/69) #69-1-3.

The Hon. Ray V. Bailey, State Representative: Reference is made to your letter of December 17, 1968, in which you state:

"I am wondering if you would be so kind as to give me an opinion regarding whether or not I, as a legislator, have a problem with Chapter 107 of the Acts of the 62nd General Assembly.

"This is the so-called 'Conflict of Interests' statute and I never thought of being involved with it until I was checking in detail as a result of being asked to serve on the committee which it sets up.

"I am one of nine equal owners of a corporation which owns and operates a nursing home here in Clarion. The nursing home takes some welfare patients. It does not, at the present time at least, handle any Medicaid patients or any Medicare patients.

"My thought would be that probably a number of questions are involved. For one thing the statute, with reference to legislators, was apparently limited to the sale of goods and does not include services so that a determination might revolve around whether a nursing home sells goods or services. Another aspect may be whether a nursing home, in dealing with welfare cases, is involved with a state agency or with a county agency. Should the decision be that I am covered by the statute as far as those points are concerned, I presume that we are then confronted with a determination of what constitutes a sale under the statute. The bill for one welfare patient for one month would be substantially less than $500.00. On the other hand the bill for one month for all of the welfare patients in the home at one time would very possibly be more than that amount; also, of course, the bill for one welfare patient for a series of consecutive months would be over $500.00."

Chapter 107, Acts of the 62nd General Assembly (hereinafter referred to as the Act) provides in §§2 and 3 thereof:

"* * *

"Whenever the terms 'legislative employee,' 'member of the general assembly,' 'employee,' or 'official' are used in this Act, the term shall be interpreted to include any firm or association of which any of the above is a member or partner and any corporation of which any of the above holds ten (10) percent or more of the stock either directly or indirectly. The use of the above terms shall also include wives and unemancipated minor children.

"Sec. 3. No official, employee, member of the general assembly, or legislative employee shall sell any goods having a value in excess of five hundred (500) dollars to any state agency unless pursuant to an award or contract let after public notice and competitive bidding. This section shall not apply to the publication of resolutions, advertisements, or other legal propositions or notices in newspapers designated pursuant to law for such purpose and for which the rates are fixed pursuant to law."

Since you own more than a ten percent interest in the Clarion nursing home you describe, the provisions of §3 of the Act would apply to such corporation. It is clear, however, that §3 is limited in its application to those situations in which there is a sale of "goods." Where the legislature wished to include services in addition to goods it used that expression. Thus, §4 of the Act provides:

"Sec. 4. No official or employee of any regulatory agency shall sell, either directly or indirectly, any *goods or services* to individuals, associations, or corporations subject to the regulatory authority of the agency of which he is an official or employee."

In our opinion a nursing home is primarily engaged in furnishing services rather than goods and the Act does not apply to the situation you describe. In light of this conclusion it is unnecessary to pass upon the other questions you raise.

I might add that we are a little bit reluctant to furnish an opinion on the application of the Act to a particular fact situation in view of §12 thereof which provides in relevant part:

"Sec. 12. There shall be an ethics committee in the senate and an ethics committee in the house, each to consist of seven members; three members to be appointed by the majority leader in each house, to members by the minority leader in each house and two individuals who shall not be employees of the general assembly by the chief justice of the Iowa supreme court.

"Each committee shall elect a chairman and shall have the following powers, duties and functions:

* * *

"3. Issue advisory opinions interpreting constitutional and statutory provisions relating to legislators and lobbyists as well as interpreting the code of ethics and rules issued pursuant to this section. Opinions shall be issued when approved by a majority of the seven members and may be issued upon the request of a member of the general assembly or upon the committee's initiation.

* * *"

This statutory provision would appear to place the primary responsibility for the issuance of opinions in cases of this kind upon the ethics committees of the two houses. I think it would be very unfortunate if the situation were to develop where the two ethics committees and the office of the attorney general were contradicting and second-guessing each other. One solution might be for our office to refrain from furnishing any opinions involving Chapter 107. Another possibility might be for the attorney general's office to furnish such opinions only when requested to do so by a majority of either of the two committees. This is probably a problem that the legislature will have to decide.

January 10, 1969

MOTOR VEHICLES: Registration and licensing snow-mobiles. §§321.17, 321.18, 321.1(2), 321.1(48), 321.30(2), 321.381, 321.384, 321.385, 321.415. Snow-mobiles. Snow-mobile cars are required to be registered, if operated on the highways, but cannot qualify for registration. May only cross highway. (Zeller to Lynch, Winneshiek County Attorney, 1/10/69) #69-1-4.

Mr. Thomas C. Lynch, Winneshiek County Attorney: Reference is made to your letter of December 23, 1968 in which our opinion is requested on the following question:

"Is a motorized 'snow-mobile' type vehicle a motor vehicle under the definition of Section 321.1(2) so as to require registration and licensing under Section 321.18?"

This requires the examination of the salient statutes which read as follows:

§321.17. "It is a misdemeanor punishable as provided in §321.482, for

any person to drive or move or for an owner knowingly to permit to be driven or moved upon any highway any vehicle of a type required to be registered hereunder which is not registered, or for which the appropriate fee has not been paid when and as required hereunder."

§321.18 "Every motor vehicle, trailer, and semitrailer when driven or moved upon a highway shall be subject to the registration provisions of this chapter except:

* * *

"2. Any such vehicle which is driven or moved upon a highway only for the purpose of crossing such highway from one property to another."

* * *

§321.1(2). "'Motor vehicle' means every vehicle which is self-propelled . . . ."

§321.1(48). "'Street' or 'highway' means the 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 the purposes of vehicular traffic."

§321.30(2). "The treasurers shall refuse registration upon any one of the following grounds:

* * *

"2. That the vehicle is mechanically unfit or unsafe to be operated or moved upon the highways, providing such condition is revealed by a member of this department or any peace officer."

* * *

§321.381. "It is a misdemeanor . . . for any person to drive or move . . . on any highway any vehicle . . . which is in such unsafe condition as to endanger any person or which does not contain those parts or is not at all times equipped with such lamps and other equipment . . . as required in this chapter."

The snow-mobile is a motor vehicle and can only move upon the highway when it is registered, as provided above, with one exception. Now, the usual snow-mobile type of vehicle has two skiis in front which also serve as a steering apparatus; and also a small motor which supplies motive power to one rear wheel. It cannot swiftly change direction and is only three to four feet in height. It would not be visible to an oncoming motorist if a hilltop or ridge intervened. This type of vehicle does not comply with the statutes as to equipment, such as brakes, lights, mirrors, etc. Also, our state traffic experts are of the opinion that snow-mobiles are mechanically unfit or unsafe to be operated or moved upon the highways.

The county treasurers throughout the State of Iowa have been notified by official members of the Department of Public Safety that these vehicles are unsafe to be operated upon the highways, and the treasurers have been instructed not to register them for highway transportation.

It is also apparent that the snow-mobiles are not equipped as required in Sections 321.381, 321.384, 321.385, 321.415, 321.417, 321.430, 321.431, 321.437 and many other sections of the law and are therefore not entitled to be registered under Sections 321.30 and 321.381.

It is my opinion that such vehicles do not comply with statutory requirements and are unsafe to operate; therefore, they cannot be registered as required and cannot be driven upon the highways.

However, under Section 321.18(2) there is an exception, permitting such a vehicle to move upon the highway "only for the purpose of crossing such highway from one property to another" without registration.

January 10, 1969

SCHOOLS: Residence — §§282.3, 282.6, 299.10 and 299.11. A mother of school age children can establish residence for herself and the children separate from that of the husband. The separate residences may be established by mutual agreement. Officials of county where children are apparently residing are the proper ones to enforce school laws. (Nolan to Schoenthaler, Jackson County Attorney, 1/10/69) #69-1-5.

Mr. David E. Schoenthaler, Jackson County Attorney: This is in response to your telephone request for an opinion on certain questions previously submitted to this office with your letter of September 27, 1968, which request was subsequently withdrawn. The questions presented with your original request are as follows:

"1. Can the wife and mother of the children establish, for tuition-free school privileges, a residence for herself and the children, separate from that of her husband?

"2. Can the husband and wife, under such circumstances, mutually agree to establish such separate residences?

"3. In view of the fact that Mary Kathryn George and her four children are apparently residing in Jackson County, but are deemed to be actual residents of Clinton County, whose duty is it to enforce the compulsory attendance of said children in school — the officials of Jackson County or the officials of Clinton County?

"4. If the specific officials charged with the duty of enforcement of provisions of Chapter 299 in this instance are the Clinton County officials, how do they proceed with this enforcement across the county line?

"5. If the specific officials charged with the enforcement of provisions of Chapter 299 in this instance are the Jackson County officials, which school district officials do they place in charge of the children, that is, do they place such children with the school officials in the Delwood District or with the school officials of the Maquoketa district?"

In answer to your questions we advise:

1. Yes. A wife and mother of school age children can establish a residence for herself and the children separate from that of her husband. It has been the opinion of this office that a married woman living apart from her husband does not have the same settlement of her husband, even though the husband may be paying partial support. 1940 OAG 189.

Section 282.6, Code of Iowa, 1966, provides:

"Every school shall be free of tuition to all actual residents between the ages of five and twenty-one years . . ."

In *Mt. Hope School District vs. Hendrickson*, 197 Iowa 191, 197 N. W. 47 (1924) the Iowa Supreme Court stated:

"Ordinarily the legal residence of a minor is the same as that of his

parents, but a minor may have a residence for school purposes other than that of his parents. The test of residence which will confer school privileges is not the same as the test for taxation or for the exercise of the right of suffrage. [Citing cases]

* * *

"The word 'domicile' indicates the real home. The word 'residence' indicates the place, abode, or dwelling.

* * *

"If a minor leaves the home of his father to reside in another place for the sole purpose of securing free public school education, without bringing with him an actual residence, and with the intent to return to his former residence, he does not become an actual resident within the purview of our school law.

* * *

"In the acquisition of a school domicile two facts concur — actual residence and intention, and these essential elements are found in the case at bar. The principle of free education is the richest legacy of our Puritan civilization, and a liberal construction of our statutes must be given in order that its benefits may inure to those who claim its privileges."

Where a child resides in the school district with one or both of his parents, such child is a resident for school purposes. If, for any purpose other than merely affording such child free public schooling, a parent or guardian maintains his or her home in any given community, the child living in that home should be considered a resident regardless of the fact that the other parent may be living in some other locality.

In determining residence in a situation where a house was bisected by the boundary line of two school districts, this office held that the place of residence is determined by the facts of where the occupants mainly and substantially performed the acts and offices which characterized the home, "such as sleeping, sitting, eating and receiving visitors." 1946 OAG 197, 201. It is my view also that such child does not lose a residence established in a school district by leaving the district in the summertime for a vacation, travel, study, work or other reasons if a home is maintained ready for the child's return.

2. In answer to your second question, it is our view that a husband and wife could mutually agree to establish separate residences for a number of reasons and that more than a mere scintilla of proof would be required to establish that the agreement was solely for the purpose of obtaining tuition free schooling.

3. The officials of the county where the children are apparently residing are the proper persons to enforce the compulsory attendance of such children in school. Section 282.3 of the Code of Iowa authorizes the school board to admit or exclude pupils from school. The board of each school corporation is empowered by §299.10 to appoint a truancy officer. Under §299.11, the truancy officer "shall take into custody . . . any apparently truant child . . . ."

4. It is our view that the officials of Jackson County are the ones to enforce the compulsory attendance laws. This being so, your fourth question is moot.

5. Under §299.11, the children returned to school under the compulsory school laws are to be placed in "the public school designated by the board of directors of the school corporation in which said child resides." If in the case presented the children have a home in the Maquoketa district, the Jackson County officials should place the children with the school officials of the Maquoketa district.

January 13, 1969

STATE OFFICERS AND DEPARTMENTS: Appointive members of judicial nominating commission, term of vacancy appointments and eligibility for reappointment — Article V, §16, Constitution of Iowa, §§46.3, 46.4 and 46.5, Code of Iowa, 1966, as amended by Chapter 399, Acts of the 62nd G. A. A person appointed to fill a vacancy on a judicial nominating commission is entitled to serve only for the unexpired portion of the term of his predecessor but is thereafter eligible for reapopintment to a full six year term. (Turner to Lyman, Clerk of Supreme Court, 1/13/69) #69-1-7

Mrs. Helen M. Lyman, Clerk of Supreme Court: Reference is made to your letter of November 19, 1968, in which you requested an opinion of the attorney general with respect to the following:

"Section 16, Article V of the Constitution of Iowa, Amendment of 1962, provides that members of the Judicial Nominating Commission who have served a six year term shall be ineligible for a second six year term on the same commission.

"If a member is appointed to finish an unexpired term of a six-year member, and does not serve a full six years, is he eligible for nomination?"

In our opinion a person appointed to fill a vacancy on a judicial nominating commission is eligible for nomination to a full six year term after completing the term of his vacancy appointment. Article V, Sec. 16 of the Constitution of Iowa provides in relevant part:

"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.*" (Emphasis added)

The statutory provisions with respect to filling vacancies in the office of appointive judicial nominating commissioners is contained in §46.5, Code of Iowa, 1966, which provides in part:

"When a vacancy occurs in the office of appointive judicial nominating commissioner, the chairman of the particular commission shall promptly notify the governor in writing of such fact. Vacancies in the office of appointive judicial nominating commissioner shall be filled by appointment by the governor. The *term* of state judicial nominating commissioners so appointed shall commence upon their appointment pending confirmation by the senate at the then session of the general assembly or at its next session if it is not then in session. The *term* of district judicial nominating commissioners so appointed shall commence upon their appointment." (Emphasis added)

The question you raise apparently stems from the fact that §46.5 quoted above provides that the "term" of appointive state and district judicial nominating commissioners shall commence upon their appoint-

ment by the governor subject, in the case of state judicial nominating commissioners, to confirmation by the senate; and the only "term" referred to in the constitution is a six year term. Thus, on the face of it it would appear that a person receiving a vacancy appointment on a judicial nominating commission should serve a full six years from the date of his appointment and be ineligible for a second six year term, rather than merely serve out the unexpired portion of the term of the office of the person he was appointed to succeed. However, to adopt this position would frustrate the requirement of Article V, Sec. 16 of the Constitution of Iowa that "As near as may be, the terms of one-third of such members shall expire every two years." Moreover, the proposition that vacancy appointments to judicial nominating commissions are for six years would be in contradiction of §§46.3 and 46.4, Code of Iowa, 1966, which were adopted to give effect to the constitutional mandate for staggered terms. As initially enacted these sections of the law provided for one-third of the members of each commission to be named for two years, one-third for four years, and one-third for six years, and made permanent provision for selection of members for six year terms in June of each odd numbered year commencing in 1965. This plan was continued in effect by the redistricting amendment of 1967, Chapter 399, Acts of the 62nd G. A. See also OAG, Turner to Clarke, Assistant to the Governor, August 8, 1967.

The statutory provisions set forth above must all be given effect and harmonized one with the other as well as with the constitution. *State v. Charlson*, ... Iowa ....., 1954 N. W. 2d 829 (1967). If the term of one selected to fill a vacancy were to extend beyond that of the person replaced it is clear that eventually the constitutional and statutory provisions for staggered terms would be effectively stultified.

Accordingly, it is our opinion that a vacancy appointment is only for the unexpired term of the person whom the vacancy appointee is succeeding and not for a full six year term. This being so it is plain that a vacancy appointee would be eligible for appointment for a full six year term upon completion of his vacancy appointment since the constitutional prohibition is only against a "*second* six year term."

January 21, 1969

STATE OFFICERS AND DEPARTMENTS: Incoming state officer, entitlement to pay — Art. IV, §22, Art. V, §12, Constitution of Iowa, §§39.8 and 63.1, Code of Iowa, 1966. An incoming state constitutional officer is entitled to be paid commencing with the day on which he takes the oath of office and is qualified, to wit, the second secular day of January and not before. His predecessor in office is entitled to be paid for so much of January as precedes such qualification. (Haesemeyer to Selden, Comptroller, 1/21/69) #69-1-8

Mr. Marvin Selden, Jr., Comptroller's Office: You have requested an opinion of the attorney general on the question of whether or not a state constitutional officer elected in November, 1968, should receive the pay attributable to his office for the entire month of January even though he did not take the oath of office until January 2, 1969. A corollary question is, of course, whether the outgoing state officer is paid only through December 31, 1968 or until his successor qualifies by taking the oath of office. Article IV, §22 and Article 5, §12, Constitution of Iowa, provide:

"Secretary — auditor — treasurer. Sec. 22. A Secretary of State, Auditor of State and Treasurer of State, shall be elected by the qualified electors, who shall continue in office two years, and until their successors are elected and qualified; and perform such duties as may be required by law."

"Attorney general. Sec. 12. The General Assembly shall provide, by law, for the election of an Attorney General by the people, whose term of office shall be two years, and until his successor shall have been elected and qualified."

§§39.8 and 63.1, Code of Iowa, 1966, provide:

"39.8 Term of office. The term of office of all officers chosen at a general election for a full term shall commence on the second secular day of January next thereafter, except when otherwise provided by the constitution or by statute; that of an officer chosen to fill a vacancy shall commence as soon as he has qualified therefor."

"63.1 Time. Each officer, elective or appointive, before entering upon his duties as such, shall qualify by taking the prescribed oath and by giving, when required, a bond, which qualification shall be perfected, unless otherwise specified, before noon of the second secular day in January of the first year of the term for which such officer was elected."

It is clear from §§39.8 and 63.1 set forth above that the term of a state constitutional officer does not commence until he takes the oath of office on the second secular day of January following his election. It is equally clear from the constitutional provisions hereinbefore quoted that an outgoing officer remains in office until his successor has qualified, i.e. taken the prescribed oath and given any required bond. This being so one would imagine the answer to your question would be obvious. As stated by the Iowa supreme court in *Bryan v. Cattell*, 15 Iowa 538, 552 (1864), "The better and safer rule doubtless is, that if he [a public officer] is in point of law actually in office, he has a legal right to the salary pertaining to it." While this conclusion might seem to us to be consistent with both reason and logic it does not square with the position taken by prior attorneys general. In a series of opinions beginning in 1922 the various attorneys general have see-sawed back and forth on this question of who gets paid for what. Opinions of the attorney general dated February 6, 1922 and January 12, 1927, ruled that officers holding over until January 3, should receive no pay for January 1 and 2 and that the officer qualifying on January 3 should receive the salary for the full month of January. These two opinions were then recalled on December 16, 1932 by the then attorney general who apparently took a different, and in our opinion a more enlightened view of the matter. However, this position did not long prevail, for three weeks later in an opinion dated January 5, 1933, the next attorney general recalled the December 16, 1932 opinion and returned to the former view of the matter. Other opinions involving county officers have adhered to this position that an officer was entitled to be paid for the first and second of January even though he did not take office until the third. 38 OAG 12, 34 OAG 69.

The trouble with all of these is that they defy logic, are unsupported by any authority, and in our view ignore the plain language of the constitution and law.

Accordingly, for the reasons stated at the outset of this opinion it is

our opinion that an incoming state officer is entitled to be paid only from the day he qualifies and that his predecessor is entitled to be paid until that time.

January 27, 1969

SCHOOLS — Area Colleges — §280A.23. Agreement for exchange of students between area school and school of another state must be reviewed by state board of public instruction. (Nolan to Abels, Department of Public Instruction, 1/27/69) #69-1-9

Mr. Leonard C. Abels, Planning & Development Consultant, Department of Public Instruction: I am returning herewith the copies of a proposed agreement between merged Area IX and Black Hawk Junior College District No. 503, Illinois, which was submitted for the review and approval of this office pursuant to §28E.9, Code of Iowa, 1966.

The proposed agreement appears to contain the specifications required by §28E.5. However, it is not supported by the resolution of the governing bodies involved as required by §28E.4, and as a consequence of this and other matters noted hereafter, it is our view that it is premature for this office to approve the same.

Upon receiving the copies I made inquiry of the Office of the Attorney General of the State of Illinois on the point of whether the Black Hawk Junior College has authority to contract with an Area school in Iowa and was advised by William G. Clark, Attorney General of Illinois, on December 30, 1968 as follows:

"In reply to your letter of December 6, with reference to the captioned matter in which you refer to Section 28E.9 of the Code of Iowa, inquiry of the Junior College Board in this State discloses that the authority for entering into the agreement in question is based upon the provisions of chapter 122, paragraph 3-40, Illinois Revised Statutes 1967, which reads as follows:

" 'To enter into contracts with *any person, organization, association or* governmental *agency for providing or securing* educational services. (Amended by L. 1967, H.B. 1235, approved July 7, 1967.)' "

It is my view that such authorization is sufficient to establish the Black Hawk Junior College with authority to contract with merged Area IX. Further, merged Area IX has the status of a body politic under §280A.16, and therefore, may enter into an agreement pursuant to authority given under §280A.23(5) which may acquire the status of an interstate compact under §28E.9. It is my view, however, that if such compact is to be approved, the approval should be given by the State Board of Public Instruction rather than by the superintendent of Public Instruction. (§257.10(7). Before approving such agreement, I would advise that the State Board of Public Instruction be assured that §14 of Chapter 244, Laws of the 62nd General Assembly, has been complied with. This amendment to §280A.23 of the Code of 1966 directs the State Board of Public Instruction to ascertain that all "courses and programs submitted for approval [by an Area Community College] are needed and that the curriculum being offered by an area school does not duplicate programs provided by existing public or private facilities in the area."

January 29, 1969

STATE OFFICERS AND DEPARTMENTS: Department of Public Safety — Federal Highway Safety Act of 1966 — Ch. 86 of the 62nd G. A. Where the governor designates the commissioner of public safety as his personal representative for all matter involving the Highway Safety Act of 1966, such designate is the proper payee of aplicable federal warrants; such warrants should be credited to a fund designated by the present governor; such designate is the proper person to certify all claims against these funds unless the new governor appoints a new personal representative; and the comptroller's office must run a pre-audit of all claims pursuant to §8.6(16) and §8.14(5). (Turner to Selden, State Comptroller, 1/29/69) #69-1-11

Mr. Marvin Selden, State Comptroller: You have asked the following questions with reference to the Highway Safety Act of 1966 (PL 89-564) and Chapter 86, Acts of the 62nd General Assembly:

The governor has designated Jack M. Fulton as his personal representative in matters involving the Highway Safety Act of 1966. (See letter from Hughes to Phillips, dated 7-7-67.) Mr. Fulton has contracted for funds pursuant to his designation and we now have the first warrant from the federal government under the contract, payable to Jack M. Fulton as Commissioner of Public Safety.

Chapter 86, Acts of the 62nd General Assembly provides:

"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 for the benefits available to this state under the federal highway safety act of 1966 as specifically set out in the national standards announced June 27, 1967 by the federal secretary of transportation 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. The governor shall be responsible for and is hereby empowered to administer through the department of public safety or through the highway commission or both, the highway safety programs of this state and those of its political subdivisions, all in accordance with said act and the constitution of the state of Iowa, in implementation thereof."

(a) Is Commissioner Fulton the proper payee under this statute?

(b) To what fund should the warrant be credited?

(c) Is Commissioner Fulton the only authorized signer of claims for warrant from such funds?

(d) Is my office required, because of pre-audit requirements of §8.6(1), 1966 Code of Iowa, to determine that expenditures are made in conformity to the national standards of June 27, 1967 under The Highway Safety Act of 1966?

In response to these questions, I answer as follows:

(a) On July 7, 1967, Governor Hughes wrote the following letter:

"Mr. Ralph M. Phillips
Regional Highway Administrator
U. S. Department of Transportation
P. O. Box 15177 — Civic Center Section
Kansas City, Missouri 64106

"Dear Mr. Phillips:

"On July 1, 1967, the Iowa Legislature authorized Iowa's participation in programs arising under the Highway Safety Act of 1966. The Act

passed by the State Legislature directs that state highway safety programs shall be administered by me 'through the department of public safety and through the highway commission or both . . . .' In accordance with this language, I am directing the Iowa Department of Public Safety to assume responsibility for the administration of all highway safety programs in the state.

"I am hereby designating Jack M. Fulton, Commissioner of the Iowa Department of Public Safety, to serve as my personal representative in matters involving the Highway Safety Act of 1966. The Office for Planning and Programming, which is under the direction of Frank M. Covington, formerly my representative in this area, will proceed at the request of Commissioner Fulton and myself to develop a state plan for implementing the objectives of the Act. An application seeking approval for a planning and administration project has been submitted to your office."

The governor's intent is clear. This letter constitutes a designation of Commissioner Fulton as the personal representative of the governor under Chapter 86, Acts of the 62nd General Assembly, and as such he is the proper payee.

(b) The fund to which the warrant should be credited should be designated by the present governor. The fact that the federal warrant describes the payee as being the Commissioner of Public Safety does not make the funds Public Safety Department funds.

(c) Jack M. Fulton is the proper person to certify all claims against these funds at the present time and, unless contrary designation is made by Governor Ray, will remain so.

(d) The pre-audit rules now existing by virtue of §8.6(16) are broad enough to imply that your office should conduct a pre-audit of claims that would include the legality and propriety of expenditures based on contracts with the federal government and standards established by federal officers under federal legislation authorizing such contracts. In addition, §8.14(5) would seem to require such a determination in that it requires you to determine, when approving a claim, "that the charges are *reasonable, proper and correct* and no part of said claim has been paid." (Emhasis supplied)

The present form of certification of a claim to your office requires reference to that portion of Iowa law under which the expenditure is claimed. The code requirements with regard to pre-audit, under this set of circumstances, may be limited to a verification of authority under Iowa law, only.

January 31, 1969

AIR POLLUTION: Local Control Program — Chapter 162, Acts of the 62nd G. A. The Quad City Regional Air Pollution Control Charter must be amended and approved by the State Air Pollution Control Commission before the local jurisdiction can sign said charter. (Seckington to Ottesen, Assist. Scott County Att'ny., 1/31/69) #69-1-10

Mr. Realff H. Ottesen, Assistant County Attorney: You have requested an opinion of the attorney general as follows:

"Pursuant to the authority granted by Section 14 of Chapter 162 of the Laws of the 62nd G. A. (1967) on Air Pollution Control, Scott County would like to enter into an area Air Pollution Control agreement with certain other political subdivisions of the State of Iowa and of Illinois. A copy of said proposed Agreement is attached for your use. Such joint exercises of Governmental Power are, of course, governed by Chapter 28E of the 1966 Code of Iowa as amended.

"The two questions involved are as follows:

1. Does the entire body of the Agreement have to be published as a part of the proceedings of the Board of Supervisors under the provisions of Section 349.16 and 349.18 of the 1966 Code of Iowa?

2. Does the approval of the Attorney General required by Section 28E.9 of the 1966 Code of Iowa have to be obtained prior to any official action of the Board of Supervisors? If so, please consider this an official request for approval."

In answer to your first question, the entire body of the agreement will have to be published as a part of the proceedings of the Board of Supervisors under §§349.16 and 349.18 of the 1966 Code of Iowa. In a November 21, 1967 opinion of the attorney general concerning the publication of zoning ordinances it was stated that "subject to the excluded items, the statute (349.16) is mandatory and requires that the proceedings [of the board of supervisors] be published." The purpose of the publication is to inform the taxpayers of what is being done by their representative. Since the proposed agreement does not fall into one of the exclusions of §349.16, 1966 Code of Iowa, it is mandatory that such proposal or agreement be published.

As to whether the approval of the attorney general is required prior to any official action of the board of supervisors, the first paragraph of §28E.9 states:

"Status of interstate agreement. If an agreement entered into pursuant to this chapter is between or among one or more public agencies of this state and one or more public agencies of another state or of the United States said agreement shall have the status of an interstate compact. Such agreements shall, before entry into force, be approved by the attorney general who shall determine whether the agreement is in proper form and compatible with the laws of this state."

Since the agreement in question involves political subdivisions of Iowa and Illinois, it falls squarely within the purview of §28E.9 and requires the approval of the attorney general before such agreement may be put into force. But we see no reason why the supervisors may not act subject to the approval of the attorney general as long as the agreement doesn't take effect until approval.

You will also note that §28E.9, supra, declares that such agreements shall have the status of interstate compacts.

Interstate compacts are subject to the consent of Congress pursuant to Article I, §10, Clause 3 of the United States Constitution. That section states in part as follows:

"No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . ."

The courts have held that congressional approval is not a requirement in all cases. So, for example, in the case of *General Expressways, Inc. vs. Iowa Reciprocity Board*, 1968, ____Iowa____, ____N. W. 2d____, the Iowa Supreme Court in speaking of interstate compacts, and whether they must be approved by congress, stated:

"It is well settled that the constitutionality of interstate compacts in this regard is tested by whether the compact is a combination tending to increase the political power of the state which may encroach upon or interfere with the supremacy of the United States . . . ."

The Iowa Supreme Court has thus held that if in fact the compact might encroach upon or interfere with the supremacy of the United States, Congress must approve the compact. *General Expressways*, supra, and cases cited therein.

The federal government has passed legislation dealing with control of air pollution, P.L. 90-148, 81 Stat. 485, known as the Clean Air Act of 1967. However, a review of the federal legislation reveals that the states are to be given every opportunity to control air pollution within their respective boundaries. Only when the states have failed to act, or when their action is ineffective will the federal government intervene. Even then, the federal government works with each state, and gives the states opportunity to adopt and enforce satisfactory rules, regulations and standards. If the state still does not take action, then the federal government, through H.E.W. exercises its jurisdiction over air pollution control.

In view of the federal law, supra, it is the opinion of this office that the compact in question need not be submitted to Congress for its approval. This is because action by the states will not and can not encroach upon federal supremacy. If the program under consideration does not meet federal approval, the federal government will exercise its statutory power. Since the action of the state will not affect the power of the federal government to act, this compact does not come within the language of the Iowa Court, supra, requiring Congressional approval.

The Iowa Air Pollution Control Commission has statutory authority affecting local air pollution programs, which must be considered also. That commission was created by Chapter 162, Acts of the 62nd General Assembly. Section 4(12) of said Act provides that the Iowa Air Pollution Commission shall review local air pollution control programs to determine whether the local program and its emission limits, rules and regulations are consistent with the State limits, rules and regulations. As of this date, there are no limits and few rules or regulations promulgated by the State Air Pollution Commission.

Iowa law demands that local air pollution control emission limits, rules and regulations, be as least as stringent as the state limits and rules. At this point in time, neither the state nor local air pollution control agencies have emission limits, rules or regulations. The state agency must be assured that its limits, rules and regulations will be minimum limits. The first paragraph of §6 of the charter under consideration clearly indicates an attempt to make federal and state limits the minimum limits. However, if the local limits, rules and regulations are established prior to state or federal limits, rules and regulations, it is not clear that the local program is bound to adopt those limits, nor is it clear by what method those limits will be adopted. In order to avoid problems such as often arise in connection with interstate compacts, this office will require that the charter provide that the state limits, whether adopted before or after the local limits, will be minimum limits. We will also require that the charter clearly outline the procedure used to implement said limits, rules and regulations in lieu of the existing local limits, rules and regulations. See Chapter 162, §15(1)(a), Acts of the 62nd G. A.

If the local program meets with the approval of the Iowa Air Pollu-

tion Control Commission pursuant to §§4, 14 and 15, Chapter 162, supra, that Commission will issue a certificate of acceptance. The certificate of acceptance will be issued only for the charter, since there are no emission limits, rules or regulations now in effect for the local program. As the local program limits, rules and regulations are adopted, they must also be submitted to and approved by the State Air Pollution Control Commission.

The approval you requested of this office can be given with the following reservations:

1. The amendment suggested above.
2. Approval of the Iowa Air Pollution Control Commission.

Once these conditions have been satisfied, Scott County will be free to enter into the Quad City Regional Air Pollution Control Charter.

February 4, 1969

STATE OFFICERS AND DEPARTMENTS: Chapter 112, §§3(3), 11(2), 11(4), 13(3), Acts, 62nd G. A. — Director and Council of Law Enforcement Academy are not authorized by this Act to prescribe minimum standards of physical, educational, mental and moral fitness governing the appointment of deputy sheriffs. (Cullison to Knoke, Pottawattamie County Attorney, 2/4/69) #69-2-1

Mr. George J. Knoke, Pottawattamie County Attorney: You requested an opinion of the Attorney General as to whether §11(4), Chapter 112, Laws of the 62nd General Assembly, authorizing the establishment of minimum physical, educational, mental and moral standards for the recruitment of "police officers," applies to the recruitment and appointment of deputy sheriffs. It is our opinion that it does not.

Chapter 112, Laws of the 62nd General Assembly is an act to provide for, among other things, the creation of a law-enforcement officer's academy. Section 11 of the Act authorizes the director of the academy, subject to the approval of the law-enforcement academy council to promulgate rules and regulations relative to various matters, including:

"2. Minimum basic training requirements *law-enforcement officers* employed after July 1, 1968, must complete in order to remain eligible for continued employment and the time within which such basic training must be completed. (emphasis added)

* * *

"4. Minimum standards of physical, educational, mental and moral fitness which shall govern the recruitment, selection and appointment of *police officers.*" (emphasis added)

A distinction is made in these sections between "law-enforcement officer" and "police officer." The term "law-enforcement officer" is defined in §3(3) of Chapter 112 as:

". . . a conservation officer, a member of a police force or other agency or department of the state, county, city or town regularly employed as such and who is responsible for the prevention and detection of crime and the enforcement of the criminal laws of this state."

County sheriffs and their deputies are clearly "law-enforcement officers" within the meaning of this section. On the other hand, the term

"police officer" is not defined in Chapter 112. It is ordinarily understood to mean a law-enforcement officer employed by a municipality, *Cleu v. Board of Police Commissioners*, 3 C A 174, 84 P 672, not county sheriffs and their deputies.

This distinction is reasonable in light of the fact that the office of county sheriff is elective and traditionally independent of all other agencies of government. As such, sheriffs have always had sole discretion in the selection of deputies. In addition, many of the useful and necessary duties of deputy sheriffs, such as serving papers and acting as bailiffs, may be adequately performed by persons not having the same physical and mental capacities as policemen. Establishment of minimum standards of "physical, educational, mental and moral fitness" of deputy sheriffs, therefore, by another agency of government, would constitute a substantial incursion upon the independence of county sheriffs.

For the foregoing reasons it is our opinion that the term "police officer," as opposed to "law-enforcement officer," was used by the legislature advisedly, and does not include deputy sheriffs.

We notice that §13(3) authorizes the academy to award "diplomas" to police officers, rather than to law enforcement officers. This may have been an error of draftmanship rather than the purpose of the legislature. Though the words are similar, the same reasoning might not apply. At any rate, there is no necessity to rule on that point at this time.

February 5, 1969

ELECTIONS: Contests in General Assembly — Chapters 57 and 59, Code of Iowa, 1966. Notice of intent of contest election is sufficient if statement is served upon incumbent as provided in §59.1 informing him of grounds by reference to a subsection of §57.1 where illegal votes are not alleged as a ground for contest. (Nolan to Renda, State Representative, 2/5/69) #69-2-2

The Hon. Thomas A. Renda, State Representative, Polk County: This is in reply to your letter of January 27, 1969 relating to the election contest in the House of Representatives between Richard Grove, contestant, and D. Vincent Mayberry, incumbent. In your letter you requested an opinion on the following questions:

"1. Is the attached notice proper under Chapter 57 and Chapter 59 of the 1966 Code of Iowa entitled 'Notice of Intent to Contest an Election'?

"2. Is this notice sufficient to confer jurisdiction upon the House of Representatives when it only sets out Subsection 6 of Section 57.1 of the 1966 Code of Iowa without setting forth sufficient facts to show that an error was made by the Board of Canvassers under that section?

"3. Does failure to comply with Section 59.3, 59.4 and 59.5 of the 1966 Code of Iowa prevent the House of Representatives from having jurisdiction over this matter? Is failure to comply with these sections fatal to an election contest?

"4. Does a verified sworn statement of notice of intent to contest an election sealed in an envelope with return receipt requested comply with Chapter 59.5 of the 1966 Code of Iowa?

"5. Does filing a notice of intent to contest an election with the Secretary of State on December 6, 1968 give the House of Representatives

jurisdiction when no deposition was taken and no other notice of contest filed?

"6. Is a notice sufficient which asks for a recounting of the ballots without showing any error, any illegal votes or good cause that someone was not duly elected?"

I.

Section 59.1 of the 1966 Code of Iowa provides:

"The contestant for a seat in either branch of the general assembly shall, within thirty days after the incumbent is declared elected, serve on the incumbent a statement as required in relation to county officers, except the list of illegal votes, which shall be served with the notice of taking depositions relative to them, and if no such deposition is taken, then twenty days before the first day of the next session."

The copy of the notice which you furnished with your request indicates that such notice was filed in the office of the Secretary of State on December 6, 1968. This is proper pursuant to §59.4, Code of Iowa, 1966. There is no indication as to whether or not such notice was also served on the incumbent. Failure to file such timely notice is fatal under §59.1, and no jurisdiction exists in the committee to entertain a contest unless the provisions of §59.1 are met. Opinion of the Attorney General, Febuary 10, 1967 (copy enclosed herewith). However, if the proper notice was served on the incumbent twenty days before the first day of the session (i.e. December 24, 1968) it would be timely, inasmuch as the notice gives no indication of an intent to take depositions relative to providing a list of illegal votes.

II.

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, is sufficient.

III.

If there is no allegation of illegal votes, there is no legal necessity of providing depositions relating thereto. In this case there appears to be no depositions pertaining to illegal votes. Consequently, the provisions of §59.4 relating to returning such to the officer taking the depositions are not applicable, and filing a copy with the Secretary of State is sufficient. The Secretary of State then transmits the papers to the house where the contest is to be tried. Section 59.5 provides:

"The Secretary [of State] shall deliver the same unopened to the presiding officer of the house in which the contest is to be tried, on or before the second day of the session, regular or special, of the general assembly next after taking the depositions, and the presiding officer shall immediately give notice to his house that such papers are in his possession."

It appears that §59.5 was probably substantially complied with in this case. If the notice of intent to contest the election was not delivered to the presiding officer, the house would not have jurisdiction over the matter.

IV.

The Code requires that statements made by contestants for seats in the general assembly be "as required in relation to county officers." The statement of county office contestants must be verified by affidavit of the contestant. (§62.5)

V.

As stated above, unless illegal votes are alleged, there is no requirement that depositions be taken. Vital to the jurisdiction of the contest, however, is that notice be given the incumbent stating the grounds for the contest. However, the provisions of Chapter 59 pertaining to the contesting elections for seats in the general assembly do not contain the requirement that the contestant file a bond as is the case with contestants for county offices. (§62.6)

VI.

In *Haas vs. Contest Court*, 221 Iowa 150, 265 N. W. 373, (1936), the Iowa Supreme Court has stated:

". . . 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.

"The sufficiency of the statement thus filed is not a jurisdictional question."

In the opinion of February 10, 1967, supra, it is stated:

"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 11, 1969

STATUTORY CONSTRUCTION — §331.15, Code of Iowa, 1966. Secular day means any day other than a Sunday. (Nolan to Emerson, Buena Vista County Attorney, 2/11/69) #69-2-3

Mr. Emery H. Emerson, Buena Vista County Attorney: This is in reply to your letter of January 24, 1969 in which you request an opinion on the question:

"What day of January 1969 would be the second secular day that is referred to in Section 331.15 of the 1966 Code of Iowa?"

The term "secular day" is generally interpreted as meaning any day other than a Sunday. In the ordinary sense of the word, secular relates to worldly affairs as opposed to spiritual or ecclesiastical matters. *State vs. Heaton*, 10 Ohio App. 2d 44, 225 N. E. 2d 608.

The fact that the first day of January is celebrated as a holiday does not exclude it from being a secular day, unless of course, the first of January falls on a Sunday. Since neither January 1 nor January 2 fell on Sunday this year, January 2 was the second secular day.

February 17, 1969

ELECTIONS: Library building bond issue, 60% vote required, §§408A.1, 408A.5, 407.10, Code of Iowa, 1966. A proposition to issue bonds to construct a library building must have the approval of at least 60% of those voting in order to be deemed carried. (Nolan to Den Herder, State Representative, 2/17/69) #69-2-4

Rep. Elmer H. Den Herder, State Representative: This is in response to your request of February 10, 1969, for an opinion on the question of whether a simple majority vote or a 60% margin is required to carry a bond issue election for the construction of a library building in the town of Orange City.

This question is determined by Secs. 407.10 and 408A.5, 1966 Code of Iowa. The provisions of these statutes are set out below.

"407.10 Majorities required. A majority of all the legal votes cast on the particular question at the election shall be sufficient to authorize the municipality to contract the indebtedness, except that if the question submitted is one in connection with waterworks, gasworks, electric light or power plants, heating plants, or the establishment of a hospital, the affirmative vote shall also be as large as a majority of all the legal votes cast at the preceding municipal election."

This section has been held to apply where bonds issued were to be paid from revenues produced by a municipal light or power plant or waterworks. *Abbott v. Iowa City*, 1938, 224 Iowa 698, 277 N. W. 437. However, if the bonds are general obligation bonds, and do not come within the class specifically referred to in the municipal utilities cases, then Chapter 408A, Code of Iowa, becomes applicable. Sec. 408A.1 provides:

"408A.1 Notice of proposal to issue bonds. Any other statute notwithstanding, except where an election is required under some other statute, before any city or town shall institute proceedings for the issuance of bonds in the amounts hereinafter set forth, the governing body thereof shall cause a notice of the proposal to issue such bonds, including a statement of the amount and purpose of said bonds, together with the maximum rate of interest which said bonds are to bear, to be published at least once in a newspaper of general circulation within such municipality at least fifteen days prior to the meeting at which it is proposed to take action for the issuance of such bonds:

"In cities and towns having a population of five thousand or less, ten thousand dollars, or more;

"In cities having a population of more than five thousand and not more than seventy-five thousand dollars, or more."

Chapter 408A then contains provisions for the petition for election on issuance of such bonds, the form the question is to be presented, the notice of election, and in Sec. 408A.5 the vote required:

"408A.5 Vote required. The proposition of issuing said bonds shall not be deemed carried or adopted unless the vote in favor of such authorization is equal to at least sixty percent of the total vote cast for and against said proposition at said election."

From the facts you have supplied, it is our opinion that the last quoted section (Sec. 408A.5, Code 1966) is controlling and that a 60% vote is required to carry the election.

February 17, 1969

STATE OFFICERS AND DEPARTMENTS: Law Enforcement Academy, appropriation for — Art. III, §26, Constitution of Iowa; §§3.8, 3.9, 3.10, Code of Iowa, 1966; §14, Chapter 112, Acts of the 62nd G. A.; H.F. 57, Acts of the 63rd G. A. An appropriation act which provided for a reversion of any remaining funds as of January 31, 1969, may be retroactively revived by an amendatory act which was "passed" on January 30, 1969, "approved" and "became a law" on January 31, 1969, and "became effective" on February 7, 1969. (Haesemeyer to Gaudineer, State Senator, 2/17/69) #69-2-5

The Hon. Lee H. Gaudineer, Jr., State Auditor: Reference is made to your letter of February 6, 1969, in which you state:

"Section 14, Chapter 112, Acts of the 62nd G. A. appropriated to the Department of Public Safety the sum of $158,000.00 'for general operating cost . . .' In respect to the Iowa Law Enforcement Academy. The Act further provided:

'Any unencumbered balance of the funds appropriated by this Act remaining *as of January 31, 1969* (emphasis supplied) shall revert to the general fund of the state as of that date.'

"House File 57 [Acts of the 63rd G. A.] changed the month of reversion from 'January' to June. It was to become effective upon publication in a weekly newspaper in Iowa Falls, Iowa and a daily newspaper in Clinton, Iowa. This bill was signed by the presiding officer of both houses on the morning of January 30, 1969. It then was rushed . . . to Iowa Falls, Iowa and was published in the *afternoon of January 30, 1969* in that publication. Governor Ray signed this bill . . . on the *morning of January 31, 1969. The* bill was not published on either January 30th or 31st, 1969 in the Clinton paper.

"Secretary of State, Melvin Synhorst, has ordered the bill be re-published in the Iowa Falls newspaper and to be published in the Clinton newspaper. He did this after the bill was signed by the governor and properly enrolled in his office. The first publication in the Iowa Falls paper was before it had been signed by the governor and enrolled in the office of Secretary of State. * * *

"This Act will shortly be effective upon republication. The question is, 'What legal effect will it actually have?' The comptroller's office informs me that as of January 31, 1969 the unencumbered balance in the account in question was $110,000.00.

"Since H.F. 57 did not appropriate any funds but only changed a date, may I have your opinion upon the following questions:

"1. Is a bill that is to be effective upon publication, a valid law if it is published prior to the time it is signed by the governor or enrolled in the office of Secretary of State?

"2. If an appropriation is made and within the appropriation it is stated that all unencumbered funds remaining as of January 31, 1969 shall revert to the general fund, is such reversion automatic upon that date without any further action needed? (Incidentally, does the language 'as of January 31, 1969' mean the reversion is at 12:01 A.M. January 31, 1969 or 11:59 P.M. January 31, 1969? Governor Ray signed the bill around 10:00 A.M., January 30, 1969).

"3. Is a law that changes the reversion date in an appropriation bill that becomes effective after the date for reversion has passed, legally effective to nullify such reversion or to reappropriate the unencumbered balance thereof?

"4. Under all of the facts presented, what is the legal effect of H.F. 57?"

Article III, §26, Constitution of Iowa, provides:

"Time laws to take effect. Sec. 26. 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."

§§3.8, 3.9 and 3.10, Code of Iowa, 1966, provide:

"3.8 Publication of Acts. Acts which are to take effect from and after publication in newspapers shall be published in two or more papers.

"3.9 Designation of papers. In case either or both of the papers named in the Act should fail or decline to publish said Act as required therein, the secretary of state may designate another paper or papers in which publication shall be made, and if such papers are not designated in the Act, the same may be designated by the secretary of state, and the Act published accordingly.

"3.10 Acts effective — certification. All such Acts shall take effect from and after the date of the last publication, and the secretary of state shall make and sign, on the original roll of each of such Acts, a certificate, stating in what papers it was published, and the date of the last publication in each of them, which certificate and the printing thereof at the foot of the Act shall be presumptive evidence of the facts therein stated."

In an opinion dated November 2, 1967, from the attorney general to Mr. Wayne A. Faupel, deputy code editor, certain terms commonly used in speaking of statutory enactments were defined and distinguished. As stated in this November 2, 1967 opinion:

"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 Constitution; 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.

"The 'approval' of a bill occurs when it is signed by the governor. Art. III, §16.

"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.

* * *

"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."

It is clear from the foregoing that H.F. 57 was "passed" on January 30, 1969 and "became a law" on January 31, 1969 when it was signed by the governor. This law which was published in the Clinton Herald on

February 4, 1969 and the Iowa Falls Citizen on February 6, 1969, became effective on February 7, 1969, i.e., on the day following the last of the two required publications. §3.10, Code of Iowa, 1966; OAG November 2, 1967, to Wayne Faupel, deputy code editor; 1919-20 OAG 528. In *Welch v. Battern*, 1877, 47 Iowa 147, where an Act of the general assembly provided that the Act should take effect from its publication in two newspapers it was held that it would not take effect by publication in one newspaper and a certificate of the secretary of state that it had been published in one newspaper would not justify the inference that the Act had been properly published. Similarly the publication of H.F. 57 on January 30, 1969, in the Iowa Falls paper was ineffective.

However, publication has nothing to do with when an Act becomes law but only determines when it becomes effective. Thus H.F. 57 became a law when it was signed by the governor on January 31, 1969, even though it did not become effective until January 7, 1969. *Schaffner v. Shaw*, 1920, 191 Iowa 1047, 180 N. W. 853.

Turning next to your third question, when H.F. 57 became law on February 7, 1969, it retroactively revived Chapter 112, Acts of the 62nd G. A., nullified the reversion, and effectively re-appropriated the unencumbered balance of the funds appropriated by such Chapter 112. As stated in 82 C.J.S. Statutes §248:

"In the absence of any constitutional restriction, a statute by a proper reference to another may incorporate in it the provisions of a former law, although the former may have expired, where the purpose of the later act is to revive the former, and this effect is given by the reviving act; and, a fortiori, an act is not void because it purports to be an act supplementary to an act which expired by its own limitation, where such act was subsequently revived. An amendment extending the date of expiration of a law, which amendment was passed and approved by the governor while the original law was in force, has been held valid and effective to extend the date of the original law, notwithstanding, because of the fact that the amendment contained no emergency clause, it became effective after expiration of the original law."

See also *Milk Control Board v. Pusifull*, 1941, 36 N. E. 2d 850, 219 Ind. 49.

In light of the foregoing the answer to your second question becomes academic. However, while we have found no specific authority for the proposition it would be our view that where a statute provides for a reversion to the general fund as of a certain date such reversion occurs automatically and without further action being necessary. It would certainly not be logical to suggest that a state official or employee could by neglecting or refusing to make a bookkeeping entry frustrate a reversion mandated by the legislature. In addition it would be our view that charges received on January 31, 1969, would serve to encumber the funds in question, i.e., that the reversion would not occur until the last moment of January 31, 1969.

The answer to your fourth question is found in the foregoing discussion of the other questions.

February 17, 1969

COUNTIES AND COUNTY OFFICERS: Supervisor simultaneously serv-

ing as coordinator of proposed lake recreation project — §§111A.3, 111A.6, 332.3, 332.3(12), Code of Iowa, 1966. Where a county conservation board has been established by law a member of the board of supervisors may not be appointed to act as a coordinator of a proposed lake project for the county. (Nolan to Smith, Auditor of State, 2/17/69) #69-2-6

The Hon. Lloyd Smith, Auditor: You have asked for an opinion as to the propriety of a member of a county board of supervisors simultaneously serving as an appointee of his county conservation board as a coordinator of a proposed recreation lake project for the county.

From the facts presented by you, it appears that by resolution of the Howard County Board of Supervisors on the 29th of May, 1968, the Supervisor in question was authorized and directed to do the following in connection with his capacity as "Chairman of the Howard County Committee on Conservation of Outdoor Resources," to wit:

"1. He shall help promote and carry out the conservation project and make the project of the Turkey River's Little Lake of the Woods a reality;

"2. He shall contact the various persons, including members of the Iowa Legislature, who are concerned with the conservation project and funding of the same;

"3. He shall report to the Board of Supervisors and to the Howard County Conservation Board at least once a month as to what his activities have been and what his future activities will be;

"4. He shall report monthly his expenses in connection with the promotion of the Turkey River's Little Lake of the Woods Conservation project and said expenses shall be paid from the Howard County general fund."

The resolution cited does not purport to determine that the project is necessary to the county, and we make no determination of such question. Under §332.3(12) of the Code of Iowa, the county board of supervisors has power to "purchase or acquire title or possession by lease or otherwise, for the use of the county, any real estate necessary for county purposes; . . ."

Under subsection 6 of the same section 332.3 the board of supervisors also has the power 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." It appears from the resolution that the Howard County Committee on Conservation of Outdoor Resources is a committee of the board of supervisors. There is no information in the file as to whether the supervisor in question is a member of a county conservation board created under §111A.2 of the Code. Where the voters of the county have authorized the creation of a county conservation board, the members of such board "shall be selected and appointed on the basis of their demonstrated interest in conservation matters, and shall serve without compensation but may be paid their actual and necessary expenses incurred in the performance of their official duties."

Due to the fact that such members are appointed by and may be removed for cause by the board of supervisors and the further fact that the county conservation board is required by §111A.3 to file a full report of

its receipts, disbursements and the program of work for the period covered and recommendations with the county board of supervisors, it is our view that the offices of member of board of supervisor and member of the county conservation board are incompatible, and no one person should be a member of both boards. See *State vs. White*, 257 Iowa 606, 133 N. W. 2nd 902 where the Iowa Supreme Court ruled that a person cannot serve as a member of a local school board and of the county board of education concurrently. In that case the court determined that incompatibility exists when there is "an inconsistency in the function" of the two offices as where one is "subordinate to the other" or "where the nature of the duties of the two offices are such as to render it improper, from considerations of public policy for an incumbent to retain both."

The rule has further been established that a person relinquishes the first office held by accepting an office which is incompatible with the first.

If the voters have not authorized a county conservation board in Howard County, then the member of the board of supervisors may represent the county in matters where it is deemed necessary for the county to acquire real estate, and the expenses of a member of the board of supervisors for such committee work are payable out of the county general fund. Under §111A.6 of the Code the expenses "incurred by the county conservation board in carrying out its powers and duties" may also be appropriated from the county general fund by the board of supervisors. Such expenses may also be paid from the county conservation fund "upon 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 such conservation board where a tax levy has been properly made."

February 18, 1969

ELECTIONS: Retention period for voter registration cards — §§48.14, 50.19, Code of Iowa, 1966. Voter registration cards which have been placed in transfer files because the voter has not voted once in four years must thereafter be retained for three more years and until the termination of any election contest then pending at which time they shall be destroyed. (Haesemeyer to Carstensen, Clinton County Attorney, 2/18/69) #69-2-7

Mr. L. D. Carstensen, Clinton County Attorney: Receipt of your letter, dated October 26, 1968 is hereby acknowledged.

In your letter you requested an opinion regarding the retention of a voter registration transfer file. Section 48.14, 1966 Code of Iowa, provides in part as follows:

"At the close of each calendar year after the fourth year of the registration under this chapter, clerks of registration shall check up the original registration list for the purpose of eliminating excess names and, to that end, they shall examine the election registers and whenever it appears that a registered voter has not voted at least once in four calendar years wherein elections are held, his card shall be taken from the original and duplicate registration lists and placed in a *transfer file*, . . ." (Emphasis added.)

Section 50.19, 1966 Code of Iowa, provides:

"The receiving officer shall file said books, [referring to pollbooks] and

the *registry books* and *lists* and *other papers pertaining to registration*, in his office, and preserve the same for three years and until the determination of any contest then pending, after which they shall be destroyed." (Emphasis added.)

Section 50.19, 1966 Code of Iowa, pertains to three types or sets of material: pollbooks, registry books and lists, and *other* papers pertaining to registration. The term "pollbook" is not synonymous with the term "registry books." *In re Superintendent of Elections in Hudson County*, 15 A. 2d 813, 814, 125 N.J.L. 246 registry is a register or book authorized or recognized by law, kept for the recording or registration of facts or documents. 76 C.J.S. *Registry*, p. 606.

Thus, the transfer file referred to in §48.14, 1966 Code of Iowa, would fit the definition of "registry books and lists" in §50.19, 1966 Code of Iowa, based on the definition of registry quoted above. The transfer files would also be included in the term "other papers pertaining to registration" mentioned in §50.19, 1966 Code of Iowa.

Thus, it is the opinion of this office that the term "transfer files" contained in §48.14, 1966 Code of Iowa, comes within the purview of "registry books and lists and other papers pertaining to registration" contained in §50.19, 1966 Code of Iowa, and the commissioner of registration must retain such transfer cards or files for three years and until the determination of any contest then pending, after which they may then be destroyed.

February 21, 1969

EMERGENCY ACTS — The provisions of Chapter 38B, Code of Iowa, 1966, contravene the Constitution. (Turner to Lawson, State Representative, 2/21/69) #69-2-8

The Hon. Murray G. Lawson, State Representative: Reference is made to yours of the 11th of February, 1969 questioning whether provisions of Chapter 38B, Code of Iowa, 1966, conflict with the Constitution of the State of Iowa. We note the issue is raised during consideration of House File 106, a bill to repeal Chapter 38B.

This Chapter is one of four — Chapters 38A, 38B, 38C and 38D — enacted by the General Assembly "to assure continuity of government" during an emergency caused by "an attack upon the United States." Chapter 38B undertakes to provide for the functioning of the General Assembly during emergencies "tantamount to martial law conditions."

The Constitution declares, Article XII, Section 1:

"This Constitution shall be the supreme law of the State, and any law inconsistent therewith shall be void. The General Assembly shall pass all laws necessary to carry this Constitution into effect."

Thus, the Constitution is paramount; this declaration of supremacy must be the foundation of every inquiry into the validity of statutes. No less cogent is the ordainment of Article III distributing the powers of the State government:

"Section 1. The powers of the government of Iowa shall be divided into three sparate 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 apper-

taining to either of the others, except in cases hereinafter expressly directed or permitted."

Governing more particularly the matter under consideration are certain other sections of Article III. These are:

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

The second sentence of the section refers to an executive power, found in Article IV, Section 11, which provides that the Governor

"may, on extraordinary occasions, convene the General Assembly by proclamation . . ."

* * *

"Section 8. A majority of each house shall constitute a quorum to transact business . . .

* * *

"Section 12. When vacancies occur in either house, the Governor, or the person exercising the functions of Governor, shall issue writs of election to fill such vacancies."

In a word, summoning the General Assembly into extraordinary session and the issuance of writs of election to fill vacancies are *powers of the governor.* The Assembly having convened, the *Constitution requires* the attendance of a majority of each house.

This opinion will examine the questions arising out of three subjects covered by sections of Chapter 38B. These are:

1. Convening of the General Assembly.
2. The statutory quorum requirement.
3. Filling of vacancies among the membership.

1. The framers of the basic law of Iowa did not in 1857 foresee the dreadful weapons of modern war, which could, indeed, cause the death or inability to act of a large proportion of the membership of the legislature and could, also, leave the survivors not only no statehouse but no capital city in which to convene.

Knowing these dreadful possibilities, the General Assembly undertook to provide by law that "the governor call the legislature into session as soon as practicable, and in any case within ninety days following the inception of the attack." (Sec. 38B.11, Code of Iowa, 1966.) Wise and prudent this enactment may be, but it cannot stand. Article XII, Section 1 of the Constitution simply does not authorize the General Assembly to command the Governor to exercise a power which it vests exclusively in the executive department.

The statute undertakes to provide, also, for the inability or failure of the governor to act, as follows:

"Section 38B.11 . . . If the governor fails to issue such call, the legislature shall, on the ninetieth day from the date of inception of the attack, automatically convene . . ."

This effort to exercise by statute the power vested exclusively in the governor suffers the same constitutional infirmity as the directive already discussed.

2. Recognizing that one house, or both, might suffer so many casualties through enemy action that no business could be transacted, the General Assembly undertook to provide for that contingency, by the following section:

"38B.14. In the event of an attack, (1) quorum requirements for the legislature shall be suspended, and (2) where the affirmative vote of a specified proportion of members for approval of a bill, resolution or other action would otherwise be required, the same proportion of those voting thereon shall be sufficient."

It is true that each house of the General Assembly has the power to "determine its rules of proceedings." (Constitution of the State of Iowa, Article III, Section 9.) That power is granted by the Constitution, which not only does not authorize the legislature to disregard its own terms, but expressly forbids deviation from them. (Article XII, Section 1.) The section, therefore, is void.

3. The Constitution clearly and precisely prescribes the procedure for filling vacancies in the General Assembly. This provision is and must be exclusive; the General Assembly is both empowered and directed to "pass all laws necessary to carry this Constitution into effect." (Article XII, Section 1.) But that is not an authority to alter the provisions of the basic law, or to substitute others. It follows that this section, too, is void.

The whole of Chapter 38B collapses with the sections discussed, and the effort of the General Assembly to make provision against a foreseeable catastrophe come to naught. Yet no other result is possible.

"The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with its shield of protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." (Ex Parte Milligan, 4 Wall 121, 71 Law Ed. 295.)

What is true of the Federal Constitution in our country as a whole is true of the Constitution of Iowa. Acts of an extra-constitutional nature, such as the U. S. Supreme Court forbade when done during a real emergency cannot be sanctioned when done on the basis of an emergency merely possible.

February 21, 1969

STATE OFFICERS AND DEPARTMENTS: Natural Resources Council; power to regulate and control projects in floodable areas. §455A.33. Council has duty and authority to regulate projects in floodable areas and may enjoin or abate projects having effects proscribed under provisions of §455A.33. (C. Peterson to Harbor, Speaker of House, 2/21/69) #69-2-9

The Hon. William F. Harbor, Speaker of the House, House of Representatives: Reference is made to your letter dated February 11, 1969, wherein you request an opinion of this office as follows:

"I am writing this letter requesting a written opinion as to the clarification of Section 455A.33, Code of Iowa, 1966.

"The question that arises is whether or not the Natural Resources Council has presently, within this noted section, the power to keep developers from causing damage in the vicinity of a levy along the rivers bordering our State. This is a question on behalf of the department commissioners as to whether or not this section does indeed give them this power as there is grave concern due to the development of some of these areas."

Section 455A.33 provides as follows:

"Unlawful acts — powers of council. It shall be unlawful to suffer or permit any structure, dam, obstruction, deposit or excavation to be erected, used, or maintained in or on any floodway or flood plains, which will adversely affect the efficiency of or unduly restrict the capacity of the floodway, adversely affect the control, development, protection, allocation, or utilization of the water resources of the state, or adversely affect or interfere with the state comprehensive plan for water resources, or an approved local water resources plan, and the same are declared to be and to constitute public nuisances, provided, however, that this provision shall not apply to dams constructed and operated under the authority of chapter 469 as amended.

"The council shall have the power to commence, maintain and prosecute any appropriate action to enjoin or abate a nuisance, including any of the foregoing nuisances and any other nuisance which adversely affects flood control.

"In the event any person desires to erect or make, or to suffer or permit, a structure, dam, obstruction, deposit or excavation, other than a dam, constructed and operated under the authority of chapter 469 as amended, to be erected, made, used or maintained in or on any floodway or flood plains, such person shall file a verified written application with the council, setting forth the material facts, and the council after an investigation or hearing, shall enter an order, determining the fact and permitting or prohibiting the same, upon such terms and conditions as it may prescribe.

"The council shall have the authority to maintain an action in equity to enjoin any such person from erecting or making or suffering or permitting to be made any structure, dam, obstruction, deposit, or excavation other than a dam constructed and operated under the authority of chapter 469, from which a permit has not been granted.

"The council shall have the power to remove or eliminate any structure, dam, obstruction, deposit or excavation in any floodway which adversely affects the efficiency of or unduly restricts the capacity of the floodway, by an action in condemnation, and in assessing the damages in such proceeding, the appraisers and the court shall take into consideration whether the structure, dam, obstruction, deposit or excavation is lawfully in or on the floodway."

Section 455A.1 contains the following definitions:

" 'Flood plains' means the area adjoining the river or stream, which has been or may be hereafter covered by flood water.

" 'Floodway' means the channel of a river or stream and those portions of the flood plains adjoining the channel, which are reasonably required to carry and discharge the flood water or flood flow of any river or stream."

The legislature has thereby vested in the Iowa Natural Resources Council (Council hereinafter) the duty and authority to regulate the

enumerated activities across the entire valley of each river or stream in the state to the limits of inundation by past or future floods. Any person desiring to undertake any of the enumerated activities within these floodable areas is required to file an application and material facts (ordinarily engineering plans) relating to the project with the Council and obtain a permit therefor prior to initiating the desired activity.

In order to approve any project or activity and grant a permit therefor, the Council must find that completion of the project in accordance with the application and engineering plans submitted will not have any of the proscribed adverse effects listed in paragraph one of §455A.33. Projects or activities which do have any of the proscribed effects are declared to be public nuisances.

Paragraph two of §455A.33 empowers the Council to enjoin or abate any such public nuisances and any other nuisance which adversely affects flood control. Any project or activity causing damage" to a levee lawfully in or on the floodway or flood plains necessarily would have some or all of the proscribed adverse effects and would be subject to abatement as a public nuisance or as a nuisance adversely affecting flood control.

Section 455A.33 was construed in considerable detail by the Supreme Court of Iowa in *Iowa Natural Resources Council v. Van Zee, et al.*, ... Iowa....., 159 N. W. 2d 111 (1968). A majority of the Court held that this section does not authorize mandatory abatement by the Council with respect to structures completed without complying with the application-permit procedure. In Division II of its opinion the Court enumerated the remedies available to the Council as follows:

"The remedies the legislature did provide under §455A.33 appear clear. Paragraph 2 authorizes mandatory injunctive relief for existing structures *if* they can be shown to be a nuisance. Paragraph 1 declares structures to be nuisances if they can be shown to 'adversely affect the efficiency or unduly restrict the capacity of the floodway, adversely affect the control, development, protection, allocation, or utilization of the water resources of the state, or adversely affect or interfere with the state comprehensive plan for water resources, * * *.' Of course, the burden of proof is placed upon the Iowa Natural Resources Council to show that one of the aforementioned conditions exists before it will be allowed to obtain the injunctive relief authorized. Paragraph 3 of §455A.33 requires a person who desires to erect or maintain a structure in a flood plain to file a verified application for a permit, and it does not excuse one from conforming with this requirement by completing such a structure prior to such application. Relief, by implication at least, is by court order to comply. Under paragraph 4 the council may obtain injunctive relief as to construction in progress or future construction by showing that it was within the flood plain and proceeding without a permit. Under paragraph 5 the plaintiff was given the alternative relief of eminent domain to obtain and remove objectionable structures, which may or may not amount to a nuisance."

In view of the above, we are of the opinion that the Iowa Natural Resources Council has the duty and authority to regulate and control projects within areas which have been or may be hereafter covered by flood waters and may enjoin or abate any project found to constitute a nuisance under the provisions of §455A.33.

February 24, 1969

WELFARE: Determination of suitability of the home is a county board decision on eligibility for ADC assistance under §239.2(1) and §239.5, 1966 Code of Iowa; and does not conflict with Title 42, U. S. C., §604(b) in view of Chapters 235, 235A and 232, 1966 Code of Iowa as amended by Chapters 203, 204 and 205, Acts of the 62nd General Assembly. (L. L. Williams, to Knoke, Pottawattamie County Attorney, 2/24/69) #69-2-10

George J. Knoke, Esquire, Pottawattamie County Attorney: You have requested an attorney general's opinion as to the interpretation of §239.2 (1) of the 1966 Code of Iowa reading in part:

"*Eligibility for aid to dependent children.* Assistance shall be granted under this chapter to any needy dependent child who:

"1. Is living in a suitable family home . . ."

In your letter, you state that "it is the contention of this office and the Pottawattamie County Board of Social Welfare that a 'suitable home' is a condition of eligibility and that such determination is within the province of the county board."

You further state, ". . . The board was informed that the State Department of Social Welfare deems a home suitable until such time as the courts determine otherwise" and the State Board reversed the County Board which refused ADC to a child residing in a home which the County Board determined was not suitable.

The question specifically is, Does the County Welfare Board have a right to consider the suitability of a home as a condition of eligibility for ADC?

§239.5, Code of Iowa 1966, reads as follows:

"*Granting of assistance and amount of assistance — co-operation of parent.* Upon the completion of an investigation, the county board shall decide whether the child is eligible for assistance under the provisions of this chapter and determine the amount of such assistance . . ."

A district court decision [Black Hawk County, No. 43596, *Oberbillig, as Next Friend of Patricia Anderson, v. Black Hawk County Department of Social Welfare, et al*] entered by Judge Blair C. Wood on February 13, 1969, concerns this legal problem.

In that case, plaintiff was denied ADC for her illegitimate children when she moved from a suitable home [her parents' home] to establish a home of her own. She was under twenty-one years of age at that time.

In the opinion, that Court quotes from §239.2, Code of Iowa 1966, as follows:

"Assistance shall be granted under this chapter to any needy dependent child who (1) is living in a suitable family home maintained by one or more of the persons referred to. . . ."

The Court, also in that opinion, in referring to Title (Section) 42, U. S. C., §604(b), states:

"This section, as amended, now permits states to disqualify from ADC aid to children who live in unsuitable homes 'if provision is otherwise

made pursuant to a state statute for adequate care and assistance with respect to such child' the Federal Department of Health, Education and Welfare has ruled that such 'adequate care and assistance' may be provided under a general welfare program."

Children are otherwise protected under provisions of the Iowa law in Chapters 235, 235A and 232, 1966 Code of Iowa, as amended by the 62nd G. A. in Chapter 204 entitled "Foster Home for Children," Chapter 203 entitled "Dependent, Neglected and Delinquent Children" and Chapter 205 entitled "Juvenile Delinquency."

In view of said §239.5 and the other aforecited Iowa statutes, as amended, the county board of social welfare is charged with making the decision as to eligibility for ADC assistance. By words of the statute, this includes a decision as to suitability of the home in which the child resides. If there is an abuse of discretion in the making of that decision, however, it is subject to reversal by a Court in an appropriate action.

February 26, 1969

STATE DEPARTMENTS — **Banking Department** — Chapter 8, Code of Iowa, 1966. The provisions of this chapter apply to the banking department. (Turner to Chrystal, Sup't. of Banking, 2/26/69) #69-2-11

The Hon. John Chrystal, Superintendent of Banking: By your letter of this date my opinion is requested on the following:

"In connection with legislative consideration of Senate File 18 relating to the banking laws of Iowa, a question has arisen as to Chapter 8 of the Code of 1966. An amendment has been filed and adopted in the House of Representatives which, in part, provides that 'Nothing in this Act shall be construed to exclude the department of banking from the provisions of chapter eight (8) of the Code.'

"The contention is made that the department of banking has been subject to the provisions of chapter eight (8) of the Code under previous law and would continue to be so subject under the provisions of Senate File 18 as passed by the Senate, so that the portion of the amendment quoted above is surplusage. If this is so, I believe that this fact should be reported to the legislature and I request your opinion in this matter. I might point out that this specific reference in a statute might raise doubt as to the application of chapter eight (8) in those instances where such a specific reference is not made."

Under §8.3 of the 1966 Code of Iowa the Governor of the state shall have:

"1. Direct and effective financial supervision over all departments and establishments, and every state agency by whatever name now or hereafter called, including the same power and supervision over such private corporations, persons and organizations that may receive, pursuant to statute, any funds, either appropriated by, or collected for, the state, or any of its departments, boards, commissions, institutions, divisions and agencies.

"2. The efficient and economical administration of all departments and establishments of the government.

"3. The initiation and preparation of a balanced budget of any and all revenues and expenditures for each regular session of the legislature."

It is my opinion that the banking department is a department within the meaning of §8.3, supra, and as defined under §8.2 in that the legisla-

ture has established a banking department of Iowa (§524.10) and authorized the banking department to receive and expend state funds. State funds as defined by §8.2, 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 authority for collecting fees for examination of banks is contained presently in §524.15, Code of 1966. Authority for expending such moneys is currently contained in the standing appropriation provided under §524.16.

In the case of *Ryan vs. Wilson*, 1941, 231 Iowa 33, 300 N. W. 707, the Iowa Supreme Court quoting the provisions of §84.03 of the 1939 Code, which is identical to the provisions of present §8.3, held that the department of banking was subject to the provisions of such statute, stating:

"As chief executive officer of the State, the defendant, under the Constitution of the State, and by statute, had the duty of directly and effectively supervising the finances of all offices, departments, agencies, boards, commissions, institutions, and divisions of the State, and the responsibility for their economic and efficient administration. He was authorized to make inquiries regarding the receipts, custody and application of state funds, existing organization, activities and methods of business of the departments and establishments.

* * *

"Most certainly, the defendant was empowered and authorized to request the Auditor of State to direct examiners from his office to investigate the administration of bank receiverships in the Department of Banking. He might have called upon the Superintendent of the Banking Department for written information in the matter, but it was apparently his wish to have the examination made by accountants outside of the department . . ."

Under §§8.7 and 8.23 the various departments of the state government are required to furnish the state comptroller with information in reference to money or property received, managed or disbursed by such department and, also, of an estimate of the expenditure requirements for each fiscal year of the ensuing biennium. In an opinion of the Attorney General dated January 25, 1935 the question of whether the state comptroller should require an itemized statement of expenditures and receipts and make his recommendations for all state departments operating on special funds other than the general revenue of the state and specifically including the banking department was answered as follows:

"Under the provisions of Sub-section 1 of Section 7 of Chapter 4, you do have the power and authority to call upon any department for information concerning the receipts and expenditures and financial condition with respect to such department. From time to time, this may be necessary in order for you to carry out the duties imposed upon you under Chapter 4."

It appears that the banking department has not been required until this year to present information for the Governor's budget hearing. This of itself does not mean that the department had not been until that time subject to the provisions of Chapter 8 of the Code of Iowa. In my opinion it has been, is, and will be.

While it should be noted that §216 of Senate File 18 makes reference to the annual report of the superintendent which is required by Chapter 17 of the Code, this proposed section adds additional matters to those required to be reported under the cited section. The inclusion of this reference to Chapter 17 does not, in my opinion, in any way exclude or diminish the requirements of Chapter 8 as they apply to the banking department at the present time or under the proposed recodification.

February 26, 1969

CONSTITUTIONAL LAW: Time for governor to sign bills. Article III, §16, Constitution of Iowa, 1966. The governor has three days within which to return a bill. (Turner to Vermeer, Ass't. to the Governor, 2/26/69) #69-2-14

Mr. Elmer Vermeer, Assistant to the Governor: In answer to your oral request, today, it is my opinion that the word "adjournment" as used in Article III, §16, Constitution of the State of Iowa, with reference to when the governor must return a bill, means adjournment sine ide. In other words, the governor has three days within which to return the bill, Sunday excepted. This does not mean Saturday or any other day on which the legislature may be in recess. Expressio unius est exclusio alterius.

There are several cases to the same effect in 2 Words and Phrases 622 to 623.

See also, O.A.G. March 11, 1957, a copy of which is herewith enclosed.

February 27, 1969

ELECTIONS: Contest of House Seat — Chapter 59, Code of Iowa, 1966. Contestant is required to serve incumbent with timely notice stating grounds of contest but not required to submit copy to secretary of state or other officer unless depositions concerning illegal votes are to be taken. (Nolan to Kluever, State Representative, 2/27/69) #69-2-12

The Hon. Lester L. Kluever, State Representative from Cass County:

In your letter of February 19, 1969 concerning the election contest brought by Richard Grove against Vincent D. Mayberry, you requested an attorney general's opinion on the following:

"The Contestant served his Notice of Intent to Contest an Election on the Incumbent on December 5, 1968. No depositions were taken. The County Auditor was not served. A list of illegal votes were not submitted. The Contestant states as his grounds Section 57.1(6), (7) and 57.5.

"The Contestant mailed his Notice of Intent to Contest An Election to the Secretary of State which was received by the Secretary of State on December 6, 1968, but said Notice of Intent was not enclosed in a separate sealed envelope and thus had no endorsement thereon showing the nature of the papers, the names of the contesting parties, and the branch of the General Assembly before whom the contest was to be tried as provided by Section 59.4. The Secretary of State could not deliver the same unopened to the presiding officer of the House as provided by section 59.5 and delivered the said Notice which he received to the Speaker of the House.

"I request an Attorney General's opinion on the following:

"1. Under Sections 59.4 and 59.5 does the House have jurisdiction to decide this matter since the Contestant did not comply with Section 59.4 and it was impossible for the Secretary of State to comply with Section 59.5?

"2. Do Sections 59.1 and 62.5 require the Contestant to furnish a list of alleged illegal votes when no depositions relative to illegal votes were taken and no illegal votes are alleged in the statement or Notice of Intent to Contest An Election?

"3. Do Sections 59.1 and 62.5 require the Contestant to give notice to the County Auditor by filing in the office of the County Auditor a written statement of his intention to contest the election or does this requirement under Section 62.5 only apply to contests other than to the General Assembly?"

It is my opinion that your first question makes an assumption not necessarily supported by the facts (i.e., that contestant did not comply with the statutes). Section 59.4, 1966 Code of Iowa, provides:

"A copy of the statement, and of the notice for taking depositions, with the service indorsed, and verified by affidavit if not served by an officer, shall be returned to the officer taking the depositions, and then, with the depositions, shall be sealed up and transmitted to the secretary of state, with an indorsement thereon showing the nature of the papers, the names of the contesting parties, and the branch of the general assembly before whom the contest is to be tried."

As a general rule an election contest is a statutory proceeding of a special and summary nature. It has been held in other jurisdictions that a strict observance of the statute is required, so far as regards the steps necessary to give jurisdiction. 18 Am. Jur., Elections, §275. Jurisdiction to hear and determine election contests is dependant upon, and regulated by, statutory provision. 18 Am. Jur., Elections, §284.

Article III, §7 of the Constitution of the State of Iowa provides:

"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."

I find nothing in Chapter 59 of the Code of Iowa to preclude the House of Representatives from taking jurisdiction of the contest referred to above. While this office has previously advised that a failure to file timely notice under §59.1 or to inform the incumbent of the grounds of the contest would be fatal to the jurisdiction of the House to entertain a hearing on the contest, it is our view that a mere technical variance with the provisions of §59.4 by failure to deliver or serve such in a sealed envelope marked in such manner as to identify the contents would not deprive the House of such jurisdiction. Irregularities in the manner of service are deemed to have been waived if the contestee obeys the notice and makes a general appearance. 18 Am. Jur., Elections, §292. In the instant case the rights of voters were not prejudiced by fact that notice was mailed to the Secretary of State in a single sealed envelope which he opened routinely.

It is my view that the use of the word "shall" in §§59.4 and 59.5 of the Code of Iowa appears to be directory but does not affect the jurisdiction of the House here, inasmuch as in the one case it is directed to the officer taking the depositions and in the second case to the secretary of state rather than to the contestant. Consequently, it would be my view

that substantial compliance by the contestant with the provisions of §59.4 would be sufficient to vest the House of Representatives with jurisdiction of the contest.

The answer to your second question is no. Grounds for the contest of the election of any person to either branch of the General Assembly are set out under §57.1 of the Code of Iowa. It is sufficient if any of the grounds set out therein are alleged, and there are numerous grounds in addition to illegal votes.

It is my opinion that §§59.1 and 62.5 of the Code of Iowa do not require that a contestant for the seat in either branch of the General Assembly file notice of contest with the county auditor. Section 59.1 provides that:

"The contestant for a seat in either branch of the general assembly shall, within thirty days after the incumbent is declared elected, *serve on the incumbent a statement as required in relation to county officers*, . . ." (Emphasis added)

Section 62.5, while providing for the place for filing of such statement by contestants of county officers, provides that the statement shall contain:

". . . the name of the contestant, and that he or she is qualified to hold such office, the name of the incumbent, the office contested, the time of the election, and the particular causes of contest . . ."

Section 62.9 provides that the chairman of the board of supervisors shall cause a copy of notice of trial "with a copy of the contestant's statement" to be served on the incumbent. In such case the county auditor acts as clerk of the trial court unless a party to the contest. (§§62.3, 62.9) The foregoing sections are not applicable to contests for seats in the general assembly where the notice is served directly on the incumbent by the contestant.

As stated in *Haas vs. Contest Court*, (1936), 221 Iowa 150, 265 N. W. 373:

". . . The real purpose of the filing of this statement is to make a record of 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.

"The sufficiency of the statement thus filed is not a jurisdictional question."

The provisions of Chapter 59 do not require that the contestant file a copy of such statement with the secretary of state. The provisions of §59.1 direct the contestant to "serve on the incumbent a statement as required in relation to county officers." It will be noted that in §59.4 the copy of the statement "shall be returned to the officer taking the depositions and then, with the depositions, shall be sealed up and transmitted to the secretary of state, with an indorsement thereon. . . ." If no depositions are taken, then no officer is responsible for transmitting the materials to the secretary of state for safe keeping until the second day of next session of the general assembly. Therefore, if the incumbent was properly served with timely notice of the grounds of the contest, the House would have jurisdiction of the question.

February 27, 1969

TAXATION: Sales Tax Refund: Division VI, Ch. 348, Acts of the 62nd General Assembly (1967). The 63rd General Assembly can constitutionally pass a law which would retroactively amend or repeal that portion of Division VI, Chapter 348, Acts of the 62nd General Assembly (1967) allowing sales tax refunds for the year 1968. (Turner to Joseph C. Johnston, State Representative, 2/27/69) #69-2-13

Hon. Joseph C. Johnston, Johnson County State Representative: This is to acknowledge receipt of your letter of February 22, 1969, in which you submitted the following:

"I am respectfully requesting an Attorney General's opinion regarding the legality of repealing that portion of the law that would allow sales tax credit refunds for the tax year 1968. I would specifically request your opinion as to whether the 63rd General Assembly can pass a law affecting the taxation of income in a year prior to the convening of said assembly. The 62nd General Assembly made a decision which presumably would affect all income for tax years 1967 and 1968. The 63rd General Assembly did not convene until January of 1969 and would presumably be able to pass laws affecting only the years 1969 and 1970.

"I would stress that my question does not involve a claim of Ex Post Facto but rather the precedent to change the rate structure and ultimately the amount of tax collected for a year prior to the convening of this General Assembly. It is clear that no General Assembly can bind a subsequent General Assembly but it is a separate question as to whether a subsequent General Assembly can affect the results of legislation as it affected the years in which the prior General Assembly was in power. To illustrate, if we can change the rate structure on income earned in 1968 can we not also change the rate structure on income earned in 1965 or for that matter in 1945?"

An Attorney General's Opinion to Mr. Wayne A. Faupel, dated November 2, 1967, states in part:

"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."

The Iowa Supreme Court has recognized the general rule that revenue laws may be retroactive, although there is a point of time when such retroactivity is beyond the legislative power. *City National Bank of Clinton vs. Iowa State Tax Commission*, 251 Iowa 603, 102 N. W. 2d 381 (1960).

In the *City National Bank of Clinton* case, the Court said at 102 N. W. 2d 384:

"Recent transactions taxable retroactively to be valid, would seem to be extended no further than two years, or up to the adjournment of the last previous legislative session . . ."

See also *Welch vs. Henry*, 305 U. S. 134, 59 S. Ct. 121, 83 L. Ed. 87 (1938).

In view of the above, it is my opinion that the 63rd General Assembly can constitutionally pass a law which would retroactively amend or repeal that portion of Division VI, Chapter 348, Acts of the 62nd General Assembly (1967) allowing sales tax refunds for the year 1968.

February 28, 1969

STATE DEPARTMENTS — State Board of Public Instruction — §257.1 (as amended by §23, Ch. 244, 62nd G. A.), §§257.3, 257.4, 69.1, 69.2(1), and 2.40, Code of Iowa, 1966. Appointments to fixed term are not vacancy appointments and do not expire at end of thirty days after General Assembly convenes. The quorum of nine member board is five. The vote of a majority, a quorum being present, will carry a measure in absence of contrary provision. Turner to Menke, Pres., State Board of Public Instr., 2/28/69) #69-2-15.

Mr. Lester D. Menke, President, State Board of Public Instruction: By your letter of February 21, 1969, you have requested an opinion from the Attorney General as follows:

"Your official opinion is requested on the following fact situation: On or about December of 1967, Governor Hughes appointed Thomas Roe, Nolden Gentry, and Richard Delaney to six year terms on the state board of Public Instruction to replace members whose terms expired on January 2, 1968. Said appointees qualified by taking the oath of office and have served on the board during 1968. After the convening of the 63rd General Assembly in January 1969, Governor Ray certified to the Senate the names of Nolden Gentry, Richard Delaney and Mrs. Richard Cole for confirmation of appointment for the unexpired remainder of the same six year terms.

"Your opinion is requested as to the status of the said appointees of former Governor Hughes pending confirmation action by the Senate on the certification by Governor Ray. Your further opinion is requested as to whether Mr. Roe may continue to serve under his appointment pending Senate confirmation of the appointment of Mrs. Cole.

"Your further opinion is requested as to the status of actions taken by the board in the absence of participation in the voting by the members whose status is in question and who were present and refrained from voting based on a ruling by the President of the board on the telephone advice of the Attorney General. Is a 4-2 vote sufficient to adopt a motion or resolution or is a majority of the entire statutory membership of nine required."

The state board of public instruction, consisting of nine members, was created by the 55th General Assembly in 1953. Chapter 114, §1, 55th G. A. The terms are for six years beginning on the second secular day in January following their appointment. Section 257.3, Code of Iowa, 1966. But originally eight of the nine members were *elected* from districts conterminous with the eight Congressional Districts then existing and one member of the board appointed by the Governor from the electors of the state at large, subject to confirmation by two thirds of the Senate. Temporary provision was made for staggering the original terms so that three served for two years, three for four years and two for six years. Chapter 114, §3, Acts of the 55th G. A.

In 1965, the 61st General Assembly provided for nominating two persons from each Congressional District to fill vacancies as they occur on the state board and then that the Governor shall appoint one of the two nominated. Chapter 226, §§7, 8 and 9, 61st G. A.

In 1967, the 62nd General Assembly amended the law to provide that the nine members be appointed directly by the Governor with the approval of two thirds of the members of the Senate. See §257.1, Code of Iowa, 1966, as amended by §23, Ch. 244, 62nd G. A.

Thus there has developed the perhaps unusual situation in which the terms of three members of the board expired in an even numbered year

(on January 1, 1968) when the legislature was not in session.

Anticipating the expiration of those three terms, Governor Hughes appointed Thomas Roe, Nolden Gentry and Richard Delaney to six year terms commencing on January 2, 1968. Section 275.4, Code of Iowa, 1966, as amended by Chapter 244, §26, 62nd G. A., provides as follows:

"The members of the state board shall qualify by taking the regular oath of office as prescribed by law for state officers. All vacancies on said board which may occur when the general assembly is not in session shall be filled by appointment by the governor, which appointment shall expire at the end of thirty (30) days after the general assembly next convenes. Vacancies occuring during a session of the general assembly shall be filled before the end of said session in the same manner in which regular appointments are required to be made."

But Governor Hughes' appointment of Messrs. Roe, Gentry and Delaney, effective January 2, 1968, were not appointments to fill vacancies within the statutory definitions of that term. See §69.2, Code of Iowa, 1966 and O.A.G. 3-16-67, where Commissioner of Public Safety Needles had been appointed to fill a vacancy resulting from the resignation of former Commissioner Sueppel. That opinion pointed out that §69.1 and §69.2(1) prevent a vacancy from occurring in certain fact situations, particularly those involving the transition from one fixed term to another. Mr. Needles was not appointed to a fixed term, but rather to fill a vacancy. An appointment to fill a vacancy commonly expires at the end of thirty days from the time the General Assembly next convenes. See §80.3, Code of Iowa, 1966, which is similar to §26, Chapter 244, 62nd G. A. So, in contrast to Mr. Needles' appointment to fill a vacancy, which expired under the terms of the statute (80.3), these appointments of Messrs. Roe, Gentry and Delaney were appointments to fixed (six year) terms and do not expire at the end of thirty days after the General Assembly next convenes. Section 26 is not applicable.

Section 2.40, Code of Iowa, 1966, provides:

"Confirmation of appointments — rejected nominees not eligible. When the nomination of a public officer is required to be confirmed by the senate, the nomination shall not be considered by the senate until it shall have been referred to a committee of five senators who shall, if possible, represent different political parties. The committee shall be appointed by the president of the senate, without motion, and shall report to the senate. The consideration of the nomination by the senate shall not be had on the same legislative day on which the nomination is so referred, unless it be the last day of the session. When a nomination has been so considered by the senate and approval has been refused, the nominee shall not be eligible for an interim appointment, prior to the convening of the general assembly in the next regular session, to any position requiring confirmation by the senate."

I have ascertained that the Senate has never acted upon Governor Hughes' appointment of Messrs. Roe, Gentry and Delaney and, in my opinion, it may do so at any time prior to adjournment of the present session, there being no particular time limit specified by law or the Constitution in this regard. And, of course, it must be presumed that the Senate will act in accordance with the requirements of the aforementioned law. Until the Senate does so act before adjournment, all three of these appointees are members of the state board of public instruction, entitled to act accordingly, and Mrs. Cole's appointment may not be acted upon.

With respect to actions taken by the board upon vote 4-2 of members present and voting, such vote would be sufficient to carry a measure if a quorum was present. The quorum of a body is an absolute majority of it unless the authority by which the body was created fixes it at a different number. 74 C.J.S. 171. In the absence of contrary provision, the quorum of a nine member board is five. The rule is well established that a majority of a quorum is all that is required for the adoption or passage of any resolution or order properly arising for the action of a collective body exercising legislative, judicial or administrative functions. *Thurston vs. Huston*, 1904, 123 Iowa 157, 160. Thus, it appears that the motions voted 4-2 carried.

Apparently, however, the three board members refrained from voting because of oral advice I gave at the time of the last meeting (which I can't now recall giving). If this is true and they voted with the two opposed to the issues, the result would have been different, 5 to 4. Therefore, perhaps, you should entertain any motion to reconsider which your rules permit.

March 4, 1969

CITIES AND TOWNS — Civil service employees — §365.29, Code of Iowa, 1966, as amended by §1-3, Ch. 314, Acts, 62nd General Assembly. Iowa civil service act prohibits civil service employees from taking active part in political campaign activity by participating in parades, advertising with lawn signs, and contributing to political funds. (Nolan to Shaw, State Representative, 3/4/69) #69-3-1

The Hon. Elizabeth Shaw, State Representative: You have forwarded to this office for an opinion certain questions concerning the interpretation of §365.29 of the 1966 Code of Iowa as amended by §§1-3 of Chapter 314, Laws of the 62nd General Assembly.

The statute as amended provides:

"No officer or employee under civil service shall, directly or indirectly, contribute any money or anything of value, to any candidate for nomination or election to any office, or to any campaign or political committee, or take any active part in any political campaign except to cast his vote and to express his personal opinion, nor shall any such candidate or committee solicit such contribution or active political support from any such officer or employee. Any person violating any provisions of this section shall pay a fine of not less than twenty-five dollars or more than one hundred dollars, or be imprisoned in the county jail not to exceed thirty days.

"Nothing in this section shall prohibit any employee or group of employees, individually or collectively, from expressing honest opinions and convictions, or making statements and comments concerning their wages or other conditions of their employment.

"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."

The United States Supreme Court has held that acting as chairman of a committee and ex officio member of a dinner committee for the purpose of raising funds for a political party constituted taking "an active

part" in violation of the Hatch Act, which was intended to prevent improper political activities by officers and employees covered by United States Civil Service. *State of Oklahoma vs. U. S. Civil Service Commission,* 67 Sup. Ct. 544, 553, 330 U. S. 127, 91 L. Ed. 794.

The language in the Iowa act also prohibits taking an "active part" in any political campaign. With this as a reference point, we proceed to answer the specific questions as submitted:

"1. Are decals on trucks or cars owned by firemen, policemen, etc. legal?

"2. Can signs posted on their private property advertising election of political candidates be considered legal?

"3. Is it legal to participate in conventions, parades or political gatherings for the purpose to hear speakers on political natures?

"4. Is it legal to supply money to political funds for election of candidates?

"5. Can firemen, policemen, etc. civil service employees under state law openly discuss political candidates?

"6. Can firemen, policemen, etc. hold poltitical offices?"

I.

Section 365.29 prohibits a civil service employee from driving his car in a political parade, but probably does not prohibit the owner of such car from decorating it in any manner he desires or restrict the use of such car except in organized political campaign activity.

II.

If a person subject to the restrictions contained in §365.29 were to place on his private property a sign advertising the election of a political candidate, in my opinion the action would be taking an active part in such political campaign, and would, therefore, be prohibited by the section cited.

III.

If the purpose of participating in a political convention or gathering is merely to hear the speaker in an effort to form opinion on the candidates and if no other active part were taken "except to cast his vote and to express his personal opinion," such activity would not be prohibited by §365.29.

IV.

Any officer or employee under civil service is specifically prohibited by §365.29 from supplying money to political funds for the election of candidates.

V.

In the 1967 amendment to §365.29 the legislature changed the following language:

"and to express his personal opinion privately"

to read:

"and to express his personal opinion."

By striking the word "privately," while there had been no constitutional test of the language prior to this amendment, the change clearly is compatible with the line of cases which uphold the right of every citizen to engage in political expression and association under the guarantees of the first amendment to the United States Constitution. See *Fort vs. Civil Service Commission of County of Alameda*, 1964, 38 Cal. Rptr. 625, 392 Pacific 2d 385. In *United Public Workers of America (CIO) vs. Mitchell*, 1947, 330 U. S. 75, 67 Sup. Ct. 556, 91 L. Ed. 754, the United States Supreme Court upheld the Hatch Act as not restricting public expressions on public affairs and personalities so long as the activity did not involve an "objective of party action" and was not directed toward "party success." It is my opinion that the principle applied there is applicable to the question presented.

VI.

In accordance with §365.29, no individual, while still a civil service employee, shall hold political office. Pursuant to the Act as amended in 1967, any employee who shall become a candidate for any partisan elective office shall receive a leave of absence without pay and shall perform no duties connected with the office or position so held.

March 5, 1969

COUNTIES: Road Employees — Ch. 309, Code of Iowa, 1966. Board of Supervisors has power to hire and fire county road employees. (Nolan to Smith, State Auditor, 3/5/69) #69-3-2

The Hon. Lloyd R. Smith, Auditor of State: This is in reply to your letter of January 27, 1969 with which there was enclosed a copy of a letter from the county auditor and county supervisor of Appanoose County seeking an opinion on two questions relating to the hiring or discharging of county employees on road maintenance or construction work.

The specific questions presented are:

"1. Does the Board of Supervisors have the power to hire or discharge any County employee on road maintenance or construction work without the approval of the County Engineer?

"2. Does the County Engineer have the power to hire or discharge any employee under his supervision without the approval of the Board of Supervisors, and if not, does the County Engineer and one of the Board of Supervisors have the power to hire or discharge an employee under the supervision of the County Engineer?"

In 1948, an opinion was issued by this office which stated:

"It is well to note at the beginning of this discussion that the Supreme Court of Iowa in the case of McKinley vs. Clarke County, 228 Iowa 1185, holds that a county engineer is not merely an employee, but is an official and as a public official has certain defined powers and duties in reference to his work and those powers and duties are coordinated with other public officers in the county, namely: the county board of supervisors throughout chapter 309 of the 1946 Code of Iowa.

"We, therefore, start with the premise that the board of supervisors and the county engineer are public officials and that the engineer is hired by the board of supervisors, and in the performance of his duties he shall work under the direction of the board of supervisors. He is a bonded official, as provided in section 309.19.

"The primary duty to construct, repair and maintain the secondary roads of a county is imposed upon the board of supervisors. They should, with the advice of the engineer, determine programs relating to both construction and maintenance work. It is their duty to determine the advisability of certain projects. When the board acting as a board and not as individual members, carries out its duties as prescribed in the statutes, including duties prescribed in section 309.67, and determines a program relating to certain roads, bridges, parts of roads and approaches to bridges, it is their duty to turn such program over to the county engineer. The joint duty is several insofar as each has his part to perform.

"It is the engineer's duty and he has the authority to direct said work and supervise the county employees in the authorized performance of construction and maintenance work. Because of his knowledge and training, the legislature has placed upon him the statutory responsibility as to how the work should be done.

"The law therefore contemplates a joint responsibility in the construction and maintenance of secondary roads. It contemplates that the board of supervisors and the engineer will work together toward good secondary road construction and maintenance. There is no conflict of power, duty or authority. The supervisors have the power and the duty, not only to pass upon the necessity and desirability of the construction and maintenance work on such roads in their county, but also have the authority to direct the county engineer to proceed with the job. The manner and method or procedure is within the responsibility of the engineer, subject to the final inspection of the board and the engineer is responsible to the board to the extent of his efficient, economical and good-faith performance of the work directed to be done by the board of supervisors.

"It is, of course, elementary and we hold that the individual members of the board should not act as foremen of maintenance work even in their assigned territory or districts as individual members have no power or authority as individual members, but have only the duty to report to the board as a whole as to the conditions in their districts requiring board action. When the board members approve their recommendations, the work is to be supervised by the engineer.

"From the discussion above set uot, it is apparent and we hold that the board should establish the policy as to construction and maintenance, as well as the feasibility of certain projects, allocation of funds for the construction and maintenance of the projects and then direct the engineer to proceed with them and in the immediate supervision and responsibility for the good-faith performance of the work shall be left to the county engineer." 1948 OAG 150.

In our opinion dated January 10, 1968, it was stated that the county board of supervisors having jurisdiction of the secondary roads and employees of the county who work on such roads has the exclusive power of determining what sick leave benefits of such employees under its jurisdiction shall be. The board would also have the sole determination as to vacation time, working hours, etc. 1964 OAG 6.39. However, this would be a matter of general regulation for all employees of a class and should not impinge upon the responsibility of the county engineer with respect to direct supervision of the work done. Now, in answer to the specific questions presented, it is our opinion that:

(1) The Board of Supervisors does have power to hire or discharge

county road maintenance employees without the engineer's approval; however, reason dictates that the supervisory responsibility of the county engineer not be undercut.

(2) There may be instances where b yproper resolution of the Board of Supervisors, the engineer or the engineer together with one member of th board are authorized to hire and fire road employees. The request for opinion does not state facts in this regard; in absence of such clear cut authority the responsibility for hiring and firing remains with the board.

March 6, 1969

CONSERVATION COMMISSION: **Moving Expenses** — §107.24(7), Chs. 25 and 25A, Code of Iowa, 1966. The Commission has no authority to pay moving expenses of newly employed director from his home to seat of government. No funds are available for such purpose and the Appeal Board has no jurisdiction under Ch. 25 of the Code. (Ivie to Selden, State Comptroller, 3/6/69) #69-3-3

Mr. Marvin R. Selden, Jr., Comptroller: This will acknowledge your letter of October 8, 1968 in which you requested the opinion of this office on the following matter:

"Recently, the State Conservation Commission hired Mr. Fred Priewert as Director. The Conservation Commission approved Mr. Priewert, and also approved as part of the terms of employment, the payment of his moving expenses from Pierre, South Dakota to Des Moines, Iowa. This is a matter of record in the minutes of the Commission.

"There is no specific appropriation for the moving or relocating expenses with the appropriation bill as passed by the Sixty-second General Assembly, Chapter 10 of the Acts. There is an item 'For support, maintenance and miscellaneous purposes of the office, maintenance of state parks, waters and forests . . . $195,400.00.'

"We ask of you the following question:

"(1) May the Conservation Commission approve, and this office pay, the costs of moving of the new director of the Commission from the funds noted?

"(2) If the answer to one (1) above is negative, are there any funds from which such expenses can be paid? Could this be a matter to be handled by the Appeal Board?"

I.

An examination of the appropriate statutory provisions relating to the office of conservation director is necessary as a preliminary matter. Chapter 107 of the 1966 Code of Iowa imposes the responsibility of hiring a conservation director on the conservation commission. (See Section 107.11) Section 107.12 of the 1966 Iowa Code states that said director shall receive an annual salary as fixed by the General Assembly. The General Assembly provided in Chapter 10, §2 of the 62nd General Assembly:

"Sec. 2. The salary of the state conservation director shall be fourteen thousand five hundred dollars ($14,500.00) for each year of the biennium beginning July 1, 1967, and ending June 30, 1969."

The 1966 Iowa Code, §79.1, further provides, in part:

"Salaries specifically provided for in an appropriation Act of the general assembly shall . . . be in full compensation of all services, except as otherwise expressly provided."

The meaning of the above-quoted statutory material clearly indicates the legislative intent that the conservation director shall receive only such state money as is appropriated, plus other monies as are "otherwise expressly provided." This conclusion is inescapable. The Court of Appeals of New York dealt with a similar question in *Supervisors of Erie County vs. Jones*, 119 N. Y. 339, 340, 23 N. E. 742, 743 (1890):

"When it declares that the county treasurer shall receive, 'as compensation for his services,' an annual salary, *it very plainly implies that such salary is to be his sole and only reward.* 'For his services' means for all his services, for the entire and complete performance of his official duties, and a specific compensation awarded for those services implies the full and entire compensation to which he is entitled." (Emphasis added)

It is, therefore, clear that the above-mentioned "moving expenses" cannot be paid, unless:

(1) Moving expenses are expressly provided for, or

(2) Moving expenses are not considered compensation.

First, it must be determined whether moving expenses are expressly provided for the state conservation director.

Chapter 107 of the 1966 Iowa Code provides for the payment of certain expenses incurred by the conservation director in §§107.6 and 107.24 (7). Section 107.6 provides in part:

". . . the conservation director . . . shall be reimbursed for all actual and necessary expenses incurred by [him] in the discharge of [his] official duties when absent from [his] usual place of abode . . ."

The clear language of this section does not authorize the payment of moving expenses of a person hired by the state where such person is leaving a non-state job. This section contemplates only such expenses as are incurred by the director when he is absent from his official residence on state business. It is impossible for this section to be interpreted as expressly providing for the director's moving expense.

Section 107.24(7) provides in part:

"Specific powers. The commission is hereby authorized and empowered to:

"* * *

"(7) Pay the salaries, wages, compensation, traveling and other necessary expenses of the . . . state conservation director . . . and to expend money for necessary supplies and equipment, *and to make such other expenditures as may be necessary for the carrying into effect the purposes of this chapter.*" (Emphasis added)

Obviously, moving expenses cannot be considered "salaries" or "wages." For the same reasons as we were given in regard to §107.6, above moving expenses cannot be considered to come under "traveling and other necessary expenses." Moving expense, under this set of facts, is additional compensation, (see further explanation below) not expressly provided for by the general assembly. Therefore, if moving expenses can

be paid by the authority of §107.24(7), the power must come from that part of the section that is underlined above.

As stated above, the commission has the duty of hiring the director, and this is a necessary act for the carrying into effect the purposes of this chapter. However, it can hardly be said that paying the expenses of moving the director to his new job is a necessary expenditure for the carrying into effect the purposes of Chapter 107. The better reasoned view must be that §107.24(7) does not expressly provide for the payment of the director's moving expense.

It, therefore, becomes obvious that the payment of the conservation director's moving expenses is not expressly provided for by statute, and if they are to be paid, they must not be considered compensation.

The Supreme Court of Iowa, in *Gallarno vs. Long*, 214 Iowa 805, 243 N. W. 719 (1932), held that expenses incurred by state officials and employees can be classified as either governmental legislative expenses or personal expenses. The issue in the Gallarno case was whether an expense allowance amounted to additional compensation. It was held that reimbursement for personal expenses amounted to compensation while reimbursement for governmental legislative expenses was not compensation and allowable. In so holding the court states, on page 811 of 214 Iowa and on page 721 of 243 N. W.:

". . . Personal expenses are for the comfort and convenience of the state official or employee . . . and those expenses have nothing to do with the performance of his duty as a state official or employee. Such expenses are those incurred for room, house rent, meals, laundry, clothes, personal communications by telephone, telegraph, or letter, and other things of like character."

Among the expenses claimed and denied by the courts holding, was a claim for "drayage for moving household goods." On pages 812 and 813 of 214 Iowa and 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 court equates the terms "legislative expense" and "governmental expense," and the distinction exists with the term "personal expense." On page 813 of 214 Iowa and on page 722 of 243 N. W. the court quotes with approval the Kansas Supreme Court Case of *State vs. Turner*, 233 Pac. 510, 511-512:

" 'All legislative expenses may be properly paid. The expenses that may be paid are not those that are incurred by a member of the Legislature because he is at the capital city; they are those that are incurred by him in the performance of his duties. They are legislative expenses, not personal expenses. The distinction between expenses that are legislative and those that are personal is that legislative expenses are those that are necessary to enable the legislature to properly perform its function, while those that are personal are those that must be incurred by a member of the legislature in order to be present at the place of meet-

ing — expenses for his personal comfort and convenience, which have nothing to do with the performance of his duty as a member of the legislature. . . .'"

In view of the Gallarno case, there can be no question that the state conservation director's "moving expenses" are "personal expenses" to him. If the conservation director was given his "moving expenses," he would be receiving additional compensation which is impossible under the law without an additional appropriation by the General Assembly. Therefore, moving expenses cannot be paid.

It is, therefore, apparent that the conservation commission lacks the authority to approve, and your office lacks the authority to pay, the costs of moving the new director of the commission from the funds noted in your letter.

II.

Your letter poses the question of whether this matter could be handled by the state appeal board.

In view of the holding in Part 1 of this opinion, Mr. Priewert's only feasible theories for further proceedings against the state must be:

(1) Breach of contract, or

(2) Negligent misrepresentation.

The state appeal board is only authorized to hear claims properly under Chapters 25 and 25A of the 1966 Iowa Code. The question remains whether either of the above two theories of recovery are properly within the purview of Chapters 25 or 25A of the 1966 Iowa Code.

The factual situation for a breach of contract action is readily apparent. The Supreme Court of Iowa in *Megee vs. Barnes*, ... Iowa ....., 160 N. W. 2d 815 (1968), held that the Tort Claims Act, Chapter 25A of the 1966 Iowa Code, has no application to an action for breach of contract.

Part 1 of this opinion held, in part, that the conservation commission lacked the authority to effectively promise to pay the director his moving expenses. It seems reasonable to assume that the commissioners thought they were so authorized. The factual situation for a negligent misrepresentation action is also readily apparent. Section 25A.14 of the 1966 Iowa Code provides in part:

"Exceptions. The provisions of this chapter shall not apply to:

"* * *

"(4) Any claim arising out of . . . misrepresentation . . ."

The Supreme Court of Iowa in *Hubbard vs. State*, ... Iowa ....., 163 N. W. 2d 904, January 14, 1969, held that the Tort Claims Act, Chapter 25A of the 1966 Code of Iowa, has no application to an action for negligent misrepresentation.

If any other legal theories can be envisioned under this set of facts, I will not speculate. However, the following from 81 C.J.S. 1087-88, States §113, has general application:

"State officers have and can exercise only such powers as are conferred on them by law, and a state is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the constitution . . . [T]he doctrine of estoppel, when invoked against the state, has only a limited application, even when an unauthorized contract on its behalf has been performed, and thereby the state has received a benefit, and it has been held that a state cannot by estoppel become bound by the unauthorized contracts of its officers; . . . Neither a state official nor the legislature may waive the question of illegality.

"Since the powers of state officers are fixed by law, all persons dealing with such officers are charged with knowledge of the extent of their authority or power to bind the state, and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred; . . ."

Chapter 25 of the 1966 Iowa Code is totally inapplicable to this type of claim. Section 25.2 of the 1966 Iowa Code lists the type of claims to be heard under Chapter 25. This list is exclusive, and by no means can a claim for moving expenses fit within this list.

March 6, 1969

COUNTIES: **Mandatory Retirement Age** — §97B.41(3), 97B.45, Code of Iowa, 1966. The General Assembly of Iowa has established the mandatory retirement age of I.P.E.R.S. covered employees, as defined in §97B.41(3)(b), 1966 Code, and only the General Assembly may vary such mandatory retirement age. (Ivie to Bauch, Tama County Attorney, 3/6/69) #69-3-4

Mr. Jared O. Bauch, Tama County Attorney: You have posed the following question with regard to mandatory retirement age of county employees:

"I have been asked to determine an answer for the following question: Can the appropriate county officers set up mandatory retirement ages for county employees subject to IPERS retirement benefits in lieu of following the Code provisions for State employees subject to IPERS retirement benefits?"

In presenting the question, you have properly pointed out that county officials are not authorized to organize county personnel departments under a merit system but rather, in cooperation with the Iowa Merit Employment Department, may establish personnel plans based on merit system principles. However, this authority should not be confused with the authority to establish mandatory retirement ages of county employees.

The General Assembly, in establishing I.P.E.R.S. (Chapter 97B, 1966 Code of Iowa), established the mandatory retirement age of all employees covered by I.P.E.R.S. §97B.45, 1966 Code reads as follows:

"A member may retire on the first day of any month coinciding with or following the date he attains the age of sixty-five upon written notification to the commission, setting forth at what time the retirement is to become effective, provided such effective date shall be after his last day of service. A member shall retire from the employment of the employer no later than the first day of the month coinciding with or next following the date he attains the age of seventy, except as otherwise provided in section 97B.46 following."

Section 97B.41 reads in part as follows:

"3. a. 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, as of July 4, 1953.

"b. The term, 'employee,' means any individual who is in employment as defined in this chapter, except

* * *"

It is clear that, with the few exceptions established in §97B.41, the General Assembly has established the retirement age of I.P.E.R.S. covered employees and only the General Assembly may vary those requirements.

The answer to your question is therefore in the negative.

March 6, 1969

ELECTION: Special election for fire district — failure to use pollbooks — §49.83, Code of Iowa, 1966. A special election to establish a fire district is not void by reason of the failure of the judges of election to enter in the special election pollbooks the names of the voters voting in such special election. (Haesemeyer to Van Werden, Dallas County Attorney, 3/6/69) #69-3-5

Mr. James E. Van Werden, Dallas County Attorney: You have requested an opinion of the Attorney General with respect to the following:

"We have the following problem in Dallas County. During the last general election a special election was held in one township and the special election was to determine whether or not part of the township should be organized as a Fire District. It would appear that the entire procedure of establishing a Fire District was in conformity with the Iowa Law except the Judges of the election forgot to enter those voter's names who were voting on the Fire District, in the special election poll book. The special election ballots have been perserved and the organization of a Fire District carried by a great majority.

"Is the special election void for failure to enter those persons names who were voting on the Fire District in the poll book?"

Section 49.83, Code of Iowa, 1966, provides:

"The name of each person when a ballot is delivered to him, shall be entered by each of the clerks of election in the pollbook kept by him, in the place provided therefore."

Thus in failing to enter those persons names who were voting in the special election in the poll books, §49.83, Code of Iowa, 1966, was violated. The question then becomes whether or not such a violation of §49.83 should invalidate the special election.

You pointed out in your letter that the special election concerning the Fire District was held in conjunction with the general election and the entire proceeding was in conformity with Iowa law except the violation mentioned. You also point out that the special election ballots have been preserved and the organization of a Fire District carried by a great majority.

On the facts presented, it is the opinion of this office that the special election is not void for the violation claimed. The principle is recognized that irregularities and omissions of clear statutory requirements by elec-

tion officials do not necessarily invalidate an election. *State vs. Lockwood*, 1917, 181 Iowa 1233, 165 N. W. 330. See also *Younker vs. Susong*, 1916, 173 Iowa 663, 156 N. W. 24. The duty of the election officers to enter names on the poll book was a ministerial duty, and the failure to perform such a duty does not invalidate the election. As the case of *State vs. Lockwood*, supra, points out even though there may have been numerous instances where election officers failed to comply with the statutes, and though this may be mandatory as to them, it may not deprive the voters who are not at fault of their right to vote.

March 6, 1969

STATE OFFICES AND DEPARTMENTS: Printing Board — authority over in-plant printing by state agencies and departments outside Des Moines — §§15.37, 15.39, Code of Iowa, 1966. State boards, departments, commissions and agencies located outside the city of Des Moines may maintain and operate their own printing equipment without authorization from the Printing Board. (Haesemeyer to Moore, Sup't. of Printing, 3/6/69) #69-3-6

Mr. J. C. Moore, Supt. of Printing: In your letter of January 17, 1969, you ask whether the state printing board has any authority over "in-plant" printing by the highway commission on its own machines at Ames. Your question apparently stems from a proposal by the highway commission to print its "Weekly Letting Report" on its own equipment rather than contracting the printing of such report to an outside printer as it has done in the past. Greenwood Printing Company which has previously printed this report has complained to the printing board about this decision of the highway commission because it has purchased new machines at substantial cost in anticipation of continuing to have this contract.

The law clearly contemplates that state boards, departments, commissions and agencies located outside the city of Des Moines may maintain and operate their own printing equipment. Thus, §§15.37, as amended by Chap. 90, Acts of the 62nd G. A., and 15.39, Code of Iowa, 1966, 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." (Emphasis added)

"15.39 Cost systems maintained by departments. Each official, board, department, commission or agency located outside the city of Des Moines, who maintains printing equipment, or does any printing for the state or its departments shall likewise keep an accurate cost system and make report each June 30 to the printing board of such amounts, and these shall be included in the biennial report of the state printing board."

Of course, as you point out in your letter, there is ample authority for the printing board to supervise the letting of printing contracts by agencies of government outside Des Moines. §15.28, Code of Iowa, 1966.

However, that is not the situation with which we are here faced, and in our opinion if the highway commission wants to print its own "Weekly Letting Report" it may do so without the concurrence or approval of the printing board.

March 7, 1969

STATE OFFICERS AND DEPARTMENTS — Licensing private detectives — §§80A.5, 80A.8, 80A.10, Code of Iowa, 1966. Requirements for a license, identification card to an agent required, and when issued. Duties of police officer not compatible with duties of a private detective or detective agency, and agency license may not issue to police officer or deputy sheriff. (Zeller to Taha, Deputy Comms'r., Dept. of Public Safety, 3/7/69) #69-3-7

Robert D. Taha, Deputy Commissioner, Department of Public Safety: Reference is made to your letter of February 12, 1969 in which you ask our opinion on the following questions:

1. "Recently we have had a number of questions come up regarding persons involved in the private detective business. One of these has to do with the employment by detective agencies of persons who would not, themselves, be able to obtain a detective license. Our first question is: Must an employee of a private detective agency have the same qualifications as the license owner, which requirements are set out in §80A.5 of the Code of Iowa 1966 as amended?"

2. "It has also come to our attention that certain license holders may have been selling identification cards to persons not in the employ of a license holder. The issuance of identification cards is covered in §80A.8 of the Code of Iowa 1966 . . . and it appears to be silent as to any restrictions on who such cards may be given to, except by inference. Our second question is: May a private detective agency sell or give the identification cards mentioned in §80A.8 to persons who are not in the employ of such detective agency or who have no legal relationship with such agency; and if such action is not permissible, what charges may be filed against the vendor or vendee?"

In answer to your first question, §80A.5 of the Iowa Code provides:

"Every application for a private detective or detective agency license, as required by this chapter shall be in such form as the commissioner may prescribe and shall contain a showing that the applicant has qualified under the following conditions:

1. That the applicant is at least twenty-one years of age.
2. That the applicant is a citizen of the United States.
3. That the applicant is of good moral character and has not been convicted of a felony."

Section 80A.10 also contains six reasons, on account of any one of which the Commissioner of Public Safety may refuse to issue or may suspend or revoke a license issued by him to a private detective or detective agency. None of the above conditions or reasons for suspension of license are made applicable to an agent or employee of a detective agency. Accordingly, it is my opinion that an employee-agent, unless included under the provisions of §80A.5, is not required to meet the qualifications required of a detective agency.

Your second question inquires as to whether a detective agency may sell or give identification cards to persons who have no legal relationship to the agency. By reading §80A.8, it is clear that identification cards

should only issue to a bona fide agent of a duly licensed holder. Therefore, a person who is not in the employ of such agency should not possess an identification card. If an agency should issue or sell an identification card to a person who is not employed as an agent, whether full-time or otherwise, then there is a violation of the provisions of §80A.8. Under such circumstances the agency's license may be revoked or suspended for cause under the provisions of §80A.10(2). It is not necessary that criminal charges be filed.

Finally, you have asked whether or not the Department of Public Safety may issue a private detective license to a person holding a special police commission or a special deputy sheriff commission.

In answering this question, it is well established that the duties of a special policeman or special deputy sheriff are to maintain law and order, prevent and detect crime, and enforce the law. *Burke vs. State*, 47 S. E. 2d, 116, 76 Ga. App. 612. But a detective agency license would authorize the policeman or deputy sheriff to serve private clients, investigate private disputes, and support his client's case, in or out of court. This investigation, disclosure of confidential facts, and assistance to his client would, in many cases, be a breach of his duties as a policeman or deputy sheriff. The policeman cannot serve two masters; and the information obtained as a policeman should not be disclosed to a private client, or visa versa. Accordingly, it is my opinion that the offices of a private detective agency and of a policeman are incompatible and that a policeman should not be licensed or authorized to engage in the private detective business.

March 7, 1969

STATE OFFICERS AND DEPARTMENTS: Employment Agency Commission — §§95.1, 95.2, 95.5 and 105A.7, Code of Iowa, 1966. The employment agency licensing commission may not require applicants for a license to operate an employment agency to include a non-discrimination clause in their applications or in the contract job applicants are required to sign. However, a licensed employment agency found to be in violation of the prohibitions against discrimination in employment contained in the Iowa Civil Rights Act would have its license revoked. (Haesemeyer to Parkins, Labor Commissioner, 3/7/69) #69-3-8

Mr. Dale Parkins, Labor Commissioner, Bureau of Labor: You have requested an opinion of the attorney general with respect to the following:

"Our department would like an opinion concerning the licensing of private employment agencies within the state. Under Chapter 95 Code of Iowa, (1966) before doing business within the state an employment agency must obtain a license from a commission consisting of the Secretary of State, the Industrial Commissioner, and the Labor Commissioner.

"Our questions are:

"1. Can this licensing commission require, the applicants for licenses, to put a non-discriminatory clause in their application and also in the contract the applicants for jobs are required to sign?

"2. Also if the commission finds that an agency is guilty of discrimination in taking applicants for referral or in referring job applicants to employers is this cause enough to revoke that employment agency license?"

Sections 95.1, 95.2 and 95.5, Code of Iowa, 1966, respectively provide:

"*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, charged or received either directly or indirectly, for procuring, or assisting or promising to procure employment, work, engagement or situation of any kind, or for procuring or providing help or promising to provide help for any person, whether such fee, privilege, or other thing of value is collected from the applicant for employment or the applicant for help, shall before transacting any such business whatsoever procure a license from a commission, consisting of the secretary of state, the industrial commissioner, and the labor commissioner, all of whom shall serve without compensation."

"*Application.* Application for such license shall be made in writing to the commission provided in section 95.1. It shall contain the name of the applicant, and if applicant be a firm, the names of the members, and if it be a corporation, the names of the officers thereof; and the name, number and address of the building and place where the employment agency is to be conducted. It shall be accompanied by the affidavits of at least two reputable citizens of the state in no way connected with applicant, certifying to the good moral character and reliability of the applicant, or, if a firm or corporation, of each of the members or officers thereof, and that the applicant is a citizen of the United States, if a natural person; also a surety company bond in the sum of two thousand dollars to be approved by the labor commissioner and conditioned to pay any damages that may accrue to any person or persons because of any wrongful act, or violation of law, on the part of applicant in the conduct of said business. There shall also be filed with the application a schedule of fees to be charged for services rendered to patrons, which schedule shall not be changed during the term of license without consent being first given by the commission.

"Any person, firm, or corporation applying for a license, as provided in this chapter, to operate an employment agency for furnishing or procuring of employment shall furnish the commission with its contract form, which form shall distinctly provide that no fee or other thing of of value in excess of one dollar shall be collected in advance of the procuring of employment and no license shall be issued unless such contract form contains such provision. Thereafter, any person, firm, or corporation to whom a license has been issued that violates this provision of its contract shall have his license canceled."

"*Revocation of license.* The commission may revoke at any time any such a license issued by it upon good cause shown and when there has been a substantial violation of any of the provisions of law regulatory of such business."

It is to be observed that §95.2 sets forth in some detail the matters which an application for an employment agency license and the contract form of an applicant for such a license must contain. However, nowhere, in such §95.2 is there to be found a requirement for a non-discrimination clause. Similarly chapter 94 of the Code which includes a number of sections regulating the operation of employment agencies, contains no requirements respecting non-discrimination in employment. Nevertheless, the Iowa Civil Rights Act of 1965, chapter 105A, Code of Iowa, 1966, clearly enunciates the state's commitment to a policy aimed at eliminating all discrimination in employment. Thus §105A.7 provides:

"*Unfair employment practices.*

"1. It shall be an unfair or discriminatory practice for any:

"a. Person to refuse to hire, accept, register, classify, or refer for employment to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the race, creed, color, national origin, or religion of such applicant or employee.

"b. Labor organization or the employees, agents, or members thereof to refuse to admit to membership any applicant, to expel any member, or to otherwise discriminate against any applicant for membership or any member in the privileges, rights, or benefits of such membership because of the race, creed, color, national origin, or religion of such applicant or member.

"c. Employer, employment agency, labor organization, or the employees, agents, or members thereof to directly or indirectly advertise or in any other manner indicate or publicize that individuals of any particular race, creed, color, national origin, or religion are unwelcome, objectionable, not acceptable, or not solicited for employment or membership.

"2. This section shall not apply to:

"a. Any employer who regularly employs less than four individuals. For purposes of this subsection, individuals who are members of the employer's family shall not be counted as employees.

"b. The employment of individuals for work within the home of the employer if the employer or members of his family reside therein during such employment.

"c. The employment of individuals to render personal service to the person of the employer or members of his family.

"d. Any bona fide religious institution with respect to any qualifications for employment based on religion when such qualifications are related to a bona fide religious purpose."

Were a licensed employment agency found to be in violation of §105A.7, it would certainly appear that its license could be revoked under §95.5. And if the employment agency commission had been given by statute any authority to make rules and regulations or prescribe the license applications or contract forms, we could conclude that the commission had the power to give effect to the public policy of the state against discrimination in employment by including provisions of the type you describe. However, the statute confers no rule making authority on the commission. Moreover, §95.2 is quite explicit in detailing those matters which must be contained in the license application and contract form. Hence, we must conclude that the commission may not require that non-discrimination clauses be added thereto. Expressio unius est exclusio alterius.

Perhaps this is a matter which the legislature would care to correct by appropriate amendment to chapter 95.

March 7, 1969

SCHOOLS: Special education — §§281.4, 281.9. A district which tuitions its special education pupil to a school district outside the county in preference to taking part in the county plan would not be eligible for a share of the money allocated to the county program. (Nolan to Jones, Taylor County Attorney, 3/7/69) #69-3-9

Mr. Richard R. Jones, Taylor County Attorney: This responds to your

letter requesting an opinion as to whether or not the New Market Community School District is entitled to a proportionate share of the special education money subsidy being furnished by Taylor County when they obtain their special education program from the Clarinda school.

Your letter states that you find nothing in §281.4 which would deny the New Market school such share of the Taylor County special education subsidy and that this school district is being taxed for this purpose. Further, your letter states:

"This controversy arises out of the interpretation placed upon Section 281.4 of the 1966 Code of Iowa. A portion of this code section provides as follows:

" 'In the event that there are not enough children of any special type in any school district to warrant the establishment of a special class, such children may be instructed in any nearby school district in which special classes have been established, by mutual agreement of the board of directors of the school district affected, and by payment of regular tuition, or the county board of education may establish such special classes in co-operation with local boards.'

"The New Market Community School District will not receive any funds from the Taylor County subsidy because they are not setting up their own program nor are they operating in conjunction with any other school in Taylor County."

It appears that the §281.4 cited in your letter was the subject of a letter from the Planning and Development Consultant of the Department of Public Instruction to the Superintendent of the Taylor County schools on July 8, 1968. The writer of that letter stated therein that he was unable "to discover any statutory authority for the county board to pay a subsidy to a local district, which already enjoys access to such classes through federal financing . . . for *not establishing* such classes." We agree with this position and cite as authority therefor §281.9, 1966 Code of Iowa, which provides:

"Reimbursement to districts or county boards. Any school district or county board of education which has maintained an approved program of special education for children requiring special education during any school year shall be entitled to and receive reimbursement from the state for the excess cost of instruction of the children in said program of special education above the cost of instruction of pupils in the regular curriculum of the district or, in the event the program of special education is established by the county board of education, the average cost of the instruction of pupils in the participating districts, which shall be determined in the following manner. The cost of instruction of all pupils exclusive of those in special education shall be determined on a per pupil basis and the total cost of instruction of all pupils in special education shall be determined on a per pupil basis. The excess of cost per pupil in special education shall be the difference between the cost per pupil of all children exclusive of those in special education, and the cost per pupil in special education; the excess per pupil cost in special education multiplied by the yearly average unit of pupils in special education in the district or county program shall be the amount to which the district or county board shall be entitled and receive by way of reimbursement from the state. The cost per pupil, both as to pupils in special education and in the regular curriculum, shall be based on the following elements: General administration costs, instructional costs, health service, attendance officers, plant operation, plant maintenance, including equipment, transportation and insurance."

It is our view that a district which tuitions its special education pupils

to another school district outside the county in preference to taking part in the county plan would not be eligible for any share of the money allocated to the county program. It is, therefore, our opinion that the New Market Community School District is not entitled to a proportionate share of special education money subsidy being furnished by Taylor County. The question of whether they might be entitled to direct reimbursement under §281.9 has not been presented and we do not advise thereon.

March 8, 1969

COUNTIES AND COUNTY OFFICERS: **Compatibility of office, simultaneous membership on city and county boards of health** — §137.3, 137.5, Code of Iowa, 1966, as amended by Ch. 163, Acts, 62nd G. A.; §420.168, Code of Iowa, 1966. There is no incompatibility in the same person, being at the same time, a member of both a city and county board of health. (Haesemeyer to Wehr, Scott County Attorney, 3/8/69) #69-3-10

Mr. Edward N. Wehr, Scott County Attorney: Reference is made to your letter of January 14, 1969, in which you state:

"I have received a request for an Opinion as to the legality of a member of the Board of Health of the City of Davenport, Iowa serving concurrently as a member of the Scott County Board of Health.

"As you are aware, there have been substantial revisions in the law concerning Boards of Health, but Davenport is a city of sufficient population to allow the maintenance of its own Board of Health.

"Since the question of the compatability of these two offices will have state-wide ramifications, I feel it proper for the Attorney General to issue an Opinion in this regard.

"I might say that there are no current conflicts whatsoever and none are anticipated, and the purpose of having a member of the City of Davenport Board of Health on the Scott County Board of Health is to establish a liaison between the two groups. It may be however that there is a conflict between the two offices, hence this request for Opinion."

In 1967 the 62nd General Assembly enacted Senate File 342, now Chapter 163, Acts of the 62nd G. A., which is an act relating to the organization, jurisdiction, powers and duties of county, city and district boards of health. Among other things this Act repeals Chapter 137 and 138 of the 1966 Code and substitutes in lieu thereof a new Chapter 137. Prior to the enactment of this measure, there would have been no doubt but that a member of a county board of health could at the same time be a member of a city board of health. Thus, §138.2, prior to its repeal by Chapter 163, provided in part:

"This board of health shall consist of not more than eleven members, three of which shall be members of the local county medical society, and the others who may include representatives of local boards of health of incorporated cities or towns situated within the county shall be appointed by the county board of supervisors."

Chapter 137, Code of Iowa, 1966, as amended by Chapter 163, Acts of the 62nd G. A., does not contain similar language specifically permitting a city health board member to serve on a county board of health. Neither does it prohibit it. Section 137.3, Code of Iowa, 1966, as amended by Chapter 163, Acts of the 62nd G. A., merely states:

"The county board of health in each county shall consist of five (5) members, at least one (1) of whom shall be licensed in Iowa as a doctor of medicine and surgery or as an osteopathic physician or surgeon, as defined by law."

The jurisdiction of county and city boards and the manner of appointment of a city board are specified in §137.5, which provides:

"The county board shall have jurisdiction over public health matters within the county, except as set forth . . . herein . . . The board of health of any city having a population of twenty-five thousand or more, according to the latest federal census, shall continue for one year from August 15, 1967, unless the city council either terminate the board sooner or elect to appoint a city board of health. The city board shall have jurisdiction within the municipal limits of said city. The council may appoint a city board in the manner specified in sections 137.3 and 137.4 or may appoint itself to act as the city board of health."

Since the jurisdictions of the two boards of health are geographical in nature and do not overlap, we cannot see how there would be any incompatibility.

Of course, Davenport being a special charter city would presumably continue to be governed by the board of health provisions of Chapter 420, i.e. §420.168 through §420.189, since such Chapter 420 is a special statute whereas Chapter 137 as amended by Chapter 163, Acts of the 62nd G. A., is a general statute. However, the qualifications for appointment to a special charter city board of health and the makeup of such board of health as set forth in §420.168 do not preclude the appointment of a member of a county board of health to such city board. In any event, for purposes of your question, it does not matter whether Davenport is proceeding under Chapter 137 or Chapter 420, and it is our opinion that a city board of health member may at the same time serve on a county board of health.

March 10, 1969

TAXATION: Real Property Tax Exemptions: Sec. 427.1(2), Code of Iowa (1966). The leasing or farming of a portion of an area community school's land is only incidental to its public use, and thus does not effect the tax-exempt status of that property. (Beebe to Huibregtse, Sioux County Attorney, 3/11/69) #69-3-11

Mr. Robert R. Huibregtse, Sioux County Attorney: This will respond to your request of February 17, 1969, in which the following facts and questions were set forth:

"The Sioux County Assessor has requested assistance in determining the real estate tax status of approximately 100 acres of a 140 acre tract of land owned by our four-county Area IX Vocational School at Sheldon, Iowa. There is no question of the 40 acres occupied by the building, parking lot and athletic area. The remaining 100 acres, however, will be farmed either on a lease basis or by the 'farm operations department' of the school.

"Question 1: If the 100 acres is leased will it continue to qualify as tax exempt property?

"Question 2: If the 100 acres is farmed by students with machinery owned by the School, will it be taxable?

"Question 3: If the 100 acres is farmed by the employment custom

work and the only educational application is the 'classroom' study, will it be taxable?"

Section 427.1(2), Code of Iowa (1966), states as follows:

"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."

An earlier Opinion of this office, 1966 O.A.G. 414, is controlling herein. A copy of that Opinion is enclosed herewith. It was there stated that renting of part of a municipal airport for farming is only incidental to the public use, and thus does not effect the tax-exempt status of that property. It is equally true that the primary and principal use to which the Area IX Vocational School land is put is a public one and any income derived from leasing or farming a portion thereof would be incidental thereto.

Thus, in answer to each of your questions, the 100 acres will be tax exempt.

March 10, 1969

STATE OFFICERS AND DEPARTMENTS: Salary of director of civil defense — §§29C.4(1) and 79.1, Code of Iowa, 1966; §§6, 65, and 69, Ch. 1, Acts, 62nd G. A. The governor may fix the salary of the director of civil defense at any amount up to the amount appropriated by the legislature for such purpose. (Haesemeyer to Orr, Director, Civil Defense, 3/10/69) #69-3-12.

Mr. George W. Orr, Director, Iowa Civil Defense Division: Reference is made to your letter of February 5, 1969, in which you state:

"It is requested that an opinion be given as to the conflict between Chapter 29C.4, paragraph 2, 1966 Code of Iowa, and Sections 65 and 69, Chapter 1, Appropriations of the 62nd General Assembly.

"Section 69, referred to above, is apparently restricted to the biennium in question. As we approach a new Appropriations Act, it would seem important that the language of such an act not be in conflict with gubernatorial authority referred to in Section 29C.4, Code of Iowa."

Section 29C.4(1), Code of Iowa, 1966, provides:

"The civil defense division shall be under the management of a civil defense director who shall be appointed by the governor, upon the recommendation of the council, for a four-year term. *The governor shall fix his compensation out of funds hereafter appropriated to or otherwise available to the department of public defense for such purpose.*"

Sections 6, 65 and 69 of Chapter 1, Acts, 62nd G. A., the biennial departmental appropriations bill provide:

"§6. For the civil defense division, department of public defense, 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 sum of $66,490 (sixty-six thousand four hundred ninety) dollars, *or so much thereof as may be necessary,* to be used in the following manner:

For salary of director	$10,500.00
For other salaries	40,990.00
For support, maintenance, and miscellaneous purposes	15,000.00
Grand total of all appropriations for all purposes for each year of the biennium for the civil defense division, department of public defense	$66,490.00"

"§65. All salaries provided for in this Act are in lieu of all existing statutory salaries, for the positions provided herein, shall be payable in equal monthly or semi-monthly installments, and shall be in full compensation for all services except as otherwise expressly provided and except further that expense allowances shall be authorized, any ruling of the federal internal revenue service with respect to the tax status thereof notwithstanding."

"§69. Where any provisions of the law of this state are in conflict with this Act, the provisions of this Act shall govern for the biennium."

It is apparent from the foregoing that any conflict between §29C.4(1) and the appropriations Act is more imaginary than real since §69 of Chapter 1 plainly states that the appropriations Act supercedes any other statutory provisions and thereby effectively removes any conflict which might otherwise have existed. In this connection it is also relevant to consider the language of §79.1, Code of Iowa, 1966 which provides in relevant part:

"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."

However, even in the absence of §§65 and 69 of the appropriation Act and §79.1 of the Code it would be our view that there is no conflict between §29C.4(1) of the Code and §6 of the appropriation Act. It is to be observed that §29C.4 merely authorizes the governor to fix the director's compensation out of funds *appropriated* to or otherwise available *for such purpose*. Reading the underlined words of such §29C.4(1) in conjunction with the words "or so much thereof as may be necessary" hereinbefore underlined in §6 of the appropriation Act, it would be our position that the statutes are in harmony. In other words, the governor could during the 62nd biennium, fix the salary of the director at any amount up to $10,500.

Almost precisely the question you now raise was previously presented by the Iowa Civil Defense Administration and in an opinion dated August 21, 1963 (64 OAG 379) the attorney general came to the same conclusion we have reached herein. A copy of this former opinion is attached for your information.

There is a body of law which holds that agreements by an official to render services for a compensation less than or different from that fixed by law are invalid as a matter of public policy. See e.g. 43 Am. Jur., Public Officers, §373: 67 C.J.S., Officers §98. However, in the situation we have before us the salary of the director of the Civil Defense is not fixed at $10,500 per year since the language of §29C.4(1) and §6 of the appropriations Act make it clear that such sum is merely a ceiling on

the amount which the governor may establish. Moreover as stated in 43 Am. Jr. Public Officers §345:

"The power to fix the compensation of public officers is not inherently and exclusively legislative in character. Unless the constitution expressly or impliedly prohibits this legislature from doing so, it may delegate the power to other governmental bodies or officers, as, for example, to the governor, to counties, to cities, to courts or judges, or to other officers or official boards. In any case the delegation of the function to fix officers' compensation and the extent of the delegation must have clear expression or implication.

"Administrative boards or officers, in pursuance of the power delegated by the legislature, may fix the compensation of public officers or classes of public officers at any sum or rate which they consider reasonable, within the statutory limitations prescribed by the legislature, and such discretionary action is not ordinarily reviewable by the courts. . . ."

Under all the circumstances it is our opinion that there is no conflict between §29C.4(1) and §§6, 65 and 69 of Ch. 1, Acts, 62nd G. A., that the prior opinion of the attorney general dated August 21, 1963, is correct, and that the governor may fix the salary of the director of civil defense at any sum not to exceed $10,500.00 per annum.

March 17, 1969

COUNTIES: County Officers — §340.3, Code of Iowa, 1966, as amended by §58, Chapter 342, Laws of the 62nd G. A. Salaries fiked in December by Board of Supervisors are for the ensuing year. (Nolan to Knoke, Pottawattamie County Attorney, 3/17/69) #69-3-13

Mr. George J. Knoke, Pottawattamie County Attorney: In your letter of February 11, 1969 you requested an opinion relative to the fixing of salaries by the board of supervisors in December 1968 pursuant to §340.3, Code of Iowa. Your letter asks whether the salaries fixed apply to the year 1968 or the year 1969.

Section 340.3, Code of Iowa, 1966, as amended by §58 of Chapter 342, Laws of the 62nd General Assembly provides:

"In December for each year, the board of supervisors, shall by resolution, fix the salaries of the officials in conformity with the salary schedule based on population as shown in the last current report of the Bureau of Census, United States Department of Commerce and on the taxable valuation of the county as certified by the Department of revenue or in conformity with these sections. If a vacancy occurs in any office, the person who is appointed or elected to fill the unexpired term in the office vacated, shall receive the same salary as the person vacating the office."

As originally enacted by the 61st G. A. this section provided in pertinent part as follows:

"In July of the year of nineteen hundred sixty-five (1965) for the remainder of such year and in each succeeding December for each year thereafter . . ." (§5, Chapter 307, Laws of the 61st G. A.)

It is my view that the salary fixed in December by the board of supervisors applies to the following year. In addition to the clear provision of Chapter 307, Laws of the 61st G. A., I base this conclusion on the fact that the board must use such information as is available to it in determining the amount to be fixed.

The fixing of salaries by the board is a legislative act. As a rule, all statutes are to be construed as prospective in operation unless the contrary is expressed or clearly implied. *Flake vs. Bennett*, 1968, ... Iowa ....., 156 N. W. 2d 849, 853.

Your letter indicates that the county auditor has taken exception to your view that the salaries as fixed in December would be for the ensuing year and bases his position on the fact that the taxable valuation of the county is based upon January 1, 1968 and that this is somewhat like a bonus given as a result of the increase in valuation. It is my view that the county auditor's position does not have merit.

Under the statute in question, the board of supervisors is required to utilize "the last current report of the Bureau of Census." In the year 1970, the 1970 decennial census should be used if it is available. If not, the last "current report" must be used. Applying this theory to the situation presented, the board of supervisors must in December, apply the last taxable valuation of the county certified as provided in the statute. The fact that such valuation is based on a January 1 date is immaterial.

March 18, 1969

SCHOOLS: Bond Election — §75.1, Code of Iowa, 1966. Spoiled ballots should not be counted in determining whether or not a bond issue passed. (Nolan to Tieden, State Representative, 3/18/69) #69-3-14

The Hon. Dale L. Tieden, State Representative: By your letter delivered to this office on March 12, 1969 you requested an opinion on the legality of a school bond election upon the following facts:

". . . The required 60% majority passed by one vote. There were seven spoiled ballots. We need an Attorney General's opinion as to whether or not spoiled ballots must be considered in declaring whether or not a bond issue passed."

The answer to your question is determined by §75.1 of the Code of Iowa, 1966, which provides:

"When a proposition to authorize an issuance of bonds by a county, township, school district, city or town, or by any local board or commission, is submitted to the electors, such proposition shall not be deemed, carried or adopted, anything in the statutes to the contrary notwithstanding, unless the vote in favor of such authorization is equal to at least 60 percent of the total vote cast for and against said proposition at said election.

"All ballots cast and not counted as a vote for or against the proposition shall not be used in computing the total vote cast for and against said proposition.

"When a proposition to authorize an issuance of bonds has been submitted to the electors under this section, and the proposition fails to gain approval by the required percentage of votes, such proposal or any proposal which incorporates any portion of the defeated proposal, shall not be submitted to the electors for a period of six months from the date of such regular or special election."

In the case entitled *Frakes vs. Farragut Community School District*, 1963, 255 Iowa 88, 121 N. W. 2nd 636, wherein the result of a school bond election was challenged, the Iowa Supreme Court held:

"Only ballots cast and counted shall be used in computing the total vote cast for and against the proposition. Properly rejected ballots are not included in the computation. For adoption the proposition required at least a 60 percent affirmative vote. Section 75.1, Code of Iowa; Dickinson County Memorial Hospital Corp. vs. Johnson, 248 Iowa 392, 80 N. W. 2nd 756; Headington vs. North Winneshiek Community School District, 254 Iowa 430, 117 N. W. 2d 831, 838."

In the Dickinson County case, the Iowa Supreme Court stated at page 394 of the Iowa Reports:

"The distinguished trial court held that, in computing 'the total vote cast for and against said proposition,' the blank ballots and the improperly marked, rejected ballots should not be included. The quoted language of the statute appears to require that conclusion and the weight of authority supports it. Obviously, a blank ballot is not a vote for or against a proposition and should not be counted on either side. Nor may a ballot be counted which is denied recognition because it is found to be invalid as not properly marked, or for some other reason.

"The noun 'vote' is sometimes defined as the formal expression, by one legally qualified, of his choice for or against a proposition. See 29 C.J.S., Elections, section 19; Words and Phrases, Volume 44, page 452. When such formal expression is authorized by law, it must be made in the form and manner prescribed by law. Hence, a ballot which is properly rejected for noncompliance therewith is not, strictly speaking, a vote, and, of course, may not be counted for or against the proposition in question.

"The text in 64 C.J.S., Municipal Corporations, section 1927, page 543, states: 'In ascertaining the total number of votes cast on a proposition to issue municipal bonds it is proper and necessary to count the legal and intelligible ballots found in the ballot box at the close of the polls, and to disregard ballots which are blank, or unintelligible, or which bear distinguishing marks, or which are for any reason illegal.'

"18 Am. Jur., Elections, section 246, page 342, states: 'The weight of authority adheres to the view that . . . blank and illegal ballots should be rejected in computing the number of votes.' "

It is my opinion that the above cited authorities give ample precedent for a determination that spoiled ballots should not be counted in determining whether or not a bond issue passed. Of course, whether the ballots were in fact spoiled, so that they should not be counted, is another question. They are not before us and we are not asked to, and do not offer, any opinion in that respect.

March 24, 1969

CONSTITUTIONAL LAW: General Assembly — session distinguished; terms of officers; carry over of bills; reintroduction of bills; authorization required for standing committee to meet between sessions; Art. III, §§1, 2, 3, 5, 7, 9, 11, 16, 18, 25, 26 and 32; Art. IV, §§11 and 12; Art. XII, §1, Constitution of Iowa; §§2.6, 2.8, 2.20, 2.41, 2.45, 2.49, 2.51, 17A.2 and 17A.4, Code of Iowa, 1966; H.F. 390, 63rd G. A. There are only two kinds of sessions known to the constitution, regular sessions and special or extra sessions. Where expression "regular sessions" is used this now means annual sessions. The terms "general assembly" and "session" are not synonymous. General Assembly refers to a group of persons elected for a term to transact the legislative business of the state. The expression "session" means the period or periods of time this same body is gathered together to conduct such business. The power of the general assembly, and either house thereof, to adopt procedural rules to govern the conduct of its or their legislative deliberations and proceedings is broad and plenary. The house and senate could by rule,

joint rule, resolution, joint resolution or statute provide for the terms of office of their officers and could authorize or forbid the carry over and/or reintroduction of bills. A joint resolution or an act would be required before standing committees could meet, transact business and draw per diem and expenses during the interim between legislative sessions. (Turner to Floyd Millen, State Representative, 3/24/69) #69-3-16

The Hon. Floyd H. Millen, State Representative: Reference is made to your letter of February 24, 1969, in which you state:

"Due to the recent constitutional amendment to the Iowa Constitution establishing annual sessions, I would request an official opinion to the following questions:

"1. Is it possible to carry over the House and Senate officers from the first session to the second session of each General Assembly?

"2. May bills introduced in the first session be carried over to the second session of the General Assembly at the same status as they were left after adjournment from the first session, or must they be reintroduced in the second session?

"Examples to illustrate the question:

"A. May a bill which has not been acted upon by either the House or the Senate be carried over to the second session at the same status?

"B. May a bill which has been indefinitely postponed carry over at the same status from the first session to the second session?

"C. May a bill passed by one house but not acted upon or passed by the other house carry over?

"D. If bills are allowed to be carried over, do they keep the same status on the calendar that they had on the day of adojournment from the first session?

"3. May a bill which has been defeated by the House or by the Senate or by both be reintroduced in the second session of the General Assembly or is it permanently defeated and may not be reintroduced in the second session of the General Assembly?

"4. Is there authority to allow standing committees to meet between sessions of the General Assembly to transact official business with per diem compensation and expenses?

"5. If under the present laws of the State of Iowa the above matters can not now be done, can this be changed by a joint rule or must it be accomplished by a statute?"

At the November 5, 1968 general election the people approved an amendment to the Constitution of Iowa so that Article III, §2 of such constitution now provides:

"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."

Prior to this amendment such Article III, §2 provided:

"Section 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."

Now, as formerly, there are only two kinds of sessions known to the constitution, regular sessions and special or extra sessions. The only change which the 1968 amendment to Article III, §2, accomplishes is that now regular sessions are held every year rather than every two years. Thus, where constitutional provisions use the expression "regular session" this now means annual sessions. Where the term "special session" or "extra session" are found, they should be taken to mean, now as formerly, those sessions convened by proclamation of the governor pursuant to Article IV, §11. And where the word "session" is used alone, this generally will be found to mean both regular (annual) sessions and special (extra) sessions. Thus, the privilege from arrest enjoyed by senators and representatives "during the session of the General Assembly" is in effect during special as well as regular sessions. Article III, §11.

Again, the language of Article III, §16, relating to bills submitted to the governor "during the last three days of a session" encompasses special as well as regular sessions. However, the requirement of Article III, §18, that a statement of receipts and expenditures "be attached to and published with the laws, at every regular session of the General Assembly" would not apply to special sessions, but only to regular, i.e. annual, sessions. In Article III, §26, relating to the time laws take effect, the expression "regular session" clearly means annual sessions and the meaning of special sessions remains unchanged. Pursuant to Article IV, §12, the governor now must deliver a message to the general assembly as to the condition of the state annually rather than biennially.

In considering the questions you have raised, it is important to keep in mind that there is a distinction to be drawn between the terms "general assembly" and "session." As stated in Article III, §1:

"The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives: and the style of every law shall be. 'Be it enacted by the General Assembly of the State of Iowa.' "

It is well settled that the term "legislature" is synonymous with "general assembly." *State vs. Gear*, 5 Ohio Dec. 569. And "legislature" means a political body of persons organized for the purpose of making laws and acting in an official capacity. *State vs. Becker*, 1932, 329 Mo. 501, 45 S. W. 2d 533. The literal signification of "session," on the other hand, is "sittings." *People vs. Powell*, N. Y., 14 Abb. Prac. 91, 93. As stated in *Ralls vs Wyand*, 1914, 40 Okla. 323, 138 P. 158, 162:

"The meaning of the word 'session' is the sitting of a body, competent for the transaction of its business; the time during which it is convened and actually engaged in business; the time during which a legislative body or other assembly sits for the transaction of business."

See also 38A Words and Phrases, "Session" p. 599 et seq.

Thus, when the constitution speaks of the "general assembly" it refers to a group of persons elected for a term for the purpose of transacting the legislative business of the state, and when such constitution uses the expression "session" it means the period or periods of time that

this same body of persons is gathered together to conduct such business. No matter how many sessions it may hold, whether regular, special or both, a general assembly continues in existence from one general election to the next. The event which marks the end of a general assembly is not adjournment sine die of its session, nor the end of the two year term beginning on January 1 following the election of its members, but the swearing in pursuant to Article III, §32 of the members of the next general assembly elected in accordance with Article III, §§3 and 5. (The fact that senators serve for four years rather than two or that new members may be elected to fill vacancies does not alter the conclusion that each general assembly lasts for only two years since at each biennial election all representatives and one-half of the senators must stand for election.)

With the foregoing distinction between "session" and "general assembly" (or either house thereof) well in mind, it is not difficult to find the meaning of the various constitutional provisions in which such terms are used. For example, Article III, §25 provides:

"Each member of the General Assembly shall receive such compensation and allowance for expenses as shall be fixed by law but no General Assembly shall have the power to increase compensation and allowances effective prior to the convening of the next General Assembly following the session in which any increase is adopted."

If the present general assembly should increase its pay whether during this session or next year's regular session or at any special session, the increase could not be effective "*prior to* the convening of the *next General Assembly* following the session in which any increase is adopted." On the other hand, vacancy appointments made by the governor prior to the present session of the General Assembly under Article IV, §10 would expire when this annual session adjourns, not when this general assembly ends or when its *next* annual session ends. This is so because such Article IV, §10 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." (Emphasis added)

In light of the foregoing we next consider the specific questions you raise.

1. In determining whether it is possible to carry over the house and senate officers from the first to the second session of each general assembly, it is necessary to consider statutory as well as constitutional provisions. Article III, §7 of the Constitution of Iowa provides:

"*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." (Emphasis added).

§2.6, Code of Iowa, 1966 provides:

"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."

Now that we have annual sessions, §2.6 would seem to require that the terms of office of the president pro tempore of the senate and the speaker of the house will continue only until the first day of the next (in this case) second regular (annual) session of the general assembly. In other words, in 1970 another election for these two offices, and, of course, other offices as well, would have to be held. In view of the language of Article III, §7, however, it would be our view that if not the constitutionality, at least the enforceability, of §2.6 as it applies to subsequent general assemblies is in serious doubt.

The right of each house to choose its own officers is derived from the Constitution whereas §2.6 of the Code rises to the dignity only of a mere statutory enactment. As stated in Article XII, §1 of the Constitution:

"Supreme law — constitutionality of acts. Section 1. This Constitution shall be the supreme law of the State, and any law inconsistent therewith, shall be void. The General Assembly shall pass all laws necessary to carry this Constitution into effect."

In *Cliff vs. Parsons*, 1894, 90 Iowa 665, 57 N. W. 599, a secretary of the senate who had been removed by vote of the senate sought to regain his office on the basis of §13 of the Code then in effect which contained the same language as §2.6 of the 1966 Code except for the words "unless sooner removed, except as may be otherwise provided by resolution of the general assembly." In rejecting the plaintiff's contention, the court stated:

"Neither house has power to control the other in choosing its officers, nor in fixing their tenure of office, nor has any general assembly power to control the right of either house of any subsequent general assembly in this respect. To say that this section 13 fixes the term of the secretary of the senate to continue during the session is to abridge, by statute, the constitutional powers of the senate to choose its own officers in such manner, and for such time, as it pleases. To say, however, that this statute does not fix a term during which the secretary shall hold his office leaves it in harmony with the powers conferred on the senate by the constitution. Whether either house might extend the term of officers other than the speaker beyond the session at which they were elected, so as to cover any succeeding session of the same general assembly, we do not determine, as that question is not before us. Our conclusions are that no term is fixed by law during which the secretary of the senate shall hold his office, that the power to appoint is exclusively in each senate, that the office is held during the pleasure of the senate appointing, and therefore the senate has power to remove without notice or hearing." *Cliff vs. Parsons*, 1894, 90 Iowa 665, 57 N. W 599, 601 (Emphasis added)

In light of the language of the supreme court in *Cliff vs. Parsons*, supra, it is our opinion that either house or both houses could provide by rule, joint rule, resolution, joint resolution or statute that the terms of officers should carry over from the first session to the second. But even if this were done and regardless of the manner in which it were done, Article III, §7 would permit either house at any time to terminate the term of any officer and replace him with another, nor could any general assembly, as distinguished from a session thereof, bind a subsequent general assembly in these respects. Whether or not, as a practical matter,

either the senate or house would have so little regard for its own rules, resolutions or acts as to do this is another question, but as a constitutional matter it would appear either of them could do so.

2. Your second inquiry raises the question of whether or not bills introduced in the first session of the general assembly can be carried over to the second session of the same general assembly retaining the same status they held upon adjournment of the first session. Here again each house has broad latitude in adopting rules to govern its own affairs. Article III, §9 of the constitution provides:

"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." (Emphasis added).

Thus, it is strictly within the competence of each house to adopt rules relative to the conduct of its own proceedings. As stated in a prior opinion of the attorney general, "This power is not limited or restricted in any respect by any other constitutional provision." 64 OAG 52. Elsewhere the applicable rule of law is stated somewhat differently but to the same effect:

"*Legislature rules and compliance therewith.* Each house of the legislature has the power to determine for itself rules and orders to govern it in the various stages of legislation, and in relation to all matters relating to the exercise of their rights, powers, and privileges. The power to make rules is absolute, if exercised within prescribed limitations, but an act will not be declared invalid because of a non-compliance with such rules." 82 C.J.S., Statutes, p. 60.

"Rules of parliamentary practice are merely procedural and not substantive. The rules of procedure adopted by deliberative bodies have not the force of a public law, but they are merely in the nature of by-laws, prescribed for the orderly and convenient conduct of their own proceedings. The rules adopted by deliberative bodies are subject to revocation, modification, or waiver at the pleasure of the body adopting them. Where a deliberative body adopts rules of order for its parliamentary governance, the fact that it violates one of the rules so adopted may not invalidate a measure passed in compliance with statute. The rules of procedure passed by one legislative body are not binding on a subsequent legislative body operating within the same jurisdiction, and, where a body resolves that the rules of a prior body be adopted until a committee reports rules, the prior rules cease to be in force on the report of the committee." 67 C.J.S., Parliamentary Law, p. 870.

Accordingly, in answer to your second question and the parts thereof, it is our opinion that the general assembly or either house thereof has complete flexibility to adopt rules relative to the carry over of bills. Conceivably, one house could determine to permit the carry over of bills whereas the other would not. Hopefully, this awkward situation would be avoided by the adoption of a joint rule. Whether or not each session is terminated by adjournment *sine die* or otherwise would not alter our conclusion on the power to make rules concerning carry over of bills since it is each general assembly and not each session of such legislative body which has the power to make rules and to amend or repeal them at any time. On the question of whether or not in the absence of any rule, bills would carry over, §2.8, Code of Iowa, 1966, provides:

"In the absence of other rules, those of parliamentary practice comprised in Robert's Rules of Order Revised shall govern."

In 67 C.J.S., Parliamentary Law, p. 871, the ordinary rule is stated as follows:

"When a meeting is adjourned before the business is finished, and that meeting closes the session, the unfinished business may be introduced at the next session as new business on the same footing as if it had never been before the assembly."

* * *

"Ordinarily, in the absence of any provision for stated meetings, an adjournment without day is notice to all concerned that matters which have been under consideration will not again be taken up unless initiated under the procedure established for new business."

Accordingly, it is our opinion that, in the absence of any rule on the subject, bills introduced at the first session of any general assembly would not survive the *sine die* adjournment of such session so as to carry over to the next session of the same general assembly.

Conversely, if adjournment is not *sine die* but to a day certain and there is no rule provided to the contrary, matters before the first session will carry over to the second session of the same general assembly with the same general assembly with the same status as they had at the first session thereof. This rule is stated in Corpus Juris Secundum as follows:

"An adjourned meeting is legally the continuation of the meeting of which it is an adjournment. At such adjourned meeting the governing body can do any act which might have been done if no adjournment had taken place, and, conversely, the limitations imposed on the governing body as regards action at the original meeting obtained at the adjourned meeting, whether it is regular or special. Where a regular meeting is adjourned, any business which would have been proper to consider at that meeting may be considered and acted on at the adjourned meeting, and business proposed, but not included, at a regular meeting may be legally considered and determined by a deliberative body at an adjourned meeting." 67 C.J.S. Parliamentary Law, p. 870.

Adjournment other than *sine die* is not an unknown event in the experience of Iowa legislatures. The 14th G. A. in regular session in 1872 adjourned on April 23rd to the third Wednesday in January, 1873. See S. Journal, p. 752. It then reconvened in session and acted on code revision bills then pending. These bills became the *Revision of 1872*. The 40th regular G. A. adjourned April 17, 1923. Thereafter the 40th G. A. convened in Extraordinary Session April 18, 1923. After enacting some bills the session adjourned on the same day to December 4, 1923. On April 26, 1924 the session *recessed* to July 22, 1924. On that date it reconvened and adjourned *sine die* July 30, 1924.

3. You next inquire, "May a bill which has been defeated by the House or by the Senate or by both be reintroduced in the second session of the General Assembly or is it permanently defeated and may not be reintroduced in the second session of the General Assembly?"

We have been unable to find any statutory or constitutional basis for saying that such a defeated bill could not be reintroduced in the second session of the general assembly or, indeed, that it could not be reintro-

duced in the same session of the general assembly. This is a matter solely within the rule making power of the respective houses. As stated in 81 C.J.S., States, 956:

"The power to determine rules of procedure embraces the right to determine as to the reconsideration of action taken, when no provision of the constitution is thereby violated. Rules limiting the reconsideration of action operate only to prevent members of the house, in which the measure originated and on which it has once acted, from again bringing the subject matter before it, but do not prevent the consideration of the same subject matter when embodied in a bill or resolution coming from the other house."

4. You next ask whether there is authority "to allow standing committees to meet between sessions of the General Assembly to transact official business with per diem compensation and expenses?"

There is no express sanction in the constitution for the creation and existence of committees of the general assembly either during or between sessions of that body. Nevertheless, it is well settled that:

"The legislatures of the several states are regarded as having inherent powers to appoint legislative committees as means of obtaining necessary information to aid them in preparing and enacting wise and needful laws, to assist them in their legislative capacity in supplying remedies for existing evils, or to furnish such information as a guide to the attorney general or other appropriate executive officer or department in performance of his or its duties in carrying out legislative mandates. The existence of such power is necessary for the efficient discharge of legislative functions and seems universally recognized under our scheme of government." 49 Am. Jur., States, Territories and Dependencies, §40.

A number of interim committees have been created by the Iowa legislature by statute which function between sessions, e.g. budget and financial control committee, §2.41, Code of Iowa, 1966; legislative research committee, §2.49; legislative departmental rules review committee, §17A.2. Although separate provision is made in the code for paying the per diem and expenses of each of the foregoing committees (respectively §§2.45, 2.51 and 17A.4) there is in addition blanket authority for the payment of interim expenses of the legislature to be found in §2.20 which provides in relevant part:

". . . 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."

However, the mere existence of a statute which authorizes the payment of the expenses of an interim committee, is not in and of itself sufficient to validate the otherwise improper creation of such a committee.

"An interim committee, appointed by the senate to act after adjournment, was not validly created merely because statutes providing for expenses of interim committees were passed prior to creation of the committee, where one statute was passed two years before creation of the committee and the other statute two months before creation of the committee." *Swing vs. Riley*, 1939, 13 Cal. 2d 513, 90 P. 2d 313.

The law relative to the authority by which legislative committees may be created and their power to act after adjournment of the legislature is well stated in 49 Am. Jur., States, Dependencies and Territories, §41, as follows:

"It is generally conceded that a legislative committee which is to func-

tion during the sessions of the legislature may be created either by a separate resolution of one branch of the assembly or by a concurrent resolution of both branches. Either house may appoint separate committees or the two houses acting concurrently may appoint joint committees for any proper purpose, and these committees may exercise during the sessions of the legislature such power or powers as the house or houses appointing them may lawfully delegate or impose, although only such powers can be delegated as are possessed by the house or houses making the appointment. Of course, such a committee may function under a regularly passed act of the legislature or general assembly."

"A legislative committee may be given power to sit during the interim between sessions of the legislature. *In the absence of special authority, however, committees appointed by the legislature have no power to sit after adjournment sine die of the legislature. and inasmuch as in the absence of legislation, the existence of all committees necessarily determines upon the adjournment of the body to which they belong, there must be an explicit enactment that the sessions of the committee can be held after such adjournment,* or at least a clear and unmistakable implication to that effect from the words used in the act creating the committee, before it can be a legally created committee to sit after the adjournment of the legislature. *Moreover, authority of a committee to sit during a recess of the legislature must ordinarily be derived from the joint act of both houses, that is, from a regularly passed act of the assembly.* A legislative committee authorized to make investigations and hold its sessions after the adjournment of the legislature cannot be created by one body of the legislature by a resolution which is not concurred in by the other. According to most authorities, a mere concurrent or joint resolution of both houses which calls into being a legislative committee or continues the existence of such a committee is not sufficient to give the committee life after the functions of the legislative body as such have ceased with its adjournment sine die, except in those jurisdictions where joint resolutions are recognized as equivalent to laws enacted by bills. In the latter case, the resolution creating the committee must contain an explicit provision empowering the committee to sit after adjournment, or the implication to that effect must be clear and unmistakable." (Emphasis added). 49 Am. Jur., States, Dependencies and Territories, §41.

On the question of whether a joint resolution or an act is required to authorize a legislative committee to hold its sessions after adjournment of the body to which it pertains see also 28 A.L.R. 1154, 81 C.J.S. States §40, 82 C.J.S. Statutes §20.

In Iowa the attorney general has on three separate occasions in the past ruled that a joint resolution is not the equivalent of a law enacted by a bill. OAG 8/28/67, Strauss to Robinson, Secretary of the Executive Council; 1906 OAG 96; 1898 OAG 102. However, the questions which gave rise to the first two of these three opinions involved proposals to accomplish changes in the law of a substantive nature. In the latest of the three opinions there is no indication of what prompted the question. But in any event, it is our opinion that authorization for standing committees to meet between sessions of the legislature is a matter of internal administration and procedure, not substantive in nature, which could be accomplished by joint resolution. This is especially true in light of the fact that a joint resolution is surrounded with all the trappings and passed with all the formalities of a bill except that it is not signed by the governor. Indeed, under our system of government it might be argued persuasively that to require the signature of the governor on an internal procedural measure of the general assembly would amount to an encroachment of the executive upon the legislative branch of government. Moreover, in the event House File 390, 63rd G. A., becomes law, there

will be created by statute a strong inference that standing committees are to meet between sessions of the legislature. Such an inference would stem from the following language in §15 of H.F. 390 appropriating money for the interim expenses of standing committees:

"*Interim expenses, including* but not limited to *salaries of members and expenses of standing and interim committees*, 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."

Accordingly, it is our opinion that for a standing committee of the general assembly to meet between sessions of the general assembly to transact official business with per diem compensation and expenses being paid to the members, either a joint resolution or an act of the general assembly authorizing such meetings would be sufficient.

5 Finally, you ask if under the present laws the matters described above cannot now be done, is it possible to take action to do the things described by joint rule or is a statute required. As indicated previously herein, the power of the general assembly and either house thereof to adopt procedural rules to govern the conduct of its or their legislative deliberations and proceedings is broad and plenary. Thus, under Article III, §§7 and 9 the house and senate could by rule provide that their officers are to carry over from the first to second sessions of the general assembly. And under Article III, §9, rules could be adopted which would authorize or forbid the carry over and/or reintroduction of bills. However, as stated previously herein, a joint resolution or an act of the general assembly would be required before standing committees could meet, transact business and draw per diem and expenses during the interim between legislative sessions.

I trust the foregoing answers the questions you have raised. However, if amplification of any of the matters discussed herein is required or if additional related questions occur to you, we will be pleased to render such additional assistance or advice as you may request.

March 27, 1969

CRIMINAL LAW: §748.4, Code of Iowa, 1966, does not prevent civilians, other than peace officers, from performing the duties of police officer. (Cullison to Caffrey, State Representative, 3/27/69) #69-3-17

Hon. James T. Caffrey, House of Representatives: This letter is in reply to your request for an opinion of the Attorney General as to the legality of hiring civilians to operate in certain police functions. Specifically, you inquired whether it is legal to hire civilians to fulfill the duties of "radar operator" and "identification technician." You stated that these positions involve the collection and preservation of evidence referred to in §748.4, Code of Iowa, 1966.

Section 748.4 states:

"It shall be the duty of a peace officer and his deputy, if any, throughout the county, township, or municipality of which he is such officer, to preserve the peace, to ferret out crime, to apprehend and arrest all criminals, and insofar as it is within his power, to secure evidence of all crimes committed, and present the same to the county attorney, grand

jury, mayor or police courts, and to file informations against all persons whom he knows, or has reason to believe, to have violated the laws of the state, and to perform all other duties, civil or criminal, pertaining to his office or enjoined upon him by law. Nothing herein shall be deemed to curtail the powers and duties otherwise granted to or imposed upon peace officers."

This section sets forth the duties of peace officers, but it does not state that the authority to perform such duties is exclusive to peace officers. If this were not the case, all of the duties enumerated in §748.4, including the arrest of criminals, securing of evidence of crime, and the presentation of same to the county attorney, grand jury, and the courts, and the filing of informations, could be performed only by peace officers. It would thereby abrogate citizen arrests, prevent the use of civilian operatives in securing and presenting evidence and prevent all but peace officers, including county attorneys, from filing informations.

March 27, 1969

CONSTITUTIONAL LAW: Proposed constitutional amendment — S.J.R. 2, 63rd G. A.; Ch. 467, Laws of 62nd G. A. — Proposed constitutional amendment would interpose a constitutional barrier to restoration of county-wide voting for legislators, in counties apportioned more than one legislator. No precedent found for proposition that apportionment of state into 50 senate and 100 representative districts might be construed to authorize establishment of 150 districts. (Turner to Charles P. Miller, State Representative, 3/27/69) #69-3-18

The Hon. Charles P. Miller, State Representative: Reference is made to your letter propounding certain questions respecting S.J.R. 2, 63rd General Assembly, which is to be found as Chapter 467, Laws of the 62nd General Assembly, at page 859, 860, and which provides as follows:

"Article three (III) of the Constitution of the State of Iowa is hereby amended by adding thereto the following new section:

" 'Section 39. In establishing senatorial and representative districts, the state shall be divided into as many senatorial districts as there are members of the senate and into as many representative districts as there are members of the house of representatives. One (1) senator shall be elected from each senatorial district and one (1) representative shall be elected from each representative district.' "

Question 1. "Is this Joint Resolution necessary now that the public has voted into law the Constitutional Amendment providing for 'single member districts' in November, 1968, and is now law?"

The Constitutional amendment of 1968, to which you refer, provides 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.

"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 apportionment amendment of 1968 does not provide categorically for "single member districts." The statutes in the past have provided for county wide election of legislators in counties apportioned more than one legislator. Thus, each elector of such a county was able to vote for as many legislators as the county was apportioned. These provisions were set aside by our Supreme Court (*Kruidenier et al. vs. McCulloch, et al.*, 258 Iowa 1121, 142 N. W. 2d 355 (1966)), consistently with the one man, one vote principle, and the directives of the Federal courts (*Davis vs. Synhorst*, 217 F. Supp. 492 (1963), and 225 F. Supp. 689 (1964).) Pursuant to the orders of the Iowa Supreme Court, the multi-member counties were apportioned further, into one-member "sub-districts," and the General Assembly was chosen accordingly in the general election of 1968. The apportionment commission of 1969, as I am informed, is engaged in drafting a new map of districts, in conformity with the Iowa constitutional amendment of 1968, each such district with a single legislator, pursuant to the principle ordained by the Supreme Court. That any future legislature would return to the method of county wide election of legislators from multi-member counties is out of the question, under the terms of the court order. Yet it cannot be said to be impossible, that a future court would overrule the single-member decision, in which event some future legislature might revert to the method of county-wide elections. The "single-member amendment" would interpose a constitutional barrier to such an enactment.

Question 2. "Could the new Joint Resolution be construed to provide for 150 legislative districts served by 'single member legislators'?"

The constitution of 49 states, in vesting the legislative power, have followed closely the original United States Constitution which established a Congress consisting of "a Senate and House of Representatives," the Senators chosen by State legislatures and the representatives by the people. The Constitution of Iowa, like those of other states, provides for two houses, different in number of members, in their powers, and having different qualifications as to age and as to apportionment. Note Article III, §34 of the Iowa Constitution:

"No law so adopted shall permit the establishment of senatorial districts whereby a majority of the members of the Senate shall represent less than 40 per cent of the population of the state . . ."

Assuming, without considering, that this provision will stand, the converse also is true: A majority of the Senate — 26 members — *may* represent 40 per cent of the population. If ever an effort were made to divide the state into 150 single-member legislative districts, the result might be that 124 members would represent 60 per cent of the state. Such a malapportionment would contravene the U. S. constitution, as declared in the decisions of the United States Supreme Court in recent years.

We have found no instance in any of the 49 states where it was proposed to apportion a state into a number of districts equal to the sum of the members of the House and Senate, and elect senators from some districts and representatives from others. The construction about which

you ask does not appear even remotely possible.

Question 3. "Does the new Joint Resolution imply that Senators and Representatives could not duplicate representation?"

I understand "duplicate representation" mean representation of a citizen in the General Assembly by both a member of the House of Representatives and a member of the Senate. Nothing in the "single member" amendment appears to suggest any departure from the traditional pattern of American government. For the reasons given in the answer to Question 2, my opinion is that the two-house system would not be disturbed by this amendment.

March 27, 1969

STATE AGENCIES — Dept. of Public Safety — Merit Employment — §§80.4, 80.5, 80.8, 80.15, 1966 Code; Ch. 95, Acts 62nd G. A. The provisions of Ch. 95, Acts, 62nd G. A., do not impair or change the personnel administration provisions of Ch. 80, 1966 Code, even though the Dept. of Public Safety is not expressly exempted from the provisions of said Ch. 95. (Turner to Mowry, State Senator, 3/27/69) #69-3-19

The Hon. John L. Mowry, State Senator: This will acknowledge receipt of your letter of March 11, 1969 in which you requested an opinion as to whether or not the provisions of Ch. 80, Code of Iowa, 1966, and in particular §80.15 of said Code can be construed as in harmony with the provisions of Ch. 95, Acts of the 62nd General Assembly.

Ch. 95, Acts of the 62nd G. A., was approved on June 20, 1967, and the effective date of such enactment was June 30, 1967, being the day following the last date of publication. The Act contains no express repeal of any of the sections of the Code except that in §23 of the Act, §8.5(6), of the 1966 Code of Iowa was stricken. You will recall that §8.5(6), established a division of personnel under the comptroller, and it was under this section of the Code that all personnel administration with the exception of those specific exemptions set up therein was handled.

§80.15, 1966 Code of Iowa, reads as follows:

"*Examination-oath-probation-dismissal.* No applicant for membership in the department of public safety, except clerical workers and special agents appointed under section 80.7, shall be appointed as a member until he has passed a satisfactory physical and mental examination. In addition, such applicant must have resided in the state of Iowa for at least the period of two years, immediately prior to making application, must be a citizen of the United States, of good moral character, and be not less than twenty-two years of age. The mental examination shall be conducted under the direction or supervision of the commissioner of public safety and may be oral or written or both. Each applicant shall take an oath on becoming a member of the force, to uphold the laws and constitution of the United States and of the state of Iowa. During the period of twelve months after appointment, any member of the department of public safety, except members of the present Iowa highway safety patrol who have served more than six months, shall be subject to dismissal at the will of the commissioner. After the twelve months service, no member of the department, who shall have been appointed after having passed the before mentioned examinations, shall be subject to dismissal unless charges have been filed with the secretary of the executive council and a hearing held before the executive council, if requested by said member of the department, at which he shall have an opportunity to present his defense to such charges. The decision of the executive council by majority vote shall be final, subject to the right of appeal by

the employee to the district court of Polk county, or to the district court of the county in Iowa in which the employee resides, within thirty days after he shall have received notice of the decision of the executive council. All rules and regulations regarding the enlistment, appointment, and employment affecting the personnel of the department shall be established by the commissioner with the approval of the governor."

Section 9, Ch. 95, Acts of the 62nd G. A. directs the merit employment commission to adopt and amend rules for the administration and implementation of Ch. 95, and in detail through the twenty-two subsections of the said §9 spells out the content of such rules. There can be no doubt that such legislative direction is in apparent conflict with §80.15, Code of Iowa, 1966, wherein the general assembly gave to the commissioner of public safety the power and duty to establish rules and regulations regarding the enlistment, appointment of and employment affecting the personnel of his department.

Other sections of Chapter 80, 1966 Code, are equally in conflict with the provisions of Chapter 95, 62nd G. A. Section 80.4 establishes the maximum number of members of the highway patrol, sets requisites on the percentage of such employees who are members of the same political party and limits the use of such employees as office personnel. Section 80.5 authorizes the Commissioner to appoint all supervisory personnel of the patrol but restricts the number of such appointments. Section 80.8 deals with the appointment by the Commissioner of all other personnel in the department, subject to the approval of the governor; salaries and other compensation for departmental personnel, including longevity and per diem meal expenses for members of the patrol, and authority in the Commissioner to delegate duties to patrol personnel as he deems proper.

Generally, the rule is that if by any fair and reasonable construction, two statutes dealing with the same subject may be reconciled both shall stand. *Board of Trustees of Farmers Drainage District vs. Iowa Natural Resources Council*, 274 Iowa 1244, 78 N. W. 2d 798.

An Act is not impliedly repealed because of conflict, inconsistency, or repugnancy between it, and the later Act unless the conflict, inconsistency, or repugnancy is plain, unavoidable, and irreconcilable. *Taschner vs. Iowa Electric Light and Power Co.*, 249 Iowa 673, 86 N. W. 2d 915. Indeed, the cases are legion on the proposition that the law abhors the implied repeal of any statute.

In the case of *Casey vs. Harned*, 5 Iowa 1, 5 Clark 1 (1857), the Supreme Court, at page 9, had the following to say with regard to enactments at the same session of the general assembly:

"Where two acts of the general assembly are repugnant to, or in conflict with, each other, the one last *passed*, being the latest expression of the legislative will, must govern. But this rule is no better settled than the further one, that if by any fair and reasonable construction, a prior and later statute can be reconciled, both shall stand. Under these two rules the act of the 24th of January, if in conflict with that of the 22nd of the same month, would govern, unless by some fair and legitimate reasoning, any seeming conflict may be reconciled."

It is worthy of note that in *Casey vs. Harned*, supra, the act last passed, i.e., that of January 24, was the first to become effective while the first act passed, i.e., that of January 22, became effective last. Never-

theless, the supreme court stated that in the event of conflict between the two acts, it is to the date of passage they will look rather than effective date and that the act passed last will govern. But in *Harned*, the foregoing rule that the bill last passed controls was not invoked or applied because the court was able to reconcile the apparent conflict.

The significance of these statements in examining the provisions of Ch. 80, 1966 Code is that both §§80.4 and 80.15 were amended by the 62nd General Assembly. The amendment to §80.15 was enacted by the 62nd General Assembly prior to enactment of Chapter 95, Acts of the 62nd G. A., and had been signed by the Governor on May 11, 1967. (See Ch. 111, Acts 62nd G. A.) The amendment to §80.4 was passed in the House of Representatives on June 26, 1967 and in the Senate on June 30, 1967. (See Ch. 109, Acts 62nd G. A.) Neither amendment appears to eliminate the apparent conflict between these sections and Chapters 95.

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. OAG Turner to Faupel 11-2-67. It is the time of "passage" rather than the time of "approval" or effective date which must be considered in determining what the legislature intended when two acts of the same General Assembly are in apparent conflict. It thus appears that the 62nd G. A. passed provisions relating to the same subject matter during the same session, and that the date of the passage of the amendment to §80.4 was after the date of passage of Ch. 95, 62nd G. A. Such enactment strongly militates against any contention that there was an implied repeal of either of those sections of Chapter 80 that deal with the same subject matter as does Ch. 95, Acts 62nd G. A.

To the same effect as *Casey vs. Harned, supra, is Eckerson vs. City of Des Moines*, 137 Iowa 452, 115 N. W. 177. At page 191, the Court says:

"Repeals by implication are not favored, and only where we are driven thereto by the necessitities of the situation do we hold that a repeal has taken place, . . . Especially where the two acts supposed to be in conflict were enacted by the same General Assembly, they should be so construed as to give effect to each if that is reasonably possible."

Section 3(15) of Ch. 95, 62nd G. A., exempts from the coverage of Ch. 95 "any other position or positions excluded by law." I can only conclude that this general exclusion was intended by the general assembly to cover such a situation as we find in the apparent conflict between Ch. 80, Code of Iowa, 1966, and Ch. 95, Acts of the 62nd G. A. and that the authority granted to the commissioner of public safety with regard to personnel administration is not impaired or changed by the passage of Ch. 95, 62nd G. A.

March 27, 1969

STATE OFFICERS AND DEPARTMENTS, RULES AND REGULATIONS — Ch. 17A, Code of Iowa, 1966, as amended by Ch. 92, Acts, 62nd G. A.; H.F. 68 and H.F. 394, 63rd G. A. Ch. 17A, does not, of itself, establish authority in state entities to promulgate rules and regulations. It is, rather, a guide to the methods of rule making. Any rule promulgated by a state agency, under power delegated to it by statute, except those within the exceptions provided in §17A.1, are subject to the provisions of Ch. 17A. (Turner to Schroeder, 3/27/69) #69-3-20

The Hon. LaVerne Schroeder, State Representative: You have asked for an opinion on the following:

"The wording of Sec. 5 of House File 394.

" 'shall operate under rules and regulations promulgated by the state highway commission.'

"1. Isn't this power already provided in Chapter 17A, Code 1966?

"2. If Chapter 17A, Code 1966, was amended or changed and this section of House File 394 was not also changed, would this still leave rule making authority to the Highway Commission. It would seem to me that this would still leave the Highway Commission rule and regulation authority even if Chapter 17A was amended or repealed.

"3. In House File 68, page 3, line 14, the department of social welfare adds the phrasing 'and in accordance with rules and regulations made by the state department of social services.' It would seem to me that they already have this power in Chapter 17A, Code 1966. I am wondering if this would give the department the power to make rules and regulations which would not have to be submitted to the rules review committee of the legislature for their examination or approval. This phrasing certainly looks like it is not in the best interest of the Iowa taxpayers.

"4. It would seem to me that under Chapter 17A that it would be very unnecessary for any of the departments of the state of Iowa to include language such as these two examples in any of their proposed departmental bills. I certainly feel that they would have the power to implement rules and regulations concerning their operation through Chapter 17A, Code 1966."

1. Chapter 17A, 1966 Code of Iowa, does not, of itself, establish authority in state entities to promulgate rules and regulations. It is, rather, a guide to the methods of rule making.

Section 5, H.F. 394, 63rd G. A. authorizes the highway commission to promulgate rules and regulations under which the functional classification boards shall operate. We do not, here, consider the sufficiency of the guidelines provided therein.

Section 17A.1(3) defines rule as follows:

" '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.

" '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."

Under the above subsection, it is possible that the rules to be promulgated by the highway commission would relate solely to internal control, or not be of general application, and, therefore, be exempt from the provisions of Chapter 17A.

2. Any rule promulgated by a state agency, under power delegated to it by statute, except those within the exceptions provided in §17A.1, Code of Iowa, 1966, are subject to the provisions of Chapter 17A. See §17A.5, Code of Iowa, 1966, as amended by Chapter 92, Section 5, 62nd G. A., which says:

"17A.5 Submission of proposed rules. Any agency empowered by law to make rules shall submit four copies 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."

March 31, 1969

CITIES AND TOWNS: **Capital improvements reserve funds** — H.F. 642, 63rd G. A. The General Assembly may authorize towns and cities to establish capital improvements reserve funds and to levy taxes therefore. (Stokes to Andersen, State Representative, 3/31/69) #69-3-21

The Hon. Leonard C. Andersen, State Representative: Reference is made to your letter of March 26, 1969 enclosing a copy of House File 642, 63rd G. A. requesting an opinion as to whether this bill is constitutional.

This is a bill for:

"An Act to authorize the creation of a capital improvements reserve fund by cities and towns."

which would add to Chapter 404, Code of Iowa, 1966, which deals with Municipal Revenue, a new section, as follows:

"Cities and towns may levy an annual tax, not to exceed two mills in any one year for the purpose of accumulating money in a capital improvements reserve fund. Such fund may be used for the construction, reconstruction, replacement, acquisition of sties, and costs incidental thereto, for any municipal facilities, including, but not limited to, public buildings, libraries, garages, police or fire communications systems, sanitation systems and work for solid or liquid waste collection, treatment and disposal, airports, street lighting, bridges, viaducts, parks and recreational uses, zoos, thoroughfares, malls, and parking. The levy shall be made only by a resolution adopted by favorable vote of three-fourths of the membership of the council after notice setting forth the purposes for which the moneys raised by the levy shall be used, and after a public hearing.

"A levy may be made without a vote of the people if the total millage for operating purposes and for this levy does not exceed the thirty-mill limitation of this chapter. A levy may be made exceeding the thirty mill limitation, for a period of not to exceed ten years, when authorized by the voters at any regular municipal election. A majority of votes cast at the election in favor of the proposition shall be sufficient to permit the council to levy the tax provided in this Act.

"The council may transfer to the capital improvements reserve fund any other funds not otherwise pledged or required for any other purpose. The capital improvements reserve funds may be invested as provided in section four hundred fifty-three point nine (453.9) of the Code. Balances in the capital improvements reserve fund shall not be construed as unencumbered or unappropriated funds for the purpose of preparing the estimates required by chapter twenty-four (24) of the Code. Appropriations from this fund may be transferred to other appropriate funds when authorized by resolution of the council."

The essential elements of the proposed section appear to be:

a. Cities and towns are authorized, but not required, to establish a "capital improvements reserve fund." *Line 8.*

b. The fund may be used to buy sites for and to build, repair or replace sundry public buildings and facilities. *Lines 8 through 16 inclusive.*

c. The council, after notice and a public hearing (Lines 18 through 20 inclusive) may levy a tax not greater than two mills (Line 7) for this purpose, by a resolution adopted by three fourths of the council. *Lines 17 and 18.*

d. It is not clear whether the "notice setting forth the purposes for which the moneys raised by the levy shall be used" (Lines 18 and 19) contemplates that the notice must indicate what projects, etc. are intended, or whether it would be sufficient to give notice that the moneys are to be placed in the reserve fund. (Line 2) The latter construction probably is correct, since the bill would authorize the levy for the fund, as a reserve for future expenditure.

e. The bill would *not* authorize a council to exceed the thirty mill limit on taxation. (Line 23) If a levy would go over the limit, it could be authorized, for a period not more than 10 years, only by vote of the people. *Lines 23 through 4, page 2, inclusive.*

f. The reserve fund may be, but is not required to be, invested (by the treasurer) as is provided for sinking funds by §453.9, Code of Iowa, 1966. *Lines 7 through 9, page 2, inclusive.*

g. Reserve funds would not be treated as unencumbered or unappropriated funds, for budget purposes under the terms of Chapter 24, Code of Iowa, 1966. *Lines 9 through 12, page 2, inclusive.*

h. Sundry surplus funds might be placed in the reserve fund, (Lines 5 through 7, page 2, inclusive) and the council would be authorized to transfer money from the reserve fund to "other appropriate funds." *Lines 12 through 14, page 2, inclusive.*

Since the proposed bill would be, if enacted, precisely an authorization, both to set up the reserve fund, and to levy a tax for the purpose, there would remain no room for doubt on these points.

The question here is not within the scope of that dealt with in the attorney general's opinion of July 10, 1968. That opinion held that Humboldt County was not authorized to levy a tax for "maintenance of a hospital" by §347.7, Code of Iowa, 1966. The reason was that the county at the time neither had a hospital nor had started building one, and the code section provided that "if the hospital be established," the supervisors could levy the tax. It should be noted that a few months later, after contracts were let and construction begun, a supplementary opinion of this office approved the Humboldt county levy for maintenance.

March 31, 1969

COUNTIES: Jail — §§332.3(12) and 345.1, Code of Iowa, 1966. County board of supervisors has no authority to enter into a lease purchase agreement for a county jail where cost exceeds limitation set out in §345.1 without the authorization of the voters. (Nolan to Knoke, Pottawattamie County Attorney, 3/31/69) #69-3-22

Mr. George J. Knoke, Pottawattamie County Attorney: By your letter of February 27, 1969 you request an opinion as to whether or not Potta-

wattamie County can enter into a lease purchase agreement for a county jail and, if they can, what, if any, limitations there would be. Your letter states that a citizens' committee at the request of the board of supervisors has suggested that the board give prime consideration to a lease purchase agreement under which a private enterprise would construct the building and lease it to the county.

The board of supervisors is empowered by §332.3(12), Code of Iowa, 1966:

"To purchase or acquire title or possession by lease or otherwise, 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."

Under §345.1 the board of supervisors is prohibited from ordering the erection of or building of additions or extensions or:

"the remodeling or reconstruction of a court house, jail, county hospital, or county home when the probable cost will exceed $10,000 . . . nor the purchase of real estate for county purposes exceeding $10,000 in value, until a proposition therefor shall have first been 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 $20,000."

The probable cost of the proposed jail has not been given to us. However, we believe it reasonable to assume that no jail facility could be constructed or obtained under lease for less than the amount set out in §345.1, regardless of the length of the lease.

In *Porter vs. Iowa State Board of Public Instruction,* 1966, 259 Iowa 571, 144 N. W. 2d 920, the Iowa Supreme Court ruling on an attempted lease of movable building sections to make additional classrooms held that the board had exceeded the authorization provided in §297.12 of the Code of Iowa which permits the school board, when necessary, to rent a room and employ a teacher where there are ten children for whose accommodation there is no schoolhouse. The court stated:

". . . the three instruments between the district and Raymur are indeed unusual and they go considerably beyond the authority granted by section 297.12. They attempt to do indirectly what the board could not do directly. The board attempted to circumvent the will of the voters who had refused four times to authorize a bond issue to raise funds for an addition to the existing school building. The state board acted illegally in approving this lease."

The county board of supervisors has the power under §356.8, Code 1966, to lease premises for the confinement of prisoners for reasonable time in the case of an immediate fire hazard. There are also provisions for joint use of facilities by several subdivisions of the state pursuant to agreements entered into under the authority of Chapter 28E, Code of

1966. I find no authority, however, for the county board of supervisors to enter into a lease purchase agreement for a county jail without the authorization of the voters where the exceptions of §345.1 are not met.

April 1, 1969

STATE OFFICERS: Governor—Protocol on rights of refugees is a treaty and, thus, supreme law of the land. Iowa laws do not appear to place refugees in less favorable position than aliens or non-residents; therefore, no legislation is necessary to implement the Protocol. (Nolan to Ball, Executive Assistant to Governor, 4/1/69) #69-4-1

Mr. William C. Ball, Executive Assistant, Office of the Governor: in your letter dated March 6, 1969 you requested this office to analyze and make recommendations concerning the Protocol relating to refugees acceded to by the United States on November 1, 1968.

Consideration has been given to the recommendations contained in a letter from Leonard C. Meeker, Legal Adviser, Department of State, Washington, D. C., which are in pertinent part as follows:

"The Protocol calls upon acceding countries to accord protection and certain basic rights and opportunities to victims of persecution or oppression who have fled their homelands and sought refuge in another country. Specifically it calls upon parties to accord to refugees the rights and benefits set forth in Articles 2 through 34 of the Convention Relating to the Status of Refugees of July 28, 1951. The text of that Convention appears in the enclosed treaty print, beginning at page 38.

"I wish to call to your attention in particular Article VI of the Protocol — the Federal Clause. By virtue of that article, the United States has assumed obligations only with respect to matters 'that come within the legislative jurisdiction' of the Federal Government. With respect to articles of the Convention 'that come within the legislative jurisdiction' of the several states 'which are not, under the constitutional system of the federation, bound to take legislative action,' the Federal Government is obligated to bring these articles to the notice of the appropriate state authorities with a favorable recommendation.

"Pursuant to that article, I commend to your attention Articles 2 through 34 of the Convention. The Federal Government is giving full effect to those provisions that are covered by Federal legislation, subject only to the two limited reservations set forth on page 35 of the enclosed treaty print. We recommend that the state of Iowa give effect to those provisions covered by state law and, if there are cases not covered by existing state law, give favorable consideration to the enactment of legislation consistent with the terms of the Convention."

It is my opinion that in Iowa no additional legislation is necessary to implement the Protocol. The Protocol is a treaty and thus the supreme law of the land.

Article I of the Constitution of the State of Iowa containing the Bill of Rights provides for the protection of the rights of all men. Under §1, the unalienable rights set forth include those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness. Sections pertaining generally to rights of free speech, personal security, trial by jury and due process of law, compensation for property taken by eminent domain, right of assemblage, etc. apply to all persons within the territorial boundaries of the state. Only §22 applies specifically to foreigners:

"Sec. 22. Foreigners who are, or may hereafter become residents of this State, shall enjoy the same rights in respect to the possession, enjoyment and descent of property, as native born citizens."

I have studied other provisions of the law of Iowa, particularly Chapter 85, pertaining to Workmen's Compensation, and I have discovered no provisions which would be less favorable to refugees than to other aliens sojourning in the state. It is my conclusion, therefore, that no additional legislation is required at this time inasmuch as there appears to be no distinction made which would place refugees in a position less favorable than aliens or other non-residents.

April 1, 1969

STATE OFFICERS AND DEPARTMENTS: Peace officers' retirement system — §97A.6(8) and (11), Code of Iowa, 1966. The ordinary death benefit payable to the beneficiary of a member of the peace officers' retirement system is either (1) A lump sum consisting of the member's accumulated contributions plus 50% of the compensation earned by the member during the year immediately preceding his death, *or* (2) A pension equal to one-fourth the average final compensation of the member but in no event less than $50.00 per month. §97A.6(11) does not apply to those situations where a member dies while in service. (Haesemeyer to Fulton, Ch., Peace Officers' Retirement System, Dept. of Public Safety, 4/1/69) #69-4-2

Mr. Jack M. Fulton, Chairman, Peace Officers' Retirement System, Department of Public Safety: Reference is made to your letter of March 4, 1969, in which you state:

"The board of trustees of the Peace Officers' Retirement System is in need of having your interpretation of section 97A.6(8) and 97A.6(11) so that a proper payment can be made to the widow and children of a deceased highway patrolman who died a natural death while a member of the peace officers' retirement system and employed by the Iowa highway patrol.

"Claim has been made by the estate of the patrolman, under section 97A.6, for all of the deceased patrolman's accumulated contributions, together with a pension which is equal to one-fourth of his average final compensation. The accumulated contributions are referred to in subparagraph a and the pension is referred to in the second paragraph under sub-section b.

"The trustees desire to have your answer as to whether or not the widow who was nominated by the member, is entitled to both the total of the member's accumulated contribution and also entitled to the pension equal to one-fourth of the average final compensation. The trustees also desire to know if the optional allowance under section 97A.6(11) applies in the above instance."

In our opinion the widow is not entitled to both the total of the member's accumulated contribution and also a pension equal to one-fourth the average final compensation. A careful reading of §97A.6(8), Code of Iowa, 1966, will disclose the reason for this conclusion. Such §97A.6(8) provides:

"Ordinary death benefit. Upon the receipt of proper proofs of the death of a member in service, there shall be paid to such person having an insurable interest in his life as he shall have nominated by written designation duly executed and filed with the board of trustees:

"a. *His accumulated contributions and* if the member has had one or more years of membership service and no pension is payable under the provisions of sub-section 9 of this section, *in addition thereto* —

"b. An amount equal to *fifty percent of the compensation earned by him during the year immediately preceding his death;* or

"If there be no such nomination of beneficiary, *the benefits provided in paragraphs 'a' and 'b'* of this sub-section 8 shall be paid to his estate; *or in lieu thereof,* at the option of the following beneficiaries, respectively, even though nominated as such, there shall be paid a pension which, *together with the acturial equivalent of his accumulated contributions, shall be equal to one-fourth of the average final compensation of such member,* but in no instance less than fifty dolars per month;

"c. To his widow to continue during her widowhood; or

"d. If there be no widow, or if the widow dies or remarries before any child of such deceased member shall have attained the age of eighteen years, then to the guardian of his child or children under said age, divided in such manner as the board of trustees in its discretion shall determine, to continue as a joint and survivor pension until every such child dies or attains the age of eighteen; or

"e. If there be no surviving widow or child under age eighteen, then to his dependent father and/or mother, as the board of trustees in its discretion shall determine, to continue until remarriage or death.

"f. In addition to the benefits herein enumerated, there shall also be paid for each child of a member under the age of eighteen years the sum of twenty dollars per month."

The critical language is that contained in subsections (a) and (b), particularly the italicized words. In our opinion the expression "in lieu thereof" contained in the second paragraph of subsection (b) relates back to the words in such second paragraph "the benefits provided in paragraphs 'a' and 'b' of this subsection 8." Thus, the ordinary death benefit would be (1), a lump sum consisting of the member's accumulated contribution plus half a year's salary, *or* (2) a pension which, when the acturial equivalent of the member's contribution is included in such pension, equals one-fourth of the member's average final compensation. In other words, there are two options available, a lump sum payment or a pension, but not both. The lump sum option includes accumulated contributions plus six month's pay. The pension is three month's pay per year or $50 per month, whichever is greater.

The inclusion in subsection (b) of the expression "together with the acturial equivalent of his accumulated contribution" presumably was calculated to make it clear that both a lump sum return of accumulated contribution and a pension were not intended. If, as has been suggested, the expression "or in lieu thereof" refers not to "the benefits provided in paragraphs 'a' and 'b' " but to the preceding words "An amount equal to fifty percent of the compensation earned by him during the year immediately preceding his death," then the words "together with the acturial equivalent of his accumulated contributions" become superfluous. It would have been much simpler to simply say ". . . a pension which shall be equal to one-fourth the average final compensation of such member. . . ." Indeed, in §97A.6(9), dealing with accidental death benefits, essentially this language was used. Thus, §97A.6(9) provides in the case of a member's accidental death while in the performance of duty that in lieu of the ordinary death benefit there shall be paid to the beneficiary of the deceased member:

"a. His accumulated contributions; and in addition thereto —

"b. A pension equal to one-half of the average final compensation of such member shall be paid to his widow, children or dependent parents as provided in paragraphs 'c,' 'd,' and 'e' of subsection 8 of this section."

Here it is clear that both a lump sum return of contributions and a pension are contemplated.

In response to your second question, it is our opinion that §97A.6(11) does not apply to the situation you describe. Such §97A.6(11) provides:

"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 state commissioner of insurance 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 per cent of his accumulated contributions shall be made by the board of trustees upon said member's or beneficiary's election."

Plainly, this section applies only to situations where a member has retired; not to those situations, such as the one you describe, where a member dies while still employed by the highway patrol. A number of events may constitute retirement, but death is not one of them. A discussion of the application of §411.6(11), which is virtually identical to §97A.6(11), is contained in a prior opinion of the attorney general, Martin to Shaff, State Senator, May 29, 1968, a copy of which is attached.

April 1, 1969

STATE OFFICERS: Sinking Fund — §§12.10, 454.12, Code of Iowa, 1966. Sinking fund protection is accorded to deposits of state funds made in compliance with Ch. 453, 1966 Code. Retained funds under §12.10, 1966 Code, are not protected by the sinking fund. (Ivie to Baringer, State Treasurer, 4/1/69) #69-4-3

The Hon. Maurice Baringer, State Treasurer: You have asked the following with reference to state sinking fund protection of public deposits:

"1. Are funds of state level entities protected by the state sinking fund?

"2. Are funds not deposited with the Treasurer by virtue of §12.10, 1966 Code, covered by the state sinking fund?"

Section 454.2, 1966 Code, reads:

"The purpose of said fund shall be to secure the payment of their deposits to state, county, township, municipal, and school corporations having public funds deposited in any bank in this state, when such deposits

have been made by authority of and in conformity with the direction of the local governing council or board which is by law charged with the duty of selecting depository banks for said funds."

The wording of §454.2, 1966 Code, as it affects the deposits of the various offices, agencies, departments, boards, commissions, institutions and bureaus of state government, is indeed ambiguous. The word "state," as it appears in that section, must be construed to be an adjective descriptive of the noun "corporations," just as the words "county, township, municipal and school" must be so construed. While "municipal corporations," "school corporations" and "county corporations" are expressly so defined by statute (See §§368.2, 274.1 and 332.1, 1966 Code), the various entities of state government, and indeed the state itself, are not coroprate bodies. But, since "state corporations" do, and did, not exist as such, and since the construction of the section clearly indicates that public deposits of such entities were to be protected by the sinking fund, we would arrive at a theory that the actions of the general assembly were a nullity in this regard; that it accomplished nothing by including the word "state" in §454.2, 1966 Code. We cannot presume that the legislature wasted its process upon a vain and empty enactment.

The title of the Act establishing the sinking fund reads in part as follows:

"An Act to create a state sinking fund for public deposits and to provide a method for the payment of public funds deposited as provided by law, in banks which have since become insolvent; . . . to increase the powers of the executive council, . . . relating to deposits of public funds; . . . to amend, revise, and codify sections one hundred thirty-nine (139), . . ."

The title does not purport to limit the funds covered by the sinking fund to non-state level funds. And, in addition, §6 of the original Act amends the public fund depository requirements of the state treasurer as they then existed.

Later amendments to what is now Chapter 454, 1966 Code, are also of aid in determining that the sinking fund does indeed secure the deposits of state level entities. Section 454.14 presently reads in part:

". . . the state of Iowa, or any county, city, town, school district or township may . . ."

This section relates to the method of making claims on the sinking fund and the procedure for allowing such claims to be paid. Such language, properly including the state of Iowa as a claimant, would correct any infirmity alleged in §454.2.

II.

With reference to those funds retained by elective and appointive state officers, boards, commissions, and departments, as authorized by §12.10, 1966 Code, §453.1, 1966 Code, does not require that the persons or entities collecting or receiving the same have approval for any depository they choose for custody of such public funds. When the predecessor of §12.10, 1966 Code (Ch. 112 §6, 13th G. A.) was enacted, those officers directed to deposit with the state treasurer had no right to retain any portion of

their receipts. A later amendment authorized the retention of 10 percent of funds collected, not to exceed $5,000.00. (§12.10, 1966 Code.) There was no simultaneous amendment to Chapter 453, 1966 Code, requiring state entities to handle deposits of such retained funds in the same manner as is required of the Treasurer.

Section 454.2, 1966 Code, therefore, appears to exclude sinking fund protection of §12.10 retained funds even though they may have been deposited in selected and authorized depositories. I conclude this from the following wording of that section:

". . . where such deposits have been made by authority of and in conformity with the direction of the local governing council or board which is by law charged with the duty of selecting depository banks for said funds."

There being no duty in anyone to select depository banks for deposit of §12.10 funds, such funds do not come within the defined purpose of the sinking fund.

April 4, 1969

MOTOR VEHICLES: Highways — §321.457(4) is an exception to the maximum length provisions of §321.457, Code of Iowa, 1966, and authorizes the movement of portable livestock loading chutes of 13 feet including their tongues in combination with 35 foot single trucks or in combination with any truck tractor or semitrailer, provided the 3 vehicle combination does not exceed an overall length of 60 feet, but does not exclude the movement of an 18 foot chute in combination with any vehicle or combination of vehicles which, with the chute, do not exceed the limitations of §321.457(3) and (6), Code of Iowa, 1966. (Graham to Don Carlos, Adair County Attorney, 4/4/69) #69-4-4

William W. Don Carlos, Adair County Attorney: I am in receipt of your letter of October 3 wherein you requested the following opinion:

Does Section 321.457, Subsection 4 restrict the maximum length of a portable livestock loading chute to 13 feet including its tongue, which may be drawn by any vehicle or combination of vehicles, or could the portable livestock chute be in excess of 13 feet including the tongue as long as such vehicle or combination of vehicles drawing such loading chute is not in excess of the legal length provided for such vehicles or combinations?

Does Section 321.457 mean that a truck having a total length of 35 feet could not pull even a 13 foot portable livestock loading chute or could a truck, tractor or semitrailer having a total length of 55 feet pull a 15 foot portable livestock loading chute?

The applicable Sections of the Code are in pertinent part:

Section 321.457 — Maximum Length.

"The maximum length of any motor vehicle or combination of vehicles . . . shall be as follows:

1. *No single truck*, unladen or with load, shall have an overall length, inclusive of front and rear bumpers, in excess of 35 feet.

* * *

3. Except as to combinations of vehicles, provisions for which are otherwise made in this chapter, no combination of truck tractor and semitrailer, *now any other combination of vehicles coupled together*, un-

laden or with load, shall have an overall length, inclusive of front and rear bumpers, in excess of 55 feet.

4. . . . Further providing that a portable livestock loading chute not in excess of a length of 13 feet including its hitch or tongue may be drawn by any vehicle or combination of vehicles, *provided that such vehicle or combination of vehicles drawing such loading chute is not in excess of the legal length provided for such vehicles or combinations.*

* * *

6. *No combination of 3 vehicles* coupled together, one of which is a motor vehicle, unladen or with load, shall have an overall length, inclusive of front and rear bumpers in excess of 60 feet."

This Code section has been previously construed by the Attorney General and a copy of said Opinion is attached. 1958 OAG 193 to Tucker, 1-28-58. This earlier Opinion held that the language of Section 321.457(4) pertaining to portable livestock loading chutes was an exception to the maximum length provisions and did not establish a maximum length of a portable chute as a single unit.

The exception is now subject to the 60 foot 3 vehicle combination restriction of Section 321.457(6) and must be strictly construed. *Wood Bros. Co. vs. Eicher*, 231 Iowa 550, 562, 1 N. W. 2d 655, 661 (1942). Thus the legal maximum length is 35 feet plus 13 feet for a single truck with loading chute and 60 feet for a combination of either 2 or 3 vehicles including the 13 foot loading chute. 321.457(1), (3) and (6) of the 1966 Code of Iowa.

Consistent with the 1958 Attorney General's Opinion, the language of Section 321.457(4) was not intended to restrict the maximum length of portable livestock loading chutes to 13 feet. Accordingly, the 18 foot loading chute mentioned in your Opinion request could be towed in combination with a single truck provided the truck did not exceed 35 feet in length and the truck in combination with the particular loading chute did not exceed 55 feet. Section 321.457(1) and (3) of the 1966 Code of Iowa. Or, such a chute may be towed as a part of a 3 vehicle combination provided that the total length of the 3 vehicle combination did not exceed 60 feet and the first and second vehicles complied with the requirements of Section 321.457(1) and (3) respectively. Care should also be taken to comply with Section 321.461 limiting the drawbars of towed vehicles such as this livestock loading chute to 15 feet.

CONCLUSION

I, therefore, conclude that Section 321.457, Subsection 4 does not restrict the maximum length of portable livestock chutes to 13 feet including their tongues. Further, that an 18 foot portable livestock chute may be moved by a single truck so long as the drawbar does not exceed 15 feet and the truck does not exceed 35 feet in length. The Section would authorize a 35 foot truck to pull a 13 foot portable livestock loading chute but would not authorize a truck tractor or semitrailer having a total length of 55 feet to pull a 13 foot portable livestock chute for the reason that the total length of the 3 vehicles in combination exceeds the 60 foot limitation of Section 321.457, Subsection 6 of the Code.

April 4, 1969

HIGHWAY COMMISSION, CITIES AND TOWNS, Joint Public Improvements, Highways — §§28E.3, 28E.4, 28E.6, 28E.12, 28E.13, 126(1), 262.67, 306.33, 306A.3, 306A.5, 306A.6, 306A.7, 306A.8, 313.21, 313.22, 313.23, 314.6, 391A.2, 391A.1(12), 391A.26, 391A.35, 404.7(2)(13), 471.2, 471.3, Code of Iowa, 1966. The Highway Commission and cities may enter into a joint agreement under authority of Chs. 313, 306A, 391A and 28E and §314.6 of the Code to jointly improve extensions of primary highways including necessary or desirable local service roads, either within or along the corporate limits of the city. Primary road funds may be expended under such a joint agreement and provisions may be made for the Commission to purchase local service road right-of-way in the name of the city and to construct the same and for the city to assume maintenance of the local service roads of the project and to contribute to the cost of necessary extensions of storm sewer outside the limits of the city. (Turner to Coupal, Director of Highways, Highway Commission, 4/4/69) #69-4-5

Mr. J. R. Coupal, Jr., Director of Highways, Iowa State Highway Commission: In your letter of recent date, you request an answer to the following questions:

"1. May the Highway Commission and the City of Urbandale enter into a joint public improvement project under authority of Chapter 28E and 306A for the reconstruction of Hickman Avenue (the primary road extension along the south side of Urbandale city limits) which requires the relocation of the existing street connections and their reconstruction as local service roads? If so, may the Commission allocate and expend primary road funds to defray the costs of the purchase of right-of-way on behalf of the joint project in the name of, and with title to run to the city, and to pay the cost of the reconstruction of said local service roads?

"2. May municipalities expend road use tax funds or other monies for construction and maintenance of storm sewers built in joint projects with the Iowa State Highway Commission located outside of their corporate limits?"

A review of the proposed agreement between the Commission and the City, would appear necessary in order to obtain an understanding of the nature of the qeustion. Attached is a diagram outlining the proposed project.

According to the agreement the total project envisions a single construction contract for the construction of a limited controlled-access road along Hickman Road from Interstate 80, east to 63rd Street. The project runs along the southwest corner of the City of Urbandale through the City of Clive and along and adjacent to the Cities of Windsor Heights and Urbandale.

It is noted that the center line of Hickman Road west of the City of Clive, coincides approximately with the south corporate limit of the southwest corner of the City of Urbandale. On the other hand, the south corporate limit of the City of Urbandale coincides approximately with the north right-of-way line of Hickman Road, along the east end of the project from the City of Clive, east to the City of Des Moines.

The project includes certain widening of the right-of-way for Hickman Road itself, and a certain relocation of the intersection of 72nd Street with Hickman Road, and the establishment of certain other local service parallel streets. Both the Hickman Road widening and the proposed new

and the proposed reconstructed and relocated city streets would all be entirely within the limits of the City.

It is apparently the intention of both the City and the Highway Commission that the new and the relocated and reconstructed local streets shall function to serve existing adjacent land uses or more generally, local traffic. To this end, the local service streets are to be separated from Hickman Road itself, by either the construction, or traffic signals, or signs. The City agrees to accept the new and the reconstructed and relocated city streets as part of their street system for all purposes including maintenance.

The original costs of the project, are to be paid by the Highway Commission from the primary road fund. Upon completion of the project, the City of Urbandale will contribute to or reimburse the Highway Commission for a portion of the cost of the establishment of the relocated and new local service streets within the corporate limits of the city.

ANALYSIS OF QUESTION 1.

Your first question appears to raise three basic issues:

1. Does Chapter 306A authorize the Highway Commission to include work on city streets, other than the extension of the primary highway itself, within a controlled-access construction project, and expend primary road funds to accomplish the proposed work on those city streets within the concept of the project?

2. May the Highway Commission and the City enter into a joint public improvement project in order to cause the establishment and relocation of such local city streets?

3. Assuming the answer to question (2.) is yes, may the City under authority of Chapter 28E exercise its power to purchase right-of-way for street purposes in a manner so as to authorize the Commission to purchase or condemn right-of-way for local service streets in the name of, and with title to run to the city?

1. The primary road fund has long been available for the improvement of extensions of primary highways inside cities and towns. Section 313.21 states:

"The state highway commission is hereby given authority, subject to the approval of the council, to construct, reconstruct, improve and maintain extensions of the primary road system within any city or town including the construction, reconstruction, and improvement of storm sewers and electrical traffic control devices reasonably incident and necessary thereto, provided that such improvement, exclusive of storm sewers, shall not exceed in width that of the primary road system and the amount of funds expended in any one year shall not exceed twenty-five percent of the primary road construction fund.

"The phrase 'subject to the approval of the council,' as it appears in this Section, shall be construed as authorizing the council to consider said proposed improvements in its relationship to municipal improvements (such as sewers, water lines, sidewalks and other public improvements, and the establishment or re-establishment of street grades). The location of said primary road extensions shall be determined by the state Highway Commission."

Section 313.22 of the Code states:

"Any city or town and the state highway commission may enter into an agreement with respect to any project for the paving of any portion of a primary road extension, and for the construction, reconstruction, and improvement of storm sewers and electrical traffic control devices reasonably incident and necessary thereto, within such city or town. Said agreement shall specify that the city or town shall pay for that portion of the cost of said project which is not payable out of primary road funds, and may authorize the state highway commission to advertise for bids, let contracts, and supervise the construction of that portion of said project to be paid for by the city or town. Such agreement shall be a valid and binding obligation on the parties thereto."

This last section authorizes the City and the Highway Commission to enter into agreements to accomplish not only work on the extension itself, but also incidental matters such as storm sewers, traffic control devices, and the like and for the Commission to advertise for bids and let contracts and supervise the construction of the work, including that portion to be paid for by the City.

Section 313.23 enables the Highway Commission to pay the original cost of the improvement and to be reimbursed upon completion of the project for the amounts advanced out of the primary road fund and expended on behalf of the City.

Considering §§313.21, 313.22, and 313.23, alone, it could be said that their grant of authority extends only so far as to include the extension itself, or put another way, that they granted the Commission authority to work on city streets or facilities, only where such local work is both incidental and engineeringly necessary to work on the extension proper.

But as your first question indicates, these Code sections must be read and construed in light of Chapter 306A of the Code. This latter Chapter being a subsequently enacted statute, authorizing highway authorities to plan, designate, establish, regulate, vacate, alter, improve, maintain, and provide controlled-access facilities shall control in any case concerning an irreconcilable conflict with prior general statutory authorizations. *Iowa Power and Light Co. vs. Iowa State Highway Commission*, 254 Iowa 534, 117 N. W. 2d 425 (1962).

Section 306A.3 states:

"Cities, towns, and *highway authorities* having jurisdiction and control over the highways of the state, as provided by Chapter 306, *acting alone or in co-operation with each other* or with any federal, state, or local agency or any other state having authority to participate in the construction and maintenance of the highways, *are* hereby *authorized* to plan, designate, establish, regulate, vacate, alter, improve, maintain, and provide controlled-access facilities for public use wherever such authority or authorities are of the opinion that traffic conditions, present or future, will justify such special facilities; *provided, that within cities and towns such authority shall be subject to such municipal consent as may be provided by law.* Said cities, towns, and highway authorities, in addition to the specific powers granted in this Chapter, shall also have and may exercise, relative to controlled-access facilities, any and all adidtional authority now or hereafter vested in them relative to highways or streets within their respective jurisdictions. Said cities, towns and highway authorities may regulate, restrict, or prohibit the use of such controlled-access facilities by the various classes of vehicles or traffic in a manner consistent with Section 306A.2." (Emphasis added)

It is noted that the above grants the Highway Commission authority

to construct such a facility on its own and subjects such authority to the single requirement that it obtain "such municipal consent as may be provided by law." In addition to the specific powers granted to the Commission in the Chapter, §306A.3 also provides that the Commission shall have and may exercise in relation to such controlled-access facilities any and all additional authority now or hereafter vested in it.

The consent required by §306A.3 must refer to §313.21. This latter code section requires approval or consent to the improvement of a primary highway extension, only as it relates to municipal improvements

". . . (such as sewers, waterlines, sidewalks, and other public improvements, and the establishment or re-establishment of street grades)."

Section 306A.5 states in pertinent part:

"For the purposes of this Chapter, cities, towns, and *highway authorities* having jurisdiction and control over the highways of the state, as provided by Chapter 306 may *acquire* private or *public property rights* for controlled-access facilities and *service roads*, including rights of access, air, view, and light, by gift, devise, purchase, or condemnation *in the same manner as such units are now or hereafter may be authorized by law to acquire such property* or property rights in connection with highways and streets within their respective jurisdictions. All property rights acquired under the provisions of this Chapter shall be in fee simple. In connection with the acquisition of property or property rights for any controlled access facility or portion thereof, or service road in connection therewith, the said cities, towns, and highway authorities, in its discretion, acquire an entire lot, block, or tract of land, if, by so doing, the interests of the public will be best served, even though said entire lot, block, or tract is not immediately needed for the right of way proper." (Emphasis added)

Section 306A.6 authorizes the designation and establishment of existing streets or highways to be included within the controlled-access facility itself. It further grants authority to provide for the elimination of intersections at grade, and for the establishment of service roads, or for the closing of such roads and streets at the right-of-way boundary line of the controlled-access highway. In addition, the Section contains the prohibition that after establishment of the controlled-access facility no highway or street which is not a part of the facility, shall intersect the same at grade.

Then §306A.8 states:

"In connection with the devolopment of any controlled-access facility cities, towns and *highway authorities* having jurisdiction and control over the highways of the state, as provided by Chapter 306, *are authorized* to plan, designate, establish, use, regulate, alter, improve, maintain, and vacate local service roads and streets or *to designate as local service roads and streets any existing road or street, and to exercise jurisdiction over service roads* in the same manner as is authorized over controlled-access facilities under the terms of this Chapter, *if, in their opinion, such local service roads and streets are necessary or desirable.* Such local service roads or streets shall be of appropriate design, and shall be separated from the controlled-access facility proper by means of all devices designated as necessary or desirable by the proper authority." (Emphasis added)

A review of §§313.21, 306A.5, 306A.6 and 306A.8 leads me to the conclusion that the Commission could not only acquire *public* property rights necessary to the project, but could include within the concept of the proj-

ect, the establishment of new local service roads, as well as designate and alter existing local streets where either *necessary* or *desirable* in order to accomplish the purposes for the project.

In answer to the first of the three basic issues raised by your question, I am of the opinion that Chapter 306A authorizes the Commission to expand the concept of primary extension to include relocations or reconstructions or establishments of local service streets such as those which are the subject of the Urbandale agreement. To this same general effect, see my Opinion of January 16, 1968, to the then Governor Hughes. The opinion acknowledges the Commission's authority to expend primary raod funds for the establishment and improvement of road side safety rest areas within the concept of a controlled-access highway, and it would be our opinion that this same principle would apply to the project you have described. Additional authority is provided in §314.6 for the expenditure of primary road funds on extension of roads along the borderline of cities and towns.

2. While it is clear that the proposed City street intersections with Hickman Road and other local service street facilities, may be established or constructed or reconstructed by the City acting alone, *Wallace vs. Foster*, 213 Iowa 1151, 241 N. W. 9 (1932), *Smith vs. City of Algona*, 232 Iowa 362, 5 N. W. 2d 625 (1942), the work may also be accomplished by both the City and the Highway Commission cooperating one with the other. *Gardner vs. Charles City*, ...Iowa....., 144 N. W. 2d 915.

Section 306A.7 states:

"Cities, towns and *highway authorities* having jurisdiction and control over the highways of the state, as provided by Chapter 306 *are authorized to enter into agreements with each other*, or with the federal government, *respecting* the financing, planning, establishment, improvement, maintenance, use, regulation, or vacation *of controlled-access facilities or other public ways in their respective jurisdictions*, to facilitate the purposes of this Chapter." (Emphasis added)

Thus, in response to the second issue raised by your first question, it is our opinion that the City and Highway Commission may enter into a joint public improvement project in order to cause the establishment and relocation of local city streets included within such a project.

3. The answer to the third issue raised by your first question requires further analysis of both Chapters 306A and 28E of the Code.

As we have seen, §306A.5 grants authority to the City and the Commission to acquire right-of-way and necessary property rights:

". . . by gift, devise, purchase, or condemnation *in the same manner as such units are now or hereafter may be authorized to acquire such . . .*" (Emphasis added)

In this connection, §28E.3 of the Code states:

"*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 the State having such power* or powers, privileges 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 permits 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." (Emphasis added)

Section 28E.6(2) envisions as a term of the agreement a provision for:

"The manner of *acquiring*, holding, and *disposing of real* and personal *property* used in the joint co-operative undertaking." (Emphasis added)

Section 28E.4 contemplates the expense of such authority pursuant to the terms of a written agreement.

Section 28E.12 of the Code states:

"Any one or more public agency may contract with any one or more 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 the responsibilities of the contracting parties." (Emphasis added)

An analysis of §§313.21, 313.22 and 313.23, and Chapter 306A and Chapter 28E, and in particular §§28E.3 and 28E.12, shows a clear and progressive extension of intergovernmental, co-operative powers.

Chapter 306A expands the authority of the Commission and the City to encompass all the elements of the cooperative project, including establishment, improvement, maintenance, use, regulation, and vacation of the access-controlled facility as well as other public ways or city streets within the project. Section 306A.7, Code of Iowa. Such an expansion would appear both logical and necessary in order to facilitate orderly and efficient balancing of the interest of thru-traffic as the primary purpose of such controlled-access facilities with the interest of maintaining such local service facilities as are consistent with the project.

As we have seen, both the Commission and the City have the authority to condemn right-of-way necessary to work on local service streets involved in a controlled-access project. §306A.5, §28E.12. Section 28E.3 grants authority to the Commission and to the City to jointly exercise their respective powers. This is consistent with the purpose of enabling state and local governments to make efficient use of their powers in providing joint services and facilities and in co-operating one with another to their respective and mutual advantage. See my Opinion to Senator Mills, dated March 6, 1967, and earlier Opinion, 1966 OAG 134. The last sentence of this same §28E.3 makes it clear that the Highway Commission when acting jointly with the City may exercise and enjoy *all* the powers conferred by the Chapter.

The joint undertaking proposed by the agreement establishes the Commission's responsibility to purchase right-of-way for local service streets on behalf of the joint project, with title to run to the City. The code contains at least three other examples of similar intergovernmental co-operative grants. Section 262.67, for example, gives the Board of Regents authority, subject to the approval of the Executive Council, to grant *easements* for right-of-way over and across public lands. Similarily, §306.33 grants the Commission authority to grant, sell, exchange, or convey to the United States perpetual rights, powers, privileges and *ease-*

ments to overflow, flood, and submerge all portions of easements for highway purposes.

Sections 471.2 and 471.3 not only provide for the purchase or condemnation of land by the state for the use and benefit of the federal government, but also its ultimate conveyance thereto.

It is my opinion that §§471.2 and 471.3 of the Code very nearly characterize the nature of the grant of authority contained in §28E.12 of the Code. Section 28E.12 authorizes not only the joint exercise of mutually possessed powers, but also the exercise by one agency of the power of the other in accordance with the contract.

Accordingly, it is my view that §28E.12 provides sufficient authority for the City to contract with the Commission, authorizing the Commission to act as its agent under the terms of proper agreement in order to acquire right-of-way necessary to the relocation of streets and local service roads. Moreover, §28E.13 of the Code provides:

"The powers granted by this Chapter shall be in addition to, any specific grant for intergovernmental agreements and contracts."

The procedure proposed in the agreement would appear to be designed to promote efficient acquisition of necessary property wherein the single authority would acquire all property necessary for the total project. Also note that the agreement requires the City to perform future maintenance on all the local service streets. In this light, a procedure designed to place title in the name of the City seems quite sensible.

ANALYSIS OF SECOND QUESTION

The answer to your second question would appear to depend upon the facts as they relate to §391A.2 of the Code. That section states:

"Municipalities shall have the power to construct, and repair all public improvements within their limits, and main sewers, sewage pumping stations, disposal and treatment plants, waterworks, water mains, and extensions, and drainage conduits extending outside their limits, and assess the cost thereof to private property within the municipality as hereinafter provided."

Sewer as defined in §391A.1(12) is broad enough to include storm sewers. And the grant of authority as contained in §391A.2 would also appear to authorize the construction of storm sewers outside the limits of the City as an extension of an existing internal facility.

I am, therefore, of the opinion that where the external storm sewer is an extension of an internal facility, the same may be constructed by the City, either alone or in co-operation with the Highway Commission under an agreement similar to that proposed. There is ample authority for the City to pay for such public improvement. See §§391A.26, 391A.35, 126(1), 404.7(2), (13) of the Iowa Code.

April 7, 1969

STATE OFFICERS AND DEPARTMENTS: Appointment of Officers — Constitution of Iowa, Art. III, §§1, 8; §257.1, Code of Iowa, 1966, as amended by §23, Ch. 244, Acts of 62nd G. A.; §§2.40 and 7.2, Code of

Iowa, 1966; §1, ¶4, Ch. 342 and §2, Ch. 209, Acts of 62nd G.A. — Appointment to office is an executive act of the governor which the governor may not recall or revoke. The appointee assumes office, in law and in fact, and subsequent nomination to such office by the governor, and senate approval of such nomination, are without force or effect, since there is no vacancy. An appointment having been duly made and entered on the Executive Journal, the senate has notice of the contents of the journal, and no communication of the appointment by the governor is necessary to give the senate the right to take up the appointment. (Turner to Ball, Executive Assistant to Governor, 4/7/69) #69-4-6

Mr. William C. Ball, Executive Assistant, Office of the Governor: Reference is made to your letters of March 28 and April 1, 1969 in which you set forth: That Governor Hughes appointed three persons to the Tax Review Board, three persons to the State Board of Public Instruction and five persons to the Council of Social Services; that Governor Ray subsequently submitted to the Senate the names of certain persons for consideration for appointment to these offices; and that three of the persons whose names were so submitted by Governor Ray were approved by the Senate during the current (1969) session, one for the Tax Review Board and two for the Council of Social Services.

Concerning these proceedings, your letters propound the following questions:

"1. What is the duty of the Iowa Senate to act upon confirmation of these appointees of former Governor Hughes without formal submission to the Senate by former Governor Hughes when there has been entry of the appointments into the Executive Journal?

"Must Governor Ray formally submit the names of the appointments made by former Governor Hughes for Senate confirmation, and only in the event these appointees are rejected by the Senate may he then proceed by placing before the Senate the names of his appointees for confirmation?

"2. When is a Gubernatorial appointment valid — at the time the appointment is made or on the date of confirmation? In other words, are these appointments nominations to be confirmed by the Senate, vesting no title to the office until both Governor and Senate concur, thus allowing the Governor to substitute new nominations? On this question your attention is directed to Section 2.40 of the 1966 Code of Iowa, which uses the word 'nomination' when referring to the Senate procedures in confirming public officers."

On these questions, your attention is directed to my opinion issued February 28, 1969 at the request of Lester D. Menke, president, State Board of Public Instruction, which made clear that the Senate may act upon Governor Hughes' appointees to that board "at any time prior to adjournment of the present session, there being no time specified by law or the constitution in this regard"; that "until the senate does so act before adjournment, all three of these appointees are members of the state board of public instruction, entitled to act accordingly"; and that the nomination of Mrs. Cole (the only one of the three proposed by Governor Ray who was not appointed by Governor Hughes) "may not be acted upon."

There appears no necessity here to repeat the substance of the opinion of February 28, which applies with equal cogency to appointments to

other agencies, as well as to the state board of public instruction.

Further, with reference to Question 1, the law provides as follows for appointment of members of the three agencies here concerned:

The state board (of public instruction) "shall be appointed by the governor with the approval of two thirds of the members of the senate . . ." Chapter 244, §23, Acts of the 62nd G. A.

"Members (of the State Board of Tax Review) shall be appointed by the governor subject to the confirmation of two thirds of the members of the senate . . ." Chapter 342, §1, ¶4, Acts of the 62nd G. A.

"The council (on Social Services) shall consist of five members appointed by the governor with the consent of two thirds of the senate . . ." Chapter 209, §2, Acts of the 62nd G. A.

An appointment is an executive act; once made it is irrevocable, unless the power to revoke is granted by constitution or the law, which in Iowa it is not. 42 Am. Jur. 960, 89 A.L.R. 138, and cases there cited.

The power to confirm, approve or consent to the appointments by Governor Hughes is vested in the Iowa senate by the three Acts which have been indicated. A procedure for such action is found in the law. §2.40, Code of Iowa, 1966. As a matter of law, the Senate has notice of the appointments made by Governor Hughes and entered in the Executive Journal, maintained pursuant to law. §7.2, Code of Iowa, 1966. See *Barrett vs. Duff*, 114 Kan. 721, 217 p. 918.

1. Thus, in answer to the first division of your first question, the right of the senate to take up these appointments is clear. *Bell vs. Sampson*, 232 Ky. 376, 23 S. W. 2d 575. What the *duty* of the senate may be in this regard neither the judicial nor the executive departments may presume to say; no officer of one department may exercise any function appertaining to either of the others. Iowa Constitution, Article III, §1. Moreover, each house of the General Assembly has exclusive power to determine its rules of proceedings. Iowa Constitution, Article III, §8. As to the second division of your first question, the senate having notice of the appointments by Governor Hughes, there is no necessity for Governor Ray to communicate those appointments to the Senate. The governor may make appointments to fill vacancies, should any occur, by resignation, death, failure to receive senate approval or otherwise; he may submit to the senate for approval prospective appointments to full terms prior to the commencement of such terms, e.g. those of Mr. Hicklin and Mr. Albert.

2. In answer to your second question, the appointments by Governor Hughes were effective when the appointees qualified and assumed their offices. The dates of confirmation have no bearing on the effective date of the appointment. As noted, Mr. Hicklin, who was confirmed, and Mr. Albert, assuming his confirmation, may assume their offices upon the date fixed by law for the commencement of the full terms for which they were appointed.

CAVEAT

In my opinion of February 28, 1969, I noted that Governor Hughes' appointment of three members to the state board of public instruction was

subject to approval by the senate; that the senate had not acted upon said appointment and "it (the senate) may do so at any time prior to adjournment of the present session, there being no particular time limit specified by law or the constitution in this regard." In other words, if the senate did not act upon the appointments by the end of the present session, those particular offices would become vacant because the failure to act would constitute a rejection. However, I am aware that each house of the legislature is now considering new rules which may carry over pending business from the first annual session of the 63rd general assembly to the second annual session thereof. See OAG 3/24/69, Turner to Millen. In making such rules as may be applicable to the senate, consideration should be given to the problem of whether pending appointments of the governor on which no action has been taken by the senate will or will not be held over to the next session as part of the pending business.

April 7, 1969

COURTS: Juvenile court referee — §231.3, Code of Iowa, 1966, as amended by Ch. 203, §26, Acts, 62nd G. A. and §605A.10, Code of Iowa, 1966. A juvenile court referee is neither a state officer nor a state employee, and a retired district court judge could accept an appointment as such a referee without loss of his annuity. (Haesemeyer to Skiver, Osceola County Attorney, 4/7/69) #69-4-7

Mr. D. E. Skiver, Osceola County Attorney: Reference is made to your letter of March 18, 1969, in which you state:

"In the latter part of March, 1969, one of the Judges of the Eighteenth Judicial District is being retired from active service. His retirement will leave this District with only two Judges during the foreseeable future. The possibility of appointing the retiring Judge as a Juvenile Court Referee has been brought up and your opinion will be appreciated on the legality of such appointment. The Referee would have jurisdiction in the six counties of the Eighteenth Judicial District and would be paid, proportionally, by the six counties.

"For your information Section 231.3 of the 1966 Code of Iowa was amended by Section 26 of Chapter 203 of the Laws of the 62nd General Assembly to provide for the appointment of such Referee.

"Your attention is further called to Section 605A.10 of the 1966 Code which provides: 'No annuity shall be paid to any person entitled to receive an annuity hereunder while he is serving as a State Officer or employee.'

"In my opinion the retired Judge would be eligible for appointment as a Juvenile Court Referee and since his payment will be coming from the counties, he would not be regarded as a State Officer or employee and would not lose his annuity under the Judicial retirement system.

"I would appreciate very much receiving your opinion on both of the questions submitted."

§231.3, Code of Iowa, 1966, as amended by Ch. 203, §26, Acts of the 62nd G. A., provides:

"231.3 Designation of judge — referee. The judges of the district court may designate one of their number to act as judge of the juvenile court in any county or counties, and may designate a superior or municipal court judge to act as judge of the juvenile court in cases arising in any city in which any such court is organized and in cases arising in any

part of any county convenient thereto. In counties having a population of one hundred thousand or over, unless said district judges designate a superior or municipal court judge to act as juvenile judge, they shall after each election, designate one of their number to act as juvenile judge for the ensuing four years.

"The judge of the juvenile court may appoint a referee in juvenile court proceedings. *The referee shall be qualified for his duties by training and experience and shall hold office at the pleasure of the judge.* The compensation of the referee shall be fixed by the judge. The judge may direct that any case or class of cases arising under chapter two hundred thirty-two (232) of the Code shall be heard in the first instance by the referee in the manner provided for the hearing of cases by the court.

"Upon the conclusion of a hearing held as provided herein, the referee shall transmit to the judge finding of fact. Notice of the findings of fact of the referee, together with a statement concerning the right to a rehearing, shall be given to the parties to the proceeding heard by the referee, including the parents, guardian or custodian of a minor, and to any other interested person as the court may direct. This notice may be given orally at the hearing, or by certified mail or other service as directed by the court.

"The parties to a proceeding heard before the referee shall be entitled to a rehearing by the judge of the juvenile court if requested within seven (7) days after receiving notice of the findings of fact of the referee. In the interest of justice, the court may allow a rehearing at any time. If a rehearing is not requested, the court may enter any appropriate order based upon the referee's findings of fact." (Emphasis added)

It can hardly be gainsaid that a retired district judge would be well "qualified by training and experience" for an appointment as a referee in juvenile court proceedings.

However, because of the provisions of §605A.10, Code of Iowa, 1966, which you have set forth at length in your letter, a question does arise as to whether a retired judge would jeopardize his retirement annuity by accepting appointment as a referee in juvenile court proceedings. The answer to this question hinges on whether such a refereee is a "state officer or employee."

Iowa cases on who is or is not a state officer are of no assistance in resolving the instant problem. See e.g. *Clark v. Herring*, 1935, 221 Iowa 1224, 260 N. W. 436 (commissioner of insurance not state officer within meaning of constitutional provision authorizing impeachment of state officers only by legislature); *Rohrig v. Whitney*, 1944, 234 Iowa 435, 12 N. W. 2d 866 (superintendent of banking is a state officer as respects tolling statute of limitations while note is held by such officer).

Elsewhere abundant authority may be found defining and explaining the distinction between state officer and county officer:

"State officers, in a general sense, are officers whose duties and powers are co-extensive with the territorial limits of the state. County officers, in the same sense, are those whose general authority and jurisdiction are confined within the limits of the county in which they are appointed, who are appointed in and for a particular county, and whose duties concern more especially the people of that county. Whether an officer unprovided for by the Constitution, but created solely by legislative enactment, is to be regarded as a state or county officer, must depend in large measure upon the territorial scope of his jurisdiction, and upon the nature and character of his powers and duties." *State v. Burns*, 21 So. 290, 295, 38 Fla. 367.

The following general statements regarding the applicable rules are found in Corpus Juris Secundum:

"A 'state office' may be defined as an office established in the first instance by the constitution of the state or created by the legislature. The office of a state officer is a state office, but an office of the state may be either a state or a local office as those terms are differentiated by a statute defining 'state officers' and 'local officers.' The mere fact that the constitution makes provision for a county authority does not make it a state office." 81 C.J.S., States, §51.

"In a more restricted sense, the term 'officers of the state' does not include all holding public office within the state, and the term 'state officers' is limited to such officers as exercise a delegated portion of the sovereign power of the state.

* * *

" 'State officers,' in the more restricted sense of that term, have been distinguished from those of a county, district, or town, the usual ground of distinction being that the powers and duties of the state officer are coextensive with the state and those of the other officer coextensive only with the political subdivision he serves.

"Every officer who performs duties for the state is not ipso facto a state officer, since the question depends on the scope of his duties and the functions of the office.

* * *

"State officers, strictly speaking, are officers whose duties concern the state at large, or the general public, even though their powers are exercised within defined limits. Generally speaking, a state officer is one whose powers and duties are coextensive with the boundaries of the state, or are not limited to any political subdivision of the state.

* * *

"A 'state officer,' in the stricter sense of the term, is ordinarily one paid by the state; but the fact that there is no salary or emolument affixed to the office does not make its incumbent any the less a state officer." 81 C.J.S., States, §52.

See also 42 Am. Jur., Public Officers, §§20 and 21.

Corpus Juris Secundum has the following to say with respect to "state employees":

"A state employee is one engaged in a merely transient or incidental employment, is not a state officer, and has been distinguished from a state officer. Payment of particular persons by the state is a very strong circumstance showing that they are state employees, and it has been held that one becomes a civil servant or employee only when he furnishes his services or labor for compensation directly paid to him by the state. Persons employed by municipalities are not state employees." 81 C.J.S., States, §53.

Although the office of juvenile court referee is created by statute, it is not of constitutional origin. As you point out, such a referee would have jurisdiction limited to six counties and he would be paid, not by the state, but by the counties. As appears from §231.3 a juvenile court referee is only a finder of fact and then only with respect to matters arising under Ch. 232 (Neglected, Dependent and Delinquent Children). He is appointed by the juvenile court judge who fixes his compensation and at whose pleasure he serves.

Considering all of these factors in light of the applicable law it is our opinion that a juvenile court referee is neither a state officer nor a state employee, and a retired district court judge could accept an appointment as such a referee without loss of his annuity under §605A.10.

April 8, 1969

STATE OFFICERS AND DEPARTMENTS: Highway Commission — §307.5(3), Code of Iowa, 1966, as amended by Ch. 257, §3, 62nd G. A. and Ch. 95, Acts 62nd G. A. The highway commission's powers and duties under §307.5(3) are not impaired or changed by the passage of Ch. 95, 62nd G. A. (Turner to Coupal, Dir. of Highways, Highway Commission, 4/8/69) #69-4-8

Mr. Joseph R. Coupal, Jr., Director of Highways, Iowa State Highway Commission: Your letter dated April 4, 1969, arrived in my office today (April 8, 1969). Therein you asked me:

"Would you please inform me at your earliest convenience whether or not the Highway Commission is in fact subject to the provisions of the Merit Act or not at this time."

The Merit System to which you appear to refer was created by Ch. 95, Acts 62nd G. A., and appears to conflict with the provisions of §307.5(3), Code of Iowa, 1966, as amended by Ch. 257, §3, 62nd G. A. and which provides as follows:

"Said commission shall:

* * *

"Appoint all assistants necessary to carry on the work of the commission, define their duties, fix their compensation, and provide for necessary bonds and the amounts thereof. The term of employment of all such assistants may be terminated by the commission, at any time and for any cause. When in the interest of the state, the commission may allow not to exceed forty-five subsistence expense for continuous stay in one location while on duty away from established headquarters and place of domicile or either; allow automobile expenses in accordance with section seventy-nine point nine (79.9) of the Code, for moving an employee and his family from place of present domicile to new domicile, and actual transportation expense for moving not to exceed seven thousand pounds of household goods. Such household goods shall not include pets or animals."

The Highway Commission appears to be in generally the same circumstances with respect to the Merit System as was the Department of Public Safety in our opinion to Senator John L. Mowry, dated March 27, 1969, and a copy of which is herewith enclosed. On the basis of that opinion and for the reasons stated therein, I do not consider that the 62nd G. A. intended to repeal §307.5(3), which it did, however, amend. In my opinion, the Highway Commission's power and duty under §307.5(3) is not impaired or changed by the passage of Ch. 95, 62nd G. A.

April 9, 1969

COUNTY CONSERVATION BOARD—Recreational Facility—Ch. 111A, 1966 Code of Iowa. The county conservation board may enter into agreements with cities to create a public golf course, and may charge a reasonable fee for the use of said facility. (Turner to Opheim, Webster County Attorney, 4/9/69) #69-4-9

Mr. David Opheim, Webster County Attorney: You have requested an opinion of the attorney general as follows:

"May the City of Fort Dodge aid in the appropriation of money for the purposes of building a golf course on land which is already acquired, in aid to the Conservation Commission?"

The facts, as I understand them, are as follows: The Webster County Conservation Board has acquired land which is available for use as a golf course. The City of Fort Dodge would like to cooperate with the county conservation board under §111A.7, 1966 Code of Iowa, by appropriating money to aid in the building of the golf course.

Section 111A.7, supra, states in part as follows:

"Any city, town, village or school district may aid and co-operate with any county conservation board or any combination thereof in equipping, operating and maintaining any museums, parks, preserves, parkways, playgrounds, recreation centers, and conservation areas, and for providing, conducting and supervising programs of activities, and may appropriate money for such purposes."

Section 111A.4(2), 1966 Code of Iowa, states as follows:

"The county conservation board . . . is authorized and empowered:

"2. To acquire in the name of the county by gift, purchase, lease, agreement or otherwise, in fee or with conditions, suitable real estate within or without the territorial limits of the county areas of land and water for public . . . recreation centers, . . . for the purpose of increasing the recreational resources of the county."

Later in that same subsection the State Conservation Commission, the County Board of Supervisors, or the governing body of any city, town or village is authorized to designate and set apart and transfer to the county conservation board any area used as recreation centers, playfields, tennis courts, skating rinks, swimming pools, gymnasium rooms, and other recreational purposes. The above specified uses should not be read to limit those things which the agencies of the state are authorized to aid the county conservation board in operating. The specified uses do indicate those things which the legislature has in mind when they use the words "recreation centers."

In subsection three (3) of §111A.4, the county conservation board is required to file plans and obtain the approval of the State Conservation Commission on all proposals of acquisition of land and for the development plans and programs if the cost of such program exceeds $2,500.

In subsection seven (7) of §111A.4, 1966 Code of Iowa, the following is provided:

"To charge and collect reasonable fees for the use of such facilities, privileges and conveniences as may be provided and for admission to amateur athletic contests, demonstrations and exhibits and other noncommercial events."

Subsection eight (8) of §111A.4, provides as follows:

"To let out and rent privileges in or upon any property under its control upon such terms and conditions as are deemed by it to be in the public interest."

It is, therefore, the opinion of this office that:

1. A recreation center or a play field such as contemplated by §111A.4(2) may include a golf course.

2. The county conservation board and the City of Fort Dodge have the authority to cooperate together in order to provide the above named facility, pursuant to §111A.7.

3. If the cost of such proposed program exceeds $2,500, the approval of the state conservation commission is necessary.

4. The county conservation board may charge and collect reasonable fees for the use of such facility, pursuant to §111A.4(7).

5. Pursuant to §111A.5, 1966 Code of Iowa, the county conservation board should make rules and regulations for the protection, regulation and control of the above mentioned facility.

April 9, 1969

AUDIT OF COUNTY HOSPITALS — Chapters 347 and 347A, Code of Iowa, 1966. County hospitals organized under Chapters 347 and 347A, Code of 1966, are authorized upon request for audit of their financial condition on a fiscal year rather than on a calendar year basis. (Strauss to Atwell, Supr. of County Audits, State Auditor's Office, 4/9/69) #69-4-10

Mr. H. E. Atwell, Supervisor of County Audits, State Auditor's Office: You have requested an opinion of the attorney general with respect to the following:

"Does the Hospital Trustees or the Administrator of a County Hospital have the authority to request that an audit of the financial condition of a hospital be made on a fiscal year rather than a calendar year basis."

§11.6, Code of Iowa, 1966, as amended by Ch. 89, §1, Acts, 62nd G. A., provides:

"The financial condition and transactions of all counties shall be examined once each year by the auditor of state. Provided however that, in lieu of an examination by state accountants the local governing body of county hospitals organized under chapters 347 and 347A and memorial hospitals organized under chapter 37, in case it elects to do so, may contract with or employ certified or registered public accountants, certified and registered in the state of Iowa, and pay for the same from the proper public funds; *in the same manner and under the same conditions as provided in sections 11.18 and 11.19 for cities, towns, and school districts.* The report of such examination of a county or county memorial hospital filed by the accountant employed with the auditor of state, as required by section 11.19, shall be in the form prescribed by the auditor of state."

§11.18, Code of Iowa, 1966, as amended by Ch. 244, §8, Acts, 62nd G. A. provides in part:

"The financial condition and transactions of all cities and city offices, merged areas, and all school offices in independent and community school districts maintaining high schools, shall be examined at least once each year. . . . Such examination shall cover the fiscal year next preceding the year in which the audit is conducted. . . . Examinations may be made by the auditor of state, or in lieu of the examination by state accountants the local governing body whose accounts are to be examined, in case it elects so to do, may contract with, or employ, certified or registered pub-

lic accountants, certified and registered in the state of Iowa, and pay the same from the proper public funds. If the city, merged area or school district elect to have the audit made by certified or registered public accountants, they must so notify the auditor of state within sixty days after the close of the fiscal year to be examined and towns electing to have their audit made by a certified public accountant must so notify the state auditor by resolution of the council designating the name of the person or firm to be employed at least ninety days prior to the end of a fiscal year."

Nowhere in either of the two foregoing statutory provisions is the term "calendar year" used although the expression "fiscal year" is found in a number of places.

Under these circumstances it is our opinion that the Board of Trustees of a county hospital organized under Ch. 347 or Ch. 347A, Code of Iowa, 1966, would be authorized to request that an audit of the financial condition of a hospital be made on a fiscal year rather than a calendar year basis. Of course common sense would dictate that any annual audit cover the same twelve months period as is used by a hospital in keeping its books.

April 9, 1969

CITIES AND TOWNS: Pension Retirement Funds — Ch. 410, §123.50(3), 1966 Code of Iowa. A city of less than 6,500 population, not having a pension fund based on acturial tables, may levy only a one-eighth mill tax annually to fund the plan. Liquor control funds received under §123.50(3), 1966 Code, may be used to pay fund benefits. Annual assessments to members may not be refunded. The benefit amounts established by §410.6 of one-half of monthly salary may not be increased except as authorized therein. (Strauss to Selden, State Comptroller, 4/9/69) #69-4-11

The Hon. Marvin R. Selden, Jr., State Comptroller: This will acknowledge receipt of your letter in which you present certain factual background with reference to a policeman's pension plan in the town of Windsor Heights, Iowa, and then pose several questions.

The pertinent portions of your letter read as follows:

"1. The City of Windsor had a population of 4,715 according to the 1960 census.

"2. On September 1, 1967 a special census was conducted and a population of 6,409 was certified to the city on September 29, 1963. (sic.)

"3. At all times material hereto, the city had an organized police department but did not have a paid fire department under which the chief is paid an annual salary and the firemen are paid on a 'per call' basis).

"4. At all times material hereto, the city did not have a civil service system.

"5. On May 20, 1963, the city adopted Ordinance No. 5-2063 creating a policeman's pension fund pursuant to the provisions of Code of Iowa, ch. 410 (1962). A copy of that ordinance is enclosed herewith.

"6. Since the adoption of said ordinance, the city has levied the one-eighth mill levy provided in Code of Iowa, §410.1 (1962). In the calendar year 1967, $1,371.00 was received by the policeman's pension fund from that source.

"7. Since the adoption of said ordinance, the city has deducted 1% of the gross salary of each police officer in accordance with the provisions of Code of Iowa §410.5 (1962). In the calendar year 1967, $376.76 was received by the policeman's pension fund from that source.

"8. In the year 1967, the city had four (4) persons receiving benefits from the policeman's pension fund; one (1) service retirement, one (1) widow of a deceased member and two (2) children of a deceased member. During 1967, the fund paid the member under service retirement the sum of $3,000.00 of which $750.00 was paid from the sources described in paragraphs 6 and 7 hereof and $2,250.00 was paid from the Liquor Profits Fund. During the year 1967, the fund paid the widow and children of the deceased member the sum of $2,190.00 of which $547.50 was paid from the sources described in paragraphs 6 and 7 hereof and $1,642.50 was paid from the Liquor Profits Fund.

"9. From the foregoing, it is apparent that the policeman's pension fund has an annual deficit of between $3,500.00 to $4.000.00 which the city is currently absorbing through the Liquor Profits Fund.

"10. In late 1967, the City Council employed George V. Stennes and Associates, Consulting Actuaries to prepare an actuarial valuation of the policeman's pension fund. A copy of that valuation is enclosed herewith.

"11. As of January 1, 1968, the city had six (6) full-time police officers on the payroll.

"12. For 1967 taxes payable in 1968, one (1) mill will bring the city approximately $11,693.00."

You have proposed seven questions with regard to the pension fund that has been created by the City of Windsor Heights, and I answer them in the order asked in your letter:

"1. Notwithstanding the one-eighth mill limitation contained in paragraph 1 of Code of Iowa §410.1 (1966) and Section 1(a) of Ordinance No. 5-2063, can the city, under the provisions of the second sentence of the second paragraph of Code of Iowa §410.1 (1966), levy sufficient millage to achieve full funding of the fund in accordance with the actuarial study referred to above? (Said study indicates, at paragraph 3 of Section C. on page 4, that full funding will require an annual payment of $14,-944.00 or an annual levy of 1.278 mills)."

In answer to this question, the second sentence of the second paragraph of §410.1, 1966 Code, specifically refers to retirement systems based upon actuarial tables as established by law. In reviewing Ordinance No. 5-2063, it is apparent that the pension fund created thereby was not, and is not, based upon actuarial tables. It will be noted that in Section 1 of Ordinance No. 5-2063 of the Town of Windsor Heights, Iowa, the only tax provided for was a tax not to exceed one-eighth mill to be levied by the city. This portion of the Ordinance is, in itself, sufficient guide for us to determine that the pension fund so created was created by virtue of the first paragraph of §410.1, 1966 Code, which reads as follows:

"Any city or town having an organized fire department may, and all cities having an organized police department or a paid fire department shall, levy annually a tax not to exceed one-eighth mill for each such department, for the purpose of creating firemen's and policemen's pension funds."

In adidtion, the Ordinance itself contains no reference whatsoever to actuarial tables. The answer to the first question is, therefore, in the negative.

"2. If the answer to Question No. 1 is in the negative, can any source of municipal revenue be used to make the annual payments required under the actuarial study?"

Your attention is directed to §123.50(3), 1966 Code, which requires the state treasurer on a semi-annual basis to distribute ten percent of the gross amount of sales made by the state liquor stores to the cities and towns of the state as provided in such section, and the section concludes with the following statement:

". . . and shall be made payable to such incorporated city or town and shall be subject to expenditure under the direction of the city council or other governing bodies of such incorporated city or town *for any lawful municipal purpose.*" (Emphasis added)

Most assuredly, the pension fund created by the Town of Windsor Heights, Iowa, is a lawful municipal purpose.

And even if the source of the funds going into a retirement pension fund were intended to be limited by the last paragraph of §410.1, I find it within the discretion of the city council to make a grant or donation from the Liquor Control Funds received by virtue of §123.50(3) for the purpose of paying benefits to persons entitled to the same by virtue of the establishment of the retirement fund.

In light of the answer to question number two as set out above, questions number three and four of your letter become moot.

"5. Code of Iowa §410.5 (1966) requires each member of a covered department to pay an annual assessment to the fund equal to one percent of his annual salary. If a member resigns from the covered department, of if his employment is terminated by the city, either with or without cause, what disposition is to be made of the assessments paid by him? (It would appear that three alternatives might be available:

"a. retention of the assessment by the fund, or
"b. mandatory refund of the assessment by the fund, or
"c. discretionary refund of the assessment by the fund.)"

The statutory authority for the annual assessment referred to in this question appears in §410.5, 1966 Code, which reads as follows:

"Every member of said department shall be required to pay to the treasurer of said funds a membership fee to be fixed by the board of trustees not exceeding five dollars, and shall also be assessed and required to pay annually an amount equal to one percent per annum upon the amount of the annual salary paid to him, which assessment shall be deducted and retained in equal monthly installments out of such salary."

Nowhere else in Chapter 410 is there any discussion with regard to the retention or refund of any such assessments to members who resign prior to being entitled to any benefits under the retirement fund. In contrast therewith, under §97B.53(1), 1966 Code of Iowa, the termination of employment of an employee prior to retirement other than by death entitles that member to a refund of all accumulated contributions.

Absent statutory authority for a mandatory or discretionary refund of the assessment, and I find none, the annual assessments of funds of members who retire prior to the vesting of their rights are retained by the pension retirement fund.

"6. The first sentence of the first paragraph of Code of Iowa §410.6 (1966) provides a pension on retirement or disability equal to one-half of the amount of monthly salary received by the member at the time of retirement or disability. Is the one-half salary amount both a minimum and a maximum or can it be considered to be a minimum only?"

Section 410.6(3) states in part as follows:

"At no time shall the monthly pension or payment to the member be less than one hundred fifty dollars."

This section makes it apparent that the true minimum in any pension retirement fund established under Chapter 410 is $150.00 per month. The language you refer to appears in the first paragraph of §410.6 and reads in part as follows:

"And upon retirement shall be paid out of the pension fund of such department a monthly pension equal to one-half of the amount of salary received by him monthly at the date he actually retires from said department."

This establishes a maximum amount of the pension fund except as adjusted by sub-paragraphs 1, 2 and 3 of §410.6.

"7. If the answer to question No. 6 is that the pension amount is a minimum only, can a different rate of pension be established for retirement occasioned by disability than is established for retirement on account of age? In other words, can a pension of two-thirds of monthly salary be established for retirement occasioned by permanent physical and mental disability and a pension of one-half of monthly salary established for all other forms of retirement?"

In light of the answer to question number six, it is apparent that there is no authority to establish a pension based on two-thirds of the monthly salary no matter what the form of retirement might be.

April 9, 1969

CONSTITUTIONAL LAW: Rental of building by school board from church — Art. 1, §3, Constitution of Iowa, §343.8, Code of Iowa, 1966. A school board of a community school district may enter into a contract for the rental of a school building from a church or church corporation, provided that the building is not a place of worship and that under the terms of the lease the building would not be under ecclesiastical or sectarian control. Such school board could enter into a contract for the rental of a building to be used as school rooms with a non-profit corporation which non-profit corporation would in advance lease the said school building from a church. Such school board could enter into a contract for rental of a building to be used as school rooms with a non-profit corporation, where the non-profit corporation owned and held title to the school building and the land underneath the building. The local school board could purchase land or a building from such a non-profit corporation. (Nolan to Stephens, State Senator, 4/9/69) #69-4-12

The Hon. Richard L. Stephens, State Senator: This replies to your request of March 10, 1969 for an opinion relating to the school situation in the Highland Community School District. Your letter requested specifically an answer to the following questions:

"1. May a school board of a community school district enter into a contract for the rental of a school building from a church or church corporation, provided that the building is not a place of worship and that under the terms of the lease the building would not be under ecclesiastical or sectarian control.

"2. May the community school board enter into a contract for the rental of a building to be used as school rooms with a non-profit corporation which non-profit corporation would in advance lease the said school building from a church. The non-profit corporation is not under church, ecclesiastical or sectarian control.

"3. May the community school board enter into a contract for rental of a building to be used as school rooms with a non-profit corporation, when the non-profit corporation should own and hold title to the school building and the land underneath the building. Is it possible for the local school board to purchase land or a building from such a non-profit corporation. The non-profit corporation is not under church ecclesiastical, or sectarian control. (I would point out here that the Board of Regents is leasing a building from a non-profit corporation in Iowa City.)"

It is my opinion that all three of your questions may be answered affirmatively. Under the authority of §297.12, 1966 Code of Iowa, the board of each school corporation may "when necessary, rent a room and employ a teacher, where there are ten children for whose accommodation there is no schoolhouse." There is no express limitation in the constitution or the Code of Iowa against renting such schoolroom from a church or church corporation, provided the building is not being used otherwise for sectarian purposes.

Article I, §3 of the Constitution of Iowa provides:

"The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; 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."

Likewise, I find no violation of §343.8 of the Code of Iowa, which provides:

"Public money shall not be appropriated, given, or loaned by the corporate authorities of any county or township, to or in favor of any institution, school, association, or object which is under ecclesiastical or sectarian management or control."

Under the circumstances presented, no public money would be appropriated by the county or township. Expressio unius est exclusio alterius. The rent would be paid by the school district.

It is my view that the present cases can be distinguished from the fact situation in the famous case entitled *Knowlton vs. Baumhover*, 1918, 182 Iowa 691, 166 N. W. 202, and the opinion of the attorney general of August 23, 1963, 1964 OAG 17.5, in which cases the lease of a single room in a parochial school, the school being operated under the parochial school name and by parochial school teachers, and under the direct supervision of the parish church, was held to be a constitutional violation. As I understand it, in the present situation, the parish church has completely discontinued the operation of the school plant and the local school district requires such building for a local attendance center.

Assuming that the local school board has already determined that the site for such schoolhouse meets the requirements of §297.1, (viz. upon some public highway and at a convenient geographical location considering the number of scholars residing in the various portions of the school corporation), there is no doubt but that the board can purchase any site

which meets the statutory requirements from any owner provided the school board gets value received for the money it spends. The board can also take appropriate action to acquire such a site even by condemnation if necessary. (See §297.6, Code of Iowa.)

Therefore, as long as the classroom space to be acquired is not located in a building currently being operated as a parochial school, it is my opinion that it is immaterial whether the lease is made with the church as owner of such school building or with a non-profit corporation acting as strawman in the transaction.

April 9, 1969

STATE OFFICERS AND DEPARTMENTS: Liquor Control Commission, overtime work by employees — §§79.1, 123.16 and 123.17, Code of Iowa, 1966. Employees of the Iowa Liquor Control Commission may be required to work in excess of forty hours per week without extra pay therefor. (Haesemeyer to Ewell, State Representative, 4/9/69) #69-4-13

The Hon. Vernon A. Ewell, State Representative: Reference is made to your letter of April 2, 1969, in which you state:

"It has come to my attention that some full-time employees of the Iowa Liquor Control Commission are being required to work in excess of 40 hours per week. More often than not, these added hours are at inconvenient times and occur irregularly and unscheduled.

"In regard to this situation, I would like to request the following:

"1. Will you please give me an opinion as to whether or not the Iowa Liquor Control Commission can require its full-time employees to work in excess of 40 hours per week, i.e., a week of five days, eight hours per day, Monday through Friday?

"2. Will you please give me an opinion as to whether or not an employee of the Iowa State Liquor Control Commission who works at a time different from, or in addition to, that work week set out in No. 1 (above)

"a. Must be paid additional salary or wages, and if so, figured at what base rate of pay?

"b. Is the rate referred to in answer to No. 2 (a) to be figured as, or considered as, straight time, overtime, or time and a half?"

Questions very similar to those you present were previously raised by the highway commission and an opinion of the attorney general issued. A copy of this opinion dated September 25, 1968, is attached. As noted therein §79.1, Code of Iowa, 1966, 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)

Prior to the enactment of Chapter 95, Acts of the 62nd G. A., certain rules entitled "Hours of Service, Holidays, Vacations, Sick Leave, etc." were promulgated by the director of personnel and approved by the executive council in accordance with the authority found in §8.5 of the Code. See 1966 Iowa Departmental Rules at pp. 380-382. Two of these 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."

However, §8.5(6) of the Code was repealed by §23 of Chapter 35, Acts of the 62nd G. A. Since the rules quoted above depended on §8.5(6) for authority for their issuance, they must necessarily fall with the repeal of §8.5(6). Although the merit employment commission established under Chapter 95 has extensive authority to adopt rules, it is my understanding that it has not yet done so. Hence we must look elsewhere for statutory authority, if any, which would justify the Iowa liquor control commission in requiring its employees to work in excess of forty (40) hours per week.

§123.16, Code of Iowa, 1966, provides in part:

"123.16 Powers. The commission shall have the following functions, duties and powers:

* * *

"6. To appoint vendors, clerks, or other employees required for the operation or carrying out of this chapter and to dismiss the same, but not without cause deemed by the commission in its discretion as sufficient; to fix their salaries or remuneration; assign them their title, duties and powers.

* * *"

§123.17 provides in part:

"123.17 Rules and regulations.

1. The commission may make such rules and regulations not inconsistent with this chapter, which to the commission may seem expedient or necessary for carrying out the provisions of this chapter and for the efficient administration thereof.

2. Without attempting or intending to limit the power of the commission as to the provisions contained in subsection 1 hereof, it is declared that the commission may and it does have the power to make regulations in the manner set forth in the foregoing subsection and that said powers shall extend to and include the following:

a. Prescribing the duties of the secretary, officers, clerks, servants, agents, or employees of the commission and regulating their conduct while in the discharge of their duties.

* * *

"j. Prescribing, subject to this chapter, the days and hours during which state liquor stores and special distributors shall be kept open for the purpose of the sale or dispensing of liquors.

* * *"

It is our opinion that considering §§79.1, 123.16 and 123.17 together that the liquor control commission has authority sufficiently broad to permit it to require its employees to work hours in excess of forty (40) per week.

Your second question is fully answered in our prior opinion of September 25, 1968. In light of §79.1 and Art. III, §31 of the constitution of

Iowa (both quoted in such prior opinion) the liquor control commission has no duty to furnish extra compensation to such of its employees who may be obliged to work hours in excess of forty (40).

However, as stated in our September 25, 1968 opinion:

"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."

April 15, 1969

STATE OFFICERS AND DEPARTMENTS: Notaries public, resident requirements — §§77.1, 77.2, 77.5, 77.7, and 77.17, Code of Iowa, 1966. There is no requirement of a six months residence in the state as a condition to appointment to the office of notary public. However, an applicant for a notary commission must be a resident of the county for which he makes application at the time he makes application. (Turner to Ball, Exec. Ass't. to Governor, 4/15/69) #69-4-15

Mr. William C. Ball, Executive Assistant, Office of the Governor: This will acknowledge receipt of yours of the 9th of April, 1969 in which is submitted the following:

"The application form being used by the Governor's Office for appointment of Notaries Public contains the following words '. . . and have resided in this State for six months last past and am a resident of the County of..... . . .'

"Chapter 77, Code of Iowa, 1966, outlines the conditions for appointment of Notaries Public, but is silent as to residency of applicants.

"Would you please advise us whether or not applicants for appointment as Notary Public must complete a minimum residency requirement as specified on the present form we are using."

In answer thereto, I advise the following:

1. Insofar as your question involves residence in the county for which appointment is sought, I am of the opinion on the authority of an opinion of this department appearing in the Report for 1938 at page 276, a copy of which is attached hereto and by this reference made a part hereof, that the applicant for a notary commission must be a resident of the county for which he makes application. The statutes made the basis for the conclusion reached in the foregoing opinion, to wit: §§1197, 1200, 1201, 1203 and 1212, all of the Code of 1935, exist as quoted in the opinion in the Code of 1966 as follows: §1197 is now §77.1; §1200 is now §77.2; §1201 is now §77.5; §1203 is now §77.7; and §1212 is now §77.17.

2. Insofar as your question involves residence requirements of six months' duration as a prerequisite to appointment as a notary, it was said in an opinion appearing in the Report for 1938 at page 48 as follows:

"In answer to your question of February 11, 1937, in which you ask:

" 'Is it possible to waive: "and have resided in this state for six months last past?" '

"contained in the application issued by your office and used by applicants for appointment as a notary public, this department is of the opinion that

the same may be waived for the reason that we find nothing in Chapter 65, Section 1200, of the Code, that refers to residence directly in the state of Iowa for any specific period. Since the law does not require such a length of residence in the state, we feel that the applicant should not be required to make such a statement in his application."

There is no existing statutory requirement of a six months residence in the state as a condition to the appointment of office of notary public. The foregoing mentioned opinion appearing at page 48, 1938 OAG, is confirmed.

April 16, 1969

STATE OFFICERS AND DEPARTMENTS: Carry over of accrued vacation from year to year — §79.1, Code of Iowa, 1966. Vacation accumulated by state employees may be carried over from one year to another in those instances where an employee is requested by his department head to refrain from taking his vacation during the year following that in which earned. (Haesemeyer to Klein, State Representative, 4/16/69) #69-4-14

The Hon. James T. Klein, State Representative: Reference is made to your letter of April 3, 1969, in which you request an opinion of the attorney general with respect to the following:

"Section seventy-nine point one, Code of Iowa, 1966, provides that 'Vacations after the first year of employment shall be granted, regardless of the anniversary date, at the discretion and convenience of the head of the department, agency or commission.'

"In regards to that provision, or any other, an opinion from your office is requested concerning the question as to whether or not vacation allowances may be accumulated and carried over from one year to another.

"If vacation time can be accrued, is such accrual subject to the approval of the department, agency or commission head; further, can said department, agency or commission head exercise a veto over the accumulation of vacation time?

"One additional question is raised regarding accumulation of vacation time if such accumulation is allowable; is there a limit implied as to how much time can be accumulated?

"Your early reply would be most appreciated inasmuch as House File 370, an Act relating to the vacation policy for state employees, is now on the House Calendar."

§79.1, Code of Iowa, 1966, to which you allude appears to be the only statutory provision which is of any assistance in answering the questions you raise. Such §79.1 provides in relevant part:

"All employees of the state including highway maintenance employees of the state highway commission are granted one week's vacation after one year's 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 (2½) 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." (Emphasis added)

It is to be noted that when speaking in terms of sick leave the draftsmen of §79.1 took pains to provide in explicit terms that unused portions of such leave could be accumulative for three consecutive years. However, in dealing with vacations the statute is silent on the question of accrual from year to year. The words of §79.1 italicized above give the head of each department, agency or commission discretion in granting the vacations for which the law provides. This is altogether reasonable since each department head obviously must give first priority to the workload and needs of his department in deciding when and whether to grant vacations to the members of his staff who are entitled to the same. Equally, reasonable, however, is the proposition that an employee who is requested by his chief to forego his vacation should be permitted to carry over vacation which he has earned and to which he is entitled by statute and should not lose such vacation altogether. Accordingly, it is our opinion that the language of §79.1 giving each department head discretion in granting vacations by implication authorizes the accumulation and carry over of unused vacation time from one year to another in those instances where an employee is requested by his department head to refrain from taking his vacation during the year following that in which earned.

This vacation policy is common in the private sector and I understand, is the practice generally followed in the state government at present. For example, Regulation 12 of the liquor control commission provides in part:

"(2) Employees of the Iowa liquor control commission are, after one full years employment, granted one week vacation with pay during their second year of employment; and after two years of employment are granted two weeks vacation with pay during their third year of employment and three weeks vacation will be granted after ten years of employment.

"(3) Provided, however, that with the approval of the department head, vacations can be taken any time between January 1 through No-

vember 15 and if not so taken shall be deemed to have been waived for the year. All vacations must be taken in periods of not less than one week.

"(4) Vacations are granted — not earned and are not to be considered as any part of earned compensation. Nor are they accumulative from year to year.

"(5) Department heads are to advise with the employees of their departments and arrange schedules of vacation to conform as nearly as may be with the wishes of the employee and the efficient conduct of departmental work.

"(6) *Exceptions to the foregoing regulations may be had only upon written request to the commission, approved by the department head.*" (Emphasis added)

Under such Regulation 12 it is clear that vacations may not be accumulative in the usual case. It is equally plain, however, that an exception to this rule may be made upon a written request to the commission.

April 16, 1969

CRIMINAL LAW: §2, S.F. 175, Acts of 63rd G. A. Although providing more severe penalty for a crime in which firearms are used is constitutional a statute making possession of firearms during the commission of a crime a separate and distinct offense falls short of clear compliance with constitutional guarantee against double jeopardy. (Turner to Kennedy and Fischer, State Representatives, 4/16/69) #69-4-16

The Hon. Gene V. Kennedy, State Representative, The Hon. Harold O. Fischer, State Representative: Reference is made to your letters of April 14 and April 16, 1969, requesting my opinion on the provisions of §2 of Senate File 175, 63rd General Assembly, which provides:

"Any person who commits or attempts to commit an assault punishable as a felony, robbery, larceny of property exceeding twenty dollars in value, burglary, breaking and entering, rape, murder, mayhem, arson, extortion, kidnapping, sodomy or escape from legal custody, when armed with or having in his possession any firearm, whether or not capable of being discharged, or any other object or device, whether toy or imitation, having an appearance similar to or capable of being mistaken for a firearm, or has a confederate aiding and abetting him in any one of said crimes, present and armed with or having in his possession any such firearm, object or device, shall be guilty of a *public offense separate and distinct from the crimes heretofare enumerated* in this section, and shall, in addition to the punishment provided for that crime, be punished on a first conviction by imprisonment in the penitentiary for not more than five years; upon a second conviction by imprisonment in the penitentiary for ten years; upon a third conviction by imprisonment in the penitentiary for twenty years; and upon a fourth or subsequent conviction, by imprisonment in the penitentiary for life. The indictment or county attorney's information shall allege the *principal crime* charged in one count and the *additional crime* charged by reason of section two (2) of this Act in an additional count. The defendant shall be tried upon *both crimes* or counts in the indictment or county attorney's information at the same trial. The jury shall return a separate verdict of guilty or not guilty upon each crime charged. In the event the defendant would be subject to a greater penalty by reason of prior convictions, the provisions of section six hundred ninety-six point ten (696.10), seven hundred forty-seven point four (747.4), and seven hundred seventy-three point three (773.3) of the Code shall be applicable." (Emphasis added)

The manifest purpose of the general assembly is to impose a more severe penalty upon persons who commit the enumerated crimes, and

aggravate the offense by using or bearing weapons. Statutes carrying such a policy of increased punishment have been sustained by the courts in many cases.

A challenge of the Iowa Habitual Criminal statute, Chapter 747, Code of Iowa, 1966, was rejected by our Supreme Court in 1963, in *State vs. Gaskey*, 255 Iowa 967, 124 N. W. 2d 723, as follows:

" 'Defendant is not being punished twice for the same offense. He is being punished for the subsequent offense of breaking and entering charged against him in the information. It is not a violation of due process to impose a more severe penalty for that offense, as the statute authorizes, because of his previous criminal convictions. Such statutes have frequently been upheld against claims of unconstitutionality. State vs. Eichler, 248 Iowa 1267, 1273, 83 N. W. 2d 576, 579.' " (See cases there cited.)

The Iowa court cited at length what probably is the most authoratative precedent on the subject, *Graham vs. West Virginia*, 224 U. S. 616, in which the United States Supreme Court held:

" 'The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted. * * * This legislation has uniformly been sustained in the state courts [citations] and it has been held by this court not to be repugnant to the Federal Constitution. Moore vs. Missouri, 159 U. S. 673, 40 L. Ed. 301, 16 S. Ct. Rep 179; McDonald vs. Massachusetts, 180 U. S. 311, 45 L. Ed. 542, 21 S. Ct. Rep. 389.' * * *"

The courts which have sustained heavier penalties by reason of prior convictions, or by reason of the circumstances of the crime, have been quite strict, however, in their enforcement of the double jeopardy rule. Thus, in sustaining an additional sentence for armed robbery, imposed under a statute very similar to Senate File 175, the Superior Court of New Jersey, Appellate Division, said in 1961:

". . . it is well settled that an indictment like the one here under consideration does not allege two separate crimes, but a single crime (robbery, N.J.S. 2A:141-1, N.J.S.A.) under circumstances which permit greater punishment for that crime. (N.J.S. 2A:151-5, N.J.S.A.)." *State of New Jersey vs, Buffa*, 168 A. 2d 49.

The Iowa Supreme Court stressed the same point in 1966, when upholding a sentence under the habitual criminal act in *State vs. Davis*, 258 Iowa 1192, 140 N. W. 2d 925, 926:

" 'The section simply provides for a greater penalty upon conviction for the third or more times of the crimes specified. No one would contend a person could be prosecuted under this section just because he had two or more convictions. He must thereafter be convicted of one of such crimes, usually referred to as the primary offense, which offense has been committed after such conviction. When he is thus convicted a greater penalty is imposed because of his prior convictions. *The section does not provide a separate crime.*' (Emphasis added)."

But as shown by the italicized words of S.F. 175, this proposed bill in express terms would make two crimes out of what in many cases the proof would show to be a single transaction. For instance, robbery is robbery regardless of whether committed with or without a gun. Although the two crimes would, under this bill, be prosecuted at the same

time, the question is controlled by the same principles of double jeopardy that have governed when one prosecution followed another.

Thus, a defendant charged with larceny from the person was upheld when he pleaded double jeopardy, upon his showing that he already had been convicted of petty larceny, for the same transaction. *State vs. Gleason*, 1881, 56 Iowa 203, 9 N. W. 126. Had both charges been made and tried at the same time, as the proposed legislation contemplates, the result must have been the same.

These authorities raise such grave doubts of the propriety of charging as a separate and distinct public offense the possession of a gun in the course of committing a crime that in my opinion the bill, Senate File 175, falls short of clear compliance with the constitution, and the guarantee against double jeopardy.

Although my opinion is that the bill as worded is not constitutional, there is, as indicated above, no absolute barrier to this policy of the legislature. The questioned language can be replaced with provisions like those in other states, simply providing more severe penalties when firearms are used in the commission of crime.

April 16, 1969

STATE OFFICERS AND DEPARTMENTS — Fire Marshal's notice to property owner to comply with law within 60 days. §103.15, Code of Iowa, 1966. Notice must give owner 60 days within which to provide a second fire exit. Notice cannot be amended later to extend the time for compliance. (Zeller to Letz, Hardin County Attorney, 4/16/69) #69-4-17

Mr. Carl R. Letz, Hardin County Attorney: Reference is made to your recent letter in which you ask our opinion as to the meaning and application of Section 103.15, Code of Iowa 1966. This section reads in pertinent part:

"It shall be the duty of any inspector required by law to inspect fire escapes or means of escape from fire to serve or cause to be served upon the owner . . . notifying him to comply with the law and requirements of the state fire marshal within sixty days after the service of such notice."

From your letter, it appears that a written notice was served on your "owner" requiring him to remove the violation within 30 days from date of service, which was November 19, 1968. On December 10, 1968, the deputy fire marshal attempted to amend the notice by serving a written amendment, purporting to extend the time for compliance to January 19, 1969. Your question is:

"May a notice be amended or must the notice originally be in sufficient form to enable a prosecution for violation pursuant to Section 103.15, 1966 Code of Iowa."

My opinion is that the amendment does not validate or correct the original notice. A full sixty days of notice should be specified in the original notice in order that the owner may be legally required to comply.

In the case of *State v. Hansen*, 244 Iowa 145 (1952), 55 N. W. 2d, 923,

the Supreme Court of Iowa held:

"A strict construction of a criminal statute against the State is the recognized rule, and the burden is upon the State to prove every element essential to constitute the crime charged. *State v. Burns*, 181 Iowa 1098, 165 N. W. 346; *State v. Cooper*, 221 Iowa 658, 265 N. W. 915."

Also, in the case of *Harrington v. City of Keokuk*, (1966), 258 Iowa 1043, 141 N. W. 2d, 633, the court said:

"It is the rule in this and most jurisdictions that knowledge on the part of the defendant will not supply the need for a valid, legal notice or summons, as required by rule or statute." *State v. Sabin*, (1964), 256 Iowa 295, 297, 27 N. W. 2d 107.

Also, in the case of *Pendy vs. Cole*, 211 Iowa 201, 233 N. W. 48, the Court said:

"But the alleged notice in this case purported to fix the date of the terms as of a certain mistaken date. The incorporation of such mistaken date was necessarily misleading. In such a case we have held repeatedly that the mistake is fatal to the validity of the Notice."

And, also, in *Eastern Iowa Light & Power Co-op vs. Interstate Power Company*, 164 N.W. 2d, 135, wherein Supreme Court said by Justice Snell:

"Courts do not have authority to sit in judgment upon everything that might come to their attention. Jurisdiction is acquired by statutory procedure. Absent a notice sufficient to meet the statutory requirements there is no jurisdiction even though from other sources there is actual knowledge. *Krebs v. Town of Manson*, 256 Iowa 957, 962, 129 N. W. 2d 744."

The original notice was defective, and the amendment was not a compliance with the statute in our opinion.

April 16, 1969

STATE OFFICERS AND DEPARTMENTS: Merit system, conservation commission not included under — Chapter 95, Acts, 62nd G. A., §107.13, Code of Iowa, 1966, as amended by Chapter 10, Acts of the 62nd G. A. The employees of the conservation commission are not covered by the merit system established by Chapter 95, Acts, 62nd G. A. (Haesemeyer to Klein, State Representative, 4/16/69) #69-4-18

The Hon. James T. Klein, State Representative: By your letter of April 15, 1969, you have requested an opinion of this office as to whether or not members of the conservation commission and particularly park and conservation officers are included within the merit system established by Ch. 95, Acts of the 62nd General Assembly.

§107.13, Code of Iowa, 1966, as amended by Ch. 10, §3, Acts of the 62nd General Assembly provides:

"107.13 Officers and employees — salaries. Said director shall, with the consent of the commission and at such salary as the commission shall fix, employ such assistants, including a professionally trained state forester of recognized standing, as may be necessary to carry out the duties imposed by this chapter on the commission; also and under the same conditions, said director shall appoint such officers as may be necessary to enforce the laws, rules, and regulations, the enforcement of which are

herein imposed on said commission. Said officers shall be known as state conservation officers. The salaries of the state conservation officers shall be [forty-eight hundred] *fifty-four hundred* dollars per year for the first year of service. A salary increase of fifteen dollars per month shall be granted to each officer at the end of the first year and every six months thereafter until an annual salary rate of [fifty-seven hundred] *sixty-three hundred* dollars is reached. Thereafter conservation officers shall be paid additional compensation in accordance with the following formula: When conservation officers have served for a period of five years their compensation then being paid shall be increased by the sum of twenty-five dollars per month beginning with the month succeeding the foregoing described five-year period; when conservation officers have served for a period of ten years their compensation then being paid shall be increased by the sum of twenty-five dollars per month beginning with the month succeeding the foregoing described ten-year period, such sums being in adidtion to the increases provided herein to be paid after five years of service; when conservation officers have served for a period of fifteen years their compensation then being paid shall be increased by the sum of twenty-five dollars per month beginning with the month succeeding the foregoing described fifteen-year period, such sums being in addition to the increases previously provided for herein; when conservation officers have served for a period of twenty years their compensation then being paid shall be increased by the sum of twenty-five dollars per month beginning with the month succeeding the foregoing described twenty-year period, such sums being in addition to the increases previously provided for herein. In order to receive the additional compensation herein provided, all years of continuous employment with the state shall be included in computing length of service." (Brackets indicate deleted matter and italics denotes new matter.)

The question you raise is essentially the same as those which were considered in our opinion of March 27, 1969, to Senator John L. Mowry and April 8, 1969, to Mr. Joseph R. Coupal, Jr., Director of Highways, in which we stated that it was our opinion that the merit system established by Ch. 95, Acts of the 62nd G. A., did not apply to employees of the department of public safety and the highway commission. In those opinions we stated that because the legislature had seen fit to make amendments in §§80.15 and 307.5(3) dealing respectively with the authority of the department of public safety and highway commission to establish rules and regulations concerning the appointment and employment of the personnel of such departments, after the passage of Ch. 95, Acts of the 62nd G. A., that such §§80.15 and 307.5(3) continue to control insofar as employees of the department of public safety and highway commission are concerned, unaffected by Ch. 95.

Since Ch. 10, Acts of the 62nd G. A., was passed on July 1, 1967, i.e., after the passage of Ch. 95, it would be our opinion, following the reasoning of the two opinions hereinbefore referred to, that the conflict between §107.13 and Ch. 95 must be resolved in favor of §107.13, and that the employees of the conservation commission are not covered by the merit system established by Ch. 95.

April 21, 1969

CONSTITUTIONAL LAW: Delegation of legislative power — Art. III, §1, Constitution of Iowa; H.F. 348, 63rd G. A. H.F. 348 which would authorize the governor to fix the salary of the director of the Iowa development commission would be an unconstitutional delegation of legislative authority unless guidelines are established as to the amount of salary which the governor could fix. (Turner to Grassley, State Representative, 4/21/69) #69-4-19

The Hon. Charles Grassley, State Representative: You have requested an opinion as to whether the legislature may constitutionally delegate to the governor power to fix salaries of department heads. Specifically, you relate to House File 348, Acts of the 63rd General Assembly, to which the senate has adopted an amendment that the governor shall fix the salary of the director of the Iowa Development Commission, payable out of the funds of the commission.

In my opinion, the legislature may delegate this power to the governor. However, it must fix guidelines or limitations within which the governor can act. Otherwise, the governor could fix the salary of the department head in any amount and this would be an unconstitutional exercise of legislative power in violation of Art. III, §1, Constitution of Iowa. See OAG, December 8, 1967, To All County Attorneys, wherein we said that Ch. 295, Acts of 62nd G. A., which delegated to the attorney general the power to fix minimum liability limits for errors and omissions insurance for county officers, was in this respect constitutionally deficient as being a delegation of legislative power devoid of guidelines. See also *Lewis Consolidated School District v. Johnston*, 1964, 256 Iowa, 236, 127 N. W. 2d 118.

Thus, in my opinion, the legislature should specify some guidelines, such as a top and bottom salary within which the governor may specify the precise amount.

As further illustrative of the problem and the solution, see OAG March 10, 1969, Haesemeyer to Orr, a copy of which is enclosed.

April 21, 1969

MOTOR VEHICLES: Resident-operator's license, §321.174, 321.176, 321.55. Actual residence in Iowa, how determined; requires Iowa driver's license. When nonresident required to obtain Iowa license plates on vehicles owned and operated in Iowa, and exceptions. (Zeller to Greenfield, Guthrie County Attorney, 4/21/69) #69-4-20

Mr. C. F. Greenfield, Guthrie County Attorney: Reference is made to your recent letter in which you inquire as to the meaning of the word "resident" in relation to requirements for an Iowa motor vehicle registration and operator's license. Your letter reads in part as follows:

"I would like a ruling from your office stating at what stage after you enter into remunerative employment that you must purchase Iowa auto licenses and obtain an Iowa driver's license. The definition of the word 'seasonal' or 'temporary' is vague as used in §321.55. I don't believe there can be a hard and fast rule. For instance, if a salesman could prove he had a home in another state and kept his family in another state, his work might be 'seasonal' or 'temporary.' If he has his family with him, it would seem to me an Iowa driver's license and Iowa license plates should be obtained."

Section 321.174 of the Code of Iowa 1966 reads:

"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 321.176(3) of the Iowa Code reads:

"The following persons are exempt from license hereunder:

* * *

"4. A non-resident who is at least 16 years of age and has in his immediate possession a valid operator's license issued to him in his home state or country may operate a motor vehicle in this state only as an operator."

This means that a non-resident may operate a car if in possession of a "foreign" state license. However, if he has become a resident of the State of Iowa, he must promptly obtain a resident's license as provided in §321.174.

The question therefore arises, "Who is a resident?" I agree with you that a salesman who has a home in another state and keeps his family in another state, although he works in the State of Iowa, is probably not a resident. The test is: where does he really "keep house" and carry on business; and if he does both in the State of Iowa, it is reasonable to conclude that he is residing here, and more particularly if he has children enrolled in the school district.

The definition of a resident is further amplified in the decision of Chief Justice Garfield in the case of *Kollman vs. McGregor*, Sup. Ct. Iowa 1949, 39 N. W. 2d, 302 at 304 (240 Iowa 1331), where the Court quoted from an article by Professor Joseph H. Beale:

"In determining where in a state a suit shall be brought, convenience will certainly incline to an actual residence, irrespective of domicile, and the courts have therefore interpreted the word in this case as meaning an actual dwelling-place, *though this means a settled dwelling-place as distinguished from a temporary resting place.*"

A further definition of "resident" appears in the case of *Pittsburgh-Des Moines Steel Co. vs. Town of Clive*, 249 Iowa 1346 at 1349, 91 N. W. 2d 602, where the Court said:

"In applying the conception of residence to a company we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought therefore to see where it really keeps house and does business. An individual may be of a foreign nationality and yet reside in the United Kingdom. So may a company."

Accordingly, it is my opinion that if a salesman maintains and occupies a settled dwelling place in your county, for himself and/or his wife and family, and lives or works there for a majority of his time, he comes under the definition of "resident." Under such conditions, he should have an Iowa driver's license and also have Iowa license plates for his automobile.

In addition, you refer to §321.55, which deals solely with non-residents and relates only to the registration of their motor vehicles. This section reads as follows:

"Every nonresident . . . but not including a person commuting from his residence in another state or whose employment is seasonal or temporary, engaged in remunerative employment or carrying on business within hhis state and owning and operating any motor vehicle, trailer or semitrailer within this state, shall be required to register each such vehicle

and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state."

This statute (§321.55) is broader and more inclusive than the residential requirements set forth for a driver's license (§§321.174 and 321.176). *Even though a nonresident,* if he is engaged in remunerative employment in this state (except where his employment is seasonal or temporary, or where he commutes from another state), he must register his vehicle in Iowa and pay for Iowa plates, exactly as a resident, if he owns and operates a motor vehicle within the state. The exceptions include seasonal employment, such as during the Spring or Fall months, or temporary employment for a few weeks or months. Each case must be governed by its own facts. For instance, employment as a school teacher within the State of Iowa is not a seasonal or temporary employment, and Iowa license plates are required. (1958 O.A.G. 179.)

Accordingly, unless the nonresident can prove that he comes within one of these exceptions, he should immediately register in Iowa any vehicle which he owns and operates within the state.

April 21, 1969

STATE OFFICERS AND DEPARTMENTS: I.P.E.R.S. — Ch. 97B, Code of Iowa, 1966; Ch. 121, §10, Acts 62nd G. A. The amendments to Ch. 97B, Code of Iowa, 1966, by Ch. 121, Acts 62nd G. A. do not change or enlarge the procedures for qualifying prior years service established in §97B.43, Code of Iowa, 1966. (Ivie to Klein, State Representative, 4/21/69) #69-4-21

The Hon. James T. Klein, State Representative: You have asked for an opinion with regard to the provisions of Chapter 121, §10, subsection 3, Acts of the 62nd General Assembly. Your specific question reads as follows:

"If an individual was a member of I.O.A.S.I. prior to July 4th, 1953, and because of being elected to a county office subsequent to such membership but prior to July 4th, 1959, was forced to end membership in I.O.A.S.I., would the provision of this code allow him to buy back into the I.P.E.R.S. and claim credit for those years for retirement purposes?"

Chapter 121, §10 reads as follows:

"Section ninety-seven B point forty-two (97B.42), Code 1966, is hereby amended as follows:

"1. By striking lines seven (7) through twelve (12) and inserting in lieu thereof the words 'individuals who.'

"2. By striking lines twenty-nine (29) through thirty-five (35) and inserting in lieu thereof the words 'ance of employment.'

"3. By adding the following new paragraphs:

" 'Nothing in this chapter shall be deemed to exclude from coverage, under the provisions of this chapter, any public employee who was not on or as of July 4, 1953, a member of another retirement system supported by public funds. All such employees and their employers shall be required to make contributions as specified as to other public employees and employers. Nothing in this chapter shall be deemed to prohibit the reestablishment of a retirement system supported by public funds which had been in operation prior to July 4, 1953, and was subsequently liquidated.

" 'Persons who are members of any other retirement system in the state which is maintained in whole or in part by public contributions other than persons who are covered under the provisions of chapter ninety-seven (97), Code 1950, as amended by the Fifty-fourth General Assembly on the date of the repeal of said chapter, under the provision of sections ninety-seven point fifty (97.50) through ninety-seven point fifty-three (97.53) shall not become members.

" 'Nothing herein contained shall be construed to permit any person in public employment to be an active member of the Iowa public employees' retirement system and of any other retirement system in the state which is supported in whole or in part by public contributions or payments except as heretofore provided.' "

The language that is stricken from §97B.42, 1966 Code, under the provisions of subsections 1 and 2 of the said §10, had originally created exceptions to those public employees who were eligible for membership in IPERS, but by so striking the General Assembly has not changed the provisions of Chapter 97. This is so because §9(3)(b) of Chapter 121, Acts of the 62nd General Assembly, adds a new definition of the term "employee" which is a restatement of the very exceptions stricken from §97B.42, 1966 Code, by the provisions of subsections 1 and 2, §10, Chapter 121, Acts of the 62nd G. A.

In addition, the first full paragraph added to §97B.42, 1966 Code, by virtue of the amendment in §10(3), Chapter 121, Acts of the 62nd G. A., is simply a restatement of §97B.63, 1966 Code, which is repealed by the provisions of Chapter 121.

In other words, all of §10 of Chapter 121, Acts of the 62nd G. A., appears to be a reorganization of certain sections of Chapter 97B.

Section 97B.43, 1966 Code, appears to be the only section of 97B which allowed for credit for years of service prior to July 4, 1953. This section of the Code was not amended by the 62nd General Assembly, and the deadline of October 1, 1953, under which a member of an abolished retirement system could elect to receive credit for years of prior service in determining his retirement allowance under Chapter 97B, has not been changed.

I find nothing in Chapter 121 which would change or enlarge the rights of persons, whether they had been a contributing member to the Iowa Old Age Survivors Insurance program or not, to now elect by voluntary contributions or otherwise to qualify under IPERS years of service that previously would not have qualified for IPERS coverage. There is no procedure under Chapter 97B, 1966 Code, other than §97B.43 previously discussed, and the provisions of Chapter 121, Acts of the 62nd General Assembly, did not enlarge on the election to so qualify prior years of service.

April 21, 1969

COUNTY AND COUNTY OFFICERS: Board of Supervisors, Secondary Road System — §§4.1(5), 306.2, 306.4, 306.12, 306.20, and 309.67, Code of Iowa, 1966. A county may not maintain a road, as part of its secondary road system, unless such road is legally a public road. A public road may be established as provided by statute or by a common law dedication. The county board of supervisors has jurisdiction and control over all public roads within the county and is obligated to repair

and maintain the same when considered part of the secondary road system. The county board of supervisors has full and exclusive power to determine, by resolution alone, the need for, and thereupon establish, new secondary roads, and has complete discretion on whether or not public hearings will be held. (Lego to Shelton, Lucas County Attorney, 4/21/69) #69-4-24

Mr. William L. Shelton, Lucas County Attorney: By letter dated January 21, 1968 (sic) you pose alternative questions concerning the status of a "dead-end road," ⅛ of a mile in length, which "has been maintained in the past by the county" and which apparently serves the function of a private farm or residential lane leading to a public highway. You state that county records fail to disclose the origin of this road, or whether there has ever been a formal dedication and acceptance thereof "as a public road," and you ask:

(1) Can the county legally maintain and care for the road at the present time, considering the same a part of the secondary road system?

(2) If this "road" is not presently a part of the secondary road system, can the board of supervisors legally establish the same as a county road?

(3) What is the shortest and most convenient, acceptable procedure for establishing the road as a part of the secondary road system, in the event it is necessary or appropriate to do so?

Roads and highways may be established as provided by statute (Sections 306.4, 306.12, 306.20, Code of Iowa 1966); or by dedication and acceptance (*Dugan v. Zurmuehlen,* 203 Iowa 114, 211 N. W. 986, *Baldwin v. Herbst,* 54 Iowa 163, 6 N. W. 257, *Sioux City v. Tott,* 244 Iowa 1285, 60 N. W. 2d 510); or by prescription (*Dugan v. Zurmuehlen,* supra, *Culver v. Converse,* 207 Iowa 1173, 224 N. W. 834, 56 O.A.G. 28.)

Since there is no evidence, according to your report of courthouse records, that the lane or facility in question was ever established as a "public road" via statute, and inasmuch as your letter contains no suggestion that the county claims continued, uninterrupted and adverse use of the road for a period of ten years under color of right actually known to the owners (this being essential to establish prescriptive rights in the county under Iowa case law, including *Culver v. Converse,* supra), your first question can be answered affirmatively only if the facts will demonstrate an actual dedication of land for public road purposes, and an acceptance thereof by the public. A common law dedication operates by way of estoppel, and the dedication and acceptance may be implied from the conduct of the parties. *Dugan v. Zurmuehlen,* supra. In order to effect a valid dedication, there must be an intention on the part of the owner to set aside the land or some interest therein to the use of the public, and it must be clearly shown that the owner parted with all right and control over the land inconsistent with the purpose of the dedication. *DeCastello, et. al. v. City of Cedar Rapids,* et al. 171 Iowa 18, N. W. 353. Such intention must be clearly, unequivocally and positively manifested, and the evidence of public acceptance thereof by the public must be clear, satisfactory, and convincing, and inconsistent with any other construction. *Culver v. Converse,* supra.

One must examine the actual facts in the light of these principles in order to finally determine whether or not, in the instant case, the conduct

of the owners and the county constituted such a dedication and acceptance as would establish the "road" as a part of the secondary road system of Lucas County. The information contained in your letter, however, does not strongly suggest that the owners contemplated that the lane connecting said farm with a public highway would be devoted exclusively to the public use. Further, the tax history with respect to land physically occupied by said "road" could be determinative, since the possibility that the owners have paid taxes on such land without any deduction or adjustment for the highway use would be inconsistent with an inference of actual dedication. *Culver v. Converse*, supra. Query, also, whether the county, by performing certain maintenance functions on the road, genuinely intended to treat and regard the same as part of the secondary road system.

If from the facts it is determined that there has been a dedication accepted by the public, and there is in existence a public road as defined in Sections 4.1(5) and 306.2 Code of Iowa, 1966, then such a public road would of course be considered part of the secondary road system under the jurisdictional and control of the board of supervisors which, under Section 309.67 of the Code, is obligated to repair and maintain the same.

Regarding your second question, the board of supervisors under Iowa law can exclusively determine the need for, and thereupon establish, "new highways." Sections 306.4 and 306.12 Code of Iowa 1966. Thus, the establishment of new secondary roads presents questions of policy which are exclusively within the administrative province of the board of supervisors, and the Supreme Court of Iowa has recognized that it is "not for us to say what roads should or should not be" built, maintained or vacated by the county. *Polk County v. Brown*, 149 N. W. 2nd 314. In the event the Lucas County Board of Supervisors should determine that it is necessary or appropriate to legally establish this particular lane as a county road, they are clearly free to do so.

Your last question is answered by the provisions of said Sections 306.4 and 306.12 of the Iowa Code which authorize the board of supervisors, on its own motion, to establish a new highway and to determine the need for a public hearing thereon. Because a hearing is not specifically required, the procedure for establishing a new county road involves nothing more than the passage of a resolution and completion of whatever right of way and construction details may be necessary.

In summary, the board of supervisors must determine from the facts whether or not there has been an actual dedication and acceptance of this particular "road," and then judge itself accordingly. If that determination is negative and the board should elect to establish the same as a "public road," it may do so by simple resolution.

April 22, 1969

KOREAN BONUS — Section 35B, Code of 1966. The provisions of §35B.8 requiring applications for benefits thereunder are mandatory, and the Bonus Board has no authority to receive and process for payment an application for its benefits after July 4, 1963. (Strauss to Kauffman, Exec. Sec., Korean Bonus Board, 4/22/69) #69-4-22

Mr. Ray J. Kauffman, Executive Secretary, Korean Bonus Board: This

will acknowledge receipt of yours of the 8th of October, 1968 in which you submitted the following:

"I make reference to Chapter 61, Acts of the 56th General Assembly, which Act was approved by the electorate of Iowa in the General Election of November 6, 1956 provides in Section 4 of said Act: (in Part)

'Every person who served on active duty in the armed forces of the United States, at any time between June 27, 1950 and July 27, 1953, both dates inclusive, and maintained at least six (6) months legal residence in Iowa prior to entry on active duty, and was *honorably* separated or discharged from such service etc., shall be entitled to $10.00 for each month domestic service and $12.50 for each month foreign service.'

'Section 8, Chapter 61 of 56th General Assembly of the Iowa Legislature: Before receiving any compensation under the provisions of this Act, the claimant, or his successor in interest, shall file with the service compensation board, application on forms provided by said board; such application *must be so filed on or before December 31, 1960.* Such application shall state facts sufficient to establish the status of such applicant within a class as defined in section four (4) of this Act, and shall be duly verified.'

"I wish to point out Chapter 75 of the 60th General Assembly of the Iowa Legislature, assembled in 1963. AN ACT relating to an extension of time for filing application for Korean veterans' bonus.

"Section 1. Section thirty-five B point eight (35B.8), Code 1962, is hereby amended by striking the word and figures 'December 31, 1960' in line seven (7) and inserting in lieu thereof the following: *'July 4, 1963.'* The above date has been final for making application for Korean Service Compensation in Iowa.

"At a meeting of the Iowa Bonus Board, October 2, 1968, the undersigned was asked to request an opinion from the Attorney General of Iowa on the following question:

'Can the Bonus Board accept and process for payment or denial an application for Korean Service Compensation from a veteran who did not make a bona fide application on record on or before "July 4, 1963" on the grounds he knew his eligibility would be disallowed because of a discharge from the armed forces entitled other than honorable; but since "July 4, 1963" a Form DD-214, a General Discharge under Honorable Conditions has been awarded a veteran, changing his status to eligibility for all veterans benefits through State and Federal Governmental agencies?'

"We enclose factual data relevant to a particular case in question.

"It would be with appreciation if you would render your opinion in behalf of our question stated."

In reply thereto I advise as far as the benefits for the Korean War Bonus is concerned, §35B.4, Code of 1966, designates the following as entitled to receive such benefits:

"Persons entitled — basis of compensation. Every person, male or female, who served on active duty, in the armed forces of the United States, at any time between June 27, 1950 and July 27, 1953, both dates inclusive, and who at the time of entering into such service was a legal resident of the state of Iowa, and who had maintained such residence for a period of at least six months immediately prior thereto, and was honorably separated or discharged from such service, or is still in active service in an honorable status, or has been retired, or has been furloughed to a reserve, or has been placed on inactive status, shall be entitled to receive from the service compensation fund ten dollars for each month that such person was in active domestic service, and twelve and one-half dollars for

each month that such person was in active foreign service, all prior to July 27, 1953, not to exceed a total sum of five hundred dollars, provided that such person served for a period of not less than one hundred twenty days prior to November 25, 1953."

Even if entitled to receive such benefits, such persons are required to file an application therefor under the provisions of §35B.8, Code of 1966, providing as follows:

"Applications. Before receiving any compensation under the provisions of this chapter, the claimant, or his successor in interest, shall file with the board, application on forms provided by said board; such application must be so filed on or before July 4, 1963. Such application shall state facts sufficient to establish the status of such applicant within a class as defined in section 35B.4, and shall be duly verified."

It will be noted that the foregoing sections provide that the application must be filed on or before July 4, 1963. The legislative intent in setting such date is clear and is mandatory. The use of the word "must" in such statute is evidence of the legislative intent. In the case of *Fletcher and Son vs. Gordon,* 219 Iowa 661, 259 N. W. 204, it is the court's decision:

"So far as we are able to determine, this exact question has not been before this court. It will be noted that the aforesaid section 12079 states that a separate petition must be filed. This was not done in this case. Some sidelights may be thrown on this question by our early holdings in Shapleigh v. Roop, 6 Iowa 524; Van Winkle v. Stevens, 9 Iowa 264; and Shaffer v. Sundwall, 33 Iowa 579.

"It is urged that the word 'must,' in certain instances, may be construed as 'may.' Our attention is called to what is said in Union Trust & Savings Bank v. Blair-Harper Seed Co., 200 Iowa 374, 202 N. W. 839. We do not think that what is there said has application to the situation before us. We think the term 'must,' as here used, cannot be construed to mean 'may,' as contended by the plaintiff."

See also to the same effect *Patch vs. Boards of Supervisors,* 178 Iowa 283, 1959 N. W. 694.

The filing of the claim described in your letter at this time is not authorized by statute. To permit such filing would constitute legislative action by the Bonus Board.

April 22, 1969

TAXATION: Assessment of real property—§§441.21, Code of Iowa, 1966; Chapter 354, 62nd G. A.; S.F. 629; Ways and Means Sub-committee amendment to S.F. 629; H.F. 784. Market value for assessment purposes must be determined by the assessor and is determined by him by exercising his fair judgment but he must consider the guidelines as set out by the legislature. Different guidelines for assessment of agricultural property are not unconstitutional. Sales prices should not be the sole determiner of market value. (Murray to Chester O. Hougen, State Senator, 4/22/69) #69-4-23

Hon. Chester O. Hougen, Senate Chambers: This will acknowledge receipt of your requests for the opinion of this office, the first of which was dated April 3, 1969, and your second request dated April 11, 1969, concerning certain provisions of S.F. 589 and H.F. 784. Senate File 589 by the Committee on Ways and Means states that this is a bill for, "An Act relating to the assessment of real property." Its counterpart, H.F. 784 by the Committee on Ways and Means is identified as a bill for, "An Act relating to the valuation and assessment of real and personal property."

Both of these bills are identified as amendments to Chapter 354, §1, Acts of the 62nd G. A., amending §441.21, 1966 Code of Iowa.

In a telephone conversation with you on April 14, you advised me that there was an additional bill on the same subject matter by a sub-committee of the Senate Ways and Means Committee which bill is not numbered and has not been introduced. You also advise that you had prepared a written explanation of this proposed bill which explanation was presented to the Ways and Means Committee on March 27, 1969. At your request, a messenger delivered the proposed sub-committee bill and your explanation thereof to me on Tuesday, April 15, 1969, and you requested that this bill also be reviewed in connection with our review of the Senate and House files relating to the same subject matter, i.e., amendments to the present statute covering the valuation and assessment of real and personal property.

In your letter of April 3, 1969, you specifically ask:

"1. Does this (S.F. 589) void the effect of market value based on sales in all instances?

"2. Does the same test apply to agricultural property, lines 21 through 23, page 2 (S.F. 589), or is a different standard or classification made of agricultural land?"

In your letter of April 11, 1969, you stated:

"A request was recently made for an opinion regarding S.F. 589.

"Will you also include in your opinion H.F. 784 the specific question:

"1. Does the provision for agricultural land as distinguished from all other real property render the same unconstitutional?"

The answer to question one, in your letter of April 3, is no.

Reference to Chapter 354, §1, Acts of the 62nd G. A., lines 5 through 11, states as follows:

"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."

The above language leaves unchanged the value to be found by the assessor, namely, "fair and reasonable market value."

Your attention is then called to the provisions of §441.17 which states as follows:

"Duties of assessor. 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."

The Supreme Court of Iowa on many occasions has stated that an

assessor must use his fair judgment in arriving at "market value." This is the primary concern of the courts when reviewing an assessment made by an assessor and if he has exercised a fair and reasonable judgment, the courts will not disturb his determination of market value. One of the most recent cases from the Supreme Court of Iowa stating this is *Chicago and North Western Railway Company v. Iowa State Tax Commission et al.* (1965) 257 Iowa 1359, 137 N. W. 2d 246, 252, 253. The court reaffirmed this proposition in *Chicago and North Western Railway Company v. X. T. Prentis et al.* (1968) .....Iowa....., 161 N. W. 2d 84, 87. We repeat that the assessor is the sole determiner of actual value which is defined as being "fair and reasonable market value" under the statute as it now exists and it will remain the same under the amendments proposed by S.F. 589.

Since the material part of the assessing statute, §441.21, has not been amended, the additional language in S.F. 589 places an undue emphasis on "sale price" in the opinion of this writer. This is so since the former language, which allowed the assessor to consider other factors when the sale price of the property or other comparable property in normal transactions reflecting market value was not known, will be striken by this amendment. The amendment specifically provides at lines 14 through 16 that:

"Sale prices of the property or comparable property in normal transactions reflecting market value shall be the best evidence of market value."

Query — in the event the sale price of the property and other comparable property is not available to the assessor, may he only look to, in the words of the amendment, "Good faith offers to buy or sell the property, and the probable availability or unavailability of persons interested in purchasing the property," in establishing his judgment of "fair and reasonable market value"? There is only an inference that he may consider other factors such as productive and earning capacity, if any; industrial conditions; costs; physical and functional depreciation and obsolescence; replacement cost; and all other relevant factors, but only after a factual determination is made by the assessor that these elements affect the market value of the property as defined by the amendment which clearly states that "sale prices" shall be the best evidence of market value.

We find a further objection to the use of a "sale price" as the best evidence of market value. To borrow some language from *Chicago and North Western Railway Company v. Prentis*, supra, at page 92 of N. W. 2d, Justice Snell, when commenting on the difficulty on arriving at a reasonable capitalization rate, stated:

"It has been said frequently that courts and judges should admit knowing what everyone else knows. We are fully aware of economic trends and conditions and the lack of attractive returns on many investments."

We will assume that the members of the legislature and this office "knows what everyone else knows." It is rather common knowledge that many properties in Iowa have not been sold and will not be for sale, e.g., family farms and large industrial and mercantile establishments. Therefore, there can be no current "sale price" to be used by the assessor as

the best evidence of the market value for these types of property. At this point we might also add that it is also common knowledge that comparable property to the property being assessed frequently does not exist. Again, we have the best evidence of market value missing. The term "sales prices" in the opinion of this writer assumes a fact situation wherein the sale *has taken* place and, therefore, the assessor must use this price as his market value. In situations where the property or comparable property has not been sold he is without his best yardstick for determining market value under this amendment. May he then look to the "sales prices" of these particular properties at the time they were last sold, which may have been many years prior to the assessment date, in order to determine its present market value; or, is he then at liberty to consider "its productive and earning capacity, if any; industrial conditions; its cost; physical and functional depreciation and obsolescence; replacement cost; and all other relevant factors"? If he may, he may be criticized for using "secondary evidenee" in arriving at the present market value of the property even though it would produce a more reasonable market value than the sale price of said property established many years prior to the assessment date.

Under our prior statute, §441.21, before it was amended by the 62nd G. A., market value was one of the elements that the assessor was directed to consider in arriving at the actual value of the property. In *Des Moines Building Loan and Savings Association v. Bomer* (1949) 240 Iowa 1192, 36 N. W. 2d 366, the court was faced with the unusual situation where a large office building in downtown Des Moines was purchased late in December for a *sale price* of approximately $276,000 and the buyer took possession of the building on January 1. By statute, the assessment of this property was made on January 1 in the amount of approximately $394,000. There was also evidence in this case that the seller had turned down an offer from another party in the amount of $250,000. The court found that the sales transaction was a legitimate one between a "willing seller" and a "willing buyer." The taxpayer argued that the actual value of the property was established by the market value as evidenced by the sale. The taxpayer also argued that various theoretical and mathematical formulae are not reliable or sufficient alone to arrive at a value for taxation purposes when the assessor has an actual bona fide sale price, and further, that only where there is no sale price may he look to other factors. The court disagreed with the taxpayer and upheld the assessment and decided that when the statute directs that the assessor, in exercising his judgment, use other factors than the sale price in arriving at his taxable value, that judgment, if reasonable, will stand, by stating:

"As heretofore stated it is our conclusion that as applied to this case and generally in the matter of all valuations for tax purposes the taxing authorities are not alone restricted to a consideration of the sale price despite the fact that the property may have been sold at approximately the same time as the assessment valuation was made."

In another case under the prior statute, *ankers Life Company v. Zirbel* (1948) 239 Iowa 275, 31 N.W. 2d 368, the court commented on the difficulty of arriving at market value even though the statute contains specific instructions:

"It is apparent the term 'market value' does not mean the same thing

to all men or under all circumstances or for all purposes. Names are not conclusive. Even Russia claims to be a 'democracy'!

* * *

"As has been said in many decisions, the science of assessment for taxation is far from being an exact science. Perfection is unattainable because there is no such thing as perfection. This is merely another way of saying that valuation, for assessment purposes, is in the realm of opinion and there is no absolute standard."

While it may appear that we have been duly critical of the language used in S.F. 589 this is not our intent. We only wish to point out that past efforts of the legislature in attempting to specifically direct that which the assessor may or may not consider in arriving at his taxable value have not met with much success in the Iowa courts. It is not the function of this office to draft legislation and we decline to do so in this instance since this is a legislative not a judicial function. Specific directions to the assessors by way of attempting to limit the factors that may be considered by them in arriving at market value should be absolutely clear and incapable of being misconstrued, e.g., if the legislature should desire and insist upon making "sales prices" of the property of comparable property in normal transactions, we think it is of primary importance that the sale price to be used should be specifically confined to a given period of time so that the assessor will have no confusion in knowing when he can look to other relevant factors.

In reference to your question number two in your letter of April 3, 1969, we are of the opinion that the language contained in lines 21 through 23, page 2 of S.F. 589 does attempt to set agricultural land apart from all other property being assessed. The previous language in Chapter 354, §1, stated in part as follows:

"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 amending language is as follows:

"The market value of agricultural property shall be determined on the basis of its current market value for its current use and not on its potential value for other uses."

In a lengthy opinion from this office (Turner to Forst, Director of Revenue, 9/3/68) a copy of which is attached hereto for your reference, we construed the words "as reflected by its current use" when referring to agricultural property as being a "preferential assessment law." We said that an effort to limit the tax burden impossed on agricultural property by stating that potential development value for other uses was not to be considered by the assessor in arriving at his current market value, was a legitimate legislative mandate. In addition to the cases cited in said prior opinion, we refer you to the Iowa cases of *Blume v. Crawford County* (1933) 217 Iowa 545, 550, 551, 250 N. W. 733, 92 A.L.R. 757 and *Dickinson v. Porter, State Comptroller, et al.* (1949) 240 Iowa 393, 35 N. W. 2d 66, appeal dismissed 70 S. Ct. 88, 338 U. S. 843, 94 L. Ed. 1371. In the latter case, Justice Garfield stated:

"Our state constitution contains the express mandate, 'The General Assembly shall encourage, by all suitable means, the promotion of intel-

lectual, scientific, moral, and agricultural improvement.' Art. IX, 2d div., sec. 3.

"We have frequently referred to agriculture as the basic industry in this state. (Citing cases)

* * *

"It is not debatable that it is part of the public policy of this state, evidenced by our constitution and numerous statutes, to encourage agriculture. It seems equally plain the encouragement of our basic industry serves the public interest. We are not convinced the legislature might not fairly conclude this law in its practical operation will both benefit and encourage agriculture."

This case upheld the enactment of the Agricultural Land Tax Credit Law.

In our opinion the amending language is for all practical purposes the same as the language construed in our opinion of September 3, 1968, but is somewhat more specific when it states that potential value for other uses shall not be considered; in other words, the amendment will now specifically state that which we said the former language meant.

However, we must again point out the dangers in directing that an assessor consider sales prices as the best evidence of market value. Assume agricultural land was sold and the sale price included the potential value of the land for other uses. Assume that the assessor is called upon to make his assessment shortly after the sale has been consummated. Must he then fix his assessment based upon the sale price even though the statute directs that he shall not consider potential use of said land when arriving at fair and reasonable market value of agricultural property? We again caution that in the area of drafting preferential legislation, preciseness in language is a must.

In your letter of April 11, 1969 and the question contained therein as to whether or not the language of H.F. 784 requiring a different procedure for assessing agricultural land as distinguished from all real property make said amendment unconstitutional. We think not. In the *Blume* case, cited above, decided in 1933, upheld a law directing county boards of supervisors to appropriate funds raised by taxation to county farm bureaus under certain conditions and says a statute in aid of agriculture is not repugnant to any constitutional provision. The plain inference from the opinion is that what benefits agriculture benefits the state as a whole.

In the *Dickinson* case, cited above, the legislature passed an act appropriating money for each fiscal year as a credit against the tax on each tract of agricultural land in certain school districts and the legislative finding that there were sufficient differences between the agricultural land referred to in the act and other properties justified the classification and the court said it would not interfere with this classification since it rested upon a reasonable basis.

While both of these cases were in essence appropriations to aid all owners of agricultural land within the definition of the respective acts, we see no distinction between that technique and the legislative direction to lessen the tax burden for all owners of agricultural land by directing, that in addition to considering sale price in arriving at market value of

agricultural property, that equal consideration shall be given to crop suitability and productivity and earning capacity capitalized at generally accepted interest rates to be applied uniformly among counties and among classes of property along with the direction not to consider potential value for other uses when arriving at taxable values. However, as you will recall, in 1966 in the case of *Borden v. Selden* (1966) 259 Iowa 808, 146 N. W. 2d 306, the Supreme Court decided that an act of the legislature was unconstitutional and in violation of the privileges and immunities clause of the United States Constitution, Amendment 14, §1, when it attempted to deny the agricultural land tax credit to non-resident owners of agricultural property within the State of Iowa. In our opinion the language of H.F. 784 is free from this discriminatory classification since it will apply to the benefit of all agricultural land and the owners thereof whether residents of Iowa or not.

We might add that the amending language of H.F. 784 does not contain the limiting language that "sales prices" of the property or comparable property must be considered as the best evidence of market value as found in S.F. 589. The directives to the assessors contained in the latter amendment advise the assessor concerning certain sales which he shall not use in determining market value if he decides that he must refer to "sales prices" in exercising judgment on property being assessed by him.

We have reviewed the amendment to S.F. 589 by the Sub-committee of Ways and Means. This amendment strikes everything after the enacting clause and thus, for all intents and purposes, will do away with the directives to the assessors contained in S.F. 589 if passed by the legislature.

Like its counterpart, H.F. 784, the sub-committee amendment does not make "sales prices" the best evidence of market value. But unlike S.F. 589 and H.F. 784, it does not contain a mandate that market value of agricultural property be assessed differently than other real property. We again repeat that the provisions preferring agricultural assessments over non-agricultural assessments is not unconstitutional and is merely a matter of policy to be decided by both legislative bodies and not this office. The language in the amendment to S.F. 589 is more in harmony with the Iowa court's construction of what the assessors may take into consideration while exercising their judgment as required by the applicable statutes. When the amendment refers to the use of "sale prices" of the property or comparable property it merely directs that the assessor shall take them into consideration in arriving at market value. But as we mentioned in our prior comments on use of sale prices by the assessor, some limitation should be made as to the date when the sales occurred. The language used, in reference to the use of sale prices, somewhat limits the time in which the sales must have occurred by stating they should "reflect current market value." This, of course, assumes that "sale price" may be defined as "current market value" and as mentioned in the previous cited cases, the court has many times said that "sale price" and "market value" are not synonymous.

Further, as we have previously mentioned, we will again assume that the legislature and this office, like judges, know what everyone else knows and we consider the following language:

"the following shall not be taken into consideration: Sales where real

estate would be joined or become a part of an existing unit." (LL. 38-40, Amend. to S.F. 589)

to mean that this type of sale is ordinarily made between owners of adjoining agricultural property and that in most instances the sale price paid does not truly reflect a normal market value and hence by excluding them from other sales there is an indication that this is a preferential treatment for agricultural property only. For the reasons above mentioned, we do not find this treatment to be either discriminatory nor unconstitutional.

We have some reservations concerning the mandate by the legislature to the Director of Revenue requiring that he shall adopt uniform rules and regulations for assessing and valuing property for tax purposes in order to provide uniformity and equalization of valuations of property within and among taxing districts. As you know, the purpose of granting rule-making authority to an administrative agency is to aid the agency and those coming within its jurisdiction to clearly understand legislative enactments. As a practical matter rules are supposed to "fill up the blanks." However, there is a well known limitation on rule-making authority and that is that a board has no authority to legislate nor can it adopt rules that are in the nature of laws. The agency can not by rule change the legal meaning of the statute. *City of Ames v. State Tax Commission* (1955) 246 Iowa 1016, 71 N. W. 2d 15; *Kistner v. State Board of Assessment and Review* (1938) 225 Iowa 404, 208 N. W. 587, 593.

In the explanation made part of both the Senate and House files and your separate explanation of the sub-committee amendment, it is clearly stated that the purpose of these proposed bills is to clarify the amendments made in §441.21, Code of Iowa, 1966, by Chapter 354, Acts of the 62nd G. A. In essence these proposed bills are explained as limiting the use of sales transactions in determining market value to those that truly reflect the value of the property as property, and to direct the assessor what things he shall consider and what he shall not consider in arriving at his market value of the property being assessed. We must assume that the legislature has found a need to amend §441.21 in order to advise the local assessors throughout the 120 assessing jurisdictions in the State of Iowa, that they must correct certain assessing "evils" which the legislature thought existed under §441.21 before the amendments of the 62nd G. A. and have now decided that further amendments are necessary as contained in these proposed bills in order to correct certain evils which the legislature now considers do prevail. Correcting these evils is purely within the jurisdiction of the legislature and these evils, if they exist, must be corrected by appropriate legislation and not by the Director of Revenue by giving him authority to make general rules and regulations which may conflict with the legislative mandates. Under the present law in the State of Iowa, the local assessors are the sole determiners of market value of all property assessed by them and they have the statutory duty of fixing market value of all assessable property. This duty can not and will not be usurped by the courts of Iowa nor should it be usurped nor be dictated by another state agency, namely the Department of Revenue. This is not to say that the Director of Revenue is totally helpless in this area. The Director of Revenue has broad powers under Chapter 421, Code of Iowa, 1966 to *supervise* and guide assessors and lo-

cal boards of review. This does not mean that he may substitute his judgment, through rules and regulations, for that of the local assessor, since this would be tantamount to making the Director of Revenue the assessor. Of course, should the legislature wish to have local property throughout the state assessed by a central assessing agency such as the Director of Revenue it certainly has the authority to so state. But until the legislature gives this authority to the Director of Revenue, the local assessor must remain the sole and exclusive agent for performing this function. The fair and reasonable market value called for by the provisions of §441.21 must be found by the assessor and it is only the legislature who can attempt to exercise some control and direction by enacting certain standards which will assist the assessor in arriving at what the legislature believes should be the market value of property. These standards or guidelines should not rest in the discretion of an administrative agency who may not add to or change the statutory law in any manner.

In 1961 the 59th G. A. in Chapter 225, §2, amended §421.17(2), fourth paragraph, as follows:

"For the purpose of bringing about uniformity and equalization of assessments throughout the state of Iowa, the state tax commission shall prescribe rules and regulations relating to the standards of value to be used by assessing authorities in the determination, assessment and equalization of actual value for assessment purposes of all property subject to taxation in the state, and such rules shall be adhered to and followed by all assessing authorities."

No rules and regulations were promulgated under this section since the state tax commission, then the governing administrative agency, did not believe that they could dictate "standards of value" which must be used by the assessor in his determination of assessments. It was the thought of the tax commission that the use of the term "standards of value" was too general and too broad and that if standards of value were to be prescribed by the commission and the assessors commanded to use them, the commission would be invading an area which is strictly a legislative prerogative. The commission interpreted this amendment to §441.17 to allow them to make rules and regulations concerning certain guidelines that they would use for the purposes of *equalizing* property throughout the state but this function is not to be confused with assessing property throughout the state. The equalization function is performed under the provisions of §§441.45 through 441.49 and it is to be noted therein that the proecdure is based upon *percentage increases* in the *aggregate valuations* as shown by the abstracts of assessment furnished to the Department of Revenue by the local assessing districts. As an equalizing agency, the prior tax commission and the now Director of Revenue, has no jurisdiction nor authority over *individual assessments* made by the assessor, except the limited authority granted by §421.17(10), second paragraph. Erroneous assessments can only be cured locally by the local boards of review.

For the above cited reasons, while it is within the discretion of the legislature to grant rule-making authority to the Director of Revenue under §441.21, it is our opinion that if the assessors are to be advised of certain "standards of value" this should clearly be spelled out by the legislature as it has attempted to do by Chapter 354, 62nd G. A., and these present proposed amendments.

In the Ways and Means Sub-committee amendment, paragraph four therein, there is authority granted to the assessor to use "sales ratios for the purpose of equalizing assessments and valuations for taxing purposes." The amendment then directs that "when used, sales of the *last three years* shall constitute the basis in computing the sales ratio." Are we to assume that this would be a "sales ratio" computed by the assessor? If so, this language should be so clarified. If reference is made to the sales ratio data required to be compiled and computed by the Department of Revenue under the provisions of §421.17(6), second paragraph, it is to be noted that the data supplied to the Department of Revenue is on a quarterly basis and that sales of property in the last quarter of a prior year are not received by the department until some time after anuary 1, the assessment date, and the ratio is not published or available to the assessor until after May 1. Unless the assessor were to compute his own ratio he would not have complete data from the Department of Revenue for the prior year until long after his assessment should have been made.

We have no comment concerning the other sections of the sub-committee amendment on the burden of proof and the requirement of furnishing information contained in any formula or method used by the assessor in determining actual value, nor do we have any comment on the changes proposed concerning the assessment of an inventory of a merchant.

Section 4 of the Ways and Means Sub-committee amendment which states:

"The director shall review any orders and shall equalize assessments in the year 1970 pursuant to the provisions of this act."

will promote much legal dissension throughout the state. As you know the listing and valuation of real property occurs on a quadrennial basis and the 62nd G. A. made the year 1968 the listing and valuation year. Equalization of values was completed by the Director of Revenue in the year 1968 and said valuation adjustments will prevail for the years 1968, 1969, 1970 and 1971 for the purpose of adjustments made under the provisions of §441.49. The year 1968 was excluded by reason of the temporary injunction obtained by certain assessing jurisdictions as a result of the decision of the Polk County District Court of which you are aware, but the proposed adjustments for the purposes of equalization must be used for the remaining three years of the quadrennial period. This amendment purports to change the listing and valuation of realty to the year 1973 and in effect requires that the properties assessed, listed and valued shall conform to these new provisions of §441.21. It is, therefore, apparent that the Director of Revenue will not have any new or changed values available to him in the year 1970, and he would therefore be unable to equalize assessments in said year under the provisions of this Act.

There is one other objection that occurs to us concerning the proposal to make "sale prices" the "best evidence of market value." When the Director of Revenue assesses certain property of utilities and railroads on a state-wide basis he is required to take into consideration the provisions of §441.21 in determining his actual value. (See §434.15, Railroad Companies and §437.7, Electric Transmission Lines as amended by the 62nd G. A.) This could be quite difficult since this type of property is very seldom sold as recognized by the Iowa Supreme Court in both the *North*

Western cases cited above. As stated by Judge Snell at page 95 of 161 N. W. 2d:

"The difficulty arises because there is no basis for comparison of railroad property to farm lands, homes or business buildings.

"Railroads are not bought and sold as are farms, homes and buildings."

Please note that the references herein were to the Senate File, House File and sub-committee amendments furnished to this office by you and you have since advised that S.F. 589 has now been refiled and appears as S.F. 629; that the subcommittee amendment was filed as the amendment to S.F. 589 and is now the amendment to S.F. 629; and we understand that H.F. 784 is the present bill before the House.

We might also add, as often times stated by the Supreme Court of Iowa, that it is not the province of this office to pass upon the policy, wisdom, advisability, or justice of a statute and it is not the purpose of this opinion so to do.

April 25, 1969

CONSTITUTIONAL LAW—S.F. 295, 63rd G. A.; Iowa Constitution, Art. I, §3, §6, Art. III, §31. Program of tuition grants to needy students in certain accredited private colleges infringes prohibitions of Iowa Constitution against laws respecting establishment of religion, and against use of tax money for religious purposes; accredited colleges indicated by proposed Act include religious and sectarian institutions; although the grants nominally are to students, the students are merely conduits through whom the grants flow to the colleges; when a construction is possible that will sustain an act there is a duty to adopt it, but this duty does not authorize any official or agency of government other than the legislature to alter or amend the terms of legislation to accomplish that result. The proposed Act as it is passed, does not violate Art. I, §6, as lacking in uniformity of application. (Turner to Hill, State Senator, 4/25/69) #69-4-25

The Hon. Eugene M. Hill, State Senator: By your letter of March 4, 1969 you have raised a question for an opinion by the attorney general as to whether Senate File 295, 63rd General Assembly, providing for tuition grants based on financial need to full-time resident students attending accredited private institutions of higher education in Iowa is in violation of the Constitution of this state. Your letter states:

"Article I, §3, of the Constitution states:

" 'The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; 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.'

"Admittedly the private colleges and universities in Iowa are in the main church related and church supported. Many require courses in religion, attendance at chapel, and a number prepared students for the ministry. Obviously proposing a policy of appropriating directly to the private colleges and universities would be unconstitutional. Consequently, the proponents of Senate File 295 have chosen the historically traditional route of those seeking state support for private church related schools, and are terming the aid to be granted aid to the student and not to the colleges and universities.

" 'Tuition grants will put the private colleges and universities in a

more competitive position with state supported universities.' President of Central College.

" 'Tuition grants will make it possible for private colleges and universities to use funds presently needed for scholarships to be used to pay higher faculty salaries, etc. . . .' President of Drake University.

" 'Obviously we are trying to bale out the private colleges. Cut it any way you like, that is the way it is.' Senator from Polk — Mr. Denman.

"Does not Senate File 295 in fact propose a policy of state support for private colleges and universities, even though it purports to be a tuition grant to the student and in so doing is it not clearly a violation of Article 1, Sec. 3 of the Constitution?

"Article 1, Sec. 6 of the Constitution states:

" 'All laws of a general nature shall have a uniform operation; the General Assembly shall not grant any citizen, or class of citizens, privileges or immunities which, upon the same terms shall not equally belong to all citizens.'

"It would appear that Senate File 295 fails in this requirement also. Historically in these United States since the turn of the century 'higher education' has meant simply 'education beyond high school.' Senate File 295 because it would limit tuition grants to those students attending 'an institution of higher education located in Iowa which is accredited by the North Central Association of Colleges and Universities, and which is operated privately and not controlled or administered by any state agency or any subdivision of the state,' appears to fail the test of general application. Students wanting to attend our state universities and area community colleges are excluded. Students wanting to attend private business schools or colleges are excluded, as are those wanting to attend schools of nursing. Students wanting to attend private vocational or technical schools in electronics, computer maintenance, refrigeration, etc. are excluded.

"Can it not be said that Senate File 295, because it fails to treat equally all students wanting an education beyond high school, is in violation of the Constitution of the State of Iowa?"

The questions raised are profound and complex and have engaged several members of this department and myself over a period of some weeks. During this time the issues were further complicated by amendments and proposed amendments in both houses of the General Assembly. With the bill in its final form, I am now able to give you a complete response to your request.

In my opinion the answer to the question of whether Senate File 295 violates Article 1, §3, Constitution of Iowa, depends in part upon certain factual considerations which are matters of common knowledge in the Iowa legislature. First, it is commonly known and understood that a large percentage of the private schools and colleges in Iowa were founded by a church and are largely church supported and controlled. Some bear religious names. Church supported institutions quite properly and naturally tend to teach their own religious faith and to support their own church. They own, construct and maintain church buildings and chapels in which the religious beliefs and doctrines of their particular church or religion are espoused and promulgated.

The definition of "accredited private institution" set forth in the Act includes religious colleges as well as non-sectarian colleges. This is so because both are included within those accredited by the North Central

Association of Colleges and Secondary Schools, which accreditation by that agency is made an essential part of the definition.

There is no question but that a law appropriating funds *directly*, to religious colleges in *direct* support thereof, would violate Iowa's constitutional prohibition against making a law respecting an establishment of religion. This is the clear requirement of the holding of the Iowa Supreme Court in *Knowlton vs. Baumhover*, 1918, 182 Iowa 691, 166 N. W. 202, in which it is said:

"If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state and that our public school system, supported by the taxation of the property of all alike — Catholic, Protestant, Jew, Gentile, Believer and Infidel — shall not be used *directly or indirectly* for religious instruction, and above all that it shall not be made an instrumentality of proselyting influence in favor of any religious organization, sect, creed or belief. So well is this understood, it would be a waste of time for us at this point to stop for specific reference to authorities or precedents or to the familiar pages of American history bearing thereon." (Emphasis added.)

Knowlton vs. Baumhover enjoined the directors and officers of a school corporation from using public funds for the support of a parochial school — in that case a Catholic school. The case held that "every church or other organization upholding or promoting any form of religious or religious faith or practice is a 'sect' " and that the right to use public school funds for the advancement of religious or sectarian teaching is denied to each and all. The Court held that to constitute a sectarian school or sectarian instruction which may not lawfully be maintained at public expense, it is not necessary to show that the school is *wholly* devoted to religious or sectarian teaching and that:

"The authorities to which we have referred show in the clearest possible manner the fixed policy of this nation and of its several states to maintain the common school system free from sectarian influence or control and to preserve the equal right of every citizen to have his children educated in these schools of the people without being subjected to the slightest sectarian leading upon the part of their teachers."

The Iowa Court made it clear, however, that it was not in any way philosophically opposed to either religion or religious schools, or to the particular religion involved:

"Neither do we expressly or by implication disparage parochial or private schools for those whose consciences or preferences lead them to make use of such means for the education of their children. We can and do hold in high respect the convictions of those who believe it desirable that secular and religious instruction should go hand in hand, and that the school which combines mental and spiritual training is best adapted to the proper development of character in the young. The loyalty to their professed principles which leads such persons to found and maintain schools of this class *at their private expense* while at the same time bearing their equal burden of taxation for the support of public schools, is worthy of admiration and convincing proof of their sincerity. But it is doubtless true *that this double burden (double only because voluntarily assumed) sometimes renders those who bear it susceptible to the misleading argument that because they thus carry an extra load for conscience' sake, there is something wrong in the policy which forbids them to make the public school a means for accomplishing the end for which the parochial school is designed.* If that feeling be allowed to prevail in a school

district or a community where there is little or no sentiment to the contrary, ecclesiastic encroachment upon the legal nonreligious character of the public school is quite sure to become apparent. But, as we have before intimated, the right of a controversy of this kind is not to be decided by a count of the number of adherents on either side. The law and one are a majority, and must be allowed to prevail. The spirit which would make the state sponsor for any form of religion or worship, and the religion, whether Protestant or Catholic, which would make use of any of the powers or functions of the state to promote its own growth or influence, are un-American; they are not native to the soil; they are inconsistent with the equality of right and privilege and the freedom of conscience which are essential to the existence of a true democracy.

"We have no criticism to offer of the great religious organization, a local branch of which happens to figure to some extent in the transaction here in controversy, a transaction which we have condemned on legal grounds alone. We cheerfully and without reservation express our appreciation of its great services to mankind; of the great names which adorn its history and its literature; of its boundless charities and its steadfast adherence to its conception of the true faith. What we have said with reference to this case we would repeat with no less emphasis if the parochial school in question were under the patronage of the followers of Martin Luther or John Calvin or John Wesley or other Protestant leadership. The cry which is sometimes heard against the so-called 'Godless school' is raised not by Catholics alone, and in not a few Protestant quarters there are manifestations at times of a disposition to wear away constitutional and legal restrictions by constant attrition and bring about in some greater or less degree a union of church and state. But, from whatever source they appear, such movements and influences should find the courts vigilantly on guard for the protection of every guaranty provided by Constitution or statute for keeping our common school system true to its original purpose." (Emphasis added.)

Although *Knowlton vs. Baumhover* was decided in 1918, it is still the leading Iowa Supreme Court case on the subject of use of public funds for private schools and the rules of stare decisis demand that it be followed. Nothing in the principles therein announced suggest a distinction as between colleges and common schools as far as supporting funds are concerned. And nothing relating specifically to either schools or colleges may be found in Article I, §3 of our constitution to justify such distinction. Moreover, I am unable to find anything in more recent foreign cases requiring a contrary result.

The strongest authority we have found in support of the theory of the bill under consideration is the 5 to 4 decision of the United States Supreme Court in *Everson vs. Board of Education*, 1947, 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 711. The board, in Everson, authorized reimbursement of parents of bus fares paid by children attending both public and nonprofit private schools. Everson, a taxpayer, challenged this provision, and in particular the reimbursement of parents whose children attended Catholic schools, as an infringement of the State and Federal constitutional prohibitions on laws respecting an establishment of religion.

The Supreme Court remarked that the case, and the decisions relevant to the issue, "show the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion." The court also said:

"It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public pur-

pose. . . . The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or 'hitchhiking.' "

Finding the reimbursement of the bus fares a proper public purpose, for the reasons indicated, the Supreme Court rejected the taxpayer's challenge, saying:

"The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."

In short, it was the bus company, and not the schools, that got the money.

The situation contemplated by this bill is entirely different. Here it is not a bus company but the colleges that will get the money; the grants are related to the tuition; it is contemplated that the student will pay it to the college; and provisions are made for the State's recovery of the tuition grants from the college, not from the student, if the student should drop out of college and become entitled to a refund. So the students act only as conduits through whom the public funds will flow into the treasuries of the colleges.

This inescapable distinction being given the weight it commands, it is clear that the famous Everson decision is not authority in support of the theory of the proposed bill. On the contrary, the careful precision of the majority opinion impels us to the view that, however indirectly accomplished, public funds may not be granted to private colleges.

In *Spears vs. Honda,* decided December 12, 1968, ... Hawaii ....., 449 P. 2d 130, a plan to reimburse sectarian and private school students for the expenses of traveling on a city bus was ruled unconstitutional. However, I do not consider this case controlling or even well reasoned; it is to be noted the Constitutional prohibition in Hawaii is much stronger than in Iowa.

Senate File 295 does not *directly* support sectarian schools or colleges. Under this proposed new Iowa law, the funds would be paid directly to students who have enrolled in the private colleges and not directly to the colleges. But as previously noted, it is strictly a tuition grant. It is granted for no other purpose than paying tuition or reimbursing the student therefor. The college gets the money.

Questions of whether religious colleges are in need of this support or actively seeking it, or even of whether the public is in need of the private colleges, are irrelevant if the public funds do, in fact, benefit them and thus tend to establish a religion. *Knowlton vs. Baumhover,* supra. And this is true although the public funds do this only indirectly. The Iowa Court says that public funds cannot be used to support religion "directly or indirectly" (see italicized words from first quotation of Knowlton above).

Of course, it is assumed that this proposal is based upon the good faith belief of all concerned that there is a great public need for private colleges; that if private colleges are no longer able to survive, our public

colleges will have to be greatly expanded; and that this will result in a great increase in cost to our taxpayers. Doubtless this is true. Certainly, no one can reasonably disagree with those statements of our Iowa Supreme Court that our religious institutions do great public good and are deserving of high praise. But neither the wisdom of our constitutional prohibition nor the wisdom of this proposed law are for me to decide.

" . . . A statute which is in conflict with the constitution is invalid regardless of the intention of the legislature in enacting it and regardless of the fact that it is based on strong considerations of public policy. Failure of an officer to enforce a statute according to its terms does not save it if it violates a constitutional provision." *16 C.J.S. 221.*

Your question to me is whether this Act (S.F. 295) violates Article 1, §3, Constitution of Iowa. In my opinion it does. The legislature may not by means of statutory enactment do indirectly that which it is prohibited from doing directly, by constitutional provision. *16 C.J.S. 216.* If this provision can stand against the prohibition of our constitution then expedients can be devised and circumlocutions discovered by ingenious and imaginative minds to avoid the same prohibition as it relates to our common schools and high schools and ultimately there will be little or no difference to the taxpayers between the burden of supporting a public school and the burden of supporting a private school. For surely there is presently little or no difference between the State's handing public funds directly to a private school and handing them to the pupil to do so.

Finally, could the Act be construed to relate only to students of nonsectarian private colleges? We have noted above that an accredited private institution is defined in the Act and includes religious colleges. If the Act did not include religious colleges and the students thereof no question would arise under Article 1, §3, of Iowa's Constitution. The principle requiring courts to adopt a construction consonant with the validity of the statute does not authorize them to go beyond the province of legitimate construction. Where the statute is unambiguous and susceptible of only one interpretation, it must be given that construction, whatever the consequences when tested by the constitution. Usage and practical interpretation of a statute cannot control the interpretation of the constitutionality unless the language of the statute is obscure and doubtful. Accordingly, courts may not, in order to save a statute from unconstitutionality, or free it from doubt thereof, give to it a meaning which was clearly not intended by the legislature enacting it, or a distorted meaning, read words into or out of the statute, or read provisions or modifications into it, or undertake virtually to rewrite its text, or add amendments thereto, or exercise legislative, executive or administrative functions. *16 C.J.S. 385-387; Yu Cong Eng vs. Trinidad,* 271 U.S. 500, 46 S. Ct. 619, 70 L.Ed 1059; *New York Life Ins. Co. vs. Burbank,* 1927, 209 Iowa 199, 216 N.W. 742; *Kruck vs. Needles,* 1966, 259 Iowa 470, 144 N.W. 2nd 296; *Town of Mechanicsville vs. State Appeal Board,* 1961, 253 Iowa 517, 111 N.W. 2d 317.

You next ask whether the bill might be in violation of the Constitution of the state of Iowa because it fails to treat equally all students wanting an education beyond high school. Legislation which applies equally to all in a reasonably designated group is not discriminatory and does not

constitute class legislation. *Doyle vs. Kahl*, 1951, 242 Iowa 153, 46 N.W. 2d 52. If there is any reasonable ground for classifications contained in a statute and it operates equally upon all within the same class, there is uniformity in the constitutional sense. *Dickinson vs. Porter*, 1949, 240 Iowa 393, 35 N.W. 2d 66, appeal dismissed 70 S. Ct. 88, 338 U.S. 843, 94 L.Ed 1371; *Lee Enterprises, Inc. vs. Iowa State Tax Commission*, 1968, ... Iowa ....., 162 N.W. 2d 730.

The whole question may ultimately be resolved by a determination of whether or not under the proposed bill public money will be appropriated for private purposes in violation of Article 3, §31 of the Iowa Constitution, which 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."

The Constitution does not define the term "private" or "public" purpose, and no inflexible definition of those terms has been adopted for the guidance of the courts. *Carroll vs. City of Cedar Falls*, 1936, 221 Iowa 277, 261 N.W. 652. The initial determination as to whether a use is public or private rests with the legislature. Courts will not interfere with its determination that uses are public unless it is clear, plain and palpable they are private in character. Such legislation has the same presumption in its favor as exists where constitutionality of a statute is challenged. *Abolt vs. City of Fort Madison*, 1961, 252 Iowa 626, 108 N.W. 2d 263.

The state may recognize moral or equitable obligations and appropriate public funds for payment. *Graham vs. Worthington*, 1966, 259 Iowa 845, 146 N.W. 2d 626. Soldier's "bonus" acts providing payments of stated amounts of money to residents of the state who served in the armed forces of the United States during certain periods have been upheld by our courts. *Faber vs. Loveless*, 1958, 249 Iowa 593, 88 N.W. 2d 112, *Knorr vs. Beardsley*, 240 Iowa 828, 39 N.W. 2d 236, *Grant vs. Kendell*, 195 Iowa 467, 192 N.W. 529.

While it might be argued that the other educational areas you have mentioned should be included, I am not disposed to say the classifications implicit in this bill are unreasonable. See *Lee Enterprises, Inc. vs. Iowa State Tax Commission*, supra, which upheld the classifications of services to which the sales tax was applicable.

April 28, 1969

LABOR LAW: Agricultural pursuit, definition — §§88.6, 92.1 and Ch. 88A, Code of Iowa, 1966. Sorting and bagging potatoes is an agricultural pursuit, and is exempted from restriction, stated in Ch. 88 and is not prohibited by §92.1 of Child Labor Law. (Zeller to Parkins, Commissioner of Labor, 4/28/69) #69-4-26

Mr. Dale Parkins, Commissioner of Labor: Reference is made to your recent letter in which you request our opinion as follows:

"I would like to request an opinion as to whether a place of business that sorts, washes and bags potatoes is covered under Chapter 88 of the Code of Iowa, 1966.

"The situation arises where several growers of potatoes and other fruits and vegetables also perform the tasks of getting their crops ready to sell to retail outlets and in some cases to the general public.

"Would this type of business be classified as an agricultural pursuit and thus be exempt from Chapter 88, Code of Iowa, 1966. (See Chapter 88.6 Code of Iowa 1966).

"At what point does the growing of potatoes and other vegetables cease to be agricultural and become industrial?"

Section 88.6 provides as follows:

"The provisions of this chapter shall not apply to agricultural pursuits."

Agriculture has been defined in Webster's International Dictionary as "the science or art of cultivating the soil, producing crops, etc." Inasmuch as sorting, washing and bagging potatoes is usually part of the job of producing a marketable crop, it is an agricultural pursuit. As such, it should be exempt from the statutory restriction in Chapter 88.

A frequently-cited decision dealing with the cleaning, sorting and packing of potatoes is reported in the case of *Pioneer Potato Company v. Division of Employment Security*, 17 N.J. 543, 111 A2d 888, 53 A.L.R. 2d, 397. The New Jersey Supreme Court there held that the cleaning, grading and packing of potatoes is essential to the preparation of potatoes for market, is an agricultural pursuit, and as such is excluded from the Unemployment Compensation Law. The Court further held that agricultural labor extends to post-harvest activities in connection with the cleaning, grading and packaging of potatoes by employees of a corporation organized for that purpose by its farmer-stockholders and whose payments are based on the average of unit prices received by the corporation.

The New Jersey case is cited with approval by the Iowa Supreme Court in the case of *Crouse v. Lloyd's Turkey Ranch*, 1959, 251 Iowa 156, 100 N.W. 2d, 115, which holds that there is a difference between the work of sorting and bagging potatoes as an agricultural pursuit, as distinguished from the slaughter and marketing of turkeys.

You also ask whether this type of business is covered under Chapter 92.1 of the Child Labor Laws, which reads:

"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, . . . "

Sorting and sacking potatoes is not an activity prohibited to minors by law, and it does not appear to be covered under §92.1.

Accordingly, unless the work is prohibited or restricted in Chapter 88A, or prohibited by the adoption of safety rules duly adopted thereunder, I do not think such work is illegal for a minor. It would become illegal, however, if prohibited by rules adopted pursuant to authority granted under the provisions of §88A.11, Code of Iowa, 1966.

April 30, 1969

CONSTITUTIONAL LAW: Iowa income tax as a percentage of federal income tax — Art. III, §1; Art. VII, §7; Art. VIII, §2; Constitution of Iowa; House File 810, 63rd G.A. An Iowa income tax computed as a percentage of a taxpayer's federal income tax determined according to federal income tax laws and regulations in effect on January 1, 1969, would not be unconstitutional. Incorporation by reference of federal law in effect at a given point of time would not amount to an unconstitutional delegation of legislative authority. Such a tax would not violate Art. VII, §7, since this constitutional provision applies only to property taxes. (Turner to Hougen, State Senator, and Den Herder, Kennedy and Milligan, State Representatives, 4/30/69) #69-4-27

The Honorable Chester O. Hougen, State Senator; The Honorable Elmer Den Herder, State Representative; The Honorable Michael K. Kennedy, State Representative; The Honorable George F. Milligan, State Representative: In recent days and weeks, you have severally requested an opinion of the attorney general with reference to the constitutionality of a bill which would make the Iowa income tax a percentage of the federal income tax.

The reason the opinion has been delayed is that it is the policy of this department not to write opinions with respect to suggested or proposed legislation before it has been actually introduced, received a file number and can be adequately and specifically identified and referred to in the opinion as to its words and terms. (On occasion, we do, however, make informal suggestions in an effort to be helpful to members of the General Assembly concerning requests with reference to proposed legislation.)

House File 810, 63rd G.A., a Bill for an Act relating to the Iowa income tax, and the purpose of which is to make said tax a percentage of the federal income tax, on a graduated scale, was introduced by the House Committee on Ways and Means and placed on the calendar on April 24, 1969. Accordingly, I am now able to respond to your question in writing.

On October 18, 1962, the Attorney General of Iowa, in the last paragraph of an opinion written by Assistant Attorney General George Murray, said:

"It is clear that if the Iowa tax were fixed at a percentage of the Federal income tax there would be the immediate objection that the legislature of Iowa was delegating its legislative authority to another body politic and further that the provision in the Iowa Constitution, §7, Article VII, quoted above would be violated." 1962 OAG 421, 422.

House File 810 avoids the first objection of the prior attorney general's opinion, i. e., that it is a delegation of legislative authority to another body politic, by making the Iowa tax a percentage of the federal income tax liability under the "laws of the United States" and then defining such laws to mean the statutes of the United States and the regulations of the Internal Revenue Service relating to federal income taxes effective for the tax year, "which were in existence on January 1, 1969." See H.F. 810, §§1(6) and (3). In other words, the bill proposes to adopt and to incorporate by reference only those federal statutes and regulations relating to federal income taxes already in existence on a given date. Nothing in the proposed bill makes subsequent amendments to the federal laws and regulations a part of the Iowa law.

Of course, it is fundamental that the General Assembly cannot delegate its power to make the law to anyone. Article III, §1, Constitution of Iowa, vests the legislative authority of this state in its own General Assembly; not in the federal government. But ordinarily our legislature can incorporate by reference and thereby adopt, as its own, such valid federal laws and regulations as are in existence when the bill is passed in the first house of the General Assembly, as long as subsequent amendments to the federal law or regulations are clearly not incorporated for automatic adoption by Iowa as they later become effective under federal law. See OAG Turner to State Representative Holden, June 22, 1967, and 16 Am. Jur. 2d 495, Constitutional Law §245, which 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.

Thus, the objection to delegation of legislative power is not raised by House File 810. The Iowa legislature would be imposing the tax thereunder, not the federal government. Whether or not Congress raised or lowered the federal income tax or granted or disallowed new exemptions or deductions, under this proposed bill, the Iowa income tax would remain the same on an individual with a constant income, exemptions and deductions, until the Iowa legislature, rather than the federal government, changed the law. It should be noted, however, that this new law will change the Iowa income tax deduction on subsequent federal income tax returns and the resulting change in federal income tax will later reflect itself in the Iowa federal income tax deduction and the Iowa tax. Under such circumstances, it cannot be said that the Iowa tax tail would be wagged by the federal tax dog.

Nevertheless, Mr. Murray's second objection is more difficult. He points out Article VII, §7, Constitution of Iowa, which states:

"Every law which imposes, continues, or revives a tax, *shall distinctly state the tax*, and the object to which it is to be applied; *and it shall not be sufficient to refer to any other law to fix such tax or object.*" (Emphasis added).

As previously noted, our legislature can *ordinarily* incorporate by reference valid federal laws and regulations already in existence. But these words of our constitution seem to prohibit imposing an Iowa tax as a percentage of a federal tax and to require instead that the law which imposes the tax and the object to which it is to be applied be stated so clearly and sufficiently that no person need refer to any other law to determine its applicability or amount. In fact, this provision of our Constitution seems to be especially designed to prohibit incorporation by reference when it comes to an Iowa tax law.

But in *Solberg vs. Davenport*, 1930, 211 Iowa, 612, 232 N.W. 477, our Iowa Supreme Court, citing two earlier Iowa cases, *Scottish Union and National Insurance Company vs. Herriott*, 109 Iowa 606, 80 N.W. 665, and *Iowa Mutual Tornado Insurance Association vs. Gilbertson*, 129 Iowa 658, 106 N.W. 153, compared the provisions of Article VII, §7, with those of Article VIII, §2 of our Constitution, which provides:

"The *property* of all corporations for pecuniary profit, shall be subject to taxation, the same as that of individuals." (Emphasis added.)

The *Solberg* case then proceeded to hold that, like Article VIII, §2, Article VII, §7, applies only to *property* tax! Without showing why or how it reached its conclusion the court says:

"Our conclusion is that, while the charges made herein are considered as a tax, they are not a property tax, and therefore do not violate Art. VII of §7 of the Constitution."

While I am unable to follow the *reasoning* of our court that Article VIII, §2, which specifically mentions "property" of corporations, has something to do with determining that Article VII, §7, which does not mention property, applies only to laws which impose, continue or revive a *property* tax (!), I am nevertheless bound to follow its *holding*. This is particularly true because in the recent case of *Lee Enterprises, Inc. vs. Iowa State Tax Commission*, 1968, ... Iowa ....., 162 N.W. 2d 730, 739, our Iowa Court cites *Solberg vs. Davenport* for the proposition that sales tax statutes by their nature are excise taxes and, as such, "are not subject to the constitutional objections applicable to *property taxes*."

An income tax is an excise tax, not a property tax. *Vilas vs. Iowa State Board of Assessment and Review*, 1937, 223 Iowa 604, 273 N.W. 338.

In the *Lee Enterprises* case, which was an attack on the constitutionality of the 62nd General Assembly's sales tax on services, the plaintiff's allegation in Division III, ¶4 of their petition, that the sales tax on these services violated §7 of Article VII, of the Iowa Constitution, was denied by the Iowa Supreme Court.

In the light of these cases, the latter of which was, of course, decided since the 1962 opinion, Mr. Murray who is again Special Assistant Attorney General specializing in the area of taxation, agrees with the other Assistant Attorneys General assigned to the department of revenue, that his former opinion with reference to Article VII, §7, should be withdrawn.

It appears that Iowa's Art. VII, §7, was taken word for word from the New York constitution of 1846, and that New York has construed its own prohibition not to apply to every tax, but only to annually recurring taxes and taxes imposed generally upon the entire property of the state. *In re McPherson*, 104 NY 306, 10 NE 685. In that case, the New York Court of Appeals said:

"But we are of opinion that this section of the constitution is not applicable to this case. In terms it applies to every tax which the legislature can impose, and is not confined to a property tax. It is not, even by its terms, confined to a general tax embracing the whole state; but the language, literally construed, is broad enough to embrace every local tax imposed for local purposes. As stated above, taxes may be imposed upon a great variety of objects. They may be direct or indirect, special or general, and they may be imposed, in the shape of excise and licenses, upon hawkers, peddlers, auctioneers, insurance agents, liquor dealers, and others. All the contributions for the support of the government, enforced from individuals in the various ways mentioned, are, properly speaking taxes. Notwithstanding the general language of the section referred to, we do not think it was intended to apply to every tax which the legislature could impose, and so it has been held.

* * *

"It wuold have been impossible for the legislature, perhaps years in advance to specify the particular objects to which the tax should be applied, and we are of opinion that this section of the constitution was intended to apply to the annually recurring taxes known at the time of the adoption of the constitution, and imposed generally upon the entire property of the state. The legislature would know definitely the objects for which such taxes were imposed, and could anticipate with some certainty the amount which they would produce; and in their imposition it was deemed important by the framers of the constitution that the object of the tax should be stated. But we do not think that the policy embodied in the section had any reference to special taxes which may collected in a variety of ways under general laws, such as auction duties, excise duties, taxes on business or particular trades, avocations, or special classes of property. It has been held in several states where constitutional provisions required that property taxes should be equal and uniform that such provisions had reference only to general, annual recurring taxes upon property generally, and not to special taxes upon privileges, or special or limited kinds of property."

The New York court noted that this is one of those rare cases where the language of the constitution must be restricted by construction rather than expanded, as is the much more frequent tendency of our courts. Of course, it should be pointed out that Iowa did not have an income tax when Art. VII, §7 was adopted as a part of the Iowa Constitution.

See also, *Colony Town Club v. Michigan Unemployment Compensation Comm.*, 1942, 301 Mich. 107, 3 NW2d 28.

Two other Iowa cases, *Ballard-Hassett Co. v. Local Board of Review*, 1933, 215 Iowa 556, 246 NW 277 and *City National Bank of Clinton v. Iowa State Tax Comm.*, 1960, 251 Iowa 603, 102 NW2d 381, uphold the constitutionality of Iowa statutes against the attack that they refer to federal laws in violation of Art. VII, §7. But these cases do not squarely face the issue since neither involved an attempt to "fix the tax" by reference to the federal law. They hold that mere reference or cross-reference to statutes of other states or to federal statutes is not unconstitutional so long as the other law does not fix the tax. *City National Bank of Clinton*, supra, says "Although as a general rule legislation by reference is to be avoided, in this case we find no such violation of Section 7, Article VII, as to make the references here unconstitutional."

In *Anderson v. Tiemann*, 1957, 182 Neb. 393, 155 NW2d 322, the Nebraska Supreme Court upheld a state income tax based upon federal laws relating to income tax. But Nebraska's constitution specifically authorized it in the following words:

"When an income tax is adopted by the Legislature, the Legislature may adopt an income tax law based upon the laws of the United States."

Thus, Nebraska was not confronted with a provision similar to our Article VII, §7. Nebraska did cite two Alaska cases, *Alaska Steamship Co. v. Mullaney*, 12 Alaska 594, 180 F. 2d 805 (9th Cir. 1950) and *Hickel v. Stevenson*, ... Alaska, ..., 416 P. 2d 236 (1966), which upheld basing the state income tax on the federal as against the delegation of powers argument. But I do not rely on the latter cases, which I consider poorly reasoned. It appears that Vermont and West Virginia also base their state income taxes on the federal, but no cases have been found in their courts with reference to these issues.

House File 810 imposes a burden which is much more progressive than is that of the federal income tax. That is to say, the Iowa tax would be graduated 5% on the first $200 of federal tax liability, 9% of the next $200 of federal tax liability, 14% of the next $400 of federal tax liability, 17% of the next $1200 of federal tax liability and 20% on all remaining federal tax liability. Thus the bill would impose progression on progression. A given Iowa who has already paid a greater percentage of his income to the federal government than many of his fellow citizens have paid of theirs will also have to pay the state a greater percentage of his federal tax than his fellow citizens have paid of theirs. But this fact does not make the bill unconstitutional.

Income taxes are not ordinarily considered unconstitutional merely because they are graduated or progressive. Indeed, in *Vilas v. Iowa State Board of Assessment and Review*, supra, our Iowa Supreme Court said at page 346 of 273 NW:

"Appellant complains that the act is unduly burdensome, discouraging, and unfair; that it handicaps the energetic, industrious, and progressive in his race with the indifference and idle; that it penalizes the successful business man by making him pay a higher rate on a graduated scale on his income, and thus discourages enterprises employing labor, drives capital into tax-exempt bonds, increases the unemployment burden upon public funds; that it gives special advantage to the farmer, due to the fact that the per capita current income of farmers is considerably lower than that of the non-farm population; a substantial portion of the farmer's income is received in noncash items which are consumed by the farmer's family and therefore not reported as taxable income; that the income tax in Iowa is one of the highest levied by any state in the Union; and that many states in the Union do not have income tax laws and their citizens, although receiving Iowa-earned income, escape all state income taxes.

"Much of this argument might be effective before the Legislature, but this court is not interested in the question of whether the income tax law, from the standpoint of public policy, is a good or bad thing for the people of this state. To be able to find fault with the law is not to demonstrate its invalidity. Courts do not make the laws; the Legislature is charged with that duty and responsibility, and if in its judgment the income tax is an advisable means of raising taxes to carry on the various functions of government, this court will not undertake to say whether or not that judgment was founded upon a sane basis. This court is interested only on the question of whether the passage of this act was in conflict with the Constitution of this state and of the nation."

Like the Iowa court's opinion in Vilas, this opinion is addressed to no considerations of wisdom, fairness or sound public policy, but is limited to the question of compliance with the Iowa Constitution. It is constitutional.

May 1, 1969

STATE OFFICERS AND DEPARTMENTS: Secretary of State, filing articles of incorporation. §§496A.3, 496A.49, Code of Iowa, 1966. The secretary of state properly refused to accept proposed articles of incorporation which stated an unlawful corporate purpose, namely, the practice of medicine. (Haesemeyer to Synhorst, Secretary of State, 5/1/69) #69-5-1

The Hon. Melvin D. Synhorst, Secretary of State: With your letter of April 16, 1969, you submitted a copy of proposed articles of incorpora-

tion of Automated Multitest Laboratories, Inc. and requested an opinion of the attorney general as to whether or not the corporate purposes set forth in such articles of incorporation were lawful.

Such proposed articles of incorporation provide in relevant part:

"The principal purpose of this corporation shall be the performance of multiphasic screening tests. Multiphasic screening is the sequential performance of a series of predetermined medical tests which are generally standard medical procedures of recognized value. They are performed on human subjects by medical personnel less highly trained than a graduate physician, using automated equipment whever technically and economically feasible. A detailed questionnaire-type medical history is also performed. The test results for each patient are then collected and displayed in a form which is suitable for interpretation by a physician. A computer may be used for collection, display and analytical purposes. The medical information thus obtained is used by a physician for diagnostic and/or preventive medical purposes.

"Further purposes shall include, but not be limited to:

"To carry out medical analysis, research, perform blood analysis, obtain chemical analysis, perform tests, perform laboratory work, operate a bio-chemical laboratory and to furnish such results or services to hospitals, medical institutions, clinics, physicians, surgeons and the entire medical profession or such other group, business or individual as may desire such results or services.

"To establish, equip, own, operate and maintain pathological and X-ray laboratories, bio-chemical laboratories or other laboratories of medical or scientific nature.

"To manufacture, compound, mix, prepare, buy or otherwise acquire, and to sell, distribute at wholesale and retail, exploit, promote, and advertise, as principal or agent, any and all drugs, chemicals, chemical compounds, solutions, medicinal preparations, drug sundries, drug and like products, pharmaceutical supplies, medical goods and appliances generally.

"To carry on the business of chemists, druggists, chemical dealers, importers, exporters, manufacturers and traders in chemical, pharmaceutical, medicinal and other preparations and chemicals.

"To maintain, conduct, manage and carry on any kind of commercial or manufacturing business or businesses; and to engage in research, experimental, laboratory, development, exploitation and exploration work in connection with any or all of the foregoing businesses."

Corporations may be organized under the Iowa Business Corporation Act for any lawful purpose or purposes. §496A.3, Code of Iowa, 1966. However, it is well settled in Iowa that a corporation may not practice a profession. *State v. Kindy Optical Co.*, 1933, 216 Iowa 1157, 248 N. W. 332; *State v. Baker*, 1931, 212 Iowa 571, 235 N. W. 313; *State v. Bailey Dental Co.*, 1931, 211 Iowa 781, 234 N. W. 260. The practice of medicine and surgery is the practice of the healing art and comprehends the whole field of medicine and materia medica. *State v. Boston*, 1939, 226 Iowa 429, 284 N. W. 143. Moreover, diagnosis as a guide to treatment is clearly one of the duties of a physician within the meaning of a statute forbidding the practice of medicine without a license. *State v. Howard*, 1932, 216 Iowa 545, 245 N. W. 871; *State v. Hughey*, 1929, 208 Iowa 842, 226 N. W. 371. In an opinion dated February 19, 1954, the attorney general expressed the opinion that a corporation which operates a hospital with a diagnostic radiology or clinical pathology department and contracts with a licensed physician to diagnose the ailments of persons examined

in said department is practicing medicine without a license. 54 OAG 122. A copy of this opinion is annexed hereto and made a part hereof.

While we agree with the observation which you made in your letter of April 16, 1969, to the effect that the matter is not entirely free from doubt, it is nevertheless our opinion that under the applicable law and all the circumstances presented the articles of incorporation submitted by Automated Multitest Laboratories, Inc. state an unlawful corporate purpose and that you were justified in refusing to accept such articles of incorporation.

In closing I might observe that this question need never have arisen. §496A.49 provides in relevant part :

"The articles of incorporation shall set forth:

* * *

"3. Either (a) the purpose or purposes for which the corporation is organized, or *(b) that the corporation shall have unlimited power to engage in, and to do any lawful act concerning, any or all lawful businesses for which corporations may be organized under this Act.*

* * *" (Emphasis added)

Thus, it is sufficient to state without elaboration that the corporation may engage in any lawful activity. If the incorporators of Automated Multitest Laboratories, Inc. had resisted the impulse to include in their article a prolix statement of purpose with the customary boiler plate and had elected instead the shorter and more flexible option offorded by §496A.49(3)(b) your question need not have been raised. This is not to say, however, that such a procedure would amount to more than a postponement of the moment of truth for if the corporation, though legally incorporated, were to engage in fact in activities amounting to the practice of medicine, it would still be vulnerable to a charge of unlawfully engaging in medical practice.

May 1, 1969

SCHOOLS: Schoolhouses — §§297.12, 297.22, Ch. 28E. Code of Iowa, 1966. School districts are generally limited as to territorial jurisdiction. However, the law does not prohibit a school district maintaining a facility outside its boundaries and it is legally possible for a school district to lease such facility from another district provided the requirements of Ch. 28E., Code of Iowa, 1966, are met. (Nolan to Tieden, State Representative, 5/1/69) #69-5-2

The Hon. Dale L. Tieden, State Representative: This is in response to your request of April 17, 1969 for an opinion on the question:

"Is it legally possible for one school district to lease facilities from another school district?"

The power of a school district to lease school facilities is set out in §297.12, 1966 Code of Iowa, as follows:

"The board may, when necessary, rent a room and employ a teacher, where there are ten children for whose accommodation there is no schoolhouse."

There is also available in §297.22 the power of a board of directors of

an independent or community school district to sell or lease any "schoolhouse, school site, or other property acquired for school purposes when, in the opinion of said board, such sale is for the benefit of the district." Reading these two sections together with §§28E.2 and 28E.3 of the 1966 Code of Iowa, it might appear that the two school districts could enter into an agreement pursuant to the provisions of §28E.4, Code of Iowa, whereby the one district might lease the schoolhouse located in the other district. However, it should be borne in mind, as pointed out in the 1955 opinion enclosed herewith that school districts are creatures of statute with only those powers expressly conferred by statute or reasonably and necessarily implied as incident to carrying out an express power. The jurisdiction over school matters extends only to the boundaries of the school district. However, the law does not prohibit a school district from maintaining a school building outside the territorial limits of its own district. Since the 1955 opinion was issued, Chapter 28E, Code of Iowa, 1966, was enacted authorizing joint exercise of governmental powers. With this authority the two districts might reach a cooperative agreement for the utilization of available school facilities.

In answer to your question, it is my opinion that it is legally possible for one school district to lease a facility from another provided the agreement meets the requirements of Chapter 28E, Code of Iowa, 1966.

May 5, 1969

CONSTITUTIONAL LAW: Item Veto — S.F. 655, §8, 63rd G. A.; Iowa Constitution, Article III, §§1, 16, as amended. Governor's authority to veto items of appropriation bills is limited to financial items, and does not authorize "item veto" of legislation included in bill, or restrictions, limitations upon expenditure of the money appropriated. (Turner to Senator Chester O. Hougen and Representative Charles E. Grassley, 5/5/69) #69-5-3

The Hon. Chester O. Hougen, Senator, The Hon. Charles E. Grassley, Representative: Reference is made to your letters of May 1 and May 2, in which your propounded questions concerning the powers of the governor, under the "item veto" amendment to the constitution, as follows:

(Senator Hougen)

"During consideration of Senate File 655, a bill for an act to appropriate funds from the general fund of the state to the board of regents and institutions under the control of said board, the Senate incorporated in that bill a section, as follows:

" 'Section 8. No part of the funds appropriated under this Act shall be used to provide payments, assistance, or education, in any form, with respect to any individual who is, while enrolled as a student or while teaching at a University, convicted in any federal, state, or local court of competent jurisdiction of inciting promoting, or carrying on a riot, resulting in material damage to public property or injury to persons, unless such individual, if a student, shall be re-examined by an admissions officer and be found by him to be of proper character for re-admission as a student.'

"According to a report in the Des Moines Tribune on May 1, the governor has threatened to use his 'item veto' power, under the terms of the recently approved constitutional amendment, to disapprove this section.

"Since final action on this bill reasonably may be expected in the next

few days, your opinion is requested as promptly as may be, on the question, does the constitution as amended vest in the governor the power to disapprove a provision of this character?"
(Representative Grassley)

"It has come to my attention through a press report that the Governor has announced he has under consideration the use of his power to withhold approval of 'any item of an appropriation bill' to veto the provision against the use of state funds for the benefit of persons convicted of riots and disorders, which is part of the bill making appropriation for the Board of Regents.

"The governor's statement may or may not have been adequately and correctly reported; the possibility that it was so reported gives me concern, particularly as I find it is not expedient until next week to ascertain from the governor himself a clarification of his reported intentions.

"Accordingly, I requested your opinion whether or not the authority vested in the governor by the constitutional amendment of 1968 (Chapter 464, 62nd G. A.) is so broad as to empower the governor to employ the 'item veto' to strike out of the measure, S.F. 655, the prohibition against benefits to rioters, or to strike out of any appropriation measure sections or provisions legislative in nature and application."

The office of governor is of high dignity, but the authority thereof is not inherent; the office was not known to the common law and the governor has no prerogative powers, but may exercise only such powers and duties as are vested in him by constitutional grant. 81 C.J.S. 982 and cases there cited.

The governor acts as a component part of the law-making power of the state, in the exercise of his power to approve or disapprove bills, but his acts are negative in character; he has no right to legislate, or to exercise a legislative function. *State vs. Buchanan*, 24 W. Va. 362; *Colbert vs. State*, 86 Miss. 796, 39 So. 65.

This power is vested in the governor of Iowa by Article III, §16 of the Constitution, as follows:

"Every bill which shall have passed the General Assembly, shall, before it becomes law, be presented to the Governor. If he approves, he shall sign it; but if not, he shall return it with his objections, to the house in which it originated, which shall enter the same upon their journal, and proceed to reconsider it; if, after such re-consideration, it again pass both houses, by yeas and nays, by a majority of two thirds of the members of each house, it shall become a law, notwithstanding the Governor's objections. If any bill shall not be returned within three days after it shall have been presented to him, Sunday excepted, the same shall be a law in like manner as if he had signed it, unless the General Assembly, by adjournment, prevent such return. Any bill submitted to the Governor for his approval during the last three days of a session of the General Assembly, shall be deposited by him in the office of the Secretary of State, within thirty days after the adjournment with his approval, if approved by him, and with his objection, if he disapproves thereof."

The amendment of 1968 added to the governor's power, as follows:

"The governor may approve appropriation bills in whole or in part, and may disapprove *any item* of an appropriation bill; and the part approved shall become a law. Any item of an appropriation bill disapproved by the governor shall be returned, with his objections, to the house in which it originated, or shall be deposited by him in the office of the secretary of state in the case of an appropriation bill submitted to the gover-

nor for his approval during the last three days of a session of the General Assembly, and the procedure in each case shall be the same as provided for other bills. Any such item of an appropriation bill may be enacted into law notwithstanding the governor's objections, in the same manner as provided for other bills." (Emphasis added.)

Do these sections of the constitution of Iowa vest in the governor the power to veto part of an appropriation bill, such as §8, S.F. 655? The law is well settled that all the governor is authorized to veto is financial items, and no more.

Under the Organic Act establishing the government of the Philippine Islands, the Governor General was given the usual, general veto power, and also "the power to veto any particular item or items of an appropriation bill." The Governor General invokes this authority, to disaprove one section (§7) of the Retirement Gratuity Law of 1933. This act provided for the retirement of certain officials and contained an appropriation therefor. The §7 in question provided:

" 'The Justices of the Peace who must relinquish office during the year 1933 in accordance with the provisions of Act Numbered Thirty-eight hundred and ninety-nine, shall also be entitled to the gratuities provided for in this Act.' " *Bengzon vs. Secretary of Justice of Philippine Islands*, Phil. Island, 57 S. Ct. 252, 254, 299 U. S. 410, 81 L. Ed. 312.

Only one section of the law made an appropriation; the others were concerned with the details of the retirement plan. Thus, the question was raised, whether the law was an appropriation measure at all. Although conceding some weight to this objection, the Supreme Court chose to meet the "item veto" issue squarely, saying:

". . . even if it be conceded that the bill could be characterized as an appropriation bill, section 7 is not an 'item' within the meaning of section 19 of the Organic Act. An item of an appropriation bill obviously means an item which in itself is a specific appropriation of money, not some general provision of law which happens to be put into an appropriation bill."

The Supreme Court commented further:

'. . . It follows conclusively that where the veto power is attempted to be exercised to object to a paragraph or portion of a bill other than an item or items, or to language qualifying an appropriation or directing the method of its uses, he exceeds the constitutional authority vested in him, and his objection to such paragraph, or portion of a bill, or language qualifying an appropriation, or directing the method of its use, becomes non-effective.'

". . . The elimination of any [section] by an exercise of the veto power, with the going into effect of the remaining portions of the bill as a consequence (if the veto be not overruled by a two-thirds vote of each house), would result in the enactment of a general law in an emasculated form not intended by the Legislature and against the will, perhaps, of a majority of each house. This would not be negation of an item or items of appropriation by veto but, in effect, affirmative legislation by executive edict."

Following this decision of the high court, a really comprehensive test of the executive's "item veto" power came in 1940, when the governor of Virginia disapproved seven provisions of an appropriation bill, claiming his authority under §76 of the Constitution of Virginia, which provided:

"the governor shall have the power to veto any particular item or items of an appropriation bill . . ."

It will be noted this section is substantially the same as the 1968 amendment to the constitution of Iowa.

The Supreme Court of Virginia said:

"We think it is plain that the veto power does not carry with it power to strike out conditions or restrictions. That would be legislation. Plainly, money devoted to one purpose can not be used for another, and it is equally plain that power to impose conditions before it can become available is legislation.

"An item in an appropriation bill is an indivisible sum of money dedicated to a stated purpose. It is something different from a provision or condition, and where conditions are attached, they must be observed; where none are attached, none may be added." *Commonwealth vs. Dodson,* 11 S. E. 2nd 120.

The Virginia court proceeded to declare unauthorized and not effective all of the governor's "item vetoes," which were:

1. An authorization for the appointment of certain attorneys by the attorney general.
2. Establishment of the office of legislative director.
3. Provision of salaries for assistants to the legislative director.
4. Provision that none of the appropriations for the state planning board be used to investigate county government.
5. Provision that the commission of fisheries "shall use no money under its control" for the operation of a certain boat.
6. Provision for reduction of the salaries of certain state employees, under certain circumstances.
7. An authorization to the governor to require information of department heads, but not of the legislative or judicial branches.

None of these, said the Virginia Supreme Court, was an appropriation, or an item of an appropriation, which the governor had the right to veto. Each section was legislation, governing, or restraining, the use of the funds appropriated; while the dollar amounts were subject to the "item veto" the legislation was not. *Commonwealth vs. Dodson,* supra.

One of the sections concerned did indeed provide for payment of salaries to the assistants to the legislative director. Since this *was* an authorization to disburse funds, it might have appeared subject to the "item veto." Yet the court held the attempted disapproval ineffective, saying it was too closely related to the section establishing the director's office. The court said:

"If the Commonwealth were to determine to erect a library building and were to set apart a certain sum for structural steel, another for a heating plant, etc., and were finally to provide for a supervising architect at a stated salary, plainly the Governor could not, by veto, dispense with the services of an architect, although the sum to be paid for his services might, in a limited sense, be regarded as an item. That term, as used in the Constitution, refers to something which may be taken out of a bill without affecting its other purposes or provisions. It is something which can be lifted bodily from it rather than cut out. No damage can be done to the surrounding legislative tissue, nor should any scar tissue result therefrom."

A similar effort by a governor to use the "item veto" on a provision legislative rather than financial in character was frustrated by the Supreme Court of Mississippi, which said:

". . . Every bill of the character in question has three essential parts: The purpose of the bill, the sum appropriated for the purpose, and the conditions upon which the appropriation shall become available. Suppose a bill to create a reformatory for juvenile offenders, or to build the capitol, containing all necessary provisions as to purpose, amount of appropriation, and conditions; may the governor approve and make law of the appropriation, and veto and defeat the purpose or the conditions or both, whereby the legislative will would be frustrated, unless the vetoed purposes or conditions were passed by a two-thirds vote of each house? This would be monstrous. The executive action alone would make that law which had never received the legislative assent. And after all, and despite pragmatic utterances of political doctrinaires, the executive, in every republican form of government, has only a qualified and destructive legislative function, and never creative legislative power. . . ." *State vs. Holder*, 76 Miss. 158, 180, 181, 23 So. 643, 644.

The discussion in the Mississippi case goes straight to the precise point at issue here. Section 8, S.F. 655, is a condition, restriction or limitation upon the disbursement of the funds appropriated to the board of regents. If the governor could veto such condition, he could effectively amend the bill and thereby fashion it to his own policy, pleasure, will or whim. Such a power smacks of the power to make the law, which is exclusively granted to the General Assembly of Iowa. Article III, §1.

The more notable authorities have been discussed herein. These decisions rest upon a substantial body of American law, in which no dissent is found from these principles. They are conclusive. Accordingly, it is my opinion that an "item veto" of §8 of S.F. 655 would be beyond the constitutional power of the ogvernor of Iowa, and would be of no force or effect.

May 6, 1969

COUNTIES: Secondary roads — §28E, §309.68, Code of Iowa, 1966. A road constructed entirely within one county is not authorized by §309.68 and there appears to be no other express provision for joint cooperation of adjoining counties in construction and maintenance of such road. (Nolan to Sturges, Plymouth County Attorney, 5/6/69) #69-5-6

Mr. William S. Sturges, Plymouth County Attorney: This replies to your request of April 22, 1969 for an opinion on the question of whether Chapter 28E of the Code of Iowa or any other statute would permit the construction and maintenance of a road entirely within one county with the cost of such maintenance and construction shared in accordance with an agreement entered into by the supervisors of both counties pursuant to Chapter 28E. Your letter states:

"The recent spring floods destroyed a bridge located upon a secondary road which is the boundary of Plymouth and Woodbury Counties. The flood also widened the river at this point so that to rebuild the same would be at considerable expense, especially because this road serves only two (2) landowners — one in Plymouth and one in Woodbury County. The Boards of Supervisors of both counties would like to vacate the present road which is one-half in each county and construct and maintain a mile-long road running at a right angle to the present right of way, and entirely to these two properties which would otherwise be without access."

Chapter 28E is available for the joint exercise of powers by public agencies of this state. The Chapter provides that the cooperation must be in "ways of mutual advantage" (§28E.1). It also provides in §28E.5 that an agreement entered into must specify "its duration."

The County Board of Supervisors has jurisdiction and control as to secondary roads within the county (§306.3). What roads should or should not be built is a question of policy for the authorities charged with the responsibility for roads. *Polk County v. Brown*, 1967 ____Iowa____, 149 N. W. 2d 314.

Since a new road would be constructed entirely within one of the two counties, it is my view that the provisions of §309.68 do not apply. I do not find express authority elsewhere for adjoining counties to contribute jointly to the construction and maintenance of a secondary road. 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. *Hilgers v. Woodbury County*, 1925 200 Iowa, 1318, 1320. In such a case, I am of the view that it would be preferable to obtain express legislative authorization for the expenditure of funds on a project located entirely outside the county even though a find of "mutual advantage" is made by both boards of supervisors.

May 8, 1969

COUNTY ATTORNEYS: Duty to assist Conservators for recipients of Old Age Assistance — §249.32, Code of Iowa, 1966. A fee for attorney assisting conservator in making annual reports is not allowed unless included as court costs within the discretion of the court. (Nolan to Ball, Davis County Attorney, 5/8/69) #69-5-7

Mr. Vern M. Ball, Davis County Attorney: This is in reply to your letter of April 23, 1969 in which you ask whether it is the duty of the county attorney to advise conservators for recipients of Old Age Assistance and to assist them in their annual reports without charging them a fee.

Section 249.32 of the 1966 Code of Iowa provides in pertinent part as follows:

"If the person applying for or receiving assistance, on the testimony of reputable witnesses, is thought to be incapable of taking care of himself or his money, the board shall complete the investigation . . . and send such application, investigation, and supporting papers to the state department. When notified by the state department of the conditional approval of said application . . . contigent upon the appointment of a legal guardian, the board shall direct the county attorney to petition the court for such appointment and shall forward the court record to the state department as notice of the person to whom assistance payments shall be made.

* * *

"All guardianship proceedings in the case of an applicant or recipient shall be carried out without fee or other expense including all court costs when, in the opinion of the court, the aged person is unable to assume such expense. At the discretion of the court, such guardian may serve without bond."

In an opinion issued by this office on June 23, 1939, a copy of which is enclosed, it is stated that:

"The county attorney is under a duty to act in guardianship matters concerning Old Age Assistance applicants or recipients and that any payment for his services is purely within the discretion of the court."

As sometimes happens, the question you present appears to be one where there appears to be no source of funds against which the charge may be made. While it is clear that in the proceedings to establish the guardianship the county attorney may not charge a fee unless such is specifically authorized by the court, the matter of the extent of the county attorney's duties once the guardianship has been established is not so clear. However, the annual report of the conservator or guardian generally includes his fee as court costs under §633.675. Consequently, any fee of the attorney for the guardian or conservator would not be allowable unless allowed as court costs, and this, as pointed out above, is entirely in the discretion of the court.

May 8, 1969

STATE OFFICERS AND DEPARTMENTS: Public Improvement Contracts — §23.1, Code of Iowa, 1966. State Educational Radio & Television Facility Board may approve a change order after the bid for transmitter equipment is accepted without resubmitting matter to further public bidding. (Nolan to Saveraid, 5/8/69) #69-6-6

Mr. Don D. Saveraid, Director of Engineering, State Educational Radio and Television Facility Board: As requested by your letter of April 17th, 1969, this will provide concurrence in the procedures to be followed by the board in connection with Bid 001-69. General Electric Company submitting a bid of $241,500 in response to specifications for transmitting equipment to be located at West Branch, Iowa and being the low bidder should be awarded the bid.

You have requested advice as to whether after the bid is accepted a change order may be approved to substitute a higher gain antenna by the addition of one more bay on the antenna to allow a lower operating cost of the transmitter over a period of years without re-submitting the matter to public bidding with the necessary resultant delay.

Under section 23.18 of the Code of Iowa 1966 all municipalities must advertise for bids on proposed public improvements when the estimated cost of construction, erection, demolition, alteration, or repair exceeds $5,000. However, it is our view that section does not apply to the State Radio and Television Facility Board inasmuch as the word municipalities is defined in section 23.1 to include: counties, cities, town, townships, school districts, state fair board, board of regents, state board of control. Expressio unius est exclusio alterius.

We find no other provision prohibiting such change order.

May 8, 1969

COUNTIES: Tax Sale Certificates — §446.37, Code of Iowa, 1966. Under the section cited a county is not required to cancel the certificates it holds. Purchase by the county at a public bidder sale is a method of collecting the tax. Such certificate may be assigned after one year. (Nolan to Erhardt, Wapello County Attorney, 5/8/69) #69-5-8

Mr. Samuel O. Erhardt, Wapello County Attorney: This is in reply to your letter of April 24, 1969 requesting an interpretation or clarification of §446.37 of the Code of Iowa, 1966, as amended by Chapter 357, §3, Acts of the 62nd General Assembly.

This section, as amended, provides:

"After five (5) years have elapsed from the time of any tax sale, and the action has not been completed during such time which qualifies the holder of the certificate to obtain a deed, it shall be the duty of the county auditor and the 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 (5) 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."

Your letter states:

". . . At the present time Wapello County holds a large number of certificates of tax sale under the provision where the county bid in the certificates because there were no other bidders. The County has never gone ahead and obtained tax title on these certificates because they did not care to go to the expense of doing so when no one seemed interested in purchasing the property. Now in a few instances because of the growth of the City, an interest has been shown in some of the certificates.

"Now the question is, is the County obligated to go ahead and cancel the certificates, place the same back on the tax rolls and wait another three years before they can foreclose on these certificates? Or can they go ahead, transfer the certificates to anyone willing to purchase the same and let them go through the procedure to obtain a tax deed?"

There is no obligation for the county to cancel the certificates which it holds after the five year period. Purchase by the county at a public bidder sale is a method of collecting the tax. No money is paid, and the transaction is a mere bookkeeping item. In the acquisition by the county, the county acts as a trustee for all taxing bodies. To cancel such sale after an elapse of years according to the terms of the statute, would impede the county in the collection of its taxes and adversely affect not only the county but all taxing bodies by and through the county. The section does not operate to cancel a sale to a county under the public bidder act. 1946 OAG 114.

Provisions for the county to assign a certificate of purchase are provided in §446.31, Code of Iowa, which in pertinent part provides as follows:

". . . When the county acquires a certificate of purchase and has the same in its possession for one year, or more, the board of supervisors may compromise and assign the said certificates of purchase, with the written approval of all tax levying and tax certifying bodies having any interest in said general taxes. All money received from assignment of said certificates shall be apportioned to the tax levying and certifying bodies in proportion to their interests in the taxes for which said real estate was sold."

In 1941 the attorney general advised that an assignment of public bidder's certificate or sale of the property acquired by property tax deed shall not be for less than the amount of taxes, subsequent, interest, and penalty, unless all taxing bodies having an interest in general taxes ap-

prove. The board of supervisors and the various taxing bodies must exercise a discretion as to each sale or assignment involved, which would have to stand on its own feet, and it could not be said that they exercised legal discretion by a blanket assignment, compromise, or cancellation even where a large number of tracts might be involved. 1941 OAG 113.

May 12, 1969

HIGHWAYS: Primary road fund, use for emergency flood control — Art. VII, §8, Constitution of Iowa, §§19.7, 29C.8, 313.1, 313.3, 313.4, Code of Iowa, 1966. Where highway commission furnishes manpower and equipment to assist in flood prevention activities the cost thereof must be reimbursed to the primary road fund because of constitutional and statutory restriction on the use of such funds. However, appropriate legislation could be enacted to correct the present situation whereby non-restricted funds are comingled with constitutionally restricted funds and in that event the non-restricted funds could be used for such purposes. (Turner to Coupal, Director of Highways, Highway Commission, 5/12/69) #69-5-4

Mr. Joseph R. Coupal, Jr., Director of Highways, Iowa State Highway Commission: By your letter of May 5, 1969, you have requested an opinion of the attorney general as to the legality of expending highway funds for flood control and in which you state:

"On March 20, 1969, Governor Ray directed a letter to me in which he declared a state of emergency and directed maximum support of state agencies to assist localities in their flood fighting activities. A copy of this is attached hereto. Subsequently, the Highway Commission at the request of the State Civil Defense Director furnished manpower and equipment to several communities to assist in the building of dikes, filling of sandbags, etc., to provide preventive action in view of the possibility of severe flooding. At that time I called to the attention of the Governor's Office the fact that there was a serious question as to the legality of the Highway Commission expending highway funds for this purpose and I requested an informal opinion from Henry Holst on this matter. Henry furnished me memoranda under dates of March 24 and March 26 in which he indicated the Highway Commission has no authority to expend primary road fund money for emergency relief projects of this type. A copy of both of these memoranda from Mr. Holst is attached."

Your enclosed copy of Governor Ray's letter to you, dated March 20, 1969, states:

"Dear Mr. Coupal:

"In view of potentially disastrous conditions due to spring flooding, a state of emergency is hereby declared for the areas affected by the Mississippi, Cedar, Iowa, Des Moines, Little Sioux, Floyd, and Big Sioux River drainage basins. I hereby direct maximum support of state agencies to assist localities in their flood fighting activities.

"I am delegating all coordination of requests and utilization of State resources to the State Civil Defense Director, George W. Orr."

The two memoranda you have received from Special Assistant Attorney General Henry Holst under dates of March 24 and March 26, 1969, both conclude that any expenditures from the primary road fund for fighting floods must be repaid to the primary road fund. His March 24, 1969 memorandum states:

"Article VII, Section (8), of the Constitution of the State of Iowa is as folows:

'All motor vehicle registration fees and all licenses and excise taxes on motor vehicle fuel, except cost of administration, *shall be used exclusively for the construction, maintenance and supervision of the public highways* exclusively within the state or for the payment of bonds issued or to be issued for the construction of such public highways and the payment of interest on such bonds.' (Emphasis added)

"Section 313.3 of the Code, 1966, is as follows:

'Primary Road Fund. There is hereby created a primary road fund which shall include and embrace:

1. All road use tax funds which are by law credited to the primary road fund.
2. All federal aid primary and urban road funds received by the state.
3. All other funds which may by law be credited to the primary road fund.
4. All revenue accrued or accruing to the state of Iowa on or after January 26, 1949, from the sale of public lands within the state, under Acts of Congress approved March 3, 1845, supplemental to the Act for the admission of the state of Iowa and Florida into the Union, chapters 75 and 76 (Fifth Statutes, pages 788 and 790), shall be placed in the primary road fund.'

"The facts presented to me are that the Governor of Iowa has directed 'maximum support of state agencies to assist localities in their flood fighting activities.' If Iowa State Highway Commission personnel (paid from the Primary Road Fund) are used in flood fighting activities, and if Iowa State Highway Commission equipment (purchased from and supported by Primary Road Funds) is used in flood fighting activities, pursuant to the direction of the Governor, such use of Commission personnel and equipment, paid for from the Primary Road Fund, is patently contrary to the above-cited section of the Constitution and Section 313.3 of the Code, 1966. The Primary Road Fund is a 'trust fund' and may be used ONLY for the purposes enumerated therein.

"The Governor is authorized by Section 29C.8 of the Code, 1966, to use the 'services and equipment * * * of * * * agencies of the state * * *' to carry out the purposes of said Chapter, and no one can deny that, but, Chapter 29C and Section 19.7 of the Code, 1966, as amended by Chapter 93 of the 62nd General Assembly, indicate the intention of the legislature that such services and equipment used in averting disasters are to be paid for.

"Consequently, I am of the opinion that when the Governor directs the Highway Commission to use their equipment and personnel (paid for from the Primary Road Fund) for fighting floods, they may permit such use, but thereafter the Primary Road Fund must be reimbursed for such expeditures therefrom."

Mr. Holst's memorandum dated March 26, 1969, states:

"As you requested, and as Mr. Ball, Assistant to Governor Ray, requested, the following are the individual sources of income credited to the Primary Road Fund as shown by the records kept by the Accounting Department and approved by the Comptroller's Office:

Interest on the Primary Road Fund Sale and Use Tax Refunds	Section 453.7(2) Chapter 14, 62nd General Assembly, §2
Right of Way Sales and Rentals Escort Fees (Reimbursement of Costs)	Section 306.20 Chapter 14, 62nd General Assembly, §2, and Chapter 285, 62nd General Assembly

Permit Fees (Reimbursement of Costs)	Chapter 14, 62nd General Assembly, §2, and Chapter 285, 62nd General Assembly
Rental and Sale of Buildings and Land Letting Reports (Reimbursement of Costs)	Section 306.20 Chapter 14, 62nd General Assembly, §2
Tabulation of Bids (Reimbursement of Costs)	Chapter 14, 62nd General Assembly, §2
Materials Testing	Chapter 14, 62nd General Assembly, §2
TWO Security Deposits (Security Only)	Chapter 14, 62nd General Assembly, §2
Liquidated Damages	Chapter 14, 62nd General Assembly, §2
Reimbursements from cities, counties, states, Corps of Engineers and other agencies, for construction work	Chapter 14, 62nd General Assembly, §2
Departmental (Maintenance, Central Services, Data Processing)	Chapter 14, 62nd General Assembly, §2, and 8.32 of The Code, 1966.

"It was also requested that I state the authority for depositing of each source of income to the Primary Road Fund. Accordingly, I have shown, to the right of the individual sources above, what I belive to be the Code Section or authority requiring said sources to be credited to the Primary Road Fund.

"I have been informed by personnel of the Accounting Department that the Highway Commission has been crediting these sources of income to the Primary Road Fund in the manner prescribed by Section 313.6 of the Code, 1966, and that the State Comptroller and the Treasurer have likewise been showing these items as credits to the Primary Road Fund pursuant to 313.7. This shows that not only the Highway Commission but also the Comptroller and the Treasurer consider these items to be part of the Primary Road Fund, and the Courts will give great weight to such administrative interpretation of the laws by the administrative officials charged with their enforcement. *School District of Soldier Twp. v. Moeller,* 257 Iowa 239, 250, 73 N. W. 2d 43, 49. Seeing no evidence to the contrary and having considered the above-cited statutes, I believe my opinion (69-6) dated March 24, 1969, was and is correct."

Section 29C.8, Code of Iowa, 1966, provides:

"*Existing facilities used.* 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."

I agree with Mr. Holst's analysis as set forth in his opinion in these memoranda. §313.4, Code of Iowa, 1966, quoted above constitutes a standing appropriation of all of the primary road fund for purposes enumerated therein, not including flood control. *Expressio unius est exclusio alterius.*

Assuming, arguendo, that §313.4 is in conflict with §29C.8, Code of 1966, and further assuming, also without deciding, that §29C.8 is a special statute and §313.4 is a general statute, rather than vice versa, and assuming the conflict cannot be reconciled, the special statute controls and will be considered an exception to §313.4. *State vs. Flack*, 1960, 251 Iowa 529, 101 N. W. 2d 535. But the conflict must be resolved if possible. *Lint vs. Bennett*, 1960, 251 Iowa 1193, 104 N. W. 2d 564. It appears to me that it can fairly and reasonably be resolved by a construction that the primary road fund must be reimbursed for any expenditures made under authority of §29C.8. Accordingly, I think Mr. Holst is correct. If there is no conflict, however, or if, as is possible, §313.4 rather than §29C.8 is the special statute, then §313.4 controls and the funds could not be used for flood control at all, even initially and notwithstanding the reimbursement, unless the flood control was primarily for the purpose of maintenance of the primary road system. §313.4 impliedly authorizes use of primary road funds to protect *highways* from flood damage.

You have also asked whether statutory revision would permit utilization of the primary road fund for this flood protection purpose. In my opinion, this could be done by a statute which would separate therefrom all motor vehicle registration fees and all licenses and excise taxes on motor vehicle fuel, the use of which is limited by Article VII, §8, Constitution of Iowa. But as long as such revenue is comingled with other revenue the use of which is not restricted by that constitutional limitation, and which comingling now occurs under both §§312.1 and 313.3, it cannot be legally separated.* A statutory correction to accomplish the Governor's purpose would require keeping all such constitutionally limited revenue thereafter collected from being comingled with other nonconstitutionally limited revenue as it is now, and completely segregated for use in accordance with the provisions of Article VII, §8. Such a provision need not otherwise lessen the total amount of funds available for the purposes presently enumerated in §313.4 and it would at the same time insure that the constitutionally limited revenue is spent strictly for the proper purpose and not diverted.

Some help may be obtained in understanding these problems from the rest stop opinion, OAG Turner to Hughes, dated January 16, 1968 and OAG Turner to Selden, dated January 9, 1968.

Of course, other funds than the primary road fund may be used for flood control. See Ch. 77, §5, Acts of the 62nd General Assembly and §19.7, Code of Iowa, 1966. *Prime vs. McCarthy*, 1894, 92 Iowa 569, 61 N. W. 220. Such sources should be looked to for reimbursing expenditures from the primary road fund for flood control.

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* The cestui que trust's equitable right of recovery is not destroyed by reason of the fact that the trustee has so comingled trust property with his own that it is impossible to particularly identify the trust property for, unless the trust property is such that it can be ascertained and separated from the rest, the entire comingled fund will be treated as subject to the trust. *State vs. Hawkeye Oil Co.*, 1961, 253 Iowa 148, 110 N. W. 2d 641.

May 15, 1969

CITIES AND TOWNS: Assessment against abutting property for cost of removal of Dutch elm diseased trees from the city parking. §§368.3,

368.32, 368.33, 404.1, Code of Iowa, 1966. Cities and towns may not assess abutting property for the cost of demoval of Dutch elm diseased trees from the parking. (Martin to Knoke, Pottawattamie County Attorney, 5/15/69) #69-5-5

Mr. George J. Knoke, Pottawattamie County Attorney: I have received your letter in which you submit, for an opinion of the Attorney General, the following question:

"[Does] . . . the city of Council Bluffs [have] authority to levy an assessment against the abutting property owner for the expense of removing a diseased elm tree from the parking in front of his residence?"

You have further informed me that the parking to which you refer belongs in fee title to the city of Council Bluffs.

Section 404.1, Code of Iowa, 1966, provides in pertinent part as folows:

"Municipal corporations shall have power to cause to be levied, the taxes provided by this chapter, and such other taxes and special assessments as are specifically provided by law except as modified by the provisions of this chapter."

Section 368.3, Code of Iowa, 1966, provides in pertinent part as follows:

"In any city or town, the council may order the owner, occupant, or person in charge of any property to remove at his own expense any tree infected with Dutch elm disease found thereon, by serving such person with written notice, stating some reasonable time within which such removal shall be made, and if such person fails to comply with said order, the council may cause the same to be executed and the cost assessed *against the property.*" (Emphasis added)

The language of §404.1, above set out, denies to municipalities the power to make assessments except those fairly specifically authorized by statute.

The provisions of §368.3, above set out, authorize assessment for diseased tree removal against "the property," which words refer back to the property upon which the diseased tree is located. The plain language of this section does not authorize assessment against the abutting property. The contrast in language between §368.3 and a section such as §368.33, Code of Iowa, 1966, further emphasizes and dictates the result we reach.

Although §368.32, Code of Iowa, 1966, authorizes municipalities to confer upon abutting property owners the responsibility for maintenance of trees and shrubbery located upon the city parking, this section contains no fairly specific power, and thus there can be none, to assess the cost of removal of a diseased tree.

The so-called Home Rule Amendment to Article III of the Iowa Constitution does not affect this result. That amendment provides in pertinent part as follows:

"Municipal corporations are granted home rule power and authority, *not inconsistent with the laws of the General Assembly* to determine their local affairs and government. . . ." (Emphasis added)

It is clear that under this constitutional provision, the provisions of §404.1, above set out, control. The power to assess must be granted in fairly specific language.

It is therefore the opinion of this office that the city of Council Bluffs may not levy an assessment against the abutting property owner for the expense of removing a diseased elm tree from the city parking in front of his residence.

May 15, 1969

STATE OFFICERS AND DEPARTMENTS: Contingent funds, use of — §§19.7, 19.18, 19.28, 19.29, Code of Iowa, 1966; Ch. 77, §5, Acts of 62nd G. A. The general contingent fund established by §19.7 is a standing appropriation of any funds in the state treasury not otherwise appropriated which may be used to pay the cost of suppressing riots and insurrections and repairing damage to state property caused by natural disasters. The biennial contingent fund is to be used to meet needs arising during the interim which the legislature did not and could not foresee. The standing appropriation created by §19.29, the so-called performance of duty fund, may be used by the executive council to perform duties imposed on it and which it cannot perform with its own equipment and personnel. (Haesemeyer to Schroeder, State Representative, 5/15/69) #69-5-9

The Hon. Laverne W. Schroeder, State Representative: Reference is made to your letter of May 2, 1969, in which you request an opinion of the attorney general with respect to the following:

"Section 19.7, *Code of Iowa* (1966), as amended states in part that:

" 'A contingent fund set apart for the use of the executive council may be expended for the purpose of paying the expenses of suppressing any insurrection or riot, actual or threatened, when state aid has been rendered by order of the governor, and for repairing, rebuilding, or restoring any state property injured, destroyed, or lost by fire, storm, theft, or unavoidable cause, . . .'

"Section 19.29, *Code of Iowa* (1966) states:

" '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.'

"From inquiries made to the Comptroller's Office, it appears that the Executive Council has for some time interpreted the foregoing sections in such manner that the Executive Council contingency fund created by biennial appropriations — the most recent of which is made by chapter 77, section 5, Acts of the Sixty-second General Assembly — are regarded as being intended for use in meeting unforeseen expenses which may confront state departments and agencies as they discharge their assigned functions and duties, and which were not contemplated in any bill presented to the General Assembly which failed to be enacted into law. Funds necessary for repair or replacement of state property damaged or destroyed by fires, storms, vandalism, and other such causes, are apparently being allocated directly from unappropriated money in the General Fund, under the interpretation that the provision by the Executive Council of funds for such repair or replacement is a 'legal duty imposed on said Council' within the meaning of section 19.29. Some of the allocations so made are in amounts as small as $100 or less.

"Your opinion is therefore requested on the following questions:

"1. Is the Executive Council legally empowered to make allocations, from any money in the state general fund not otherwise appropriated,

for the purpose of paying for repair or replacement of state property which has been damaged or destroyed, without regard to whether or not the Executive Council's contingent fund is exhausted?

"2. Is it necessary and proper for any state department or agency which has control of or responsibility for state property that has been damaged or destroyed to request an allocation from the Executive Council to repair or replace the property, even though the amount involved may be less than, for example, $100?

"3. What are the limitations on the Executive Council's power under section 19.29 of the Code?"

Historically, §19.7, Code of Iowa, 1966, and the similar code provisions which preceded it have been considered as amounting to a standing appropriation of any funds in the state treasury not otherwise appropriated for paying the cost of suppressing riots and insurrections and repairing damage to state property caused by natural disasters. 1911-12, OAG 146, 34 OAG 704. The absence of any specific language making the appropriation is not always necessary. *Prime v. McCarthy*, 1894, 92 Iowa 569, 61 N. W. 220. It was from this contingent fund established pursuant to §19.7 that the executive council in 1968 authorized the expenditure of $43,065.73 to repair tornado damage to the Oelwein armory. There is a significant difference between this §19.7 standing appropriation and a biennial general contingent fund such as that established by Ch. 77, §5, Acts of the 62nd G. A. The former provision by its term is to be used for suppressing insurrection or riot and for repairing, rebuilding or restoring any state property injured or destroyed by fire, storm, etc. It insures against major calamities such as insurrection, natural disaster and acts of God — such things as would normally be described as *force majeure*. The biennial contingent fund, on the other hand, is made available to the executive council to meet *unforeseen* circumstances that arise between sessions of the legislature. This biennial contingent fund is not necessarily limited to (although I point out without deciding that it might conceivably also be used for) the same purposes as the contingent fund created by §19.7. A flood control project could be an unforeseen necessity justifying use of the biennial contingent fund. OAG 10/24/68, Turner to Selden. But use of the biennial contingent fund is proscribed as to any purpose or project which was presented to the general assembly by way of a bill which failed to be enacted into law.

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" or could be held to be "unforeseen" by the council, so as to justify use of the biennial contingent fund. 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; OAG 10/24/68, Turner to Selden, State Comptroller.

These opinions adequately delineate the limitations on the use of the biennial fund. As we have repeatedly said, to be a contingency an event must be to some degree unforeseen 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.

Thus, in answer to your first question it is our opinion that the §19.7 and biennial contingent funds are separate and distinct and are to be used for somewhat different purposes. The §19.7 fund is to be used to pay expenses incurred because of major catastrophes. The biennial contingent fund is to meet needs arising during the interim which the legislature did not and could not foresee.

§19.29 constitutes another standing appropriation. However, there are, as your third question suggests, strict limitations on the uses of this fund. The fund may only be used to perform a duty imposed on the council. Insofar as repairs are concerned this would ordinarily be limited to repairing buildings and grounds at the seat of government. §19.18. Of course, as noted previously major repairs to state owned buildings elsewhere in the state under appropriate circumstances might be paid from the §19.7 fund. Repairs, not to buildings, but to equipment and furniture, for example, should not be paid from the §19.29 fund but from the appropriations of the appropriate department under §19.28. By way of illustration, the use of §19.29 funds to pay the cost of erecting interior partitions in the new Grimes office building was recently determined by this office to be improper. OAG, Turner to Executive Council, 4/8/68. Thus, in answer to your second question where small amounts are involved, as, for example, $100 or less, repairs other than to buildings and grounds at the seat of government should not be paid by the executive council from §19.29 funds but from the appropriation of the department concerned.

In reply to your third question there are two limitations on the executive council's power under §19.29. One such limitation, as previously noted, is that the expense incurred must be necessary to the performance of some legal duty is one which cannot be performed by the council or its regular employees.

May 16, 1969

STATE OFFICERS AND DEPARTMENTS: Agents of the Bureau of Criminal Investigation, attendance at FBI Academy. §80.13, Code of Iowa, 1966. An agent of the Bureau of Criminal Investigation may be authorized to attend a twelve week course at the FBI National Academy. (Turner to Executive Council, 5/16/69) #69-5-10

The Executive Council of Iowa: Your Secretary, Stephen C. Robinson, in a letter dated May 12, 1969, has requested an opinion of the attorney general as to whether Special Agent James P. Tighe, Bureau of Criminal Investigation, may be authorized to attend a 12-week course at the F.B.I. National Academy beginning in August, 1969. You indicate concern on account of my letter to Director Harmon of the Department of Social Services, dated December 20, 1968, a copy of which is herewith enclosed, with reference to the Educational Leave of Absence of that department and in which I said there was no statutory authority. In that instance, the department had established a large scale Educational Leave of Absence Program with 49 employees taking full-time formal courses of graduate study in universities throughout the continental United States and Hawaii, and receiving a salary of $460 per month.

The F.B.I. National Academy 12-week course is not at all comparable. It is especially designed for training the better veteran law enforcement officers, such as Mr. Tighe, who are already full time employees of a state or local law enforcement agency so that these officers may return to their agencies and relate and impart their training to their fellow officers. Such specialized training is so technically and directly related to the duties of the officer and of such immediate benefit to the agency employing him that it may be said to constitute an actual part of the officer's duty and work. Certainly, the specialized on the job training of any governmental employee to do the job at which he works is a necessarily and fairly implied power of any governmental employer. Thus, I suggest, without deciding, that even in absence of specific statutory authority, Special Agent Tighe could be legally authorized to attend this particular 12-week course of training.

But it does appear that there is special statutory authority in §80.13, Code of Iowa, 1966, which, as amended by Ch. 110, Acts of the 62nd General Assembly, states:

"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. The expenses of such school of training shall be paid in the same manner as other expenses of the patrol."

Prior to amendment of the aforementioned section by the 62nd General Assembly, the commissioner could not send a member of the Department of Public to a recognized training school for a period of more than one month. But that one month limitation is no longer applicable. Moreover, Executive Council approval is not required by this section.

May 21, 1969

CRIMINAL LAW: Gambling, bingo — Art. III, §28, Constitution of Iowa; §726.8, Code of Iowa, 1966. A bingo game where a cash donation for coffee, rolls, etc. is taken at the door and where canned food or other donations are awarded as bingo prizes is unlawful. (Turner to Schmeiser, State Representative, 5/21/69) #69-5-11

The Hon. Lloyd F. Schmeiser, State Representative: By your letter of May 19, 1969, you have requested an opinion of the attorney general as to whether bingo is legal for senior citizens who have a meeting every week and "take a cash donation for coffee, rolls, etc. at the door" and "with canned food or other donated items as prizes."

In my opinion, bingo is illegal under the fact situation you relate. See *State vs. Mabrey,* 1953, 244 Iowa 415, 56 N. W. 2d 888, a copy of which is herewith enclosed and which holds that where patrons of a club paid two dollars on entering the club and are given a ticket which entitles them to a smorgasbord meal, and then are permitted to play bingo for cash prizes, the one operating the club is guilty of violation of a statute dealing with keeping of gambling houses. Under the facts you state, canned food or other donated items are just as much a thing of value as cash. *State ex rel Harman vs. Doe,* 1963, 255 Iowa 814, 123 N. W. 2d 400.

You also asked me how the senior citizens can play bingo and stay within the law. They can do so only by eliminating either the considera-

tion they pay for the privilege of playing or the prize. There must be no identifiable or provable stake hazarded directly or indirectly for the chance of winning a prize. But, unfortunately, though many have tried, no one has figured a way to gamble without gambling, at least as far as I know.

May 22, 1969

STATE OFFICERS AND DEPARTMENTS: Department of Revenue, use of a commercial bank to handle remittances sent to the motor vehicle fuel tax division — Chapter 342, §6, Acts, 62nd G. A., 1967. The Director of Revenue is authorized to contract with a bank for the handling of remittances sent to the motor vehicle fuel tax division. (Turner to Anderson, State Senator, 5/22/69) #69-5-12

The Hon. Quentin V. Anderson, State Senator: You have orally requested an opinion of this office concerning the authority of the director of revenue to enter into an agreement with the Iowa-Des Moines National Bank for the handling of remittances sent to the Motor Vehicle Fuel Tax Division. In essence, the bank picks up the remittances in a special post office box, deposits same in a special account for the state treasurer, and then forwards all records pertaining to the Motor Vehicle Fuel Tax Division.

The agreement with Iowa-Des Moines National Bank, referred to in your request, was entered into prior to July 1, 1968, at a time when the Motor Vehicle Fuel Tax Division was under the state treasurer. In entering into the agreement, the state treasurer was acting pursuant to §324.76, Code of Iowa, 1966, which then stated in part:

"The treasurer is hereby empowered to employ such inspectors, auditors and other help as he may deem necessary for the effective enforcement of this chapter, the number and compensation of such employees to be fixed by the executive council."

On July 1, 1968, the Motor Vehicle Fuel Tax Division became a branch of the department of revenue under Ch. 287, Acts of the 62nd G. A., and §324.76 was repealed by §45 thereof. Since that time, the director of revenue has acquiesced in the agreement originally entered into by the state treasurer. It is a general proposition of law that public officials may ratify such acts as they could have authorized. *Calaveras County v. Calaveras County Water Dist.*, 7 Cal. Rptr. 396, 184 C.A. 2d 276; *Mizen v. Adams County*, 96 Neb. 304, 147 N. W. 699.

The only remaining question is whether the director of revenue could have authorized this agreement. Such authority is implicit in Chapter 342, §6, Acts of the 62nd G. A., 1967, which states in part:

"The director shall further prescribe by rule and regulation the manner and methods by which all departments and agencies of the state shall cause the money to be deposited with the treasurer of state or in a depository designated by the state treasurer."

It is our opinion that the director of revenue does have the authority to enter into an agreement with Iowa-Des Moines National Bank for the handling of remittances sent to the Motor Vehicle Fuel Tax Division and further that the director of revenue has entered into such an agreement by ratifying the act of his predecessor, the state treasurer.

May 27, 1969

CITIES AND TOWNS: Evansdale urban renewal project, conflicts of interest — §403.16, Code of Iowa, 1966, as amended by House File 733, Acts of the 63rd G. A. Legislature could be enacting H.F. 733 eliminate certain conflict of interest provisions and retroactively cure and legalize conflicts under the law existing before the amendment which had not resulted in the projects involved being judicially declared void prior to the effective date of such curative Act. (Turner and Cullison to Ewell, State Rep., 5/27/69) #69-5-13

The Hon. Vernon A. Ewell, State Representative, Black Hawk County:
By your letter of May 1, 1969, you have requested an opinion of the attorney general as to whether House File 733, 63rd G. A., legalizes the Evansdale urban renewal project. You state facts as follows:

"Evansdale has had two administrations since it initiated Urban Renewal proceedings under Chapter 403 of the Iowa Code. The first council had three of the six members owning property within the proposed project area. These councilmen had their homes within the area and one of them had a business which he owned located next to his own home. The second and present council has one member living within the project area. All of the above councilmen at one time or another cast votes in proceeding affecting the Urban Renewal Project. None of the proceedings, however, directly and specifically affected the councilmen's property. The proceedings in fact, have not directly affected any specific parcel or parcels of property regardless of ownership. All action taken to date has been concerned with the planning of the project and there has been no action as to the execution of the project."

In *Wilson vs. Iowa City*, decided by the Iowa Supreme Court on March 11, 1969, ____Iowa____, 165 N. W. 2d 813, it was held that a vote by a member of a city council on any resolution relating to an urban renewal project, if in violation of the conflict of interest provision of the urban renewal law, is void and the result reached by the council is also void whether the vote determined the issue before the council or not. The court also held that ownership of any stock in a corporation which owns or holds interest in property in an urban renewal project, or proposed project, is a disqualifying interest under the conflict of interest provision of the urban renewal law.

The conflict of interest provision of the urban renewal law applied in the *Wilson* case was §403.16, Code of Iowa, 1966, which prohibits a public official or employee from voluntarily acquiring a personal interest in an urban renewal project and requires disclosure of any interest such person involuntarily acquires or already owns therein. It also prevents such person from participating in any action by the municipality affecting such property. A violation of this section constitutes misconduct in office.

As a proximate result of *Wilson*, House File 733, 63rd G. A., was quickly introduced, enacted, and took effect upon publication on or about April 22, 1969. This fast action was required when it was discovered that §403.16 as construed and applied by the *Wilson* case would invalidate or seriously restrict or hamper urban renewal projects all over the state because of interests owned by councilmen which constituted conflicts under §403.16. This Acts amends §403.16 to eliminate some of the potential and statutorily defined conflicts of interest and to legalize or cure those projects in Iowa not judicially declared void prior to the effective

date of the Act. After eliminating and redefining the conflicts, subparagraph eight (8) of this Act states:

"No action of an official, employee of a municipality, board, or commission prior to the effective date of this Act not judicially declared to be void as of such date shall be construed to be prohibited or disqualified provided such action was in accord with the standards of this section as now amended. All actions which have been in accord with the standards of this section are hereby declared legal and valid."

A curative act may cure or legalize any act which the general assembly could, as an original question, have authorized. A large discretion is vested with the legislature in determining which such laws should be passed. It is no objection to such legislation that it was passed after action is commenced disputing the validity of the act. Of course, the legislature cannot impair the obligation of contracts, nor by subsequent legislation disturb vested rights. *Windsor vs. City of Des Moines*, 1900, 110 Iowa 175, 81 N. W. 476.

House File 733 is clearly general rather than special or local in its application. It is retroactive as to all urban renewal proceedings in Iowa except those which have been adjudicated void by a court. It is obviously necessary to make a curative act retroactive in order to cure defects in proceedings which occurred prior to enactment of the law. Ordinarily, a statute is construed to be prospective only unless, according to its clear terms, it is retroactive. *Flake vs. Bennett*, 1968, ... Iowa ....., 156 N. W. 2d 849. This act clearly renders valid actions taken prior to its effective date which, at the time taken, might have been illegal. See subparagraph 8 of H.F. 733.

In a May 5, 1969, letter relating to this question, the Department of Housing and Urban Development, commonly called HUD, has raised the question of whether "validating legislation in Iowa may be general rather than special in its application." In *Chicago, R. I. & P. Ry. Co. vs. Independent District of Avoca*, 99 Iowa 556, 68 N. W. 881, a case decided by the Iowa Supreme Court in 1896 in which the counsel for the Avoca school board were Turner and Cullison (grandfathers of the writers of this opinion), it was held:

"As we have said, the curative act above referred to is claimed to be unconstitutional for the reason that it is a local or special law, and that a general law could have been made applicable and operative throughout the state, as required by section 30, art. 3, of the constitution of this state. This is not a new or novel question in this court. Under the pleadings in the case, when the ruling was made on the demurrer there is no doubt that the court rightly held that the act was constitutional. The precise question has been determined by this court in many cases. The fact that the law was retrospective in its effect is no valid objection to its validity. In Boardman v. Beckwith, 18 Iowa, 292, it was determined that the legislature may by retrospective legislation legalize the levy and assessment of taxes which were assessed and levied when there was no statute in force authorizing the levy. It is said in that case that: 'The power to pass acts of this character, conducive as they are to the general welfare, and based upon considerations of controlling public necessity, is in our opinion undoubted. It does not interfere with vested rights, nor impair the obligation of any contract.' It is true that was a general law. We cite it for the purpose of showing the extent to which courts go to maintain the acts of the proper authorities in administering the laws pertaining to the assessment and collection of the necessary public revenue. The same doctrine was also announced in the case of Land Co. v. Soper,

39 Iowa, 112. The curative act in that case was also general in form. But the same principle has also been applied to local and special acts. In State v. Squires, 26 Iowa, 340, it was held that a local and special curative act legalizing the defective organization of a school district was valid. And in McMillen v. Boyles, 6 Iowa 304, it was held that, when the legislature has power to authorize an act to be done, it may by a retrospective act, legalize and declare valid any informality or irregularity in the exercise of the power thus conferred."

There is no longer any question and it is well settled that curative acts may be special or general under Iowa law. *Chicago R. I. & P. Ry. Co. vs. Rosenbaum*, 1930, 212 Iowa 227, 231 N. W. 646. An entire title of the Iowa Code, 1966, (Title XXVII), consisting of Chapters 585 to 594A, inclusive, is devoted to legalizing acts, all of which are of a general nature. Ordinarily, legalizing acts of a special or local nature are found only in the session laws and are not printed in the Code.

HUD also asks whether the exception in the validating provisions of the Act relating to actions judicially declared void as of the effective date of the Act impairs the validity of the Act.

It is not uncommon for the Iowa General Assembly to legalize all acts of a certain class or pertaining to a certain subject, by a law general in its nature, and at the same time to provide that nothing in the Act shall affect any pending litigation or prior court adjudications. For examples, see §§593.3, 594A.1, 594A.2, 594A.3, 594A.5, 586.1, 587.3, 587.12, 589.4, 589.15, 589.18, 589.21 and 591.12, Code of Iowa, 1966. Indeed, §591.12, a typical example, says that §§591.1 to 591.11 with reference to legalizing corporations on account of defective publications, notices, etc., "shall not affect pending litigation and shall not operate to revive rights or claims previously barred."

Perhaps a legislature might except pending litigation or prior court adjudications from the terms of a legalizing act out of an abundance of caution to avoid conflict with or invasion of the powers of the judiciary — or because it does not deem it proper to revive rights previously barred — or even simply because it is satisfied with the judicial determinations. But it is not required to except prior adjudications. *Iowa Electric Light & Power Co. vs. Incorporated Town of Grand Junction*, 1935, 221 Iowa 441, 264 N. W. 84, 90. The courts have been equally respectful of legislative prerogatives and not at all reluctant to hold that the force and effect of a subsequent legislative act was to render the former decree null and void. *Board of Education vs. Bremen Twp. Independent School District*, 1967, ... Iowa ....., 148 N. W. 2d 419. It is for the legislature to determine whether to except prior court adjudications from its remedial legislation. The legislature having chosen to do so, it is sufficient in this case to say that the classification is a reasonable one. In our opinion the Act has a uniform operation and does not violate either Article III, §30 or Article 1, §6, Constitution of Iowa. See *Dickinson vs. Porter*, 1949, 240 Iowa 393, 34 N. W. 2d 66.

Wilson did not involve a question of the council's jurisdiction. The council, as a council, had jurisdiction of the subject matter. But certain members of the council were prohibited from acting on account of their statutorily defined conflicts under §403.16. The legislature has not changed a council's jurisdiction under the urban renewal law — it has merely redefined the proscription against action by its members.

Assuming the facts you have stated to be correct, it appears that no councilman's property in Evansdale was directly or specifically affected. I also assume that the Evansdale project has not been judicially declared void prior to the effective date of the Act. Thus, no reason appears why the urban renewal proceedings at Evansdale would not be upheld.

May 29, 1969

CONSTITUTIONAL LAW: Constitutional amendments, separate paper ballots not required — Art. II, §6, Art. X, §§1 and 2, Constitution of Iowa; §§52.24 and 52.25, Code of Iowa, 1966. Submission of the five constitutional amendments approved by the people at the general election in 1968 on voting machines constitutes submission by means of a separate ballot and separate paper ballots are not required. (Turner to Voorhees, State Representative, 5/29/69) #69-5-14

The Hon. Donald E. Voorhees, House of Representatives: Reference is made to your request for the opinion of the attorney general, on the following question:

"Was the submission of the five constitutional amendments on voting machines in some counties according to the Constitution and law of the state?"

Article X, Sections 1 and 2, Constitution of Iowa provides:

"Sec. 1. Any amendment or amendments to this Constitution may be proposed in either House of the General Assembly; and if the same shall be agreed to by a majority of the members elected to each of the two Houses, such proposed amendment shall be entered on their journals, with the yeas and nays taken thereon, and referred to the Legislature to be chosen at the next general election, and shall be published, as provided by law, for three months previous to the time of making such choice; and if, in the General Assembly so next chosen as aforesaid, such proposed amendment or amendments shall be agreed to, by a majority of all the members elected to each House, 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; and if the people shall approve and ratify such amendment or amendments, by a majority of the electors qualified to vote for members of the General Assembly, voting thereon, such amendment or amendments shall become a part of the Constitution of this State.

"Sec. 2. 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." Constitution, Article X, §§1, 2.

The requirements of the Constitution must be satisfied, the Supreme Court of Iowa said in *Koehler & Lange vs. Hill,* 60 Iowa 543, 568; 14 N. W. 738, 744 (1883):

". . . if there is any provision of the Constitution which should be regarded as mandatory, it is where the constitution provides for its own amendment otherwise than by means of a convention called for that purpose . . . the constitutional mode must prevail, even if it be conceded some other would have been better."

An amendment prohibiting liquor was proposed by the 18th General Assembly in 1880, by the 19th General Assembly two years later, and approved by a large majority in a special election on June 27, 1882. The Supreme Court determined that the House journal set out the original resolution introduced in the house, but that after the Senate acted the journal merely stated that the house concurred in the senate substitute

"and therefore the house journal fails to show that it adopted the same resolution which was adopted by the senate." Moreover, the court determined that four words in the resolution approved by the senate were not in the resolution approved by the 19th G. A. Yet the Supreme Court held these to be fatal flaws, saying:

". . . it is not only the province, but the duty of the judiciary, to fearlessly declare a statute or amendment to the Constitution to be unconstitutional, when such is clearly the case." *Koehler & Lange vs. Hill,* Supra.

The courts of last resort of California, Nevada and South Dakota have invoked this decision of the Iowa Supreme Court in support of the position that entry in a legislative journal, when required by a constitution, means entry in full.

"All political power is inherent in the people." (*Iowa Constitution, Article 1, §2.*) But the hypothesis that approval by a majority of the electors could cure or overcome a defect *constitutional in character* was disposed of by the Supreme Court in these words.

"While this is so, the Constitution is a limitation on such power . . . The power which is inherent in the people must be expressed and exercised in a lawful manner." *Koehler & Lange vs. Hill,* Supra.

The necessity of entry in full on the journal was declared anew in 1901, after an amendment providing biennial elections was approved by the people in the general election, November 6, 1900. The court ascertained that amendment was entered in full on the journal of the senate, of the 27th General Assembly, but on the house journal by title only and at no time in full. Upon the authority of the Koehler decision, supra, the Iowa Supreme Court held the amendment of 1900 "was not proposed and adopted as required by our constitution and has not become a part thereof." *State ex rel. Bailey vs. Brookhart,* 113 Iowa, 250; 84 N. W. 1064, 1067, (1901).

There is a significant difference between the circumstances in 1882 and 1900 and those in the nineteen sixties. The amendment which fell in the Koehler case, as a matter of law, *did not ever get to the people.* The Constitution requires that the *same proposal of amendment* be approved by two successive General Assemblies. The journals showed that this *Constitutional* requirement was not met. The 18th G. A. did not, as a matter of law, *propose anything,* for the Senate approved one form of amendment, the House another. The 19th G. A. *alone* could not submit a constitutional amendment proposal to the people, but as the matter turned out, the 19th G. A. had, in the view of the Supreme Court, undertaken to do so. A similar omission by the 27th G. A. was fatal to the 1900 Amendment, State ex rel. *Bailey vs. Brookhart,* 113 Iowa 250; 84 N. W. 1064 (1901).

The requirement that each proposed amendment to the constitution be voted upon separately was fully expounded by the Iowa Supreme Court in 1905 in *Lobaugh vs. Cook,* 127 Iowa 181; 102 N. W. 1121. At the general election in 1904 the people approved an amendment changing elections from annual to biennial, altering the method of designating the chief justice of the Iowa Supreme Court, and providing that all elections for office be held at one time. The inclusion of these several purposes in a single amendment was challenged. The Supreme Court said:

"The evident purpose of this section (Art. X §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 judgement approves, to vote for another he would otherwise oppose.

"The amendments contemplated are those to the Constitution, and not necessarily to any particular article or section thereof. The change proposed may affect many parts, and yet constitute but a single amendment, or there may be several independent amendments to a single article. Some difficulty has been experienced elsewhere in determining what shall be included and must be excluded to avoid any infraction of the rule requiring a separate submission. Modifications such as are merely incidental to the main purpose and object sought to be attained are to be included, as essential to the preservation of the symmetry and harmony of the Constitution as a whole. Otherwise great confusion would be possible, from the adoption of some and rejection of other incidental changes necessary to accomplish the purpose proposed. It follows that, while an amendment can have but one main object, it should include such additional provisions as are essential, upon its ratification by the people, to render it consistent with other portions of the Constitution.

"* * * 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 separate purposes, not depedent upon or connected with each other. (Citing cases)"

The five amendments in question here were submitted to the people in the general election of 1968. The summaries of these amendments, prepared by the secretary of state for use in the voting machines, pursuant to §52.25, Code of Iowa, 1966, described these five proposals as follows:

"To require annual sessions of the General Assembly.

"To allow General Assembly to fix compensation and expenses of members of Assembly but no increase shall be effective prior to the next General Assembly.

"To grant home rule to municipal corporations to govern their local affairs but not the power to levy a tax unless authorized by the General Assembly.

"To fix the basis of representation in the General Assembly with no more than 50 Senators and no more than 100 Representatives, and to provide for congressional districting.

"To give the Governor authority to veto any item of an appropriation bill subject to power of the General Assembly to override the veto."

From the secretary's summaries, it is apparent that each of the amendments deals with a single subject matter, and that each can be voted on by itself, without reference to the others. There appears no reason to question the amendments of 1968, under the section of the constitution dealing with the process of amendment. There is, also, a provision that "all elections . . . shall be by ballot" (Art. II, §6). The use of voting

machines is consistent with this requirement. The supreme court said in *U. S. Standard Voting Machine Co. vs. Hobson,* 132 Iowa 38, 109 N. W. 358 (1906):

"We see no reason for saying that a vote cast by means of an authorized machine will not be as valid and effectual as one cast by an Australian ballot."

The court also said:

"We see no merit in the contention that the provision for use of voting machines is unconstitutional, and that an election in that method would be invalid" Ibid.

The law as declared by the Iowa court has found concurrence in many states. If the five amendments of 1968 were wrongly submitted, it was not by reason of any flaw inherent in the machines, making them repugnant to the constitution but the fault, if any, lay in a failure to submit the amendments to the people "in such manner" as the General Assembly shall provide.

The General Assembly, in the joint resolutions proposing the amendments, directed that each of them be submitted to the people in the 1968 general election "in the manner required by the Constitution of the State of Iowa and the laws of the State of Iowa." Chapters 461, 462, 463, 464, and 466, Acts of the 62nd G. A., p. 855 et seq.

There being no specific legislative directive for submission of the amendments of 1968, and the constitutional provisions having no direct application, the question comes down to this: was the submission of the amendments on voting machines in many counties, according to the law?

Here is the statute:

"§52.24 What statutes apply — separate ballots. All of the provisions of the election law now in force and not inconsistent with the provisions of this chapter shall apply with full force to all counties, cities, and towns adopting the use of voting machines. Nothing in this chapter shall be construed as prohibiting the use of a separate ballot for public measures; provided, however, that separate ballots shall be used for the submission to the people of the question of a constitutional convention or amendments or contracting state debts."

"§52.25 Summary of amendment or public measure. Constitutional amendments and public measures including bond issues may be voted on the voting machines in the following manner:

The entire amendment or public measure shall be printed and displayed prominently in at least two places within the voting precinct and on the left-hand side inside the curtain of each voting machine, said printing to be in conformity with the provisions of chapter 49. The amendment or public measure shall be summarized by the auditor or city clerk and in the largest type possible printed on the inserts used in said voting machines. In the case of an amendment or measure to be voted upon in more than one county, the summary shall be worded by the secretary of state and said summary shall be used in each county.

"Any portion of sections 49.43, 49.44, 49.45, 49.46, 49.47, or 49.48 in conflict herewith is hereby declared inapplicable to those counties which have adopted voting machines and follow the procedure of this section." Code of Iowa, 1966.

In a word, §52.25 sets forth the procedure for using voting machines, but §52.24 says, "separate ballots shall be used" for the submission of

amendments to the constitution. A choice registered on a voting machine is a "ballot," as the decisions cited above make plain. However, this law calls not merely for voting by "ballot," but by "separate ballot." The whole issue of proper submission of these amendments turns upon whether *"paper ballots"* are necessary, or voting machines are sufficient, to comply with the statutory requirement.

We find in Article V of the constitution, following the amendment of 1962, this section:

"[Sec. 17. Members of all courts shall have such tenure in office as may be fixed by law, but terms of Supreme Court Judges shall be not less than eight years and terms of District Court Judges shall be not less than six years. Judges shall serve for one year after appointment and until the first day of January following the next judicial election after the expiration of such year. They shall at such judicial election stand for retention in office on *a separate ballot* which shall submit the question of whether such judge shall be retained in office for the tenure prescribed for such office and when such tenure is a term of years, on their request, they shall at the judicial election next before the end of each term, stand again for retention on such ballot. . . ."

To implement this part of Article V, the General Assembly in 1963, enacted *inter alia*, the following:

"Sec. 22. *Voting.* Voting at judicial elections shall be by separate paper ballots *or* by voting machines in the space provided for public measures . . ." Acts of the 60th G. A., p. 124. §46.22, Code of Iowa, 1966. [emphasis added]

If the position could be maintained that this falls short of compliance with the requirement of a *separate ballot* for judicial elections, this enactment would be unconstitutional. But "regularly enacted laws are presumed to be constitutional." *Diamond Auto Sales, Inc., vs. Erbe,* 251 Iowa 1335, 105 N. W. 2nd 650, 653. As our Supreme Court subsequently said:

". . . we are bound to follow certain well settled rules . . . So we must presume constitutionality, and this presumption must be overcome by one who challenges the statute by proving its invalidity beyond a reasonable doubt. Also if any reasonable state of facts can be conceived which will support the constitutionality of the statute, it is our duty to sustain it; and the attacker must negative every such possible hypothesis." *Lewis Consolidated School District vs. Johnston,* 256 Iowa 236, 127 N. W. 2nd, 118, 123.

By the enactment in 1963, the General Assembly has declared submission on a voting machine is submission upon the *separate ballot* required by the Constitution.

"Here we have a legislative construction of the Constitution which should not and cannot be ignored." *Koehler & Lange vs. Hill,* 60 Iowa 543, 557; 14 N. W. 738.

A long line of decisions, both State and Federal, concurs with the principle enunciated by the Iowa Supreme Court. The uncertainty, or possible uncertainty that has evoked this opinion, is whether a "separate ballot" requirement is met when voting machines are used.

The Iowa Supreme Court invoked the principle of legislative construction in 1946, citing with approval the Corpus Juris Secundum treatise on Constitutional Law, 16 C.J.S. §33, as follows:

"If the meaning of the constitution is doubtful, a legislative construc-

tion will be given serious consideration by the courts, both as a matter of policy and also because it may be presumed to represent the true intent of the instrument. A *contemporaneous* legislative exposition of a constitutional provision is entitled to great deference, as it may well be supposed to result from the same views of policy and modes of reasoning which prevailed among the framers of the instrument expounded." *Carleton vs. Grimes*, 237, Iowa 912, 23 N. W. 2d 883. [Emphasis added]

When the legislative constructions are contemporaneous with the ratification of the constitution or, as was the case in 1963, a constitutional provision, courts of last resort have enjoined still greater respect for their authority.

"A legislative construction of a constitutional provision made by an enactment within a few months after the constitutional convention, in which members of the legislature had an influential part, may not be lightly cast aside. *Cherey vs. Long Beach*, 282 N. Y. 382, 26 N. E. 2d 945, 127 A.L.R. 1210.

"The contemporaneous construction of a state constitution by the first legislature assembling after its adoption is of great weight. *Cooper Mfg. Co. vs. Ferguson*, 113 U. S. 727, 28 L. ed 1137, 5 S. Ct. 739.

American Jurisprudence notes it often occurs that the members of the legislature are in part those who assisted in drafting the constitution, or, as in this matter, the constitutional provision. (16 Am. Jr. 362.) The laws enacted by them may be treated as clearly approved by those who, as members of the legislature, were in effect giving a practical construction to the constitution they helped to establish. (*See Fairbanks vs. United States*, 181 U. S. 283; 45 L. Ed. 257; 21 S. Ct. 648.)

The judiciary amendment, requiring "a separate ballot" in judicial elections was drafted by the 58th General Assembly and approved in the 59th General Assembly. The 60th General Assembly complied with this requirement by directing the use of paper ballot *or* voting machines in such elections.

Of the 50 Senators in the 60th General Assembly, one had served in the 58th G. A., 12 had served in the 59th G. A. and 26, a majority of the Senate, served in *both* the 58th G. A. and the 59th G. A. *Leg. Direc. 60th G. A.*, (issued by Sec. of State).

Of the 108 representatives in the 60th General Assembly, 2 served in the 58th G. A., 33 in the 59th G. A. and 48 served in *both* the 58th G. A. and the 59th G. A. Ibid.

A construction of a constitutional provision by a legislature more contemporaneous, more squarely within the doctrine could not readily be found. Nor is there need to belabor the proposition that legislative construction of the words "separate ballot" in the Iowa Constitution (Article V, §17) must hold for subsequent application of the same words in the statute. (§52.24, Code of Iowa, 1966).

A final question that remains is whether the machine voting provision of the Act of 1963 (§46.22, Code of Iowa, 1966) may contravene the requirements of the constitution, as found not only in Art. V, Sec. 7, but also in Art. X, Sec. 2. The constitutional requirements are not for a separate *paper* ballot, which might put the issue in a posture more troublesome, but merely for a "separate ballot," and for voting on each amendment separately. And who should know better, as the courts have

recognized, what "a separate ballot" means than the legislators who drafted and submitted the amendment containing those words? Of these legislators, 38 out of 50 of the senators, and 81 out of 108 of the representatives were members of the 59th G. A. which enacted the amendment of which the application is the concern of this opinion.

The period since this legislative construction has been six years, by the calendar, but in terms of events it has been long and significant. Pursuant to this construction, three amendments have been submitted, of which two were adopted and have become effective. "The injustice that would inevitably result by the disturbing of such constructions after a long period of acquiescence therein, during which many rights will necessarily have been acquired, is a very strong argument against it." *16C. J.S. 113* and cases there cited.

There being no clear conflict with the constitution, in the Act of 1963 (§46.22, Code of Iowa, 1966) and, indeed, respecting the doctrine of legislative construction, no conflict at all, the question of the validity of this enactment is disposed of. Were there any doubt remaining, it would necessarily yield to the fundamental rule that every intendment, every presumption, is to be invoked *in favor* of the constitutionality of a statute. As the Iowa Supreme Court declared:

". . . to declare an act unconstitutional and void, is the exercise of the highest power of the court, and is not to be resorted to, unless it become necessary. Although the power is to be exercised when the case demands it, yet the courts will not favor it, nor use it, unless in a clear and decided case. 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. (Rice vs. Foster, 4 Harringt. 479; State vs. Cooper, 5 Blackf. 258; Ogden vs. Saunders, 12 Wheat. 270; Calder vs. Bull, 3 Dall. 386; Fletcher vs. Peck, 6 Cranch 87.)"

State ex rel. Wier, 2 Iowa 282 (1855) See also *Santo vs. The State*, 2 Iowa 208 (1855).

Among thousands of opposite rulings upon the principle, there is no dissent in any jurisdiction. 16 Am. Jr. 336.

After ratification by the people, which is the case here, every reasonable presumption, both of law and fact, is to be indulged in favor of the validity of an amendment to a state constitution. (See *People vs. Sours*, 31 Colo. 369, 74 P. 167; *State ex rel. Kemp vs. Baton Rouge*, 215 La. 315, 40 S. 2d 477; *Weeks vs. Ruff*, 164 S. C. 398, 162 S. E. 450; *State ex rel. Morgan vs. O'Brien*, 134 W. Va. 1, 60 S. E. 2d 722.) Moreover, once an amendment has been ratified, the courts ought to be slow to declare it invalid on technical grounds unless substantial requirements have been violated in the submission. (Note *Keenan vs. Price*, 68 Idaho 423, 195 P. 2d 662).

For the reasons here stated, it is my opinion that the five amendments to the Constitution of Iowa were submitted to the people in 1968 according to the Constitution and the laws of this state, that they were duly and properly ratified and are now and since their ratification have been in full force and effect.

June 2, 1969

HIGHWAYS: Road use and street funds, use to construct a garage to

house street construction and maintenance equipment — Art. VII, §8, Constitution of Iowa; §§312.6 and 404.7, Code of Iowa, 1966. A municipality may use street funds to erect a garage to house and maintain road construction and maintenance machinery and equipment. (Turner to Fenton, Polk County Attorney, 6/2/69) #69-6-1

Mr. Ray A. Fenton, Polk County Attorney: You have requested an opinion of the attorney general with respect to the following:

"Is it permissible to use street or road tax funds to construct a building to house and maintain street department equipment and materials?"

A prior opinion of the attorney general, 1962 OAG 251, examined statutes pertaining to road use taxes and concluded that such funds could be spent only for the purposes set out in §312.6, Code of Iowa, 1958.

That section provided in pertinent part as follows:

"Funds received by municipal corporations from the road use tax fund shall be used solely for the construction, reconstruction, repair and maintenance of roads and streets, ..."

This same section, as amended by Chapter 265, Acts of the 61st General Assembly, now provides in pertinent part as follows:

"Funds received by municipal corporations from the road use tax fund shall be used: (1) For the purposes for which street fund money may be used, ..."

It is clear that under the change of language in §312.6 municipalities may now expend road use tax funds for any purpose for which they are authorized to expend that portion of local taxes allocated to the street fund, provided that such expenditure is consistent with Article VII of the Constitution of Iowa, §8 of which provides:

"All motor vehicle registration fees and all licenses and excise taxes on motor vehicle fuel, except cost of administration, shall be used exclusively for the construction, maintenance and supervision of the public highways exclusively within the state or for the payment of bonds issued or to be issued for the construction of such public highways and the payment of interest on such bonds."

§404.7, Code of Iowa, 1966, sets out the purposes for which a municipality may expend its street funds as follows:

"Municipal corporations shall have power to annually cause to be levied for a fund to be known as the street fund a tax on all taxable property within the corporate limits and allocate the proceeds thereof to be spent for the following purposes:

* * *

"2. Opening, widening, extending, constructing, maintaining, repairing, marking, draining, and grading any street, highway, avenue, alley, public ground, or market place, and purchase of necessary equipment and machinery therefor.

* * *"

Thus, the question is whether the power to construct a garage in which to maintain and house road equipment and machinery may be said to be implied in the general power of municipalities to expend funds for "opening, widening, extending, constructing, maintaining, repairing, surfacing,

marking, draining and grading any street," or from the power granted to purchase equipment and machinery for conducting such operations. We believe it is.

Although 1962 OAG 251 took a somewhat narrow view of the purposes for which secondary road use tax funds could be spent, subsequent opinions from the Iowa Supreme Court indicate that the statutes involved are not to be so construed. *Slapnicka v. City of Cedar Rapids*, 1965, 258 Iowa 382, 139 N. W. 2d 179, 182; *Edge v. Brice*, 1962, 253 Iowa 710, 113 N. W. 2d 755. In these cases, the court held that §8, Article VII of the Constitution of Iowa, and the statutory provisions here involved, are to be construed broadly and liberally in favor of the acknowledged purpose of these provisions. That purpose is to "assure adequate highways and . . . a source of funds . . . for that purpose; and at the same time to limit the use of the funds, not to maintain the status quo of highway construction, but to keep such fees and taxes at reasonable rate and not allow the same to become a general revenue measure to be used for governmental purposes totally foreign to highways." *Edge v. Brice*, 1962, 253 Iowa 710, 113 N. W. 2d 755, 759.

The court in the *Edge* case held an expenditure of road use tax funds to reimburse a utility for relocation of their facilities to be properly within the scope of "construction . . . of public highways." In *Slapnicka*, the word "construction" was found to be broad enough to authorize an expenditure of road use tax funds to compensate engineers for a preliminary engineering study for a proposed expressway.

In *Slapnicka*, the court noted with approval the broad language found in *Lawhorn v. Johnson*, 1938, 196 Ark. 991, 120 S. W. 2d 720, and observed:

"The court considered its statute providing that the fund shall be used for making and repairing public roads. The right to use the money for the salary was challenged. The court said:

" 'It would appear that supervision is as much a necessary expense in the building of roads as the driving of a grader, or the use of a plow or other instrumentality.' The court held that the services of the ex officio road commissioner did enter into the 'making and repairing public roads and bridges.' "

Thus, an expenditure of road use tax funds is proper even though it not be actually, physically, involved in the laying of pavement or the filling of pavement holes. It is sufficient if the expenditure is reasonably essential and necessarily inferable from the "opening, widening, extending, constructing, maintaining, repairing, surfacing, marking, draining and grading in a street, highway, avenue, alley, public ground, or market place." §407.7(2), Code of Iowa, 1966.

The *continuing* nature of the duty of municipalities to build, repair and maintain our public roads, makes evident their need to house and repair equipment. The substantial capital investment necessary in successfully meeting their municipal responsibility would suffer unconscionable loss without such facilities.

It appears just as logical to allow the construction of a garage in which to house and maintain road machinery, equipment and materials, under existing constitutional and statutory provisions, as it is to authorize the payment of the salary of a road supervisor from road use tax

funds, as was impliedly approved in *Slapnicka*.

In the instant case, it would appear that the questioned expenditure would also be reasonably essential and necessarily inferable under the expressly granted power to purchase equipment and machinery for road purposes. The same reasons apply.

Moreover, it should be noted that Art. VII, §8 of the Constitution and §404.7 of the Code permit the use of the road use and street funds not only for the construction of roads and streets but also their maintenance. Plainly the roads and streets cannot be maintained without appropriate equipment and common sense dictates that such maintenance equipment itself be maintained so that it will be in running order when called upon to perform its road construction and maintenance functions. It is no more unreasonable to allow the expenditure of road use tax funds for the construction of a building to house road maintenance machinery than it would be to imply the authority to purchase fuel for such equipment or paint or tarpaulins to protect the same from the elements.

It is, therefore, the opinion of this office that road use tax funds may be spent for the construction of a garage in which to house and maintain road machinery under the provisions of §404.7(2), Code of Iowa, 1966.

This opinion should not be construed as impliedly negating the effect of any statutory limitations, such as, for example, those found in §312.11, Code of Iowa, 1966.

June 3, 1969

STATE OFFICERS AND DEPARTMENTS: Iowa Development Commission Foundation, Inc. not authorized to acquire a proprietary interest in an invention — §§28.11, 28.12, 28.13, Code of Iowa, 1966. The Iowa Development Commission Foundation, Inc. has no authority to enter into a license and option agreement under the terms of which it would acquire the exclusive right and license to manufacture, use, sell and sublicense throughout the world a winged rotary kite. (Haesemeyer to Johnson, Iowa Development Commission, 6/3/69) #69-6-2

Mr. E. L. Johnson, Director of Development, Iowa Development Commission: You have requested an opinion of the attorney general on the question of whether or not the Iowa Development Commission Foundation, Inc. may properly enter into and make payments pursuant to a certain option and license agreement by and between one Lynn D. Richardson, as licensor, and the Iowa Development Commission Foundation, Inc., as licensee.

A copy of this agreement executed on April 11, 1969, by Mr. Richardson and on April 14, 1969, on behalf of the Iowa Development Commission Foundation, Inc. by Kenneth Robinson, its Vice President, is attached hereto as Exhibit A. It is to be observed that under the terms of the agreement the Foundation is given the exclusive right and license to manufacture, use, sell and sublicense throughout the world a Winged Rotary Kite, for which the inventor, Mr. Richardson, has a patent application pending. Under the terms of the contract the Foundation is to pay $2,000 to Richardson for the first sixty days of the agreement and then if it elects to continue with the agreement an additional $2,000 on or before May 1, 1970, with the sole ownership of the entire right, title

and interest in and to Richardson's invention vested in the Foundation, subject to the Foundation's duty to pay royalties under other provisions of the agreement.

Before considering the question of the validity of the agreement insofar as the Foundation is concerned it is first appropriate to review the purposes and functions of the Foundation as well as the circumstances surrounding its origin. Chapter 28, Code of Iowa, 1966, authorizes the creation of the Iowa Development Commission to consist of eleven members appointed by the governor. Generally speaking the objectives of the commission are to promote the industrial and agricultural development and economic welfare of the State of Iowa. §§28.11 through 28.16 authorize the development commission to create a non-profit corporation under Ch. 504 of the Code, and it is pursuant to this grant of authority that the Iowa Development Commission Foundation, Inc. was formed. §§28.11, 28.12, and 28.13 are especially relevant to the question you raise and are hereinafter set forth at length:

"28.11 Corporation to evaluate ideas and inventions. The Iowa development commission is hereby authorized to form a corporation under the provisions of chapter 504 for the purpose of evaluating the commercial possibilities of scientific developments, ideas or inventions in all of the sciences, arts and technologies useful to the public, received from applicants residing in Iowa, and to aid in the financing and promotion for manufacture in the state of Iowa of said developments, ideas or inventions; and where appropriate to provide assistance to applicants in arranging for the production and marketing of their developments, ideas or inventions.

"28.12 *No legal interest to corporation. The corporation is without authority to require the licensing, assignment or sale to the corporation of any legal interest whatsoever in said developments, ideas or inventions.*

"28.13 Commitments by corporation.

1. *The corporation shall not involve itself 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; provided, however, that the corporation shall not be prohibited, in its discretion, from loaning funds to any applicant for the acquisition of letters patent on his own behalf.

2. The corporation, prior to any commitments made by applicants to it, shall fully inform applicants in writing that the submission of their developments, ideas or inventions does not create nor afford any legal protection therefor under the United States patent laws, and that the acquisition of such protection is the sole responsibility of applicants." (Emphasis added)

Pursuant to the statutory grant of authority contained in Ch. 28 the Iowa Development Commission Foundation, Inc. was duly incorporated as a non-profit corporation under Ch. 504 of the Code. A copy of these articles of incorporation executed on May 3, 1963, is attached hereto as Exhibit B. The purposes and objects of the Foundation are found in Art. II of such articles of incorporation which provides as follows:

"The purpose of this corporation is to evaluate the commercial possibilities of scientific developments, ideas or inventions in all of the sciences, arts and technologies useful to the public, received from applicants residing in Iowa, and to aid in the financing and promotion for manufacture in the State of Iowa of said developments, ideas or inventions; and where appropriate, to provide assistance to applicants in arranging for the production and marketing of their developments, ideas or inventions."

Art. V delineates the powers of the corporation at some length. Section 1 of such Article V gives the corporation the customary broad power:

"To enter into contracts, . . . to take by purchases, . . . real and personal property, whether the same be tangible or intangible, including, but without, limitation either as to class or kind, inchoate rights of whatsoever kind and nature, and to hold, dispose of, manage, and administer the same in the carrying out of the purposes and objects of the corporation."

However, the remaining sections of Art. V are considerably less sweeping in their scope than is section 1 and manifest an intention that the corporation is not to have the power to acquire an actual legal interest in an invention contrary to the provisions of §28.12 of the Code. Thus, sections 3, 4, 5, 7, 8 and 9 of Art. V provide:

"3. To *aid* financially in the prosecution of applications for patents, both foreign and domestic, and to assume and pay appropriate expenses incurred.

"4. To conduct experiments and tests, and to promote and develop scientific and commercial values of inventions, discoveries and processes, and to pay the necessary and appropriate expense thereof.

"5. To enter into contracts or trusts or trust agreements with inventors or applicants for, or owners of, patents, patent rights, licenses, or interest therein, for the rendering financial aid in obtaining, perfecting and/or maintaining of patents and rights therein, both foreign and domestic, and the protection thereof, and for the testing, developing, improving, manufacturing, use and disposition of patented articles, devices and processes, and for the disposition of patented rights, devices and processes, licenses and interests therein, upon such terms and conditions, and with such provisions as to the application and use of earnings and proceeds in the payment of royalties as may be agreed upon, *and not inconsistent with law or the purposes of this corporation.*

"7. To establish on a continuing basis, facilities to identify and develop ideas and inventions, acquaint residents of the State of Iowa of the purposes of this corporation, with the objectives thereof, how the purposes are to be carried out, and how interested persons may obtain help in developing and marketing their ideas and inventions.

"8. To establish a centralized facility which will include engineering, marketing, financial and legal counsel as well as facilities for the manufacturing of pilot models of any inventions. As required, to secure technical services on a sub-contractual basis.

"9. To do and perform any act or thing necessary, proper or convenient in accomplishing any or all of the above enumerated matters and to *have and exercise all powers conferred by the laws of the State of Iowa or otherwise upon a corporation of this type formed for the aforesaid purposes.* The enumeration herein of specific powers shall not be deemed exclusive nor affect the rights of the corporation to exercise all of any other powers necessary or incidental to the accomplishment of its purposes."

Art. XI of the articles of incorporation provides that the eleven members of the Iowa Development Commission are to constitute the board of directors of the corporation and then goes on to say:

"The business and affairs of the corporation shall be managed and controlled by the Board of Directors except as the Articles of Incorporation or the law of Iowa otherwise provide. The Board of Directors may delegate to the members and the Technical Evaluation and Advisory Committee such powers, duties and responsibilities as the same is deemed

necessary by the Board of Directors."

Art. XII makes provision for the Technical Evaluation and Advisory Committee (TEAC) as follows:

"There shall be a Technical Evaluation and Advisory Committee composed of all the members who are not members of the Boards of Directors. The Committee shall be responsible for evaluating and approving or rejecting projects and applications submitted to the corporation and otherwise advising the Board of Directors and the staff of the corporation respecting all matters affecting the management and operation of the corporation. The Committee shall have such other responsibilities, duties and authority as is from time to time delegated to it by the Board of Directors."

The bylaws of the foundation, a copy of which is annexed hereto as Exhibit C, provide among other things for a president, vice president and secretary and prescribes their duties as follows:

"Section 2. *President.* The President shall have primary responsibility for implementing the policies of the corporation as adopted and enunciated by the Board of Directors; shall sign such contracts, documents and other papers on behalf of the corporation as authorized by the Board of Directors or the Executive Committee; may approve projects and applications submitted by residents of Iowa when authorized by the Technical Evaluation and Advisory Committee; and otherwise assist the Chairman of the Board in supervising the activity and administration of the corporation. The President shall have the authority to employ, hire and otherwise contract for and terminate the services of administrative and professional personnel subject to the approval of the Chairman of the Board.

"Section 3. *Vice President.* The Vice President shall assist the President and shall perform such other duties as from time to time may be delegated to that office by the Board of Directors.

"Section 4. *Secretary.* The Secretary is charged with the responsibility of maintaining all of the records of the corporation except the financial records; prepare and mail such notices as directed by the Chairman of the Board or the Board of Directors; shall countersign all documents, contracts and other papers exclusive of checks and negotiable instruments executed in the name of the corporation by authority of the Board of Directors; and keep the minutes of all meetings of the corporation, Board of Directors and the Technical Evaluation and Advisory Committee, as well as the tally of any votes had therein. The Secretary shall have such other duties and responsibilities as from time to time may be delegated to that office by the Board of Directors."

Art. VI of the bylaws deals with the Technical Evaluation and Advisory Committee (TEAC). Section 1 thereof provides:

"Section 1. *Responsibilities.* The Technical Evaluation and Advisory Committee shall be responsible for examining, evaluating and approving or rejecting projects and applications submitted to the corporation and otherwise advising the Board of Directors and the staff of the corporation respecting all matters affecting the management and operation of the corporation. The Committee shall have such other responsibilities, duties and authority as is from time to time delegated to it by the Board of Directors."

The matter is further complicated by the existence of an agreement between the foundation and Iowa State University, Extension Division, Center for Industrial Research and Service (CIRAS). A copy of this agreement dated November 1, 1966, is attached hereto as Exhibit D.

Under this agreement it would appear that CIRAS was to become the operating arm of the foundation, undertake the actual evaluation and rating of inventions and be responsible for promoting any which seemed feasible. It should be noted that under section 7 of Art. I, TEAC was to serve as a board for the foundation and the primary liaison with CIRAS. The relevance of this agreement is somewhat conjectural in view of section 10 of Art. I, which provides:

"10. This agreement shall terminate June 30, 1968, but shall be subject to continuation at the option and mutual consent of both IDCF and CIRAS. If either or both parties do not agree to a continuation of this agreement at that time, or prior thereto, all rights and obligations of IDCF to CIRAS, of CIRAS to IDCF, shall automatically terminate as of June 30, 1968."

It is my understanding that neither of the parties has taken any affirmative action to renew the agreement and under these circumstances it would be my opinion that the foregoing language would operate to terminate the agreement as of June 30, 1968. Nevertheless, I mention this agreement since it serves to round out the picture and also because Richardson is an employee of CIRAS.

With all of the foregoing in mind it is appropriate now to return to the basic question presented which is whether the agreement entered into between Richardson and the foundation is valid and enforceable or ultra vires and void. For a number of reasons it is our opinion that this agreement is invalid and unenforceable.

As noted previously herein §28.12 of the Code states flatly that, "The corporation is without authority to require the licensing, assignment or sale to the corporation of any legal interest whatsoever in said developments, ideas or inventions." Plainly, this would seem on its face to prohibit the foundation from entering into an agreement of the type we have here to consider. However, the argument has been advanced that the presence of the word "require" in §28.12 indicates that the legislature meant only to prohibit the foundation from compelling or coercing inventors into turning over to the foundation title to their inventions as a condition to the granting of any aid or assistance to such inventors. It seems to us that this position is without merit for a number of reasons. First, such an interpretation of §28.12 is inconsistent with the presence in such section of the expression "any legal interest *whatsoever*." The inclusion of these emphatic words would indicate that the authors of Ch. 28 wanted to make it clear that the foundation was not to get into competition with private industry or acquire any proprietary interest in any invention. Moreover, there runs through the surrounding sections of Ch. 28 which relate to the foundation a common thread, namely, that the foundation's mission is to aid and assist but not take charge. It is to be a marriage broker between inventors and Iowa industry and then step aside. It is to be completely non-profit and not a money-making concern perpetuating itself out of earnings generated by its acquisitions. The foundation's mandate as found in §28.11 consistently falls just short of authorizing it to acquire inventions for itself. Such §28.11 uses such expressions as "evaluate ideas and inventions," "evaluating commercial possibilities," 'aid in the financing and promotion" and "provide assistance . . . in arranging for . . . production and marketing." Furthermore, §28.13 provides that the foundation is not to involve itself in any

way with the acquisition of patents by applicants except by rendering financial assistance under certain circumstances. This idea that the foundation is to be limited in its functions to aiding, assisting, advising and evaluating pervade not only those sections of Ch. 28 relating to the foundation but also §28.7 which outlines the duties of the development commission using such words as "acquaint," "encourage" and "aid."

This concept that the foundation's function is to be only promotional and advisory is carried through in its articles of incorporation. See, for example, Art. II relating to the purposes and objects of the foundation and most of the sections of Art. V which describe the powers of the corporation. It is true that certain catch-all language of a general nature is to be found in the articles of incorporation, particularly in §1 of Art. V, which could ordinarily be said to authorize a contract of this sort. However, we do not consider such language to be controlling in the face of the prohibition of §28.12 of the Code and the manifest purpose of the foundation which permeates Ch. 28 and the articles of incorporation.

No discussion of the questions raised by the execution of the contract here involved would be complete without a discussion of the case of *State v. All-Iowa Agricultural Ass'n.*, 1951, 242 Iowa 860, 48 N. W. 2d 281. In this case defendant, a non-profit corporation organized under Ch. 504, was the owner and operator of a fairgrounds known as Hawkeye Downs near Cedar Rapids. It entered into a five year agreement with one Gerber authorizing him to conduct weekly auto races at its fairgrounds between May 1 and November 1. Plaintiff, himself an owner of an auto race track, claimed that defendant had exceeded the authority conferred on it by law because Ch. 174, Code of Iowa, 1950, relating to county and district fairs in setting forth the powers of fair societies simply stated, "Each society may hold annually a fair. . . ." Plaintiff applying the maxim *expressio unis est exclusio alterius* maintained that this language prohibited defendant from doing anything but holding one fair each year. The court appeared to agree with plaintiff's contentions stating:

"As plaintiff argues, a corporation organized under a general law may exercise only such powers as are authorized by the law and those reasonably incident thereto. The provisions of statute enter into and form part of the corporate charter. Articles of incorporation may not clothe the society with powers not authorized by law. In case of conflict in this regard between the statute and the articles, the statute governs." *State v. All-Iowa Agricultural Ass'n.*, 1951, 242 Iowa 860, 48 N. W. 2d 281, 284.

However, here the court was talking not about Ch. 174 which authorized holding an annual fair but about Ch. 504, the non-profit corporation law observing that:

"As before stated, it is not contended defendant has exceeded any limitation of powers found in Code chapter 504, I.C.A., under which it was incorporated. The authorities just cited are of no aid to plaintiff unless defendant has only such power as provided by section 174.2, above quoted, to 'hold annually a fair.' We are unable to agree that the statutory powers of defendant are thus limited by section 174.2. We think this section does not prohibit the exercise of corporate powers authorized by the chapter under which the corporation was formed and those reasonably incident thereto that are not in violation of the articles of incorporation. Chapter 174 contains no provision by which a society may be incorporated under that chapter. It does not deal with incorporation."

The court ultimately rejected plaintiff's contentions and held for defendant. It seems to us that *State v. All-Iowa Agricultural Ass'n.*, supra, can and should be distinguished from the foundation's situation. In the first place Chapter 174 merely authorized a certain activity, i.e., the holding of an annual fair, without prohibiting anything. §28.12 on the other hand flatly prohibits precisely the type of conduct that the foundation's contract with Richardson contemplates. Secondly, Ch. 28 expressly authorizes the incorporation of the foundation under Ch. 504, whereas Ch. 174 was silent on how or under what statutes county and district fair associations were to be organized. Indeed, the court in the *All-Iowa* case noted that but for the fact that it had applied for state aid the fair association in that case might never have run afoul of Ch. 174.

Finally, the court in *All-Iowa* appears to have based its decision to a significant extent on factors not present in the instant situation. For example, the court seems to have placed considerable reliance on the fact that "officials and contemporary usage have long construed the statutes contrary to plaintiff's contention." Here there is no administrative practice of long standing upon which reliance can be placed to uphold the contract between Richardson and the foundation.

The court in *All-Iowa* also had this to say about Ch. 174:

"The principal object of chapter 174 appears to be to prescribe the qualifications fair societies must meet in order to receive state and county aid. Section 174.2 merely authorizes the holding of an annual fair for certain purposes. It does not purport to enumerate corporate powers nor to deprive any 'society' formed under chapter 504 of the powers therein enumerated.

"We see no good reason why defendant, upon receiving state and county aid, may not continue to exercise the powers conferred by chapter 504 and those reasonably incident thereto. At least the legislature has not prohibited it from so doing."

§28.11 does enumerate and in considerable detail what the foundation is supposed to do. Moreover, in enacting §§28.12 and 28.13, the legislature *has* prohibited the foundation from doing certain things among which is acquiring any legal interest whatsoever in developments, ideas or inventions.

There are other reasons why we feel that the contract between Richardson and the foundation is ultra vires. The bylaws provide that the president is to sign contracts on behalf of the corporation. The vice president is merely to assist the president and perform such other duties as are delegated to him by the board of directors. We have not been advised that the president asked Mr. Robinson to execute the agreement with Richardson or that the board of directors authorized him to do so. It does appear that TEAC authorized the execution of the agreement and that TEAC has for some time and for all practical purposes acted as the foundation's board of directors. However, it is unclear just what authority TEAC had for acting in this capacity. Certainly, the November 1, 1966, agreement with CIRAS is of no help in this respect for as we have seen that agreement expired by its own terms on June 30, 1968. The articles of incorporation and bylaws would appear to indicate that TEAC's function was to be merely an advisory one and that the final authority and responsibility for the conduct of the foundation's affairs, as in the case of most corporations, was to be vested in the board of directors.

In any event it is not necessary to reach any final conclusions on these questions as to the authority of Robinson to execute the agreement on behalf of the foundation because it is our opinion that the agreement is ultra vires and void by reason of the prohibitions contained in §28.12 of the Code.

June 13, 1969

STATE OFFICERS AND DEPARTMENTS: Iowa Law Enforcement Academy Council — Ch. 112, §6, 62nd G. A. (§80B.6, Iowa Code Annotated). Once appointed to a 4 year term on the Iowa Law Enforcement Academy Council, a state senator's term is no longer ex officio and does not expire with his term as a state senator. (Turner to Jepsen, Lieutenant Governor of Iowa, 6/13/69) #69-6-3

The Hon. Roger Jepsen, Lieutenant Governor of Iowa: By letter from the secretary of the senate, Carroll A. Lane, dated June 10, 1969, you have requested an opinion of the attorney general as to whether former State Senator Kruck is still a member of the Iowa law enforcement academy council to which he was appointed during his tenure as a state senator. It is my understanding that Senator Kruck has not resigned; that he was appointed to a four year term, and that that term has not expired, he having been appointed August 14, 1967. The issue turns on whether Senator Kruck was merely an ex officio member of the council and held office thereon only by virtue of being a senator. In other words did his term of office on the council terminate, expire and become vacant when he was no longer a state senator?

In my opinion, Senator Kruck is still a member of the council and the term to which he was elected did not expire with his term in the senate. Ch. 112, §6, Acts of the 62nd General Assembly, (now §80B.6, Iowa Code Annotated) provides in pertinent part as follows:

"There is hereby created the Iowa law-enforcement academy council which shall consist of the following members:

* * *

"2. One member appointed from the senate by the lieutenant governor for a term of four (4) years, commencing upon the effective date of this Act. In the event that the member appointed by the lieutenant governor is unable to complete his term, a vacancy shall exist which shall be filled for the unexpired term in the same manner as the original appointment.

* * *"

While it is true that one member of the Iowa law enforcement academy must be appointed from the senate, his appointment to a four year term commencing upon the effective date of the Act is necessarily inconsistent with a senator's term in office or the theory that he thereafter holds such office only so long as he remains in the senate. Any senator appointed to a four year term on the council commencing on the effective date of the Act (August 15, 1967) would already have served a part of his four year term as senator. If the general assembly had intended that the term of the senator appointed to the council should expire when he left the senate, it would have said so rather than that he serve an otherwise unlimited term of four years. Compare §2.49, Code of Iowa, 1966, which creates the legislative research committee and provides that the offices become vacant when a member of the committee ceases to be a member of the general assembly.

June 16, 1969

STATE OFFICERS AND DEPARTMENTS: Iowa State Fair and World Food Exposition Committee — S.J.R. 24, 63rd G. A.; Ch. 486, 61st G. A.; Ch. 472, 62nd G. A. Where a committee created by one general assembly to report to the next is "continued" by the next and the members thereof continue to serve and report to still a third general assembly, and the third G. A. again continues the committee, specifically providing for new members to represent the general assembly on the committee, it is implied that the non-legislative members continue to serve and that the legislative members be newly appointed (Turner to Jepsen, Lieutenant Governor of Iowa, 6/16/69) #69-6-4

The Hon. Roger Jepsen, Lieutenant Governor of Iowa: By letter dated June 10, 1969, Carroll A. Lane, secretary of the senate, has conveyed your request for an opinion of the attorney general as to the following:

"S.J.R. 24 — Iowa State Fair and World Food Exposition Original committee established by Acts of the 61st General Assembly provided for ten members. S.J.R. 24 places the President of the Senate and a member of the Senate from the opposite political party on the committee.

"*Question:* Will the President of the Senate and the Speaker of the House be the only additional members on the committee?

"*Question:* Do the provisions of S.J.R. 24 replace the senate appointees under the original resolution?"

The "Iowa State Fair and World Food Exposition Study Committee" was created by Ch. 486, Acts of the 61st General Assembly, to be composed of ten members, including the president and secretary of the Iowa State Fair Board, the director of the Iowa Development Commission, the president of Iowa State University, the secretary and state department of agriculture, the director of the Iowa Marketing Division of the state department of agriculture, two senators named by the president of the senate, and two representatives named by the speaker of the house. One such senator and representative so appointed "shall be appointed from the minority party." See §1, Ch. 486, 61st G. A.

§4 of that Act provided that the committee make a final report of its work to the 62nd General Assembly prior to January 1, 1967, and, from all that appears in the bill, that report was the conclusion of the work of the committee. But the 62nd General Assembly "continued" the committee, with the final report to be made to the 63rd General Assembly prior to January 1, 1969. See Ch. 472, Acts, 62nd G. A. No provision was made by the 62nd General Assembly for continuing the initial members in office but, presumably, they continue to serve during that period.

S.J.R. 24 of the 63rd General Assembly provides in §1:

"Section 1. The 'Iowa State Fair and World Food Exposition Study Committee' established by the Sixty-first General Assembly is hereby continued, except that the members of the committee representing the General Assembly shall, after the effective date of this Act, include the president of the Senate, one senator appointed by him form a different political party, the speaker of the House and one member of the House appointed by him from the minority party."

The words "except that the members of the committee representing the General Assembly" seem to imply that the 63rd General Assembly intended to continue as members of the committee the president and secre-

tary of the Iowa State Fair Board, the director of the Iowa Development Commission, the president of the Iowa State University, the secretary of the state department of agriculture and the director of the Iowa Marketing Division of the state department of agriculture, all non-legislative members, as members of the committee, and to substitute the president of the senate and one senator appointed by him from a different political party for the two senators and the speaker of the house and one member of the house appointed by him from the minority party for the two state representatives.

Accordingly, it is my opinion that the aforementioned non-legislative members will continue to hold office under S.J.R. 24 along with the president of the senate and the speaker of the house and that the president of the senate should appoint one senator from a different political party and the speaker of the house should appoint one representative from the minority party. In other words, it is my opinion that the legislature intended to substitute the president of the senate and the speaker of the house and their aforementioned appointees for the "members of the committee representing the general assembly" under the original bill. Of course, the president of the senate could reappoint one of the two senators if one is a member of the minority party still serving in the senate and the same would be true regarding the speaker's appointment of a minority party representative. But neither the president of the senate nor the speaker would be bound to appoint either of the senators or representatives who have heretofore served on the committee.

June 18, 1969

TAXATION: §441.21, H.F. 784, §1, paragraph 1. The words "classes of property" in the amendment to §441.21 refers only to agricultural property in reference to the capitalization rate to be fixed by the State Board of Tax Review for use by assessors when assessing agriculural property. (Murray to Vermeer, Adm. Ass't. to the Governor, 6/18/69) #69-6-5

Mr. Elmer H. Vermeer, Administrative Assistant, Office of the Governor: You have requested our opinion on the following question:

"In reference to Conference Committee Report on House File 784, would you please give me an opinion for Governor Ray's information on Section 6, Sub Section A, as to its meaning as it deals with classes of property. Does it refer to only agricultural property as above mentioned or all classes of property."

In order that there could be no mistake concerning the language used in the amendment to §441.21, H.F. 784, we have obtained a copy of the enrolled bill and, therefore, our references will be to the bill as passed and not to the sections of the Conference Committee Report referred to in your letter.

The language referred to by you as Section 6, Sub Section A of the Conference Committee Report appears in H.F. 784 as §1, paragraph 1, sub paragraph 3(a) and the language is as follows:

"a. The productivity and net earning capacity determined on the basis of the use for agricultural purposes capitalized at a rate representing a fair return on the investment, such rate to be established by the state board of tax review and applied uniformly among counties and among classes of property."

The forepart of the above quoted language states as follows:

"In assessing and determining the actual value of agricultural property fifty percent consideration shall be given to each of the following factors:"

We quote the foregoing language since it is necessary to read it in connection with sub paragraph a, in order to correctly interpret the language in question.

We have also prepared and are attaching for your convenience §441.21, Code of Iowa, 1966, as amended by Chapter 354, Acts of the 62nd G. A., as amended by H.F. 784, Acts of the 63rd G. A. You will note that we have underlined the new language of H.F. 784 and have placed it in §441.21 as it will appear in the Code. We believe the attached is helpful in correctly placing the language in question in its proper place so that all of §441.21 can be read in its entirety and thus may be more readily under standable.

It is to be noted that sub paragraph a follows a colon and is therefore part of the first sentence of sub paragraph 3. Paragraph a is a clause within the sentence and must necessarily be referred back to the introductory phrase. It is obvious that the language in the entire paragraph has reference to what consideration shall be given in determining the value of agricultural property for assessment purposes and does not refer to any other kind or class of property in the opinion of this writer.

The words "classes of property" by no stretch of the imagination could be considered to refer to other *types* of real property, if such exists, since all real and tangible personal property subject to taxation shall be value at its actual value and shall be assessed at twenty-seven percent (27%) of such actual value by the clear intent of §441.21. We, therefore, have no other "classes of property" for assessment purposes even though in the mechanics of assessing real property various kinds and types of property are distinguished one from the other. For example, it is common knowledge that the assessors in one hundred and twenty (120) assessing districts throughout the state, refer to real property according to its characteristics such as agricultural realty outside incorporated cities and towns (more than ten acres), agricultural realty within incorporated cities and towns (more than ten acres), improved land, unimproved land, residential realty, both outside incorporated cities and towns of ten acres or less and within incorporated cities and towns, mercantile realty outside of incorporated cities and towns, mercantile realty within incorporated cities and towns, industrial and manufacturing property outside incorporated cities and towns, industrial and manufacturing property within incorporated cities and towns, personal property-livestock, personal property-other than livestock, farm machinery, merchandise inventories and other personal property. There is also a separate designation under the assessing law of the State of Iowa for forest and fruit tree reservations which are assessed according to the statute at a flat four dollars ($4.00) per acre.

The above and foregoing listed kinds or classes of property may be found on the Final Property Valuation Notice used by the Director of Revenue when equalizing property values under the provisions of §441.48, Code of Iowa, 1966, a copy of which is attached hereto, and other kinds

and classes of property may be noted on the Assessment Roll for 1969, also attached, used by all assessors throughout the State of Iowa and it should be noted the roll also refers to various kinds and classes of property clearly understood by those whose duty it is to assess property. These forms have been in use for a great number of years with various minor changes made necessary by amendments to the assessing statutes, and we presume the legislature in adopting the amendment to §441.21 knew the construction of said statute and was conscious of the existing law and how it is administered.

John Hancock Mutual Life Insurance Co. v. Lookingbill, 218 Iowa 373, 253 N. W. 604 (1934);
Lever Brothers Co. v. Erbe, 249 Iowa 454, 87 N. W. 2d 469 (1958);
Severs v. Abrahamson, 255 Iowa 979, 124 N. W. 2d 150 (1963);
McKinney v. McClure, 206 Iowa 285, 220 N. W. 354 (1928).

We can only conclude that the use of the words "classes of property" when read in connection with the subject matter of the entire paragraph can only refer to agricultural property.

It is a familiar rule of statutory construction that words may be supplied in a statute in order to give it effect and to make it harmonize with legislative intention. Sutherland, *Statutory Construction,* Vol. II (3rd Ed. 1943), §4924, pp. 455-457. If this may be done perhaps we should insert the word "agricultural" after the word "classes" and it would thus read "classes of agricultural property." We might also consider adding the word "agricultural" before the word "property" in the first sentence of the following paragraph, paragraph b, since then there would be no doubt that the references in both paragraphs a and b are to agricultural property and to no other kind or class, however, it is also obvious that without adding these words, the subject matter of both paragraphs a and b is agricultural property. It is also obvious that there are different kinds or classes of agricultural property, i.e. agricultural property located within incorporated limits of cities and towns which is exempt from taxation for general city taxes under the provisions of §404.15, Code of Iowa, 1966, and agricultural property outside of incorporated cities and towns.

Paragraph a clearly states that the productivity and net earning capacity determined on the basis of the use for *agricultural purposes* capitalized at a rate representing a fair return on the investment can only mean an investment by the owner in agricultural property used for agricultural purposes. It is absurd to believe that the legislature intended that once this particular capitalization method and rate was established by the State Board of Tax Review that it must then be used by all assessors, including the Director of Revenue when assessing utility properties at the state level, in valuing different kinds of property such as manufacturing, mercantile, residential, industrial and utility properties. It is quite obvious that these other classes or kinds of property are not used for agricultural purposes and hence the rate of capitalization to be used by the assessor would necessarily depend upon the nature of the investment of the owner of said property.

As we understand the language used, it is nothing more than an effort on the part of the legislature to lay down a particular guideline which must be used by *all* assessors who have the duty of arriving at the tax-

able value of agricultural property. That the legislature may do this has long been the law in Iowa as stated by the Iowa court in *City of Davenport v. The Mississippi and Missouri Railroad Co.*, (1864) 16 Iowa 348, 357:

"Again, it is no less competent for the legislature, in its discretion, to vary the *rule or method of taxation* in respect to different descriptions of property, than it is to exempt one class altogether and tax others. Upon this subject the Constitution is silent, and one is no greater stretch of power than the other." (Emphasis added)

We conclude that the capitalization rate fixed by the State Board of Tax Review must be applied uniformly among the counties and among classes of property only when said property is agricultural property and the earnings therefrom are derived from its use as agricultural property and that said capitalization rate need not be used by assessors in assessing other classes of real property.

June 23, 1969

LIQUOR, BEER AND CIGARETTES: Use of minors in liquor and beer law enforcement — §622.1, 1966 Code of Iowa. Minors may assist law enforcement agencies in obtaining evidence of liquor and beer law violations. Except where license revocation is automatic or where statutory discretion exists, the Commission must recognize the conviction of a licensee even if a minor assisted in obtaining the evidence. (Claerhout to Sackett, 6/23/69) #69-6-7

Mr. Robert W. Sackett, Clay County Attorney: This is in response to your letter of April 24, 1969, wherein you have asked the Attorney General to render an opinion on whether or not the Iowa law and rules of evidence permit the use of persons less than 21 years of age to assist law enforcement agencies in obtaining evidence of violations of Iowa's liquor and beer laws.

A review of the Iowa law and rules of evidence reveals no prohibition against the use of persons under 21 years of age to assist in investigation and enforcement relating to liquor and beer laws. Section 622.1, 1966 Code of Iowa states:

"Every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases, except as otherwise declared."

The Iowa Supreme Court has consistently held under the above mentioned law that the trial judge is vested with the primary decision as to whether a child has capacity to testify, depending on "the apparent degree of intelligence and maturity of mind." *State* v. *King*, 1902, 117 Iowa 484, 486-588, 91 N. W. 768; *Murphy* v. *City of Waterloo*, 1963, 255 Iowa 557, 570, 123 N. W. 2d 49. Prosecution of liquor and beer law violators has been accomplished in the past using the testimony of minors. *State* v. *Davis*, 1953, 244 Iowa 400, 402, 56 N. W. 2d 881; *State* v. *Beiser*, 1957, 248 Iowa 728, 730 82 N. W. 2d 115. There is no apparent reason why this practice should not be continued.

The second question posed in your request for an opinion is whether or not the Iowa Liquor Control Commission should recognize evidence and convictions obtained with the assistance of minors, for the purposes of license revocation. Reference to both §§123.46(3) and 124.30 of the 1966

Code, shows that a license or permit "shall" automatically be revoked if the holder knowingly provides alcoholic beverage or beer to a minor. The Iowa Supreme Court now has an appeal under consideration which asks how much action, if any, is necessary under "automatic" revocation (*Smith* v. *Iowa Liquor Control Commission*, argued March 14, 1969). However, regardless of the result in that case, the revocation upon conviction of one of the enumerated offenses would in no event fall to a discretionary status. "Shall" is ordinarily mandatory when used in a statute and does not allow discretion. *Schmidt* v. *Abbott*, 1968, ...Iowa...., 156 N. W. 2d 649, 651; *Gibson* v. *Winterset Community School District*, 1966, 258 Iowa 440, 444, 138 N. W. 2d 112. Thus, for all of the above reasons, I am of the opinion that except in situations where the revocation of a permit or license is "automatic" or the commission has statutory discretion, it must recognize the conviction of the licensee or permittee even if a minor assisted in the proceedings.

June 24, 1969

DEPARTMENT OF SAFETY: Highway Patrol — 61st & 63rd G. A. Appropriation made by the 61st and 63rd General Assembly to the Safety Department, Highway Patrol are available for the construction of a Headquarters Building in District No. 12. (Strauss to Robinson, Secretary, Executive Council, 6/24/69) #69-6-8

Mr. Stephen C. Robinson, Secretary, Executive Council: Reference is herein made to yours of the 20th of June, 1969, in which you enclosed a copy of the request from the highway safety patrol in regard to the construction of a headquarters building in District #12, namely the DeWitt District, together with a copy of a portion of the minutes of the special executive council meeting held June 19, 1969, concerning the same subject matter.

From the letter of Colonel Miller of the highway safety patrol to the council and from the legislative history of the several bills enacted in connection with this matter the following appears:

The 61st General Assembly by Senate File 624 provided for the construction of two highway patrol district headquarters to be built by the patrol using appropriations from the general fund of the state in the amount of $80,000.00, or so much thereof as may be necessary, to be used for the construction of two new district headquarters. Such numbered Act also provided that when the department of public safety had approved the projects to be financed with such funds that a description of the said projects and estimated cost should be reported to the governor and the state comptroller for allocation of funds.

It is not expressly shown in the bill the projects to be constructed but it appears that under the authority of that bill that the safety department had decided such projects to be constructed were headquarters at the Cherokee District and the DeWitt District. The Cherokee headquarters were constructed and the cost thereof paid out of the $80,000.00 appropriation and is in use.

The site for the DeWitt District was acquired from the highway commission just off the Highway 74 interchange but the site was unavailable for use as a headquarters until later in the winter of 1968. On January

9, 1969, after due advertisement by the council bids for the construction of District #12 highway patrol building were opened and the low bidder was George G. Rice Construction Company of Davenport, Iowa. Their bid for this construction was $66,600.00, which sum exceeded the balance of the $80,000.00 appropriation made by the 61st General Assembly. The Rice Company advised of the fact that it was the low bidder but was acquainted wth the fact that the fund was insufficient to begin construction. To meet that situation the 63rd General Assembly by H.F. 816 appropriated to the highway patrol, department of public safety, from the general fund of the state the sum of $44,000.00, or so much thereof as may be necessary, to be used for the construction of new district headquarters at Oelwein and in the district of DeWitt.

It is further provided that before any of the funds appropriated shall be expended it shall be determined by the department of public safety, with the approval of the executive council, that the expenditures shall be for the best interests of the state.

In the foregoing situation it would appear that the Rice Company being the low bidder and being so advised of such fact was bound in law to the performance of a contract that resulted from being the low bidder. *Pennington v. Sumner*, 222 Iowa 1005, 270 N. W. 629, 109 ALR 355; *Cedar Rapids Lumber Co.* v. *Fisher*, 129 Iowa 332, 105 N. W. 595, 4 LRA (NS) 177. The fact that there was insufficient money in the appropriation to finance the contract did not work a cancellation thereof. There being no statutory requirement that performance of the construction should begin at any specific time the contract remains in full force and effect and now bears the action of the council in conformity with the provisions of H.F. 816 approving the contract with Rice Company as required by the terms of H.F. 816. The record of such action by the council follows:

"Moved by Governor Ray and seconded by Secretary Liddy that the Council approve the request from the Iowa Highway Safety Patrol to award a contract to George G. Rice Construction Company of Davenport, Iowa, in the amount of $66,600, for the construction of the District #12, namely the DeWitt District, Headquarters Building, with the finding that said expenditure is for the best interest of the state, subject to the opinion of the Attorney General that the Department of Public Safety has the authority to make the site selection.

"The vote: Ayes — Governor Ray, Secretary Synhorst,
Treasurer Baringer, Secretary Liddy.
Nays — None
Absent — Auditor Smith.

"Colonel James Machholz stated to the Council by telephone and later in personal appearance that the Iowa Highway Commission had relinquished their control or jurisdiction of the real estate upon which the office is to be constructed, to the Iowa Department of Public Safety, providing that the Department of Public Safety agrees to pay to the Iowa Highway Commission the sum of $5,000 immediately upon legislative action authorizing the Department to expend funds for this land acquisition."

In view of the foregoing the appropriations made to the safety department, highway patrol, by the 61st and 63rd General Assemblies are available for the construction of a headquarters building in the DeWitt area, the location thereof to be determined by the safety department.

July 9, 1969

TAXATION: Military Service Property Tax Exemptions — §§427.3(4); 427.5; and 427.6; Chapter 351, Acts of 62nd G. A., as amended by S.F. 79, Acts of 63rd G. A. A statement of service from an individual in the armed forces is not sufficient to qaulify him for the military service tax exemption under §427.3, Code of Iowa, 1966. The Director of Revenue may prescribe the type of form for those serving honorably on active military duty during the time of the Vietnam conflict in order to qualify for the military service property tax exemption. (Murray to Edgar J. Koch, Woodbury County State Representative, 7/9/69) #69-7-1

The Hon. Edgar J. Koch, Woodbury County State Representative: This replies to your letter of April 28, 1969, concerning Senate File 79 of the 63rd General Assembly which amends Chapter 351 of the Acts of the 62nd General Assembly, which in turn amends §427.3 of the Code of Iowa, 1966. In your letter you state:

"I note that with the passage of Senate File 79, it seems to state that any individual that is presently in active duty, and has been so during one of the Veteran's Exemption periods of war status, that they should receive their Veteran's Tax Exemption.

"However, in the past, officers in service on a continuous basis, have been denied their veteran's exemption even though they have continued to own their home in Iowa. The reason stated for this has been that they have not been discharged from the service.

"My question is 'will a statement of service from the individual in the armed forces, suffice to give them their veteran's exemption, even though they may have been on continuous service for 10, 15 or 20 years, and they do not have a discharge certificate in their possession?' "

The law does not require that a person be discharged from service to obtain a military exemption. The language of S.F. 79 supra, adds to the previous legislative enactment the words "as well as those serving honorably on active military duty during the time of the Vietnam conflict." The passage of this amendment extends the property tax exemption to those qualified persons who are currently serving on active duty as well as to those persons who have been "honorably separated, retired, furloughed to a reserve, placed on inactive status, or discharged." §427.3(4), Code of Iowa, 1966.

To qualify for the exemption:

". . . 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, furloughed to reserve, inactive status, or honorable discharge is lost he may record in lieu of the same, a certified copy thereof. . . ." §427.5, Code of Iowa, 1966.

Neither Senate File 79 nor Chapter 351 of the 62nd General Assembly changed the requirements of §427.5. Consequently a mere statement of service from an individual in the armed forces is not sufficient to qualify him for the military exemption under §427.3, Code of Iowa, 1966. However, it would be impossible for a person serving on active duty to furnish any of the forms prescribed in §427.5. Section 426A.7, Code of Iowa,

1966, as amended, dealing with the military service tax credit provides in part:

"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."

The Director of Revenue may, then, prescribe the type of form which will be required of those in military service who do not possess any of the documents enumerated in §427.5. This has been done by the Department of Revenue and a copy of said form entitled "Certification as to Honorable Service on Active United States Military Duty During the Time of the Viet Nam Conflict" is enclosed.

As stated in the Attorney General's Opinion of Beebe to Shafer, 12-27-68:

"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."

Consequently, it is within the power of the Director of Revenue to prescribe, and the county recorder to accept, such appropriate proof of active military duty during the time of the Viet Nam conflict so as to implement the execution of Senate File 79.

The claim for Military exemption must be filed annually on or before July 1, and if allowed is effective to secure an exemption for only the year in which the exemption is filed. §427.6. If the person claiming the exemption is in active service, the claim may be executed and delivered or filed by the owner's spouse, parent, child, brother, sister, or any person active under his power of attorney.

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CERTIFICATION AS TO HONORABLE SERVICE
ON ACTIVE UNITED STATES MILITARY DUTY
DURING THE TIME OF THE VIET NAM CONFLICT

To the Iowa Department of Revenue and the County Officials in the State of Iowa who examine Claims filed for Iowa Military Service Tax Exemption:

The undersigned hereby certifies that.....

....., whose home of record at the time of

entry into active Military Service was.....

.....,

Street — R.F.D. — City — State

and whose service number is....., is as of the date of this certification serving honorably on active military duty during the time of the Viet Nam Conflict, the beginning date of which was August 5, 1964, under Iowa law.

I further certify that the following information is correct as shown by official files or records available to me with respect to the Military Record

of the said.....

.....

1. Department, Branch or Class:.....
2. Rank, Grade or Rate:.....
3. Date of Entry into Service:.....
4. Address at which mail is received:.....

.....

5. Selective Service Number is:.....

I further certify that I am the Commanding Officer of said.....

....., and I understand that this certification is to be used by him in applying for Military Service Tax exemption on certain property located in..... County, State of Iowa.

Dated at....., the.....day of....., 19.....

.....
— Name of Certifying Officer —

.....
.....
— Rank —

.....
— Branch of Service —

.....
— Address —

July 9, 1969

SCHOOLS: Joint Agreements — §28E.5, Code of Iowa, 1966. A county board of education and a merged area board may enter into a joint agreement for the utilization of electronic data processing equipment. (Nolan to Johnston, Supt. of Pub. Inst., 7/9/69) #69-7-2

Mr. Paul F. Johnston, Superintendent Public Instructions: I am enclosing herewith five executed copies of an Agreement between the Directors of the Boards of the Pottawattamie County School System and Merged Area XIII for joint utilization of an Electronic Data Processing Education Program, entered into pursuant to the authority contained in Chapter 28E of the 1966, Code of Iowa. The proposed joint agreement appears to be properly supported by resolutions of each of the two boards authorizing the president and secretary of such boards to affix their signatures thereto, and complies with the specifications set out in section 28E.5 of the Code.

Inasmuch as the agreement deals with the provision of services under the control and jurisdiction of the Department of Public Instruction, it is forwarded for consideration by the State Board of Public Instruction. In

this connection, I call your attention to Paragraph No. 8, Page 7, which provides:

"Other public school agencies may become parties hereto and may participate in the activities of the joint board upon such terms and conditions as the parties hereto unanimously approve."

Recently, in a contract entered into by several counties in southern Iowa for the creation of the Area XV Media Center, it was recommended that similar language be deleted for the reason that all eligible schools were already included in the Area XV Media designation under the Iowa Plan for the Distribution of Material made available under the Elementary Secondary Act of 1965, Public Law 89-10 as amended.

The stated parties to the proposed Joint Agreement now considered are the Pottawattamie County School Board and the Merged Area XIII Board only, hence it appears proper to retain the language permitting other county school systems or school districts to join in the cooperative action, although their failure to do so will not in any way lessen the obligation of the Pottawattamie County School System to carry out the responsibilities imposed upon it by Iowa Plan under the federal law cited above.

July 11, 1969

DRAINAGE DISTRICTS: Eligibility of drainage districts for Federal Disaster Assistance — 42 U.S.C. §1855a(e), Chs. 455 and 462, Code of Iowa, 1966. Drainage districts are political subdivisions of the state within the meaning of the federal disaster assistance statutes. (Martin to Orr, Director, Iowa Civil Defense Division, 7/11/69) #69-7-3

George W. Orr, Director, Iowa Civil Defense Division: I have received your letter of June 13, 1969, in which you request an opinion of the Attorney General as follows:

". . . [Is] an organization in Palo Alto County, Iowa known as 'Drainage District Number 81' . . . a legal public entity under Iowa State Law."

In your letter, and by telephone, you have indicated that the purpose for asking this question is to determine whether or not Drainage District Number 81 is eligible to receive federal financial assistance for the 1969 spring flood disaster.

Federal statute 42 U.S.C. §1855a(e) defines the term "Local government," for the purpose of determining those instrumentalities of government to which federal disaster assistance may go as follows:

" 'Local government' means any county, city, village, town, district, or other political subdivision of any state, . . ."

In *State v. Des Moines County,* ..... Iowa ....., 149 N. W. 2d 288, 291 (1967), the Iowa Court stated as follows:

"Counties are political subdivisions of the state (Citing authorities) And an organized drainage district is a political subdivision of the county in which it is located, its purpose being to aid in the governmental functions of the county. It is a legally identifiable political instrumentality.

"We conclude drainage districts come within the classification of a political subdivision or instrumentality of the state or one of its political subdivisions or instrumentalities."

In light of the Court's equation of the status of a political subdivision of a county with a political subdivision of the state, we conclude that a drainage district is a political subdivision of the state, within the meaning of the above set out federal statute.

This opinion should not be construed as passing upon the validity of the formation or organization of "Drainage District Number 81."

July 22, 1969

STATE APPEAL BOARD — Interest on Refunds — Art. III, §24, Iowa Constitution; §25.2, Code of Iowa, 1966. The state appeal board's authorization to approve claims for refunds does not include authority to approve payment of interest thereon. (Turner to Baringer, Treasurer of State, 7/22/69) #69-7-4

Hon. Maurice Baringer, Treasurer of State, Chairman, State Appeal Board: You have asked for the opinion of the attorney general on whether interest should be paid by the state on refunds to trucking companies under the *General Expressways* case. My answer is in the negative, for the reasons outlined below.

In *General Expressways, Inc.* v. *Iowa Reciprocity Board*, 163 N. W. 2d 413 (1968), the Iowa Supreme Court invalidated parts of Acts of 61st G. A. Ch. 302, 1965, which amended Ch. 326, Code of Iowa, 1962. Interstate truckers who paid excessive prorated registration fees in accordance with the invalid provisions are entitled to refunds, upon recommendation by the special assistant attorney general, and approval by the state appeal board under §25.2, Code of Iowa, 1966. The question here is whether they are also entitled to interest on the illegally collected fees that are refunded.

The long-standing rule in Iowa has been that interest is not allowable against the state in absence of explicit statutory provision therefor. *Herman M. Brown Co.* v. *Johnson*, 248 Iowa 1143, 82 N. W. 2d 134, 84 N. W. 2d 44 (1957) (use tax); *Crown Concrete Co.* v. *Conkling*, 247 Iowa 609, 75 N. W. 2d 351 (1956) (personal property tax); *Wieting* v. *Morrow*, 151 Iowa 590, 132 N. W. 193 (1911) (collateral inheritance tax); *Home Sav. Bank* v. *Morris*, 141 Iowa 560, 120 N. W. 100 (1909) (tax on bank capital). For cases from other jurisdictions, both in agreement and disagreement with these, see Annot., 88 A.L. R. 2d 823. Section 25.2 covers claims for

"outdated warrants; outdated sales and use tax refunds; license refunds; additional agricultural land tax credits; outdated invoices; fuel and gas tax refunds; outdated homestead and veterans' exemptions; outdated funeral service claims; tractor fees; registration permits; outdated bills for merchandise; services furnished to the state; and refunds of fees collected by the state."

No mention is made of interest or other incidental factors, and the *Morris* case above has already inscribed for the ages that the word "refund" in statutes such as this does not contemplate interest.

While it might be that a private individual or corporation would have to pay interest on an analogous claim, and while it may even be egregiously unfair for the state to have the use of a taxpayer's money for a time without becoming liable for interest on it, only the legislature can

remedy this problem. "No money may be expended from the state treasury [even for interest] but in consequence of appropriations made by law." Art. III, Section 24, Constitution of Iowa.

July 22, 1969

STATE OFFICERS AND DEPARTMENTS: Arts Council, use of funds—§1, H.F. 793, Acts, 63rd G. A.; Ch. 249, Acts, 62nd G. A. The Arts Council may spend a reasonable sum from its appropriation to hold receptions in honor of visiting artists and dignitaries. In addition to its appropriation the Council is limited as to funds to the sources specified in the Act creating it and earnings from commercial ventures would go to the general fund. (Haesemeyer to Olds, Exec. Dir., Iowa Arts Council, 7/22/69) #69-7-5

Mr. Jack E. Olds, Executive Director, Iowa Arts Council: You have requested an opinion of the attorney general with respect to the following:

"1. There are times when visiting artists or dignitaries come to our state to demonstrate, to exhibit, to lecture, or to perform in one of the arts. We feel a modest reception should be held on these few special occasions, and yet believe that the cost should not be a personal one to the Arts Council members or to the director. Are we allowed to use state funds for such purposes? If not, are we allowed to establish a foundation of some sort that might receive donations from which expenditures could be made to pay caterers and to reimburse the director for money spent on a reception?

"2. If the Arts Council was to partially fund a project conducted by a person, or an organization, or an institution, (which is how we usually operate), and the project makes a profit, would we be allowed to share in the profits if this was stipulated in advance? The possibility exists because we have made a grant to a young architect to research important Iowa architecture and he expects to publish his findings in book form. As our bill now reads, are we legally allowed to request a percentage of the profits? Or must we establish something such as the Connecticut legislature has (see enclosed)?"

1. The relevant appropriations bill is of no assistance in answering your question. Section 1 of House File 793, Acts of the 63rd G. A., merely provides in pertinent part as follows:

"Section 1. For the following departments there is hereby appropriated from the general fund of the state for each year of the biennium beginning July 1, 1969 and ending June 30, 1971, the following amounts, or so much thereof as may be necessary, to be used in the manner designated:

* * *

"3. ARTS COUNCIL, IOWA STATE

For salaries, support, maintenance and miscellaneous purposes ..... $30,730.00"

However, Chapter 304A, Code of Iowa, 1966, as added by Chapter 249, Acts of the 62nd G. A. (1967) contains among others the following provisions:

"WHEREAS, the general welfare of the state will be promoted by:

1. Giving further recognition to the arts as a vital part of our culture and heritage.

2. Expanding the scope of opportunity for citizen participation in the arts.

3. Providing in-state professional opportunity for Iowa artists.

4. Stimulating the economic growth of Iowa through its cultural activities; and

"WHEREAS, it is the policy of the state to join with private patrons and with institutions and professional organizations concerned with the arts, to insure that the role of the arts in the life of our community will continue to grow and to play an ever more significant part in the welfare and educational experience of our citizens; and

"WHEREAS, all arts activities undertaken by the state shall be directed toward encouraging and assisting, rather than in any way limiting, the freedom of artistic expression which is essential for the well-being of the arts;

* * *

"Sec. 4. The council shall:

1. Advise the director with respect to policies, programs, and procedures for carrying out his functions, duties, or responsibilities under the provisions of this Act.

2. Review programs to be supported under this Act and make recommendations thereon to the director. The director shall not approve or disapprove any such program until he has received the recommendation of the board on such program, unless the board fails to make a recommendation thereon within a reasonable time.

"Sec. 5. The duties of the director shall be to:

1. Stimulate and encourage throughout the state the study and presentation of the performing and fine arts and public interest and participation therein.

* * *

"4. Ascertain how the state resources, including those already in existence and those which should be brought to existence, are to serve the cultural needs and aspirations of the citizens of the state.

* * *

"Sec. 6. The director shall have the powers and authority necessary to carry out the duties imposed upon him by his Act including the power to:

* * *

"2. Make and sign any agreements and perform any acts which may be necessary, desirable, or proper to carry out the purpose of this Act.

* * *

"5. Accept any federal funds granted, by Act of Congress or by executive order, for all or any purposes of this Act, and receive and disburse as the official agency of the state any funds made available by the national foundation on the arts.

"6. Accept gifts, contributions, or bequests for all or any of the purposes of this Act."

It is apparent from the foregoing that the arts council and its director are given quite broad, albeit sometimes rather vague, powers with respect to the accomplishment of their assigned role of stimulating and encouraging throughout the state the study and presentation of the performing and fine arts and public interest and participation therein. Thus, the director is given among other things the power to "perform any acts which may be necessary, desirable, or proper to carry out the purposes of this

Act." While we have been unable to find any authority on the question you raise, it would be our opinion that it would be necessary, desirable and proper for the arts council to spend a reasonable sum from its appropriation to hold modest receptions in honor of visiting artists and dignitaries. Certainly, public interest and participation in the arts would be likely to be stimulated by the opportunities to personally meet and visit with distinguished members of the artistic community which such receptions would afford.

2. In response to your second question it is our opinion that apart from its appropriation the arts council would be limited to those sources of funds specifically described in Sec. 6(5) and (6) of Chapter 304A. *Expressio unius est exclusio alterius.* Moreover, there is nothing in Chapter 304A which could be said to manifest a legislative intention that the arts council was to involve itself as a profit making partner in commercial artistic ventures. In this connection see our opinion of June 3, 1969 to Mr. E. L. Johnson, Iowa Development Commission, relative to the permissible activities of the Iowa Development Commission, Inc.

In any event any profit the council did make would go to the general fund and not the arts council. As you appear to anticipate remedial legislation would be necessary for the council to keep profits made by it and use them for its own purposes.

July 24, 1969

COUNTIES AND COUNTY OFFICERS: Salaries, amount and effective date of increase — §§340.1, 340.3 and 444.2, Code of Iowa, 1966; S.F. 614, Acts, 63rd G. A. Taxable valuation for purposes of determining the amount of pay increases authorized for certain county officers by S.F. 614, Acts, 63rd G. A., includes moneys and credits. However, salaries for each year must be computed and fixed by resolution of the supervisors in December of the preceding year. Hence, no salary increase for a county auditor, county treasurer, county recorder or clerk of the district court may be effective until January, 1970. (Turner to Wornson, Cerro Gordo County Attorney, 7/24/69) #69-7-6.

Mr. Clayton L. Wornson, Cerro Gordo County Attorney: In your letter of June 25, 1969, you have requested an opinion of the attorney general as to whether the valuation of moneys and credits should be included in arriving at "taxable valuation" under §4 of Senate File 614, Acts, 63rd General Assembly, an Act to increase the compensation of county officers.

S.F. 614 repealed §340.1, 1966 Code of Iowa, the section which had previously been the guideline for salary determination of county auditors, county treasurers, county recorders and clerks of the district court. That section contained the following formula:

"The annual compensation shall be the sums of the salary in Column A based on population when added to the salary shown in Column B based on taxable valuation *less the valuation of moneys and credits.*"

Section 4, S.F. 614, 63rd G. A., substantially reenacted §340.1 with a new table to provide raises in compensation with the following formula:

"The annual compensation shall be the sums of the salary in Column A based on population when added to the salary shown in Column B based on taxable valuation."

The words "less the valuation of moneys and credits" were deleted in S.F. 614 and it appears, at first blush, that the general assembly must have intended by this deletion that the valuation of moneys and credits were to be included in the statutory formula for computing the annual salaries of these particular county officers under §340.1, Code of 1966, as amended by S.F. 614. Whether the valuation of moneys and credits is included makes a substantial difference in the salaries of many of these officers and, because §340.4 provides that their deputies may be paid an amount not to exceed eighty percent thereof, the cost to the taxpayers in some counties will be much greater if the valuation of moneys and credits is included.

Since your question has come to light, it has been contended by the press and many legislators and legislative observers that the legislature simply erred in deleting these words; that it was not intended that these words be deleted; and that the salaries were intended to be computed at the lower rate, nevertheless, as though moneys and credits were still to be deducted from taxable valuation. Indeed, I am satisfed from my own knowledge and memory of the history of the bill, and from discussions with many legislators and legislative leaders, including several of the committee members directly responsible for the drafting, that the legislature as a whole did not anticipate, and was surprised by, the resulting difference. I believe both the governor and the lieutenant governor have expressed similar views. Some legislators have suggested action to get the difference back if it is paid and some have encouraged county officers not to accept the difference. Even the county officer's association and their lawyer representatives say they were surprised and that the greater resulting raises were neither requested nor anticipated. On the contrary, every informed and reliable source I have consulted insists that it was expected that these county officers would receive a raise of about $2000 under this Act except that it would be slightly more in the largest counties and possibly slightly less in the smallest.

§340.1, as it appears in the Code of 1966, was enacted by the 61st General Assembly in 1965. This was the first time the legislature based the salaries of these officers on taxable valuation as well as population. Prior to that time, the salaries of these officers had been based on population alone. See the same section in Code of 1962. The 62nd General Assembly did not amend or raise this compensation. Presumably, then, moneys and credits were not included in taxable valuation for the purpose of computin these salaries for the remainder of the year commencing in July, 1965 when the new basis was first effective or for the years 1966, 1967, 1968 or 1969.

No less than four separate bills were introduced in the 63rd General Assembly in 1969 for the purpose of raising county officer salaries: H.F. 133, S.F. 497, S.F. 587 and S.F. 614. In the first two of these bills, H.F. 133 and S.F. 497, the words appeared exactly as those first quoted above from §340.1, Code of 1966. But they were deleted in both S.F. 587 and S.F. 614, the latter of which became the Act which passed. The legislative research assistant who handled the drafting of S.F. 587 and S.F. 614 told me he was instructed to delete the phrase "less the valuation of moneys and credits" by two or three legislators on the committees handling these bills "because they were not necessary." While the committee

legislators did not completely recall all details, those to whom I talked each suggested in separate conversations I had with them that the reason the words were deleted was that they were considered superfluous and unnecessary because moneys and credits were not taxed by the counties. All said they had no intention of including moneys and credits as a part of taxable valuation and none realized that deletion of the words might be construed to have that effect.

Indeed, it has been submitted to me with great force and logic that the words "less the valuation of moneys and credits" as they appear in §340.1, Code of 1966, were superfluous and that moneys and credits could not have been included in taxable valuation even in their absence. Several reasons are suggested for this. First, moneys and credits are not necessarily assessed in the county in which they are located but rather where their owner resides. §429.2, Code of Iowa, 1966. The argument then is that it would be grossly unfair to the small county officers that large county officers receive much greater raises simply because of deposits in banks and savings and loan associations in the big cities of those large counties. Second, by reason of enactment of Chapter 360 (as amended by Chapter 359), Acts, 62nd G. A., commencing in 1966, moneys and credits of certain classes of owners were removed from any taxation by the county under the provisions of Chapter 429, Code, 1966, but are taxable now only by the state at the rate of one mill under §35B.11, Code, 1966, and at various other rates against some classes of owners in other sections not here relevant. Thus, the counties no longer obtain any direct benefit or revenue from the taxation of moneys and credits and this being true, there is no logical reason why the salaries of these officers should be related to moneys and credits. Third, the county budget and tax levy procedures exclude moneys and credits from taxable valuation (albeit in specific terms set out in parenthesis in §444.2) and the millage levies provided and authorized by statute commonly provide for levies against taxable property of the county, not including moneys and credits, without specifically saying that moneys and credits are to be deducted therefrom. Of course, county tax levy statutes must be read in pari materia and construed together with §444.2 which by its specific terms excludes moneys and credits. The force of this third argument is lost if, as I believe and will explain, a salary statute is not in pari materia with a tax levy statute.

On the other hand, it is well settled that words in a statute will never be construed as unmeaning and surplusage if a construction can be legitimately found which will give force to and preserve *all* the words of the statute. *Leversee, v. Reynolds*, 1862, 13 Iowa 310; *Smith v. Day & Zimmerman*, 1946, 65 F. Supp. 209; *Board of Directors of Menlo Consolidated School District of Menlo v. Blakesley*, 240 Iowa 910, 36 N. W. 2d 751. The legislature must be presumed to have inserted every part of a statute for a purpose, and to have intended that every part should be carried into effect. *Goergen v. State Tax Commission*, 1969, ____Iowa____, 165 N. W. 2d 782.

Can a construction be legitimately found which does prevent these words of §340.1, Code 1966, from being surplusage? In *Zobel v. Schau*, 1967, ____Iowa____, 150 N. W. 2d 626, the Supreme Court after considering the same general arguments to the contrary as set forth above, felt

constrained to follow its earlier decisions in *Mack v. Independent School Dist.*, 1925, 200 Iowa 1190, 206 N. W. 145 and in *McLeland v. Marshall County*, 1924, 199 1232, 1252-1254, 201 N. W. 401, 408-409, 203 N. W. 1, that moneys and credits are to be included as taxable property in computing the debt limit of counties, cities, towns and school districts for bond purposes. This was true in spite of the fact that, as the court noted, "Moneys and credits have not borne the obligation of satisfying bonded indebtedness since 1911 because they have not been subject to levy for that purpose." Chief Justice Garfield said, in a dissenting opinion in which he was joined by Justice Larson:

"In my opinion moneys and credits which may be taxed only to the extent of one mill for payment of Korean War Veterans Bonus Bonds issued by the state and for no other purpose, and which will bear none of the obligations of satisfying the city's bonded indebtedness it is now proposed to incur, are not, in any practical or realistic sense, taxable property within the city, as the term is used in Article XI, section 3, Iowa constitution."

While the majority opinion recognized the merit and logic of foreign cases discussed at length and may well have followed them but for the earlier Iowa cases, stare decisis controlled. Certainly, I am similarly bound in determining whether there was a legitimate reason for the words "less the valuation of moneys and credits" in §340.1, Code 1966. I cannot adequately distinguish these Iowa cases to justify the desirable finding that they were mere surplusage in §340.1 and deleted by S.F. 614 merely to clean up the statute. As long as moneys and credits are required to be assessed by the counties, there will exist a legitimate question as to whether they are part of the taxable valuation of the property whether the county may tax them or not.

Moreover, nothing in S.F. 614 suggests that the words "less the valuation of moneys and credits" as they appeared in §340.1, Code of Iowa, 1966, were unnecessary surplusage and were being deleted simply for that reason. In *In re O'Donnell's Estate*, 1962, 253 Iowa 607, 113 N. W. 2d 246, the Supreme Court held that when an amendment to a statute deletes certain words, a change in the law is presumed unless the remaining language amounts to the same thing. See also, *State ex rel Fenton v. Downing*, 1968, ... Iowa ....., 155 N. W. 2d 517; *Holland v. State*, 1962, 253 Iowa 1006, 115 N. W. 2d 161; *City of Ottumwa v. Taylor*, 1960, 251 Iowa 618, 102 N. W. 2d 376; *State v. Flack*, 1960, 251 Iowa 529, 101 N. W. 2d 535; *Crawford v. Iowa State Highway Commission*, 1956, 247 Iowa 736, 76 N. W. 2d 187; 50 Am Jur, Statutes §§275-276, pp. 262-263; 82 CJS, Statutes §384b,s). Thus, by deleting the words "less the valuation of moneys and credits" the meaning of the statute was changed to *include* the valuation of moneys and credits within the words "taxable valuation." The Supreme Court cannot assume that the legislature intended a useless act. *State v. Odegaard*, 1969, ... N. D. ....., 165 N. W. 2d 677.

As mentioned earlier, it is argued that §340.1, Code 1966, must be construed in pari materia with §444.2 and that when it is so construed moneys and credits cannot be a part of a county's taxable valuation. It is true that statutes relating to the same subject matter or to closely allied subjects are in pari materia and must be construed, considered and

examined in the light of their common purposes and intent. *Northwestern Bell Tel. Co. v. Hawkeye State Tel. Co.*, 1969, ____ Iowa ____, 165 N. W. 2d 771. But the statutes in question relate to entirely different subject matters and are not closely allied. §444.2 pertains to county levies. §340.1 pertains to the computation of the salaries of county officers. The fact that the legislature specifically required moneys and credits to be deducted from taxable valuation in *both* suggests that the legislature did not consider them as being in pari materia. On the contrary, the specific requirement of deduction in each constituted a tacit definition of taxable valuation as *including* moneys and credits in absence of the words requiring specific deduction. Where the legislature deems it advisable to define a word or phrase, it acts as its own lexicographer and its definitions are binding on the Supreme Court. *Iowa State Commerce Commission v. Northern Natural Gas Co.*, 1968, ____ Iowa ____, 161 N. W. 2d 111; *S & M Finance Co. v. Iowa State Tax Commission*, 1968, ____ Iowa ____, 162 N. W. 2d 505; *Inter-State Nurseries, Inc. v. Iowa Dept. of Revenue*, 1969, ____ Iowa ____, 164 N. W. 2d 858.

It is unnecessary to determine whether the words should be included if left out because of mistake or clerical error because all indications are that they were deliberately omitted, albeit for erroneous reasons. And, of course, neither I nor the Supreme Court can amend the Act.

In interpreting statutes the court must first determine whether application of the rules of statutory construction is necessary. If the language of a statute when given its plain and rational meaning is precise and free from ambiguity, no more is necessary than to apply to the words used their ordinary sense in connection with the subject considered. *State v. McNeal*, 1969, ____ Iowa ____, 167 N. W. 2d 674; *State v. Valeu*, 1965, 257 Iowa 868, 134 N. W. 2d 911. It is well settled that the courts will search for the legislative intent as shown by what the *legislative said* rather than what it believes it should or might have said. *Overbeck v. Dillaber*, 1969, ____ Iowa ____, 165 N. W. 2d 795; R. C. P. 344(f), par. 13. There is no room for construction where the language used in a statute is plain and unambiguous and its meaning clear and unmistakable and courts are not permitted to search for meaning beyond the statute itself. *Miller Oil Co. v. Abramson*, 1961, 252 Iowa 1058, 109 N. W. 2d 610. Courts will not give weight to administrative construction of a statute or invoke other extrinsic aids to construction unless the meaning of the statute is really doubtful. *Iowa Mutual Tornado Ins. Ass'n. v. Fischer*, 1954, 245 Iowa 951, 65 N. W. 2d 162. The legislative intent is an uncertain guide of interpretation, and the opinions, motives, or purposes of individual legislators, remarks made in debate, or the intention of the draughtsman of the statute are too uncertain to be considered. *Tennant v. Kuhlemeier*, 1909, 142 Iowa 241, 120 N. W. 689. In the absence of ambiguity, specific matters concerning the history of an act in its passage through the legislature are not competent and material and, therefore, are not admissible. *Felt v. City of Des Moines*, 1956, 247 Iowa 1269, 78 N. W. 2d 857.

In my opinion, the pertinent parts of S.F. 614 and §340.1, Code 1966, are clear, plain and unambiguous in their terms. Under the foregoing rules, I do not believe the court will look beyond these words to determine the legislature's intent although the actual intent probably was as I have suggested earlier. If it were to do so, even in this instance, it would al-

most certainly open the door to countless and repeated contentions ever after that, although the legislature actually said "black," it meant "white." The legislature must be held bound by that it clearly says if there is to be any certainty about the law. Without certainty, there would be only chaos.

For all of these reasons, I am of the opinion that taxable valuation as used in §4 of S.F. 614, 63rd G. A., includes the valuation of moneys and credits.

But in all the hubbub over this problem, it seems to have been overlooked by *everyone* that the salary raises here under consideration cannot go into effect before January, 1970, notwithstanding that the Act took effect on July 1, 1969. That is because the original enactment found in Chapter 307, Acts of the 61st G. A., contains this provision:

"Sec. 5. In July of the year nineteen hundred sixty-five (1965) for the remainder of such year *and in each succeeding December for each year thereafter*, the board of supervisors shall, by resolution, fix the salaries of the officials in conformity with the schedule based on population as shown in the last current report of the bureau of census, United States department of commerce and on the taxable valuation of the county as certified by the Iowa state tax commission or in conformity with this Act. * * *." (Emphasis supplied)

The foregoing section has been amended only by substitution of the department of revenue for the state tax commission. Ch. 342, §58, 62nd G. A. The code editor also deleted the words pertaining to July, 1965, in the Code of 1966 (See §340.3) in accordance with his duty because they had no significance in 1966.

But none of this alters the requirement of the original act that the salaries must be computed and fixed by resolution of the supervisors *in each succeeding December for each year thereafter* (after July, 1965). Sec. 340.3 has been the subject of a previous opinion of the attorney general tending to support this conclusion. See OAG 3-17-69 to Pottawattamie County Attorney George Knoke hereto attached.

Thus, although the legislature may not have intended the result which I believe it accomplished in granting the substantially larger raises, it appears there will be a substantial net saving because these particular officers and their deputies can get no raise whatsoever until January, 1970.* Instead of an unexpected depletion of county funds, there will in effect be a windfall as far as the taxpayers are concerned. The supervisors obviously cannot do in July 1969 that which they are directed by law to do in December, 1969.

On January 12, 1970, before the first regular pay day in which the raises are paid, the general assembly will convene for its annual session and may well immediately change the law to specifically exclude moneys and credits from taxable valuation, thereby reducing the raise to its expected proportions. If it does so, it may also see fit to amend §340.3, Code of 1966, to make the proper raise retroactive to July 1, 1969, and everyone will then be happy.

* This opinion should not be construed to affect the compensation or raise of any county officer except the county auditor, county treasurer, county recorder, clerk of the district court and, indirectly, the deputies of each,

all of whom have my sympathy and will have my support for the proper raise retroactive to July 1, 1969, when the legislature meets again. It is also possible that even a deputy of one of these officers can get a raise before January 1970 if he or she is not now receiving 80% (or 75% as the case may be) of the salary his or her principal is now legally receiving.

August 7, 1969

COUNTIES AND COUNTY OFFICERS: Salaries, effective date of increase — §§340.1, 340.3 and 444.2, Code of Iowa, 1966; S.F. 614, Acts, 63rd G. A. A motion adopted by a county board of supervisors on January 2, 1969, providing that any county officers' pay raise subsequently authorized by the legislature would be retroactive to the first of the year was ineffective since it is contrary to the statutory requirement that such pay be fixed in December. (Turner to Opheim, Webster County Attorney, 8/7/69) #69-8-1

Mr. David A. Opheim, Webster County Attorney: You have requested an opinion of the attorney general as to whether a "resolution" of your county board of supervisors passed January 2, 1969, could make effective the pay raise for the county auditor, county treasurer, county recorder and clerk of the district court on July 1, 1969.

Your question arises under section 4 of Senate File 614, Acts of the 63rd General Assembly, with respect to increasing the compensation of these particular county officers. In an opinion of the attorney general dated July 24, 1969, I said the new raise could not take effect until January, 1970, because of the provisions of section 5, chapter 307, Acts of the 61st G. A., as amended by section 58, chapter 342, 62nd G. A., and which provides as follows:

"In July of the year nineteen hundred sixty-five (1965) for the remainder of such year *and in each succeeding December for each year thereafter*, the board of supervisors shall, by resolution, fix the salaries of the officials in conformity with the schedule based on population as shown in the last current report of the bureau of census, United States department of commerce and on the taxable valuation of the county as certified by the Iowa department of revenue or in conformity with this Act. * * *" (Emphasis supplied)

Said opinion of July 24, 1969, noted that the new pay raise law (S.F. 614) did not amend the foregoing section, which is now section 340.3, Code of Iowa, 1966, in any way which would make the pay raise effective on July 1, 1969. I said, "the supervisors obviously cannot do in July 1969 that which they are directed by law to do in December, 1969."

The so-called resolution which your supervisors adopted on January 2, 1969, page 409 of their minutes, reads as follows:

"Moved by Hansch, seconded by Hade that the salaries of the County Auditor, County Treasurer, County Recorder and County Clerk be set at $7,200.00 per year as per law. However if change in valuation or salary change by State Legislation, the change be retroactive to the first of the year. Motion carried."

This was a motion, not a resolution. It appears from the second sentence that your board anticipated the possibility that the valuation might change or that the legislature might change the salary and attempted to make any such change retroactive to the first of 1969 rather than to July 1, 1969. The board certainly had no power to put the pay raises into effect on January 1, 1969, even before the pay raise statute (S.F. 614)

was effective on July 1, 1969, unless the statute was similarly retroactive, which it was not. And, in my opinion, it could not make the raises effective on July 1, 1969, when the statute clearly prevents their taking effect before 1970.

It is not significant that the motion was passed on January 2, 1969, rather than in December, 1968, as the statute directed. At either of those times the board was required to follow the mandate of the statute as it then existed. Even if the motion had been a resolution, and even if the resolution had attempted to make the anticipated raise effective on July 1, 1969, the board had no power to make it then. Section 5, Chapter 307, 61st G. A., as amended and quoted above, grants to the board the power to find the facts upon which the law makes its own action depend. The board is to determine the population and the taxable valuation and, by resolution, fix the salaries of those officers in conformity with the schedule provided in the statute. Its acts in this regard are ministerial and it has no discretion to raise or lower the salary established by law. Since the new pay raise statute was not in effect on January 2, 1969, the second sentence of the board's motion was and is utterly without force and effect.

August 7, 1969

COUNTIES AND COUNTY OFFICERS: Board of Supervisors not authorized — §§174.14, 306.9, .13, .16, 332.3(12), (13), (17), Code of Iowa, 1966. County board of supervisors and highway commission are not authorized to trade land. County board may acquire land for fairground purposes when "necessary" under its general authority in §332.3(12); or it *may* acquire such land after an election held pursuant to §174.14, but only upon petition by 25% of the qualified county voters. (Nolan to Waples, Des Moines County Attorney, 8/7/69) #69-8-2

Mr. Alan N. Waples, Des Moines County Attorney: This is in reply to your letter of May 26, 1969, requesting an opinion as to whether the Board of Supervisors is required to hold an election to effect a trade of certain lands now used for fairground purposes which may be acquired by the Iowa Highway Commission for highway purposes. In your letter you state:

"A question has arisen in our county as to whether or not there is a conflict between Section 174.14 of the 1966 Code of Iowa, and 174.24 of the 1966 Code of Iowa. The Iowa Highway Commission in its acquisition of land for the Highway 34 Freeway, in the City of Burlington, has proposed to the County Board of Supervisors and the Fair Board, that it obtain comparable land to that now owned by the county and used as fair grounds, and trade this to the county when the fair grounds are acquired for highway purposes.

"Section 174.14 provides for submitting a purchase or acceptance of gift of real estate for fair purposes to a vote of the county voters while 174.24 provides that the Board of Supervisors may accept legal title to land in the name of the county to be used for fair purposes.

"The question my Board has, is will they be required to hold an election to effect this trade with the Highway Commission. Since 174.14 says the Board of Supervisors may submit the question to the voters it would seem that this action is permissive rather than mandatory."

At the outset it is noted that, under prior opinions of this office, an exchange of real estate such as you contemplate would not be authorized in any event. Although the highway commission has authority to purchase or sell land, §§306.9, .13, .16, Code of Iowa, 1966, and a county board of

supervisors has similar authority under §332.3(12), (13), (17), it does not appear that such an abundance adds up to an authorization to exchange parcels of land. 1962 O.A.G. 20.14. See also 1964 O.A.G. 18.8; 18 C.J.S., States §107, at 1080.

Proceeding to your question of whether an election would be required under §174.14 in the event that the county were to acquire new land for a fairground, it would appear that such election is permissive, and is authorized only when a petition signed by 25% of the qualified voters of the county as shown by the poll books of the last preceding general election is presented to the board of supervisors. The board is authorized by §332.3(12) without such an election, "to purchase or acquire title or possession by lease or otherwise, for the use of the county, any real estate necessary for county purposes. . . ."

The word "necessary" is not a word with a clear-cut fixed meaning but is one which varies in meaning, depending upon the situation in which it is used. *Reese v. Walker Ohio Mun.*, 151 N. E. 2d 605, 607. When used in connection with eminent domain statutes the word "necessary" means reasonable necessity under circumstances, but does not mean immediate, absolute or indispensable need, but rather considers the rights of public to expect or demand that certain services be provided. *City of Des Moines v. Hemmingway*, Wash., 437 P. 2d 171, 177, *Solether v. Ohio Turnpike Comm.*, 99 Ohio App. 228, 133 N. E. 2d 148, 151.

August 7, 1969

MUNICIPAL CORPORATIONS — RETIREMENT PENSIONS: §410.10, 1966 Code of Iowa. A common law marriage, properly proved, does create a surviving spouse eligible for pension benefits under the requirements of the section. (Ivie to Thordsen, State Senator, 8/7/69) #69-8-3

The Hon. Harold A. Thordsen, State Senator: You have asked for an interpretation of the provisions of Sec. 410.10, 1966 Code of Iowa, with reference to the following set of facts:

A police officer eligible for retirement benefits under Chapter 410, 1966 Code of Iowa, retired some several months prior to his 50th birthday. Between the date of his retirement and the date of his 50th birthday, the officer married. His pension, of course, commenced on the date of his 50th birthday.

Upon his death some years thereafter, the question was raised as to the eligibility of his surviving spouse under Sec. 410.10, since, at the time of the officer's retirement he was unmarried, or at least had not formally contracted any marriage in a civil or religious ceremony. The spouse, however, now contends that a common law marriage existed for some five years prior to the formal ceremony.

Sec. 410.10, 1966 Code of Iowa, reads in part as follows:

"Pensions—surviving spouse—children—dependents. Upon the death of any acting or retired member of such departments, leaving a spouse or minor children or dependent father or mother surviving, there shall be paid out of said fund as follows:

"1. To the surviving spouse, so long as said spouse remains unmarried

and of good moral character, a sum equal to one-half of the deceased member's total adjusted pension as provided for in section 410.6, but in no event less than seventy-five dollars per month. . . .

"Provided, however, that the benefits provided by this section shall be be subject to the following definitions: The term 'spouse' shall mean only such surviving spouse of a marriage contracted prior to retirement of a deceased member from active service, . . ."

Under a strict reading of the section as set out above, a surviving spouse to be eligible for benefits must meet the definition of "surviving spouse" as set out therein. Without the alleged "common law" marriage averred to, there could be no doubt that the officer's widow would not be an eligible "surviving spouse."

The question raised, therefore, is whether a common law marriage, properly proved, can meet the definition of "a marriage *contracted* prior to retirement." In this regard, Sec. 595.1, 1966 Code of Iowa, carries the following definition of "Marriage":

"Contract. Marriage is a civil contract, requiring the consent of the parties capable of entering into other contracts, except as herein otherwise declared."

Sec. 595.11, 1966 Code of Iowa, states in part:

"Marriages solemnized, with the consent of the parties, in any other manner than as herein prescribed, are valid; * * *."

Thus it is that the courts and writers have found even statutory authority for recognition of common law marriage as a valid marriage under Iowa law. See 23 Ia. L. Rev. 75, 78. And, because consent of the parties is a requisite of a common law marriage, such a marriage has been described by the Iowa Supreme Courts as a *contract. Love v. Love,* (1919) 185 Iowa 930, 171 N. W. 257.

A properly proved common law marriage, then, does meet the definition of "a marriage contracted prior to retirement" and would mean that the surviving spouse is eligible for the benefits described in Sec. 410.10, 1966 Code, so long as she meets the other requirements of that section.

With reference to the possibility of a lump sum payment, no such authority exists, and, such proposed settlement would contravene the continued requirements of eligibility for monthly payments as established in Sec. 410.10, 1966 Code.

August 8, 1969

LABOR: Employment Agency, application for permit, copy of contract form, limitation of fee — §§94.6, 95.1, 95.2, 1966 Code. 1. A copy of its contract form must be submitted with agency's application for approval, and must contain certain terms. 2. Schedule of fees to be charged to either employer or employee, or to both, shall not exceed 5% of annual gross earnings. (Zeller to Addy, Commissioner, Bureau of Labor, 8/8/69) #69-8-4

Mr. Jerry L. Addy, Commissioner of Labor: Reference is made to your recent letter, in which you state the following facts and ask for our written opinion.

"On May 22, 1969, our office received an application file for renewal of

their employment agency license from Agricareers, Inc. This file consisted of the application form, surety bond in the amount of $2,000.00, payment of license fee in the amount of $50.00, and two copies of their schedule of fees.

"Their statement of schedule of fees was as follows: 'No Fee Charged to the Individual.'

"Fee Schedule as charged to the Business

Under $10,000 Salary	8%
$10,000 to $17,000	12%
Over $17,000	16%

"A letter which accompanied this file from the Vice President of Agricareers, Inc., states in part: 'We never accept a fee from an individual, as advertised in the Sunday Des Moines Register and other Midwest newspapers. For this reason we have no contract, either between the individuals or the businesses dealt with.'

* * *

"In view of the events of the past year as shown above, we would like to request an opinion to serve as a guideline to be followed in regard to this particular type of employment agency, namely, whether;

1. Printed contract forms are needed as provided in Chapter 95.2, Code of Iowa, 1966, and;
2. If their schedule of fees are within the limitations of Chapter 94.6, Code of Iowa, 1966, and;
3. If the answers to (1) and/or (2) be in the negative, what procedures should we now follow?"

§95.2 provides in pertinent part as follows:

"Any person, firm, or corporation applying for a license, as provided in this chapter, to operate an employment agency for furnishing or procuring of employment shall furnish the commission with its contract form, which form shall distinctly provide that no fee or other thing of value in excess of one dollar shall be collected in advance of the procuring of employment and no license shall be issued unless such contract form contains such provision. Thereafter, any person, firm, or corporation to whom a license has been issued that violates this provision of its contract shall have his license cancelled."

§94.6 provides in pertinent part:

"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 ($250.00) per month which shall exceed twenty-five percent (25%) 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 percent (5%) of the annual gross earnings."

In answer to your first question, §95.2 applies and provides in pertinent part that any person . . . or corporation applying for a license, "shall furnish the commission with its contract form." Such form must contain two clauses, one of which is set forth in full in the above statute, and the other of which states *in full the fee or other consideration to be paid by the applicant.* The agency may not avoid the statute by stating that no fee is payable by the employee, but only by the employer. If an individual obtained by the agency applies for and fills an employment request, the

acceptance of the employee by the business or employer, constitutes a contract, and subjects the business or employer to a duty to pay the required fee. It is a contract, whether oral or written by past practice; and the applicant for the license to carry on an employment agency is required to furnish the commission with a written or printed contract form, stating the essential terms.

§95.1 provides that any person or corporation, who shall keep or carry on an employment agency, shall procure a license from the commission, "whether such fee, privilege, or other thing of value is collected from the applicant for employment or the applicant for help." This indicates clearly that the employment agency provisions are intended to apply and control whenever or wherever employment is furnished or procured by the agency, for either party to the employment.

Your second question is whether the schedule of fees, payable by the employer, is within the limitations of §94.6. This section provides in part, "but in no event shall the charge for the furnishing or procurement of any situation or employment be in excess of five percent of the annual gross earnings." Procurement is defined in Webster's International Dictionary, 3rd Edition, as the act of obtaining or causing to be done. There are always two parties to an employment. There are also two parties who expect to benefit from the employment, the employee who receives a salary or earnings, and the employer who receives help or services in his business. The statute applies to the charge to be made for procuring the employment, and is not limited in any way, because of the person who pays the charge. An employment agency exists merely for the purpose of bringing the employer and employees together. Both parties usually benefit and the payment by the employer does not avoid the limitation of fee to five percent. The language is plain and unmistakable. It is explicit and applicable to the charge paid by any person for the employment, which must be mutually agreeable before the employment commences.

If it were not so, an agency could always evade the statute by taking the fee from the employer and reduce the annual earnings payable to the employee by the amount of the agency's fee. The purpose of the statute was to limit the fee. If the statute were not applied, there would be no limit to the amount an agency could charge the employer.

The above answers dispose of your third question, and the agency's application for a renewal of license should comply with the statutory requirements as indicated.

August 11, 1969

HEALTH: Community Mental Health Centers — Treatment of Alcoholics — Ch. 123A, 224, 225B, §§4.1(6), 218.1, 218.3(2), 226.1, 230.24, 234A.11, 444.12, Code of Iowa, 1966; Acts of 62nd G. A., Ch. 197, 202, 209; S. F. 525, 63rd G. A., 1969. Mental Health Centers are authorized to provide psychiatric examination and treatment for alcoholics in need thereof, and also, when done in coordination with the Iowa Commission on Alcoholism such mental health centers can potentially receive funds through the Iowa Mental Health Authority, the Iowa Commission on Alcoholism, and county boards of supervisors. (Turner to Gittins, Office for Planning, & Programming, 8/11/69) #69-8-5

Mr. Harry R. Gittins, Associate State Planner, Office for Planning and Programming: By your letter of July 3, 1969, you have requested an opinion of the Attorney General as to (1) whether mental health centers have authority to treat alcoholics, and (2) whether or not they can apply and use federal, state, or local funds for such treatment.

Mental health centers are established under, and governed primarily by, §230.24, Code of Iowa, 1966, which provides:

"*County fund for mental health — psychiatric treatment — mental health center.* The board of supervisors shall, annually, levy a tax of one mill or less, as may be necessary, for the purpose of raising a fund for the support of such mentally ill 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, which shall be known as the county fund for mental health, and shall be used for no other purpose than the support of such mentally ill persons and for the purpose of making such additions and improvements as may be necessary to properly care for such patients as are ordered committed to the county home.

"The county board of supervisors are authorized to expend from the county fund for mental health as provided in this section funds for psychiatric examination and treatment of persons in need thereof or for professional evaluation, treatment, and habilitation of mentally retarded persons, in each county where they have facilities available for such treatment, and any county not having such facilities may contract through its board of supervisors with any other county, which has facilities for psychiatric examination and treatment or for professional evaluation, treatment, and habilitation of mentally retarded persons for the use thereof. Any county now or hereafter expending funds from the county fund for mental health for the psychiatric examination and treatment of persons in a community mental health center may levy an additional tax of not to exceed one-half mill.

"A county, or affiliated counties, desiring to establish an incorporated mental health center and having a total or combined population in excess of thirty-five thousand according to the last federal census, may establish such new mental health center in conjunction with the Iowa mental health authority. In establishing such mental health center, the board of supervisors of each such county is authorized to expend therefor from the state institution fund an amount equal to, but not to exceed, two hundred fifty dollars per thousand population or major fraction thereof. Such appropriation shall not be recurring and shall not be applicable to any mental health center established prior to January 1, 1963."

The only language in §230.24 tending to define or limit the services that a mental health center may offer is contained in the second paragraph; notably, it is provided that county funds may be expended "for psychiatric examination and treatment of persons in need thereof." While there is no specific authorization for treatment of alcoholics, it takes no straining of the statutory language to hold that an alcoholic can be *a person in need of psychiatric examination and treatment.* Indeed most people today feel that alcoholism is a form of mental illness, or at least that it is rooted in mental and personality disturbances which are amendable to psychiatric treatment. Although §4.1(6) bears on the meaning of the term "mentally ill person" (it included "mental retardates, lunatics, distracted persons, and persons of unsound mind"), it does not provide any clear solution to our present problem.

There are a number of statutory provisions in force that deal specifically with the treatment of alcoholics. Although none of these provisions

expressly grants or denies mental health centers the authority to treat alcoholics, they collectively support the foregoing interpretation of §230.24. The treatment-of-alcoholics provisions fall into two distinct categories — those pertaining to state mental health institutes, and those pertaining to other facilities. The state institutes, which are governed by the department of social services (see 218.1, 218.3(2), 226.1, 234A.11, Code of Iowa, 1966, as amended, Acts of 62nd G. A. Ch. 209, §§13, 40, 41, 1967), are authorized to treat alcoholics who apply voluntarily for admission (§§226.35-39, Code of Iowa, 1966, as amended, Acts of 62nd G. A. Ch. 209, §§167-69, 1967) and also those who are involuntarily committed (§§224.1-.5, Code of Iowa, 1966, as amended, Acts of 62nd G. A. Ch. 209, §§148-51, 1967). These provisions for treatment of alcoholics in the state institutes were amended in 1967 when the new department of social services was established (see above citations).

The central agency for coordinating the treatment of alcoholics in other facilities is the Iowa commission on alcoholism, which was created in 1961 and whose authority was extensively revised earlier this year. See Ch. 123A, Code of Iowa, 1966; S.F. 525, 63rd G. A., 1969. One of that commission's main new functions is to contract with qualified "facilities" for treatment of alcoholics on a voluntary basis. S.F. 525, §3. The new amendment defines a "facility" to be

"a contracting hospital, institution, detoxification center, or installation providing care, maintenance, and treatment for alcoholics; however, a facility shall not include a mental health institute under the control of the department of social services." S.F. 525, §1(2), 63rd G. A., 1969.

Since the social services department's mental health institutes are definitely authorized to treat alcoholics (on either a voluntary or involuntary basis), and since the definition of "facility" in S.F. 525 expressly excludes only those mental health facilities, it is fair to infer that within the contemplation of the legislature, a local mental health center *can* be a "facility" for the treatment of alcoholics. The reasons for excluding the state institutes are evidently that (a) they treat involuntary alcoholic patients as well as voluntary ones, and (b) they are under the comprehensive administrative supervision of the department of social services. Had the legislature felt that other mental health facilities are necessarily inappropriate for treating alcoholics, it could very simply have excluded all mental health facilities from the definition.

S.F. 525 also evidences a clear policy favoring local services, interagency cooperation, and utilization of existing facilities. Thus, in addition to contracting for treatment with qualifying "facilities," the commission on alcoholism is authorized in §17 to

"1. Carry on a statewide program of education, prevention, treatment, and rehabilitation to combat alcoholism and alcohol.

"2. Provide a system of coordination and interagency cooperation at all levels of government to achieve the goals and duties of the commission.

"3. Stimulate the development and refinement of services for alcoholics and create a system for providing and expanding services to alcoholics.

"4. Provide, insofar as feasible, for a community based staff in local service centers to act as catalysts for local planning, programming, and

coordination. The service centers shall provide direct services to alcoholics through assessment, referral, intensive follow-through, personal or social support, guidance, and other actions as necessary within budgetary limitations.

"5. Operate or cooperate, insofar as feasible, with local agencies to develop transitional residential or day protective environmental settings which provide for an orderly transition of alcoholics from the various phases of treatment and rehabilitation to the time of reentry into productive community life. The residential or day treatment for individuals may consist of, but shall not be limited to, counseling, psychological and social assistance, prevocational training, sheltered social situations, or semicustodial services operated and conducted in cooperation with other agencies. The treatment shall not duplicate services of existing facilities which have been determined adequate by the commission.

"6. Cause to be established local commissions on alcohol, when practical and desirable, to perform duties similar to those of the commission."

The inference here again is that a local mental health center should be able to participate in the treatment of alcoholics, especially when done in coordination with the commission on alcoholism.

The policies outlined above did not originate entirely with the 1969 S.F. 525. From its inception in 1961, the commission on alcoholism has been (and still is) authorized to "contract for such educational, research, personnel and services of public and private agencies as may be necessary to carry out the provisions of this chapter." §123A.7, Code of Iowa, 1966. Also, the commission has previously had authority similar to what was quoted above from S.F. 525, §17. See §123A.5, Code of Iowa, 1966, repealed by S.F. 525, §20, 63rd G. A., 1969. And additionally, Acts of 62nd G. A. Ch. 197, §2, 1967 (designated §220.2, Code of Iowa), declares: "The policy of the state of Iowa hereby is declared to be the development of maximum services to alcoholics through the coordination and full utilization, of all state and local, public and private agencies. . . ." Although the Iowa comprehensive alcoholism project (I.C.A.P.) has now expired by the terms under which it was created (see Acts of 62nd G. A. Ch. 197, §5, designated Iowa Code §220.5), the statute itself has not expired or suffered repeal, so the foregoing continues to be the declared policy of this state. Finally, the somewhat elusive language of §224.2 does at least support the treatment of alcoholism along with mental illness:

"All statutes governing the commitment, custody, and treatment of mentally ill shall, *so far as applicable*, govern the commitment, custody, treatment, and maintenance of those addicted to the excessive use of . . . intoxicating liquors." (Emphasis added.)

In accordance with the foregoing, my answer to your first question, regarding the authority of mental health centers to treat alcoholics, is as follows: They may treat alcoholics as part of their services "for psychiatric examination and treatment of persons in need thereof"; but any specialized program for care and treatment of alcoholics should be carried on in coordination with the Iowa commission on alcoholism. That body is very clearly given the primary policy-making initiative for development and coordination of services to alcoholics.

As to your second question, it is my opinion that a mental health center has no authority of its own to apply for funds for treatment of alcoholics. But it may use funds acquired through the following channels:

Iowa Mental Health Authority. Under §230.24 (quoted earlier), mental health centers are established "in conjunction with" the mental health authority, which in its own turn is charged with "directing the benefits of Public Law 487, 79th Congress of the United States and amendments thereto." §225B.1, Code of Iowa, 1966. And §225B.4 provides:

"*Supervision.* All authorized funds of the mental health authority shall be disbursed under the supervision of the state board of regents and programs of the Iowa mental health authority shall be administered according to policies established by the committee on mental hygiene."

Funds supplied through the mental health authority can be used in treatment of alcoholics so long as it is consonant with any restrictions of the federal law and of the state agencies mentioned above.

Iowa Commission on Alcoholism. S.F. 525, §§2-3, 63rd G. A., 1969, specifically authorizes this body to apply for federal funds and to allocate such as may be available, along with state funds appropriated by the legislature, through its contracts with qualified "facilities." As mentioned earlier, a mental health center could qualify as a "facility" and contract with the commission, although these matters are subject to the regulations and approval of the commission. See S.F. 525, §4.

County Boards of Supervisors. There are two sources of local funds available for possible use by a mental health center — the county fund for mental health, and the state institution fund. According to §230.24 quoted above, the former fund can be used for the support of mentally ill persons and for psychiatric examination and treatment of persons in need thereof. This fund, which can be sustained by a levy of as much as 1½ mills, can be used for the support of alcoholics who are mentally ill and for the psychiatric examination and treatment of alcoholics who are in need thereof. Cf. 1968 OAG 998.

The state institution fund is governed primarily by §444.12, Code of Iowa, 1966, as amended, Acts of 62nd G. A. Ch. 202, §2. It may be used on a one-shot basis for the establishment of a community mental health center pursuant to §230.24, and it can be used on a continuing basis for support of mentally ill persons. The 1969 bill amended §444.12 to include "care, maintenance, and treatment for alcoholism while a voluntary patient in a facility as defined in section one (1) of this Act," S.F. 525, §18, 63rd G. A., so the state institution fund may be used for treatment of alcoholics in a mental healh center which has undertaken specialized programs therefor in coordination with the commission on alcoholism.

August 11, 1969

STATE OFFICERS AND DEPARTMENTS: Employment Safety Commission — §§88A.4, 88A.5, 88A.6, 1966 Code of Iowa; §34, Ch. 69, Laws, 63rd G. A. Where senate deferred action on the nomination of a commissioner the nominee is not qualified to serve or to be appointed to an interim term and the commissioner whom he was to succeed continues in office. (Nolan to Ray, Governor of Iowa, 8/11/69) #69-8-6

The Hon. Robert Ray, Governor of Iowa: This letter is submitted in response to a request by Elmer Vermeer of your office for advice as to whether John H. Harness of Ottumwa, Iowa, can be appointed to serve on the Employment Safety Commission or whether in order to provide the required number of members on such commission, it is necessary to with-

draw Mr. Harness' name and to appoint someone else.

The controlling statutes in this case are §88A.4, §88A.5, §88A.6, 1966 Code of Iowa, and Chapter 69, Laws 63rd G. A. 1st Session.

88A.4 "The Governor, with the approval of two-thirds of the members of the senate, shall appoint the members of the commission without regard to political affiliation. . . ."

88A.5 "Each member of the commission shall serve for a term of six years and until his successor is appointed and qualifies. However, the members first appointed shall be appointed within thirty days after the effective date of this chapter and shall serve for terms beginning when the members have been approved by the senate and ending on the following dates: one employer member and one employee member, June 30, 1967; two employer members and one employee member, June 30, 1969. . . ."

88A.6 ". . . any vacancy occurring while the general assembly is not in session shall be filled by appointment by the governor, which appointment shall expire thirty days after the general assembly next convenes. . . ."

Although the name of John H. Harness appears to have been properly submitted to the senate for confirmation, the Senate Journal for May 27, 1969, shows that after the committee appointed to investigate the character and qualification of the appointee had recommended that the appointment be confirmed, on the motion of Senator Stanley, further action on the confirmation of the appointment by the members of the senate was deferred. Since the law requires that an appointee be confirmed before assuming the duties of the appointment, it is our view that Mr. Harness is not now eligible to serve as a member of the Employment Safety Commission. Further it is our view that the effect of the motion to defer action on the confirmation was a refusal to confirm. Section 34 of Ch. 69, 63rd General Assembly, first session provides:

"When the nomination of a public officer is required to be confirmed by the senate, the nomination shall not be considered by the senate until it shall have been referred to a committee of five senators who shall, if possible, represent different political parties. The committee shall be appointed by the president of the senate, without motion and shall report to the senate. The consideration of the nomination by the senate shall not be made on the same legislative day on which the nomination is so referred unless it be the last day of the session. *When a nomination has been so considered by the senate and approval has been refused, the nominee shall not be eligible for an interim appointment to any position requiring confirmation by the senate, prior to the convening of the next regular session of the general assembly.*" [Emphasis supplied]

Since the senate did not give confirmation, Mr. Harness has therefore, not qualified to serve and he is also disqualified by the terms of Ch. 69, 63rd G. A. *supra*, from being appointed to an interim term.

Even if the name of John H. Harness were withdrawn from further consideration by the senate, it is the opinion of this office, that no other person could be appointed, at this time, to serve in the interim. There appears to be no vacancy since §88A.5 provides that "each member of the commission shall serve . . . until his successor is appointed and qualifies." Consequently the commission member whom John H. Harness

was nominated to replace, continues in the office according to the language of the statute, until a vacancy occurs by his resignation or other cause. See opinion attorney general, February 28, 1969, copy enclosed.

August 11, 1969

DEPARTMENT OF SOCIAL SERVICES: Child Welfare, Chapter 235, 1966 Code of Iowa. Gifts of real estate and facilities for day care center in Iowa can be received under Section 218.96, 1966 Code of Iowa, as amended by Section 107 of Chapter 209 of the 62nd General Assembly, with authority to operate a day care center pursuant to Chapter 235, 1966 Code of Iowa, as amended by Chapter 209 of the 62nd General Assembly. (Williams to Harmon, Commissioner, Iowa Dept. of Social Services, 8/11/69) #69-8-7

Mr. Maurice A. Harmon, Commissioner, Iowa Department of Social Services: In your letter dated July 17, you request an Attorney General's opinion as to the legal capacity of the Department to accept a gift of a building and equipment therein in Sioux City, Iowa, to be used as a day care center. In your letter you state:

"The Sanford Building Center, Inc. of Sioux City, Iowa, has offered to build and equip a day care center in Sioux City at an estimated cost of $140,000 and to donate it to the Department of Social Services as a philanthropic gift under the following conditions.

"'(1) The center would be constructed to the specifications which comply with standards for licensing such facilities as established by the Department of Social Services;

"'(2) The Department of Social Services must agree to staff and operate the facility as a day care center for a minimum period of five years. If the Department did not comply with this requirement, ownership and possession of the property would revert back to the Sanford Building Center, Inc. After ten years, however, the reversion clause would cease;

"'(3) The Department of Social Services would be granted the right to use a yearly depreciation value of the cost of the building for the purposes of securing Federal matching funds if such arrangements could be negotiated with the Federal Department of Health, Education and Welfare.'"

The Department of Social Services was created by the enactment of Senate File 739 by the 62nd General Assembly of Iowa. Both the former Social Welfare Department and the former State Board of Control are consolidated in this newly formed Department headed by a Commissioner.

Services provided in Chapter 235.1, 1966 Code of Iowa, captioned "Child Welfare" are to be administered by the newly-formed Department of Social Services. Section 235.1 of the 1966 Code of Iowa defines child welfare services as:

"'Child welfare services' means social welfare services for the protection and care of children who are homeless, dependent or neglected, or in danger of becoming delinquent, including when necessary care and maintenance in a foster care facility."

Section 235.2 enumerates the powers and duties of the Division as:

"1. Administer and enforce the provisions of this chapter. . . .

"8. Co-operate with the juvenile courts of the state, and with the other directors and divisions of the department of social services regard-

ing the management and control of state institutions and the inmates thereof."

Section 235.3 of the 1966 Code of Iowa, as amended by said Chapter 209 of the 62nd General Assembly, setting forth the powers and duties of the Director of said Division reads:

"1. Plan and supervise all public child welfare services and activities within the state as provided by this chapter. . . .

"5. Designate and approve the private and county institutions within the state to which neglected, dependent and delinquent children may be legally committed and to have supervision of the care of children committed thereto, and the right of visitation and inspection of said institutions at all times. . . ."

Day care services include Foster Care services within the meaning of §235.1 of the 1966 Code of Iowa, and are included within the definition of child welfare services as defined in Chapter 235 of said Code. [See Attorney General's Opinion dated September 15, 1967 regarding Child Welfare Services]

The Commissioner of the Department of Social Services may accept gifts from "any source" to be used in the performance of the services within the scope of statutory authority granted to the Department of Social Services.

Section 218.96, 1966 Code of Iowa, as amended by Section 107, Chapter 209 of the 62nd General Assembly, reads:

"Gifts, grants and devises. The Commissioner of the Department of Social Services is authorized to accept gifts, grants, devises or bequests of real or personal property from the federal government or any source. The Commissioner may exercise such powers with reference to the property so accepted as may be deemed essential to its preservation and the purposes for which given, devised or bequeathed."

The question is similar to one raised in the case of *Eckles vs. Lounsberry*, 253 Iowa 172, 111 N. W. 2d 638 concerning, however, Section 565.3 of the 1958 Code of Iowa. There, at page 183 the Court said:

"We think the State is capable of accepting and administering the devise. No constitutional or statutory prohibition against it has been cited."

Section 565.3, 1958 Code of Iowa reads:

"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."

It is noted that the gift has a reversionary clause attached. Under the terms thereof, the Department is required to "staff and operate the facility as a day care center." The performance of such a condition by the Department, however, is within the scope of its authority under the aforecited statutes.

Therefore, it would appear that upon the conditions imposed, the Commissioner of the Department of Social Services for the State of Iowa could accept the gift with such conditions attached thereto.

August 12, 1969

CRIMINAL LAW: Board of Parole — Time to be served on conviction for violation of Uniform Narcotic Drug Act — §§204.20, 246.39, 246.43, Code of Iowa, 1966. Where conviction *is not* for one of the specific offenses stated in §204.20(4), the prisoner is eligible for probation or parole, and may be finally discharged prior to time that minimum imprisonment provided for the offense would have been served. Where conviction *is* for one of the specific offenses, the prisoner is not eligible for probation or parole prior to time that minimum imprisonment provided for the offense shall have been served; however, prisoner may be finally discharged prior to that time. (Moser to Bobzin, Sec. & Dir. of Parole, State Board of Parole, 8/12/69) #69-8-8

Mr. R. W. Bobzin, Secretary & Director of Parole, State Board Parole: Reference is made to your letter dated February 12, 1968, in which you request the opinion of the Attorney General as to the application and effect of §204.20, Code 1966.

The basic question involved may be phrased as follows: Is the Board of Parole precluded from granting parole to a prisoner serving a sentence in connection with §204.20, Code 1966, in all cases, until the minimum sentence imposed by law is served exclusive of "good-time" and "honor-time" earned under §246.39 and §246.43, Code 1966?

You stated in your letter that the Board of Parole has been operating in accordance with the Opinion of the Attorney General No. 57-3-8 (Forrest to State Board of Parole, 3-5-57). This opinion was written with reference to a specific prisoner and was based on §204.22, Code 1954, under which that prisoner was convicted. This was the prisoner's second conviction under Chapter 204 (Uniform Narcotic Drug Act), Code 1954, and he was accordingly sentenced to five years under §204.22(1), Code 1954 (now §204.20(1), Code 1966), which provided for second offenses to be imprisoned in the state penitentiary not less than five or more than ten years.

Section 204.22(4), Code 1954, stated:

"For violation of the provisions of this chapter the imposition or execution of sentence shall not be suspended and probation or parole shall not be granted until the minimum imprisonment herein provided for the offense shall have been served."

Based on the foregoing, the conclusion contained in the opinion was as follows:

"Therefore, . . . since the sentence was for the minimum sentence only, the Board is precluded from applying Section 246.39 or any parole or probationary provisions to the confinement time allotted by the sentence of the above named prisoner, and he must remain confined for the five year period."

Because of subsequent case law and statutory enactment, it is my opinion that this conclusion can no longer be considered as entirely correct.

(1) In *Masteller v. Board of Control of State Institutions*, 251 Iowa 234, 100 N. W. 2d 111 (1959), it was held that the provisions of the "good-time" statutes (§§246.39 and 246.43, Code of Iowa) were applic-

able to a prisoner convicted under the Uniform Narcotic Drug Act even though the act provided that probation or parole should not be granted until the minimum imprisonment should have been served, since this did not prevent giving credit for "good-time."

In *Masteller* the trial court imposed the minimum sentence fixed by law of ten years (third offense) as provided in §204.22(1), Code 1954. The Supreme Court of Iowa held that the trial court had such authority to impose the minimum sentence. The Supreme Court, in *Masteller*, went on to say:

"It is true, as indicated, section 204.22, subdivision 4 provides that 'probation or parole shall not be granted until the minimum imprisonment . . . shall have been served,' but there is no prohibition against giving credit for 'good-time.'

"We agree that probation and parole are specifically precluded 'until the minimum imprisonment herein provided for the offense shall have been served.' We hold, however, that execution of the sentence imposed is subject to the provisions of the 'good-time' statutes, sections 246.38, 246.39 and 246.48."

The opinion of the court in *Masteller* results in the situation that a prisoner convicted under any of the provisions of the Uniform Narcotic Drug Act is not eligible for probation or parole within the period of the minimum sentence imposed by law because of the operation of §204.22(4), Code 1954. However, the decision also has the effect of making possible the final discharge of such a prisoner within the period of such minimum sentence due to the operation of the "good-time" statutes (§§246.39 and 246.43, Code of Iowa).

The end result is that such a prisoner may be released by expiration of sentence before he is eligible for parole.

(2) Chapter 204, Iowa Code, 1962, Uniform Narcotic Drug Act, derived from Acts of the 47th G. A., Chapter 114, §§1-25, as amended, consisting of §§204.1 to 204.25, was repealed by Acts of the 61st G. A., Chapter 195.

Chapter 204, Uniform Narcotic Drug Act, consisting of §§204.1 to 204.23 was enacted by Acts of the 61st G. A., Chapter 195, §§1-21, 23, 24. The effective date of this legislation is July 8, 1965.

Section 204.20(4), Code 1966 (formerly §204.22(4)) provides:

"For violation of the provisions of this chapter *concerning the manufacturing, selling, administering to another person, or dispensing a narcotic drug*, the imposition or execution of sentence shall not be suspended and probation or parole shall not be granted until the minimum imprisonment herein provided for the offense shall have been served." (Emphasis added)

It is readily apparent that this section differs materially from the former section (§204.22(4), Code 1954) in that in the former the preclusion of probation or parole within the minimum sentence applied to all convictions for violations under the Uniform Narcotic Drug Act; while in the present section the legislature has specifically delineated those offenses where the preclusion of probation or parole within the minimum sentence is to be operative.

Therefore, as to those convictions for offenses under the Uniform Nar-

cotic Drug Act not specifically mentioned in §204.20(4), Code 1966, the Board of Parole would have jurisdiction to grant parole to the prisoner within the period of the minimum sentence. That is, the decision in *Masteller v. Board of Control of State Institutions* would not be controlling as to those types of offenses.

A prisoner, for example, convicted under the Uniform Narcotic Drug Act for *possession* of a narcotic drug would be eligible for parole within the period of the minimum sentence.

Masteller would still seem to be the law as to the offenses specifically mentioned in §204.20(4), Code 1966.

Upon application of the foregoing, the following are my conclusions in response to your letter.

I. Where the prisoner *has not* been convicted for violation of the provisions of Chapter 204 "concerning the manufacturing, selling, administering to another person, or dispensing a narcotic drug":

A. The prisoner is eligible for probation or parole prior to that time that the minimum imprisonment provided for the offenses would have been served (See §204.20(4), Code 1966).

B. The prisoner may be finally discharged prior to that time that the minimum imprisonment provided for the offense would have been served due to the operation of §§246.39 and 246.43, Code 1966 (See *Masteller v. Board of Control of* State Institutions, 251 Iowa 234, 100 N. W. 2d 111 (1959)).

II. Where the prisoner *has* been convicted for violation of the provisions "concerning the manufacturing, selling, administering to another person, or dispensing a narcotic drug":

A. The prisoner is not eligible for probation or parole prior to the time that the minimum imprisonment provided for the offense shall have been served (See §204.20(4), Code 1966; and *Masteller v. Board of Control of State Institutions*, 251 Iowa 234, 100 N. W. 2d 111 (1959)).

B. The prisoner may be finally discharged prior to that time that the minimum imprisonment provided for the offense would have been served due to the operation of §§246.39 and 246.43, Code 1966 (See *Masteller v. Board of Control of State Institutions*, 251 Iowa 234, 100 N. W. 2d 111 (1959)).

August 27, 1969

STATE OFFICERS AND DEPARTMENTS: Reciprocal agreements with other states concerning drivers licenses — §321.176(3), Code of Iowa, 1966. Under Illinois law there is no way the states of Iowa and Illinois could agree that Illinois would recognize the drivers licenses of Iowa citizens under the age of 18 who have passed approved driver education courses. (Zeller to Garrison, Director of Legislative Serv. Bur., 8/27/69) #69-8-9

Serge H. Garrison, Director of Legislative Serv. Bur.: Reference is made to your letter of August 5 in which you request a legal conclusion as to whether or not the law of Iowa and Illinois would allow the two

states to work out an agreement, whereby Illinois would recognize Iowa's drivers under the age of 18 who have passed the driver approved education course under the same conditions that Iowa and Illinois license their own residents. Your attention is directed to the Illinois statute §6A-101, which provides:

"No person except those expressly exempted by Section 6A-102 shall drive any motor vehicle upon a highway in this State unless such person has a valid license or permit issued under the provision of this Act."

Your attention is also directed to Code 6A-102 which provides:

"The following persons are exempt from the requirements of Section 6A-101 (2). A nonresident who is at least 18 years of age and who has in his immediate possession a valid license issued to him in his home state may operate a motor vehicle. * * * The provisions of this section granting exemptions to any nonresident shall be operative to the same extent that the laws of the State or County of such nonresident grant like exemptions of residents of this State."

The office of the Secretary of State of Illinois has answered your question by letter on July 17, 1969, which states therein:

"Paragraph two explains that a nonresident must be eighteen years of age before he is entitled to drive in the State of Illinois. There is no provision in the law to allow a sixteen or seventeen year old nonresident to drive in this State even though he has successfully passed a driver education course, as the Illinois law also requires for Illinois drivers."

I agree with this opinion of the Illinois official who must interpret the Illinois laws as written. You refer to the drivers license compacts with other states, which has been adopted by both Iowa and Illinois.

This statute reads in pertinent part as follows:

"(a) * * *

3. The continuance in force of a license to drive is predicated upon compliance with laws and ordinances relating to the operation of motor vehicles, in whichever jurisdiction the vehicle is operated.

"(b) It is the policy of each of the party states to:

"1. Promote compliance with the laws, ordinances, and administrative rules and regulations relating to the operation of motor vehicles by their operators in each of the jurisdictions where such operators drive motor vehicles.

"2. Make the reciprocal recognition of licenses to drive and eligibility therefore more just and equitable by considering the overall compliance with motor vehicle laws, ordinances and administrative rules and regulations as a condition precedent to the continuance or issuance of any license by reason of which the licensee is authorized or permitted to operate a motor vehicle in any of the party states."

There is nothing in this compact which would authorize the Illinois Secretary of State to rewrite the Illinois law and exempt Iowa drivers, who are not resident in Illinois from the requirements of its laws. It is of course true, that the Iowa statute (§321.176 (3)) exempts a nonresident (or Illinois) operator, who is under 18 years of age and has in his immediate possession a valid license issued to him in his home state. But this permit is not based, or contingent upon reciprocal treatment by the state in which the operator resides. The Iowa law was not written so as to make such exemptions contingent upon reciprocal treatment. In order

to admit Iowa operators under 18 years of age in Illinois, then that state must rewrite its exemptions to recognize Iowa operators under the age of 18, who have valid Iowa licenses.

September 2, 1969

STATE OFFICERS AND DEPARTMENTS: Iowa state commerce commission, regulation of interstate shipments of poison gas — Art. I, §8, cl. 3, Constitution of the United States; §§474.12, 474.14, 474.24, Code of Iowa, 1966. Any direct state action to prohibit or obstruct the interstate rail shipment of phosgene gas across the territory of this state would under the U. S. Constitution amount to an unconstitutional burden on interstate commerce. However, under state law the Iowa commerce commission could require reasonable repairs to be made to track, roadbed and equipment so as to minimize the likelihood of an accident on the railroad. (Haesemeyer to Gannon, State Representative, 9/2/69) #69-9-1

The Hon. William J. Gannon: You may be certain that we share your concern for the safety and welfare of those citizens of Iowa who live near the route of the proposed rail shipments of phosgene gas. Our anxiety is increased by the potential harm which could result from publication of information about these shipments which perhaps should be classified in the interest of state, as well as national, security. A total lack of editorial restraint would appear to enhance this potential. However, after exhaustive research we are compelled to conclude that because of the interstate character of these shipments there is no direct action that the state of Iowa or the attorney general can take to halt or impede the movement of this gas through this state. The matter is strictly up to the federal government which apparently has adopted a somewhat blase attitude toward the whole thing and if the federal authorities persist in being unconcerned about the potential danger to our people which these gas shipments pose I am afraid we will have to draw what comfort we can from the fact that poison gas trains have been moving across Iowa without incident for years. However, as hereinafter indicated there does appear to be a possibility that the commerce commission and the commerce counsel could take steps under Iowa law to improve the operating safety of the railroad carrying the gas so that the potential for an accident would at least be minimized.

Article I, §8 of the Constitution of the United States provides in part:

"The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

This is what is generally referred to as the interstate commerce clause of the federal constitution. It is a provision which has given rise to an enormous amount of litigation involving a multitude of legal questions. However, a number of doctrines under the commerce clause have emerged over the years which while fairly easy to state are frequently more difficult to apply. One such rule is that the regulation of foreign and interstate commerce is a subject within the exclusive jurisdiction of congress. *Railroad Commission v. Worthington,* Ohio, 1912, 32 S. Ct. 653, 255 U. S. 101. However, until congress sees fit to legislate in a particular area involving interstate commerce the states may, in the proper exercise of their police power, impose reasonable regulations which do not unduly

burden interstate commerce. *Chicago etc. R. Co. v. Fuller,* Iowa 1873, 17 Wall 568, 21 L. Ed. 710. But where railroads are concerned:

"Through the medium of the Interstate Commerce Act, 49 U.S.C.A. §1 et seq., Congress has spoken generally in the area of railroad regulation and in such area Congress enjoys a wide latitude in defining and distributing the power to regulate interstate commerce." *New Orleans Terminal Co. v. Spencer,* D. C. La. 1965, 255 F. Supp. 1, remanded and reversed on other grounds 366 F. 2d 160, certiorari deneied 87 S. Ct. 974, 386 U. S. 942, 17 L. Ed. 2d 873.

Moreover, congress has enacted specific laws dealing with the interstate transportation of poison gases. The federal criminal law provides in 18 U.S.C.A. §834(a).

"(a) The Interstate Commerce Commission shall formulate regulations for the safe transportation within the United States of explosives and other dangerous articles, including radio-active materials, etiologic agents, flammable liquids, flammable solids, oxidizing materials, corrosive liquids, compressed gases, and poisonous substances, which shall be binding upon all carriers engaged in interstate or foreign commerce which transport explosives or other dangerous articles by land, and upon all shippers making shipments of explosives or other dangerous article via any carrier engaged in interstate or foreign commerce by land or water."

The powers and duties imposed upon the interstate commerce commission by the foregoing statutory provision are now exercised by the department of transportation. Pub. L. 89-670, 80 Stat. 931. Pursuant to the rule making authority conferred upon it by such §834(a) the department of transportation has promulgated extensive regulations covering the transportation of dangerous articles specifically including phosgene gas. 49 C.F.R. §171-179. The purpose of these regulations as stated in 49 C.F.R. §173.1 is:

"(a) To promote the uniform enforcement of law and to minimize the dangers to life and property incident to the transportation of explosives and other dangerous articles by common carriers engaged in interstate or foreign commerce, the regulations in Parts 171-179 of this chapter are prescribed to define these articles for transportation purposes, to state the precautions that must be observed by the shipper in preparing them for shipment by rail freight, rail express, rail baggage, highway, or by carrier by water. It is the duty of each such shipper to make the prescribed regulations effective and to thoroughly instruct employees in relation thereto.

"(b) Explosives and other dangerous articles may be offered to carriers for transportation provided the articles are in proper condition for transportation, are as defined, and are packed, marked, labeled, described, certified, and otherwise as provided for in Parts 171-179 of this chapter for acceptable articles for transportation by rail freight, rail express, rail baggage, highway, or water. Articles must be loaded and stayed according to regulations in Parts 171-179 of this chapter applying to carriers by rail. Methods of manufacture, packing, and storage, insofar as they affect safety in transportation, must be open to inspection by a duly authorized representative of the initial carrier or of the Bureau of Explosives. Shipments that do not comply with the regulations in Parts 171-179 of this chapter must not be offered for transportation."

In a case involving an interpretation of 18 U.S.C.A. §834 the court had this to say:

"It is claimed that the respondent failed to comply with the require-

ments of the laws of the state of New Jersey and with the municipal regulations of Jersey City in respect to the storage of explosives. It is sufficient to say that the dynamite which exploded was addressed to Carlisle, Crocker & Co., Montevideo. It was a foreign shipment and as such was subject exclusively to the act of Congress approved March 4, 1909 (35 Stat. 1135, c. 321 [U. S. Comp. St. Supp. 1911, p. 1660]). That act (Section 233) authorized the Interstate Commerce Commission to formulate regulations for the safe transportation of explosives which should be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives by land. The Interstate Commerce Commission accordingly formulated and issued regulations governing the transportation of explosives in interstate and foreign commerce. We have no doubt that the dynamite in question was subject exclusively to the regulations of the Interstate Commerce Commission. When Congress has legislated upon a subject within its constitutional control, and has manifested its intention to deal therewith in full, the authority of local jurisdiction is necessarily excluded. See Northern Pacific Railway Co. v. State of Washington, 222 U. S. 370, 378, 32 Sup. Ct. 160, 56 L. Ed. 237." *Actiesselskabet Ingrid v. Central R. Co. of New Jersey, et al,* C.C.A. 2d, 1914, 216 F. 72, 82.

See also City of Seattle vs. Lloyds' Plate Glass Ins. Co., C.C.A. 9th, 1918, 253 F. 321. Thus under 18 U.S.C.A. §834 and the regulations promulgated pursuant thereto the federal government has occupied the field of regulation of the interstate transportation of dangerous articles including phosgene gas and any attempt by this state at direct action to inhibit or enjoin one or more shipments of such gas across this state would in our opinion run afoul of the interstate commerce clause and be unconstitutional.

However, the paramount power of the federal government to regulate interstate commerce in those areas which congress has seen fit to preempt does not necessarily preclude all state action especially where the public health, safety and welfare of any such state's inhabitants are concerned. As stated in *Lasting Products Co. v. Genovese,* Va. 1955, 87 S. E. 2d 811:

"Notwithstanding the delegation of power from states to Congress to regulate commerce with foreign nations and among the several states, states have power to adopt regulations upon matters of local concern to protect public health, morals, public safety and public convenience, provided such acts are local in their character and affect interstate commerce only incidentally."

In another case involving New York's railroad full crew laws the court stated:

"Regulation of train crew consist practices does not fall within area of law inherently requiring national conformity, although Congress has power to enact a national regulatory statute." *New York Cent. R. Co. v. Lefkowitz,* 1965, 259 N. Y. S. 2d 76, 46 Misc. 68.

States may for example regulate train lengths:

"66 Okl. St. Ann. §§102, 103, limiting length of trains are not invalid as conflicting with legislation enacted by Congress under this clause, where acts of Congress did not contain any provision from which it could be fairly implied that Congress intended to exert the paramount character of its authority in relation to length of trains in such manner as to exclude or supersede state action." *Missouri-Kansas-Texas R. Co. v. Williamson,* D. C. Okl. 1941, 36 F. Supp. 607.

They may also enact safety and inspection regulations involving vessels.

"Rem. Rev. Stat. §9843 et seq., relating to the inspection and regulation of vessels is valid so far as it provides for the inspection of hull and machinery in order to insure safety and seaworthiness, and as to other requirements which lie outside the bounds of federal action thus far taken, and as to which uniformity of regulation is not needed." *Kelly v. State of Washington ex rel, Foss Co.*, Wash. 1937, 58 S. Ct. 87, 302 U. S. 1, 82 L. Ed. 3.

As stated in *Fleming v. Richardson*, 1946, 237 Iowa 808, 24 N. W. 2d 280:

"Where Congress has not spoken, the states may regulate local matters affecting the health, morals, convenience, or safety of persons within their territorial jurisdiction though interstate commerce is indirectly and incidentally affected."

The Iowa law does contain provisions which concern themselves with the safe operation of railroads and which do not encroach upon an area of interstate commerce already occupied by the federal government. §§474.12 and 474.14, Code of Iowa, 1966, provide respectively:

"474.12 Inspection-notice to repair. [The commerce commission] shall from time to time carefully examine into and inspect the condition of each railroad. its tracks. bridges, and equipment, and the manner of its conduct, operation, and management with regard to the public safety and convenience in the state.

If found by it unsafe, it shall immediately notify the railroad company whose duty it is to put the same in repair, which shall be done by it within such time as the commission shall fix. If any corporation fails to perform this duty the commission may forbid and prevent it from running trains over the defective portion while unsafe."

"474.14 Changes in operation and improvements. When, in the judgment of the commission, any railway corporation fails in any respect to comply with the terms of its charter or articles of incorporation or the laws of the state; or when in its judgment any repairs are necessary upon its road; or any addition to its rolling stock, or addition to or change in its stations or station houses, or the equipment thereof, for the health and convenience of the public, or change in its rates of fare for transporting freight or passengers, or change in the mode of operating its road or conducting its business, is reasonable and expedient in order to promote the security, convenience, and accommodation of the public, the commission may make an order prescribing such improvements and changes as it finds to be proper and shall serve a notice upon such corporation, in the manner provided for the service of an original notice in a civil action, which notice shall be signed by its secretary. A report of such proceedings shall be included in its annual report to the governor. Nothing in this or sections 474.12 and 474.13 shall be so construed as relieving any railroad company from its responsibility or liability for damage to person or property."

Thus, while we do not believe that the state can by direct action ban a particular shipment or all shipments of phosgene gas across its territory it does appear possible that the Iowa commerce commission could inspect the track, roadbed and equipment of a carrier transporting such gas and order any necessary repairs to be made within a reasonable time. While this would not halt the gas shipments, it would at least reduce the likelihood of an accident. Of course, if the railroad refused or failed to make the required repairs the statute authorizes the commission to forbid the running of trains over the defective track. Moreover, the Iowa law authorizes the commerce counsel to invoke the aid of the courts in enforcing the orders of the commerce commission. §474.24 provides:

"474.24 Jurisdiction of courts to enforce order. The district courts of this state shall have jurisdiction to enforce, by proper decrees, injunctions, and orders, the rulings, orders and regulations affecting public rights, made by the commission as authorized by law for the direction and observance of railroads in this state. The proceedings therefor shall be by equitable action in the name of the state, and shall be instituted by the commerce counsel, whenever advised by the commission that any railway corporation, or person operating a line of road in this state, is violating and refusing to comply with any rule, order, or regulation made by the commission, and applicable to such railroad or person."

While it is our opinion that requirements reasonably calculated to insure that track, bridges and equipment are maintained in a safe manner would not come into conflict with the interstate commerce clause, we would have grave reservations as to the likelihood of success of any efforts by the commission in the present atmosphere of near hysteria to now use §§474.12 and 474.24 to do indirectly what it could not do directly, namely, halt all shipments of phosgene gas through the state by suddenly requiring extensive track, roadbed and equipment repairs upon short notice and then closing the railroads tracks to all traffic because of failure to make the ordered repairs. Additionally, there is a very real practical problem which would arise if the commerce commission were to attempt to proceed under §474.12. As I understand it, the commission has only one man knowledgeable in and assigned to railway safety and this person already has his hands full inspecting crossings, signals and switches. Thus, there appears to be some question as to whether the commission has the manpower to physically make the inspections which §474.12 requires.

September 5, 1969

SCHOOLS: Board of Regents, purchase of land for a new institution of higher education in southwest Iowa — H.F. 747, 62nd G. A.; S.F. 689, 63rd G. A. It is the duty of the state board of regents to proceed without delay to purchase land for the establishment in western Iowa of an institution of higher education. (Nolan to Richey, Ex. Sec., Board of Regents, 9/5/69) #69-9-3

Mr. R. Wayne Richey, Executive Secretary, Board of Regents: This is in reply to your letter of August 19, 1969, which states that the Board of Regents voted to obtain an attorney general's opinion on the relationship of H.F. 747, 62nd G. A., and S.F. 689, 63rd G. A., pertaining to the acquisition of land for an institution of higher education in western Iowa. Your letter set out five specific questions as follows:

"1. Does H.F. 747, 62nd G. A., mandate the Board of Regents to purchase land for a western Iowa institution of higher education?

"2. Is S.F. 689 permissive or directive as regards the western Iowa institution?

"3. Does S.F. 689 supersede or complement H.F. 747?

"4. On the basis of verbal instructions only, is the Board required to earmark $330,000 of its capital appropriation for western Iowa?

"5. May this $330,000 be used for any purpose other than the acquisition of land for western Iowa?"

The pertinent parts of the two Acts in question, both of which are appropriation Acts are set out below:

Chapter 6, Laws of the 62nd G. A. (H.F. 747)

Sec. 4. "The state board of regents shall engage consultants acknowledged to be experienced in the field of planning for institutions of higher education, and therewith proceed to initiate plans for the location, establishment, construction and operation of a state institution of higher education in western Iowa.

"The state board of regents, upon its selection of the location, shall purchase, acquire, lease, option, or accept as a gift any real property necessary for the establishment and growth of this institution.

"Included in the appropriation to the state board of regents in this Act is a sum not to exceed five hundred thousand dollars, ($500,000), to be used to carry out the study, planning and the establishment of this institution of higher education to be established in western Iowa.

* * *

Sec. 6. "Any unemcumbered balance remaining as of June 30, 1971, of the funds appropriated by this Act, shall revert to the general fund of the state of Iowa, as of June 30, 1971."

Senate File 689, 63rd G. A.,

Sec. 1. "There is hereby appropriated from the general fund of the state for the biennium beginning July 1, 1969, and ending June 30, 1971, to the board of regents the sum of seven million one hundred thousand (7,100,000) dollars, or so much thereof as may be necessary to be used *to supplement any prior appropriations* for capital improvement items for construction of new buildings, repairs, improvements, *purchases of new land,* replacements, or alterations, or for any other capital expenditures the board of regents may deem necessary for the proper and necessary function of any institution under its jurisdiction *and for the purchase of land for a western Iowa regents' institution.*" [Emphasis supplied]

A statute is not open to construction as a matter of course. It is open to construction only where the language used in the statute requires interpretation, that is, where the statute is ambiguous or will bear two or more constructions or is of such doubtful or obscure meaning, that reasonable minds might be uncertain or disagree as to its meaning. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules for statutory interpretation. 50 Am. Jur., Statutes, 225. The language of H.F. 747 appears to be clear and definite. By the use of the word *"shall,"* which is mandatory, it requires the board of regents to acquire the real property necessary for the establishment and growth of the institution to be located in western Iowa. *Hansen v. Henderson,* 1953, 244 Iowa 650, 56 N. W. 2d 59.

On the presumption that whenever the legislature enacts a provision it has in mind the previous statutes relating to the same subject matter, the statutes should be construed together the new provision being enacted in accord with the legislative intent embodied in the prior statute. Sutherland, *Statutory Construction,* 3 Ed. §5201.

In answer to your questions, we advise that H.F. 747, 62 G. A. imposes an obligation on the Board of Regents to acquire any real estate necessary for the establishment of an institution of higher learning in western Iowa. The funds appropriated under H.F. 747 were not sufficient to carry out this purpose. The appropriation available under S.F. 689 1st Sess.

63 G. A. was made expressly to "supplement" prior appropriations to the Board and clearly provides that it be used "for the purchase of land for a western Iowa regents' institution." Because this appropriation act does not contain a specific line appropriation for each institution under the jurisdiction of the Board there is undoubtedly a degree of flexibility in how the Board spends the money appropriated. However, this does not relieve the Board of responsibility for carrying out the directive to purchase land "proper and necessary" for the establishment of the institution at the selected site at Atlantic. Consequently, the Board should proceed with the purchase of such land — utilizing whatever is necessary from the amount which remains unexpended and uncommitted under both bills, but not to exceed the total amount of $7,600,000. It is the duty of the board to proceed without further delay. We have no idea what "verbal instructions" you are talking about or where you arrived at a figure of $330,000.

September 8, 1969

STATE OFFICERS AND DEPARTMENTS: Executive Council — Discharge of Debts Owing to State — §§19.9, 554.3104, .3307, .3413, .3605, .3802, Code of Iowa, 1966; §§541.59, .61, .120-.121, .186, Code of Iowa, 1962. Executive Council may effect discharge of small, uncollectible debts represented by dishonored checks by resolving pursuant to §19.9 that debts be discharged and directing that checks be cancelled. (Turner to Robinson, Sec., Executive Council, 9/8/69) #69-9-2

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: You have referred to me for my recommendation a request made to you by the department of agriculture for permission to charge a number of small, uncollectible checks off its fee books. The checks (in amounts ranging from $1 to $20) have been dishonored for insufficient funds, and all efforts to collect them have been unsuccessful. The department of agriculture has been carrying them on its books for some time, the great bulk of them since 1966.

§19.9, Code of Iowa, 1966, gives the executive council authority to compromise debts owing to the state under appropriate report by the attorney general:

"The executive council, on a written report to it by the attorney general together with his opinion as to the legal effect of the facts, may determine by resolution to be duly entered in its official records, the terms on which claims of doubtful equity or collectibility, and in favor of the state, may be compromised and settled with all or any of the parties thereto. . . ."

Although the statute speaks only of compromising and settling debts, it is my opinion that the executive council is thereby authorized to discharge debts under this section. I can see no substantive difference, for example, between settling a debt of doubtful equity for 1¢ on the dollar and forgiving the debt altogether. And that is how the attorney general read the statute in 1919:

"(T)he statutes of Iowa permit the executive council . . . to compromise claims which the state has against individuals, and I have no doubt that registered optometrists who have failed to pay their annual license fee on account of their being in the military service of the United States could have the penalty remitted by making application to the executive council." 1920 OAG 694-95.

Each of the checks here in question is a negotiable instrument that can be enforced by suit thereon. See §§554.3104(2)(b), 554.3307(2), 554.3413(2), 92cmfwy cmfwypa oicmfwyptao oicmfwypao oicmfwypa oicmfwypoo (2), Code of Iowa, 1966, for checks drawn after July 4, 1966, and §§541.59, 541.61, 541.186, Code of 1962, for those drawn earlier. The debtors may be discharged on the instruments by deliberately destroying or mutilating the checks or by striking out their signatures, thereby cancelling such instruments or signatures; and this will be effective even without payment of consideration by the debtors. See §554.3605(1), Code of 1966, and §§541.120-.121, Code of 1962. The legal effect of discharging the debtors on their checks would be to discharge them also on the underlying obligations for which the checks were issued. See §544.3802(1)(b), Code of 1966.

My recommendation in this case is that you resolve pursuant to §19.9, Code of Iowa, 1966, that the debts be discharged, and direct the department of agriculture accordingly to cancel the checks as indicated above. Ordinarily, it would seem unwise to discharge a debt against the state merely because it appears to be uncollectible; but here the debts are so small in amount that their uncollectibility has become a practical certainty, and they pose a bothersome bookkeeping problem to the department of agriculture.

September 15, 1969

LIQUOR, BEER AND CIGARETTES: §§98.2, 98.6 and 98.8, Code of Iowa, 1966. Cigarettes purchased for the purpose of removing the same from packages and then dropping them out of an airplane in connection with the filming of a motion picture would be subject to the cigarette tax imposed by Chapter 98. (Haesemeyer to Reichardt, State Senator, 9/15/69) #69-9-4

The Hon. William J. Reichardt, State Senator: You have orally requested an opinion of the attorney general with respect to the following important question which you expect will arise during the filming of the motion picture "Cold Turkey" currently in production at Greenfield, Iowa.

As I understand the matter the story line of the film centers generally around an offer by an eccentric millionaire to bestow several millions of dollars upon the citizens of a small town if they collectively agree to forswear all uses of the tobacco cigarette. The citizens gather together in the town square to consider the offer and while so assembled are deluged from the air with some 200,000 loose cigarettes, a strategem devised by the evil tycoons of the tobacco industry who, concerned at the potential loss of even this small part of their vast market, hope by means of this cigarette airdrop to influence the townsmen's deliberations. Outraged at this heavy-handed effort to sway their decision the citizens vote to accept the millionaire's offer and mill about trampling the cigarettes or I believe otherwise destroying them. At least, as I under stand the matter, the plot does not call upon the people to gather up the unbroken cigarettes for future smoking.

In filming the sequence described above the producers of Cold Turkey, with a devotion to realism which does them credit, have determined to use real cigarettes.

To this end they propose to purchase 10,000 packages of cigarettes, remove the cigarettes from the packages, load them onto an airplane and, while cameras record the incident, drop them onto a large assemblage of extras gathered below in the Greenfield square. Whether the cigarettes would be standard length or king size, regular or menthol, or plain or filter tip I do not know nor do I care. These matters are irrelevant for the purpose of this opinion (although they doubtless would be of some interest to persons on the ground below).

While unwilling to compromise with reality to the extent of using ersatz cigarettes the producers are frugal enough to want to avoid payment of the tax imposed on cigarettes by Chapter 98, Code of Iowa, 1966, as amended by Chapter 342, Acts, 62nd G. A. Thus, those responsible for the filming of Cold Turkey have asked you and you in turn have asked us, if there is any way the necessary 200,000 cigarettes can be purchased ex tax or, if the tax is paid at the time of purchase, is there any way a subsequent refund of the tax can be obtained.

In considering this difficult question I think we may assume that the cigarettes in question will not be consumed in the usual way, viz, by placing the same between the lips, igniting the exposed end and periodically drawing smoke into the lungs. As indicated above the scenario of the movie calls for these cigarettes not to be smoked and I believe we may safely assume that none will be at least while the scene is being filmed. Moreover, I would like to think that we may assume that none of the persons assembled in the square will be so faithless to his or her pledge as to snag cigarettes from the air as they fall past or furtively retrieve undamaged cigarettes from the ground to be smoked later in private leisure.

However, even in the face of all of the foregoing assumptions, it is our opinion that the cigarette tax must be paid. §98.6, Code of 1966, provides in relevant part:

"1. There is hereby levied, assessed, and imposed, and shall be collected and paid to the department, the following taxes on all cigarettes used *or otherwise disposed of in this state for any purpose whatsoever:*

Class A. On cigarettes weighing not more than three pounds per thousand, five mills on each such cigarette.

Class B. On cigarettes weighing more than three pounds per thousand, six mills on each such cigarette. * * *" (Emphasis added)

It is true that §98.8 contains, among other things, the following language:

"The director may promulgate rules and regulations providing for refunds of the face value of stamps affixed to any cigarettes which have become unfit for use and consumption, unsalable, or for any other legitimate loss which may occur, upon proof of such loss. Refund shall be made by issuing new stamps of an aggregate value of the tax paid on the cigarettes adjudged to be unfit for use, consumption, unsalable, or any other loss suffered."

However, it is a matter open to conjecture whether or not deliberately throwing 200,000 cigarettes out of a low flying airplane would constitute a "legitimate loss" within the meaning of §98.8. Quaere, too, whether the cigarettes would be "unfit for use and consumption" even after having

been swept up following the filming of the scene. There is, after all, a certain base type of individual who has no qualms about rummaging through an ash tray for a partially smoked butt of an acceptable length. A scavenger of this sort would hardly cavil at smoking an otherwise undamaged cigarette merely because it had lain for a time in Greenfield square. In any event under the statute the refund, if any, would be made only to a permit holder, not an ultimate purchaser.

Insofar as the federal tax is concerned I discussed this matter with Mr. Ed Crozier of the Regional Commissioner's Office, Alcohol and Tobacco Tax, United States Internal Revenue Service, here in Des Moines. He was somewhat less than sanguine about the prospects of the producers of Cold Turkey getting a refund of federal tax for the reason that that tax is imposed on the manufacturer.

By way of one final caveat I should perhaps mention §98.2 which 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, or give to any minor under eighteen years of age any tobacco in any other form whatever except upon the written order of his parent or guardian or the person in whose custody he is."

In view of this provision of the law, it may be that the producers would be well advised to exclude persons under eighteen from the vicinity of the cigarette drop, or if such persons are allowed to be present, take steps to insure that individuals under eighteen retrieve none of the cigarettes.

September 15, 1969

ELECTIONS: Members of senatorial or congressional district party central committee selected by county convention — §§43.97, 43.101, 43.102, Code of Iowa, 1966. The person elected by a county convention to serve on a senatorial or congressional district party central committee need not be a member of the county central committee. (Haesemeyer to Pelzer, Emmet County Attorney, 9/15/69) #69-9-5

Mr. Max Pelzer, Emmet County Attorney: I am advised that you have orally requested an opinion of the attorney general with respect to §43.97, Code of Iowa, 1966, which provides in part as follows:

"The said county convention shall:

* * *

"5. Elect a member of the party central committee for the senatorial and congressional districts composed of more than one county.

* * *"

As I understand the matter you have asked us whether the foregoing language requires that the person named by a county convention to serve on the central committee of a senatorial or congressional district composed of more than one county must be a member of the county party central committee. In our opinion the person elected need not be a member of the county party central committee.

It is clear that where a senatorial or congressional district is composed of more than one county each political party is to hold a convention. §43.101. Moreover, such districts are to have a central committee which has the duty of calling district conventions. §43.102. Thus, when §43.97 (5) speaks in terms of electing a member of the party central committee for the senatorial and congressional districts composed of more than one county it means elect a member *to* the party central committee for the senatorial and congressional districts composed of more than one county. To adopt the position that it requires the election of a member of the county party central committee for the senatorial and congressional districts would leave a void in the statute "senatorial and congressional districts" — what? If it were intended that a member of the party county central committee was to be elected the statute would have to read "elect a member of the party central committee for the district central committee for the senatorial and congressional districts composed of more than one county." But that is not what the statute says. Hence, it is our opinion that county conventions can elect anyone to a district party central committee for senatorial and congressional districts composed of more than one county.

September 22, 1969

MOTOR VEHICLES: Issuance of operator's or chauffeur's license by sheriff, §321.187, §321.188, and §321.195. Sheriff is not authorized to issue either operator's or chauffeur's license, or duplicates thereof, or deduct fees for such issuance, except when specially designated by the Department of Public Safety to examine applicants for this purpose. Sheriff may only issue a temporary license to expire within 15 days, if a Department's examiner is not available. (Zeller to Taha, Deputy Commissioner of Public Safety, 9/22/69) #69-9-6

Mr. Robert D. Taha, Deputy Commissioner of Public Safety: Reference is made to your recent letter, in which you request an opinion as follows:

"The Department of Public Safety has recently had its attention drawn to a case where a county sheriff is issuing duplicate Iowa motor vehicle operators licenses or what purports to be duplicates of Iowa motor vehicle operators licenses and chauffeur's licenses. * * * In reality it is a "sheriff's copy" of an operators license which has been photostated and bears beneath it what purports to be a certification indicating that the photostat is a true and exact copy of the record kept by the sheriff.

"In addition to issuing these purported licenses the sheriff has been collecting two dollars from each subject and deducting fifteen cents from the two dollar fee in the case of an operators license and fifty cents from the two dollar fee in the case of a chauffeur's license.

"The particular sheriff has not, and in fact no sheriff, has been appointed as a drivers license examiner pursuant to Chapter 321.187 of the Code of Iowa, 1966 as amended.

"We ask the following questions:

1. May a sheriff, without being appointed as an examiner pursuant to Chapter 321.187 of the Code of Iowa, 1966, as amended, issue an operators license or chauffeur's license other than that referred to in §321.188?

2. Should the answer be yes to question number (1) may the sheriff

deduct fees for the issuance of duplicate licenses pursuant to §321.192 of the Code of Iowa 1966 as amended?

3. Is the document the sheriff has issued of any validity?

4. May a sheriff deduct a fee for accepting application for duplicate licenses as provided in §321.188?"

Section 321.187 reads in part as follows:

"Appointment of examiners. The department is hereby authorized to appoint persons from the highway patrol or may designate the county sheriff for the purpose of examining applicants for operators and chauffeurs licenses."

Section 321.188 reads in pertinent part as follows:

"Sheriff may issue temporary licenses. When a department uniformed examiner is not available, the county sheriff may in his discretion accept from a person holding a valid operator's license of this state or a valid chauffeur's license of another state, application to the department for a chauffeur's license accompanied by the regular fee therefor, and is hereby authorized to issue a license to operate a motor vehicle as a chauffeur, using forms provided by the department, to expire *fifteen days* from issuance. The entire fee and application shall be turned over to the department examiner on or before the date of expiration of such license."

Section 321.195 reads in pertinent part as follows:

"In the event that an instruction permit or operator's or chauffeur's license or extension certificate issued under the provisions of this chapter is lost or destroyed, the person to whom the same was issued may upon payment of a fee of two dollars for an operator's or chauffeurs license, or extension certificate, obtain a duplicate, or substitute thereof, upon furnishing proof satisfactory to the department that such permit, license, or extension certificate has been lost or destroyed."

In answer to your first question, it is clear that the sheriff is not authorized by the provisions of §321.188 to issue a license, except when the department's uniformed examiner is not available, and in that event may only issue a temporary license to expire *15* days from issuance. The issuance by the sheriff of a two-year license is unauthorized and illegal. Also, it appears that the certification of a copy of a recorded license in the office of the sheriff, if certified and issued by him or his deputy, is illegal. There is no statutory authority for such certification. When photostatic copies of operators or chauffeur's licenses, in certain counties, are sent to the respective sheriffs by the Department of Public Safety, such copies are for their information only, in enforcing the state's motor traffic laws, and in preventing the use of the highways by unlicensed drivers.

In answer to your second question, the sheriff is not authorized to issue duplicate licenses pursuant to the provisions of §321.195. The operator or owner may only obtain a duplicate license from the *Department of Public Safety* by furnishing proof satisfactory to it that the original permit, license or certificate has been lost or destroyed. Since the sheriff has no authority to issue a duplicate license, he may not deduct fees for its issuance pursuant to Chapter 321.192, as it would be an illegal act. The certification of a record copy by the sheriff, from a photostatic copy in his office, is also illegal and the sheriff may not collect or deduct fees for such improper certification.

In answer to your third question, the document issued by the sheriff

has no validity. The Department of Public Safety has sole discretion and authority to determine if a duplicate license shall be issued.

The sheriff may not deduct a fee for accepting an application for duplicate licenses.

September 22, 1969

STATE OFFICERS AND DEPARTMENTS: Contingent fund, use to repair flood damage at Men's Reformatory §§19.7 and 19.29, Code of Iowa, 1966. The executive council may use a portion of the standing contingent appropriated by §19.7 to defray the cost of repairing flood damage at the Men's Reformatory. (Haesemeyer to Robinson, Sec., Executive Council, 9/22/69) #69-9-7

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: Reference is made to your letter of August 19, 1969, in which you request an opinion of the attorney general with respect to the following:

"The Executive Council, in meeting held August 18, 1969, approved the request from the Department of Social Services for an allocation of $3,400.00, as provided in Section 19.29 of the Code of Iowa, to repair flood damage to a roadway, electric highline and fencing on Farm #1 at the Men's Reformatory, which occurred on July 18, 19 and 20, 1969; subject, however, to the receipt of an opinion from the Attorney General that it is permissible for the Council to allocate General Revenue funds for this purpose, specifically, for the stated repair of a 'roadway.'

"We would appreciate an opinion in regard to this matter."

§19.29, Code of Iowa, 1966, as provides:

"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."

§19.7, Code of Iowa, 1966, as amended by Chapter 93, §§1 and 2, Acts, 62nd G. A. (1967) provides in relevant part:

"A contingent fund set apart for the use of the executive council may be expended . . . for repairing, rebuilding, or restoring any state property injured, destroyed, or lost by fire, storm, theft, or unavoidable cause, . . . Any such project for repair, rebuilding or restoration of state property 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. . . ."

As your letter indicates the damage at the men's reformatory was occasioned by a natural disaster to wit, a flood. The situation is somewhat similar to that involved in a prior opinion of the attorney general, OAG December 16, 1968, Haesemeyer to Robinson, Secretary, Executive Council, which centered around tornado damage to the Oelwein Armory. In this earlier opinion we stated that the repair of the tornado damage was to be paid for from the standing contingent fund appropriated by §19.7. And it would be our view that the damage to the roadway, electric highline and fencing on farm #1 at the men's reformatory which you describe in your present letter should also be paid from this fund. See also

in this respect OAG May 15, 1969, Haesemeyer to Schroeder, State Representative.

September 23, 1969

STATE OFFICERS AND DEPARTMENTS: Notaries Public, public bonds, facsimile signature by State Surety Company on notary bonds — §§64.4, 64.7 and 77.4(2), (3) and (4), Code of Iowa, 1966. When duly authorized, a facsimile signature has the same legally binding effect as a hand written signature, and State Surety Company may use facsimile signature on their notary bonds provided that sufficient evidence of authorization, along with a copy of the facsimile signature, be filed with Governor's office during the period of its use. (Ivie to Peterson, Administrative Ass't to Governor, 9/23/69) #69-9-8

Mr. Keith E. Peterson, Administrative Assistant, Office of the Governor: This will acknowledge your March 5, 1969 letter to this office in which you ask the following question:

"We have had a request from State Surety Company that they be allowed to use a facsimile signature on their Notary bonds. They will attach to these bonds a resolution showing the officer has been specifically authorized to execute Notary bonds for the State of Iowa."

It is clear that before a person is commissioned as a notary public he must execute a bond to the state of Iowa. See §77.4(2), (3) and (4) of the 1966 Iowa Code.

Chapter 64 of the 1966 Iowa Code sets forth the basic requirements of public bonds. Where Chapter 77 is silent as to details of the required bond, Chapter 64 controls. See §64.4, 1966 Iowa Code. Section 64.17 of the 1966 Iowa Code approves the use of "Surety Companies" as surety upon bonds required by law in the following language:

"Surety company bonds. Any association or incorporation which does the business of insuring the fidelity of others, and which has authority by law to do business in this state, shall be accepted as surety upon bonds required by law."

There is nothing in the 1966 Iowa Code that would indicate whether the use of facsimile signatures, in the above indicated instances, would be proper or improper. The key consideration is that the surety's signature must have binding legal effect, and any method of signature gaining that end would be proper.

A brief review of some basic principles of corporate law is in order. Obviously, the corporation cannot act on its own volition. All corporate acts are made by individuals authorized or held to be authorized to act on behalf of the corporation, e.g., officers, board of directors, board members, or stockholders. Such authorization is either implied from the nature of the office or is actual, that is given by statute, articles of incorporation, by laws, stockholders' vote, or board resolution. The resolution referred to in your letter would make it clear that the officer signing for the corporation was duly authorized to legally bind the corporation by his signature.

The only question then is whether a facsimile signature of a duly authorized person has the same legal effect as his actual signature.

A "signature" is whatever mark, symbol, or device one may choose to

employ as representative of himself. See *Griffith vs. Bonawitz*, 73 Neb. 622, 103 N. W. 327, 339 (1903); *Joseph Denunzio Fruit Co. vs. Crane*, 79 F. Supp. 117, 128 (D.C. Cal. 1948). Likewise, it has often been held that a "signature" may be written by hand, printed, stamped, typewritten, engraved, photographed, or cut from one instrument and attached to another, and a signature lithographed on an instrument by party is sufficient for the purpose of signing it; it being immaterial with what kind of instrument a signature is made. See *Smith vs. Greenville County*, 188 S. C. 349, 199 S. E. 416, 419 (1938); *Maricopa County vs. Osborn*, 60 Ariz. 290, 136 P. 2d 270, 274 (1943); *Weiner vs. Mullaney*, 59 Cal. App. 2d 620, 140 P. 2d 704, 712 (1943); *Cummings vs. Landes*, 140 Iowa 80, 117 N. W. 22, 23 (1908); *Plemens vs. Didde-Glaser, Inc.*, 244 Md. 556, 224 A. 2d 464, 467 (1966); *Katz vs. Teicher*, 98 Ga. App. 842, 107 S. E. 2d 250 (1959); and 80 C.J.S. 1292-1296, Signatures, §§7 and 9.

In determining that facsimile signatures of public officials were legally sufficient to be binding, the Oklahoma Supreme Court, in *State vs. Williamson*, ...Okla..... , 352 P. 2d 394, 395-396, (1960), held:

"In the absence of a statute prescribing the method of affixing a signature, it may be affixed in many different ways.

"Facsimile signature of a person may be a genuine signature."

Also see *Hill vs. U. S.*, 288 F. 192 (7th Cir. 1923).

It seems that the weight of authority and the better reasoned view supports the proposition that, when duly authorized, a facsimile signature has the same legally binding effect as a hand written signature. It is, therefore, the opinion of this office that the use of a facsimile signature as outlined in your opinion request is lawful. It is also the opinion of this office that the attaching of evidence of authorization, as suggested in your letter, seems advisable. Such evidence of authorization, along with a copy of the facsimile signature, should be required by your office to be filed with your office during the period of its use.

September 23, 1969

MOTOR VEHICLES: Registration Fees, §321.122, H.F. 2, Acts of 63rd G. A. Registration fees, how described for trucks, tractors, etc. (Zeller to Fulton, Commissioner, Dept. of Public Safety, 9/23/69) #69-9-9

Mr. Jack M. Fulton, Commissioner, Department of Public Safety: Reference is made to your recent letter, which asks our opinion as follows:

"Subsection 1 of Section 321.122 Code of Iowa 1966 was amended by the Acts of the first session of the 63rd General Assembly. It now reads as follows: '1. The annual registration fee for motor trucks except special trucks, truck tractors, or road tractors, shall be based on the combined gross weight of any combination of vehicles. All trucks, truck tractors, semi-trailers, or road tractors shall be registered for a gross weight equal to or in excess of the unladen weight of the vehicle or combination of vehicles. The annual registration fee for such vehicle or combination of vehicles shall be;

'For a combined gross weight of 3 tons or less, thirty five dollars for the first ten full registrations, and the fee shall be twenty five dollars thereafter.

'For a combined gross weight exceeding 3 tons and not exceeding 4 tons, forty five dollars.

'For a combined gross weight exceeding 4 tons and not exceeding 5 tons, sixty dollars.

'For a combined gross weight exceeding 5 tons and not exceeding 6 tons, seventy five dollars.

'For a combined gross weight exceeding 6 tons but not exceeding 7 tons, one hundred dollars.

'For a combined gross weight exceeding 7 tons, but not exceeding 24 tons, the fee shall be one hundred dollars and in addition thereto thirty five dollars for each ton over 7 tons.

'For a combined gross weight exceeding 24 tons, the fee shall be six hundred ninety five dollars and in addition thereto forty dollars for each ton over twenty four tons.

'For a combined gross weight of 34 tons or more, a fee of twenty five dollars which shall be in addition to the registration fees herein provided . . .'

"We are therefore asking your opinion as to whether or not the quoted language makes the twenty five dollar fee a registration fee or a flat fee not to be considered as a registration fee."

The twenty five dollar fee is the final fee stated in a sentence which commences as follows:

"The annual registration fee for such vehicle or combination of vehicles shall be * * * a fee of twenty five dollars." It is also described as "in addition to the registration fees herein provided."

Although stated as an additional fee, it comes within the coverage of the sentence, setting forth all registration fees to be paid. It should be considered a registration fee.

September 23, 1969

MOTOR VEHICLE: Highway — Implement of Husbandry. §321.1(16), Code of Iowa, 1966. Agricultural machinery owned and operated by a custom operator are implements of husbandry. (Holst to Fischer, State Representative, 9/23/69) #69-9-10

The Hon. Harold O. Fischer, State Representative: Your letter of June 20, 1969, to the attorney general requesting an opinion regarding custom agricultural operators has been referred to this office for answer. You asked whether all custom operators of agricultural farm equipment are excluded from the application of §321.1(16). In our opinion the answer is no.

Section 321.453, Code of Iowa, 1966, exempts "implements of husbandry temporarily moved upon a highway" from the provisions of Chapter 321 governing size, weight, and load. Section 321.1 (16) is a definition of the term "implement of husbandry," which includes "every vehicle which is designed for agricultural purposes and exclusively used by the owner thereof in the conduct of his agricultural operations . . ."

Your precise question arose in the case of *Worthington v. McDonald,* (1955) 246 Iowa 466, 68 N. W. 2d 89, 91. One side contended that an "implement of husbandry" must be used exclusively in farming the land

owned by or rented to the owner of the implement and cannot be used upon the land farmed by another. The Supreme Court of Iowa rejected this argument, saying:

"We are unwilling to give the language of Section 321.1(16) such a narrow construction as defendant urges upon us. We think it cannot be said as a matter of law plaintiff was not conducting his agricultural operations merely because he was on his way to combine beans for another for pay. The combining of grain, a form of threshing, is certainly an agricultural operation (citations). Plaintiff and no one else was conducting the operation. It was one of his operations."

It appears, then, the court has interpreted the phrase "for agricultural purposes and exclusively used by the owner in the conduct of his agricultural operation rendered in §321.1(16) to refer to the ownership of the implement rather than the owner of agricultural land. The Court thought this section not clear and ventured that the legislature should have expressed itself further if the statute was intended to have the more restricted meaning.

In light of the Supreme Court's interpretation of §321.1(16) as it is now written, a machine or implement used for agricultural purposes by the owner of the machine would be an "implement of husbandry." Whether or not the owner used it on his own land or another's appears immaterial.

Section 321.1(16) has been amended by the 63rd General Assembly by House File 192 which, when effective, will reinforce the above conclusion.

In that amendment the definition of "implement of husbandry" is broadened to include "any vehicle which is primarily designed for agricultural purposes and which is moved during the daylight hours by a person . . . from one farm site to another farm site." "Farm site" is then defined as "a place or location at which vehicles principally designed for agricultural purposes are used or intended to be used in agricultural operations. . . ." H.F. 192, §1(b)(3). This new language is in addition to the portion of §321.1(16) discussed above, and it does not appear to be merely an enumeration of the old but rather an addition as otherwise the new words would be surplusage without meaning.

Therefore, either with or without the amendment, it is our opinion that a custom owner-operator of agricultural farm equipment would fall within the "implement of husbandry" definition of §321.1(16) of the Code and would be entitled to the same exemptions as a fixed farm owner and operator of agricultural machinery.

September 23, 1969

STATE OFFICERS: Korean War Bonds — Purchase of bonds by State — §35B.2, 1966 Code. Call of bonds in numerical order pursuant to §35B.2 is the only authorized method of early retirement of said bonds. (Ivie to Baringer, Treasurer of State, 9/23/69) #69-9-11

Hon. Maurice E. Baringer, Treasurer, State of Iowa: You have asked whether the State of Iowa has authority to purchase Korean Veterans' Bonus Bonds issued pursuant to Chapter 35B, 1966 Code of Iowa, other than as prescribed by the provisions of that chapter.

From discussions with you, I am aware that some of those bonds are being offered directly for early redemption and further that they are readily available for purchase on the open market at well below par. I am also aware that both of these opportunities exist because the bonds bear interest at the rate of two and one-half percent annual interest until maturity and that they do not appear to be a highly sought after and competitive security on todays inflationary market.

Certainly I do not question that early retirement of these bonds at some level below par could be an economic advantage, nor do I question that you and your staff could effectively compute that level.

But, the bonds themselves were issued pursuant to the provisions of Chapter 35B and §35B.2 establishes authority to call the bonds "in numerical order on six months notice." Purchase on the open market or on voluntary early surrender might legally constitute a call of all like bonds, to the economic detriment of the state. In addition such a maneuver might adversely affect future proposed issue of bonds by the State of Iowa.

Since §35B.2, 1966 Code, seems to describe only one method of early retirement — that is by call — I respectfully suggest this is the only proper method to effect the early retirement of any of these bonds.

September 23, 1969

ELECTIONS: Appointment of mobile registrars — §48.27, Code of Iowa, 1966. Mobile registrars may be appointed for the 1970 general election at any time between the date that registration closed for the 1968 general election and August 1, 1970, provided the lists required have been supplied the commissioner for that purpose from the county chairman of the Republican and Democrat parties. (Haesemeyer to Synhorst, Secretary of State, 9/23/69) #69-9-12

The Hon. Melvin Synhorst, Secretary of State: You have requested an opinion of the attorney general with respect to a question which was submitted to you by Mr. Jay H. Honohan, Iowa City, City Attorney. Mr. Honohan in a letter to you dated August 5, 1969, states:

"The City Clerk has requested that I write to you requesting your opinion as to whether or not it is a requirement under the Iowa Statutes that he appoint mobile registrars at this time. He has received a request to do this by one of the local chairmen so that mobile registrars may register voters for the coming school board election.

"My examination of the applicable statute leads me to believe that it is discretionary with the Clerk. We would appreciate your opinion or an opinion from the Attorney General on this matter."

The question presented is answered by a prior opinion of the attorney general, 66 OAG 187, a copy of which is attached. As stated therein:

"Though the general assembly by [§48.27, Code of Iowa, 1966] has made it mandatory that the mobile deputy registrars be appointed before the first of August preceding any general election, they have not legislated as to whether such registrars may be appointed earlier. Consequently, the appointment of the registrars may be made at an earlier date provided the lists have been supplied to the commissioner for that purpose from the county chairman of the two political parties polling the highest vote in the jurisdiction in the last preceding general election, as

the statute requires. Once these lists have been furnished the commissioner, the question of whether such earlier appointments are to be made or not is a matter left to the discretion of the commissioner. Because the terms of the previous registrars end upon the date registration closes for a general election, the act implies that new registrars may be appointed at any time after that date."

Hence, mobile registrars may be appointed for the 1970 general election at any time between the date that registration closed for the 1968 general election and August 1, 1970, provided the lists required have been supplied the commissioner for that purpose from the county chairmen of the Republican and Democrat parties.

September 23, 1969

STATE OFFICERS AND DEPARTMENTS: Executive Council — Sale of Personal Property of the State — §19.23, Code of 1966. The Executive Council is authorized under the provisions of §19.23, Code of 1966, to sell a pipe organ acquired by the state. There is no statutory requirement that such sale be by public auction. (Strauss to Wellman, Deputy Sec., Executive Council, 9/23/69) #69-9-13

Mr. W. C. Wellman, Deputy Secretary, Executive Council of Iowa: Reference is herein made to yours of the 10th of July, 1969, advising that the Council in their purchase of the Capitol Hill Christian Church, acquired among other things a pipe organ. The Council is proceeding to sell the pipe organ at public auction. You request an opinion as to whether the law requires the employing of services of an Auctioneer for this purpose or if a State employee could serve in this capacity.

In reply thereto, I advise that the Council's authority to make this sale is provided by §19.23, Code of 1966, as follows:

"Disposal of State property. 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."

There is no statutory requirement for the Council to employ the services of an auctioneer for this sale. The Council would be within its authority in having a State employee serve in that capacity.

September 23, 1969

CITIES AND TOWNS: Conflict of Interest — §§368A.22 and 763.4, Code of Iowa, 1966; Chapter 768, Code of Iowa, 1966; Chapter 400, §237, Acts of the 62nd G. A. Neither a mayor nor a mayor's business partner may serve as a bondsman for a criminal defendant appearing before the mayor. Only when a mayor has played no role in determining the amount of bail, may a mayor or a business partner of a mayor serve as bondsman for a criminal defendant on an appeal bond. (Martin to Voorhees, Black Hawk County Representative, 9/23/69) #69-9-14

The Hon. Donald E. Voorhees, State Representative: I have received your letter of July 1, 1969, in which you request an opinion from this office as follows:

1. May a mayor of a municipality who holds court, serve as a bondsman for a criminal defendant in a case pending before him?

2. May a business partner of a mayor of a town serve as a bondsman for a criminal defendant in a case pending before the mayor?

3. If a defendant, found guilty in the mayor's court, appeals his conviction to a higher court, may the mayor or his business partner serve as an appeal bondsman?

Section 368A.22, Code of Iowa, 1966, provides in pertinent part as follows:

"1. When used in this section 'contract' means any claim, account or demand against or agreement with a municipality, express or implied, . . .

"2. No municipal officer or employee shall have an interest, direct or indirect, in any contract or job of work or material or profits thereof or services to be furnished or performed for his municipality."

Section 763.4, Code of Iowa, 1966, as amended by Chapter 400, §237, Acts of the 62nd General Assembly, provides as follows:

"Bail is put in by a written undertaking, executed by one or more sufficient sureties (with or without the defendant, in the discretion of the court, clerk, or magistrate), accepted by the court, clerk, or magistrate taking the same, and may be substantially in the following form:

"County of.....

An order having been made on the.....day of.....,

A.D....., by A.....B.....,

a justice of the peace (or other magistrate), of the township of.....

....., (or as the case may be) that C.....

D.....be held to answer upon a charge of (stating briefly the nature of the offense), upon which he has been duly admitted to

bail in the sum of.....dollars.

"We, E.....F.....and G.....

H....., hereby undertake the said C.....D

....., shall appear at the district court of the county of

....., on the.....day of.....

(month), 19..... (year) (which date shall be not more than twenty days after perfection of the undertaking, and answer said charge, and submit to the orders and judgment of said court, and not depart without leave of the same, or, if he fails to perform either of these conditions, that we will pay to the state of Iowa the sum of.....dollars (inserting the sum in which the defendant is admitted to bail).

E.....F.....

G.....H.....

Accepted by me as.....in the township of.....,

in the county of....., this.....day of

....., A.D.....I.....J.....,

(with official title)."

The suggested form of the bond set out above, indicates that a bail

undertaking is a contract which under your facts would be undertaken between the mayor as a private bondsman and the mayor as a judge of the mayor's court. That the city, in the event of forfeiture, will not receive face amount of the bond, which would be transferred by the mayor to the county to be placed in the school fund, does not affect the impropriety of the contract. Section 368A.22(2) prohibits a municipal officer from having an interest in an agreement with a muncipality to provide services. A bail undertaking is essentially an agreement to provide services. The service provided is to assure the appearance of the defendant when required. If a bondsman-mayor discovers that an accused is about to flee the jurisdiction of the court, the bondsman-mayor may arrest the defendant and bring him before the mayor. Chapter 768, Code of Iowa, 1966.

It therefore appears that a bail bond contract between a mayor, as bondsman, and a mayor, as judge of the mayor's court, is in conflict with and violates the provisions of §368A.22, Code of Iowa, 1966.

For the same reasons, a partner of a mayor may not sell a bond to a criminal defendant appearing before the mayor. The obligation of the bond in all likelihood would be the partnership's, and the mayor is a part of that partnership. Which partner would actually sell the bond is irrelevant.

If bail is taken, for appeal purposes, by a judge or clerk of the district court, or by a judge or clerk of the Iowa Supreme Court, the mayor is no longer, within his official capacity, a party to the contract. Therefore, the provisions of 368A.22 do not apply. This statute, however, does not attempt to catalog all contracts, agreements, or combinations which are improper. The common law is itself a source of doctrine against certain contracts. *Bay v. Davidson*, 133 Iowa 688, 111 N. W. 25 (1907); *Liggett v. Shriver*, 181 Iowa 260, 164 N. W. 611 (1917). Concerning this common law doctrine against contracts which violate public policy, the Iowa court in *Liggett, supra*, stated as follows:

"The term 'public policy' is of indefinite and uncertain definition, and there is no absolute rule or tenet by which it can be always determined whether a contract contravenes the public policy of the state; but each case must be determined according to the terms of the instrument under consideration and the circumstances particular thereto . . . It is the public policy of the government, state and national, to require all public officials, in the performance of the duties of their office, to subordinate every private interest to the public welfare, and to avoid transactions of every kind which may place private interests in antagonism to public duty."

See also Cannons of Judicial Ethics of the American Bar Association, Cannons 24 and 29.

Because, under normal criminal procedure, the trial judge, in this case the mayor, sets the amount of the bond on appeal, there would appear to be a private interest in conflict with a public duty. The bondsman's profit rises as the amount of bail he requires increases. This is just as true when a partner of a mayor serves as bondsman as it is when the mayor serves as bondsman. The only instance in which it would appear proper for a mayor, or a partner of a mayor, to serve as bondsman for a criminal defendant on an appeal, would be a case in which the mayor has played no role in determining the amount of bail.

September 23, 1969

STATE OFFICERS AND DEPARTMENTS: Bureau of Labor inspection of public records, Chap. 106, §7, Acts 62nd G. A. Reports of employment agencies are confidential, and are not subject to public inspection. (Zeller to Addy, Labor Commissioner, 9/23/69) #69-9-15

Mr. Jerry L. Addy, Labor Commissioner, Bureau of Labor: Reference is made to your recent letter of inquiry as follows:

"Our department would like to request an opinion concerning Chapter 106, Section 7, subsection 6, 62nd G. A. Session Laws. Pertinent parts are as follows:

"The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian on 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."

You now have a written request, from a local employment agency to review the files of all employment agencies licensed in the State. Your letter further states:

"These employment agency files consist of the following:

1. Audit reports showing the number, name, and location of placements and the number and amount of fees collected.

"2. Licensing files which contain the schedule of fees, contract, and other information pertinent to the business.

"We would like an opinion as to whether or not these files fall within the exception listed above to the Public Record Law."

Such information if released would surely give an unfair advantage to competition to know the business names of all clients and the fees collected by any particular agency. It is also for you to determine whether these reports if released would serve any public purpose. It is difficult from our point of view to see any public purpose to be served in releasing this information. The competing firm is not engaged in enforcing the law dealing with limitation of fees, and unless there is some clear public purpose for the disclosures of these facts, the request should be denied under the statutory exceptions.

September 23, 1969

STATE OFFICERS AND DEPARTMENTS: Department of Social Services, furnishing legal counsel to welfare recipients and applicants in hearings held to determine eligibility for welfare benefits — §§13.2, 13.5, 234.6, 235.2, 241.4, 241A.4, 249.2, 249A.4, Code of Iowa, 1966. Attorneys on the staff of the attorney general may not be used to represent welfare applicants or recipients in hearings held to consider eligibility for, termination or reduction of welfare benefits. The department of social services has no authority to use any state funds for this purpose but could enter into some arrangement whereby the services of counsel would be made available at no cost to the state. (Turner to Gilman, Commissioner, Iowa Department of Social Services, 9/23/69) #69-9-16

Mr. James N. Gillman, Commissioner, Iowa Department of Social Services: By a letter dated July 17, 1969, from former Commissioner Harmon

an opinion of the attorney general was requested with respect to the following:

"In SRS Program Regulation 10-2, the Department of Health, Education and Welfare requires that all states administering federal public welfare funds shall provide legal services to welfare clients who request them in matters pertaining to client appeals, and in those occasions when a decision of the welfare department adversely affects or cancels the client's welfare payment. A copy of SRS Program Regulation 10-2 is attached.

"Our Department has two concerns on this matter. First, Chapter 13 of the 1966 Code outlines the role of the Attorney General's office in providing legal services for the Department. Thus, this raises the question of whether the Department of Social Services has the authority to provide legal services as required by SRS Regulation 10-2.

"Secondly, does the Department of Social Services have the authority to participate in, endorse, or facilitate the acquisition and utilization of federal matching funds from HEW and enter into a 'third party' arrangement with an agency qualified to provide the services prescribed for in SRS Regulation 10-2?"

A copy of SRS Program Regulation 10-2 is annexed hereto and made a part hereof. As stated in such SRS Program Regulation 10-2 the proposed regulations were published in the federal register of November 30, 1968, and were preceded by a statement that:

"DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Social and Rehabilitation Service
[45 CFR Ch. 11]

Fair Hearings-Public Assistance Programs

Legal Services for Appellants; Continuing Assistance During Appeals

"Notice is hereby given that the regulations set forth in tentative form below are proposed by the Administrator, Social and Rehabilitation Service, with the approval of the Secretary of Health, Education, and Welfare. The proposed regulations relate to public assistance State plan requirements concerning continuation of assistance during a period of appeal and availability of legal services to appellants in fair hearings.

"Prior to the adoption of the proposed regulations, consideration will be given to any comments, suggestions, or objections thereto which are submitted in writing to the Administrator, Social and Rehabilitation Service, Department of Health, Education, and Welfare, 330 Independence Avenue S. W., Washington, D. C. 20201, within a period of 30 days from the date of publication of this notice in the Federal Register."

On December 28, 1968, I duly filed objections to these proposed regulations pointing out that if implemented they would violate Iowa law. By a letter dated December 30, 1968, you also raised strenuous objections to the regulations as proposed. It appears that our objections as well as the protests of other states fell on deaf ears since the proposed regulations now have been adopted without significant change and without any hearings being held to afford objecting states an opportunity to be heard.

Turning to your first question, Chapter 13, Code of Iowa, 1966, does not authorize the use of attorneys on the staff of the attorney general to represent welfare applicants and recipients in cases involving termination or reduction of welfare assistance. On the contrary it is the duty of

the attorney general to represent the state. §13.2, Code of Iowa, 1966. Thus, in any hearing of the type described in SRS Program Regulations 10-2 the attorney general's office would be cast in a role adverse to that of the welfare applicant or recipient. The attorney general cannot be forced to take a position adverse to that of those he is legally bound to advise and represent. *State ex rel Fletcher v. Executive Council,* 1929, 207 Iowa 923, 223 N.W. 737. The same reasoning would apply to the special assistant attorney general appointed to perform and supervise the legal work of the division of child and family services of the department of social services pursuant to §13.5, Code of Iowa, 1966, as amended by §23, Ch. 209, Acts, 62nd G. A. (1967). Since the department of social services has no authority to employ its own attorneys there can be no question of using attorneys on the staff of the department of social services to represent welfare recipients. In any event, even if Iowa law provided attorneys for the staff of the department of social services and permitted their use for this purpose, it is clear that the federal regulations do not. Title 45, Chapter 11, §205.10(a)(2) C.F.R., which is the codification of SRS Program Regulation 10-2 provides, "Attorneys on the staff of the welfare agency may not be used to represent the claimant at fair hearings."

Secondly you ask, "does the Department of Social Services have the authority to participate in, endorse, or facilitate the acquisition and utilization of federal matching funds from HEW and enter into a 'third party' arrangement with an agency qualified to provide the services prescribed for in SRS Regulation 10-2?" We have been unable to find any authority in applicable Iowa law for your department to expend funds appropriated to the department of social services to provide attorneys for welfare applicants and recipients. There are, however, a number of provisions containing rather broad grants of authority to do whatever is necessary to qualify for federal funds. Thus, Chapter 234, Code of Iowa, 1966, as amended by Chapter 209, §216, Acts, 62nd G. A. (1967); House File 435, §69, 63rd G. A. (1969) provides in part:

"234.6 * * *

"The state director shall:

* * *

"Co-operate with the federal social security board created by title VII of the social security Act [42 U.S.C. 901], enacted by the 74th Congress of the United States and approved August 14, 1935, or other agency of the federal government for public welfare assistance, in such reasonable manner as may be necessary to qualify for federal aid, including the making of such reports in such form and containing such information as the federal social security board, from time to time, may require, and to comply with such regulations as such federal social security board, from time to time, may find necessary to assure the correctness and verification of such reports.

* * *"

Chapter 235, as amended by Chapter 154, §2, Acts, 62nd G. A. (1967) relating to child welfare provides in part:

"235.2 The state division, in addition to all other powers and duties given it by law, shall:

* * *

"2. Join and co-operate with the government of the United States through its appropriate agency or instrumentality or with any other officer or agency of the federal government in planning, establishing, extending and strengthening public and private child welfare services within the state.

* * *

"4. Apply for and receive any funds which are or may be allotted to the state by the United States or any agency thereof for the purpose of developing child welfare services.

* * *"

Chapter 241, as amended by Chapter 209, §301, Acts, 62nd G. A. (1967) provides in part:

"241.4 The state director shall:

* * *

"4. Co-operate with the federal social security board, created under title VII of the Social Security Act, approved August 14, 1935 [42 U.S.C. 901] or any other agency of the federal government, in any reasonable manner as may be necessary to qualify for federal aid and assistance to the needy blind and in conformity with the provisions of this chapter; including the making of such reports in such form and containing such information as the federal social security board, or any other agency of the federal government, may from time to time find necessary to assure the correctness and verification of such reports.

* * *"

Chapter 241A, as amended by Chapter 209, §317, Acts, 62nd G. A., relating to aid to the disabled incorporates the provisions of Chapter 234.

"241A.4 Powers. The state director and county board shall, in the administration of this chapter, have the same powers and duties provided for by chapter 234."

The statutes relating to old-age assistance and medical assistance contain similar provisions:

"249.2 * * *

"The state director shall:

"1. Co-operate with the federal social security board, created by title VII of the Social Security Act, Public Law No. 271, enacted by the 74th Congress of the United States and approved August 14, 1935 [42 U.S.C. 901], in such reasonable manner as may be necessary to qualify for federal aid for old-age assistance, including the making of such reports in such form and containing such information as the federal social security board, from time to time, may require, and to comply with such regulations as said federal social security board, from time to time, may find necessary to assure the correctness and verification of such reports.

* * *"

"249A.4 The state board:

* * *

"3. Shall cooperate with any agency of the state or federal government in any manner as may be necessary to qualify for federal aid and assistance for medical assistance in conformity with the provisions of this chapter and Title XIX of the federal Social Security Act, as amended.

* * *"

These attempts to confer on administrative officials of the federal government the power to make and impose requirements relative to the various welfare programs which are not expressly authorized by the law of this state are by their terms very broad and sweeping, totally devoid of any guidelines and likely to have prospective operation. In our opinion they amount to an unconstitutional delegation of legislative power and may not be utilized to authorize the expenditure of state funds to employ counsel to represent welfare applicants and recipients in hearings involving cancellation or reduction of benefits. *Lewis Consolidated School District v. Johnston*, 1964, 256 Iowa 236, 127 N. W. 2d 118, 68 OAG 166.

As stated in 16 Am. Jur. 2d 495, Constitutional Law, §245:

"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.

While state funds or personnel may not be utilized to afford legal representation to welfare applicants or recipients there is no reason that such services may not be furnished to the extent that this can be done without cost to the state. The new regulation apparently contemplates this as §205.10(a)(2) provides in part:

"This may be done through legal service projects under the Office of Economic Opportunity, Legal Aid, or other organizations making legal services available; or through enabling the appellant to engage an attorney or be assigned an attorney in accordance with the procedures of the local Bar Association; or through the use of law students acting under the supervision of a law teacher or of a legal services organization. . . . States are not required to pay to the extent that adequate services are available without cost to the State agency."

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D. C. 20201

TITLE 45 — PUBLIC WELFARE
CHAPTER II — SOCIAL AND REHABILITATION SERVICE
(ASSISTANCE PROGRAMS)
DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PART 205 — GENERAL ADMINISTRATION-PUBLIC ASSISTANCE PROGRAMS

Notice of proposed regulations for the programs administered under Titles I, IV-Part A, X, XIV, XVI, or XIX of the Social Security Act with respect to fair hearings — legal services, continuing assistance, was published in the Federal Register on November 30, 1968 (33 F.R. 17853). After consideration of the views presented by interested persons, the regulations as proposed, with a change providing for use of the services of law students, are hereby adopted. Accordingly, a new Section 205.10 is added to Part 205, Chapter II of Title 45 of the Code of Federal Regulations as set forth below:

Sec. 205.10 Fair Hearings: Legal Services; Continuing Assistance

(a) STATE PLAN REQUIREMENTS: Effective October 1, 1969, a State plan for OAA, AFDC, AB, APTD, AABD, or MA under the

Social Security Act must provide that:

(1) When a fair hearing is requested because of termination or reduction of assistance, involving an issue of fact, or of judgment relating to the individual case, between the agency and the appellant, assistance will be continued during the period of the appeal and through the end of the month in which the final decision on the fair hearing is reached. (If assistance has been terminated prior to timely request for fair hearing, assistance will be reinstated.) Where delays are occasioned during the period of appeal, assistance will be continued if the delay is at the instance of the agency or because of illness of the claimant or for other essential reasons. To the extent that there are other delays at the request of the claimant the agency may but is not required to continue assistance.

(2) The service of lawyers will be made available to welfare applicants and recipients who desire them in fair hearings. This may be done through legal service projects under the Office of Economic Opportunity, Legal Aid, or other organizations making legal services available; or through enabling the appellant to engage an attorney or be assigned an attorney in accordance with the procedures of the local Bar Association; or through the use of law students acting under the supervision of a law teacher or of a legal services organization. Appropriate fee schedules are established or other methods are developed to assure legal representation when desired. Attorneys on the staff of the welfare agency may not be used to represent the claimant at fair hearings. States are not required to pay to the extent that adequate services are available without cost to the State agency.

(b) FEDERAL FINANCIAL PARTICIPATION: Federal financial participation is available in:

(1) Cost for services of lawyers, under the adult categories to represent welfare clients in fair hearings, at the 75% rate, if the State has an approved services plan for the adult categories. The 50% rate would be applicable if the State has no approved plan for services in the adult categories.

(2) Cost for services of lawyers, under Title IV, Part A, to represent clients in fair hearings, at the 85% rate to July 1, 1969, and at the 75% rate thereafter.

(3) Cost for legal services at the applicable rate for clients pursuing judicial review of a fair hearing decision.

(Sec. 1102, 49 Stat. 647, 42 U.S.C. 1302)

Dated: January 15, 1969

/s/ Joseph H. Meyers
Acting Administrator,
Social and Rehabilitation Service

Approved: January 17, 1969
/s/ Wilbur J. Cohen
Secretary

September 23, 1969

LABOR: Employment Agency, Definition Modeling Agency — §§94.6, 95.1 to 95.3, 1966 Code. Any employment agency must be licensed. A theatrical booking agency is not restricted, but a modeling agency is restricted in amount of fees it may charge. (Zeller to Addy, Labor Commissioner, 9/23/69) #69-9-17

Jerry L. Addy, Labor Commissioner, Secretary of Agencies Commission: Reference is made to your recent letter in which you inquire as follows:

"To clarify a question in the Employment Agency Licensing Commission and the enforcement of Chapter 94 and 95 of the Iowa Code, I, as Labor Commissioner and Secretary to the Commission would like to have your formal opinion on the following questions:

"1. 'Is an agency engaged in theatrical bookings required to have a license as an employment agency?'

* * *

"2. 'I would also like to request your opinion as to whether or not modeling agencies are required to have a license and if so, are they subject to the fee limitation?' "

The answer to your first question is provided in the letter of the Attorney General dated July 16, 1963, addressed to the Commissioner of Labor and a copy of this opinion is attached.

In answer to your second question, modeling agencies are also required to have a license. As to the fee limitation provision set forth in §94.6, the statute provides:

"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."

A modeling agency is usually operated to provide fashion models for business purposes and is not operated or directed for the supply or furnishing of theatrical, stage, or platform attractions, or amusement enterprises. In my opinion, therefore, such agencies are subject to the fee provision unless these agencies are used solely for the purpose of procuring personnel for theatrical, stage or platform attractions, or amusement enterprises.

September 23, 1969

COUNTIES AND COUNTY OFFICERS: Liability for medical expenses of student at School for Deaf. Chapters 270, 252, 252A, 255, 1966 Code of Iowa, Chapter 209, §429, Acts of the 62nd G. A. County is not liable for medical expenses under §270.4, but may be liable in certain instances for support of poor if proper procedures are instituted pursuant to Chapter 252, 252A, or 255. (Seckington to Bentz, Madison County Attorney, 9/23/69) #69-9-18

Mr. C. R. Bentz, Madison County Attorney: Some time ago, you requested an opinion of the attorney general as follows:

"Is Madison County liable for . . . medical expenses incurred by a pupil at the School for the Deaf just because the State Comptroller says so even though the legislature has not seen fit to include medical expenses in Code section 270.4?"

Section 270.4, Code of Iowa, 1966, reads as follows:

"When pupils are not supplied with clothing, or transportation, it shall be furnished by the superintendent, who shall make out an account therefor against the parent or guardian, if the pupil be a minor, and against the pupil if he have no parent or guardian, or has attained the age of

majority, which bill shall be certified by him to be correct, and shall be presumptive evidence thereof in all courts."

The Board of Regents and the administration of the School for the Deaf has approved the practice of billing counties for medical expenses pursuant to §270.4, supra in reliance on a letter from Earl F. Wisdom to the Iowa State Board of Education dated December 31, 1932. A copy of that letter is attached.

The Code section referred to above has appeared in the same form since the Code of 1924. Nowhere is there any mention of medical expenses. The statute speaks only of making the county liable for clothing and transportation.

As the Iowa Supreme Court stated in *Consolidated Freightways Corp. v. Nicholas* (1965) 258 Iowa 115, 121, 137 N. W. 2d 900:

"The only legitimate purpose of statutory construction and interpretation is to ascertain the legislative intent, but when the language of the statute is so clear, certain and free from ambiguity and obscurity that its meaning is evident from a mere reading, then the canons of statutory construction are unnecessary, because there is no need of construction and interpretation. We need not, indeed we should not, then search beyond the wording of the statute. *Jones v. Thompson,* 240 Iowa 1024, 1036, 38 N. W. 2d 672, 678."

Certainly, no one can argue that the words "clothing" and "transportation" as used in the statute could be interpreted to include medical expenses regardless of the rule of statutory construction used.

I have reviewed Chapters 252 and 255, 1966 Code of Iowa as amended, and find no provision in those chapters which would permit the school to charge a county for medical expenses. It should be noted that §255.28, 1966 Code of Iowa, was authority for the School for the Deaf to send pupils of the school to the University Hospitals for medical treatment. The medical expense, including transportation to and from ths hospital was to be paid by the institution from which the pupil was sent.

Chapter 209, §429, Acts of the 62nd G. A. states as follows:

"Section two hundred fifty-five point twenty-eight (255.28), Code 1966, is amended as follows:

1. By striking all of lines one (1) through four (4) inclusive, and all of line five (5) up to the word 'may' and by inserting in lieu thereof the words 'The commissioner of the department of social services and the dircetor of any of the divisions of such department,'.

2. By striking from line twelve (12) the word 'boards' and by inserting in lieu thereof the words 'state department of social services.' "

It is clear that the result of this legislation was to abolish the authority of the School for the Deaf to send pupils to the University Hospitals at institutional expense.

As noted above, there is no apparent way under Chapter 270, supra for the school to charge medical expenses back to the county of legal settlement of the person incurring the medical expense.

The above should not be construed to mean that the county has no obligation in matters of this type. So, for example, proper procedures

may be instituted, pursuant to Chapters 252, 252A or 255, to compel the support, including medical expenses, of a poor person.

It is the opinion of this office that §270.4, supra does not include medical expenses, and that the county cannot be charged therefor unless the procedures set out in Chapters 252, 252A or 255, supra have been complied with and the county has been made financially responsible for said expenses in the first instance. The county could, of course, pursue its remedies for reimbursement under those chapters.

September 23, 1969

STATE OFFICERS AND DEPARTMENTS: Highway Commission and Merit Employment — Chapters 95, Acts 62nd G. A.; S.F. 612, Acts 63rd G. A.; H.F. 823, 63rd G. A. The longevity and overtime authorized by H.F. 823, 63rd G. A., are to be paid during the 63rd biennium on rules established by the Highway Commission. (Ivie to Miller, State Representative, 9/23/69) #69-9-19

Hon. Leroy S. Miller, State Representative: You have asked whether or not the provisions of S.F. 612, 63rd General Assembly and the provisions of H.F. 823, 63rd General Assembly are in conflict. More specifically your question is directed to whether or not the "merit system" implemented by the highway commission in 1967, is absorbed by the Merit Employment Department by virtue of Chapter 95, 62nd General Assembly and S.F. 612, 63rd G. A. or whether the provisions of H.F. 823, 63rd G. A. cause the Highway Commission to remain independent thereof during the 63rd biennium.

On April 8, 1969, the attorney general issued an opinion that the personnel administrative functions of the Highway Commission, by virtue of §307.5(3), 1966 Code of Iowa, were not impaired or changed by the passage of Chapter 95, 62nd G. A. We had previously written on March 27, 1969, that this was also true of personnel administrative functions of the Department of Public Safety, by virtue of various sections of Chapter 80, 1966 Code. Similarly on April 16, 1969, the same opinion was issued with reference to the Conservation Commission, by virtue of §107.13, 1966 Code. Throughout the 1966 Code, one could find personnel sections similar to those upon which these rulings were based and it was apparent that, because the law abhors implied repeal of statutes, and because Chapter 95, 62nd G. A. contained the specific repeal of only one section (§8.5(6), 1966 Code), the personnel administrative functions of many boards, departments and agencies remained intact despite the enactment of Chapter 95, 62nd G. A.

On April 4, 1969, S.F. 612, 63rd G. A., was introduced by the committee on State Government. Many proposed amendments to the committee bill were filed thereafter, including at least three that would have added to the list of exemptions from coverage, under the merit system, the "employees and staff of the Iowa state highway commission." All amendments directed to the exempting of the highway commission failed.

In its final form, as signed by the Governor, S.F. 612, 63rd G. A., contained the following provision:

"The Provisions of this Act, including but not limited to its provisions on employees and positions to which the merit system apply, shall prevail

over any inconsistent provisions of the Code, including the Acts of the Sixty-second General Assembly, and all subsequent Acts unless such subsequent Acts provide a specific exemption from the merit system."

Thus it is clear that, absent finding a specific legislative exemption to the contrary in some section of the Code, or in "subsequent Acts." The highway commission became subject to the provisions of Chapter 95, 62nd G. A., as amended by S.F. 612, 63rd G. A.

I am unable to find any such specific legislative exemption as would affect the highway commission coverage. H.F. 823, 63rd G. A., to which you refer, does create interpretative problems in that:

(1) Appropriations are made for the payment of salaries plus *longevity.*

(2) Authorization for use of appropriations *"for overtime pay of employees involved in technical trades"* is specifically authorized. (Emphasis supplied)

Pursuant to the mandate of Chapter 95, §9(2), 62nd G. A., a pay plan for state employees covered by Chapter 95, as amended by S.F. 612, 63rd G. A., has been adopted by the Merit Employment Commission and approved by the Executive Council. That plan is silent as to the payment of longevity and overtime. Similarly, Chapter 95, 62nd G. A., as now amended, is silent as to such payments.

Where the legislature specifically authorizes longevity and overtime, such payments are authorized in addition to the compensation established under the pay plan previously referred to. In this regard, we said in an opinion on *July 26, 1967,* that longevity payments are distinguishable from salary. (See copy attached.) But, prior to the enactment of Chapter 95, 62nd G. A., the payment of longevity was a part of a compensation plan adopted by the Executive Council. §8.5(6), 1966 Code, which was specifically repealed by Chapter 95, 62nd G. A., was the authority for planning and controlling salaries and other compensation. With the repeal of that section, no rules now exist for determination of payment of longevity, an anomalous situation.

On July 14, 1969, there were filed in the office of the Secretary of State, pursuant to the requirements of Chapter 17A, 1966 Code of Iowa, rules involving the payment of overtime to state employees. (See Chapter 4, Sec. 6, IRCP — Merit Employment Commission.) At the time they were filed, they were accompanied by an opinion from this office indicating that adoption of such rules did not create authorization for payment of overtime by state agencies, boards and departments absent statutory authorization to those entities to make such payments.

No rules are on file which purport to deal with longevity. And, further, Chapter 95, 62nd G. A., as amended, contains no reference to either longevity or overtime, specifically.

The General Assembly, in specifically authorizing the payment of longevity and overtime in H.F. 823, 63rd G. A., did not set any guidelines for payment of these items. Perhaps this was due to the fact that, for many years, under a personnel plan approved by the Executive Council pursuant to §8.5(6), 1966 Code, longevity rules had existed. In addition, the Highway Commission, in December, 1967, adopted their own rules

with regard to longevity.

In reviewing those rules, I find them to be in keeping with the former rules as approved by the Executive Council.

The Comptrollers' office has assured me that the Highway Commission authority to pay overtime and the line item appropriations for longevity in H.F. 823, 63rd G. A., were included in the act after budget computations based upon the Highway Commission Personnel Procedures adopted in December, 1967. The significance of this is threefold:

(1) The pay plan adopted under the provisions of Chapter 95, Acts 62nd G. A. as amended, was to be "within the purview of an appropriation made by the General Assembly." Budget limitations are specifically a primary control.

(2) The rules governing payment of overtime were not promulgated by Merit Employment Commission at the time H.F. 823, 63rd G. A. was enacted, and, as previously stated, no rules on longevity have yet been promulgated by that Commission.

(3) The overtime rules of Merit Employment Commission are more liberal than those employed by the Highway Commission in its 63rd Biennium budget. Under the Merit Employment Commission rules, a standard work week of forty hours in a seven day period, or 80 hours in a fourteen day period, is established. (See §4.6(1)i(1) — Merit Rules). On the other hand, the Highway Commission overtime pay, for those eligible, is geared to Saturday and Sunday work and does not relate to the hours worked during the regular five day week.

It seems apparent, therefore, that, in order to effectuate the provisions of H.F. 823, 63rd G. A., with regard to longevity and overtime, the proper rules to be applied to govern such payments during the 63rd Biennium would be those rules of the Highway Commission established in December, 1967. Even the Merit Rules with regard to overtime, §4.6(1)i(2) specifically, recognize the limitation of the rules based on budgetary limitations.

For the reasons set out above, Chapter 95, Acts 62nd G. A. as amended, and H.F. 823, 63rd G. A. are not in conflict although the Highway Commission is now subject to the provisions of Chapter 95 62nd G. A. as amended.

September 24, 1969

SCHOOLS: Funds — §453.1, Code of Iowa, 1966. Where the school board has directed that certain school funds be deposited in certain banks it is the duty of the treasurer to obey the mandate of the school board. (Nolan to Graven, Sac County Attorney, 9/24/69) #69-9-20

Mr. Jim J. Graven, Sac County Attorney: This is in response to your letter of August 8, 1969, requesting an opinion of this office interpreting §453.1 of the Code of Iowa as amended by Ch. 359 Acts of the 62nd General Assembly. Specifically the question you have presented is whether or not the school board may designate which bank accounts are to be placed in each of the two depositories as have been approved. Your letter states:

"The school board has directed the school treasurer to place the general fund in a specified bank even though there is another bank which has

been approved as a depository and in which some funds are on deposit in other accounts. The school treasurer maintains that he should be able to determine which accounts are to be placed in the depositories and that the function of the school board is only to select the depositories."

Our search of the precedents available indicates that the school treasurer is the one who must select the depository and the selection thereof must be approved or disapproved by the board of directors. Opinion Attorney General 1934, page 304. Subsequently, in an opinion issued on October 14, 1965, this office advised that the treasurer of a school district is not required to keep separate bank accounts where the statutory language requires a separate account for each fund, but that it is better practice to do so.

We have considered the 1936 opinion of the Attorney General appearing on page 409 of the 1936 Reports which indicates that the duty of the board is to *designate* and *approve* the bank or banks to be the official depository of public funds and that further such board must specify the amount that may be kept on deposit in each such bank. Where the school board has directed that certain funds be placed in certain banks it is the duty of the school treasurer to obey the mandate of the school board. 1925, 1926 OAG, page 384.

September 24, 1969

STATE OFFICERS AND DEPARTMENTS: Educational TV — §8.14, Code of Iowa, 1966; Ch. 88, Laws 62nd G. A. State Educational Radio and Television Board is authorized to make some purchases without having the purchase orders approved by the Executive Council. (Nolan to Montgomery, Exec. Director, State Educational Radio and TV Facility Board, 9/24/69) #69-9-21

Mr. John A. Montgomery, Executive Director, State Educational Radio and Television Facility Board: This replies to your letter of August 14, 1969. You have requested an opinion on the following question:

"Is the State Educational Radio and Television Facility Board required to purchase through the Executive Council, or do they have the power to purchase without having their purchase orders aproved by the Executive Council?"

Your letter further quotes from a letter which you received from the comptroller dated August 13, 1969, and which states:

"I truly believe, to protect both you and myself, that we should require Executive Council approval on all purchases, unless we do have a formal opinion to the contrary.

"Hence, this office will require Executive Council approval until such time as the Attorney General's office says it is not required."

Ch. 88 of the Laws of the 62nd General Assembly which creates the State Educational Radio and Television Facility Board specifically empowers the board:

". . . to purchase or lease property, equipment, and services and to improve same for proper educational communication uses, and to dispose of property and equipment when not necessary for other purposes." (§15)

This section of the Code authorizes the board to make purchases di-

rectly and without going through the Executive Council. The term property, not being otherwise restricted, should be interpreted as meaning both real and personal property.

Chapter 19, (Senate File 682), 1st Session, 63rd General Assembly, is an appropriation for the Educational Radio and Television Facility Board and provides that the provisions of Ch. 8 of the Code shall apply to the appropriations made for the biennium 1969-1971. However, Ch. 8 while providing for budget and financial control does not require approval of purchases by the Executive Council where there is other express statutory authority therefor. See §8.14. Consequently, it is our view that the comptroller should approve a claim arising from a purchase made by the State Educational Radio and Television Facility Board even though such purchase is not approved by the Executive Council, where the claim submitted otherwise complies with §8.14, Code of 1966.

September 24, 1969

SCHOOLS: Area Colleges — §280A.23, §296.1, Code of Iowa, 1966. There is no statutory authority for area college superintendents to be provided rent free housing on the campus in addition to the salary provided by law. (Nolan to Stephens, State Senator, 9/24/69) #69-9-22

The Hon. Richard L. Stephens, State Senator: This is in response to your letter of August 19, 1969 concerning the action by the Area X Vocational School Board in Cedar Rapids with respect to the purchase of a house to provide the superintendent of Area X rent free housing on the campus. According to your letter, the board is now taking over a house on the campus by purchasing the purchase contract for $2,500 and proposing to spend $15,000 to remodel the house and "then allow the superintendent of Area X to live in it rent free. The board admits that this is done to give the superintendent fringe benefits above his $25,000 salary." You then request an Attorney General's opinion on whether "the Area School superintendents are able to receive any such proposed fringe benefits in addition to a $25,000 salary."

The salary limitations for Area School superintendents were set by the 62nd General Assembly (§14, Ch. 244, Laws 62nd G. A.) by adding a new subsection to §280A.23, Code 1966. The amendment provided:

"The area board, when setting the salary of the area superintendent, shall take into consideration the salaries of administrators of educational institutions in the area, and the enrollment of the area schools; the salary range shall be from seventeen thousand (17,000) dollars to twenty-five thousand (25,000) dollars per annum. The superintendent shall not be required to hold any teacher's certificate."

We find nothing in this provision to permit free housing for the area superintendent in addition to his salary. §280A.23 also provides in subsection 4 that area boards 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 Ch. 279."

There is nothing in Ch. 279, Code of Iowa, which authorizes the board to acquire and remodel a home to provide rent free housing for the superintendent.

There is, however, in §296.1 of the Code of Iowa power for a school corporation when authorized by approval of the voters thereof:

". . . to contract indebtedness and to issue general obligation bonds to provide funds to defray the cost of purchasing, building, furnishing, reconstructing, repairing, improving or remodeling a schoolhouse or schoolhouses and additions thereto, gymnasium, stadium, field house, school bus garage, teachers' or superintendent's home or homes, and procuring a site or sites therefor, or purchasing land to add to a site already owned, . . ."

The provision cited is, however, not available to the board of an Area School District. Therefore, we are of the opinion that the area school superintendents are not able to receive fringe benefits in the form of rent free housing on the campus in addition to the salary provided for them by law.

September 24, 1969

MOTOR VEHICLES: Implement of Husbandry — Special Mobile Equipment, Permissive Registration, Ch. 198, Acts of 63rd G. A., 1st Sess.; §§321.1(16), 321.1(17), 321.18, 321.21, 321.57 to 321.63, 321.383, 321.384 to 321.429, Code of Iowa, 1966. (1) All types of special mobile equipment including vehicles designed for agricultural purposes may be issued special plates as special mobile equipment upon payment of a $3.00 fee. However, the issuance of such plates does not constitute a "registration." (2) Agricultural type vehicles to which are issued special plates as special mobile equipment cease to be implements of husbandry but are still granted the exemption contained in §321.383. (3) Persons seeking to obtain special plates need not be a manufacturer, transporter, or dealer. (4) The fifty mile limitation on movement of vehicles principally designed for agricultural purposes contained in §321.1(16) does not apply to special mobile equipment registered as such or moved under the provisions of §§321.57 and 321.63. (Zeller to Fulton, Dept. of Public Safety, 9/24/69) #69-9-23

Jack M. Fulton, Commissioner, Department of Public Safety: Reference is made to your recent letter which is as follows:

"Section 321.18 Code of Iowa 1966 provides that any motor vehicle, trailer, and semitrailer when driven or moved on a highway shall be subject to the registration provision of this chapter except: . . . 3. Any Implement of Husbandry.

"The first session of the 63rd General Assembly amended the definition of Implement of Husbandry as set out in Subsection 16 of Section 321.1 Code of Iowa 1966 so that it now reads as follows: 'Implement of husbandry' means every vehicle which is designed for agricultural purposes and exclusively used, except as herein otherwise provided, by the owner thereof in the conduct of his agricultural operations. Implements of husbandry shall also include:

"A. * * *

"B. Any vehicle which is principally designed for agricultural purposes and which is moved during daylight hours by a person either:

(1) From a place at which such vehicles are manufactured, fabricated, repaired, or sold at retail to a farm site;

(2) To a place at which such vehicles are manufactured, fabricated, repaired, or sold at retail from a farm site; or

(3) From one farm site to another farm site. For the purpose of this

subsection the term 'farm site' means a place or location at which vehicles principally designed for agricultural purposes are used or intended to be used in agricultural operations or for the purpose of exhibiting, demonstrating, testing or experimenting with the same, provided, however, that said place or location shall not be deemed a 'farm site' if the movement of said vehicle, from or to the place at which vehicles principally designed for agricultural purposes are manufactured, fabricated, repaired, or sold at retail, exceeds a distance of fifty miles.

"Notwithstanding the other provisions of this subsection any vehicle covered thereby if it otherwise qualifies may be registered as special mobile equipment, or operated or moved under the provisions of sections three hundred twenty-one point fifty-seven (321.57) to three hundred twenty-one point sixty-three (321.63) of the Code, inclusive, if the person in whose name such vehicle is to be registered or to whom a special plate or plates are to be issued elects to do so and under such circumstances the provisions of this subsection shall not be applicable to such vehicle, nor shall such vehicle be required to comply with the provisions of sections three hundred twenty-one point three hundred eighty-four (321.384) to three hundred twenty-one point four hundred twenty-nine (321.429) of the Code, inclusive, when such vehicle is moved during daylight hours, provided however, the provisions of section three hundred twenty-one point three hundred eighty-three (321.383) of the Code, shall remain applicable to such vehicle.

"Subsection 4 of Section 321.18 Code of Iowa 1966 also provides that special mobile equipment is exempt from registration.

"We therefore ask the following questions:

"1. Does the word 'Registered' as used in the last paragraph of Subsection 16 of Section 321.1 Code of Iowa 1966 mean that special mobile equipment may now be registered; does the word mean that certain types of special mobile equipment may be registered or does the word registered have any legal efficacy whatsoever?

"2. If implements of husbandry or agricultural type vehicles can be registered do they then cease to be implements of husbandry, hence not allowing the exemptions of Section 321.383 Code of Iowa 1966?

"3. Since the provisions of Sections 321.57 through 321.63 Code of Iowa 1966 apparently apply only to manufacturers, transporters and dealers in vehicles required to be registered, does this mean that a person who wishes to obtain the special plates referred to in Subsection 16 of Section 321.1 Code of Iowa 1966 must be either a manufacturer, transporter or dealer and licensed as such?

"4. If the answer to number 3 is yes does this not create a conflict with Subsection 16 of Section 321.1 Code of Iowa 1966 since the language of that subsection is couched in terms of permissive registration as opposed to terms of mandatory registration used in Subsections 38, 39, and 40 of Section 321.1 Code of Iowa 1966?

"5. Is the 50 mile movement limitation in Subsection 16 of Section 321.1 Code of Iowa 1966 applicable to all vehicles as defined by that subsection or is the limitation only partially applicable?"

§321.1(17) defines "Special mobile equipment" to mean:

". . . every vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways, . . ."

§321.21 provides:

"1. A person owning any special mobile equipment as herein defined may make application to the department, upon the appropriate form fur-

nished by the department, for a certificate containing a general distinguishing number and for one or more pairs of special mobile equipment plates or single special mobile equipment plates as appropriate to various types of special mobile equipment. The applicant shall also submit proof of the status of the vehicle or vehicles as special mobile equipment as may reasonably be required by the department.

"2. The department upon granting such application, shall issue to the applicant a certificate containing, but not limited to, the applicant's name and address and the general distinguishing number assigned to the applicant and such other information deemed necessary by the department for proper identification.

"3. The department shall also issue special mobile equipment plates as applied for, which shall have displayed thereon the general distinguishing number assigned to the applicant. Each plate or pair of plates so issued shall have displayed thereon the words: Special Mobile Equipment. The fee for each plate or pair of special plates shall be three dollars."

§321.1(16) as amended provides a new definition for "implements of husbandry" which includes vehicles which are "principally designed for agricultural purposes," but which are moved by any person from or to a "farm site" for the purpose of exhibiting, demonstrating, or testing or experimenting with the same, or using them in agricultural operations.

However such vehicles may also be described as special mobile equipment, and for that reason, the statute, §321.1(16) states that these vehicles, if they qualify as special mobile equipment under the definition, may be registered or identified as special mobile equipment, and special equipment plates may be issued to the owner. The fee for such pair of special plates shall be $3.00. But the statute also provides in §321.21(6) that:

"The certificate and plates issued hereunder shall not constitute a 'registration' as required under the provisions of this chapter. . . ."

Therefore in answering your first question, I am of opinion that all types of special mobile equipment, including these vehicles designed for agricultural purposes may be registered or identified by special plates as special mobile equipment, for a fee of $3.00. But the issuance of these plates to the owners of special mobile equipment does not constitute a "registration," as required under this article. The word "registration" and vehicle subject to "registration" are specifically stated in §321.18, and do not include either article of husbandry or special mobile equipment, or vehicles moved upon the highway by manufacturers, dealers or transporters, pursuant to §§321.57 and 321.58.

Second, if agricultural type vehicles are reported and granted special plates with a number as special mobile equipment, pursuant to this section, they cease to be implements of husbandry, but are still granted the exemptions of §321.383 by the last sentence of §1 of this recent amendment of §321.1(16).

Third, the person who wishes to obtain the special plates referred to in §321.1(16) need not be a manufacturer, transporter, or dealer. He may be a farmer who owns special mobile equipment, as above defined, and who may apply for a certificate containing a distinguishing number and for special mobile equipment plates. He may be any person, and is not required to be a "dealer" as defined, or a transporter, or manufacturer

or licensed as such.

Fourth, since the answer is "no" to the previous question, there is no conflict with §321.1(16) which deals with permissive application for a number by the owner of special mobile equipment, and the issuance of pairs of special mobile equipment plates on payment of a fee of $3.00, for each vehicle so designated.

Fifth, the 50 mile limitation on movement applies only to vehicles principally designed for agricultural purposes which are being moved in daylight hours as implements of husbandry from or to a farm site for the purposes stated in the amendment. If registered as special mobile equipment or moved under provisions of §§321.57 to 321.63, "the provisions of this subsection shall not be applicable to such vehicle," and the fifty mile limitation therefore is not applicable, when such vehicle is moved during daylight hours.

September 24, 1969

SCHOOLS: State aid to high school districts — Ch. 356, Acts of 62nd G. A.; §282.8, Code of Iowa, 1966. Pupils sent to attend school in another state may be treated as pupils of districts where they reside for purposes of computing state aid. (Nolan to Johnston, Supt. of Public Instruction, 9/24/69) #69-9-24

Mr. Paul F. Johnston, Superintendent, Department of Public Instruction: By your letter of May 16, 1969, you have requested an opinion in connection with the computation of state aid to school districts under Chapter 356, Acts of the 62nd G. A., §442.12 I.C.A. The formula for the computation of state aid uses as a factor "average daily membership" in each public high school district.

A certain border school district sends some of its pupils to a public school in another state under the provisions of §282.8, Code 1966, and wished to count those pupils in its average daily membership which you state would appear to be in conflict with the general provisions.

§442.12, *supra,* provides:

"The average daily membership for each public high school district shall be determined by dividing the aggregate sum of the pupil membership 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."

§282.8, *supra,* provides:

"The Board of Directors of school districts located near the state boundaries may designate a school or schools of equivalent standing across the state line for attendance of both elementary and high school pupils when the public school in the adjoining state is nearer than any appropriate public school in his district of residence or in Iowa, as provided in §282.17. Arrangement shall be subject to reciprocal agreements between the state superintendent of public instruction of the respective states subject to statutory limitations as to tuition and transportation. *A person attending school in another state shall continue to be treated as a pupil of the district of his residence in the apportionment of the current school fund and the payment of state aid.*" [Emphasis added]

It is my opinion that where school districts qualify under the special

classification set out in §282.8, all pupils of that district including those attending school in another state are to be counted for purposes of determining average daily membership. There is ample authority to support the principle that when a general statute is in conflict with a specific statute, the later ordinarily prevails, whether enacted before or after the general statute. *Ritter v. Dagel,* 1969 ..... Iowa....., 156 N. W. 2d 318, citing *Kruse v. Gaines,* 258 Iowa 983, 139 N. W. 2d 535.

September 24, 1969

CITIES AND TOWNS: Constitutional law. Withholding from wages of city employees for credit union purposes — Art. III, §40, Constitution of Iowa. Under the home rule amendment to the constitution adopted in November 1968, a city council could now authorize municipal employees to authorize deductions from such employees wages for credit union purposes. (Turner to Smith, Auditor of State, 9/24/69) #69-9-25

The Hon. Lloyd R. Smith, Auditor of State: You have requested an opinion of the attorney general with respect to the following:

"Considerable question is being raised as to the right of power of cities to install a 'check off' system, and proceed to check off employees pay for distribution by the 'check off' system. This office has been informed that the so-called 'check off' is being used in numerous cases for employee's Credit Union purposes.

"Your opinion is respectfully requested as to whether or not cities may check off from employees wages for Credit Union or any other purpose, and if so, whether or not Council approval of the 'check off' is necessary."

The law relative to credit unions, Chapter 533, Code of Iowa, 1966, by its express terms neither permits nor prohibits deductions from the pay of municipal employees for credit union purposes. Elsewhere in the code are a number of provisions which expressly require or permit employees to authorize deductions from their wages or salaries for various purposes. Thus, a city employee may authorize his employer to make deductions from his salary for contributions to a group insurance plan. §509.17. Similarly, an employee of a city or town may authorize a deduction from his wages of subscription payments to a nonprofit hospital service plan, medical service plan or pharmaceutical service plan. §514.16. In a number of cases the law requires deductions from salaries. Two obvious instances are, of course, the federal and state income tax withholding requirements. In addition §§98B.11 and 97C.6 respectively require deductions to be made for the Iowa public employees retirement system and federal social security purposes.

Prior to the approval by the people at the 1968 general election of the home rule amendment to the constitution of Iowa, it seems likely that application of the maxim *expressio unius est exclusio alterius* and the well-known Dillon rule would have compelled the conclusion that deductions from the wages of municipal employees for credit union purposes would not be authorized. However, the home rule amendment is now part of the constitution of this state. Art. III, §40, provides:

"Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly.

"The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state."

While as noted above there is no express statutory authorization for deductions for credit unions from the wages of municipal employees, so also there is no express prohibition against such deduction. Accordingly, it is our opinion that a city council could now authorize municipal employees to authorize deductions from such employees' wages for credit union purposes.

September 24, 1969

CITIES AND TOWNS: Exercise of power of eminent domain for public library purposes. §§368.37, 368.38 and 378.1, Code of Iowa, 1966. Cities and towns may utilize the power of eminent domain for library purposes. (Haesemeyer to Grafton, Director, Iowa State Traveling Library, 9/24/69) #69-9-26

Miss Ernestine Grafton, Director, Iowa State Traveling Library: By your letter of September 12, 1969, you have requested an opinion of the attorney general with respect to the following:

"To confirm our telephone conversation of today, we are in need of some advice and a legal decision on condemnation procedures for a public library acquiring land for a new building.

"First, would you outline the procedures required for condemning land for public buildings. Second, could you rule that a public library is a public building by virtue of the fact that the library is established by the city, the board is appointed by the Mayor and the City Council, and the appropriation is made from the Municipal Enterprises fund.

"This is an inquiry from the Cedar Rapids Public Library and time is pressing on them, so could you take care of this at your earliest convenience."

The answer to your first request is found in Chapter 472, Code of Iowa, 1966. Since the eminent domain procedures set out in such chapter are fairly lengthy I am enclosing a copy thereof rather than trying to outline the entire chapter in this opinion.

Prior to 1951 the law made specific provision for condemnation of real estate for library purposes. However, this authority which was found in §403.3, Code of Iowa, 1950, was repealed by Chapter 151, §41, Acts, 54th G. A. (1951). Thus, we must look elsewhere for authority for the use of the power of eminent domain for library purposes. §§368.37 and 368.38, Code of Iowa, 1966, provide respectively:

"368.37 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 The procedure for the condemnation of land by municipal corporations shall be that provided by chapter 472."

It should be noted that the foregoing two sections dealing with the general power of municipalities to exercise the power of eminent domain

were enacted by the same Act of the general assembly which repealed §403.3, Code of Iowa, 1950, that is, Chapter 151, Acts, 54th G. A. (1951). Such Chapter 151 was in effect a recodification of the law relating to the general powers of municipal corporations. In fact in the Session Laws it is described as: "An Act relating to the general powers of municipal corporations and to repeal chapter three hundred sixty-eight (368) of the code, relating thereto, and certain other sections of the code, relating thereto and to enact a substitute therefor and to amend various sections of the code relating thereto." In addition to §403.3 of the 1950 Code which, as we have seen, relates to specific authority for cities and towns to condemn land for library purposes Chapter 151 also repealed §§391A.3 and 403.1 of the 1950 Code which formerly gave cities and towns specific power of condemnation to acquire real estate for respectively, street improvements and sewers, and an itemized list of other specific purposes. Thus, the language of §§368.37 and 368.38 of the 1966 Code which gives cities and towns the power of condemnation in general terms for any public purpose was substituted for a number of previous statutory provisions which individually conferred the power of condemnation for specified public purposes. It would seem, therefor, that §368.37 could be utilized by a municipal corporation to condemn land for library purposes. Apart from the foregoing I do not think that anyone could seriously contend that the establishment of a public library is not a public purpose. In this connection see §378.1, Code of Iowa, 1966, which provides in part:

"378.1 Cities and towns may provide for the formation and maintenance of free public libraries open to the use of all inhabitants under proper regulations, and may purchase, erect, or rent buildings or rooms suitable for this purpose and provide for the compensation of necessary employees."

I should perhaps point out that it is only the city or town and not the board of library trustees which has the authority to exercise the power of eminent domain.

September 24, 1969

STATE OFFICERS AND DEPARTMENTS: Executive Council — power of eminent domain — §§306.13, 306A.5, 313.4, 471.1, Code of Iowa, 1966. Council may use its power of eminent domain to assist the Highway Commission in acquiring a site for a maintenance facility where funds have been appropriated therefor. (Turner to Robinson, Sec. Executive Council, 9/24/69) #69-9-27

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: You have asked whether the Executive Council may use its power of eminent domain to assist the Highway Commission in acquiring a site for maintenance facility. It is my opinion, for the reasons outlined below, that the Council is authorized to use its condemnation power for that purpose.

The Highway Commission has power of its own to condemn "the necessary right of way" for "the maintenance, relocation, establishment, or improvement" of roads, and also to condemn "land necessary for highway drainage, for weighing stations, or land containing gravel or other suitable material for the improvement or maintenance of highways, together with the necessary road access thereto." §306.13, Code of Iowa, 1966. The Commission has the same powers with respect to controlled-access facilities under §306A.5. This authority does not fairly include

condemnation of land to serve as a maintenance shed site. Although the statute authorizes the condemnation of land necessary for "maintenance" of roads, it is only "right of way" that may be so condemned. See further 1956 OAG 8.

But the primary road fund can be used by the Commission to acquire a maintenance shed site by means other than condemnation. §313.4 provides, in relevant part:

"Said primary road fund is hereby appropriated for and shall be used in the . . . maintenance of the primary road system, . . . all other expense incurred in the . . . maintenance of said primary road system and the maintenance and housing of the state highway commission."

See also, 1968 OAG 494.

The Executive Council's power of eminent domain is set out in §471.1, Code of Iowa, 1966:

"Proceedings may be instituted and maintained by the state of Iowa, or for the use and benefit thereof, for the condemnation of such private property as may be necessary for any public improvement which the general assembly has authorized to be undertaken by the state, *and for which an available appropriation has been made. The executive council shall institute and maintain such proceedings in case authority to so do be not otherwise delegated.*" (Emphasis added.)

Since the legislature has authorized the Highway Commission to acquire maintenance sites and has appropriated funds therefor, (Ch. 16, 62nd G. A. 1967), and since the commission has not been delegated the power to condemn land for that purpose, it is my opinion that the executive council may, in the exercise of its sound discretion after giving due regard to all of the circumstances, use its condemnation power for that purpose under §471.1.

September 25, 1969

STATE OFFICERS AND DEPARTMENTS: National Guard — Pay allowances while in active state service — §29A.27, Code of Iowa, 1966. Officers and enlisted men of the Iowa National Guard in active state duty are entitled to the same pay and allowances as are paid for the same rank and service in the United States Army. (Strauss to Major General Joseph G. May, Adjutant General, 9/25/69) #69-9-28

Joseph G. May, Major General, The Adjutant General: Reference is herein made to yours of the 3rd of September, 1969, in which you submitted the following:

"Chapter 29A, Code of 1966, is titled 'Military Code' and governs the administration of the Iowa National Guard while not in Active Federal Service.

"Section 29A.27 provides, in part, as follows:

" 'PAY AND ALLOWANCES — injury or death benefit board. Officers and enlisted men while in active state service shall receive the same pay and allowances as are paid for the same rank or grade for service in the armed forces of the United States. When in active state service, except when such service is for the purpose of training, enlisted men shall receive additional pay in the sum of five dollars per day; provided, however, that no employee of the state who receives pay from the state as such employee during said active state service shall receive the additional pay herein provided for enlisted men.'

"The following Iowa Attorney General Opinions pertain to the above matter:

" 'It was not within power of commander-in-chief or of any officer or person to fix a different compensation for officers and men who were called out to engage in competitive target practice than that fixed by statute. Op. Atty. Gen. 1906, p. 218.

" 'Where compensation was fixed by statute for performance of any duty, the person performing such duty was entitled to the compensation fixed and no increase or diminuation of such compensation could be made. Id.

" 'Officers and enlisted men of the Iowa State Guard while in active service shall receive the same pay and allowances as paid for same rank or grade for service in the army of the United States. Op. Atty. Gen. 1942, p. 166.'

"Certain few Iowa National Guardsmen, including the Governor's Aide and pilot, are in full time 'Active State Duty' status in the employment structure of the Military Division of this Department. Inasmuch as the above Opinions are very old, and one pertains to the 'Iowa State Guard,' a current opinion is respectfully requested as to whether or not it is mandatory, under the law, to pay such individuals 'the same pay and allowances as are paid for the same rank or grade for service in the Armed Forces of the United States.' "

The language of §29A.27 is clear on its face and the prior opinions of the attorney general are still valid.

For these reasons it is our opinion that the provisions of the §29A.27, Code of 1966, are mandatory and the officers and enlisted men of the Iowa National Guard in active state duty are entitled to the same pay and allowances as are paid for the same rank and service in the United States Army.

September 25, 1969

STATE OFFICERS AND DEPARTMENTS: Approval required for printing not expressly required by law — §15.43, Code of Iowa, 1966. Chapter 1, §59, Acts of the 61st G. A. (1965) which required that all printing not expressly authorized by law be approved by the executive council did not become a part of the permanent law and did not repeal by implication code section 15.43 which requires such approval by the budget and financial control committee and by the state printing board. (Haesemeyer to Robinson, Sec., Executive Council, 9/25/69) #69-9-29

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: Reference is made to your letter of September 3, 1969, in which you state:

"The Executive Council, in its meeting held August 18, 1969, directed that I obtain from you an official opinion in regard to the request for printing made by various state departments. I conferred with Mr. Wayne Faupel, Code Editor, and he relates the following history:

"In Chapter 1.53 of the Acts of the 58th General Assembly, the following language appears:

'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.'

"This same language appeared in 1.57 of the Acts of the 59th General Assembly. Mr. Faupel, as Code Editor, concluded that this was part of the permanent law of the state and included same in the 1962 Code of Iowa at Section 15.43.

"In Chapter 1.57 of the 60th General Assembly the same provision was again included with the same language. In Chapter 1.59 of the Acts of the 61st General Assembly the legislature changed the provisions as follows:

'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 executive council. A violation of this section shall constitute malfeasance in office.'

"This gave the authority to approve printing requests to the Executive Council. You will note also that the penalty change is from misfeasance to malfeasance. Meanwhile, the Code Editor included in the 1966 Code of Iowa the same provision of Section 15.43 as in the 1962 edition which required the approval of the B & FCC.

"The 62nd General Assembly and the first session of the 63rd General Assembly enacted no legislation in this regard. There seems to be no question that the Code Editor was authorized to include the provisions of the 58th and 59th General Assemblies in the 1962 Code of Iowa. Thus, is there an implied repeal of Section 15.43 by Section 1.59 of the Acts of the 61st General Assembly or is Section 1.59 of the Acts of the 61st General Assembly a provision that is applicable only for a period of two years during which the biennial appropriations are made?"

In our opinion §1.59, Acts, 61st G. A. (1965) did not become a part of the permanent law of this state and was in effect only for the biennium ending June 30, 1967. Such §1.59 did not constitute an implied repeal of §15.43, Code of Iowa, 1962, and such §15.43 remains a part of the code. It is well settled in Iowa that repeal by implication is not favored and it will not be found unless the intent to repeal clearly and unmistakably appears from the language of a latter statute and such holding is absolutely necessary. *Northwestern Bell Telephone Company v. Hawkeye State Telephone Company*, 1969, ...Iowa....., 165 N. W. 2d 771.

September 26, 1969

COUNTIES AND COUNTY OFFICERS: Sheriff's duty with respect to the issuance of concealed weapon — Chapter 695, Code of Iowa, 1966. It is the mandatory ministerial duty of each county sheriff to issue a permit to carry a revolver, pistol or pocket billy, to any peace officer who is a resident of his county and who makes application for such. With respect to "other such persons who are residents of his county," the sheriff may, in the proper exercise of his discretion, determine that such person should not go so armed, and refuse to issue a permit. (Turner to Carr, Delaware County Attorney, 9/26/69) #69-9-30

Mr. E. Michael Carr, Delaware County Attorney: By your letter of August 20, 1969, you have requested an opinion of the attorney general as to whether §695.7, Code of Iowa, 1966, makes it *mandatory* for the sheriff to issue a permit to a peace officer to go armed with a revolver, pistol or pocket billy (hereinafter synonymous with a concealed weapon).

§695.7 provides: "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."

The question is whether the qualifying phrase "who, in the judgment of [the sheriff], should be permitted to go so armed" applies to peace officers as well as to "such other persons." Or, in other words, should this section be construed to say that permits must be issued to peace officers and *to* such other persons who in the judgment of the sheriff should be permitted to go armed? Should the word "to" be read into the section? Certainly, these bare words of the statute are not clear in that respect and the qualifying phrases following "such other persons" could be read to apply to peace officers or not from all that appears from them. It is necessary therefor to consider the entire statute and, if it is still not clear, to resort to the rules of construction.

§695.4 says "The sheriff of any county may issue a permit *to a resident of his county only* which shall be valid throughout the state, limited to the time which shall be designated therein, to carry concealed or otherwise, a revolver, pistol, or pocket billy." (Emphasis added).

Thus it appears that the permit may be granted only to a resident of the sheriff's county regardless of the provisions of §695.7, and that these qualifying words of §695.7 having to do with residence are superfluous. (Although, of course, under the terms and subject to the limitations of §695.8, the sheriff may issue a permit to a nonresident of the *state* — as distinguished from a nonresident of his county who is otherwise a resident of Iowa — if he is employed or on duty in the county.)

§695.11 provides that "Permits issued to peace officers or to employees of railroad or express companies shall permit such persons to go armed anywhere within the state while in the discharge of their duties." See also §695.14.

§695.12 provides that "Banks, trust companies, mining, transportation, manufacturing, and mercantile companies or establishments may obtain a general permit good for any of their employees, only while on duty, actually engaged in guarding any property or the transportation of moneys or other valuables."

See also §§695.13 and 695.14 which contain the only other limitations on the duration, extent and use of permits in Iowa.

Since any other adult (§695.26) resident or non-resident to whom a permit is issued on his personal application (§695.5), may apparently carry a concealed weapon anywhere in the state, limited only to the time therein designated (§§695.4 and 695.8), it appears from the entire statute that a peace officer or railroad or express company employee may be somewhat more limited in the use of a concealed weapon under the permit issued him than is a resident or nonresident who has made personal application. The former can use such only in discharging their duties while the latter are not so restricted. It might then be argued that because a peace officer's permit is more limited, its issuance by the sheriff is mandatory while issuance of the broader permit is not. But such argument alone is not persuasive. The words are still not clear.

We think it is necessary to look for the legislature's intent beyond the terms of the statute. In so doing, we will consider the legislative history and certain rules of statutory construction. The first Iowa law on the subject prohibited *all* persons other than police officers and those persons executing processes or warrants, or making arrests, from carrying concealed weapons. §3879, Code of Iowa, 1873, provided:

"If any person carry upon his person any concealed weapon, or shall willfully draw and point a pistol, revolver or gun at another, he shall be guilty of a misdemeanor, and be fined not more than one hundred dollars, or imprisoned in the county jail not more than thirty days; but this section shall not apply to police officers and other persons whose duty it is to execute process or warrants or make arrests."

Then in 1913, the general assembly enacted the first comprehensive statute relating to the sale and carrying of dangerous and concealed weapons. §§3 and 4 of Ch. 297, 35th G. A. provided:

"Sec. 3. *Permit to carry concealed weapons — how obtained.* The chief of police in cities of the first and second class, special charter cities and cities under commission form, or where there is no organized police force, in counties, towns and villages the sheriff or mayor shall issue a permit to carry concealed a revolver, pistol or pocket billy, *provided that in the judgment of said officials such permit should be granted.*"

"Sec. 4. *Permits — to whom issued.* It shall be the duty of said officials to issue a permit to go armed with a revolver, pistol or pocket billy *to all peace officers and such other persons who, in the judgment of said officials, should be permitted to go so armed.* Mining companies, banks, trust companies, railroad and express companies may obtain a general permit good for any of their employees, only while on duty, actually engaged in guarding any property or the transportation of moneys or other valuables.

"Permits issued to peace officers or to employees of railroad or express companies shall permit such persons to go armed anywhere within the state while in the discharge of their duties." (Emphasis added).

It will be noted that the substance of these sections is quite similar to the law today and that the words now under consideration first appeared as underscored in §4 above. Moreover, it is clear that §3, above, *also* required the judgment of the officials as to whether a permit should be granted even to a peace officer. In other words, the judgment requirement appeared in *two* sections of the same law.

In 1917, the 37th General Assembly repealed §3 of the 1913 law quoted above and enacted as a substitute:

"For the purpose of enforcing the laws, local, state or national, the mayor or chief of police in cities of the first class, special charter cities and cities under the commission form of government, where there is an organized police force, and in counties, cities of the second class, towns and villages, the sheriff of the county may on request of mayors or peace officers issue a permit, limited to the time therein to be designated, to carry concealed a revolver, pistol or pocket billy, *provided that in the judgment of said officials such permit shall be granted for defense or service while on official duty,* or to express, mail or bank agents or messengers or other officers requiring them for protecting property in their care. Each such permit shall, unless revoked by notice in writing sent by registered mail to the permit holder by the officer issuing same, expire on December 31st following the issuance. * * *" (Emphasis added).

The 1917 revision, quoted above, left unchanged §4 of the 1913 law, so that the judgment requirement remained in the law in two places.

In 1924, the General Assembly again amended, revised and recodified this law in Chapter 158, S.F. 247, Unpublished (Mimeographed) Acts, 40th General Assembly, Extra Session. In §2 thereof, it is provided:

"The sheriff of any county may issue a permit, limited to the time which shall be designated therein, to carry concealed a revolver, pistol or pocket billy. It shall be the duty of said sheriff to issue a permit to go armed with a revolver, pistol or pocket billy to all peace officers and such other persons who, in the judgment of said official, should be permitted to go so armed. * * *"

What had been §§3 and 4 of the 1913 Act, quoted above, were condensed into the above quoted section. Thus, the judgment requirement which had been included in §3 of the 1913 statute, as well as in §4, and which had been retained in the 1917 amendment in slightly different form ("provided that in the judgment of said officials such permit shall be granted for defense or service while on official duty") had now disappeared from one of the two places in the law where it had previously been found. What had been a clear requirement of judgment of the issuing official even as to peace officers has been unclear since 1924. While it may be that the 1924 legislature merely intended to delete superfluous words because they were later repeated in another section, a statute should not be construed as to make parts of its surplusage unless no other construction is reasonably possible. *Smith v. Day & Zimmerman*, 1946, D. C. Iowa, 65 F. Supp. 209; *Seversee v. Reynolds*, 1862, 13 Iowa 310; *Menlo v. Blakesley*, 1949, 240 Iowa 910, 36 N. W. 2d 751. It seems reasonably possible that the legislature deleted the judgment requirement from one of the sections of the 1913 and 1917 laws in order to make issuance of a permit to a peace officer mandatory rather than simply to delete superfluous words.

Subsequent amendments in 1929 (Ch. 261, 43rd G. A.), 1935 (Ch. 122, 46th G. A.) and 1965 (Ch. 437, 61st G. A.) are not significant to this problem, although it is to be noted that in 1929 the county residence requirements now found in §§695.4 and 695.7 were inserted and provision was made for permits to nonresidents of the state employed or on duty in the sheriff's county (now §695.8).

Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. Thus, a provisal is construed to apply to the provision or clause immediately preceding it. *Sutherland Statutory Construction*, 3rd Edition, §4921. This rule of statutory construction, however, is not controlling or inflexible and may be rebutted by the circumstances. *50 Am. Jur. 258, Statutes, §269.* But it is the general rule. *Haveman v. Board of County Road Commissioners*, 1959, 356 Mich. 11, 96 N. W. 2d 153, 77 ALR 2d 935; *Hopkins v. Hopkins*, 1934, 287 Mass. 542, 192 N. E. 145, 95 ALR 1286; *Winokur v. Michigan State Board of Dentistry*, 1962, 366 Mich. 261, 114 N. W. 2d 233; *Lewis v. Annie Creek Mining Co.*, 1951, ...S. D....., 48 N. W. 2d 815. The last antecedent is the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence. *In re Kurtzman's Estate*, 1964, ...Wash....., 396 P. 2d 786. Applying this rule the judgment requirements applies only to "such other persons" and not to peace officers. I find no circumstances, language or other reason why this general rule of statutory should not be applicable here.

Perhaps none of these indicia, taken alone, would be sufficient basis for an opinion that it is mandatory that the sheriff issue a concealed weapon

permit to a peace officer on proper application therefor, but their cumulative effect persuades me that such was the intention of our General Assembly.

Policy arguments, which are for the legislature rather than the attorney general, may be made each way. On the one hand it could be forcefully argued that not all peace officers need to be armed in order to discharge their duties. In addition to sheriffs and their deputies, constables, marshals and policemen, special agents appointed by the commissioner of public safety and all members of the department of public safety except the clerical staff, and agents appointed by the secretary of the board of pharmacy examiners, all of whom are designated peace officers under §748.3, Code of Iowa, 1966, other peace officers are provided by law. Thus, in 1968 OAG 547, 551 we noted that Capitol police serving in and about the Capitol and other state buildings at the seat of government are peace officers. §18.2(4). The same we said was true of conservation officers, boat inspectors and water safety patrolmen (§106.19), state employees designated as emergency highway peace officers (§7.10), members, directors and designated officers and employees of the aeronautics commission (328.12(6)), watchmen, sextons, superintendents and gardeners of cemeteries (§349.39), county and district fairground police (§174.5), parole agents (§247.24) and probation officers (§231.10). Some deputy sheriffs are women. Others are elderly and incapacitated. Many perform services, such as radio operator, court bailiff or even process server, in which it may be unnecessary to be armed. Some might be incapable of handling a weapon. Considering all possibilities, the legislature might well conclude that the sheriff should determine which peace officers should be permitted to go armed. See OAG Cullison to Knoke, 2-4-69, #69-2-1.

On the other hand, the legislature might believe that any person competent and qualified to be a peace officer and duly appointed as such by proper authorities, should be entitled to be armed for the public safety and his own protection in the performance of his duty; and that the sheriff should not be permitted any discretion in the issuance of a permit lest he constitute a bottleneck and stymie proper law enforcement. Accordingly, no weight is given to the various pro and con policy arguments which might ring out in legislative halls.

In my opinion, upon receipt of a proper application therefore, it is the mandatory ministerial duty of the sheriff to issue a permit to carry a revolver, pistol, or pocket billy to any peace officer who is a resident of his county. With respect to "other such persons who are residents of his county," the sheriff may, in the proper exercise of his discretion, determine that such person should not go so armed, and refuse to issue a permit.

September 26, 1969

COUNTIES AND COUNTY OFFICERS — §§337.11 and 340.4, Code of Iowa, 1966. (1) The sheriff is entitled to receive statutory fees for the care and boarding of prisoners regardless of whether or not the county pays for bedding, laundry equipment and supplies and gas for cooking meals. (2) When a special clerk is hired to assist an officeholder it is the prerogative of the Board of Supervisors to determine whether such clerk should be paid as much as a deputy. (Nolan to Erhardt, Wapello County Attorney, 9/26/69) #69-9-31

Mr. Samuel O. Erhardt, Wapello County Attorney: This replies to your letter forwarding two requests from the Wapello County Board of Supervisors. One requests an interpretation of §337.11(11 and 12), Code of 1966, relating to fees collected by sheriffs for the care of prisoners. The other pertains to the hiring and compensation of a special clerk in an office where two Deputies are presently employed pursuant to §340.4, Code 1966.

I

The first question presented asks whether the sheriff is entitled to 15¢ for each night's lodging and 5¢ per day for waiting on and washing for the prisoners. Also whether the county should pay for gas used in cooking the prisoners' meals in addition to the 55¢ per meal which the sheriff is allowed.

We understand from the correspondence that Wapello County has been purchasing bedding, soap and laundry equipment and paying all the costs in connection with doing the laundry for prisoners. Section 337.11, Code 1966, provides in pertinent parts as follows:

"The sheriff shall charge and be entitled to collect the following fees: * * *

11. For boarding a prisoner, a compensation of . . . 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 in twenty-four consecutive hours; and fifteen cents for each night's lodging. But the amount allowed a sheriff for lodging prisoners shall in no event exceed the aggregate sum of two hundred fifty dollars for any calendar year. . . .

12. For waiting on and washing for prisoners the sum of five cents per prisoner per day."

From the above quoted Code provisions it appears that the sheriff is entitled to the fees prescribed by statute regardless of whether or not the county pays for the supplies, equipment and utilities. The Board of Supervisors, pursuant to §332.10 of the Code is required to furnish the sheriff with the fuel and light necessary for the discharge of the duties of his office. "All charges and expenses for the safekeeping and maintenance of prisoners shall be allowed by the board of supervisors" pursuant to §356.15.

II

The second request for an opinion concerns the creation of a position of special clerk by the principal office holder and the Board of Supervisors acting jointly and asks whether such special clerk may be paid compensation equal to that of the two Deputies now employed in the office at 80% of the compensation of the principal office holder.

We find only one Code section which refers to the employment of two Deputies at an 80% compensation of the principal office holder. This is §340.4 which provides:

"Deputies compensation. The first and second deputies and the deputy in charge of the motor vehicle registration and title department, may be paid an amount not to exceed eighty percent of the amount of the annual salary of his or her principal. In counties where more than two deputies are required, deputies in excess of two may be paid an amount not to exceed seventy-five percent of the annual salary of his or her principal. Upon certification to the board of supervisors by the elected official con-

cerned, the amount of the annual salary for each deputy as above provided, the board of supervisors shall certify to the county auditor of any such county the annual salary certified by the elected officials, but in no event shall said board of supervisors be required to certify to the auditor of any such county an amount in excess of the amounts authorized above. The board of supervisors shall fix all compensation for extra help and clerks."

This section does not impose a limit compensation for extra help and clerks except that it be fixed by the board of supervisors. It is the board's prerogative therefore to determine whether or not a clerk should be paid as much as a deputy. When, and if, it has fixed such compensation, it should provide for the payment of the same under its general powers set out in §332.3(11).

September 26, 1969

SCHOOLS: State Aid — §442.12, 1966 Code as amended by Ch. 356, Acts, 62nd G. A. Average daily membership for each day school is in session means enrollment rather than attendance and applies to all schools within the district. (Nolan to Johnston, Supt. of Public Instruction, 9/26/69) #69-9-32

Mr. Paul F. Johnston, Superintendent of Public Instruction: You have requested an opinion interpreting Section 13 of Chapter 356, Acts of the 62nd General Assembly (§442.12), as it relates to kindergartens. Your letter asks:

". . . whether the phrase 'for each day school was in session' refers to the total number of schools in a district as an indivisible unit, so that school would be considered, 'in session' for purposes of average daily membership for all levels on any day that school was open at any level, or; whether 'in session' is more properly applicable to specific levels, as for example, kindergarten, elementary school or high school, where such levels operate on certain days that the other levels are closed."

The statute in question provides in pertinent part:

"Sec. 13. The average daily membership for each public high school district shall be determined by dividing the aggregate sum of the pupil membership 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."

In an example cited in your letter, kindergarten is conducted for a full day on alternate school days and the school districts in reporting their average daily membership have resorted to reporting the kindergarten as having been in session on all days that school was in session in other grades. This practice appears to be consistent with the Department's Rules and Regulations issued under the authority of §286A.6 of the Iowa Code prior to the amendment of the Chapter by the 62nd G. A. See 1966 IDR p. 387:

"1.2(2) School Day. A school day shall mean . . . not less than three hours in kindergarten, preprimer or primer grades.

"1.2(3) Average Daily Attendance. Average daily attendance is that average obtained by dividing the aggregate attendance for the period (month, semester, year) by the number of days school was in session for the period.

a. Average daily attendance concerns itself only with days present, not days absent.

b. Where kindergartens or primary grades are limited to half-day sessions count each half-day session as a full day of attendance."

These rules do not answer the question presented now, and appear to be obsolete. The present statute does not require computation of average daily attendance but uses the term "membership."

Section 13, Ch. 356, Laws 62nd G. A. provides:

"The average daily membership for each public high school district shall be determined by dividing the aggregate sum of the pupil membership in all schools of the district for each day 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 is our view that the term "daily membership" means the total number of pupils enrolled in school on each day of the school year. Since state aid is directed to the high school district, all public elementary and secondary schools within the district should be treated as an indivisible unit, and the "number of days school was in session" is the number of days the high school was in session. Consequently, if the grade schools or kindergartens close before the end of the high school year the "aggregate sum of pupil membership" will drop accordingly. Therefore, it is immaterial whether kindergarten is held every day or every other day because each child enrolled in kindergarten should be counted as a school member every day from the beginning of his school year until the end.

September 26, 1969

TAXATION: Municipal Exemption from real estate taxes — §427.1(2), Code of Iowa, 1966. Taxes upon real estate may not be enforced as a personal obligation of the landowner. They are an in rem claim against the land alone. Upon purchase of land by a municipality, a pre-existing tax lien against the property merges with the title held by the municipality. (Martin to Kauffman, Jackson County Attorney, 9/26/69) #69-9-33

Mr. Ralph M. Kauffman, Jackson County Attorney: We have received your request for an opinion of the Attorney General in which you state the following facts:

"October 30, 1967, the Morris Plan Company of Iowa, the Morris Plan Leasing Company, and the Maquoketa Civic Development Association joined in a contract whereby it was agreed to sell to the City of Maquoketa, Iowa, certain real estate to be used for the purpose of off-street parking. Subsequently, in February of 1968, the real estate in question was conveyed by a warranty deed. The grantors being the same parties as the sellers in the contract and the grantee being the city of Maquoketa."

You inquire as to whether or not the county has a right to proceed against the sellers for the purpose of collecting the 1967 real estate taxes which were payable in 1968. You then inquire as to whether the sellers would have a right of recovery against the city if they are found liable for the taxes. Finally, you inquire as to whether the city's exemption could be asserted on behalf of the seller in the county's action against the seller.

In *Helvering vs. Johnson County Realty Co.*, 128 F. 2d 716, the court stated as follows:

"Taxes on real estate in Iowa constitute an in rem claim. They are not a debt for which the owner of the land against which they are assessed is personally liable. *Plymouth County vs. Moore*, 114 Iowa 700, 87 N. W. 662; *Lucas vs. Purdy*, 142 Iowa 359, 120 N. W. 1063, 1066, 24 L.R.A., N.S., 1294, 19 Ann. Cas. 1974."

It thus appears that the county may not maintain an action against either the vendor or vendee which seeks to enforce collection of the taxes from those individuals, personally.

The question thus becomes one of whether or not taxes levied against the property by the county, before the city acquired it, constitute a lien against the property.

Section 427.1, Code of Iowa, 1966, provides in pertinent part as follows:

"The following classes of property shall not be taxed:

* * *

"2. Municipal and military property. The property of a county, township, city, . . . of the state of Iowa, when devoted to public use and not held for pecuniary profit."

In 1964 O.A.G. 426 it was stated as follows:

"As applied to the contemplated transfer by the Van Buren County Trustees, the Idaho Court, in State ex rel. *Hoover vs. Minidoka County*, 50 Idaho 419, 298 P. 366, held that the state obtained complete unconditional title to such land, and that the title was freed from past taxes, and that all such liens on the tax records become nil and subject to cancellation, and therefore, may not revive and attach upon a subsequent reconveyance by the state.

"Also see *Childress County vs. State*, 127 Tex. 343, 92 S. W. 2d 1011, wherein the Court said:

" 'We think the great weight of authority sustains the rule that when the title to this land reverted to the County, the tax lien for state purposes became merged with the ownership of the land by the County. This property, dedicated to a County exclusively for a public purpose . . . cannot be burdened with taxes due the state during the time it was privately owned.'

"It is my opinion then, that upon acquisition of real property by a County, subsequent levies upon the property are illegal and must be cancelled; and tax liens in existence against that property at the time of acquisition of that property by the County are merged with the title in the County and are not revived by subsequent conveyance by the County."

We believe this doctrine applies to governmental units below the county level. *City of Long Beach vs. Board of Supervisors of the County of Los Angeles*, 50 Cal. 2d 674, 328 P. 2d 964 (1958). The reasoning behind the concept of merger of the title between the acquired title and a pre-existing tax lien is best set forth in *Long Beach*, as follows:

". . . [W]herever a municipal corporation or public agency of the state owns real property used for the purposes of such agency, the ultimate title is in the state itself. The agency holds the title upon the twofold trusts, the one for the public, the other for the state; and that to continent taxation of such property would be to continent the folly of the

sovereign taxing its own property 'and taking money out of one pocket to put in another.' "

Because of the result we reach in this opinion, we need not consider whether or not machinery exists through which the county could enforce collection of real estate taxes against the property in the hands of the city. Nor are we called upon to consider the issue raised by Section 427.1(2), set out above, concerning municipal use for pecuniary profit. We assume that the land involved in the October 30, 1967 contract is eligible for exemption.

It is, therefore, the opinion of this office that taxes on real estate in Iowa constitute an in rem claim, unenforceable in a personal action against the land owner. Real estate taxes must be enforced against the property. It is further the opinion of this office that upon the purchase of land by a municipality, a pre-existing tax lien against the property merges with and dissolves into title held by the city. The lien thus disappears.

September 26, 1969

MOTOR VEHICLES: Registration of used cars for month of December — §§321.106, 321.135, Code of Iowa, 1966; Chapter 197, Acts of 63rd G. A. Any used car brought into the state by an Iowa resident in December of any year must be registered and pay a fee which will be 1/12 of its annual registration fee. (Zeller to Waples, Des Moines County Attorney, 9/26/69) #69-9-34

Mr. Alan N. Waples, Des Moines County Attorney: Reference is made to your recent letter in which you ask two questions as follows:

"The following questions have been propounded to me by my County Treasurer with the request that I seek your opinion on them:

"1. A resident of Des Moines County, Iowa, purchased a used vehicle from a resident of Illinois December 10, 1968.

Question: Must this individual purchase a prorated 1968 plate for the month of December in addition to the full year of 1969 license? Refer to Chapter 321.106.

"2. A resident of Nebraska becomes a resident of Des Moines County, Iowa December 6, 1968.

Question: Must this individual purchase a prorated 1968 license and registration for the month of December in addition to the 1969 registration and License? Refer to Chapter 321.106."

Section 321.106 has been amended to read as follows, in Chapter 197, Acts of the 63rd G. A.:

"Where there is no delinquency and the registration is made in February or succeeding months to and including November, registration fees for vehicles designed to carry nine passengers or less shall be computed on the basis of one-twelfth of the annual registration fee as provided in this chapter multiplied by the number of unexpired months of the year. No fee shall be required for the month of December for a new car in good faith delivered during that month.

* * *

"Whenever any registration fee computed under this section contains a fractional part of a dollar, the fee shall be computed to the nearest

whole dollar which amount shall be the fee collected. The fee so computed for an original registration shall be deemed to be the annual registration fee for the remainder of the registration year."

§321.107 provides:

"Such reduction in the registration fee shall not be allowed until the applicant first files with the County Treasurer an affidavit stating the date on which the vehicle first came into his possession or control."

§321.18 provides as follows:

"Every motor vehicle * * * when driven or moved upon a highway shall be subject to the registration provision of this chapter."

Your first question applies to a used vehicle brought into the state by an old resident, and your second question applies to a used vehicle brought into the state by a new resident in December, 1968.

The former section, §321.106, is headed or described as "Fractional part of year." It applies to any car, which is registered for only a part of a full year, or a fractional part of a year. It has been interpreted over many years by the Department of Public Safety and by the Reciprocity Board to mean that where the registration is made in December and there is one unexpired month left, that the owner should pay one-twelfth of the annual registration fee, instead of paying no fee at all. Such a construction by an administrative agency charged with the enforcement of the statute for many years (since 1960) is given much weight in interpreting this statute.

State ex rel. McElhinney vs. All-Iowa Agriculture Association, 48 N. W. 2d 281, 242 Iowa 860.

The recent amendment to the statute, §321.106, uses the same language in prorating the registration fee for the fractional part of any year. Further, if the amount of the fee for the fractional part of a year were prorated only to and including November of any year, then there would be no need for the statute to provide a December exemption for a new car delivered during that month. The lesser exemption would then be included in the greater exemption, and this last provision exempting delivery of a new car in December would be superfluous. Effect should be given to every provision of a statute if fairly possible; and it is fairly possible to do so.

This principle of statutory construction is set forth in *Independent District vs. Iowa Emp. Sec. Comm.,* 237 Iowa 1301, 1309, 25 N. W. 2nd 491, 496, where the court said:

"If fairly possible, a statute will not be construed so part of it is rendered superfluous. Effect should ordinarily be given to every provision of an act."

The same principle is supported in *State vs. Valeu,* 257 Iowa 867, 870, 134 N. W. 2nd 911.

Accordingly the answer to each of your questions is that the Iowa resident owner must file an affidavit with the County Treasurer, register and purchase a prorated license for his used car, if brought into the state in the month of December in any year.

Even though the statute has been recently amended by the 63rd G. A., the interpretation of the former statute, containing substantially the same provisions, in the opinion of the Assistant Attorney General, dated December 7, 1961, 1962 O.A.G. 420, No. 20.77 still applies.

A copy of this opinion is annexed for your further reading in support of this construction.

September 29, 1969

STATE OFFICERS AND DEPARTMENTS: Payment of claim by U. S. Department of Labor against Iowa Department of Public Safety — §§8.13 and 25.2, Code of Iowa, 1966. In order to recover from the state department of public safety for failure to properly fulfill a contract with the OEO for on-the-job training, the U. S. department of labor must file a claim with the state comptroller within 90 days as required by §8:13. After 90 days the federal government must file its claim with the appeal board in accordance with §25.2. (Ivie to Fulton, Commissioner, Department of Public Safety, 9/29/69) #69-9-36

The Hon. Jack M. Fulton, Commissioner, Dept. of Public Safety: You have posed the following question:

"Several years ago the Department of Public Safety entered into a contract for on the job training with the Office of Economic Opportunity with funds to be provided by the Department of Labor. The Department of Labor is now demanding repayment of the entire amount of the contract in that the contracts were not fulfilled properly. $2,781.73 which was not used from the contract has been returned to the Office of Economic Opportunity, but the $1,583.27 was paid to the University of Iowa for classes and to individuals, several which no longer work for the Department of Public Safety, for out of pocket expenses.

"We would appreciate receiving your opinion as to whether or not the Department of Public Safety can pay to the Department of Labor, the $1,583.27 out of the current appropriations of this Department."

Your attention is directed to §8.13, 1966 Code of Iowa, which is the controlling section of Iowa law for the issuance of warrants in payment of claims against the state. In checking with the Comptroller's office I have determined that no claim has been filed by the federal government. Under the provisions of §8.13, 1966 Code, such claim must be filed within ninety days of accrual. The claim described in your letter is considerably more ancient than ninety days and cannot now be approved and honored without action by the Appeal Board under the provisions of Chapter 25, 1966 Code of Iowa. The fact that the federal government is the claimant does not alter the requirements of Chapter 8, 1966 Code.

Accordingly, claim forms to the Appeal Board should be executed by the appropriate federal officials and processed under Chapter 25, 1966 Code.

For your information, upon approval of such claim by the Appeal Board, under §25.2, 1966 Code, payment would be "out of any money in the state treasury not otherwise appropriated." As I recall, this claim accrued at latest in the 62nd biennium so that funds reverting under §8.33, 1966 Code of Iowa, would make §25.2, 1966 Code, applicable.

September 30, 1969

COUNTIES AND COUNTY OFFICERS: Acquisition of real estate by

county conservation boards — Chapter 23 and §111A.6, Code of Iowa, 1966. Although §111A.6 subjects all expenditures in excess of $5,000 to the requirements of Ch. 23, the latter applies to "public improvements" which, as defined in §23.1, does not include the acquisition of real estate. (Seckington to Priewert, Director, Iowa State Conservation Commission, 9/30/69) #69-9-35

Mr. Fred A. Priewert, Director, Iowa State Conservation Commission: We have received your request for a clarification of an opinion from Turner to Samore dated January 22, 1968.

You state that some difficulty is being encountered because of the mention of Chapter 23, 1966 Code of Iowa, in that a:

". . . county auditor will not permit the issuance of a warrant . . . until the requirements of Chapter 23 are met. This compliance consists of the holding of a public hearing on any expenditure exceeding $5,000.00. . . ."

The opinion in question considers only whether Chapter 345, Code of Iowa, 1966, applies to purchases under Chapter 111A, Code of Iowa, 1966. The only reason that Chapter 23 was mentioned is because reference is made to that Chapter in §111A.6, Code of Iowa, 1966. That section makes it mandatory to subject expenditures of a County Conservation Board in excess of $5,000.00 to *all* the provisions of Chapter 23.

Section 23.2, Code of Iowa, 1966, states as follows:

"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."

The words "public improvement" are the critical words in the section, and are defined in §23.1, as follows:

"The words 'public improvement' as used in this chapter shall mean any building or other construction work to be paid for in whole or in part by the use of funds of any municipality."

Since the acquisition of real estate obviously does not come within the definition quoted above the remainder of the chapter does not and can not apply to such acquisitions.

We do not think anything in our prior opinion is inconsistent with our position as stated herein. We believe it is quite clear what was intended and in fact accomplished. To place any other interpretation on the sections in question would be to demand that the County Conservation Boards engage in a practice of futility. We assume that the acquisition of real estate is accomplished by purchasing lands of a certain description from the owner or owners thereof, and that said owner or owners are known to the buyer. Since the owners of said real estate are the only people the County Conservation Board (or anyone else) should purchase the land from, it seems pure folly to ask for bids from people who are not the owners.

As a legal conclusion and as a practical matter, we think that the acquisition of real estate is not governed by Chapter 23, Code of Iowa, 1966.

October 7, 1969

SCHOOLS: Educational TV — Contracts — §573.12, Code of Iowa, 1966. Payments to contractor may be made under §573.12 of the Code as amended by Ch. 392, Acts, 62nd G. A. where contract is silent as to terms of payment. (Nolan to Bidler, Business Manager, State Educational Radio & TV Facility Board, 10/7/69) #69-10-1

Mr. Carroll L. Bidler, Business Manager, State Educational Radio and Television Facility Board: In reply to your letter of September 25, 1969, requesting advice as to whether or not the State Educational Radio and Television Facility Board can make partial payments on the contract with Kline Iron and Steel Company, based on the amount of work done at a given date, we direct your attention to §573.12, Code 1966, as amended by Ch. 392, Acts 62nd G. A.:

"Payments made under contract for the construction of public improvements, unless provided otherwise by law, shall be made on the basis of monthly estimates of labor performed and material delivered. In making said payments, there shall be retained ten (10) percent of each said monthly estimate by the public corporation; provided, however, that if the contract is for more than fifty thousand (50,000) dollars and if the public corporation at any time after fifty (50) percent of the improvement has been completed finds that satisfactory progress is being made, the public corporation may authorize any of such remaining payments to be made in full."

Upon receipt of a verified claim voucher showing the labor performed and material delivered, the payments may be made even though the contract documents do not contain anything with respect to the terms of payment in connection with construction.

October 8, 1969

CITIES AND TOWNS: Civil Service Employees as candidates for public office — §365.29, 1966 Code of Iowa as amended by Ch. 314, Acts, 62nd G. A. and S.F. 159, Acts, 63rd G. A. Municipal civil service employee when candidate for public office related to his employment is on automatic leave of absence without pay until elected, defeated or withdrawal as candidate. If elected, upon qualification for elective office, such employee is no longer eligible to serve as civil service employee of the municipality. (Ivie to Gaudineer, State Senator, 10/8/69) #69-10-2

The Hon. Lee H. Gaudineer, Jr., State Senator: You have asked the following with reference to possible conflicts of interest:

"Senate File 159, Acts of the 63rd G. A., amend Chapter 314, Acts of the 62nd G. A., allowing public employees to run for any public office. Chapter 314 requires that if a public employee becomes a candidate for an office related to his employment that he must be given a leave of absence. However, the statute is silent as to whether or not after he is elected he is prohibited from resuming his employment prior to qualifying for office and after qualifying for office whether or not he is, also, prohibited from resuming his employment.

"Therefore, may I have your opinion whether or not Section 365.29 as amended by Chapter 314, Acts of the 62nd G. A. and Senate File 159, Acts of the 63rd G. A. prohibits a municipal employee under civil service from continuing in such employment after he is elected to the city council and prior to qualifying for such office and, also, after he qualifies for such office."

With reference to the propriety of a city employee, under civil service after election to the city council but before qualifying and serving in that

elective capacity, continuing employment for said city until qualifying, Section 3 of Chapter 314, Acts of the 62nd G. A. reads as follows:

"Section three hundred sixty-five point twenty-nine (365.29), Code 1966, is hereby further amended by adding thereto the following:

'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.' "

Senate File 159, 63rd G. A., after striking the word "partisan" from the first line of the above section and the words "for remuneration" from the second line thereof, added the following paragraph:

"However, an employee who is a candidate for a non-partisan office not related to his employment, shall not be required to take a leave of absence if such employee refrains from campaigning while on duty as an employee."

As you know, Sec. 365.29, 1966 Code of Iowa, prior to these amendments by the 62nd and 63rd G. A., was construed as requiring the resignation of an employee under civil service prior to that employee running for any public office. 66 OAG 50. Such a resignation would have occasioned the loss of seniority to such an employee. After the amendment by the 62nd G. A., the same problem existed for a civil service employee where running for a non-partisan elective office. 68 OAG 323. For this reason, the amendments above described were enacted by the 63rd G. A. and became law on July 1, 1969.

Under the facts outlined in your letter, a civil service employee contemplates becoming a candidate for an elective office that is related to his employment. Under §365.29, 1966 Code as now amended, he is prohibited from performing any duties connected with his civil service position *"until such person is eliminated as a candidate."* The employee is eliminated as a candidate by withdrawal, election or defeat in the election. A synonym for "candidate" being "competitor," one ceases being either when the competition terminates. Thus, at that stage, it would be proper for the employee, even though elected, to return to his civil service employment.

After such employee is elected and qualifies, however, the situation is different in that the office he would then hold would be related to his employment. The legal objection to one holding a position as a municipal civil service employee while also being a member of that city's council is based on the common law conflict of interest doctrine, there being no specific statutory prohibition against such a relationship.

In the case of *Wilson v. Iowa City et al*, 1969, ...Iowa....., 165 N. W. 2d 813, the Iowa Supreme Court found conflicts of interest based on common law standards, even though express statutory prohibitions were also in issue in that litigation. The Court said, at page 822 of 165 N. W. 2d:

"The high standards which the public requires of its servants were set by common law and adopted later by statute. It is almost universally held that such statutes are merely declaratory of the common law. * * *

"These rules whether common law or statutory, are based on moral

principles and public policy. They demand complete loyalty to the public and seek to avoid subjecting a public servant to the difficult, and often insoluble task of deciding between public duty and private advantage."

While the foregoing should be sufficient to answer as to the propriety of one simultaneously serving as a council member and civil service employee of that municipality, there is a statute which also effectively should dissuade one from affirmatively supporting the propriety thereof.

§368A.21, 1966 Code of Iowa, reads as follows:

"Ineligibility — change of compensation. No member of any city or town council shall, during the time for which he has been elected, be appointed to any municipal office which has been created or the emoluments of which have been increased during the term for which he was elected, nor shall the emoluments of any city or town officer be changed during the term for which he has been elected. No person who shall resign or vacate any office shall be eligible to the same during the time for which he was elected, when, during the time, the emoluments of the office have been increased."

What this statute prohibits directly should not be circumvented by indirection. In other words, the moral prohibition expressed therein which then became a legal prohibition, most certainly must apply to one who first takes a public office and then assumes the post of councilman wherein he can affect the emoluments of his office. As stated in the Wilson case, *supra*, complete loyalty to the public may be possible but "it is the potential for conflict of interest which the law desires to avoid."

Accordingly, it would be improper for a city council member to continue his employment for that municipality after qualifying as a member of the council.

October 13, 1969

COUNTY & COUNTY OFFICERS: Board of Education — Ch. 98, Acts, 62nd G. A. A board policy statement indicating that closed sessions would be warranted and desirable for the review of matters related to arguments and evidence presented during an open meeting on a school reorganization matter does not constitute an exception to the open meeting rule and a regular or general practice of holding closed sessions for such purpose is prohibited by the statute in question. (Nolan to Saur, Fayette County Attorney, 10/13/69) #69-10-3

Mr. Walter L. Saur, Fayette County Attorney: This is in reply to your letter of September 9, 1969, requesting an opinion on the application of Chapter 98 of the Acts of the 62nd General Assembly to the meetings of the Fayette County Board of Education and asking whether the board's policy of reviewing reorganizational matters in closed session constitutes an exception to the open meeting rule. Your letter quotes a board policy statement as follows:

"It is the intent of the Fayette County Board of Education to conform with the public policy established by (Section 3, Chapter 98, 62nd General Assembly), and publicized, open meetings will be provided for the expression of arguments, presentation of evidence and the establishment and pronouncement of any decisions related to the reorganization proposal. The county board, however, is required to review the matter on its merits, and past experiences would indicate that closed sessions would be warranted and desirable for the review and deliberations related to the arguments and evidence provided during the open meeting.

"During the many reorganizational meetings conducted during the past fifteen to twenty years, county boards of education have invariably met in closed session to review the factors involved in the reorganization proposal. Precedents would indicate a probability that personalities and interpersonal factors, would need to be comprehensively and specifically considered. In many respects, therefore, the review conducted by the county board of education could be compared to the functions of a jury, which conducts its review in closed session."

It is my view that the statement quoted above does not constitute an "exceptional reason so compelling so as to override the general public policy in favor of public meetings." We recognize that §275.15, Code of Iowa, provides that the county board shall rule on objections and enter an order fixing a proposed district's boundaries within five days after the conclusion of any hearing. However, the fixing of boundaries has been held to be a legislative function. Whatever practice originated during the period of school reorganizations with respect to meetings in closed session to review factors involved in the reorganizational proposal would appear to be inapplicable, and indeed generally unacceptable under the present law. Further, the reference contained in the policy statement to review being compared to the functions of a jury is likewise inappropriate when the board is acting in a legislative capacity.

It is impossible for us to speculate on the facts of all situations which might constitute an "exceptional reason so compelling so as to override the general public policy in favor of public meetings," therefore we do not attempt to answer your question asking exactly what does this phrase include. We have no doubt that the phrase contained in §3 of the Act in question, when taken in the context of "necessary to prevent irreputable 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," may have more relevance to some public meetings than others, depending upon the degree of sensitivity or security required and also upon whether or not the meeting would involve discussion of records which are made confidential by other sections of the Code.

In any event, a general policy of holding closed sessions is specifically prohibited by §3 of the Act which states in pertinent part:

"No regular or general practice or pattern of holding closed sessions shall be permitted."

October 14, 1969

STATE OFFICERS AND DEPARTMENTS: Legislative Inquiry — §2.43, §262.9, Code of Iowa, 1966. The "social adaptability" of employees of Board of Regents institutions is a proper subject of legislative inquiry by a legislative interim committee studying state university financial affairs. (Nolan to Doderer, State Senator, 10/14/69) #69-10-4

The Hon. Minnette Doderer, State Senator: This will acknowledge your letter of July 20, 1969, in which you and Representative Joseph C. Johnston jointly requested an opinion on matters pertaining to a proposed investigation by the Budget and Financial Control Committee of the 63rd General Assembly at the Board of Regents Institutions in this state. Your letter states in pertinent parts as follows:

"The BFCC is proposing to probe into four areas of the Board of Regents:

(1) whether the universities are using their academic and administrative staffs efficiently;

(2) whether they are using their physical facilities efficiently;

(3) what the minimum and maximum enrollment figures at the three state schools should be; and

(4) determine the policy of the Regents for seeking the professional, academic and social adaptability and abilities of its professors and administrators.

* * *

"However, we seek your opinion on questions pertaining to the fourth area of the investigation. Did the legislature in setting up the BFCC intend to grant authority to this committee to probe any area of state government whether or not the probe was connected with budget and financial or reorganization matter? We, therefore, raise the question of whether or not there is a legal basis for the BFCC to investigate the 'social adaptability and abilities' of professors and administrators? We raise the question whether or not, the investigation of 'social adaptability and abilities' would not, in fact, be ultra vires, i.e., outside the legal scope of the powers of BFCC."

The memorandum from the Steering Committee to the Budget and Financial Control Committee, dated July 14, 1969, which recommends that the study be made, states as follows:

"1. The Steering Committee recommends that a study of the Board of Regents institutions be instituted and that the following four items be the principal objectives of the study:

1. Efficient utilization of academic staff.
2. Efficient utilization of administrative staff.
3. The efficient maximum enrollment and size of the universities.
4. Efficient utilization of the physical facilities.

The Steering Committee recommends that all activities of the study be directed in every degree to accomplish these objectives.

"II. To implement the study, the Steering Committee respectfully requests that the following procedures be used:

1. That the Steering Committee be utilized as the control element of the study, to assist the full committee in setting forth progressive steps and projects to accomplish the above mentioned objectives.

2. That the Steering Committee with the assistance of the Legislative Fiscal Director, Comptroller, and Auditor, and a professional consultant or consultants conduct in depth interviews with certain members of the Board of Regents, Presidents of the institutions, members of the academic staff, members of the administrative staff, students, and the public. All members of the Budget and Financial Control Committee are to be notified of the Steering Committee meetings and hearings.

3. Periodic reports will be made to the Budget and Financial Control Committee with recommendations to include persons to be interviewed by the full committee, recommendations for study projects to be made by a consulting firm, recommendations to the full committee for public hearings to include persons to appear at the hearings and such other actions as may be necessary to attain the objectives listed above.

4. The Steering Committee will periodically report conclusions and recommendations to the Budget and Financial Control Committee.

5. The Steering Committee will bring recommendations to the full committee on the hiring of a professional consultant or consultants and a budget for such consultants.

"III. To assist in attaining the foregoing objectives the study committee recommends that immediate action be initiated in the following areas:

1. The State Comptroller's office to analyze construction contracts at the Board of Regents institutions over the past fifteen years.

2. The Committee be provided with detailed organization charts of the academic and administrative staffs.

3. The Budget and Financial Control Committee hire qualified personnel for the duration of this study to analyze the Board of Regents institution activities in lieu of the personnel who should have been hired for this purpose by the State Comptroller's office but who have not been so hired.

4. Request the Board of Regents to furnish the Budget and Financial Control Committee with a list of numet needs for this biennium.

5. The Board of Regents provide the Committee with a statement of policy used to determine the professional, academic and social adaptability and abilities of academic and administrative staffs.

6. Request preparation of a document revealing all funds available to each university during this biennium.

7. Request that the State Auditor prepare a schedule showing the total increase cost ratio to student enrollments.

"IV. Considering the short period of time the study committee has addressed itself to this question, we have concluded that the results, if handled objectively and unemotionally, should have a far-reaching and beneficial impact upon the Board of Regents institutions in the State of Iowa. It is our intent and sincere recommendation that action be initiated immediately and that the total effort be one of objectivity and sincere determination to combine the efforts of all state agencies to the benefit of the taxpayers, Board of Regents, administration, faculty, and students to the improvement of educational and academic excellence with efficient use of moneys."

It seems to us that this investigation is within the scope of fact finding study, budget and financial control committee is authorized pursuant to §2.43(3), Code of Iowa, 1966.

"2.43 Authorized purposes of committee. The authorized purposes of the budget and financial control committee shall be as follows:

* * *

3. Reorganization. *The committee shall make a continuous study of all offices,* departments, agencies, *boards,* bureaus and commissions *of the state government* and *shall determine* and recommend to each session of the legislature *what changes therein are necessary* to accomplish the following purposes:

a. To reduce expenditures and promote economy to the fullest extent consistent with the efficient operation of state government.

b. To increase the efficiency of the operations of the state government to the fullest extent practicable within the available revenues.

c. To group, co-ordinate, and consolidate judicial districts, agencies and functions of the government, as nearly as may be according to major purposes.

d. To reduce the number of offices, agencies, boards, commissions, and departments by consolidating those having similar functions, and to abolish such offices, agencies, boards, commissions and departments, or functions thereof, as may not be necessary for the efficient and economical conduct of state government.

e. To eliminate overlapping and duplication of efforts on the part of such offices, agencies, boards, commissions and departments of the state government." [Emphasis added].

Investigations, whether by standing or special committees are an established part of representative government. *Tenney v. Brandhove*, 1950, 341 U. S. 367, 377. The power to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as the possibility of needed statutes. *Gibson v. Florida Legislative Investigation Committee*, 1963, 372 U. S. 539; 83 S. Ct. 889, 9 L. Ed. 2d 929.

As stated in 49 Am. Jur., States, Territories, Dependencies, §43:

"Whenever the legislature has authority to enact laws, it has corresponding authority to make necessary investigations for the ascertainment of such facts as are necessary predicate for the enactment of the law, and to this end may appoint investigative committees. This is the principle purpose and function of legislative committees. A legislative committee may be created to investigate the management of various state institutions and departments of the state in order to ascertain facts as a basis for possible remedial legislation or to investigate . . . with a view to further legislation. The powers of such committees need not, however, be restricted to investigations upon matters pertinent only to legislation, legislative committees may be created to investigate any subject legitimately within the scopes of the powers, functions, and duties of the legislature, and to secure information necessary to the proper discharge thereof. A committee of the legislature may be created and empowered . . . to investigate into the administration of the government of a city or a county within the scope of the state or to investigate public institutions and departments."

Recently the courts have outlawed legislative inquiries which tend to have a "chilling" effect on First Amendment freedoms. *Gibson v. Florida Legislative Investigative Committee*, supra. They have declared void resolutions which by their "vagueness and overbreadth" leave too much to the discretion of the committee to roam at large in the "sensitive area of First Amendment freedoms," *Liveright v. Joint Committee of General Assembly of Tennessee*, 1968, 279 F. Supp. 205. The rights of speech and association prohibit compulsory exposure of an individual's associations and beliefs. A compelling state interest must be shown to justify intrusion. *Keyishian v. Board of Regents*, 1967, 385 U. S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629.

In a law day speech delivered in Cedar Rapids, May 1, 1969, David M. Elderkin, former President of Iowa Bar Association stated:

"The idea that an institution of learning is the exclusive domain of the faculty and students, in which the general public has no legitimate interest and upon which they are kind of poachers, is a doctrine that should be quickly re-examined. Those who truly believe in academic freedom should realize that the greatest danger to it lies in any attempt to insist that it cover and include academic violence."

In *Goldman v. Olson*, 286 F. Supp. 35, a 1968 case involving the gathering of facts by a legislative committee inquiring into riots on the Madison

campus of the University of Wisconsin it was alleged that plaintiffs were deprived of rights secured by the First and Fourteenth Amendments to the United States Constitution by reason of the "vagueness and overbreadth" of the resolution authorizing the investigation and that as applied to plaintiffs it would "force public disclosure of opinions and association of private citizens and create and stimulate public stigma and scorn." Then the court stated:

"For the purpose of the present action, it is enough to observe that the very process of legislative investigation must often be tentative and uncertain. It is not reasonable to require the legislature, even before its investigatory function has been commenced, to define the subject or subjects of investigation with that degree of specificity and clarity which must mark its ultimate articulation of a criminal prohibition. In its investigative function, the legislature must enjoy more leeway."

The legislature may act as its own lexicographer. *Iowa State Commerce Commission v. Northern Natural Gas Co.*, 1968, ...Iowa....., 161 N. W. 2d 111. However, where a term utilized by a legislative body or a committee is not defined it must be assumed that such term will be given its common meaning until it is given judicial construction.

Webster's Seventh New Collegiate Dictionary defines "social" when relating to human society as "the interaction of the individual and the group, or the welfare of human beings." "Adaptability" is defined therein as the quality or state of being "suitable" or fitting — a state cannoting "readiness."

We have made an exhaustive search of authorities seeking a judicial construction of the term "social adaptability" and find none. However, Ballentine's Law Dictionary, 3rd, cannotes "social duty" with "moral obligation" which is defined as a duty connected with the "receipt of benefit of material or pecuniary nature" and an "obligation arising from ethical motives" springing from "a sense of justice and equity that an honorable person would have."

Perhaps it could be said that "social adaptability" is the opposite of "social leprosy." See *Sweeney v. Baker*, 13 W. Va. 158, 193, 31 A. Rep. 757. In any event, it is our view that the term as used by the budget and financial control committee is neither negative nor vague nor does it imply that the committee will presume guilt by association. And one who holds unpopular beliefs could nevertheless be socially adaptable.

We believe from the term used, in the context in which it is found, that it is the purpose and intent of the committee to ascertain whether those hired with public funds are respectable people, ready and capable of assuming the duties of the position. We are of the opinion that the budget and financial review committee has not exceeded its authority. Whether those being employed are respectable and capable is a proper subject of legislative inquiry.

If the interest of the state requires it, the committee may gather facts to determine whether there should be additional legislation to attract persons of fine character with a well developed sense of personal responsibility and community awareness to staff the state institutions under the supervision of the board of regents, or to bar from the public payroll persons who have been convicted of felonies involving moral tur-

pitude or those who have conflicts of interest. With respect to the latter, we note that Chapter 107, Acts, 62nd G.A., known as the "Iowa Public Officials Act" imposes a standard of ethics upon the board of regents and its employees. Neither the measures prescribed therein nor the provisions of §262.9, Code of Iowa, 1966, which outline the powers and duties of the Board of Regents, deal with the qualifications of employees or establish a criteria of competence and moral fitness as is often otherwise requisite to the issuance of licenses or the holding of public office. See §§80.2, 82.6, 86.4, 86.7, 116.9, 117.15, 118.8, 146.13, 260.2, 474.1, 505.2, 524.2, 610.2.

Moreover, "all presidents, deans, directors, teachers, professional and scientific personnel, and student employees under the jurisdiction of the state board of regents" are exempt from and beyond the reach of the Merit System Personnel Administration Act (Ch. 95, Acts 62nd G. A.). The Act does not exempt other employees of board of regents' institutions. Accordingly, it would not be inconsistent with the proper classification of all state employees for the committee to obtain factual data concerning the employment practices of the publicly supported institutions.

October 15, 1969

TAXATION: Property Tax — Iowa Military Service Tax Exemption — §427.3(4), Code of Iowa, 1966, as amended by Ch. 351, Acts of 62nd G. A., and Ch. 253, Acts of 63rd G. A., and §§427.5 and 427.6. Reservists and National Guardsmen who have participated in "Active Duty for Training in Federal Status" during one of the enumerated periods set out in §427.3(4) of the Code of Iowa, as amended, and fulfill the timely filing requirements of §§427.5 and 427.6, are eligible for the Military Service Tax Exemption. (Murray to Burrows, Iowa Dept. of Revenue, 10/15/69) #69-10-5

Mr. E. A. Burrows, Deputy Director, Iowa Department of Revenue: This will acknowledge receipt of your letter in which you requested an Opinion of the Attorney General on the following question:

"The Department of Revenue respectfully requests an Attorney General's opinion as to whether 'active duty for training in federal status' constitutes 'active service in the armed forces of the United States' and is sufficient to make the claimant eligible for Iowa Military Service Tax Exemption under Section 427.3, 427.4, and 427.5, Code of Iowa."

Section 427.3(4), Code of Iowa (1966), as amended by Chapter 351, Acts of the 62nd General Assembly (1967), and Chapter 253, Acts of the 63rd General Assembly (1969), 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 second World War, . . . 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, as well as those serving honorably on active military duty."

Senate File 79, Acts of the 63rd General Assembly, amends Chapter 351, Acts of the 62nd General Assembly, which in turn amends §427.3(4)

of the Code of Iowa, 1966, by adding the following words:

"as well as those serving honorably on active military duty during the time of the Viet Nam Conflict."

The passage of this amendment extends the property tax exemption to those qualified persons who are currently serving on active duty as well as those persons who have been "honorably separated, retired, furloughed to a reserve, placed on inactive status or discharged." Section 427.3(4), Code of Iowa, 1966. (O.A.G. Murray to Koch, 7-9-69)

You have enclosed correspondence with your request for an Opinion indicating that certain Reserve and National Guard members have applied for the Military Service Tax Exemption. It appears by further correspondence that these claimants were in the "active service" of the armed forces of the United States, but this active service was "for training only."

The statute in question does not explicitly require that one have performed "active service in the armed forces of the United States" to be considered for the exemption. Section 427.3(4) of the Iowa Code specifically states that any honorably separated, retired, furloughed to a reserve, placed on inactive status or discharged soldier, sailor, marine, or nurse of the enumerated periods set out in the statute as well as those serving honorably on active military duty are eligible for the Military Service Tax Exemption. However, past Opinions of the Attorney General, as well as the Iowa Supreme Court, have interpreted the statute to require the taxpayer to have performed active service. *Jones vs. Iowa State Tax Commission*, 247 Iowa 530, 74 N. W. 2d 563 (1956). Thus, the issue boils down to whether or not "active duty for training" is sufficient to fulfill the "active service" requirement placed upon those applying for the exemption.

"Active duty" is defined by 10 U.S.C. §101(22), as follows:

" 'Active duty' means full-time duty in the active military service of the United States. It includes duty on the active list, *full-time training duty, annual training duty*, and attendance while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned." (Emphasis supplied)

The Explanatory Notes accompanying the definition further clarify the term as follows:

"In clause (22), the definition of 'active duty' is based on the definition of 'active Federal service' in the source statute, since it is believed to be colser to general usage than the definition in 50:901(b), which excludes active duty for training from the general concept of active duty."

In a letter to the Director of the Property Tax Division of the Iowa Department of Revenue, from Junior F. Miller, Major General, the previous Adjutant General of Iowa, he stated in part:

"Explanation of the status of National Guardsmen in 'Active Duty for training in Federal Status' must be premised upon the legalistic principle that members of the National Guard only attain 'Federal Service' status as a result of a 'Call' or 'Order' of the President or Congressional action. However, section 672(d) title 10, U. S. Code, provides authority for performance of duty by Guardsmen, referred to as 'Active Duty for Train-

ing in Federal Status,' which results, to a degree, in an exception to the above stated legal principle. Paragraph 2b, National Guard Regulations 25-5, states:

" 'All nonprior service personnel enlisting in the Army National Guard must successfully complete an initial period of active duty for training in a Federal Status.' "

10 U.S.C. §672(d), the authority under which National Guardsmen and Reservists are called to their "active duty for training in federal status," provides in part:

"At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to *active duty*, or retain him on active duty, with the consent of that member." (Emphasis supplied)

This statute, which is the basis for a Guardsman's period of full-time training at a federal installation, makes no distinction between "active duty" and "active duty for training."

It is to be noted that certain Opinions of the Attorney General, as well as several Iowa Supreme Court decisions, have dealt with various factual situations, but have not developed consistent general rules with which to interpret the statute. There have been inconsistent holdings as to the individual's right to the exemption.

In *Jones vs. Iowa State Tax Commission*, supra, plaintiff, having been found unqualified for service in any of the regular military branches, joined an organization under the supervision of the Civil Aeronautics Administration. In finding plaintiff not entitled to the military exemption, the Court made the following statement concerning one's service:

"The conclusion is inescapable that plaintiff was never on what is known as 'active service' so that he comes within the letter of the statute. The plaintiff contends that in interpreting the Iowa statute we are not bound by federal regulations and laws as to who were and who were not soldiers. This may be conceded, and yet we think, since it was the Federal Government which called for soldiers and inducted them and in whose service they were at all times employed, we must give weight to that government's interpretation when we are called upon to determine the fact of being or not being an 'honorably separated, retired, furloughed to a reserve, placed on inactive status, or discharged soldier. . . .' All our country's soldiers of this war were soldiers of the United States, rather than of any state. We think it clear that the Iowa statute, section 427.3(4), could refer only to such soldiers, and we must therefore determine whether they were 'soldiers' within the meaning of the term as used by the Federal Government."

247 Iowa 536, 74 N. W. 2d 566.

Also, in *Lamb vs. Kroeger*, 233 Iowa 730, 8 N. W. 2d 405 (1943), the Supreme Court denied the exemption to plaintiff, who had been discharged prior to leaving for the induction center due to the cessation of hostilities. The Court, in denying the exemption, stated:

"Lamb, under this record, was neither an officer nor a private in the military service. Did he serve in the Army? Was he one of an organized body of combatants? We think not. The Army had not accepted him as yet. He had passed no Army physical examination."

233 Iowa 733.

The above cases may be compared with and distinguished from the situation presently before us, in order that a more complete perspective of these claimants' positions may be obtained. In contrast to the *Jones* case, supra, claimants were members of the military service, as defined above by the U. S. Code. Also, they were of a particular rank in the military service, did serve on "active duty" as defined by the federal government, and were members of an organized body of combatants, all in direct contrast to the claimant's situation in *Lamb vs. Kroeger*, supra.

An Opoinion of the Attorney General in 1932 (1932 O.A.G. 247) summarily denied the exemption to an individual in the naval reserve. Later Opinions, however, have not been entirely consistent with this view. At 1940 O.A.G. 607, it was stated:

". . . [w]e are of the opinion that the exemption is contingent upon an honorable discharge showing service in the military forces of the United States. . . ."

See also 1950 O.A.G. 17; 1946 O.A.G. 144; and 1942 O.A.G. 79.

An Attorney General's Opinion has also defined those persons who come under the terms of the military service exemption statute. At 1946 O.A.G. 55, 57, it is stated:

"In using the term 'soldier, sailor, marine or nurse' we are of the opinion the term designates those persons who are component part of the naval and military establishments of the United States."

In a 1934 Attorney General's Opinion (1934 O.A.G. 70), it was held that a woman who had actively served in the U. S. Naval Reserve was entitled to the exemption.

As shown above, "active duty" includes training duty in federal status. At the end of this training period, the Reservists or National Guardsmen receive the same form DD214 as other military personnel who have performed other types of active duty and are then returned or "furloughed" to their Reserve Unit. For example, it is our understanding a National Guardsman completing the six month training period in federal status receives the same form from the Defense Department (DD214) at the time of his return to his Guard Unit as does a Guardsman who is called to active duty and serves for a period under federal authority. During these duty periods, both are also subject to the Federal Uniform Code of Military Justice under 10 U.S.C. §802(1).

It is the opinion of this office that members of the Reserve or National Guard who participate in the "Active Duty for Training in Federal Status," or who are placed on active federal duty by a call of the President or Congress have sufficiently met the implicit requirement of active duty to qualify for the Military Service Tax Exemption, provided their active service is within the dates set out in §427.3(4) of the Iowa Code. A national Guardsman or Reservist who participates in his required training period in federal status during one of the enumerated periods, just as one who is called to another form of active duty during an enumerated period, is entitled to the benefits of the exemption upon timely submission to the County Recorder of the proper form required by §§427.5 and 427.6, Code of Iowa (1966). This is compatible with the holding in 1938 O.A.G. 391, where, in allowing the exemption to a soldier discharged

after six days of service, it was stated:

"The provision . . . does not make time a prerequisite to the exemption allowed. Although this man's service to his country was of short duration, he cannot be denied the privileges granted to him by statute on that account."

The National Guardsmen and Reservists, who fulfill the federal active duty requirement, cannot be denied the exemption merely because their active duty time is of short duration in comparison to their total service or the service of members of the regular military branches. In order that one be eligible for the tax exemption, an individual's active military service does not have to take place in Viet Nam or other war areas, but only during the dates of the Viet Nam War or the other war periods set out in the statute. 1968 O. A.G. 925.

It is our opinion that Reservists and National Guardsmen who have participated or are participating in "Active Duty for Training in Federal Status" during one of the enumerated periods as set out in §427.3(4) of the Code of Iowa (1966), as amended, and fulfill the timely filing requirements of §§427.5 and 427.6, are eligible for the Military Service Tax Exemption.

October 15, 1969

CRIMINAL LAW: Informations in Mayor's Court — §762.3, Code of 1966. It is within the power of an arresting officer to designate in an Information, upon making an arrest, the specific statute which has been violated. §762.3 is a mandatory statute, and a mayor is without authority to change an Information filed in his court from a charge of a violation of a statute to a violation of a town ordinance. (Turner to Atwell, Supt. of County Audits, Auditor's Office, 10/15/69) #69-10-6

Mr. H. E. Atwell, Superintendent of County Audits: You have requested an opinion of the attorney general as follows:

"Does the arresting officer, such as the Highway Patrol, have the authority to write on the information the section of the code which has been violated prior to making an arrest or issuing a ticket?

"Does the Mayor have the authority to change the information on the ticket from a violation of a state law to the violation of a city ordinance?

"The fines from state violations go to the county treasurer and under a violation of city ordinance it goes to the city clerk."

You also sent copies of three informations that were prepared by the arresting officers and filed in mayor's court. Each of them contains a brief statement of the crime charged and a code section number, both written in by the arresting officer. And in each case the mayor has crossed out the code citation and inserted a city ordinance number instead. For example, one of the informations charges R. J. D. with "failure to stop at a stop sign. Code of Iowa 321-345," but the code reference was crossed out and "Town Ord. 8166" written in.

I also note that each information contains a brief account by the arresting officer of what the defendant allegedly did (or failed to do), followed by these modifying words printed on the ticket form:

"Contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Iowa."

As far as your first question is concerned, it is to be said that no statute requires an Information to contain the section of the law claimed to be violated by the defendant. However, the Supreme Court in *State vs. Jennings*, 1967, ____Iowa____, 153 N. W. 2d 485, considered a fact situation that is relevant to the one you pose:

"The investigating police officer gave defendant a traffic ticket, charging her with failure to yield the right of way to a pedestrian and requiring her to appear in Municipal Court on a date stated therein. The ticket is on a printed form and is a summons or notice to appear in Municipal Court. It contains blanks or boxes for various information which the investigating officer does not supply, but which is later inserted and which then converts the ticket into an information upon which the criminal prosecution is based. As given to defendant, the ticket did not show whether the charge was being brought under a city ordinance or under section 321.257, Code, 1966, nor did it name either the City of Des Moines or the State of Iowa as her accuser. The printed form of ticket contains boxes for the supplying of all of this information and it was, sometime subsequent to the issuance of the ticket and before the time of trial, supplied on the form."

The court queried whether a defendant must ascertain for himself what the charge is against him, and concluded:

"We have never understood this to be a defendant's obligation when one is charged with the commission of a crime. The very least one is entitled to know is the specific proviison of law alleged to have been violated, and the identity of the accuser. This is the requirement of section 762.3, Code, 1966. It is also the holding in State v. Bethards, 239 Iowa, 889, 903, 32 N. W. 2d, 769, 771."

Clearly, on the above authority, the enforcing officer was acting within his authority in designating the specific statute of Iowa claimed to have been violated by the defendant.

In answer to your second question, §762.3(2) requires the information to contain "the names of the parties, if the defendant be known, and if not, then such names as may be given them by the complainant." Of course the mayor's switch of the charge from a code violation to a violation of city ordinance effects a concomitant switch in the parties. As said in *State v. Bethards*, 1948, 239 Iowa 889, 32 N. W. 2d 769, the requirements of §762.3 are mandatory:

"Paragraph 1 of section 762.3 was complied with. Paragraph 2 was complied with in part. It correctly named the defendant. But for the plaintiff it named two, 'The State of Iowa' and 'City of Des Moines.' Defendant was charged with a single so-called offense. Under the record, it could not have been against both the State and the City. If the obstruction of traffic violated an ordinance it was a Class 'D' action under section 602.25 of the Code, and the defendant would be summarily tried by the court, and his appeal would be to the district court. If the offense was against the State, the action was a Class 'C' one under section 602.25, triable to a jury, and any appeal would be to the Supreme Court. There was no compliance with paragraph 2 of section 762.3. An information so entitled would tend not only to misinform a defendant, but to mislead him. Defendant was tried by the court. He may have waived a jury trial. The record is silent on the matter. If he did not ask for a jury it may have been that he was misled. The provisions of said section 762.3 are mandatory. Defendant has not specifically argued the point mentioned in this division."

This mandatory statute was not complied with, and the mayor was

without authority to make the change that he did.

October 20, 1969

STATE OFFICERS & DEPARTMENTS: Iowa Reciprocity Board — Uniform Compact — §326.2, Code of Iowa, 1966: The Reciprocity Board is not required to withdraw from a compact which requires the pro-ration of truck license fees on a different formula than that set forth in 326.2, supra, when the board was already bound by the compact formula before the section in question became law. §326.2, supra, only aplies to compacts in futuro. The amending of the compact, as allowed by the terms thereof, does not constitute entering into a new contract. (Turner to Barry, Chairman, Iowa Reciprocity Board, 10/20/69) #69-10-15

Robert C. Barry, Chairman, Iowa Reciprocity Board: The Iowa Reciprocity Board has posed the following questions to this office:

1. Is the Board required by Section 326.2, Code of Iowa, 1966 to take positive action that would constitute withdrawal by the State of Iowa from the Uniform Vehicle Registration Proration and Reciprocity Agreement?

2. Would the submission by Iowa to the other jurisdictious party to the agreement of an amendment dealing with the collection of the registration fees of Iowa based applicants if accepted and approved, constitute a new agreement between Iowa and the other jurisdictious?

You are advised that the opinion of this office is as follows:

I

At the time the Board entered into the Agreement Section 326.2 limited the Board's authority to enter into agreements providing for the apportionment of registration fees to those agreements based upon a "total fleet mile" formula.

In 1965, Section 326.2 was amended such that the Board continues to have authority to make agreements with other jurisdictions providing for the apportionment of registration fees but requires the Board to apportion such fees on a "compact mile" formula. As stated by the Iowa Supreme Court in *General Expressways, Inc. v. Iowa Reciprocity Board,* ....Iowa...., 163 N. W. 2d 413.420, "the provisions of Section 326.2 as amended and the provisions of the Uniform Compact are not necessarily in conflict, and both may stand."

The Court notes at 163 N. W. 2d 421, that if no permission of the other members of the Uniform Compact to prorate on a compact mile basis was obtained by the Board ". . . the implication was cancellation."

The intent of the legislature as expressed in the statute, should, of course, be followed. However, in construing statutes we must search for the legislative intent as shown by what the legislature said, rather than by what it should or might have said. We do not inquire what the legislature meant. We ask only what the statute means. State v. Ricke, ...Iowa...., 160 N. W. 2d 499.

Section 326.2 makes no mention of agreements entered into previously by the Board nor does it direct the Board to take any action in regard to any agreements other than those which Board may make from the effective date of the amendment onward.

Accordingly, it is our opinion that while Section 326.2 gives the Board authority to "make" proration agreements only on a compact mile basis, that section refers only to the authority of the Board "to make" future agreements; it does not refer to the authority of the Board to continue agreements made in the past. Section 326.2 does not require the Board to take action to withdraw Iowa from the Compact.

II

Section 38 of the Compact states as follows:

"Amendment This agreement may be amended by joint action of the contracting states, acting through the officials thereof authorized to enter into this agreement. Any amendment shall be placed in writing and become a part hereof."

The words "become a part hereof" clearly indicate that the agreement itself is not terminated by being amended but merely incorporates into itself any amendment. As stated in *Collins v. Gard*, 224 Iowa 236, at page 240:

"That parties to an agreement may subsequently modify the original agreement by mutual consent needs no citation of authorities."

An "alteration" or "modification" of a contract which introduces new elements into the details of the contract, or cancels some of them, but leaves the general purpose and effect undisturbed is distinguishable from "termination" of a contract which refers to abrogation, thereby doing away with the existing agreement upon the terms and with the consequences agreed upon. 17A C.J.S. §373 (a) p. 419

The Board can amend the compact with the consent of the other jurisdictious without such action constituting a termination of the existing contract and the entering into of a new agreement.

October 21, 1969

COUNTIES: **Supervisors.** Chapter 218, 63rd G. A., 1st session. Supervisors must choose election plan by November 1, 1969, but such elections need not be held in 1969. The terms of incumbents are cut short if (1) the plan chosen is different from the one presently in effect, or (2) two or more supervisors are redistricted into the same district. (Nolan to Neu, State Senator, 10/21/69) #69-10-7

The Hon. Arthur A. Neu, State Senator: This replies to your letter of September 10, 1969, which presents several questions requiring an interpretation of House File 812 enacted by the 63rd G. A. first session. Your questions are:

"1. If Plan 2 or 3 is adopted by the supervisors and no election is petitioned for or held, do incumbents finish their terms?

"2. If Plan 2 or 3 is adopted by the voters pursuant to a petition, do incumbents finish their terms?

"3. If Plan 2 or 3 is adopted or if a county redistricts and two incumbents are thrown into the same district, do they both finish their term or are new elections required?

"4. If districts are redrawn after the 1970 census thereby putting

two incumbents together or putting an incumbent from one district into another district, must new elections be held?

"5. If the supervisors adopt Plan 2 or 3 in 1969 and pursuant to a petition of 10 percent of the voters, another plan is adopted at a later date, are incumbents permitted to finish their terms and which, if any, must run for re-election?"

House File 812 substantially amends a number of sections in Ch. 331 of the 1966 Code of Iowa. It does not, however, change §331.1 which provides:

"The board of supervisors in each county shall consist of three persons, except where the number has been or may hereafter be increased in the manner provided by this chapter. They shall be qualified voters, and be elected by the qualified voters of their respective counties and shall hold their office for four years."

House File 812, supra, requires the supervisors to select one of three alternate representation plans by November 1, 1969. Failure to make such selection results in automatic imposition of Plan 1 (at large election and representation) by operation of law.

When petitioned by 10% of the qualified electors voting at the last previous general election, the supervisors shall cause a special election to be held to determine which plan shall apply in the county. Such petition, as provided in §2 of the Act, "shall be filed with the county auditor by January 1, of the year 1970 or any general election year thereafter." Consequently, this special election is not required to be held in 1969.

Under §6, if Plan 2 or 3 is adopted by the board of supervisors and no election is petitioned or held, the terms of incumbents will not be shortened unless: (1) if lal incumbents were permitted to finish their terms the board would be composed of much more than five members after January 1971, or (2) two or more such holdover members are residents of the same district.

Incumbents may finish their terms where Plan 2 or 3 is adopted by the voters and the plan adopted is the plan in effect at the time of the election. Otherwise, under §2, if the special election is held in 1970 or thereafter, and the plan approved by a plurality of the votes cast is not the plan currently in effect then the terms of *all* members of the board serving at the time of the special election expire on the second secular day of January folowing the next general election. This would apply as well to the set of facts about which you inquire in question number (5) set out above.

New elections are required if in the adoption of Plan 2 or Plan 3, a county redistricts and two incumbents are thrown in the same district. See §6 of H.F. 812:

"If Plan 2 or 3 is selected unde rthe circumstances described in subsection one (1) of this section, each holdover member shall represent the supervisor district wherein he resides; however, if two or more such holdover members are residents of the same district the terms of both or all of such members shall expire on the second secular day of January following the 1970 election and members shall be chosen in such election to fill the vacancies thus created."

H.F. 812 is silent on the matter of whether new elections must be held

if, after the decennial census, two incumbents are thrown together in a district which has been redrawn as a result of population shift. Towever, since §69.2(3) of the Code of Iowa, provides that a vacancy is created when an incumbent ceases to be a resident of the district "by or for which he was elected" and inasmuch as H.F. 812 prohibits the enlargement of boards of supervisors to more than five members, it i sour opinion that the terms of holdover incumbents thrown together in a single representative district following a decennial census redistricting are cut short, since the district is entitled to only one supervisor.

October 21, 1969

COURTS: Eligibility of nominees for appointment to the Supreme Court — Ch. 46 and §605.24, Code of Iowa, 1966. (1) "Appointment" is the event which marks the commencement of the initial term of an individual named by the Governor to the Supreme Court. For such purpose it means the act of the Governor in designating, choosing or selecting an individual to fill a vacancy from among those nominated. It can occur prior to investiture in or taking the oath of office and before the vacancy actually exists. (2) To be eligible for nomination to the supreme or district court an individual must be able to serve an initial and one regular term before reaching the age of 72. Since the initial term of judges is for 1 year after appointment and until Jan. 1 following the next general election after the expiration of such year, the initial term of a judge appointed on or before Nov. 3, 1969 would expire Jan. 1, 1971 but the initial term of a judge appointed after Nov. 3, 1969, would not expire until Jan. 1, 1973. (3) A district court judge who has held office continually since before July 1, 1965, who might now be appointed to the supreme court must retire at age 72 even though if he remained on the district court bench he would not have to retire until age 75. (Haesemeyer to Justice Larson, Bradley & Dallas, 10/21/69) #69-10-8

The Hon. Robert L. Larson, Judge, Iowa Supreme Court; Mr. F. James Bradley; Mr. William M. Dallas, Members, State Judicial Nominating Commission: By a letter dated September 30, 1969, addressed to the attorney general, Messrs. Bradley and Dallas, as members of the state judicial nominating commission, have requested an opinion of the attorney general with respect to the following:

"We request your opinion upon the questions herein submitted in order that the Commission may correctly ascertain who is eligible to be a Supreme Court nominee and in order that the Commission may correctly ascertain how long a nominee would actually serve if appointed (assuming service to the age of mandatory retirement).

"(1) Frequently, the Governor will designate the appointee and the appointee will file his oath of office on dates subsequent to the first day that the vacancy exists. In such situations, does the appointee's initial term commence as of the first day of the vacancy, or as of the day the Governor appoints him, or as of the day the appointee files his oath of office?

"When such a situation arises in respect to a vacancy occurring in the latter part of a year preceding a judicial election, it becomes important for the Commission to know the date that the appointee's initial term will commence. It could make a difference in the date of expiration of the appointee's initial term, and consequently make a difference as to the age qualification of prospective nominees. Because the dates of *designation by the Governor* and filing of the oath of office cannot be known to the Commission, certainly can be achieved only if the first day of the vacancy constitutes the day the initial term commences.

"(2) Bearing in mind that the 1970 general election will be held on November 3, under the provisions of 1966 Iowa Code §46.16, sub-paragraph 1, will the initial term of a Supreme Court Justice that commences after November 3, 1969, but before January 1, 1970, expire on January 1, 1971 or will the initial term expire on January 1, 1973?

"It is, of course, important for the Commission to know with certainty the date the initial term will expire in order to determine the age qualification of prospective nominees.

"(3) Under the provisions of 1966 Iowa Code §605.24, if a District Court Judge who has continuously served as such since prior to July 1, 1965, is appointed as a Justice of the Supreme Court, must he retire at the age of 75 or at the age of 72?

"It appears to us that §605.24 must be construed in harmony with 1966 Iowa Code Chapter 605A, the Judicial Retirement System Chapter, and that such a District Court Judge who is qualified for appointment to the Supreme Court should not face the penalty, if appointed, of losing three years' tenure and possible reduction of retirement benefits. In addition, the Judicial Retirement Fund should not be deprived of his contributions for this period. It also appears to us that since such a judge was a judge 'of the Supreme court or district court holding office on July 1, 1965' he is entitled to serve until age 75, and that any other construction would be inconsistent with the language and the spirit of the statute.

"(4) If your answer to question (3) is 75, under the provisions of 1966 Iowa Code §46.14, is a District Court Judge who has continuously served as such since prior to July 1, 1965, and who is of such age that he would be able to serve an initial and one regular term as Supreme Court Justice before reaching his mandatory retirement age of 75 (but who would reach the age of 72 before completing his initial and one regular term), qualified to be a nominee for the Supreme Court?

"It appears to us that Code §§46.14, 46.16 and 605.24 should be construed together and in harmony with one another in answering this question. The obvious intent of the legislature was two-fold; first, that all Judges, whether serving on the District Court or Supreme Court of Iowa should be compelled to retire when they reach the age of 75 years; and second, all Judges, at the time of their initial appointment, should be of an age that they would be required to make an equitable contribution to the Judicial Retirement Fund before they reach the mandatory retirement age and thus, that a nominee merely be sufficiently young to fully serve out his initial term and one regular term. To construe the respective statutes, one with the other, that the age of 75 is the applicable age, and that he is therefore qualified to be a nominee, would be consistent with 1966 Iowa Code §4.1 that the statutes shall not be construed 'inconsistent with the manifest intent of the general assembly, or repugnant to the context of the statute.' "

We shall consider your questions in the order in which they are presented.

(1) §§46.12, 46.14 and 46.16, Code of Iowa, 1966, provide respectively:

"46.12 Notification of vacancy and resignation. When a vacancy occurs or will occur within sixty days in the supreme court or district court, the secretary of state shall forthwith so notify the chairman of the proper judicial nominating commission. The chairman shall call a meeting of the commission within ten days after such notice; if he fails to do so, the chief justice shall call such meeting.

"When a judge of the supreme court or district court resigns, he shall submit a copy of his resignation to the secretary of state at the time he

submits his resignation to the governor; and when a judge of the supreme court or district court dies, the clerk of district court of the county of his residence shall in writing forthwith notify the secretary of state of such fact."

"46.14 Nomination. Each judicial nominating commission shall carefully consider the individuals available for judge, and within sixty days after receiving notice of a vacancy shall certify to the governor and the chief justice the proper number of nominees, in alphabetical order. Such nominees shall be chosen by the affirmative vote of a majority of the full statutory number of commissioners upon the basis of their qualifications and without regard to political affiliation. Nominees shall be members of the bar of Iowa, shall be residents of the state or district of the court to which they are nominated, and shall be of such age that they will be able to serve an initial and one regular term of office to which they are nominated before reaching the age of seventy-two years. No person shall be eligible for nomination by a commission as judge during the term for which he was elected or appointed to that commission. Absence of a commissioner or vacancy upon the commission shall promptly certify the names of the nominees, in alphabetical order, to the governor and the chief justice."

"46.16 Terms of judges. Subject to the provisions of sections 605.24 and 605.25 and to removal for cause:

1. The initial term of office of judges of the supreme court and district court shall be for one year after appointment and until January 1 following the next judicial election after expiration of such year; and

2. The regular term of office of judges of the supreme court retained at a judicial election shall be eight years, and of judges of the district court so retained shall be six years, from the expiration of their initial or previous regular term as the case may be."

It is clear from §46.16, supra, that the event which marks the commencement of the initial term of office of a justice of the supreme court is his "appointment." It is equally plain from reading §46.12 that the law contemplates that the state judicial nominating commission may meet as much as 60 days in advance of the actual occurrence of a vacancy on the court. Indeed, §46.12 is susceptible of the interpretation that once the required notice has been given by the secretary of state a meeting must be held within ten days. Under §46.14 the judicial nominating commission has sixty days after receiving notice of a vacancy or expected vacancy to certify its nominees to the governor. Thus, under the law it is evident that it is entirely possible for all steps required for the naming of a new justice except the filing of the oath to have been completed before a vacancy actually occurs.

We have been able to find no Iowa cases or authorities which shed any light on the meaning of the term "appointment" in the context in which it is found in §46.16. However, cases from other jurisdictions indicate that appointment means the act of appointing or assigning to an office. *Rogers v. Industrial Commission of Ohio,* , 27 Ohio N.P., N.S. 256; *State ex rel Nicholls v. City of New Orleans,* 1889, 41 La. Ann. 156, 6 So. 592; *Com. ex rel Maurer to Use of Braden v. O'Neill,* 1951, 368 Pa. 369, 83 A. 2d 382, 384. It is not synonymous with nomination. *Harrington v. Pardee,* 1905, 1 Cal. App. 278, 82 P. 83, 84. Elsewhere it has been stated that appointment to office by one possessing appointing power is the designation of another person to discharge the duties of an office and is completed when the appointing authority has performed acts incum-

bent upon him to accomplish such purpose, though the title to the office and the tenure of the officer remain subject to action of the senate. *McChesney v. Sampson*, 1930, 232, Ky. 395, 23 S. W. 2d 584.

In another case a person who was informed of her acceptance for a position was "appointed" even though formal assumption of duties was prevented by intervening circumstances. *In re Bienvenu*, 1963, 158 So. 2d 213, 216.

Thus, it would appear that appointment is something more than nomination, yet it is completed with something less than formal investiture in and taking of office. Where confirmation by the senate is required an appointment may nevertheless be complete prior to such confirmation.

In Iowa law we find numerous provisions whereby various officials are appointed by the governor and confirmed by two-thirds of the senate. Similarly, it is not uncommon to find statutory provisions that an appointive officer is to serve for a fixed term and until his successor is appointed and qualified. Such language would certainly seem to indicate that an appointment is something different from confirmation or qualification.

Accordingly, it is our opinion that "appointment" for the purposes of §46.16 is the act of the governor in designating, choosing or selecting an individual from those nominated to fill a judicial vacancy. This does not mean that upon such appointment the appointee takes or holds office or is entitled to exercise any of the authority thereof. It merely means that at the time of the governor's appointive act the initial term commences.

We appreciate that this conclusion may, as you suggest, place the commission in something of a dilemma since at the time it makes its nomination it will have no way of knowing when the governor will make his appointment and one or more nominees might become ineligible by reason of the governor's inaction. However, the governor will be aware of any such precarious situation and if he favors a particular nominee in danger of becoming ineligible if not appointed by a certain date, it is within the governor's power to appoint him in time. If he refrains from doing so, it would be a safe assumption that another nominee was regarded more favorably.

(2) The language of §46.16 as to the initial term of judges of the supreme and district court is quite clear and free from ambiguity. The initial term of a judge appointed after November 3, 1969, would, in our opinion, expire January 1, 1973. Judicial elections are held at the time of the general election. §46.17. As you point out the 1970 election will be held on November 3. Since a judge appointed after November 3, 1969, would not complete one year until after such November 3, 1970, his initial term would not expire until January 1 following the general election after that, i.e. November 7, 1972.

(3) §605.24, Code of Iowa, 1966, 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."

It is to be observed that both §605.24 and Chapter 46 were all enacted in substantially their present form by the same Act of the general assembly, Chapter 80, 60th G. A.

It is true that in determining the meaning of a statute all provisions thereof and the Act of which it is a part must be considered. *Georgen v. State Tax Commission*, 1969, ____Iowa____, 165 N. W. 2d 782. Moreover, statutes which relate to the same subject matter or to closely allied subjects are in *pari materia* and must be construed, considered and examined in the light of their common purpose and intent. *Northwestern Bell Tel. Co. v. Hawkeye State Tel. Co.*, 1969, ____Iowa____, 165 N. W. 2d 771. Thus, if recourse to the rules of statutory construction were justified in the present case it would be appropriate to consider and seek to harmonize Chapter 605A of the Code together with Chapter 80, 60th G. A. However, it is well settled that there is no room for interpretation of statutes which are plain, clear and unambiguous. *Michel v. State Board of Social Welfare*, 1954, 245 Iowa 961, 65 N. W. 2d 89. And where a statute is plain we are not free to search for its meaning beyond its express terms and words cannot be written into a statute which are not there. *Dingman v. City of Council Bluffs*, 1958, 249 Iowa 1121, 90 N. W. 2d 742; *Iowa-Illinois Gas & Elec. Co. v. City of Bettendorf*, 1950, 241 Iowa 358, 41 N. W. 2d 1.

In the instant case the 60th General Assembly enacted in a single bill, Chapter 80, what is now Chapter 46 and §605.24 of the Code. The bill contained a publication clause and became effective on May 3, 1963. However, §26 of the Act (now code section 605.24) expressly provided that such section should not be effective until July 1, 1965. Thus, the legislature took great pains to provide that judges of the supreme or district court holding office on July 1, 1965, need not retire until age 75 but that judges appointed after that date would be obliged to retire at age 72. This same legislature in the same bill also passed §46.14 which requires a judicial nominee to be able to serve an initial and regular term before reaching the age of 72. They made no execption for persons sitting on the district court bench prior to July 1, 1965, and we are not prepared to engraft language onto the statute to cover such a situation. We must assume that the legislature knew what it was doing. While what you suggest has a certain appeal as a matter of logic we are limited to considering what the legislature said rather than what we think it should or might have said if it had thought of it. *Overbeck v. Dillaber*, 1969, ____Iowa____, 165 N. W. 2d 795.

In addition it should be remembered that §26(A) of Chapter 80, 63rd G. A. reads somewhat differently from §605.24 of the Code, these differences being accounted for by changes quite properly made by the code editor. As passed by the general assembly §20(A) provides:

"A. '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 (75) years for all judges of the supreme court or district court holding office on the effective date of this Act. The mandatory retirement age

shall be seventy-two (72) years for all judges of the supreme court or district court appointed to office after the effective date of this Act. *This section shall not be effective until July 1, 1965.*' " (Emphasis added)

Bearing in mind that the rest of Chapter 80 including what is now §46.14 of the Code became effective on May 3, 1963, and that §15 thereof required that after June 30, 1963, all appointments to the supreme and district courts were to be made from nominees of the respective judicial nominating commissions, there was a period of two years when the law required a judicial nominee to be able to serve an initial and one regular term before reaching age 72, but contained no provision as to mandatory retirement. Would anyone seriously suggest that a district court judge would have been eligible for appointment to the supreme court during this period if he could not serve an initial and one regular term before reaching age of 72. §46.14, unaided by §605.24 would not admit of this possibility. It would quite plainly and on its face establish a 72 year age limit. We are not prepared to say that §46.14 would mean one thing between June 30, 1963 and July 1, 1965, and something quite different thereafter merely because §26 of Chapter 80, 60th G. A. became effective on July 1, 1965.

Finally the absence of any language in §46.14 to make an exception for district court judges holding office as of July 1, 1965, who might be appointed to the supreme court would seem to manifest a legislative intent that the meaning contended for was not to be given §605.24. In other words if the legislature had thought that §605.24 meant that a district court judge holding office on July 1, 1965, who was thereafter appointed to the supreme court was entitled to a mandatory retirement age of 75 rather than 72, it seems reasonable to suppose they would have made a similar proviso in §46.14 rather than leave us to flounder in a sea of conjecture and idle speculation or compel us to force the same result by a kind of boot strap operation requiring the addition to a statute of words which are not there. The fact that the general assembly made no such provision in §46.14 leads me to conclude that as far as the legislature was concerned July 1, 1965 was the magic date and anyone *appointed* after that date had to retire at age 72 regardless of what office he might have held before that time. While it is true that §605.24 does provide, "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." It is equally beyond doubt that such section also says, "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." It cannot be gainsaid that a district court judge named to the supreme court after July 1, 1965, would be "appointed to office" within the meaning of this sentence.

Accordingly, it is our view that a district court judge having a mandatory retirement age of 75 who now might be appointed to the supreme court would have to retire from such court at age 72.

(4) In view of our answer to question number 3, it is unnecessary to answer question number 4.

October 23, 1969

COUNTY SUPERVISORS: Reducing from seven to five man board — H.F. 812, 63rd G. A., §331.6, 1966 Code. In reducing from seven to five man board, elective terms of incumbents are terminated if, in creating five districts, two or more incumbents then reside in the same district, in which event those incumbents must stand for reelection in 1970. (Ivie to Kliebenstein, 10/23/69) #69-10-9

Mr. Don Kliebenstein, Grundy County Attorney: You have asked the method in which Grundy County should reduce from a seven to five man board prior to the 1970 general election pursuant to the requirements of House File 812, 63rd G. A.

Section 6(2) of House File 812, 63rd G. A. requires the following:

"The terms of holdover members elected to five-year terms in the 1968 general election shall expire on the second secular day in January, 1973. No county board shall, after the second secular day in January, 1971, be composed of more than five members. Boards of more than five members shall, before the 1970 general election, reduce their number to five *in a manner determined by the board and pursuant to law.*

"If plan two or three is selected under the circumstances described in subsection one (1) of this section, each holdover member shall represent the supervisor district wherein he resides; however, if two or more such holdover members are residents of the same district the terms of both or all of such members shall expire on the second secular day in January following the 1970 general election and members shall be chosen in such election to fill the vacancies thus created. The terms of such members shall be two years. All subsequent members shall be elected pursuant to this Act." (Emphasis added.)

The underlined portion certainly falls short of presenting any guidelines for accomplishment of the reduction from a seven to a five man board. It implies certain discretion in the board while requiring procedures adopted to be "pursuant to law." House File 812 provides no other guidance in regard to such procedures, unless it be argued that §8 thereof serves as authority.

"Section three hundred thirty-one point three *(331.3)*, Code 1966, is hereby repealed and the following enacted in lieu thereof:

" 'In any county where the number of supervisors has been increased to five, the board of supervisors shall, on petition of one-tenth of the qualified electors of the county having voted in the last previous general election for the office of governor, or may on its own motion by resolution, submit to the qualified electors of the county, at any regular election, a proposition as to whether or not the number of supervisors should be decreased to three.

"If a majority of the votes cast shall be in favor of the decrease to three members, then the number of supervisors shall be so reduced as provided in section three hundred thirty-one point six (331.6) of the Code and section nine (9) of this Act.' "

That section deals with reduction from a five to three man board *after special election* and would require all incumbents to stand for reelection at the next general election.

Similarly §331.6, 1966 Code of Iowa, provides for incumbents, *after special election* reducing boards from seven to five members or from five to three members, to stand for reelection at the next general election.

This method has been consistently carried into the provisions of House File 812, 63rd G. A., as we have seen above but is *limited* to a reduction in numbers as a result of a special election. In the case of Grundy County, however, the reduction to a five man board is the result of legislative requirement in House File 812 without, as has been stated, any indication as to the status of incumbents.

It is clear, however, that the 63rd G. A., in enacting House File 812, made every attempt to preserve the elective terms of supervisors. In this regard, §6(1) reads as follows:

"In the event there is no special election pursuant to section two (2) of this Act or a special election does not change the supervisor representation plan selected by the board pursuant to section one (1) of this Act, the members of the board elected in the 1968 general election shall, except as provided in subsection two (2) of this section, continue to retain office until their terms expire. If plan one is selected, or imposed pursuant to section one (1), subsection three (3) of this Act, such holdover members shall become supervisors at large."

The only other section of House File 812 which would shorten the terms of supervisors generally is §8 which again, as reproduced supra, demonstrates it applies only after special election.

Since all of the above cited sections apply to reduction based on special election, I do not believe they are applicable in the case of Grundy County. Rather, the second paragraph of §6(2), House File 812 more properly will control the method of reducing to five members. Under that authority, only those present members whose terms would normally expire on the second secular day of January, 1971, and those who, after redistricting to five districts, find one or more holdovers residing in their newly defined district, need stand for reelection in 1970.

October 23, 1969

TAXATION: Personal Property Tax Credit and Military Service Tax Exemptions §427.3, Code of Iowa, 1966, as amended by Chapter 351, Acts of 62nd G. A. and Senate File 79, Acts of 63rd G. A.; §41 of Chapter 356, Acts of 62nd G. A., as amended by §1 of House File 400, Acts of 63rd G. A. For purposes of certifying the military service tax credits and personal property tax credits to be reimbursed to the county by the state, county officials should first apply the military service tax exemption to the listed personal property of a qualified veteran who does not have other property against which to apply such exemption. (Murray to Kliebenstein, Grundy County Attorney, 10/23/69) #69-10-10

Mr. Don Kliebenstein, Grundy County Attorney: You have requested an opinion of the Attorney General as follows:

"Should the appropriate County Officials, in order to certify the military service tax credits and personal property tax credits to be reimbursed to the County by the State under the provisions of Chapter 426A of the 1966 Code and Chapter 356 of the Acts of the 62nd G. A., first apply the personal property tax credit (as specified by H.F. 400, Acts of the 63rd G. A.) or first apply the Military Service Exemption (as specified by Section 427.3 of the 1966 Code) to the listed personal property of a qualified veteran (who does not have other taxable property against which to apply the credit) in order to determine under which provision of the law the reimbursements are to be made to the County."

Section 41 of Chapter 356, Acts of the 62nd General Assembly (1967),

as amended by §1 of House File 400, Acts of the 63rd General Assembly (1969), provides in relevant part:

"Persons entitled to exemption from personal property tax under provisions of section four hundred twenty-seven point three (427.3), Code of Iowa, shall be granted such exemption, in addition to the credits provided by this Act.

"There is hereby granted a credit of not to exceed two thousand seven hundred (2,700) dollars against the assessed value of tangible personal property as defined in section thirty-nine (39), chapter three hundred fifty-six (356), Acts of the Sixty-second General Assembly, owned by a person or business enterprise."

Section 427.3, Code of Iowa, 1966, as amended by Chapter 351, Acts of the 62nd General Assembly (1967), and Senate File 79, Acts of the 63rd General Assembly (1969), provides for a property tax exemption for veterans of certain wars as well as those persons serving honorably on active military duty during the time of the Viet Nam Conflict. This tax exemption is based on the taxable value of the property. In general, "taxable value" and "assessed value" are synonymous concepts for property tax purposes. §441.21, Code of Iowa, 1966, as amended by §1 of Chapter 354, Acts of the 62nd General Assembly (1967).

As you will note, the personal property tax credit is not an exemption from taxation, but rather is in the nature of a deduction from the total assessed value of tangible personal property. Property taxes are levied upon the assessed value of taxable property in the county. §444.9, Code of Iowa, 1966, and §441.21, Code of Iowa, 1966, as amended by §1 of Chapter 354, Acts of the 62nd General Assembly (1967).

However, §427.3 of the Iowa Code provides for a property tax exemption, not a tax credit or deduction from the taxable or assessed value of taxable property.

In *Lewis vs. Commissioner of Internal Revenue*, 47 F. 2d 32 (3rd Cir. 1931), the issue was whether the taxpayer, in ascertaining his federal net income, was entitled to deduct from his gross taxable income expenses incurred in earning income not subject to federal income tax. The Court held that the taxpayer was not entitled to such a deduction.

By analogy to this case, it would be a paradox if the personal property tax credit should first be applied to the listed property of one who qualifies for a property tax exemption by virtue of §427.3 of the Iowa Code since the credit would then be applied against the assessed value of property exempt from taxation.

Therefore, in the situation outlined in your letter, the appropriate county officials should first apply the military service exemption to the taxable value of listed tangible personal property of a person qualified under §427.3 of the Iowa Code in order to certify the military service tax credits and the personal property tax credits to be reimbursed to the county by the State of Iowa.

October 23, 1969

SCHOOLS: Bonding base — Chapter 356, 62nd G. A., as amended by Ch.

254, 63rd G. A. The total valuation of taxable property within the district including that amount returned to the county as a replacement tax credit should be used for the determination of the legal debt limit. (Nolan to Tieden, State Representative, 10/23/69) #69-10-11

The Hon. Dale L. Tieden: Sometime ago you requested an opinion on the interpretation of House File 686 of the 62nd General Assembly particularly as it relates to determining the legal debt limit for issuing school district bonds. Your question was — what effect does the $2500 personal property exemption have in the determination of valuation of taxable property to support such a school bond issue. The personal property exemption was increased to $2700 by Chapter 254, Acts of the 63rd General Assembly, 1st session.

The term taxable property has been defined as "property that may be taxed — property which is not exempt from taxation." *McKinney* v. *McClure,* 206 Iowa 285, 289, 220 N. W. 354, 356. See also, *Mack v. Independent School District,* 200 Iowa 1190, 206 N. W. 145. In *Zobel v. Schau,* 1967, 260 Iowa 796, 150 N. W. 2d 626, the Iowa Supreme Court has said that the term "taxable property within such county" must mean the same as the term "taxable property" used in the constitution.

House File 686, *supra,* (Chapter 356) was enacted 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." Section 45, 46, and 47 of this act provide that the various counties are to certify to the state comptroller the amount of personal property upon which taxes "shall not be collected, due to the tax credit granted" and that upon receipt of such, he shall issue warrants payable to the respective county treasurer from the money appropriated to carry out the provisions of this act. The county treasurer is directed to apportion the proceeds "among the taxing districts in the county as certified by the county auditor." (§46) The language of Chapter 356 is couched in terms of a "credit" rather than an "exemption." Consequently, it is our view that the total valuation including that returned to the county through the replacement tax credit should be used in the base for purposes determining the legal debt limit for school district bonds.

October 23, 1969

COUNTY OFFICERS: Recorder, Auditor — §§306.15, 409.9, 1966 Code of Iowa. All subdivision platting must be done in compliance with provisions of Ch. 409, Code. If these requirements are met the Recorder must record the plat. Auditor receives notes pertaining to roads to be located outside of cities and presents them to board of supervisors and records action taken thereon by board. If board of supervisors disapproves roads in a plat dedication of such roads to the secondary road system is precluded. (Nolan to Koch, Woodbury State Representative and Samore, Woodbury County Attorney, 10/23/69) #69-10-12

The Hon. Edgar J. Koch, State Representative, Woodbury County; Mr. Edward F. Samore, Woodbury County Attorney: This replies to your request for an attorney general's opinion concerning the proper procedure for filling and recording the plat of a subdivision located outside the corporate limits of the city. From Representative Koch's letter it appears that the facts of the situation in question are as follows:

"A private citizen owns agricultural land in Woodbury County situated within one (1) mile of a duly incorporated town of a population of less than 25,000 according to the last Federal Census and the town does not have a duly constituted plan commission under the provisions of Chapter 373. The County of Woodbury has a county zoning commission constituted under the provisions of Chapter 358A Code of Iowa. As of the present date, the county commission has undertaken only a study and has promulgated no rules or regulations.

"The land-owner has attempted to plat a tract of his land into lots for the purpose of resale. He has devised a private road system within the tract and has reserved utility easements at appropriate places. The platting which has been attempted has been wholly under the provisions of Sect. 306.15 of the 1966 Code of Iowa. The County Engineer and County Board of Supervisors by appropriate certificate and/or resolution have approved the plat but refused to accept the roads. The town council of the town in question has by resolution approved the road plans but, has within the resolution, declined any responsibility for the maintenance thereof.

"The County Recorder refuses to accept the plat in its present form, claiming the procedures set forth by Chapter 409 of the Code of Iowa are applicable. The plat has been filed with the County Auditor who is uncertain whether the language of Sect. 306.15 of the Code of Iowa requires him to have the plat 'recorded' in the Recorder's office; or whether, having 'filed' the documents, his duties are at an end."

Both requests ask what are the duties of the recorder and the auditor in the premises. §306.15, 1966 Code of Iowa, appears in the chapter entitled, Establishment, Alteration and Vacation of Highways and provides:

"All road plans, plats and field notes and true and accurate diagrams of water, sewage and electric power lines for rural subdivisions shall be filed with and recorded by the county auditor and approved by the board of supervisors and the county engineer before the subdivision is laid out and platted, and if any proposed rural subdivision is within one mile of the corporate limits of any city or town such road plans shall also be approved by the city engineer or council of the adjoining municipality. Such plans shall be clearly designated as 'completed,' 'partially completed' or 'proposed' with a statement of the portion completed and the expected date of full completion. In the event such road plans are not approved as herein provided such roads shall not become the part of any road system as defined in this chapter."

The legislative history of this section of the Code indicate that the penultimate sentence of the paragraph quoted was added by virtue of Chapter 438, §4, Acts of the 61st General Assembly. This amendment though contained in the Act relating to consumer frauds, does not change the requirements of law with respect to platting subdivisions.

All subdivision platting in the state must be done in compliance with the provisions of Ch. 409 of the Code. There is no other guideline. Particularly, the plat must be accompanied by: a complete abstract of title and an opinion from an attorney at law that the fee title is in the proprietor and the platted land is free from encumbrance (other than that secured by bond) and a certified statement from the treasurer of the county where the land lies that it is free from taxes and from the clerk of the district court that it is free from all judgments, attachments or liens, and from the county recorder that the title in fee is in the proprietor and it is free from encumbrances. (§409.9). If the requirements of the statute are met, the recorder must record the plat. This is separate and distinct from the road plan.

It is the auditor's duty to receive and file the notes pertaining to roads and easements to be located outside the cities and to present them to the board of supervisors for their approval, then to record the action taken.

The board of supervisors may approve a plat and at the same time disapprove roads in the plat. 1964 OAG 6.6. In such case the roads in a rural subdivision must be maintained as private roads, as the platting, in and of itself, does not effect a dedication of such road to the secondary road system, without the approval of the county engineer and board of supervisors as it formerly did.

In 1961, the attorney general, in two opinions dealing with the code sections involved here advised (1) that §409.9 applies to every plat within the one-mile limit of cities, 1962 OAG, 3.16; and (2) that if road plans within such plat do not bear the approval of the city engineer or the city council of the adjoining municipality, the recorder has the power and duty to refuse plats where the statute has not been complied with, 1962 OAG 7.53.

October 23, 1969

COUNTY & COUNTY OFFICERS: Assessment of rural Electrical Co-operatives — §437.14, Code of Iowa, 1966. All coop property not assessed by state is to be assessed locally as real property. (Nolan to Hall, Crawford County Attorney, 10/23/69) #69-10-13

Mr. Gary R. Hall, Crawford County Attorney: This is in reply to your inquiry requesting an opinion on the following matters concerning the assessment of transmission lines owned by a cooperative. Your letter states:

"I would like to know what responsibility the County Assessor has in valuing and assessing transmission lines, real estate and personal property located within his jurisdiction and owned by a Cooperative.

"What component part can be classified as transmission line?

"I would like an explanation of Section 437, Paragraph 14, 1966 Code of Iowa. Does this section exempt any personal property that may be owned by a cooperative?

"Can two way radio equipment used for communication between trucks and office, etc. be classified as part of a transmission line as an incidental use or can that part be assessed as personal property as separated from the transmission line?"

In answer to your first question, I advise that the property of a co-operative not assessed by the State Department of Revenue is to be assessed by the County Assessor as real property, spreading the assessment thereof among all the members of such cooperative according to §437.14, Code of Iowa, 1966 which provides:

"The value of the interests of members in such co-operative corporations or associations which are not organized or operated for profit shall, for the purpose of taxation, be deemed real estate, and be assessed as part of the real estate served by such transmission line or lines."

Proceeding to your second question, it is unnecessary to determine what component parts are classified as transmission lines since all the property is to be assessed under the statute cited above and not some other section of the Code, and the value of a member's interest computed by dividing

the amount of the total assets by the number of members. 1960 OAG 488. See also 34 Iowa Law Review 340, 345-346, January, 1949.

I find no exemption of personal property owned by a cooperative under the section of Chapter 437 which you cite. As stated above, in determining members' interests, the total assets both real and personal are to be considered. This, I believe, also answers your fourth question.

October 23, 1969

SCHOOLS: Size of site — §§297.2, 297.3, Code of Iowa, 1966. Code prescribes maximum size of site which can be acquired for a school. Word "block" has a precise meaning if land has been platted but not otherwise. (Nolan to Balloun, State Senator, 10/23/69) #69-10-14

The Hon. Charles F. Balloun, State Senator: In answer to your letter of August 19, 1969, which presented two questions concerning the limitation of the size of a school site, we advise:

1. The maximum size of a school site is 10 acres under §297.2, Code of 1966. However, §297.3 provides that a school corporation "may take and hold an area equal to 2 blocks exclusive of the street or highway, for a schoolhouse site, and not exceeding 30 acres for school playground, stadium, or field house or other purposes for each such site."

2. The word "block" generally refers to a space in a city, usually rectangular, enclosed by streets and used or intended for buildings. Words and Phrases, page 783. A commonly accepted meaning of a "block" is 300 feet. *Bland v. Fox*, 111 N. W. 2d, 537, 539, 172 Nebr. 662. The word "block" is part of our common speech and while it is true that it is not a word of precise meaning since there are short blocks and long blocks, just as there are short tons and long tons, it is capable of precise definition in any context should precision be material. *Bonner v. Ames*, 97 N. W. 2d 87, 88, 356 Mich. 537. However, if the land has not been platted, it would be impossible to determine what constitutes a "block" within the meaning of §297.3, Code 1966.

October 30, 1969

ELECTIONS: Time for turning in registrations by mobile deputy registrars — §§48.11, 48.13 and 48.27, Code of Iowa, 1966. Like the commissioner of registration, mobile deputy registrars should receive applications for registrations up to and including the tenth day next preceding any election. Thereafter, no registrations may be received for the particular election involved so that the commissioner shall have nine full days between the last day of registration and election day to perfect his election registers. Mobile deputy registrars are an integral part of the internal operations of the commissioner's office and where the tenth day preceding an election fell on a Saturday the commissioner could in his discretion permit his mobile deputies to file the registrations obtained by them on the following Monday. (Haesemeyer to Synhorst, Secretary of State, 10/30/69) #69-10-16

The Hon. Melvin D. Synhorst, Secretary of State: Representative Rudy Van Drie has orally requested an opinion of the attorney general concerning an election matter and the attorney general has asked me to direct this opinion to you.

The question as I understand it is this: If the deadline for mobile

registrars to turn in voter registrations falls on a Saturday can such registrations be turned in to the city clerk on Monday?

Sec. 48.11, Code of Iowa, 1966, provides in relevant part:

"The commissioner of registration, or a duly authorized clerk acting for him, shall, up to and including the tenth day next preceding any election, receive the application for registration of all such qualified voters as shall personally appear for registration at the office of the commissioner or at any other place as is designated by him for registration, who then are or on the date of election next following the day of making such application will be entitled to vote. . . ."

Sec. 48.13 provides in relevant part:

"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."

Sec. 48.27 provides for the appointment of mobile deputy registrars by the commissioner of registration and contains this sentence, "Mobile deputy registrars are authorized to secure registration of eligible voters anywhere in the jurisdiction and shall make such reports of new registrations and changes as the commissioner of registration requests."

A careful reading of these three sections would seem to indicate that *applications* for registration must be received up to and including the tenth day next preceding any election. §48.11. This would be true not only on applications received at the office of the commissioner of registration and at such other place as might be designated by him for registration but also *applications* received by deputy mobile registrars. It is clear also that under §48.13 he is to 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. However, it should be noted that under §48.27 mobile registrars are deputies of the commissioner of registration and as such have the same power as the commissioner to accept registrations of voters. As such they, like the commissioner, should accept applications for registration up to and including the tenth day next preceding any election which, in this case, falls on a Saturday. Under the quoted sentence of §48.27 the commissioner of registration is authorized to require reports of new registrations and changes to be submitted to him. In our opinion the commissioner of registrations would have some flexibility as to when he would require these reports to be submitted. Hence, while deputy mobile registrars could not accept any applications for registration after Saturday it would be up to the commissioner of registration as to whether or not he wanted to require reports of such registration on the following Monday. This is not inconsistent with the requirement of §48.13 that the commissioner of registration have nine full days to perfect his election registers since the deputy mobile registrars after all are deputies and the reports they submit to the commissioner are in the nature of internal reports and really form a part of the process of compiling and perfecting the election registers.

November 3, 1969

ELECTIONS: Special charter cities, municipal elections; time for withdrawal of nomination — §§43.59(2), 43.87, 43.88 and 43.114, Code of Iowa, 1966. A candidate for alderman of a special charter city nominated at a primary election may withdraw or resign his candidacy and a substitute may be appointed by the representatives on the county party central committee from the ward involved at any time provided certification of the substitute nomination is received by the appropriate officer in time to place the candidate's name on the balolt. §43.59 has no application to municipal elections of this type. (Haesemeyer to Newton, State Representative, 11/3/69) #69-11-1

The Hon. Robert E. Newton, State Representative: Reference is made to your letter of November 1, 1969, in which you state:

"In the city primary held October 6, Mr. Charles Dippel was duly chosen as the Republican candidate for this office by the voters. Subsequently on October 21, Mr. Dipple resigned this nomination, and Mr. Scriven was selected the same day to fill the vacancy by a caucus of the Republican precinct committeemen and committeewomen of the First Ward. Previously Mr. Scriven, an incumbent member of the Davenport City Council, was defeated in the primary where he sought renomination as an alderman-at-large.

"This withdrawal and substitution would seem to be a violation of Iowa law inasmuch as Sec. 59(2) of Chapter 43, *Code of Iowa*, does not permit withdrawal and substitution of candidates within a forty day period prior to a general election.

"Upon receiving advice as to his legal rights in this matter, Mr. Dipple requested Scott County Attorney Wehr to bring a quo warranto action against City Clerk Wiese to remove Mr. Scriven from the ballot and to restore himself to his nomination. Mr. Wehr has declined to exercise the discretionary powers of his office to commence this action.

"Chapter 660 which provides for quo warranto action also provides that 'If on demand of any citizen of the state, the county attorney fails to bring the action, the attorney general may do so . . .' At this time, therefore, acting in my capacity as a citizen I request you to bring an immediate quo warranto action against City Clerk Wiese.

"Further, in my capacity as a member of the House of Representatives of the Sixty-Third General Assembly, I request an Attorney General's opinion on the following issues: Does Sec. 59(2), Chapter 43, *Code of Iowa*, prevent the withdrawal and substitution of candidates undertaken in the present instance? If Mr. Scriven's name remains on the ballot and if he is elected First Ward Alderman, may he lawfully assume the duties of this office?"

Section 43.59(2), Code of Iowa, 1966, to which you make reference provides:

"2. Candidates nominated in primary elections may withdraw their names from the nominations any time prior to forty days preceding the general election and the appropriate county or state central committee or district convention shall designate a person to fill such vacancy. Vacancies shall be filled by the appropriate central committee within five days following the day of such withdrawal."

In our opinion this section of the code has no application to the situation you describe. For example, it provides for the filling of a vacancy by the appropriate county or state central committee or district convention and makes no provision for vacancies arising in smaller political units such as a ward in the case of the municipal election. Moreover, it

permits a candidate to withdraw his name at any time prior to forty days preceding the general election. But §43.114 provides:

"43.114 Time of holding special charter city primary. In special charter cities holding a municipal primary election under the provisions of section 43.112 such primary shall be held on the first Monday in October of the year in which general municipal elections are held."

Presumably it was because of this section that your municipal election was held on October 6, 1969. If §43.59 were applied to an election held under §43.114 it would have the anomalous effect of prohibiting a candidate from withdrawing as much as ten days before he was even nominated and knew he was a candidate.

In our opinion the applicable statutes are §§43.87 and 43.88 of the code which provide respectively:

"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.

"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."

Under §43.87 a vacancy in a nomination for an office which is to be filled by a territory smaller than a county is filled by the members of the party committee for the subdivision. That is precisely what was done in this case. Under §43.88 nominations made in case of a vacancy are to be forthwith certified to the proper officer by the chairman and secretary of the committee and if such certificate is received in time the names of such nominees must be printed on the official ballot the same as if the nomination had been made in the primary election.

Accordingly, it is our opinion that the Republican precinct committeemen and committeewomen of the first ward acted in all respects quite properly and Mr. Scriven is the duly nominated candidate of the Republican Party for the first ward.

In answer to your specific questions §43.59(2) does not prevent the withdrawal by Mr. Dipple of his nomination and the substitution of Mr. Scriven's candidacy in the circumstances you describe. Moreover, if Mr. Scriven is elected first ward alderman he may lawfully assume the duties of that office.

For the reasons stated Scott County Attorney Wehr quite properly refused to bring the requested quo warranto action against City Clerk Wiese. The Attorney General also declines to bring such an action.

November 4, 1969

SCHOOLS — Aid and Appropriations. H.F. 825, 63rd G. A., 1969, amend-

ing Ch. 286A, Code of Iowa, 1966. The new formula enacted in H.F. 825, for computing general state aid to junior and community colleges and merged areas, applies to future appropriations commencing July 1, 1971; and the specific appropriations contained in H.F. 825 are available for withdrawal after July 1, 1969. (Nolan to Johnston, Supt. of Public Instruction, 11/4/69) #69-11-2

Mr. Paul F. Johnston, Superintendent of Public Instruction: On May 23, 1969, you requested an opinion concerning appropriations for Area Schools under House File 825 of the 63rd General Assembly. In connection therewith, you state in your letter:

"Your opinion is requested on the following question relating to interpretation of House File 825, 63rd General Assembly.

"The Act apparently does two things: First, it amends chapter 286A of the Code, relating to the formula for computing general state aid to junior and community colleges and merged areas. Second, it makes a specific appropriation for each of designated merged areas and school districts.

"Under section 1 of House File 825, a new formula for computing general aid is enacted. However, said section contains language indicating that initial applicability of said formula will be for allocation of the appropriation 'for the fiscal year beginning July 1, 1971.'

"Section 2 of House File 825 provides a new set of percentages for quarterly payment on the allocations made under the formula prescribed in section 1.

"Section 5 of the House File 825 contains a specific line appropriation for each existing merged area and junior college. It makes no reference to or provision for application of any formula to the specific amounts appropriated.

"Your opinion is requested as to whether the specific line appropriations in section 5 of House File 825 are to be paid to the respective named merged areas in an annual lump sum, without reference to the formula in section 1 or the quarterly payments in section 2, by reason of the apparent time delay in section 1 until the time of the future appropriation 'for the fiscal year beginning July 1, 1971.' "

Appropriations by the legislature are not available for expenditure by the person or office for whom the appropriation is made until allocation is made pursuant to §8.30, Code 1966. The procedure for making such allocation is set out in §8.31 as follows:

"Before an appropriation for administration, operation and maintenance of any department or establishment shall become available, there shall be submitted to the governor, not less than twenty days before the beginning of each quarter of each fiscal year, a requisition for an allotment of the amount estimated to be necessary to carry on its work during the ensuing quarter. Such requisition shall contain such details of proposed expenditures as may be required by the governor.

"The governor shall approve such allotments, unless he finds that the estimated budget resources during the fiscal year are insufficient to pay all appropriations in full, in which event he may modify such allotments to the extent he may deem necessary in order that there shall be no overdraft or deficit in the several funds of the state at the end of such fiscal year, and shall submit copies of the allotments thus approved or modified to the head of the department or establishment concerned, and to the state comptroller, hereinabove provided for, who shall set up such allotments on his books and be governed accordingly in his control of expenditures. * * *"

Where the law fixes no limitation as to the availability or direction for the expenditure of the appropriation throughout the biennium, it is a matter within the discretion of the officer as to when it shall be used. 1898, O.A.G. 335. After an appropriation has been withdrawn from the treasury, the office to which it was appropriated has complete charge and control of the disposal of the funds and the state has no further control of such funds except to see that they are expended for the purpose for which they were appropriated. 1928 O.A.G. 168.

It is my opinion that after the Department receives notice that the allotment has been approved as provided in §8.31, the funds may be paid to the respective named merged areas in lump sum or in such amounts as they may deem necessary to withdraw.

Section 1 and section 2 of House File 825 do not have application until computations are made for future appropriations for the fiscal year commencing on July 1, 1971.

November 4, 1969

STATE OFFICERS AND DEPARTMENTS: Acceptance of travel having a value of $25 or more from outside interests prohibited — Ch. 107, §5, 62nd G. A., 1967. Payment of travel expenses in the amount of $25 or more of state officials and employees by outside interests would in the usual case be prohibited. (Haesemeyer to Wellman, Secretary, Executive Council, 11/4/69) #69-11-3

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: Reference is made to your letter of October 21, 1969, in which you state:

"The Executive Council, in meeting held October 20, 1969, in reviewing the requests for travel authority, noted that State employees were traveling at the expense of a Company, or their travel expenses were being paid by a grant received from a Company.

"These requests were approved subject to this office requesting an opinion that these requests were permissible under Section 5, Chapter 107 of the 62nd G. A. (Public Officials Act).

"We would appreciate a written opinion in connection with the above matter."

Chapter 107, 62nd G. A., 1967, the Iowa Public Officials Act, provides in §5 thereof:

"Sec. 5. 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."

As I recall there were three specific instances which gave rise to your question. Two of these involved a proposal by General Electric Company to pay the travel expenses of two employees of the Iowa educational television network to permit them to be present at the company's test site to witness the testing of a new antenna being purchased by the Iowa

agency. It was explained to me that both the company and the educational television network considered the payment of the travel expenses to be a contractual obligation of the company. On this basis we advised you orally that in our opinion Chapter 107, §5, 62nd G. A., 1967, did not apply and the employees were free to accept the travel. In the other case which involved an offer by a drug company to pay the expenses of a health department employee in attending a professional conference, there were no such mitigating circumstances present and we orally informed you that §5 did apply.

Generally speaking, it is to be observed that the prohibitions contained in §5 quoted above are quite sweeping. Travel is specifically included as being among prohibited gifts along with a great many other things. Of course the argument can always be advanced that payment of travel and other trip expenses is really a gift to the state. The rationale for this position proceeds on the assumption that the employee would take the trip anyway and all the private donor is doing is saving the state some money. However, in our opinion this suggestion would not in most instances amount to anything more than a transparent ruse to circumvent the manifest purpose and intent of Chapter 107. It is true that there is statutory authority for the acceptance of gifts to the state or to state institutions. Thus, §§565.3 and 565.5, Code of Iowa, 1966, provide:

"565.3 Gifts to state. 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."

"565.5 Gifts to state institutions. Gifts, devises, or bequests of property, real or personal, made to any state institution for purposes not inconsistent with the objects of such institution, may be accepted by its governing board, and such board may exercise such powers with reference to the management, sale, disposition, investment, or control of property so given, devised, or bequeathed, as may be deemed essential to its preservation and the purposes for which the gift, devise, or bequest was made."

However, a mere reading of these sections discloses that they contemplated gifts to the state of property somewhat more substantial than occasional trips principally benefitting specific individuals. In adidtion one encounters certain logical difficulties in attempting to apply the terms of these statutes to a gift of travel to a state employee. Moreover, while it could conceivably be argued that where a private party pays travel expenses for a state official a gift is really being made to the state since the employee might well have made the trip in any event but at state expense, it could be urged with equal force that both the recipient employee's superiors and the executive council would be less disposed to approve the same trip were state funds to be involved. This latter fact would not be lost on the employee receiving the trip, a circumstance which could not help but make him feel, at least to some extent, more favorably disposed toward the donor than to others less generous.

Accordingly, it is our opinion that §5 means what it says and that payment of travel expenses of state officials and employees by outside interests would in the usual case, be prohibited by such §5. Adoption of the position that such payments are gifts to the state would for all practical

purposes effectively emasculate §5 and offer a readily available subterfuge to circumvent its restrictions.

November 7, 1969

CITIES AND TOWNS: Member of City Planning Commission; conflict of interest — §368A.22, Code of Iowa, 1966, and Chapter 373, Code of Iowa, 1962. A member of a City Planning Commission is an "officer" within the meaning of §368A.22 and as such may not, subject to certain specified exceptions, be interested, directly or indirectly, in any contract or job for work or material or the profits thereof or services to be furnished or perfomed for the city or town. (Haesemeyer to Schwartz, State Representative, 11/7/69) #69-11-4

The Hon. James H. Schwartz, State Representative, Wapello County: Reference is made to your letter of October 3, 1969, in which you state:

"The above captioned architect [Kenneth Steffen] is serving in a non-paying capacity as a member of the City Planning Commission. In the event he or any member of his firm secured a commission for work contracted with the City of Ottumwa, please advise if there would be any Conflict of Interest."

It is our opinion that your question must be answered in the affirmative.

An attorney general's opinion dated February 15, 1965, stated that:

"Members of City Planning Commissions, established under provisions of Chapter 373, Code of 1962, are officers and subject to the conflict of interest prohibitions of Chapter 368A.22, Code of Iowa, 1962."

Section 368A.22 of the 1962 Code of Iowa, as amended, provided:

"No officer, including members of the city council shall be interested, directly or indirectly, in any contract or job for work or material or the profits thereof or services to be furnished or performed for the city or town. Nothing in this section shall prohibit the fulfillment of any contract lawfully entered into by the city or town and the contracting party before the party's election to the council, but such contract may not be amended or altered during such party's term of office."

Section 368A.22 of the 1966 Code of Iowa, as amended, states:

"Interest in contracts — when not applicable

1. When used in this section 'contract' means any claim, account or demand against or agreement with a municipality, express or implied, and shall include the designation of a depository of public funds.

2. No municipal officer or employee shall have an interest, direct or indirect, in any contract or job of work or material or the profits thereof or services to be furnished or performed for his municipality. The provisions of this section shall not apply to:

a. The payment of lawful compensation to any municipal officer or employee holding more than one municipal office or position, the holding of which is not incompatible with another public office or is not prohibited by law.

b. The designation of a bank or trust company as a depository, paying agent, or for investment of funds.

c. An employee of a bank or trust company, who serves as treasurer of any municipality.

d. Contracts made by municipalities of less than three thousand population, upon competitive bid in writing, publicly invited and opened.

e. Contracts with a person, firm, corporation or association in which a municipal officer or employee has an interest solely by reason of employment, or a stock interest of the kind described in paragraph i or both, if such contracts are made by competitive bid, publicly invited and opened, and if the remuneration of such employment will not be directly affected as a result of such contract and the duties of such employment do not directly involve the procurement or preparation of any part of such contract. The competitive bid requirement of this paragraph shall not be required for any contract for professional services not customarily awarded by competitive bid.

f. The designation of an official newspaper.

g. A contract in which a municipal officer or employee has an interest if such contract was made before the time he was elected or appointed, but such contract shall not be renewed.

h. Contracts with volunteer firemen or civil defense volunteers.

i. A contract with a corporation in which a municipal officer or employee has an interest by reason of stockholdings when less than five percent of the outstanding stock of the corporation is owned or controlled directly or indirectly by such officer or employee.

j. A contract made by competitive bid, publicly invited and open, in which a member of a city or town board of trustees or commission has an interest if he is not authorized by law to participate in the awarding of the contract. The competitive bid requirement of this paragraph shall not be required for any contract for professional services not customarily awarded by competitive bid.

3. Any contract entered into in violation of this section is void."

The statutes are similar in effect, with the exception that the 1966 code as amended lists ten specific instances where the general rule does not apply. Unless the official in question comes under one of the exceptions, he may not have any interest in any contract made with the municipality.

Based on the facts you have given us, it would seem that subsections 2(e), 2(i) and 2(j) could apply in this case. If the architect in question is only an employee of the firm, or if the firm is a corporation and he owns less than five percent of the outstanding stock, and if the contract is made by competitive bid, then he would not be considered to have a conflict of interest. If, on the other hand, he does not come under one of these exceptions, the general rule as stated in §368A.22(2) of the code and as construed by the 1965 attorney general's opinion (see attached copy) will apply.

November 7, 1969

TAXATION: **Property Tax: Homestead Tax Credit** — §§425.2, 425.11, Code of Iowa, 1966. Owners, husband and wife, as joint tenants of homestead, who entered into a contract of sale prior to 1969 with no money to be paid until delivery of deed and possession on January 2, 1970, who continue to occupy premises and filed timely application for homestead tax credit and will pay property taxes for 1969, are entitled to homestead tax credit. (Petosa to Blum, Frankling County Attorney, 11/7/69) #69-11-5

Mr. Lee B. Blum, Franklin County Attorney: This is to acknowledge receipt of your letter in which you posed the following situation:

"A husband and wife own a tract of land less than an acre in extent with their dwelling house located thereon. They hold record title as joint tenants, subject to a small mortgage and they occupy the dwelling house or occupied the dwelling house during the calendar year 1969 to date and presumably will occupy it the further remainder of the calendar year. Prior to 1969 a contract of sale was entered into whereby the said property was sold to certain purchasers without any down payment and with possession and deed to be delivered on January 2, 1970."

You have supplied the further facts that no money had been subsequently paid on the contract and the full purchase price is payable on January 2, 1970.

Your letter then asks the following questions:

"Assuming the said contract to have been recorded, are the owners and contract recorders eligible for homestead tax credit or is the property eligible for homestead tax credit for 1969 taxes due and payable in 1970 if timely application was made therefor?"

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, on 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 endorsed 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, as amended by H.F. 485, 63rd G. A., provides in pertinent part:

"a. The homestead must embrace the dwelling house in which the owner is living at the time of filing the application, except as herein provided, 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."

Section 425.11(2), Code of Iowa, 1966, as amended by H.F. 686, Acts of 62nd G. A., 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 occuping 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 homestead 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. For the purpose of this chapter the word 'owner' shall be construed to mean a bona fide owner and not one for the purpose only of availing himself of the benefits of this chapter."

Reference should be made to an Attorney General's Opinion on a similar fact situation, O.A.G. Murray to Johnson, November 15, 1967, which states:

"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."

The Iowa Supreme Court has held that, for the purposes of the Homestead Tax Credit Law, a "fee simple" estate may be either legal or equitable, and "title" may be synonymous with ownership. *Johnson v. Board of Supervisors of Jefferson County*, 1946, 237 Iowa 1103, 24 N. W. 2d 449.

The contract vendors hold both legal title and the deed to the homestead and therefore satisfy the fee simple requirement or §425.11(2).

You state that the owner vendors made timely good faith application for the homestead tax credit pursuant to §425.11, and they are paying the 1969 taxes due and payable in 1970, and therefore, based on the facts you have presented, they are entitled to the homestead tax credit.

We trust that the above opinion answers your questions.

November 13, 1969

STATE OFFICERS & DEPARTMENTS: Conservation Officers — Merit Employment. Conservation Officers, designated as Park and Water Officers for administrative purposes, are subject to Executive Council approved pay plan but should conduct all public business as Conservation Officers. (Ivie to Priewert, Director, State Conservation Commission, 11/13/69) #69-11-6

Mr. Fred A. Priewert, Director, State Conservation Commission: You have requested opinions on the following:

"(1) I would like an opinion from your office regarding the status of our Conservation, Park and Water Officers. The Executive Council approved the Merit System pay plan on June 4, 1969; however, the Conservation, Park and Water Officers were excluded from approval because they were to receive a $900.00 increase which would throw the Merit Pay Plan out of balance. Since that time the Executive Council has not approved the Officers' pay and they are not in step with Merit, which leads us to believe that they are remaining under the old pay plan and are still entitled to longevity (see Chapter 107.13 of the Iowa Code). What is your opinion?

"(2) Another question has arisen regarding the Peace Officer status of the Park and Water Officers, position numbers 5215 and 5426. The Code of Iowa Chapter 107.15 states that Conservation Officers have the powers of a Peace Officer, but no mention has been made of Park Officers or State Waters Officer 11. Are the Park and Water Officers legally law enforcement officers under the new Merit System?"

With regard to question (1), please be advised that on July 14, 1969, the Executive Council did approve a pay plan for the Conservation, Park

and Water Officers. Such officers were paid from July 1, 1969, to July 15, 1969 on the basis established in S.F. 674, Acts of the 63rd G. A., and since then have been paid on the basis of the pay plan approved by the Executive Council.

As to question (2), the Merit Employment Commission lacks authority to create a new title or titles for Conservation Officers who are statuatory creatures. The designations as Park and Water Officers is administrative only for purposes of establishing qualifications and pay for such positions. The officers, however, are Conservation Officers and should conduct all official business under such title.

November 18, 1969

COUNTY AND COUNTY OFFICERS: Anticipatory warrants — Exception to prohibition against issuance — §343.10, §343.11(4), 1966 Code; S.F. 525, 63rd G. A., claims against state institutional fund arising by virtue of S. F. 525 are within the exception of §343.11(4). (Ivie to Fenton, Polk County Attorney, 11/18/69) #69-11-8

Mr. Ray A. Fenton, Polk County Attorney: You have asked the opinion of this office on the following:

"This is a request for an opinion from your office on a question arising out of Senate File 525 enacted by the 63rd General Assembly. Senate File 525 created the Iowa Commission on Alcoholism.

"Section 4 of S.F. 525 provides that the Commission thus created may enter into written agreements with "any qualified facility" to pay one-half the cost of the care, maintenance and treatment of an alcoholic confined to the facility. Section 5 provides for payment of the remaining one-half of the cost by the county in which the alcoholic has a legal settlement. Payments are to come from the county's state institution fund.

"Polk County, of course, neither levied nor budgeted in 1968 for such expenditures in 1969. Nor is there money in the general fund available for transfer to the state institution funds as permitted by Section 444.12, 1966 Code of Iowa.

"It is our understanding that Polk County's share of expenses for the Harrison Treatment and Rehabilitation Center in Des Moines are estimated at $106,000 for the last six months of 1969, and for Half Way House expenses, $7,500.

"Assuming that anticipatory warrants could be issued pursuant to H.F. 436, Acts of the 63rd G. A., on the State Institution Fund, the question is:

"Would such expenditures fall within Section 343.11(4) 1966 Code of Iowa, so as to insulate the Board of Supervisors and other county officers from the personal liability imposed by Section 343.10?"

§343.10, 1966 Code of Iowa, reads as follows:

"Expenditures confined to receipts. It shall be unlawful for any county, or for any officer thereof, to allow any claim, or to issue any warrant, or to enter into any contract, which will result, during said year, in an expenditure from any county fund in excess of an amount equal to the collectible revenues in said fund for said year, plus any unexpended balance in said fund for any previous years.

"Any officer allowing a claim, issuing a warrant, or making a contract contrary to the provisions of this section, shall be held personally liable

for the payment of the claim or warrant, or the performance of the contract."

§343.11(4), 1966 Code of Iowa, reads as follows:

"Exceptions. Section 343.10 shall not apply to: 4. Expenditures for the benefit of any person entitled to receive help from public funds."

Thus, the interpretation of §343.11(4) is essential in responding to your question.

In reviewing authorities interpretive of the exception set out in §343.11(4) it has become apparent: (1) that no case law in Iowa contributes toward the understanding of the exception, and (2) prior opinions of the Attorney General have not been consistent in their interpretation thereof.

In 34 OAG 679, the Attorney General approved the issuance of anticipatory warrants for support of the insane in state hospitals by finding such expenditures "squarely within exception 4 of §5259 of the Code" (now §343.11(4), 1966 Code).

In 40 OAG 69, the Attorney General reached a contrary conclusion with regard to the expenditures by a county under "insane commitment claim."

Thereafter, in 40 OAG 362 and 40 OAG 421, Soldiers Relief Fund and Widows Pension Fund payments were held to be within the exception under discussion herein.

But, it was under 40 OAG 69 that the pattern for the future was set by the following statement with regard to §343.11(4):

"This provision, we think applies to poor relief, soldiers' relief, widows' pensions, etc."

I am advised by the Auditor's office that counties have historically issued anticipatory warrants under authority of §343.11(4) on poor relief funds but not on the state institutional fund or mental health fund. Aside from the authority of 40 OAG 69, it is difficult to distinguish any logical reason for this long standing administrative action. The wording of §343.11(4), 1966 Code, as set out supra, does not lend itself readily to an interpretation so limiting. As the Attorney General stated in 54 OAG 60, the section does not use the term "poor relief," and there is no reason to imply such a limitation to the exception.

In S.F. 525, 63rd G. A., a new concept with regard to the treatment of alcoholics at public expense was added to Iowa law. Under that law the expense of temporary residence and treatment of voluntary patients was, to a limited extent, authorized from state and county funds on an equal basis. To now say that such expenditures are not for the benefit of persons entitled to receive help from public funds would be unrealistic. Such a. position would ignore the fact that facilities, such as the Harrison Treatment Center in Des Moines, would surely be unable to provide the care and treatment sought by the patients voluntarily entering such facilities without the new economic aid authorized by S.F. 525. And, further, S.F. 525 does not contemplate expenditure of public funds where the patient is economically responsible.

And yet, S.F. 525 expressly states, in several places, that the state institutional fund is the source from which the counties share of alcoholic treatment and residence shall be paid. Based on the practice of years past, as discussed previously, this, in itself, would preclude the issuance of anticipatory warrants under authority of §343.11(4), 1966 Code.

I find the opinions of 1934 and 1954, referred to previously herein, much more persuasive than 40 OAG 69. And, the purpose for which the expenditures are made is certainly a better measure than the fund from which payments are to be made in determining whether the expenditures are within the meaning of §343.11(4). We have always stated in the past that we do not lightly withdraw prior opinions of this office. See 68 OAG 30. Where, however, as here, we do not find authority or reasonable disclosure of the rationale for such an opinion, it is withdrawn, and accordingly, that portion of 40 OAG 69 that purports to limit the exception of §343.11(4) to poor relief, soldiers' relief, widows' pensions, etc., is withdrawn.

Your question as to whether the expenditures by the Polk County Board of Supervisors and other county officers in payment of claims arising by virtue of S. F. 525 would fall within the exception of §343.11(4) is answered in the affirmative.

November 19, 1969

COUNTY & COUNTY OFFICERS: Dismissal of deputy treasurer — §341.3, Code of Iowa, 1966. Treasurer, as appointing officer, may revoke appointment by filing written revocation in Auditor's office. (Nolan to Straub, Kossuth County Attorney, 11/19/69) #69-11-7

Mr. Joseph J. Straub, Kossuth County Attorney: We have your letter requesting an opinion as to whether a Deputy County Treasurer may be summarily dismissed by the County Treasurer after the Treasurer had submitted the deputy's appointment to the Board of Supervisors for their approval and the appointment had been approved by them for the year 1969.

Under §341.3, Code of 1966, a county officer may discharge any deputy or assistant for whose acts he is responsible, in the following manner:

"Any certificate of appointment may be revoked in writing at any time by the officer making the appointment, which revocation shall be filed and kept in the office of the auditor."

The appointing officer is the only person with power to revoke any appointment made in his office. 1942 OAG 29. In view of the fact that this is the only provision for the revocation of an appointment, all others would of necessity, be excluded, and the Board of Supervisors would not have any power to take any further action. 1928 OAG 247. An early Iowa case, *Iowa City vs. Foster*, 10 Iowa 189 states:

". . . public officers . . . are governed by considerations relating to the common good, and that there is nothing of the nature of contract, pertaining to them, . . ."

Based on the foregoing, therefore, it is my opinion that even though the Deputy Treasurer had accepted the appointment and performed the duties relating thereto, there is no right accompanying such employment

which is not terminated by the revocation of the appointment by the proper person pursuant to §341.3 of the Code of Iowa.

November 20, 1969

WELFARE: Revenues for counties for poor relief and aid to dependent children programs; county contributions to the state for one-half of the state's share in the Aid to Dependent Children Program and Disabled Persons Program cannot exceed county limitations on taxes; (see §343.10, 1966 Code of Iowa). Revenue is to be raised as provided in §§239.11, 241A.12, 24.22 and 343.11(4), and Chapter 346, 1966 Code of Iowa; emergency funds as provided under Chapter 251, 1966 Code of Iowa, are not available to increase county revenues for poor relief in order to obtain county contributions to the A.D.C. and Disabled Persons' programs; if taxing limitations are reached, counties should obtain revenue from bond issues under Chapter 346, 1966 Code of Iowa; resort to the General Assembly for relief may be necessary when all other avenues are exhausted or inappropriate. (Williams to Samore, Woodbury County Attorney, 11/20/69) #69-11-9

Mr. Edward F. Samore, Woodbury County Attorney: This replies to your request for an opinion on the matter of the county obligation for A.D.C. and Aid to Disabled in Woodbury County. Your letter states:

"Section 252.43 of the Code states that Poor Relief shall first be paid out of the ordinary county revenue and if that is insufficient the Board may levy a poor tax, which in our county amounts to four and one-half mills. In addition the Board may levy a quarter mill tax for A.D.C. and a quarter mill tax for Aid to the Disabled. Our county is required to pay approximately 20% of the A.D.C. costs and approximately 20% of the Aid to the Disabled costs. The remaining 80% of these programs is paid by the State and Federal governments. I assume that ordinary county revenue refers to the County General Fund which is three mills here in Woodbury County. We are also levying the one mill emergency fund tax authorized by Chapter 24.

"Sections 239.10 and 239.11 state that the A.D.C. budget will be prepared by the County Board of Social Services and be approved by the State Department of Social Welfare and will be presented to the Board of Supervisors. The county A.D.C. budget presented for 1970 is in the amount of $600,000. In addition, the A.D.C. budget contains a request for $140,000 to make up the estimated A.D.C. fund deficit for 1969. The remainder of the Poor Fund budget totals $974,075. One mill tax in Woodbury County raises approximately $180,000.

"Section 239.11 of the Code also states that the A.D.C. appropriations shall not exceed statutory tax limitations except for the addition of the aforesaid quarter mill.

"The Board of Supervisors is in a position where it cannot meet all of the other demands upon the General Fund even with the emergency one mill levy and have enough money to meet the required budget for A.D.C., Aid to the Disabled and General Relief. The Poor Fund is administered here as an integrated county and the County Director of Social Welfare is also the Overseer of the Poor. It is the opinion of the Counsel for the Board of Supervisors, that it must be necessarily implied that the Board of Supervisors has the discretionary power, exercised in a reasonable way, to allocate money from the General Fund for other county functions and to limit the amount of money transferred from the General Fund to the Poor Fund to a reasonable figure, for example one quarter mill. If the Board does this, it will nevertheless expend all the money in the General Fund including the emergency one mill levy and this will still leave a deficit in the Poor Fund on account of the A.D.C. appropriation which is up 40% over last year or approximately one half of a million dollars." . . ."

In connection with the above you asked four questions:

1. "It is the opinion of the Board that they must reduce the Poor Fund budget including the A.D.C. budget and the Aid to Disabled budget to a sum which is within the statutory taxing limitations of the county. Is this correct?

2. "If the above action makes it impossible for the county to meet its 20% obligation for A.D.C. and Aid to the Disabled, how is the deficit made up?

3. "I would point out that Chapter 346 permits the Board to initiate a bond issue to make up deficits in the county budget, but it must be approved by referendum. If the voters do not approve it, then what?

4. "Lastly, could the County curtail all other relief programs, i.e. General Relief, and if not, how is the deficit made up?"

In answer to these questions, it is the opinion of this office that:

I

We concur with the Board in their opinion that they should compute the Poor Fund Budget, including the A.D.C. Budget and the Aid to Disabled Budget to the sum which is within the statutory taxing limit of the county.

Following are excerpts from the 1966 Code of Iowa, which set forth the taxing limits:

Section 444.9, in part, reads:

"County levies. Annual levies. The board of supervisors of each county shall, annually, at its September session, levy the following taxes upon the assessed value of the taxable property in the county:

1. For state revenue . . .

2. For ordinary county revenue, not to exceed . . . three mills on a dollar in counties having an assessed valuation of thirty-two million dollars or more.

[Assessed valuation in Woodbury County] . . ."

Section 24.6 reads:

"Emergency fund — levy. Each municipality as defined herein [includes counties], may include in the estimate herein required, an estimate for an emergency fund. Each such municipality shall have power to assess and levy a tax for such emergency fund at a rate not to exceed one mill upon the taxable property of the municipality, provided that no such emergency tax levy shall be made until such municipality shall have first petitioned the state board to make such levy and received its approval thereof. Transfers of moneys may be made from the emergency fund to any other fund of the municipality for the purpose of meeting deficiencies in any such fund arising from any cause, provided, however, that no such transfer shall be made except upon the written approval of the state board, and then only when such approval is requested by a two-thirds vote of the governing body of said municipality. ["State Board" means the State Board of Appeals created by §24.26. (242.2, definition of terms)]

Revenues for the funds, "Funds for Aid to Dependent Children" as defined in §239.12, and the "Fund for Aid to the Disabled" as provided in §241A.14 must be obtained in accordance with §239.11 [A.D.C. Fund]and 241A.13 [A.D. Fund]. Portions of these sections read as follows:

"239.11 County appropriations. The county board of supervisors in each county in this state shall appropriate annually, and pay in the manner hereinafter specified from the county poor fund, . . . Should the sum so appropriated, however, be expended or exhausted during the year for which it was appropriated, such additional sum shall be appropriated by the board of supervisors from the county poor fund as shall be sufficient to meet the obligation of the county to pay its share as heretofore provided of all assistance and benefits with respect to dependent children be chargeable to the county. The appropriation provided in this section shall not exceed statutory tax limitations now or hereafter provided, except that in counties having a population of sixty thousand, or more, the board of supervisors may levy annually an additional tax not to exceed one-fourth mill . . . [Woodbury County's population bracket] . . ."

Section 241A.13 has a like provision and permits the county to levy an additional one-fourth mill for the Aid to Disabled persons' fund.

Section 252.43 relates to raising revenue for the poor fund. This section reads in part as follows:

"252.43. Poor tax. The expense of supporting the poor shall be paid out of the county treasury in the same manner as other disbursements for county purposes; and in case the ordinary revenue of the county proves insufficient for the support of the poor, the board may levy a poor tax, not exceeding one and one-half mills on the dollar, to be entered on the tax list and collected as the ordinary county tax.

"Should the one and one-half mill levy fail to provide adequate funds to take care of the poor, then the board of supervisors, with approval of the state comptroller, . . ."

There are tax limitations in §24.14, §24.15, Article XI, §3, the Iowa Constitution, and §407.2, 1966 Code of Iowa which codifies the provision of the State's Constitution. These provisions read as follows:

"24.14 Tax limited. 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 therefore, 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."

"24.15 Further tax limitation. No tax shall be levied by any municipality in excess of the estimates published, except such taxes as are approved by a vote of the people, but in no case shall any tax levy be in excess of any limitation imposed thereon now or hereafter by the constitution and laws of the state."

"Article XI, §3. Indebtedness of political or municipal corporations. No county, or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount, in the aggregate, exceeding five per centum on the value of the taxable property within such county or corporation — to be ascertained by the last State and county tax lists, previous to the incurring of such indebtedness."

"407.2 Limitations. 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."

Section 343.11, Section 4, 1966 Code of Iowa, referred to in §24.14 reads as follows:

"4. Expenditures for the benefit of any person entitled to receive help from public funds."

With the approval of the State Appeal Board, created in §24.26, 1966 Code of Iowa, funds may be transferred from the general fund to the poor fund under the circumstances contained in the following quoted Code sections.

Section 24.22, Local Budget Law, reads in part:

"Transfer of active funds — poor fund. Upon the approval of the State Board, it shall be lawful to make temporary or permanent transfers of money from one fund of the municipality to another fund . . . No transfer shall be made to a poor fund unless there is a shortage in said fund after the maximum permissible levy has been made for said fund."

There are penalties imposed upon any officer violating the provisions of tax limitations. Section 343.10 reads as follows:

"Expenditures confined to receipts. It shall be unlawful for any county, or for any officer thereof, to allow any claim, or to issue any warrant, or to enter into any contract, which will result, during said year, in an expenditure from any county fund in excess of an amount equal to the collectible revenues in said fund for said year, plus any unexpected balance in said fund for any previous years.

"Any officer allowing a claim, issuing a warrant, or making a contract contrary to the provisions of this section, shall be held personally liable for the payment of the claim or warrant, or the performance of the contract."

In §343.11, there are exceptions, however, relating to "Expenditures for the benefit of any person entitled to receive help from public funds." [Referred to in §24.14] . . .

In Sections 239.11 (A.D.C.) and 241A.13 (A.D.), the legislature fixed the amount of the county's share to be contributed to the State's share in order to receive Federal matching funds for the welfare programs for dependent children and disabled persons. The county has no authority to reduce these statutory payments. The sections also contain the method for obtaining additional revenue if there are insufficient funds in the Poor funds to meet the said statutory payments. In enacting these statutes, the legislature undoubtedly believed that the additional taxing provisions, if the amount that can be obtained legally for the poor fund is exhausted, would cover the said mandatory payments in the welfare programs.

It seems apparent that, in order to make funds available for transfer to the Poor Fund in Woodbury County to meet the present level of claims, the Board would have to curtail county expenditures for other statutory purposes. The unlimited authority to transfer funds is obviously meaningless where no funds are available for transfer.

II

If necessary curtailment in the General Fund still makes it impossible

for the county to meet the mandatory 20% obligation for Aid to Dependent Children and Aid to the Disabled Fund, the county should consider the bond issue provisions in Chapter 346 of the Code, which you refer to in your question No. 3. Except for an emergency contemplated by the legislature in the enactment of Chapter 251 (which first appeared as §3828.067, 1939 Code of Iowa, and antedated the Aid to Dependent Children and the Aid to Disabled Persons statutes), §251.2(4) would not be available to a county.

It is the opinion of this office that the Aid to Dependent Children and Aid to the Disabled programs are not emergency welfare programs within the meaning of that Statute. [Also, it should be noted that the 63rd General Assembly made no specific appropriation to the Department of Social Services (Chapter 57, Acts of the 63rd General Assembly), although it had made small apropriations to cover administrative services in past sessions of the Assembly.]

III

Chapter 346, as you point out, refers to the County Issuing County Bonds to provide funds to cover outstanding indebtedness. Section 346.9 prohibits the issuance of bonds in excess of the constitutional limit hereinbefore referred to. Section 346.1 provides for the funding and refunding of such bonds, and reads in part as follows:

"When the outstanding indebtedness of any county on the first day of January, April, June, or September, in any year exceeds the sum of five thousand dollars, the board of supervisors, by a two-thirds vote of all its members, may fund or refund the same, and issue the bonds of the county therefore in sums of not less . . ."

If the county attempts a bond issue under Chapter 346 but fails in this regard for any reason, it is apparent that the county must resort to the General Assembly for relief. For your information, we find no requirement that such bond issue be submitted to the voters for approval. In the meantime, it would seem desirable for the county to continue to issue anticipatory warrants to the State in payment of its share of the two programs, A.D.C. and A.D., discussed in this opinion. The reason for this is that the anticipatory warrants bear interest at the rate of five (5) per cent per annum; whereas if the State takes legal action to obtain judgment, the legal rate of interest payable thereon would be six (6) per cent.

IV

In figuring the budgets, the Board of Supervisors should include reasonable figures for providing adequate services for those needing General Relief although there is no set amount made mandatory. However, in figuring the budget for the Aid to Dependent Children and Aid to the Disabled, the board must be mindful of the mandatory amounts figured on the formulae set out in the statutes above referred to. During the year, there may need to be an adjustment of the budget by transfer of funds to the poor fund from the General County Fund, as by law, in order for the County to meet its share of contribution to the "Aid to Dependent Children Fund" and "Aid to the Disabled Fund" provided by the statutes referred to above.

November 21, 1969

WELFARE: County contributions to aid to dependent children and totally disabled programs; Provisions of Chapter 251, "Emergency Relief Administration" do not apply to give additional method of raising revenue for counties to make contributions to Aid to Dependent Children and Totally Disabled Programs as required in §239.11 and 241A.13, 1966 Code of Iowa. (Williams to Gillman, Commissioner, Iowa Department of Social Services, 11/21/69) #69-11-10

Mr. James Gillman, Commissioner, Iowa Department of Social Services: I have before me the request for an Attorney General's Opinion from James R. Rowen, Deputy Commissioner (Acting), dated September 4, 1969 regarding §251.3, 1966 Code of Iowa which is found in the Chapter titled "Emergency Relief Administration."

In the request for Opinion, Mr. Rowen states the following:

". . . This section [251.3, 1966 Code of Iowa] states that the State Department may make assistance to the counties for additional relief if the county has reached the maximum millage rate. . . .

"The Department of Social Services has no additional appropriation at this time to meet this type of an emergency, and it is our feeling that the Department of Social Services has no means to obtain the additional funds, and that this section of the Code is referring to emergency relief and does not relate to the A.D.C. responsibility of the county."

The County Attorney of Woodbury County, Mr. Edward F. Samore, has asked a similar question in addition to some other problems relating thereto. Attached hereto is a copy of the Attorney General's Opinion in answer to his questions, which Opinion is dated November 20, 1969.

As you will observe from the Opinion, this office does not believe that the Iowa Legislature, in enacting Chapter 251 titled "Emergency Relief Administration" referred to any of the Federal-Categorical Welfare Programs. The categorical welfare programs, Aid to Dependent Children and Totally Disabled, to which the Counties pay a proportionate share were both enacted at a date later than the enactment of said Chapter 251, 1966 Code of Iowa, which first appeared in the Code of 1939 as Section 3828.067.

Each of the Federal-Categorical programs in which the Iowa Legislature adopted as welfare programs for the residents of the State of Iowa meeting the qualifications set forth therein, have their own manner of meeting emergencies if the counties share to administer such program exceeds the statutory limitations on taxes that can be levied by the county to raise revenue for such purposes. The undersigned refers you to §239.11 relating to Aid to Dependent Children Assistance, and §241A.13, 1966 Code of Iowa, relating to Aid to Disabled Persons.

If the manner in which the legislature intended the counties to raise their proportionate share of their contributions to these two Federal-Categorical Programs is not adequate to provide the means by which the county can make such contributions as necessary for the Iowa Department of Social Services to maintain a uniform money grant to all residents of the State of Iowa, the matter is for the consideration of the legislature. It is the opinion of the undersigned that Chapter 251 of the

1966 Code of Iowa is not intended to be a valve to offer relief to counties who have already exhausted the additional revenue-raising method in the Chapters concerning Aid to Dependent Children and the Totally Disabled Programs.

It is further to be noted that the legislature made no specific appropriations to the Emergency Relief Administration Program anyhow, and that were the Chapters read together as a means to solve the problems of Woodbury County or any other county, there is no practical solution because of lack of appropriation.

November 26, 1969

SCHOOLS: Teachers — §29A.28, Code of Iowa, 1966. Speech clinician employed by county board of education is not entitled to leave of absence for military duty with pay where such teacher resigned prior to commencing the ten month enmployment contemplated by his contract. (Nolan to Milroy, Benton County Attorney, 11/26/69) #69-11-11

Mr. Boyd J. Milroy, Benton County Attorney: This responds to your letter of October 7, 1969, requesting an opinion on the following facts relating to a claim against Benton County Board of Education:

"On April 15, 1969, the Benton County Board of Education entered into a contract for the services of a teacher as a Speech Clinician at a given salary of $8,690.00 per school year, or more specifically $869.00 per school month of four (4) weeks for a term of ten (10) school months. Such salary payable in installments of $724.16 on the last day of each calendar month for a period of twelve (12) consecutive months. The first payment to be on the 1st day of August, 1969.

"On July 18, 1969, the school teacher so employed notified the Benton County Board of Education that he was being called to fulfill his military obligations and resigned his position.

"On August 26, 1969, demand was made on the School Board for payment of his first thirty (30) days due to his induction into the armed forces as provided under Section 29A.28 of the 1966 Code of Iowa as amended.

"The Benton County Board of Education is requesting your opinion as to whether or not this is a just and valid claim based upon the facts as presented by this request."

A copy of the contract with the teacher, the letter of resignation, dated July 18, 1969, and a claim against the Benton County Board of Education made under §29A.28 of the 1966 Code of Iowa was attached to your request. §29A.28, supra, provides:

"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 pay 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."

After examining all of the documents presented, it is our view that the claim is not valid for the reason that the resignation was submitted prior

to the induction into service or the beginning of the school year. The contract clearly provides for the teacher to perform the duties of speech clinician for a term of ten school months. The first payment of salary for one-half month's services was not payable under the contract until August 31, 1969. We believe that it is clear that the teacher having resigned on July the 18th performed no services prior to August 31, 1969. Nor could he be given thirty days leave with pay prior to the commencement of the ten months school year inasmuch as he was not required under the contract to perform any services prior to the last half month of August, 1969.

Every employer in this state is prohibited from discharging any person from employment on account of such person's membership in the military forces or hindering or preventing him from performing any military service he may be called upon to perform by proper authority. 1968 OAG 715, 717. However, such employer is not required by the statute cited to grant leaves of absence to persons who are not on the payroll at the time the military service is required to be performed. Further, it appears that the contract itself provides, in subsection C, that if the teacher is released by mutual agreement, final settlement shall be made so that the total amount which the teacher shall have received shall "be an amount equal to the product of the number of days of service multiplied by the amount considered as pay for one day of service." Since the teacher performed no service under this contract, it is our view that he has no valid claim for payment thereunder. As stated in an opinion of the attorney general in 1942, if a teacher contracts to perform teaching services at a future time, and enters the armed forces before the period when the teacher had agreed to begin work, the teacher is not entitled to benefits of this section (29A.28) since the teacher has not yet become an "employee." 1944 OAG 3.

November 26, 1969

COUNTY & COUNTY OFFICERS: County hospitals — §347.17, Code of Iowa, 1966. Hospital complies with provisions of §347.17 re collection for services by collecting from Blue Cross for services covered by contract. (Nolan to McGrath, Van Buren County Attorney, 11/26/69) #69-11-12

Mr. James W. McGrath, Van Buren County Attorney: This has reference to our telephone conversation of November 5th, 1969, in which the matter of the Van Buren County Memorial Hospital Board of Trustees request for an opinion on the legality of the Blue Cross Hospital Care Contract was discussed. You will recall that I indicated that I failed to see the problem involved since the Hospital Care Contract offered by this nonprofit corporation has been approved by the insurance department of this state and such contracts are in effect over the whole state. The language of paragraph two of the contract:

"And the hospital agrees not to charge to or collect from such Member any amount whatsoever for such Hospital Services so furnished therefor as hereinafter provided"

is in the old form of contract as well as the new form which has been presented to the Hospital Board. I see no conflict between this language and §347.17, 1966 Code of Iowa, which provides:

"It shall be the duty of the trustees either by themselves or through the superintendent to make collections of all accounts for Hospital Services rendered for others than indigent patients or patients entitled to free care as provided in Ch. 254. Such accounts shall be payable on presentation to the person liable therefor of an itemized statement and if not paid or secured within sixty days after such presentation the said trustees shall proceed to enforce collections by such means as are necessary and are authorized . . ."

A nonprofit corporation is a "person" under Iowa law. See §504A.2(1). Blue Cross is Ch. 504 corporation rather than Ch. 504A corporation. However, it is my belief that the term "person" is equally applicable and that under the terms of the contract the Blue Cross is the *only* "person liable" for the Hospital Services covered by the contract. Therefore, the Hospital Board complies with §347.17 by collecting from Blue Cross.

I understand from our conversation that you have already advised the board of hospital trustees to sign the proposed contract. This would appear to moot the opinion request to this office. However, we are furnishing the above analysis of the matter in response to your renewed request for such advice.

November 26, 1969

COUNTIES & COUNTY OFFICERS: Recorder — §421.17(6), Code, 1966, as amended. County Recorder must comply with requests for information concerning reporting of real estate transfers "in manner and form" prescribed by Department of Revenue. (Nolan to Richardson, Greene County Attorney, 11/26/69) #69-11-13

Mr. R. K. Richardson, Greene County Attorney: This is in reply to your letter requesting an opinion concerning the requirement that the county recorder obtain from persons filing deeds, information as to the name and address of both the grantor and the grantee on every deed recorded. You state that the county recorder has requested you to inquire by what authority the State Department of Revenue requires that he obtain this information for their convenience. You state further that the deed forms do not provide a place for putting the complete address of each grantor and grantee and the recorder is burdened by the fact that often the party filing the deed will not have the information which is necessary.

The authority under which the State Department of Revenue requires the recorders to furnish names of parties filing and recording deeds is §421.17(6), Code of Iowa 1966, as amended by Chapters 342 and 343, Acts of the 62nd General Assembly. This section gives the Director of Revenue the power,

"To require city, town, township, school district, county, state, or other public officers to report information as to the assessment of property and collection of taxes and other such information as may be needful or desirable in the work of the department in such form and upon such planks as the director may prescribe.

"The director shall require all county recorders and city and county assessors to prepare a quarterly report in the manner and the form to be prescribed by the director showing for each warranty deed or contract of sale of real estate, divided between rural and urban, during the last completed quarter, the amount of revenue stamps, sale price or consideration, and the equalized value at which that property was assessed that year.

This report with such further information as may be required by the director shall be submitted to the department within sixty days after the end of each quarter. The department shall prepare annual summaries of such records of the ratio of assessments to actual sale prices for all counties, and for cities having city assessors, and such information for the preceding years shall be available for public inspection by May 1."

The county recorder's duties under the above statute are to prepare the quarterly report "in the manner and form" prescribed by the Director of the Department of Revenue.

November 26, 1969

STATE OFFICERS AND DEPARTMENTS — Restoration of citizenship — §§248.3, 248.6, 248.7, 248.12, 710.1 and 710.2, 1966 Code of Iowa. One convicted of "embezzlement by a public officer" as defined in §710.1 is, after receipt of a restoration of citizenship, eligible for employment under the laws of Iowa despite the provisions of §710.2, 1966 Code. (Ivie to Pratt, Admin. Ass't., Merit Employment Dept., 11/26/69) #69-11-14

Mr. Ray O. Pratt, Administrative Assistant, Merit Employment Department: You have asked the following:

"A former state employee, convicted of embezzlement of state funds on March 24, 1968 under Chapter 710.1, 1966 Code of Iowa, has been accepted for employment in a state agency.

"An opinion is requested regarding this applicant's eligibility for state employment following said conviction according to the provisions of Chapter 710.2, 1966 Code of Iowa."

§710.2, 1966 Code of Iowa reads as follows:

"Such officer shall be imprisoned in the penitentiary not exceeding ten years, and fined in a sum equal to the amount of money embezzled or the value of such property converted, and shall be forever after disqualified from holding any office under the laws of the state."

Under the mandate of §710.2, without some intervening action by the governor, it is clear that an officer convicted under the provisions of §710.1, which is entitled "Embezzlement by public officers," "shall be forever after disqualified from holding any office under the laws of the state," a sweeping prohibition. §710.3, 1966 Code, defines public officer to include any person employed in state government.

I am aware that, while your inquiry is general in character, it is occasioned by the recent employment of an individual who has also recently been granted a Restoration of Citizenship upon the recommendation of the Board of Parole under §248.3, 1966 Code, which provides:

"Recommendation of restoration of rights of citizenship. The board of parole shall recommend to the governor the restoration of citizenship of such persons as have been discharged from parole and who have, by their conduct given satisfactory evidence that they will continue to be law-abiding citizens."

In order to properly answer your question, therefore, it is essential to examine the effect, under Iowa law, of the exercise of executive clemency by the governor and what effect such executive action might have in removing the disability imposed by §710.2, 1966 Code. In *Slater v. Olson*, 1941, 230 Iowa 1005, 299 N. W. 879, the Iowa Supreme Court dealt with

the right of a pardoned felon to qualify for a civil service position where one of the qualifications of such position was:

"5. Has not been convicted of a felony."

In reviewing the authorities of other states the Court decided:

"We do hold, however, that a *full pardon* granted after conviction contemplates, as stated in *State v. Forkner*, 94 Iowa 1, 62 N. W. 772, 777, 28 L.R.A. 206, supra, a remission of guilt "both before and after a conviction, forgives the offender and relieves him from the results of the offense, relieves not only from the punishment which the law inflicts for the crime but also exempts him from additional penalties in the form of disqualification, or disabilities based on his conviction. *Undoubtedly the legislature may prescribe qualifications for office, but the power must be exercised subject to the right of the pardoned man to be exempt from additional disabilities or qualifications imposed because of the conviction.*" (Emphasis supplied).

Further the Court said:

"While the *pardon* did not, of itself, conclusively restore the character of the plaintiff, and although the acts done by him were not obliterated by the pardon, they were purged of their criminality * * *."

Under the authority of the Slater case, what the Court describes as a "full pardon" would circumvent the prohibition against public employment by an individual convicted under §710.1, 1966 Code. The logical question to now consider is whether a Restoration of Citizenship will bring about the same result.

In 36 OAG 417 the Attorney General described a restoration to citizenship as follows:

"However, the right of so-called restoration to citizenship is generally considered as an incident to the pardoning power and, therefore, must be construed in light of not only Section 5 of Article II above quoted (Constitution of Iowa), but also with reference to Section 16 of Article IV of the Constitution, which, among other things, provides that the governor shall have power to grant reprieves, commutations and pardons after convictions for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law. Substantial authority holds that by such executive act the governor releases the person pardoned from the disabilities imposed by the conviction and to the full enjoyment of his civil rights."

That opinion continues:

"* * * we are of the opinion that one convicted of any infamous crime, to whom certificate of restoration has been granted by the governor, *enjoys in effect a pardon, although it may not be so named.*" (Emphasis supplied).

An examination of the form of Pardon as opposed to the form of Restoration of Rights historically used in Iowa lends strong support to the opinion above cited.

Both forms contain the following identical language:

"I do hereby restore the said.....to all rights, privileges and immunities which were forfeited by reason of said conviction."

The Restoration of Citizenship form continues with the following:

"This Restoration of Citizenship shall not be construed as a Pardon or as a remission of guilt or forgiveness of the offense, and shall not operate as a bar to greater penalties for second offenses or subsequent convictions or conviction as a habitual criminal."

On the other hand, in the Pardon form, the following appears in lieu of the above quoted paragraph:

"This Pardon not being granted by reason of the innocence of..... shall not be construed as a remission of guilt or forgiveness of the offense, and shall not operate as a bar to greater penalties for second or subsequent convictions, as provided for in Section 747.7 of, Code of Iowa, 1966."

The only real distinction between the two forms is that the Restoration of Citizenship recites that it shall not be construed as a Pardon, the legal significance of which is not readily apparent upon examination of what the two documents purport to do and the removal of civil disabilities accomplished by the execution of each.

Moreover, §248.12 provides:

"Restoration of rights of citizenship. The governor shall have the right to grant any convict, whom he shall think worthy thereof, a certificate of restoration to all his rights of citizenship. * * *"

§248.6, 1966 Code of Iowa, requires, as prerequisite to the issuance of a pardon, that the governor present the matter of proposed pardon to, and seek the advice of, the Board of Parole. Under §248.3, 1966 Code, the Board of Parole is required to recommend restoration of citizenship for persons discharged from parole. Even in this regard, there is no distinction in the handling of these matters."

Under §248.7, 1966 Code, there is a notice requirement that is obligatory in the granting of pardons where there has been a death sentence or life imprisonment imposed. No such requirement exists with regard to a restoration of citizenship in the Code, but, obviously, under either such sentence, no restoration of citizenship would be issuable without a prior commutation of sentence by the governor.

It is, therefore, difficult, if not impossible, to distinguish any significant legal difference between Pardon and Restoration of Citizenship under Iowa law. The granting of either is sufficient to remove the disability imposed by §710.2, 1966 Code of Iowa.

While §248.3 may be considered part of a general statute, and §710.2 is a special statute, the two are not in conflict and §710.2 does not control. *Wilson v. City of Council Bluffs*, 1961, 253 Iowa 162, 110 N. W. 2d 569, 571.

For all the reasons stated, it is our opinion that the individual discussed herein is eligible for state employment although common sense would dictate that such employment not be of a nature where public funds are handled or accessible.

November 28, 1969

TAXATION: Suspension of taxes §427.11. Where taxes on the property of a recipient of old age assistance are suspended, the suspension continues while the property is in the hands of a surviving spouse or minor

child. Such suspension, if lifted, may be reimposed and tax sale void where persons entitled to the protection afforded by statute are barred from repurchasing their property by payment of sums advanced. (Nolan to Eaton, Fremont County Attorney, 11/28/69) #69-11-15

Mr. Gene Eaton, Fremont County Attorney: This replies to your request for an opinion on the validity of the tax sale of the homestead of a deceased old age recipient. In your letter you state that the tax sale was held in December, 1967, and a certificate issued to Fremont County. Title to the property was in the name of an old age recipient who had died intestate some three years prior, leaving surviving, a husband and some children. The estate was less than $15,000.00. The suspension on the property was lifted at the death of recipient. In December, 1967, the children executed an instrument conveying to their father, the surviving spouse of the recipient, their purported interests in the property, which deed was duly recorded. The property, however, was sold under the name of the recipient.

Your questions then are:

"1. Could the suspension legally be lifted at the death of the recipient, or does it by operation of law inure to the benefit of the surviving spouse without necessity of reinstatement?

"2. Assuming the suspension was validly lifted at the death of the recipient, could it be subsequently reinstated so as to avoid an intervening tax sale?

"3. If the tax sale was not voided by the subsequent reinstatement of the suspension, was the tax sale invalid because sold under the name of the deceased recipient rather than under the name of the surviving spouse?"

It is our opinion that:

1. Under §427.11, Code 1966, the suspended taxes become due and payable upon the sale of the property or death of the old age assistant recipient except where such property passes by devised bequest, or inheritance to the surviving spouse or a minor child. 1960 OAG 258. If the property passes to a surviving spouse or a minor child the suspension continues. §427.11. However, the petitioner or any other person shall have the right to pay the suspended taxes at any time. Such taxes become collectible when a property passes from the hands of such surviving spouse or minor child, provided the suspended taxes have been entered on the treasurer's books. *Swanson v. Page County*, 1945, 236 Iowa 227, 17, N. W. 2d 125. And where a person by age or infirmity is unable to contribute to the public revenue, such person may file a petition with the board of supervisors asking for cancellation of the suspended taxes assessed against the property, then such taxes may be cancelled. §427.10, 1942 OAG 158, 1932 OAG 221. The board also has the power to compromise such taxes when in the best interest of the public and the recipient. 1968 OAG 243.

2. In *Re Estate of Hoyt*, 1954, 246 Iowa 292, 67 N. W. 2d 528, it was urged that any tax sale held in contravention of the suspension statutes and any tax deed issued pursuant thereto is void. The court did not decide the case on this point but held the tax sale void on other ground prohibiting the taking of the tax title by a lienholder in derogation of the rights of the owner of the realty. However, the language of the opinion

in discussing the import of social legislation clearly intended to help aged persons in need states, "Here is a clear indication of the legislative purpose to protect the beneficiary and his heirs against an adverse title acquired by the Board. They are given the right to repurchase their property by payment of any sums advanced. They would have no such right if we should hold the tax deed valid in the case at bar."

It appears therefore that the suspended tax does not become delinquent as long as the property remains in the hands of a surviving spouse or minor child. Where the suspension was lifted at the death of the recipient of old age assistance it could subsequently be reinstated for the benefit of a surviving spouse who would be entitled to such assistance, but in any event, the suspended taxes do not become delinquent so long as the property is held by such surviving spouse, and as a consequence, even though the suspension might subsequently be lifted on the property again placed on the tax rolls, no tax sale could be held for the suspended taxes so long as the property remained in the hands of the surviving spouse. Any tax sale held for the suspended taxes would therefore be void.

3. Your third question is answered above.

November 28, 1969

COUNTIES: Hospital trustees §347A.1, Code, 1966, as amended by Ch. 221, Acts 63rd G. A. Chairman, secretary and treasurer must be members of Board of Trustees. (Nolan to Martinson, Buchanan County Attorney, 11/28/69) #69-11-16

Mr. Kenneth W. Martinson, Buchanan County Attorney: This replies to your letter requesting an opinion on the appointment of a secretary and treasurer by the Board of Trustees of a county hospital. Your question is:

"Do the secretary and the treasurer for the Board of Trustees have to be members of the Board of Trustees or can these officers be appointed by the Board of Trustees from outside their membership?"

Section 347A.1, Code of Iowa, 1966 as amended by Chapter 221 Acts of the 63rd G. A., First Session now provides in pertinent part:

". . . The board first appointed shall organize promptly following their appointment, and shall serve until such time as their successors are elected and qualified; thereafter during the month of December of each year the board shall reorganize by the appointment of a chairman, secretary, and treasurer. The secretary and treasurer shall each file with the chairman of the board a surety bond in such penal sum as the board of trustees requires, with sureties to be approved by the board of trustees, for the use and benefit of the county hospital. The reasonable cost of the bond shall be paid from the operating funds of the hospital. The secretary shall report to the county auditor and the county treasurer the names of the chairman, secretary and treasurer of the board as soon as practicable after the appointment of each. The treasurer of the county hospital shall receive and dispurse all funds. Warrants shall be drawn by the secretary and countersigned by the chairman of the board after the claim has been certified by the board. The treasurer of the county hospital shall keep an accurate account of all receipts and disbursements and shall register all orders drawn and reported to him by the secretary, showing the number, date, to whom drawn, the fund upon which drawn, the purpose, and amount. The secretary of the board of hospital trustees shall file with the board on or before the tenth day of each month, a com-

plete statement of all receipts and disbursements from all funds during the preceding month, and also the balance remaining on hand in all funds at the close of the period covered by the statement. Before the third Monday of each month, the county treasurer shall give notice to the chairman of the board of hospital trustees of the amount of revenue collected for each fund of the hospital to the first day of that month, and the chairman shall draw his draft therefor countersigned by the secretary, upon the county treasurer, who shall pay such taxes to the treasurer of the hospital, only on such draft. The board of hospital trustees may employ, fix the compensation and remove at pleasure professional, technical and other employees, skilled or unskilled, as it may deem necessary for the operation and maintenance of the hospital, and disbursement of funds in such operation and maintenance shall be made upon order and approval of the board of hospital trustees. . . ."

From the language quoted (viz., the "board shall reorganize by the appointment," etc.) we must conclude that the chairman, secretary, and treasurer must all be members of the Board of Trustees and that appointments to these offices should not be made from outside their membership.

November 28, 1969

TAXATION: Board of Review — §441.31, Code, 1966. Only the Conference Board can effect the reduction of the board of review to three members. (Nolan to McGrath, Van Buren County Attorney, 11/28/69) #69-11-17

Mr. James W. McGrath, Van Buren County Attorney: You have requested an opinion of the attorney general, which states as follows:

"The Van Buren County Assessor and Board of Supervisors have asked me to obtain your opinion as to whether or not the Van Buren County Board of Review, appointed under Iowa Code Chapter 441, can be reduced from a five-member board to a three-member board, and, if so, by whom and what procedure should be followed."

§441.31, 1966, Code of Iowa, provides:

"The chairman of the conference board shall call a meeting by written notice to all of the members thereof for the purpose of appointing a board of review for all assessments made by the assessor. Such board of review may consist of either three members or five members. As nearly as possible this board shall include one licensed real estate broker and one registered architect or person experienced in the building and construction field. In the case of a county, at least one member of the board shall be a farmer. Not more than two members of the board of review shall be of the same profession or occupation and no two members of the board of review shall be citizens of the same town or township except in the case of cities having their own assessor in which case the members shall be selected so as to give each of the townships included within the city the highest possible numerical representation. The terms of the members of the board of review shall be for six years, beginning with January 1 of the year following their selection. In boards of review having three members the term of one member of the first board to be appointed shall be for two years, one member for four years and one member for six years. In the case of boards of review having five members, the term of one member of the first board to be appointed shall be for one year, one member for two years, one member for three years, one member for four years and one member for six years."

§441.32 then provides:

"The terms of the members of the board of review shall be for six years each. Members of this board may be removed by the conference board but only after a public hearing upon specified charges, if requested

by such member. Subsequent appointments, and an appointment to fill a vacancy, shall be made in the same way as the original selection. The board shall have the power to subpoena witnesses and administer oaths."

It is our opinion that the board of review can be reduced from a five-member board to a three-member board by allowing two positions thereon to go unfllled as the terms expire or where a vacancy exists by reasons of death or resignation. The statute appears to leave within the discretion of the county conference board the matter of whether there will be a three-member or five-member board of review. Consequently, only the conference board may effect such reduction.

November 28, 1969

COUNTY AND COUNTY OFFICERS: Medical Examiner — §§339.6, 339.8, Code of Iowa, 1966. Deputy medical examiners may serve on rotating basis when a medical examiner is appointed and bonded in accordance with §339.8. Claims of deputy examiners may be paid under §339.6. (Nolan to Waples, Des Moines County Attorney, 11/28/69) #69-11-18

Mr. Alan N. Waples, Des Moines County Attorney: Your letter of October 16, 1969, requests an opinion as to the legality of action by the Des Moines County Board of Supervisors. The board appears to be unable to find from the licensed physicians or osteopaths of the county or adjoining counties a medical examiner as provided under Ch. 339 of the Code of Iowa. Consequently, the board has appointed a number of the members of the local medical society as deputy medical examiners on a rotating basis.

Your letter included a copy of the recent communication from the office of the Auditor of State to the effect that this was in violation of §339.8 inasmuch as the board has no authority to appoint assistants or deputies unless a principal accepts the appointment and qualifies for the job by filing a bond with the board. The Auditor's letter also states that only the principal or county medical examiner has the authority to determine when an autopsy shall be performed, therefore, assistants or deputies functioning under an illegal appointment are without such authority.

You also inquire as to whether it would be permissible to have the board appoint a county medical examiner who would be bonded, and who would retain the same number of deputies to serve on a rotating basis, as is now the case.

With respect to the statement of the Auditor's office that the county board of supervisors has acted in violation of §339.6 Code of 1966, and allowing claims of deputy examiners for performing autopsies, we advise that the acts of defacto officers are binding on third parties and that such officers may be compensated for their services on a quantum meruit basis. See 43 Am. Jur. Public Officers, §489, 1969 supplement.

With respect to your suggestion that a medical officer be appointed by the board of supervisors with a number of deputies acting on a rotating basis, it is our view that this would comply with the statute and appears to be a feasible solution. In such case a deputy may perform all of the duties of the medical examiner. See 1968 OAG 9.

November 28, 1969

SCHOOLS: Elections — §277.16, 1966 Code of Iowa. Voters of school districts must comply with permanent registration requirements where applicable even though district boundaries also encompass areas where permanent registration is not mandatory. (Nolan to Pelton, State Representative, 11/28/69) #69-11-19

The Hon. Charles H. Pelton, State Representative: This replies to your letter of September 30, 1969, requesting an opinion on the application of Ch. 48, 1966 Code of Iowa, as amended, dealing with permanent registration of voters, to school elections. Your letter states:

"A portion of the Camanche Community School District lies within the city limits of the City of Clinton, an area recently annexed by Clinton. Sections 48.2 and 48.3 of the Code clearly indicate that school elections (without limitations) are within the purview of Chapter 48. The chapter applies to qualified voters who are residents of Clinton, making registration as provided therein mandatory for this relatively small group of Camanche School District voters.

"Should a proper interpretation of Sections 277.16 and related sections in Chapter 277 indicate that since permanent registration is provided for in the Camanche School District, albeit only a portion thereof, Chapter 48 must govern the procedure the district must follow in administering school elections to the extent city of Clinton residents are concerned?

"A literal reading of these Code sections seems to indicate that Clinton residents must comply with applicable permanent registration requirements when seeking to vote in Camanche School District elections, as their residence address entitles them to so vote, regardless of the boundaries of said district and registration requirements applicable elsewhere within said district, primarily the City of Camanche. This seems an impractical result."

As we understand the issue, the question is whether a double standard is applied with respect to voter registration within the single school district since the directors of the district are elected at large and part of the district is comprised of an area in which permanent registration is effective and the rest is outside of such area, and voters must register before each election.

No cases in point have been located. However, it seems to this writer that the result is analagous to the election of state and national officers by voters living both within and without permanent registration areas. Unless there is some particularly difficult problem in the administration of the registration laws of this state, which we fail to see it is our view that further amendment of Ch. 48, Code of Iowa, or any amendment to §277.16, Code, is not required.

November 28, 1969

SCHOOLS: Schoolhouses — §275.32, 1966 Code of Iowa. Architect's fee for schematic phase of projects presented to electorate may be paid from general fund even where bond issue is defeated. And where elementary building constructed with proceeds of 2½ mill schoolhouse levy, the architect may be paid from such fund. (Nolan to Dickey, Lee County Attorney, 11/28/69) #69-11-20

Mr. Robert Dickey, Lee County Attorney: This is in reply to your letter requesting an opinion on the legality of the Keokuk Community School District board right to pay, after a proposed school bond issue was de-

feated (1) the architect's fee for schematic design phase of school buildings and (2) the architect's invoice for construction documents work on an elementary school. Your letter states:

"In preparation for a vote on a three million dollar school bond issue for the construction of various school buildings, the Board entered into a written contract with school architects, the contract being the standard form agreement adopted by the American Institute of Architects, providing for a 6% fee on new work and an 8% fee on remodeling of the ultimate cost of each project; with 20% of the total fees to be paid at the completion of the schematic design phase; 35% at the completion of the design development phase and 75% to be paid at the completion of the construction documents phase. In accordance with instructions from the Board, the schematic design phase was completed as to all construction. As to a proposed elementary school, the construction documents phase was completed.

"Following this work, and on November 26, 1968, the bond issue was voted by the electorate of the School District and failed to pass.

"An invoice has been submitted by the architects for 20% of their fees. It is also probable that at some point the School Board will be billed additionally by the architects for the remainder of their fees due to date on the construction design phase of their work on the elementary school.

"The Board's position has been and is that the schematic design phase as to all projects was necessary to be done in advance of the election as to establish accurate cost data and demonstrate to the public what was proposed to be done. In addition the Board felt it necessary that the construction documents phase proceed on the elementary school so as to enable the immediate commencement of the project without the delays which would be inherent in waiting to go ahead with that work until after the bond issue election."

Further you have requested our views on which funds the bills can be paid from, if they may be paid at all.

In answer to your first question concerning the payment of the architect's fee for the schematic phase of the work, it is our view that such fee may be paid from the general fund. In an opinion of October 14, 1954, issued by this office, a similar situation was involved. The opinion states:

". . . I refer you to an official opinion of November 19, 1953. In this opinion it was held that the board of supervisors could in the exercise of *sound discretion* employ architects in order to inform itself of the requirements of the several public offices and housing thereof and in the event that the bond issue failed, could pay for the services of said architects from the general fund. The duty of the school board to provide adequate and safe schooling is somewhat applicable to the duty of the board of supervisors to provide its several county officials with offices. It would appear that only common sense would require that the school board inform itself as to building construction, types, costs, etc., all of which information could only be obtained through technical assistance of professional architects and would not be in the knowledge of the school board members before submission of a bond issue."

In answer to your second question, the voters of the Kokuk Community School District, Lee County, Iowa, authorized a two and one-half mill schoolhouse levy for each of the years 1968 through 1977, "for purchase of school grounds, construction of schoolhouses . . . and the payment of debts contracted for the erection of the schoolhouses." Assuming that the construction of the elementary school building is to proceed and

to be paid for from the schoolhouse fund, any debts contracted in connection with the erection of such elementary schoolhouse, including the payment of the architect for the work done to complete the construction document phase of the work may be paid from the money available in such schoolhouse fund. See §275.32, Code, 1966.

November 28, 1969

COUNTY AND COUNTY OFFICERS: Compatibility — Police Judge and Justice of Peace. Whether office is elected or appointed does not necessarily affect the issue of compatibility of public offices. Offices of Police Judge and Justice of Peace are incompatible. (Nolan to Pahlas, Clayton County Attorney, 11/28/69) #69-11-21

Mr. Harold H. Pahlas, Clayton County Attorney: This replies to your letter of September 18, 1969, in which you requested clarification in the matter of incompatibility of the office of Justice of the Peace and Police Judge. You asked specifically whether there is any difference if the town Police Judge is appointed rather than elected.

Under Iowa law as enunciated in the decision of *State v. White*, 1965, 257 Iowa 606, 133 N. W. 2d 903:

". . . 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.' "

From the above, it is our view that whether the office is elective or appointive does not necessarily affect the issue of compatibility of public offices. In this instance, we believe the offices are incompatible. See 1936 OAG 313.

November 28, 1969

STATE OFFICERS AND DEPARTMENTS: Board of Regents — Insurance — §517A.1, 1966 Code of Iowa. Board has power to purchase liability insurance coverage for security officers at its institutions. (Nolan to Richey, Ex. Sec., State Board of Regents, 11/28/69) #69-11-22

Mr. Wayne Richey, Executive Secretary, State Board of Regents: This replies to your letter of October 13, 1969, requesting a review of the matter of the purchase of insurance coverage against personal liability in the performance of official duties for security officers employed at Board of Regents institutions. The Board of Regents has power to purchase such insurance at the present time.

§517A.1, Code of Iowa, authorizes and empowers all state commissions, departments, boards and agencies 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 . . . while in the performance of any or all of their duties . . ."

This statutory authority is not mandatory as is the directive contained

in Ch. 295, Acts 62nd G. A., which requires counties to purchase insurance covering county officers for personal liability resulting from errors or omissions. However, the fact that §517A.1 is not written in mandatory language does not preclude the board from obtaining coverage for security officers at its institutions where such coverage would be desirable.

The existence of the State Tort Claims Act §25A, Code 1966, should be noted. However, in §25A.14 the law provides that the State Tort Claims Act shall not apply to:

"4. Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse or process, libel, slander, misrepresentation, deceit or interference with contract rights."

Because of these exclusions and the fact that the State Tort Claims Act does not in any event preclude a suit against the individual, even though the acts complained about may have been performed in the line of duty, it would appear that the Board of Regents may properly consider obtaining insurance coverage for such security officers under the provisions of §517A.1.

November 28, 1969

STATE OFFICERS AND DEPARTMENTS: Treasurer — §§453.1-.3, 1966 Code of Iowa. Successive resolutions by a political subdivision, approving depositories for public funds, do not impair effectiveness of prior resolutions approving different depositories for purposes of protection under the state sinking fund. (Nolan to Baringer, Treasurer of State, 11/28/69) #69-11-23

The Hon. Maurice E. Baringer, Treasurer of State: You have requested an opinion of the attorney general concerning the deposit of public funds. Your letter states:

"We are receiving resolutions for approval by the Treasurer of State from the various political subdivisions of the State naming depositories and maximum amounts for deposit of public funds.

"This is pursuant to Chapters 453.1, 453.3, and 454.6 Code of Iowa, 1966. In the past some have submitted resolutions for different banks and succeeding dates.

"If a political subdivision submits resolutions covering different banks on succeeding dates, are all resolutions effective, or does the latest resolution only apply for the purposes of protection under the State Sinking Fund?"

Under §453.2 of the 1966, Code of Iowa, the board or council authorized to approve a bank as a depository of public funds must do so by written resolution or order, "which shall be entered of record in the minutes of the approving board, and which shall distinctly name each bank approved, and specify the maximum amount which may be kept on deposit in each such bank."

Previous opinions by this office have stated that a bank once designated as a depository will remain a depository until a new bank has been properly designated. 1934 OAG 304, 1932 OAG 147.

The 1932 opinion, *supra*, further advises that a change in the membership of the governing board does not necessitate action by the new board

affirming the resolution designating the depository approved by the prior board. However, where a bank which has been validly designated as a depository merges or is consolidated with another bank, a new resolution must be passed designating the surviving bank the depository inasmuch as the bank previously designated no longer exists. See 1934 OAG 431.

Thus, within the limitation set forth in §453.3, Code 1966, that "the maximum amount so committed to be deposited in a named bank shall not be increased except with the approval of the treasurer of state," where there are several nonconflicting resolutions of a political subdivision covering different banks on succeeding dates all are, in the view of this office, effective for the purpose of affording protection under the State Sinking Fund.

November 28, 1969

STATE OFFICERS AND DEPARTMENTS: Comptroller — Escheated Estates — §633.546, Code, 1966. If satisfied with proof of entitlement supplied by claimant, Comptroller may make payment without further court proceedings. Funds may be paid to attorney for claimants upon determination that he has the proper power of attorney. (Nolan to Selden, State Comptroller, 11/28/69) #69-11-24

The Hon. Marvin R. Selden, Jr., Comptroller: This replies to your letter of August 11, 1969, requesting advice in connection with your duties concerning the payment of an escheated estate to the representative of persons claiming to be heirs.

The Estate of Bessie K. Porter was originally probated in Monona County, Iowa. In October 1968, a petition to determine heirship was filed in Monona County District Court by the persons representing themselves as the heirs of Bessie K. Porter. The application was dismissed for lack of jurisdiction, the estate having been closed and the administrator discharged on June 4, 1965. There was no prayer in the petition for re-opening of the estate and re-appointment of an administrator. Since the proceeds of this estate are no longer located in Monona County, the court of that county would have no jurisdiction unless the estate were re-opened.

You have asked whether:

"(1) If I am satisfied of the research done by Mr. Chase, may I turn the funds to the estate or must it go through court proceedings?

"(2) If I may pay out the funds, can I pay them to Mr. Chase as the attorney suggests?"

In answer to your first question, §633.546, Code 1966 provides:

"The money or any portion of it shall be paid at any time within ten years after the sale of the property or the appropriation of the money, but not afterwards, to anyone showing himself entitled thereto."

While the law does not appear to require a court proceeding for the determination of heirship, this is the practice that has generally been followed over the years. If you are satisfied with the proof supplied, it is within your power pursuant to §633.546, supra, to pay the claimant without further court proceedings. If you are not satisfied you may require further showing of entitlement as by court decree. In either case, it is

necessary to obtain the proper inheritance tax clearances before the money is distributed to such heirs. The Department of Revenue has an automatic inheritance lien by virtue of §450.7, Code 1966.

In answer to your second question, if you are satisfied that Mr. Chase has the proper power of attorney from such persons as may be entitled to the funds held under the provisions of §633.546, and you have issued no regulations on how such money will be distributed, it may be paid to Mr. Chase, as attorney in fact for the claimants when the other provisions of law, i.e. the payment of inheritance tax have been complied with.

November 28, 1969

STATE OFFICERS AND DEPARTMENTS: Educational TV. The Comptroller is not prohibited from issuing warrants to lessor of TV cameras delivered to possession and control of Educational TV Board pursuant to an approved lease. (Nolan to Bidler, State Educational Radio and TV Facility Board, 11/28/69) #69-11-25

Mr. Carroll L. Bidler, Business Manager, State Educational Radio and Television Facility Board: By your telephone call and your letter of November 5, 1969, you have asked how to proceed to get a warrant issued for the payment of $25,000.00 due on delivery of two TK-44A color camera chains per RCA contract. I understand that the Comptroller has cited 1936 Attorney General's Opinion which prohibits the issuance of warrants in payment of *services* in advance. The matter under discussion there dealt with rents under leases of land, water, light and telephone service.

It is my view that equipment in the possession and control of the lessee falls in a different category than those discussed by the 1936 opinion. In addition, there have been several opinions issued by this office subsequent thereto in which the lease of land or equipment for a reasonable period of time has been approved. See 1940 OAG 458, 1964 OAG 18.18.

The RCA lease was also approved by this office. The Comptroller is not prohibited from issuing warrants in payment for the delivery of the cameras pursuant to the RCA lease.

November 28, 1969

COUNTIES AND COUNTY OFFICERS: Joint ambulance service — Ch. 28E, §§332.3 and 368.74, Code of Iowa, 1966; S.F. 51 and S.F. 60, 63rd G. A.; Ch. 293, 62nd G. A. County board of supervisors, being authorized to provide ambulance service, may do so jointly under agreement with cities or towns, and may agree to allocate funds by population; or it may contract to reimburse cities and towns for ambulance services they furnish. But in either case provision must be made for the county to recover from each user an amount which will substantially cover the cost of his use, and any deficit is paid out of the general fund. (Nolan to Travis, Taylor County Attorney, 11/28/69) #69-11-26

Mr. Michael F. Travis, Taylor County Attorney: This is an answer to your opinion request concerning the furnishing of ambulance service in Taylor County. Your letter states that the City of Bedford has contracted to purchase an ambulance and hired qualified personnel to operate it and that the other towns in the county have made similar arrange-

ments or are operating emergency vehicles on a donation basis. Specifically, you inquire:

"1. Can the County Board of Supervisors under Section 332.3 of the 1966 Code of Iowa and Senate File 51 of the 62nd General Assembly contract with the various cities and town in the county to subsidize a portion of the costs of operating their respective ambulance or reimburse the cities or towns for a portion of the contract the cities or towns may have with third parties to provide ambulance service?

"2. If the Board of Supervisors under Section 332.3, etc., have the power to contract to subsidize with the various cities and towns or reimburse the cities and towns do they have the power to levy a fraction of a mill or more for this purpose or does such subsidy or reimbursement have to be paid directly from the general fund?

"3. If the Board of Supervisors does have the general power to contract with or reimburse the cities, can they allocate the funds by population to the various districts the city or towns have agreed to service?

"4. If the Board of Supervisors are prohibited from contracting to subsidize or reimburse the cities or towns for ambulance service, then it is my understanding that Senate File 51 gives the Board of Supervisors power to provide such ambulance service. My question is in regard to Section 1 of Senate File 51, whereby it states: 'There shall be a sufficient charge assessed to the user of this service to substantially cover the cost, operation, maintenance and depreciation of said ambulance.' Does this mean that said charge assessed to the user must be sufficient to cover all costs of operation, maintenance and depreciation of the ambulance to the extent that the county would be reimbursed for all expenditures? If this charge is insufficient to substantially cover the cost of operation, maintenance and depreciation, should the deficit be paid from the general fund?"

First, the county board of supervisors has been authorized by Chapter 293, Laws of the 62nd General Assembly, 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. 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."

Cities and towns are authorized by §368.74 of the Code of Iowa, 1966, "To purchase, lease, equip, maintain and operate an ambulance or ambulances to provide necessary and sufficient ambulance service or to contract for such vehicle, equipment, maintenance or service." This authorization was amended by Senate File 60 of the 63rd General Assembly to provide in addition: "They may by ordinance provide a schedule of fees to be charged the users of such service."

Since both counties and cities are authorized to provide ambulance service, they may do so jointly under an agreement entered into pursuant to provisions of Chapter 28E, 1966 Code.

Second, the board of supervisors does not have specific authorization to levy a fraction of a mill or more for the purpose of providing subsidized ambulance service. If the county is going to provide ambulance service it must charge the user of such service an amount which will substantially cover costs. Any difference between the charge to the user and actual costs must be paid from the general fund.

Third, there would appear to be no legal barrier to allocation of funds by population to the various districts in the county which the cities or towns may agree to service. However, as a practical matter this may not be consistent with the actual usage of such service by the people in the county, or relevant to the distance which the ambulance must travel to take such persons to the hospital. Consequently, it may be unwise to allocate funds solely on the basis of population since the population centers are the cities and towns which also furnish the service.

Fourth, while it is our view that the board of supervisors are not prohibited from contracting to reimburse cities and towns for ambulance service, they of cuorse, may provide the service themselves. In either case the county is required to recover from the user of the service an amount which will substantially cover the county's cost of supplying the service, and any deficit that arises is to be paid out of the general fund.

November 28, 1969

STATE OFFICERS AND DEPARTMENTS: Development Commission — Ch. 239, Acts, 63rd G. A. Amendment to low rent housing authorization (Ch. 403A, Code, 1966) is construed as an alternative method of procedure limited in application to projects for elderly and handicapped. Other projects are not disturbed by the amendment. (Nolan to McLaughlin, Iowa Development Com., 11/28/69) #69-11-27

Mr. William M. McLaughlin, Planning Director, Iowa Development Commission: This is in response to your request for an opinion construing Ch. 239, Laws of the 63rd G. A., First Session. The Act in question provides for the approval of low-rent housing projects for the elderly and physically handicapped without a referendum. §§3 and 4 of Ch. 239 are set out below:

§3. Chapter four hundred three A (403A), Code 1966, is hereby amended by adding thereto the following new section:

"As an optional procedure, a municipality or low-rent housing agency may proceed to exercise the powers granted by this chapter on its own motion without an election, in the manner and subject to the limitations prescribed by this section. Before adoption of the resolution to proceed, the governing body of the municipality shall cause a notice of the proposed resolution to be published at least once in a newspaper of general circulation within the municipality, at least fifteen days prior to the meeting at which it is proposed to take action on the resolution to proceed. The scope of property acquisition for the low-rent housing project or projects shall be specifically limited, by the resolution to proceed to:

1. The use of dwelling units in existing structures to be leased from private owners.

2. The construction or acquisition of dwelling units which are specifically designed for, and the occupancy of which is to be limited to, persons who are sixty-two years of age or older, or who are physically handicapped and said project shall not be used for other rental or occupancy except for such limited part or parcel used by the superintendent or manager of such dwelling unit."

§4. Any provision of chapter four hundred three A (403A) of the Code notwithstanding, no housing project shall be approved unless as a condition at least ten percent of all rents and supplemental rental aid shall be paid annually as taxes to the office of the treasurer in the respective county in which said project is located, except as to the use of dwelling units in existing structures leased from private owners.

You have requested that we answer several questions propounded by the Department of Housing and Urban Development questioning the proper interpretation of §§3 and 4 set out above. The questions are as follows:

1. "In the event a 'low-rent housing agency' rather than a 'municipality' is proceeding under said §3, what procedure is required for the publication of notice?

2. "Does the limitation 'and the occupancy of which is limited to' merely require that elderly persons be given priority or would it preclude non-elderly tenants in the event that elderly tenants were not available?

3. "Does the term 'supplemental rental aid' appearing in §4 of House Bill 196, Laws of 1969, State of Iowa, require as a condition of approval of low-rent housing projects under Ch. 403A of the Iowa Code, 1966, as amended, payment in lieu of taxes of a sum in excess of an amount equal to ten percentum of the annual shelter rents charged?

4. "Does §4 House Bill 196, Laws of 1969, State of Iowa apply to all low-rent housing under Ch. 403A of the Iowa Code, 1966, as amended whether authorized to proceed by resolution or referendum?

5. "How is §4 of House Bill 196, Laws of 1969, State of Iowa, affected by §403A.4 of the Iowa Code, 1966 as amended?"

1. Under §403A.5, Code 1966, a municipality may create a "Low-Rent Housing Agency" which is a public body corporate and politic but which has limited powers as expressly authorized by the municipality creating such Agency. If a low-rent housing agency is authorized to transact business and exercise powers it operates by a board of commissioners.

In the event a low-rent housing agency rather than a municipality attempts to proceed with a low rent project on its own motion and without an election, there must be a published notice of the proposed resolution to proceed as prescribed by Ch. 239, §3, Acts 63rd G. A. The procedure is as follows:

". . . Before adoption of the resolution to proceed, the governing body of the municipality shall cause a notice of the proposed resolution to be published at least once in a newspaper of general circulation within the municipality at least fifteen days prior to the meeting at which it is proposed to take action on the resolution to proceed. The scope of property acquisition for the low-rent housing project or projects shall be specifically limited, by the resolution . . ."

2. The limitation of the powers conferred by Ch. 239, supra, would exclude from the low-rent housing units provided, all persons who are neither 62 years of age or physically handicapped, or the spouse of such persons.

3. Where Ch. 239 provides that at least 10% of all rents and supplemental rental aid shall be paid annually as taxes to the office of the treasurer in the respective county in which the project is located, it is our interpretation that the amount to be paid in lieu of taxes is to represent the percentage of the rents and rental aid combined. The Act provides for such payment in an amount *"at least"* 10%. It does not provide for payment *in excess of* 10%. We view this to mean that exactly 10% of the combined monies paid to the project as shelter rents and as rent supplemental aids are to be paid by the Agency to the County Treasurer in lieu of taxes on the project. However, the federal limitation of 10% of "shelter rents charged" would have to be observed where the combined

monies available exceed shelter rents charged.

4. Ch. 239 applies only to low-rent housing authorized to proceed by resolution instead of by referendum. This is a pilot project measure and §4 thereof is limited to the housing for the elderly or handicapped authorized under §3 and has no application to other projects.

5. Prior to the enactment of Ch. 239, supra, certain legislative leaders consulted with representatives of the Department of Housing and Urban Development and proceeded with the understanding that this pilot program for the elderly had federal sanction. Projects commenced under Ch. 239 are goverened by §4 thereof, rather than by any other section of Ch. 403A. It is well settled that a general law may be amended to include a class for which the limited provisions of the amendatory act prevail while other classes covered by the general act remain undisturbed by the addition of the amendment. Sutherland, *Statutory Construction* §1915.

December 3, 1969

CITIES AND TOWNS: Municipal building regulations and state laws regulating construction — generally. §§1.2, 368.9, Code of Iowa, 1966. A municipality may not enforce its building codes, nor state laws concerning construction, against the state, except as expressly stated by statute. In this area, municipalities will suffer no liability for failing to inspect and enforce these laws against the state. (Martin to Grassley, State Representative, 12/3/69) #69-12-1

The Hon. Charles E. Grassley, State Representative: I have received your letter of March 28, 1969, in which you request an opinion of the Attorney General as follows:

"Are buildings under construction by the State of Iowa within the city limits of any city that has adopted a recognized building code, such as the Uniform Building Code, subject to these same regulations?"

You have also orally requested an opinion on the following:

1. May municipalities enforce provisions of state law regulating construction against the state?

2. Could a municipality be liable for not enforcing its building code or state law, against the State?

We assume your question refers to buildings owned by the State itself, and not to buildings which are owned by an arm or agency of the State, such as a school district's school building. The latter structures are subject to municipal construction regulations. *Cedar Rapids Community School District of Linn County vs. City of Cedar Rapids,* 252 Iowa 205, 106 N. W. 2d 655 (1960).

The answer to your first question was perhaps best stated in the case of *City of Milwaukee vs. McGregor,* 140 Wisc. 35, 121 N. W. 642 (1909). The court in holding the city to be without power to enforce its building code against the State, stated as follows:

"The infirmity of appellant's position has been, from the first, in supposing that the state, in respect to constructing a building in the city of Milwaukee, has no more free hand than a private person or corporation, while the fact is that the people of the state in their sovereign capacity,

except as restrained by some constitutional limitation, and there is none in this case, is as exempt from mere general or local laws as the king was of old in the exercise of his sovereign prerogatives as 'universal trustees' for his people. So it has been said, 'The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not' the sovereign 'in the least, if they may tend to restrain or diminish any of his rights and interests.' So general prohibitions, either express or implied, apply to all private parties but 'are not rules for the conduct of the state.'" (loc. cit. supra at 643 of the Northwest Reports)

This common law concept of sovereignty is further found in the case of *Newton vs. City of Atlanta*, 189 Ga. 441, 6 S. E. 2d 61 (1939) in the following language:

"'The general rule is that public property and the various instrumentalities of government are not subject to taxation. This immunity rests upon the most fundamental principles of government; being necessary in order that the functions of government be not unduly impeded' as well as for other reasons. The state's properties and instrumentalities are thus exempt from municipal taxation or *regulation*, in the absence of express legislative authority." (Emphasis added) (loc. cit. supra at 63 of the Southeast Reports)

The same result was reached in *Ex Parte Means*, 14 Cal. 2d 254, 93 P. 2d 105, 123 A.L.R. 1378.

Section 1.2, Code of Iowa, 1966, provides in pertinent part as follows:

"The state possesses sovereignty coextensive with the boundaries referred to in section 1.1 . . ."

The concept of sovereignty has thus been continued in statutory form. See also Iowa Rule of Civil Procedure 9, Code of Iowa, 1966.

We are therefore of the opinion that a municipality may not, generally speaking, enforce its building code against the State.

For the same reasons, the State is not, generally speaking, subject to municipal enforcement of state law concerning construction of buildings.

As a practical matter, the question of the State's general exemption aside, a municipality may not generally compel the state, through the operation of judicial power, to comply with either municipal ordinance or state law. The state is, in the absence of a statute, immune from suit. *Montandon vs. Hargrave Construction Co.*, 256 Ia. 1297, 130 N. W. 2d 659 (1964); *Collins vs. State Board of Social Welfare*, 248 Ia. 369, 81 N. W. 2d 4 (1952); *Bachman vs. Iowa State Highway Commission*, 236 Ia. 778, 20 N. W. 2d 18 (1945). We have found no statute which grants municipalities the right of suit against the state, in all cases of this nature.

Your last question inquires as to whether the cities are subjecting themselves to possible liability for failure to inspect and enforce municipal and state laws, against the State. Since, as above stated, municipalities have no power to inspect or enforce these laws against the State, they have no duty to do so, which, upon breach, could subject them to liability. *Prosser, the Law of Torts*, Chapter 6, 165 &ff., Second Edition, 1955.

The above discussion merely states general rules. There may be nar-

row areas in which the cities are given the express power to enforce their ordinances or the state law, against the State.

December 4, 1969

TAXATION: Confidential records — §441.21, 1966 Code of Iowa. Lists of bank stockholders when furnished the city assessor as part of a supplemental return pursuant to §441.21 should be kept confidential in accordance with §441.19(4). (Nolan to Burns, Muscatine County Attorney, 12/4/69) #69-12-2

Mr. Jack L. Burns, Muscatine County Attorney: This replies to your letter requesting an opinion on the matter of whether or not a list of bank stockholders furnished the city assessor as part of the supplemental return provided for in §441.21 of the 1966 Code, is public record and must be disclosed upon demand. Your letter made reference to an opinion issued by this office on January 23, 1968, which says that the list is a public record.

On the facts presented in your letter, the list of stockholders was furnished to the city assessor as part of the supplemental return filed in pursuance of §441.19(4). The pertinent part of that section provides as follows:

"The supplemental returns herein provided for shall be preserved in the same manner as assessment rolls, but shall be confidential to the assessor, board of review, or state tax commission, and shall not be open to public inspection, but any final assessment roll as made out by the assessor shall be a public record, provided that such supplemental return shall be available to counsel of either the person making the return or of the public, in case any appeal is taken to the board of review or to the court."

The January, 1968, opinion does not reach the point now raised by your letter, but contemplates only the lists furnished pursuant to Ch. 430 of the Code of Iowa, and relies extensively on an opinion previously issued by this office on June 26, 1963, a copy of which is attached. While the "Public Records Act" Ch. 106 Laws of the 62nd G. A. does not contain a specific exception with regard to supplemental reports filed with an assessor as it does for information obtained by the state tax commission (now Department of Revenue), see §10, it does provide that a number of records shall be kept confidential. Among these are:

"Reports to government agencies which, if released would give advantage to competitors and serve no public purpose." (§7(6)).

Where the stockholders lists are part of the supplemental return made pursuant to §441.21 they should be kept confidential.

December 5, 1969

LIQUOR, BEER AND CIGARETTES: Issuance of more than one Class C liquor license to same licensee — §123.27(9), Code of Iowa, 1966. A qualified applicant may be issued a Class C Liquor License for an establishment in a city although he is a licensee holding a Class C Liquor License issued by a board of supervisors for an establishment outside the city, but within the county. (Turner to Knoshaug, Wright County Attorney, 12/5/69) #69-12-5

Mr. Dewayne A. Knoshaug, Wright County Attorney: You have requested an opinion of the attorney general as to whether §123.27(9),

Code of Iowa, 1966, prohibits issuance of a Class C Liquor License by a city or town council for an establishment located within the corporate limits of the city or town when such applicant already has a Class C License issued by the county board of supervisors for an establishment located outside the corporate limits, but within the same county.

Section 123.27(9), Code of Iowa, 1966, provides:

"There shall be no limit upon the number of liquor control licenses which may be issued by a city or town council or board of supervisors, except that not more than one class 'C' liquor control license may be issued to each qualified applicant."

As you have noted, an opinion of the attorney general (1964 OAG 278), dated August 7, 1963, says that this limitation on the number of Class C Liquor Licenses which may be issued to each qualified applicant applies only to local agencies and not to the liquor control commission, and finds that a qualified applicant may obtain one Class C License in one city and another in another city without violating the prohibition. While this section is undoubtedly susceptible of a more rigid interpretation limiting the applicant to only one such license regardless of where or by whom it is issued, the reasoning of the opinion, which is of long standing and appears to have been followed by the liquor control commission ever since, seems to have been carefully considered. We apply the doctrine of stare decisis and do not lightly withdraw former opinions unless they are clearly unsound.

The same reasoning which upholds the issuance of a Class C License by a city to a qualified applicant already a licensee in another city compels the conclusion that a qualified applicant may be issued a Class C Liquor License for an establishment in a city although he is a licensee holding a Class C Liquor License issued by a board of supervisors for an establishment outside the city, but within the county.

December 5, 1969

SCHOOLS: Approval of mergers of county school systems or cooperative agreements — §§273.14, 273.22, 257.9, 257.10, 17A.1 and 17A.5, Code of Iowa, 1966. §273.22 authorizes the state board of public instruction to adopt criteria in addition to those set forth in the statute as a condition precedent for the approval of proposed mergers. §257.9 does not substantially increase the authorization for the state board to establish the policies limiting the approval of county school system mergers, and the state board may not refuse to act upon or deny county mergers submitted to it for approval which otherwise meet statutory requirements. A policy or guideline which constitutes a "standard of general application" falls within the definition of a rule and such rule should be submitted for review in accordance with the provisions of §17A.5, unless such policy is one of internal application only. The selective application of a policy prohibiting the approval of joint county mergers for reasons outside of the statutory requirements prescribed under §273.22 is an arbitrary and capricious abuse of discretion by the state board. (Nolan to Grassley, State Representative, 12/5/69) #69-12-6

The Hon. Charles E. Grassley, State Representative: You have asked for an opinion of the attorney general on the authority of the State Board of Public Instruction to establish policies and guidelines in connection with the approval of mergers of county school systems (§273.22, Code of Iowa 1966) or cooperative agreements between county boards of

education for programs or services (§273.14.) Your letter states that the state board established six guidelines without submitting them to the legislative departmental rules review committee and that such guidelines deny approval to all statutorily proper applications and agreements unless all six of the guidelines are met. Your letter further states:

"These guidelines provide that all joint county systems shall be created within the boundary of one or more existing area vocational schools or community colleges; that not more than one 'regional educational service agency' unit will be approved within the boundary of an existing area of a vocational school or community college; that a 'regional education service agency' may be formed by a combination of contiguous county school systems and local districts not presently assigned to an area vocational school or community college providing all guidelines can be met; that in instances where a combination of an unassigned county school system or school districts fail to meet all guidelines herein specified they should be attached to a presently organized contiguous area vocational school or community college area; that an optimum of 30,000 students, pre-school through grade 12, shall be enrolled in public schools of the area; 'that an optimum assessed valuation of $300,000.00 shall be available in the area.'

"I find no such requirements in the Code and am aware of no legislative policy or requisite which would relate area vocational schools or community colleges to joint county systems or 'regional educational service agencies.'"

You then submitted several specific questions which we have set out and answered below:

1. Does the state board of public instruction have the power to establish any such policies and guidelines?

Under the authority of §273.22 the county boards of education of any two or more adjacent counties may, by concurrent actions at special meetings or at the regular meetings of the respective boards in July merge the school systems into one school system; *"provided, however, that said mergers shall be approved by the State Board of Public Instruction* before becoming effective and provided further that notice of the proposed merger shall be published at least twenty days prior to the proposed merger . . ." [Emphasis supplied]

This section further provides that the merged school system shall be known as "a joint county system"; that the merged system shall have one tax base; that the system shall become effective on the first of July following approval of said merger by the Board of Public Instruction; that the territory of the joint county system shall be divided into six election areas, as nearly as possible, of equal population, and contiguous territory; that a joint board of education shall consist of seven members, one member elected from each of the respective election areas and one elected at large, such election to be held at the annual school elections in odd numbered years; that initial members of the joint board of education shall be selected from the members of the respective county boards at least thirty days prior to the effective date of the joint system; that the joint board shall have authority to provide adequate office facilities and branch offices as necessary; that the joint district budget shall be certified to the county auditor of the county in which the central office is located; that the joint board is authorized to appoint necessary advisory committees; that joint boards subject to the approval of the state board of public

instruction are authorized to provide special courses and services for physically, mentally and educationally handicapped and special and remedial courses and services and to lease, acquire, maintain and operate such facilities and buildings as deemed necessary to administer such authorized programs; that the joint boards are authorized to make application for and accept and spend state and Federal funds for programs of educational benefit approved by the state board; that joint boards shall exercise all the powers and carry out all the duties imposed on county boards of education by statute. None of these provisions of §273.22 authorize the state board of public instruction to adopt criteria relating to other objectives as a condition precedent for the approval of proposed mergers. See *Lewis Consolidated School District v. Paul F. Johnston, State Superintendent*, 1964, 256 Iowa 236, 127 N. W. 2d 118.

Since §273.22 does not provide authority for the state board to adopt extrinsic policy for the approval of joint county system mergers we have examined §257.9 of the Code of Iowa, which sets out the general powers and duties of the state board, and which authorizes the board to "determine and adopt such policies as are authorized by law and are necessary for the more efficient operation of any phase of public education."

It is our opinion that §257.9 does not substantially increase the authorization for the state board to establish the policies limiting the approval of county school system mergers since there has been no showing that such guidelines are "necessary for the more efficient operation" of the county school systems. Nor do we find any specific power under §257.10 which would enable the state board to establish such policies and guidelines. In this connection, we are aware that §257.10(8) does authorize the state board to "adopt a long-range program for the state system of public education based upon special studies, surveys, research, and recommendations submitted by or proposed under direction of the state superintendent of public instruction." However, we do not believe that this is sufficient to permit the state board to refuse to act upon or deny county mergers submitted to it for approval which otherwise meet statutory requirements.

2. Does the state board of public instruction have the power to deny approval to proposed joint county systems or cooperative agreements on the sole basis of the policies which have been established, if such meet existing statutory requirements?

No. See the answer to question No. 1 above.

3. Should such policies and guidelines be submitted to the attorney general and the departmental rules review committee under the provisions of Ch. 17A, Code of Iowa, 1966?

Section 17A.5 provides:

"Any agency empowered by law to make rules shall submit four copies 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."

A *rule* as defined by §17A.1 is "any rule, regulation, order, or standard of general application or the amendment, supplement, repeal, recission, 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." Where a state board adopts a policy or guideline which constitutes a "standard of general application" such policy falls within the definition of a rule and such rule should be submitted for review in accordance with the provisions of §17A.5, unless such policy is one of internal application only.

4. Are not the foregoing policies and guidelines an illegal or unconstitutional exercise of legislative power?

When the conditions for approval are prescribed by statute such as in §273.22, the state board acts in an administrative capacity with such limited administrative discretion as may be fairly implied from the language of the statute. And while acting within the limits of their statutory authority they are presumed to act under a constitutional delegation of power. The mere statement of administrative policy is not unconstitutional unless some constitutional right is transgressed thereby. *Zwingle Independent School District v. State Board of Public Instruction,* 1968, Iowa, 160 N. W. 2d 299. All inferences in favor of the legality of official acts are observed by the courts and only where it clearly appears that there was a failure to comply with the statutory requirements so as to transgress a constitutional right, will the courts take jurisdiction of controversies involving such matters. *Board of Ed. of Green Mountain Independent School District v. Iowa State Board of Public Instruction,* 1968 Iowa, 157 N. W. 2d 919.

5. If the state board has such a policy making power, is the policy here established an arbitrary and capricious abuse of discretion of the state board of public instruction?

Applying the criteria set out above, it is my view that the selective application of a policy prohibiting the approval of joint county mergers for reasons outside of the statutory requirements prescribed under §273.22 is an arbitrary and capricious abuse of discretion by the state board. However, since such matters are properly determined by the courts and since legislation concerning further mergers of county school systems has been introduced in the 63rd General Assembly, the state board could properly postpone additional action on the proposed mergers until the state policy is clarified by the legislature, there being no set period of time under §273.22 within which the board is required to act.

The state board should not delay acting upon requests for approval of written agreements between two or more adjacent counties for the appointment of a superintendent and the joint operation of services for mutual benefit, (§273.14), where the term of such agreements do not exceed one year.

December 8, 1969

COUNTY AND COUNTY OFFICERS: Health Centers — Chapter 299, Acts, 62nd G. A. Where authorized a levy should be made for each particular fund rather than one general health fund levy to be spread among the various health agencies. The two mills authorized by Ch.

299 is in addition to that provided for in §230.24. (Nolan to Faches, Linn County Attorney, 12/8/69) #69-12-3

Mr. William G. Faches, Linn County Attorney: This replies to your letter requesting an interpretation of Chapter 299, Acts of the 62nd General Assembly, which authorized certain counties to establish health centers. Your letter requests assistance in determining the proper method of funding such a project. Section 2 of Chapter 299, *supra*, to which you refer provides in pertinent part as follows:

". . . To pay the cost of operating, maintaining, and managing a health center the board of any such county is authorized to levy an annual tax not exceeding two (2) mills per annum on all taxable property in the county, said levy to be in addition to all other levies authorized by law for similar purposes."

Under §3 of the Act the county is authorized to borrow money and issue and sell general obligation bonds to pay all or any part of the cost of carrying out such project.

You have presented three questions as follows:

1. "Is it necessary to levy a tax specifically enumerated for the county health center or can the county have one general levy for all health funds and spread the proceeds of said levy among the various health agencies including the county health center?"

In answer to your first question, we advise that the levy should be made specifically for each particular fund. For example, there is no statutory maximum levy for the state institution fund (§444.12) but there is a maximum limit on the county mental health fund (§230.24) and also on the county hospital general fund, (§347.7). No transfers may be made out of any of these funds and no transfers may be made into the last two enumerated funds. See 1962 OAG, 363.

The board of supervisors have only such powers as are expressly conferred by statute or necessarily implied in the powers so conferred. *Mandicino v. Kelly*, 1968, ... Iowa ... 158 N. W. 2d 754.

2. "Is the county health center limited to a maximum of two (2) mills per annum on all taxable property?"

The two mill maximum lexy authorized under Chapter 299 is in addition to that provided for by §230.24. Therefore, if the activities of the health center include the care of county home patients and psychiatric examination and treatment or professional evaluation of the mentally retarded and mentally ill, the budget for the county health center may contemplate an amount in addition to the maximum of two mills per annum on all taxable property.

3. "Can the county mental health center be funded out of the county health center levy or is it necessary to have a specific levy for the county mental health center and a specific levy for the county health center?"

This question is answered above.

December 8, 1969

COUNTY AND COUNTY OFFICERS: Hospital — §347.7, Code, 1966.

Construction and maintenance funds for county hospitals may be comingled in a single county public hospital fund and used to erect and equip hospital buildings and additions. (Nolan to Graham, State Representative, 12/8/69) #69-12-4

The Hon. J. W. Graham, State Representative: By your letter of August 5, 1969, you have requested an opinion as to whether the money raised for the maintenance of a county hospital can legally be used to construct a hospital. Your letter states that around 1946 Humboldt County passed a $100,000.00 bond issue to construct a county hospital. Shortly thereafter, Humboldt County levied a one fill tax for two years under §347.7, Code 1966, for hospital maintenance. Approximately $38,000.00 was kept in a separate hospital maintenance fund by the County Treasurer for a period of time. Then the money raised for maintenance and that produced by the bond issue was turned over to the Humboldt County Board of Trustees, which board apparently comingled the funds.

Subsequently, on July 10, 1968, at 1968 OAG 780, we advised that unless a county hospital actually exists, the one mill levy for maintenance and replacements would be illegal. We understand that some claims have been made for a refund of the tax illegally collected prior to 1969. However, the $38,000.00 referred to above represents funds for which no refund claims have been filed.

In an opinion dated October 31, 1968, 1968 OAG 957, this office determined that the levy for improvement, maintenance or replacement of the Humboldt County Hospital "may be made in 1968, payable in 1969," inasmuch as the hospital was, at the date of the opinion, under construction and thereby "established."

Section 347.7 which authorizes *both* the one mill levy for maintenance, and the two mill levy for erection and equipment, provides in pertinent part:

"The proceeds of such taxes shall constitute the county public hospital fund. Provided, however, that the board of trustees of a county hospital of said county, where funds are available in the county public hospital fund of said county which are unappropriated, may use such unappropriated funds for erection and equiping hospital buildings and additions thereto without authority from the voters of such county."

From the above it appears that there is adequate legislative authority for the comingling of construction and maintenance funds into a single hospital fund and the use of any and all of the money otherwise unappropriated to erect and equip hospital buildings and additions. In other words, it appears that the use of the maintenance fund for the construction of the hospital is clearly authorized by the statute.

December 15, 1969

STATE OFFICERS AND DEPARTMENTS: Authority to purchase, control, assign and sell state owned motor vehicles — §§21.1, 21.2, 21.6, 262.9, 313.37, Code of Iowa, 1966. The governor and through him the state car dispatcher has sole authority and responsibility for the purchase, assignment, control and sale of all state owned motor vehicles including those used by the highway commission and the board of regents. (Turner to Johnson, State Car Dispatcher, 12/15/69) #69-12-8

Mr. Frank E. Johnson, State Car Dispatcher: Reference is made to your letter of December 3, 1969, in which you request an opinion of the attorney general and state as follows:

"Chapter 21 — Dispatcher of State Automobiles 21.2(4) The state car dispatcher shall purchase all new motor vehicles for all branches of the state government.

"Chapter 262 — State Board of Regents 262.9(4) Manage and control the property, both real and personal, belonging to said institutions.

"In regard to the above chapters in the 1966 Code, enacted by the 62nd General Assembly we ask for your opinion on the following:

"Should the purchase, control, and sale of all vehicles maintained by the State Board of Regents and the State Highway Commission be directly under the State Car Dispatcher, or controlled by each division as they are at the present time?"

Sections 21.1, 21.2 and 21.6, Code of Iowa, 1966, provide in relevant part as follows:

"21.1 Upon the taking effect of this chapter, the authority to assign all state-owned motor vehicles to state officers and employees, or to state offices, departments, bureaus, and commissions, shall be transferred and vested in the governor."

"21.2 In order to carry out the powers vested in him by this chapter, the governor shall appoint a state car dispatcher and such other employees as may be necessary, their compensation to be fixed by the governor and Comptroller, but said compensation of the state car dispatcher shall be as fixed by the general assembly, to carry out the provisions of this chapter. . . . Subject to the approval of the governor, the said state car dispatcher shall have the following duties:

1. He shall assign to a state officer or employee or to a state office, department, bureau, or commission, one or more motor vehicles which may be required by said officer or department, after said officer or department has shown the necessity for such transportation. The state car dispatcher shall have the power to assign said motor vehicle either for part time or full time. He shall have the right to revoke said assignment at any time.

2. The state car dispatcher may cause all state-owned motor vehicles to be inspected periodically. . . .

3. The state car dispatcher shall install a record system for the keeping of records of the total number of miles state-owned motor vehicles are driven and the per-mile cost of each motor vehicle. . . .

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 motor vehicle designated. No passenger motor vehicle except the motor vehicle provided by the state for the use of the governor, ambulances, buses, trucks, or station wagons shall be purchased for an amount in excess of the sum of two thousand five hundred 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 two thousand eight hundred dollars. Provided, further, that for station wagons the maximum amount shall be two thousand eight hundred dollars.

5. All used motor vehicles turned in to the state car dispatcher shall be disposed of by public auction, and such sales shall be advertised in the newspaper of general circulation one week in advance of sale, and

the receipts from such sale shall be deposited in the depreciation fund to the credit of that unit within the department or agency turning in the vehicle."

"21.6 There is hereby appropriated out of any money in the state treasury not otherwise appropriated the sum of twenty-five thousand dollars, which shall be known as the car dispatcher revolving fund. From this fund shall be paid all purchases of gasoline, oil, tires, repairs, and all other general expenses incurred in the operation of state-owned motor vehicles, and all salaries and expenses of the car dispatcher's department shall be paid from said fund.

"At the end of each month the state car dispatcher shall render a statement to each state department or agency thereof for the actual cost of operation of all motor vehicles assigned to such department or agency, together with a fair proportion of the cost of administration of the state car dispatcher's department during such month, as shall be determined by him, all subject to review by the executive council upon complaint of any state department or agency adversely affected. Such expense shall be paid by the state departments or agencies in the same manner as other expenses of such department are paid, and when such cost of operation and administration is paid by the department, such sum shall be credited to the car dispatcher revolving fund. If any surplus accrues to said revolving fund in excess of twenty-five thousand dollars for which there is no anticipated need or use, the governor may order such surplus turned over to the general fund of the state."

It is clear from the foregoing provisions of law that responsibility and authority for the assignment of all state owned motor vehicles is vested in the governor and through him in the state car dispatcher. It is equally clear that the state car dispatcher has total responsibility and authority for the purchase, control and sale of all state owned motor vehicles as well as the installation and maintenance of an accurate system of records relative to the operation, maintenance and repair of such motor vehicles.

Insofar as the state board of regents is concerned §262.9 to which you make reference merely provides in relevant part:

"The board [of regents] shall:

* * *

"4. Manage and control the property, both real and personal, belonging to said institutions.

* * *"

A prior opinion of the attorney general 40 OAG 377 took the position that because of the foregoing language in §262.9(4) the board of regents could continue to purchase, operate and sell their own motor vehicles despite the enactment of what is now Chapter 21 of the Code. This earlier opinion is in our view clearly wrong and is hereby withdrawn. §262.9(4) merely gives the board of regents the authority to manage property *belonging* to the various institutions under its control. Of course, no property "belongs" to any board, commission, agency or department of the state government in the sense that they own it or have title to the same. All state property belongs to the state and §21.1, upon the taking effect of Chapter 21, specifically transferred and vested exclusive authority for the assignment of state owned motor vehicles in the governor. Apart from this Chapter 21 is a special statute explicitly dealing with state owned motor vehicles, whereas §262.9(4) is a general

statute dealing in broad terms with the management generally of the property of the institutions under the control of the regents.

It is interesting to observe that the earlier opinion of the attorney general mentioned above, 40 OAG 377, rested on the well settled proposition that repeals by implication are not favored. This is especially strange since the opinion quoted the following provisions form Chapter 131, 48th General Assembly (now Chapter 21 of the Code):

"Sec. 7. All acts and parts of acts in conflict herewith are hereby repealed."

It is apparent that the author of the opinion was suffering under some misapprehension as to what constitutes implied repeal. The language from Chapter 131 quoted above amounts to express repeal, not repeal by implication, and cases and authorities supporting the proposition that implied repeals are not favored are inapposite.

It is well settled that if one statute deals with a subject in a general and comprehensive manner, and another statute deals with part of the same subject in a more minute and definite way, the two statutes should be read together and harmonized if possible, but, to the extent of any necessary repugnancy between them, the special statute will prevail over the general statute, unless it appears that legislature intended to make the general act controlling. *Georgen v. State Tax Commission*, 1969, Iowa , 165 N. W. 2d 782; *Ritter v. Dagel*, 1968, Iowa , 156 N. W. 2d 318. And this is true even where the general statute was passed after the special one. *State v. Halverson*, 1967, Iowa , 155 N. W. 2d 177. But here the special statute, Chapter 21, was passed after the general provision, §262.9(4). §262.9(4) has been in the Code in its present form for many years without change. Chapter 21 on the other hand was enacted only in 1939. Chapter 131, Acts, 48th General Assembly, and relevant provisions thereof have been amended as recently as 1967 without any diminution of the car dispatcher's authority with respect to all state owned motor vehicles. Apart from the special/general statute dichotomy it is axiomatic that where two acts of the general assembly are repugnant to or in conflict with each other, the one last passed, being the latest expression of the legislative will, must govern. *Casey v. Harned*, 1857, 5 Iowa 1, 5 Clark 1. Thus, even if it were to be conceded *arquendo* that there is indeed a conflict or repugnancy between Chapter 21 and §262.9(4) (a questionable premise at best) Chapter 21 would prevail not only because it is a special statute but also because it is the later enacted of the two statutory provisions.

It is noteworthy, too, that §21.1 as originally enacted contained this sentence:

"Until an assignment of such vehicles is made by the governor, each of these state motor vehicles shall continue to be operated by the state officer, department, bureau, or commission which now uses them."

Chapter 131, §1, 48th General Assembly (1939). This proviso was deleted in 1941. Chapter 70, §1, 49th General Assembly. The legislative purpose in the repeal is manifest. The grace period was over, and all vehicles formerly operated by any department, agency or commission

were to be under the control of the governor and the car dispatcher appointed by him.

Insofar as the highway commission is concerned the only statutory provision which we could find which would give the highway commission even colorable authority to purchase, sell and operate its own motor vehicles is §313.37 which provides:

"313.37 The state highway commission is authorized to purchase road material or road machinery required in the improvement or maintenance of the primary roads, after receiving competitive bids, and to pay for the same out of the primary road fund, and is directed to purchase, rent or lease any machinery or other articles necessary for the use and most economical operation of the field engineering work, the testing of materials, the preparation of plans, and for all allied purposes, in order to enable the commission to carry out the provisions of this chapter."

Here again Chapter 21 is a specific as opposed to a general statute and is also the later enacted statutory provision.

Accordingly, it is our opinion that the state car dispatcher should purchase, sell, assign and be responsible for the operation and maintenance of all state owned motor vehicles including those used by the highway commission and the board of regents.

No doubt questions will arise as to what are motor vehicles subject to the control of the state car dispatcher under Chapter 21 and what is road machinery and equipment under the control of the highway commission. Chapter 21 furnishes only limited guidance in this respect. However, in placing limitations on the amounts the state car dispatcher can spend for new motor vehicles §21.2(4) says in part:

"No passenger motor vehicle except the motor vehicle provided by the state for the use of the governor, ambulances, buses, trucks, or station wagons shall be purchased for an amount in excess of the sum of two thousand five hundred 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 two thousand eight hundred dollars."

Apart from the fact that the foregoing language seems to have the anomolous effect of including trucks within the category of passenger motor vehicles, it would also appear to give the car dispatcher control over not only trucks and cars but also over ambulances, buses and station wagons.

The Code contains numerous definitions of motor vehicles for various purposes. §81.1 (itinerant merchants); §127.1 (seizure and sale of conveyances transporting liquor); §321.1 (motor vehicles and the law of the road); §324.57 (fuel tax); §325.1(1) (certificated carriers); §327.1 (truck operators); §423.1(7) (use tax). Perhaps the definitions best calculated to furnish some guidance in determining what types of vehicles the state car dispatcher should control are those found in §324.57. Subsections (2) and (3) thereof provide:

"2. 'Motor vehicle' shall mean and include all vehicles (except those operated on rails) which are propelled by internal combustion engines and are of such design as to permit their mobile use on public highways for transporting persons or property. A farm tractor while operated on a farm or for the purpose of hauling farm machinery, equipment or

produce shall not be deemed to be a motor vehicle. 'Motor vehicle' shall not include 'mobile machinery and equipment' as hereinafter defined.

"3. 'Mobile machinery and equipment shall mean and include vehicles self-propelled by an internal combustion engine but not designed or used primarily for the transportation of persons or property on public highways and only incidentally operated or moved over a highway such as corn shellers, truck mounted feed grinders, roller mills, ditch digging apparatus, power shovels, drag lines, earth moving equipment and machinery, and road construction and maintenance machinery such as asphalt spreaders, bituminous mixers, bucket loaders, ditchers, leveling graders, finishing machines, motor graders, paving mixers, road rollers, scarifiers and earth moving scrapers. The foregoing enumeration shall not operate to exclude other vehicles which are within the general terms of this definition. 'Mobile machinery and equipment' shall not however include dump trucks or self-propelled vehicles originally designed for the transportation of persons or property on public highways and to which machinery, such as truck mounted transit mixers, cranes, shovels, welders, air compressors, well boring apparatus, or lime spreaders, has been attached.

"Mobile machinery or equipment originally designed as motor vehicles which are owned by the counties, cities, and towns of Iowa shall not be exempt from payment of fuel taxes on fuel used when operating on the public highways."

In the final analysis a common sense approach should make it possible to resolve any questions as to what types of vehicles are covered under Chapter 21.

December 22, 1969

COUNTIES AND COUNTY OFFICERS: Eligibility for soldiers relief. §§250.1, 250.2, 250.10, Code of Iowa, 1966. The wife of a member or employee of a soldiers relief commission, if otherwise eligible, should not be denied relief merely because of her husband's membership in or employment by the soldiers relief commission. The same is true of county employees generally. (Williams to Samore, Woodbury County Attorney, 12/22/69) #69-12-7

Edward F. Samore, Esquire, Woodbury County Attorney: You have requested an Attorney General's Opinion concerning eligibility for Soldier's Relief. In your letter of November 17th, you state:

"The Executive Secretary for the Soldiers Relief Commission is unable to pay the balance on his wife's hospital bill. She has been in the hospital for two years, which has brought about this situation.

"An employee for Woodbury County requests relief for his wife, who has been in doctor's care, and will be for some time. He also has a hospital bill for her."

You then ask the following questions:

"(1) Should the Soldiers Relief Commission approve a claim by its executive secretary for relief on his wife's hospital bill?

(2) Should the Soldiers Relief Commission approve claims from all County employees on all relief bills?"

Relief for soldiers, sailors and marines is provided for in Chapter 250, 1966 Code of Iowa as amended by Chapter 224, Section 1, 62nd General Assembly. The amendment relates to veterans of the Vietnam Conflict. Section 250.1, in part, reads:

"Tax. A tax not exceeding one mill on the dollar may be levied by the board of supervisors upon all taxable property . . . 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 . . . and their indigent wives, widows and minor children not over eighteen years of age, having a legal residence in the county."

Section 250.2, 1966 Code of Iowa, reads:

"Control of fund. Said fund shall be expended for the purposes aforesaid by the joint action and control of the board of supervisors and the relief commission hereinafter provided for."

Moreover, §250.10 provides in part:

"250.10 Disbursements — inspection of records. On the first Monday in each month, all claims certified shall be reviewed by the board of supervisors and the county auditor shall issue his warrants in payment of same drawn upon the soldiers relief fund. . . ."

Thus, the administration of the soldiers relief fund is not vested solely in the soldiers relief commission. The board of supervisors bear joint responsibility for the fund and review all claims approved by the commission.

The facts you state do not indicate whether or not the "executive secretary" of the Soldiers Relief Commission is a Commission member or a paid employee of the Commission. Under §250.6 the "secretary" is a member of the commission, but the same Code section provides for an administrative assistant and other employees who are not members. In any event, however, it is our opinion that so long as the members of the Commission and the Board of Supervisors find that this veteran's wife is otherwise entitled to relief, an employment situation of the veteran should not be used as a ground for refusal of relief.

In the case of a Commission member as distinguished from an employee for the Commission, he should decline to pass upon his own claim as a member of the Commission. Insofar as this opinion is contrary to a prior attorney general's opinion dated May 11, 1937 (38 OAG 218), that opinion is withdrawn.

II

Under the aforecited statutes, the veteran must be indigent to entitle him or his dependents to relief. Two (2) prior Attorney General's Oponions have touched upon the meaning of indigency within this statute; and if that becomes a question before you, I refer you to 1920 OAG 700 and 32 OAG 163.

The wife of a County employee, whose veteran husband would be otherwise eligible for relief if he were in private industry, should not be deprived of Soldiers Relief solely because of County employment.

December 22, 1969

STATE OFFICES: Banking Department — §524.16, Code, 1966. §§207, 209, 213, Chapter 273, Laws 63rd G. A., 1st Session. Moving expenses of bank examiners relocated by the department is authorized. (Nolan to Fritz, Supt. of Banking, 12/22/69) #69-12-9

The Hon. Collin Fritz, Superintendent of Banking: This has reference to a request for an opinion concerning payment of moving expenses when an employee is relocated at the request of the department.

Under §524.16 of the 1966 Code of Iowa, the "actual and necessary expenses" of the superintendent of banking, examiners, special assistants and other employees of the banking department within the state "shall be allowed." The superintendent of banking as head of the banking department is the proper authority to determine what are in fact "actual and necessary expenses." See §524.10. Under the new banking act which goes into effect in January, 1970, the sections corresponding to those quoted above are §§207, 209, and 213. (Ch. 273, Laws of the 63rd G. A., First Session.)

We do not find authority for the location of "resident offices" for bank examiners in various areas of the state. It is our understanding that no such offices exist nor are such offices contemplated. Moving expenses cannot be paid where an employee is receiving a salary provided for in an appropriation act unless they are expressly provided for by statute or are not considered compensation. (Ivie to Selden, State Comptroller 3/6/69).

Where the convenience of the employer requires intrastate transfer of employees, the payment of reasonable moving expenses is allowable. 1968 OAG 984.

It may be fairly determined that the expense of getting them to and from such place is a necessary and actual expense which is "governmental" rather than "personal." *Gallarno v. Long*, 1932, 214 Iowa 805, 243 N. W. 719.

The schedule of some bank examinations precludes daily travel to and from the seat of government by bank examiners. Their work requires physical presence at the banks which are examined. Efficient operation of the banking department would seem to call for the employment of examiners who live in localities close to their work. However, it is also requisite to the optimum operation of the department that examiners be assigned to different territories from time to time.

You have indicated that the budget of the department of banking, as approved by the 63rd G. A., contains an allowance for paying the costs of moving the household goods of employees who are relocated at the request of the department. It is our opinion that the present law and the new banking act authorize the allowance of such expenditures.

December 23, 1969

STATE OFFICERS AND DEPARTMENTS: Employment Security Commission, utilization of private financing to fund a portion of the cost of erection of a structure adjacent to the employment security building. §§96.25, 96.26, 96.27 and 96.28, Code of Iowa, 1966. The employment security commission may borrow from lending institution an amount sufficient to make up the difference between the cost of the commission's proposed administration building adjacent to the employment security building and the amount received from the federal government for that purpose. Such difference would be amortized from additional federal funds which the federal government has committed

itself to provide. (Hasemeyer to Schroeder, Executive Secretary, Employment Security Commission, 12/23/69) #69-12-11

Mr. Keith V. Schroeder, Executive Secretary, Employment Security Commission: This is in reply to your letter of November 18, 1969, in which you state:

"Thank you for your November 12, 1969 letter providing us with a copy of a memorandum from Mr. Dillard Stokes to yourself regarding the proposed addition to the Employment Security building. I thought perhaps this communication would be sufficient, along with the Attorney General's Opinion written by the Honorable Oscar Strauss, February 28, 1962. However, in talking with several of the lending institutions about financing the deficit portion of the proposed building, the lending institutions would like to see an updating of the 1962 Opinion to specifically cover the proposed addition.

"The Sixty-Third General Assembly passed House File 605, appropriating $730,182.60 of Reed Bill money for erection of a structure adjacent to the present administrative office building at 1000 East Grand Avenue for the Iowa Employment Security Commission. At the time the legislation was passed, the proposed structure was estimated to cost $1,224,000, and it was understood that private financing would be used to fund a portion of the cost on a lease-purchase basis arrangement and funded annualy on an amortization basis through the Manpower Administration, U. S. Department of Labor. The Regional Office Manpower Administration, U. S. Department of Labor, Kansas City, on February 4, 1969, provided us a letter, a copy of which is attached, committing itself to provide the money in the amount of the deficit in the original grant, which is the difference between the $730,182.60 already in the Unemployment Insurance Trust Fund and the estimated cost of the building, $1,224,000.

"Sections 96.25, 96.26, 96.27, and 96.28 give the Commission legal authority to acquire lands and buildings and purchase upon such terms and conditions as may entitle this state the granting of funds from the federal government. We now have $730,182.60 of Reed Bill funds available and appropriated and in the near future will want to enter into an agreement, sometime in December, 1969, with lending institution(s) for the remaining amount of funds needed to complete the building. The Manpower Administration, in its February 4, 1969 letter, has said the Commission would be entitled to grants or credit of funds under the Social Security of the Wagner-Peyser Act to be applied to the cost of the building. These grants then be used to liquidate the privately funded indebtedness portion of the building first. The private funding would start after the available $730,182.60 Reed Bill funds were used.

"These additional funds are necessary if the building is to be erected. If the proposal to acquire these additional funds is not accepted, the Reed Bill money appropriated for the purpose of erecting the addition to our present structure will revert to the Unemployment Trust Fund and after July 1, 1971, will be irretrievably lost for the purpose of acquiring a building. The Legal Department of the Employment Security Commission and the lending institutions, which have committed themselves as ready to provide the necessary cash, believe that Sections 96.25, 96.26, 96.27 and 96.28 give the Commission the necessary authority under the existing conditions, along with the Attorney General's Opinion written by Mr. Strauss on February 28, 1962. However, they desire and request your confirmation in regard to the financing of the deficit portion in the manner outlined in this communication. Would your office please review our request and provide us with an Opinion to cover the proposed addition?"

In 1962 the Employment Security Commission requested an opinion from the attorney general regarding the commission's authority to borrow from lending institutions an amount sufficient to make up the difference between the cost of the commission's proposed administration building

and the amount received from the federal government for that purpose. In reply, First Assistant Attorney General Oscar Strauss expressed the opinion that the Employment Security Commission had the legal power to pledge its credit to the amount of the deficit and to execute the proper instruments to evidence such pledge.

Mr. Strauss' opinion was based on the following facts:

1. The authority to purchase lands and buildings for the purpose of fulfilling the legislative intent of providing office space for the Employment Security Commission was vested in that commission.

2. The Federal Department of Labor had committed itself to providing money in the amount of the deficit in the original federal grant.

3. The power to purchase was treated, by both the employment security commission and the department of labor, by its agents, to include in such term the power to erect.

Similar facts are presented in the current proposal. The employment security commission, under §96.25 of the Code of Iowa, 1966, has the authority to purchase lands and buildings to provide office space for the commission. The U. S. Department of Labor has committed itself to provide money in the amount of the deficit in the original grant, to wit: the difference between the $730,182.60 already in the unemployment insurance trust fund and the estimated cost of the building, $1,224,000. Finally, the power to purchase is treated as including the power to erect.

We are, therefore, of the opinion that, with respect to the proposed addition to the employment security commission building, the employment security commission has the legal power to pledge its credit to the amount of the deficit and to execute the proper instruments to evidence such pledge.

December 23, 1969

STATE OFFICERS AND DEPARTMENTS: Employment Security Building insurance. §§96.25 and 96.26, Code of Iowa, 1966. The employment security commission may insure its building. (Haesemeyer to Wellman, Secretary, Executive Council, 12/23/69) #69-12-12

Mr. W. C. Wellman, Secretary, Executive Council: This is in reply to your letter of November 10, 1969, in which you state:

"The Executive Council, in meeting held this date, deferred action on purchase order #132061, submitted by the Employment Security Commission, for a first year premium installment on a 3-year policy for Fire, Extended Coverage, Vandalism, and Malicious Mischief, and Civil Disorders for the Administrative Office Building, for a period covered noon, October 28, 1969 through noon, October 28, 1970, from Employers Mutual Fire Insurance Company, Des Moines, Iowa, for $731.00, and directed that we obtain from you an opinion as to whether or not a department may be authorized to buy insurance of this type."

There are no provisions in the Code of Iowa specifically authorizing the purchase of such insurance. Section 517A.1 authorizes state departments, boards, agencies, and commissions to purchase liability insurance for public employees, but it does not authorize the purchase of casualty insurance on state property. Most state property is "self insured" under §19.7 of the Code which states:

"A contingent fund set apart for the use of the executive council may be expended for the purpose of . . . repairing, rebuilding, or restoring any state property injured, destroyed, or lost by fire, storm, theft, or unavoidable cause, ... Any such project for repair, rebuilding or restoration of state property 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 argued, however, that because the employment security commission building was financed largely by federal grants, and because no additional federal funds will be available to cover losses to the building, property insurance should be purchased to cover the possibility of such losses. The employment security commission cites Standard 1030-A-2 of the Employment Security Manual as authority for the commission to purchase the insurance. The standard states:

"Granted funds may be used to pay the cost of insurance protection of buildings against loss by fire, flood, tornado, or other elements where the cost of the buildings has been or is being amortized by the use of granted funds."

Section 96.25, Code of Iowa, 1966, authorizes the employment security commission to acquire buildings "upon such terms and conditions as may entitle this state to grants or credits of funds under the Social Security Act or the Wagner-Peyser Act to be applied against the cost of such property, for the purpose of providing office space for the employment security commission at such places as the commission finds necessary and suitable."

Section 96.26 of the Code authorizes the employment security commission to accept, receive, and receipt for all moneys received from the United States for the payments authorized by §96.25, and it further authorizes the commission to comply with any rules and regulations made under the Social Security Act or the Wagner-Peyser Act.

The Employment Security Manual consists of rules and regulations made under the Wagner-Peyser Act. Title 20 of the Code of Federal Regulations, Part 602, is based in part on the Wagner-Peyser Act. Section 602.14 states that "[T]he Director of the United States Employment Service shall provide the states with a comprehensive guide on all matters pertinent to the Federal-State cooperative program for the maintenance of a national system of public employment offices, to be included in the Employment Security Manual." Section 602.16 requires each state agency to comply with the Bureau of Employment Security Fiscal Standards, set forth in Part IV of the Employment Security Manual. Standard 1030-A-2, on which the Iowa Employment Security Commission relies for authority to purchase insurance is contained in Part IV of the Employment Security Manual.

We are therefore of the opinion that the Iowa employment security commission is authorized, but not required, to purchase casualty insurance on its building. The Iowa code authorizes the commission to comply with rules and regulations made under the Wagner-Peyser Act. The Wagner-Peyser Act is authority for the provisions of Title 20, Part 602 of the Code of Federal Regulations. 20 C.F.R. 602.14 authorizes the issuance of the Employment Security Manual, and 20 C.F.R. 602.16 re-

quires the state agencies to comply with the provisions of Part IV of said manual. Standard 1030-A-2, contained in Part IV of the manual, is therefore binding on the Iowa employment security commission, and allows the commission to use granted funds for the purchase of casualty insurance.

In conclusion, we wish to emphasize that the language of Standard 1030-A-2 is permissive in nature, and does not require the commission to insure its building. It should also be noted that this opinion deals only with the acquisition of such insurance by the employment security commission. It is our opinion that the employment security commission, because of its relationship to the federal government, is an exception to the general rule that state buildings are "self insured," and that §19.7 of the Code of Iowa, 1966 is applicable to all other state departments, boards, agencies and commissions.

December 23, 1969

STATE OFFICERS AND DEPARTMENTS: Executive Council approval not required to purchase books and publications directly from publisher. §§15.43 and 17.27, Code of Iowa, 1966. Neither executive council nor budget and financial control committee approval is required for the purchase by state departments of books and other publications direct from the publisher. The approval required by §15.43 relates to books, pamphlets and other printed material printed by or at the direction of the state printing board or state departments. The restriction on the distribution of state publications costing more than fifty cents to produce similarly applies only to books or other printed material printed by or at the direction of the state. (Haesemeyer to Wellman, Secretary, Executive Council, 12/23/69) #69-12-13

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: Reference is made to the letter of September 24, 1969, from Mr. Stephen C. Robinson in which he states:

"The Executive Council, in their meeting held September 22, 1969, asked that I obtain an official opinion from your office concerning the practice by many State departments of purchasing books and other publications directly from the Publisher.

"Since Section 15.43 of the Code of Iowa requires the approval of the Budget and Financial Control Committee (see our opinion request of September 3, 1969 asking for a clarification as to whether or not Budget and Financial Control Committee approval is required or Executive Council approval) would their approval be necessary for the purchase of books and publications.

"The Council also directed that I obtain from you an opinion as to whether or not, in the event of the distribution of said books and publications to the public, wherein the cost of same exceeds 50¢, the Department is required to make such a charge as they are in the case of publications printed by the State of Iowa."

In our opinion, §§15.43 and 17.27, Code of Iowa, 1966, do not apply to the practice by state departments of purchasing books and other publications directly from the publisher. The language of these sections is as follows:

"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."

"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."

These sections apply only to books, pamphlets, and other printed material published by or at the direction of the state printing board or other state departments or commissions. They do not apply to books, pamphlets, and other printed material which have been published by publishing companies and offered for sale by said companies to the general public. Therefore, the approval of the budget and financial control committee and the state printing board is not required for the purchase of said publications.

An earlier opinion of the Attorney General, 68 OAG 521 interpreted §17.27 as follows:

"State publications costing more than fifty cents (50¢) per copy to produce may not be distributed *gratis* but must be sold."

Publications purchased by state departments and commissions from publishing companies are not included within the meaning of "state publications." Only those publications actually published or printed by the state printing board, or by a state department or commission, or under contract from said board, department, or commission are considered to be state publications. Therefore, publications purchased by state departments or commissions are considered to be state publications. Therefore, publications purchased by state departments or commissions from publishing companies are not required under §17.27, to be sold at cost if the cost per publication is fifty cents (50¢) or more.

December 26, 1969

STATE OFFICERS AND DEPARTMENTS: Department of Health — Licensing of Pharmacists — §§147.2, 148.1(2), 148.2(5), 155.1(2), Code of Iowa, 1966; U. S. Constitution, Art. VI, Cl. 2. Pharmacists licensed in Iowa may lawfully fill prescriptions written for Indians by U. S. Public Health Service physicians who are not Iowa-licensed. And, while Iowa law literally prohibits Public Health Service pharmacists who are not Iowa-licensed from filling prescriptions written for Indians by Iowa-licensed physicians, such prohibition would be inoperative under

the Supremacy Clause where the pharmacists are fully authorized by federal law to fill prescriptions. (Turner to Crews, Sec., Iowa Pharmacy Examiners, 12/26/69) #69-12-14

Mr. Paul H. Crews, Secretary, Iowa Pharmacy Examiners: This will acknowledge your request for my opinion on the following questions:

1. Can pharmacists, licensed in Iowa, honor the prescriptions written by a physician, employed by the United States Public Health Service (Indian Health Service Division) for Indians, when such physician is not licensed to practice medicine in Iowa?

2. Can a pharmacist, employed by the United States Public Health Service (Indian Health Service Division), who is not licensed to practice in Iowa fill prescriptions written for Indians by physicians who are licensed to practice in Iowa?

Section 147.2, Code of Iowa, 1966, makes it completely clear that in Iowa a person in the practice of "medicine and surgery" or of "pharmacy" must be duly licensed:

"*License required.* No person shall engage in the practice of medicine and surgery . . . [or] pharmacy . . . as defined in the following chapters of this title, unless he shall have obtained from the state department of health a license for that purpose."

Under §148.1(2), persons "who prescribe, or prescribe and furnish medicine for human ailments" are deemed to be "engaged in the practice of medicine and surgery" and consequently §147.2 applies to them and requires them to be licensed. Similarly, §155.1(2) provides that persons who "fill the prescriptions of licensed physicians and surgeons" are "deemed to be engaged in the practice of pharmacy," so §147.2 requires them to be licensed too.

Generally speaking, then, the legislative intent is to treat both the writing and filling of prescriptions as professional acts which can be done only by persons who have met Iowa's licensing requirements. However, §148.2(5) expressly exempts "physicians and surgeons of the United States army, navy, or public health service when acting in the line of duty in this state" from the provisions of §148.1. There is no similar exemption under Iowa law for pharmacists of the United States Public Health Service.

The answer to your first question is, very clearly, "yes." The physician, when acting in the line of duty as an officer of the Public Health Service, can lawfully prescribe medicine; so a pharmacist who is licensed in Iowa can lawfully fill the prescription.

The answer to your second question is also "yes," although the reasons behind it are somewhat more complex. In this case it is the physician who is licensed in Iowa, so of course he is authorized to prescribe medicine. But since there is no exemption for Public Health Service pharmacists from the Iowa licensing requirements, such a pharmacist who is not licensed in Iowa would be prohibited by the literal terms of Iowa law from filling prescriptions. While Iowa law standing alone thus indicates a "no" answer to your second question, it must be acknowledged that the Iowa requirements would be inoperative under the Supremacy Clause (U. S. Const., art. VI, cl. 2) insofar as they attempted to restrict or regulate federal personnel in the performance of their duties under federal law. So long as a pharmacist of the Public Health Service is

fully authorized to dispense drugs to Indians under federal law, the state licensing requirements could not limit his authority. Such a pharmacist could certainly fill a prescription written for an Indian by a Public Health Service physician, and no relevant new element is added when it is supposed that the prescribing physician is licensed in Iowa to write prescriptions.

December 26, 1969

CITIES AND TOWNS: Municipal financial support of cemeteries — §§404.10, 343.8, 368A.16, Code of Iowa, 1966. A city or town may not contribute funds to a cemetery owned, operated and controlled by a sectarian institution. (Martin to Wegman, Chickasaw County Attorney, 12/26/69) #69-12-15

Mr. William L. Wegman, Attorney at Law: I have received your letter in which you request an opinion of the Attorney General in the following terms:

"The city attorney of the town of Nashua, Chickasaw County, Iowa, has advised me that there are three cemeteries located within such town: (a) Greenwood Cemetery (b) Oakhill Cemetery, and (c) The Catholic Cemetery. The town contributes $500.00 each to the first two named cemeteries and the issue now has arisen regarding whether or not the city can contribute $100.00 to the Catholic Cemetery. The question is: Can the town of Nashua, Iowa, under Section 404.10 of the Code of Iowa, as amended, or any other section thereof, legally contribute a sum of money to a catholic cemetery?"

You have further informed me that the Catholic Cemetery is owned, operated, and controlled by the Catholic parish involved. Church officials play a direct role in governing the cemetery.

Section 404.10, Code of Iowa, 1966, provides in part as follows:

"Municipal corporations shall have power to annually cause to be levied for a fund to be known as the municipal enterprises fund an annual tax on all taxable property within the corporate limits and allocate the proceeds thereof to be spent for the following purposes:

* * *

"2. For the care, preservation, and adornment of any cemetery utilized for burial purposes by the people of the city or town, whether such cemetery is located within the limits of such municipality or is established by its authority outside of its corporate limits. Said fund may be used for any cemetery owned and controlled by said municipal corporation within or without the corporate limits, or for any cemetery owned and controlled by any private or incorporated cemetery association, township, or other municipality, even though situated in an adjoining county, if actually utilized for burial purposes by the people of the city or town. Said tax may be so expended for the support and maintenance of any such cemetery after it is no longer used for the purpose of interring the dead."

Section 343.8 Code of Iowa, 1966, provides as follows:

"Public money shall not be appropriated, given, or loaned by the corporate authorities of any county or township, to or in favor of any institution, school, association, or object which is under ecclesiastical or sectarian management or control."

This section, coupled with the provisions of 368A.16, Code of Iowa, 1966, prohibits municipalities from contributing state or city funds to a sectarian institution. 1966 O.A.G. 382, 386.

Section 404.10(2) is a general statute authorizing a municipality to provide funds to anyone owning a cemetery. Sections 343.8 and 368A.16 are specific statutes prohibiting particular expenditures. It is a fundamental rule of construction that when a conflict arises between a general statute and a specific statute, the specific statute controls. *Smith vs. Newall*, 254 Iowa 496, 501, 117 N. W. 2d 883, 886 (1962); *Gade vs. City of Waverly*, 251 Iowa 473, 477, 101 N. W. 2d 525, 527 (1960); *Liberty Consolidated School District vs. Schindler*, 246 Iowa 1060, 1065, 70 N. W. 2d 544, 547 (1955).

Although your question, on its face, appears to raise a question of constitutional magnitude under Article 1, §3, Constitution of Iowa, we need not reach that issue. Your question having been disposed of upon a statutory basis, the necessity required before considering the constitutional issue does not exist. *Boliva Watch Co. vs. Robinson Wholesale Co.*, 252 Iowa 740, 108 N. W. 2d 365 (1961); *Eysink vs. Board of Sup'rs of Jasper County*, 229 Iowa 1240, 296 N. W. 376 (1941); *Reed vs. Snow*, 218 Iowa 1165, 254 N. W. 800 (1934).

It is, therefore, the opinion of this office that the municipality of Nashua may not give money to a cemetery owned, operated, and controlled by the Catholic Church.

December 26, 1969

TAXATION: §§428A.1, 428A.3, 428A.4, Code of Iowa, 1966. Deeds executed by sheriffs in connection with their official duties at an execution sale are not subject to the documentary tax. (Murray to Graven, Sac County Attorney, 12/26/69) #69-12-16

Mr. Jim K. Graven, Sac County Attorney: We had a request from your predecessor in office, Mr. Charles Mather, wherein he raised the following questions:

(a). Are stamps required on a sheriff's deed following execution sale?
(b). If they are, at what point does the sheriff require the money be paid to him so he can purchase the stamp?

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 of 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."

Section 428A.3 states who is liable for the tax as follows:

"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.*" (Emphasis added)

Section 428A.4 provides that the validity of the deed shall not be af-

fected by the failure to comply with §428A.1 nor shall the failure to comply impair the record of notice.

It has been our position that we will follow the federal regulations concerning documentary stamps when they are applicable. Federal Regulation, §47.4361-2 regarding conveyances of this kind are subject to the stamp tax:

"(4) Deeds given by masters in chancery, sheriffs, clerks of court, etc., for realty sold under foreclosure or execution. The tax is computed on the amount bid for the property plus the cost if paid by the purchaser, whether the purchaser is the mortgagee, judgment creditor, or any other person."

Following this regulation is the case of *Railroad Federal Savings and Loan Association v. United States* (1943) 135 F. 2d 290. Based on this case and the regulations, a sheriff's deed following an execution sale is subject to the tax based on the amount of the bid plus costs if paid by the purchaser. However, because of §428A.3 we cannot reach the same result under our law.

Section 428A.3 expressly provides that no public official shall be liable for the tax with respect to any instrument executed by him in connection with his official duties. If the deed is executed by the sheriff, the transaction would not be subject to the tax. If for any reason the grantor would be other than a sheriff or a public official, then the tax should be imposed on the grantor.

December 26, 1969

TAXATION: Assessment of Platted Lots: §§409.48, 428.4, 1966 Code of Iowa. Real estate is to be assessed on the 1st of January of each year and thus the expiration of the three year period provided for in §409.48 after January 1st of a given year will result in the platted lots not being adjusted for full taxation until January 1st of the year next following. (Turner to Forst, Director of Revenue, 12/26/69) #69-12-17

Mr. William H. Forst, Director, Iowa Department of Revenue: This is in response to your request of February 26, 1969, for an Attorney General's Opinion wherein you stated:

"A plats land on 1/15/65 and files plat. He sells a lot during 1965 and taxes are prorated as to the total assessed value of the tract before platting. He retains the remainder of the lots until 1/15/69. Since January 1 of any year is the assessment date, when should the lots have been adjusted for full taxation? Is the period two years and a fraction of a year, or three years and a fraction? The Code says three years after platting, but platting during the interim between assessment dates of this type is causing some confusion."

Section 409.48, Code of Iowa (1966), states as follows:

"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 not be assessed in excess of the total assessment of the land as acreage or unimproved property for a period of three years after the recording of said plat, or until such time as the lots are actually improved with permanent construction upon and within the boundaries of the individual lot or lots whichever period is shorter. When an individual lot has been improved with permanent construction, it shall then be assessed for taxation as provided in chapters 428 and 441.

"The provisions of this section shall have no effect upon special assessment tax levies."

Section 428.4, Code of Iowa (1966), states in part as follows:

"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."

The quoted portion of §428.4 was interpreted by a 1953 Opinion of this office, 1954 O.A.G. 58. It was therein held that real estate should be assessed as of January 1st of the year in which it is subject to assessment and that any change in value after that date must be reassessed the following year. Section 428.4 has since been amended but the portion interpreted by the 1953 Opinion has remained unchanged and that Opinion is therefore controlling herein. Further, support for the proposition that real estate is to be assessed on the 1st of January of each year is found in *Churchill v. Millersburg Sav. Bank*, 211 Iowa 1168, 235 N. W. 480 (1931), wherein the Supreme Court of Iowa interpreted §6959, Code of Iowa (1927), the predecessor of the present §428.4.

Section 409.48 provides that when a plat is recorded, the lots contained therein are not to be assessed in excess of the total assessment of the land as acreage or unimproved property for the shorter of two periods: (1) Three years after the recording of the plat, or (2) such time as the lots are actually improved with permanent construction upon and within the boundaries of the individual lot or lots.

In the situation you have posed, three years is the shorter period. It is therefore our conclusion that the lots should be adjusted for full taxation on January 1, 1969. The three year period would run on January 15, 1968, but, as previously enunciated, the 1968 assessment would have already been completed on January 1, 1968.

December 26, 1969

MILITARY: Armory Board — §29A.58, Code of 1966. There is no authority in the Armory Board as lessee to pay interest upon special assessments levied by cities upon property occupied by a unit of the National Guard. (Strauss to May, Adjutant General, 12/26/69) #69-12-18

Mr. Joseph G. May, The Adjutant General: This will acknowledge receipt of yours of the 23rd of September, 1969, in which you state as follows:

"Section 29A.58 Code 1966, in part, provides authority for the Armory Board of the State to enter into leases, as lessee, for property to be used for armory purposes and other training of the National Guard, wherein such leases may provide for an option to purchase the leased property. This statute further provides, in part, as follows:

"'* * * Payments of special tax assessments arising under such leases may be paid from funds appropriated for the support and maintenance of the national guard.'

"The Iowa National Guard Armory located in Corning, Iowa, is leased from the Corning Armory Corporation under a purchase-option type lease as explained above.

"Inclosure #1 is a photo copy of a special tax assessment notice pertaining to street improvement adjacent to the armory.

"Inclosure #2 is a photo copy of a letter from the Treasurer of Adams County, dated 2 September 1969, accompanying the special tax assessment notice wherein the County Treasurer indicates that the tax claimed

does not include interest in the amount of 6% dating from May 28, 1969, on the first payment until the day paid.

"Inclosure #3 is a photo copy of a letter from the County Treasurer, dated September 18, 1969, which demands payment of the interest.

"An opinion of the Attorney General is respectfully requested as to the liability of this Department for payment of interest on the special tax assessment payable from Departmental funds in accordance with the provisions of the above referenced statute."

The Armory Board is a state agency having specific powers, among which is the power to which you refer. As between the Armory Board and the Iowa National Guard of Corning, the relationship of landlord and tenant is created.

The specific power bestowed upon the Armory Board by §29A.58, Code of Iowa, 1966, is to make available to the Armory Board the National Guard operational fund for the payment of a special assessment levied against the Iowa National Guard at Corning. According to that statute the extent of the power of the Armory Board over the National Guard fund is limited to the payment of a special assessment.

By reason of the foregoing, I am of the opinion that interest on the assessment is not payable by the Armory Board.

See opinion Strauss to White, January 10, 1950, copy of which is attached hereto.

December 26, 1969

COUNTY AND COUNTY OFFICERS: Sheriff — §338.1, Code of Iowa, 1966. Sheriff is required to repay money erroneously paid to him as compensation for boarding and lodging prisoners even though the audits failed to uncover the erroneous overpayment. (Nolan to Wehr, Scott County Attorney, 12/26/69) #69-12-20

Mr. Edward N. Wehr, Scott County Attorney: You have requested an opinion concerning the liability of the Sheriff of Scott County for an amount of $4,086.20 erroneously paid to him for lodging, boarding and care of prisoners.

According to your letter the situation arose because the 61st General Assembly in 1965 amended §338.1, Code 1962, so that it now reads as follows:

"The duty of the sheriff to board, lodge, wait on, wash for and care for prisoners in his custody in the county jail in counties having a population in excess of fifty thousand shall be performed by the sheriff without compensation, reimbursement or allowance therefor except his salary as fixed by law."

Apparently, unaware of the fact that this section of the Code was made applicable to counties of over fifty thousand population, where previously it had applied only to counties with population in excess of one hundred fifty thousand, the sheriff continued to submit claims for the care and feeding of prisoners and the claims were approved by the supervisors and paid.

We are of the opinion that the sheriff is required to reimburse the county for funds erroneously paid to him.

Where the board of supervisors of a county has allowed extra compensation to an officer and it is later discovered that under the law the officer

is not entitled to any extra compensation, the payment is illegal. Any officer who willfully takes higher or other fees than are allowed by law is guilty of a misdemeanor, §740.10, Code 1966. The sheriff upon being advised of the erroneous overpayment should immediately repay the sums due.

Further, you have asked if it is proper for the board of supervisors and the sheriff to arrange a repayment schedule. To spread the repayment over a period of time would be permitting the personal use of public monies for which there is no authority. 1932 OAG 132.

Finally, you have asked whether the State Auditor's office is responsible for all or any part of the erroneous overpayments made to the sheriff on account of the failure of his deputies to discover them at one or more previous audits made during the interim prior to the audit at which the actual discovery was made. The answer is clearly and obviously no. It would be a strange doctrine, indeed, that would render an investigator liable for the errors or omissions of those he is investigating merely because he at first failed to notice the wrong. If, for example, an income tax examiner discovered an error in a certain taxpayer's latest return, he would be loath to investigate for the same error in earlier returns if the law rendered him liable therefore. In any event, our research has uncovered no such theory or statutory imposition of liability upon a State Auditor. And we believe that if there were such, few would risk running for this high State office. Moreover, it does not seem inappropriate to point out that it is common knowledge that our present State Auditor has uncovered errors, omissions and even shortages, which might, with more diligence, have been discovered by the previous State Auditor.

December 26, 1969

SCHOOLS: Area Schools — §280A.22, 1966 Code of Iowa. Area school board is not authorized by §280A.22 to exceed the annual levy in its budget for the purposes specified in §280A.22. The board should not encumber all of the potential taxes expected to be received over a 5 year period before such taxes have been levied. Taxes levied for the retirement of bonds must be levied in accordance with provisions of Ch. 76, Code of 1966. (Nolan to Smith, Auditor of State, 12/26/69) #69-12-21

The Hon. Lloyd R. Smith, Auditor of State: You have requested the opinion of this office on four questions concerning the electors of Merged Area IX in the counties of Clinton, Scott, Muscatine, Cedar, and Louisa, authorization of a ¾ mill levy per year for a period of five years for the "purchase of grounds, contruction of buildings, payment of debts contracted for the construction of buildings, and the acquisition of libraries, and for the purpose of maintaining, remodeling, improving, or expanding the area vocational school and the area community college of the merged area, as provided in Chapter 247 Section 22 of the Acts of the Sixty-first General Assembly." The proposition carried by a 65.53% affirmative vote on September 22, 1966.

Your questions are:

1. "Does this election authorize the board to incur debt beyond the amount of tax levy for the current year?

2. "May the board incur any debt not 'distinctly specified'? Article VII Sec. 5 of the Constitution of the state of Iowa.

3. "May the board obligate or encumber by contract or agreement all of the potential taxes to be received within the 5 year limitation before such taxes have actually been levied. For example, if the ¾ mill levy yielded $375,000 annually, could the board spend or encumber $1,875,000 (5 x 375,000) the first year in which the levy was authorized.

4. "Are area schools authorized under 280A.19, 280A.20, and 280A.21 to levy a tax for the retirement of bonds in addition to the tax authorized in 280A.22."

In answer to the above questions, it is our opinion:

1. The board is not authorized by §280A.22, Code, 1966, to incur indebtedness. It may not exceed the annual levy in its budget for the purposes specified in §280A.22, supra, or the expenses therefor.

Boards are authorized to incur indebtedness and issue bonds under §280A.19, Code 1966, if such board action is approved by the voters at an election held as provided under §280.21. However, the language of the proposition adopted by the voters of Area IX to which you refer does not provide such authority.

2. Article VII, §5 Constitution of Iowa provides:

"Except the debts herein before specified in this article, no debt shall be hereafter contracted by, or on behalf of the 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; and such law shall be published in at least one newspaper in each county, if one is published therein, throughout the state, for three months preceding the election at which it is submitted to the people." [Emphasis added]

The purposes specified in §280A.19 are, we believe, "distinctly specified" to the degree required by the Constitution. Further, §280A.22 sufficiently states the object to which the tax to be levied shall be applied as required by Article VII §7 of the Iowa Constitution.

3. The board should not encumber all of the potential taxes expected to be received within the five year period before such taxes have been actually levied. Area Vocational Schools and Community Colleges are to be governed by the provisions in the local budget law. Opinion of the Assistant Attorney General Gentry to Budget Examiner, Office of the Comptroller, September 7, 1966.

4. Area Schools are authorized under §280A.19, §280A.20, and §280A.21 to levy a tax for the retirement of bonds in addition to the tax authorized in §280A.22. Any taxes levied for the retirement of bonds must be levied in accordance with the provisions of Ch. 76, Code of 1966.

December 26, 1969

COUNTY OFFICERS: Supervisors — §332.3(19), Code of Iowa, 1966. Control of hours when courthouse is open rests with Board of Super-

visors which has authority to establish, publish and enforce rules regulating use of all county buildings and grounds by the public. (Nolan to Carr, Delaware County Attorney, 12/26/69) #69-12-27

Mr. E. Michael Carr, Delaware County Attorney: You have requested an opinion on the control of the hours when the court house is to be open. Your letter states:

"Section 333.1 of the Code of Iowa states that the County Auditor shall have the general custody of the Court House in each county, respectively, subject to the County Board of Supervisors. By resolution of the Board of Supervisors in April of 1967 the Court House in Delaware County is to be closed on Saturday mornings, however, each county officer has his own key to the Court House.

"The specific question is can a county officer, who voluntarily desires to work and transact business on Saturday mornings, open and leave open the outer door or doors of the Court House contrary to the direction of the Board of Supervisors, but done in order to allow free passage into and out of the Court House to his office, or must he open and close the outer door of the Court House for each individual he desires to serve?"

It is our view that the proper solution to this question is found in §332.3(19) of the Code of Iowa which provides the Board of Supervisors of the county power:

"To establish, publish and enforce rules regulating and restricting the use by the public of all county buildings and grounds. Such rules, when established, shall be posted in conspicuous places about said buildings and grounds. Any person violating any such rule shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not to exceed one hundred dollars or be imprisoned in the county jail not to exceed thirty days."

It would seem that the answer to the whole question depends upon whether or not the Board of Supervisors have posted regulations in this regard. There is no longer any state policy that all court houses shall be open for business five and one-half days per week, the former Section 340.6 of the Iowa Code having been repealed by Chapter 297, Laws of the 62nd General Assembly.

December 26, 1969

COUNTY AND COUNTY OFFICERS: Liability for care of mentally retarded — §222.78, Code of Iowa, 1966. County may proceed with collection of claim for sums advanced by county for care of mentally retarded persons without obtaining tax returns of persons liable to county for such sums. (Nolan to Carr, Delaware County Attorney, 12/26/69) #69-12-28

Mr. E. Michael Carr, Delaware County Attorney: You have submitted a question for an attorney general's opinion on that part of §222.78 of the Code of Iowa, relating to the support of a person admitted or committed to a hospital school for the mentally retarded, which provides as follows:

"Provided further that the father or mother of such person shall not be liable for the support of such person after such person attains the age of twenty-one years and that the father or mother shall incur liability only during any period when the father or mother either individually or jointly receive a net income from whatever source, commensurate with that upon which they would be liable to make an income tax payment to this state."

You ask specifically:

"Is it the duty and the responsibility of the County to secure a copy of the income tax report or reports referred to in this section from the state if the father and/or mother do not voluntarily produce them? Further, should the County just contact the mother and/or father and request that they produce their Iowa state income tax report or reports before contacting the state? Also, if the state is requested by the County to produce an income tax report under these circumstances will it do so without the consent of the father or mother?

"If they refuse to consent how does the County obtain this information?"

Chapter 222 of the Code of Iowa is concerned with provisions of the care of mentally retarded persons. In considering §222.78 it is necessary to consider first §222.60 which provides:

"All necessary and legal expenses for the cost of admission or commitment or 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 the person has legal settlement as defined in Section 252.16.

"2. The state when such person has no legal settlement or when such settlement is unknown."

Then, under §222.78 the father and mother of any person admitted or committed to the hospital-school or other person bound by contract for the support of such person shall "be and remain liable for the support of such person. Such person and those legally bound for the support of the person shall be liable to the county for all sums advanced by the county to the state under Sections 222.60 and 222.77."

It is my view that it is not the duty and the responsibility of the county to secure copy of the income tax report referred to in §222.78. However, it is obvious that the parents or the persons liable should be advised that they are not liable for the support of the hospitalized mentally retarded person as provided in the section of the Code under discussion if they come within the classification set out therein. If such persons refuse to provide the information or cannot, then the county would be under no duty to proceed further to obtain the state income tax reports before proceeding with the collection of the county's claim.

December 26, 1969

MOTOR VEHICLES: Serviceman's discharge — §321.198, Code of Iowa, 1966. Term "discharge" in section of code which extends a valid chauffeur's or operator's license without fee until six months following discharge from military service should be interpreted as meaning final separation or termination as evidenced by a document of final discharge and not mere release from active duty. (Nolan to Carr, Delaware County Attorney, 12/26/69) #69-12-29

Mr. E. Michael Carr, Delaware County Attorney: You have requested an interpretation by this office of the words "discharge of such person from the military service." In your letter you state:

"Section 321.198 extends the effective date of a valid operator's license and of a valid chauffeur's license without fee until six months following the discharge of such person from military service if he held a valid license at the time of entering the military service of the United States or of the state of Iowa subsequent to September 19, 1940, and provided such discharge is honorable and such person is not suffering such physi-

cal disabilities as to impair his competency as an operator and provided further that such licensee shall upon demand of any peace officer furnish satisfactory evidence of his military service.

"The question specifically is, does the word discharge therein mean release from active duty or ultimate discharge from the armed services after completion of full obligation?"

My research has led to the conclusion that the term "discharge" in the context in which it appears must be interpreted as meaning the final separation or termination as evidenced by a document of final discharge even though such document might not be obtained until an extended period following release from active duty. You will note that §321.198 provides for military service of the United States or of the *state of Iowa.* Section 29A.25, Code of Iowa 1966, provides:

"All enlistments in the National Guard shall be as prescribed by federal law and regulations."

I am enclosing herewith a copy of the pertinent sections of the federal law relating to "discharge from military service."

December 29, 1969

TAXATION: Sales and Use Tax. Bulk paper and newsprint. §§423.1, 422.42(3), Code of Iowa, 1966, bulk paper and newsprint, whether readily obtainable in Iowa or not, which are purchased outside the State of Iowa and, by the process of printing and publishing in Iowa, become an integral part of newspapers, magazines, journals, books, or any periodical intended to be sold ultimately at retail are exempt from the Iowa use tax. (Turner to Potgeter, State Senator, and Welden, State Representative, 12/29/69) #69-12-19

Hon. James A. Potgeter, Iowa State Senator; Hon. Richard W. Welden, Iowa State Representative: You have requested an opinion of the Attorney General on the question of whether bulk paper or newsprint which is purchased outside the State of Iowa and which is processed within this state into a finished product would be subject to Iowa use tax.

Section 423.2, Code of Iowa, 1966, as amended by Ch. 348, §§35, 36, Acts 62nd G. A., imposes the Iowa use tax on the use in Iowa of tangible personal property purchased for use in this state at the rate of three percent of the purchase price of such property.

Section 423.1(1), Code of Iowa, 1966, defined "use" in pertinent part as follows:

"1. 'Use' means and includes the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include processing, or the sale of that property in the regular course of business. Property used in "processing' within the meaning of this subsection shall mean and include (a) any tangible personal property including containers which it is intended shall, by means of fabrication, compounding, manufacturing, or germination become an integral part of other tangible personal property intended to be sold ultimately at retail . . . (c) industrial materials and equipment, which are not readily obtainable in Iowa, and which are directly used in the actual fabricating, compounding, manufacturing, or servicing of tangible personal property intended to be sold ultimately at retail . . ."

Section 423.1(10), Code of Iowa, 1966, defined the phrase "readily obtainable in Iowa."

By way of background information, our research has discovered an "Order" issued by the now defunct State Tax Commission, predecessor of the Department of Revenue, wherein the Commission ruled, on June 23, 1939, that newsprint was exempt from the Iowa use tax. A copy of this "Order" is attached to this opinion.

In an opinion of the Attorney General, O.A.G. Smith to Fischer, April 21, 1965, a copy of which is attached hereto, it was ruled that the sale of a newspaper was a "service" for sales tax purposes, but for purposes of a use tax exemption for materials and equipment not readily obtainable in Iowa, sales of newspapers were deemed to be "tangible personal property." This inconsistency is obvious but the Attorney General stated that any change must come from the legislature. In any event, bulk paper and newsprint would have been exempt from Iowa use tax under the provisions of §423.1(1)(c).

In 1967, the General Assembly repealed §§423.1(1)(c) and 423.1(10) of the 1966 Code. See §§33, 34, Ch. 348, Acts 62nd G. A.

Therefore, the issue boils down to whether bulk paper and newsprint may still be exempt from Iowa use tax by reason of the provisions of §423.1(1)(a) which excepts from the definition of "use" upon which the tax is imposed, tangible personal property which, after processing, becomes an integral part of *other tangible personal property intended to be sold ultimately at retail.* Bulk paper and newsprint do become an integral part of newspapers, magazines, journals and other periodicals which are ultimately sold to consumers and users at retail. Is the ultimate sale of newspapers, magazines and other periodicals and books the sale of a service? If so, the bulk paper and newsprint are subject to Iowa use tax. But, if the ultimate sale of these magazines, newspapers, and other periodicals and books is a retail sale of tangible personal property, the bulk paper and newsprint which is processed and becomes an integral part of these items of property is exempt from Iowa use tax pursuant to §423.1(1)(a).

In *Bismark Tribune Co. v. Omdahl*, 1966, N. D. , 147 N. W. 2d 903, the issue was whether the sale of a newspaper to a subscriber constituted a retail sale of tangible personal property or whether it was a sale of a service for purposes of the North Dakota sales and use tax laws. The North Dakota statutes defined the terms "use" and "processing" in identical language as is found in §§423.1(1) and 423.1(1)(a) of the Iowa Code. See §§57-40-01(2) and 57-40-01(3), N.D.C.C. The newspaper company argued that their purchase of newsprint and ink outside of North Dakota and used in the publication of newspapers in North Dakota was exempt from the state's use tax. The North Dakota Tax Commission contended that sales of newspapers were sales of a service, not sales of tangible personal property; that sales of newspapers at retail were expressly exempt by statute from North Dakota sales tax; and that purchases of newsprint and ink for storage, use, and consumption in North Dakota were subject to use tax. The North Dakota Supreme Court rejected the argument that a sale of a newspaper is a service at 147 N. W. 2d 906:

"The question to be determined, therefore, is whether a newspaper, when printed, is tangible personal property or whether, as urged by the appellant, it is merely a service. Webster's Third International Diction-

ary defines 'personal property' as 'property other than real property consisting in general of things temporary or movable including intangible property.' Thus 'tangible' personal property would be personal property that can be touched or handled. The argument of appellant that a newspaper is a service is based, to a degree, on the fact that after it has been read it has no further value or use. That hardly seems to be a valid basis for determining the nature of the product resulting from the publication of a newspaper. If the fact that such product cannot be used after it has been read should be the determining factor, hundreds of items, such as paper towels, paper napkins, paper cups, and similar articles would have to be classed as services rather than personal property.

"It is true that the definition of a 'sale' in the sales tax law specifically exempts newspapers from that tax. The fact that no sales tax is paid on newspapers does not necessarily mean that a use tax is imposed on the items which are used in the processing of the newspapers, if such items are exempt from such tax by the provisions of the use tax law. Are the newsprint and the ink tangible personal property used in the manufacture or production of other tangible property intended to be sold at retail, under Section 57-40-01(3), North Dakota Century Code, as amended? We believe it cannot be denied that the newsprint and the ink purchased by the plaintiffs are combined by the process of printing and publishing into tangible personal property, the newspaper. The newsprint and ink become ingerdients or component parts of the newspaper, the product produced.

"We hold, therefore, that newsprint and ink are ingredients and component parts of the tangible personal property produced, and thus come within the definition of 'property used in processing' and exempt from use tax under the law above set forth."

See also *Zinc Engravers v. Bowers*, 1958, 168 Ohio St. 43, 151 N. E. 2d 226.

In *Time, Incorporated vs. Hulman*, 1964, 31 Ill. 2d 344, 201 N. E. 2d 374, the Illinois Supreme Court stated at 201 N. E. 2d 377, with reference to magazines:

"The sale of a magazine is essentially not different from the sale of a loaf of bread, or an automobile. While it is true that the utility or value of plaintiffs' magazines is in their content and not the paper and ink with which they are printed, the taxability of the transaction is not determined by weighing the value of the intangible properties of the item of sale, such as form, organization and design, against the value of its tangible properties, such as weight, size and texture. The test is, where tangible personal property is transferred, as the parties agree occurs in the transactions here involved, whether the transfer is the substance of the transaction or merely incidental to a service. n selling magazines by subscriptions, plaintiffs act as retailers of tangible personal property and as such are liable for retailers' occupation tax, if not otherwise exempt."

We have found no cases which hold that, for sales and use tax purposes, sales of newspapers, magazines, journals or other periodicals are sales of "services."

Rule No. 77, Sales and Use Tax Rules of the Tax Commission, now the Department of Revenue, 1966 I.D.R. 726, provides in part:

"Publishers of newspapers are deemed to be rendering a service to their subscribers and the gross receipts from the sale of newspapers to the public are therefore not taxable. The sales of magazines, trade journals, and other periodicals when sold to consumers or users are sales at retail and the gross receipts from such sales are taxable."

This rule was impliedly approved by the Attorney General in the opin-

ion which we heretofore mentioned, O.A.G. Smith to Fischer, April 21, 1965, since it was a rule of long standing. The Attorney General did not cite, in that opinion, the case of *Morrison-Knudsen Co. vs. State Tax Commission*, 1950, 242 Iowa 33, 44 N. W. 2d 449. This case involved the use tax law and the Court stated at 242 Iowa 41:

"We are told in argument the 'tax commission has *for many years* interpreted the law so as to require the payment of a use tax where property has been brought into Iowa for use even though it was originally sold and used in another state.' Such interpretation would be correct if the property were purchased for use in this state. *There is no statutory basis for a use tax on property not so purchased and the tax commission certainly cannot create one.*" (Emphasis supplied)

See also *Northern Natural Gas Co. vs. Lauterbach*, 1960, 251 Iowa 885, 100 N. W. 2d 908, a use tax case, wherein the Supreme Court again stated that an interpretation of the use tax statute over a long period of time by the Tax Commission and the Attorney General, if erroneous, would not be sustained by the courts. Thus, even though the Iowa Supreme Court has had for consideration a policy of long standing, the Court did not hesitate to invalidate the same where it conflicted with the Iowa use tax statutes.

We are of the opinion that the first sentence of Rule No. 77 quoted above, is inconsistent with Iowa sales and use tax laws. Section 422.42 (3), Code of Iowa, 1966, defines a "retail sale" in part as a sale to a consumer or to any person for any purpose with exceptions not here relevant. Nowhere is the sale of newspapers at retail in Iowa held to be exempt from the Iowa sales tax and, even if there was an express sales tax exemption for newspapers, as in *Bismark Tribune Co. v. Omdahl*, supra, the bulk paper and newsprint would still be exempt from Iowa use tax because of the provisions of §423.1(1)(a) and the fact that sales of newspapers are sales of tangible personal property. The second sentence of Rule No. 77, quoted above, correctly states the law in regard to sales tax and recognizes the fact that magazines, journals and other periodicals are tangible personal property which are sold at retail to consumers and users.

It is our opinion that bulk paper and newsprint, whether readily obtainable in Iowa or not, which are purchased outside the State of Iowa and, by the process of printing and publishing in Iowa, become an integral part of newspapers, magazines, journals, books, or any periodical intended to be sold ultimately at retail are exempt from the Iowa use tax. Of course, bulk paper and newsprint so purchased and processed into a finished printed product which will not be sold at all, but distributed for free, would not be exempt from the Iowa use tax because such transactions would be outside the scope of the exception contained in §423.1(1)(a). That portion of the Attorney General's opinion, O.A.G. Smith to Fischer, April 21, 1965, which is inconsistent with this opinion is withdrawn.

December 30, 1969

STATE OFFICERS AND DEPARTMENTS: Judicial Nominating Commission, open meetings — §3, Chapter 98, 62nd G. A. (1967). State and district judicial nominating commissions are subject to the open public

meetings law. But a state or district judicial nominating commission could by two-thirds vote of its members present hold a closed session to consider the qualifications, reputation, integrity, legal ability and character of candidates for a place on the bench. The names of all individuals considered by a particular commission in its deliberations would not have to be made public. (Turner to Sellers, Administrative Assistant, Office of the Governor, 12/30/69) #69-12-22

Mr. Michael M. Sellers, Administrative Assistant, Office of the Governor: Reference is made to your letter of December 8, 1969, in which you request an opinion of the attorney general and state:

"Section 3 of Chapter 98 of the Acts of the 62nd General Assembly provides in part as follows:

" 'Section 1. All meetings of the following public agencies sahll 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:

" '1. Any board, council, or commission created or authorized by the laws of this state.'

"Is the State Judicial Nominating Commission a commission within the pervue of Chapter 98 of the Acts of the 62nd General Assembly of Iowa?

"The Governor's Office has received inquiries with reference to the conduct of meetings by the State Judicial Nominating Commission.

"For many years it has been the practice of the State Judicial Nominating Commission to conduct non-public meetings for the purpose of discussing the character, reputation, integrity, legal ability and qualifications of each of the nominees for the State Supreme Court. This practice has been deemed necessary to prevent irreparable and needless injury to the reputation of the individuals being considered pursuant to the Public Meeting Law set forth in Chapter 98, Section 3, Acts of the 62nd General Assembly, to wit:

" '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 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. . . .'

"Does the Public Meeting Act referred to above apply as fully to the Judicial Nominating Commission as it does to other state agencies considering the fact that the sole function of the Judicial Nominating Commission is to consider the qualifications, reputation, integrity, legal ability and character of candidates for the position of Justice of the Iowa Supreme Court?

"Section 3 of Chapter 98 of the Acts of the 62nd General Assembly further provides in part, to-wit:

" '. . . 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.'

"The above section requires that final actions must take place in public meetings. Where voting is concerned, does this mean that only the final

vote of the Commission must be made in a public meeting, especially where preliminary voting could be injurious to the professional reputations of the candidates?

"Is the Judicial Nominating Commission required to make public the names of all individuals that are considered by the Commission in its deliberations?

"Does Chapter 98 of the Acts of the 62nd General Assembly affect the conduct of meetings of the District Judicial Nominating Commissions in the same way as it affects meetings of the State Judicial Nominating Commission?"

Turning to the first of the several questions you raised it is our opinion that both the state and district judicial nominating commissions are commissions within the meaning of Chapter 98, 62nd General Assembly (1967) and subject to all of the provisions of such chapter. Quite obviously the *are* commissions and they are created or authorized by the laws of this state, viz. Chapter 46, Code of Iowa, 1966. This is all that the law requires. Chapter 98, §1(1).

Because of the exception contained in §3 of Chapter 98 it is our opinion that a state or district judicial nominating commission could by two-thirds vote of its members present hold a closed session to consider the qualifications, reputation, integrity, legal ability and character of candidates for a place on the bench. In light of the requirement of the statute that any final action on any matter shall be taken in open meeting, it would be reasonable to expect that each commission would at a meeting open to the public take whatever steps constitute final action under its rules of procedure.

The names of all individuals considered by a particular commission in its deliberations would not have to be made public. As stated in §3 of Chapter 98, "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.*"

December 31, 1969

TOWNSHIP: Township Trustees' authority to sell a township hall. Chapter 360, Code of Iowa, 1966. Township trustees have no power under Chapter 360, Code of Iowa, 1966, to sell a township hall. (Martin to Henke, Floyd County Attorney, 12/31/69) #69-12-24

Mr. E. W. Henke, Floyd County Attorney: I have received your letter in which you request an opinion of the Attorney General as follows:

"Chapter 360 of the Code of Iowa makes provision for the acquisition by Township Trustees of a Township Hall. I find no provision for the disposition of or sale of such property by the Township Trustees.

"I would be pleased to have your opinion as what procedure should be followed in making sale of a Township Hall."

After a review of Chapter 360, Code of Iowa, 1966, the chapter which authorizes township trustees to acquire or erect a township hall and which provides funds therefor, we are of the opinion that township trustees have no power to sell the township hall. See 1962 O.A.G. 497 (22.7). Even if one assumes that township trustees possess powers which are inferable from expressly granted powers, one cannot find in Chapter

360, Code of Iowa, 1966, nor in any other statutory provision relating to township trustees, the power to sell a township hall.

December 31, 1969

COUNTIES AND COUNTY OFFICERS: Sheriff's deputies, retention of notary fees — §§77.19, 337.3, 342.1, 342.2, Code of Iowa, 1966. Since a sheriff's deputies and clerks have no statutory duty to be notaries public and notarize documents for the general public the fees collected for such services belong not to the county but to the individual notaries. (Haesemeyer to Smith, Auditor of State, 12/31/69) #69-12-25

The Hon. Lloyd R. Smith, Auditor of State: You have orally requested an opinion of the attorney general with respect to the following matter.

As a result of an audit of a county court house made by members of your staff it has come to your attention that a number of deputies, clerks and employees of a certain sheriff are all notaries public. Such sheriff's office personnel frequently are asked by members of the public to notarize various documents and they do so, collecting for such service the fees allowed by law.

It is not entirely clear but it is my understanding that the documents notarized or the notarial services performed are unrelated to the official business of the sheriff's office.

The fees thus collected are deposited in a separate account and reflected in the sheriff's accounts as receipts under the caption "notary fees." The cost of the notaries' seals, bonds and the periodic fee for renewal of their commissions are all paid out of this fund Monthly, the amount remaining in the notary fees account is withdrawn by a check payable to one deputy, such disbursement being reflected on the sheriff's books as "fees paid to notary."

The question you raise is, should these notary fees properly be considered fees of the office and payable to the county treasurer?

There are a number of statutory provisions bearing upon the question you have presented which are hereinafter set forth:

"77.19 Notary fees. Notaries public shall be entitled to the following fees:

1. For all services in connection with the legal protest of a bill or note, two dollars.

2. For being present at a demand, tender, or deposit and noting the same, seventy-five cents.

3. For administering an oath, ten cents.

4. For certifying to an oath under his official seal, twenty-five cents.

5. For any other certificate under seal, twenty-five cents."

"337.3 Execution and return of writs. The sheriff shall, by himself or deputy, execute and return all writs and other legal process issued by legal authority to him directed."

"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."

"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."

Rules of Civil Procedure:

"59(a) Signature-fees. Iowa officers may make unsworn returns of original notices served by them, as follows: Any sheriff or deputy sheriff, as to service in his own or a contiguous county; any other peace officer, or bailiff or marshal, as to service in his own territorial jurisdiction. The court shall take judicial notice of such signatures. All other returns, except those specified in rules 56(d) and 56(e), shall be proved by the affidavit of the person making the service. If served in the state of Iowa by a person other than such peace officer acting within the territories above defined or in another state by a person other than a sheriff or other peace officer, no fees or mileage shall be allowed therefor."

In addition to the foregoing, consideration must be given to §337.11, Code of Iowa, 1966, which enumerates those services, some eleven in number, for which the sheriff is entitled to collect and retain fees. Performing services as a notary public is not among them. Ordinarily, application of the maxim, *expressio unius est exclusio alterius* to such §337.11 would compel the conclusion that notary fees could not be retained by the sheriff or his deputies. However, such reasoning ignores the obvious dichotomy between fees earned for services related to official duties and those received for unrelated services. In this connection it is pertinent to look to §342.1, which is for all practical purposes a statutory codification of the *expressio unius* rule so far as fees of county officers are concerned. Upon doing so one notes that it is only fees and charges collected for *official service* which belong to the county. Thus, in an earlier opinion, 1968 OAG 458, we said:

"It is clear from the foregoing [referring to §§342.1 and 342.2] 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 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 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 description 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."

Similarly, it is our opinion that since a sheriff's deputies and clerks have no statutory duty to be notaries public and notarize documents for the general public the fees collected for such services belong not to the county but to the individual notaries. And if these sheriffs' office personnel wish to turn the fees over to one deputy on a monthly basis that is entirely their affair. This being so such fees should not be recorded in the fee book required by §342.2. Of course fees, if any, collected for notarizing documents which pass through the sheriff's office in the course of the regular business of that office would belong to the county and should be paid to the county treasurer. For example, R.C.P. 59(a) requires that certain returns of service must be proved by the affidavit of the deputy making the service. No notary fee should be charged for taking such affidavits as the return is not complete without it and the sheriff is already allowed a fee by statute for the service and return. §337.11(1).

This opinion is limited to notary fees collected by sheriffs' office personnel and should not be construed as applying to other county offices or to fees other than notary fees.

December 31, 1969

CITIES AND TOWNS: Appointment of city attorney — §368A.1, Code of

Iowa, 1966, as amended by Chapter 313, 62nd G. A. (1967). Any member of the city council may propose a qualified person for the office of city attorney. (Turner to Erhardt, Wapello County Attorney, 12/31/69) #69-12-26

Mr. Samuel O. Erhardt, Wapello County Attorney: You have requested an opinion of the attorney general as to the following question:

"Assuming that the person the Mayor-elect proposes for the office of City Attorney is not confirmed by the members of the City council, and assuming further that he has no other person to propose for this office, can another member of the City Council propose a person for the office of City Attorney?"

Even under the commission form of government in Ottumwa, appointment of the city attorney is the prerogative of the city council, not the mayor. §368.1, Code of Iowa, 1966, as amended by Chapter 313, Acts of the 62nd General Assembly, provides in pertinant part as follows:

"In all municipal corporations, except when otherwise provided by laws relating to a specific form of municipal government, the council shall:

* * *

"7. Appointments. Have power to appoint an attorney, city attorney, city clerk, deputy city clerk, engineer, health officer, and such other officers, assistants and employees as are provided by ordinance and are necessary for the proper and efficient conduct of the affairs of the municipal corporation, and fix the terms of employment which may include vacations, retirement plans and sick leave."

Thus, any member of the city council may propose a qualified person for the office of city attorney.

January 6, 1970

CONSERVATION: Election of soil conservation district commissioners—§467A.6, Code of Iowa, 1966, as amended by H.F. 210, Acts, 63rd G.A. (1969). If there is a commissioner presently serving from a particular voting precinct, there can be no candidates for the office of commissioner from that precinct until the expiration of the term of the commissioner in office. (Haesemeyer to Griener, District, Soil Conservation Committee, 1/6/70) #70-1-1

Mr. William H. Greiner, Director, State Soil Conservation Committee: This is in reply to your letter of November 10, 1969, in which you state:

"The 63rd General Assembly amended the Soil Conservation District's law Chapter 467A.5, Code 1966, making it possible for soil conservation districts to have five elected Commissioners.

"Enclosed is a copy of the enrolled bill, HF 210. You will note that Section 2 of the bill reads as follows:

" 'Sec. 2. Section four hundred sixty-seven A point six (467A.6), Code 1966, is hereby amended by striking lines two (2) through five (5) and inserting in lieu thereof the following:

'the district shall consist of five commissioners, elected as provided in section four hundred sixty-seven A point five (467A.5), who shall be residents of the district and no more than one of whom shall be a resident of any one voting precinct established pursuant to chapter forty-nine (49) of the Code. No person shall be eligible to the office of commissioner who is a resident of a city or town not subject to the jurisdiction of the district, unless such person owns land in the district outside such city or town. The commissioners'.

"The question has been raised regarding a candidate running for the office of Commissioner in a voting precinct in which a Commissioner already resides and has several years remaining in his term.

"We have been asked by one of our soil conservation districts to answer this question as the man who is considering running for the office of Commissioner lives in the same voting precinct in which the Commissioner resides who has four years remaining of his six-year term.

"Our specific question would thus be: Can this prospective candidate submit his name to appear on the ballot for the office of Soil Conservation Commissioner when there is already a Commissioner serving from his voting precinct?

"This particular district has an election scheduled for the month of January 1970. Therefore, we would appreciate an opinion as quickly as possible because the district will need to circulate nominating petitions for the office of Commissioner."

It is our opinion that the prospective candidate referred to in your letter cannot submit his name to appear on the ballot for the office of soil conservation commissioner as long as there is already a commissioner serving from his voting precinct. If the prospective candidate were nominated and elected, there would be two commissioners serving from the same voting precinct. This would be in violation of the express language of §467A.6, Code of Iowa, 1966, as amended by the 63rd G.A.

Section 4.1, Code of Iowa, 1966 states:

"In the construction of the statutes, the followoing rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the statute:

"2. Words and phrases shall be construed according to the context and the approved usage of the language; but technical words and phrases, and **such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such meaning.**"

The Supreme Court of Iowa in *Hardwick v. Bublitz,* 253 Iowa 49, 111 N.W. 2nd 309 (1962) held:

"[A] rule which needs no citation of authority is that where the words of the statute make clear its meaning, there is no cause for judicial construction, . . ."

It is our opinion that the language of §467A.6 of the Code, as amended by the 63rd general assembly, is clear and unambiguous. The obvious intention of the legislature is to limit the number of soil conservation commissioners from any one voting precinct to one. If there is a commissioner presently serving from a particular voting precinct, there can be no candidates for the office of commissioner from that precinct until the expiration of the term of the commissioner in office.

January 6, 1970

STATE OFFICERS AND DEPARTMENTS: Commission for the blind, open public records—Chapter 106, 62nd G.A. (1967). A counselor assigned by the commission for the blind to the Iowa braille and sight saving school would have no greater right than another person to examine personal and medical records of students at the school. (Haesemeyer to Jernigan, Director, Iowa Commission for the Blind, 1/6/70 #70-1-2

Mr. Kenneth Jernigan, Director, Iowa Commission for the Blind: By your letter of December 16, 1969, you have requested an opinion of the attorney general on the question of whether or not, in the event a counselor is assigned by the commission for the blind to Iowa braille and sight saving school, student records, including personal information and medical records, must be made available to such counselor.

Under the Iowa Public Records Act, Chapter 106, 62nd G.A. (1967), virtually every record of every public agency in the state are open to inspection by any citizen of Iowa. And ordinarily a counselor assigned by the commission for the blind to the Iowa braille and sight saving school would have just as much right to examine school records as any other citizen. However, Chapter 106 contains certain exceptions. Thus, §7 thereof 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:

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 pationt, including out-patient."

Mr. Kenneth Jernigan: Under the provisions of the law the records you describe would be required to be kept confidential unless the lawful custodian of the same, in this case, the superintendent of the school or his designee, decided in his discretion to make them available.

The fact that your counselor would be an employee of another agency of state government, namely, the commission for the blind, is irrelevant. He would be in no different or more privileged position than any other citizen insofar as examining as a matter of right the confidential records of the Iowa braille and sight saving school.

January 6, 1970

STATE OFFICERS AND DEPARTMENTS: Conservation Commission, payment for meals and lodging—Chapter 107, 62nd G.A. (1967). An employee of the state conservation commission could legally accept meals and lodging from the Michigan Bear Hunters Association while in attendance at its meeting in Lansing, Michigan. (Haesemeyer to Wellman, Secretary, Executive Council, 1/6/70) #70-1-3

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: Reference is made to your letter of December 22, 1969, in which you state:

"The Executive Council, in meeting held this date, deferred action on Travel Request #69-2925, submitted by the Conservation Commission, for Fred A. Priewert to travel to Lansing, Michigan, January 9-11, 1970, to attend and appear on the program of the Michigan Bear Hunters Association meeting on January 10, 1970, pending the receipt of an opinion from the Attorney General as to the legality of the Michigan Bear Hunters Association providing meals and lodging for Mr. Priewert, i.e., is this in violation of Section 5 of Chapter 107 of the Acts of the 62nd General Assembly?"

Chapter 107, 62nd G.A., 1967, the Iowa Public Officials Act, provides in §5 thereof:

"Sec. 5. 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 directy 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.*" (Emphasis added)

Referring to the underlined language of §5 set forth above it is difficult to see how acceptance of meals and lodging from the Michigan Bear Hunters Association could be said to be anything but unrelated to Mr. Priewert's state employment. Moreover, it seems highly unlikely that Mr. Priewert would be improperly influenced in any detrimental way by receiving such meals and lodging from the Michigan Bear Hunters Association. And in our view the improper influencing of legislators and state employees by means of gifts is the evil which Chapter 107 manifestly seeks to prevent.

Accordingly, it is our opinion that Mr. Priewert could legally accept meals and lodging from the Michigan Bear Hunters Association while in attendance at its meeting in Lansing, Michigan, on January 9-11, 1970.

January 9, 1970

TAXATION: Property Tax Exemptions—§427.1(1) and 427.1(2), Code of Iowa, 1966. The tangible personal property of a drainage district is not exempt from property taxation. (Murray to Samore, Woodbury County Attorney, 1/9/70) #70-1-4

Mr. Edward F. Samore, Woodbury County Attorney: You requested that an opinion be rendered as follows:

"Your opinion is respectfully requested as to whether or not a drainage district can be taxed for a dragline and caterpillar tractor when this equipment is used solely for drainage district purposes only."

Exemptions from property tax are provided for in Chapter 427, Code of Iowa, 1966. Sections 427.1(1) and 427.1(2) provide as follows:

"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 without 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.

"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."

Taxation is the rule and exemption the exception; therefore, tax exemption statutes are to be strictly construed. *South Iowa Methodist Homes, Inc. v. Board of Review of Cass County,* 1965, 257 Iowa 1302, 136 N.W. 2nd 488; *Trinity Lutheran Church of Des Moines v. Browner,* 1963, 255

Iowa 197, 121 N.W. 2d 131; *Clarion Ready Mixed Concrete Co. v. Iowa State Tax Commission,* 1961, 252 Iowa 500, 107 N.W. 2d 553. Immunity from taxation by the state will be recognized unless granted in terms too plain to be mistaken. *Bross v. Polk County,* 1945, 236 Iowa 384, 19 N.W. 2d 225; *Theta Xi Building Ass'n. of Iowa City v. Board of Review of Iowa City,* 1933, 217 Iowa 1181, 251 N.W. 76.

In *State ex rel. Iowa Employment Security Commission v. Des Moines County,* 1967, 149 N.W. 2d 288, the Supreme Court of Iowa, after noting that a drainage district is a political subdivision of the county in which it is located, stated at 149 N.W. 2d 291:

"We conclude drainage districts come within the classification of a political subdivision or instrumentality of the state or one of its political subdivisions or instrumentalities."

Whether a drainage district be considered a political subdivision of the county or of the state, it is the opinion of this office that said drainage district does not fall within the ambit of either §427.1(1) or §427.1(2) and accordingly, that its tangible personal property is not exempt from taxation. Section 427.1(1) exempts property of the state of Iowa but makes no mention of the property of a political subdivision of this state. On the other hand, that same section exempts property of the United States and certain property of an "instrumentality thereof". Since specific mention is made of instrumentalities of the United States, the conclusion is inescapable that if the legislature had intended to include political subdivisions of the state, they would have said so. The same reasoning is equally applicable to §427.1(2) since there is no specific reference in that section to political subdivisions of a county. As previously enunciated, the provisions of a tax exemption statute will not be extented by construction.

It is, therefore, our opinion that a dragline and caterpillar tractor of a drainage district are subject to taxation regardless of the fact that said equipment is used solely for drainage district purposes.

January 15, 1970

DOMESTIC RELATIONS: Marriage—§§595.3, 595.8, 595.9, Code of Iowa, 1966. Without the parents being divorced, the clerk is not authorized by statute to grant a marriage license to a minor upon the written consent of one parent even though the other parent is missing and his whereabouts unknown, or where one parent is in a mental institution and unable to consent. Clerk can postpone issuing marriage license at the request of the parties, however, must, when the license is ultimately issued, be satisfied at that time as to the competency of the parties to contract a valid marriage. (Turner to Erhardt, Wapello County Attorney, 1/15/70) #70-1-5

Mr. Samuel O. Erhardt, Wapello County Attorney: This is in reply to your recent request for an Attorney General's opinion regarding the issuance of marriage licenses. The first question you have raised is who may consent to the marriage of a minor where his parents are separated, although not divorced, and the whereabouts of one parent is unknown, or one parent is in a mental institution and unable to consent.

Section 595.3, Code of Iowa, 1966, provides in part:

"Previous to the solemnization of any marriage, a license for that pur-

pose 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.

"2. 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. If one of the parents is dead such certificate may be executed by the survivor. If both parents are dead the guardian of such minor may execute such certificate but if such minor has no guardian then the judge of the district court having jurisdiction in the county may, after hearing, upon proper cause shown, execute such certificate. If the parents are divorced, the parent having legal custody may execute such certificate."

Section 595.8 also prescribes the duty of parents or guardians of minor applicants for a marriage license as follows:

"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 therof entered in the license book. The false making of such certificate shall be punishable by forgery."

In respect to the foregoing sections, a consent certificate from both parents must be filed with certain exceptions, viz., where one or both parents are deceased, or if the parents are divorced, the parent having custody of the minor may execute the consent certificate. No exception is made by the statutes for the consent of one parent where the other is still living and the parents are not divorced. Applying the principle of *expressio unius est exclusio alterius,* any execption to the requirement of parental consent to the marriage of a minor would be excluded if not expressly stated in the statute. It is, therefore, my opinion that without the parents being divorced, the clerk is not authorized by statute to grant a marriage license to a minor upon the written consent of one parent even though the other parent is missing and his whereabouts unknown, or where one parent is in a mental institution and unable to consent.

It can also be noted that a waiver of §595.8 would subject the clerk to a penalty under §595.9 which states:

"If the clerk issues a license in violation of the provisions of section 595.8, or if a marriage is solemnized without its being procured, the clerk so issuing the same, and the parties married, and all persons aiding them, are guilty of a misdemeanor."

You also inquire whether a marriage license can be issued where the parties have made application, but wait for a period of sixty days before requesting that the license be issued. The legislature apparently did not contemplate this unusual situation arising, and, therefore, did not specifically provide for it. Section 595.4 provides in part: "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." If the marriage is not so solemnized within twenty days following issuance of the license, tthe license shall become void pursuant to §596.7. Thus, the Code provides that no marriage license shall be issued until the expiration of three days from the date of application. Following issuance thereof, the license remains valid for twenty days. It would thus appear that the clerk could postpone issuing the license at the request of the parties. However, the clerk must, when the license is ultimately issued, be satisfied at that time as to the competency of the parties to contract a

valid marriage.

Perhaps the General Assembly may wish to consider amending the statute.

January 15, 1970

STATE OFFICERS AND DEPARTMENTS: National Guard, temporary and part time state employees—§29A.28, Code of Iowa, 1966. Temporary and part time state employees who are ordered to active service are entitled to 30 days leave with pay and without loss of status. (Strauss to May, Adjutant General, 1/15/70) #70-1-6

Major General Joseph G. May, Camp Dodge: This will acknowledge receipt of yours of October 24, 1969, in which you submitted the following:

"§29A.28 of the Iowa Code 1966, provides that when employees of the state, who are members of the national guard, are ordered to active service they are entitled to a leave of absence without loss of status and without loss of pay during the first thirty days of such leave of absence.

"29A.43 of the Code of Iowa, 1966, prohibits discrimination against members of the national guard who are in private employment other than employment of a temporary nature.

"Other Chapters of Code exempt *part time students* from the IPERS system and *part time* employees are excluded from the merit system.

"Realizing the competitive disadvantage that student-guardsmen might have for temporary summer employment with the various agencies of Iowa State Government, your opinion is respectfully requested on the following questions:

"1. Are temporary employees of the state entitled to receive military leave pay as provided in Chapter 29A.28 of the Code of Iowa, 1966?

"2. Are part time employees of the state entitled to receive military leave pay under the provisions of Chapter 29A.28 of the Code of Iowa, 1966?

"3. If your opinion in number two is in the affirmative, on what basis would the amount of pay be determined for employees who are paid on an hourly basis and who work a varying number of hours per week."

The foregoing numbered section as it appears as §29A.28, Code 1966, in terms provides:

"All officers and employees oof the state, or a subdivision thereof, oor 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 activate 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."

The foregoing questions No. 1 and 2 require statutory construction and so far as that is concerned it is said in the Case of *Paul Goergen, Executor of the Estate of Paul Diederich, Deceased v. State Tax Commission, State of Iowa, et al.* 165 N.W. 2d 782, 786:

"A cardinal principle of statutory construction is that the legislative intent is to be gleaned from the whole statute or statutes relating to the

matter, and not from any particular part, with due consideration for the object to be attained. City of Nevada v. Slemmons, supra; State of Iowa for use of Estherville v. Hanson, 210 Iowa 773, 231 N.W. 428; Davelaar v. Marion County, 224 Iowa 669, 277 N.W. 744.

"It is often stated that in the construction of statutes courts start with the assumption that the legislature intended to enact an efective law and, if reasonably possible to do so without doing violence to the spirit and language of the Act, interpret the statute or the provisions thereof to give it efficient peration, and not to explain away or render meaningless or inoperative any provision thereof. 50 Am. Jur., Statutes, §357. We said in Board of Directors of Menlo-Consolidated School Dist. v. Blakesley, 240 Iowa 910, 918, 36 N.W. 2d 751, 755;; '. . . we should endeavor to construe our statutes so no part will be rendered superfluous . . .' and did construe two statutes so as to give effects to every provision thereof."

Applying the foregoing principles to the statute quoted §29A.28, Code 1966, results in the conclusion that the general terms of the first sentence thereof to-wit:

"All officers and employees of the state, or a subdivition thereof, or a municipality therein, who are members of the national guard, . . ."

include not only state employees having permanent status as well as status and efficiency rating but also those state employees designated in the statute as temporary employees. And by the generality of its terms such statute includes part time employees. Therefore, the answers to your questions No. 1 and 2 are in the affirmative.

Insofar as your question No. 3 is concerned, I advise there is no guideline provided by which the amount of payment to temporary employees or part time employees may be measured. Legislation providing such guidelines is required.

January 19, 1970

COUNTY AND COUNTU OFFICERS: County Health Boards—Powers and duties—Ch. 163, §§6, 8, Acts, 62nd G.A.; H.F. 56, 63rd G.A. Statute establishing a general law on waste disposal imposes duty of enforcement upon county health boards; such enactment does not augment or diminish local board powers beyond its own terms. Recent "Home Rule Amendment" indicated, as guarantee of local powers. (Turner to Doderer, State Senator, 1/19/70) #70-1-7

The Honorable Minnette Doderer, State Senator: Reference is made to your letter of January 16, 1970, asking my opinion in several particulars relating to House File 56, "An Act to prohibit the discharge of sewage or certain other wastes into open ditches along the right-of-way of any highway or public road."

The bill provides:

"No person, firm, association, corporation or public or private institution or agency shall discharge or empty or cause to be discharged or emptied in any manner, into open ditches along the right-of-way of any highway or public road, any type of sewage, including the effluent from septic tanks or other sewage treatment devices, or any other domestic, commerical, or industrial waste, or any putrescible liquids, without first securing a written permit to do so from the local board of health."

With certain exceptions, the county boards of health "have jurisdiction over public health matters within the county." Ch. 163, §6, Laws of 62nd G.A. That Act provides also:

"Sec. 8. Local boards shall have the following powers:

1. Enforce state health laws and the rules and lawful orders of the state department.

2. Make and enforce such reasonable rules and regulations not inconsistent with law or with the rules of the state board as may be necessary for the protection and improvement of the public health."

Should House File 56 be enacted, it would become one of "the state health laws" which the local boards have the power and duty to enforce.

In regard to your question, "I would also like a statement from you on whether or not the local boards of health will tend to lose their broad powers through court challenges if the General Assembly sets out many specific duties in the Statutes."

The duties of these boards are imposed by statute and their powers are granted by statute, both being subject to such exceptions or limitations as the statute may provide. An Act by which the General Assembly added to or diminished these powers and duties, or the exceptions thereto, would not, in my opinion be likely to be construed so as to effect change beyond its own terms.

Senator Potgeter's amendment might, or might not, have a bearing on regulations already being enforced. On this point I could not have an opinion without consideration of the regulations in question. However, the recent home rule amendment to our Constitution would appear an ample guarantee for the powers of the local boards.

January 21, 1970

CITIES AND TOWNS: Franchised Transit Company as public instrumentality—Title 49, USCA, §§1601-1611. A transit company operating by franchise, is exclusive instrumentality authorized by the municipality to provide, under public regulation, mass transportation for citizens. Under such circumstances transit company, although it may be privately owned, would have the character of public agency or instrumentality of city, within the terms of the federal statute. "Agent" and "agency or instrumentality" must be distinguished in this regard. (Turner to Denman, State Senator, 1/21/70) #70-1-8

The Honorable William F. Denman, State Senator: You have asked our opinion on the following:

"Given the circumstances of a franchise such as exists between the City of Des Mones, Iowa and the Des Moines Transit Company and a city ordinance in substantially the form proposed (attached hereto) would a transit company, which is privately owned and operated, operating under such franchise and ordinance, constitute a public agency or instrumentality of such a municipality and thereby qualify as an applicant for a grant under Sections 1601 through 1611 of Title 49, USCA?"

You enclosed for our examination a copy of such franchise and such propsed ordinance. You also indicated that the ultimate question designed to be answered in part by the opinion requested—whether or not such a transit company, under such circumstances, would qualify as an applicant for a grant or loan under Sections 1601 through 1611 of Title 49, U.S.C.A.

We have examined the provisions of the U.S.C.A. cited and would allude to such provisions briefly to indicate the relevance of such a determination. Subsection 1602 (a) of Title 49 U.S.C.A. states in part as follows:

"In accordance with the provisions of this Chapter, the Secretary is authorized to make grants or loans (directly, through the purchase of securities or equipment trust certificate, or otherwise) to assist States and local public bodies and agencies thereof in financing the acquisition, construction, reconstruction and improvement of facilities and equipment for use, by operation or lease or otherwise, in mass transportation service in urban areas and in coordinating such service with highway and other transportation in such areas. . . ."

Subsection 1608 (c) of said Title provides as follows:

"(1) the term 'States' means the several States, the District of Columbia, the Common-wealth of Puerto Rico and the possessions of the United States:

(2) the term 'local public bodies' includes municipalities and other political subdivisions of States; public agencies and instrumentalities of one or more States, municipalities, and political subdivisions of States; and public corporations, boards, and commissions established under the laws of any State;

(3) the term 'Secretary' means the Secretary of Housing and Urban Development;

(4) the term 'urban area' means any area that includes a municipality or other built-up place which is appropriate, in the judgment of the Secretary, for a public transportation system to serve commuters or others in the locality taking into consideration the local patterns and trends of urban growth; and

(5) the term 'mass transportation' means transportation by bus or rail or other conveyance, either publicly or privately owned, serving the general public (but not including school buses or charter or sightseeing service) and moving over prescribed routes."

The statutory authority contained in the Act is therefore such that the Secretary may make grants to municipalities including public agencies and instrumentalities thereof. Reference to Subsection 1608 (c) (2) indicates that the words "public agencies and instrumentalities" are intended to indicate a class in addition to and separate and distinct from "municipalities and other political subdivisions of states" and "public corporations, boards and commissions established under state law" as these are separately listed. The rules of statutory construction, and common sense, applicable under both State and Federal law would require that effect be given to every part of the subject statute. *Boomhower v. Cerro Gordo County Board of Adjustment,* (1968), Iowa 163 N.W. 2d 75, 76; *Georgen v. State Tax Commission,* (1969), Iowa , 165 N.W. 2d, 782. Legislative intent is to be gleaned from the whole statute or statutes relating to a matter and not from any particular part, with due consideration for the object to be attained. *Georgen v. State Tax Commission,* supra, at page 785 of 165 N.W. 2d. These rules of construction require, as indicated, both a comparative analysis of the words used and also a functional analysis of the words used. As above indicated, the "public agencies and instrumentalities" must be given meaning in addition to and distinct from the words "municipalities" and "public corporations, boards and commisions." In other words, they must define a class different from those entities normally thought to comprise either the principal or the agency in normal public agency concepts as the normal principal under such concepts would be the municipality and the normal agent would be the public corporations, boards or commission.

It appears that in terms of function the "public agencies or instrumentalities" above referred to are, under the Sections cited, given status as potential grantees or lendees of federal funds to assist in financing physical improvements for use in mass transportation service in urban areas and for use in coordinating such service. Thus, the words of such subsections require, and the statement of function permits, consideration for inclusion within such terms of a transit company, privately owned and operated, which is franchised under local law in its operation and function for transit purposes though it is not and may never become a public corporation, board or commission.

An accepted rule of law is that a relationship such as would be indicated by the words "agency" or "instrumentality" may be public or private, complete or partial, limited or unlimited, depending upon its scope and purpose. It is said, for instance, in *Freeman v. Navaree,* 289 P. 2d 1015, 1019, 47 Wash. 2nd, 760 that "agency" is a comprehensive term, and it embraces an almost limitless number of relationships between two or more persons or entities. Along this same line it is well to observe, as did the Court in *Ciulla v. State,* 77 N.Y.S. 2d 545, 550, 191 Misc. 528, that the words "agency" and "instrumentality" with respect to a state, have a distinct difference in legal connotation from the word "agent", in that the former contemplate an authority to which the state delegates governmental power for performance of a state function while the latter connotates one through whom the state acts in directly carrying out its governmental functions. At page 552 of 77 N.Y.S. 2d, the Court cites as illustrations, examples of corporations, privately owned and privately managed and which operate for private profit in the field of urban redevelopment which are held to be "agencies and instrumentalities of tthe State" though neither "branches" of the State or "agents" of the state. Thus, both under the federal statutes cited and State law, we find we are directed to look not for a principal and agent relationship at all, but instead to look for an independent authority with delegated governmentaal functions of the kind described in the statutes cited. The question then is, does a transit company operating under such a franchise as is supplied for examination and such an ordinance as is proposed, have the status and legal relationship requisite to bring it within the definitions contained in subsection 1608(c)2 of Title 49, U.S.C.A.

We have reviewed the subject franchise approved by the voters of the City pursuant to the provisions of Chapter 386, Code of Iowa, 1966, and find such franchise grants to the subject transit company a right for a period of ten years to provide mass transportation services for hire within the City, utilizing the streets of the City. We also note that the franchise specifies terms and conditions which closely regulate the streets which may be used, the rates which may be charged, the percentage of maximum earnings based upon depreciated costs, the quality of service to be provided, maintenance of accounts, monthly operating financial reports and also make such accounts and reports subject to City audit, all under the supervision of the City Council of the City. It is nonetheless clear that neither the City or the transit company becomes a principal or agent as to the other under such franchise.

Blacks Law Dictionary, 4th Edition, defines "public utility" as "A business or service which is engaged in regularly supplying the public

with some commodity or service which is of public consequence, and need, such as electricity, gas, water, transportation, or telephone or telegraph service" citing *Gulf States Utilities Company v. State,* Tex. Civ. App. 46 S.W. 2d 1018, 1021. To the same effect is *Des Moines v. West Des Moines,* 239 Iowa, 1, 7, NW 2d 500.

It thus appears that the transit company, under Iowa law and such franchise, regardless of what the situation may be under other state laws or other franchises, is operating as a regulated public utility of the City of Des Moines under powers delegated by the people of the City. As such, it is an instrumentality and in fact under the franchise the exclusive instrumentality permitted by which the city has endeavored to provide mass transportation services to its citizens. Under such franchise it is the authority and has the authority to provide such services under such close regulation. The proposed ordinance to which we are referred merely affirms as a matter of local law, the conclusions last indicated. Its worth in the circumstances would be to give local legislative recognition to what we conceive to be the status quo under the franchise.

It is therefore, the opinion and conclusion of this office that, given the circumstances of a franchise, such as exists between tthe City of Des Moines, Iowa, and the Des Moines Transit Company, and an ordinance directed to the point of recognizing the relationships under such franchise, such a transit company though under such franchise, such a transit company though privately owned and operated would constitute a public agency or instrumentality of the City within the definitions of Subsection 1608(c)2 and as such constitute a qualified applicant for certain grants in its own behalf under the provisions of Sections 1601 through 1611 of Title 49, U.S.C.A.

January 22, 1970

COUNTY OFFICERS: SUPERVISORS. Chapter 217, Acts of the 63rd G.A., First Session. Mileage is allowable to supervisors who receive salaries under the provisions of Chapter 217 for actual and necessary travel to and from regular or adjourned sessions of the board of supervisors. (Nolan to Werling, Cedar County Attorney, 1/22/70) #70-1-9

Mr. Max R. Werling, Cedar County Attorney: This is in response to your letter requesting an opinion on the provisions of Chapter 217, 63rd G.A., first session. Your question is:

"Is mileage compensation payable to supervisors who are paid on an annual salary basis, from their home to the county courthouse?"

Such mileage is allowable for supervisors who receive a salary payable on an annual basis under the provisions of the Act in question. The pertinent part of the Act being:

"These 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. Such mileage shall be limited to one thousand dollars for each supervisor. Supervisors on boards of more than five members shall receive a salary equal to the total salaries received by a five member board pursuant to the population schedule, divided by the number of members on such boards."

There is no provision in this Act for mileage from home to the courthouse. However, "statutory mileage" is that contemplated by §79.9 Code, 1966, which is "ten cents per mile of actual and necessary travel." Attendance at regular or adjourned sessions of the board of supervisors is an official duty for which mileage compensation may be claimed. 1968 OAG 446.

January 22, 1970

COUNTY OFFICERS: SUPERVISORS. Chapter 217, Acts of the 63rd G.A., First Session. In counties of less than 40,000 population board members may elect to receive compensation on a per diem basis rather than on an annual salary schedule and receive $25.00 per day not to exceed $5,000 per year plus $10c per mile in going to and from sessions and to and from place of performing committee service. If in such counties the board is paid a salary, members may claim statutory mileage not exceeding $1,000, in addition to their salaries. (Nolan to Dillon, Louisa County Attorney, 1/22/70) #70-10-10

Mr. John L. Dillon, Louisa County Attorney: This is in reply to your letter requesting an interpretation of Chapter 217, 63rd G.A., first session, as applied to counties of less than 40,000 population.

In a county of less than 40,000 population where the board of supervisors elects to receive compensation on a per diem basis rather than on the annual salary schedule, each member shall receive, "twenty-five dollars per day for each day actually in session or employed on committee service or at a ditch or drainage board considering drainage matters." (Not to exceed $5,000 per year). In addition such member shall receive 10c per mile in going to and from sessions and in going to and from the place of performing committee service.

Where the board is paid a salary under the provisions of Chapter 217, supra, members may still claim mileage for necessary travel to and from sessions and in performance of committee service. See 1968 OAG 446 and opinion of this date to Max R. Werling, Cedar County Attorney. However, no such claim shall be allowed which would exceed the limitation of $1,000 as provided in Ch. 217.

January 22, 1970

COUNTY OFFICERS: SUPERVISORS. Chapter 218, Acts of the 63rd G.A., First Session. Terms of incumbent supervisors remain unchanged where Plan 1 under Section 6 of Chapter 218, supra, becomes effective by operation of law unless such supervisors were elected to five year terms in the 1968 general election in which such terms expire on the second secular day of January, 1973. (Nolan to Rex, State Representative, 1/22/70) #70-1-11

The Honorable Clyde Rex, State Representative: This responds to your letter requesting clarification of two matters relating to the terms of county supervisors and the new mileage law.

Your letter indicates that the supervisors of Hamilton did not select one of the three alternate redistricting plans provided in Ch. 218, Acts 63rd G.A., first session, before the November 1, 1969 deadline. Therefore, Plan One (election at large and without district residence requirements for members) became effective, by operation of law, on January 1, 1970. Under §6 of Ch. 218, supra,

". . . If plan one is selected, *or imposed pursuant to section one (1), subsection three (3) of the Act,* such holdover members shall become supervisors at large.

"2. The terms of holdover members elected to five year terms in the 1968 general election shall expire on the second secular day in January, 1973. No county board shall, after the second secular day in January, 1971, be composed of more than five members. . . ." [Emphasis added]

Since Hamilton County has a three member board of supervisors (Iowa Official Directory of State and County Officers 1969-1970) there is no statutory requirement that the size of the board be reduced. Therefore, the terms of incumbents remain unchanged unless one or more were elected to five year terms in the 1968 general election — in which case the term expires on the second secular day of January 1973.

Your second question on whether the supervisors can draw mileage up to $1,000 for driving back and forth to work at the county seat each day has been answered in opinions to Max Werling and John Dillon issued this date, copies of which are enclosed.

January 22, 1970

COUNTY OFFICERS: SUPERVISORS. Chapter 217, Acts of the 63rd G.A., First Session. $1,000 mileage limitation under Chapter 217 is not an automatic suppliment to the salary but is rather a ceiling on tthe amount of reimbursement which a supervisor may claim for any and all use of an automobile while actually performing official duties. The board members may claim mileage for travel outside the county to meetings if such are essential to tthe accomplishment of duties enumerated under Ch. 332, Code, 1966, or promote the accomplishment of principal purposes of such duties. (Nolan to Atwell, Audit Supervisor, Auditor of State, 1/22/70) #70-1-12

Mr. H. E. Atwell, Aublic Accountants Audit Supervisor, Office of Auditor of State: This has reference to the questions you presented in connection with Ch. 217, Acts 63rd G.A., First Session, concerning the compensation of supervisors in counties of less than forty thousand population. Your letter states:

". . . Senate File 614 provided that all boards of supervisors in counties of less than forty thousand population could choose whether or not they would accept an annual salary or stay on a per diem basis.

"The salary 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. Such mileage shall be limited to $1,000.00 for each supervisor.

The questions which you wish answered are:

1. May a board member draw his $1,000.00 in mileage for the year even though he does no driving or drives his car occasionally in his work?

2. When the board member drives his car outside the county to various called meetings including schools of instruction, is this mileage to be included as part of the mileage in his limitation of $1,000.00 for the year?

3. Should the supervisors charge mileage in driving from home to the court house and back each day?

No public officer is entitled to compensation for mileage when he is gratuitously transported by another, nor when transported by another public officer or employee who is entitled to mileage or transportation expense. §79.11, Code of Iowa 1966.

Ch. 217, supra, provides in pertinent part as follows:

"These 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. Such mileage shall be limited to one thousand dollars for each supervisor." [Emphasis added]

Statutory mileage is covered by §79.9, Code 1966:

"When a public officer or employee, other than a state officer or employee, is entitled to be paid for expenses in performing a public duty, no charge shall be made, allowed, or paid for the use of an automobile in excess of ten cents per mile of actual and necessary travel except as otherwise provided."

We are of the opinion that the term "actual and necessary travel" includes traveling to and from official meetings at tthe courthouse as well as such travel as may be occasioned by trips on committee service or other official business from the courthouse to the site of such activity. 1968 OAG 446. However, no supervisor is entitled to statutory mileage unless he has a valid claim based on actual expenditure. 1934 OAG 305,

The Iowa Supreme Court in *Schanke v. Mendon* 1958, 250 Iowa 303, 310, 93 N.W. 2d 749, haas outlined the rule thus:

"When a duty is required of an officer and no provision is made for expenses, they are properly charged to the public body for whose benefit it is done. 67 C.J.S., Officers, Section 91, page 329. But he is allowed only the actual expense; ;any excess over the actual cost is an increase in compensation a 'change in emoluments' of his office."

Thus the $1,000 limitation provided by Ch. 217 is not merely an automatic supplement to the salary but is, rather, a ceiling on the amount of reimbursement which a supervisor may receive during the year for any and all use of an automobile while actually performing official duties.

Where a board member drives his car outside the county to called meetings and schools of instruction he may claim mileage for the use of the automobile at the rate of ten cents per mile of actual and necessary travel, subject where applicable to the $1,000 limitation, if such meetings are essential too the accomplishment of the duties enumerated under Ch. 332, Code, or promote the accomplishment of principal purposes of such duties. *Nesbitt Fruit Products v. Wallace,* 1936, 17 F. Supp. 141, 143.

Your third question is answered by opinions of this date directed to Max Werling, Jones County Attorney and John Dillon, Louisa County Attorney, copies of which are enclosed herewith.

January 22, 1970

MOTOR VEHICLES: Mobile homes Sunday sales, §§322.3(9), and 322.2(7) Code of Iowa, 1966. Mobile homes are vehicles subject to registration under the laws of this state and as such may not be sold on Sunday. A prior contrary opinion, Zeller to Faches, Linn County Attor-

ney 12/23/69, #69-12-10, is withdrawn. (Elderkin to Faches, Linn County Attorney, 1/22/70) #70-1-13

Mr. William G. Faches, Linn County Attorney: Upon reconsideration, our former opinion to you of December 23, 1969, is withdrawn and the following substituted in lieu thereof. As you will recall, your question read:

"Due to the rapid growth of mobile home parks and dealerships in Linn County which I am sure is also true throughout the State of Iowa, my office has received numerous requests for an opinion as to whether or not mobile homes may be sold on Sunday, particularly in view of Section 322.3(9), 1966 Code of Iowa. The primary concern of these businesses is that they are competing with the sale of homes which is presently permitted on Sunday."

Section 322.3(9) of the 1966 Code of Iowa provides as follows:

"No person licensed under this chapter shall, either directly or through an agent, salesman or employee, engage in this state, or represent or advertise that he is engaged or intends to engage in this state, in the business of buying or selling at retail new or used *motor vehicles* on the first day of the week, commonly known and designated as Sunday." (Emphasis added)

The term "motor vehicle" is defined for purposes of Chapter 322 of the Code in §322.2(7) as "any vehicle subject to registration under the laws of this state." As set fortth in §135D.1(1) of the Code a "mobile home" is a "vehicle." And, it is clearly subject to registration in Iowa as a registration fee is provided for under §321.123(3) of the Code "regardless of whether or not [such mobile homes] are used on the highways, except those in a dealer's or manufacturer's stock not used as a place for human habitation."

We would note that the recent case of *State* vs. *Lindsey,* .... Iowa ...., 165 N.W.2d 807 (1969), although perhaps not entirely clear from the opinion, involved the question of whether a single Sunday sale of a mobile home violated tthe provisions of §322.3(9) of the Code. The Supreme Court of Iowa, after an extensive review of the subject, held that since §322.3 was enacted in the exercise of the police power of the state for the protection of the public health and safety, even one isolated sale of a mobile home on Sunday would be in violation of the law.

It is, therefore, the opinion of this office, that the Sunday sale of a mobile home or homes by persons set forth in §322.3(9) of the Code would constitute a clear violation of that provision.

January 22, 1970

CONSTITUTIONAL LAW: Constitutional amendments — Art. X, §2. Proposed amendment, S.J.R. 7, 63rd G.A., Second Session, defining the privileges and duties of persons 19 years of age including the right to vote is not unconstitutional as being two amendments not of necessity connected or related. (Haesemeyer to Gannon, State Representative, 1/22/70) #70-1-14

The Honorable William J. Gannon, State Representative: Reference is made to your letter of January 20, 1970, in which you request an opinion of the attorney general as to whether or not Senate Joint Reso-

lution 7 presently pending in the general assembly would be in violation of Art. X, Section 2 of the Constitution.

Article II, §1 of the Constitution provides:

"Electors. Section 1. Every [white]' 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."

Senate Joint Resolution 7 woould repeal such Art. II, §1 and substitute in leiu thereof the following:

"Every citizen of the United States, of the age of nineteen (19) years, who shall have been a resident of this state for such period of time as shall be provided by law and of the county in which he claims his vote for such period of time as shall be provided by law, shall be entitled to vote at all elections which are now or hereafter may be authorized by law. The general assembly may provide by law for different periods of residence in order to vote in various elections. The required periods of residence shall not exceed six (6) months in this state and sixty (60) days in the county. A person nineteen (19) years of age or older shall be deemed to be an adult for all purposes known to law and shall enjoy all rights and privileges and be subject to all duties and liabilities now or hereafter provided by law for persons twenty-one (21) years old. Provided, that no qualification established by this constitution for holding any public office shall be deemed to be changed by this amendment."

Article X, §2 of the Constitution to which you make reference 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."

Your request centers around the question of whether or not S.J.R. 7 would constitute two amendments within the meaning of Art. X, §2, so as to require separate submission to the electors. In an earlier opinion, 1968 OAG 11 we concluded that the proposed constitutional amendment which would (1) change the length of term of the office of governor and lieutenant governor and (2) combine the governor and lieutenant governor into one voting bracket instead of two would unconstitutionally contravene Art. X, §2. 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 incongrous 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 separate purposes, not dependend upon or connected with**

each other. (Citations)"

S.J.R. 7 differs significantly from the situation presented in our earlier opinion. In such earlier opinion two separate sections namely Art. IV, §2 and Art. IV, §3, would have been amended. S.J.R. 7 would merely repeal a single section, Art. II, §1, and substitute a new provision in lieu thereof. In our opinion S.J.R. 7 is not two amendments each having a different object and purpose. On the contrary S.J.R. 7 has a single unitary purpose namely, the privileges and duties of persons over the age of nineteen years. Moreover, applying the test enunciated by the supreme court it can hardly be said that the propositions contained in S.J.R. 7 are not dependent upon or connected with each other.

January 23, 1970

STATE OFFICERS AND DEPARTMENTS: I P E R S, investments in common stocks — §97B.7, Code of Iowa, 1966, as amended by Chapter 120, 62nd G.A. (1967). It is not mandatory that any part of the Iowa Public Employees Retirement Fund be invested in common stocks. (Haesemeyer to Maley, General Counsel, Iowa Employment Security Commission, 1/23/70) #70-1-15

Mr. Walter F. Maley, General Counsel, Iowa Employment Security Commission: Reference is made to your letter of January 19, 1970, in which you request an opinion of the attorney general with respect to the following:

"The Iowa Employment Security Commission solicits your opinion and advice relative to a matter included in the Auditors' Report, Iowa Public Employees' Retirement System, dated April 19, 1968. Page 17 of the Auditors' Report herein referred to states in part as follows:

" 'We would recommend that an opinion be secured from the Attorney General to determine if the passage of Senate File 650 in fact makes investments in Common Stocks mandatory.'

"Senate File 650 referred to in the preceding quotation appears as Chapter 120, Acts, Regular Session, 62nd General Assembly, as an amendment to section 97B.7, 1966 Code of Iowa."

Sec. 97B.7, Code of Iowa, 1966, as amended by Chapter 120, 62nd G.A. (1967) creates the Iowa Public Employees' Retirement Fund and sets forth the duties of the trustee of such fund among which is the following:

"2. . . . b. Invest such portion of said trust funds as in the judgment of the commission are not needed for current payment of benefits under this chapter in interest-bearing securities issued by the United States, or interest-bearing bonds issued by the state of Iowa, or bonds issued by the state of Iowa, or bonds issued by counties, school districts and/or general obligations or limited levy bonds issued by municipal corporations in this state as authorized by law, *or other investments* authorized for life insurance companies in this state *including common stocks* issued or guaranteed by a corporation created or existing under the laws of the United States or any state, district, or territory thereof subject to the following restrictions:

"(7) The total cost price of common stocks held by the retirement fund *shall not exceed* ten (10) percent of the total value of the retirement fund. The cost price of stock investments in any one corporation *shall not exceed* five (5) percent of the maximum amount which may be invested in stocks. Not more than five (5) percent of the issued

stock of any one (1) corporation may be owned by the fund. For purposes of this chapter value consists of cash, the par value balance of all unmatured or unpaid balance of all unmatured or unpaid investments requiring the payment of a fixed amount at payment date, and the cost price of all other investments. The total cost of common stocks puchased during any year, shall not exceed twenty-five (25) percent of all monies collected under chapter ninety-seven (B) (97B) of the Code together with investment income received by the system during that year. (Emphasis added)

It is to be observed that the authority given to the trustee to invest in various types of securities is in all cases in the disjunctive including the authorization to invest in common stocks. Moreover, it is to be observed that in subsection (7) of subsection b that the limitations on the amount which may be invested in common stocks or in any particular common stock are couched in terms of "shall not exceed".

Under these circumstances we do not see how it could conceivably be said that §97B.7 as it now exists makes it mandatory for the trustee to invest any part of the Iowa public employees' retirement fund in common stocks.

January 23, 1970

STATE OFFICERS AND DEPARTMENTS: State Printing Board, purchase of raw paper stock — §15.7, Code of Iowa, 1966. The printing board may purchase raw paper stock for the use of centralized printing and other departments without going through the bidding process. (Haesemeyer to Moore, Supt. of Printing, 1/23/70) #70-1-16

Mr. J. C. Moore, Superintendent of Printing, Iowa State Printing Board: You have requested an opinion of the attorney general as to whether or not you, as superintendent of printing, can purchase raw paper stock for the use of centralized printing and other departments without going through the customary bidding procedures.

Section 15.7, Code of Iowa, 1966, provides:

"15.7 'Printing' defined. The term 'printing' as used in this and chapters 16 and 17 shall include binding and *may include material,* processes, or operations necessary to produce a finished printed product, but shall not include binding, rebinding or repairs of books, journals, pamphlets, magazines and literary articles by any library of the state or any of its offices, departments, boards and commissions held as a part of their library collection." (Emphasis added)

Sections 15.11 et seq. set out the bidding procedures for the doing of public "printing".

In interpreting what is now §15.7 an earlier opinion of the attorney general concluded:

"The provisions of the above statute are not mandatory with respect to 'processes.' The question as to whether or not any certain process would come with the provisions of this section of the Code is one in which a sound discretion can and should be exercised." 1934 OAG 594.

What is true of processes is also true of material and certainly raw paper stock is material. However, there remains a question as to who has the discretion to determine whether "material, processes or operations necessary to produce a finished printed product" are to be included within the term "printing" for the purposes of Chapter 15, 16 and 17

of the Code. In our opinion it is the printing board. Chapter 15 generally gives the board broad control over state printing and §15.30 specifically authorizes it to purchase paper.

Accordingly, in our opinion the printing board could either on a case by case basis or as a standing policy purchase raw paper stock without resorting to bids.

January 26, 1970

SCHOOLS: Merged Areas — Tax Sheltered Annuities — Ch. 185, 63rd G.A., 1st Session. Plan offered by Great West Life Assurance Company is a group plan and does not qualify as an authorized tax sheltered annuity available to employees of Eastern Iowa Community College under Ch. 185, 63rd G.A. which authorizes the purchase of "individual" contracts only (Nolan to Holden, State Representative, 1/26/70) #70-1-17

The Honorable Edgar H. Holden, State Representative: This replies to your letter requesting an opinion construing (S. F. 593) Ch. 185, Acts 63d G.A., (First Session) which provides:

"At the request of an employee through contractual agreement the board may arrange for the purchase of an individual annuity contract for any of their respective employees from any company the employee may choose that is authorized to do business in this state and through an Iowa licensed insurance agent that the employee may select, for retirement or other purposes and may make payroll deductions in accordance with such arrangements for the purpose of paying the entire premium due and to become due under such contract. The deductions shall be made in the manner which will qualify the annuity premiums for the benefits afforded under section four hundred three b (403b) of the Internal Revenue Code of 1954 and amendments thereto. The employee's rights under such annuity contract shall be nonforfeitable except for the failure to pay premiums."

Your letter states that Eastern Iowa Community College is now interested in entering into an arrangement with the Great West Life Assurance Company for the purchase of annuity contracts on behalf of employees' who have indicated a desire to participate in the tax sheltered annuity program of that company. The company offers both fixed and variable annuities, qualifying under §403b, supra, with nonforfeitable rights for the employee. However, both fixed and variable annuity plan contracts submitted with your letter are "group contracts" rather than "individual" contracts, and are according to your letter, to be "administered on a group basis for the purpose of achieving lower net cost for participants through the economies of group administration."

The question is then whether these contracts qualify as individual contracts within the meaning of the term as used in Ch. 185, supra.

In favor of such interpretation are the following:

1. Each participating employee would have an Individual Annuity Account and an Individual Certificate evidencing participation.

2. The contract with the employer provides that application for coverage may be made for any employee at any time — there are no limited open periods for enrollment. An employee for whom application is made is deemed covered as of the first day of the contract year in which premium is paid for him.

3. Each individual employee covered has a number of fully vested non-forfeitable rights which he may unilaterally exercise including election of a retirement date, selection of any of the forms of settlement options designated in the contract, naming of a beneficiary, and surrender of the accumulation or accumulation units for a cash payment under the surrender benefit provided for in the contract.

On the other hand, the Individual Certificate which the employee receives specifically states that the employee is covered by either a "Group Policy" (for fixed annuities) or a "Group Variable Annuity Contract" (for variable annuities). Further, the amount and payment of premiums under either contract are determined by the employer and not the employee.

While, for administrative purposes, there appears to be no legal objection to an employer writing a single warrant or draft to a company to cover payment of all premiums due under individual annuity contracts purchased for employees, such is not the case here. The Great West contracts are clearly group contracts calculated to provide lower net costs for the participants through *group* administration. No individual policy was submitted and information furnished to us indicates that the company writes only group annuity coverage. Such group contracts do not qualify as tax sheltered annuities which may be purchased by area schools for their employees. The statute provides only for individual contracts. Expressio unius est exclusio alterius.

January 27, 1970

CITIES AND TOWNS: Authority to allocate funds for rubella inoculations — Chapter 28E, Code of Iowa, 1966; §§366.1 and 368.2, Code of Iowa, 1966; §§9, 18 and 22, Chapter 163, Acts of the 62nd G.A. Cities and towns have authority to appropriate from the Sanitation Fund monies to be utilized for a rubella inoculation program. (Martin to Lipsky, State Representative 1/27/70) #70-1-18

The Honorable Joan Lipsky, State Representative: I have received your letter of January 19, 1970 in which you request an opinion of the Attorney General concerning whether cities and towns can allocate funds toward a Rubella inoculation program.

There is little question that municipal corporations have the power to act to preserve the health and safety of their inhabitants. *Wilson v. City of Council Bluffs,* 253 Iowa 162, 110 N.W. 2d 569 (1961); *Felt v. City of Des Moines,* 247 Iowa 1269, 78 N.W. 2d 857 (1956). Municipal corporations are empowered under the provisions of §368.2, Code of Iowa, 1966, to exercise ". . . . general powers and privileges . . . for the protection of their property and inhabitants. . .. ." Section 366.1, Code of Iowa, 1966, also empowers municipal corporations to exercise those powers that are ". . . necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of said corporations and the inhabitants thereof. . . ."

In addition, cities with a population in excess of 25,000 may exercise, through their local board of health, powers to ". . . provide such personal and environmental health services as may be deemed necessary

for the protection and improvement of the public health. . . . [and to] . . . engage in joint operations and contract with colleges and universities, the State Department, other public and private agencies, and individuals for public health activities or projects." Section 9, Chapter 163, Acts of the 62nd G.A.

The first question thus is, does a campaign to inoculate against the disease Rubella fall within these powers to provide for the general health.

Rubella is a contagious disease. After an incubation period of from one to three weeks, the disease begins with slight fever, catarrhal symptoms, sore throat, pains in the limbs, and the appearance of an eruption of red papules similar to that of measles, but lighter in color, not arranged in crescentic masses, and disappearing within a week. Dorland's Illustrated Medical Dictionary, pp. 802 and 1197, 23rd Edition, 1957, W.B. Saunders Company. We are informed that the chief danger of the disease, and the principle one at which the present inoculation program is aimed, is the effects o the disease upon a developing fetus when contracted by a pregnant woman, particularly during the first trimester. Cataracts, deafness, and congenital heart defects have been among the defects noted in infants whose mothers were afflicted with Rubella during pregnancy. With outbreaks of the disease occurring roughly every seven years, the last in 1964, it has been reliably estimated that a substantial increase in the incidence of the disease will occur during 1971.

With these facts in mind, it is easy to see the need for an effective inoculation program and the potential results if such a program is not carried out. This program clearly falls within the statutory powers of municipalities to provide for the general public health. *Wilson v. City of Council Bluffs,* 253 Iowa 162, 110 N.W.2d 569 (1961).

Funds for this project may be allocated by cities and towns from the Sanitation Fund under the provisions of §22, Chapter 163, Acts of the 62nd G.A. which provides as follows:

"The board of supervisors of any county may appropriate from the county general fund and the council of any city or town may appropriate from the sanitation 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 of this Act."* (Emphasis Added)

As will be indicated below, such funds should be, by each city or town, placed in a "local health fund". The local board in cities with a population in excess of 25,000, that have opted to establish a local health board, may under the provisions of §9, Chapter 163, Acts of the 62nd G.A., engage in a joint project with a county board, the Iowa State Department of Health,or other private agency or individual for the purpose of carrying out a Rubella inoculation program. Cities with a population in excess of 25,000 which have not established a local board of health, cities with a population of less than 25,000, and towns, may cooperate, under the provisions of Chapter 28E, Code of Iowa, 1966, with any level of government possessing the power to engage in such a program. For the same reasons as are set out above, the county boards of health possess

the power to engage in this program, and they would be the logical agency of government with which such cities and towns should carry out such a program.

Although it may be argued that cities with a population in excess of 25,000 but having no local health board, cities with a population of less than 25,000, and towns, possess no express power in Chapter 163 to establish a "local health fund", due to the definition of that fund contained in §18, Chapter 163, Acts of the 62nd G.A., it is the opinion of this office that the power to establish such a fund may be implied. It appears well settled that where a power is conferred by statute, everything necessary to carry out that power and make it effectual will be implied. *Koelling v. Board of Trustees of Mary Frances Skiff Memorial Hospital,* 259 Iowa 1185, 146 N.W.2d 284 (1967); *Daily Record Co. v. Armel,* 243 Iowa 913, 54 N.W.2d 503 (1952); *Gilchrist v. Bierring,* 234 Iowa 899, 14 N.W.2d 724 (1944). In this case the authority to appropriate funds from municipal tax revenues has been granted. Municipalities have also been granted the power to expend those funds for public health purposes. From these statutes, and in order to stay within the framework of Chapter 163, Acts of the 62nd G.A., one may infer the power of municipal treasurers, in a city with a population of more than 25,000 when that city has not established a local health board, a city of less than 25,000, or a town, to establish a "local health fund".

It is, therefore, the opinion of this office that all cities and towns in the State of Iowa have authority to appropriate from the Sanitation Fund, funds for the purpose of carrying out a Rubella inoculation program. These municipal corporations have the power to establish a "local health fund". In cities with a population in excess of 25,000 having a local health board, the local health board may in cooperation with the county local health board or a college, university, the Iowa State Department of Health, or any other public or private agency or individual, carry out a Rubella inoculation program. In cities with a population in excess of 25,000 but having no local health board, in cities with a population of less han 25,000 and in towns, the governing body may appropriate from the Sanitation Fund, funds to be utilized in a Rubella inoculation program. The municipal corporation in such cities and towns may cooperate with the county local health board, or any other public agency also possessing the power to engage in such a program, in conducting a Rubella eradication program.

January 29, 1970

CITIES AND TOWNS: Lease purchase of building for city and county offices — Article III, §40, and Article XI, §3, Constitution of Iowa; §§368.18, 368.35 and 407.5, Code of Iowa, 1966. A city may by a three-fourths vote of the council acquire a building by lease purchase for use as city offices and may lease a portion of such building to the county. To the extent that the lease purchase arrangement created an indebtedness of the city constitutional and statutory debt limitation provisions would have to be observed. (Haesemeyer to Shepherd, State Representative, 1/29/70) #70-1-19

The Honorable Stanley T. Shepherd, State Representative: You have requested an opinion of the attorney general as to whether or not the

City of Fort Madison can enter into a lease purchase agreement for the purchase of a building from Textron, Inc. to be used for city and county offices. While the city would acquire the property, plans are that a portion thereof would be leased to the county. The periodic payments under the lease purchase agreement would be paid out of current operating revenues.

Sections 368.18(1) and 368.35, Code of Iowa, 1966, provide:

"368.17 . . . 1. They shall have power by a three-fourths majority vote of the council to acquire, erect, or purchase buildings and building sites to the extent necessary to house and carry on authorized governmental functions or purposes of the municipal corporation."

"368.35 Lease of municipal property including air space. 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."

It is to be observed that §368.18 gives a city the authority to both "acquire" or "purchase" buildings and building sites. An outright purchase of a building would of course be covered by the term "purchase". Thus, the addition of the word "acquire" must have been intended to authorize something more. The expression "acquire" has been held to encompass leasing and lease purchase. *San Joaquin Fruit & Investment Co. v. C.I.R.*, . . ., 77 F.2d 723, 727; *Langley v. Police Jury of Calcasieu Parish*, ... *La.* . . . . , 201 So.2d 300, 303; *Richmond Greyhound Lines, Inc. v. Davis*, ... , 200 Va. 147, 104 S.E.2d 813, 818.

Accordingly, it is our opinion that the language of §368.18 is sufficiently broad to authorize acquisition of property by means of a lease purchase agreement.

An earlier opinion of the attorney general took the position that under §368.18 a city could not enter into a long term lease of a building to be used for municipal purposes. 1966 OAG §2.50. However, that opinion was issued before the 1968 adoption of the home rule amendment to the Iowa Constitution. Article III, §40 of such Constitution now provides:

"Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly.

"The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state."

Thus, even if it might have been argued in 1966 that a city could not enter into an agreement such as you describe because the power to do so was not granted in express words, the same would not be true after the adoption of the home rule amendment.

Section 368.35 would seem to furnish ample authority for the lease of a portion of the property to the county.

Of course, to the extent that the lease purchase arrangement you contemplate would create an indebtedness of the city, consideration would have to be given to the debt limitation provisions of the Constitution, Art. XI, §3, and the Code, Chapter 407. Moreover, §407.5 would appear to require an election to authorize the indebtedness. In this connection see the attached prior opinion of the attorney general, 1966 OAG §2.47, a copy of which is attached.

January 29, 1970

COUNTY AND COUNTY OFFICERS: Supervisors, authority to match Crime Commission grants — Ch. 100, Laws 63rd G.A.; §337.4, Code of Iowa, 1966. Crime Commission is a statutory agency to implement broad legislative policy of study and suppression of crime. County supervisors lack specific authority to appropriate funds to match commission grants. However, an appropriate program of the commission might constitute a special investigation which might be financed under §337.4. (Turner to Mills, Executive Director, Iowa Crime Commission, 1/29/70) #70-1-20

Mr. Max Milo Mills, Executive Director, Iowa Crime Commission: You have requested an opinion of the attorney general as to whether county boards of supervisors have statutory authority to appropriate matching funds for various crime prevention programs of the Iowa Crime Commission and federal government.

The Crime Commission was established by Ch. 100, Acts of the 63rd G.A., First Session, and §8 thereof provides:

"Acceptance of grants. The commission with approval of the governor may accept funds, grants, services, facilities and property from any source, and all such receipts of the commission, including gifts, grants in aid and other revenue, are hereby appropriated for carrying out the purposes of this Act. The expenditure of any funds available to the commission shall be by warrant to the treasurer of the state, drawn by the state comptroller upon vouchers authorized by the executive director of the commission.

"The commission may:

1. Expend such monies as may be appropriated by the general assembly, or otherwise shall be available, for study, research, investigation, planning and implementation.

2. Make grants to towns, cities, counties and areas pursuant to law and such regulations as may be applicable.

3. Provide supplies, facilities, personnel and staff for the function and operations of the commission, and for such other purposes as may be necessary and proper to accomplish the policy of this Act."

In my opinion, nothing in the Crime Commission Act authorizes the county to appropriate county funds for this purpose. Of course, the counties do have authority to appropriate funds for the sheriff and county attorney. §337.4, Code 1966, says:

"337.4 Investigation on order of county attorney. The sheriff shall, whenever directed so to do in writing by the county attorney, make special investigation of any alleged infraction of the law within his

county, and report with reference thereto within a reasonable time to such county attorney. When such investigation is made the sheriff shall file with the county auditor a detailed, sworn statement of his expenses, accompanied by the written order of the county attorney, and the board shall audit and allow only so much thereof as it shall find reasonable and necessary."

Depending upon the nature of the crime prevention program, it appears that the county boards of supervisors may, in the proper exercise of their discretion, determine that a particular program would constitute a special investigation. The legislative declaration of policy in the Crime Commission Act would appear to support a liberal construction.

January 30, 1970

STATE OFFICERS AND DEPARTMENTS: Board of Pharmacy Examiners, Persons authorized to prescribe, dispense and administer dangerous drugs — Ch. 189, Acts of the 62nd G.A. Medical practitioners are authorized to prescribe, administer and dispense dangerous drugs and pursuant to §2(8) of Ch. 189, Acts of the 62nd G.A., may delegate the authority to administer and dispense said dangerous drugs to those persons mentioned in §2(8) of Ch. 189, Acts of the 62nd G.A., but only when said person is acting in the course of his or her employment. (Seckington to Crews, Division of Narcotics, 1/30/70) #70-1-21

Mr. Paul Crews, Division of Narcotics: On April 1, 1968, this office issued an opinion to the Board of Pharmacy Examiners (Seckington to Crews) concerning the prescribing, administering and dispensing of narcotic and dangerous drugs.

One of the conclusions reached in the opinion was that only a medical practitioner could legally dispense dangerous drugs. However, a reconsideration of that conclusion leads us to believe that it should be withdrawn. Insofar as dangerous drugs, Chapter 189, Acts of the 62nd G.A., are concerned, only the prescribing must be done by the medical practitioner and the tasks of dispensing and administering may be accomplished by a person mentioned in §2(8) of Chapter 189, Acts of the 62nd G.A., i.e.:

"8. An employee or agent of any person described in subsections one (1) through six (6) of this section, and a nurse or other medical technician under the supervision of a medical practitioner while such employee, nurse, or medical technician is acting in the course of his employment or occupation and not on his own account."

The act of dispensing drugs, unless prohibited by statute, has been considered a function which a medical practitioner may delegate to various persons; in this state, those persons mentioned in §2(8), supra. While the Supreme Court of this state apparently has not passed on the
TEN — FF & C .....
question of exactly what is delegable, many other courts have done so. See *Chalmers-Francis v. Nelson,* 52 P.2d 1312 (1936). This office may have passed on delegable and non-delegable medical functions, although if so, it was implied. See OAG 1946, pp. 189-192, a copy of which is enclosed.

Since dispensing is a delegable duty, §2(8), supra, is applicable and thus those persons mentioned therein may dispense drugs under the supervision of a medical practitioner but only while "acting in the course of his employment or occupation and not on his own account."

Insofar as the opinion dated April 1, 1968 conflicts with the above, it is hereby withdrawn.

January 30, 1970

CONSTITUTIONAL LAW: Constitutional amendment — Art X, §2, Constitution of Iowa, and H.J.R. 6, 63rd G.A. (1970). H.J.R. 6 which would change the terms of office of the governor, lieutenant governor, secretary of state, auditor of state, treasurer of state and attorney general is not more than one proposition requiring separate submission to the people. (Haesemeyer to Doderer, State Senator, 1/30/70) #70-1-22

The Honorable Minnette Doderer, State Senator: Reference is made to your letter of January 27, 1970, in which you request an opinion of the attorney general on the question of whether or not House Joint Resolution 6, 63rd G.A., contravenes the requirement of Article X, §2 of the Constitution that:

"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 effect you are asking whether or not H.J.R. 6, "A Joint Resolution proposing an amendment to the Constitution of the State of Iowa relating to the terms of office of elected state officials", constitutes more than one amendment.

It is true that H.J.R. 6 would amend more than one section of the Constitution, specifically, Article IV, §§2, 3, 15 and 22, and Article V, §12. However, the sole purpose and effect of H.J.R. 6 would be to alter the terms of office of the governor, lieutenant governor, secretary of state, auditor of state, treasurer of state and attorney general from two to four years. Hence, we do not consider the fact that more than one section would be amended to control or be dispositive of your question. The supreme court of Iowa has instructed us as to the tests which must be applied in cases involving Article X, §2. In *Lobaugh v. Cook,* 1905, 127 Iowa 181, 102 N.W. 1121 the 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 separate purposes, not dependent upon or connected with each other.* (Citations)" (Emphasis added)

Plainly, as previously noted herein, H.J.R. 6 has but a single and

unitary purpose, namely changing from two to four years the terms of office of the state elected constitutional officers. It could hardly be said, to use the words of the court, that H.J.R. 6 has, "at least two distinct and separate purposes, not dependent upon or connected with each other."

We attach no significance to the fact that, as you point out, H.J.R. 6, in line 5, §2, page 3, reads:

"Sec. 2. The foregoing amendments to the constitution . . ."
No doubt this plural reference stems more from inadvertence than design. Moreover, the title, §1 and the explanation use the singular term "amendment".

Finally you ask, "If House Joint Resolution 6 is approved by the 64th General Assembly, in what manner will it be submitted to the voters of Iowa? Will it be one question or more than one?" I believe we have already answered these questions. However, lest there be any doubt, there will be but one question. The electors will be able to vote either for or against four year terms for all elected state constitutional officers.

February 2, 1970

STATE OFFICERS AND DEPARTMENTS: Dept. of Public Safety, accident reports — §§ 321.266 and 321.271, Code of Iowa, 1966. The department of public safety should not furnish to any person a copy of an accident report filed with it by a driver involved in an accident. The law requires only the furnishing of the name and address of the person filing the report. However, copies of the investigating officer's report would have to be made available to any party to an accident, his insurance company or its agent or his attorney upon written application to the department and payment of a fee of one dollar ($1.00) per copy. (Turner to Fulton, Commissioner of Public Safety, 2/2/70) #70-2-1

Mr. Jack M. Fulton, Commissioner of Public Safety: Recently, I have had complaints from two different Iowa attorneys that your department has refused to furnish copies to their clients of written motor vehicle accident reports filed with your department by law enforcement officers and relating to accidents in which the clients were involved.

In each instance, the attorney has mailed me a copy of a form letter signed by Major John Mahnke, Director, Drivers License Division, Iowa Department of Public Safety, and in which it is stated that "According to the 'Attorney General's' opinion, this Department may disclose *only* the identity of a person involved in an accident and his address." These forms contain what appear to be a form number, SR-117-A, in the lower left hand corner.

I presume that the Attorney General's opinion is 1964 OAG 295, issued to former Commissioner Sueppel on August 10, 1964, and which makes reference to an earlier opinion, 1952 OAG 117.

I know that you are aware that effective July 1, 1967, former Sec. 321.271, Code of Iowa, 1966, was repealed and that a substitute was enacted in lieu thereof by Chapter 276, § 1, Acts of the 62nd General Assembly. Thus, the former Sec. 321.271 provided:

"321.271 Reports confidential-without prejudice. All accident reports shall be in writing and the written report shall be without prejudice to the individual so reporting and shall be for the confidential use of the department, except that upon the request of any person involved in an accident, or the attorney for such person, the department shall disclose the identity of the person involved in the accident and his address. A written report filed with the department shall not be admissible in or used in evidence in any civil case arising out of the facts on which the report is based."

Said substituted section now provides:

"All accident reports filed by a driver of a vehicle involved in an accident as required under section three hundred twenty-one point two hundred sixty-six (321.266) of the Code shall be in writing. The report shall be without prejudice to the individual so reporting and shall be for the confidential use of the department, except that upon the request of any person involved in the accident, his insurance company or its agent, or the attorney for such person, the department shall disclose the identity and address of the person involved in the accident. The written report filed with the department shall not be admissible in or used in evidence in any civil or criminal case arising out of the facts on which the report is based.

"All written reports filed by a law enforcement officer as required under section three hundred twenty-one point two hundred sixty-six (321.266) of the Code shall be made available to any party to an accident, his insurance company or its agent, or his attorney on written request to the department of public safety and the payment of a fee of one (1) dollar for each copy."

Sec. 321.266, Code of Iowa, 1966, requires the filing of accident reports by both the drivers involved and the investigating officer. The driver's report "shall be without prejudice to the individual so reporting and shall be for the confidential use of the department, except that upon the request of any person involved in the accident, his insurance company or its agent, or the attorney for such person, the department shall disclose the identity and address of the person involved in the accident" and that report is not admissible in evidence in any civil or criminal case arising out of the facts on which it is based. Thus, the department should not furnish a copy of that report to anyone, even another party to the accident, but "shall disclose the identity and address of the person involved in the accident."

But the department must make available written reports filed by any law enforcement officer "to any party to an accident, his insurance company, or its agent, or his attorney upon written request to the department of public safety and the payment of a fee of one dollar for each copy." The fact that the rules of evidence or the statutes may exclude, restrict or limit the use of the evidence in a trial (see *Baysinger v. Haney*, 1968, Iowa , 155 N. W. 2d 496 and authorities cited therein, and 69 ALR 2d 1148) does not prohibit the department from forwarding a copy of the investigating officer's written report as aforesaid. This opinion applies also to the provisions of § 321.273, Code of Iowa, 1966. To the extent that the aforementioned 1964 and 1952 opinions are in conflict herewith, they are hereby withdrawn.

February 9, 1970

CITIES AND TOWNS: Franchise fees — § 368.2 and Ch. 397, Code of

Iowa, 1966. A municipal corporation has no authority to exact from a private utility as a condition precedent to the granting of a franchise, a franchise fee. (Martin to Davis, St. Senator, 2/9/70) #70-2-2

The Hon. Wilson L. Davis, State Senator: I have received your letter of January 30, 1970 in which you request an opinion of the Attorney General as follows:

"May a city as a condition of granting a non-exclusive franchise for twenty-five years to a private utility receive as consideration for granting of franchise or contract an annual franchise fee?"

We assume, for the purposes of this opinion, among other things, that a gift has not been made by the utility to the municipality. We also assume that no municipal property, not by statute a part of the franchise, is sought by the utility for its use in connection with the carrying out of its service. We further assume that the municipality is not claiming the amount sought from the utility as a dollar equivalent to free service for the municipal corporation itself. We express no opinion as to these matters.

Section 368.2, Code of Iowa, 1966, provides in pertinent 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 ex-action except as expressly authorized by statute."

Upon review of Chapter 397, Code of Iowa, 1966 and other pertinent statutory provisions, we are unable to find any express statutory authority which would authorize municipal corporations to charge such a franchise fee. See, *City of Pella vs. Fowler,* 215 Iowa 90, 244 N. W. 734 (1932). For an opinion explaining the non-applicability of the Home Rule Amendment to Article 3, Constitution of Iowa, as to this type of situation, see O.A.G. May 15, 1969, Martin to Knoke.

February 9, 1970

TAXATION: Retail sales tax on services partially paid for by the federal government. §§ 422.43 and 422.45, Code of Iowa, 1966, as amended by Ch. 348, Acts of 62nd G. A., and Ch. 248, Acts of 63rd G. A. The Iowa retail sales tax could be properly levied and collected on that portion of the funds supplied by the federal government and used in sharing the cost of payment of excavating and grading conservation services rendered and performed for landowners. (Griger to McGill, State Senator, 2/9/70) #70-2-3

Hon. Donald S. McGill, Iowa State Senator: This will acknowledge receipt of your letter in which you requested an opinion of the Attorney General as follows:

"In the performance of Agricultural Conservation Practices such as terracing, gulley control, pasture renovation, and so forth, it is common practice for the Federal Government to match funds with those of the landowner to pay for the cost of these practices.

"I would appreciate your rendering an opinion relative to the legality of the State of Iowa to levy and collect a service tax on that portion of the funds supplied by the Federal Government and used in payment for such practices."

The Agricultural Stabilization and Conservation Service was established on June 5, 1961, by the Secretary of the United States Department

of Agriculture under authority of 5 U.S.C. § 22. One of the activities of the Agricultural Stabilization and Conservation Service, hereinafter referred to in this opinion as ASCS, is conservation practices carried out through sharing with individual landowners the cost of installing needed soil, water, woodland and wildlife conserving practices.

We contacted an official of the ASCS office in Des Moines, Iowa, and he gave us the following factual information: A landowner enters into a contract with a contractor for the performance of various types of conservation services. There is no contract between the contractor and ASCS nor does ASCS consider such conservation services as being performed for the Federal government. These conservation services are considered performed for the landowner and ASCS merely shares in the cost thereof.

Section 25 of Ch. 348, Acts of 62nd G. A., amended § 422.43, Code of Iowa, 1966, to extend the Iowa retail sales tax to a variety of services, including excavating, grading and construction services.

Section 9 of Ch. 248, Acts of 63rd G. A., first session, repealed the tax on any services on or connected with new construction as follows:

"The tax on any services on or connected with new construction, reconstruction, alteration, expansion, remodeling, or the services of a general contractor, architect, or engineer contracted for after June 1, 1969, shall be null and void."

This amendment became effective on July 1, 1969. In a Circular dated November 28, 1969, the Department of Revenue states that new construction may include land improvements.

In a telephone conversation on January 29, 1970, you stated that our opinion was being requested for land improvement conservation services rendered to landowners prior to July 1, 1969. The ASCS official we contacted states that, prior to July 1, 1969, his office did share in paying the tax as it was considered a legitimate levy.

Section 422.45(1), Code of Iowa, 1966, as amended by § 22 of Ch. 348, Acts of 62nd G. A., exempts from the retail sales tax, services which the State of Iowa is constitutionally prohibited from taxing. Section 422.45 (5), as amended by § 22 of Ch. 348, Acts of 62nd G. A., exempts from the retail sales tax, services which are rendered to the Federal government and its instrumentalities.

In the instant situation, the tax was not imposed directly upon the Federal government. The conservation services were rendered to the landowner, not to the government. Since the landowner purchased these services, the legal incidence of the retail sales tax falls upon him. 1968 O.A.G. 870. Therefore, the mere fact that the Federal government has voluntarily assumed the economic burden of paying for a portion of the cost of said conservation services rendered for landowners does not constitutionally preclude the levy of the tax. *Alabama vs. King & Boozer*, 1941, 314 U. S. 1, 62 S. Ct. 43, 86 L. Ed. 3. Retail sales tax was properly levied and collected on that portion of the funds supplied by ASCS and used in part payment of the cost of excavating and grading conservation services rendered and performed for landowners.

February 10, 1970

CONSTITUTIONAL LAW: Trade Regulation — Fair trade practices by motor vehicle franchisors — H.F. 1137, 63rd G. A., Second Session. H.F. 1137 is constitutional on its face as a legitimate exercise of the state's police power. (Turner to Van Nostrand, State Representative, 2/10/70) #70-2-4

Hon. Maurice Van Nostrand, Iowa State Representative: In your letter of January 30, 1970, you have requested the opinion of the Attorney General concerning the constitutionality of H.F. 1137.

H.F. 1137 is entitled "An Act to provide for fair trade practices by motor vehicle franchisors." The bill, on its face, is an attempt to regulate when and how a motor vehicle manufacturer or distributor may terminate, discontinue, or establish motor vehicle dealership franchises in a particular community within the State of Iowa.

There are certain well established principles which are applicable in any consideration of constitutionality of legislation. Statutes are presumed to be constitutional and will not be declared invalid unless they clearly, palpably, and without doubt infringe the constitution. *Lee Enterprises, Inc. v. Iowa State Tax Commission*, 1968, ____Iowa____, 162 N. W. 2d 730. If the constitutionality of a statute is merely doubtful or fairly debatable, the Courts will not interfere. *Burlington & Summit Apartments v. Manolato*, 1943, 233 Iowa 15, 7 N. W. 2d 26. All reasonable grounds upon which a statute may be held valid must be overcome before the statute will be declared unconstitutional. *Collins v. State Board of Social Welfare*, 1957, 248 Iowa 369, 81 N. W. 2d 4. If any reasonable state of facts can be conceived which will support the validity of a statute, it is the Court's duty to sustain it. *Diamond Auto Sales, Inc. v. Erbe*, 1960, 251 Iowa 1330, 105 N. W. 2d 650. It must be assumed that public officers will act fairly and impartially, and a statute will not be held unconstitutional because of a supposed possibility that they will not do so. *Spurbeck v. Statton*, 1960, 252 Iowa 279, 106 N. W. 2d 660. Neither the wisdom nor the advisability of any legislation presents a question as to constitutionality. *Faber v. Loveless*, 1958, 249, Iowa 593, 88 N. W. 2d 112.

The police power appertains to such regulations relating to personal and property rights as affects the public health, public safety, and public welfare and is a power inherent in a government to enact laws, within constitutional limits, to promote the order, safety, health, morals, and general welfare of society. 16 C.J.S. *Constitutional Law*, § 174.

You have inquired whether H.F. 1137 violates the Federal and Iowa Constitutions by impairing the obligations of existing contracts between motor vehicle manufacturer or distributor franchisors and motor vehicle dealer franchises.

Article I, § 10 of the United States Constitution provides that no state shall pass any law impairing the obligation of contracts. Article I, § 21 of the Iowa Constitution also provides that no law impairing the obligation of contracts shall be passed. These provisions of the Federal and Iowa Constitutions are synonymous. *Des Moines Joint Stock Land Bank of Des Moines v. Nordholm*, 1934, 217 Iowa 1319, 253 N. W. 701.

Your question with reference to the constitutional prohibition on impairment of existing contractual obligations must necessarily be directed to §§ 2, 10, and 11 of H.F. 1137. Section 2 provides that, notwithstanding any agreement, a franchisor is precluded from terminating or refusing to continue any dealership franchise unless the franchisor establishes at a hearing before the Iowa State Commerce Commission that there is good cause therefor and that upon termination or noncontinuance, another franchise of the same line-make will become effective in the same community, without diminution of existing services, or that the community cannot support such a franchise. Section 10 provides that, notwithstanding any agreement, "good cause" is not constituted per se for termination or noncontinuance of franchises or for the establishment of an additional dealership in a community for the same line-make for the following reasons: (1) Franchisor desires further penetration of the market; (2) Change of ownership or executive management of a dealership unless the franchisor shows such changes will be substantially detrimental to the distribution of the franchisor's motor vehicles in the community; (3) Refusal by the dealership to purchase or accept delivery of any motor vehicle, commodities, or services not ordered by said dealership. Section 11 provides that, notwithstanding any agreement and subject to two (2) above, the franchisor shall give effect to changes in ownership or executive management of the franchisee's dealership. Are these provisions of H.F. 1137 vulnerable to the constitutional objection of impairment of contractual obligations? We think not.

The constitutional prohibition against impairing the obligation of contracts is not an absolute one and is not to be read with literal exactness like a mathematical formula. 16 C.J.S. *Constitutional Law*, § 281; *Home Bldg. & Loan Ass'n. v. Blaisdell*, 1933, 290 U. S. 389, 54 S. Ct. 231, 78 L. Ed. 413.

In *Aetna Ins. Co. v. Chicago Great Western R. Co.*, 1920, 190 Iowa 487, 180 N. W. 649, the Iowa Court upheld the validity of a statute which rendered a railway liable for negligently injuring property of another, in operation of its right-of-way, any existing lease or contract to the contrary notwithstanding. The Court stated at 190 Iowa 491-2:

"The question here involved is whether Section 2110-m, supra, as applied to the provisions of the lease set forth in Division 2 of defendant's answer, is invalid, because of the constitutional provision prohibiting the enactment of laws impairing the obligation of contracts. It is fundamental that a state can by no act deprive itself of the right or authority to enact legislation within the proper scope of its police power, although the effect of a particular enactment be to impair the obligation of private contracts, and prevent the enforcement of the terms thereof."

The Court further stated at 190 Iowa 493:

"Laws enacted in the interest of the public health, morals, and welfare are valid, within the police power of the state, and are not rendered invalid under Section 10, Article I, of the Constitution of the United States, because their effect may be to impair the obligation of private contracts. The whole subject is exhaustively treated in many of the cited cases, and it is unnecessary here to repeat the arguments offered in further support of their conclusion. The statute in question is remedial in nature, and the evil, as said, if existing, is quite as persistent in the provisions of existing contracts as though they were thereafter inserted. All intended

by the statute is that a railroad company may not shield itself from the consequences of its own negligence. The removal of releases or exemptions contained in leases or contracts is well calculated to accomplish this, and this will be done if the language of this statute is construed according to the context and the approved usage of the language."

Statutes enacted to promote fair dealing between automobile manufacturers and dealers have been held to be a legitimate exercise of the state's police power. *Kuhl Motor Co. v. Ford Motor Co.*, 1955, 270 Wis. 488, 71 N. W. 2d 420.

Applying the aforementioned legal authorities to H.F. 1137, we find that, although existing contractual relations between motor vehicle franchisors and franchisees would be somewhat impaired, this bill does not unconstitutionally impair contractual obligations. It is within the province of the legislature to regulate dealings between automobile manufacturers and independent dealers. H.F. 1137 is clearly remedial legislation, designed to prevent the arbitrary termination of motor vehicle dealership franchises by manufacturers. This legislation does not insulate the dealers from termination or noncontinuance of their franchises nor does it prevent additional dealerships of the same line-make from being established in a particular community, provided the mechanics of the bill are followed. A franchisor may terminate or discontinue a dealership for good cause as long as motor vehicle service is not diminished in the community. Furthermore, a franchisor may discontinue a franchise if it discontinues a particular line-make or if the franchisee's license is revoked pursuant to Chapter 322 of the Iowa Code. If a franchisor can establish that the particular community needs additional franchises, § 5 of H.F. 1137 clearly allows him to do so. In short, it seems to us that the only possible contractual provisions which could be impaired by H.F. 1137 would be those allowing the franchisor to cancel a dealership franchise without a good reason. It does not appear that a franchisor will suffer any monetary loss under the provisions of H.F. 1137. The evil, if any, which H.F. 1137 seems designed to prevent is loss of motor vehicle dealer services to the people in a community through cancellation of a dealership franchise. This evil, if existing, would be as prevalent in the provisions of existing contractual motor vehicle franchises as in new ones inserted in franchise agreements entered into subsequent to the enactment of H.F. 1137. We find that H.F. 1137, on its face, does not unconstitutionally impair the obligation of contracts.

Your next inquiry asks whether the bill in any way grants an unconstitutional extension of the police power.

We must, of course, follow the general rules pertaining to constitutional challenges of statutes as previously set forth.

In the area of police power of the state, more rules must, of necessity, be used. These rules are merely yardsticks by which the Courts have measured the extension of the police power, and when applied to specific facts, to determine whether the legislature has tried to overextend said power.

In *Central States Theatre Corp. v. Sar, et al.*, 245 Iowa 1254, 66 N. W. 2d 450, the Iowa Supreme Court reviewed the standards by which the exercise of the police power is judged. Those standards were reiterated

as recently as 1966 in *Pierce v. Inc. Town of La Porte City*, 1966, 146 N. W. 2d 907, 259 Iowa 1120, wherein the Court quoted from *Central*, supra, at 146 N. W. 2d 909, as follows:

"The right to operate an legitimate business is one which the state may regulate but may not prohibit or unreasonably restrict . . .

"But, as we have said above, a regulatory statute enacted in the exercise of the police power must be reasonable. Its real purpose must be to protect the public health, morals, or general welfare, and it must be reasonably required and suited to attain that purpose. It cannot masquerade as an exercise of the police power and arbitrarily invade personal rights or private property. It cannot disregard the constitutional guaranties . . ."

In *INRC v. Van Zee*, 158 N. W. 2d 111, 116, the following is found:

"It is also well established that whether legislation is a lawful exercise of a state's 'police power' depends upon whether the collective benefit therefrom outweighs the specific restraint imposed thereby (citations omitted)."

The Wisconsin Supreme Court has recently passed on the police power of the state in connection with a Fair Trade Practices Act, *State v. Eau Claire Oil Co.*, 1967, 151 N. W. 2d 634. At page 638 of that case, the Court quoted with approval from *Wholesale Tobacco Dealers Bureau of Southern California, Inc. vs. National Candy & Tobacco Company*, 1938, 11 Cal. 2d 634, 82 P. 2d 3, 118 ALR 486, as follows:

"It has now become firmly established that the police power of the state extends not only to the preservation of the public health, safety and morals, but also extends to the preservation and promotion of the public welfare. In recent years, the state, in promoting and advancing the general welfare of its citizens, has frequently and properly used this power to promote the general prosperity of the state by the regulation of *economic* conditions . . ."

See *Indianapolis Brewing Co. v. Liquor Control Commission of the State of Michigan, et al.*, 21 F. Supp. 969, 59 S. Ct. 254, 305 U. S. 391, 83 L. Ed. 243.

It is therefore our opinion that it is within the police power of the state to regulate automobile franchises by the enactment of fair trade laws assuming that the means used is reasonably related to the evils sought to be regulated thereby. The legislature, if it passed the bill under consideration in its present form, would have to find that the regulation of motor vehicle franchisors is in the public interest as it affects highway safety and economic conditions in the state. The preamble to the bill contains numerous considerations, as does the explanation, to that effect. Before a bill becomes law, it is or may be subjected to considerable debate as to its wisdom and whether it does in fact affect the public health, safety, or morals of the people of this state. Should the legislature pass the bill in question, the only issue for this office to pass on would be whether the means used are reasonably related to the evils sought to be remedied. It is not for us to say whether the bill is the most reasonable of all regulations which might be imposed, but only if the constitutionality required test of reasonableness has been met.

As noted above, the proposed law is intended to protect consumers by

providing for continuous service; to promote highway safety by insuring proper highway safety by insuring proper maintenance and service; and to insure that the economic stability of a state will not be disrupted or depressed. These are the evils to be corrected or avoided by the legislation. The means to the end is simply a process whereby an administrative hearing is necessary to determine whether (1) a francise can be terminated; (2) a franchise can be granted; or (3) additional franchises may be granted in the same town.

By regulating the termination of franchises, the legislature can insure continuity of service and economic stability. By forbidding too many franchises, the legislature is again insuring economic stability and, arguably, keeping services at a sufficient level of quality.

It appears that "the purposes and the means used to accomplish them are rationally related to the welfare and prosperity of the people of this state, and are a valid exercise of police power." See *INRC v. Van Zee*, 158 N. W. 2d 111; Iowa , 1968.

You have inquired whether H.F. 1137 constitutes arbitrary and discriminatory class legislation and, therefore, violates the Fourteenth Amendment to the United States Constitution which provides in relevant part as follows:

". . . 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."

In *Kuhl Motor Co. v. Ford Motor Co.*, supra, the Court was concerned with that portion of the Wisconsin Auto Dealership Law, Sec. 218.01(3)(a)(17), Stats, which provided that manufacturers could not unfairly, without due regard to the equities of said dealer and without just provocation, cancel the franchise of any motor vehicle dealer. The Court said at 71 N. W. 2d 427-8:

"The fact that the persons to be benefited by this regulatory measure are confined to one class of our citizens, auto dealers, does not militate against the same being a legitimate exercise of the police power."

See also *Forest Home Dodge, Inc. v. Karns*, 1965, 29 Wis. 2d 78, 138 N. W. 2d 214.

In *Williamson v. Lee Optical Co.*, 1955, 348 U. S. 483, 75 S. Ct. 461, 99 L. Ed. 563, the Supreme Court stated at 348 U. S. 489:

"The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Tigner v. Texas, 310 U. S. 141. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. Semler v. Dental Examiners, 294 U. S. 608. The legislature may select one phase of one field and apply a remedy there, neglecting the others. A. F. of L. v. American Sash Co., 335 U. S. 538."

Clearly, the legislature has the right to adopt regulatory and remedial legislation pertaining to the sale and distribution of motor vehicles to the public. H.F. 1137, on its face, is an attempt to do this. We are of the

opinion that H.F. 1137 does not constitute arbitrary and discriminatory class legislation.

You have inquired whether H. F. 1137 creates inadequate standards which are vague and indefinite, and are thus unconstitutional.

It is a general rule of constitutional law that:

"The legislature may delegate to executive offices or bodies the power to determine certain facts or conditions, or the happening of contingencies, on which the operation of a statute is, by its terms, made to depend, but the legislature must prescribe sufficient standards, policies or limitations on their authority."
16 CJS, Constitutional Law, § 138, pp. 583-585 (citations omitted).

In that respect, however, the Supreme Court of the United States stated:

"It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed stautory framework. See Opp. Cottin Mills v. Administrator, supra, 312 U. S. at pages 145, 146, 61 S. Ct. at pages 532, 533, 85 L. Ed. 624 and cases cited."
Yakus v. U. S., Mass., 64 S. Ct. 660, 667, 321 U. S. 414, 88 L. Ed. 834.

The U. S. Supreme Court has considered various standards set by Congress, but probably the most hotly contested standards were found in laws setting minimum wages. In *Opp. Cotton Mills v. Administrator of W. and H. D., etc.*, 61 S. Ct. 524, 312 U. S. 126, 85 L. Ed. 624 (1940), the Court stated at 61 S. Ct. 532:

"But where, as in the present case, the standards set up for the guidance of the administrative agency, the procedure which it is directed to follow and the record of its action which is required by statute to be kept or which is in fact preserved, are such that Congress, the courts and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed, there is no failure of performance of the legislative function.

* * *

"The Constitution, viewed as a continuously operative charter of government, is not to be iterpreted as demanding the impossible or the impracticable. The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective."

When viewing the present bill in light of the above pronouncement; we find the legislative policy to be explicitly stated in the introduction and further explained in §§ 2, 3, 4, 10, 14, and 15. All the noted sections deal with termination or noncontinuance of a franchise or the establishment of a franchise which termination, noncontinuance or establishment can only come about after hearing and decision by the commission, and then only after a determination that "good cause" has been shown.

If the statute allowed the commission to determine what constituted "good cause," a closer question would be presented. See *Pierce v. Inc. Town of La Porte City*, 1966, 259 Iowa 1120, 146 N. W. 2d 907; but see *Danner v. Huss*, 1965, 257 Iowa 654, 134 N. W. 2d 534, and *State v.*

Rivera, 1967, 149 N. W. 2d 127.

However, the legislature did not stop with an attempt to delegate a "good cause" standard. "Good cause" as used in H.F. 1137 is defined in both positive and negative terms in the following sections:

"Sec. 10. Notwithstanding the terms, provisions or conditions of any agreement or franchise, the following shall not constitute good cause for the termination or noncontinuation of a franchise, or for entering into a franchise for the establishment of an additional dealership in a community for the same line-make:

1. The fact that franchisor desires further penetration of the market.

2. The change of ownership of the franchisee's dealership or the change of executive management of the franchisee's dealership, unless the franchisor, having the burden of proof, proves that such change of ownership or executive management will be substantially detrimental to the distribution of franchisor's motor vehicles in the community.

3. The fact that the franchisee refuses to purchase or accept delivery of any motor vehicle or vehicles, parts, accessories or any other commodity or service not ordered by the franchisee."

Sec. 14. In determining whether good cause has been established for terminating or not continuing a franchise, the commission shall take into consideration the existing circumstances, including, but not limited to:

1. Amount of business transacted by the franchisee.

2. Investment necessarily made and obligation incurred by the franchisee in the performance of his part of the franchise.

3. Permanency of the investment.

4. Whether it is injurious to the public welfare for the business of the franchisee to be disrupted.

5. Whether the franchisee has adequate motor vehicle service facilities, equipment, parts and qualified service personnel to reasonably perform the necessary maintenance and repairs to the motor vehicles sold at retail by such franchisee."

"Sec. 15. In determining whether good cause has been established for entering into an additional franchise for the same line-make, the commission shall take into consideration the existing circumstances, including, but not limited to:

1. Amount of business transacted by other franchisees of the same line-make in that community.

2. Investment necessarily made and obligations incurred by other franchisees of the same line-make, in that community, in the performance of their part of their franchises.

3. Permanency of the investment.

4. Effect of the retail motor vehicle business as a whole in that community.

5. Whether it is injurious to the public welfare for an additional franchise to be established."

In *Danner v. Hass*, supra, the Iowa Supreme Court had to determine whether a legislative delegation to the Commissioner of Public Safety to determine what was a "serious violation" with reference to the motor vehicle laws contained sufficient standards to withstand a constitutional

challenge. Our Court quoted with approval from *La Forest v. Board of Commissioners*, 67 App. D. C. 396, 92 F. 2d 547, wherein that Court had to consider whether a suspension of operators permits was valid where the standard was "for any cause which they [commissioners] or their agent may deem sufficient."

" 'The delegation, when correctly understood, is confined to the right to take proper safeguards for the protection of life and limb through reasonable rules regulating traffic in the district, and the right to revoke or suspend the permit is limited to those cases in which there has been a breach, by the holder, of these reasonable rules. Considered in this aspect, it cannot be properly urged that Congress may not delegate a reasonable discretion to the Commissioners in carrying out the legislative intent expressed in the act.' "
134 N. W. 2d at 540.

When considered alongside such standards as "serious violation" (*Danner v. Hass*), "for good cause shown" (*La Forest*), and "to place signs where necessary to carry out the provisions of the chapter" (*State v. Rivera*), we believe that "good cause" as defined in the sections quoted herein contains much more detailed standards than any of the above cited cases wherein all were held constitutional. It is, therefore, our opinion that the House File in question contains sufficient standards and is constitutional in that respect.

As to the question concerning freedom of speech, we note that a prior opinion request on a similar bill (S.F. 539) asked the same question. However, that bill contained a section which stated as follows:

"Sec. 10. The use of coercion by the franchisor or any franchisee to obtain support for or consent to the establishment of any additional franchise for the line-make then represented by the franchisee shall be cause for denial of an application for the establishment of a franchise. Any request or solicitation, direct or indirect, by the franchisor or the franchisee shall be deemed coercion for the purposes of this section."

Because of that section, an opinion request was submitted concerning the impairment of free speech. That section is not in H.F. 1137, nor is any section in H.F. 1137 similar to the section quoted above. After a careful review of all sections of H.F. 1137, we find no part which in any way raises any constitutional question of free speech. We are therefore of the opinion that the answer to question 2E and question 5, must be in the negative.

You have questioned whether H.F. 1137 results in the taking of property by impairing the freedom to contract in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution.

First of all, it is clear that the motor vehicle industry is clothed with or affected with a public interest. In *Scarborough v. Webb's Cut Rate Drug Co.*, 1942, 100 Fla. 754, 8 So. 2d 913, the Court stated at 8 So. 2d 918:

"There is no magic in the phrase, 'clothed with or affected with a public interest.' Any business is affected by a public interest when it reaches such proportions that the interest of the public demands that it be reasonably regulated to conserve the rights of the public and when this point is reached, the liberty of contract must necessarily be restricted."

See also *Nebbia v. New York*, 1934, 291 U. S. 502, 54 S. Ct. 505, 78 L.

Ed. 940; *West Coast Hotel Co. v. Parrish*, 1937, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703.

In *Benschoter v. Hakes*, 1943, 232 Iowa 1354, 8 N. W. 2d 481, the Court stated at 232 Iowa 1361-2:

"It is true that under our form of government the use of property and the making of contracts are normally matters of private and not of public concern, but it is also true that when the use of property or the making of contracts is tinged with public concern, then the owners of the property and the contracting parties can be subjected to reasonable regulations and prohibitions by a lawful exercise of the police power. The parties who are subjected to the regulation receive their benefit by virtue of being part of the public in whose interest the regulations are imposed."

We are of the view that H.F. 1137 does not result in the taking of the franchisor's property by unconstitutionally impairing the freedom of contract. The franchisor and the franchisee are not restricted by H.F. 1137 from entering into contractual relationships. H.F. 1137 will prohibit arbitrary provisions in such contracts allowing franchisors to terminate franchises without good cause. However, if a franchisor has good cause to terminate a franchise or establish additional ones, H.F. 1137 provides a procedure for the same by application to the Iowa State Commerce Commission and subsequent appeal to the Courts. It is within the legislative perogative to deem the protection for the public of dealership services concerning motor vehicles paramount to the otherwise freedom of motor vehicle manufacturers to terminate or discontinue such dealership services without good cause or to establish additional dealerships where none are needed, all of which may cause diminution of such services.

You have raised the question of whether H.F. 1137 creates an arbitrary presumption and penalty in violation of due process of law.

Section 8 of H.F. 1137 provides that, upon hearing before the Iowa State Commerce Commission for termination or noncontinuance of a franchise or for establishment of an additional motor vehicle dealership, the franchisor has the ultimate burden of proof. Does this section of the bill create an arbitrary presumption? We think not.

In *Mobile, J. & K. C. R. R. v. Turnipseed*, 1910, 219 U. S. 35, 31 S. Ct. 136, 55 L. Ed. 78, the Supreme Court said at 219 U. S. 43:

"If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

H.F. 1137 does not create any conclusive presumptions. The bill does not preclude the franchisor the opportunity to submit his case to either the Commerce Commission or the Courts. If the franchisor violates the provisions of H.F. 1137 by termination or noncontinuance of a particular existing franchise or attempts to establish an additional franchise by noncompliance with this bill, § 16 states that no license shall be issued to that franchise or proposed franchise to engage in business of selling motor vehicles manufactured or distributed by the franchisor. Section 16 of H.F. 1137 does not create an arbitrary penalty. *Forest Home*

Dodge, Inc. v. Karns, 1965, 29 Wis. 2d 78, 138 N. W. 2d 214.

The next question you ask concerns whether the bill in question creates an unreasonable and unnecessary burden upon interstate commerce.

It is a general rule of constitutional law that the states may enact laws that have an effect on interstate commerce and that such laws may not be invalid merely because of such effect. See *Head v. Board of Examiners*, 374 U. S. 424, 10 L. Ed. 2d 983, 83 S. Ct. 1759.

"In marking out activities which, though subject to federal regulation under the commerce clause, are so intimately related to local welfare that, in the absence of congressional action, they may be regulated by the states, the primary test is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather, whether, in each case, the competing demands of the state and national interests involved can be accommodated."
15 Am. Jur. 2d, § 21, p. 654 (citation omitted).

It thus appears that state laws may be enacted which have an affect on interstate commerce, and that same will not be invalid unless the burden on interstate commerce is great in comparison to the benefit to the state.

A review of the police power of the state has been considered previously in this opinion. There is shown the legitimate interests of the state. The question with which we are now faced is, does the bill (H.F. 1137) impose a burden on interstate commerce, and, if so, does the burden weigh more heavily than the benefit to the state so as to be an unconstitutional burden on interstate commerce.

A reading of the bill shows on its face that one of the main purposes of said bill is to prevent termination or noncontinuance of a franchise unless good cause is shown. It is readily apparent that those provisions are intended to keep the flow of interstate commerce uninterrupted. The only encroachment on the flow of interstate commerce in the bill is § 15 which must be used in order to establish a franchise in a community where there is already a franchise being operated. However, there is nothing in that section which prevents an additional franchise in a community. The provisions of § 15 only insure that additional franchises will not be established if it will have a substantial adverse affect on other franchisees of the same line-make or if it would adversely affect the motor vehicle business as a whole or would be injurious to the public welfare.

As stated in *Huron Portland Cement Co. v. Detroit*, 1960, 362 U. S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852, 859:

"State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand."

We can see nothing in the pending bill which could be used to discriminate against interstate commerce. The only provision which might be invoked to regulate interstate commerce is § 15, above. That provision comes into effect only when a franchisor wishes to establish additional franchises of the same line-make in a community. Then, and only then, is the state in a position to adversely affect interstate commerce.

Merely being in that position is not unconstitutional. If the franchisor and prospective franchisee can show that the vital local interests will not be adversely affected, then the Commerce Commission will approve the additional franchise.

When the limited possibility of adversely affecting interstate commerce pursuant to § 15 is weighed against the vital local interests protected, and the provisions of the act which attempt to keep the flow of commerce intact, we are of the opinion that the state's interests far outweigh any impediment on interstate commerce. We therefore are of the opinion that there is no unconstitutional burden on interstate commerce.

You have questioned whether H.F. 1137 constitutes an improper delegation of legislative authority to an administrative agency, namely, the Iowa State Commerce Commission, precluded by the Iowa Constitution.

Article III, § 1, of the Iowa Constitution provides:

"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."

In *Lewis Consolidated School District v. Johnston*, 1964, 256 Iowa 236, 127 N. W. 2d 118, the Court noted at 256 Iowa 247-8:

"We also know that the trend of modern decisions is to liberalize the setting of standards and to require less exactness in regard to them in legislative enactments. But where standards or guidelines 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.'"

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 on which the law makes, or intends to make, its own action depend. *Spurbeck v. Statton*, 1961, 252 Iowa 279, 106 N. W. 2d 660; *State v. Van Trump*, 1937, 224 Iowa 504, 275 N. W. 569.

In *State v. Rivera*, 1967, ...Iowa....., 149 N. W. 2d 127, the Court stated at 149 N. W. 131-2:

"Much has been written about the problem of legislative delegation of power. Many apt quotations are to be found in the cited cases. We content ourselves with the following from Goodlove v. Logan, supra, 'In the case of McLeland v. Marshell County, 199 Iowa 1232, at page 1238, 201 N. W. 401, 403, 203 N. W. 1, it is said:

" 'It may be stated, in a general way, that it is for the legislature to determine what the law shall be, to create rights and duties, and provide a rule that must be followed by an administrative officer, but that an executive or commission may be vested by the legislative branch of the government with discretion, within certain limits, in carrying out the provisions of a statute.'

" 'And again on page 1240 of this same opinion in 199 Iowa, 201 N. W. 401, 404, 203 N. W. 1, this Court said:

" 'It is said in 1 Sutherland on Statutory Construction, §88:

" 'The true distinction is between the delegation of power to make the law, which involves a discretion as to what the law shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' "

It has been held that the revocation of a business license under a blue sky law for "good cause" was a sufficient standard and did not vest in the administrative agency an undue delegation of legislative authority. *G. F. Redmond & Co. v. Michigan Securities Commission*, 1923, 222 Mich. 1, 192 N. W. 688.

Applying the above legal authorities to H.F. 1137, it is clear that this bill does not delegate arbitrary and undefined discretion to the Iowa State Commerce Commission to say what the law shall be. Section 1 of the bill contains definitions of seven (7) terms used therein. Section 2 states the conditions upon which the franchisor is allowed by the Commerce Commission to terminate or refuse to continue a franchise, the basic condition of which is a finding by the Commission of "good cause." Section 4 of H.F. 1137 precludes the establishment of additional franchises in a community of the same line-make unless the franchisor establishes "good cause" in a hearing before the Commission. Sections 5 through 9, inclusive, establish the procedural machinery for hearings before the Commerce Commission, including notice provisions, burden of proof, and admissability of evidence. Section 10 of the bill enumerates what conditions, in and of themselves, will not constitute "good cause." Sections 14 and 15 of H.F. 1137 enumerate certain conditions which the Commission shall consider in determining whether good cause exists for the termination, noncontinuance, or establishment of additional franchises of the same line-make. Merely because one or more of these conditions are present would not preclude the Commerce Commission from finding good cause to allow the franchisor to terminate, discontinue, or establish new franchises.

Therefore, the Commerce Commission is not delegated the discretion to set up standards for H.F. 1137. The Commission is not allowed to deny a franchisor's application for no reason at all. The Commission is delegated the power to determine the facts and the state of things (good cause) on which H.F. 1137 makes its own action depend. The Commission is not delegated the power to make law, only a discretion as to the law's execution, to be exercised under and in pursuance of H.F. 1137.

In *Best Motor & Implement Co. v. International Harvester Co.*, 1958, 5th Cir., 252 F. 2d 278, a motor vehicle dealer's business was badly in default with no real prospects of recovery. The Court held that the manufacturer was entitled to cancel the dealership contract without violation of R.S. 32: 1254(4) (c) of the Lousiana Statutes which prohibited cancellation of motor vehicle dealer franchises without due regard to the equities of said dealer and without just cause. Clearly, the Court had no problem with a finding of "just cause" or "good cause" in this case.

In view of what we have said, we are of the opinion that H.F. 1137 does not constitute an undue delegation of legislative authority to the Iowa State Commerce Commission in violation of Article III, § 1, of the Iowa Constitution.

In conclusion, we wish to point out that our opinion should not be construed as implying that we are in favor of or opposed to the final enactment of H.F. 1137 by the legislature. We express no opinion on the wisdom or desirability of H.F. 1137 for such matters are for the legislature to determine.

February 10, 1970

TAXATION: Use Tax — § 423.2, Code of Iowa, 1966, as amended by Ch. 348, § 36, Acts, 62nd G. A.; §§ 423.5, 423.25, Code of Iowa, 1966. An Iowa resident who purchases a used motor vehicle in another state and who brings the vehicle back to Iowa for his use here is required to pay Iowa Use Tax, but is entitled to receive credit for tax paid to that other state pursuant to § 423.25. (Griger to Faulkner, Mahaska County Attorney, 2/10/70) #70-2-5

Mr. Hugh V. Faulkner, Mahaska County Attorney: We acknowledge receipt of your letter in which you have requested an opinion of the Attorney General as follows:

"A resident of Iowa purchased a used motor vehicle in the State of Illinois and brought said motor vehicle back to the State of Iowa for his use here. The question is whether or not he is required to pay use tax on this vehicle to the State under these facts."

Section 423.2, Code of Iowa, 1966, as amended by Ch. 348, § 36, Acts 62nd G. A., imposes the Iowa Use Tax on the use in this state of tangible personal property purchased for use in Iowa, at the rate of three percent of the purchase price of such property.

The Iowa Supreme Court, in interpreting § 423.2, has held that the Iowa Use Tax is imposed only where, at the time of the purchase of the property, the taxpayer-user has a specific intent to use that property in Iowa, and, in fact, does use it in this state. *Morrison-Knudsen Co. v. Iowa State Tax Commission,* 1950, 242 Iowa 33, 44 N. W. 2d 449; *Western Contracting Corp. v. Iowa State Tax Commission,* 1962, 253 Iowa 365, 112 N. W. 2d 326.

Section 423.5, Code of Iowa, 1966, provides:

"For the purpose of the proper administration of this chapter and to prevent evasion of the tax, evidence that tangible personal property was sold by any person for delivery in this state shall be prima-facie evidence that such tangible personal property was sold for use in this state."

In your letter, you stated that an Iowa resident purchased a used motor vehicle in the State of Illinois and brought the same back to Iowa for his use here. Pursuant to § 423.5, the fact that this used motor vehicle was sold for delivery in Iowa is prima-facie evidence that such vehicle was sold for use in Iowa.

Section 423.25, Code of Iowa, 1966, provides:

"If any person who causes tangible personal property to be brought into this state has already paid a tax in another state in respect to the sale or use of such property, or an occupation tax in respect thereto, in an amount less than the tax imposed by this title, the provisions of this title shall apply, but at a rate measured by the difference only between the rate herein fixed and the rate by which the previous tax on the sale or use, or the occupation tax, was computed. If such tax imposed and

paid in such other state is equal to or more than the tax imposed by this title, then no tax shall be due in this state on such personal property."

It is clear that the Iowa resident is required to pay Iowa Use Tax for the privilege of using this vehicle in this state, but if said resident has paid a tax in Illinois in respect to the sale or use of said vehicle, or an occupation tax in respect thereto, he is entitled to receive credit for the tax paid to Illinois pursuant to § 423.25.

February 10, 1970

TAXATION: Property Tax — Iowa Military Service Tax Exemption — § 427.3(4), Code of Iowa, 1966, as amended by Ch. 351, Acts 62nd G. A.; and §§ 427.5 and 427.6. The Coast Guard is a part of the armed forces of the United States. A four year veteran of the Coast Guard who has been honorably separated, retired, furloughed to a reserve, placed on inactive status or discharged and has served or is presently serving honorably on active military duty in the Coast Guard, during one of the enumerated periods as set out in § 427.3(4) of the Code of Iowa, 1966, as amended, and fulfills the timely filing requirements of §§ 427.5 and 427.6 is eligible for the Military Service Tax Exemption. (Petosa to Stephens, State Senator, 2/10/70) #70-2-6

Hon. Richard L. Stephens, State Senator: This will acknowledge receipt of your letter in which you request an opinion of the Attorney General on the following question:

"Is the U. S. Coast Guard a part of the Armed Services forces of the United States?

"Is a four year veteran of the Coast Guard after taking up civilian life eligible for serviceman's tax exemption?"

Section 427.3(4), Code of Iowa, 1966, as amended by Ch. 351, Acts 62nd G. A. and Ch. 253, Acts 63rd G. A., 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 second World War, . . . 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, as well as those serving honorably on active military duty."

The question then becomes, in light of the statute's wording, is a member of the Coast Guard a "soldier, sailor, marine, or nurse" within the meaning of § 427.3(4), and therefore eligible for the Military Service Tax Exemption? In *Jones v. Iowa State Tax Commission*, 1956, 247 Iowa 531, 74 N. W. 2d 563, the Court stated that in interpreting Iowa Code § 427.3(4), its terms such as who is a soldier, etc., are to be determined as they are used by the federal government.

Authority for the United States Coast Guard is found in title 14 of the United States Code. It is stated at 14 U.S.C.A. § 1:

"The Coast Guard as established January 28, 1915, shall be a *military service and a branch of the armed forces of the United States at all times.*" (Emphasis supplied)

This is supported by the definition of "armed forces" contained at 10 U.S.C.A. § 101(4), the general federal military provisions:

" 'Armed Forces' mean the Army, Navy, Air Force, Marine Corps, and Coast Guard."

Two prior opinions of the Attorney General have dealt with the questions of the eligibility of a Coast Guard veteran for veteran's benefits. 46 O.A.G. 144, 145; 32 O.A.G. 242. Both relied upon the fact that the Coast Guard may, in time of war or when the President directs, be removed from the jurisdiction of the Treasury Department and placed under the Navy. The opinions held that if the person served while the Coast Guard was attached to the Navy during an enumerated period, he would be eligible for the benefits. However, neither cited any authority nor dealt with the defining of the statutory terms of the Iowa and federal provisions. In addition the definitions of "armed forces" found at 10 U.S.C.A. § 101(4) was not promulgated until 1956, considerably after the opinions had been issued. As is stated in a recent opinion dealing with this statute, a copy of which is enclosed (O.A.G. Murray to Burrows, 10-15-69):

"It is to be noted that certain opinions of the Attorney General, as well as several Iowa Supreme Court decisions, have dealt with various factual situations, but have not developed consistent general rules with which to interpret the statute."

In answer to your first question, after examining § 427.3(4), Code of Iowa, 1966, as amended, and the federal statutes concerning the status of the United States Coast Guard, it is the opinion of this office that the Coast Guard is a part of the armed forces of the United States. In answer to your second question, a four year veteran of the Coast Guard who has been honorably separated, retired, furloughed to a reserve, placed on inactive status or discharged and has served or is presently serving honorably on active military duty in the Coast Guard, during one of the enumerated periods as set out in § 427.3(4) of the Code of Iowa, 1966, as amended, and fulfills the timely filing requirements of §§ 427.5 and 427.6 is eligible for the Military Service Tax Exemption.

February 18, 1970

CONSTITUTIONAL LAW: Racial discrimination — Articles II and III, Constitution of Iowa; S.F. 1112, 63rd G. A. A scholarship and tuition grant bill which would by its terms exclude members of a certain race from consideration for a certain number of scholarships on tuition grants would be unconstitutional. (Nolan to Smith, State Senator, 2/18/70) #70-2-7

Marvin W. Smith, State Senator: You have asked for an opinion on the constitutionality of Senate File 1112, 63rd G. A., a bill for an act to provide scholarships and tuition grants for non-Caucasian students. We understand that no federal funding would be involved.

Every reasonable presumption is indulged in favor of constitutionality of acts of the legislature. *State v. McNeal*, 1969, Iowa, 167 N. W. 2d 674.

However, it is our view that the proposed bill sets up a classification which has no reasonable basis in law. In *Brown v. Board of Education*,

347 U. S. 483, 74 S. Ct. 686 the United States Supreme Court decided that there is no correlation between race and scholarship ability or need. In a series of subsequent decisions the courts have restated again and again the strong public policy of eliminating racial discrimination. The bill proposed appears to fly in the face of such policy by *requiring* that the Higher Educational Facilities Commission:

"Provide that at least fifty scholarships or tuition grants be awarded annually to qualified non-Caucasian students."

Such requirements excludes all others who are qualified students and thereby does not apply equally among the class of "qualified students" and is not uniform in the constitutional sense. The power to classify includes a like power to sub-classify but the sub-classification may not be unreasonable or arbitrary. *Collins v. State Board of Social Welfare*, 1957, 248 Iowa 369, 81 N. W. 2d 4.

In our view this is a delegation of authority in violation of Articles II and III (as amended in 1868) of the Iowa Constitution.

February 19, 1970

CRIMINAL LAW: Prize fighting — § 727.5, Code of Iowa, 1966, as amended by Ch. 304, § 1, Acts of the 63rd G. A. Prize fighting discussed. (Martin to Dutton, Black Hawk County Attorney, 2/19/70) #70-2-8

Mr. David J. Dutton, Black Hawk County Attorney: I have received your letters of January 26, 1970 and February 9, 1970 and the statement taken from an individual whose activities you are investigating. Your inquiries ask this office to rule on whether this individual's activities fall within the provisions of § 727.5, Code of Iowa, 1966. You indicate that you are concerned with a specific situation in which the expenses of boxers have been paid in connection with appearances in boxing matches in the city of Waterloo.

Section 727.5, Code of Iowa, 1966, as amended by Chapter 304, § 1, Acts of the 63rd G. A., provides as follows:

"Whoever engages in any boxing contest or sparring exhibition with or without gloves for a prize, reward, or anything of value, at which an admission fee is charged or received, either directly or indirectly, and whoever knowingly aids, abets, or assists in any such boxing contest or sparring exhibition, and any owner or lessee of any ground, lot, building, hall, or structure of any kind knowingly permitting the same to be used for such boxing contest or sparring exhibition, shall be fined not exceeding three hundred dollars, or imprisoned in the county jail not exceeding ninety days. This section shall not apply to amateur boxing."

Only the last sentence "This section shall not apply to amateur boxing" was added by the first session of the 63rd General Assembly. Otherwise, the law has been the same for many years.

In 1922 O.A.G. 368, the elements of the offense of violation of § 727.5 were set out as follows:

"For such an exhibition to be criminal under the provisions of the section above quoted, two things are essential.

"1. The exhibition shall be for a prize, reward or anything of value.

"2. An admission fee is charged or received directly or indirectly. In the absence of either one of these two essentials, the sparring exhibition is not prohibited in our opinion."

Under the statute as it now stands, a third element has been added. The fight must not have been an amateur bout.

We assume that in the particular case to which you refer, an admission fee was charged. We also assume that the losers as well as the winners received their personal expenses. In other words, the expenses were not the prize. The question thus becomes whether the payment of expenses such as meals, lodging, transportation, and other incidental expenses, falls within the exception for amateur boxing within meaning of § 727.5, Code of Iowa, 1966.

We have not been able to find definitions of the term "amateur" in the Iowa law. *Webster's Third New International Dictionary Unabridged*, 1966, defines amateur as follows: ". . . one that engages in a particular pursuit, study, or science as a pastime, rather than as a profession . . . one that competes in sports or athletics for pleasure rather than for financial gain . . ."

While we understand that you desire our opinion on the specific facts set forth in the statement which you have forwarded to us, it is not the function of an attorney general's opinion to find a person guilty of a crime. This may be done only upon trial of the case with the defendant afforded his full rights of defense. It is well settled, of course, that it is the special province of a jury to pass upon questions of fact. Based upon this, it is our opinion that a jury may be presented with the case and instructed concerning the term "amateur" along the lines suggested in the above set out definition.

It appears from the court reporter's statement at a hearing held pursuant to the county attorney's subpoena that this individual, who is evidently the promoter of the boxing contest in question, will contend, and offer evidence, that so-called amateur athletes, including boxers, tennis players, track stars, hockey players, etc., often receive some type of remuneration in addition to their expenses, even in America. I think this is commonly known and, indeed, the first session of the 63rd General Assembly appears to have recognized it because prior to this last amendment "any boxing contest * * * for a prize, reward, *or anything of value*, at which an admission fee is charged or received, either directly or indirectly" was already unlawful in Iowa. Thus, even amateur boxing was unlawful in Iowa prior to the amendment if the boxer received "anything of value" and the other circumstances were present. But the legislature now clearly says that amateur boxing is not unlawful even though the participants do receive "a prize, reward, or anything of value" and notwithstanding that "an admission fee is charged or received, either directly or indirectly."

Undoubtedly, it will be argued that Webster's definition does not necessarily preclude an amateur from receiving compensation; that Webster keys its definition to the subjective test of the participant's intent in much the same manner as, for example, the law looks at "residence" as the place where one intends to remain. Just as one may own a home in

one place and nevertheless be considered a resident of another, one may pursue a sport as a pastime, rather than as a profession, or compete in athletics for pleasure, rather than financial gain, and compensation will not necessarily alter the participant's state of mind or reason for pursuing his endeavor. It will be urged that this is particularly true if he has other income or resources. Moreover, it may also be argued that merely because the boxers have taken part in professional bouts elsewhere, or even that they, or the Olympic Committee or the Intercollegiate Boxing Association consider them professionals or non-amateurs does not render the particular match in which they take part "professional boxing." Professionals may possibly be allowed to take part in amateur events. It is professional *boxing*, not boxers, that is proscribed by the statute, which expressly does not apply to "amateur boxing." Of course, the jury might find otherwise upon being told that a substantial number of the participants are "sometimes professionals" in some states other than Iowa but amateurs only when they fight in Iowa. A jury may balk when it hears that the fighters can switch their professional status off and on so conveniently as to bring the boxing contest within the amateur provision of the Iowa statute.

If you desire further advice concerning your handling of this matter in areas such as strategy or evidence, you may contact us. An attorney general's opinion is generally not useful for this type of advice when litigation is imminent.

February 19, 1970

STATE OFFICERS AND DEPARTMENTS: State Employees — § 79.1, Code of Iowa, 1966. Established practices for application of § 79.1 to state employees would not be altered by measure changing provisions relating to allowing vacations. The legislation would not operate so as to apply § 79.1 to city and county employees not previously covered. (Turner to Hougen, State Senator, 2/19/70) #70-2-9

Chester O. Hougen, State Senator: Reference is made to your letter of February 18, 1970, enclosing House File 1197, 63rd G. A., (Second Session), and amendments thereto, which would amend : 79.1, Code, 1966, in which you propound these questions:

"1. Does this section include employees only on the state payroll, or does it include all college professors and employees, school teachers, county and city employees.

"2. Do lines one through nine of the Hougen amendment amending the House Bill which extended vacation periods, give an employee with one year of employment three weeks vacation instead of one?"

As you note in your letter, § 79.1 applies to "all employees of the state including highway maintenance employees of the state highway commission." The pending bill, and amendments, altering the formula for allowing vacations would apply to all those within the terms of the statute.

There is in general no problem about who or who are not state employees. The several categories of employees now are treated as belonging to one class or the other as a matter of course. These practices for the most part rest upon the sanction of long precedent, without having been questioned, rather than upon clear cut, precise enactment.

Legislative cognizance that not all public servants are employees of the state plainly appears in the declaration that the purpose of the IPERS act is "to promote efficiency and economy in the *public service*" and to induce qualified persons "to enter *public service* in the state." § 97.2 Code, 1966. [Emphasis added.] Thus the legislative intent was, and the practice has been, to apply the IPERS act to all persons on public payrolls in Iowa, whether city, county or state. On the other hand, the merit system of employment was limited in its application "to all employees of the state" with certain enumerated exceptions. *Ch. 95, § 3, Laws 62nd G. A.*

The provisions on vacations, which would be altered by the pending bill and amendments, historically has been applied to employees of the state but not to those of cities and counties. These provisions have applied to many employees of the Board of Regents, but not to sundry academic personnel. In this regard we note that the merit act provides:

". . . 6. All presidents, deans, directors, teachers, professional and scientific personnel, and student employees under the jurisdiction of the state board of regents." Ch. 95, § 3, Sub. 6. Laws, 62nd G. A.

The practice of the Regents, who have broad powers under §§ 262.7 and 262.9, Code of Iowa, 1966, is by this section made specific in the merit act. Also relevant is that portion of § 79.1, Code of Iowa, 1966, authorizing the Regents to set up sick leave grants for persons employed "nine months or more" in a twelve-month period, *e.g.* professors.

Accordingly my opinion is that application of §79.1 to employees of the Regents would not be altered by the pending bill and its amendments, and that the bill and amendments would not operate to extend the vacation provisions of § 79.1 to public employees not now covered by them, such as school teachers, or city and county employees.

In response to your second question, I can say only the Hougen amendment is quite clearly stated, and — like any statute — is open to restatements, each literally correct but of different emphasis. This amendment provides that one employed prior to January 1 shall, after working six months, have one week of vacation and that one who has worked a full year shall have two weeks vacation. Add these up and it does, indeed, appear that one who has worked barely a year has three weeks off coming to him. With equal truth, if he did not get his two weeks until his twenty-fourth month of employment, it could be said the employee worked nearly two full years before he got the three weeks the law allows him. The practical consideration, when the vacation is allowed, is one of administration; if the supervisors are lax or incompetent the proposed provision, and any other provision that could be enacted, could be abused.

February 26, 1970

WELFARE: Legal responsibility of parents for minor children in AB, AD, or ADC Assistance under Chapters 241.1, 241A.1, 239.1, 1966 Code of Iowa as amended by Chapter 211, § 1, 62nd G. A. and Chapter 152, § 11, 1st Session, 63rd G. A.; Title 42, U.S.C. § 1202, subsection (a); Title 42 U.S.C., § 1351 and § 1352 (a)(8); Title 42 U.S.C., § 601; Parents of a minor child are liable for the necessaries of a minor child whether under 18 years of age or between the ages of 18 and 21 years;

if a child under 21 years of age reaches her majority by marriage and is divorced, the parent's liability for her support terminate unless she is a dependent under Chapter 252A, 1966 Code of Iowa, being "unable to maintain herself and is likely to become a public charge." (Williams to Gillman, Commissioner, Iowa Dept. of Social Services, 2/26/70) #70-2-10

Mr. James N. Gillman, Commissioner, Iowa Department of Social Services: You have requested an Attorney General's Opinion regarding the granting of assistance under the welfare program in the State of Iowa for persons between the ages of 18 and 21. In your letter dated January 19th, you pose the following questions:

"1. If a child between the ages of 18 and 21 applies for AB, AD, or ADC (for her child) and such 18 year old lives outside the home of her parents, what legal responsibility do her parents have to contribute toward her support?

"2. If the child, between 18 and 21, living in the home of his or her parents applies for assistance, what legal responsibilities have the parents to contribute to his or her support?

"3. If the child has been married, then subsequently deserted, divorced or separated is there any difference in the answer to questions 1 and 2?

"4. If there is a different responsibility between 1 and 2, what is the difference and why?

"5. If the age of the client is under 18 years of age what would the opinions be as related to the questions enumerated above?"

I

Parent of a minor child are liable for the necessaries for that minor child although the child is not living with them or is not in their custody.

Section 597.14, 1966 Code of Iowa, captioned Family Expenses reads as follows:

"The reasonable and necessary expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately."

We find the definition of minor children in § 599.1, 1966 Code of Iowa, which reads as follows:

"§ 599.1 Period of minority. The period of minority extends to the age of twenty-one years, but all minors attain their majority by marriage, and females, after reaching the age of eighteen years, may make valid contracts for marriage the same as adults."

Thus, be reason of the foregoing quoted statute, an unmarried child between the ages of 18 and 21 is a minor, and his parents are obligated to provide him support.

This liability is imposed upon both the mother and the father by the statute. [At common law, however, only the father was liable for the support of his minor children. (*Addy vs. Addy*, 240 Iowa 255, 36 N. W. 2d 352)]

A step-father living in the home of his minor step-children is also liable

for their support. (*Rule vs. Rule*, 204 Iowa 1122, 216 N. W. 629; *Minor Heirs of Bradford vs. Bodfish*, 39 Iowa 681; *Adoption of Cheney*, 244 Iowa 1180, 59 N. W. 2d 685; and *Chapter 252A*, sub-section 3, 1966 Code of Iowa)

The father of said minor children who is divorced from their mother is liable for the support of the minor children even though they reside with the mother, and he had no knowledge of medical expenses incurred by the mother for the child. (*Stech v. Holmes*, 210 Iowa 1136, 340 N. W. 326) It is also the law of this state that a father cannot be relieved from the duty to support his minor children by an agreement with their mother. (*Jaffe vs. Jaffe*, 182 N. W. 784)

The early landmark case in Iowa which required a father to furnish family necessaries to a minor child residing away from the homestead is *Porter vs. Powell*, 79 Iowa 151, 40 N. W. 295, wherein a minor daughter, aged 14, moved from her home and became self-supporting. When at age 17 years she became ill, an action was started for medical expenses furnished to her. The Supreme Court upheld the judgment holding the father liable for such obligations, saying at pages 157 and 158:

". . . The obligation of parents to support their minor children does not arise alone out of the duty of the child to serve. If so, those who are unable to render service because of infancy, sickness or accident — who, most of all others, need support — would not be entitled to it. Blackstone, in his Commentaries (volume 1, page 446), says: 'The duty of parents to provide for the maintenance of their children is a principle of natural law — an obligation . . . for they would be in the highest manner injurious to their issue if they only gave their children life that they might afterwards see them perish. By begetting them therefore, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have the perfect right of receiving maintenance from their parents.' This obligation to support is not grounded on the duty of the child to serve, but rather upon the inability of the child to care for itself. It is not only a duty to the child, but to the public. . . ."

The Iowa statutes providing for support payments to needy individuals do not alter the legal liability of a mother and a father to support their minor children between the ages of 18 and 21 years of age wherever they reside.

In the year 1957 the Iowa Supreme Court in *Bouska vs. Bouska*, (249 Iowa 281, 86 N. W. 2d 884) observed that while parents are equally liable for the support of their minor children, they may contract between themselves as to that liability for support, but "a parent may not be entirely relieved from such liability; the public policy of the state forbids."

In *Addy v. Addy*, (240 Iowa 255, 36 N. W. 2d 352) the father urged a defense that no action for the support of his minor children would lie unless the child is "dependent, neglacted or delinquent" within the meaning of Code Section 232.5, or a "poor person" within Code Section 252.1, or the action is by a third person by an action under Code Section 597.14. To the defense, the Supreme Court of Iowa, speaking through Justice Garfield, said at pages 263 and 264:

". . . The argument cannot be accepted . . . The effect of this argument is that a father is under no enforceable duty to support his child

unless the latter is 'dependent, neglected, or delinquent' or a 'poor person' or unless a third party seeks recovery under section 597.14. The father's duty of support is not measured by these statutes. It is the right of the child to receive and the obligation of the parent to furnish support to the end [that] resort to any of the statutes need not be had."

The question herein is related to the welfare programs in which there is Federal-State joint participation, [Aid to the Blind, Aid to the Totally Disabled, and Aid to Dependent Children].

The Federal Social Security Law, as well as the Iowa statutes in these three categorical programs, provide for assistance to only needy individuals, and makes it mandatory that any resources be considered in fixing the amount of assistance grant.

In the Federal Social Security Law and the 1966 Code of Iowa, Chapters 241, 241A and 239 as amended by Chapter 211, § 1, 62nd G. A. and Chapter 152, § 11, 1st Session, 63rd G. A., such provisions are found in the following sections:

1. Aid to the Blind, Title 42 U.S.C., § 1201, "Needy Individuals who are Blind"; Title 42 U.S.C., § 1202, sub-section (a) "A state plan for the Aid to the Blind must . . . take into consideration any other income and resources . . ."

Chapter 241.1, 1966 Code of Iowa "Assistance to a Needy Blind Person"; 241.2, 1966 Code of Iowa, subsection 8 "Has not sufficient income or other resources. . ."

2. Aid to the Totally Disabled, Title 42 U.S.C., § 1351, "Needy Individuals 18 Years of Age and Older Who Are Permanently and Totally Disabled"; Title 42 U.S.C. § 1352, "(a) A State plan . . . must . . . (8) . . . take into consideration any other income and resources . . ."

Chapter 241A.1, 1966 Code of Iowa, 4. "Disabled Person in Need"; Chapter 241A.2, sub-section 4 "Has not sufficient income or resources."

3. Dependent Children, Title 42 U.S.C. § 601, "Needy Dependent Children," § 602 "(a) a state plan . . . must (7) take into consideration any other income and resources of any child or relative claiming aid to families with dependent children . . ."

Chapter 239.1, sub-section 3, 1966 Code of Iowa, "Needy child under the age of sixteen years or under the age of twenty years and a student and . . ."

Chapter 164, First Session, 63rd General Assembly "The county board shall take into consideration the income and resources of any child or relative . . ."

When an unwed mother between the ages of 18 and 21 who resides outside the home of her parents applies for ADC for her child, (as she can do pursuant to Chapter 164, Sections 1 and 2, First Session, 63rd General Assembly), the legal liability for her support is not altered.

Parental support is a resource which must be considered in any public assistance grants in the Aid to the Blind, Aid to the Totally Disabled, or Aid to Dependent Children Programs, both by Federal and State law. This was made clear in the pronouncement of the United States Supreme Court on June 17, 1968 in the case *King vs. Smith,* (392 U. S. 309, 20 L. Ed. 2d 1118, 88 S. Ct. 2128) when referring to the 1968 amendments to the Social Security Act. (These amendments included provisions which require the states, effective January 1, 1969, to report to the Department

of Health, Education and Welfare any parent against whom an Order for Support and Maintenance of such child or children has been issued by a Court if such parent is not making the required support payments, and require the states to cooperate with the Department of Health, Education and Welfare in locating any parent against whom a support Petition has been filed in another state and in securing compliance with any Support Orders issued by another state.)

After referring to those amendments, the United States Supreme Court in its Majority Opinion, at page 1134 said:

"[15] The pattern of this legislation could not be clearer. Every effort is to be made to locate and secure support payments from persons legally obligated to support a deserted child. . . . The provisions seek to secure parental support in lieu of AFDC support for dependent children. . . ."

II

The writer believes that the foregoing answer to question No. 1 sufficiently responds to question No. 2.

III

You ask if a daughter reaching here majority by marriage and later divorces her husband relieves her parents from legal liability for her support. In the absence of being a dependent within the meaning of Chapter 242A, 1966 Code of Iowa by reason of some physical or mental disability, the parental responsibility for support is not reinstated.

In an early Attorney General's Opinion, reported in volume 1923-1924, at page 330, the Commissioner of Labor asked: "What is the effect of- . . . divorce, upon the status of a minor who has attained his majority by marriage, as provided under § 3188 of the Code of 1897" [§ 599.1, 1966 Code of Iowa]. The answer given there was ". . . The decree of divorce places the party in a new status of relationship and does not restore them to their former status."

If the divorced minor child, however, is under the terms of Chapter 252A, 1966 Code of Iowa "unable to maintain himself and is likely to become a public charge," the parental responsibility for support is not terminated.

In the Iowa decision, *Davis vs. Davis*, 246 Iowa 262, 67 N. W. 2d 566 a handicapped son was age 30. His parents were divorced and he was living with the mother. An action was brought against the father for the support of his son, who resided in the same County within the State of Iowa pursuant to Chapter 252A, 1966 Code of Iowa, titled "Uniform Support of Dependents Law."

At page 266 in the *Davis* case the Supreme Court of Iowa, speaking through Justice Garfield, said:

"[2] It is true, as respondent suggests, that generally at common law a parent's obligation to support his child ends when the latter becomes of age. But there is an important, widely recognized exception to this rule where the child because of weak body or mind is unable to care for

itself upon attaining majority. The obligation to support such a child ceases only when the necessity for the support ceases. Courts throughout the land have so held emphatically and eloquently. This case plainly falls within this exception to the general rule.

"[3] In support of what we have just said see Pocialik v. Federal Cement Tile Co., 121 Ind. App. 11, 17, 97 N. E. 2d 360, 363 ('The tendency in most jurisdictions in this country where the question has arisen * * * is to find that there is an obligation to support defective children who are unable to support themselves upon attaining their majority.'); In re Glass' Estate, 175 Kan. 246, 262 P. 2d 934; Williams v. West, Ky., 258 S. W. 2d 468, 473 (holding the decided weight of authority is, it is not necessary that the adult child live in the father's home); Breuer v. Dowden, 207 Ky. 12, 268 S. W. 541, 42 A.L.R. 146, and annotation 150, 154; Wells v. Wells, 227 N. C. 614, 44 S. E. 2d 31, 1 A.L.R. 2d 905, and annotation 910, 921; Van Tinker v. Van Tinker, 38 Wash. 2d 390, 229 P. 2d 333, 334; 39 Am. Jur., Parent and Child, section 69; 67 C.J.S., Parent and Child, Section 17.

"See also Anderson v. Anderson, 124 Cal. 48, 56 P. 630, 71 Am. St. Rep. 17; Perla v. Perla, Fla., 58 So. 2d 689, 690; Borchert v. Borchert, 185 Md. 586, 591, 45 A. 2d 463, 465, 162 A.L.R. 1078, 1081 ('The doctrine of liability in a father to support an incapacitated adult child seems to have permeated the courts of this country, in many cases without any statutory enactment to support it.'); Commonwealth ex rel. Groff v. Groff, 173 Pa. Super. 535, 98 A. 2d 449, 450."

IV

The foregoing answer to question No. 1 sufficiently answers the question numbered 4. There is no difference in the legal responsibilities of parents to support their minor children between the ages of 18 and 21 whether they live within or without the home of the parents.

V

Whether the child is under 18 or between the ages of 18 and 21, the foregoing answers are the same concerning civil liability.

There is also a recent criminal statute which makes it a crime for parents not to support their minor children under the age of 18. Chapter 205, § 2, 62nd General Assembly, reads as follows:

"Sec. 2. Section two hundred thirty-three point one (233.1), Code 1966, is hereby further amended by striking all of subsection five (5) and inserting in lieu thereof the following:

'5. For a parent willfully to fail to support his child under eighteen years of age whom he has a legal obligation to support.' "

February 26, 1970

WELFARE: Resources in fixing ADC grants; legal responsibility of parents to support children is a resource within the meaning of the Social Security Act, Title 42 U.S.C. § 602(a)(7) and § 239.5, 1966 Code of Iowa, as amended by Chapter 165, Acts of the First Session, 63rd General Assembly. (Williams to Knoke, Pottawattamie County Attorney, 2/26/70) #70-2-11

Mr. George J. Knoke, Pottawattamie County Attorney: You have requested an Attorney General's Opinion concerning the legality of the policy stated by the Iowa Department of Social Services in failing to

recognize the legal obligations of a father to support his child as a resource to be considered in arriving at the amount of a grant.

You state the facts to be:

"On the 10th day of September, 1969, the County Board was presented an ADC application for Board approval pursuant to ICA, Supp (1970) 239.5. The instant case involved application by the maternal grandmother, as payee only, for her unwed 16 year old daughter and her two illegitimate children.

"The County Board duly approved this application and fixed the amount of the grant pursuant to the authority of Section 239.5, thereby reducing the maximum grant by that portion which by State Department of Social Services standards is allocated to shelter and utilities.

"Upon being advised of the Board's action, the payee filed an Appeal (#1538) to the State Department of Social Services. Hearing was held on October 14, 1969. By a letter dated December 19, 1969 the State Department advised our County Board that it had reversed its decision, and instructed the County Director 'to refigure the grant, in its proper amount, retro-active to the date the incorrect action occurred.'

"The State Department's decision is purportedly based upon their Circular Letter No. 27Z-32-BIMS which relates to a change in basic policy governing computation of assistance grants, and more specifically paragraph two therein."

The circular letter referred to above is dated November 13, 1968, and the second paragraph contains the following illustration which is pertinent to the facts in the case you cite and reads as follows:

"The other change in this area pertains to those situations comprised of an unmarried mother under age 21 and her child(ren). Under the new policy the basic needs of such a mother and her child will be considered as a separate and distinct unit regardless of the fact she may be living with her parents who are self-supporting or with her parents who are also receiving assistance. *Example:* The household consists of the ADC payee and her two minor children having basic needs of $201. In the event her unmarried nineteen year old daughter returns home with her child there will be no change in the basic needs of $201 for the payee and her two eligible children. The basic needs of the daughter and her child shall be established by column 2 of the Schedule of Allowance at $152. The total basic needs included in the one grant will amount to $353."

You then ask:

"Does the County Board of Social Welfare have the authority to reduce an assistance grant by an amount equivalent to the portion which, by state standards, is allocated to shelter and utilities in each of the following instances:

1. Where an unemancipated minor unwed mother and her child resides in the home of her parent?

2. Where an emancipated minor unwed mother and her child resides in the home of her parents?"

Prior to July 1, 1969, the County Board in the first instance fixed the grant "subject to the approval of the State Division." Section 239.5, Code of Iowa, 1966 as amended by Chapter 209, § 288, 62nd General Assembly, (1967) reads in part:

"The County Board shall, on the basis of actual need, fix the amount

of assistance necessary for any dependent child, subject to the approval of the State Division, with due regard to the necessary expenditures of the family and the conditions existing in each case, taking into consideration any income or other resources of any child claiming assistance under this Chapter and any private resources found to be available to such child."

The portion of § 239.5, as amended, above-quoted, was deleted by Chapter 165, § 1, Acts of the First Session, 63rd General Assembly (1969), and the following language substituted:

"The County Board, in accordance with rules and standards established by the State Department of Social Services, shall fix the amount of assistance necessary for any dependent child. In determining the amount of assistance, the County Board shall take into consideration the income and resources of any child or relative claiming assistance under this Chapter. However, in fixing the amount of assistance for any child or family, the county board, in accordance with rules established by the state department of social services, may disregard a reasonable amount of the income of the child or the family, in order to encourage the family or any of its members to become self-supporting. . . ."

Unless the policy as stated by the State Department in its rules and regulations exceeds the authority and power of the State Department, they are binding upon the County Boards in connection with the fixing of the assistance grants.

Actions by an Administrative Agency which exceeds its authority, however, are illegal and ultra vires. In *State of Iowa ex rel, Ray Fenton vs. Arthur Downing*, (1969), Iowa, 155 N. W. 2d 517, the action of the Iowa State Board of Social Services was challenged in a quo warranto proceeding by the County Board of Social Welfare in Polk County. In holding that the State Board has exceeded its power, the Court at page 520 said:

"[9] IV. Appellant argues that the court has no authority to interfere with a discretionary act of an administrative board. That is true as a general proposition but it does not follow that the court may not interfere when an administrative board attempts to act beyond its power."

The legality of the policy then should be examined in accordance with your request.

The Federal Social Security Act makes it mandatory upon the state to consider resources in fixing the amount of a grant. Title 42 U. S. C., § 602, reads in part as follows:

"(a) A State plan for aid and services to needy families with children must . . . (7) except as may be otherwise provided in clause (8), 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, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income; . . ."

This precise question has never been raised by previous Attorney General requests nor cases in the State or Federal Courts of Iowa.

In the United States District Court for the Northern District of Cali-

fornia, however, a Three Judge Court decided that a regulation of the Department of Health, Education and Welfare was illegal as it violated the above-quoted Federal Social Security Act. *Lewis vs Montgomery,* ... F. Supp. ..., probable jurisdiction noted 38 Law Weekly (323). (This is now on Appeal to the Supreme Court). Two actions were combined in this case. One concerned the resources available to a child where a man, unmarried to the mother, lived in the home; and another involved the question of a step-father instead of a man living in the home controversy. The California statute required an adult person assuming the role of spouse to support his wife's children if he is able to do so ". . . if without support from such . . . adult male person they would be needy children eligible for aid under this chapter." In reciting the facts, the Court said:

"The MARS' (Man Assuming Role Spouse) ability is determined by the state according to established categories of allowable income and deductions. Under California's statute and regulations, the amount of assistance to the needy family is reduced by the amount of income which the state has computed to be available from the MARS. Under the HEW (Health, Education and Welfare) regulations, the amount of assistance may be reduced only by the amount of proved contributions. . . . Under the HEW regulations the family is considered needy; under California law it is not."

In rendering its decision, the Three Judge Court stated:

"Plaintiffs contend that the HEW regulations must prevail over the California practice because the regulations were adopted pursuant to an act of Congress. We disagree, for we find the California practice, and not the HEW regulations to be in accord with the Social Security Act. As mentioned above, the Act requires the states, in determining need, to consider 'any other income and resources of any child.' 42 U.S.C. § 602 (a) (7). The Act does not instruct states to consider only resources guaranteed by the legal consequences of a marital or biological relationship. Nor does the Act instruct the states to consider only resources whose receipt by the child has been proved. . . . In addition to upholding the California practice for the reason that the HEW regulation violates the policy of the Social Security Act, this court also finds that the regulation, by dictating to the states the manner in which they shall consider income and resources, intrudes upon an area reserved by federal law and policy to the states. As the Supreme Court has noted, the 'AFDC program is based upon a scheme of cooperative federalism.' *King v. Smith,* 392 U. S. at 316. Under this scheme, the states have the sole responsibility for determining the standard of economic security. Moreover, the legislative history of the Act makes clear that the States have the sole power to determine who is needy. Id at 319 n. 14. As one Representative said during the floor debates, 'need is to be determined under the State law.' Id at 319 n. 14. . . ."

The Court then discussed the distinguishing features between the case before it and the facts and holdings in *King vs. Smith,* and said:

"This case is quite different. . . . California . . . simply considers the man's income in computing the welfare grant. It provides for a reduction of payments to the extent the man has *actual* ability to support . . . California determines whether a legally fatherless child is destitute before granting, limiting or denying aid, and that determination includes the 'reasonable' inquiry as to whether the child has a MARS *to look to for support which the state obligates him to provide.*" (Emphasis added)

Also, the California Federal 3-Judge Court said:

"First, we repeat that payments from an able MARS are compelled

by law. If the state assumed the availability of resources whose application to the needs of the family were not required by law, that would present a different case. Here the MARS is under a legal obligation to support the children. Welf. & Inst. Code § 11351.

We are reluctant to prohibit the state from operating on the assumption that the law has been complied with. Nor are we in a position to deny to the state a logical method for encouraging compliance with the law. As one authority has observed, the practice of budgetary modification was adopted not so much to measure contributions actually being made as to see to it that contributions were made."

Continuing, and concluding, the Court said:

"California's budgetary rules obligate a man assuming the role of spouse to contribute his income, to the extent that he is able, to an otherwise needy AFDC family. To the extent of the MARS' administratively determined ability, the grant to the AFDC family is reduced. Although this practice conflicts with a recent HEW regulation requiring proof of actual contributions, we sustain it because we find the HEW regulation to be inconsistent with the language and policy of the Social Security Act, an unfounded intrusion into a province reserved by the Act and its legislative history for the states, and therefore invalid. . . ."

The Iowa Legislature at its last Session (First Session, Sixty-Third General Assembly), commands the County Board "in determining the amount of assistance, *the County Board shall take into consideration the income and resources* of any child or relative claiming assistance under this chapter." It repealed the provision "and any private *resources found to be available* to such child."

A parent is legally obligated to support his minor children, (See Attorney General Opinion of even date herewith, Williams to Gillman, Commissioner of Social Services); and that *legal obligation* is a resource within the meaning of these laws.

The policy stated in Circular Letter 27Z-32-BIMS exceeds the authority and discretion of the State Department of Social Services, for it is contrary to the state statute and federal law requiring resources to be considered in fixing need.

In the fact situation in the case before the Pottawattamie County Board of Welfare, not only is the father of the unwed mother of the two illegitimate children legally liable to support his daughter, he also is doing so. Any grant for her should be deleted from the amount fixed by the County Board, as this legal responsibility is a resource to said unwed mother. Since she has her two illegitimate children living with her at the home of her father, they have as a resource to them the cost of utilities and shelter, and no allowance for these items should be included in the grant.

February 27, 1970

ELECTIONS: Calling of Constitutional Convention — 1964 Amendment, Constitution of Iowa, §§ 49.43 and 49.48, Code of Iowa, 1966. The question of calling a constitutional convention which by the 1964 amendment to the constitution must be submitted to the voters in 1970 and every ten years thereafer, is not itself a constitutional amendment nor is it a public measure. Hence, in 1970 where paper ballots are used it could be placed on a ballot separate and distinct from the three con-

stitutional amendments or on the same ballot with them as the Secretary of State deems appropriate. (Haesemeyer to Landess, Deputy Secretary of State, 2/27/70) #70-2-12

Mr. Robert C. Landess, Deputy Secretary of State: Reference is made to your letter of February 11, 1970, in which you state:

"Code of Iowa, 1966, section 49.48 states:

'If more than one constitutional amendment or public measure is to be voted upon, they shall be printed upon the same ballot, one below the other, with one inch space between the several constitutional amendments or public measures to be submitted.'

"Section 49.43 states:

'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?"'

"The 1964 amendment to the Constitution of Iowa states in part, as follows:

'At the general election to be held in the year one thousand nine hundred and seventy, and in each tenth year thereafter, and also at such times as the General Assembly may, by law, provide, the question, "Shall there be a Convention to revise the Constitution, and propose amendment or amendments to same? shall be decided by the electors qualified to vote for members of the General Assembly. . . .'

"Is the question of calling a constitutional convention a 'public measure' as contemplated by the foregoing set out code sections? In other words, should the question of calling a constitutional convention be placed upon the same ballots as are the constitutional amendments to be voted upon, or should it be on a separate ballot?"

I understand that your inquiry relates only to those situations where paper ballots are involved and not where voting machines are in use.

We have been able to find only two cases in which the question of what is or is not a "public measure" was involved, *Nott v. Suburban Cook County Tuberculosis Sanitarium Dist.*, 1950, 95 N. E. 2d 611, 615, 407 Ill. 436, and *People v. Cowden*, 1896, 43 N. E. 788, 789, 160 Ill. 557. Neither is of any assistance in resolving the question you raise. Hence, we must resort to common sense and the practicabilities of the matter.

I understand that as things now stand three proposed constitutional amendments will be submitted to the electorate this year.

Plainly, the proposition called for by the 1964 amendment is not in and of itself a constitutional amendment. Any convention called pursuant thereto would not necessarily result in any changes in the constitution. On the other hand it is not what one ordinarily thinks of as a "public measure." In other words it is neither fish nor fowl, but something else which the constitution requires be submitted to the people. However, the statutes are completely silent on the manner of submission.

Accordingly, in our opinion where paper ballots are used it could be placed on a ballot separate and distinct from the three constitutional amendments or on the same ballot with them as you choose.

March 2, 1970

TAXATION: Special Assessments. Ch. 391, Acts of 62nd G.A., §§391.35, 391.60, 391.64, 446.6, 446.7, 446.9, 446.10, 446.11, 446.18, 446.19, 447.1, 569.8, Code of Iowa. Property sold for delinquent taxes at either a reg-

ular or scavenger tax sale should be sold subject to special assessment liens. Where a county bids in at a scavenger tax sale, special assessment liens are not cut off, but upon resale of said property to a new purchaser by means of public bidders auction sale, said new purchaser takes title to the property free and clear of all existing special assessment installments and all existing general property tax liens. At scavenger tax sale for special assessments only, the County Treasurer must accept the higest bid. Where property is sold at regular or scavenger tax sale for an excess of the amount of all deliquent taxes, penalties, interest and costs, said excess is to be refunded to the taxpayer, if possible, but if said taxpayer cannot be found, the excess is to be placed in the county general fund and disposed of pursuant to the provisions of Ch. 391, Acts of 62nd G.A. (Griger to Buck, Marshall County Attorney, 3/2/70) #70-3-1

Mr. Max H. Buck, Marshall County Attorney: This will acknowledge receipt of your letter of December 17, 1969, in which you have requested an opinion of the Attorney General upon a number of questions concerning three types of sales namely, regular tax sale pursuant to §446.7, scavenger tax sale pursuant to §446.18, and public bidders auction sale pursuant to §569.8 of the Iowa Code.

Your first series of questions involve an amendment to §391.35, Code of Iowa, 1966, by §6 of Chapter 357, Acts of 62nd G.A. Section 391.35, as amended, provides as follows:

"Thereupon all special taxes for the cost thereof, or any part of said cost, which are to be assessed and levied against real property, or any railway or street railway, together with all interest and penalties on all of said assessments, shall become and remain a lien on such property from the date of the filing of said papers with the county auditor until paid, and such liens *shall have equal precedence with ordinary taxes and* shall have precedence over all other liens except ordinary taxes, and shall not be divested by any judicial sale." (Amendment underlined)

As you state in your letter, §391.35, prior to the above amendment by the 62nd G.A., has been interpreted to mean that a tax sale for general or ordinary property taxes would displace and evtinguish the liens for all special assessments against the property sold, existing at the time of the general tax sale, and without regard to whether the said special assessments were then due or were to become due. *Bennett vs. Greenwalt,* 1939, 226 Iowa 1113, 286 N.W. 722. Special assessments are payable by installments pursuant to §391.60, Code of Iowa, 1966.

In view of the amendment to §391.35, you have presented the following eight questions:

"1. Is a regular or scavenger tax sale, when sale is made for general taxes only, subject to special assessments?

"2. Should the Treasurer cancel all special assessments as against the real estate when he issues a Treasurer's deed for property sold at regular or scavenger tax sale or will these special assessments remain as a lien against the property?

"3. If the special assessments are to remain as a lien, is the Treasurer or Auditor required to collect all future installments of special assessments from the new owner before the deed is issued?

"4. If the scavenger sale is to the County for general taxes, is the County required to collect all future installments of special assessments

from the new owner when the property is resold at public bidders auction by the County?

"5. If special assessments are to remain as a lien, is the County required to collect all back special assessments from the new owner when the property is resold at public bidders auction by the County?

"6. If the installment of special assessments are to remain as a lien, does the person redeeming have to pick up all past due special tax liens?

"7. What is the effect of Section 391.35 as amended upon Section 569.8 where the County acquires title to the property under a tax deed at Scavenger Sale? Should the proceeds be apportioned to both the special assessment taxes, including all installments, and general taxes and the special assessments stricken off or does the amount received at public auction go to the payment of general taxes only with all installments of special assessment taxes surviving?

"8. Does the date of the special assessment as relative to the date of the general assessment have any determination as to whether or not the special assessment will survive a regular or scavenger sale for the general tax levy?"

Your first question is answered in the affirmative in view of the clear language of §6 of Chapter 357, Acts of 62nd G.A. Conversely, a regular or scavenger tax sale of realty for delinquent special assessments is also subject to delinquent general property taxes which are existing liens against the property sold.

In answer to your second question, these special assessments will remain as a lien against the property conveyed at the tax sale. To avoid this result, the Treasurer should offer the property for sale for both general and special assessments. Section 391.64 provides as follows:

"Property against which a special assessment has been levied for street improvements or sewers may be sold for any sum of principal or interest due and delinquent at any regular or adjourned tax sale, in the same manner, with the same forfeitures, penalties, and right of redemption, and certificates and deeds on such sales shall be made in the same manner and with like effect, as in case of sales for the nonpayment of ordinary taxes."

The County Treasurer has a duty to proceed with the collection of special assessments by the same proceedings used in the collection of general and ordinary property taxes, *Bennett vs. Greenwalt,* supra; 1944 O.A.G. 138.

For answer to the third question, we are of the opinion that the County Treasurer is only required to attempt to collect at the tax sale all installments of special assessments which, at the time of the sale, are a lien upon the property sold. In *Harrington vs. Valley Savings Bank,* 1903, 119 Iowa 312, 93 N.W. 347, the Court stated at 119 Iowa 313:

"Whatever may be the rights of parties holding liens for special taxes which have attached when a sale for ordinary taxes is made, or for taxes which become a lien concurrently with that of the ordinary taxes, we think it clear that in this case appellant's lien was junior to that of the ordinary taxes. When the sale for these taxes was made in 1896, there was no special assessment or lien therefor, and hence the treasurer could not sell for both the ordinary and the special tax, and the purchaser at this sale did in fact pay all taxes then assessed and due against the property;"

Therefore, the new purchaser at the tax sale would not be required to pay special assessments arising after the tax sale, and not a lien on the property at the time of the sale, prior to the issuance of the tax deed to that purchaser. 1942 O.A.G. 205. However, the new purchaser could not take title to the property, free and clear of all future installments of existing special assessment liens.

For answer to your fourth and fifth questions, the County is only authorized to bid for the property when there is a scavenger sale pursuant to §446.18, Code of Iowa, 1966, which provides as follows:

"Each treasurer shall, on the day of the regular tax sale each year or any adjournment thereof, offer and sell at public sale, to the highest bidder, all real estate which remains liable to sale for delinquent taxes, and shall have proviously been advertised and offered for two years or more and remained unsold for want of bidders, general notice of such sale being given at the same time and in the same manner as that given of the regular sale."

Section 446.19, Code of Iowa, 1966, provides as follows:

When property is offered at a tax sale under the provisions of section 446.18, and no bid is received, or if the bid received is less than the total amount of the deliquent general taxes, interest,penlties and cists, the county in which said real estate is located, through its board of supervisors, shall bid for the said real estate a sum equal to the total amount of all delinquent general taxes, interest, penalties and costs charged against said real estate. No money shall be paid by the county or other tax-levying and tax-certiffying body for said purchases, but each of the tax-levying and tax-certifying bodies having any interest in said general taxes for which said real estate is sold shall be charged with the full amount of all the said delinquent general taxes due said levying and tax-certifying bodies, as its just share of the purchase price."

At a scavenger sale, the Treasurer must sell the property for all taxes due and delinquent at the time of the sale, including special assessment liens. 1928 O.A.G. 270. However, the County should only bid for the amount of the general taxes, interest, penalties and costs, and no more. *Fleck vs. Duro*, 1939, 227 Iowa 356, 288 N.W. 426; 1936 O.A.G. 260. If the special assessments were liens at the time of the scavenger sale to the County, said liens would not be displaced or extinguished by that sale. If the special assessments are not liens pursuant to §391.35 at the time of the scavenger sale to the County, then there would be no authority for the Treasurer to sell the property for both the general tax liens and the special assessments. The County's bid for the amount of the general taxes, interest, penalities and costs charged against the property would have the effect of cutting off all special assessments which are not liens against the property, but would not cut off any such liens, including all installments, for purposes of the resale of said property to a new purchaser at public bidders auction sale pursuant to §569.8, Code of Iowa, 1966, as amended by §5 of Chapter 357, Acts of 62nd G.A., which provides:

"When the county acquires title to real eetate 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 endorsements 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. How-

ever, where the total amount stated in the tax sale certificate including all endorsements 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 accured against said real estate since said tax sale and after payment of insurance premimums on any buildings located or 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."

(Amendment underlined)

Section 569.8 does not, by its terms, prohibit the sale of the property for a greater amount than stated in the County's tax sale certificate which would be for general taxes only, and not for the special assessment liens. Since §391.35, as amended, makes special assessment liens equal in precedence with general tax liens, the board of supervisors should attempt to collect the general tax liens and all special assessment installments whether due or not, which were liens at the time of the sale to the County pursuant to §446.19, by sale to the highest bidder at public bidders auction sale. The amount received at the public auction, pursuant to §569.8, as amended, should be ratably apportioned to all installments due or to become due under existing special assessment liens and to general tax liens, after payment of the items listed in the last sentence of the first paragraph of the statute. Subject to the provisions of §569.8 which require approval of tax-levying and tax-certifying bodies having a majority interest in the general taxes, the new purchaser's title will extinguish the special assessment liens and the general tax liens.

The answer to your sixth question is yes. Whether or not the property sells at regular or scavenger tax sale for the full amount of the special assessment liens, the redeemer must pay all past due special assessment installments and all general taxes against the property before a redemption certificate could issue, 1940 O.A.G. 250. See also §447.4, Code of Iowa, 1966.

Your seventh question has been answered above.

With reference to your eighth question, what is relevant is whether the special assessment has become a lien pursuant to §391.34 and §391.35, as amended, at the time of the tax sale. If the special assessment has not become a lien at the time of the tax sale of the property for the delinquent general tax levy, then the property is clearly not sold subject to any special assessment lien. Special assessments do not become liens save as made so by statutory authority. *Cemansky vs. Fitch,* 1903, 121 Iowa 186, 96 N.W. 754.

Your next series of questions pertains to a tax sale held in Marshall County detailed in your letter as follows:

"On a Scavenger Sale held in Marshall County on December 3, 1969, there was one tract of ground upon which all general taxes had been paid. There remained, however, $248.95 worth of special assessments which were a lien against the property and interests and costs in the amount of $54.46, giving rise to a total taxes due on Scavenger Sale in the amount of $303.41, all of which were for special taxes. At scavenger tax sale, the County, of course, is not obligated to bid since the general taxes were paid. The City was not notified of this Scavenger Sale and the City was not present to bid. A bid of $200.00 was received for this property, which bid has not yet been accepted. If the bid is accepted, a tax sale certificate will issue for the amount of $200.00 and a redemption under Chapter 447.1 can be made for the amount for which the property was sold and four (4%) per cent of such amount added as penalty with six (6%) per cent interest per annum on the whole amount thus made from the date of sale. This would result in a loss to the City of $103.41. In connection therewith, I have the following questions:

"1. Should the City have been notified of this Scavenger sale?

"2. Can a bid of less than the full amount of special taxes due be accepted at Scavenger Sale by the County?

"3. Can the County reject this bid at Scavenger Sale and accept only a bid for the full amount of special assessments due?

"4. If this bid is rejected by the County and at a subsequent time the City bids it is for $303.41, with the tax certificate issuing to the City, must the City then pay the amount bid to the County and have the County repay the money back to the City, or may the City merely transfer it from its general fund to the special fund involved and take title to the real estate in question upon service of notice of right of redemption and filing of Affidavit of Completion of Service of Notice of Expiration of Right of Redemption?"

In answer to your first question above, §446.18 which provides for scavenger sales should be read in pari materia with §391.64 which provides for tax sales for delinquent special assessment liens. Section 391.64 expressly states that tax sales for special assessments are to be made in the same manner as such sales for the non-payment of general property taxes. Section 446.9, Code of Iowa, 1966, provides for the type of notice to be given, namely publication, with reference to a tax sale for general taxes. In the alternative, the Treasurer, when it is not possible to procure the publication of notice for the sum as prescribed in §446.10, Code of Iowa, 1966, as amended by §3 of Chapter 303, Acts of 62nd G.A., may give notice as provided in §446.11, Code of Iowa, 1966. The statutory provisions with regard to publication of notice of tax sale must be followed. 1932 O.A.G. 185. Therefore, if the notice of the tax sale described in your letter was given in accordance with the above applicable statutes, said notice is valid.

With reference to your second question, the Treasurer, at a scavenger sale must sell at public sale to the highest bidder according to the clear language of §446.18. The Treasurer may accept a bid of less than full amount of special assessments due and delinquent. 1928 O.A.G. 425.

In answer to your third question, the Treasurer has a duty to sell the real estate in question to the highest bidder at a scavenger sale for all

prior tax delinquencies. *Board of Supervisors of Pottawattamie County vs. Stone*, 1931, 212 Iowa 660, 237 N.W. 478. Therefore, the County Treasurer has no discretion to reject the bid in question. However, in order for redemption to be made from said tax sale, the redeemer must pay the full amount of all taxes, interest, penalty and costs due at the time of the sale and all taxes paid by the purchaser subsequent to the sale. 1922 O.A.G. 170; 1940 O.A.G. 250; §447.1, Code of Iowa, 1966.
6 F & C Att Gen

This office contracted you concerning your fourth question and you agreed that it was a hypothetical situation. It is the policy of this office not to render opinions pertaining to hypothetical situations.

Your final series of questions concerns the scavenger sale described in your letter and the following situation:

"In connection with the sale held on December 3, 1969, in the Courthouse in Marshalltown, Marshall County, Iowa, several pieces of property which went to sale on Scavenger sale were sold for an amount in excess of the amount of taxes, interest and cost assessed against the property. This, I understand, to be in accordance with Section 446.18 where all real estate which remains liable for the sale of delinquent taxes shall be sold by the Treasurer at public sale to the highest bidder. My question concerning this procedure is as follows:

"1. Is such procedure correct?

"2. What is the application of Section 446.6 to Section 446.18?

"3. Does the person redeeming, under 447.1, pay four (4%) per cent of the amount for which the property was sold at Scavenger Sale or the amount of taxes due against it?

"4. If 446.6 applies to any surplus received under the provisions of 446.18, and if the whereabouts of the owner is unknown, should the Treasurer place any amount received over the amount of taxes, interest and costs in the unclaimed fee fund for purposes of distribution in accordance with the provisions regulating and controlling the unclaimed fee fund or should the excess balance be placed in the general fund?

Your first question is answered in the affirmative. Section 446.18 clearly states that, at a scavenger sale, the Treasurer shall sell the property to the highest bidder.

With reference to your second question, §446.6, Code of Iowa, 1966, provides as follows:

"Any surplus remaining above the taxes, charges of keeping, and fees for sale shall be returned to the owner, and the treasurer shall, on demand, render an account in writing of the sale and charges."
This statute should be read in pari materia to §446.18 since both statutes concern the same subject matter, namely, the sale of property by the Treasurer for delinquent taxes.

In answer to your third question, the person redeeming, under §447.1, Code of Iowa, 1966, would be required to pay four (4) percent of the amount for which the property was sold at the tax sale. Section 447.1, Code of Iowa, 1966, provides as follows:

"Real estate sold under the provisions of this chapter and chapter 446

may be redeemed at any time before the right of redemption is cut off, by the payment of the auditor, to be held by him subject to the order of the purchaser, of the amount for which the same was sold and four percent of such amount added as a penalty, with six percent interest per annum on the whole amount thus made from the day of sale, and the amount of all taxes, interest, and cost paid by the purchaser or his assignee for any subsequent year or years, with a similar penalty added as before on the amount of the payment for each subsequent year, and six percent per annum on the whole of such amount or amounts from the day or days of payment."

The holder of tax sale certificate, evidencing purchase of property at a scavenger sale, would be entitled to receive, in case of redemption, the amount which he bid for the property, together with the statutory interest and penalty, and in addition to that, any subsequent taxes paid by him on the property together with said interest and penalty on such amount. 1936 O.A.G. 341. Section 447.1 clearly states that the redeemer is to pay the Auditor, to be held by him subject to the order of the purchaser, the amount for which the property was sold at the tax sale and four (4) percent thereof as a penalty.

In answer to your final question, it is our opinion that the excess amount received from the tax sale should not go into an unclaimed fee fund. Pursuant to §606.16, Code of Iowa, 1966, the Clerk of the District Court is to pay over to the County Treasurer unclaimed fees. However, the Clerk is not entitled to the receipt of this excess amount and, in any event, such could not be termed a "fee." The Attorney General has ruled that, in the absence of a statute authorizing payment of a claim from a specified fund, said claim shall be paid from the County General Fund and no other. 1940 O.A.G. 47. Section 8 of Chapter 391, Acts of 62nd G.A., provides as follows:

"All intangible personal property held for the owner by any court, public corporation, public authority, or public officer of this state, or a political subdivision thereof, that has remained unclaimed by the owner for more than ten (10) years is presumed abandoned."

This provision is part of an extensive statute providing for the disposition of unclaimed abandoned property. Section 13 of Chapter 391 provides for payment to the State Treasurer of all such abandoned property. Therefore, we are of the opinion that the excess amount received from the tax sale should be kept by the County Treasurer in the County General Fund and, if the owner of the property sold for delinquent taxes, cannot be found and the excess paid to him, within the ten-year period, the same becomes abandoned property and its disposition is subject to the provisions of Chapter 391, Acts of 62nd G.A.

March 2, 1970

STATE OFFICERS AND DEPARTMENTS: Payment from the primary road fund of claims allowed by the appeal board — §§25.2, 25A.11, 313.4, Code of Iowa, 1966. (1) Claims for highway construction included in the enumeration in §25.2, and which have been approved by the state appeal board may be paid from the primary road fund if such claims are otherwise legally payable. In such proper cases the highway commission or its director with authority from the highway commission may approve payments therefor from the primary road fund. (2) If the claim relates to support of the highway commission

for engineering and administration of highway work or maintenance of the primary road system, it is authorized by said §25.2 and is otherwise legally payable, that part of the primary road fund allocated by the general assembly to be spent by the highway commission for support, engineering and administration of highway work, and maintenance of the primary road system is available for the payment of such claims, provided, however, such allocation has not reverted. (3) For these reasons, we are of the opinion that tort claims filed under the provisions of Ch. 25A of the Code, 1966, as amended, may not be paid from primary road fund nor any allocation thereof. (Holst and Sather to Coupal, Director of Highways, Iowa State Highway Commission, 3/2/70) #70-3-2

J. R. Coupal, Jr., Director of Highways, Iowa State Highway Commission: On January 21, 1970 you directed a letter to the Attorney General requesting an opinion regarding the authority of the Iowa State Highway Commission to approve payment from the Primary Road Fund of claims allowed by the State Appeal Board. The opinion of this office is as follows.

When a claim is filed with the State Comptroller pursuant to the procedure set forth in Chapter 25, Code of Iowa, 1966, and the Comptroller makes the judgment that:

(1) the State would be liable thereon except for the fact of its sovereignty; or that

(2) no appropriation is available for its payment,
he thereafter delivers the claim to the State Appeal Board.

Section 25.2, Code of Iowa, 1966, permits the State Appeal Board with the recommendation of the Special Assistant Attorney General for Claims to approve or reject the following claims against the State *of less than ten years*:

(1) outdated warrants;
(2) outdated sales and use tax refunds;
(3) license refunds;
(4) additional agricultural land tax credits;
(5) fuel and gas tax refunds;
(6) outdated invoices;
(7) outdated homestead and veterans' exemptions;
(8) outdated funeral service claims;
(9) tractor fees;
(10) registration permits;
(11) outdated bills for merchandise;
(12) services furnished to the state; and
(13) refunds of fees collected by the State.

If then, a claim is less than ten years old and is one of said enumerated allowable claims, and it has been recommended for approval by said Special Assistant Attorney General, it may be approved by the State Appeal Board. If it is so approved by the State Appeal Board it may be paid:

(1) from the appropriation or fund of original certification of the claim; or

(2) from "any money in the state treasury not otherwise appropriated" if the foregoing appropriation or fund has reverted.

The Primary Road Fund is a standing appropriation. *Frost v. Iowa State Highway Commission*, ... Iowa ....., 172 N.W. 2d 575; (11/12/69) Section 313.4, Code of Iowa, 1966, as amended. Claims for Highway Construction included in the enumeration in Section 25, supra, and which have been approved by the State Appeal Board may be paid from the Primary Road Fund if such claims are otherwise legally payable. In such proper cases the Highway Commission or its Director with authority from the Highway Commission may approve payments therefore from the Primary Road Fund.

If the claim relates to support of the Highway Commission for engineering and administration of highway work or maintenance of the Primary Road System, it is authorized by said Section 25.2 and is otherwise legally payable, that part of the Primary Road Fund allocated by the General Assembly to be spent by the Highway Commission for support, engineering and administration of highway work, and maintenance of the Primary Road System is available for the payment of such claims, provided, however, such allocation has not reverted.

If such approved claim is presented to the Highway Commission *after* the reversion of such allocation of funds, neither the Highway Commission nor its Director may approve payment thereof from such allocation or from the Primary Road Fund. Under such circumstances, said Section 25.2 requires such a claim to be paid "out of any money in the state treasury not otherwise appropriated."

Chapter 25A, Code of Iowa, 1966, must also be considered in connection with your request. Section 25A.11 of the Code, 1966, provides that:

"Any award to a claimant under this chapter, and any judgment in favor of any claimant under this chapter, shall be paid promptly out of appropriations which have been made for such purpose, if any; but any such amount or part thereof which cannot be paid promptly from such appropriations shall be paid promptly out of any money in the state treasury not otherwise appropriated. . ."

The Primary Road Fund was not appropriated for such purpose, i.e., the payment of tort claims. It is a standing appropriation for the purposes set forth in Section 313.4 and Amendment 18 of the Iowa Constitution. Both Section 313.4 and said 18th Amendment proscribe the use of Primary Road Funds for the payment of tort claims, unless specifically appropriated for that purpose. The Primary Road Fund is "otherwise appropriated."

For these reasons, we are of the opinion that tort claims filed under the provisions of Chapter 25A of The Code, 1966, as amended, may not be paid from the Primary Road Fund nor any allocation thereof. This being the case, we are, consequently, of the opinion that the State Appeal Board does not have authority to approve such expenditures from the Primary Road Fund nor does the Highway Commission or its Director have authority to sign vouchers authorizing such payments.

March 2, 1970

COUNTIES AND COUNTY OFFICERS: Errors and omissions insurance for county officers — Chapter 517A, Code of Iowa, 1966, Chapters 295 and 405, 62nd G.A. (1967). In the event of repeal of Ch. 295, the purchase of errors and omissions insurance for county officers would no longer be mandatory. However, the purchase of such insurance would still be discretionary under Ch. 517A and Chapter 405. (Nolan to Schroeder, State Representative, 3/2/70) #70-3-3

The Honorable Laverne Schroeder, State Representative: This will reply to your letter of January 15, 1970, and your oral request for an opinion on whether Ch. 517A, Code, 1966, contains sufficient authority for county governments to purchase errors and omissions insurance should Ch. 295, Acts of the 62nd G.A., be repealed. Ch. 295 is the Act which makes it mandatory for boards of supervisors to purchase and pay premiums on insurance covering and insuring county officers against personal liability for errors and omissions in the performance of official duties.

Not only is Ch. 517A available to authorize boards of supervisors to purchase and pay the premiums on liability insurance covering officials while engaged in the performance of their duties, but there is also available Ch. 405, Acts of the 62nd G.A., which authorizes the governing bodies (board of supervisors) to "purchase a policy of liability insurance, insuring against all or any part of liability which might be incurred by such municipality or its officers, employees and agents" acting within the scope of their employment duties, whether arising out of governmental or proprietory function, including any claim based upon an act or omission of such officers exercising due care in the execution of a statute, ordinance, or duly adopted resolution or regulation of the governing body. See §§2, 4, 7, Ch. 405, supra.

Therefore, repeal of the act making the purchase of errors and omissions insurance mandatory would not affect the right of the board of supervisors to obtain such insurance as they deem necessary under the authority of the two chapters cited above.

March 2, 1970

COUNTIES AND COUNTY OFFICERS: Vacation and sick leave for county employees—§332.3, Code of Iowa, 1966. County boards of supervisors have authority to provide vacation and sick leave at county visors have authority to provide vacation and sick leave at county expense for county employees. (Nolan to Atwell, Auditor's Office, 3/2/70) #70-3-4

Mr. H. E. Atwell, Public Accounts Audit Supervisor: This is in response to your request for an opinion of the following questions:

"Does the Board of Supervisors have the authority, under their general powers as provided in Section 332.3, to provide for vacation and sick leave, at county expense for all county employees similar to the benefits provided for state employees as found in Chapter 79.1?

"If the county engineer is entitled to two weeks vacation per year according 'to the terms of his contracts for the years he has been employed by the county and the county engineer does not take his vacation but instead works—upon his resignation as county engineer, can he be compensated for the vacation time he worked during the period of his employment?"

It is our opinion that both questions may be answered affirmatively. In 1950 OAG 78 with an opinion dated July 6, 1949, then Attorney General Robert L. Larson advised on this matter as it pertains to county road employees:

> "While we find no specific authority for boards of supervisors to allow their highway maintenance employees vacations with pay, and while it is true authority must be found to authorize the expenditure of tax funds by boards, we do not feel the allowance of paid vacations is to be classified as a gift or reward, but rather as a benefit to the employer who obtains from the employee better services due to his restored vigor and stamina. This is the modern theory of granting vacations with pay and with its philosophy we agree. It does not, of course, apply to the occasional or casual worker.
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> * * *
>
> "in this regard the state itself has established a suitable standard for vacations and sick leave and specifically provided its conditions. This should be the limit of the expenditure of tax moneys for this purpose. See Section 79.1, Code 1946."

Subsequently, by opinion dated May 8, 1964, at 1964 OAG 118 this office citing a number of prior opinions advised:

> ". . . it is our opinion that the board of supervisors, and all elective county officers, have the sole determination as to the vacation time, working hours, and sick leave to be granted to employees under their jurisdiction."

This opinion further stated that §79.1 (Code 1962) is "inapplicable to county employees" since it "makes reference only to 'employees of the state'." This statement may be regarded as a contradiction of the 1949 opinion which merely indicated that such section provides "the limit of the expenditure of tax moneys for this purpose." Consequently the limitation would be determined by the contract of employment, and the authority of the board of supervisors in this regard is derived from §332.3(10), Code 1966:

> "To fix the compensation for all services of county and township officers not otherwise provided by law, and to provide for the payment of the same."

March 3, 1970

CONSTITUTIONAL LAW: Supreme Court, judicial districting by — Senate File 1237, 63rd G.A., §10, Art. V, Constitution of Iowa, Ch. 399, Acts, 62nd G.A. (1967). A bill which would delegate to the supreme court authority to change the number and boundaries of judicial districts with guidlines would not be unconstitutional. (Turner to De Koster, State Senator, 3/3/70) #70-3-5

The Honorable Lucas J. De Koster, State Senator: By your letter of February 24, 1970, you have requested an opinion of the attorney general as to whether Senate File 1237, 63rd General Assembly (second session), a bill relating to judical redistricting, wuld be an unconstitutional delegation of legislative power. Specifically, you inquire as to whether the guidelines are adequate and "whether the legislature can delegate this function to the administrative body which supposedly has authority over the courts." With reference to the quoted portion of your question, I am

not aware that any administrative body has authority over the courts or, indeed, that the bill makes any delegation to an administrative body; the delegation is to the supreme court.

Senate File 1237 would repeal §1 of Chapter 399, Acts of the 62nd General Assembly (1967) entitled "An Act to establish the judicial districts for the district courts and to provide for determination of the number of judges in each district." Senate File 1237 would substitute the following for §1 of Chapter 399:

"The supreme court sitting en banc shall, by majority vote of its members, divide the state for judicial purposes into judicial districts. The specific number of such districts and their boundaries shall be as determined by such court, which shall take into consideration the state highway system, population, geographical distance and area, natural and artificial boundaries, and case load distributions both present and projected, in making such determination.

"The supreme court may revise such districting plan from time to time as circumstances require, applying the same criteria as required by this section in making the initial districting determination.

"Notwithstanding anything in this chapter, the judicial districts in effect on June 30, 1970, shall remain in effect until changed by the supreme court, pursuant to this section."

The remainder of Chapter 399, including the formula by which the number of judges in each district is to be determined, is left in force by this bill.

The first question I have considered is whether the legislature can delegate the aforementioned power to the supreme court at all, even with guidelines.

Sec. 10, Art V, Constitution of the tate of owa, provides:

"The State shall be divided into eleven Judicial Districts; and after the year Eighteen hundred and sixty, the General Assembly may re-organize the Judicial Districts and increase or diminish the number of Districts, or the number of Judges of the said Court, and may increase the number of Judges of the Supreme Court; but such increase or diminution shall not be more tsan one District, or one Judge of either Court, at any one session; and no re-organization of the districts, or diminution of the number of Judges, shall have the effect of removing a Judge from office. Such reorganization of the districts, or any change in the boundaries thereof, or increase or diminution of the number of Judges, shall take place every four years thereafter, if necessary, and at no other time."

Without repealing §10, the people of Iowa amended it, at least by implication, in 1884 by adding the following:

"At any regular session of the General Assembly the State may be divided into the necessary Judicial Districts for District Court purposes, or the said Districts may be reorganized and the number of the Districts and the Judges of said Courts increased or diminished; but no re-organization of the Districts or diminution of the Judgees shall have the effect of removing a Judge from office."

Thus, the people have vested in the legislature the power to establish the judicial districts for the district court at any regular session of the general assembly and to reorganize and increase or diminish the number of the districts and judges. But in absence of any express prohibition, the

fact that the people have delegated these powers to the legislature does not necessarily mean that the legislature may not, in turn, delegate part of its power to the supreme court provided it does so with adequate guidelines.

"The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some factor state of things upon which the law makees, or intends to make, its own action depend." *Field v. Clark,* 143 U.S. 649, 12 S. Ct. 495, 36 L. Ed. 294.

Since the people have specifically made establishment of the *number* of district judges and the *number* of judicial districts a legislative function, the general assembly cannot delegate its power to determine the number of judicial districts to the supreme court without guidelines, such as, for example, "not more than eighteen or fewer than eight". Otherwise, the supreme court might have the power to fix *any* number of judicial districts. Such power would thwart the provision of §10, Article V, Constitution of Iowa, as amended in 1884. *Lewis Consolidated School District v. Johnston,* 1964, 256 Iowa 236, 127 N.W.2d 118.

The law with reference to delegations of legislative power seems to be equally as applicable to delegations to the judicial branch as to delegations to the executive branch. *State ex rel Klise v. Town of Riverdale,* 1953, 244 owa 423, 57 N.W. 2d 63. But the legislature can provide for the exercise by a court of the power to judicially determine facts which are made the conditions on which the law operates. *Denny v. Des Moines County.* 1909, 143 Iowa 466, 121 N.W. 1066. Thus, if adequate guidelines are supplied fixing the maximum and minimum limits upon the number of judicial districts, the delegation will be proper in this respect. Absent such parameters, the delegation is open to serious constitutional question.

Guidelines for the delegation of power to the court to determine the boundaries of the districts, on the other hand, appear to be adequate. *Danner v. Hass,* 1965, 257 Iowa 654, 134 N.W.2d 534. Here the court is directed to consider the state highway system, population, geographical distance and area, natural and artificial boundaries, and case load distributions both present and projected, in determining the boundaries. The court would also be bound by the provisions of §2(2), Chapter 399, 62nd General Assembly, which sets out the formula for determining the number of judgeships in each judicial district, and which is an additional guideline which may be considered in support of the delegation. Still other such additional guidelines are readily apparent from examining Chapter 399. For example, each district judge in office on July 1, 1967, shall continue to serve in the district of his domicile so long as he remains a district judge. §2(1). And, it is clear from Chapter 399, §2(9) that a primary purpose of the existing law is "to handle the judicial business in all districts promptly and efficiently at all times."

Of course, there may be practical problems in applying the formula for the number of judges in each district to a reduced number of districts and perhaps there should be some experimenting with hypothetical examples to determine whether the formula will be workable on varying numbers of districts, or whether it, too, should be amended.

The proposal also may require amendments to other chapters of the code such as Chapter 46, which provides for district judicial nominating commissions, and consideration of the effect a reduction of the number of districts would have on such matters as the terms of office of the commissioners and upon the judges standing for re-election.

For an excellent, well reasoned and scholarly exegesis of judicial redistricting in Iowa, and the factors and guidelines important to the efficient administration of such districts and achieving equal justice in Iowa, see Judge Harvey Uhlenhopp's article, 18 Drake Law Review 47.

March 4, 1970

SCHOOLS: Local School Boards. Conflict of interest of members thereof, and powers of the president of such boards — §279.1, Code of 1966. The president of a local school board is a member of the board elected by the board to the presidency and does not lose any of his membership authority or privileges thereby. There is no conflict of interest in the purchase by the local school board of real property owned by a member of the board and the purchase of such real property by the board is not prohibited. (Strauss to Tieden, State Representative, 3/4/70) #70-3-6

The Honorable Dale L. Tieden, House of Representatives: Reference is herein made to your letter in which you have requested the following:

"a. Can the president of a school board make a motion and can he vote?"

"b. A school board is attempting to purchase additional property for expansion. One of the school board members is legal overseer of some of the property involved. He also is a shareholder in a corporation which owns property that must be purchased. Can this member legally act as a board member on these transactions? Would there be a conflict of interest? What would be the legal status of any transactions made by this board pertaining to these particular parcels of property?"

I advise as follows:

1. Members of a school board in all communities and independent districts and undivided school townships shall be chosen at the regular school election for a term of three years to succeed those whose terms expire, §277.24, Code of 1966. The president of the school board shall be elected from the members of the board and shall be entitled to vote as a member, §279.1, Code of 1966. Such elected member of the board, holding the office of president, does not lose any of his authority or privileges thereby. He, therefore, is entitled to make a motion from the floor after substitution of another member as temporary president.

2. Insofar as your second question is concerned, I would advise that a member of the board of directors of the school who is a stockholder in a corporation which owns the property, which must be purchased by the board, would be prevented by reason of conflict of interest from acting as a member of the board on such transaction. This problem has had the previous consideration of the department, and as a matter of fact, if he should so deal, any contract made for such purchase would be void and contrary to public policy. An opinion of this department appearing in the report for 1932 at page 110, and 111, relied on the case of

James v. City of Hamburg, Iowa, 174, Iowa 301, *156*, N.W. *394*, where it was stated:

" . . . He was called upon to serve two masters; one with which his interest financially was bound up; the other, in which was involved his public duty as an officer of the city. He was bound, therefore, to serve both faithfully — the bank of which he was an officer and in which he was an officer and in which he was financially interested, and the city, of which he was also an officer and servant. It is an old saying that a man cannot serve two masters, but we think the case here is even stronger than that. He was called upon practically to serve himself in a transaction in which his duty called him to serve another. These interests might be antagonistic. He might be called upon to say which he would serve — himself or the one to which he owed a public duty. If the contract had not been performed by the construction company as required by its contract, and was presented to the city in an unfinished condition, or in a condition not in compliance with the contract, a temptation would be offered to the intervener, represented by Baldwin, to disregard his public duty, and yield to the temptation of personal interest. It is this that the law guards against. It is this sort of a condition that the law is intended to avoid. It is not necessary that there be evidence of dereliction of duty on the part of a public officer to bring these contracts within the inhibition of the law. The inhibition applies when the contract is of such character that, in the very contract and in the making of it, a temptation to dereliction of duty is created. The law intends that these public officers should, like Caesar's wife, be above suspicion and temptation. . . . ."

And quoted the following from the case of *Bay v. Davidson,* 133 Iowa 688, 111 N.W. 25:

". . .'Now, by general law, contracts of sale as here shown cannot be upheld because they are not only violative of the fundamental law of agency, but are contrary to public policy. The defendant Binning was an officer and agent of the town, and the duty and obligation which the law cast upon him in such relation forbade him from acting in any transaction for himself as an individual on the one part, and as an officer and agent of the town on the other part. And it can make no difference that in the particular transaction, he refrained from voting for the purchase of goods as made. It was his duty to vote, and he could not reap an advantage by avoiding that duty'."

"Further, the Court said:

It is the universal holding of the courts that, in determining the validity of contracts such as we are dealing with, it is not necessary, to avoid the contract, that it is adjudicated and determined that the parties stipulated for corrupt action. It is enough for the court to know that the contract tends to those results, and furnishes a temptation to the plaintiff to resort to corrupt means or improper influences to accomplish the result. It is the general tendency of the decisions of the courts of this country to frown upon all attempts and all contracts and all actions on the part of public officers which tend to place them in a position where they will be tempted to act from motives other than a fair and honest discharge of their public duty; and where it appears from the contract sought to be enforced that the tendencies of such contract, if allowed, will be to place the public officer in such a position that his personal interests conflict with his public duty, in all such cases the contract will be held illegal, and the courts will leave the parties in the position in which they placed themselves."

More directly as concerns the purchase of land, conflict of interest was determined not to exist in an opinion appearing in the report for 1930, page 94, where it is stated:

". . . . The only provisions limiting contracts between an individual member of a board and the school board are contained in Section 4468. We are of the opinion that this section would not prohibit the transfer of a piece of land owned by a member of the board to the board for school purposes. It is, of course, very unusual and the strictest openness should be observed as to the transaction so that no accusal could be made of any collusion between the board and the property owner to secure the sale of the property or to determine the price paid therefor."

The same concusion was reached in the opinion appearing in the same report for 1930 at page 146, where it was stated:

"Schools and School Districts: May purchase real estate from a member of the board upon appraisal; may also condemn.

"June 24, 1929. Superintendent of Public Instruction: This will acknowledge receipt of your letter requesting the opinion of this department upon the following proposition:

'A certain school board wishes to proceed with the erection of a school house. The site it wishes to procure belongs to a member of the board. Is there anything in the law that would make it illegal for the board to purchase a site from one of its members? There seems to be a feeling that this particlar member of the board is asking a higher price for the site than is justified. Could the board start condemnation proceedings to secure a site that belongs to one of its members?' There is nothing in the law which would prevent a school board from purchasing real estate from one of its members although such purchase is unusual. In order to conform to the rule of public policy we suggest two courses.

"The board should, if it purchases this property, do so only after an appraisal by a competent board of appraisers with whose appointment there should be no collusion or connivance. They should be three disinterested persons recognized for their ability as such appraisers. If this course is not followed, the board should condemn the land. The latter procedure would, in our opinion, be preferable."

Other than the conflict of interest arising out of the purchase of textbooks and school supplies, §301.28, Code of 1966, there is no statutory definition of conflict of interest defined for school offices. Rules of common law and public policy control school authorities in the purchase of real estate by school districts as herein exhibited. The purchase of real estate by school boards of real property owned by one of its directors is not prohibited and void.

March 5, 1970

STATE OFFICERS AND DEPARTMENTS: Department of Health — Migratory Labor Camps Act enforcement — §§3, 12 and 13, subsection 2, ¶b of Ch. 134, Acts of the 63rd G.A. The Iowa Department of Health may make the factual determination under §12, subsection 3 of Ch. 134, Acts of the 63rd G.A. that an overall ceiling height of 6 feet 10 inches is an appropriate alternative measure to having a ceiling one-half of which is 7 feet high and the remainder of which might be as low as 5 feet high. Variances granted under the provisions of Ch. 134, Acts of the 63rd G.A. last for only 1 year. The provisions of the Act do not require notification of the local boards of health of the areas involved of the granting of variances, but good practice and procedure requires such notification. (Martin to Reeve, Commissioner, Dept. of Health, 3/5/70) #70-3-7

Arnold M. Reeve, M.D., M.P.H., Commissioner of Public Health: A previous Commissioner of Public Health submitted for the opinion of

this office the following questions relating to Chapter 134, Acts of the 63rd G.A., the Migratory Labor Camp Act, hereinafter referred to as the Act:

1. Section 13, subsection 2, paragraph b of the Act requires that at least one-half of the floor space of migrant housing shall have a seven foot ceiling height. Is it within the commissioner's authority to grant a variance for a mobile home having an overall ceiling height of six feet ten inches? Assume that this mobile home otherwise meets all the requirements of §13 of the Act.

2. Are variances granted under the provisions of the Act permanent or must authority for a variance be obtained annually?

3. Does the Act require that notification of the granting of a variance be given by the Department of Health to the local board of health serving the area in which the migrant labor camp is located?

Section 13, subsection 2, paragraph b of the Act provides as follows:

"To be eligible for a permit, a migrant labor camp, or portion thereof, shall meet each and all of the following requirements: ***

"2b. At least one-half of the floor area in each living unit shall have a minimum ceiling height of seven feet. No floor space shall be counted toward the minimum requirements where the ceiling height is less than five feet."

Section 12 of the Act provides as follows:

"The commissioner may grant written permission to individual camp operators to vary from the provisions of this Act or the rules and regulations of the department when the extent of the variation is clearly specified and it is demonstrated to the commissioner's satisfaction that:

"1. Such a variation is necessary to obtain a beneficial use of an existing facility.

"2. The variation is necessary to prevent a substantial difficulty or unnecessary hardship.

"3. Appropriate alternative measures have been taken to protect the health, safety, and welfare of any inhabitants of a migrant labor camp and assure that the purpose of the provisions for which variation is sought will be observed.

"Written application for such variations shall be filed with the commissioner and local board of health serving the area in which the migrant labor camp is situated. No such varaiation shall be effective until granted in writing by the commissioner."

Section 12 of the Act, above set out, provides in subsection 3 thereof that a variance may be granted from the provisions of the act if "appropriate alternative measures have been taken to protect the health, safety, and welfare of any inhabitants of the migrant labor camp and assure that the purposes of the provisions for which variation is sought will be observed." Section 13, subsection 2, paragraph b of the Act indicates that only one-half of the floor area in each unit must have a minimum ceiling height of seven feet. Under the terms of this section, one-half of the floor space could have a ceiling height of seven feet while the other half of the floor space could have a ceiling height as low as five feet. If it is assumed that the ceiling height of a mobile home is uniform, in other words that, for example, six feet ten inches is the

height over all of the floor space, it would appear that the department could make a factual determination that this is an adequate alternative measure which would assure that the purpose of the provisions from which variation is sought would be observed.

The answer to your second question may be found in the provisions of §3 of the Act which provides as follows:

"Written application to operate a migrant labor camp, or portion thereof, shall be made to the department upon forms approved by the department at least sixty days prior to the first day of the intended operation of such camp. However, during the year 1969, application shall be made as soon as practicable after the effective date of this Act. The application shall state the name and address of the person requesting a permit; and name and address of the owner of the camp, or portion thereof; approximate number of persons to be lodged in such camp; approximate period during which the migrant labor camp, or portion thereof, is to be operated; the location of such camp, or portion thereof; and any other information required by the department. A separate application shall be submitted for each camp, or portion thereof, and a separate permit shall be issued annually for each such camp, or portion thereof."

Because a permit, in which a variance may be granted, lasts only for one year, it is the opinion of this office that the variance lasts for only one year.

Your final question is whether notification of the granting of variances is required by the Act to be given to the local board of health serving the area in which the migratory labor camp is located. Section 12 of the Act above set out, requires that prior to the granting of a variance, application therefor shall be made both to the local board of health and to the Iowa Department of Health. Only the approval of the Iowa Board of Health is necessary. We find nothing in the act which requires notification of the local board of health of the granting of the variance. However, in as much as §8, subsection 1 of Chapter 163, Acts of the 62nd G.A. requires local boards of health to enforce state health laws, one of which is the Migratory Labor Camp Act, good practice and procedure would seem to dictate that the department notify the appropriate local board of health.

It is, therefore, the opinion of this office that the Iowa Department of Health could make the factual determination under §12, subsection 3 of the Act, that an overall ceiling height of six feet ten inches is an appropriate alternative measure to having a ceiling one-half of which is seven feet high and the remainder of which might be as low as five feet high. It is further the opinion of this office that variance lasts only for one year. It is also the opinion of this office that the provisions of the Act do not require notification of the local boards of health of the areas involved of the granting of variances, but good practice and procedure require such notification.

March 5, 1970

COUNTY AND COUNTY OFFICERS: Townships — Fire protection levy — §359.43, Code of Iowa, 1966, as amended by Ch. 308, §2, Acts of the 62nd G.A., and §359.44, Code of Iowa, 1966, as amended by Ch. 308, §3, Acts of the 62nd G.A. When township trustees, on their

own motion, bring up the question of whether to levy a tax for fire protection purposes, they may on the ballot itself fix the amount of the levy at any level up to and including the statutory maximum. Once they opt to set a limit below the statutory maximum, another election must be held to increase the levy to the statutory maximum. (Martin to Story, Jones County Attorney, 3/5/70) #70-3-8

Mr. Robert H. Story, Jones County Attorney: I have received your letter of November 20, 1969, in which you request an opinion of the Attorney General as follows: In 1952 the electors of Oxford Township voted in favor of a proposal to levy a ¾ mill tax for the purpose of furnishing township fire protection. The ballot expressly stated that the only authorization sought was for ¾ mill. The township trustees now desire to increase the amount of the levy to one and one-half mills. Your question is whether the provisions of Sections 359.43 and 359.44, Code of Iowa, 1966, require an election before the millage may be so increased.

You have informed me by telephone that the original proposition of whether to make a levy for fire protection purposes was brought up at the trustees' own motion. This matter was not raised by a petition signed by 25 percent of the resident electors as provided for in Section 359.44, Code of Iowa, 1966.

Section 359.43, Code of Iowa, 1966, as amended by Chapter 308, Section 2, Acts of the 62 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 portion 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." (Emphasis Added)

Section 359.44, Code of Iowa, 1966, as amended by Chapter 308, Section 3, Acts of the 62 General Assembly provides in pertinent part as follows:

"Such proposal to levy the tax provided for in section 359.43 *may be submitted by the township trustees* at any regular election held in the township, or at a special election called for the purpose, and such township trustees shall submit the proposition when petitioned therefor by twenty-five percent of the qualified electors of said township, or portion thereof, residing without the limits of a city or town." (Emphasis Added)

With the exception of amendments not here relevant, such as that referred to above, these sections have remained unchanged since before the Oxford Township election in 1952. In other words, the township trustees under the provisions of Section 359.43 could have submitted to the electors a request for authorization to levy one and one-half mills. The question thus is, do the township trustees have discretion to fix the millage rate at a level below the statutory maximum.

The language of Section 359.44, above set out, indicates that the question of whether or not to levy a tax for fire protection purposes

may be brought up in two ways. First, the township trustees may, upon their own motion, bring up this question and submit it to the electors. Secondly, if petitioned therefor by 25 percent of the qualified electors, the township trustees are required to submit the proposition to the electors.

It is a fundamental rule of statutory construction that the word "may" implies discretion, and that the word "shall" implies direction. In applying these rules to Section 359.44, it is clear that if the trustees do not receive the required petition, they have the choice of whether to bring up the matter. Under the provisions of Section 359.43, if the trustees opt to bring up the matter, they may levy "not exceeding one and one-half mills". A levy of ¾ mills clearly falls within this provision. Thus, in the absence of the required petition, the trustees may not only determine whether ther shall be a levy, but what the levy shall be.

In the factual situation which you pose, a levy of ¾ mills was the only authority requested — all the electors gave. It is, therefore, the opinion of this office that prior to increasing the amount of the levy, the approval of the electors must be obtained. See 1968 O.A.G. 922, 924.

March 5, 1970

CITIES AND TOWNS: Compatibility of offices — §273.22(13) and 441.2, Code of Iowa, 1966. The offices of city mayor and member of a county school board are incompatible. (Martin to Moore, Shelby County Attorney, 3/5/70) #70-3-9

Mr. David B. Moore, Shelby County Attorney: I have received your letter of November 26, 1969, in which you request an opinion of the Attorney General as follows:

"The question I submit to you is whether the office of mayor and the office of member of the county board of education are incompatible."

The Iowa court in *State v. White,* 257 Iowa 606, 133 N.W.2d 903 (1965) set forth the following test to be utilized in determining incompatibility: "The test of incompatibility is whether there is an inconsistancy 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'."

In a series of unpublished opinions reaching back to 1948, this office has held that the office of mayor is incompatible with the office of county school board member.

Section 441.2, Code of Iowa, 1966, provides in pertinent part as follows:

". . . each county and each city having an assessor there shall be established a conference board. In counties the conference board shall consist of the mayors of all incorporated cities and towns in the county whose property is assessed by the county assessor, members of the county boards of education as now or hereafter constituted, and members of the board of supervisors. . . . ."

You have informed me by telephone that none of the cities in your county have assessors and that no joint county school system has been formed between your county school board and that of any other county.

See 273.22(13), Code of Iowa, 1966. Thus, we are squarely faced with the application of the above set out statute.

In our opinion, the duties of the offices of mayor and member of the county board of education are incompatible. Under Section 441.2 the same individual, holding both the offices of mayor and member of the county board of education is a member of the county conference board. 1968 O.A.G. 74. Because such an individual represents two different governmental units whose interests may at times at least appear to be at odds, allowing one man to hold both is improper.

March 5, 1970

MOTOR VEHICLE FUEL TAX: Aviation Gas Tax Fund, constitutional law — §324.81, Code of Iowa, 1966, credit to state aviation fund of moneys remaining after payment of refunds to users is proper and does not violate the Iowa Constitution. (Murray to Balloun, State Senator, 3/5/70) #70-3-10

Honorable Charles F. Balloun, Iowa State Senator: We have your request concerning the constitutionality of the transfers being made under Section 324.81, Code of Iowa, 1966, and presume that you are referring to moneys paid to the State Aviation Fund from moneys remaining in the fund after all claims for refund and the costs of administering same have been paid.

This particular section of the Code became effective July 4, 1959 (Chapter 247, §1, Acts of the 58th G.A.). However, as indicated by a copy of the attached opinion dated February 18, 1953, written to Senator Jack Schroeder, then Chairman of the Aeronautics Committee, House of Representatives, the 55th General Assembly had the same statute before it but failed to enact it into law.

We have examined this opinion and agree that it is a correct statement of the law. This particular section of the Code has not been passed upon by the Iowa Supreme Court, but courts of other jurisdictions have followed the law as discussed in the enclosed opinion from Smith to Schroeder. We, therefore, are of the opinion that if the transfers mentioned by you in your request for an opinion are the type we have outlined above, said transfers are constitutional.

March 5, 1970

HIGHWAY COMMISSION: §§306.16, 306.17, 306.18, 306.19, Code of Iowa, 1966, as amended. The Highway Commission may properly enlist the services of a real estate broker, and pay a reasonable fee or commission therefor, in connection with a proposed sale of excess land under its jurisdiction and control, where bids have been solicited and no bids submitted, or all bids rejected, provided there is full compliance with all provisions of §§306.16, 306.17, 306.18 and 306.19 of the Code. (Lego to Wellman, Sec., Executive Council, 3/5/70) #70-3-11

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: Your letter of November 10, 1969, requests an opinion concerning the authority of the Iowa State Highway Commission "to list excess, unsalable property with real estate brokers in communities where such land exists and to pay commissions to brokers for selling such properties, after bids have been solicited, if there have been no bids submitted or if bids

have been rejected as beinfg too low."

Section 306.16 of the Code of Iowa, 1966, as amended, enables the Highway Commission to sell a tract of land, or part thereof, for cash if such parcel was acquired for a highway improvement project and the Commission has determined that it is not now and will not hereafter be used in connection with, or for the improvement, maintenance or use of, said highway, and provided further that the sale must be approved by the Executive Council of the State of Iowa. This statute, together with Sections 306.17, 306.18 and 306.19 of the Code, establish a sale procedure requiring satisfaction of the following conditions before the Highway Commission can properly consummate a sale of excess or unused right of way:

1. Title to the parcel to be sold (i.e. the "sale tract") must have been acquired for highway improvement purposes;

2. The Commission must have determined that the sale tract is no longer needed for highway use;

3. Notice of the Commission's intention to sell said tract must be given by certified mail, at least ten days before the actual sale, to the present owner of adjacent land from which said tract or part thereof was originally bought or condemned for highway purposes, and in the event said tract is located within municipal limits, such notice must also be sent to the mayor of the city or town;

4. The Commission must give preference to the aforesaid "present owner" if his or its cash offer equals or exceeds in amount any other offer received;

5. The Commission must accept a cash offer by a bidder, subject to approval by the Iowa Executive Council;

6. The sale must be made upon the condition that the land cannot be used so as to endanger the public safety, interfere with the public use of the highway, or materially damage the adjacent owner;

7. The Executive Council must approve the sale transaction entered into by the Commission and said bidder; and

8. The Governor and the Secretary of State must sign the instrument of conveyance containing conditions as prescribed by the Iowa Executive Council.

It is the general rule that failure to comply with statutory provisions which govern such a sale of land will render the transaction void. 81 Corpus Juris Secundum, States, Section 107. It should be noted, however, that these are the only conditions which must be satisfied under the Iowa law, and there is no requirement, for example, that a proposed sale by publicly advertised, nor that the highest offer be accepted While it may be argued that the public interest will be best served by a policy or procedure which would reasonably publicize a proposed sale, thereby assuring good exposure and enhancing the opportunity to reap a price approaching probable market value, the legislature has not required this, and the Highway Commission is free to exercise its discretion in selecting reasonable, alternative sale procedures, provided of course that the specific conditions set forth in the aforesaid statutes are satisfied. The Highway Commission is apparently following a procedure whereby bids are solicited, and the high bid accepted if con-

sidered fair by the Commission. Without in any way disparaging that particular policy, we are constrained to mention that this policy of the Highway Commission is not presently required by Iowa law.

The provisions of said Sections 306.16, et seq., do not of course specifically authorize the Highway Commission to enlist the services of real estate brokers in connection with its efforts to sell excess or unused land previously acquired for highway purposes. However, the Highway Commission is not restricted to the exercise of powers expressly conferred by these statutes, but may exercise those implied powers which may be necessary to implement authority expressly conferred, or which are considered requisite in order to achieve the purposes of the legislature in passing the act or acts in question. 39 Corpus Juris Secundum, Highways, Sections 157 and 168. Surely it would frustrate the purpose of the legislature in passing these particular statutes, if the board or commission in control of the particular highway or parcel could not exercise all reasonable means, within the framework of those conditions set forth in the laws, to secure a reasonable price for lands which were no longer needed for highway purposes and which could best be sold to the public. Such reasonable means could well include, in our opinion, the hiring of real estate brokers or other special agents which, for a reasonable fee or return for their service, could materially assist such board or commission in disposing of such unused land and in maximizing the opportunity to secure the most favorable price obtainable on the market. It is well settled that a highway commission has broad power to make contracts respecting matters within its jurisdiction and that it may employ such agents as may be necessary or convenient in order to properly carry out its work. 39 Corpus Juris Secundum, Highways, Section 158. The Iowa Supreme Court, in *Harvey v. Iowa State Highway Commission*, 256 Iowa 1229, 130 N.W. 2d 725, 727, (1964) cite an impressive list of authorities in support of the following rule of Iowa law:

> When the Highway Commission acts within the powers conferred upon it by statute, its discretion is broad and plenary. In the absence of fraud, bad faith, or arbitrary abuse of that discretion, the courts have no power to control the manner in which it shall exercise the authority with which it has been invested.

You are, accordingly, advised that if the Highway Commission, in connection with a proposed sale of excess or unused land under its jurisdiction and control, wishes to enlist the services of a real estate broker, and pay a reasonable fee or commission therefor, after bids have been solicited, and where no bids are submitted or all bids are rejected, it may properly do so, provided it complies fully with all provisions of said Sections 306.16, 306.17, 306.18 and 306.19 of the Code. It should be clearly understood, for example, that the Highway **Commission, at least ten days before the date of actual sale to any prospective buyer (including one obtained through the services of a realtor), must properly notify the "present owner of adjacent land", in accordance with Section 306.17 of the Code, of its intention to make the sale, thus affording said owner the right to match or exceed the amount of that buyer's offer on or before the time of sale.**

March 5, 1970

COUNTIES AND COUNTY OFFICERS: Counties-Extensions of Secondary Roads — §314.5, 1966 Code of Iowa. A county board of supervisors may lawfully establish, construct and/or maintain extensions of secondary roads in cities and towns, using county road funds to finance the work, irrespective of any cost contribution by cities and towns. The exercise of such authority is largely discretionary, and the board is not required to provide such extensions, nor to maintain previously placed extensions in any city or town. A city or town retains chief responsibility for maintenance of a street which is an extension of a secondary road, despite any participation in such maintenance by the county board of supervisors. (Holst to Graven, Sac County Attorney, 3/5/70) #70-3-12

Mr. J. K. Graven, Esquire, Sac County Attorney: Your letter or May 21, 1969, seeks our advice on the following questions concerning extensions of various secondary and farm-to-market roads located in Sac County, Iowa:

1. Does the fact that the farm-to-market system does not, under §310.10 of the "1966" Code of Iowa, include any roads within cities and towns serve to prohibit the county from extending its roads into cities and towns unless the city or town would pay full construction costs?

2. Is the county required to provide extensions of secondary roads in cities or towns under 2,500 population?

3. Are counties required to maintain previously placed extensions of secondary roads in cities or towns?

4. Is a city or town responsible for maintenance of a street which is an extension of a secondary road?

The authority of the Board of Supervisors to construct, imporve or maintain a municipal street forming an extension of a secondary road is contained in §314.5 of the "1966" Code of Iowa which provides as follows:

"Extensions in certain cities and in towns. The *board* or commission in control of *any secondary road* or any primary road is authorized, subject to approval of the council, to eliminate danger at railroad crossings and to *construct, reconstruct, improve, repair, and maintain any road or street which is an extension of such road within any town or city.* Provided, that this authority shall not apply to the extensions of *secondary roads* located in cities over twenty-five hundred population, where the houses or business houses average less than two hundred feet apart.

"The phrase "subject to the approval of the council" as it appears in this section, shall be construed as authorizing the council to consider said proposed improvement only in its relationship to municipal improvements such as sewers, water lines, establishing grades, change of established street grades, sidewalks and other public improvements. The locations of such road extensions shall be determined by the board or commission in control of such road or road system." (Emphasis supplied.)

The reference to secondary road(s) in the opening paragraph of said section includes both "farm-to-market roads" and "local secondary roads," and makes no distinction between those two classes as your letter tends to suggest. Under §306.2 of the "1966" Code of Iowa, the phrase "Secondary roads" is defined as covering "all public highways, outside of cities and towns, except primary roads and state park and institutional roads," and carries such meaning "when used in this Chapter or in any other

chapter of the Code relating to highways." Thus, your first inquiry applies with equal force to local secondary roads, and questions, in effect, the uncompensated expenditure of secondary or farm-to-market road funds by the county for improvements to a road or street inside municipal limits, even through the same si an extension of a secondary road.

From the plain meaning of the words in said §314.5, it is evident that the Legislature intended to confer certain authority upon the board of supervisors over roads and streets within the borders of cities and towns, where such roads or streets would constitute extensions of said board's secondary roads. This special authority supplements and modifies the general jurisdiction of the board over secondary roads "outside of cities and towns," as shown by §§306.2 and 306.3 of the "1966" Code of Iowa, and vests in the board sole discretion to determine those roads or streets which will be established or classified as extensions of secondary roads. Note in this connection the last sentence of said §314.5 which states:

"The locations of such road extensions shall be determined by the board or commission in control of such road or road system."

Although this special authority is subject to a number of restrictions recited therein, there is no hint from any language in said §314.5 that the exercise of such authority to so "construct, reconstruct, improve, repair and maintain" secondary road extensions is subject to the condition that the city or town must finance the cost of such work. Indeed, the grant of power contained in said section seems to presuppose or necessarily imply that county road funds will be available to make the exercise of this authority practicable. However, we find no statute which specifically empowers the board to use secondary or farm-to-market road funds for such purposes. Note that §§309.9 and 310.4, covering, respectively, the uses to which the secondary road fund and the farm-to-market road fund may be devoted, do not mention extensions of secondary roads. Even sub-part 6. of said §309.9 which contemplates use of secondary road funds for any legal obligation or contract "in connection with secondary roads" will not suffice in this regard, since the power of the county over such extensions is entirely discretionary, and the county is not "required by law" to take over and assume such contract or obligation, as further provided in said sub-part 6.

Conversely, the Legislature has expressly provided that the primary road fund may be used, subject to certain limitations, by the Highway Commission on extensions of primary roads, as shown by various provisions in §§313.22, 313.23 and 313.36 of the "1966" Code of Iowa. This consideration militates somewhat against the argument that the language of said §314.5 (which parallels §313.21 relating exclusively to the power of the Highway Commission to construct, reconstruct, improve and maintain primary highway extensions) necessarily implies the availability of county funds with which to finance extension projects.

Despite this doubt concerning the "necessary" funding implications of said §314.5, we are satisfied that this statute reasonably implies authority to use secondary road funds on secondary road extensions, since the Legislature has clearly recognized that certain extensions may be regarded as a part of the secondary road system. §314.6 of the "1966" Code of Iowa provides as follows:

"Highways along city or town limits. *Whenever any public highway* located along the corporate line of any town or city *is an extension of a farm-to-market road*, or of a primary road, *it may be included in the farm-to-market system* or the primary road system, as the case may be, *and may be constructed, reconstructed, imporved, repaired, and maintained as a part of said road system.* (Emphasis supplied.)

This legislative recognition that a particular extension shall be treated as a part of the secondary road system (embracing, in part, as hereinabove noted, all farm-to-market roads) suggests the collateral intention of the Legislature that county road funds may be used for county road extensions in the same manner as is the case for any other road which is "included in" or made "a part of said road system." This interpretation is fortified by §§311.5 and 311.23 which also demonstrate a legislative intent that secondary road funds may be used on extensions of the secondary road system.

The Iowa Supreme Court has rejected the contention that a primary highway extension was a part of the primary road system of the state. *Smith v. City of Algona,* 232 Iowa 362, 5 N.W. 2d 625. By analogy, this case virtually outlaws an inference that a secondary road extension may generally be regarded as a part of the secondary road system, and this in turn appears to undermine the key criteria for our position that secondary road funds can be legally expended for work on secondary road extensions. However, this was a tort case involving a claim against a city for damages occosioned by ailure to properly maintain a city street which was also a primary highway extension. The opinion of the Court turned on the issue of whether or not the road in question lost its character as a city street by virtue of its classification and use as an extension of the primary system, thereby suspending or excusing the city from maintenance responsibility and attendant liability for negligence. The case did not involve the propriety of using Highway Commission funds for work on said extension, and therefore cannot control our decision on the first problem you have posed.

In view of the above considerations, it is our conclusion that extensions of secondary roads may be regarded as a part of the secondary road system for the limited purpose of justifying the expenditure of secondary road funds for work on such extensions, and it is our opinion, with respect to your first question, that the board of supervisors may lawfully extend its farm-to-market and local secondary roads into cities and towns pursuant to §314.5 of the "1966" Code of Iowa, using secondary road funds to finance such projects, and it is not necessary that such cities and towns bear the costs of construction incident thereto.

As we have already discussed hereinabove, the authority conferred upon the board under §314.5 is entirely permissive and discretionary, not mandatory, and the board is free to exercise their independent judgment in each case. This discretion applies equally to new (or prospective) extensions and to a continuance of, or withdrawal from, existing extensions. See 1950 OAG 176 which contains an excellent discussion directly in point. Accordingly, we advise in relation to your second and third questions that a county is not "required" to provide extensions of any secondary roads in any city or town, including those under 2,500 in population, nor is it "required" to maintain or continue any existing or previously

placed extensions of such roads therein.

Your forth question concerns the responsibility of a city or town for maintenance of a secondary road extension, and invites analysis of the concurrent or over-lapping jurisdiction or interest of both county and municipality regarding such extensions. Under §§389.1 and 389.12 of the "1966" Code of Iowa, cities and towns are charged with principal jurisdiction and control over all public streets, highways, roads and avenues within their corporate limits. The mere fact that a given street has become an extension of a county road does not obliterate its character as a municipal street, nor relieve the city or town of its obligations thereover. For the Iowa Supreme Court, in the previously mentioned trt case, which required construction of a Code provision (now §313.21) comparable to §314.5, held that the exercise of the permissive authority granted to the Highway Commission on primary road extensions did not relieve the city of its statutory burden to properly maintain its own streets. *Smith v. City of Algona*, supra. The court stated that the Legislature has never taken the control of its streets from a city, either expressly or by implication, even though it has authorized another governmental body to aid in the construction or maintenance of highway extensions through the city. Accordingly, we advise that the maintenance "responsibility" of a city or town over its own streets is not superseded, suspended or diminished by the exercise of board authority in construction, improving or maintaining such street as a secondary road extension, although its economic burden is naturally lessened in direct proportion to the county's investment in construction and maintenance costs of such extension. The city or town retains chief responsibility for such maintenance, just as it does with respect to any other street, subject to the rights of the county under §314.5 to participate by dollar or deed in the actual maintenance and/or construction of such extensions.

In summary, our answer to your first three questions is in the negative, and the last question is answered in the affirmative with the qualification that the county can, largely at its own discretion, concurrently participate in such maintenance withuot relieving the city or town of its statutory duty to maintain the street.

March 5, 1970

HIGHWAYS: Interest in Contract Prohibited — §314.2, Code of Iowa, 1966. A corporation in which the county engineer is a majority stockholder is prohibited from bidding on contracts for highway construction, maintenance, etc., in his own county as well as in other counties. (Holst to Thomas, Mills County Attorney, 3/5/70) #70-3-13

Mr. James A. Thomas, Mills County Attorney: Your letter of February 12, 1970, to Attorney General Turner has been referred to this office. In your letter you ask:

"Is a corporation in which the county engineer is a majority stockholder prohibited from bidding on contracts for highway construction, maintenance, etc., in another county under Section 314.2."

§314.2 of the Code of Iowa, 1966, is in pertinent part as follows:

"No state or county official or employee, elective or appointive shall

be directly or indirectly interested in any contract for the construction reconstruction, improvement or maintenance of any highway, bridge or culvert, or the furnishing of materials therefor . . ."

The County Engineer is an employee of the County as provided in §309.17 of the Code of Iowa, 1966. The word "no" has been defined by Webster's Dictionary as meaning "not any; not one or none".

A stockholder of a corporation which is involved in a contract is "interested in the contract". *Miller v. City of Martinez,* 1938, 82 P. 2d 519, 523, 28 Cal. App. 2d 364; *State v. Robinson,* 1942, 2 N.W. 2d. 183, 188, 190, 71 N.D. 463, 140 A.L.R. 332.

The word "any" means "all or every". *Iowa-Illinois Gas & Electric Co. v. City of Bettendorf,* 1950, 241 Iowa 358, 41 N.W. 2d 1, 4, 5; *Herman v. Muhs,* 1964, 256 Iowa 38, 41; 126 N.W. 2d 400, 402; *State v. Bishop,* 1965, 257 Iowa 336, 132 N.W. 2d 455.

Thusly, the words in said statute, "any contract" are broad enough to include *all contracts* (for maintenance of any highway, bridge or culvert, or the furnishing of materials therefor). The words "all contracts" are broad enough to include, and in my opinion do include, such contracts in any and all counties of the State of Iowa, and are not limited to contracts within the County in which such engineer is employed.

The statute (314.2) provides that contracts in which an employee is interested will be nullities, and because I am of the opinion that such employee would be "interested" in such a contract, it is my opinion that the corporation in which the county engineer is a majority stockholder is effectively prohibited from bidding on contracts for highway construction, maintenance, etc., in any and all counties.

March 5, 1970

STATE OFFICERS AND DEPARTMENTS: §444.21, Code of Iowa, 1966; Ch. 273, §207, 63rd G.A. (1969). Revenue from the sale of the equipment used by the department of banking reverts to the general fund. (Haesemeyer to Wellman, Sec., Executive Council, 3/5/70) #70-3-14

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: By your letter of February 4, 1970, you have requested an opinion of the attorney general concerning the following:

"The Council has directed this office to secure from you an opinion as to whether the proceeds realized from a sale at auction or acceptance of the GSA established tradein allowances of items of equipment purchased from Trust Fund accounts can be credited to the General Fund or do they have to revert to the Trust Fund accounts."

Section 444.21, Code of Iowa, 1966, provides the following:

"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 the state."

This section requires that all tax money be part of the general fund of the state unless the law specifically designated otherwise. The Iowa

Banking Act of 1969, Chapter 273, 63rdrd G.A., First Session, at §207 provides in relevant part that:

"No transfers shall be made from the general fund of the state or any other fund for the payment of the expenses of the department of banking and no part of the funds held by the treasurer of state for the account of the superintendent shall be transferred to the general fund of the state or any other fund, . . ."

The money for the department of banking is segregated from the general fund. The relevant question is whether the revenue from the sale of the equipment can be used by the department of banking for its expenses or must such revenue revert to the general fund.

Again, §207 of the Iowa Banking Act of 1969 provides:

"All expenses required in the discharge of the duties and responsibilities imposed upon the superintendent and the state banking board by the laws of this state shall be paid from *fees* provided by such laws." (emphasis added)

Proceeds from the sale of equipment are not fees for regulating and examining state and private banks pursuant to §219 of the Iowa Banking Act of 1969. The statute provides that the sole source of revenue is fees and does not provide that any other source of revenue may be used to pay the expenses of the banking department. The sale of these various items of equipment does not produce a fee as contemplated by §207 of the Iowa Banking Act of 1969.

Accordingly, it is our opinion that the proceeds from the sale of equipment by the department of banking should be credited to the general fund and do not revert to the trust fund account.

March 5, 1970

ELECTIONS: County supervisors, canvassing returns — §43.49, 331.14, Code of Iowa, 1966. A quorum of a county board of supervisors, i.e., a majority thereof, is all that is necessary to canvass election returns pursuant to §43.49. (Haesemeyer to Faulkner, Mahaska County Attorney, 3/5/70) #70-3-15

Mr. Hugh V. Faulkner, Mashaska County Attorney: Reference is made to your letter of February 17, 1970, in which you state:

"Under Section 43.49 the board of supervisors following the primary election are required to meet, open and canvass the returns from each voting precinct in the county and make abstracts thereof. Section 43.50 requires the members of the board to sign the abstracts and certify the correctness thereof. One of the members of our county board of supervisors does not plan to be here at that time and my question is whether it is necessary for him to be here in order to carry out the statutory duty of the board with respect to canvassing the primary election vote.

"I find nothing in the annotations which answers this question and respectfully ask that you give me your opinion as to whether *all* members of the board must be present to canvass the returns and sign the abstracts thereof."

Sections 43.49 and 43.50, Code of Iowa, 1966, provide respectively:

"43.49 Canvass by county board. On the Friday next following the

primary election, the board of supervisors shall meet, open and canvass the returns from each voting precinct in the county, and make abstracts thereof, stating in words written at length:

1. The number of ballots cast in the county by each political party, separately, for each office.

2. The name of each person voted for and the number of votes given to each person for each different office.

"43.50 Signing and filing of abstract. The members of the board shall sign said abstracts and certify to the correctness thereof, and file the same with the county auditor."

As you note there is nothing in either of these provisions of the election laws or the annotations thereto specifically touching upon the question you raise. However, §331.14 provides:

"331.14 Quorum. A majority of the board of supervisors shall constitute a quorum to transact business, but should a division take place on any question when only two members of the board are in attendance, the question shall be continued until there is a full board."

See also to the same effect *Riggs v. Board of Supervisors of Van Buren County,* 1917, 181 Iowa 178, 164 N.W. 359. Moreover, as stated in *Thorson v. Board of Supervisors of Humboldt County,* 1958, 249 Iowa 1088, 90 N.W. 2d 730, "Proceedings before a county board of supervisors and similar tribunals are necessarily informal and courts are not disposed to review them with technical strictness."

Accordingly, it is our opinion that it is not necessary that the entire board of supervisors be present to canvass the vote pursuant to §43.49 so long as a quorum on the board is present.

March 5, 1970

CRIMINAL LAW: Pardoned felon, right to own, possess and carry firearms — Art. IV; §16, Constitution of Iowa; Ch. 248, Code of Iowa, 1966. Where a pardon has already been granted to an individual, that pardon can be amended to specifically provide that the individual may own, possess and carry firearms without resubmitting a new pardon application to the Board of Parole. Since a full pardon reinstates all of the felon's civil rights, there was already inherent in the pardon a right to own, possess and carry firearms. (Haesemeyer to Sellers, Administrative Assistant, Governor's Office, 3/5/70) #70-3-16

Mr. Michael M. Sellers, Administrative Assistant, Office of the Governor: You have requested an opinion of the attorney general with respect to the following:

"The 1968 Federal Firearms Act provides that a pardoned felon may own, carry and possess firearms if his pardon specifically provides that he may do so.

"Where a pardon has already been granted to an individual, can that pardon be amended to specifically provide that the individual may own, possess and carry firearms without resubmitting a new pardon application to the Board of Parole pursuant to Chapter 248 of the 1966 Code of Iowa."

The question raised by your inquiry has received no case law interpretation which we have been able to find. A preliminary question which must be considered relates to the effect of a pardon under Iowa law. In

Slater v. Olson, 1941, 230 Iowa 1005, 229 N.W. 879 the Iowa supreme court considered the right of a pardoned felon to qualify for a civil service position where one of the requirements for the position was that he should not have been convicted of a felony. The court indicated that:

"We do hold however, that a full pardon contemplates, as stated in State v. Forkner, 94 Iowa 1, 62 N.W. 772, supra, a remission of guilt 'both before and after conviction,' forgives the offender and relieves him from the results of the offense, relieves not only from the punishment which the law inflicts for the crime but also exempts him from additional penalties and legal consequences in the form of disqualifications or disabilities based on his conviction."

Under the authority of *Slater* the pardoned person is not subject to disabilities based on his previous conviction and receives his full civil rights.

If a full pardon reinstates his civil liberties, then inherent in these liberties would be the right to own, possess, or carry a firearm. Hence, an amendment to the pardon to meet the requirements of the federal law would be sufficient without resubmitting a new pardon application. The right to the use of the firearm was in actuality already inherent in the pardon previously granted. The board of parole has in effect previously considered the rights attendant to a pardon when it made its original recommendation. Therefore, it would be redundant to resubmit a new pardon application with an amendment annexed to it describing a right already encompassed by the original full pardon.

In 34 OAG 372 the attorney general described the function of the board of parole in the granting of a pardon as follows:

"The only purpose of Section 3817 of the Code is to require the Governor to obtain all the facts from the Board of Parole and obtain their advice before he acts. If, after obtaining all the facts, he should be of a different mind from the Board of Parole, he would have authority under the Constitution of this state to act contrary to the advice of the Board."

The board of parole's function is merely advisory. Sole authority for the granting of pardons is vested in the governor. Article IV, §16, Constitution of Iowa. Therefore, the subsequent amendment would have no effect on the pardon which had been granted previously. Since the board has considered the pardon application and advised the governor, a submission would produce nothing new to guide the governor. Thus, it is our opinion that a pardon can be amended to provide that a person may own, possess, and carry firearms without a resubmission of the pardon to the board of parole.

March 5, 1970

CITIES AND TOWNS: Termination of social security coverage by certain groups of city employees — §§97C.1, 97C.2, Code of Iowa, 1966. A department within a political subdivision covered by social security cannot terminate its coverage. An individual department of a political subdivision does not constitute an absolute coverage group. An absolute coverage group includes the employees of all the departments of the political subdivision. It would, therefore, be necessary for the entire political subdivision to be included or excluded under the Social Security Act. (Haesemeyer to Alt, State Representative, 3/5/70) #70-3-17

The Honorable Don D. Alt, State Representative: This is in reply to your letter of January 12, 1970, in which you state:

"I am requesting an opinion from your office regarding the interpretation of Chapter 97C, 1966 Code of Iowa, as to whether or not certain departments within a political subdivision falling within the purview of Chapter 97C, can be excluded from the Federal Social Security Act while other departments within the political subdivision remain thereunder, or must all departments of the political subdivision be included or excluded as the case may be.

"What procedure, if any, is necessary if certain departments within a political subdivision, presently under Social Security, desires now to be excluded. Do new employees employed by a political subdivision have any option as to whether or not they will or will not come under the Federal Social Security Act?

"Your promptness in regard to these matters will be greatly appreciated."

It is our understanding that your request was prompted by the desire of the members of the West Des Moines Police Department to terminate their coverage under the Social Security Act.

For the following reasons we are of the opinion that your question as to whether departments within a political subdivision of the state may terminate social security coverage must be answered in the negative.

Section 97C.1, Code of Iowa, 1966, states that:

"In order to extend to employees of the state and its political subdivisions and to the dependents and survivors of such employees, the basic protection accorded to others by the old-age and survivors' insurance system embodied in the Social Security Act, Title II (which includes section 218) of the federal Social Security Act, it is hereby declared to be the policy of the general assembly, subject to the limitations of this chapter, that such steps be taken as to provide such protection to employees of the state and its political subdivisions on as broad a basis as is permitted under the Social Security Act, Title II."

Section 97C.2(6) of the code defines "political subdivision" as including an instrumentality (a) of the State of Iowa, (b) of one or more of its political subdivisions or (c) of the state and one or more of its political subdivisions, but only if such instrumentality is a puristic entity which is legally separate and distinct from the state or subdivision and only if its employees are not by virtue of their relation to such juristic entity employees of the state or subdivision.

Section 218 of the Federal Social Security Act [42 U.S.C.A. 418(a)(1)] authorizes the Secretary of Health, Education and Welfare to make agreements with states for the purpose of extending social security benefits to employees of states and subdivisions of states. Such agreements are made at the request of the states.

The U. S. Department of Health, Education and Welfare has issued the *Handbook for State Social Security Administrators* (hereinafter referred to as the handbook). The handbook sets forth the procedures for the administration of the provisions of the Social Security Act by states.

Section 254 of the handbook [based on 42 U.S.C.A. 418(g), 418(c)(7) and 418(u)] states that coverage can be terminated by the state or by the Secretary of Health, Education and Welfare. It further states that either the entire agreement can be terminated, or termination action can be taken selectively by absolute coverage groups. Section 201 of the handbook [based on 42 U.S.C.A. 418(b)(5) specifies what constitutes an absolute coverage group. Employees of a political subdivision of a state engaged in performing services in connection with governmental (non-proprietary) questions are an absolute coverage group.

The State of Iowa entered into an agreement with the Secretary of Health, Education and Welfare, pursuant to Section 218 of the Social Security Act, on July 1, 1953. The agreement extends social security benefits to employees of the state and its political subdivisions. A city or town within the State of Iowa is a political subdivision within the meaning of Chapter 97C of the Code of Iowa, 1966. The employees of a city or town engaged in performing services in connection with governmental functions constitute an absolute coverage group within the meaning of Section 201 of the *Handbook for State Social Security Administrators.*

Based on the above facts, laws and regulations we are of the opinion that a department within a political subdivision covered by social security cannot terminate its coverage under said Act. An individual department of a political subdivision does not constitute an absolute coverage group. An absolute coverage group includes the employees of all the departments of the political subdivision. It would, therefore, be necessary for the entire political subdivision to be included or excluded under the Social Security Act.

With respect to your question regarding the option of new employees of a political subdivision to elect coverage under social security, we are of the opinion that no such option is available. If the political subdivision is covered, then all of its employees are covered. There are no special provisions for new employees.

March 5, 1970

STATE OFFICERS AND DEPARTMENTS: Executive Council, use of biennial contingent fund — §§29A.57, 29A.58, Code of Iowa, 1966; Ch. 68, 63rd G.A. (1969). The biennial contingent fund may not be used to provide funds to the military department to exercise the option to purchase contained in its lease purchase agreement for the Sioux City Armory. (Haesemeyer to Wellman, Sec., Executive Council, 3/5/70) #70-3-18

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: You have requested an opinion from the attorney general relative to various legal means available to protect the state's equity in the Sioux City Armory Building. In your letter you state:

"We are attaching herewith all pertinent documents in connection therewith, with the request as to whether or not the Executive Council can enter into a leasing arrangement with the Sioux City Boy's Club, or

the possible outright sale of said property, and whether or not the Council has the legal authority to dispose of the property after acceptance of the title and upon the exercise of the option by the Armory Board. Also, can the Council use Council Contingent Funds or request an open-end appropration for this specific purpose from the second session of the 63rd General Assembly."

Attached to your letter was a summary of the situation which is set forth below:

GRANDVIEW STREET ARMORY
Sioux City

THE ARMORY COMPANY OF SIOUX CITY

"The Armory Company of Sioux City was created in 1926 as a non-profit Corporation with the sole object and purpose of constructing and maintaining an armory for use of the Iowa National Guard.

"The Armory Building was constructed sometime prior to 1933, apparently financed through sale of Trust Bonds. The original cost of the building is not known but it may reasonably be assumed that the Armory Company's investment was in excess of $150,000.00.

"The Articles of Incorporation provide authority for conduct of the Company's business by a Board of Trustees. The present officers are

R. H. Hatfield — President. Mr. Hatfield is a member of the Law Firm of Stewart & Hatfield, 830 Frances Building, Sioux City.

H. V. Bull, Treasurer

W. L. Sloan, Trustee for Bondholders.

OCCUPANCY BY IOWA NATIONAL GUARD

"The building was occupied, as an Armory, by the Sioux City Garrison from 1933, by term leases executed for each Unit of the Garrison, until the Garrison was ordered into Active Federal Service in 1941. The leases provided an aggregate return for the Company ranging from $10,980.00 in 1933 to $13,600.00 in 1941.

"The re-organized Sioux City Garrison again occupied the Armory following WW II, under the term lease arrangement, until October of 1951.

PURCHASE — OPTION LEASE

"The Armory Board of the State entered into a purchase-option type lease with the Sioux City Armory Company commencing on October 1, 1951, for a period of twenty years, which included the following provisions:

"The Armory Board agreed to pay as consideration, for the lease with purchase-option, the sum of $98,500.00 amortized over the 20 year period, on the basis of 4¼% quarterly, payable in equal quarterly installments in the amount of $1,834.07, and an additional amount, quarterly, of $124.50 to cover the cost of required insurance, the first such payment due as of January 1st, 1952.

"The State Armory Board could at any time during the period of the lease elect to purchase the property. In this event it was agreed that the

regular quarterly rental payments, exclusive of the insurance payments, would be treated as purchase payments on an amortized basis of 4¼% quarterly from 1 October 1951, upon the sum of $98,500.00, and upon liquidation of the balance due and payment of expense incident of Trustee fees, attorney fees and abstracting costs, the lessor Armory Company will convey title to the State.

"The lease will terminate by its own terms on 30 September 1971 and the Adjutant General's records indicate that the approximate balance due at that time, to liquidate the purchase price, will be $149.42. Upon payment of authorized expenses incident to fees and abstracting costs the State can, at that time, exercise the option and take title.

TERMINATION OF OCCUPANCY BY GARRISON

"A new armory-maintenance shop complex for the Sioux City Garrison is presently under construction at Sergeant Bluff and it is presently estimated that this facility will be availavle for occupancy not later than 1 April 1970, and the Grandview Street Armory will thereupon be vacated.

AUTHORITY FOR DISPOSITION OF GRANDVIEW STREET ARMORY

"Alternate solutions for disposition of the Grandview Street Armory, are available at such time as the Garrison moves to the new facility.

"Armory Board as Lessor:

Section 29A.58 Code 1966 in part as follows:

'The Armory Board as lessor or sublessor may for a term not to exceed twenty years, lease property under the control of the Board for purposes other than armory or military use when the leasing does not interfere with the use of such property for military purposes.'

"If the Board elected to follow this course the rental should at least equal the cost to the State under the existing purchase-option lease or $1,837.04 plus $124.50 quarterly. Although under this plan the State could exercise the option to take title on 30 September 1971, a further unfavorable factor is the continuing responsibility of the Department for maintenance of the building. I am sure that I am not speaking out of turn if I say that the Adjutant General would prefer another course of action.

"Mutual Release of Both Parties to the Purchase-Option Lease.

"With the approval of the Executive Council the Armory Board could initiate proceedings for a mutual release of both parties to the existing lease. This is not seriously suggested as an advisable alternative in as much as the State will have invested $87,908.24 toward it's option to purchase the building for $98,500.00 and to release the Armory Company from it's obligation to convey title under the terms of the lease upon payment of an additional $11,000.00 (approximate amount) would certainly not be in the State's interest or good business. Also taxable.

"Armory Board Exercise Option by V *April* VTGJ

"It is respectfully suggested that the most expedient and advantageous disposition of the building would result from the following course of action:

"Payment, by 1 April 1970, of the unliquidated balance of the State's obligation under the purchase-option lease and exercise the State's option to take title to the property. Section 29A.57 Code 1966 provides the Armory Board with authority to '*** acquire *** facilities *** when funds for the same are made available by *** the state of Iowa.' This action would require funding availability of approximately $11,000.00. Although funding commitments by the Armory Board in connection with acquisition of facilities are payable from funds appropriated for the support and maintenance of the National Guard, and the Military Division Budget Program reflected in the 63rd Biennial Support Appropriation for FYs 1970 and 1971 included funding in support of most of the Sioux City Armory Company lease spread over quarterly installments, the payment of this approximate $11,000.00 in one lump sum by 1 April 1970 would result in serious disruption of the Military Division's programmed Budget execution and further would, in fact, result in the Military Division paying for something that will no longer be within the military requirement. However, in as much as the indicated transaction would very much inure to the advantage of the State it is respectfully suggested that a request to the 2nd Session of the 63rd GA for an open end appropriation for the specific purpose would probably be non-controversial and meet with Legislative approval.

"Following acceptance of title by the Executive Council upon exercise of the option by the Armory Board, as suggested, the matter of disposition of the property will fall within the jurisdictional responsibility of the Council. Section 29A.57 Code 1966 provides in part, as follows:

" 'The title to such property so acquired shall be taken in the name of the State of Iowa and such real estate may be sold or exchanged by the Executive Council, upon recommendation of the Board, when no longer needed for the purpose for which it was acquired.'

"The present market value of the Grandview Street Armory is not known. It lies adjacent to the downtown Sioux City area, and is a well constructed building. However the fact that it would require considerable interior renovation, that it would no longer be tax exempt as military property, and that parking facilities are very limited are factors that will influence the market value. It is believed that a realistic estimate of the possible resale value would not exceed $75,000.00.

"The Sioux City Garrison of the Army National Guard entered Federal active duty on 13 May 1968 and was released from such duty on 12 December 1969. During this period of time the Armory facility was made available to the Sioux City Boy's Clubs, Inc. on a minimal rental basis in consideration for the user's agreement to support all operating and minor maintenance costs. It was considered advisable to have the building occupied by a responsible activity such as the Boy's Club and that such useage would minimize the possibility of accelerated deterioration and vandalism. The argeement expired on 31 October and a new limited agreement for use of certain parts of the Armory by the Boys Clubs has been arranged which will terminate at such time as the Garrison vacates the building. This Organization has indicated an active interest in the possibility of acquiring title to the building or possibly continuation of a lease arrangement for the future."

Of the three alternatives contained in the summary the second "Mutual Release of Both Parties to the Purchase-Option Lease" is clearly out of the question simply from a dollar and cents standpoint. You recognize this when you state that "This is not seriously suggested."

The first alternative leasing of the facility by the Armory Board until the expiration of the purchase-option agreement and exercise of the option of September 30, 1971, is obviously available and authorized by §29A.58,

Code of Iowa, 1966, which you have set forth at length in your summary.

The third alternative would involve exercise of the purchase-option by April 1, 1970, and would be authorized by §29A.57 but as you point out the military department's budget is not in such a condition that it could absorb the lump sum payment necessary to achieve this result.

The general contingent fund created by Ch. 68, Acts, 63rd G.A., First Session, 1969, is not available for this purpose. As is customary the legislation creating this biennial contingent fund provides that it may be used "only for contingencies arising during the biennium." We have repeatedly stated in the past that to be a contingency an event must be to some degree unforseen. See e.g. 68 OAG 552, 68 OAG 564 (two opinions), 68 OAG 652, 68 OAG 955.

Thus, if you want to exercise the option by April 1, 1970, and funds to do so are not available from the appropriation to the military department you will have to ask the legislature for an appropriation for this purpose. Of course, as indicated earlier you could go the alternative one route and sublease the property until the expiration of the agreement on September 30, 1971 and exercise the option at that time.

March 5, 1970

STATE OFFICERS AND DEPARTMENTS: Executive Council, approval of out of state travel — §8.13, Code of Iowa, 1966. Out of state travel by area college personal does not require Executive Council approval. (Haesemeyer to Wellman, Sec., Executive Council, 3/5/70) #70-3-19

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: Reference is made to your letter of January 29, 1970, in which you request an opinion of the attorney general as to whether or not personnel working in the area colleges need council approval for travel outside the State of Iowa.

Sec. 8.13, Code of Iowa, 1966, provides in relevant part:

"The state comptroller shall be limited in authorizing the payment of claims, as follows:

* * *

"2. Convention expenses. No claims for expenses in attending conventions, meetings, conferences or gatherings of members of any association or society organized and existing as quasi-public association or society outside the state of Iowa shall be allowed at public expense, unless authorized by the executive council; . . .

* * *

Area colleges receive financial assistance by way of legislative appropriations. See e.g. Chapter 190, §5, 63rd G.A., First Session (1969). However, funds of the area colleges are not disbursed by means of warrants issued by the state comptroller and in our opinion executive council approval is not required for travel by area college personal outside the state of Iowa.

March 12, 1970

CITIES AND TOWNS: Interstate Bridges — Diversion of interstate toll

bridge revenues to general city purposes and to other non-bridge purposes — Ch. 383, Code of Iowa, 1966. A bridge commission operating under Ch. 383, Code of Iowa, 1966, may not divert interstate toll bridge revenues to general city purposes nor may they divert such revenues to other non-bridge purposes. §383.13, Code of Iowa, 1966. (Keokuk) (Holst to Fischer, State epresentative 3/12/70) #70-3-21

The Honorable Harold Fischer, State Representative: In your letter of January 22, 1970, you asked whether the revenues from the interstate toll bridges at Keokuk and Burlington, Iowa, may be lawfully diverted to city purposes, other than bridge operation, maintenance, bond interest and retirement, and bridge improvement or reconstruction purposes.

With respect to the said diversion funds from the Keokuk Bridge, we are of the opinion that the toll revenues therefrom may be used pursuant to §383.13 of the Code of owa, 1966, for only the following purposes (and purposes necessarily incidental thereto):

(1) To pay the interest and principal of any bonds issued under Chapter 383, of the Code of Iowa, 1966;

(2) To provide an additional fund to pay the cost of maintaining, repairing and operating such bridge;

(3) To provide a reserve fund reasonably sufficient to provide for the cost of the continued operation, supervision, maintenance, and repair of said bridge for a period not to exceed twenty-five years after the removal of toll charges;

(4) To finance reconstruction, extension, enlargement, replacement, or renewal of that particular bridge or in aid of the acquisition, construction, reconstruction, extension, enlargement, replacement, or renewal of any other bridge owned in whole or in part by said city.

Inasmuch as the toll bridge operation at Burlington, Iowa, is separate and district from that at Keokuk, Iowa, we will, if requested, furnish a separate opinion with respect thereto.

The bridge at Keokuk, the subject of this opinion, was constructed prior to 1870 by the Keokuk and Hamilton Bridge Company, pursuant to authority granted by an Act of Congress, dated July 25, 1886, 14 Stat. 244, 245. This Act is in pertinent part as follows:

". . . Sec. 7. *And be it further enacted* That the Keokuk and Hamilton Bridge Company, a corporation existing under the laws of the State of Iowa, and Hancock County Bridge Company, a corporation existing under the laws of the State of Illinois, be and hereby are authorized to construct and maintain a bridge over the Mississippi River between Keokuk, Iowa and Hamilton, Illinois, of the same character, description and construction as provided in this act for the bridges at Quincy and Burlington; and the said bridge, in its use and operation, shall be subject to the same restrictions that apply to said bridges at Quincy and Burlington by the terms of this act."

(Note: The restrictions applying to said bridges at Quincy and Burlington do not relate to tolls.)

The said bridge at Keokuk was subsequently reconstructed pursuant to authority granted by an Act of Congress, approved March 4, 1915, P.L. 342, 38 Stat. 193 (63rd Congress, Vol. 38, Part 1, Public Laws, Page 1220, Chapter 193 U. S. Statutes at Large). This Act is as follows:

"Be it enacted by the Senate and House of Representatives in Congress Assembled, That the consent of Congress is hereby granted to the Keokuk and Hamilton Bridge Co. and its successors and assigns, to reconstruct, maintain, and operate their bridge and approaches thereto across the Mississippi River at a point suitable to the interest of navigation, at or near Keokuk, Iowa, in the County of Lee, in the State of Iowa, in accordance with the provisions of the Act entitled 'An Act to regulate the Construction of Bridges over Navigable Waters,' approved March 23, nineteen hundred and six.

"Sec. 2. That the right to alter, amend, or repeal this Act is hereby expressly reserved."

The reconstruction of said bridge was therefore subject to the provisions of: "An Act to regulate the construction of Bridges over Navigable Waters," approved March 23, 1906.

The said Act of March 23, 1906, referred to above, is in pertinent part as follows:

". . . If tolls shall be charged for the transit over any bridge constructed under the provisions of said sections (491-498), of engines, cars, street cars, wagons, carriages, vehicles, animals, foot passengers, or other passengers, such tolls shall be reasonable and just, and the Secretary of the Army may, at any time, and from time to time, prescribe the reasonable rates of toll for such transit over such bridge, and the rates so prescribed shall be the rates demanded and received for such transit." 34 Stat. 85, 33 U.S.C.A. §494, pp. 192 and 193.

Section 498a, Title 33, U.S.C.A., at Page 201, specifically makes the Act authorizing the reconstruction of said bridge (38 Stat. 193, supra) subject to the provisions of §§491 through 497 of said Act of March 23, 1906. It is as follows:

"In the case of bridges authorized, prior to June 10, 1930, by Acts of Congress epecifically reserving to Congress the right to subsequently regulate tolls on such bridges, such bridges shall, in respect of the regulation of all tolls, be subjected to the provisions of sections 491-497 of this title."

The right to alter, amend, or repeal the Act of March 4, 1915, (authorizing reconstruction of said bridge) was expressly reserved therein.

There can be no doubt then but that the tolls charged on said bridge are subject to federal regulation and Congress has expressly reserved the right to amend the Act authorizing the reconstruction of the Keokuk Bridge, which right to amend includes the right to fix tolls. Inasmuch as this opinion turns on the power of the State of Iowa over tolls on this bridge, it will be helpful to mention briefly the relationship between the federal power and the state power.

The power of Congress over obstructions across navigable streams is plenary (*The Fort Fetterman v. South Carolina State Highway Department* 1958, 261 F. 2d 563, rehearing 268 F. 2d 27), but it will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so (*Schwartz v. Texas* 1952, 344 U.S. 199, 97 L. Ed. 231, 235). Therefore, there is no apparent conflict between the federal statutes cited above and Chapter 383 of the Code of Iowa, 1966, relating to interstate toll bridges. The power of the State of Iowa to fix tolls is not in conflict with the federal mandate to fix tolls which are "reasonable and just." In fact, the said Iowa Statute begins with the words:

"The rates of tolls to be charged for the use of any bridge acquired or constructed under the provisions of this chapter shall be fixed and adjusted as may be required by law of the United States now in force or hereafter to be enacted . . ."

Up to this point then, Congress had authorized the Keokuk and Hamilton Bridge Company to reconstruct the bridge and had directed said Company its successors and assigns, to charge tolls which are "reasonable and just." The said Chapter 383 of the Code of Iowa, 1966, likewise so provides by necessary inference.

On February 7, 1941, the Keokuk and Hamilton Bridge Company made a gift proposal of said vridge to the City of Keokuk. The gift proposal was subject to various representations, terms and conditions, among which was an agreement for a deed, providing:

". . . that such bridge shall be forever free to yehicular and pedestrian traffic subject to regulatory ordinances as may be enacted by the donee. . ."

On the same day the City of Keokuk passed Resolution No. 202, in which it was agreed that:

". . . the City of Keokuk does hereby accept said proposed gift, subject to all the terms and conditions therein expressed . . ."

Presumably, the City of Keokuk accepted this gift proposal by virtue of the provisions of §§5899.01 (Chapter 302.1) and 10188, of the Code of Iowa, 1939. These provisions together may permit cities to accept the gift of a bridge and to change tolls for the use thereof.

Referring back to the said Federal Act of March 23, 1906, ("requiring just and reasonable tolls"), I have been unable to find any evidence which would indicate that the Secretary of War has ever fixed the rate of tolls on said bridge, or that after this function was transferred to the Secretary of Transportation in 1966, that he has ever fixed rate of tolls on said bridge.

Note: For transfer of functions, see Pub. L. 89-670, October 15, 1966, 80 Stat. 931, 49 U.S.C.A., Transportation, §§1655 (g) (6) (B).

Also in force on the day of the acceptance of the gift proposal was §5899.13 (Chapter 302.1) of the Code of Iowa, 1939. This section of the Code of Iowa, 1939, provided in part as follows:

"The rates of tolls to be charged for the use of any bridge acquired or constructed after the provisions of this chapter shall be fixed and adjusted as may be required by any law of the United States now in force or hereafter to be enacted, and shall be so fixed and adjusted as to propide a fund sufficient to pay the interest and principal of any bonds issued under this chapter, and to provide an additional fund to pay the cost of maintaining, repairing and operating such bridge, and may also provide for the cost of the continued operation, supervision, maintenance and repair of such bridge or bridges for a period of not to exceed twenty-five years after the removal of toll charges. After the provisions of said funds have been completed, such bridge or bridges shall thereafter be maintained and operated free of toll unless or until the charging of reasonable tolls may be continued or resumed by the city or its commission in order to finance reconstruction, extension, enlargement, or renewal of that particular bridge . . ."

This section was in force at the time of the said gift proposal and acceptance, and it became by force of law, an integral part of the contract between the parties, and they were governed thereby. This means that the city's authority to charge tolls was limited by said §5899.13, charging tolls to pay for matters authorized in said §5899.13.

The law concerning the powers of municipal corporations in effect on February 7, 1941, is best expressed in the case of *Merriam v. Moody's Executors,* 1868, 25 Iowa 163, which was a case dealing with the City of Keokuk's lack of authority to sell a lot for a delinquent assessment. On appeal from a district court decision that the City had no such power, the Supreme Court said:

"In determining the question now made, it must be taken for settled law, that a municipal corporation possesses and can exercise the following powers *and no others*: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation; fourth, any fair doubt as to the existence of a power is resolved by the courts against corporation — against the existence of the power . . ." (citing cases)

Until this decision was changed by §368.2 of the Code of Iowa, 1966, (effective July 4, 1963) this decision was the law of the State of Iowa, and municipal corporations had only those powers set forth therein.

On December 2, 1948, the City of Keokuk created and established the Keokuk Bridge Commission. This was done by the unanimous passage of Ordinance No. 775, which is in part as follows:

". . . There is hereby created and established the Keokuk Bridge Commission, which commission shall have all the power and authority conferred upon it by Chapter 383 of the 1946 Code of Iowa and amendments thereto regarding the operation, maintenance, and repair of the interstate bridge across the Mississippi River between Keokuk, Iowa, and Hamilton, Illinois."

On December 7, 1948, the Deed to the said bridge from the Keokuk and Hamilton Bridge, Inc., to the City of Keokuk, was filed with the County Recorder in Keokuk in Book 117, Page 205. Said Deed recited in part that it was subject to:

". . . (b) Agreement on the part of the party of the second part (City of Keokuk) that the bridge shall be maintained in perpetunity as a free bridge for vehicular and pedestrian traffic subject to such regulatory ordinances as may be enacted by said party of the second part. . . ." (Material in parenthesis added)

Also in force and effect on the date of the creation of said bridge commission was §383.13 of the Code of owa, 1946. This section was essentially the same as the old §589.13 (Code of Iowa, 1939), and the presently effective §383.13 of the Code of Iowa, 1966, and permitted toll revenues to be used only for the purpose specified therein.

On the basis of the analysis set forth above, it is my opinion that even if the city has general authority to fix said tolls, that such authority is limited by the said federal statutes as well as the provisions of Chapter 383 of the Code of Iowa, 1966.

A specific question posed in your letter of January 22, 1970, requests

my opinion on the legality of diverting bridge commission funds to city purposes such as recreation, urban renewal, airports, and other miscellaneous uses. As a general proposition, any diversion of funds of said bridge commission to such city purposes is unauthorized by law, but before attempting to answer your question relating to the diversion of bridge commission funds to specified city uses, it is necessary that I have an opportunity to study the results of a detailed investigation and audit of the financial records of both the city and the said bridge commission. Therefore, at this time, I respectfully decline to answer further the question relating to the specific diversions of bridge commission funds to the city.

March 12, 1970

CONSTITUTIONAL LAW: Repression of Obsenity. House File 1239, 2nd Session 63rd General Assembly. Proposed bill forbidding exposure of children to obscene materials and spectacles held within the power of state, under contemporary constitutional doctrine. Section providing penalty for publication so obstrusive that unwilling person could not avoid exposure held infringement on constitutional guaranties. (Turner to Alt., State Representative 3/12/70) #70-3-22

Mr. Don L. Alt, State Representative: Reference is made to your letter of March 3, 1970, requesting my opinion on the constitutionality of House File 1239, 2d Session, 63rd G.A., an Act relating to obscenity and providing punishment for violations thereof.

Sections 2, 5 and 6 of this bill are very similar in wording to §484-h of the New York Penal law, enacted as Ch. 327 of the acts of the legislature of that state in 1965. A challenge of that statute was rejected, and the law upheld by the United States Supreme Court in 1968, *Ginsberg vs. New York, 390 U.S. 629, 20 L. Ed 2d, 195.* Moreover, the propriety of state concern with the welfare of its children and its power to safe- of state concern with the welfare of its children and its power to safeguard them from abuse was asserted by the Supreme Court in prior cases. *Cf. Prince vs. Massachusetts, 321 U.S. 158, 88 L. Ed 645.*

There are, however, several departures from the wording of the New York statute that give me concern. §2(6) of House File 1239 indicates material which "appeals . . . to the interest of minors." The statute that was upheld speaks of material which *"predominately appeals . . .* to the interest of minors." §2(6) of House File 1239 refers to material which *"has no redeeming social value."* The New York statute speaks of material *"utterly without redeeming social value."* These words of the New York Act clearly were keyed to the language of what, for the time being at least, is the Supreme Court's description of obscenity, *Roth vs. United States,* 1957, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed 2d 1498.[1] These departures from the act that already has survived the scrutiny of the highest court might prove significant should the proposed bill be enacted, and challenged in the courts.

Although the proposed bill quite properly makes "willfully" and "knowingly" elements of the offenses described and punished, the same reasoning would require the inclusion of the definitions that are part of the New York statute. They are:

"(g) 'knowlingly' means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

"(i) the character and content of any material described herein in which is reasonably susceptible of examination by the defendant, and

"(ii) the age of the minor, provided however, that an hones mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor."

§§3 and 4 of House File 1239 are restatements of criminal laws that have long been part of the Code of Iowa, concerning the constitutionality of which there appears to be no question.

The language of §9 is tantamount to a summary description of the behavior of the defendant whose conviction was upheld in the Eros case, *Ginzburg vs. United States,* 1963, 383, U. S. 463, 86 S. Ct. 942, 16 L. Ed 2d 31, and accordingly there would appear to be no constitutional question by a statute forbidding it.

[1]The *Roth* doctrine, as developed by the Supreme Court, requires the *coalescence* of three discrete elements to constitute obscenity, which the court would deny constitutional protection. The elements: (1) the material must have a *dominant theme* that appeals to prurient interest; (2) it must be *patently* offensive by reason of going against contemporary standards of the community; and (3) the work must be *utterly* without redeeming social value.

The United States Supreme Court rather cogently has suggested that the right of the citizen *not* to have objectional material thrust upon him deserves protection no less than the rights of others to freedom of speech and of the press. See the dictum in *Redrup v. New York*, 1967, 386 U.S. 767, 87 Ct. 1414, 18 L. Ed 2d 515, where the court said in reference to the dismissal of certain charges of obscenity:

"In none (of the cases) was there any suggestion of an assault upon individual privacy by publication in a manner so obstrusive as to make it impossible for an unwilling individual to avoid exposure to it."

The court seems to be approving the propriety of a statute, for instance, to penalize such manifest trespasses as those of street vendors who literally shove filthy pictures in the faces of innocent passersby, or who slip unseemly publications into the mail slots or under the doors at the homes of persons without reference to whether such publications had been ordered or solicited. It is obstrusive and offensive *delivery* of the material rather than *publication,* in the legal sense of that process, that the court indicates a statute might properly proscribe.

However, the language of an opinion discussing the possible thrust of such legislation, may not be taken over unchanged for enactment as a criminal law. The suggestion of *Redrup* necessarily was in general terms; a criminal law must be specific. A discussion may be enhanced by its context; a criminal statute must stand on its own terms. So that although §8 of House File 1239 follows what may well be the thinking of the Supreme Court, and indeed is framed in the words of a decision

of the court, my opinion is that this section as drafted could not be upheld.

The crime of "assault" known to the law is too narrow for this purpose and the proposed regulation of "publication," whatever the drafters may intend, would be open to the construction ofprior censorship or review during or concommitant with the process of production of books, magazines, newspapers, pamphlets and stories. This the constitution does not permit. There seems no necessity to burden this opinion with references to the cases on this matter, when all of us are well aware of the narrow and rigid standards prescribed by the Supreme Court for dealing with the sale and circulation of material already produced and in being. Such material, which often of late has turned out not to be "obscene" as that concept is understood and enforced by the Supreme Court is nevertheless considered by ordinary decent non-legal people to be filthy, nasty, offensive and objectionable, dull, dreary trash.

Thus, except for §8 which we have indicated is capable of acceptable modification, we find this bill a valid and proper exercise of the police power of the State, consistent with the mandate of the Supreme Court.

March 13, 1970

ELECTIONS: Tenure of Senators Ch. 89, §3 (5), (6), Acts, 63rd G.A., 1st Session. Signatory to a statement that he would not be a candidate in 1970, pursuant to §3 (6) of the Reapportionment Act of 1969, would not thereby be barred as a candidate in a special election to fill out an unexpired term in the Senate, should a vacancy occur. (Turner to Clarke, State Senator, 3/13/70) #70-3-23

The Honorable Hugh H. Clarke, State Senator: Reference is made to your letter of March 12, 1970, propounding certain questions of law as follows:

"In a district now represented by one senator, elected in 1968 to a four-year term, and another senator whose term expires at the end of 1970, if the senator whose term expires at the end of 1970 files the statement provided by #3 (6) c, Chapter 89, Acts, Sixty Third Assembly, First Session, should the office thereafter become vacant, would it properly be filled by a special election?

"Should such a special election be held, would the Senator whose term expired at the end of 1970 be eligible to be a candidate, notwithstanding his having filed the statement referred to in the foregoing?"

The reapportionment act, Ch. 89, Acts, 63rd G.A., 1st Session, provides, §3 (5) and (6), as follows:

"5. Each senatorial district established by section five (5) of this Act in which two or more incumbent senators resided as of April 1, 1969, shall elect one senator in 1970. The term of any senator residing in a district in which an election is required by this subsection, who was elected in 1968 to a four-year term or was subsequently elected to complete the unexpired portion of a four-year term which began in January, 1969, shall be terminated effective January 1, 1971. However, this subsection shall not apply to a district if (a) subsection four (4) of this section is applicable, due to the death, resignation, or change of residence of one or more senators, or (b) subsection six (6) of this section is applicable.

"6. In any senatorial district established by section five (5) of this Act in which a senatorial election in 1970 would otherwise be required by subsection five (5) of this section no senatorial election shall be held in 1970 if all the incumbent senators residing in the district on March 15, 1970, file with the secretary of state, on or before March 15, 1970, a statement signed by each of them to the effect that:

"a. The district is to be represented in the senate for the Sixty-fourth General Assembly by one of the signatory resident incumbent senators, who must be identified in the statement and must have been elected to a four-year term in 1968 or subsequently elected to complete the unexpired portion of a term which began in January, 1969.

"b. Each of the other incumbent senators residing in the district who were elected to a four-year term in 1968 or were subsequently elected to complete the unexpired portion of a four-year term which began in January, 1969, have filed with the governor their resignations from the senate, to take effect not later than January 1, 1971.

"c. No incumbent senator residing in the district whose term will expire on or about January 1, 1971, will be a candidate for election as senator from that district in the 1970 primary and general elections.

"The district shall be represented in the Sixty-fourth General Assembly by the resident incumbent senator designated in the signed statement."

In fine, if on April 1, 1969, two or more senators resided in one of the newly established districts, their terms would terminate by law at the end of the year 1970, even though one or more of them had been elected in 1968 to serve four years.

But the operation of Subsection (5) would be prevented by compliance with Subsection (6), which provided for the filing with the secretary of state on or before March 15, 1970, of a statement signed by all such senators, setting forth, that one senator elected in 1968 to serve four years proposes to do so, that others so elected have filed their resignations effective not later than the end of 1970, and that those whose terms expire with the end of the 63rd General Assembly undertake not to be candidates in the primary or general elections of 1970.

My opinion is that as soon as the statement so provided has been filed, in proper form and according to law, the process of determining the tenure of the senators concerned is final and complete. Accordingly, once the statement is filed, the senator indicated thereby as proposing to serve out the four-year term ending in 1972 assumes the same status, and his tenure is on the same basis, as that of senators elected in 1968 to serve four years who on April 1, 1969, were the only senators representing their respective districts, as established by the Act of 1969.

From this it follows that a vacancy happening subsequent to the filing of the statement provided by Subsection (6) would be filled by a special election. My opinion is that the statement is concerned *only* with regular elections and that a signatory to such a statement would not be barred thereby from candidacy in a special election to fill a vacancy.

Forms for the filing of the statement provided by Subsection (6) are provided by the secretary of state, and available to you on request.

March 13, 1970

STATE OFFICERS AND DEPARTMENTS: Commission on the Aging — §§283A.2, 283A.3, 297.9, Code of Iowa 1966. School lunch facilities may not be used for the serving of meals on wheels and the serving of meals in the schools to senior citizens. (Haesemeyer to Nelson, Ex. Sec., Commission on the Aging, 3/13/70) #70-3-24

Mr. Earl V. Nelson, Executive Secretary, Commission on the Aging: Reference is made to your letter of February 23, 1970, in which you state:

"The Commission of the Aging requests a written opinion on the legality of the use of school lunch facilities for the serving of meals-on-wheels and the serving of meals in the schools to senior citizens.

"This means that the senior citizens would pay the full cost of the meal, both delivered out to the home and also any meal which would be served in the school facility.

"Other states are now doing this, and we request this opinion which will assist local communities in developing senior programs in Iowa. The meals delivered would not be delivered by school personnel, but by either volunteers or senior citizens paid from other than school funds."

Chapter 283A, Code of Iowa, 1966, entitled "School Lunch Programs" generally authorizes school boards to operate or provide for the operation of school lunch programs and for this purpose to use any funds legally available. See specifically §283A.2. The superintendent of public instruction is authorized to accept and direct the disbursement of federal funds in connection therewith. §283A.3. Moreover, the superintendent may enter into agreements with any school board or with any other agency or person, prescribe regulations, employ personnel and take such other action as he may deem necessary to provide for the establishment, maintenance, operation and expansion of any school lunch program, and direct the disbursement of federal and state funds, in accordance with any applicable provisions of federal or state law. §283A.4. However, we have been unable to find any provision of law which specifically authorizes the use of school lunch facilities, commodities, or funds for other than school children.

The National School Lunch Act, 42 U.S.C., §§1751-1761, the Child Nutrition Act of 1966, 42 U.S.C., §§1772-1784, and the Older Americans Act of 1965, 42 U.S.C., §§3001-3053, contain no direct or inferential manifestation of federal policy which would justify using school lunch resources other than for furnishing free or low cost meals to needy school children. Senate File 645 which is currently pending in the general assembly provides that the provisions of the National School Lunch Act and the Child Nutrition Act and the benefit of all funds appropriated under said Acts are accepted by the state of Iowa. However, even if this bill should pass and become law, nothing would change.

Returning to the Iowa law §297.9 provides:

"297.9 Use for other than school purposes. The board of directors of any school corporation may authorize the use of any schoolhouse and its grounds within such corporation for the purposes of meetings of granges, lodges, agricultural societies, and similar rural secret orders and societies, for parent-teacher associations, for community recreational activities, for public forums and similar community purposes; provided, however, that the board may not grant such permission to any organization known or

believed to held views that are in conflict with the republican form of government as set forth in the constitution of the United States; and for election purposes, and for other meetings of public interest; provided that such use shall in no way interfere with school activities; such use to be for such compensation and upon such terms and conditions as may be fixed by said board for the proper protection of the schoolhouse and the property belonging therein, including that of pupils."

It is to be observed that the board of directors of a school corporation may authorize the use of the schoolhouse only for certain limited and enumerated purposes. In an earlier opinion of the attorney general 1925-26, OAG 203, in which §4371 of the 1924 Code, the pre-cursor of §297.9, was involved it is stated. "that the enumeration of certain specific things in a statute operates as an exclusion of things not mentioned therein, *Talbot v. Blacklege*, 22 Iowa 572; *State v. Santee*, 111 Iowa 1. Although the language of the statute involved in this earlier opinion was somewhat different than existing §297.9 the principle is the same. Thus, unless it can be said that use of school facilities for lunches for senior citizens is a "community purpose" or an "other lodges, agricultural societies, similar rural secret orders and societies, parent-teacher association, community recreational activities or public forums, the statute would not authorize uses of the type you describe. We think it is not. See 66 OAG 292.

The program you suggest will in our view require the express authorization of the Iowa general assembly.

March 13, 1970

CONSTITUTIONAL LAW: Submission of question of calling constitutional convention — 1964 Amendment, Constitution of Iowa. It is proper to use voting machines rather than separate paper ballots to submit to the people the question of calling a constitutional convention. (Haesemeyer to Landess, Deputy Secretary of State, 3/13/70) #70-3-25

Mr. Robert C. Landess, Deputy Secretary of State: Reference is made to your letter of March 10, 1970, in which you state:

"In the forthcoming General Election, the question of 'Shall there be a convention to revise the Constitution and propose amendment or amendments to same?' shall be submitted to the voters. This is submitted pursuant to the 1964 amendment to the Constitution.

"In Mr. Haesemeyer's opinion of February 27, 1970, he indicates that this question does not fall under the definition of a 'constitutional amendment' or 'public measure'.

"I, therefore, request your opinion as to whether or not this issue may be submitted to the voters on a voting machine or must it be submitted by a separate paper ballot?"

Attached is a copy of an opinion of the attorney general to State Representative Donald Voorhees dates May 29, 1969. In this opinion we said that submission of the five constitutional amendments approved by the people at the general election in 1968 on voting machines constitutes submission by means of a separate ballot and that separate paper ballots are not required.

In our view the reasoning of this opinion would apply with equal force to the question of calling a constitutional convention and the use of voting machines rather than separate paper ballots for submitting such question to the voters would be proper.

March 13, 1970

CONSERVATION: Excise tax on motor fuel used in watercraft — Art. VII, §8, Constitution of Iowa; Ch. 324, Code of Iowa, 1966; H.F. 1232, 63rd G.A. Revenue from tax on motor fuel used for nonhighway purposes are subject to legislative process and may be diverted to non-highway funds and purposes without violating §8, Art. VII, Iowa Constitution. (Peterson to Tieden, State Representative, 3/13/70) #70-3-26

Honorable Dale L. Tieden, Iowa State Representative, House of Representatives: Reference is made to your letter of March 12, 1970 quoted herewith:

"I would like an Attorney General's opinion on the following sections of H.F. 1232.

"I. Lines 11 through 16

"2. Sec. 4 of H.F. 1232

"Constitutionality of these two sections has been questioned."

House File 1232 by the Committee on Conservation and Recreation, filed February 10, 1970 provides in part as follows:

Lines 11 through 16:

"Before the preceding credits are made for the fiscal year beginning July1, 1970, the amount of five hundred thousand dollars, which it is hereby determined represents the net proceeds of motor fuel tax attributable to motor fuel used in watercraft, shall be placed in a separate fund, which is hereby created and designed as the 'marine fuel tax fund.' "

Section 4 of House File 1232:

"During the fiscal year beginning July 1, 1970, the legislative service bureau shall conduct a study to determine the percentage of total motor fuel tax collected which is attributable to motor fuel used in watercraft. The percentage determined by the study shall be applied in the following years to determine the amount of motor fuel tax which shall be credited to the marine fuel tax fund. The legislative service bureau shall use the most appropriate method available in conducting the study. The state conservation commission and the department of revenue shall cooperate with the legislative service bureau in conducting the study. the study shall be reviewed, and the applicable percentage recomputed, at least once every four years."

The pertinent constitutional provision is Section 8, Article VII, Constitution of Iowa, 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 Iowa excise tax on motor fuel is imposed under the provisions of Chapter 324, Code of Iowa, 1966, which in pertinent part states:

"324.2(1) 'Motor fuel' shall mean (a) all products commonly or commercially known or sold as gasoline (including casinghead and absorption or natural gasoline) regardless of their classifications or uses; and (b) any liquid advertised, offered for sale, sold for use as, or commonly or commercially used as a fuel for propelling motor vehicles, which when subjected to distillation of gasoline, naphtha, kerosene and similar petroleum products (American Society of Testing Materials Designation D-86), show not less than ten per centum distilled (recovered) below three hundred forty-seven degrees Fahrenheit (one hundred seventy-five degrees Centigrade) and not less than ninety-five per centum distilled (recovered) below four hundred sixty-four degrees Fahrenheit (two hundred forty degrees Centigrade); provided, that the term 'motor fuel' shall not include liquefied gases which would not exist as liquids at a temperature of sixty degrees Fahrenheit and a pressure of fourteen and seven-tenths pounds per square inch absolute, nor naphthas and solvents as hereinafter defined unless the liquefied gases or naphthas and solvents are used as a component in the manufacture, compounding, or blending of a liquid within (b) above, in which event the resulting product shall be deemed to be motor fuel."

"324.50 This division and applicable provisions of division IV of this chapter and any amendments to either shall be known and may be cited as the 'Interstate Fuel Use Tax Law,' and as so constituted is hereinafter referred to as this division."

"324.57(1) 'Fuel taxes' means and includes the per gallon excise taxes imposed under divisions I, II and III of this chapter with respect to motor fuel and special fuel.

"2. 'Motor vehicle' shall mean and include all vehicles (except those operated on rails) which are propelled by internal combusion engines and are of such design as to permit their mobile use on public highways for transporting persons or property. A farm tractor while operated on a farm or for the purposes of hauling farm machinery, equipment or produce shall not be deemed to be a motor vehicle. 'Motor vehicle' shall not include 'mobile machinery and equipment' as hereinafter defined.

* * *

"4. 'Public highways' shall mean and include any way or place available to the public for purposes of vehicular travel notwithstanding temporarily closed."

A section substantially the same as the present Code Section 324.2 was considered by the Supreme Court of the United States in *Monomotor Oil Company v. Johnson*, 54 S. Ct. 575, 292 U.S. 86, 78 L.Ed. 1141, the court holding that the tax was an excise tax imposed on the use of fuel for the propulsion of vehicles on the highways of the State of Iowa, and that no tax was intended to be laid upon non-highway users.

In *Plank v. Grimes*, 238 Iowa 594, 28 N.W. 2d 34, the Iowa Supreme Court held that the Iowa Motor Fuel Tax Law (Chapter 324) was an excise tax upon the use of motor fuel for ". . . the propulsion of vehicles on the highways of the state. As an excise tax to be paid by users of motor vehicle fuel to propel vehicles on the highways of this state, the law operates with uniformity upon all within the class, and the equality and due process provisions of the state and federal constitutions are satisfied."

The effect of said Chapter 324 is to improse an excise tax on the use

of motor fuels for the propulsion of motor vehicles on highways of the state. With a few exceptions, the tax is imposed on all motor fuels imported and its application is limited by providing for refunds of taxes on fuel used for non-highway purposes rather than by exempting such fuel from payment of the tax in the first instance.

Obviously, if the term "highways" as used in the constitution and the statute includes waterways, taxes collected under the statute could be used for the construction, maintenance and supervision of waterways at the will of the legislature and we are aware that the generic term "highways" in certain contexts includes navigable waters. In construing similar statutes and constitutional provisions, however, the courts of last resort in other jurisdictions have uniformly held and we agree that the term "highway" in this context is equivalent to a public road and does not include waterways. *Sears v. Steel,* 55 Or. 544, 107 P. 3; *Northern Pacific Railway Co. v. Hirzel,* 29 Idaho 438, 161 P. 854; *Manigault v. S. M. Ward & Co.,* 123 F. 707; *Hatteras Yohet Co. v. High,* 625 N.C. 653, 144 S.E. 2d 821; *Speights v. Calleton County,* 100 S.C. 304, 84 S.E. 873.

Therefore, any tax revenues resulting from the use of motor fuel in watercraft operated on waters of the state are not within the purview of Section 8, Article VII of the Constitution of Iowa and the imposition of an excise tax on the use of motor fuel in watercraft and the allocation of revenues resulting therefrom are subject to the legislative process.

By means of eliminating refunds therefore (§§2 and 3), House File 1232 imposes an excise tax on motor fuel used in watercraft within the state and allocates the revenues therefrom to the marine fuel tax fund for appropriation to the State Conservation Commission for use in its recreational boating program. The amount of the net proceeds of motor fuel tax attributable to motor fuel used in water craft during the fiscal year beginning July 1, 1970 is determined by lines 11 through 16 of the bill and the means of determining the amount thereof in subsequent years is contained in Section 4 thereof. Your request for an opinion concerns these portions of House File 1232 and poses the question whether either or both would result in a diversion of tax funds collected on the use of motor fuels to propel motor vehicles on highways of the state, contrary to the constitutional provision prohibiting such diversion.

In neither case may the portion of the motor fuel tax funds allocated to the marine fuel tax fund invade that portion of the motor fuel tax funds collected in connection with highway use of motor fuels.

In lines 11 through 16 of the bill, the amount of $500,000 is legislatively determined to be the net proceeds of motor fuel tax attributed to motor fuel in watercraft during the fiscal year beginning July 1, 1970. The constitutionality of this portion of the bill is dependent upon whether the amount thus allocated to the marine fuel tax fund includes any funds collected in connection with use for highway purposes. We are informed that the results of various federal, state and industry surveys and studies regarding the use of motor fuels in watercraft has been made available to the House Committee on Conservation and Recreation and to the General Assembly as a whole. These studies indicate that the

amount of revenues attributable to use in watercraft far exceeds the amount allocated by House File 1232 to the marine fuel tax fund for fiscal 1970 and, if House File 1232 is enacted, the legislative determination of the revenues attributable to use in watercraft will have been made in the light of the studies and surveys noted above. We are not prepared to say that these surveys and studies are not sufficiently accurate to prevent any constitutionally prohibited encroachment upon road funds, particularly since the amount attributed to use in watercraft by House File 1232 is significantly less than the amount attributed thereto in any of the surveys and studies.

Section 4 of House File 1232 directs the Legislative Service Bureau to conduct a study, by the most appropriate method available, to determine the percentage of total motor fuel tax collected which is attributable to motor fuel used in watercraft. The percentage thus determined would be applied to determine the amount of motor fuel tax to be credited to the marine fuel tax fund after fiscal 1970. Section 4 thus delegates to an administrative agency of the state the duty and authority to determine a fact upon which the operation of the law depends. This the legislature can do. *Goodlove v. Logan,* 217 Iowa 98, 251 N.W. 39; *State v. Van Trump,* 224 Iowa 504, 275 N.W. 569; *Lewis Consolidated School District v. Johnson,* 256 Iowa 236, 127 N.W. 2d 118.

Allocations made to the marine fuel tax fund pursuant to the percentage thus determined may not include funds constitutionally earmarked for the construction, maintenance and supervision of highways. In specific terms, House File 1232 directs the allocation (to the marine fuel tax fund) of funds which are subject to the legislative process, that is, funds attributable to motor fuel used in watercraft. Again, we are not prepared to say that the percentage of total motor fuel tax collected which is attributable to use in watercraft cannot be determined by the legislative service bureau. Various methods of determining the amount of fuel used in watercraft have been used in the thirty or so states allocating motor fuel tax funds for use in park and recreational boating programs. The legislative service bureau would have the benefit of this experience in selecting the "most appropriate method" of determination required by the statute or might develop its own "most appropriate method," perhaps through verified consumer reports of fuel used in watercraft in conjunction with application for registration of boats.

In summary, we are of the opinion that House File 1232 is not unconstitutional on its face and that the constitutionality of allocations of funds pursuant thereto is dependent upon the validity of the factual determinations made pursuant to the terms thereof.

March 13, 1970

CONSERVATION: Water Safety Regulations — Ch. 106, Code of Iowa, 1966. Proposed Lake Panorama, under facts noted, is exempt from state water navigation regulations (Ch. 106, Code 1966) as a "privately owned lake" if substantially all use thereof is limited to owners of the lake and their personal guests, the latter term implying a host-visitor relationship between the owners and particular visitors. (C. Peterson to O'Malley, State Senator, 3/13/70) #70-3-27

Honorable George E. O'Malley, Iowa State Senator: Reference is made to your request for an official opinion of this office on the following questions:

"1. Whether the Lake Development at Panora, Iowa by the Mid-Iowa Lakes Corporation referred to as 'Lake Panorama' which is being constructed pursuant to authority granted under Chapter 455A of the 1966 Code of Iowa is a 'privately owned lake' within the definition set fourth in Chapter 106.2

"2. Whether the Iowa Conservation Commission has regulatory jurisdiction over the water that will be impounded at Lake Panorama pursuant to Section 106.2(4)."

Iowa statutes pertinent to these questions include the following sections of Chapter 106, 1966 Code of Iowa:

"106.1 Declaration of Policy. It is the policy of this state to promote safety for persons and property in and connected with the use, operation and equipment of vessels and to promote uniformity of laws relating thereto.

"106.2 Definitions. As used in this chapter, unless the context clearly requires a different meaning:

* * *

"4. 'Water 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.

"5. 'Farm pond' means a body of water wholly on the lands of a single owner, or a group of joint owners, which does not have any connection with any public waters and which is less than ten surface acres.

* * *

"8. '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.

* * *

12. 'Privately owned lakes' means any lake, located within the boundaries of this state and not subject to federal control covering navigation owned by an individual, group of individuals or a non-profit corporation and which is not open to the use of the general public but is used exclusively by the owners and their personal guests."

This opinion is based upon information furnished in your letter with attachments thereto to the effect that "Lake Panorama" will be formed by constructing a dam across the Middle Raccoon River in Guthrie County, Iowa; that no part of the Middle Raccoon River was meandered in the original government survey; that the lake will have a water surface area of about 1,270 acres and will store water in permanent storage in the maximum quantity of 19,700 acre-feet; that jurisdiction over the waters of the Middle Raccon River or Lake Panorama has not been specifically delegated to local authorities; that state permits to construct the dam and to impound water have been secured; that the lake bed and all land access around the lake is owned by the developer and private purchasers of cabin or home sites; and that, on completion of the develop-

ment phase of the project, ownership, management and control over common elements of the project (including the lake) will pass to owners of lots in the development, either as an association or as a nonprofit corporation.

The power of the legislature to enact regulations affecting the public health, safety, morals and general welfare of its citizens is well established. *City of Des Moines v. Manhattan Oil Co.*, 1921, 197 Iowa 1096, 184 N.W. 823; *Benshoter v. Hakes*, 1943, 232 Iowa 1354, 8 N.W. 2d 481; *Steinberg-Baum & Co. v. Countryman*, 1956, 247 Iowa 923, 77 N.W. 2d 15; *Iowa Natural Resources Council v. Van Zee et al*, 1968, ... Iowa ...., 158 N.W. 2d 111.

The "police power" is inherent in the state and is given the scope within the state commensurate with what the legislature reasonably believes to be necessary for the protection and preservation of the health, morals and welfare of its citizens. *State* v. *United States Express Co.*, 1914, 164 Iowa 112, 145 N.W. 451; *Davis* v. *Barrett*, 1962, 253 Iowa 1092, 296 N.W. 2d 211; *Benschoter* v. *Hakes*, 1943, 232 Iowa 1354, 8 N.W. 2d 481.

The Supreme Court of the United States said, in *Lawton* v. *Steele*, 1894, 152 U.S. 133, 14 S.Ct. 499:

"The extent and limits of what is known as the 'police power' have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay, or otherwise endangering the lives of passersby; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxication liquors are sold. Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the Legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interest. Barbier v. Connolly, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923; Kidd v. Pearson, 128 U.S. 1, 9 S.Ct. 6, 32 L.Ed. 346."

All matters relating to the policy, wisdom, or expediency of particular regulations under the police power are exclusively or primarily for legislative, rather than judicial, determination, and the determination of the legislature in this regard will not be disturbed by the courts, unless such regulation has no relation to the ends of which the police power exists. 16 C.J.S. Constitutional Law §198; *City of Des Moines* v. *Manhattan Oil Co.*, supra; *Fevold* v. *Board of Supervisors*, 202 Iowa 1019, 210 N.W. 139; *Burlington & Summit Apartments v. Manolato*, 233 Iowa 15, 7 N.W. 2d 26.

In this instance, the Iowa legislature has determined that the public interest requires the regulation of certain boat traffic " . . . to promote safety for persons and property in and connected with the use, operation and equipment of vessels . . ." and has enacted specific regulations in Chapter 106. The regulations imposed are obviously related to the ends sought and we are not prepared or permitted to substitute our judgment for that of the legislature with regard to the need for such regulation.

Our inquiry then is directed to whether Chapter 106 water navigation regulations are or will be applicable specifically to Lake Panorama under the facts noted.

The proposed lake clearly is of such size, depth and stability as to constitute "navigable waters" as defined in §106.2(8) and, as such, comes within the definition of "waters of this state under the jurisdiction of the state conservation commission" subject to water navigation regulations imposed under the provisions of said Chapter 106, unless exempted as a "privately owned lake" as defined in §106.2(12) quoted above.

It seems equally clear that neither the proposed lake nor the natural flow in the Middle Raccoon River is of such magnitude as to constitute navigable waters of the United States "subject to federal control covering navigation." The matter of navigability of certain waters with regard to imposition of the federal navigation servitude is a matter for decision in the federal courts and the prevailing test of navigability of waters in the federal courts is one of fact. Thus, navigable in fact is navigable in law and navigable in fact means susceptibility to use under normal conditions as a highway of commerce. *United States* v. *Utah,* 1931, 283, U.S. 64; *The Daniel Ball,* 1870, 77 U.S. 557; *The Montello,* 1874, 87 U.S. 430; *United States* v. *Appalachian Electric Power Co.,* 1940, 311 U.S. 377; *United States v. Rio Grande Dam & Irr. Co.,* 1899, 174 U.S. 770. We are not aware of any past or potential use of the waters of the Middle Raccoon River or the proposed lake as a highway of commerce and therefore conclude that such waters are not subject to "federal control covering navigation."

As stated above, ownership, management and control over common elements of the Lake Panorama project (including the lake proper) will be exercised by the owners of lots therein either as an association or as a nonprofit corporation. Ownership and control in either capacity satisfies the ownership requirements of §106.2(12) for exemption from state water navigation regulation regulations as a "privately owned lake."

Finally, in order to be exempt from state water navigation regulations imposed pursuant to Chapter 106, the lake must also be " . . . not open to the use of the general public but . . . used exclusively by the owners and their personal guests." Of use in construing this section are the following definitions taken from the sources cited:

GENERAL

"1. Of or pertaining to a genus or kind; pertaining in common to all, as of a class, group, order, or community; as, a general direction. 2. Pertaining to the majority; common to the greater number but not to all; true of a large number or proportion widespread or prevalent, as distingushed from universal; as a general practice . . ." Funk and Wagnalls New

Standard Dictionary of the English Language.

" . . . means extensive, common to many, or the majority, but not universal . . ." *McNeil v. McNeil,* 1914, 166 Iowa 680, 148 N.W. 643.

PUBLIC

"1. The people collectively, or in general, as of a particular locality, state, or nation, or of the world at large . . ." Funk and Wegnalls New Standard Dictionary of the English Language.

" . . . refers to a general body of mankind of a nation, state or community." *City of Ardmore* v. *Knight,* 1954, 270 P. 2d. 325.

" . . . does not mean all the people, nor very many people of a place, but so many of them as contradistinguishes them from a few." *State* v. *Baker,* 1913, 88 Ohio St. 165, 102 N.E. 732.

" . . . of or pertaining to the people; relating to or affecting a nation, state, or community at large." *People* v. *Powell,* 1937, 280 Mich. 699, 274 N.W. 372.

EXCLUSIVELY

"Apart from all others . . . Purely . . . Solely . . . Substantially all or for the greater part . . . To the exclusion of all others; without admission of others to participation; in a manner to exclude . . ." Black's Law Dictionary, Fourth Edition, and cases cited therein.

OWNER

. . . A general term having a wide variety of meanings depending on the context and the circumstance in which it is used. Broadly, an 'owner' is one who has dominion over property which is the subject matter of ownership. . . . one who has dominion over a thing, which he may use as he pleases, except as restricted by law or by agreement . . ." 73 C.J.S. Property §13 and authorities cited therein. See also *Prudential Ins. Co. of America* v. *Kraschel et al,* 1936, 222 Iowa 794, 266 N.W. 550.

" . . . The term 'owner' is one of quite general application, and is frequently applied to one having an interest in or claim upon property much less than absolute and unqualified title." *Lumber Co. v. Peterson & Sampson,* 1904, 124 Iowa 599, 100 N.E. 550; *Bare* v. *Cole,* 1935, 220 Iowa 388, 260 N.W. 338.

". . . a right to use the land of another without his consent . . . is an interest in the lands." *Cheever* v. *Pearson,* 1831, 33 Mass. 266.

PERSONAL

". . . pertains to a particular person or relates to an act done in person without the intervention of another." *Prete* v. *Finkelstein,* 1948, 83 N.Y.S. 2d 353.

". . . springing from or belonging to oneself; affecting or relating to one individually." *Genung* v. *Best,* 1927, 100 N.J.Eq. 250, 135 A. 514.

GUEST

". . . a person entertained in one's house or at one's table . . . a person to whom hospitality (as of a home or club) is extended; esp.: one invited to participate in some activity (as an excursion) at the expense of another . . ." Webster's Third New International Dictionary.

" . . . connotes both a social relationship and the existence of a host . . ." *Chumely v. Auderton,* 1937, 20 Ten.App. 621, 103 S.W. 2d 331.

". . . a person entertained in one's house or at one's table; a visitor entertained without pay; hence a person to whom the hospitality of a home, club, etc., is extended . . ." *Wilson* v. *Hawkeye Cas. Co.,* 1950, 67 Wyo. 141, 215 P. 2d 867.

". . . one entertained without pay, and a person to whom hospitality is extended . . ." Dobbs v. Sugioka, 1947, 117 Colo. 218, 185 P. 2d. 784.

In light of the above, we are persuaded that; as used in §106.2(12), the term "owners" means the joint owners of the lake and the term "personal guest" means and implies a host-visitor relationship between owners of the lake and particular visitors.

We are, therefore, of the opinion that the water of the proposed Lake Panorama, under the facts noted, are exempt from state water navigations as a "privately owned lake" if substantially all use thereof is limited to owners of the lake and their personal guests, the latter term implying a host-visitor relationship between the owners and particular visitors.

March 13, 1970

CITIES AND TOWNS: Funds for sidewalk construction — §§312.2, 312.6, 404.7, Code of Iowa, 1966. Road use tax funds allocated to cities and towns cannot be used for sidewalk construction which is not part of a street construction project. (Holst to Wood, Hamilton County Attorney, 3/13/70) #70-3-28

Mr. Carroll Wood, Hamilton County Attorney: In your letter to the attorney general you asked for an opinion for the Jewell City Attorney to the following question:

Can a town use road use tax funds for the purpose of sidewalk construction where said construction is not a part of the street construction project? It is our opinion that the answer is "no."

State road use tax revenue is allocated to municipal corporations by authority of §312.2(4) for inclusion in the municipal street construction fund. §312.6 places limitations on the use of these funds. Paragraphs 1 and 3 thereof, as follows, are germane to your question, and authorize use of these funds:

"1. For the purpose for which street fund money may be used, with the exception of parking facilities as provided in subsection 5 of section 404.7.

* * *

"3. For sidewalk expenditures required as part of a street construction or reconstruction project."

The creation of authority for, and use of municipal street funds are found in §404.7. Reference is specifically made to road use tax funds in §404.7(14), and §312.6 makes reference to street funds. Therefore, the two statutes should be considered *in pari materia.* See *Fitzgerald v. State,* 1935, 220 Iowa 548, 551, 260 N.W. 681, for a complete discussion of and references to the *in pari materia* rule.

Section 404.7(14) states:

"Funds received by municipal corporations from the road use tax fund shall be separately allocated for expenditure within the street fund for only the purposes authorized and permitted by law."

Logically, the "purpose authorized and permitted by law" refers to

the purposes of the road use tax fund and not the street fund. Otherwise the phrase would be redundant and superfluous to the rest of the section. The entire section should be considered as well as related statutes (§312), and an effort should be made to give effect to every part and word of an act. *Manila Community School District v. Halverson* 251 Iowa 496, 101 N.W. 2d, 705.

An opinion of the attorney general, dated January 16, 1968, relating to primary road funds and safety rest areas thoroughly discusses the history of the road use tax funds, the constitutional limitation of their use and the court's interpretation of our statutes relating to Chapter 312. From this discussion it appears Chapter 312 should be given a liberal interpretation and on first analysis it would seem the answer to your question would be "yes."

However, while §312.6(1) *generally* authorizes use of road use tax funds for any purpose stated in §404.7 with one exception, §312.6(3) *specifically* authorizes the use for sidewalk construction when required as a part of a street construction or reconstruction project.

With the foregoing in mind, without the inclusion of §312.6(3), road use tax funds could be used for sidewalk construction either as part of a street project or independently by virtue of §312.6(1). Therefore, the section would have no effect and would be surplusage. Our statutes should be construed so that no part will be rendered superfluous and every effort ordinarily should be given to every provision. *Board of Directors v. Blakesley*, 240 Iowa 910, 918, 36 N.W. 751. It is our opinion §312.6(3) is a specific provision which limits the general provisions. As such it controls. *McBride v. Des Moines City Railway Company*, 134 Iowa 398, 109 N.W. 618.

Therefore, the answer to your question must be "no."

March 13, 1970

COUNTIES AND COUNTY OFFICERS: County Board of Supervisors — §§306.3, 309.3, 321.475, 332.1, Code of Iowa, 1966. Operating overloaded truck is "illegal operation" thereof under §321.475, and damage to secondary bridge may be recovered by board of supervisors. (Holst to Dillon, Louisa County Attorney, 3/13/70) #70-3-29

Mr. John L. Dillion, Louisa County Attorney: In your letter of May 22, 1969, you requested an opinion of the Attorney General as follows:

"1. Is an overload sufficient to make this (bridge damage caused by a truck) an 'illegal operation' as required by Section 321.475?

"2. In view of the denial of liability by the insurance company is the next step for the Board (of Supervisors) to file suit?"

Section 321.475 states in part as follows:

"Any person driving any vehicle, object, or contrivance upon any highway or highway structure shall be liable for all damage which said highway or structure may sustain as the result of any illegal operation, driving, or moving of such vehicle, object, or contrivance . . ."

The Iowa Supreme Court in *State v. F. W. Fitch Company*, 1945, 236 Iowa 208, 213, 17 N.W. 2d 380 stated in regard to Section 5035.24, now 321.475:

"The first part of the section refers to 'any illegal operation.' The context indicates this includes any operation contrary to any of the requirements of the division captioned Size, *Weight,* and Load, not within the exceptions listed in Section 5035.02" (now 321.453). (Emphasis added.)

". . . Damage may be recovered in a civil action brought by the authorities in control of such highway or highway structure."

The County is considered a body corporate, and in accordance with §332.1". . . may sue and be sued . . . hold property . . . and do such other acts and exercise such other power as are authorized by law."

The jurisdiction and control over secondary roads are vested in and imposed on the County Board of Supervisors as to secondary roads in their respective counties §306.3, as well as secondary bridges and culverts, §309.3.

It is therefore, the opinion of this office that:

1. An "illegal operation" as contemplated in §321.475 is any operation contrary to the law regarding vehicle weight.

2. The Board of Supervisors is empowered to commence legal action for recovery of damages to highways and highway structures within their jurisdiction and control if negotiations or settlement attempts fail.

March 13, 1970

TAXATION: Sales Tax Exemption — Soldiers' Relief Commission — §§422.45(5) and 250.1, Code of Iowa, 1966. Sales tax should not be collected by retail merchants on grocery order slips issued and paid for by a County Soldiers' Relief Commission. (Petosa to Kauffman, Iowa Bonus Board, 3/13/70) #70-3-30

Mr. Ray J. Kauffman, Executive Secretary, State of Iowa Bonus Board: This will acknowledge receipt of your letter in which you request an opinion of the Attorney General on the following question:

"Is it legal for a retail merchant to collect sales tax on grocery order slips issued by a County Soldiers' Relief Commission to eligible recipients?"

Section 422.45(5), Code of Iowa, 1966, provides for a sales tax exemption in relevant part as follows:

"The gross receipts or from services rendered, furnished, or performed and 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 . . . . 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 collection of taxes, . . ."

Section 250.1, Code of Iowa, 1966, provides in relevant part as follows:

"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 . . . 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 . . . and their indigent wives, widows and minor children not over eighteen years of age, having a legal residence in the county."

It is our understanding that the Soldiers' Relief Commission which derives funds raised by the authorized levying of taxes under §250.1, Code of Iowa, 1966, provides purchase orders for food essentials to qualified indigent men and women of the wars enumerated in §250.1, Code of Iowa, 1966, and indigent wives, widows and minor children not over eighteen years of age, having a legal residence in the particular county concerned.

The concerned grocery store which has honored the purchase order submitted by the indigent individual then submits a notarized claim against the county to that particular county's Soldiers' Relief Commission.

It is our opinion that a County Solders' Relief Commission qualifies for sales tax exemption under §422.45(5), Code of Iowa 1966, and sales tax should not be collected by retail merchants on grocery order slips issued and paid for by a County Soldiers' Relief Commission.

March 13, 1970

HIGHWAYS: Underground telephone cable — §§306A.2, 306A.3, 306A.10, 306.3, 488.1, 488.3, 488.4, 319.2, Code of Iowa, as amended, Art. 1, §18, Constitution of Iowa. The Iowa State Highway Commission may authorize a telephone company to place or construct an underground telephone cable along the untraveled portion of a controlled access highway, within the Primary Road System of the state, without consent or permission from an abutting landowner who holds the underlying fee in such highway. Such an installation of an underground telephone facility, so authorized by the Highway Commission, is a proper and lawful highway use, and does not constitute an additional servitude upon the underlying fee for which compensation must constitutionally be paid. (Lego to Kosek, State Senator, 3/13/70) #70-3-31

The Honorable Ernest Kosek, State Senator: By letter dated November 3, 1969, you have asked our opinion on the authority of the Iowa State Highway Commission to authorize installation of an underground telephone cable along the untraveled portion of a public highway, outside of a city or town, without the permission of the underlying fee owner of that portion of the highway. Assuming the "public highway" to which you refer is a controlled access facility (as defined by Section 306A.2 of the Code of Iowa, 1966, as amended) forming part of the Primary Highway System of the State which, as you know, is under the jurisdiction of the Highway Commission per Sections 306.3 and 306A.3 of the Code, we advise as follows.

Section 488.1 of the Code provides that a telephone company may construct its lines and fixtures along the public roads of the State. While such a company's occupancy of public roads is subject to certain controls for purposes of pubilc safety and convenience (see Sections 488.3 and 319.2 et seq. of the Code), the broad language in said Section 488.1 amounted to a statutory franchise which assumed such a company's right to locate its facilities within the limits of public roads, and only the manner or mode of such use of the highway right of way could be regulated or controlled by appropriate highway authorities. *City of Des Moines v. Iowa Telephone Co.*, 1917, 181 Iowa 1282, 162 N.W. 323. Thus, the

force of this statute (488.1) would apparently warrant an inference that the legislature has itself directly authorized a telephone company to place its facilities along primary roads, and the role of the Highway Commission would be confined only to regulations regarding the manner, as opposed to the fact, of highway occupancy by such telephone facilities.

However, Chapter 306A of the Code, which was enacted by the 56th General Assembly as Chapter 148 of its Acts and became law on July 4, 1955, contains provisions which appear to conflict irreconcilably with this unfettered authority of telephone companies under said Section 488.1 to occupy public highways. For Section 306A.3, in the light of Section 306A.10, seems to vest in the Highway Commission full supervision over all controlled access highways within their own jurisdiction, including the planning, designating, establishing, vacating, altering, improving, and above all, regulating the same. The Supreme Court of Iowa in the case of *Iowa Power and Light Company v. Iowa State Highway Commission,* 1962, 117 N.W. 2d 425, faced a parallel problem when the utility Company challenged the right of the Highway Commission under Chapter 306A to prohibit use or occupancy of an interstate highway by facilities of the Company. Pursuant to an application filed by the plaintiff with the Iowa State Commerce Commission under Chapter 489 of the Code, a franchise was granted and the Highway Commission refused to designate a location for the Company's facilities along the interstate right of way. The Court reasoned that Chapter 489 pertained to all highways outside cities and towns and that Chapter 306A, being a subsequently enacted and special statute, must govern in the event the competing statutes cannot be fairly reconciled. The Court specifically held that the Highway Commission had power under Chapter 306A to determine all matters concerning controlled access highways, including the right to construct utility lines along and upon their rights of way, and could accordingly permit or prohibit at their own discretion the use of interstate right of way by a public utility. Although the facts of that particular case dealt only with an interstate highway, and the decision applied only thereto, the Court acknowledged on Page 427 of 117 N.W. 2d that "logically it appears the same reasoning would apply to any controlled access road." The analogy between this case and the situation you have presented is strong. Section 488.1 is a general and earlier statute applying to all "public roads of the state," whereas Section 306A.3, as well as Section 306A.10, afford subsequent and special authority for the Highway Commission to regulate utilities within the right of way of controlled access facilities. In our opinion, the apparent authority of the telephone company to place its facilities along primary roads under Section 488.1 has been qualified and superseded by the provisions of Sections 306A.3 et seq. of the Code, and the Highway Commission possesses power under present Iowa law to withhold permission for a telephone company to install underground cable facilities within the limits of a controlled access facility forming part of the Primary Highway System, or to grant such permission on terms and conditions considered reasonable and proper, and irrespective of any consent from the owner of the underlying fee who may be affected by such action.

A related aspect of your inquiry concerns the compensability of such an underlying fee owner's interest when the highway right of way is devoted to the additional use involved by the installation of underground telephone facilities therein. Private property may not be taken by a telephone company without payment of just compensation. Article 1, Section 18, Constitution of Iowa, Section 488.3 and 488.4, Code of Iowa, *Hagenson v. United Telephone Company*, 1969, 164 N.W. 2d 853. Thus, if such installation of telephone facilities within highway limits will constitute an additional servitude requiring payment of just compensation to the underlying fee owner, the owner must either consent to the installation or require that his damages be ascertained via eminent domain. This question has never been determined by the Iowa Supreme Court, and cases from other jurisdictions are about equally divided on the matter. (See 29A Corpus Juris Secundum, Eminent Domain, Section 133, and Nichols' The Law of Eminent Domain, Revised Third Edition, Volume 3, Section 10.5 [1], and extensive citations of cases on both sides of the issue reported therein.) However, Nichols on Eminent Domain, at Sections 10.211 [2] and 10.4 of said Volume 3, seems to indicate rather clearly that in cases such as the one you have presented the public benefit tends to outweigh private inconvenience, and the right of an underlying fee owner to additional compensation for the use of a public highway by an underground telephone facility is not constitutionally protected. Moreover, it is difficult to see how a telephone cable in a public highway could inflict any real damage upon an abutting owner who also holds the fee beneath the road, such a use of the public highway in modern times would appear to be perfectly natural, compatible and consistent with the public interest, convenience and necessity in making full and efficient use of the pubilc thoroughfare of the State.

In our opinion, an underground telephone cable located on the highway easement should be recognized as within the same category as other lawful highway uses, and entitled to the same immunities, and such an installation will not constitute a special interference with the enjoyment of the fee by the abutter, nor generate an additional burden or servitude for which said abutter must be compensated under Article I, Section 18, of the Iowa Constitution and Section 488.3 of the Code. Accordingly, we are unable to conclude that such an underlying fee owner's consent to the installation of telephone cables within highway right of way is necessary, even in the sense that he has some constitutionally protected right to compensation.

You are, therefore, advised that the Iowa State Highway Commission may authorize a telephone company to place or construct an underground telephone cable along the untraveled portion of a controlled access highway, within the Primary Road System of the State, without consent or permission from an abutting landowner who holds the underlying fee in such highway. Such an installation of an underground telephone facility, so authorized by the Highway Commission, is a proper and lawful highway use, and does not constitute an additional servitude upon the underlying fee for which compensation must constitutionally be paid.

March 13, 1970

CONSTITUTIONAL LAW: Manner of making Act retroactive by publication — Art. III, §26, Constitution of Iowa. A simple statement in the publication clause would be the best way to make a published law retroactive to a given date, to wit: "This Act, being deemed of immediate importance, shall be in full force from January 1, 1970 after its publication in the ....., a newspaper published at ....., Iowa and the ....., a newspaper published at ....., Iowa." (Turner to Faupel, Deputy Code Editor, 3/13/70) #70-3-32

Mr. Wayne A. Faupell, Deputy Code Editor: You have requested an opinion of the attorney general as to the simplest, most practical and effective mechanical manner in which to make an entire Act (as distinguished from a part thereof) retroactive by publication. In your letter you say:

"Article III, §26 of the Iowa Constitution (as amended) 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. *** 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.' (i.e. *prior* to July 1)

"Webster's Unabridged Dictionary defines the word 'retroactive' when applied to a law as 'taking *effect* prior to enactment.'

"Since the courts have stated universally that the General Assembly can make laws retroactive if it is *clearly* stated, and since the Constitution states that law may be put into *effect* by publication and the word 'retroactive' means to put into *effect* at a prior time it would seem to clearly indicate that a simple statement in the publication clause would be the best way to make a published law retroactive to a given date, and to wit: 'This Act, being deemed of immediate importance, shall be in full force from January 1, 1970 after its publication in the ....., a newspaper published at ....., Iowa and the ....., a newspaper published at ....., Iowa."

I agree with your conclusion that your example complies with the constitutional requirement of putting the law into effect by publication and also makes it retroactive, at the same time eliminating the ambiguity of two sections, one of which makes the act retroactive to a certain date and the second making it effective by publication. It also eliminates the necessity of using the words "retroactive to and from", which are really superfluous when it clearly appears from the effective date that the bill is in fact retroactive. See 1968 OAG 379, Turner to Faupel, 11-2-67, and particularly Divisions V and XII thereof, the latter of which states:

"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."

March 18, 1970

STATE OFFICERS AND DEPARTMENTS: Executive Council — Con-

stitution, Art. III, §1, Art. V, §12, Chapter 18, 19, Code 1966. The executive council has the power and duty to administer capitol grounds and buildings, and in particular to establish reasonable regulations for distribution of printed materials, etc. A regulation for this purpose held valid, except in one particular, i.e., review of applications for permits to distribut such materials is not a function the attorney general is authorized by the Constitution or by law to perform and is forbidden him by the clause enjoining strict separation of powers. Regulation providing for such review held invalid. (Turner to Executive Council, 3/18/70) #70-3-33

Executive Council of Iowa: Reference is made to your request of March 6, 1970, as follows:

"The Executive Council, in special meeting held March 6, 1970, rescinded the policy adopted in the Executive Council meeting of March 2, 1970, relative to requests asking permission to distribute literature on the grounds and in the hallways of State buildings.

"The new policy relative to this type of request is as follows:

"All persons who desire to engage in distribution of printed materials or other items in state buildings or areas leased by the State, located in the City of Des Moines, shall, before starting such distribution, go to the office of the Secretary of the State Executive Council and comply with the following procedures:

"1. Each person desiring to engage in such distribution, shall, after proper identification, sign a register maintained in the Council office for the purpose which shall also show the date of signing and address of each registrant. A sample of all printed matter of each item to be distributed shall, at the same time, be given to the Council Secretary.

"2. Each registrant shall be handed written instructions advising him to limit the distribution to hallways and general public access areas, and not in working areas.

"3. The Secretary of the Council shall immediately examine the printed material or item to be distributed. Upon consideration, he shall grant the permit unless he questions the legality of the material proposed to be distributed among citizens visiting the capitol, and in particular, children of high school or grammer school age provided that nothing herein shall be construed to regulate distribution of any material elsewhere than on state property. Should the Secretary have such question of legality, he then shall request an opinion of the Attorney General as to the legality of the distribution of such material in question. If the Attorney General rules the material to be legal, the Secretary shall issue the permit, said plan being proposed pursuant to the provisions of Chapter 18.5, Code of Iowa, 1966.

"The Council directed this office to secure from you an opinion as to the legality of this policy.

EXECUTIVE COUNCIL OF IOWA
W. C. Wellman
Secretary."

The questions propounded are whether or not the Executive Council has authority to adopt a policy and directives to regulate distribution of printed materials or other items in state buildings and leased areas in Des Moines, and whether or not that authority has been duly and lawfully exercised. My opinion is that by the law of this state the council does indeed have such authority.

The capitol grounds and the buildings thereon are under the administration and control of the Executive Council. The superintendent of public grounds and buildings, *Ch. 18, Code 1966*, is appointed by the council and serves at its pleasure, §*18.1, Code 1966*. He has certain duties prescribed by law and shall perform "all duties required by . . . order of the executive council," §*18.2(7), Code 1966*. It is the council that assigns office space in the capitol buildings, §*19.15, Code 1966*, authorizes and regulates concessions in the lobby, §*19.16, Code 1966*, *1956 OAG, 86* provides for repairs, §*19.18, Code 1966*, and allots space to veteran organizations and for other purposes, §§*19.15, 19.17, 19.19, Code 1966*.

Although in the capitol, the Hall of the House of Representatives and the Senate Chamber, and rooms necessary for legislative purposes are under the sole governance of the respective houses of the General Assembly, *Const. Art III* §9. Assignment of any of these legislative quarters to others is terminated upon the convening of the general assembly §*19.15, Code of 1966*. Also, we must observe that the Supreme Court controls its own courtroom, chambers and offices and their control is not likely to be challenged.

As regards the rest of the capitol area the position of the council is quite analagous to that of the management of any large business building or building complex, with the same duty to maintain and safeguard the property, assign and utilize the space efficiently and in general to carry on and advance the enterprise the building is meant to serve. However, the responsibility of the council, and accordingly its authority is far more broad and general, for the council is administering *public buildings*. The council must secure the *rights of the public* in all senses and all respects, whereas private managements have no duty even to admit members of the public to their establishments.

The law vests in council express powers consonant with these responsibilities, providing, §*18.5, Code 1966*:

"The executive council shall establish, publish, and enforce rules regulating and restricting the use by the public of the capitol building and the capitol grounds and all buildings and erections thereon. Such rules when established shall be posted in conspicuous places about said buildings and grounds. Any person violating any such rule shall be guilty of a misdemeanor and upon conviction be punished by a fine of not to exceed one hundred dollars or by imprisonment in the county jail not to exceed thirty days."

Manifestly it is to these rules, and such other orders as he may have from the council, that the superintendent of grounds and buildings must look for guidance as to what is "proper" as he performs the duties enjoined by §18.2(3), Code 1966, which provides the superintendent shall:

"See that all visitors, at proper hours, are properly escorted over said grounds, and through said buildings, free of expense."

The council action concerning which this opinion is asked recites that it is taken pursuant to §18.5, Code 1966, as quoted above. This statute,

as well as the other relevant sections, certainly leaves no doubt of the council's authority under the law of Iowa. There remains the question whether this authority was exercised in a due and proper manner.

The law is clear, of course, that streets, parks and other public areas are proper places for the exercise of freedom of expression, and that the giving out of phamphlets and handbills is one form of such expression.

The law is no less clear that the guaranty of free speech must be reasonably exercised, and that it is not a barrier to reasonable regulation by a government of areas wholly within its control, *e.g.,* in this instance the capitol grounds and buildings.

There appears no necessity to belabor the proposition that the requirement of §1 is reasonable regulation. Persons who propose to distribute materials to the public at large can hardly boggle at giving a copy to the secretary.

Here it is to be noted that there are three classes or types of areas within capitol grounds and buildings. One is comprised by the hall, chambers and other quarters of the Supreme Court; and the legislative halls and offices which are under the sole governance of the General Assembly. There are the State offices, the areas in which officers and employees of the state do their work. And there are the corridors and grounds open to the public.

The judges, under their general powers, control the distribution of materials in the court; the House and Senate have rules on the subject. And as for the offices, the file rooms, all the areas in which the work of the state is carried on, the law provides that "official apartments shall be used only for the purpose of conducting the business of the state," §19.15, Code 1966. So the instruction to registrants directed by §2 of the council action is not a regulation framed by the council but a method of acquainting a registrant with the law, which the council as well as the registrant must observe.

By §3 the council provides for consideration of the possible propriety of the material proposed to be distributed. The guaranty of freedom of speech is not absolutely a blank check for the sale or gift of *anything* to *anybody* in any place. The United States Supreme Court opinion which laid down the three-element obscenity rule *1/* made the clear cut reservation, "we hold that obscenity is not within the area of constitutionally protected free speech." *Roth v. United States,* 1957, 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed 2d 1498. The same high court subsequently held that the "well being of its children is of course a subject within the State's constitutional power to regulate." *Ginsberg v. New York,* 1968, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed 2d 195. The court added, in *Ginsberg,* that the state (in this case, New York) could properly give effect "to prevailing standards in the adult community as a whole with respect to what is suitable material for minors." *Ibid.*

1/ The *Roth* doctrine, as developed by the Supreme Court, requires the *coalescence* of three discrete elements to constitute obscenity, which the

court would deny constitutional protection. The elements: (1) the material must have a *dominant theme* that appeals to prurient interest: (2) it must be *patently* offensive by reason of going against contemporary standards of the community; and (3) the work must be *utterly* without redeeming social value.

The council makes clear its awareness of the large numbers of children who throng the corridors of the capital during the session of the General Assembly. The number of them during the session has been estimated at from ten to fifteen thousand. This is, to some extent, a matter of record. Note, for instance, that the Journal of the House of Representatives records the presence on March 4, 1970, just one day — of the following visitors:

72 Girl Scouts from Cerro Gordo and neighboring counties.

53 Students from Southwest Warren High School at Mils and Liberty Center.

40 American government class students from Clarinda Community Schools.

10 Members of 4-H Club at Red Oak.

58 Sixth grade students from Davis School, Grinnell.

80 Senior students from government class at Tripoli High School.

No one who has had occasion to make his way through the corridors, the public areas of the capitol building, during the legislative session, can doubt that these visitors of tender years outnumber manyfold the adult visitors. The council quite properly has taken these facts into account, or rather, it has directed its secretary to take them into account. The secretary is directed to grant the request permit for distribution, unless he has doubts as to the legality of the material. The one flaw in this section is the directive: "Should the secretary have such question of legality, he then shall request an opinion of the attorney general as to the legality of the distribution of such material in question."

The constitution of Iowa establishes the office of attorney general in the judicial department of the state government, Const. Art V, §12, not in the legislative department, or the executive department. The responsibilities of the attorney general are judicial in character; his concern is with matters of law and procedure, with the prosecution, defense and appeal of actions in the courts, and not with making of laws, which is the function of the General Assembly, or the administration of the state government, the function of the executive department, of which the governor is the principal officer.

The constitution vested in the attorney general those powers inherent in his office and the legislature from time to time by law has assigned him duties consonant therewith, with the powers incident thereto. The constitutional powers and duties do not in any manner or degree comprehend administration of the capitol grounds and buildings, or the framing of regulations concerning public use thereof, or the granting of permits for such use, or determining whether or not such permits, or any permit, shall or shall not be granted.

The general assembly has not by law vested these powers and duties in the office of the attorney general. Nor could the general assembly do so, for the constitution expressly enjoins the distribution of powers among the three departments of government, and provides:

" . . . no person charged with the exercise of powers properly belonging to one of these departments shall *exercise any function* pertaining to either of the others, except in cases hereinafter expressly directed or permitted." [Emphasis supplied]. Const. Art. III §1

The constitution does not direct or permit the attorney general to exercise the function here considered. The attorney general simply has no authority or duty to review or rule upon applications for permits to distribute materials in the capitol buildings and grounds. This function which the founding fathers in 1857 chose not to assign the attorney general by constitutional provision and which the general assembly has not and, in my opinion, could not assign him by law, the executive council cannot impose upon him by resolution.

The law does indeed require the attorney general to "give his opinion in writing, when requested, upon all questions of law submitted to him . . . by any state officer, elective or appointive . . . " *§13.2(4), Code 1966.* Pursuant to that statute this opinion is given.

But questions of fact, questions of policy, questions of judgment, cannot be converted into "questions of law" just by dragging the word "legality" into the regulation, or invoking it in a request for an opinion.

If by this sort of verbal transmogrification officials and agencies could at their pleasure shift their powers and shrug off their responsibilities, the attorney general, or some other officer, might find himself saddled with responsibility for granting or refusing licenses and permits for everything from accounting to watchmaking. Indeed, if the attorney general undertook or arrogated unto himself these powers sua sponte, the hysterical bleatings of the smut merchants and their apologists would deafen us all.

Accordingly, it is my opinion that the portion of §3 of the council's rule which undertakes to transfer to the attorney general the executive council's function of determining whether or not permits shall be granted or refused, is beyond the power of the council, is in contravention of the constitution and being thus invalid, is of no force or effect.

March 18, 1970

STATE OFFICERS AND DEPARTMENTS: Attorney General — Executive Council — powers and duties. The attorney general has no authority as responsibility for granting permits or licenses; executive council has such authority. (Turner to Wellman, Secretary, Executive Council, 3/18/70) #70-3-34

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: Reference is made to your letter of March 6, 1970, as follows:

"Pursuant to the policy established by the Executive Council in their special meeting held March 6, 1970, I am writing to advise that Mr. Evan Evans and Mr. Garry Grace, representing the community newspaper, "Chrysalis," did, on March 3, 1970, make application for permis-

sion to distribute this publication, free of charge, on the Capitol grounds and in the corridors of the State Capitol Building.

"I have examined the printed material to be distributed and question the legality of the material proposed to be distributed, and request an opinion as to the legality of making distribution of the material in question.

"The copy of the newspaper "Chrysalis" was forwarded with our letter of March 3, 1970."

As you will note from the opinion this day transmitted to the executive council, there is no power in the office of the attorney general to grant or withhold permits or licenses, or to consider or review applications for the same. Nor does the constitution allow this function to be assigned to the attorney general.

The executive council does have this power and function and may delegate the same to its staff, *e.g.,* the secretary or the superintendent of grounds and buildings, or to one or more of its members, *e.g.* the governor, or to a standing or *ad hoc* committee of staff, or members, or both.

Accordingly I return herewith the copy of the newspaper "Chrysalis" forwarded with your letter of March 3, 1970, without review or consideration, However, in preparing this letter I have necessarily observed the front page of this item, and I will say, that if the executive council is not able to determine whether or not to permit the distribution among school children of a drawing of the act of rape being committed upon two half naked female figures, I must doubt any opinion an attorney general could write would be of much help.

March 17, 1970

CRIMINAL LAW: §725.5, 725.10, Code 1966. Literature pertaining to birth control not within scope of criminal statute prescribing any "article or thing designed or intended for . . . preventing conception." (Turner to Conklin, State Senator, 3/17/70) #70-3-35

Honorable W. Charlene Conklin, State Senator: Reference is made to your letter of March 10, 1970, propounding certain questions, as follows:

"I wish to request an opinion relative to Chapter 125, 'Obscenity and Indecency.' In particular I wish an interpretation of 725.5 and 725.10 as to who can distribute literature pertaining to birth control. Can such literature be distributed by others under the supervision of those excepted in 725.10? If so, how 'direct' must this supervision be?"

The substantive section to which you advert, which was enacted in 1886, condemns obscene books, etc., and articles, among which the General Assembly chose to include contraceptives and advertisements therefor, §725.5, in these terms:

"Obscene literature — articles for immoral use.

"Whoever sells, or offers for sale, or gives away, or has in his possession with intent to sell, loan, or give away any obscene, lewd, indecent, lascivious, or filthy book, pamphlet, paper, drawing, lithograph, engraving, picture, photograph, writing, card, postal card, model, cast, or any instrument or article of indecent or immoral use, or any medicine, article, or thing designed or intended for procuring abortion or preventing conception, or advertises the same for sale, or writes or prints any letter, circular, handbill, card, book pamphlet, advertisement, or notice of any

kind, giving information, directly or indirectly, when, where, how, or by what means any of the articles or things hereinbefore mentioned can be purchased, or otherwise obtained or made, shall be guilty of a misdemeanor and be fined not more than one thousand nor less than fifty dollars, or be imprisoned in the county jail not more than one year, or both." Code of Iowa 1966.

This section of the code was part of "An Act to suppress the circulation, advertising and vending of obscene and immoral literature and articles of indecent and immoral use, and to confiscate such property." As our Supreme Court has observed, "when the title of the Act says that its purpose is to suppress the vending of articles of indecent and immoral use the listing by the legislature of what it considers indecent and immoral is within the limits of the Constitution." *State vs. Social Hygiene, Inc.* 1968, ... Iowa ...., 156 N.W. 2d 288.

Here the General Assembly has listed with painstaking care the objects of its interdict. The graphic and printed materials so enumerated are forbidden not because of their *subject matter* alone but because of the unseemly style, or language or manner of presentation. The objective acts recounted in contemporary pornography could be presented in clinical terms so as not to offend the Act of 1886. In that case, to be sure, those who buy this trash would not do so; in fact they would not understand it. In like manner, most edifying and beautiful passages of the New Testament could be recorded in outrageously offensive language, in violation of the statute. From what we may loosely term the arts, the General Assembly turned to ban "any medicine, article or thing designed or intended for . . . prevent conception" and advertisements therefor, By-passing the issues of free speech and press, if the legislators had intended to forbid *literature* on the *subject* of birth control they would have done so, in a statute so comprehensive and meticulous. *Inclusio unius est exclusio alterius.*

My opinion is that "literature pertaining to birth control" is *not* an "article or thing designed or intended for procuring abortion or preventing conception' within the meaning of the statute and the purpose of the General Assembly. Hence such literature is not within the statute and may be circulated freely, and indeed has been so circulated, witness the contemporary avalanche of books, pamphlets, magazine articles, newspaper items, public speeches on the subject.

However, should the literature in question be couched in filthy, foul or obscene language, or accompanied by illustrations of that sort, then it would be actionable under the obscene literature provisions of §725.5. Also if the literature should constitute an advertisement for medicines, articles or things designed or intended for procuring abortion or preventing conception, then it would be in violation of §725.5.

In fine, the forum of debate and discussion in this State is open to the subject of birth control, but not to pamphlets, or other advertisement saying, "buy Such and Such contraceptives at So and So's Drug Store."

In view of the foregoing, the distribution of otherwise lawful *literature* pertaining to birth control would not require the immunity of the exception statute, which provides, §725.10:

"Exceptions — doctors — druggists — artists

"Nothing in sections 725.5 to 725.9, inclusive, shall be construed to affect teaching in regularly chartered medical colleges, or the publication or use of standard medical books, or the practice of regular practitioners of medicine or druggists in their regular business, or the possession by artists of models in the necessary line of their art."

Code of Iowa 1966.

"Supervision" is the act, pratice or process of overseeing, having general control and direction, superintending, and administering. If persons distributed literature under the "supervision" of those listed in the section of exception, the supervision, to be within the law, necessarily would be *actual*, and not merely verbal, *pro forma* or pretended.

March 18, 1970

SCHOOLS: State University of Science and Technology — Functions of Extension Service — 7 U.S.C.A. 301 et seq., §159.20, et seq. and §189.2, Code of Iowa, 1966, as amended. 7 U.S.C.A., §361(b) authorizes the universities established under land grants from the federal government to engage in promotional matters involving the marketing of agricultural products by private industry. The universities cannot, however, engage in regulatory matters. (Conlin to Liddy, Sec. of Agriculture, 3/18/70) #70-3-36

The Honorable L. B. Liddy, Secretary of Agriculture: This will acknowledge receipt of your letter dated January 20, 1970, wherein you requested an opinion of the attorney general as to whether or not land grant universities are allowed to engage in promotional programs or regulatory activities, or both, involving the marketing of agricultural products by private industry.

The Iowa State University of Science and Technology was one of the universities funded by 7 U.S.C.A., §301 et seq., first enacted by Congress in 1862, which provides land and appropriations for the operation of colleges and universities in the several states. The State of Iowa accepted the grant pursuant to legislation enacted more than a century ago and which is now §266.1, Code of Iowa, 1966, and which provides in relevant part as follows:

"Legislative assent is given to the purposes of the various congressional grants to the state for the endowment and support of an Iowa State University of science and technology, and an agricultural experiment station as a department thereof, upon the terms, conditions, and restrictions contained in all Acts of Congress relating thereto, and the state assumes the duties, obligations, and responsibilities thereby imposed. . . ."

7 U.S.C.A., §305, Conditions of Grant, sets out some of the requirements for the receipt and use of land grants and appropriations. None of the provisions therein contained would prohibit the activities to which you refer.

Further, in §341 of the same chapter, Congress provides for the continuation or inauguration of agricultural extension service as follows:

"In order to aid in diffusing among the people of the United States useful and practical information on subjects relating to agricultural and home economics, and to encourage the application of the same, there may be continued or inaugurated in connection with the colleges . . . in

each state . . . now receiving . . . the benefits of Section 301 [et seq.] . . . Agricultural extension work which shall be carried on in cooperation with the United States Department of Agriculture. . . ."

7 U.S.C.A., §361(a) includes the following definition:

"As used in §§361(a)-361(i) of this title, the term 'state agricultural experiment station' means a department which shall have been established, under the direction of the college or university . . . in each state in accordance with §§301-305, 307 and 308 of this title. . . ."

The Congress of the United States has clearly defined the purpose of the agricultural extension service in 7 U.S.C.A., §361(b):

Section 361(b), Congressional Statement of Policy; Researches, Investigations and Experiments.

"It is further the policy of the Congress to promote the efficient *production, marketing, distribution* and *utilization* of products of the farm as essential to the health and welfare of our peoples and to promote a sound and prosperous agricultural and rural life as indispensable to the maintenance of maximum employment and national prosperity and security. It is also the intent of Congress to assure agriculture a position in research equal to that of industry, which will aid in maintaining an equitable balance between agriculture and other segments of our economy. It shall be the object and duty of the state agricultural experiment stations through the expenditure of the appropriations hereinafter authorized to *conduct original and other researches, investigations, and experiments bearing directly on and contributing to the establishment and maintenance of a permanent and effective agricultural industry* of the United States, including researches basic to the problems of agriculture in its *broadest aspect,* and such investigations as have for their purpose *the development and improvement of the rural home and rural life and the maximum contribution by agriculture to the welfare of the consumer,* as may be deemed advisable having due regard to the varying conditions and needs of the respective states."

(Emphasis supplied)

The above quoted section grants broad powers to the agricultural extension service, which is a department of the state university under 7 U.S.C.A., §361(2). It is the opinion of the Attorney General that said section and others in pari materia authorize that department to conduct promotional functions which "contribute to the establishment and maintenance of a permanent and effective agricultural industry."

Regulatory matters, on the other hand, are by §§159.20 et seq. and 189.2, Code of Iowa, 1966, as amended specifically within the province of the Secretary of Agriculture. Section 159.20 sets up a marketing division within the Department of Agriculture. Section 159.21 provides in pertinent part as follows:

"The director, under the general supervision and direction of the secretary of agriculture, is empowered and directed: . . . (5) to perform the acts of inspection and grading, or both, of any farm product where requested by any person, group of persons, partnership, firm, company, corporation, co-operative, or association engaged in the production, marketing, or processing of such farm products, providing such person or persons, partnership, firm, company, corporation, co-operative, or association is willing to pay for such services under such rules and regulations as he may prescribe, including payment of such fees as he may deem reasonable, for the services rendered or performed by employ-

ees of the division of marketing. Such standards, grades, or classification shall not be lower in their requirements than the minimum requirements of the official standards for corresponding standards, grades and classifications commonly known as United States grades promulgated from time to time by the secretary of agriculture of the United States; (6) to make rules and regulations necessary to carry out the provisions of this section."

Regulatory powers cannot be implied, but must be specially and properly delegated. It is therefore the opinion of the Attorney General that land grant institutions do not have the authority to perform regulatory functions on behalf of private agricultural industry.

March 20, 1970

CITIES AND TOWNS: City Attorney — §§420.40, 420.41 and 368A.22, Code of Iowa, 1966. No statutory conflict of interest or invalidity of contract where in city of less than 3000 population city attorney passes upon questions involving contract with company of which he was an officer at time of bidding and award. (Nolan to Shaff, State Senator, 3/20/70) #70-3-37

The Honorable Roger J. Shaff, State Senator: This is in answer to your request for an opinion on the following:

"Can a city attorney pass upon questions involved in a contract letting in a Special Charter City when at the time of letting the City Attorney held the capacity of Secretary Treasurer in the corporation that was the successful bidder, and where the City Attorney advised the city at the time of letting?"

We understand that the question raised arises from Camanche which is a special charter city. Under §420.40, Code of Iowa 1966, municipal corporations organized under special chapter have all the powers and privileges of municipal corporations of ilke population organized under the general law, and having the mayor-council form of government. §420.41 provides in pertinent part:

"Except as hereinafter in this section provided, the provisions of this Code which, by their terms, are made applicable to all municipal corporations, shall be applicable to cities organized under special charter, and the provisions of this Code, applicable by their terms to municipal corporations of a certain population, shall be applicable to cities under special charter of like population. . . .".

None of the exceptions set out in §420.41 cover the situation presented. We turn therefore to the general powers of officers of cities and towns as set forth in §368A.22 which, in pertinent part provides:

"2. No municipal officer or employee shall have an interest, direct or indirect, in any contract or job of work or material or the profits thereof or serves to be furnished or performed for his municipality. The provisions of this section shall not apply to:

"a. The payment of lawful compensation . . .

"b. The designation of a bank or trust company as a depository . . .

"c. An employee of a bank or trust company who serves as treasurer . . .

"d. Contracts made by municipalities of less than 3,000 population, upon competitive bid in writing, publicly invited and opened.

* * *

The population of Camanche according to the 1960 census as reported

in the Iowa Official Register is 2,225. Except for the distribution of liquor control funds and road use tax money, the last official decennial census of population is controlling. (§26.6). Consequently, it would appear that in the situation presented, a city attorney may pass on questions involved in such contract even though at the time of letting of the contract he was an officer in the corporation which was the successful bidder. In the absence of other objections such public contract would be valid. Additionally there would be no conflict of interest prohibited by statute.

March 20, 1970

COUNTY AND COUNTY OFFICERS: Incompatibility—§§229.31, 336.5, Code, 1966. The offices of Assistant County Attorney and County Mental Health Commissioner are compatible. (Nolan to Ridout, 3/20/70) #70-3-38 Ass't. Emmet County Att.

Mr. William B. Ridout, Assistant Emmet County Attorney: This is in answer to your request for an opinion on the following:

"I am presently the Assistant County Attorney for Emmet County Iowa. Previous to taking this position as Assistant County Attorney, I was the lawyer-member of the Emmet County Mental Health Commission as organized under Sec. 229.31 of the 1966 Code of Iowa. We have a shortage of attorneys who are willing to serve on this board and I would be willing to continue with this position if such position is not in conflict with my job as Assistant County Attorney."

The test for incompatibility of offices is set out in *State v. White*, 1965, 257 Iowa, 606, 133 NW 2d 903. For such incompatibility there must be "an inconsistency in the functions in the two offices, 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, or where the nature and the duties of the two officers are such as to render improper from consideration of public policy for an incumbent to retain both.

Under §229.31, Code, the commissioners are appointed by the judge of the district court. The duties of such commissioners are set out in §229.32 as follows:

"Said commission shall at once proceed to the place where said person is confined and make a thorough and discreet examination for the purpose of determining the truth of said allegations and shall promptly report its findings to said judge in writing. Said report shall be accompanied by a written statement of the case signed by the superintendent."

Such duties do not, in my opinion, conflict with the duties of assistant county attorney, therefore, I see no incompatibility in the holding of the two appointments simultaneously. It should be noted that the reasonable compensation and necessary expenses are allowed to the commissioners by the court under §229.35, such compensation to be paid from funds in the state treasury not otherwise appropriated. Further, under §340.10, assistant county attorneys receive as their annual salaries in counties of less than thirty-six thousand population, no compensation. According to the official directory the population of Wright County is less than thirty-six thousand, therefore, there should be no question raised about double compensation. Further, we have examined §336.5

of the Code, which contains specific application to the question which you raised, and find therein no statutory conflict of interest.

March 23, 1970

TAXATION: Assessment of electric cooperatives — §437.14, Code 1966. Where statutes are unworkable the courts will declare such statute void in a proper case but in absence of such determination the assessors remain charged with the duty to make the assessments. (Nolan to Fisher, State Representative, 3/23/70) #70-3-39

The Honorable C. Raymond Fisher, State Representative: This replies to your request for an opinion on the constitutionality of §437.14, Code of Iowa, 1966. Your question arises from the fact that this office by an opinion dated October 23, 1969, advised the county attorney of Crawford County that the property of a rural electric cooperative not assessed by the State Department of Revenue is to be assessed by the county assessor as real property spreading the assessment thereof among all the members of the cooperative. Further, the opinion stated that the total assets of the cooperative, both real and personal, are to be considered in such assessment.

Subsequently, the Director of the Department of Revenue has advised that the myriad of problems surrounding the assessment of cooperative property has caused such uncertainty that little or no attempt has been made over the years to give effect to the code section cited above. The October, 1969 opinion did not differ basically from a previous opinion of the attorney general, dated March 7, 1940 (1940 OAG 488) wherein it was stated:

"The legislature, by Section 7102, merely went behind the corporation or association entity and for the purpose of assessment for taxation placed the burden on the members in proportion to the ownership of the member in all cooperative property. It was the extent of the individual member's share in the cooperative owned property that was to 'be deemed real estate.' When deemed real estate it received the general levy when the assessment was made of the real estate served by the transmission line.

"In this situation clearly the mortage indebtedness would not be a proper deduction. We are dealing here merely with the assessment of the member's share in the cooperative property. The debts owned by the cooperative might be deductible items if we were considering a money and credit tax, but here we are considering property taxes, the subject of the general levy and not to money and credit levies. If the mortgage indebtedness was to be considered as a deductible item, then we can conceive of a situation when it would be an advantage for a cooperative to never pay a mortgage indebtedness. If the mortgage indebtedness was equal to the assessed valuation of the property and the interest rate on the mortgage was lower than the general levy, it would be to the advantage of the cooperative to continue the mortgage lien and thereby escape taxation.

"In view of the foregoing, we are of the opinion that the method of assessment outlined by you is correct and that the assessment should be made on the basis of the member's share or interest as a member of the cooperative in all of the tangible property of the cooperative without regard to indebtedness or other liens that might exist against the property of the cooperative. The member's interest can be ascertained by dividing the total value of all the property of the cooperative by the number of members in the cooperative."

Apparently, despite the interpretations offered by this office local assessors have been unable to determine what and how to assess to properly administer the provisions of §437.14, Code. That section now provides:

"The value of the interest of members in such co-operative corporations or associations which are not organized or operated for profit shall, for the purpose of taxation, be deemed real estate, and be assessed as part of the real estate served by such transmission line or lines."

When statutes are so incomplete, vague, defective, indefinite and uncertain as to be unworkable, or incapable of enforcement, the courts, upon presentation of a proper petition will declare such statute inoperative and void. *Davidson Bldg. Co.* v. *Mulock,* 1931, 212 Iowa 730, 235 N.W. 45.

In the absence of such judicial determination in the case of assessment of property of rural cooperatives the assessors remain charged with the duty to make assessments and the hiatus will continue until the legislature changes the law.

March 23, 1970

HIGHWAYS: Road Use Tax Fund — H.F. 394, 63rd G.A., First Session. Allocation of Road Use Tax Fund to the primary road fund, the secondary road fund, the farm-to-market fund, and the street construction fund. The definitions contained in House File 394, 63rd G.A., First Session, do not control the definitions in Sections 310.10 and 313.2, as amended, Code of Iowa, 1966, but apply only to the provisions of said H.F. 394. (Holst to Hill, State Senator, 3/23/70) #70-3-40

The Honorable Eugene M. Hill, State Senator, Iowa State Senate: In your letter to Attorney General Turner, recived on March 2, 1970, you asked two questions:

(1) Whether the definitions in House File 394, 63rd G.A., or the definitions in §§310.10, 313.2, and 389.1, Code of Iowa, 1966, control in the allocation of the road use tax fund; and

(2) Would the mileage limitations and percentage limitations placed upon the road and street systems defined in said House File 394 change the allocation of the road use tax fund from what it would be if such limitations were not imposed?

We answer these questions as follows:

(1) We are of the opinion that the definitions in §§310.10 and 313.2 of the Code of Iowa, 1966, prevail over the definitions in said House File 394.

(2) Inasmuch as we are of the opinion that the provisions of §§310.10 and 313.2 of The Code of Iowa, 1966, prevail over the definitions in said House File 394, we are of the opinion that the limitations apparently placed upons the said street and road systems by House File 394 would not change the allocation of the road use fund from what it would be if such limitations were not imposed.

(3) Section 389.1 of the Code of Iowa, 1966, is not a definition

section, and is consequently not in conflict with the definitions in said House File 394.

ANALYSIS

Section 312.2 of the Code of Iowa, 1966, as amended by Chapter 213, §2, Laws of the Sixty-second General Assembly (Page 272) provides the manner and amounts of the Road Use Tax Fund to be allocated as follows:

(1) To the primary road fund, forty-seven percent.

(2) To the secondary road fund of the counties, twenty-nine percent.

(3) To the farm-to-market road fund, nine percent.

(4) To the street construction of the cities and towns, fifteen percent.

Section 312.2 of the Code of Iowa, 1966, as amended by Chapter 213, Laws of the Sixty-second General Assembly, has not been amended or repealed by the passage of said House File 394, and consequently, these allocations remain as heretofore existing.

Primary Road System. Chapter 313 of the Code of Iowa, 1966, is a special chapter dealing specifically with the primary roads, their definition, source of financing, etc. Section 313.2 of the Code of Iowa, 1966, provides in part as follows:

"The highways of this state are, *for the purposes of this chapter*, divided into two systems, to wit: the primary road system and the secondary road system. The primary road system shall embrace those main roads, not including roads within cities and towns, which connect all county-seat towns, cities, and main market and industrial centers and which have already been designated as primary roads in chapter 241, Code of 1924 . . ." (Emphasis added)

Section 313.4 of the Code of Iowa, 1966, as amended by Chapter 254, §1, Laws of the Sixty-second General Assembly, authorizes the disbursement of the primary road fund (of which the allocation from the road use tax fund is part) for the establishment, construction, etc., of the *primary road system* and for other miscellaneous purposes. Since the primary road system, for the purposes of said Chapter, is defined in said §313.2, the primary road system so defined is the contemplated system upon which primary road funds may be expended.

Said Chapter 394 does not overtly amend or repeal said definition of the primary road system in said §313.2. We must inquire, therefore, whether said §313.2 was amended or repealed by the implication. To ascertain this, we must inquire into the purpose for the enactment of said House File 394. From the information this office has been able to garner, it appears that said House File 394 was enacted to establish a basis for the state's portion of the Federal Highway Classification Study, required by §17, P.L. 90-495, which is as follows:

"The Secretary of Transportation shall, in the report to Congress required to be submitted by January 1970, by section 3 of the Act of August 28, 1965, (79 Stat. 578; Public Law 89-139), include the results of a systematic nationwide functional highway classification study to be made in cooperation with the State highway departments and local governments with particular attention to the establishment of highway

system categories, rural and urban, according to the functional importance of routes, desirable as one of the bases for realigning Federal highway programs to better meet future needs and priorities."

On the fact of it then, it appears that House File 394 was not intended to repeal the system of allocations from the road use tax fund but was intended to establish a preliminary classification of roads as part of the state's share of the federal study set forth above. This conclusion is buttressed by a reading of §§2, 4, 5, 6, 7, and 8 of said House File 394.

The law concerning repeals by implication is amply restated by the Supreme Court of Iowa in the recent case of *Northwestern Bell Telephone Company v. Hawkeye State Telephone Company, et al.*, 1969, ... Iowa ....., 165 N.W. 2d 771, 774, as follows:

". . . repeal by implication is not favored and will not be upheld unless the intent to repeal clearly and unmistakably appears from the language of the later statute and such holding is absolutely necessary."

On the same page, the Supreme Court of Iowa went on to say:

"The court must harmonize statute relating to the same subject, if possible, and give to each, that is, all applicable laws on the same subject matter should be construed together so as to produce a harmonious system or body of legislation, if possible. The statute should be so construed to give meaning to all of them, if this can be done, and each statute should be afforded a field of operation. So, where the enactment of a series of statutes results in confusion and consequences which the legislature may not have contemplated, the courts must construe the statutes to reflect the obvious intent of the legislature and permit the practical application of the statutes . . ."

In the present case, it appears that the intent of the legislature was to establish a preliminary classification of roads by the enactment of House File 394. It does not appear, by implication or otherwise, that the legislature intended to change the allocations from the road use tax fund. We must assume that the legislature did not intend to repeal or amend the sections of the law relating to allocations from the road use tax fund.

Assuming, however, that there is an apparent conflict between House File 394 and the said sections of the Code of Iowa, 1966, we must refer to the decisions of the Supreme Court of Iowa, to resolve the conflict. In this respect, the Iowa Supreme Court, in the case of *Goergen v. State Tax Commission,* 1969, ... Iowa ....., 165 N.W. 2d 782, 787 stated.

"We ourselves have held where there is a conflict or ambiguity between specific and general statutes, the provisions of specific statutes control . . ."

In the present case §310.10 and 313.2 are specific statutes referring to specific situations, while the definitions in House File 394 are, by their very language, general. In such cases, therefore, the specific statutes would control the general statutes, and said §§310.10 and 313.2 will prevail over the general language of the definitions found in said House File 394.

Farm-to-Market Road System. The same arguments advanced above

in connection with the primary road system similarly apply to the secondary road system, the farm-to-market road system, and the municipal system of streets, roads and highways.

In view of the foregoing discussion, we are further of the opinion that the mileage and percentage limitations placed upon certain classifications of roads and streets by House File 394, do not affect the allocation of road use tax funds to the several funds hereinbefore described. Reading House File 394 in its most consistent and favorable light, it appears that the intent of the legislature was only to subdivide the already existing allocations from the road use tax fund. The allocations would be the same, but would be broken down (sometime after September 1, 1971) into smaller allocations according to the subclassifications set forth in §2, Paragraph 2, House File 394. It is conjectural whether this has been accomplished.

At the present time we have no mileage figures relating to either the present or future classification of roads and, consequently, we are unable to advise you thereon.

The Iowa Supreme Court said in the case of *Overbeck v. Dillaber,* 1969, ... Iowa ....., 196 N.W. 2d 795, 797:

"In construing a statute, . . . it is the business of the courts to so construe an act as to suppress the mischief and advance the remedy . . ."

If we could construe House File 394 as superseding §§310.10 and 313.2 considering only the references in the Code of Iowa up to the Sixty-second General Assembly, such construction could affect in ways unknown at this time, 218 sections of the law. In our opinion such a construction could also conflict with the present definitions contained in §§310.10 and 313.2. Under these circumstances, we have construed House File 394 in such a manner as to suppress said mischief and advance the remedy.

For the reasons given above, we reaffirm answers 1, 2, and 3 on Page one of this opinion.

March 23, 1970

COUNTY AND COUNTY OFFICERS: Supervisors — Ch. 218, Acts, 63rd G.A. Supervisors in Hamilton County currently serving representative districts may serve out their terms when the Plan adopted by the voters does not change the plan currently in effect. (Nolan to Rex, State Representative, 3/23/70) #70-3-41

The Honorable Clyde Rex, House of Representatives: It has come to our attention that our opinion of January 22, 1970, in response to your letter of December 11, 1969, asking for clarification of the term of incumbents where the supervisors did not choose one of the three Plans for supervisor representation available under Ch. 218, Acts of the 63rd G.A., First Session, does not adequately answer the questions now arising in Hamilton County. Ordinarily, where the supervisors did not make such a selection by November 1, 1969, Plan 1 became effective by operation of law on January 1, 1970. However, subsequent to your letter, a requisite number of eligible voters of the county petitioned

for a special election to be held so that the voters might determine which Plan is to be the Plan for the county.

Having now considered the fact that such petition for a special election was duly and timely filed, it is our opinion that the provisions of subsection 3, Section 1, Ch. 218, supra, do not apply to Hamilton County. As a consequence thereof, Plan 1 did not become effective on January 1, 1970, by operation of law in Hamilton County, and the supervisors continued under a district representation plan.

When the voters on February 20, 1970, chose Plan III they selected the plan of supervisor representation "currently in effect" in the county. Therefore, all the members of the board are entitled to serve out their terms.

March 24, 1970

STATE OFFICERS AND DEPARTMENTS: Cooperative Corporation—Issuance of stock — §§499.22, 499.40, Code of 1966. The provisions of §499.22 providing that the voting stock of the corporation shall be issued to agricultural producers and non-voting stock to all other members, does not permit further subdivision of non-voting stock into two other distinct classes of stock. (Strauss to Dodds, State Senator, 3/24/70) #70-3-42

The Honorable Robert R. Dodds, Senate Chamber: Referring to yours of February 19, 1970, in which you submitted the following:

"A cooperative formed under Chapter 499 of the 1966 Code of Iowa is contemplating some changes in its authorized capital structure.

"In addition to its preferred shares which would remain the same, it proposes to raise the value of its Class A common (voting) stock and to divide its non-voting stock into shares of Class B and Class C Common.

"The Class B non-voting contemplates the familiar statutory requirement that it be restricted to non-producers. However addition of the proposed Class C common stock contemplates a new class of non-voting stockholders who purchase from the cooperative for resale purposes. The value of such shares would be substantially higher than the other non-voting classification.

"My inquiry is directed at whether or not language of Section 499.22 which says in part: 'if the articles so provide common stock may be issued in two classes, voting and non-voting. Voting stock shall be issued to agricultural producers and non-voting to all other members***' precludes subdivision of the non-voting stock into two further distinct classes."

In answer thereto informally I would advise that the language of the specific statute referred to in your letter, §499.22, Code of 1966, is plain and unambiguous and does not permit by interpretation a further sub-division than the two distinct classes mentioned therein. Obviously, such proposed stock is not authorized. 18 C. J. S. page 625, title corporations provides:

"The power of a corporation to create and issue stock depends on its charter and the state laws under which it is organized; and the charter or governing statute is controlling as to the mode of creation, restrictions, the kind of stock, and the body or officer who may create or issue."

The articles of incorporation according to §499.40 should provide:

"6.(a) That the association shall have capital stock; the classes, par value and authorized number of shares of each class thereof; how shares shall be issued and paid for and what rights, limitations, conditions and restrictions pertain to the stock, which shall be alike as to all stock of the same class; . . ."

which would constitute additional reason for denying the authority to issue such proposed stock.

March 24, 1970

STATE OFFICERS AND DEPARTMENTS: State Geologist—Executive Council — Chapter 194, Laws of the 63rd G.A.; Ch.. 84, §1931, Revision of 1860; §2639, Code of 1897; §3948, Code of 1939; §263.3, Code of 1966. Storage space for preserving geological and mineralogical specimens collected by the state geologist is fixed by the legislature at Iowa City, Iowa. (Strauss to Wellman, Secretary, Executive Council, 3/24/70) #70-3-43

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: Reference is herein made to yours of December 23, 1969, in which you submitted the following:

"The Executive Council, in a meeting held December 22, 1969, directed its Secretary to obtain from the Attorney General an opinion as to whether or not the Iowa Geological Survey office is required by statute to be located in Iowa City, Iowa."

In reply thereto, I advise the State Geologist is a state officer appointed by the Geological Board, and his duties and authority are prescribed by the several sections of Chapter 305, Code of Iowa, 1966. However, no power to lease property by such chapter is conferred upon such officer or on the Geological Board which, as far as this problem is concerned, are used interchangeably. This is the view of this department as shown by opinion appearing in the report for 1968, page 982 where it is stated:

"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."

The lack of this power remained until the 63rd G.A., by Chapter 194 provided:

"Section 1. Section three hundred five point four (305.4), Code 1966, is hereby amended by inserting in line eight (8) after the word 'interest' the following sentence:

"For the purpose of preserving well drilling samples, rock cores, fossils, and such other materials as may be necessary to carry on such investigations, the state geologist shall have the authority to lease or rent sufficient space for storage or such materials subject to the approval of the executive council."

Storage of these geological and mineralogical specimens has been the subject of legislation from 1860 to the present. Ch. 84, §1931, Revision of 1860 provides:

"In all cases where specimens of natural history, and geological and mineralogical specimens which are or may be hereafter collected by the state geologist of Iowa, or by any others appointed by the state to investigate its natural history and physical resources, are found, they shall belong to and be the property of the state university, and shall form a part of its cabinet of natural history."

Section 2639, Code of 1897 provides:

"Apparatus — library — cabinet of natural history. The board of regents may from time to time expend of the income of the university fund such portion as it may find expedient in the purchase of apparatus, library, and a cabinet of natural history, to provide suitable means to preserve and keep the same, and in procuring other necessary facilities for giving instruction. For the purpose of supplying a cabinet of natural history, all geological and mineralogical specimens which are now or may hereafter be collected by the state geologists, or by others appointed by the state to investigate its natural history and physical resources, shall belong to and be the property of the university, under the charge of the professors of those departments."

Section 3948, Code of Iowa, 1939, provides:

"Cabinet of natural history. For the purpose of supplying a cabinet of natural history, all geological and mineralogical specimens which are collected by the state geologists, or by others appointed by the state to investigate its natural history and physical resources, shall belong to and be the property of the university, under the charge of the professors of those departments".

Section 263.3, Code of 1966 provides:

"Cabinet of natural history. For the purpose of supplying a cabinet of natural history, all geological and mineralogical specimens which are collected by the state geologists, or by others appointed by the state to investigate its natural history and physical resources, shall belong to and be the property of the university, under the charge of the professors of those departments."

All such statutes relate to the same thing, are in Pari Materia, and to secure the legislative intent are treated as one law, though made at different times and not referring to each other. *State v Shaw,* 28 Iowa 67.

While none of these statutes expressly require such storage to be located at Iowa City, the plain implied intent of these several provisions is to locate this storage at Iowa City. All the foregoing statutes provide that such specimens shall belong to and be the property of the university. Article I, Section 21, Constitution of Iowa, provides for the permanent establishment of the University of Iowa to be at Iowa City, County of Johnson.

From the foregoing I am of the opinion that while there may be other matters involved in the performance of this leasing authority bestowed upon the state geologist for the council to approve, the location of the storage of such specimens is fixed by the legislature.

March 24, 1970

LABOR: Child Labor — §92.12, 1966 Code of Iowa; §6 Art. I, Iowa Constitution. No conflict with federal statute; classifications based on age, sex and city populations are not unconstitutional. (Haesemeyer to Hansen, State Representative, 3/24/70) #70 3-44

Representative Willard R. Hansen: You have requested an opinion of the Attorney General with respect to the following

"I write to you concerning Chapter 92, Section 12 of the Code of Iowa, entitled 'Street Occupations Forbidden.'

"It is my contention that the law as presently stated in the Code of Iowa is in conflict with the recently enacted equal opportunity law in that §92.12 discriminates against young women 11 years of age or older.

"I believe, too, that the law discriminates against youth who live in cities and towns 10,000 or larger since they are required to have 'street trades' permits, while youth in cities and towns smaller than 10,000 do not.

"I would appreciate an opinion from your office as to whether or not this section is, in fact, discriminatory to the point that its constitutionality can be challenged."

Several statutes should be considered. Section 92.12, Code of Iowa, 1966, reads as follows:

"Street occupation forbidden. No boy under eleven years of age nor girl under eighteen years of age shall be employed, permitted or suffered to work at any time in any city of ten thousand or more inhabitants within this state in or in connection with the street occupations of peddling, bootblacking, the distribution or sale of newspapers, magazines, periodicals, or circulars, nor in any other occupations in any street or public place, . . ."

Section 6 of Article I of the Iowa Constitution reads as follows:

"Section 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 Federal Equal Opportunity Law is found in U.S.C.A. 29, §§623, 631 and forbids discrimination against any individual on the basis of his age. This Act is limited, however, to individuals between ages 40 and 65, and does not apply to child labor.

The State statute, supra, forbids certain street occupations to girls under eighteen years of age, presumably for reasons that her health may be injured or morals depraved. But boys of eleven years of age or older are permitted to engage in the same street occupations. Also, the State statute applies this rule only in cities of 10,000 or more inhabitants which is another classification which you claim is discriminatory.

However, if there is any reasonable ground for the two classifications, one distinguishing between boys and girls, and the other applying the restriction only to cities of 10,000 or more, then the statute must be supported. If the law operates equally upon all persons within the same class, then there is uniformity in the statutory sense. These classifications must be based upon something substantial, distinguishing one class from another in such manner as to suggest the reasonable necessity for such classification.

The State of Iowa has general police power and a broad range of discretion in establishing classifications in the exercise of their powers of regulation. This area of regulation of child labor, by banning certain street occupations to girls under eighteen years of age and to boys under eleven years of age is for the reasons that the child's health may be injured or her morals depraved. The constitutional guarantee of equal protection is interposed against discrimination that is entirely arbitrary. There should be a relation between the classifications and the

purposes of the act in which they are found. Such a relationship appears to exist in forbidding certain street occupations to boys and girls under different age restrictions.

Hutton vs. Pasadena City Schools, 1968, 68 Calif. Reptr. 103, 108

Becker vs. Board of Education, 1965, 258 Iowa 277, 282

"The equal protection clause goes no further than to prohibit invidious discrimination."

People vs. Pyle, 1960, 103 N.W. 2d 597, 360 Mich. 249. Children under age of seventeen years were not permitted in dance halls. This is a reasonable classification.

Dickinson vs. Porter, 1959, 240 Iowa 393, 408, 35 N.W. 2d 66, 76.

"A classification is not arbitrary which rests upon some reason of public policy."

The same reasoning would apply to the statutory limitation, applying these restrictions of street occupation to children, only in cities of 10,000 or more inhabitants. It may be argued that in cities of this size or larger that there is more street traffic, more people on the streets, more strangers among the street walkers, and therefore, greater dangers to the health or morals of the youth in these cities. In any event, classifications on the basis of population have been held to be proper and valid.

State vs. Neveau, 1940, 294 N.W. 796, 803, 237 Wisc. 85. In this case, a classification relating to unfair competition and trade practices in specified trades including the barber trade was held valid, which provides that the statute shall not apply to any city or town having a population of 5,200 or less.

State vs. Gerhardt, 1968, 159 N.W. 2d 622, 627, 39 Wisc., 2d 701

Vol. 16A, C.J.S. §491, p. 252, 253

State vs. Rosenfield, 1910, 126 N.W. 1068, 111 Minn. 301. Legislation looking to the protection of minors is not an unreasonable exercise of police power by the State.

In answer to your first question, there is no conflict between §92.12, Code of Iowa, 1966, and the Federal statute, prohibiting discrimination between employees because of age

In answer to your second question, the statute is not unconstitutional because it forbids employment of boys under eleven years of age and girls under eighteen years in certain street occupations in cities of 10,000 or more inhabitants, and permits their employment in any city under 10,000 persons. There may be a reasonable necessity for such classifications, and there is sufficient uniformity to comply with the State constitution.

State ex rel Dairy vs. Iowa Coop. Assoc., 1959, 250 Iowa 839, 95 N.W. 2d 441, 445.

March 24, 1970

COUNTY AND COUNTY OFFICERS: County Treasurer — Scavenger sale and redemption therefrom — §§446.18 and 447.1, Code of Iowa, 1966. Any surplus remaining in the county treasury as a result of the payment of a delinquent tax upon a scavenger sale is payable to the owner of the property. (Strauss to Atwell, Supervisor of County Audits, Auditor of State's Office, 3/24/70) #70-3-45

Mr. H. E. Atwell, Supervisor of County Audits, Office of Auditor of State: You have requested an opinion with respect to the following:

"At the annual tax sale held December 2, 1968 two people bid simultaneously under Section 446.18 for a property which was being offered for the third time at scavenger sale.

"The taxes, interest and cost was $55.00, however, the property was sold by the Treasurer to the highest bidder for $170.00

"If there had been only one bidder for this property the certificate of purchase would have been issued for $55.00. Since there were two bidders competing the amount went up to $170.00 and a certificate of purchase was issued for that amount.

"How should the Treasurer dispose of the extra $115.00? In order to redeem does the owner have to pay the full $170.00 plus redemption cost?"

1. In reply thereto I would advise you that the statutory provision under which this property was sold is §446.18, Code of Iowa, 1966, providing as follows:

"Each treasurer shall, on the day of the regular tax sale each year or any adjournment thereof, offer and sell at public sale, to the highest bidder, all real estate which remains liable to sale for delinquent taxes, and shall have previously been advertised and offered for two years or more and remained unsold for want of bidders, general notice of such sale being given at the same time and in the same manner as that given of the regular sale."

It will be noted that there is no statutory provision for an allocation of this surplus resulting from this sale, and it remains in the county treasury. There appears to be no statutory provisions for the disposition of this surplus. A comparable situation was presented to the Supreme Court of the United States in the case of *United States vs. Lawton*, 110 US 146, 28 L.Ed 100, 3 Supreme Court 545. There, in following the ruling of the Supreme Court in *United States vs. Taylor*, 104 US 216, where the land was sold for the non-payment of a tax to the person who paid the purchase money to the United States, the surplus proceeds were in the treasury, and noting that there is no difference in law between the situation where the purchase money is paid by a person on one hand or paid by the United States on the other, the court stated the rule as follows:

"The land in the present case having been 'struck off for,' and 'bid in' for, the United States at the sum of $1,100.00, we are of the opinion that the surplus of that sum, beyond the $170.50 tax, penalty, interest and costs, must be regarded as being in the treasury of the United States, under the provisions of Section 36 of the act of 1861, for the use of the owner, in like manner as if it were the surplus of purchase money received by the United States from a third person on a sale of the land to such person for the non-payment of the tax. It was

unnecessary to go through any form of paying money out of the treasury to any officer and then paying it in again to be held for the owner of the land. But, so far as such owner is concerned, the surplus money is set aside as his as fully as if it had come from a third person. If a third person had bid $1,099 in this case, there would have been a surplus of $928.50 paid into the treasury, and held for the owner. It can make no difference that the United States acquired the property by bidding $1 more. To withhold the surplus from the owner would be to violate the Fifth Amendment to the Constitution and to deprive him of his property without due process of law, or to take his property for public use without just compensation. If he affirms the propriety of selling or taking more than enough of his land to pay the tax and penalty and interest and costs, and applies for the surplus money, he must receive at least that."

In 51 Am Jur, §1029, titled Taxation, the rule is stated as follows:

"The proceeds of a tax sale are applied in the discharge of delinquent taxes against the property for which the land was sold, and of interest, costs, and penalties, in the manner and order directed by statute. Any surplus remaining after the payment of taxes, interest, costs, and penalties must ordinarily be paid over to the landowner. This is usually a matter of express statutory requirement."

In view of the foregoing, I am of the opinion that the surplus arising from this sale should be paid by the county treasurer to the owner of the property sold under the scavenger sale, and the County treasurer should make disposition thereof in that way.

2. In answer to your question number two as to whether in order to redeem the owner has to pay the full $170 plus redemption costs, I advise that that is his obligation in making redemption as required by §447.1, Code of 1966, providing as follows:

"Real estate sold under the provisions of this chapter and chapter 446 may be redeemed at any time before the right of redemption is cut off, by the payment to the auditor, to be held by him subject to the order of the purchaser, of the amount for which the same was sold and four percent of such amount added as a penalty, with six percent interest per annum on the whole amount thus made from the day of sale, and the amount of all taxes, interest, and costs paid by the purchaser or his assignee for any subsequent year or years, with a similar penalty added as before on the amount of the payment for each subsequent year, and six percent per annum on the whole of such amount or amounts from the day or days of payment."

March 24, 1970

LABOR: Employment agency fees — §94.6, Code of Iowa, 1966. The maximum employment agency fee is 5% and a provision in a contract calling for a larger fee in the event of voluntary leaving would be invalid. The 5% provision is a limitation and not a mere guideline. (Haesemeyer to Addy, Commissioner of Labor, 3/24/70) #70-3-47

Jerry L. Addy, Commissioner, Bureau of Labor: Reference is made to your letter, enclosing copy of a letter, from Donald D. Jayne, which asks for a reinterpretation of Chapter 94, and also an answer to the following questions:

"1 Whether or not an agency can include in its contract a provision, such as, if the new employee voluntarily quits of his own accord he would be obligated to pay the full fee, or part thereof, depending upon the contract provisions. Present interpretation is that no such provision can be

stated in a contract — Attorney General Opinion dated June 2, 1967. [1968 O.A.G. 241]

"2. Whether or not the 5% provision in Chapter 94.6 is a maximum *fee guideline* for agencies to utilize in establishing their fees rather than the present interpretation stating that only 5% of what is actually earned may be charged by an agency — Attorney General Opinion dated June 2, 1959."

Section 94.6 limiting fees chargeable by an employment agency reads in pertinent part as follows:

" . . . but in no event shall the charge for the furnishing or procurement of any situation or employment be in excess of five percent (5%) of the annual gross earnings. . . ."

The key words to be interpreted here are 5% of the annual gross earnings. What is the meaning of gross earnings?

In the case of *Accurate Employment Service vs. Rowell,* 126 N.E. Rep. 2d 81 (1954) Ohio, the employee worked for two days only when she left the employment for good cause and without receiving any compensation. The court ruled upon the agency contract, requiring the employee to pay a "percentage of the first month's salary (gross earnings)" for placing her in employment. The court held that "gross earnings" means entire earnings received. The court held that no fee was payable to the agency under the agreement as no earnings were received.

A similar opinion is given in the letter opinion of the Assistant Attorney General, Carl M. Pesch, 1960 O.A.G. 142 (17.6). Also, in the more recent opinion of the Attorney General, 1968 O.A.G. 241, the same limitation to 5% of the "annual gross earnings" of any employee was made applicable to a baby-sitting agency.

In answer to your first question, the above opinion is still valid, and by the words of the statute, "in no event shall the charge for the furnishing or procurement of any employment be in excess of five percent of the annual gross earnings." It is also true that the employer may terminate the employment after one month of salary paid, as well as the employee. In either event, your five percent fee must be limited to the actual wage or salary earned and payable.

In your second question, your inquiry is to whether the 5% of gross earnings is a guideline or limitation. It is our opinion that this clause is both a guideline and a strict limitation upon the charge which any agency may legally collect for its services.

March 24, 1970

CONSTITUTIONAL LAW: Terms of office of county supervisors — House File 1154, Acts, 63rd G.A. (1970). House File 1154 merely amends Chapter 218, 63rd G.A. (1969) to prevent terms of certain supervisors from being cut short and is not unconstitutional. (Nolan to Pelton, State Representative, 3/24/70) #70-3-49

The Honorable Charles H. Pelton, State Representative: By your letter of March 17, 1970, you have requested that this office review H. F. 1154 which has passed both houses of the 63rd G.A., and which was submitted to the Governor on March 17, 1970. Your letter asking for a formal opinion as to the constitutionality of the bill, states:

"The Supreme Court of Iowa held in Mandicino v. Kelly et al, 158 NW 2d 754 (May 7, 1968) that county boards of supervisors were unconstitutionally apportioned. The court maintained jurisdiction and mandated the legislature to take appropriate legislative action. The first session of the Sixty-Third G.A. (1969) responded to this mandate by passing House File 812, now Chapter 218, Acts of the Sixty-Third G.A. Under this law all county boards of supervisors would be constitutionally apportioned by January 1, 1973. The transition period was four years. It was necessary to cut a number of supervisors terms short; that is, those supervisors who were elected in 1968, to serve a five year term, beginning January 1970. These terms were cut short by two years so that these boards would be constitutionally apportioned by January, 1973, rather than January, 1975. House File 1154 would reinstate this additional two year term from 1973 to 1975.

"Since the Supreme Court maintained jurisdiction, and because it is not disrupting to the boards of supervisors to have them constitutionally reapportioned by 1973, I am concerned that the High Court will hold H. F. 1154 invalid. This is why I seek your opinion on this matter. The Governor, I think, should also be advised of your opinion."

The effect of the bill in question, if it becomes law, would be to amend two Acts of the General Assembly.

1. Chapter 218, Acts 63rd G.A., First Session would be amended to read as follows:

Sec. 6

1. In the event there is no special election pursuant to section two (2) of this Act or special election does not change the supervisor representation plan selected by the board pursuant to section one (1) of this Act, the members of the board elected in the 1968 general election shall continue to retain office until their terms expire. If plan one is selected, or imposed pursuant to section one (1), subsection three (3) of this Act, such holdover members shall become supervisors at large.

2. No county board shall, after the second secular day in January 1971, be composed of more than five members. Boards of more than five members shall, before the 1970 general election, reduce their number to five in a manner determined by the board . . ."

Comment. It is well settled that Acts of the legislature are presumed to be constitutionally valid unless clearly and palpably discriminatory, or vague and unworkable. Likewise, there is a long standing presumption that the legislature will not enact a fruitless piece of legislation. With these principles in mind, it is our view that the amendments to Ch. 218, Acts of the 63rd G.A., are not unconstitutional and do not thwart the mandate impressed by *Mandicino v. Kelly,* 158 NW 2d 754 at page 761:

"We hold the apportionment standards which apply to states also apply to those governmental units of the state that exercise general governmental units of the state that exercise general governmental functions and powers delegated to them by the state and are designed to be controlled by the voters of the geographic area served by the body; the county is a governmental instrumentality or division of the state and the board of supervisors is the legislative body of the county . . ."
and at page 765:

"We hold Code section 39.19 in forbidding the election of more than two residents of Sioux City township to the board is violative to Amendment 14 to the federal constitution and Article 1 of the Iowa Constitution

in the circumstances here . . ."

* * *

". . . the principle of one man, one vote in the election of its members is not limited to Woodbury County.

* * *

"The legislature has duty to establish a system of county government meeting constitutional standards . . ."

and at page 766:

"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 legislative* . . ."

[Emphasis ours].

Chapter 218, Acts of the 63rd G.A., First Session, became effective July 1, 1969. This Act established three plans for county supervisor representation (§1) none of which is in any way affected by H. F. 1154, and all of which meet one man, one vote requirements. The Act also repealed Code section 39.19 (§11), therefore the constitutional requirements referred to in Mandicino have been complied with by the legislature.

Now let us consider whether the legislature has performed a fruitless task by passing H. F. 1154. The first amendment contemplated by H. F. 1154 merely strikes an exception which formerly shortened the terms of holdover supervisors elected in 1968, thus restoring such terms to the length specified on the ballot. Section 1 of this bill also struck out the following language from §6 of Ch. 218, supra:

"The terms of holdover members elected to five-year terms in the 1968 general election shall expire on the second secular day in January, 1973."

Since the terms of holdover supervisors were not immediately cut off at the effective date of Ch. 218, supra, striking the language quoted above merely permits such terms to run their course. The amendment does not preclude any district from being drawn on an equal population basis under Plan III, nor the holdovers being succeeded by supervisors elected at large under Plans I and II as provided in Ch. 218, supra.

2. By Sec. 2, H. F. 1154 has re-enacted as §39.18 of the Code provision for four year terms for township trustees and supervisors. The purpose of such re-enactment being evidently to restore the word "supervisors" previously amended out by §10 of Ch. 218. This amendment also reinstated provisions for a supervisor to be elected to a term commencing more than a year later than date of his election. A similar provision was previously written into the law in §39.18 so that the terms of supervisors might be staggered and this was on the books prior to the 1968 election (§1, Ch. 104, Acts 62nd G.A.). The desired effect has now surely been accomplished. To re-enact the defferred commencement provision now, in my opinion, results in no beneficial effect and in fact only creates uncertainty because §7 of Ch. 218 makes adequate provisions for the division of supervisors into two classifications (2 year and 4 year terms) so that

no more than a bare majority of any board will stand for election each time after the general election in 1970. Therefore while this section of H. F. 1154, like the rest, is not unconstitutional, it certainly is untenable.

March 25, 1970

COUNTY AND COUNTY OFFICERS: County Treasurer — §428.4 as amended by House File 686 of the 62nd G.A. and §446.7, Code of Iowa, 1966. Building erected upon leased land shall be assessed with this land as real property and not personal property, and the county treasurer on any tax sale shall include such building as real property and be sold for delinquent taxes thereon. (Strauss to Atwell, Supervisor of County Audits, Auditor of State's Office, 3/25/70) #70-3-46

Mr. Herman E. Atwell, Supervisor of County Audits, Office of Auditor of State: You have requested an opinion with respect to the following:

"Part of the Section 428.4 of the 1966 Code of Iowa has been changed as recorded in Chapter 356 Section 40 of the 62nd General Assembly. Does this mean that the County Treasurer should, in the future, classify all buildings on leased land as real property? If your answer is in the affirmative, should the County Treasurer include this property at Tax Sale with other Real Estate as provided in Section 446.7?"

In reply thereto, I would advise you that §428.4, Code of 1966 provides the following:

"Personal property — real estate — buildings. 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. Real estate shall be listed and valued in 1933 and every four years thereafter, and in each year in which real estate is not regularly assessed, the assessor shall list and assess any real property not included in the previous assessment, and also any buildings erected since the previous assessment, with a minute of the tract or lot of land whereon the same are situated, and the auditor shall thereupon enter the taxable value of such buildings on the tax list as a part of the real estate to be taxed; 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."

It was amended by Section 40 House File 686 of the 62nd General Assembly and appears in the Acts of the 62nd General Assembly as Chapter 356, which amendment follows:

"Sec. 40. Section four hundred twenty eight point four (428.4), Code of Iowa, is hereby amended by striking from line seventeen (17) thereof the words 'real estate' and inserting in lieu thereof the word 'land'. Section four hundred twenty eight point four (428.4), Code of Iowa, is hereby amended by striking from line eighteen (18) thereof the expression 'personal property, but' and inserting in lieu thereof the expression 'real property.' and by striking all of lines nineteen (19), twenty (20), and twenty one(21)."

As so amended, §428.4, Code of 1966, provides the following:

"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. Real estate shall be listed and valued in 1933 and every four years thereafter, and in each year in which real estate is not

regularly assessed, the assessor shall list and assess any real property not included in the previous assessment, and also any buildings erected since the previous assessment, with a minute of the tract or lot of land whereon the same are situated, and the auditor shall thereupon enter the taxable value of such buildings on the tax list as a part of the real estate to be taxed; 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."

The clear and legislative intent as so amended by House File 686 was to eliminate the personal tax on buildings erected on leased ground and to impose upon the owner of the land the obligation to pay the tax upon the land and include any building regardless of the fact that the building was erected upon the land by a lessee of the land. In tax sales, the clear meaning of the statutes impose upon the County Treasurer the duty to classify all buildings on leased land as real property. In that aspect, the duty of the County Treasurer in the conduct of a tax sale pursuant to the provisions of §446.7, Code of 1966, obligates him to include deliquent tax upon the land and the buildings thereon. This statute so far as applicable to this situation, provides the following:

"Annually, on the first Monday in December the treasurer shall offer at his office at public sale all lands, town lots, or other real property on which taxes of any description for the preceeding year or years are deliquent which sale shall be made for the total amount of taxes, interest, and costs due and unpaid thereon, including all prior suspended taxes, provided, however, that no property, against which the county holds a tax sale certificate, shall be offered or sold. No interest or penalty on suspended taxes shall be included in the sale price, except that six percent interest per annum from the date of suspension shall be included as to taxes suspended under the provisions of section 427.8."

At a tax sale in the foregoing statute the County Treasurer is required to offer all lands, town lots, or other real property on which taxes of any description for the preceeding year or years is delinquent. This duty of the Treasurer under the foregoing statute is plain, and such sale clearly would include any delinquent real property tax upon leased land and any buildings situated thereon.

March 25, 1970

COUNTIES AND COUNTY OFFICERS: County hospital, lease of equipment — §§347.13 and 347.14, Code of Iowa, 1966. County hospital trustees may lease equipment for hospital. (Haesemeyer to Knight, State Representative, 3/25/70) #70-3-48

The Honorable Harold L. Knight, State Representative: Reference is made to your letter of March 24, 1970, in which you state:

"I would like an opinion whether the Board of Trustees, Humboldt County Memorial Hospital, can enter into a lease agreement for hospital equipment."

It is my understanding that the type of "lease" which the board contemplates actually has many aspects of a lease purchase or installment contract since at the end of the term of the lease title to the equipment will vest in the hospital.

Section 347.13(1) and (2) and 347.14(10), Code of Iowa, 1966, provides:

"1. Purchase, condemn, or lease a site for such public hospital, and provide and equip suitable hospital buildings.

"2. Cause plans and specifications to be made and adopted for all hopsital buildings and equipment, and advertise for bids, as required by law for other county buildings, before making any contract for the construction of any such building or the purchase of such equipment."

"10. Do all things necessary for the management, control and government of said hospital and exercise all the rights and duties pertaining to hospital trustees generally, unless such rights of hospital trustees generally are specifically denied by this chapter, or unless such duties are expressly charged by this chapter. Added Acts 1959 (58 G.A.) ch. 262, §6."

It is clear that in addition to the rather broad powers conferred by the catchall language of §347.14(10), the board under §347.13(1) and (2) has the duty to equip the hospital buildings and to purchase equipment.

Reading all of the foregoing statutory provisions together it is our opinion that the board has sufficient latitude in equipping its hospital in the manner contemplated.

March 25, 1970

STATE OFFICERS AND DEPARTMENTS: State Soil Conservation Committee — Requirements for formation of sub-district — Chapter 467A, Code of Iowa, 1966. "Landowner" as used in statute means person who owns record title to land and who meets other requirements of statute. Soil conservation sub-district may not "absorb" a drainage district. (Haesemeyer to Greiner, Director, Soil Conservation Committee, 3/25/70 #70-3-61

Mr. William H. Greiner, Director, Soil Conservation Committee: You have requested an opinion of the attorney general with respect to the following:

"1. Who needs to sign the petition (467A.14) when joint ownership, mortgagor, trustees, etc. are involved?

"2. Can a legal drainage district be absorbed into a sub-district and, if so, can the sub-district assume the debt of the drainage district if the sub-district includes the drainage district and the district levy pay for future work needed in the drainage district?"

Section 467A.14, 1966 Code of Iowa, states in part as follows:

"The petition shall contain a brief statement giving the reasons for organization, requesting that the proposed area be organized as a sub-district and must be signed by 65% of the landowners in the proposed sub-district."

That portion of §467A.14 quoted above used the word "landowners" which is the crucial word for purposes of your first question. Section 467A.3(10), 1966 Code of Iowa, defines "landowner" as follows:

"Landowner includes any person, firm, or corporation who shall hold title to three or more acres of land lying outside incorporated cities or towns and within a proposed district or a district organized under the provisions of this chapter."

The person who holds title to real property and meets the other conditions of the statute, supra, is a landowner for purposes of this chapter.

In this state, the generally accepted meaning of "title" as it pertains to real estate, is record title, or that title to land which is recorded in the county recorder's office. If the records of the county recorder's office show the title of certain real estate to be vested in a person, firm or corporation and said person, firm or corporation meets the other statutory requirements, then the person, firm or corporation is a landowner within the meaning of §467A.14, 1966 Code of Iowa. See also O.A.G. dated July 14, 1958 and January 14, 1963.

Section 467.15, Code of Iowa, 1966, indicates that the legislature did not intend for all those with an interest in land to be considered "landowners" for purposes of Chapter 467A. So, for example, the following language is found in 467A.15:

"Within thirty days after such petition has been filed with the soil district commissioners, they shall fix a date, hour, and place for a hearing thereon and direct the secretary to cause notice to be given to the owners of each tract of land, or lot, within the proposed sub-district as shown by the transfer books of the auditor's office, and to each lienholder, or encumbrancer, or any such lands as shown by the county records, and to all other persons whom it may concern, and without naming individuals all actual occupants of land in the proposed sub-district."

The above quoted language shows that the legislature separates owners of land from lienholders, other encumbrancers and persons in possession. The above cited statute provides for notice to those who had less than a record title interest in real estate so they may object to the formation of a sub-district. However, it is the opinion of this office, that only persons with record title to land are landowners for the purpose of Chapter 467A, and only then if said title holder meets the other conditions set forth in 467A.3(10), supra

In your second question, you initially ask if a drainage district may be absorbed into a soil conservation sub-district.

The word "absorb" means "to take in, to incorporate, to take over." Webster's Third International Dictionary.

Drainage districts are created pursuant to Chapter 455, 1966 Code of Iowa. The district is governed by said chapter for as long as it exists, except under special circumstances set forth in said chapter, and said district is dissolved pursuant to the provisions of Chapter 455, supra.

Soil conservation sub-districts are created pursuant to Chapter 467A, 1966 Code of Iowa. Nowhere in that chapter, either by express wording, implication or necessity, is there any authority for a soil conservation sub-district to absorb (tak over) a drainage district, except in 467A.13, Code of Iowa, 1966. Both entities are created, governed and dissolved under different chapters of the Code. They have different functions, powers and responsibilities. To allow a soil conservation sub-district to absorb a drainage district would be dissolving a legal entity in a manner contray to law, by another legal entity which no power or authority, express or implied, to do that act, except for the language of 467A.13, supra. One must certainly wonder why the word "drainage" was included in the 1957 amendment which was passed to allow the formation of soil

conservation sub-districts within existing soil conservation districts, and no similar revision was made in the drainage district law. If §467A.13, supra, were read without the word "drainage" included, it would reach a more reasonable result for several reasons.

First, as noted above, soil conservation districts and drainage districts are created, governed and dissolved under different chapters of the Iowa Code. Nowhere in either chapter is there any reference to any concurrent powers or responsibilities except §467A.13, supra. A drainage district is created by the Board of Supervisors pursuant to chapter 455. After it's creation, the Board appoints commissioners who classify the land and assess costs of improvement to the landowners in the same ratio as benefits accruing to the land.

A soil conservation district is created by petitioning the State Soil Conservation committee pursuant to §467A.5. An election is held to determine who will sit on the district governing body. It should be especially noted that a soil conservation district is without power to levy a tax or assess costs of projects to landowners. That fact is the reason the 1957 Amendment was passed. That amendment, now §467.13 et seq allows the formation of a sub-district which has all the power of a soil conservation district plus the authority to levy an annual tax to cover the cost of improvements.

If the word "drainage" is deleted from 467A.13, then it becomes obvious that a soil conservation sub-district may be formed within a district, and may levy the annual tax to cover project costs within the sub-district; but it may not consist of the entire district solely for the purpose of taking over the operation of a district, because that would enable a sub-district to levy the special tax over the entire district.

For all the reasons set forth above, we believe the rule of law which prohibits absurd results applies here. In Re, *Will of Petersen,* 186 1 75 N.W. 206 (1919). *Fortune v. Commissioners,* 140 N.C. 322, 52 S.E. 950.

For all the reasons discussed above, we find that the word "drainage" is surplusage and should be read out of the statute in order to give meaning to §467A.13, supra.

March 26, 1970

COUNTY AND COUNTY OFFICERS: Drainage — §§465.1, 465.6, 465.8, Code, 1966, as amended by Ch. 260, Acts, 63rd G.A. Board of Supervisors decides whether a drainage tile may be projected across or through a road right-of-way to a suitable outlet. (Nolan to Blum, Franklin County Attorney, 3/26/70) #70-3-50

Mr. Lee B. Blum, Franklin County Attorney: You have asked for an opinion on the question of who makes the final decision when a tile line or drainage ditch must be projected across a road right-of-way to a suitable outlet. Your letter states that there is a dispute as to whether the line must be projected and as to who makes the decision. In a previous letter you stated that a Franklin farmer inisits that a particular tile line must cross a right-of-way to a suitable outlet and that he is supported by the Soil Conservation Service. The Franklin County Board

of Supervisors objects to the expenditure of road funds for the expense. You asked "is this to be decided by the Board of Supervisors, the township trustees or someone else?"

Prior to the enactment of Chapter 260 by the 63rd G.A., such decisions were made by the township trustees. However, the law now fixes this authority with the Board of Supervisors of the county. Ch. 465 of the Code of Iowa 1966, as amended by Ch. 260, Laws of the 63d G.A., First Session, now provides that when the owner of any land desires to construct tile across a right-of-way he may file an application with the auditor of the county. (See §465.1, Code, §32, Ch. 260, First 63d G.A.). The auditor then fixes a time and place for hearing on the application before the county board of supervisors, and causes notice to be served. At the time set for hearing the board "shall . . . determine the merits of the application, all objections thereto, and all claims filed for damages or compensation, and may view the premises." (§465.6, Code, Section as amended by §36, Ch. 260.).

§465.8 of the Code, as amended by §38, of Ch. 260, now provides:

"The board shall reduce its findings, decisions, and determination to writing, which shall be filed with the auditor, who shall record it in the official record of the board's proceedings, together with the application and all other papers filed in connection therewith, and he shall cause the findings and decision of the board to be recorded in the office of the recorder of the county in which such land is situated and said decision shall be final unless appealed from as provided in section 465.9. . . "

March 26, 1970

CRIMINAL LAW: Lotteries — §726.8, Code of Iowa, 1966. A proposal whereby a gasoline retailer allows prospective purchasers of gasoline to roll dice or draw a card for the purpose of determining a discount rate at which they may purchase gasoline is not a lottery for the reason that no consideration is given by the prospective purchaser for the oportunity to take a chance. (Cullison to Knoke, Pottawattamie County Attorney, 3/26/70) #70-3-51

Mr. George J. Knoke, Pottawattamie County Attorney: You requested an opinion as to whether a "promotional scheme" adopted by local gasoline stations constitutes an illegal lottery. The scheme was described in your letter as follows:

"Several gasoline stations in town have a scheme whereby when one goes into purchase gas they either roll a dice or pick a card with a number on it and obtain gasoline at a price less than the going price in the amount of cents that they either have chosen or rolled. This throwing of the dice or drawing of a card is done prior to the ordering of gasoline. Of course you are not required to participate in the drawing and the amount of gasoline purchased has no bearing on the price."

Section 726.8, Code of Iowa, 1966, prohibits the operation of a lottery. The statutory definition of a lottery is in that section and states as follows:

"When used in this section, lottery shall mean any scheme, arrangement, or plan whereby a prize is awarded by chance or any process involving a substantial element of chance to a participant who has furnished a consideration for such chance."

Three elements must be established before a scheme may properly be termed a lottery — consideration, chance and prize. The scheme described in your letter contains the elements of prize, to-wit the opportunity of purchasing gasoline at a reduced price, and chance, to-wit the drawing of cards or rolling of dice to determine the amount of reduction in price. However, the element of consideration appears to be lacking.

Section 726.8, Code of Iowa, 1966 defines consideration 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 requested 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 representatives 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 to communicate the offering of the prize or the regular mail. As amended Acts 1965 (61 G.A.) ch. 441, §§1, 2."

The operable language of the statutory definition is as follows:

". . . a consideration shall be deemed to have been paid . . . where as . . . a condition of obtaining a *chance* to win a prize, the participants are required to make . . . a purchase . . . ."

(emphasis added)

The scheme, as related by you, permits a customer to draw cards or roll dice and simply leave the premise without purchasing gasoline if the outcome is not advantageous to the customer. In other words, the gasoline retailer promises to sell gasoline at a reduced price determined by chance; however, the customer promises nothing. It should be noted that the customer must purchase gasoline to realize or obtain the prize which is a reduction in cost. The purchase must be a condition precedent to obtaining a *chance* to win a prize, not a condition precedent to obtaining the prize, which in this case is an opinion to purchase gasoline at a reduced price. In the interpretation of a statute creating a crime, the rule of strict construction must be applied. See I.C.A. §4.1, Note 81.

It is our opinion that the scheme in question cannot be termed an illegal lottery because the customer does not provide consideration for obtaining a chance to win a prize.

March 26, 1970

CONSTITUTIONAL LAW: The fifth and fourteenth amendments to the Constitution of the United States do not require the legislature to afford potential condemnees an opportunity to be heard on questions

of the necessity or expediency of such takings. (Holst to Hougen, State Senator, 3/26/70) #70-3-52

The Honorable Chester O. Hougen, State Senator, Iowa State Senate: In your letter to Attorney General Turner dated February 13, 1970, you ask whether to satisfy the due process requirements of the 5th and 14th Amendments to the United States Constitution it is necessary for the legislature to afford potential condemnees an opportunity to be heard on the question of the necessity or expediency of such taking. In our opinion, the answer to your question is "no."

Our conclusion is based upon the holdings in the many cases cited in support of §4.103(1), *Nichols on Eminent Domain,* 3rd ed., page 484, which section is as follows:

"Inasmuch as an owner of land which it is sought to take by eminent domain has no constitutional right to a judicial hearing upon the necessity and expediency of the public improvement for which it is sought to take it, or upon the necessity or expediency of taking his land for such improvement, he has no constitutional right to notice of the proceedings in which it is decided to construct the improvement and its location is determined."

Of course, we do not imply thereby that the necessity and expediency of such matters may not be questioned in connection with allegations of *mala fides* or abuse of power. As stated by the Supreme Court of Iowa in the case of *Bennett v. City of Marion,* 1898, 106 Iowa 628, 76 N.W. 844, 845:

" . . . In many cases it may be difficult for the court to determine whether all property sought . . . will be necessary . . . The danger always to be guarded against is the *abuse of power,* in taking more from the citizen than is reasonably required for the improvement contemplated."

(Emphasis added)

Alleged illegalities relating to the exercise of eminent domain may be challenged either before or after the fact by injunction or certiorari. In the case of *Batcheller v. Iowa State Highway Commission,* 1960, 251 Iowa 364, 101 N.W. 2d 30, the Iowa Supreme Court said:

". . . If an agency of state, defendant here, is proceeding illegally or in derogation of statutory authority it may be enjoined from so proceeding. Hoover v. Iowa State Highway Commission, 207 Iowa 56, 58, 60, 222 N.W. 438, and citations . . ."

In the case of *Aplin v. Clinton County,* 1964, 256 Iowa 1059, 129 N.W. 2d 726, 728, the Iowa Supreme Court said:

"It is well settled in this state that certiorari is available in condemnation cases involving jurisdictional questions, substantial departures from statutory requirements, and other illegalities by a lower tribunal, board or commission . . ."

(Emphasis added)

For the reasons given above, it is our opinion that it is not necessary to provide for priod notice and hearing on the question of expediency and necessity of taking private property for public purposes.

March 26, 1970

HIGHWAYS: Sale of unused right of way — Highway Commission — §§306.16, 306.18, 306.20, 313.4, Code of Iowa, 1966. The Executive Council may approve a contract of the Iowa State Highway Commission to sell with restrictions unused right of way, The money received therfor by the Highway Commission shall be credited to the primary road fund, and the Highway Commission may use primary road funds to purchase additional right of way. (Holst to Wellman, Secretary, Executive Council, 3/26/70) #70-3-53

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: Mr. Stephen C. Robinson has requested an opinion of the Attorney General whether or not the proceeds from the sale of certain Highway Commission right of way to Pecault Realty, Inc., Sioux City, Iowa, will revert to the State General Fund or will be available to the Highway Commission for the acquistion of other real estate. Mr. Robinson also asked if such a "package transaction" as such sale appears to be can be approved.

Section 306.20 provides in pertinent part that:

". . . the funds received from the sale . . . of any highway right of way or land, shall be . . . credited to . . . the road fund or funds applicable to said highway or highway system."

The application of the Highway Commission, dated January 2, 1969, shows the proposed sale to be a part of the right of way for Primary Road No. U.S. 75 (Woodbury U-75-4(9)—40-97, Woodbury U-UG-75-4 (2)—44-97, Parcel No. 109 & 110). It being part of a primary road, it should be credited to the primary road fund described in §313.3 of the Code of Iowa, 1966. Section 313.4 of the Code of Iowa, 1966, provides that such primary road fund ". . . shall be used in the . . . establishment, construction, and maintenance of the primary road system . . . ." Therefore, it is our opinion that the funds received from the sale of said land shall be credited to the primary road fund and that the Highway Commission may generally use the primary road fund to purchase other real estate for primary road purposes. Such proceeds may not be credited to the general fund of the state.

It is also our opinion that the Highway Commission may sell less than fee simple title to said land that the Executive Council may approve the same. Section 306.16 of the Code of Iowa, 1966, provides in part that:

"When in the judgmnet of the . . . commission in control of said highway, said tract or parcel of land, *or part thereof*, . . . will not hereafter be used in connection with or for the . . . use of said highway, the . . . commission . . . may sell said tract, . . . or *any part thereof* . . ."

(Emphasis added)

In addition, §306.18 of the Code of Iowa, 1966, requires certain conditions to be made part of the said sale. Accordingly, it is our opinion that the sale of said property, subject to the conditions set forth in said application is legal and may be approved by the Executive Council.

March 26, 1970

STATE OFFICERS AND DEPARTMENTS: §§247.5, 247.9, 1966 Code

of Iowa. Duration of the period of parole is in the discretion of the Board of Parole and can be terminated at any time. §246.39, 1966 Code of Iowa. Statutory reduction for good time earned while incarcerated does not apply to persons on parole. §246.41, 1966 Code of Iowa. Violation of parole does not foriet reduction of sentence for good time earned. (Essy to Bobzin, Parole Board, 3/26/70) #70-3-54

R. W. Bobzin, Parole Board Executive: You have requested an opinion of the Attorney General on the following questions:

1. Does time on parole expire upon termination of the period for which an individual was sentenced, or does time on parole expire upon termination of the period for which an individual was sentenced less the time he could have earned for good conduct had he not been paroled.

2. Under Section 246.39, Code of Iowa, 1966 can a parolee be given credit for good time he would have earned had he remained in the institution during his time of release thus reducing the actual sentence imposed.

3. Can a violation of parole forfeit the reduction of time served earned under Section 246.41, Code of Iowa, 1966.

Section 247.5, Code of Iowa, 1966 provides:

". . . The Board may also terminate or discharge a parole granted by it from the penitentiary or men's or women's reformatory or placed under its supervision by the district court at any time and in its sole discretion whenever it is satisfied that satisfactory evidence has been given that society will not suffer thereby. Said discharge shall relieve the parolee from further liability under his sentence."

Section 247.9, Code of Iowa, 1966 provides:

"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."

In *Kirpatrick v. Hollowell,* 197 Iowa 927, 196 N.W. 91, 198 N.W. 81, the court interprets statutes from which the above sections are derived. There the court in deciding the period during which a parole can be revoked gives light to the question as to how long a parolee remains on parole. The court stated:

"We think it would in large measure defeat the very plan and purpose of the parole statute to hold that the board of parole loses all control of a paroled prisoner and cannot order his rearrest the moment that the full period of time of his sentence from the date of his incarceration has expired. The very language of the statute seems to negative such a proposition. It is expressly provided that the paroled prisoner is subject 'at any time' while under parole to be returned to the institution . . . .

"As we have suggested, the board of parole had the power to revoke the parole 'at any time' after it was issued and before the discharge of the prisoner from his sentence. They could have done so, if advised of its violation, within the five-year period of his original sentence. Under our statute they can do it after the expiration of the five-year period, if the prisoner is still under parole, and without discharge therefrom . . . ."

Under the clear provisions of the above statutes and indirectly in *Kirkpatrick,* supra, the period under which a parole is operative under law may be terminated at any time the board in its discretion so deems; and, under *Kirkpatrick,* supra, the parole may be revoked "at any time" and until final discharge.

It is therefore the opinion of this office that parole may extend to the period which the parolee was originally sentenced, or beyond and may be terminated at any time that the board in its discretion so deems.

Section 246.39, Code of Iowa, 1966 provides:

"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 . . . ."

Since this section does not include, specifically, individuals on parole, pardon or conditional release from a penitentiary, it is reasonable to interpret that the legislature intended that only prisoners, in the real sense, (i.e. those incarcerated in the institution) can earn reductions of sentence. In support of this conclusion the following is submitted:

Section 247.12, Code of Iowa, 1966 provides:

"Parole time not counted. The time when a prisoner is on parole or absent from the institution shall not be held to apply upon the sentence against the parolee if the parole be violated."

In citing the above section, the Supreme Court of Iowa in *State v. Byrnes,* 150 N.W. 2d 280 states:

"The rule is now well established that a parole operates as a suspension of the convict's sentence during the liberty granted, so that on a violation of its terms the convict may be compelled to serve *the full portion of his term which was unexpired when the parole was granted.* This conclusion is reached in some jurisdictions by the terms of statutes or by the terms of the parole." (Citations Omitted) (Emphasis Added)

The court then held that a parolee is not entitled to credit on his original sentence for time which he spent on parole. In *Kirkpatrick v. Hollowell,* 197 Iowa 927, 196 N.W. 91, 198 N.W. 81, the court also held:

"By the very terms of the statute, if he [parolee] violates the terms of his parole, he loses all of the time that he has been released on parole, and must serve the *full term* of imprisonment provided by the statute . .."

(Emphasis Added)

By the terms of the above statutes and the words emphasized above that the parolee, upon reentering the institution must serve the full term of imprisonment, and since Section 246.39 does not include parolee within its terms it is reasonable to infer that a parolee does not earn credit for good time envisioned under Section 246.39. It is, therefore, the opinion of the Attorney General that a parolee does not earn credit for good time he would have earned had he been in the institution during his time on release, thus the actual sentence is not reduced nor the period of parole. However, as discussed above the board may, at any time, and in its discretion terminate a parole.

Section 246.41, Code of Iowa, 1966 provides: "A prisoner who violates

any of such rules shall forfeit the reduction of sentence earned by him . . . ."

Again, since this section does not include, specifically, individuals on parole, pardon or conditional release from a penitentiary, it is reasonable to interpret that the legislature intended that only prisoners, in the real sense, are liable for forfeiture of good time.

In support of this conclusion, the Supreme Court of Iowa in *State ex rel. Davis v. Hunter,* 124 Iowa 569, 100 N.W. 510, where the Governor issued a conditional pardon upon the revocation of which the convict was to forfeit the good time that he had earned, stated that ". . . no authority [exists] for the exercise by the governor, at his discretion to deprive a prisoner his statutory [deduction] . . ."; and held that, ". . . the diminution of imprisonment provided for by statute is a privilege of which the prisoner can be deprived only in accordance with the provision of the statute . . ."; and that, "since no provision in statute exists no such forfeiture can be imposed under any condition or stipulation by the executive."

We think the position of the Board of Parole is analogous to that of the executive. It is, therefore, the opinion of this office that violation of parole does not constitute a forfeiture of good conduct time earned before the granting of parole.

March 26, 1970

STATE OFFICERS AND DEPARTMENTS: Iowa Public Officials Act — Ch. 107, Acts, 62nd G.A. Where state of Iowa pays expenses of state officials by payment of membership fees in national associations it is not a violation of Ch. 107, Acts, 62nd G.A., for state official to accept benefits of such membership in excess of $25 while on official business of the state. (Nolan to Montgomery, Ex. Dir., Iowa Educational Network, 3/26/70) #70-3-55

Mr. John A. Montgomery, Executive Director, Iowa Educational Broadcast Network: In response to your request and that of the Executive Council, we have reviewed your request to the Executive Council for approval of travel to Phoenix, Arizona, to attend the winter sessions of the NET Affiliates Council with particular attention to that portion of your request which states:

". . . you will see that by request for travel authority indicated that NET would provide hotel accomodations at the conference. I now understand that some other expenses in addition may be born by NET but I am not exactly sure at this moment as to what they will be."

The letter of W. C. Wellman, Secretary of the Executive Council of Iowa, states that the request was approved "subject to your checking with the Attorney General to determine that acceptance of lodging and other expenses is not in conflict with §5, Ch. 107, Iowa Public Officials Act, enacted by the 62nd G.A." It is our opinion that such conflict does not exist under the circumstances. Your letter to the Executive Council states:

". . . the Affiliates Council of ten station managers meets quarterly with the NET administration to consult on broad policies and practices effecting the relationships between NET and the stations. Committees

of the Affiliates Council focus on specialized topics such as long-range planning and promotional activities with NET Counterparts. I am Chairman of the Promotion Committee.

"There is a great deal of interdependence among stations in the field of educational television. It would not be possible for us to operate in Iowa in an effective way without the assistance of a number of such national organizations. I am, therefore, anxious to render our share of imput to the total national effort."

From this it appears clear that the hospitality is related to your employment as Executive Director of the State Educational Radio and Television Facility. Acceptance of such lodging and other expenses in excess of $25.00 in other circumstances might be in violation of §5 of Ch. 107, Acts of the 62nd G.A., known as the Iowa Public Officials Act. See opinion Haesemeyer to Wellman, Secretary, Executive Council of Iowa, January 6, 1970, a copy of which is attached. However, the Educational Radio and Television Facility Board pays an annual assessment of $50.00 to the NET Affiliate Council in addition to the $100.00 for NET Affiliate membership which provides five (5) hours of new programing each week for the educational television stations in Iowa. (KDIN : KIIN) It appears that the state of Iowa has already contributed to the defraying of expenses of Affiliate Council members and therefore, there has not been a violation of the Iowa Public Officials Act.

March 26, 1970

CONSTITUTIONAL LAW: Department of Public Health. Legislative proposals of department of health concerning ex parte court order for removal or destruction of a dwelling in case of emergency and provision for enjoining health nuisances are not unconstitutional. (Hughes to Voorhees, State Representative, 3/26/70) #70-3-58

Honorable Donald E. Voorhees, Iowa State Representative: Reference is made to your letter of February 25, 1970 in which you request an opinion concerning the constitutionality of certain legislative proposals submitted to you by the Iowa State Department of Health. In that letter you stated:

"Attached is a proposal by the Department of Health. I would like an opinion on the constitutionality of several sections.

"Section 9, in reference to their powers in the event of an emergency to remove and destroy dwellings.

"Section 3, five lines starting with 'in addition to' and ending with the word 'jurisdiction'."

The pertinent part of Section 9 of said proposals is as follows:

"Provided, except in cases of emergency before the local board of health removes or destroys a dwelling, application shall be made by the county attorney for a county board of health, the city attorney for a city board of health, or other attorney designated by the board, upon request by the board, to a court having jurisdiction for an order authorizing removal or destruction of the dwelling. Such proceeding shall be in equity. An order may be granted ex parte at the discretion of the court in cases of emergency."

The foregoing proposal means that ordinarily, as a condition precedent to removing or destroying a dwelling, the local board of health, by its

attorney, must obtain an order from a court having jurisdiction and sitting in equity. An exception to this precedure provides that in cases of emergency, a court in its discretion may issue ex parte an order calling for removal or destruction of a dwelling.

The most obvious constitutional challenge to the validity of such a procedure is that it deprives an individual of property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 9 of the Constitution of the State of Iowa. To meet a test of constitutionality it must appear that the proposed power delegated to a local board of health is a valid exercise of state police power.

In *State v. Strayer,* 1941, 230 Iowa 1027, 299 N.W. 912, the Iowa Supreme Court considered attacks on the constitutionality of a statute which authorized local boards of health to determine the existence of health nuisances and abate those nuisances at the owner's expense if an order of abatement issued by a local board of health was ignored. Concerning the power of a local board of health to determine the existence of a health nuisance and order abatement of the nuisance, the court stated as follows at page 917 of 299 N.W.:

"The particular form of procedure prescribed may vary from the customary procedure, but essential rights are not violated by granting to the board the right, in an emergency, to proceed in the abatement of a nuisance, detrimental to public health, ... While the courts have not been uniform in their holdings, we believe that the weight of authority as well as reason and necessity, prescribe that in cases involving the public health, where prompt and efficient action is necessary, the state or its officers should not be subject to the inevitable delays incident to a complete hearing before action may be taken."

In *State v. Strayer,* supra, the court quoted from *Lawton v. Steele,* 1894, 152 U.S. 133, 145 S. Ct. 499, 500, 38 L.Ed. 385. In that case the United States Supreme Court stated as follows:

"The extent and limits of what is known as the 'police power' have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the pubilc safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay, or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; . . . ."

The owner of a dwelling which a local board of health seeks to have removed or destroyed by ex parte order is not subjected to a completely unilateral assertion of the findings of a local board of health. Before an order may issue ex parte, the local board of health must affirmatively show that a situation of emergency exists sufficient to warrant abridgment of a fullfledged adversary proceeding. Even if such a condition is found to exist by a court, the issuance of an ex parte order is not mandatory, but lies in the discretion of the court.

Several rules of law govern the burden of proof which must be met by one challenging the constitutionality of a statute. These rules recently

have been concisely stated in *Lee Enterprises, Incorporated, et al v. Iowa State Tax Commission, et al,* 1968, ... Iowa ...., 162 N.W. 2d 730. At page 737 of 162 N.W. 2d the Iowa Supreme Court stated:

"At the outset we must recognize the presumption of constitutionality of this statute. The rule is well settled that a statute will not be declared unconstitutional unless it clearly, palpably and without doubt infringes the constitution. We have often stated that every reasonable doubt must be resolved in favor of constitutionality. Zilm v. Zoning Board of Adjustment, Iowa, 150 N.W. 2d 606, 610 (1967); Housen v. Haugh. Iowa 149 N.W. 2d 169, 174 (1967), and citations."

Another rule appearing at page 738 of 162 N.W. 2d is as follows:

"The general rule applicable here is that one challenging the constitutionality of the legislative act on these grounds has the burden of establishing that the act is unconstitutional and must negative every reasonable basis which may sustain the statute. Knorr v. Beardsley, supra, 240 Iowa 828, 839, 38 N.W. 2d 236, 243 (1949)."

Based upon these authorities and the proposed procedure, it is our opinion that in cases of emergency, an ex parte application for and issuance of a court order for removal or destruction of a dwelling is not per se a denial of due process of law. The procedure outlined qualifies as a "summary procedure" and is conducted under color of law even though the exigency of the situation suspends customary adversial procedure.

Section 3 of the legislative proposals is as follows:

"Sec. 3. Section twenty-three (23) of Chapter one hundred sixty-three (163), Acts of the Sixty-second (62nd) General Assembly, is hereby amended by adding the following:

" 'In addition to or in lieu of a criminal penalty, any person who violates any provision of this act or the rules and regulations of a local board or any lawful order or notice of said, its officers, or authorized agents may be temporarily or permanently enjoined therefrom by any court having jurisdiction.' "

The section to which this amendment would be added sets forth a criminal sanction to be imposed against violaters of the act, its rules and regulations, and lawful orders of local boards of health. The proposed amendment simply provides a civil remedy in addition to or in lieu of the criminal sanction.

It is our opinion that no viable challenge to the constitutionality of such a provision can be maintained. It is perfectly proper for the legislature to prescribe a civil remedy which may be employed against violators of its law. It is appropriate for the legislature to provide a vehicle for enforcement of its laws.

It should be noted that this opinion is restricted to the two specific legislative proposals of the Iowa State Department of Health which were set forth in your request.

March 27, 1970

TAXATION: Property Tax — Moneys and credits included in deter-

mining debt limits of political subdivisions — Art. XI, §3, Iowa Constitution; Chs. 35B, 429, 430 and 430A, Code of Iowa, 1966; H.F. 1294, 63rd G.A., Second Session. Moneys and credits of state and national banks, trust companies, and savings and loan associations would not, under the provisions of H.F. 1294 be included in determining the debt incurring capacity of political subdivisions under Article XI, Section 3, of the Iowa Constitution. However, moneys and credits of production credit associations would still be "taxable property" and thus so included. (Griger to Hon. Dennis L. Freeman, State Representative, 3/27/70) #70-3-56

Honorable Dennis L. Freeman, State Representative, Buena Vista County: This will acknowledge receipt of your letter of March 19, 1970, wherein you have requested the opinion of the Attorney General as follows:

"House File 1294 provides for state collection of a tax involved on financial institutions and its return in large part to local taxing bodies. The monies and credits will no longer be shown on the local tax lists. Will this property any longer be included in determining the debt incurring capacity of local bodies under Section 3 of Article 11 of the Constitution? If it is to be counted, in what amount?"

House File 1294 is a bill which purports to levy a franchise tax according to and measured by the net income of financial institutions. The bill defines financial institutions to include state and national banks, trust companies, savings and loan associations, and production credit associations.

Section 14 of House File 1294 repeals Chapter 429 and 430, Code of Iowa, 1966, which pertain, respectively, to the taxation of moneys and credits, in general, and the taxation of shares of stock of certain financial institutions, in particular. Chapter 35B, Code of Iowa, 1966, provides for the issuance of Korean War Veterans' Bonus Bonds. Section 35B.11 provides for the levy of a one mill direct annual tax upon all moneys and credits for the payment of the principal of said bonds and the interest thereon. Pursuant to the provisions of House Joint Resolution 19, which is Chapter 334, Acts of 63rd G.A., First Session, the one mill tax on the Korean Veterans' Bonus was levied for the last time for 1969 taxes, payable in 1970. The Department of Revenue has informed us that this tax was not levied for the year 1970 taxes, payable in 1971.

Article XI, Section 3, of the Iowa Constitution provides as follows:

"No county, or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount, in the aggregate, exceeding five per centum on the value of the taxable property within such country or corporation — to be ascertained by the last State and county tax lists, previous to the incurring of such indebtedness."

In *Zobel vs. Schau*, 1967, 260 Iowa 796, 150 N.W. 2d 626, the Iowa Supreme Court held that the value of assessed and listed moneys and credits taxed under the provisions of Chapter 35B of the Iowa Code may be included as "taxable property" in computing the debt limits of cities and towns because such intangibles were not exempt from moneys and credits property taxation.

If House File 1294 should be enacted into law, thereby repealing Chapters 429 and 430 of the Iowa Code, and in view of the fact that the

one mill levy for the Korean Veterans' Bonus is no longer being made, moneys and credits of financila institutions consisting of state and national banks, trust companies, and various savings and loan associations would no longer be included in determining the debt incurring capacity of Iowa political subdivisions under Article XI, Section 3, of the Iowa Constitution for the reason that other than Chapters 35B, 429 and 430 of the Iowa Code, there are no Iowa statutes imposing a property tax on moneys and credits of such financial institutions.

However, House File 1294 does not purport to repeal the tax levied by Chapter 430A, Code of Iowa, 1966. Chapter 430A concerns the taxation of capital employed in the business of making loans or investments within the State of Iowa by loan agencies engaged in such business of making loans or investments within Iowa on other than real estate security. Section 430A.3 provides as follows:

"There is hereby imposed upon capital employed in the business of making loans or investments within the state of Iowa, as determined under the provisions of this chapter, a tax of five mills on each dollar of such capital; such tax to be considered a tax upon moneys and credits of such corporations and to be apportioned as provided by law to the various taxing districts, as are the proceeds of other taxes on moneys and credits. The term 'loans' as used herein shall mean the lending of money to members of the general public upon other than real estate security. The term 'investments' as used herein shall mean the discounting, purchasing, or otherwise acquiring notes, mortgages, sales contracts, debentures, or any other evidences of indebtedness, based upon other than real estate security when such investments are made in connection with loans made to members of the general public in the state of Iowa or in the course of any operations having as their effect the financing of business transactions within the state of Iowa resulting in the incurring of any indebtness based upon security other than real estate security."

It is clear that a production credit association is a corporation which does make loans within the State of Iowa on other than real estate security. Therefore, the capital employed in the business of making such loans within Iowa is subject to a tax of five mills on each dollar of such capital pursuant to the provisions of §430A.3. Since such capital is subject to a moneys and credits tax, then those moneys and credits may be included as "taxable property" in computing the debt limits of Iowa political subdivisions. The amount of such "taxable property" is each dollar of such capital which is subject to moneys and credits tax and this amount is to be used in determining the debt incurring capacity of local political subdivisions under Article XI, Section 3, of the Iowa Constitution.

March 27, 1970

COUNTY AND COUNTY OFFICERS: Board of Supervisors — §321.285(7), Code of Iowa, 1966. Board has power to reduce speed limits on secondary roads only upon basis of an engineering and traffic investigation conducted by State Highway Commission. (Holst to Myers, Marion County Attorney, 3/27/70) #70-3-57

Mr. Pat Myers, Marion County Attorney: In your letter you request our opinion whether valid speed restrictions by a county board of super-

visors must be based upon an engineering and traffic investigation by the State Highway Commission.

Section 321.285(7) provides in part:

"Whenever the board of Supervisors of any county shall determine *upon the basis of an engineering and traffic investigation conducted by the state highway commission* when so requested by said board that the speed limit on any secondary road is greater than is reasonable and proper under the conditions found to exist at any intersection or other place or upon any part of a secondary road, said board shall determine and declare a reasonable and proper speed limit thereat."

(Emphasis added)

The wording of §321.285(7) of the statute is plain and unambiguous and capable of no other construction (1940 O.A.G., pages 306 and 307). However, the determination of the board must also be reasonable and not arbitrary or capricious and must be reasonably supported by an engineering and traffic survey conducted by the State Highway Commission (1964 O.A.G., 209 and 210).

The answer to your question, in my opinion, is that in order to establish valid speed restrictions in said residental areas, other than those set out in §321.285(2), it is a necessary condition precedent that the county base said restrictions upon an engineering and traffic investigation conducted by the State Highway Commission.

March 30, 1970

WELFARE: Old Age Assistance Eligibility — §249.6(8), 1966 Code of Iowa. One residing in a county tax-supported nursing home is not eligible for Old Age Assistance under §249.6(8), 1966 Code of Iowa. (Williams to Kennedy, 3/30/70) #70-3-59

Honorable Gene V. Kennedy, State Representative, Dubuque County: In your memorandum received March 19, 1970 addressed to the Attorney General requesting an opinion, you state:

"Are residents of a county tax-supported nursing home eligible for Old Age Assistance?"

Section 249.6, 1966 Code of Iowa, reads:

"Old age assistance may be granted and paid only to a person who: . . . (8) Is not an inmate of a public institution, except as a patient in a medical institution for treatment for other than tuberculosis or mental diseases or who has been diagnosed as having tuberculosis or psychosis and is a patient in a public medical institution as a result thereof. However, an inmate of such institution may make application for assistance, but the assistance, if granted, shall not begin until he has ceased to be an inmate."

A similar provision appeared as §3828.008(9) in the 1939 Code of Iowa, reading:

"Old age assistance may be granted and paid only to a person who: . . .9. Is not, because of physical or mental condition in need of continued institutional care, and such care is reasonably available to him in one of the institutions provided by the United States, the State of Iowa or one of its political subdivisions."

Although dealing with a related question, the Attorney General in

an opinion rendered March 6, 1941 [1942 AGO 33] made the statement:

"However, under subsection 9 of §3828.008, it is equally apparent that the recipient was ineligible to receive old age assistance by reason of his being an inmate of the county home."

It is observed that while such opinion is not binding upon the undersigned, as it actually dealt with another question, nevertheless the interpretation above-quoted is the same interpretation that this writer gives to the present Code provision.

It is the opinion of this writer that "a public institution" includes the tax-supported county nursing home, and therefore a recipient therein is not eligible to receive Old Age Assistance. The purpose of the Old Age Assistance Program is to provide aid to individuals, and not to subsidize public institutions providing such aid to the elderly.

March 31, 1970

ELECTIONS: Form of signature on nominating petition — §§43.14, 43.15, 43.17, Code of Iowa, 1966, as amended by House File 1020, Acts 63rd G.A. (1970). A married woman may sign nominating petition in any of several ways as for example, Mary A. Smith, Mrs. Mary Smith, Mrs. Henry J. Smith, Mrs. H. J. Smith, etc. (Haesemeyer to Hill, State Senator, 3/31/70) #70-3-60

The Honorable Eugene M. Hill, State Senator: Reference is made to your letter of March 30, 1970, in which you state:

"Request is made herewith for an official opinion as to the validity of certain signatures on nominating petitions of candidates for public office.

"In signing of nominating petitions for public office it has been noted that some married women have signed their names using the abbreviation "Mrs." followed by the first name and middle initial of the signer's husband, as for example "Mrs. Henry J. Smith." A Variation of this signature has also been noted where the husband's initials only are used, as for example, "Mrs. H. J. Smith." Others have signed their names using the abbreviation "Mrs." and their own first name and initial, as for example, "Mrs. Mary A. Smith." Still others have signed their names without using as a prefix the abbreviation "Mrs." but using their first name and middle initial, as for example, "Mary A. Smith."

"As a matter of common practice it appears that County Auditors and the Secretary of State are accepting, and counting as valid, signatures in the various described above. However, a question has arisen as to whether all are valid. It would appear that the signature which uses the abbreviation "Mrs." and the first name and middle initial of the signer is most acceptable since it identifies the signer as a married woman and uses her own first name and initial. This is not to say, however, that the other signatures do not provide adequate identification.

"Specifically, the undersigned directs the following questions to the Attorney General. Is the signature of a married woman who has used the abbreviation "Mrs." followed by the first name and initial of her husband, as for example, "Mrs. Henry J. Smith" a sufficient and valid signature on the nominating petition of a candidate for public office?

"Is the signature of a married woman who has used the abbreviation "Mrs." followed by the initials of her husband's first and middle name, as for example "Mrs. H. J. Smith," a sufficient and valid signature on the nominating petition of a candidate for public office?

"Is the signature of a married woman who has not used the abbrevia-

tion "Mrs." but who has used her first name and middle initial, as for example, "Mary A. Smith" a sufficient and valid signature on the nominating petition of a candidate for public office?"

In our opinion all of the forms of signature you describe are valid for signing nominating petitions.

The relevant statutory provisions are found in §§43.14, 43.15 and 43.17, Code of Iowa, 1966, as amended by House File 1020, Acts 63rd G.A. (1970), which state:

"43.14Form of nomination papers. All nomination papers shall be about eight and one-half by thirteen inches in size and in substantially the following form:

'I, the undersigned, a qualified elector of ..... county, and state of Iowa, and a member of the ..... party, hereby nominate ..... of ..... county or legislative district, state of Iowa, who has affiliated with and is a member of the ..... party, as a candidate for the office of ..... to be voted for at the primary election to be held in June, 19....'

"No signatures shall be counted unless they are on sheets each having such form written or printed at the top thereof."

"43.15 Requirements in signing. The following requirements shall be observed in the signing and preparation of nomination blanks:

1. Each signer may sign as many nomination papers for the same office as there are officers to be elected to said office, and no more.

2. Each signer shall add his residence, with street and number, if any, and the date of signing.

3. All signers, for all nominations, of each separate part of a nomination paper, shall reside in the same county, representative or senatorial district for members of the general assembly.

4. When more than one sheet is used, the sheets shall be neatly arranged and securely fastened together before filing, and shall be considered one nomination paper.

5. Only one candidate shall be petitioned for or nominated in the same nomination paper."

"43.17 Affidavit to nomination papers. The affidavit to 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 or legislative district 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 therof; that their respective residences are truly stated therein; and that each signer signed the same on the date stated opposite his name."

It is to be observed that §43.15 which contains the requirements in signing makes no mention of the form of signature to be used. However, under §43.14 each person signing makes the statement that he *is* a qualified elector, etc. Moreover, §43.17 requires an affidavit of a qualified elector in which he *swears* that he knows each person signing the paper, that he knows them to be qualified electors, etc. Plainly, these require-

ments are aimed at insuring that only qualified electors of the appropriate party and election district sign nomination papers and nothing more. It would be difficult to see what useful purpose would be served by creating, in addition to the statutory requirements, hypertechnical standards as to the form of signature. If the person signing the paper is willing to make the statement required by law and the paper contains the affidavit required by law that should be sufficient. In this connection see 68 OAG 771 in which we stated that, "Nomination papers of a person seeking the office of state representative are not defective by reason of the fact that the adress of one of the signers thereof 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."

Another opinion, 64 OAG 272, involving local option petition signatures is inapposite. The statute there in question provided:

"Each sheet of the petition shall contain not more than 30 names of electors with their personal signatures, . . . *if residing within a city or town where the electors are required to be registered, the signature shall be the same as it appears upon the registration records.*"

(Emphasis supplied)

There is no similar express requirement insofar as nominating petitions are concerned.

April 2, 1970

STATE OFFICERS AND DEPARTMENTS: Merit employment department — §§ 152.1, 152.2, Code of Iowa, 1966; § 2, Ch. 189, 62nd G. A. (1967). We recently issued an opinion, Seckington to Crews, January 30, 1970, which I believe is pertinent to your inquiry. A copy of this opinion as well as an earlier opinion 1946 OAG 189 are attached hereto. On the basis of these opinions and the authorities cited therein it would be our opinion that either a licensed practical nurse or a non-licensed nursing assistant acting under the supervision and direction of a licensed medical practitioner could dispense and administer drugs while acting in the course of his or her employment. (Haesemeyer to Keating, Director of Merit Employment, 4/2/70) #70-4-2

Mr. Wallace Keating, Director of Merit Employment: You have requested an opinion of the attorney general with respect to the following:

"Merit Employment Department is presently studying nursing assistant positions at state institutions to determine if there is a need for a Licensed Practical Nurse class. In the course of our study we have found a number of non-licensed employees who handle narcotics, and administer medications by topical, oral, or parenteral means. Since this function of nursing care would appear essential to the development of a Licensed Practical Nurse class, we are interested in an opinion regarding who may legally handle and administer drugs especially by the injection method.

"Our department is uncertain as to who falls under the concept 'Medical Technician' as it is used in Paragraph 2(8) of Chapter 189, Acts of the 62nd G. A. Does this section imply that non-licensed nursing assistants may give medications and injections?

"Paragraph 152.2(5) of the 1966 code can be interpreted to say that an individual who is not at least a Licensed Practical Nurse may not

practice nursing as defined in Paragraph 152.1. If this is a correct interpretation, are these sections in conflict with Paragraph 2(8) of Chapter 189, Acts of the 62nd G. A. or does it define what 'Medical Technicians' must be?"

Section 152.1, Code of Iowa, 1966, provides:

"152.1 Practice of nursing defined. For the purpose of this title any person shall be deemed to be engaged in the practice of nursing as a registered nurse who performs any professional services requiring the application of principles of biological, physical or social sciences and nursing skills in the observation of symptoms, reactions and the accurate recording of facts and carrying out of treatments and medication prescribed by licensed physicians in the care of the sick, in the prevention of disease or in the conservation of health.

"For the purpose of this title the practice of nursing as a licensed practical nurse shall mean the performance of such duties as are required in the physical care of a convalescent, a chronically ill or an aged or infirm patient, and in carrying out such medical orders as are prescribed by a licensed physician or nursing services under the supervision of a registered nurse, requiring the knowledge of simple nursing procedures but not requiring the professional knowledge and skills of a registered nurse."

Section 152.2 provides in relevant part:

"152.2 Exceptions. The practice of nursing as defined in this chapter shall not confer any authority to practice medicine as defined in chapter 148 or to practice osteopathy or osteopathy and surgery as defined in chapter 150 and it shall not include the following:

* * *

"5. The performance of services by employed workers in offices, hospitals or nursing homes under the supervision of a physician or nurse licensed under this title provided such person does not hold himself out or accept employment as a person licensed to practice nursing under this title.

* * *"

Section 2 of Chapter 189, 62nd G. A. (1967), provides in part:

"Sec. 2. Section three (3) of this Act [making it unlawful to give or dispense depressant or stimulant drugs] shall not apply to the following:

* * *

"8. An employee or agent of any person described in subsections one (1) through six (6) of this section, and a nurse or other medical technician under the supervision of a medical practitioner while such employee, nurse, or medical technician is acting in the course of his employment or occupation and not on his own account.

* * *"

We recently issued an opinion, Seckington to Crews, January 30, 1970, which I believe is pertinent to your inquiry. A copy of this opinion as well as an earlier opinion 1946 OAG 189 are attached hereto. On the basis of these opinions and the authorities cited therein it would be our opinion that a licensed practical nurse acting under the supervision and direction of a licensed medical practitioner could dispense and administer drugs while acting in the course of his or her employment. The same would be true of non-licensed nursing assistants.

April 3, 1970

CONSERVATION: Joint exercise of governmental powers — Soil Conservation Districts — Chapter 28E, §§ 467A.2, 467A.3(1), 467A.7(3), 467A.7(4), Code of Iowa, 1966. Chapter 28E permits an Iowa soil conservation district to enter into an agreement with an agency of another state with like powers for the joint exercise of governmental powers granted to such agencies, including the furnishing of financial or other aid. (C. Peterson to Anderson, State Senator, and Christensen, State Representative, 4/3/70) #70-4-1

Hon. Quentin V. Anderson, Iowa State Senator, Hon. Perry L. Christensen, Iowa State Representative: Reference is made to your request for an opinion of the Attorney General as follows:

"May an Iowa (soil) conservation district participating with a Missouri agency with like powers on a watershed project accept funds from the Missouri agency and use the same pursuant to the agreement and the provisions of chapter 28E of the Code of Iowa or any other law of Iowa?"

Statutes governing this situation are, in pertinent part, as follows:

"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 cooperate 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.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."

"28E.13 Powers are additional to others. The powers granted by this chapter shall be in addition to any specific grant for intergovernmental agreements and contracts."

"467A.2 Declaration of policy. It is hereby declared to be the policy of the legislature to provide for the restoration and conservation of the soil and soil resources of this state and for the control and prevention of soil erosion and for the prevention or erosion, floodwater, and sediment damages, and thereby to preserve natural resources, control floods, prevent impairment of dams and reservoirs, assist and maintain the navigability of rivers and harbors, preserve wild life, protect the tax base, pro-

tect public lands and promote the health, safety and public welfare of the people of this state."

"467A.3 Definitions. Wherever used or referred to in this chapter, unless a different meaning clearly appears from the context.

"1. 'District' or 'soil conservation district' means a governmental subdivision of this state, and a public body corporate and politic, organized in accordance with the provisions of this chapter, for the purposes, with the powers, and subject to the restrictions hereinafter set forth."

"467A.7 Powers of districts and commissioners. A soil conservation district organized under the provisions of this chapter shall have the following powers, in addition to others granted in other sections of this chapter:

* * *

"3. To carry out preventive and control measures within the district, including, but not limited to, crop rotations, engineering operations, methods of cultivation, the growing of vegetation, changes in use of land, and the measures listed in section 467A.2, on lands owned or controlled by this state or any of its agencies, with the consent and co-operation of the agency administering and having jurisdiction thereof, and on any other lands within the district, upon obtaining the consent of the owner or occupier of such lands or the necessary rights or interests in such lands. The approval of the Iowa natural resources council shall be required on any project which relates to or in any manner affects flood control.

"4. To co-operate, or enter into agreements with, and within the limits of appropriations duly made available to it by law, to furnish financial or other aid to any agency, governmental or otherwise, or any owner or occupier of lands within the district, in the carrying on of erosion-control and watershed protection and flood prevention operations within the district subject to such conditions as the commissioners may deem necessary to advance the purposes of this chapter."

Section 467A.2 is the declaration of legislative policy with regard to soil conservation and the public purposes thereby served. Section 467A.7 (3) provides authority to soil conservation districts to carry out soil conservation projects within the district and § 467A.7(4) authorizes the district to ". . . co-operate, or enter into agreements with . . . furnish financial or other aid . . ." in carrying on operations within the district. Your request for an opinion assumes like powers in the corresponding Missouri district or agency.

Section 467A.3(1) defines a soil conservation district as a governmental subdivision of the state. Thus such districts are "public agencies" within the purview of Chapter 28 and are within the specific grant of authority contained in § 3 thereof whereby ". . . any power . . . may be exercised and enjoyed jointly." Section 3 is a clear and unambiguous grant of power and where there is no ambiguity, there is no need for statutory construction. *Kruck* v. *Needles*, 259 Iowa 470, 144 N. W. 2d 296. Similarly, § 28E.4 is clear legislative authority for entering into an agreement with other public or private agencies ". . . for joint or co-operative action. . . ."

We are, therefore, of the opinion that Chapter 28E, Code of Iowa, 1966, permits an Iowa soil conservation district to enter into an agreement with its Missouri counterpart for the joint exercise of governmental powers granted to such public agencies with respect to soil conservation projects,

including the furnishing of financial or other aid. Such agreements may be entered into only on compliance with the procedural steps specified in §§ 28E.4 through 28E.10.

April 8, 1970

COLLEGE IN WESTERN IOWA: Statute of Frauds, State Immunity, 63rd G. A.; § 262.7 and .9, §§ 622.32 and .33, and § 613.8, Code of Iowa, 1966; Art. I, § 10, Constitution of U. S.; Art. I, § 21, Constitution of Iowa. The state is liable on its oral contract for the purchase of land for a state institution of higher education in western Iowa because the Board of Regents has followed the statutory mandate to purchase the same and the vendors have fully performed their obligation under the contract by delivering the deeds and perfecting the title. The General Assembly did not require Executive Council approval of purchase of land for this purpose and the Board of Regents could not add that requirement to the statutory mandate under which the Board acted. State immunity from suit not waived by § 613.8, Code, 1966, is immunity from liability. Other remedies may be available to vendors. Regardless of immunity, the state cannot make a law impairing the obligation of its contract. (Turner to Kluever, State Representative, 4/8/70) #70-4-3

The Hon. Lester L. Kluever, State Representative: By your letter of April 8, 1970, you have requested an opinion of the attorney general as to whether or not the Board of Regents has purchased the land for the college in western Iowa at Atlantic. In your yetter you state:

"It appears in the minutes of the Board of Regents for December that the Board would purchase the land for the college if the owners presented them with the deeds and abstracts of title to the land. The land owners delivered the deeds and abstracts to the Board of Regents at the January, 1970, meeting of the Board. The deeds and abstracts were accepted by the Board of Regents and they reaffirmed their December, 1969, action to purchase the land which appears in the minutes of their January, 1970, meeting.

"The usual procedure followed by the Board of Regents when it purchases land is to have the approval of the Executive Council before paying for the land purchased. This Executive Council approval is a ministerial procedure to make sure the Board of Regents have complied with law such as whether or not the purchase price is within the appraisals of the land, whether or not they are authorized under the law to make the purchase, etc. The Board of Regents followed this usual procedure as to purchasing the land for the college in western Iowa and asked for the approval of the Executive Council. This approval was only for making sure they had followed the law and was not for having the Executive Council decide if the purchase should be made, if the college is needed, if it is wise to purchase the land, etc.

"Your opinion as to whether or not the Board of Regents has purchased the land for the college in western Iowa at Atlantic is respectfully requested."

Chapter 6, Laws of the 62nd General Assembly, provided in pertinent part as follows:

Sec. 4. "The state board of regents shall engage consultants acknowledged to be experienced in the field of planning for institutions of higher education, and therewith proceed to initiate plans for the location, establishment, construction and operation of a state institution of higher education in western Iowa.

"The state board of regents, upon its selection of the location, *shall purchase,* acquire, lease, option, or accept as a gift any real property necessary for the establishment and growth of this institution.

"Included in the appropriation to the state board of regents in this Act is a sum not to exceed five hundred thousand dollars, ($500,000), to be used to carry out the study, planning and establishment of this institution of higher education to be established in western Iowa." (Emphasis supplied)

* * *

Sec. 6. "Any unencumbered balance remaining as of June 30, 1971, of the funds appropriated by this Act, shall revert to the general fund of the state of Iowa, as of June 30, 1971."

Senate File 689, 63rd G. A.,

Sec. 1. "There is hereby appropriated from the general fund of the state for the biennium beginning July 1, 1969, and ending June 30, 1971, to the board of regents the sum of seven million one hundred thousand ($7,100,000) dollars, or so much thereof as may be necessary to be used *to supplement any prior appropriations* for capital improvement items for construction of new buildings, repairs, improvements, *purchases of new land,* replacements, or alterations, or for any other capital expenditures the board of regents may deem necessary for the proper and necessary function of any institution under its jurisdiction *and for the purchase of land for a western Iowa regents' institution.*" (Emphasis supplied)

It will be noted that the first of the above Acts was enacted in 1967 and the second in 1969. On August 19, 1969, more than two years after the aforementioned legislative mandate requiring the Board of Regents to purchase the land for the college in western Iowa, the Board of Regents requested an opinion of the attorney general as to whether the purchase was mandatory. In an opinion, dated September 5, 1969, Nolan to Richey, Executive Secretary of the Board of Regents, said Regents were assured that the purchase was, indeed, mandatory because of the words in the statute "shall purchase." A copy of said opinion is hereto attached.

It is to be noted that at the time of the request for the opinion, the Board of Regents had engaged consultants experienced in the field of planning for institutions of higher learning and had therewith proceeded to initiate plans for the location, establishment, construction and operation of a State institution of higher education in western Iowa, as required by the statute, and had paid for the services of those experts and performed all other acts requisite to determining the location thereof. Indeed, as early as December 16, *1968,* Mr. Richey, the Executive Secretary of the State Board of Regents, told a group of property owners near Atlantic that "the Regents will proceed to acquire all parcels of land within said site, including condemnation proceedings if necessary for the purpose of a proposed institution of higher education in western Iowa."

On January 8, 1970, and on January 14, 1970, deeds and abstracts of title were delivered to Mr. Richey in Des Moines. On January 15, 1970, the State Board of Regents adopted a motion, a copy of which is hereto attached, voting to purchase 698.81 acres of land near Atlantic from certain individuals named therein for a total purchase price of $556,537.00 "subject to the approval of the warranty deeds and abstracts by the office of the Attorney General *and approval of the purchase of the properties by the Executive Council.*"

On January 16, 1970, the Attorney General's office issued a written opinion, a copy of which is hereto attached, approving the deeds and ab-

stracts to all 9 of the parcels located in Cass County. On January 21, 1970, Mr. Richey sent a letter of transmittal to the Executive Council, and transferred to them all deeds, abstracts and papers pertaining to the purchase. On January 26, 1970, the Executive Council met and deferred action on approving the purchase, although I met with the Council and informed them that the purchase of the land, in question, was mandatory and that their duties in connection therewith, if any, were purely ministerial. I told them that the law required them to approve the purchase if they found the deeds and abstracts, and the title opinion, were in order, as I had found they were.

It is to be noted that there is no provision in either of the foregoing statutes which requires approval of the Executive Council for this purpose. In § 1 of Chapter 49, Acts of the 63rd General Assembly, $7,100,000, or so much thereof as may be necessary, was appropriated to the Board of Regents "to be used to supplement any prior appropriations for capital improvement items for construction of new buildings, repairs, improvements, purchases of land, replacements, or alterations, or for any other capital expenditures the board of regents may deem necessary for the proper and necessary function of any institution under its jurisdiction and for the purchase of land for a western Iowa regents' institution." In § 2, contracts "for improvements for which funds are appropriated by this Act shall be submitted by the board of regents to the Governor and the State Comptroller, except that items commonly known as change orders need not be submitted to the Governor and the State Comptroller unless such change orders actually increase the total cost of that particular project." It is to be noted that no requirement, whatsoever, of Executive Council approval is mentioned. Contracts for "*improvements*" were directed to be "submitted" to the Governor and the State Comptroller, but not to the Executive Council. It may be implied from such a direction that contracts for *improvements* are to be approved by the Governor and State Comptroller, but there is no requirement of approval for the purchase of land for a western Iowa institution, or for anything else except improvements. And there is no requirement of approval of the Executive Council for any of the matters specified in the Act.

§ 262.7, Code of Iowa, 1966, provides:

"Institutions governed. The state board of regents shall govern the following institutions:

1. The state University of Iowa.
2. The Iowa state university of science and technology, including the agricultural experiment station.
3. The University of Northern Iowa.
4. The Iowa braille and sight-saving school.
5. The state school for the deaf.
6. The state sanatorium.
7. The state hospital-school."

§ 262.9, Code of Iowa, 1966, provides in pertinent part as follows:

"The board shall:

* * *

"5. With the approval of the executive council, acquire real estate for

the proper uses of said institutions, and dispose of real estate belonging to said institutions when not necessary for their purposes. A disposal of such real estate shall be made upon such terms, conditions and considerations as the board may recommend and subject to the approval of the executive council. If real estate subject to sale hereunder has been purchased or acquired from appropriated funds, the proceeds of such sale 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 state board of regents which, with the prior approval of the executive council, may be used to purchase other real estate and buildings, and for the construction and alteration of buildings and other capital improvements. All transfers shall be by state patent in the manner provided by law."

It is to be noted that the legislature required approval of the Executive Council to acquire real estate for the proper uses of "said institutions" not including the college in western Iowa. Expressio unis est exclusio alterius.

From all of the foregoing, it is my considered opinion that approval of the Executive Council of the purchase of land in western Iowa was not a requisite to the purchase and that the Board of Regents could not add that requirement to the mandate of the statute.

But even assuming approval of the Executive Council was necessary, the Executive Council had nothing whatsoever to say about the wisdom of the purchase, the terms, the location, or to require anything but compliance with the terms of the statute. The purchase of the college in western Iowa was a policy decision made by the legislature and the Executive Council was utterly without power to alter that policy. The policy decision had been fully carried out and executed by the Board of Regents. See *Gibson* v. *Winterset Community School District*, 1965, 258 Iowa 440, 138 N. W. 2d 112.

As noted in the *Gibson* case, the word "shall" when used in a statute is ordinarily to be considered and construed as mandatory. "A ministerial act has been defined as 'one which a person or board performs *upon a given state of facts*, in a prescribed manner, in observance of the mandate and legal authority and without regard to or the exercise of his own judgment upon the propriety of the act being done.' "

Thus, if the Executive Council had any authority or duty in connection with this purchase, it was purely ministerial. But I again emphasize that in my opinion they had no such duty or authority to approve the purchase. Had the legislature which enacted these laws determined that such approval should be required, it would have said so. They had opportunity in both the 62nd and 63rd General Assemblies to add the western Iowa college to the list of institutions for which land purchases were subject to Executive Council approval, but neither General Assembly did so. It is well settled that where a specific statute conflicts with the requirements of a general statute, the specific statute controls.

While there was no written contract between the vendors and the State of Iowa regarding the purchase of this land, there was an oral agreement which the vendors fully performed when they perfected title and delivered their deeds. Oral contracts are enforceable in Iowa with respect to the

purchase of real estate when there has been a partial performance. See §§ 622.32 and .33, Code of Iowa, 1966, and *In re Estate of Lindsey*, 1962, 254 Iowa 710, 118 N. W. 2d 598. For these reasons, it is my opinion that the State has entered the contract in good faith and is legally bound and obligated to pay for the land, pursuant to the agreement.

However, the State is probably immune from suit on the contract for the purchase price. *Megee v. Barnes*, 1968, ...Iowa....., 160 N. W. 2d 815. § 613.8, Code of Iowa, 1966, provides:

"Actions against state. Upon the conditions herein provided for the protection of the state, the consent of the state be and it is hereby given, to be made a party in any suit or action which is now pending or which may hereafter be brought in any of the district courts of Iowa, any of the United States district courts within the state or in any other court of or in Iowa having jurisdiction of the subject matter, involving the title to real estate, the partition of real estate, the foreclosure of liens or mortgages against real estate or the determination of the priorities of liens or claims against real estate, for the purpose of obtaining an adjudication touching or pertaining to any mortgage or other lien or claim which the state may have or claim to the real estate involved. The petition in such action shall specifically allege the interest or apparent interest of the state and the specific facts upon which the claim against the state is based and it shall be legally insufficient to allege said claim in general terms."

I do not believe that a suit on the contract for the purchase price involves the "title to real estate" or any of the enumerated causes of action as to which the State waives immunity in § 613.8. However, the fact that the State may be immune from suit does not mean that it is immune from liability. *Wittmer v. Letts*, 1957, 248 Iowa 648, 80 N. W. 2d 561. Not only is the State morally bound to pay for this land but, under the present state of the record, it is probable that an action in mandamus would lie against the State Comptroller to compel him to issue his warrant for the purchase price of this land.

Moreover, the fact that the State is immune from suit on its good faith contract is no excuse or power to impair the obligation thereof. Article I, § 10, Constitution of the United States provides that no state shall pass any law impairing the obligation of contract. And Article I, § 21, Constitution of the State of Iowa provides that no law impairing the obligation of contract shall ever be passed. The sovereign State of Iowa is as bound by its contract both morally and legally, as any person. The State should not cast itself in the role of welsher. As I understand it, the citizens of Atlantic have, in this matter, raised the sum of $130,000 to pay a part of the purchase price of the land for this college as a gift to the State. This was an outright gift and not merely to take advantage of an opportunity to match Federal funds, none of which are involved. A churlish withdrawal of funds appropriated by two successive General Assemblies, slapping these people in the face for their generous gesture of good citizenship is not in the highest tradition of the liberties we prize and the rights we will maintain.

April 10, 1970

STATE OFFICERS AND DEPARTMENTS: Service compensation tax fund, reversion to general fund. Chapter 35A, Code of Iowa, 1966. The

amount remaining in the service compensation tax fund established pursuant to Chapter 35A after setting up a trust account for unredeemed bond coupons should revert to the general fund. (Haesemeyer to Baringer, 4/10/70) #70-4-4

The Hon. Maurice Baringer, Treasurer of State: Reference is made to your letter of April 5, 1970, in which you state:

"The present balance in the Service Compensation Tax Fund is $288,-961.08. All bonds and coupons have been redeemed with the exception of the following two coupons:

#24248 due December 1, 1951 in the amount of	$ 6.25
#34048 due December 1, 1968 in the amount of	$ 7.50
Total outstanding coupons	$13.75

"Our question is as follows: May we transfer $288,947.33 to the General Fund and set up a trust account in the treasurer's books for the liability of unredeemed coupons in the amount of $13.75? This would set out clearly the state's liability for the unredeemed coupons and allow the balance of this fund to be transferred to the General Fund forthwith."

The Service Tax Compensation Fund was established pursuant to Ch. 35A, Code of Iowa, 1966, to pay bonuses to veterans of World War II. Under the law the last date on which an eligible veteran could have filed an application for a bonus was June 30, 1957. Sec. 35A.13. Hence, there is no possibility that any of the funds which you now hold will be required to pay veterans' bonuses.

In addition as you point out all of the bonds issued to create this fund have been redeemed and all that remain outstanding are two interest coupons in the total amount of $13.75. Sec. 35A.13 provides in part:

"Notwithstanding the provisions of any other statute or statutes the balance remaining in the service compensation fund, after the payment of all expenditures herein authorized, shall revert to the general fund of the state."

It is inconceivable to me that the loss of two coupons in the total amount of $13.75 should prevent the reversion to the general fund of the entire $288,961.08 remaining in the Service Compensation Tax Fund. In our opinion you would be justified in transferring $288,947.33 to the general fund and setting up a trust account in the Treasurer's books for the liability of unredeemed coupons in the amount of $13.75. It should be noted that Sec. 35A.2 provides in part:

"If any of said bonds are not presented for payment within ten years after maturity they shall be barred."

In our opinion this language applies as much to the coupons as it does to the bonds to which they relate and ten years after the maturity date of such bonds the coupons would be barred also and the $13.75 would revert to the general fund.

April 10, 1970

COUNTY AND COUNTY OFFICERS: Health insurance for families of county employees — §§ 509.15, .16, .19, Code of Iowa, 1966. Board of Supervisors may not pay premiums for health insurance coverage for families of covered employees. (Nolan to Riehm, Hancock County Attorney, 4/10/70) #70-4-10

Mr. Curtis G. Riehm, Hancock County Attorney: In answer to your request for an opinion on the question of whether health insurance deductions may be made for the family of the county employee, it has been the consistent opinion of this office that the governing body authorized by § 509.15 of the 1966, Code of Iowa, to participate in the payment of premiums on group insurance plans for its employees is not authorized thereby to pay the premiums for the families of such employees.

Your request specifically asked:

"(1) May the Board of Supervisors pay the Blue Cross and Blue Shield premiums for all road employees and their families?

"(2) If allowed is the amount paid considered as income to each employee."

As stated above the Board of Supervisors may not pay the premiums for the coverage of the families of the employees.

The Board is authorized under § 509.16(3) to make contributions for the coverage of county employees. If the plan established under § 509.15 is funded from contributions wholly or in part by the governing body (§ 509.16(3)) the fund must be used solely for the purpose of administering and carrying out the provisions of the plan adopted by the governing body. (§509.19) In light of this limitation it is our view that such funding is not income to the employees.

On the matter of authorization of an employee to participate in a plan whereby an employee could purchase further coverage for his dependents, see 1966, O.A.G. 2.7, a copy of which is enclosed herewith.

April 13, 1970

COUNTY AND COUNTY OFFICERS: Hospitals, Municipal Hospitals, Merger — Chs. 28E and 348, Code 1966; Ch. 164, Acts, 62nd G. A. County and city hospitals may enter into contract for joint operation under Ch. 28E or be included in a "merged area" under Ch. 164, Acts 62nd G. A. (Nolan to Vanderbur, Story County Attorney, 4/13/70) #70-4-6

Mr. Charles E. Vanderbur, Story County Attorney: This will acknowledge your recent request for an opinion on several questions relating to county hospitals. The first of these asks whether the Ames Municipal Hospital and the Story County Hospital could be consolidated under Ch. 348, Code 1966, and if so, could this be done without consolidating also with the hospital in Story City. Ch. 348, supra, permits counties having a population of 135,000 inhabitants or over and in which there is located a city containing 125,000 population or over to consolidate the hospital service of the county and such city. However, your letter has specifically stated that Story County does not have the population to come within the provisions of Ch. 348. Therefore, the Ames Municipal Hospital and the Story County Hospital cannot be consolidated pursuant to the present provisions of Ch. 348.

Secondly, you asked whether under Ch. 28E.12 the Story County Hospital could enter into a contract with a municipal hospital in such a way so that tax money from the county hospital could be diverted to the municipal hospital. § 28E.12 provides:

"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."

This office has interpreted § 28E.12, supra, to authorize not only the joint exercise of mutually possessed powers, but also the exercise by one agency of the power of the other in accordance with the contract, Turner to Coupal, April 4, 1969. We are of the opinion that under a suitable contract a county hospital and a municipal hospital might be jointly operated and appropriate financial arrangements made for the benefit of the contracting parties.

In addition, your attention is directed to consideration of Ch. 164, Acts of the 62nd G. A., which authorizes the creation of area hospitals. By an opinion dated November 13, 1967, 1968 OAG 401, this office advised that political subdivisions which are already supporting a county or municipal hospital may be included in a "merged area," and taxed to finance an area hospital.

April 13, 1970

SCHOOLS: Educational TV; Contracts; Leases — § 15, Ch. 88, Acts 62nd G. A. State Educational Facility Board has authority to enter into lease contracts, but a long term lease of space on a television tower for which the State of Iowa would pay more than 64% of the authorized cost to the lessor should have clear prior approval of the legislature. (Nolan to Montgomery, State Educational Radio and Television Facility Board, 4/13/70) #70-4-7

Mr. John A. Montgomery, Executive Director, State Educational Radio and Television Facility Board: Your letter of March 19, 1970, outlined a proposal of WHO Broadcasting Company for sharing a proposed television tower to be constructed at Alleman, Iowa. According thereto, "the estimated annual charge to KDIN-TV would be approximately $21,692.00 per year for fifteen years and . . . the rental charge after fifteen years would be subject to re-negotiation at a reduced level with Palmer Broadcasting Company retaining title to the tower." You further state:

"Since the estimated cost over the fifteen-year period of $325,380 is less than we could acquire land and construct a tower for ourselves, we are interested in proceeding toward an agreement with WHO for joint use of this tower as outlined in the attached letter. Our thought would be that we could be in a position to begin usage of this tower on approximately July 1, 1971, and that said annual lease payments could be made from the Operating Budget of the Iowa Educational Broadcasting Network rather than from the Capital Appropriations currently in existence for the expansion of Channel 11 to full power.

"We respectfully request your opinion as to the following: Does the State Educational Radio and Television Facility Board have the authority to enter into an agreement of this sort? If the Board does have such power, would such an agreement be required to be approved by the State Executive Council since the term of the lease would in affect require future appropriations?"

A cursory examination of the proposal reveals that the annual rental contemplates that the State of Iowa, through Channel 5 (WOI-TV), and

Channel 11 (KDIN-TV) will pay 64.36% of the cost of a $470,000.00 tower (plus interest at 9¼% on a 10 year loan) and annual property taxes and insurance on the tower. The total pro-rated charge to Channel 5 over the 15 years being $331,876.10, plus $27,000.00 for ground rent for a transmitter. The total pro-rated charge to Channel 11 would be $298,385.85 plus $27,000.00 ground rent for transmitter. In addition, while your letter does not mention it, there would be the additional costs of construction for the transmitter buildings for Channels 5 and 11 and charges for telephone lines from the production studios to the transmitter.

The State Educational Radio and Television Facility Board has power to enter into lease contracts § 15, Ch. 88, 62nd G. A. A board may bind succeeding boards on lease contracts for a reasonable term when it is necessary to do so in the good faith determination of the board. 1964 OAG 349.

In view of this rather extensive outlay of funds and the fact that the State of Iowa would be expected to contribute more than 64% to the total amortization of such tower, without any equity at the end of the proposed lease I suggest that neither the term nor the terms appear to be reasonable. Therefore, the State Radio and Television Board should obtain a clear expression of approval by the legislature before proceeding further with such proposed lease negotiations.

April 13, 1970

SCHOOLS: Teachers — Contracts — Deductions for United Campaign and Teachers' Organizations — §§ 79.15, 279.12, 279.13, 294.16, 509.17, Code of Iowa, 1966. There is at present no authority for a teacher and a school board to agree by contract to make deductions from the teacher's salary for United Fund, teachers' organization dues or credit union deposits or loan payments. (Nolan to Milligan, State Representative, 4/13/70) #70-4-8

The Hon. George F. Milligan, State Representative: This is in reply to your recent request for an opinion on the question of whether a school board by contract with one or more of its teachers may agree to withhold or deduct certain sums from the teachers' compensation and return these amounts to designated payees such as the United Campaign, Teachers' organizations and credit unions?

School teachers unlike many other public employees must be hired under written contract. Section 279.13 of the Code, 1966, provides:

"Contracts with teachers must be in writing, and shall state the length of time the school is to be taught, the compensation per week of five days, or month of four weeks, and that the same shall be invalid if the teacher is under contract with another board of directors in the state of Iowa to teach covering the same period of time, until such contract shall have been released, and such other matters as may be agreed upon, which may include employment for a term not exceeding the ensuing school year, except as otherwise authorized, and payment by the calendar or school month, signed by the president and teacher, and shall be filed with the secretary before the teacher enters upon performance of the contract but no such contract shall be entered into with any teacher for the ensuing year or any part thereof until after the organization of the board . . ."

The above cited section has been the subject of numerous opinions issued by this office, none of which cover directly the question which you raise. However, in 1950 OAG 170, this office advised that a provision inserted in a teacher's contract to waive the provisions of § 279.13, relating to automatic continuation of such contract would be in excess of the power of the board and therefore of no force and effect. The school board has no authority to agree to any provision as a matter of contract aside from its express powers under the statute or those powers which may be necessarily implied therefrom. A school district is a quasi corporation created by the legislature to carry out the governmental function of maintaining public schools, and it has only such powers as are bestowed on it by a statute or necessarily implied to carry out those granted. *Boyer v. Iowa High School Athletic Association*, 1964, 256 Iowa 337, 127 N. W. 2d 606, *Cedar Rapids Committee School District v. City of Cedar Rapids*, 1961, 252 Iowa 205, 106 N. W. 2d 655, *Independent School District of Danbury v. Christianson*, 1951, 242 Iowa 963, 49 N. W. 2d 263.

Under § 279.12, Code, the board may include in contracts with teachers all or any part of the cost of group health insurance plans, non-profit group hospital service plans, non-profit group medical service plans, and group life insurance plans adopted by the board for the benefit of the employees of the school district. Under § 509.17 the employee may authorize deductions from his wages or salary in payment of the group insurance plan authorized under Ch. 509. Under § 294.16 an employee of a school district may through contractural agreement request the board to purchase a tax sheltered annuity for retirement or other purposes and make payroll deductions in accordance with such arrangements for paying the entire premium to become due under the annuity contract. These are the only deductions which can be made a matter of contract as the law stands at present.

Whereas, under § 79.15 state employees may authorize deductions for United Fund, I do not find statutory authority for such deductions from the payroll of teachers employed by school districts. Since there is no statutory authorization for such deduction, it is my opinion that such cannot be made a matter of contract between the board and the teacher. Similarly it is my opinion that the teacher and the district cannot by contract agree to deduct sums from the teacher's compensation to be paid to teachers' organizations or credit unions. See 1960 OAG 168. (Copy enclosed herewith).

April 13, 1970

COUNTY AND COUNTY OFFICERS: County Attorneys — Habeas Corpus, Claims, Court appointed attorneys — § 663.44, Code 1966. Lee County is not liable for expenses incurred by other counties where representation is based on county interest in state law enforcement. (Nolan to Samore, Woodbury County Attorney, 4/13/70) #70-4-9

Mr. Edward F. Samore, Woodbury County Attorney: Your request for an opinion interpreting § 663.44 of the 1966 Code of Iowa, raises the question of which county is liable for expense incurred by your office in connection with a hearing on a petition for writ of habeas corpus where the petitioner was committed out of Woodbury County, Iowa, to the state

penitentiary at Fort Madison. Your letter states that the Woodbury County Attorney's office sent a lawyer from its staff to represent the Warden at the hearing held in Fort Madison, Iowa. We believe such action is consistent with your duties under § 336.2(6) Code of Iowa, 1966, to "defend all actions and proceedings in which . . . the county is interested. . . ."

This office has previously interpreted the provisions of § 663.44, supra, as they relate to attorneys' fees. See 1968 OAG 657, 19. While these opinions do not directly touch the point you raise, they do set out that part of the statute which we believe pertinent:

"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 . . ."

From the above quoted portion of the statute it appears that Lee County rather than Woodbury County would be liable for the expenses of court appointed attorneys when the costs and fees cannot otherwise be collected. Upon accepting such liability Lee County may be reimbursed by the State upon presentation of the facts concerning such payment to the executive council as provided in § 663.44, supra. However, such county is not liable under the statute for fees or costs incurred by other counties furnishing assistance to the respondent in such a hearing where the representation is premised on county interest in the enforcement of State laws. Such expenses should be born by the county sending the attorney to assist with the representation of the warden of the state institution involved.

April 13, 1970

COUNTY AND COUNTY OFFICERS: Compensation, Deputies, Group Insurance — §§ 509.13, 509.25. Group insurance plans must be made uniformly available to deputies even where they receive maximum statutory compensation. (Nolan to Faches, Linn County Attorney, 4/13/70) #70-4-11

Mr. William G. Faches, Linn County Attorney: This replies to your request for an opinion on a matter involving the compensation of deputies of county officers. The question presented in your letter is:

"If a deputy in the County Auditor's Office, Treasurer's Office, Clerk's Office, Recorder's Office, Sheriff's Office, or the County Attorney's Office is receiving the maximum compensation prescribed by law, may the County pay this deputy's Blue Cross and Blue Shield under a group plan?"

The county board of supervisors is responsible under Ch. 509, Code 1966, for the establishment of plans to procure group insurance for county employees. (509.25). Under § 509.13(3) it is possible for the county to make contributions to such plan. Under § 509.17 all employees participating in such plan (which participation shall be optional) are to be assessed an amount fixed by the board. I found no statutory classification of deputies receiving maximum compensation to distinguish them from other "employees" whose participation in such group insurance is optional as provided by Ch. 509. Therefore, it is my opinion that such

group insurance plans must be made available uniformly to deputies as well as other employees. See opinion of Strauss to Shafer, March 24, 1966, OAG 5.57, 1966, copy enclosed.

April 14, 1970

CONSTITUTIONAL LAW: Pipelines, power lines, land acquisition — Ch. 490, 1966 Code. Senate Files 1184, 1185, 2nd Session, 63rd G. A. Requirements that public utility provide "a statement of legal rights of the landowner" and disclose "relationship of project to . . . future land use and zoning ordinances" held to impose impossible burdens upon utility. Procedures to be required by bills held excessive burdens on interstate commerce. These provisions held in conflict with United States Constitution and applicable Federal statutes. (Turner to Fischer, State Representative, 4 14 70) #70-4-5

The Hon. Harold O. Fischer, State Representative: This is in response to your letter of April 13, 1970, wherein request was made that an opinion be given concerning the constitutionality of Senate File 1184 and Senate File 1185, which provide certain amendments to the Code of Iowa, 1966.

Certain language contained in Senate File 1184 would:

(1) appear to impose burdens, impossible to perform, upon an applicant, as envisioned in Chapter 490, Code 1966,

(2) in addition, the proposed amendment seeks to limit transfer or negotiation for transfer of affected real estate or interests therein, from a time that is uncertain until a future time when described prior conditions have been met; and finally,

(3) the added procedural steps described would in all likelihood be construed as an attempt to interfere with interstate commerce at the Federal level

Each of the above identified areas of Senate File 1184, describes procedure which renders it unconstitutional.

Specifically, Clause 4, § 1 of Senate File 1184, requires that "a statement of the legal rights of the landowner" be included and notice prescribed. It would be an impossibility for an applicant to make a meaningful assessment of any given individual's legal rights. For each specific segment of real property, facts and circumstances will vary and will be susceptible of different legal interpretation. Clauses 9 and 10 of § 2 of Senate File 1184 likewise impose impossible burdens upon an applicant to include in a petition: "(9) the relationship of the proposed project to the present and future land use and zoning ordinances," and "(10) the inconvenience or undue injury which may result to property owners as a result of the proposed project." Clause 9 would require the applicant to make suppositions concerning future land use and to apply this to an interpretation of local zoning ordinances. Clause 10 requires the applicant to make a determination of the "inconvenience or undue injury" which may result. In each instance the applicant is required to assess future results of a proposed project, as it may pertain to a number of varying property interests. It would appear to be an impossibility for an applicant to make a meaningful determination of the interests of others or the values of same as Clauses 9 and 10, as written, would require.

And while a legitimate business may be regulated, it may not be pro-

hibited or unreasonably restricted. The Supreme Court of Iowa in the case of *Al Pierce* v. *Incorporated Town of La Porte City*, 1966, 259 Iowa 1120, 146 N. W. 2d, 907, has said:

"Neither the legislature by statute, a municipal corporation by ordinance, nor an administrative board exercising police power may deprive the owner or operator of a legitimate business of his property by prohibition of his operation or by a capricious and unjust regulation."

See also *Central States Theater Corporation* v. *Sar*, 1954, 245 Iowa 1254, 66 N. W. 2d, 450, where the Court further indicated that such a deprivation would result in a denial of due process and thus be unconstitutional on that ground as well. The Court has also said in the case of *State Ex Rel Mitchell* v. *Thompson's School of Beauty Culture*, 1939, 226 Iowa 556, 285 N. W. 133, that the legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business or impose undue and unnecessary restrictions upon lawful occupations.

Additionally, Clause 10 introduces speculation into a determination of damages. The Supreme Court of Iowa has held there must be some basis on which the amount of damages can be ascertained without resort to speculation and surmise. *Vojak* v. *Jensen*, 1968, ...Iowa....., 161 N. W. 2d 100.

The proposed amendment seeks to limit negotiations which concern real estate "known to be affected," by a proposed project (lines 15 to 18, page 2, Senate File 1184). As worded it would appear to prohibit any attempt to alienate any real property interest by any party, from the moment a proposed project becomes "known" until such time as conditions described therein have been met. This provision is an attempt to limit the contract rights of certain landowners as well as those of any other person or firm wishing to negotiate for an interest in the property.

While the legislature may properly exercise reasonable regulation therein, the limitations set forth in Senate File 1184 upon the freedom to contract, represents arbitrary restraints which have no bearing upon the public health, safety, morals, or general welfare.

Finally the added procedural steps contemplated in said amendment, as well as the restraint placed upon the transfer of real estate interests, are of such nature that a burden is placed upon proposed projects involving interstate commerce. By placing requirements, impossible to fulfill, upon an applicant and by restricting contract rights, the State will likely find itself in conflict with the federal constitution (Article I, § 8, Clause 3). In such instance, the interests of the State are subordinate. In the case of *State Ex Rel Board of Railroad Commissioners* v. *Stanllind Pipeline Company*, 1933, 216 Iowa 436, 249 N. W. 366, the Supreme Court noted that while a State may enact reasonable inspection laws designed to conserve the public safety and health, police power of the State is never justified in going beyond the scope of such limited regulation and contrary to the federal constitution by placing a burden upon and restricting interstate commerce. This view has been subsequently affirmed in the case of *Mid-America Pipeline v. Commerce Commission*, 1964, 255 Iowa 1304, 125 N. W. 2d, 801. Both of the above cases have noted with favor the language of *Haskell* v. *Cowan*, 187 F. 403, in which the 8th Cir. Court of Appeals found that, "all powers of the State are subordi-

nate to the powers of the nation and its will that such commerce shall be free;" said commerce being a reference to transportation among the states by pipeline of a product and noting further that such is "national in character and susceptible of regulation by uniform rules." The above noted cases would indicate that the restrictions appearing in Senate File 1184 would place this statute in conflict with such law pertaining to interstate commerce.

For the above and foregoing reasons it is my opinion that Senate File 1184 as now written is unconstitutional.

This opinion, in all relevant and material particulars, applies also to Senate File 1185.

April 14, 1970

COUNTY AND COUNTY OFFICERS: Minors, change of surname — §§ 674.1, 674.10, Code of Iowa, 1966. No minor is authorized by law to change his name on his own volition. The surname of a minor is changed only when the surname of his natural or legal father is changed. (Haesemeyer to Morrison, Henry County Attorney, 4/14/70) #70-4-12

Mr. James L. Morrison, Henry County Attorney: You have requested an opinion of this office on the following matter:

"The clerk of the Henry County court desires an opinion from your office construing Iowa Code section 674.1. That section is clear that a minor may not change her name. Our clerk is wondering if the natural mother, who has legal custody of a minor child, may, under Chapter 674, change that child's name. If you decide that she cannot do this for the minor, would your opinion be otherwise if both the natural mother and natural father agree and join in the change?"

Chapter 674 of the 1966 Iowa Code provides the exclusive statutory method for changing names in Iowa. § 674.1 of the 1966 Iowa Code explains who is authorized to change their name under this chapter:

"674.1 Who authorized. Any person, under no civil disabilities, who has attained his or her majority and is unmarried, if a female, desiring to change his or her name, may do so as provided in this chapter."

Section 674.1 is clear, and, obviously, no minor is authorized by law to change his name on his own volition. It is thus clear, that if the name of a minor can be changed the authority for such a change must come from some other section of Chapter 674.

Section 674.10 of the 1966 Iowa Code is the only section of Chapter 674 that provides for the change of the surname of a minor. Section 674.10 states:

"674.10 New name of wife and minor children. The surname of such new name shall become the legal surname of the wife and minor children of such person."

Section 674.10 is exclusively restricted to the situation where the natural father changes his surname, thus changing the minor child's surname. (Let it be noted that § 674.10 would also apply to the situation where a father has legally adopted a minor child.) The word "person" as used in § 674.10 means husband and natural or legal father.

On October 18, 1951, this office held (1952 OAG 69) that § 674.10 pro-

vides the sole statutory method of changing a minor's surname, and this statutory situation raises the inference that no other change in the surname of a minor is authorized under Chapter 674. This position is hereby affirmed.

Both questions that you posed in your opinion request must thus be answered in the negative.

The October 18, 1951, Attorney General's Opinion is enclosed for your convenience.

April 17, 1970

STATE OFFICERS AND DEPARTMENTS: Food Establishments — Power to License — §§ 170.2, 332.23, 368.6, Code of Iowa, 1966. The power of the Secretary of Agriculture to regulate and license food establishments coexists with the power of municipal corporations and of counties to regulate and license food establishments within their boundaries. (Conlin to Liddy, Secretary of Agriculture, 4/17/70) #70-4-13

The Hon. L. B. Liddy, Secretary of Agriculture: We have received your letter of April 2, 1970 wherein you request an opinion as follows:

"My specific question is — does a city, town, county, or any such division of the state government have the authority to require an additional license for establishments already licensed by the Iowa Department of Agriculture."

Generally, the power to require licenses may be delegated by the legislature to political subdivisions or agencies of the State within their respective limits such as to counties, towns or municipal corporations. In such cases the power to license is not inherent but is wholly dependent on, and limited by the statute delegating the power. When the occupation or businesses which may be taxed are enumerated in the statute, the power to license others ordinarily is denied by implication. 53 C.J.S., Licenses, § 9.

Your letter refers particularly to § 170.2 which states as follows:

"No person shall maintain a food establishment, tavern, motor inn, hotel, or restaurant until he has obtained a license from the department of agriculture. However, cigar stores, drug stores, egg, cream, or poultry buying stations, or any other establishment selling or offering for sale only candy or gum, schools selling or offering for sale refreshments at athletic contests, band festivals, or similar events, and children selling or offering for sale lemonade or other soft drinks and candy or gum on lawns, curbings, sidewalks, or any other property shall not be required to obtain a license. Each license shall expire September 1 following the date of issue except a hotel license which shall expire on the last day of December following the date of issue and a restaurant license which shall expire one year from date of issue. This section shall not be construed to require the licensing of establishments or persons involved in a hot-lunch program in any public or parochial school of the state of Iowa or to vehicles selling only milk and dairy products licensed as required by section 192.3 or to those persons or establishments exclusively engaged in the processing of meat and poultry licensed as required under section 189A.3 of the Code."

Section 368.2, Code of Iowa 1966, as amended appears to abrogate the strict construction rules as to municipal corporations except insofar as

their power to levy taxes, assessments, excises, fees, charges or other exactions.

However, the power to license hotels and restaurants is specifically delegated to cities and towns by § 368.6, I.C.A. wherein it is provided:

"They shall have power to regulate and license:

"1. Hotels. Hotels, restaurants, and eating houses."

* * *

Counties, likewise, have specifically delegated power to license food establishments within the provisions of § 332.23 which provides as follows:

"For the purpose of promoting the health, safety, recreation, and general welfare of the people of the county, the county board of supervisors shall have the power to regulate and license outside the limits of an incorporated city or town any theatre, moving picture show, pool or billiard room or table, dance hall, skating rink, amusement park, bowling alley, restaurant or other business establishment open to the public and located on or accessible to a road or highway outside the limits of an incorporated city or town where entertainment, foodstuffs, prepared food or drink is furnished to the general public for hire, sale or profit."

The broad powers to license delegated to the Secretary of Agriculture by § 170.2, Code of Iowa 1966, co-exists with those specifically delegated to municipal corporations and counties. Such co-existing powers are not inconsistent with each other. They are independently exercised and enforced under the above cited statutory provisions.

April 20, 1970

SCHOOLS: Students smoking — § 279.9, Code of Iowa, 1966. The legislature has validly exercised police power in the public interest by requiring school boards to issue rules prohibiting use of tobacco and narcotics by students. (Nolan to Representatives Wells and Gene Kennedy, 4/20/70) #70-4-14

The Hon. James D. Wells and The Hon. Gene Kennedy, House of Representatives: This replies to your letter of April 7, 1970, which states as follows:

"Due to numerous inquiries from friends and constituents regarding state law on students smoking in our school system, I would appreciate your opinion regarding Chapter 279 Section 279.9 of the current Iowa Code."

Ch. 279 Code of Iowa pertains to the powers and duties of school district directors. §279.8 provides that the board shall make rules for its own government and that of the directors, officers, teachers and pupils and care of property of the school corporation and performance of the duties imposed by law and the rules. § 279.9 provides:

"Such rules shall prohibit the use of tobacco and other narcotics in any form by any student of such schools and the board may suspend or expel any student for any violation of such rule."

An opinion of the attorney general in 1930 OAG 337 advises that the board of directors may prohibit the attendance of any pupil addicted to tobacco and may prohibit smoking cigarettes within a block of the school building. The Iowa Supreme Court has recently stated that it is not in

the Board's power to control individual conduct wholly outside the school or playgrounds. However, conduct which relates to and effects management of the school and its efficiency is a matter within the sphere of regulations by school authorities. *Board of Directors of Independent School District of Waterloo v. Green*, 1967, 259 Iowa 1260, 147 N. W. 2d 854.

It appears to us that the legislature of Iowa has validly exercised the police power available to it in the public interest by requiring that school boards issue rules to "prohibit the use of tobacco and other narcotics in any form by any student of such schools."

April 20, 1970

TAXATION: Deductions from Income Tax — Ch. 422, Code of Iowa, 1966. (1) The reasonable value of services donated to the State of Iowa by any person is not deductible from the net income of individuals. (2) The deduction of the reasonable value of equipment, supplies, etc., donated to the State of Iowa or subdivisions thereof by an individual is authorized by § 422.9, Code of Iowa, 1966, and by the Federal Internal Revenue Code and the interpretations thereof. (3) Such deductions claimed by corporations as donations is controlled by § 422.35, Code of Iowa, 1966, and by the Federal Internal Revenue Code of 1954. (4) Partnerships are required to file an information tax return as provided by § 422.15, Code of Iowa, 1966, and deductions of partnerships are not required to be exhibited in such returns, however, the partners may take allowable individual deductions on their individual tax returns. (Murray to Maricle, Director, Iowa Civil Defense Division, 4/20/70) #70-4-15

Mr. Albert R. Maricle, Director, Iowa Civil Defense Division: We have your request for an opinion wherein you submitted the following:

"*Discussion:* A person, firm or corporation offers to the state, or to any political subdivision thereof, services, equipment, supplies, material or funds by way of gift or grant, and the state, or political subdivision thereof, acting through its Executive Officer or governing body, accepts such services, equipment, supplies, material or funds on behalf of the state or political subdivision thereof, as the case may be.

"*Question:* Is the reasonable cost of such services, equipment, supplies, material or funds donated (by way of gift or grant) by any person, firm or corporation to the state or political subdivision thereof an authorized deduction of income reported on the Iowa income tax form submitted by the donee."

In reply thereto, I advise the following: The foregoing situation involves a question arising out of the Iowa Income Tax Statute, Chapter 422, Code of Iowa, 1966. Deduction from the net income of an individual is authorized under the provisions of § 422.9, Code of Iowa, 1966. Subsection 2 of which is pertinent to this section provides the following:

"In computing taxable income of individuals, there shall be deducted from net income the larger of the following amounts:

* * *

"2. The total of contributions, interest, taxes, medical expenses, child-care expense, losses and miscellaneous expenses deductible for federal income tax purposes under the Internal Revenue Code of 1954, with the following adjustments:

"a. Subtract the deduction for Iowa income taxes.

"b. Add the amount of federal income taxes paid or accrued as the case may be, during the tax year, adjusted by any federal income tax refunds. Provided, however, that where married persons, who have filed a joint federal income tax return, file separately, such total shall be divided between them according to the portion thereof paid or accrued, as the case may be, by each; and provided further that where a taxpayer has used an optional standard deduction on his federal return, he shall use the optional standard deduction provided for above."

Applying the foregoing formula to claimed deductions by individuals, I advise:

1. In reference to paragraph two above under the Internal Revenue Code of 1954 the most current regulation thereunder, Reg. § 1.170-2(a)(2), states in part as follows:

"No deduction is allowable for contribution of services. However, unreimbursed expenditures made incident to the rendition of services to an organization contributions to which are deductible may constitute a deductible contribution. . . . Similarly, out-of-pocket transportation expenses necessarily incurred in rendering donated services are deductible.

"Reasonable expenditures for meals and lodging necessarily incurred while away from home in the course of rendering donated services also are deductible."

2. As far as the deductibility of the cost of equipment, supplies, material, etc. donated by an individual to the State or a subdivision thereof, the formula thereof is provided by the foregoing statute, § 422.9, Code of Iowa, 1966. Such claimed deduction is not controlled by any general rule of law, but the deductibility of each such claim is controlled by the Federal Internal Revenue Code and interpretations thereof. Lacking any general rule, such claims for such deductions are determined when and as they are submitted to the Iowa Income Tax Division in their income tax returns.

3. Such deductions claimed by corporations to the State or a subdivision thereof are controlled by § 422.35, Code of Iowa, 1966 which provides:

"The term 'net income' means the taxable income less the net operating loss deduction, both as properly computed for federal income tax purposes under the Internal Revenue Code of 1954, with the following adjustments:"

Such adjustments aggregate five subsections. Subsection 1, 2, 4 and the following part of subsection 5 have general application to such returns, appears following:

"1. Subtract interest and dividends from federal securities.

"2. Add interest and dividends from foreign securities and from securities of state and other political subdivisions exempt from federal income tax under the Internal Revenue Code of 1954.

* * *

"4. Subtract federal income taxes paid or accrued, as the case may be, during the tax year, adjusted by any federal income tax refunds; and add the Iowa income tax deducted in computing said taxable income.

* * *

"Provided, however, that a corporation affected by the allocation pro-

visions of section 422.33 shall be permitted to deduct only such portion of the deductions for net operating loss and federal income taxes as is fairly and equitably allocable to Iowa, under rules and regulations prescribed by the state tax commission."

4. As far as partnerships are concerned, they are required to file an information tax return, see § 422.15, Code of Iowa, 1966, and there is no specific authority requiring claimed deductions of partnerships to be exhibted in such return. The Internal Revenue Code, § 702 and Reg. § 1.702-1(a)(4), is substantially the same as the Iowa statute referred to above. A partnership is not a taxable entity. Only the partners are taxable in their individual capacities. Each parner shall take into account as part of the contributions paid by him, his distributive share of each class of charitable contributions paid by the partnership within the partnership taxable year.

April 20, 1970

EMINENT DOMAIN: Right to rents — Article I, § 18, Constitution of Iowa; §§ 472.17, 472.23, 472.25, 472.26, 472.27, Code of Iowa, 1966. Condemenor cannot collect rents from owner in lawful possession of condemned lands and buildings. (Peterson to Wehr, Scott County Attorney, 4/20/70) #70-4-16

Mr. Edward N. Wehr, Scott County Attorney: Reference is made to your letter of March 9, 1970 wherein you requested an opinion of this office as follows:

"The Scott County Conservation Board is in the process of acquiring land for park purposes by way of Eminent Domain proceedings. In some instances, Appeals are being taken from the award made by the Sheriff's Jury.

"An opinion is requested as to whether or not, under these circumstances, the Conservation Board can legally collect rents from owners who continue to occupy the condemned property, with particular reference to the dwellings thereon, after the Jury's award has been made, but prior to any Judgment in the District Court. A similar question arises in the situation where the owner remains in possession of the property, pending an Appeal from the District Court to the Supreme Court of Iowa.

"I would appreciate receiving your opinion as to the legality of collecting rents for use of any residence, farm buildings, or agricultural land after a Sheriff's Jury has made an award, and pending the outcome of any Appeals which may be taken."

Section 18 of Article I of the Constitution of Iowa provides in pertinent part 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."

Chapter 472, Code of Iowa, 1966, governs procedure under power of eminent domain. Pertinent portions are quoted herewith:

"472.17 When appraisement final. The appraisement of damages returned by the commissioners shall be final unless appealed from."

"472.23 Question determined. On the trial of the appeal, no judgment shall be rendered except for costs, but the amount of damages shall be

ascertained and entered of record."

"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. . . ."

"472.26 Dispossession of owner. A landowner shall not be dispossessed, 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 or 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."

The condemnor thus is liable only for costs of the condemnation proceedings and may abandon the proposed improvement and decline to pay the award. The condemnor has no right to possession of the condemned lands except upon deposit of the award with the sheriff. *Stellingwerf* v. *Lenihan*, 1957, 249 Iowa 179, 85 N. W. 2d 912; *Hayes* v. *Chicago, Rock Island & Pacific Railway Co.*, 1948, 239 Iowa 149, 30 N. W. 2d 743; *Haggard* v. *Independent School District of Algona*, 1901, 113 Iowa 486, 85 N. W. 777. Further, the landowner may not be dispossessed of his "resirence, dwelling house, outhouse, orchard or garden" until the damages have been finally determined and paid. A proposed dam or reservoir which injuriously affects such lands and structures may not be erected until the injury had been determined in favor of the condemnor on appeal.

The condemnor may abandon the project, may pay the award and proceed with the improvement if there is no appeal, or may deposit the amount of the award with the sheriff and take possession at once of all condemned lands and structures other than those enumerated in §§ 472.26 and 472.27. The rights of the condemnor with respect to the condemned property arise with possession thereof achieved pursuant to the provisions of Chapter 472.

In response to your specific question, we are of the opinion that the Scott County Conservation Board cannot collect rents from owners in lawful possession of condemned lands and buildings.

April 21, 1970

COUNTY AND COUNTY OFFICERS: Union dues. Deduction of union dues from salary or wages of county employee at his request is improper. (Nolan to Faches, Linn County Attorney, 4/21/70) #70-4-17

Mr. William G. Faches, Linn County Attorney: We have your letter requesting an opinion on the question of whether the county has authority to deduct labor union dues from the check of a county employee if so requested by the employee.

The Code of Iowa 1966, makes specific provisions for allowable deductions from the salaries of the public employees of a county. Such authorized deductions include: group, health and medical insurance (§ 509.17), IPERS (§ 97B.11), and federal state income taxes (§ 422.16). However, we find no statutory authority either expressed or implied to authorize the county to withhold union dues from the check of a county employee even upon his request. Consequently, it is our view that such deductions from the salary or compensation of a county employee are improper.

April 22, 1970

SCHOOLS: COUNTY AND COUNTY OFFICERS: County Systems — Schools — §§ 273.22, 279.13, Code of Iowa, 1966. Teachers, consultants and supervisors employed by county school system do not come under continuing contract provisions of § 279.13 unless employed pursuant to contractural arrangement with a school district, pursuant to Ch. 28D. (Nolan to Opheim, Webster County Attorney, 4/22/70) #70-4-18

Mr. David A. Opheim, Webster County Attorney: Some time ago you requested an attorney general's opinion on the following question:

"Do the certified employees of the Joint County System, as authorized in Chapter 273.22, Code of Iowa, 1966, and including teachers, consultants supervisors, clinicians, directors and superintendents, come under the provisions of the Continuation of Contract law as outlined in the Code of Iowa, Chapter 279.13?"

The provisions of § 273.22, which relate to the question presented are as follows:

"10. Joint boards or county boards subject to approval of the state board of public instruction are hereby authorized to provide courses and services for physically, mentally and educationally handicapped; provide special and remedial courses and services, educational television, vocational rehabilitation training centers, workshops; to lease, acquire, maintain and operate such facilities and buildings as deemed necessary to provide authorized courses and services and administer such authorized programs."

The provisions of Ch. 279, Code 1966, apply to the board of directors of school corporations. Such provisions provide generally that contracts with teachers must be in writing and such contracts shall be automatically continued until terminated as provided in § 279.13. This section also provides for the exchange of teachers of a public school corporation with other public school corporations.

While the county school system and the county board of education are a part of the public school system of the State of Iowa (§ 273.1) there is no statutory provision designating such county school system a "school corporation." It is, therefore, our view that the provisions of Ch. 279.13 are not applicable to employees of the county board of education unless the teachers serving the county school system are employed under contractural agreement with the school district made pursuant to Ch. 28D of the Code of Iowa. § 28D.3 permits the interchange of employees among the government agencies. The period of individual assignment under an interchange program shall not exceed 12 months in any 36 month period. § 28D.6(3) provides in pertinent part:

"Employees who are detailed to the receiving agency shall not by virtue of such detail be considered employees thereof . . ."

April 22, 1970

CONSTITUTIONAL LAW: Sunday Closing — Senate File 1087, 63rd G. A., First Session. There is lawful and constitutional power in the legislature to enact into law a Sunday closing act of the character of the above numbered bill. (Strauss to Perkins, State Representative, 4/22/70) #70-4-19

The Hon. Larry L. Perkins, State Representative: This will acknowledge receipt of yours of February 20, 1970, in which you stated:

"I would very much appreciate the legal opinion of your office regarding the bill dealing with Sunday closing.

"I sincerely question the constitutionality of this piece of legislation, in that it seriously impairs free enterprise."

In reply I advise the following:

The bill to which you refer is Senate File 1087, and is entitled as a Bill for an Act to prohibit the operation of a place of buisiness on Sunday with certain exceptions, and to provide injunctive relief and criminal penalties for violation. An Iowa law of like intent being § 5040, Code of 1897, which provided as follows:

"If any person be found on the first day of the week, commonly called Sunday, engaged in carrying firearms, dancing, hunting, shooting, horse racing, or in any manner disturbing a worshiping assembly or private family, or in buying or selling property of any kind, or in any labor except that of necessity or charity, he shall be fined not more than five nor less than one dollar, and be imprisoned in the county jail until the fine, with costs of prosecution, shall be paid; but nothing herein contained shall be construed to extend to those who conscientiously observe the seventh day of the week as the Sabbath, or to prevent persons traveling or families emigrating from pursuing their journey, or keepers of toll bridges, toll gates and ferrymen from attending the same."

was interpreted by our Supreme Court in the case of *State vs. Linsig*, 178 Iowa 484, 159 N. W. 995. Therein holding the operation of a barber shop on any Sunday was a violation of the foregoing statute the court stated:

"It is not necessary for the court to consider or designate the particular purposes or reasons influencing the mind of the legislature in enacting this statute. It is enough to know that such regulation is one which may be lawfully and constitutionally enacted and this has been settled over and over again by our courts of last resort, both state and national. State v. Petit, 74 Minn. 376; Petit v. Minnesota, 177 U. S. 165, Breyer v. State, 102 Tenn., 103; People v. Havnor, 149 N. Y. 195."

This statute § 5040, Code of 1897, and appearing in the 1954 Code as § 729.1, was repealed by the 56th G. A., Ch. 273, § 1. The public policy involved in the Sunday closing laws was considered in the case of McGowan vs. Maryland, 366 U. S. 420, 6 L. Ed. 393 Second Edition, 81 S. Ct. 1101, 1153, 1218:

"Sunday Closing Laws go far back into American history, having been brought to the colonies with a background of English legislation dating to the thirteenth century. In 1237, Henry III forbade the frequenting of markets on Sunday; the Sunday showing of wools at the staple was banned by Edward III in 1354; in 1409, Henry IV prohibited the playing of unlawful games on Sunday; Henry VI proscribed Sunday fairs in churchyards in 1444 and, four years later, made unlawful all fairs and

markets and all showings of any goods or merchandise; Edward VI disallowed Sunday bodily labor by several injunctions in the mid-sixteenth century; various Sunday sports and amusements were restricted in 1625 by Charles I. Lewis, A Critical History of Sunday Legislation, 82-108; Johnson and Yost, Separation of Church and State, 221 . . .

* * *

"A substantial number of cases in varying postures bearing on state Sunday legislation have reached this Court. Although none raising the issues now presented have gained plenary hearing, language used in some of these cases further evidences the evolution of Sunday laws as temporal statutes. Mr. Justice Field wrote in Soon Hing v. Crowley, 113 U. S. 703, at p. 710:

'Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficient and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the State.'

"While a member of the California Supreme Court, Mr. Justice Field dissented in Ex parte Newman, supra, at pp. 519-520, 528 saying:

'Its requirement is a cessation from labor. In its enactment, the Legislature has given the sanction of law to a rule of conduct, which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion, among philosophers, moralists and statesmen of all nations, as on the necessity of periodical cessations from labor. One day in seven is the rule, founded in experience, and sustained by science. . . . The prohibition of secular business on Sunday is advocated on the ground that by it the general welfare is advanced, labor protected, and the moral and physical well-being of society promoted.'

"This was quoted with approval by Mr. Justice Harlan in Hennington v. Georgia, supra, who also states:

'It is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty. The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it was within its discretion to fix the day when all labor, within the limits of the State, works of necessity and charity excepted, should cease.' "

April 22, 1970

COUNTIES: Supervisors. Ch. 217 Acts 63rd G. A. First Session. Supervisors work on drainage matters is related to their duties as county offcers and they are not entitled to receive payment for such services in addition to the compensation provided in Ch. 217, supra. (Nolan to Ensign, Assistant Worth County Attorney, 4/22/70) #70-4-20

Mr. Floyd E. Ensign, Assistant Worth County Attorney: You have requested an opinion on whether Ch. 217, Acts of the 63rd G. A., as it relates to the salary of members of the board of supervisors entitles board members to charge drainage districts for services rendered to them on days not otherwise devoted to the performance of official duties on behalf of the county.

Your letter states:

"We are much persuaded by the language of 'services rendered to the county,' that this means only work for the benefit of the county and not work for the benefit of a separate legal entity, namely, a drainage district. We agree that the law permits the board to charge either the general fund or the drainage district if county affairs are both considered on the same day. However, if the local board operates on a 200 day basis it won't have time to devote much attention to drainage and we think the board members should be compensated for this separate work."

Under § 455.1, Code of Iowa, 1966, the board of supervisors is empowered to establish drainage districts ". . . whenever the same will be of public utility or conducive to the public health, convenience, or welfare."

A drainage district is a legal entity. *State ex rel Iowa Employment Security Commission v. Des Moines County*, 1967, ...Iowa....., 149 N. W. 2d 288. However, when a drainage district has been established the landowners are represented in contracting matters by the board of supervisors.

Under § 455.44, Code, "all contracts for work or materials in constructing the improvements of such district shall be . . . signed by the chairman of the board of supervisors *for and on the behalf of the district*. . . ." In so contracting the board incurs liability to take proper proceedings to levy and devote the proceeds of the special assessment to the improvements. *First National Bank v. Webster County*, 1927, 204 Iowa 720, 216 N. W. 8. [Emphasis added].

It is a well settled rule that the burden of maintaining improvements should be borne by lands which benefit therefrom, so far as reasonably possible. *Kerr v. Chilton*, 1958, 249 Iowa 1159, 91 N. W. 2d 579. Special assessments for similar purposes are not uncommon in cities and towns where lots are filled or drained (§ 368.26) or flood protection provided (Ch. 395) and the property within the improvement district assessed the costs of the improvement (§ 395.11). But here Code § 455.61 also provides:

"Such taxes when collected shall be kept in a separate fund known as the *county drainage or levee fund* and shall be paid out *only* for purposes properly connected with and growing out of the *county* drainage and levee districts on order of the board . . ." [Emphasis added].

This leads to the inevitable conclusion that as far as the members of the board of supervisors are concerned, their work on drainage matters is related to their duties as county officers and they are not entitled to receive payment for services from the drainage districts in addition to the salary which they receive under Ch. 217, Acts 63rd G. A. See *Moore v. Mahaska County*, 61 Iowa 177, 16 N. W. 79..

April 22, 1970

LIQUOR, BEER AND CIGARETTES: Class "C" beer permit fees — § 124.24, 1966 Code of Iowa. Section 124.24 limits beer permits issuing authorities to a choice of three specific amounts. The fees fixed by the authorities for the class "C" permits may not exceed the fee established for class "B" permits. (Essy to Lynch, Winneshiek County Attorney, 4/22/70) #70-4-21

Mr. Thomas C. Lynch, Winneshiek County Attorney: You have requested an opinion of the Attorney General regarding the Iowa beer law. Specifically, you have asked:

"Does an issuing authority having an established fee of $200.00 per year for Class 'B' permits have authority to establish Class 'C' permits in steps of $50.00, $150.00 and $200.00? Or is it limited to steps of $50.00 and $150.00 with the $300.00 step being prohibited because of its being in excess of the $200.00 Class 'B' beer permit fee?"

Section 124.24, 1966 Code of Iowa, was amended by Chapter 160, Acts of the 62nd General Assembly, by deleting a twenty-five dollar fee and inserting other fees so that the law now reads in pertinent part as follows:

"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 or three hundred dollars. Such permit fee shall be graduated among the above amounts by such authority . . . No class 'C' permit fee shall exceed the fee as established by the issuing authority for class 'B' permits."

The applicable dictionary definition of "graduated" includes "arrangement in degrees or ranks." Webster's Seventh New Collegiate Dictionary 362. The degrees or ranks provided by the legislature in the above law are specific. No other class "C" graduations are mentioned and reference in the statute is to "the above amounts." In construing a statute, the express mention of one thing implies the exclusion of others, the Latin phrase being "expressio unius est exclusio alteruis." *Dotson v. City of Ames*, 1960, 251 Iowa 467, 472, 101 N. W. 2d 711. Stated another way, the legislative intent is expressed by omission as well as by inclusion. *State* v. *Flack*, 1960, 251 Iowa 529, 533, 101 N. W. 2d 535. It follows that class "C" beer permit fees must be fixed by the issuing authority only at the specified amounts.

According to an earlier provision in § 124.24, the class "B" permit fee "shall not be less than one hundred dollars, nor more than three hundred dollars." There is no provision in the statute for graduation of specific fee amounts regarding the ordinary class "B" permits as there is with the class "C" permits. Thus, it is the opinion of the Attorney General that the three hundred dollar class "C" fee and the one hundred fifty dollar class "C" fee could not be fixed by the issuing authorities where such amounts would exceed the established class "B" fee.

April 22, 1970

DOMESTIC RELATIONS: Marriage — legal age — § 595.2. There is no authority for the district court to grant an order authorizing issuance of a marriage license by the clerk of the district court unless the male is under age eighteen or the female under age sixteen and the female is pregnant. (Hughes to Dutton, Black Hawk County Attorney, 4/22/70) #70-4-22

Mr. David J. Dutton, Black Hawk County Attorney: Reference is made to your letter of March 26, 1970, in which you request an interpretation of Section 595.2, Code of Iowa, 1966. Your question, as I understand it, is whether a district court judge may grant an order authorizing the clerk of the court to issue a marriage license to two parties both eighteen years of age if the female is pregnant. Section 595.2, Code of Iowa, 1966, states as follows:

"A marriage between a male of eighteen and a female of sixteen years of age is valid; but if either party has not attained the age thus fixed,

the marriage will be a nullity or not, at the option of such party, made known at any time before he or she is six months older than the age thus fixed.

"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. The records of the court which pertain to such condition of pregnancy shall be sealed and available only to the contracting parties or to any interested party securing an order of court."

It is our opinion that this section limits the district court's authority to grant an order authorizing the clerk of the court to issue a marriage license to situations in which two conditions precedent are fulfilled. The first condition is that the female must be pregnant. The second condition is that the male must be under the age of eighteen or the female under the age of sixteen.

The answer to your question is that a district court judge may not grant an order authorizing the clerk to issue a marriage license to two parties if both parties have attained the age of eighteen years.

April 22, 1970

BANKING: Private Banks — § 107, Ch. 273, Acts, 63rd G. A., First Session. Once a private bank has been liquidated it cannot be revived under Iowa law. (Nolan to Foster, Deputy Supt. of Banking, 4/22/70) #70-4-23

Mr. Holmes Foster, Deputy Superintendent of Banking, Department of Banking: This replies to your letter requesting an opinion as to whether the bank of Lanyon, if any such entity exists, may resume the business of banking as a private bank, and whether Maurice W. Lindquist may commence the business of banking as a private banker as a result of his having acquired the bank of Lanyon.

Transmitted with your letter were a number of documents from which we deduced the following facts:

The Bank of Lanyon was founded and was in continuous operation prior to 1922 and until some time late in the year 1969. On August 23, 1969, the banking department was informed by D. E. Carlson, President and Cashier of the Bank of Lanyon, that the bank was in process of liquidation which should be completed "on or before September 15, 1969." On September 12, 1969, Mr. Carlson informed the banking department that "we can now say that the liquidation of the Bank of Lanyon was completed Sept. 10, 1969. * * * We are maintaining the building for the storing of the records for a number of years. We feel we have fulfilled the legal requirements for liquidation with the payment in full of all the deposits."

A memorandum of the Federal Deposit Insurance Corporation, Division of Research and Statistics, dated November 17, 1969, states:

"Subject bank was placed in Voluntary Liquidation. Please delete from List of Operating Banking Offices." (Effective date September 10, 1969).

A bill of sale dated November 11, 1969, recites:

"I, David E. Carlson, d/b/a BANK OF LANYON (being the same private bank that I acquired on the 7th day of December 1911 from N. A. Lindquist, et al), in consideration of ten dollars ($10.00) and other valuable consideration do hereby sell, assign and transfer and reconvey all of my right, title and interest in said BANK OF LANYON to Frank W. Lindquist, one of the original owners, and to Maurice W. Lindquist, a grandson of one of the original owners."

Subsequent thereto, on December 4, 1969, apparently an attempt was made to reestablish the Bank of Lanyon.

It is the opinion of this office that once a private bank has been liquidated it cannot be revived under the present laws of Iowa. § 107 of the Iowa Banking Act of 1969 (Ch. 273, Acts 63rd G. A.) provides:

"1. No person may lawfully engage in this state in the business of receiving money for deposit, transact the business of banking, or may lawfully establish in this state a place of business for such purpose, except a state bank which is subject to the provisions of this Act, a private bank to the extent provided for and limited by section seventeen hundred one (1701) and seventeen hundred two (1702) of this Act, and a national bank authorized by the laws of the United States to engage in the business of receiving money for deposit."

§ 1701, supra, provides:

"Nothing in this Act shall be construed as affecting or in any way interfering with any private bank or private banker that was engaged in lawful business prior to April 19, 1919."

A private bank may be sold or any interest therein transferred and the bank continue to operate as a private bank if the sale is made while that private bank is being conducted under the authority of the laws of this state. 1922 OAG 5. However, when such a bank has been liquidated, the "grandfather" authority ceases, and neither the last owner nor anyone else may again revive and operate such a bank. Since subsequent to the liquidation of such bank the president and cashier could not himself revive the operation of such bank, it is apparent that the bill of sale dated November 11, 1969, conveyed no such power to anyone else.

April 22, 1970

SCHOOLS: CONTRACTS: § 279.26, § 74.2. Finance charges § 279.26 (1) Whether a school district is liable for finance charges on a bill for supplies depends upon the contract. (2) Interest authorized to be paid on warrants stamped "not paid for want of funds" is not applicable in the case presented. (Nolan to Faches, Linn County Attorney, 4/22/70) #70-4-24

Mr. William G. Faches, Linn County Attorney: This is in reply to your letter requesting an opinion on the legality of payment of finance charges on unpaid balances of accounts of the school districts. Your letter states:

"Due to the high interest rate, various suppliers furnishing equipment and materials to school districts have submitted invoices indicating that if the bills are not paid within 60 days of the date of the invoice a service charge in the amount of a certain percent, such as 1½% per month of the unpaid balance, will be charged in addition to the invoice price.

"The Cedar Rapids Community School District has requested that we obtain your opinion concerning their liability for such charges.

"The questions are as follows:

"1. May school districts legally pay such finance charges if bills are not paid within the specified time?

"2. If such charges can be legally paid, is the amount of interest limited to 5% per year as stipulated for unpaid warrants in Section 74.2, Code of Iowa?"

The school board authority to provide and pay for supplies and equipment deemed necessary for each school building as provided by Ch. 279 does not contain any restriction about delayed payment. § 279.26, Code, 1966, provides:

"The board shall audit and allow all just claims against the corporation and no order shall be drawn upon the treasury until the claim therefor has been audited and allowed. In any district in which the board consists of five or more members, an audit made by one or more members of the board designated by the board or by a certified public accountant employed by the board, and certified to the board by such member or members of the board or by such accountant, shall satisfy the requirements of this section with respect to the audit of a claim."

There are certain exceptions set out in § 279.27 but they do not appear to be those items contemplated by your letter.

The school boards of directors have discretion to fix the amount of money to be withheld by the treasurer for books and supplies, etc. 1900 OAG 137. They also have the duty to audit and allow just claims against the corporation (§279.26). The approved practice for financing purchases is by the use of available money in the general fund or school house fund whichever is appropriate, by the issuance of bonds after authorization by electors of the district or by the issuance of warrants against the general fund stamped, "not paid for want of funds." A school district may not give promissory notes for the purpose of borrowing. 1948 OAG 5. The issue of school warrants in excess of the indebtedness to whose payment they are applied is prima facie usurious. *Eastman, Bovee & Co. v. The District Township of Lyon,* 1875 40 Iowa 438.

It would seem that in each case the contract between the school district and the suppliers must be examined, and a decision made as to whether or not the school board agreed to the payment of any financing charge or whether the equipment and materials received were merely to be paid for upon receipt and acceptance as indicated by the approval of the voucher upon presentation to the board.

Your second question makes reference to § 74.2, Code of Iowa, which as amended by Ch. 96 § 2, and Ch. 260 § 1 of the 63rd G. A., First Session now reads:

"When any such warrant is presented for payment, and not paid for want of funds, or only partially paid, the treasurer shall endorse the fact thereon, with the date of presentation, and sign said endorsement, and thereafter said warrant or the balance due thereon, shall draw interest at five percent per annum on state and county warrants, and five percent per annum on city, and school warrants, unless the treasurer arranges for the sale of said warrant at par at a lower rate of interest."

Inasmuch as warrants are not to be drawn unless the municipality "shall determine that there are not or will not be sufficient funds on hand to pay the legal obligations of a fund," and this question is not raised by your letter, I do not see that the provisions of § 74.2, Code, are applicable

to the question presented, unless of course, the claim of the supplier is approved by the school board and its payment directed, although there may not be sufficient money in the fund to cover such payment.

April 22, 1970

HOSPITALS: Counties — Commissioners of Hospitalization — §§ 228.8, 229.2, 229.26, 229.43, 347.13(7), Code of Iowa, 1966. County hospital must provide suitable room for "detention" of persons brought before commissioners of hospitalization but would not be required to provide guard for such persons unless the hospital has legal custody of such patient. (Nolan to Folkers, Mitchell County Attorney, 4/22/70) #70-4-25

Mr. Jerry H. Folkers, Mitchell County Attorney: This responds to your request for an opinion construing § 347.13(7), Code of Iowa 1966. The question which you raised is as follows:

"The above referenced Code Section provides that a county public hospital shall provide a suitable room for detention and examination of persons brought before the Commissioners of Hospitalization. Must the county hospital, in addition to providing a room, also provide personnel to attend to such person and provide other items incident to the detention of said person, including meals?"

From your letter we understand that the hospital's position is that with the room goes the collateral facilities and services normally provided by the hospital to its patients, but that the hospital is unwilling to provide a "guard" in the case of a violent prisoner.

The fact that the statutory provision states that such suitable room be provided for "detention" raises the question of custody of the persons brought before the county commissioners of hospitalization. It is our view that the hospital would not be required to provide a guard for such persons unless the hospital has legal custody of such person while a patient therein. If such person is in the custody of the sheriff or someone else, the hospital would not be required to furnish a guard.

In cases other than those where the alleged mentally ill person is being held in custody under indictment returned by the grand jury or a trial information filed by the county attorney, (§ 228.8) the commissioners of hospitalization have authority to provide for temporary custody of the person until their investigation is concluded. § 229.2. If the care and custody of the patient is not provided by relatives or friends, such patient on order of the commission shall be restrained and cared for at the expense of the county. See §§ 229.26, 229.42.

Your letter implies that the hospital does not include in its budget provision for the care of violent patients. In such case, claims for the necessary care should be submitted to the board of supervisors on a case by case basis.

April 22, 1970

ELECTIONS: Furnishing of voter instructions — § 49.69, Code of Iowa, 1966. The Secretary of State is required to furnish voter instructions to county auditors for the primary and general elections and may furnish them to city clerks. (Haesemeyer to Landess, Deputy Secretary of State, 4/22/70) #70-4-26

Mr. Robert C. Landess, Deputy Secretary of State: Reference is made to your letter of April 20, 1970, which states:

"Code section 49.68 requires the Attorney General to prepare, and from time to time, revise written instructions to voters relative to voting and deliver such instructions to the Secretary of State.

"Code section 49.69 states:

'The secretary of state shall furnish county auditors and city clerks with copies of the foregoing instructions.'
"Code section 49.70 states:

'The county auditor and city clerk shall cause copies of the foregoing instructions to be printed in large, clear type, under the heading of "Card of Instructions," and shall furnish the judges of election with a sufficient number of such cards as will enable them to comply with section 49.71.'

"Code section 49.71 states:

'The judges of election, before the opening of the polls, shall cause said cards of instructions to be securely posted as follows:

1. One copy in each voting booth.
2. Not less than four copies, with an equal number of sample ballots, in and about the polling place.'

"This office has prepared printed copies of the instructions to voters to be used specifically in the Primary and General Elections of 1970. Copies of these instructions have been sent to each county auditor.

"Since the city clerks are not involved specifically in the Primary and General Elections of 1970, is it necessary that this office mail copies of these instructions to them at this time?"

County auditors are charged with the responsibility for conduct of the primary and general elections.

§ 49.28, Code of Iowa, 1966 states, in part:

"The auditor shall prepare and furnish to each precinct two pollbooks, and all other books, blanks, materials, and supplies necessary to carry out the provisions of this chapter."

Inasmuch as municipal elections are not held at the same time as the 1970 primary and general elections (§ 363.8, Code of Iowa, 1966) it is not necessary that you mail copies of the card of instructions prepared for the primary and general elections of 1970, to the city clerks unless they specifically request the same.

April 22, 1970

COUNTIES: Board of Supervisors: Ch. 218, Acts 63rd G. A., First Session. The number of supervisors may be reduced by the voters of a county under Ch. 218, Acts 63rd G. A., First Session. (Nolan to Wegman, Chickasaw County Attorney, 4/22/70) #70-4-27

Mr. William L. Wegman, Chickasaw County Attorney: This will acknowledge receipt of your letter of March 26, 1970, requesting an opinion as to whether or not Ch. 218, Acts of the 63rd G. A., First Session, makes a provision for the decrease in the number of supervisors from five to three. The letter asks:

"1. Is there any legal way in which the voters of Chickasaw County can reduce the supervisor membership total from five (5) to three (3)?

"2. In the event that there is a proper legal procedure which would allow the electors of Chickasaw County to reduce the supervisor total . . . what is the latest possible date for the filing of the said petition with the county auditor?"

Ch. 218, Acts of the 63rd G. A. First Session, supra, provides substitutes for §§ 331.2, 331.3, and 331.7, Code 1966. As amended these sections now provide:

§ 331.2

"When petitioned to do so by one-tenth of the qualified electors of said county, the board of supervisors shall submit to the qualified electors of the county, at any regular election, one of the following propositions as may be requested in said petition, or the board may, on its own motion, by resolution submit either of said propositions:

"1. Shall the proposition to increase the number of supervisors to five be adopted?

"2. Shall the proposition to increase the number of supervisors to seven be adopted?

"If the majority of the votes cast shall be for the proposition so submitted, then at the next general election the requisite additional supervisors shall be elected, and one-half of the additional supervisors shall hold office for three years and one-half for two years.

"The length of term for which any person is a candidate and the time when the term begins shall be indicated on the ballot."

§ 331.3

"In any county where the number of supervisors has been increased to five or seven, the board of supervisors, on the petition of one-tenth of the qualified electors of the county, shall submit to the qualified voters of the county, at any regular election, one of the following propositions, as the same may be requested in such petition:

"1. Shall the proposition to reduce the number of supervisors to five be adopted?

"2. Shall the proposition to reduce the number of supervisors to three be adopted?

"If a majority of the votes cast shall be for the decrease, then the number of supervisors shall be reduced to the number indicated by such vote."

§ 331.7

"At the next general election following the one at which the proposition to reduce the number of members of the board was carried there shall be elected the number of members required by such proposition.

"Where such proposition reduces the board to five members, two persons shall be elected as members of the board for two years, two for three years, and one for four years.

"In counties where the proposition reduces the board to three members, one person shall be elected as member of the board for two years, one for three years, and one for four years.

"The length of term for which any person is a candidate and the time when the term begins shall be indicated on the ballot."

The Act does not effect the provisions of § 331.1, Code of 1966:

"The board of supervisors in each county shall consist of three persons,

except where the number has been or may hereafter be increased in the manner provided by this chapter. They shall be qualified electors, and be elected by the qualified voters of their respective counties, and shall hold their office for four years."

Since § 331.1 has been in the Iowa code for a number of years, it is my opinion that the language of § 8, of Ch. 218, supra, which is a substitute enacted for § 331.3 provides adequate authority for the reduction of a five member board to a three member board, and adequately provides the procedure for accomplishing this result.

In answer to your second question I am enclosing copies of two opinions of the attorney general issued in 1932 and 1934 which indicate that a "regular" election is the "general" election.

It is my view that the provisions of Ch. 218, supra, do not require that the petition for reduction of the number of supervisors be filed with the county auditor at any particular time. In fact, the language of § 8 of Ch. 218, supra, indicates that the petition shall be submitted to the board of supervisors. Such petition would of necessity need to be filed in time for the board of supervisors to act upon it by resolution and to order the auditor to have the proposition printed on the ballots for the general election. The time for printing ballots is covered in § 49.63, Code of Iowa, 1966.

April 22, 1970

STATE OFFICERS AND DEPARTMENTS: Department of Public Safety — Law Enforcement Officer — Ch. 112, Acts of the 62nd G. A. The definition of "law enforcement officer," for the purposes and operations of this Act, includes: Highway Commission Weight Officers; Narcotics Division; Fairground Police; Capitol Police; Law Enforcement Division of the Liquor Commission; Parole Board Agents; College and University Security Police; and Constables. (Essy to Fulton, Dept. of Public Safety, 4/22/70) #70-4-28

Mr. Jack M. Fulton, Commissioner, Department of Public Safety: You have requested an opinion of the Attorney General as to whether or not members of the following groups fall within the definition of "law enforcement officer" as found in Chapter 112, Acts of the 62nd General Assembly:

Highway Commission Weight Officers; Narcotics Division; Fairground Police; Capitol Police; Law Enforcement Division of the Liquor Commission; Parole Board Agents; College and University Security Police; and Constables.

Section 3, subsection 3, Chapter 112, Acts of the 62nd General Assembly states:

" 'Law-enforcement officer' means a conservation officer, a member of a police force or other agency or department of the state, county, city or town regularly employed as such and who is responsible for the prevention and detection of crime and the enforcement of the criminal laws of this state."

The intent of the legislature in creating the academy is similarly broad in scope according to Section 2 of the Act:

"It is the intent of the legislature in creating the academy and the council to maximize training opportunities for law-enforcement officers,

to coordinate training and to set standards for the law-enforcement service, all of which are imperative to upgrading law enforcement to professional status."

The most recent change in the law relating to the law enforcement academy is found in Chapter 103, Acts of the 63rd General Assembly, in which references to "police" officers were striken and "law enforcement" inserted in lieu thereof.

The general definition of law enforcement officer appears to cover persons who are also covered by the definition of "peace officers." Section 748.3, 1966 Code of Iowa. Moreover, it is the duty of a peace officer ". . . to preserve the peace, to ferret out crime, to apprehend and arrest all criminals, and insofar as it is within his power, to secure evidence of all crimes committed, and present the same to the county attorney, grand jury, mayor or police courts, and to file information . . ." Section 784.4. It follows, that if the persons listed in your letter are designated peace officers, then they would, "if regularly employed as such" be included in the broad definition of law enforcement officer.

The members of the groups referred to in your letter have been provided with specific designations as "peace officer" in the Iowa Code: Highway Commission Weight Officers, Section 321.477; Narcotics Division, Section 204.19(3); Fairground Police, Section 173.14(7); Capitol Police, Section 18.2(4); Liquor Commission agents, Section 748.3, Code of Iowa, 1966, as amended by Chapter 305, Acts of the 63rd General Assembly; Parole agents, Section 247.24; College and University Security Police, Chapter 180, Acts of the 63rd General Assembly; Constables, Section 601.121. Therefore, I am of the opinion that the broad language of the definition of "law enforcement officers" includes the above mentioned persons.

April 22, 1970

SCHOOLS: BOARD OF REGENTS: Institutions: 28E, § 269.1, Code of Iowa, 1966. Board of Regents may not pay expenses of Iowa resident attending school for blind outside the state of Iowa for the sake of convenience. (Nolan to Richey, Executive Sec., State Board of Regents, 4/22/70) #70-4-29

Mr. R. Wayne Richey, Executive Secretary, State Board of Regents: In response to your question as to whether the Iowa Braille and Sight Saving School may pay an out-of-state institution the cost of educating and maintaining a blind Iowa child attending the out-of-state school, provided the costs do not exceed the cost of instruction at the Iowa school, we have determined that such a practice is not permitted by Iowa law where the child as a matter of convenience and not as a matter of need attends the out-of-state school.

§ 269.1, Code of Iowa, 1966, provides that:

"All blind persons and persons whose vision is so defective that they cannot be properly instructed in the common schools, who are residents of the state and of suitable age and capacity, shall be entitled to an education in the Iowa braille and sight savings school at the expense of the state . . ."

This section makes unequivocally clear that blind residents are entitled

to an education at the expense of the state at the Iowa Braille School. No provision is established in this section for the Board of Regents to defray expenses of residents who attend out-of-state private institutions for the blind.

Concededly, § 28E.4 permits agreements between public or private agencies of this state and other public or private agencies. Nonetheless, agencies cannot enter into agreements which exceed their statutory grant of authority. The Regents are directed to provide educational services for blind residents at the Iowa Braille School by statute, § 269.1, and for the Regents to subsidize a resident's education at an out-of-state school for the blind would be to exceed this statutory limitation on their authority.

Further, the purpose of Ch. 28E concerning joint exercise of governmental powers is to provide efficient use of public services through cooperation for mutual advantage with public and private agencies.

Iowa attorney general's opinions of October 13, 1967, (1968 OAG 357) concerning public subsidization of private agencies providing special education to the handicapped and the opinion of August 10, 1965, (1966 OAG 113) concerning county subsidization of a private treatment center for the mentally retarded are distinguishable. In both of those opinions the public agencies involved were empowered, either expressly or implied by statute to entertain agreements with private agencies for public services. Also, the public agencies in those opinions had entered into their agreements with private agencies to provide more efficient public services through cooperation, and not to subsidize residents who seek out-of-state private services for convenience sake.

For the foregoing reasons we have determined that the Iowa Braille and Sight Saving School may not pay an out-of-state institution the cost of educating and maintaining a blind Iowa child who is attending such a school as a matter of geographic convenience.

April 24, 1970

TAXATION: Municipal Property Exempt — § 427.1(2), 419.11, Chapter 284, Code of Iowa, 1966. Property owned by a municipality not developed under Chapter 419 and to be used as a city golf course retains its tax exempt status. (Murray to Ottesen, Ass't Scott County Attorney, 4/24/70) #70-4-30

Mr. Realff H. Ottesen, Assistant Scott County Attorney: I do not think I clearly understand the question raised by you in your request for an opinion dated March 30, 1970.

You have factually stated that the City of Davenport annexed its municipal airport and environs to avoid reimbursement of taxes to the North Scott Community School District. I assume you are referring to the provisions of Chapter 284 — Reimbursement of School Districts for Loss of Taxes by the State.

You further state that the airport facilities were rented out to individuals who pay the rental to the city and that extra land not used for airport purposes has been in the past rented out as farm land, but at this time said farm land will be given to the Park Board of Davenport for a

golf course. Under the provisions of § 368.29, a golf course owned by a city is a legitimate municipal enterprise and the fact that this land will be given to the park board will not effect its tax exempt status since it remains municipal property devoted to public use.

You next refer to § 419.11, Code of Iowa, 1966, which in part provides that a municipality *acquiring any industrial buildings as provided in this Chapter 419* shall annually pay out of the revenue from such industrial buildings to the school district a sum equal to the amount of tax which would be raised if industrial buildings had been owned by a private individual. Your question then follows and you ask:

"Whether the wording as provided in this chapter 419, and an industrial project, before the tax equivalent is due and payable by the municipality; or whether any city or municipality owned building rented for industrial purposes is subject to the tax equivalent."

If the city is not now proceeding under the bonding provisions of Chapter 419, the tax equivalent provisions of § 419.11 are not applicable to your situation. Please note that § 419.11 only applies when a municipality is acquiring industrial buildings "as provided in this chapter" (Chapter 419).

As I understand the facts you have given me, the City of Davenport has owned this property since its annexation and the mere fact that it had been rented said property for farm purposes would not have removed it from its exempt status under the provisions of § 427.1(2) which states:

"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."

For an interpretation of this exemption statute under a similar factual situation see 66 O.A.G. 414. This opinion clearly states that renting of a part of a municipal airport grounds for farming is only incidental to the public use, and thus does not affect tax exempt status of that property. On a related question see also 68 O.A.G. 54.

For a thorough discussion of the application of § 419.11 see *Green* v. *City of Mt. Pleasant*, 1964, 256 Iowa 1194, 131 N. W. 2d 5.

I think it possible that the subject matter of these two Attorney General opinions and the *Green* case as decided by the Iowa Supreme Court should answer your question. If not, do not hesitate to so advise me.

April 24, 1970

DOMESTIC: DOGS — LICENSING AND TAXING — §§ 351.1, 351.24, Code of 1966: All dogs, except dogs left in kennels and not allowed to run at large, are subject to license by the counties. Dogs kept in kennels and not allowed to run at large are subject to taxation as personal property. Cities and towns are vested with licensing authority. (Strauss to McDonald, Cherokee County Attorney, 4/24/70) #70-4-31

Mr. James L. McDonald, Cherokee County Attorney: Reference is herein made to yours of March 23, 1970, in which you submitted the following:

"On behalf of the Cherokee County Assessor, I would like your opinion concerning the licensing of hunting dogs which are kept in kennels, except when hunting.

"Our policy has always been to exclude kenneled dogs from the annual licenses, only if they are used for breeding. The owner claims that they are not allowed to run at large and should be taxed under Section 351.24.

"The specific question boils down to whether or not a dog used solely as a hunting dog and at all other times kept in a kennel is subject to the license fee as set out in Section 351.1 of the Iowa Code."

In reply thereto I advise the several statutes effective of this situation are §§ 351.1 and 351.24 both Code of 1966, and respectfully provides the following:

§ 351.1 "The owners of all dogs three months old or over, except dogs kept in kennels and not allowed to run at large, shall annually obtain license therefor as herein provided."

§ 351.24 "Dogs kept in kennels and not allowed to run at large shall be taxed as personal property. Dogs licensed as herein provided shall not be so taxed. Cities and towns may license dogs in addition to the license herein required."

Analysis of the foregoing statutes results in the following:

1. § 351.1, Code of 1966, provides for the licensing by the county of all dogs except dogs kept in kennels and not allowed to run at large.

2. § 351.24, Code of 1966, provides for the taxing of dogs kept in kennels and not allowed to run at large as personal property.

3. Dogs that are licensed under the provisions of § 351.1 are not the subject of taxation as provided in § 351.24.

Accordingly all dogs in the county three months old or over are subject to licensing as provided by § 351.1 provided that they are not dogs that are kept in kennels and not allowed to run at large, and if so licensed such described dogs will not be subject to taxation as personal property as provided by § 351.24. The dog described in your letter being kept in kennels and not allowed to run at large is taxable as personal property under provisions of § 351.24. In addition to the foregoing licensing authority vested in the county, cities and towns are likewise so vested.

April 24, 1970

TAXATION—INHERITANCE TAX: Time Deposit Certificates, § 450.37. Time certificates should be valued for inheritance tax purposes at the market value in the ordinary course of trade on the date of decedent's death. (Nolan to Woodward, Muscatine County Attorney, 4/24/70) #70-4-32

Mr. Garry D. Woodward, Muscatine County Attorney: This will acknowledge receipt of your request for an Attorney General's opinion concerning the valuation of bank time certificates of deposit for inheritance tax purposes. Your letter points out that banks are now paying as high as 5¾% interest compounded quarterly on time certificates of deposit,

and that if the principal is withdrawn before the quarterly computations, no interest is paid. You then ask:

"How shall the county inheritance tax board require attorneys for estates to value bank time certificates of deposit, particularly with reference to the accrued interest from the last interest paying date to the date of death of the decedent?"

It is our view that the matter is covered by § 450.37, 1966 Code of Iowa, which provides:

"The appraised value of the property shall in all cases be its market value in the ordinary course of trade, and in domestic estates the tax shall be calculated thereon after deducting the debts as defined herein."

In an opinion dated February 28, 1930, (1930 OAG, 275) this office dealt with the proper valuation of rent notes which were not due at the time of the death of the deceased and advised that such notes should "be appraised at their present value." It is our view that the certificates of deposit should be valued as of the date of death of decedent at the "market value in the ordinary course of trade." If interest has accrued and is payable on such certificates at the date of the decedent's death such interest should be included in the value placed upon the time certificate.

April 24, 1970

DEPARTMENT OF SOCIAL SERVICES: COUNTIES: County of legal settlement of juveniles placed in the Iowa Juvenile Home must reimburse Tama County for incidental expenses and fees for court-appointed attorneys pursuant to § 232.52, 1966 Code of Iowa as amended by § 10, Chapter 203, 62nd G. A., in any hearings before the juvenile court in Tama County. Procedure to obtain reimbursements is set forth in § 232.53, 1966 Code of Iowa, as amended by § 1, Chapter 204 of the 62nd G. A., and § 2, Chapter 161 of the 63rd G. A. (First). Any contest between counties shall be resolved pursuant to §§ 252.22 and 252.23, 1966 Code of Iowa. (Williams to Bauch, Tama County Attorney, 4/24/70) #70-4-33

Jared O. Bauch, Esquire, Tama County Attorney: This is in response to your request for an Attorney General's Opinion concerning the payment of incidental expenses and fees for court-appointed counsel to represent the interest of juveniles at juvenile hearings who are confined in the State Juvenile Home located at Toledo, Tama County, Iowa. You recite that for some reason they must appear before the juvenile court and that several of these cases involve a conflict between the interests of the parents and the child. You also indicate in your letter that none of the juveniles involved in such court actions have legal settlement in Tama County, although confined to the State Juvenile Home.

In your letter, you also say:

"It is my understanding of Section 232.52 and 232.53 of the 1966 Code of Iowa as amended by the 62nd General Assembly that Tama County should be able to recover the costs and expenses incurred under these sections by forwarding the Judge's certified Statement of Expenses to the County (of) legal settlement of the juvenile.

"We have followed this procedure in several cases during the past year. These counties have refused our claims and allege the state is in custody of the child and, therefore, we should file our claim with the state.

"My questions are as follows, to-wit:

"Is my understanding of the Code correct, in that Tama County should be able to recover the court costs for court-appointed attorneys and incidental expenses from the County of legal settlement which sent the child to the State Juvenile Home?

"Is the outlined procedure the correct procedure to recover from those counties?

"If we cannot recover from the counties sending the juveniles to Toledo, are we to recover these costs by filing a claim against the State of Iowa?"

You are correct in thinking that Tama County should be able to recover the reasonable compensation for court-appointed attorneys and incidental expenses connected with the hearing as enumerated in the statutes.

Section 232.52, 1966 Code of Iowa, as amended by Chapter 203, Section 10, 62nd General Assembly, reads as follows:

"232.52 Expenses charged to the county. The following expenses upon certification of the judge or upon such other authorization as provided by law are a charge upon the county in which the proceedings are held.

"1. The fees and mileage of witnesses and the expenses and mileage of officers serving notices and subpoenas.

"2. The expenses of transporting a child to a place designated by a child placing agency for the care of the child if the court transfers legal custody to a child placing agency.

"3. The expenses of transporting a child to or from a place designated by the court.

"4. Reasonable compensation for an attorney appointed by the court to serve as counsel or guardian ad litem. * * *"

The procedure to be reimbursed for these costs appears in Section 232.53, 1966 Code of Iowa, as amended by Chapter 204, Section 1 of the 62nd General Assembly and Chapter 161, Section 2 of the First Session of the 63rd General Assembly.

This Section, as amended, reads in part as follows:

"232.53 Recovery of costs. The county charged with the cost and expenses under sections . . . 232.52 of this Act may recover the costs and expenses from the county where the child has legal settlement by filing verified claims which shall be payable as are other 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. . . ."

From these statutes, it is apparent that any reimbursement for these costs must be from the county of legal settlement of the child. There is no provision for any reimbursement by the State of Iowa.

If there is contest between the counties by reason of any dispute concerning the legal settlement of the child, that matter should be resolved according to Section 232.53, 1966 Code of Iowa, as amended, by following the procedure set forth in Sections 252.22 and 252.23, 1966 Code of Iowa.

These Sections pertaining to disputes as to the legal settlement of the minor read in part as follows:

"252.22 Contest between counties. When relief is granted to a poor person having a settlement in another county, the auditor shall at once by mail notify the auditor of the county of his settlement of such fact, and, within fifteen days after receipt of such notice, such auditor shall inform the auditor of the county granting relief if the claim of settlement is disputed. If it is not, the poor person, at the request of the auditor or board of supervisors of the county of his settlement, may be maintained where he then is at the expense of such county, and without affecting his legal settlement. . . ."

"252.23 Trial. If the alleged statement is disputed, then, within thirty days after notice thereof as above provided, a copy of the notices sent and received shall be filed in the office of the clerk of the district court of the county against which claim is made, and a cause docketed without other pleadings, and tried as an ordinary action, in which the county affording the relief shall be plaintiff, and the other defendant, and the burden of proof shall be upon the county granting the relief."

In the course of your letter, you state:

"We consider this to be the home county of the parents even though the child-parent relationship may have been severed at the time the child was sent to the Home."

You are also correct in thinking that even though parental rights have been terminated pursuant to Chapter 232, 1966 Code of Iowa, the county from where the child was committed to the institution continues to the county of legal settlement of that child. This was answered in an Attorney General's Opinion dated February 12, 1965, the notation of which appears as 5.30 on page 145 of the Report of Attorney General of Iowa, 1966, and reads as follows:

"Legal Settlement of Minor — A minor, adjudicated to be dependent and neglected under Chapter 232 and ordered to an institution under 232.21(3) in different county than that of committing court, assumes the legal settlement of the committing court inasmuch as this court retains final jurisdiction over the minor whose derivative settlement of the parents is terminated by the court's action under Chapter 232, 232.21(3), 232.21(5), 232.23, 1962 Code of Iowa."

April 24, 1970

STATE OFFICERS AND DEPARTMENTS — DEPARTMENT OF SOCIAL SERVICES: COUNTIES: County of legal settlement at time a minor is placed in the State Institution at Glenwood or Woodward is liable for the cost of care pursuant to §§ 222.60 and 252.16, 1966 Code of Iowa, but if parental legal settlement changes pursuant to § 252.17, liability shifts to that county. Original county has obligation to notify other county of change of legal settlement. (Williams to Gillman, Commissioner, Dept. of Social Services, 4/24/70) #70-4-34

Mr. James N. Gillman, Commissioner, Iowa Department of Social Services: You have asked for an official Attorney General's Opinion in your letter dated March 13, 1970 concerning a county's financial responsibility for care of minor children in Glenwood and Woodward, which institutions house only the mentally retarded pursuant to Chapter 222, 1966 Code of Iowa, as distinguished from the mentally ill, under Chapter 230, 1966 Code of Iowa.

In your letter, you ask the following questions:

"1. When a minor child is placed in Glenwood or Woodward does the responsibility for the cost of care remain with the county of original settlement or does this financial responsibility change when the parents establish legal settlement in another County?

"2. If the legal settlement of the child does change, is it the responsibility of the original county to determine when the change occurs and, if so, to notify the county to which settlement is transferred? If notice is not given, does the original county remain responsible for costs of care until such time as it notifies the county to which the parents moved?"

I

When a child is placed in Glenwood or Woodward, the responsibility for the cost of care depends upon the legal settlement of the minor as defined in § 252.16, 1966 Code of Iowa. Section 222.60, 1966 Code of Iowa reads in part as follows:

"222.60 Costs paid by county or state. All necessary and legal expenses 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 § 252.16. * * *"

Section 252.16, 1966 Code of Iowa, reads in part as follows:

"252.16 Settlement — how acquired. 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 settlement in that county.

2. 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.

* * *

4. A married woman has the settlement of her husband, if he has one in this state; if not, or if she lives apart from him or is abandoned by him, she may acquire a settlement as if she were unmarried. Any settlement which the wife had at the time of her marriage may at her election be resumed upon the death of her husband, or if she be divorced or abandoned by him, if both settlements were in this state.

5. Legitimate minor children take the settlement of their father, if there be one, if not, then that of the mother.

6. Illegitimate children take the settlement of their mother, or, if she has none, then that of their putative father. . . ."

Under § 252.17, Settlement once acquired continues "until such person has . . . acquired a legal settlement in some other county . . ."

Section 222.60, 1966 Code of Iowa, was enacted by the Sixty-First General Assembly of Iowa and appears as Chapter 107, Laws of the Sixty-First General Assembly. [This repealed §§ 223.14 and 223.16, 1962 Code of Iowa and thus, the Attorney General's Opinion concerning these repealed sections which appears at page 181, 1942 A.G.O. is no longer applicable].

Thus, pursuant to the statutes above-quoted, the answer to your question numbered "1" is that the cost of care for a minor child placed in the hospital-school, at either Glenwood or Woodward, is to be paid by the county of legal settlement of the minor, and if the parents established legal settlement in another county after such admission in either of the hospital-schools, that county is legally responsible for the cost thereof.

II

In answer to the questions raised in question numbered "2," we wish to state that the county of legal settlement of the minor at the time of his admission to either of the said hospital-schools has the obligation to notify the county to which the minor's legal settlement has been changed, and it must continue payment for such care until it is assumed by the county either voluntarily or by litigation.

April 24, 1970

TAXATION: Documentary Tax — 428A. Assignments of real estate contracts for the purchase of real property are not subject to documentary stamp tax under provisions of § 428A.2, Code of Iowa, 1966, which excepts executory contracts of sale and assignments thereof. (Murray to Story, Jones County Attorney, 4/24/70) #70-4-35

Mr. Robert H. Story, Jones County Attorney: I have your letter of March 19, 1970 which contained enclosures of copies of instruments furnished to you by your recorder. You have asked whether (1) these instruments are conveyances and should be treated as deeds requiring revenue stamps under the provisions of Chapter 428A, Code of Iowa, 1966; (2) whether they are security instruments and should be treated as a lien against the real estate; and (3) are they merely assignments of personal property to be indexed in Miscellaneous Records?

I agree with your personal opinion that the answers to the first two questions are negative and that the answer to the third question is affirmative.

Section 428A.2 — Exceptions, states in part as follows:

"The tax imposed by this chapter shall not apply to:

"1. Any executory contract for the sale of land under which the vendee is entitled to or does take possession thereof, *or any assignment . . .* thereof. . . ." (emphasis added)

I have examined the enclosures numbered one through four and they clearly appear to be "assignments" and as such are excepted from the stamp tax. Said instruments are titled as follows:

1. Collateral Assignment of Real Estate Contract;
2. Assignment of Interest of Purchaser in Real Estate and Assignment of Interest of Purchaser in Contract for the Sale of Real Estate;
3. Assignment of Contract as Collateral Security; and
4. Assignment of Real Estate Contract.

April 24, 1970

EMINENT DOMAIN: Highway Commission. §§ 306.13, 306A.5, Code of

Iowa, 1966. Absent bad faith, fraud, or manifest abuse of power, the Iowa State Highway Commission may condemn private real estate for future highway uses. (Holst to Christensen, State Representative, 4/24/70) #70-4-36

The Hon. Perry L. Christensen, State Representative: In your letter of April 8, 1970, you asked our opinion whether the Iowa State Highway Commission is authorized to condemn real estate for which it will have no public use for ten years. In our opinion, the Iowa State Highway Commission may absent fraud or a manifest abuse of power do so without violating either state or federal constitutions or law.

We are reliably informed that the highway to which you refer was, in February of 1968, designated by the Iowa State Highway Commission as a four-lane expressway and that this designation appears in the Highway Commission's Publication "Iowa Freeway System." This freeway will be a controlled-access facility.

The power of the Iowa State Highway Commission to condemn for such roads is found in §§ 306.13 and 306A.5 of the Code of Iowa, 1966. Section 306.13 is in pertinent part as follows:

"In the . . . establishment, or improvement of any road, . . . the commission or board having control of such road shall have authority to purchase or to institute and maintain proceedings for the condemnation of the *necessary* right of way therefor . . ." (Emphasis added)

Section 306A.5 is in pertinent part as follows:

". . . highway authorities having jurisdiction and control over the highways of the state, as provided by chapter 306, may acquire private or public property rights for controlled access facilities . . . by gift, devise, purchase, or *condemnation* in the same maner as such units are now authorized by law to acquire such property . . . in connection with highways . . . within their respective jurisdictions . . . In connection with the acquisition of property or property rights for any controlled access facility or portion thereof, . . . the said . . . authorities, (may) in its (their) discretion, acquire an entire lot, block, or tract of land, if, by so doing, the interests of the public will be best served, *even though said entire* lot, block or *tract is not immediately needed for the right of way proper* . . ." (Emphasis added)

Both of these statutes, when read together, require that the land condemned be "necessary" for such road purposes. If the land condemned is "necessary," it is clear that the Highway Commission has the power to condemn it. *Porter v. Iowa State Highway Commission,* 1950, 241 Iowa 1208, 44 N. W. 2d 682, 686.

The next question to be answered is whether land condemned for future road purposes may be considered as "necessary" within the context of the statutes cited above. The Iowa Supreme Court in the case of *Porter v. Iowa State Highway Commission,* cited above, held that it may. The United States Supreme Court in the case of *Rindge Co. v. Los Angeles County,* 1923, 262 U. S. 700, 707, 67 L. Ed. 1186, 1193, said:

"In determining whether the taking of property is necessary for public use not only the present demands of the public, but those which may be fairly anticipated in the future, may be considered. Central P. R. Co. v. Feldman, 152 Cal. 303, 309, 92 Pac. 849."

In the *Rindge Co.* Case, cited above, the United States Supreme Court went on to say in the last paragraph of the opinion:

"We therefore conclude that the property . . . has been taken for highways constituting a public use authorized by law, and upon a public necessity for the taking duly established, and that *they* have *not been deprived of their property in violation of the 14th Amendment.*" (Emphasis added)

In Highway Research Board Special Report 27, "Acquisition of Land for Future Highway Use," National Academy of Sciences-National Research Council, (Publication No. 484) (1957), it is reported that:

"Acquisition for future use in the highway field has been upheld in the following cases:

Department of Public Works & Buildings v. McCaughey, 332 Ill. 416, 163 N. E. 795 (1928). See Appendix B, p. 65.

State Highway Commission v. Ford, 142 Kan. 383, 46 P. 2d 849 (1935). See Appendix B, p. 65.

Porter v. Iowa State Highway Commission, 241 Iowa 1208, 44 N. W. 2d 682 (1950). See Appendix B, p. 68.

State v. State Highway Commission, 163 Kan. 187, 182 P. 2d 127.

State v. Superior Court for Cowlitz County, 33 Wash. 2d 638, 266 P. 2d 1028 (1949).

State v. Curtis, 359 Mo. 402, 222 S. W. 2d 64 (1949).

Erwin v. Mississippi State Highway Commission, 213 Miss. 885, 58 So. 2d 52 (1952). See Appendix B, p. 68.

Woollard v. State Highway Commission, 220 Ark. 731, 249 S. W. 2d 564 (1952). See Appendix B, p. 67.
and denied in:

State v. City of Euclid, 164 Ohio St. 265, 130 N. E. 336 (1935). See Appendix B, p. 72."

In addition to these authorities it should be noted that in § 306A.5, cited above, the Iowa State Highway Commission is authorized to take whole tracts ". . . even though said entire . . . tract is *not immediately needed* for the right of way proper." (Emphasis added)

Considering the case authorities, said §§ 306A.5 and 306.13, the 14th Amendment to the United States Constitution, and Article I, Section 9, Constitution of the State of Iowa, it is our opinion that the Iowa State Highway Commission, absent bad faith, fraud, or manifest abuse of power, may condemn private real estate for future highway uses.

April 27, 1970

COUNTIES AND COUNTY OFFICERS: Assistant county attorneys, offices and secretarial help — §§ 332.9 and 332.10, Code of Iowa, 1966. County boards of supervisors would be obliged to reimburse an assistant county attorney for a portion of his office expenses including secretarial help where he is not furnished a suitable adequately staffed office in the courthouse. (Haesemeyer to Atwell, Public Accounts Audit Supervisor, Office of Auditor of State, 4/27/70) #70-4-37

Mr. H. E. Atwell, Public Accounts Audit Supervisor, Office of Auditor of State: You have requested an opinion of the attorney general with re-

spect to the following:

"Is the county obligated to furnish office space, or reimburse for part of the rental cost of an office, for Assistant County Attorneys as provided in Section 332.9?

"Should the county reimburse the Assistant County Attorneys for part of the cost of secretarial help?"

Section 332.9, Code of Iowa, 1966, provides:

"332.9 Offices furnished. The board of supervisors shall furnish the clerk of the district court, sheriff, recorder, treasurer, auditor, county attorney, county superintendent, county surveyor or engineer, and county assessor, with offices at the county seat, but in no case shall any such officer, except the county attorney, be permitted to occupy an office also occupied by a practicing attorney."

In addition to office space the officers mentioned in § 332.9 are also entitled to necessary supplies. Thus, § 332.10 provides:

"332.10 Supplies. The board of supervisors shall also furnish each of said officers with fuel, lights, blanks, books, and stationery necessary and proper to enable them to discharge the duties of their respective offices, but nothing herein shall be construed to require said board to furnish any county attorney with law books or library.

"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."

Numerous opinions of the attorney general have been issued in the past to the effect that the supervisors must furnish the county attorney suitable office space in the county courthouse or make some provision to repay him for rent for an office elsewhere. 40 OAG 34, 28 OAG 342, 28 OAG 307, 24 OAG 140, 16 OAG 178, 14 OAG 161. Moreover, although not mentioned in either § 332.9 or § 332.10 it has been held that stenographic help is to be supplied to the county officers. 40 OAG 34, 38 OAG 714. Indeed, it has been found that the board of supervisors has implied authority to furnish offices for officers not mentioned in § 332.9. 44 OAG 98 (county board of social welfare).

Under § 332.10 supplies and services not mentioned therein may be furnished. OAG Dec. 13, 1965 (xerox machine), 28 OAG 307 (typewriter), 40 OAG 381 (telephone). And here again county offices not enumerated are entitled to supplies. OAG January 31, 1962 (county civil defense director). Thus, it is apparent that over the years §§ 332.9 and 332.10 have been liberally construed to permit county boards of supervisors to furnish office space, secretarial help and supplies to various county offices regardless of whether or not they are specified in § 332.9.

Under these circumstances it is our opinion that county boards of supervisors would be obliged to reimburse an assistant county attorney for a portion of his office expenses including secretarial help where he is not furnished a suitable adequately staffed office in the courthouse.

April 29, 1970

CITIES AND TOWNS: Libraries, bookmobiles, method of purchase and

use made — §§ 378.1, 378.11 and 378.12, Code of Iowa, 1966. A bookmobile can be leased for a term of up to twenty years with or without an option to purchase and the same can be used either within the confines of the city or within the city and within another city contracting for library services. (Haesemeyer to Grafton, State Traveling Library, 4/29/70) #70-4-38

Mrs. Ernestine Grafton, Director, Iowa State Traveling Library: You have requested an opinion of the attorney general with respect to the following:

"The Board of Library Trustees for the Sioux City Public Library wishes to purchase a bookmobile to replace the one currently being operated within the confines of the city. Doubt as to the legality of such a purchase has been expressed within the city and the Board would appreciate greatly a written opinion by the State Attorney's office on the following questions pertaining to this matter.

"Is it legal for the city or the Board of Trustees to purchase a new bookmobile for use within the confines of the city?

"Is it legal for such a vehicle to be purchased for use within the city and within a municipality contracting with the Sioux City Public Library for such service?

"What methods of purchase for such a vehicle are legal? Are methods such as lease/purchase, extended payment over a period of one to three years, or other methods legal; or is cash purchase the only approved method of purchase?"

Section 378.1, Code of Iowa, 1966, provides in part:

"Cities shall have power to enter into long-term leases, for a term not to exceed twenty years, with or without an option to renew or purchase, for the acquisition of free public libraries. Such leases may cover a library building and site, with or without books, furniture or *equipment*, or may provide for the erection and equipping with furniture and books of such a library upon a site owned by the city. A lease may be entered into for an existing building or for one to be erected in the future. Rent paid under the terms of a lease may be paid from the municipal enterprises fund or from any of the sources named in section 378.2, or from any other source of funds available for library purposes. Counties and school districts are hereby expressly authorized to contribute to the support of libraries and such contributions shall be taken into consideration for the purpose of fixing charges under the provisions of section 378.10, subsection 6." (Emphasis added)

If it can be said that a bookmobile is "equipment" then it is clear from the foregoing that any of the methods of purchase you describe are permissible. In view of the provisions of § 378.11, and in particular § 378.12, it is evident that the draftsmen of Chapter 378 considered the operation of bookmobiles as a proper function of library boards. Thus, § 378.11 provides, and § 378.12, as amended by Chapter 324, 62nd G. A. (1967), provides in relevant part:

"378.11 Power to contract. Contracts may be made between the board of trustees of any free public library and other boards of trustees of free public libraries, and any city, town, school corporation, township, or county or with the trustees of any county library district for its use by their respective residents. Townships and counties may enter into such contracts, but may only contract for the residents outside of cities and towns. Such contract by a county shall supersede all contracts between the library trustees and townships or school corporations outside of cities and towns."

"378.12 Method of use. Such use shall be accomplished by one or more of the following methods in whole or in part:

* * *

"3. By the transportation of books of such library by mobile or other conveyance for lending the same to such residents at stated times and places.

* * *"

Reading the three statutes quoted herein in *pari materia* it is our opinion that a bookmobile is "equipment" within the meaning of § 378.1 and that such a vehicle could be leased for a term of up to twenty years with or without an option to purchase and that the same could be used either within the confines of the city or within the city and within another city contracting for library services.

April 29, 1970

MOTOR VEHICLES: Maximum length, vehicle defined — §§ 321.1 and 321.457, Code of Iowa, 1966. A combination consisting of a motor vehicle upon which is fastened a van box and which also draws and bears a portion of the weight of a semitrailer is a combination of three vehicles, the maximum length of which is 60 feet. (Turner to Walsh, State Senator, 4/29/70) #70-4-39

The Hon. John M. Walsh, State Senator: Reference is made to your letter of April 3, 1970, in which you state:

"Mr. Paul Crouse, Crouse Cartage of Carroll, bought some new equipment. The tractor has a van box behind the cab which hauls freight (this is called a dromedary). Behind this Mr. Crouse pulls a trailer (one-half of a double bottom).

"I would appreciate your opinion as to whether this comes under the semi length law of 55′ or the double law of 60′."

It is our understanding that the vehicles in question comply in all respects with statutory requirements as to height, width, axles, etc. and that the only question is as to length. As a matter of fact the particular units which give rise to your question have an overall length of 55 feet 10 inches.

Section 321.457, Code of Iowa, 1966, provides in relevant part:

"The maximum length of any motor vehicle or combination of vehicles, . . . shall be as follows:

* * *

"3. Except as to combinations of vehicles, provision for which are otherwise made in this chapter, no combination of truck tractor and semitrailer, nor any other combination of vehicles coupled together, unladen or with load, shall have an overall length, inclusive of front and rear bumpers, in excess of fifty-five feet.

* * *

"6. No combination of three vehicles coupled together one of which is a motor vehicle, unladen or with load, shall have an overall length, inclusive of front and rear bumpers in excess of sixty feet."

The question then is whether the units in question are a "combination

of truck tractor and semitrailer" or "a combination of three vehicles coupled together."

Section 321.1, Code 1966, as amended, provides in 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.

"1. '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.

"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 trolley wires, but not operated upon rails. The terms 'car,' 'new car,' 'used car' or 'automobile' shall be synonymous with the term 'motor vehicle.'

* * *

"4. 'Motor truck' means every motor vehicle designed primarily for carrying livestock, merchandise, freight of any kind, or over nine persons as passengers.

* * *

"6. '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.

* * *

"8. 'Road tractor' means every motor vehicle designed and used for drawing other vehicles and not so constructed as to carry any load thereon either independently or any part of the weight of a vehicle or load so drawn.

* * *

"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.

* * *

"23. 'Combination' or 'combination of vehicles' shall be construed to mean a group consisting of two or more motor vehicles, or a group consisting of a motor vehicle and one or more trailers, semitrailers or vehicles, which are coupled or fastened together for the purpose of being moved on the highways as a unit.

* * *"

The power unit, constructed as it is to bear and total weight of the dromedary and, in addition, to draw and bear a portion of the weight of the semitrailer, is not a truck tractor as defined in § 321.1(6). Nor is it a "motor truck" as defined in § 321.1(4) because it is designed primarily for drawing a semitrailer and bearing a portion of the semitrailer's weight, rather than being "primarily designed for carrying." And obvi-

ously it does not fall within the definition of "road tractor" (§ 321.1(8)) because it is constructed to carry a load and a portion of the weight of the vehicle and load so drawn.

In our opinion the unit is a combination of three vehicles, one of which is a motor vehicle, and the 60 foot limitation applies. The dromedary, while perhaps not a vehicle within the meaning of that term as it is commonly understood, does fall within the statutory definition of that term as found in § 321.1. That is to say it is undeniably a "device in . . . which property is or may be transported . . . upon a highway."

May 4, 1970

LIQUOR, BEER AND CIGARETTES: Liquor Commission, distribution of price lists with advertising — §§123.17 and 123.47, Code of Iowa, 1966. The liquor commission could authorize the free distribution in state liquor stores of privately published price lists containing advertising if the advertisement, itself does not contain the price or code number of the brand, although such price and code number would be found in the lists apart from the advertisement. (Turner to Yost, Iowa Liquor Control Commission, 5/4/70) #70-5-1

Mr. William J. Yost, Director of Law Enforcement, Iowa Liquor Control Commission: By your letter of April 24, 1970, you have requested an opinion of the attorney general as to whether the Liquor Commission may allow a private publisher to distribute, on the premises of State Liquor stores, a publication in the nature of a trade magazine or periodical, listing the various liquors sold by the State in the stores, the code numbers, prices and other information, on a regular periodic basis, but which publication would advertise certain brands. Specifically, you state:

"A publishing corcern wishes to fill a void in state service by making available to the public on a regular basis a listing of liquor code numbers and prices. In other words, the listing will show the items carried by the state liquor stores. The publication would be in the nature of a trade magazine or periodical and carry pertinent up-to-date listings and information as to how liquor, including special orders, might be obtained through the state. In addition, items of contemplated general interest might be carried.

"It is our understanding that the publication would be made available to customers of the monopoly system free of charge for the taking with costs to be borne by those firms wishing to advertise products carried by the state within the magazine.

"All advertising would appear inside the magazine covers and be designed for off state store premise use. Prime value of the publication would be as an aid to the prospective state customer in making a selection prior to the time the state store is reached. Little or no use would be made of the publication inside the state store itself since board listings and self-service would speak for itself.

"Is there anything in your opinion that would make the offering of a limited supply of this publication in the various state liquor stores free of charge to store patrons illegal?"

§123.47, Code of Iowa, 1966, provides:

"Advertisements. Except as permitted by federal statute and regulations, there shall be no public advertisement or advertising of alcoholic liquors in any manner or form within the state.

"1. No person shall publish, exhibit, or display or permit to be displayed any other advertisement or form of advertisement, or announcement, publication, or price list of, or concerning any alcoholic liquors, or where, or from whom the same may be purchased or obtained, unless permitted so to do by the regulations enacted by the commission and then only in strict accordance with such regulations.

"2. This section of the chapter shall not apply, however:

a. To the liquor control commission.

b. To the correspondence, or telegrams, or general communications of the commission, or its agents, servants, and employees.

c. To the receipt or transmission of a telegram or telegraphic copy in the ordinary course of the business of such agents, servants, or employees of any telegraph company."

§123.47 was enacted in 1934 (see Acts 1933 to 34 extra session, 45th G.A., Ch. 24, §40) and Ch. 136, 37th G.A., on which an earlier attorney general's opinion (1919 to 20 OAG 751) was based, was repealed. See Compiled Code of Iowa, 1919, §1026, Ch. 35, 40th Ex. G.A., S.F. 51 and *Dayton v. Pacific Mutual Life Insurance Co.*, 1926, 202 Iowa 753, 210 N.W. 945. As a consequence, said earlier opinion of the attorney general is no longer of any force.

§123.17, Code of Iowa, 1966, provides that the commission may make rules and regulations.

"f. Providing for the issuing and distributing of price lists showing the price to be paid by purchasers for each brand, class or variety of liquors kept for sale under this chapter by the commission. * * * "

The Liquor Commission has adopted rules and regulations concerning the advertising of distilled spirits, both on and off the premises of a liquor licensee. See 1966 Iowa Departmental Rules page 354 and the July 1966 supplement thereto, page 56, in which the "off premise advertising" is regulated by rules adopted May 11, 1966. It is clear from these rules and from the statutes that "off premise advertising" means off the premises of the liquor licensee rather than off the premises of the State liquor stores. Rule 1.1 of these rules provides:

"No person engaged in business as a producer, manufacturer, bottler or importer of distilled spirits, directly or indirectly, or through an affiliate, shall publish or disseminate or cause to be published or disseminated in any newspaper, magazine or similar publication any advertisement of distilled spirits, unless such advertisement is in conformity with these regulations; Provided, that these provisions shall not apply to the publisher of any newspaper, magazine or similar publications, unless such publisher is engaged in business as a producer, manufacturer, bottler, importer, wholesaler, or retailer of distilled spirits, directly or indirectly, or through an affiliate."

The other sections of the rules and regulations pertaining to off premise advertising are fairly comprehensive and the Liquor Commission could, in the proper exercise of its discretion, allow a publisher who strictly complies therewith to distribute the type of publication you described in the State liquor stores. As I understand it, the published list, itself, would not emphasize any one brand over another, in black type or otherwise, except that advertisements would be included in the publications separate and apart from the list. Under Rule 1.4 (123) (1) and (2), of the rules of the Liquor Control Commission, July 1966 supple-

ment, an advertisement "shall not contain" e. "the code number or price". In my view, this simply means that the code number or price of a particular brand could not be shown on any advertisement of that brand found within the publication, although the brand, together with the code number and price, would be found in the list apart therefrom.

Otherwise, I find no prohibition against this type of publication in any statutes or regulations. While the publication would be a vehicle for advertising liquor, it is within the power of the Commission to authorize and seems similar in its purpose to the yellow pages of a telephone directory. 1964 OAG 248.

May 5, 1970

ELECTIONS: Registration lists, duplication furnished to county chairmen of political parties — §48.5, Code of Iowa, 1966, as amended by Ch. 92, 63rd G.A. (1969), Ch. 106, 62nd G.A. (1967). Under the election law the commissioner of registration is required to furnish free duplicate registration lists only to the county chairmen of political parties polling more than 2% of the vote in the last general election. Such lists must be furnished the County Chairman as frequently as they are changed and requested by the county chairman. An arrangement between the commissioner and the county chairman whereby the latter is furnished only names and information added to the duplicate list, after he has once been furnished a copy thereof, would satisfy this requirement and seem more reasonable than furnishing a complete new list upon every such request. Under the public records law, every citizen of Iowa has a right to examine the voter registration list, which is a public record, and to copy the same. The commissioner may make a charge reasonably related to the actual cost for copying records and supervising such records while they are being examined and copied. (Turner to Shaw, St. Rep., 5/5/70) #70-5-2

The Honorable Elizabeth Shaw, State Representative: On May 4, 1970, you requested an opinion of the attorney general as to whether the commissioner of registration must prepare duplicate voter registration lists for others than the county chairman of a political party; how many lists and how often must the commissioner of registration furnish such duplicate lists to the county chairman of a political party; and whether the commissioner can charge a fee for the expense of this duty.

§48.5, Code of Iowa, 1966, as amended by Ch. 92, First Session, 63rd G.A., provides as follows:

"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, 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. Such duplicate lists shall include name, address, precinct number and party affiliation of such voters.

"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 first until September fifteen 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."

A duplicate registration list is required to be kept by the commissioner and open to public inspection at all reasonable times. There is no requirement in this particular law that the commissioner furnish anyone other than the county chairman a duplicate registration list. Such lists must be furnished the county chairman as frequently as they are changed and requested by the county chairman. An arrangement between the commissioner and the county chairman whereby the latter is furnished only names and information added to the duplicate list, after he has once been furnished a copy thereof, would satisfy this requirement and seem more reasonable than furnishing a complete new list upon every such request. There is no provision for charging any fee to him.

But under Ch. 106, 62nd G.A., the public records law, every citizen of Iowa shall have a right to examine the voter registration list, which is a public record, and to copy the same. The commissioner may make a charge reasonably related to the actual cost for copying records and supervising such records while they are being examined and copied. But he must allow them to be copied by any citizen. See 1968 OAG 656.

May 8, 1970

CITIES AND TOWNS: Liquor revenue and road use tax distributions, census error, certified figures used — §§26.2, 26.3, 26.5, 26.6, 123.50, 312.3, Code of Iowa, 1966, as amended. Where the U.S. census bureau made a mistake in the 1960 census in the population of a city or town which was not discovered and corrected until 1970, the state may not go back and recover excessive allocations of liquor revenue and road use taxes made on the basis of the incorrect figures. However, the correct figures should be used prospectively from the time the correct figures are certified and published by the Secretary of State. The effect of the correction on other cities and towns is *de minimis* and no prospective adjustment of their shares need be made. (Haesemeyer to Baringer, Treasurer of State, 5/8/70 #70-5-3

The Honorable Maurice Baringer, Treasurer of State: You have requested an opinion of the attorney general and state:

"An error in the 1960 Federal Census has come to the attention of this office. We now have certification from the Director of the Bureau of Census, dated February 19, 1970 that the Town of Pioneer had a population of 76 people in the 1960 census not the 448 previously certified.

"This error affects the distribution of road use tax, Ch. 312.3, Subsect. 2, Code of Iowa, 1966, and liquor profits, Ch. 123.50, Sub-sect. 3, Code of Iowa, 1966.

"Is there a legal basis for recovery of monies distributed to Pioneer based on an incorrect census figure? See Chapter 26, Code of Iowa.

"If there is legal basis for recovery, what effective date should be used for determining the correct distribution?

"If recovery is legal, how should we proceed? Can we withhold any future distributions until the 'overpayment' is recovered? Can we ask for remittance of present unencumbered funds held by Pioneer which are remaining from the amounts distributed since January 1, 1961? Approximately three years would be required to recover the balance if future distributions are entirely withheld.

"If funds are recovered, what distribution can be made? Should any recovery be regarded as current income in the month recovered and redistributed?

"Had the proper population been used from January 1, 1961, through December 31, 1969, the Town of Pioneer would have received $29,306.00 less in street construction monies and $7,650 (estimated) less liquor profits, representing an overpayment of $36,956.00 (estimated) over the nine years.

"The Town of Pioneer currently has unencumbered funds of about $14,000. The balance of the overpayment has been expended for street construction and other town operating expense during the nine years.

"If recovery cannot legally be attempted, from what date should the corrected population figure be used? Chapter 26 does not speak to the possibility of error except differences between the certified figures and the published figures. Under Chapters 123.50 and 312.3, results of a *special* census are not to be used until the following calendar year. Again, the Code is silent in regard to discovery of error.

"What would be the effect if an error should occur that would result in an understatement of population?

"Should we consider asking for a legislative enactment legalizing distribution of road use and liquor monies prior to certification of the error by the Director of the Census Bureau? Refiguring the distributions for all the remaining cities and towns back to January 1, 1961 would be impossible at this late date and would be much more costly than the overpayment to Pioneer. When the overpayment is spread over the remaining cities and towns, the difference for any city or town is not affected until the factor is carried to the eighth decimal. Further adjustments due to any special census anywhere in the state would be extremely difficult and costly."

§123.50(3), Code of Iowa, 1966, as amended by Chapter 157, §1; Chapter 158, §3; Chapter 253, §2, 62nd G.A. (1967), provides in relevant part:

"3. The state treasurer shall semiannually distribute, a sum of money equal to ten percent of the gross amount of sales made by the state liquor stores, to the cities and towns of the state in the manner hereinafter provided. Such amount shall be distributed to the cities and towns of the state in proportion to the population that each incorporated city or town bears to the total population of all incorporated cities and towns of the state as computed by the latest federal census. 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. Such apportionment shall be made semiannually as of July 1 and January 1 of each year. . . . "

§3912.3, Code of Iowa, 1966, as amended by Chapter 253, §1, 62nd G.A. (1967) and Chapter 213, §3, 63rd G.A. (1969) provides in part:

"The treasurer of state shall, on the first day of each month:

* * *

"2. Apportion among the cities and incorporated towns of the state, in the ratio which the population of each city or town, as shown by the latest available federal census, bears to the total population of all such cities and towns in the state, the fifteen percent of the road use tax funds which he has credited to the street fund of the cities and towns, and shall remit to the city clerk of each such city or town the amount so apportioned to such city or town. 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 secetary of state.

* * *"

§26.6, Code of Iowa 1966, as amended by Chapter 253, §4, 62nd G.A. 1967) provides in part:

"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. . . . 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."

It is evident that the payments which have been made since 1961 arose out of a mutual mistake of fact stemming from an error by the United States census bureau which has only recently been discovered. The applicable rule as stated in 40 Am. Jur., Payments, §199, is:

"§199 — Public Money Paid by Mistake. — Reasons for the application of the rule that money paid under a mistake of fact may be recovered are much more potent in the case of the contracts of the government than of contracts of individuals, for the government must necessarily rely on the acts of agents, whose ignorance, carelessness, or unfaithfulness would otherwise often bind it, to the serious injury of its operations. Thus, it frequently has been held that recovery may be had of money paid by mistake by a state or subdivision thereof to another political body, and it appears to be well settled that the rule that money paid under a mistake of fact, may be recovered back applies to money belonging to public bodies generally, where paid to private individuals or concerns, as well as to any other money."

See also Restatement of Restitution, §C, comment 16, 63 A.L.R. 1346. However, any effort to recover back the money erroneously paid to the town of Pioneer would almost certainly be greeted with the equitable defense that the town has changed its position because of the mistake and that it would be unjust now to compel a refund nine years after the mistake was made. As stated in 40 Am. Jur., Payment, §201:

"§201 Cirsumstances Rendering Recovery Inequitable. — The rule that money paid under a mistake of fact may be recovered back does not apply where the payment has caused such a change in the position of the other party that it would be unjust to require him to refund. Thus, where the plaintiff alone is at fault, or his fault is greater than that of the defendant, then the cases seem to agree that alteration of position of the defendant is a defense to an action for recovery of the money by the plaintiff, and, as a general rule, in cases where the plaintiff and the defendant are equally to blame for the mistake under which the money was paid, or equally innocent in respect thereto, an alteration of position on the part of the payee is held to prevent liability in an action for recovery."

The principle is stated somewhat differently but to the same effect in the Restatement of Restitution, §142:

"The right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution."

Moreover, it may well be that we may not take legal notice that a mistake occurred — at least not retroactively. §§26.2, 26.3 and 26.5 of the Code provide respectively:

"26.2 Federal census. The secretary of state shall, whenever a general census is taken by the federal government, procure from the supervisor of such census, or other proper federal official, a copy of such part of said census as gives the population of the state of Iowa by counties, by townships, by cities, and by towns, and file the same in his office and attach thereto, dated and signed by him, a certificate that the same is the census report furnished to him by said federal official."

"26.3 Publication. He shall at once cause such census report and certificate to be published once in each of two daily newspapers of the state and of general circulation, and from and after the date of such publication said census shall be in full force and effect throughout the state. On payment of a fee of two dollars he shall furnish a certified copy of the whole or any part of such census report."

"26.5 Evidence. Said certified census records in the office of the secretary of state, and said authorized publications, including the certificates attached thereto, shall be competent evidence of all matters therein contained."

It would seem from the foregoing that until the census report is certified by the secretary of state and published in two newspapers it is not in effect, but that once it is certified and published, right or wrong, it is in effect for all purposes. In *Broyles v. Mahaska County*, 1931, 213 Iowa 345, 239 N.W. 1 the Iowa supreme court held that publication under the certificate of the secretary of state fixes the date from which the census becomes effective and that it does not relate back to the date on which the census was taken. See also 52 OAG 22 and 1919-20 OAG 808.

We conclude from the foregoing that in law the population of Pioneer was 448 from the time of certification and publication by the secretary of state of the 1960 census until a new certification and publication was made. We understand that the secretary of state has recently certified and published the correct census data received from the census bureau and you should from the date of such publication compute the share of the town of Pioneer to road use tax and liquor revenues on the basis of the newly certified 1960 population, to wit, 76 persons. It is to be observed that the mandate of §26.6 is that population is the official census *last* certified or certified and published.

However, it would appear to us that insofar as the other cities and towns are concerned this is a situation where strict adherence to the formulas established by §§123.50 and 312.3 should yield to obvious practicalities.

As you state, "When the overpayment is spread over the remaining cities and towns, the difference for any city or town is not affected until the factor is carried to the eighth decimal. Further adjustments due to

any special census anywhere in the state would be extremely difficult and costly." *De minimis non curat lex.*

May 12, 1970

INSURANCE: Credit life insurance, small loan law — §§522.1, 536.26, Code of Iowa, 1966. A small loan licensee may sell credit life insurance to a borrower and deliver to the borrower a certificate of insurance together with a copy of the group master policy of credit insurance issued to the small loan licensee rather than separate individual policies for each borrower. In such circumstances a small loan licensee need not be licensed as an insurance agent. (Turner to Mogged, State Senator, 5/12/70) #70-5-5

Honorable Charles G. Mogged, State Senator: You have requested an opinion of the attorney general as to whether a small loan licensee may sell credit life insurance under a group program in connection with a loan made under the provisions of Chapter 536, Code of Iowa, 1966, if he is not a licensed insurance agent. Specifically you say:

"Section 536.26 of the Iowa Small Loan Law provides in the fifth paragraph thereof, in part, that '*** and the licensee shall cause to be delivered to the borrower a copy of the policy (of credit insurance) within fifteen days from the date such insurance is procured.'

"It is your opinion that technical and substantial compliance with that requirement might be accomplished by delivering to the borrower the Certificate under a group plan together with a copy of the Group Master Policy which an insurance company issues to the creditor organization, thus eliminating the necessity of maintaining a fully licensed agent in each loan office?

"In other words, the question which I would appreciate receiving an answer on is, will a group program where not only the Certificate, but also a copy of the Group Master Policy is delivered be in compliance with the Small Loan Law of Iowa in such a manner as to relieve the necessity of having a licensed agent (fully licensed for all types of life, accident and health insurance) in each office?"

I

I assume that the group program makes the *creditor* the actual policyholder and is in compliance with the requirements of §509.1(3), Code of Iowa, 1966, where all of the debtors of the creditors are eligible for insurance under the group master policy.

§536.26, Code of Iowa, 1966, was enacted by the 61st General Assembly in 1965 (See 61 G.A., Ch. 409, S.F. 146, §14) and provides as follows:

"Insured loans. No licensee shall, directly or indirectly, sell or offer for sale any insurance in connection with any loan made under this chapter *except as and to the extent authorized by this section.* Life, accident and health insurance, or any of them, may be written by a licensed insurance agent upon or in connection with any loan for a term not extending beyond the final maturity date of the loan contract but only upon one obligor on any one loan contract.

"The amount of life insurance shall at no time exceed the unpaid balance of principal and interest combined which are scheduled to be outstanding under the terms of the loan contract or the actual amount unpaid on the loan contract, whichever is greater.

"Accident and health insurance shall provide benefits not in excess of the unpaid balance of principal and interest combined which are scheduled to be outstanding under the terms of the loan contract and the amount of each periodic benefit payment shall not exceed the total amount payable divided by the number of installments and shall provide that if the insured obligor is disabled, as defined in the policy, for a period of more than fourteen days, benefits shall commence as of the first day of disability.

"The premium, which shall be the only charge for such insurance, shall not exceed that approved by the commissioner of insurance of the state of Iowa as filed in the office of such commissioner. Such charge, computed at the time the loan is made for the full term of the loan contract on the total amount required to pay principal and interest, shall be stated separately in the contract and in the same location in such contract as are the statements of the principal and interest of the loan.

"If a borrower procures insurance by or through a licensee, the statement required by section 536.14 shall disclose the cost to the borrower and the type of insurance, and the licensee shall cause to be delivered to the borrower a copy of the policy within fifteen days from the date such insurance is procured. No licensee shall decline new or existing insurance which meets the standards set out herein nor prevent any obligor from obtaining such insurance coverage from other sources.

"If the loan contract is prepaid in full by cash, a new loan, or otherwise (except by the insurance) any *life*, accident and health insurance procured by or through a licensee shall be canceled and the unearned premium shall be refunded. The amount of such refund shall represent at least as great a proportion of the insurance premium or identifiable charge as the sum of the consecutive monthly balances of principal and interest of the loan contract originally scheduled to be outstanding after the installment date nearest the date of prepayment bears to the sum of all such monthly balances of the loan contract originally scheduled to be outstanding.

"Notwithstanding any other provision of this chapter, any gain or advantage to the licensee or to any employee, affiliate, or associate of the licensee from such insurance or the sale or provision thereof shall not be deemed to be additional or further interest or charges in connection with such loan; nor shall any of the provisions pertaining to insurance contained in this section be deemed prohibited by any other provisions of this chapter." (Emphasis added)

By forbidding a licensee from directly or indirectly selling or offering for sale any insurance in connection with any loan "except as and to the extent authorized by this section", the legislature is expressly authorizing the small loan licensee to sell kinds of insurance specified in the section if he does so strictly in accordance with its terms. One of those terms is that "the licensee shall cause to be delivered to the borrower a copy of the policy."

In an opinion of the attorney general, Scalise to Link, 1966 O.A.G. 209, it is concluded as follows:

"There is no ambiguity and the law is clear as to what a 'policy' is and what a 'certificate' is. Therefore, it is my opinion that a small loan licensee may no longer write credit insurance on the group plan whereby a policy is issued to the lender and certificates to the borrower. The individual policies must meet the requirements of Chapter 514A, which refer to individual health and accident policies, and must contain the entire contract."

However, if the small loan licensee also causes to be delivered to the *borrower* a copy of the group master policy, in addition to the certificate,

within the specified fifteen days, he is in compliance with that particular requirement. Mr. Scalise's opinion obviously contemplated only a situation in which the copy was not delivered to the borrower.

II

§522.1, Code of Iowa, 1966, provides:

"License required. No person shall directly or indirectly, act within this state as agent, or otherwise, in receiving or procuring applications for insurance, or in doing or transacting any kind of insurance business for any company or association other than fraternal beneficiary associations, except that the licensing of persons so acting for county mutuals shall be subject only to the provisions of section 518.16, until he has procured from the commissioner of insurance a license authorizing him to act for such company or association as agent."

This raises your second question as to whether a small loan licensee need be licensed to sell insurance in order to sell credit life insurance under a group program. As we have seen, the first paragraphs of §536.26 prohibits the small loan licensee from directly or *indirectly* offering for sale any insurance in connection with a loan *"except as and to the extent authorized by this section."* But putting it in the alternative expressly provided, he *can* sell the insurance directly or *indirectly* as and to the extent authorized by *that* section. In other words, he *can* sell or offer the insurance for sale, directly or indirectly to the extent he does so within the exception to the prohibition as it is found in that section. The second sentence of the first paragraph of §536.26 provides only that "Life, health or accident insurance . . . may be written by a licensed insurance agent upon or in connection with a loan . . . " but does not suggest that the small loan licensee may be the one to write it.

Moreover, nothing in the *section* (§536.26) specifies that the small loan licensee must be licensed to sell insurance, or offer it for sale, *indirectly*, so long as he does not actually write it, whether it be group insurance or not.

On the contrary, the fifth paragraph of §536.26 expressly authorizes a borrower to procure insurance "by or *through* the small loan licensee" provided the statement which §536.14 requires the small loan licensee to deliver the borrower discloses the cost to the borrower and the type of insurance; provided a copy of the policy is *caused* to be delivered to the borrower within fifteen days; and provided the borrower is allowed to furnish or acquire other insurance meeting the standards of the section from another source in lieu thereof.

The provisions of §536.26 are, in sum, replete with suggestions that a small loan licensee, not licensed to sell insurance, may nevertheless sell this type of insurance in accordance with this section (§536.26), if he does so through a licensed insurance agent.

To this extent, the provisions of §536.26, conflict with the provisions of §522.1, Code of Iowa, 1966, quoted above. But §522.1 was a general statute enacted earlier than §536.26, which is a special statute. When a general statute is in conflict with a special statute, the latter prevails. *Mason City v. Yerble*, 1958, 250 Iowa 102, 93 N.W.2d 94. In the Mason City case, the general statute authorizing municipal corporations to enact

ordinances to provide for safety, health, etc. did not authorize the city to license electrical contractors since the special statute authorizing cities to regulate electrical contractors made it clear that the legislature drew a distinction between "regulate" and "license". So, in this instance, the General Assembly has carefully regulated the small loan licensee, and prescribed the narrow limits within which he may offer insurance for sale through a licensed insurance agent, without requiring an insurance license of him.

Thus, in effect, §536.26 is a further exception engrafted upon §522.1. The former opinion, 1966 O.A.G. 209, overlooked these points and reached the opposite conclusion on this question. To that extent the former opinion is hereby withdrawn and modified.

It is not necessary that the insurance sold or offered be group insurance so long as §536.26 is otherwise observed. But a group credit policy, duly issued through a licensed insurance agent covering all debtors enrolled thereunder is the only contract with which they or the law is here concerned. Addition of debtors enrolled under the contract and certificates issued to the debtors evidencing their interest therein do not impair the obligation thereof. Thus, in enrolling additional debtors, as members under the group policy, the small loan licensee performs no real function for which he needs to be a licensed insurance agent. It is presumed herein that the policy was initially issued by a licensed insurance agent and in all respects complies with the provisions of §509.1(3), Code, 1966.

May 13, 1970

ELECTIONS: Absentee ballots, servicemen — §§53.2, 53.39, 53.40, 53.51, Code of Iowa, 1966. A serviceman acting for himself may in one request ask for ballots for both the primary and general elections. However, where someone else is requesting the ballots on behalf of the serviceman separate requests are required. (Haesemeyer to Synhorst, Secretary of State, 5/13/70) #70-5-4

The Honorable Melvin D. Synhorst, Secretary of State: You have requested us to furnish an attorney's general's opinion with respect to a question involving the absent voter's law which has been raised by the Buena Vista County auditor. Simply stated the question is this:

"May a serviceman request his absentee ballot in one request for both the primary and general elections?"

§53.2, Code of Iowa, 1966 provides:

"Any voter, under the circumstances specified in section 53.1, may, on any day not Sunday, election day, or a holiday and not more than twenty days prior to the date of election, make application to the county auditor, or to the city or town clerk, as the case may be, for an official ballot to be voted at such election. Such application may be made in person or in writing as provided in section 53.10."

Because of the statutory requirement that an application for absentee ballot be made not more than twenty days prior to the election it would obviously be a physical impossibility for absent voters generally to make their requests for both the primary and general elections at the same time. However, §53.2 does not apply to the members of the armed forces.

Thus, §53.39 provides:

"The provisions of sections 53.2, 53.4 and 53.5 shall not apply in connection with the primary and general elections in the case of a qualified elector of the state of Iowa serving in the armed forces of the United States; in any such case an application for ballot as provided for in said sections shall not be required and an absent voter's ballot shall be sent or made available to any such voter upon a request being made therefor as provided for in this division. . . . "

Moreover, §53.40 provides in relevant part:

"Request in writing for ballot for the primary election and for the general election may be made by any member of the armed forces of the United States who is or will be a qualified voter on the day of the election at which said ballot is to be cast, *at any time prior to either of said elections, the request stating for which election the request is made. In the case of the general election such request may likewise be made, not more than fifty-five days before said election, for an don behalf of a voter in the armed forces of the United States by a spouse, parent, parent-in-law, adult brother, adult sister, or adult child of any such voter,* residing in the county of said voter's residence, provided that any such request made by other than the voter may be required to be made on forms prescribed by the Iowa servicemen's ballot commission.

* * *

"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. . . . " (Emphasis added)

Because of the underlined language of the first sentence of §53.40 set forth above it is plain that where a request for an absent voter's ballot is made by the serviceman himself his request may be made at any time prior to the election for which the request is made. It is equally clear, however, that where a request for a ballot is made by someone else on behalf of a serviceman the request would have to be made not more than fifty-five days before the particular election involved. Since more than fifty-five days separates the primary and general elections it would be again a physical impossibility in one request to ask for an absentee ballot on behalf of a serviceman for both the primary and general elections. But where the serviceman himself requests the ballots there is no time requirement as to when the requests are to be made.

Of course consideration has to be given to what is meant by the term "request". Obviously, a serviceman could mail separate requests for the primary and general elections in two separate envelopes even though they might be mailed and also received on the same days. This being so it seems only logical that he could enclose both separate requests in the same envelope. Carrying logic a little further it seems only reasonable that he could make both requests in a single letter. Certainly this interpretation is consistent with §53.51 which provides:

"Rule of construction. This division shall be liberally construed in order to provide means and opportunity for qualified voters of the state of Iowa serving in the armed forces of the United States to vote at the primary and general elections."

May 15, 1970

STATE OFFICERS AND DEPARTMENTS: Barber examiners, reciprocity with other states, admission to apprentice examinations — §147.52, Code of Iowa, 1966. If any other state discriminates against graduates of Iowa barber schools in admission to take barber examinations in such other states, the Iowa board of barber examiners is acting quite properly in placing similar disabilities on the graduates of schools in such other states. (Haesemeyer to Shaw, State Representative, 5/15/70) #70-5-6

The Honorable Elizabeth Shaw, Scott County Representative: Reference is made to your letter of April 16, 1970, in which you request an opinion of the attorney general and state:

"At present any person desiring to become a barber is restricted by rulings of the Board of Barber Examiners to attending schools only in states having reciprocal arrangements with Iowa under penalty of non-admissibility to the Iowa apprentice examinations. I request that you examine Section 147.52 of the Code to determine whether its provisions are constitutional when extended to the denial of the right to take a licensing examination upon the basis of a discriminatory law of another state.

"Of all the professions covered by Chapter 147 of the Code, the Board of Barber Examiners is the only group which interprets Section 147.52 as restricting admission to the Iowa examination to graduates of schools in states which permit graduates of Iowa barber colleges to take their licensing examinations.

"I call your attention to Code Sections 147.49 governing recognition of *licenses* granted by other states, and Code Section 158.4 which gives the Board of Barber Examiners discretion to evaluate the standards of any barber school and to determine whether the school provides an approved training course. In view of these provisions, I request your opinion as to whether Section 147.52 is unconstitutionally restrictive of the right of a citizen of this state to attend the barber college of his choice, so long as its curriculum is approved by the Board of Barber Examiners."

Subsequently you supplemented this request with your letter of April 23, 1970, in which you say:

"In reviewing my request for an opinion with respect to Section 147.52 of the Code which was made by letter to Mr. Turner, April 16, 1970, it occurs to me that I ought also to have asked for an interpretation of the scope of the language of this Code provision.

"Many of the other professions covered by Chapter 147 do not interpret the language as applicable to admission to licensing examinations. Does the wording encompass admissibility to licensing examinations, and if it does, is such a provision constitutional?"

§147.52, Code of Iowa, 1966, provides:

"Reciprocity. When the laws of any state or the rules of the authorities of said state place any requirement or disability upon any person holding a diploma or certificate from any college in this state in which one of the professions regulated by this title is taught, which affects the right of said person to be licensed in said state, the same requirement or disability shall be placed upon any person holding a diploma from a similar college situated therein, when applying for a license to practice in this state."

§158.4, Code of Iowa, 1966, is a part of Chapter 158, a chapter devoted exclusively to the practice of barbering. It provides in part:

"Whenever any person has successfully completed a nine months course both of theory and practice *in any school of barbering approved by the barber examiners board,* and has furnished the necessary certificates and complied with the requirements of section 158.3, he may take an examination for registration as a barber's apprentice, said examination to be given by the board at the same time as the regular examination for barber's license." (Emphasis supplied)

Chapter 147, Code of Iowa, 1966, has application to the practice of various professions including medicine and surgery, podiatry, osteogathy, osteopathic medicine and surgery, chiropractice, physical therapy, nursing, dental hygiene, optometry, pharmacy, cosmetology, *barbering,* and funeral directing or embalming, §147.2. The administration and enforcement of the provisions of the chapter is vested in the various examining boards including of course the barber board, §147.12.

§147.52 is part of a division or subtitle of Chapter 147, consisting of §§147.44-147.54 entitled "Reciprocal Licenses". This division of Chapter 147 provides generally for the negotiation by the various examining boards of agreements with their counterparts in other states for the reciprocal licensing of residents of the contracting states.

§147.49 does as you indicate provide for reciprocal *licensing* but in these terms:

"The department shall, upon presentation of a license to practice a profession issued by the duly constituted authority of another state, with which this state has established reciprocal relations, and subject to the rules of the examining board for such profession, license said applicant to practice in this state, unless under the rules of said examining board a practical examination is required in such cases."

Note that this section does not apply where a practical examination is required and in any event is subject to the rules of the exabining board. The board of barber examiners does require a practical examination for licensing as an apprentice, §158.4. Hence, in our opinion §147.49 is not particularly germane to the question you present.

Statutes authorizing reciprocal licensing quite commonly provide as does Iowa law that where the laws of another state place a requirement or disabality upon a person licensed to practice in Iowa, the same requirement or disability shall be placed upon persons licensed in such other state. Such statutes have withstood the challenge that they unconstitutionally delegate to the other state the power to make the law of the enacting state. 16 Am. Jur. 2d, Constitutional Law §247.

In Iowa the supreme court rejected an assertion that the requirements of the board of medical examiners that an applicant submit to an examination and be a graduate of a medical school of recognized standing amounted to unconstitutional class discrimination. *State v. Miller,* 1910, 146 Iowa 521, 124 N.W. 167.

In *Moratto v. Harper,* 1941, 237 Wis. 295, 296 N.W. 902, certain Wisconsin residents who had graduated from an unregistered cosmetology school in another state were unsuccessful in challenging on constitutional grounds the action of the board of health in refusing to permit them to take the examination to be licensed as cosmetologists. See also 56 A.L.R. 2d 900 and 10 Am. Jur. 2d, Barbers and Cosmetologists, 824.

But in any event there is no mistaking the meaning of §147.52. If any other state discriminates against graduates of Lowa barber schools in admission to take barber examinations in such other states, the Iowa board of barber examiners is acting quite properly in placing similar disabilities on the graduates of schools in such other states.

The fact that the other professions covered by Chapter 147 do not interpret §147.52 the same as the barber examiners is not, in our opinion, dispositive of the matter.

May 15, 1970

STATE OFFICERS AND DEPARTMENTS: Barber licenses, both apprentice's license and certificate required. — §§147.80, 158.4, Code of Iowa, 1966. To continue practicing as an apprentice barber an individual must have both a currently valid apprentice's license issued under §147.80(17) and an apprentice's certificate issued under §158.4. (Haesemeyer to Dr. Reeve, Commissioner of Public Health, 5/15/70) #70-5-7

Dr. Arnold M. Reeve, Commissioner of Public Health: You have requested an opinion of the attorney general with respect to the following:

"Since the adoption of the amendment to Section 147.80 of the Code of Iowa by the Sixty-third General Assembly found in Chapter 139, Acts of the Sixty-third General Assembly, a question has arisen in regard to the administration of Section 158.4 because of the following rovision in the amendment, 'for an original apprentice barber's license, and the annual renewal of an apprentice barber's license, a fee of five dollors.'

"Is a person who is given an apprentice's certificate under the provisions of Section 158.4 of the Code, but who has failed to appear for or failed to pass the barber examination, eligible to continue practicing as an apprentice barber indefinitely by renewing the apprentice barber license as providdeed in the aforesaid amendment?"

§147.80, Code of Iowa, 1966, as amended by Chapter 139, :1, 63rd G.A. (1969), provides in relevant part:

"The following fees shall be collected by the state department of health:

* * *

"15. For a barber's examination and a barber school instructor's examination, a fee of twenty-five dollars; for an apprentice barber's examination, a fee of fifteen dollars.

"16. For an original barber school instructor's license, and the annual renewal of a barber school instructor's license, a fee of twenty-five dollars.

"17. For an original apprentice barber's license, and the annual renewal of an apprentice barber's license, a fee of five dollars.

* * *"

§158.4 provides:

"Whenever any person has successfully completed a nine months course both of theory and practice in any school of barbering approved by the barber examiner's board and has furnished the necessary certificates and complied with the requirements of section 158.3, he may take an examination for registration as a barber's apprentice, said examination to be given by the board at the same time as the regular examination for barber's license. If any such applicant successfully passes the examination, he shall be given an apprentice's certificate which certificate will

entitle him to pursue a clinic or practice course under the direct supervision and tutelage of a licensed practitionar of barbering for a period of eighteen months from the date of issuance thereof. At the end of said period of eighteen months, upon furnishing to the board satisfactory proof that he has faithfully pursued a course of study as apprentice under the supervision and tutelage of a licensed barber in this state for said period of time, h eshall be permitted by said board to take the regular examination for a license to practice barbering. Provided, however, that any person who has practiced barbering in the state of Iowa for a period of more than five years prior to the taking effect of the barbers license law, or any person who has practiced barbering in any other state for a period of more than five years, shall, upon furnishing satisfactory proof thereof to the examining board, be permitted to take the examination for a license to practice barbering in this state."

Under the wording of these statutes an individual with the necessary prerequisites could apply for and have administered to him the examination for registration as a barber's apprentice (§158.4) and pay the fifteen dollars ($15.00) fee therefor (§147.80(15)). If he passed the examination he would be entitled to an apprentice's certificate good for eighteen months, §158.4. At the same time he would have to obtain an original apprentice license good for one year and pay the required five dollar ($5.00) fee, §147.80(17). Twelve months later he would have to renew this license and pay another five dollars, §147.80(17). Six months after that even though his *license* had six months to go on it his apprentice's *certificate* would expire and he would have to do one of two things. He would either have to take and pass the barber's examination or again take and pass the apprentice's examination, in the latter case again paying the fifteen dollar ($15.00) fee.

It would seem somewhat anomolous for an individual to be obliged to have both a certificate issued under §158.4 and a license under §147.80(17) in order to be an apprentice barber but in our opinion that is what the law requires. Thus, in answer to your question an apprentice barber who failed to take or pass the barber examination would have to stop practicing as an apprentice barber unless he then again took and passed the apprentice barber's examination and obtained another apprentice's certifictae good for eighteen months. Presumably, this procedure could go on indefinitely but the person involved would at all times have to have both an apprentice certificate issued under §1588.4 and an apprentice license under §147.80(17).

May 20, 1970

MOTOR VEHICLES: Fees required by §13, Subsection 1, and §23 of H.F. 1, Acts of the 63rd G.A., become effective July 1, 1970. No notice is required to be given to carriers or other jurisdictions. (Beamer to Fitzgerald, Iowa Reciprocity Board, 5/20/70) #70-5-8

Mrs. Joy B. Fitzgerald, Executive Secretary, Iowa Reciprocity Board: Reference is made to your recent letter in which you requested, on behalf of the Iowa Reciprocity Board, the following opinion with respect to §§13 and 23 of H.F. 1, Acts of the 63rd G.A., Second Session:

"1. Item 1. of Section 13 provides for a seven dollar fee for reissuance of registration credentials or for transfer of credentials.

"2. Section 23 provides, in part, for identification fees and fee for the reciprocity permit. With the exception of the one dollar fee assessed for the backing plate, all other fees have increased.

"Will these fees go into effect July 1, 1970? If not, when will they become effective? If effective as of July 1st what notice should be given to the carriers and to the other jurisdictions?"

Section 326, Code of Iowa, 1966, was repealed by the Acts of the 63rd G.A., Second Session. Section 13, subsection 1, of H.F. 1, Acts of the 63rd G.A., Second Session, provides as follows:

"1. No additional registration fee shall be assessed on a replacement vehicle upon which the registration fee would have been the same as that for the deleted vehicle. The fee for reissuance of registration credentials or for transfer of credentials shall be seven dollars."

Section 23 of H.F. 1, Acts of the 63rd G.A., Second Session, provides as follows:

"Sec. 23. Any nonresident registered vehicle shall be subject to all laws, rules, and regulations governing the operation of such vehicle on the highways of this state. The registration number plates, sticker, or other identification assigned and furnished to any vehicle for the current registration year by the state in which the vehicle is registered shall be displayed on such vehicle substantially as provided in chapter three hundred twenty-one (321) of the Code for vehicles registered pursuant to the provisions of this Act. In addition, the board shall charge and collect an additional fee of one dollar for each plate, and two dollars for each sticker, or other identification furnished for each vehicle registered in accordance with the provisions of this section or extended reciprocity in accordance with the provisions of this section except that no charge shall be made for the initial registration receipt or cab card issued for each vehicle registered pursuant to an apportionment registration agreement. The same fee shall be charged for issuance of duplicate plates, stickers or other identification required and a fee of two dollars shall be charged for each duplicate or replacement registration receipt or cab card."

House File 1, Acts of the 63rd G.A., Second Session, was passed by the General Assembly and approved by the Governor. The Attorney General has given his opinion that a bill becomes a law following its passage when it is approved by the Governor. 1968 OAG 379, 380. It was approved on April 9, 1970.

There being no publication clause, and no time specified in the act, or in another law, as to when it is to take effect after July 1, 1970, H.F. 1 will take effect July 1, 1970, under the provisions of §3.7, Code of Iowa, 1966, as amended by Ch. 83, 62nd G.A. 1968 OAG 379, 381. It cannot take effect until then. Art. III, §26, Constitution of Iowa. Thus the fees required by H.F. 1 will be imposed on or after that date. Enactments of the legislature are notification to all concerned of what they contain. The enactments themselves are notice of the terms, especially when clearly expressed. *Woodruff and Son v. Rhoton*, 1960, 251 Iowa 550, 101 N.W. 2d 720; Merrill on Notice, Vol. 3, Chapter 23, §§1104 and 1107. The law is presumed to be equally within the knowledge of all parties. *Upton v. Tribilcock*, 1875, 91 U.S. 45, 23 L.Ed 203.

In summary, the fees provided for in §23 and §13, subsection 1, of H.F. 1 become effective on July 1, 1970. No notice is required to be given to carriers or other jurisdictions.

June 10, 1970

LABOR — EMPLOYMENT AGENCIES: *Licensed Employment Agencies,*

Fee Limitation, Employment Agency Contracts, Bureau of Labor Fund, §94.0 as amended 63rd G.A., S.F. 173, §§94.5, 95.2, 95.3, 95.1, Code of Iowa, 1966. An employment agency cannot collect any fee in advance of wages actually paid, except registration fees of $1.00 or less, and cannot collect the total 8% of employee's annual gross earnings the first month on positions covered by §94.6. Employment agency contracts are unilateral in nature and are terminated by acceptance of employment secured by agency and payment of fee, after which there is no obligation as to future employment. If employment is never secured by the employment agency for the applicant, then there is no obligation from applicant unless he later takes a job that employment agency can show they procured for him. Bureau of Labor funds may be used for rating and classification purposes since investigation of employment agencies is a duty of Employment Agency Licensing Commission of which Labor Commission is a member, if other members of the Employment Agency Licensing Commission so desire. (Garretson to Addy, Commissioner, Bureau of Labor, 6/10/70) #70-6-1

Mr. Jerry Addy, Commissioner, Bureau of Labor: This will acknowledge your letter of May 25, 1970, in which you observe that Section 94.6, Code of Iowa, 1966 has been amended by the 63rd General Assembly. You request an opinion on various subjects which you have divided into three groups and which we summarize as follows:

1. May an employment agency collect any fee in advance of wages actually paid, as for example the total eight percent of an employee's yearly gross earnings during the first month of employment, and if so, what authority has the Employment Agency Licensing Commission to set out regulations regarding collection of such fees?

2. What action or inaction terminates a contract between an employment agency and a job applicant, does procurement and acceptance of such employment terminate the contract, and does failure to procure employment within a specified time limitation terminate such contract? You ask whether the Employment Agency Licensing Commission has authority to set a specific time limit for termination of such a contract?

3. Does the Labor Commission have authority to use funds allocated to the Bureau of Labor to obtain a rating and classification report for purposes of investigation as required by Section 95.3, Code of Iowa, 1966?

In reply to the above, it would perhaps be best first to set out Section 94.6, Code of Iowa, 1966, as amended by recent acts of the 63rd General Assembly (Senate File 173). This Code section now reads as follows:

"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 percent 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 eight percent 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, or to fees charged solely to employers where no fee is charged to the employee."

In response to your first question, an employment agency may not collect any fee in advance of wages actually paid, with the exception of

registration fees of $1.00 or less referred to in Section 94.5 and 95.2, Code of Iowa, 1966. Section 95.2 clearly and unequivocally requires that an applicant for or holder of an employment agency license cannot charge more than this $1.00 in advance and we set out the pertinent parts of said Code section as follows:

* * *

"Any person, firm, or corporation applying for a license, as provided in this chapter, to operate an employment agency for furnishing or procuring of employment shall furnish the commission with its contract form, which form shall distinctly provide that no fee or other thing of value in excess of one dollar shall be collected in advance of the procuring of employment and no license shall be issued unless such contract form contains such provision. Thereafter, any person, firm, or corporation to whom a license has been issued that violates this provision of its contract shall have his license canceled."

In Attorney General's Opinion of June 2, 1959, it was pointed out that money must *first be paid* to the employee before a percentage can be determined on same. At the time of this opinion, the limitation was five percent of annual gross earnings. The recent acts of the General Assembly raised the amount to eight percent of annual gross earnings. The statutory raising of the annual percentage does not affect the reasoning otherwise contained in the previous Attorney General's Opinion.

Also an employment agency would not be allowed to collect the total eight percent of an employee's yearly earnings in the first month. The statute clearly limits fees on positions covered to not more than twenty-five percent of the first month's wages. Twenty-five percent of the first month's wages is not eight percent of a year's wages. For example, an employee making two hundred dollars per month would be making two thousand four hundred dollars per year. Twenty-five percent of two hundred dollars the first month is fifty dollars, the maximum the employee would have to pay the first month, which is considerably short of the eight percent of two thousand four hundred dollars or one hundred ninety-two dollars.

The answer to the above being in the negative, it is not necessary to answer that part of your question regarding authority to set out regulations for fees.

Your second group of questions concerns what action or inaction terminates a contract between an employing agency and the job applicant.

The general nature of contracts of this sort may be considered unilateral. An excellent definition of a unilateral contract is found in Volume 42, *Words and Phrases,* as being a "promise by one party to do a certain thing in the event another party performs a certain act." Applying this definition to employment agency contracts, the performance is the furnishing of employment to the job applicant. If employment is procured by the employment agency the applicant pays; if not procured, he does not pay. It would seem. therefore, that for this unilateral contract to be "terminated" it would be necessary that it be completed by acceptance of employment through the employment agency and payment of wages by the employer, upon which the percentage due to the employment agency

could be determined and paid. If the contract was so performed, then there would, of course, be no further obligation between the employee and the employment agency with regard to any subsequent employment.

It must be kept in mind, however, that *if* the employee is *never* placed in any employment by the employment agency, then there has been no performance on the part of the employment agency on their part of the unilateral contract, and thus there is no obligation due from the employee, unless the employee later takes work in a position which the employment agency *could show* was actually procured by them.

As to your question as to what authority the Employment Agency Licensing Commission has to establish a time limit for "termination" of a contract between an applicant and an employment agency, we find none. It is pointed out further that any regulation of this chapter is legislative in nature, and any rules drawn covering same could only be under clear statutory enactment and authority given by the legislature.

Your final question is as to whether the Labor Commissioner has the authority to use funds allocated to the Bureau of Labor to obtain a rating and classification report for purpose of investigation as required by Section 95.3, Code of Iowa, 1966.

This Code Section deals with the issuance or refusal of licenses for employment agencies, and reads as follows:

"95.3 *Issuance or refusal.* The commission shall fully investigate all applicants for the license required by section 95.1, and shall not issue any license earlier than one week after the application therefor is filed, provided, however, that the commission shall either grant or refuse such license within thirty days from the date of the filing of the application. All licenses issued under the provisions of this chapter shall expire on June 30 next succeeding their issuance."

The commission above defined is further described at Section 95.1, Code of Iowa, 1966, as consisting of the Secretary of State, the Industrial Commissioner, and the Labor Commissioner. The investigation thus being a duty, at least in part of the Labor Commissioner, there is no valid reason why funds of the Bureau of Labor could not be spent to obtain a rating and classification report if the other members of the commission desire same.

June 12, 1970

COUNTIES: COUNTY OFFICERS, Sale of County Property, §446.27, 569.8, Code of Iowa, 1966. Assessor is not precluded by statute from purchasing real estate sold by county pursuant to §569.8, Code of Iowa, 1966, and the prohibition contained in public bidder law, §446.27 does not apply to lands purchased from the county under 569.8. (Nolan to Pelzer, Emmet County Attorney, 6/12/70) #70-6-2

Mr. Max O. Pelzer, Emmet County Attorney: This is in answer to your request for an opinion on the following question:

"Can a county assessor purchase property at a sale under Section 569.8?"

The request further states that you are concerned with the prohibitions set out in §446.27, Code of Iowa 1966, which prohibit the Treasurer or Auditor from purchasing real estate sold for the nonpayment of taxes.

A tax sale held pursuant to Ch. 466, Code 1966, does not create or pass title to the property but gives the holder of a tax certificate only a chattel or lien which can ripen into title upon compliance with statutory requisites. *Moffitt v. Future Assurance Associates, Inc.,* 1966, 258 Iowa 1160, 140 NW2d, 108. When property is offered at a tax sale under the provisions of §446.18 and no bid received, or if the bid received is less than the total amount of the delinquent taxes, interest, penalties, and costs, the county, through its board of supervisors, may be a purchaser at such sale and be entitled to all the rights of purchasers at tax sales. §446.19.

§569.8 provides:

"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 endorsements of subsequent general taxes, interests, and costs, . . .

"Rural 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."

Where the county is the purchaser under the public bidder law (§446.19) and notice of the expiration of the right of redemption has been served upon the person in possession of such real estate and also upon the person in whose name the same is taxed, pursuant to §447.9, it may thereafter acquire title to the real estate by virtue of a tax deed executed pursuant to §448.1, Code of 1966, by the county treasurer. When the title becomes vested in the county by virtue of such tax deed, or by bidding in real estate at an execution sale pursuant to §569.1, then the county may thereafter manage, control, lease or sell such real estate on such terms, conditions, or security as the governing body may deem best. (§569.5). §569.7 then provides:

"The said governing body may appoint its chairman . . . to execute and acknowledge, for and on behalf of the . . . county . . . leases and deeds of conveyance, but said instruments when executed shall be approved by the said body and said approval spread upon its minutes with the yea and nay vote thereon. A transcript of said minutes certified by the secretary of said body shall be entitled to be recorded in the same manner as the approved instrument is entitled to be recorded."

The prohibition contained in §446.27 concerning the purchase of real estate sold for nonpayment of taxes does not apply to sales made pursuant to §569.5. We find no statute precluding the assessor from purchasing real estate sold by the county under §569.5.

June 15, 1970

COURTS: Garnishment — §627.10, Code 1966. $150.00 limitation applies to each garnishment but does not limit the number of garnishments. (Nolan to Pelzer, Emmet County Attorney, 6/15/70) #70-6-3

Mr. Max O. Pelzer, Emmet County Attorney: This is in reply to your request for an opinion on the following:

"Can the Sheriff garnish for more than $150.00 plus costs of garnishment for a creditor?

"Section 627.10, in the 1966 Code of Iowa, provides 'all above said exempt amount shall be liable for garnishment, except that no creditor may garnish for more than one hundred fifty dollars plus his costs of garnishment'.

"It can be argued either way: whereby, no matter how many times you garnish the $150.00, exemption applies to each garnishment, or you can argue that the $150.00 applies no matter how many times you garnish the maximum that you realize to be $150.00.

"I think that the $150.00 limitation applies to only *each garnishment;* therefore, if a new garnishment is issued, the creditor could then again realize $150.00."

I am enclosing herewith a copy of an unpublished opinion issued by this office on November 20, 1957, (Ref. 1958 OAG 9.8) which states:

". . . I am of the opinion that the limitation of $150.00 upon a creditor exercising his remedy of garnishment is not by the terms of the statute, or by intent a limitation upon the number of garnishments a creditor may pursue. However, the maximum amount that a creditor may recover by the remedy of garnishment is $150.00."

In the 43 Iowa Law Review at page 561 this opinion was interpreted as follows:

"It has been questioned whether this provision ($150.00 limitation) limits the creditor to $150.00 each time he garnishes, or whether the limitation imposed is a total maximum amount recoverable by the remedy of garnishment. The Iowa attorney general has expressed an opinion embracing the latter construction, which seems the more reasonable."

The Iowa Law Review does not correctly interpret the 1957 opinion. Garnishment is a proceeding for the seizure under legal process of property of the debtor in the hands of a third person prior to any adjudication of the rights of the plaintiff. 4 AmJur., Attachment and Garnishment, 553. Garnishment is a species of attachment being in effect a subrogation or formal judicial assignment of actual property, money and credits that would be capable of being voluntarily assigned. *Lewis v. Barnett,* 33 P 2d 331, 335, 139 Kan. 821, 93 ALR 1082. However, death of the defendant before a judgment is rendered against him has been held to dissolve garnishment proceedings had in an action against defendant. *First National Bank v. Rohlik,* 262 NW 458, 66 N.D. 72. The garnishment creates no lien in plaintiff's favor *Bower v. Port Huron Engine & Thresher Co.,* 80 NW 345, 109 Iowa 255. See also *Gilmore v. Cohn* 71 NW 244, 245, 102 Iowa 254.

I am of the opinion that the 1957 opinion issued by this office is a correct statement of the law. Garnishment against specific property is generally obtained only once. However, neither the opinion nor §627.10, Code 1966, prohibit a creditor from obtaining a garnishment of wages or salary for services not covered by the prior garnishment whether held by the same or different employers. Thus it would appear that a creditor could garnish up to $150.00 more than once on a series of garnishments.

June 15, 1970

ELECTIONS: Voter Registration — Ch. 1037, Acts, 63rd G.A. Requires permanent registration in all precincts of counties over 50,000 population in addition to that presently required in cities over 10,000

population. Cost is to be shared but further legislation is indicated re salary of auditor or commissioner. (Nolan to Hansen, State Representative, (6/15/70) #70-6-4

Mr. Willard R. Hansen, State Representative: This is a response to your request for an opinion clarifying House File 1097, Ch. 1037, Acts 63rd G.A., Second Session. The Act which becomes effective as law on July 1, 1970, requires permanent registration in all counties of 50,000 population and over in addition to the present requirement for permanent registration in cities of 10,000 population or more.

Your questions are set out below:

"Commencing with line 13 of the amendment, I call your attention to the words, 'in any such city or county', as it fits into 48.3.

"1. In counties over 50,000, what requirements are made of towns under 10,000?

"2. Does the choice of 'such city' refer only to those over 10,000 as found in line 5 of 48.1?

"3. Is the word 'county' broad enough to include towns under 10,000?

"I am concerned as to whether this bill would require registration in counties over 50,000, the cities therein over 10,000, and any other unincorporated areas within that county, but not incorporated areas under 10,000."

In answer to the above it is our opinion that under this act, all residents of counties with a population over 50,000 must register to be eligible to vote. The city clerk is the commissioner of registration in cities of 10,000 population or over, and the county auditor is designated commissioner of registration in the counties.

The words "such city" at line five of §48.1, Code 1966, refer only to those cities of 10,000 population and over. The word "county" is, I believe, broad enough to include all other towns within the county.

You also asked about §48.18, Code 1966, which provides that the city and county shall share the cost of setting up registration equally. You asked:

"1. How is this cost shared, what is the formula for pro-rating this cost?

"2. If registration is imposed on towns under 10,000 in counties over 50,000, who incurs the cost of the area's registration?"

The cost of setting up registration is to be "shared equally". §48.18(5). However, House File 1097 (Ch. 1037) provides that additional compensation of the commissioner shall be fixed by "ordinance". Since Ch. 217, Acts of the 63rd G.A., First Session makes provision for the county auditor's salary on the basis of population and assessed valuation of the county, this language coupled with the fact that the board of supervisors acts on salaries by resolution rather than by ordinance leads us to conclude that clarifying legislation on this matter is indicated.

June 15, 1970

COURTS: Court Reporters (S.F. 253) Ch. 1268, Acts 63rd G.A., 2nd Session. Court may consider any service as a full-time court reporter in determining whether to order increase in salary for a full-time court reporter employed by the court under provisions of S.F. 253 which authorizes such increase "for length of service in excess of five years". (Nolan to Gaudineer, State Senator, 6/15/70) #70-6-5

The Honorable Lee H. Gaudineer, Jr., State Senator: You have requested an opinion on the meaning of the language "for length of service" as it appears in S. F. 253 (Ch. 1268, Acts of the 63rd G.A., Second Session). In your letter you state that the bill raised the pay of the district court reporters. Your letter also states:

"It was intended that any court reporter who had more than five years experience should receive an additional amount not to exceed ten per cent of his designated base salary as determined by all of the judges in his district.

"However, in reading the specific language, it has been construed to mean that such experience must be in the judicial district in which he is currently employed. This language was an amendment added from the floor of the senate. It was rejected twice when it was designed to apply only to certain districts within the state. Thereafter it was hurriedly redrafted to apply to all of the judicial districts within the state. I suppose I should have used the terminology, 'for length of service as a court reporter' because this was the intention. Upon reading the entire bill I believe that is what the language actually means.

"In any event in some of our judicial districts one or two judges have raised the question whether or not this language actually restricts this additional compensation to those court reporters who have been reporters in their district only in excess of five years. As you know, the order for additional compensation must be signed by all judges in the district and if one abstains, the additional compensation cannot be paid.

"Therefore, may I ask for your kind review of Senate File 253 and opinion as to whether or not the language, 'for length of service' when taken with the context of the bill, actually means, 'for length of service as a court reporter' or experience as a court reporter."

The language in question as it appears in S. F. 253 is as follows:

"All of the judges in a judicial district may, by joint order, increase the annual salary of a full-time shorthand reporter in that district for length of service in excess of five years by an additional amount not to exceed ten per cent of a reporter's annual salary in such a district." (§1 Subsection 5)

* * *

"All of the judges of municipal court may, by joint order, increase the salary of a full-time shorthand reporter in that court for length of service in excess of five years by an additional amount not to exceed ten per cent of a reporter's annual salary in such municipal court." (§3)

As used in S.F. 253 the term "length of service" does not appear to be qualified as to place or kind. The Act permits additional increase in salary only for a shorthand reporter, now employed full-time in that district, or municipal court, thus precluding the hiring of a shorthand reporter, regardles of experience in other jurisdictions, at a salary greater than the new base pay.

However, there is no qualification of where the service in excess of five years may have been completed, in the case of a shorthand reporter who otherwise under this bill might be given an increase in annual salary upon joint order of the court. In *Lee v. Board of Education, City of New York,* 50 N.Y.S. 2d 86, 186 Misc. 1011, recognition was given only for regular service with tenure where the law specified "length of service in the system." Since S. F. 253 contains no requirement that the service be *in the judicial district* or *in the municipal court,* where the reporter is currently employed, the judges by joint order may recognize any service as a full-time shorthand reporter in determining whether or not to order an increase in salary.

June 15, 1970

COUNTIES: Highways — §309.68, Code 1966, Ch. 1132, Acts 63rd G.A., 2nd Session. Green County secondary road funds may be used to assist in the opening of a connecting road in Guthrie County providing access to Highway 141. (Nolan to Richardson, Greene County Attorney, 6/15/70) #70-6-6

Mr. R. K. Richardson, Greene County Attorney: You have asked for an attorney general's opinion as to whether it would be permissible under Sec. 309.68, Code 1966, as amended by Senate File 1069 (Ch. 1132 Acts of the 63rd G.A., Second Session) for Greene County to use its secondary road funds to assist in the construction of a continuation of such road in an adjoining county. Your letter states:

"Our problem concerns the paving of a county secondary road to the county line. At the county line, the road must turn either left or right for a mile before extending on one mile south, in Guthrie County, to Highway 141. The County Engineer's question is, can Greene County, under this Section, spend secondary road funds to assist Guthrie County in opening the road in Guthrie County directly south of the Greene County road so that it will not be necessary to turn, and so that the Greene County road would extend directly on south to Highway 141. From a financial standpoint, if the road had to be turned at the County line, it would require such a turn that it would cost the County more money to purchase the land to make the turn than it would to assist Guthrie County in purchasing the right-of-way and constructing the road straight through."

Senate File 1069 was enacted by the last session of the legislature to permit two counties to cooperate in the construction of a road under very similar circumstances to those which you present. It is a statute of general and not special application and is available for the purposes you describe. The provisions of the Act are as follows:

"Section 1. Section three hundred nine point sixty-eight (309.68), Code 1966, is hereby amended by adding the following subsection:

'Make joint agreements for the location, construction, and maintenance of roads under their jurisdiction wholly within one county to provide road access to lands in an adjoining county, when such location provides the most economical and practical method of providing such road access. The expense of constructing and maintaining such a road shall be equitably shared by the counties in such proportion as the boards may determine' ".

The joint agreements referred to in this Act are those made pursuant to Ch. 28E, Code 1966, to provide joint services and to cooperate in ways of mutual advantage.

June 15, 1970

SCHOOLS: Principals — Departmental rule specifying number of principals for elementary and secondary schools is subject to modification of H.F. 1338, Acts, 63rd G.A., 2nd Session which permits number of principals to be determined by the local board. (Nolan to Grassley, State Representative 6/15/70) #70-6-7

The Honorable Charles E. Grassley, State Representative: This is in reply to your opinion request of April 15, 1970. You have presented the question of whether language contained in House File 1338, 63rd G.A., Second Session, which was enacted by both houses and signed by the Governor on April 10, 1970, is sufficient to permit school boards locally to determine whether there should be a principal at each school plant in the district. The language in question is as follows:

"The board or governing body of each school or school district shall provide such principals as it finds necessary to provide effective supervision and administration for each school and its faculty and student body."

During your visit to this office you indicated that you had been advised by the State Department of Public Instruction that such language would make it necessary to have at least one principal in each building and possibly two or more principals.

The word "such" ordinarily refers to an antecedent word or phrase identifying something previously spoken of, a specified thing, or class just pointed out. It may also be used for purpose of comparion as to quality or character, or as a word of limitation. 40A Words and Phrases, 1964, pages 37, 38. However, neither of these guides is particularly helpful in resolving the present question because there is no antecedent word to identify or qualify the word. H. F. 1338 amends §257.25, Code of 1966. This section of the code which has been amended previously contains only a general reference to *adequate school staffing.* See §257.25 (11). In *Tarpey v. McClure,* 213 P 983, 987, 109 Cal 593, a statute authorizing the state engineer to employ "such engineers as he may deem necessary" was held not to give unguided discretion as to the number to be employed, it merely being implied that there shall be facts reasonably justifying his conclusion.

In the context in which the phrase is used in House File 1338, it is our view that the words "such principals as it finds necessary" will authorize the governing body of a school district to assign one individual to serve as principal of more than one school building, if the facts substantiate a determination that effective supervision and administration for each school and its faculty and student body can be maintained thereby.

Thus the departmental rule providing that ". . . [n]ot more than one secondary school shall be assigned to one secondary school principal . . ." and that there be an elementary principal in charge of elementary schools is effectively modified by this subsequent legislation and should be revised. See Rule 3.4 (8) Department of Public Instruction, Iowa Departmental Rules, January 1967, Supp. p. 117.

June 15, 1970

STATE OFFICERS AND DEPARTMENTS: Merit Employment, State Board of Regents, Regulations, Statutory Construction — Ch. 17A, Code 1966; Ch. 95, Acts 62nd G.A. 1. Both Merit Act and Regents' regulations are to be equitably applied to all persons in same class. 2. Regents' classification plan is subject to approval of Iowa Merit Employment Commission. 3. Rules of Board of Regents should be submitted for review in accordance with provisions of Ch. 17A, Code 1966. (Nolan to Keating, Iowa Merit Employment Dept., 6/15/70) #70-6-8

Mr. W. L. Keating, Director Iowa Merit Employment Department: This is in reply to your letter of March 27, 1970, requesting consideration of a letter previously submitted by your department on August 8, 1969, asking for an opinion as to the intent and objectives of the Merit Employment Act. The intent and objectives of the Merit Employment Act, Ch. 95, Acts of the 62nd G. A., are set out in §1 thereof as follows:

"Section 1. The general purpose of this Act is to establish for the state of Iowa a system of personnel administration based on the merit principles and scientific methods governing the appointment, promotion, welfare, transfer, lay-off, removal and discipline of its civil employees, and other incidents of state employment. All appointments and promotions to positions in the state service shall be made solely on the basis of merit and fitness, to be ascertained by competitive examinations, except as hereinafter specified."

The previous letter stated that the Merit Employment Commission voted to seek the opinion of the Attorney General as to the proper interpretation of certain rules and regulations submitted by the State Board of Regents pursuant to §3 sub-paragraph 15:

* * *

". . . The state board of regents shall adopt rules and regulations for its employees, which rules and regulations shall not be inconsistent with the objectives of this Act, and which shall be subject to approval of the Iowa merit employment commission. If at any time the director determines that the board of regents merit system does not comply with the intent of this Act, he, subject to the approval of the commission, shall have authority to direct correction thereof and the rules and regulations of the board shall not be in compliance until the corrections are made."

Upon examination of the proposed regulations of the Board of Regents we note that each institution is permitted to set up a separate classification of its employees excluding therefrom all persons excluded by the Act in §3, sub-paragraph 6 (all presidents, deans, directors, teachers, professional and scientific personnel, and student employees under the jurisdiction of the State Board of Regents).

We then proceed to answer the questions posed in the August 8, 1969 letter as follows:

"1. Is it the intent of the Act that the uniform merit system be established for all institutions under the jurisdiction of the State Board of Regents?"

Applying the language from §3(15) set out above it is our view that the Merit Employment Commission may require that the regulations proposed by the Board of Regents are 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 persons in the same class in the same geographical area on a uniform basis. Obviously, there may be some positions included in classifications at one institution for which there is no comparable position and classification at another institution.

"2. Is it the intent of the Act that a uniform classification plan be established for all institutions rather than separate plans for each?"

This question is answered above.

"3. Who approves the classification plan?"

Any rules establishing a classification plan "shall be subject to the approval of the Iowa merit employment commission." The director of the merit system has authority subject to the approval of the commission to direct the correction of the rules and regulations submitted by the Board of Regents so that they comply with the objectives of the Merit Employment Act. (§3) (15).

"4. Is it the intent of the Act that a uniform pay plan be established for all institutions rather than separate plans for each?"

Having in mind that the Board of Regents institutions are located in different geographical areas, such fact may be utilized in setting up pay plans for the employees of such institutions. The merit employment commission itself may consider such fact in adopting its rules and regulations pursuant to §9 sub-paragraph 1 of the Act, supra.

"5. Who approves the pay plan?"

It appears that provision for pay plans covered by an appropriation made by the general assembly and not otherwise provided by law for all employees of the merit system, was covered by §9, sub-paragraph 2 of the Act, supra, such plan to be approved by the executive council after submission from the merit employment commission.

"6. Are public hearings required in the pay plan approval process?"

There is a provision in sub-section 2 of §9 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", to be covered in the merit employment rules for the administration of the Act, "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." [Emphasis added].

"7. Who is the legal appointing authority for the Board of Regents?"

The Board of Regents may designate a personnel officer at each institution as well as the presidents and heads of departments to make appointments to be approved by the Board of Regents. See §262.12, Code of Iowa 1966.

"8. Who is empowered to conduct hearings on appeals of disciplinary actions initiated by the Board of Regents or its delegated agents?"

Paragraph XVII of the proposed rules of the Board of Regents makes no provision for hearings on appeals of disciplinary actions. This para-

graph also incorporates almost without change the provisions of §9, subparagraphs 15 and 16 of the Merit Employment Act, supra, which are also silent on the matter of appeals. Paragraph XXII of the proposed rules of the Board of Regents establishes informal and formal appellant procedure providing for final appeal to the State Board of Regents in cases of dismissal, suspension, demotion, or an alleged act of discrimination. While this paragraph apparently permits the institutions to establish the appeals procedure, the regents themselves retain authority to provide additional regulations on this subject.

"9. Are the rules submitted by the State Board of Regents subject to processing under Chapter 17 A, Code of Iowa?"

§3 sub-section 15 provides that the rules and regulations of the State Board of Regents shall not be inconsistent with the objectives of the Merit Employment Act. §9 of the Merit Employment Act provides that the rules of the Merit Employment Commission should be adopted, "in accordance with chapter seventeen A (17A) of the Code." In order to be consistent, it is my opinion that Board of Regent rules should also be submitted for review in accordance with the procedure set out in Ch. 17A of the Code.

June 15, 1970

COUNTY AND COUNTY OFFICERS: Highways — §306.4, Code 1966. County vacating a road is not required to return roadbed to "farmable condition". (Nolan to Blum, Franklin County Attorney, 6/15/70) #70-6-9

Mr. Lee B. Blum, Franklin County Attorney: This is in answer to your request for an opinion on the following question:

"If a secondary road is vacated under the provisions of Section 306.4 et seq. Iowa Code (1966), is the county required to return the same to 'farmable condition' or to the condition in which the land was immediately prior to being used for road purposes?"

In an opinion dated July 25, 1963, 1964 OAG 208, the attorney general advised that there is no distinction between the terms "vacate" and "close". This opinion cites *McCarl v. Clarke County,* 167 Iowa 14, 148 NW 1015, *Christensen v. Board of Supervisors of Woodbury County,* 253 Iowa 978, 114 NW2d 897. The opinion then states:

"Since these words are used interchangeably, the action of the board of supervisors in vacating a road would also be a formal closing of such road. Even if the formal vacating of the road does not involve its closing without further action, *a highway which is lawfully vacated ceases to be a highway and is completely discharged from the public servitude.*" [Emphasized]

Section 306.4, Code 1966, provides authorization for the "board or commission which has control and jurisdiction over . . . [a] highway . . . on its own motion, to alter or vacate and close any such highway . . .". In the sections which follow this provision, the requirements for vacation are set out, to-wit:

"In proceeding to the vacation and closing of any road . . . the board or commission . . . shall fix a date for a hearing thereon in the county where said road, or part thereof . . . is located. [§306.5]

"Notice of such hearing shall be published in some newspaper of general circulation in the county or counties where such road is located, at least twenty days prior to the date of the hearing. The board or commission . . . holding such hearing, shall notify all adjoining property owners, all utility companies whose facilities adjoin the road right of way, . . . of the time and place of such hearing, by certified mail addressed to the affected property owners . . . as the case may be. [§306.6]

"Said notice shall state the time and place of such hearing, the location of the particular road, or part thereof, . . . and such other data as may be deemed pertinent. [§306.7]

"At such hearing . . . any interested person, may appear and object and be heard. Any person owning land abutting on a road which it is proposed to vacate and close, shall have the right to file, in writing, a claim for damages at any time on or before the date fixed for hearing. [§306.8]

* * *

"After such hearing, the commission, board or boards which instituted such proceedings and conducted such hearing, shall enter an order. Said commission or board may dismiss the proceedings, *or it may vacate and close such road* . . . in which event it shall determine and state in the order the amount of *damages allowed to each claimant. Said order thus entered shall be final except as to the amount of damages.* A copy of such order shall be filed with the county auditor . . . [§306.10, Emphasis supplied]

"Any claimant for damages may . . . appeal as to the amount of damages, to the district court of the county in which the land is located . . ." [§306.11]

Assuming from the question presented by your letter that all of the statutory requirements of §§306.4, through 306.11 have been met, nothing further is required to be done on the part of the county. Such acts may be shown by record of proceedings to vacate. *Polk County v. Brown,* 1967, 260 Iowa 301, 149 NW2d 314. *Braden v. Board of Supervisors of Pottawattamie County,* 1968, — Iowa —. 157 NW2d 123. There is no statutory requirement that a vacated road be made "farmable" by the county.

June 15, 1970

COUNTIES AND COUNTY OFFICERS: Courthouse parking — Ch. 28E, Code 1966. A joint agreement may be entered into by city and county to provide off-street parking on courthouse grounds. (Nolan to Henneberg, Lyon County Attorney, 6/15/70) #70-6-10

Mr. Carrol G. Henneberg, Lyon County Attorney: This is in answer to your letter requesting an opinion as to whether the county has authority to enter into an arrangement whereby the county would permit the development of an offstreet parking lot on courthouse grounds by the city of Rock Rapids, at no expense to the county for the use of the public without charge. Your letter outlining the proposal states as follows:

"The Board of Supervisors of Lyon County, Iowa, has been approached with the request to permit a part of the Courthouse square to be converted to a parking lot for the City of Rock Rapids, Iowa. The proposal is that the County permit the City to use part of the Courthouse grounds which is presently devoted to lawn for a parking lot with the City to bear the expense of improving the same for parking purposes including the installation of 'blacktopping' material, electric lights, etc. The project would be

at no expense to the County and would not involve any formal lease but in my opinion the granting of such permission to use said ground would be tantamount to a lease or license to use said premises.

"Although the 'offstreet' parking would be available to the public without any fees or parking meters it poses the question as to whether or not such use by the public would be for county purposes or whether it would be for the City of Rock Rapids purposes."

Under the provisions of Ch. 28E, Code 1966, it is possible for the city and county to enter into a joint agreement to provide for the establishment of offstreet parking on courthouse grounds. The statutory requirements of such chapter must be strictly followed. Otherwise, there appears to be no authority express or implied for the county to transfer control of courthouse grounds to the city, for parking purposes, by lease or gift.

See Strauss to Cady, Franklin County Attorney, 5-15-59, Strauss to Cothern, Clark County Attorney, 7-27-59, and Strauss to Kober, Black Hawk County Attorney, 4-24-53, copies of which are enclosed herewith.

June 23, 1970

STATE OFFICERS AND DEPARTMENTS: Treasurer of State, warrants, form of — §8.16, Code of Iowa, 1966. The proposed new form for state warrants is in compliance with statutory requirements. (Haesemeyer to Baringer, State Treasurer, 6/23/70) #70-6-11

The Honorable Maurice E. Baringer, Treasurer of State: Reference is made to your letter of June 15, 1970, in which you request an opinion of the attorney general as to the legality of the proposed new state warrant form.

Section 8.16, Code of Iowa, 1966, sets forth those matters which must be included in state warrants as follows:

"8.16 Warrants — form. Each warrant shall bear in the face thereof the signature or a facsimile thereof of the comptroller, or the signature or a facsimile thereof of an assistant comptroller in case of the vacancy in the office of the comptroller; a proper number, date, amount, name of payee, a reference to the law under which it is drawn, whether for salaries or wages, services or supplies, and what kind of supplies, and from what office or department, or for any other general or special purposes whatsoever, or in lieu thereof, a coding system may be used, which particulars shall be entered in a warrant register kept for that purpose in the order of issuance; and, as soon as practicable after issuing such warrant register, the comptroller shall certify a duplicate thereof to the treasurer."

Since the newly designed state warrant form attached to your letter appears to meet all of these statutory requirements it is in our opinion legal.

June 23, 1970

STATE OFFICERS AND DEPARTMENTS: Employment agency commissions, fees charged by employment agencies — §94.6, Code of Iowa, as amended by Senate File 173, Acts, 63rd G.A. (1970). Four prior opinions regarding maximum fees chargeable by employment agencies are reaffirmed. However, the purpose of the statute is to protect job applicants and, if the applicant knowingly agrees to pay the fee in advance, with the full understanding that he is not required to do so,

a contractural arrangement for advance payments with provisions for refund of fees in excess of the respective percentages of actual earnings, when they are ascertained, would be proper. (Turner to Synhorst, Secretary of State, 6/23/70) #70-6-12

The Honorable Melvin D. Synhorst, Secretary of State: At your request, we have reconsidered that portion of the opinion of the attorney general, Garretson to Addy, Commissioner, Bureau of Labor, June 10, 1970, which said that §94.6, Code of Iowa, 1966, as amended by Senate File 173, Second Session, Acts 63rd General Assembly, prohibits an employment agency from collecting a fee in advance of wages actually paid to the applicant. In this connection, we also reconsidered an opinion of the attorney general, Pesch to Lowe, Commissioner, Bureau of Labor, June 2, 1959, and an opinion, Haesemeyer to Parkins, Commissioner of Labor, June 2, 1967, as well as 1964 OAG 243.

Having reconsidered, we believe all of these opinions to be correct. In other words, we believe §94.6, as amended, is clear in its terms and not open to construction. If properly followed, in accordance with past opinions, the fee to the employment agency can easily be computed after the wages have been paid and, in such event, there is no necessity for the consideration of refunds. Not only does this section make reference to "wages paid" and "annual gross earnings", which latter could not in many cases be accurately ascertained in advance, but no provision is made in the entire chapter for a refund after employment has been procured. Accordingly, we must conclude that no employment agency may insist on collecting its fee in advance or in excess of the limitations imposed by §94.6.

However, the purpose of the statute is to protect job applicants and, if the applicant knowingly agrees to pay the fee in advance, with the full understanding that he is not required to do so, a contractural arrangement for advance payments with provisions for refund of fees in excess of the respective percentages of actual earnings, when they are ascertained, would be proper.

June 25, 1970

LIQUOR, BEER AND CIGARETTES: Liquor Control Commission, affixing of seals §§123.24, as amended by Senate File 1122, Acts 63rd G.A. (1970) and 123.17 (2) (g). Containers must contain identifying markers affixed by the commission on the premises of a state warehouse, store or special distributor. The commission may still, as before, require that an additional seal or marker be affixed by distillers prior to shipment into Iowa but may not charge the distillers for buying and affixing the seals or markers. However, any such seals affixed by distillers would serve no useful purpose and would merely duplicate the seals required to be affixed by the commission on its premises. (Turner to Vermeer, Office of the Governor, 6/25/70) #70-6-13

Mr. Elmer Vermeer, Administrative Assistant Office of the Governor: You have requested an opinion of the attorney general whether, in view of Senate File 1122, Second Session, 63rd General Assembly, the liquor commission has authority to require a distinctive seal or mark to be placed on liquor containers which they purchase, prior to shipment of the containers into Iowa.

Before its amendment by Senate File 1122, §123.24, Code of Iowa, 1966, provided in pertinent part as follows:

"Restrictions on sales — seals — labeling. No alcoholic liquor shall be sold by the commission to any purchaser except in sealed container with the official seal or label prescribed by the commission and no such container shall be opened upon the premises of any state warehouse, store or special distributor. Such seal or label shall bear the seal of the commission and shall certify the quality, age, and contents of the bottle or package on which it is affixed and must be attached and sealed to all liquors sold in the state. Possession of alcoholic liquors bought or sold in the state which do not carry such label or seal shall be considered a violation of this chapter . . ."

In addition, §123.17 (2) (g), Code of Iowa, 1966, authorized the commission to make regulations

"Prescribing what official seals or labels should be attached to the packages of liquor sold under this chapter including the various kinds of official seals or labels for the different classes or varieties or brands of liquors."

Senate File 1122 did not amend or in any way limit §123.17 (2) (g) and the commission may still prescribe what official seals or labels should be attached to packages of liquor sold by them. As I understand it, the commission has always required the distillers to affix to each bottle shipped into the state an Iowa seal or stamp purchased by the commission and furnished by them to the distiller. This has been an expensive and time-consuming process.

You will not that the law, even before Senate File 1122 was enacted, did not *require* a seal or label before purchase by the commission — or to be applied by a distiller. §123.24 merely required that no alcoholic liquor be sold by the commission without the seal.

The commission's practice has been to order ten or twenty million stamps at a time, which are submitted to bid to decal companies through the state printing board. I'm informed that these stamps generally cost the state about 1½ cents apiece. When the commission places an order for the purchase of liquor from the distiller, it mails the stamps along with the order to the distiller and charges the distiller 3½ cents per stamp. Doubtless the cost to the distiller is added to the price of the liquor purchased and is subsequently borne by the consumer. While the principal purpose of the stamps was undoubtedly to prevent bootlegging and to discourage consumers from buying their liquor in another state and bringing it illegally into Iowa, it has also apparently been converted to a source of revenue by which the state gains some $28,000 per year! There is no statutory authority for *charging* the distillery for buying and affixing the stamps. Such charge, at least that portion in excess of the cost of the stamps to the state, constitutes a tax on the distillery and a hidden tax if it is passed on to the consumer. Of course, taxation is exclusively a legislative function and the liquor commission has never had power to impose a tax. Evidently, the distillers have accepted the practice for the privilege of selling their products in Iowa. And the unfortunate consumer has either been unaware of this hidden tax or too thirsty to complain.

Otherwise, except for the charge, I see no reason why the commission

could not specify that its suppliers perform the service of affixing the commission's seal. Any large buyer is likely to, and quite properly does, make special demands upon his suppliers for merchandise and service peculiar or suitable to his specific needs or requirements. The commission has authority to continue requiring the distillers to affix the seals although, for reasons which will appear, I doubt they will do so.

In 1967, the General Assembly repealed the 10% occupational tax on gross receipts of liquor licensees on sales of alcoholic beverages by the drink and replaced the lost revenues by adding a 15% markup on all liquor sold to liquor licensees, at the same time discontinuing the discount which had been allowed to liquor control licensees for quantity purchases and imposing the retail sales tax on gross receipts from sales by the drink. See Chapter 158, 62nd G.A. To prevent the liquor licensee from avoiding the 15% markup by repurchasing bottles legally purchased by individuals, each bottle purchased by a licensee was required to bear an additional identification marker applied at the place of purchase. Approximately 30% of all liquor sold by the commission is sold to licensees for sale by the drink. Thus, since that law, each Iowa liquor store has marked, by a rubber stamp, each bottle sold to a liquor licensee (some 30% of the bottles) at the time of purchase. The liquor licensee stamp should not be confused with the official seal or label which the liquor commission has heretofore required the distillers to stick on each bottle.

Although not required by law, the commission's official seals placed on the bottles by the distillers each have a serial number. The Governor's Economy Committee found that recording these serial numbers required a full-time clerk and said "This is needless since no use is made of these numbers. Elimination of the task will save $4800.00 a year in salary." See page 106 of the Economy Committee report.

Senate File 1122, Second Session, 63rd General Assembly, (1970) amended §123.24, apparently for the purpose of allowing the state liquor commission to discontinue the requirement that distilleries affix liquor seals on bottles shipped into Iowa for sale at the state liquor stores and instead to permit the commission to add to the sealed container "such identifying markers as shall be prescribed by the commission and affixed on the premises of a state warehouse or store" and possesion of liquors which do not carry identifying markers as prescribed is still a violation of the liquor control law, the same as before.

Thus, while the liquor commission could, in the exercise of its broad discretion, still require the distillers to affix the labels prior to shipment into Iowa, this would not satisfy the requirement of the new law that identifying markers be affixed *on the premises of a state warehouse or store.* One identifying mark on all bottles sold by the commission to anyone and an additional mark on those 30% sold to liquor licensees would now appear to be adequate to prevent bootlegging and illegal imports without the requirement of still another by the distiller. The commission has never been *required* to serially number the seals, or even to affix them prior to shipment into Iowa and, under the new law there appears to be no greater danger of theft or abuse *prior* to sale by the commission, particularly if the numbers are removed from the seals as

recommended, whether or not the seals are affixed by the distillers. Moreover, eliminating the seal will save the state money because, as noted, the present charge to the distillers is an illegal tax which should be stopped at once, and the commission should bear the full cost of the seals required.

Perhaps the most unfortunate aspect of the new law is that the official seal, whether continued or not, will no longer certify the quality, age and contents of the bottle as it did under §123.24 before amendment, and prosecutors will have to find another means of proving that an unopened bottle does in fact contain alcohol.

June 26, 1970

COUNTIES AND COUNTY OFFICERS: County director of social services subject to Iowa merit system — §§234.12, Code of Iowa, 1966, as amended by Ch. 209, §219, 62nd G.A. (1967), and §249.2, Code of Iowa, 1966, as amended by ch. 209, §388, 62nd G.A. (1967). (Haesemeyer to Shafer, Allamakee County Attorney, 6/26/70) #70-6-14

Mr. John W. Shafer, Allamakee County Attorney: Reference is made to your letter of May 21, 1970, in which you state:

"State Representative John Mendenhall has requested that I write you and ask for an opinion regarding the authority of the Allamakee County Board of Supervisors to appoint a person as director of Social Welfare although she does not possess the educational requirements set out in the Iowa Merit System.

"The case of State of Iowa vs. Arthur Downing listed as Cause No. 72216 in Polk County set forth the authority of the County Board of Supervisors to remove or hire a County Director of Social Welfare. This opinion is dated June 13, 1967. Following that time the merit system was effective approximately September 1, 1967.

"Allamakee County presently has no Director of Social Welfare and the County Relief Director who has over 15 years practical experience could be appointed to this job but the State Department of Social Welfare has raised a matter of her qualifications under the merit system.

"We are aware that there are a number of Directors of Social Welfare in the State of Iowa who do not possess the educational requirements under the merit system but their appointments were either temporary or were made before the merit system was effective."

In *State ex rel Fenton v. Downing,* 1968, — Iowa —, 155 N.W.2d 517, the supreme court held that a county director of social welfare is an employee of the county board of social welfare rather than the state board. The court also rejected the argument that its decision might disqualify the state from receiving federal funds observing:

"It is argued by appellant that without the power to discharge the state board *may* fail to comply with Federal requirements for participation in Federal funds. There is nothing in the record before us to so indicate and the question is not before us. In any event that is a matter for the consideration of the legislature with which this court cannot interfere. 'This court has no power to write into the statute words which are not there.' Iowa Public Service Company v. Rhode, 230 Iowa 751, 754, 298 N.W. 794, 796."

Nevertheless, it is important that we consider the question of eligibility for federal funds in answering the question you raise.

It is clear that under the law a political subdivision may establish a system of personnel administration based on merit principles and to that end may contract with the state merit system for the necessary services and facilities. Thus, Ch. 95, §16, 62nd G.A. (1967) provides:

"Sec. 16. 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 subdivision 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."

In an opinion of the attorney general, 68 OAG 1004, we said:

"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 234.12, Code of Iowa, 1966, as amended by Ch. 209, §219, 62nd G.A. (1967), and renumbered §217.29 in 1969 by the Code Editor, provides:

"217.29 County board employees. The county board shall employ a county director and such other personnel as is necessary for the performance of its duties. The number of employees shall be subject to the approval of the state director. The county director and all employees shall be selected solely on the basis of the fitness for the work to be performed, with due regard to experience and training.

"When the duties of the director of social welfare are combined with the duties of another officer or employee as provided in this Act, the person named to perform the combined duties shall be employed as herein provided."

Section 249.2, Code of Iowa, 1966, as amended by Ch. 209, §388, 62nd G.A. (1967), relating to old-age assistance, provides in part:

* * *

"The state director [of social services] shall:

"1. Co-operate with the federal social security board, created by title VII of the Social Security Act, Public Law No. 271, enacted by the 74th Congress of the United States and approved August 14, 1935 [42 U.S.C. 901], in such reasonable manner as may be necessary to qualify for federal aid for old-age assistance, including the making of such reports in such form and containing such information as the federal social security board, from time to time, may require, and to comply with such regulations as said federal social security board from time to time, may find necessary to assure the correctness and verification of such reports.

* * *

Section 234.6, as amended, and renumbered §217.24 by the Code Editor in 1969, relating to the powers generally of the state director contains

similar language in subsection 1 thereof. Moreover, §217.24(2) requires the state director to:

"2. Exercise general supervision over the county boards of social welfare and their employees."

The chapters of the Code dealing with the various programs administered by the department of social services generally authorize the state department to cooperate with the federal government and do whatever is necessary to qualify for federal funds. See, e.g., §235.2(2) and (3), child welfare; §241.4(2) and (4), aid for the blind; §241A.4, aid to the disabled.

To qualify for federal funding of certain of the programs administered by the state a plan or plans must be adopted which meet the federal requirements. Thus, 42 U.S.C.A., §302 provides in part:

"(a) A State plan for old-age assistance, or for medical assistance for the aged, or for old-age assistance and medical assistance for the aged must —

"(1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

"(5) provide (A) such methods of administration (including methods relating to the establishment and maintenance of personnel standards on a merit basis, . . .

* * *

Virtually identical provisions are found in 42 U.S.C.A., §602(a), aid to dependent children; 42 U.S.C.A., §1382(a), aid to the aged, blind or disabled; 42 U.S.C.A., 1396a(a), medical assistance.

In an earlier opinion of the attorney general, 42 OAG 59, the following question was raised:

"does the state board of social welfare have the power to pass upon the competency of clerical and stenographic help, or to set up standards for qualification on clerical help by the imposition of merit system examinations, in view of the second paragraph of section 3661.013 of the 1939 Code of Iowa."

The opinion then goes on to quote §§3661.013 and 3828.003 of the 1939 Code which statutory provisions are now found in §§217.29 and 249.2 of the 1966 Code, hereinbefore set forth, and concludes:

"The 76th Congress amended the Federal Social Security Act requiring that after January 1, 1940, all states wishing to participate in federal funds must establish and maintain personnel standards on a merit basis. In other words, before the state of Iowa can continue to receive federal funds from the Federal Social Security Board, it was necessary that a merit system be instituted in the state of Iowa. Such merit system necessarily extended to all employees under the control of the State Board of Social Welfare. The authority for the State Board of Social Welfare to so act is found in the provisions of Section 3828.003 above quoted.

"In your letter you state that Dubuque County is an integrated county. As such, all of the employees of the Dubuque County Social Welfare office are paid by the state and are subject to control by the State Board of Social Welfare. Section 3661.013 above quoted apparently gives the County Board the right to employ any clerical or stenographic help which it chooses. However, under the provisions of Section 3828.003 above

quoted, the State Board of Social Welfare must cooperate with the Federal Social Security Board in all respects so as not to lose federal funds.

"Under the amendment to the Federal Social Security Act, it has become necessary for the State Board of Social Welfare to require all employees, including clerical and stenographic help in the county offices, to come under the merit system and to pass a merit examination. It thus appears that in actual operation, section 3661.013 and section 3828.003 are in conflict with each other. It is our opinion that in such a case, section 3828.003 should be given precedence and that all employees coming under the supervision and control of the State Board of Social Welfare must be required to join in the operation of the merit system and pass a merit examination."

In our view this earlier opinion is well reasoned and should be reaffirmed. *State ex rel Fenton v. Downing,* supra, should be limited strictly to the facts of that case and a candidate for the position of county director of social welfare in our opinion would have to meet the requirements of the state merit system to be eligible for appointment. However, it may be that the particular individual you have in mind could be employed as acting director on an emergency or temporary basis under §9(9) of the state merit system act (ch. 95, 62nd G.A. (1967)).

June 29, 1970

AGRICULTURE: Partition Fences — Ch. 113, Code of Iowa, 1966. — The respective owners of adjoining land involved in a partition thereof are required to participate in the erection and maintenance of such partition fence notwithstanding the adjoining tracts are disproportionate in size and dissimilar in usage. Such numbered chapter does not require both tracts involved in the construction of a partition fence to be farmers. Fence viewers have no authority to declare either property to be exempt from liability to participate in the construction of such fence. (Strauss to Holden, State Representative, 6/29/70) #70-6-15

The Honorable Edgar H. Holden, State Representative: This will acknowledge receipt of your letter of April 21, 1970, in which you submitted the following:

"We have numerous instances in our area where a small tract containing the farm residence is sold separately when farm land is sold. This small tract is often occupied by persons who own livestock for pets or as a hobby. Usually the adjacent farm land is continuously cropped and never has livestock on it. In the cases with which I am familiar where the large tract owner has livestock and desires a fence he has assumed full responsibility for the fence.

"The problem arises over the partition fence where the small tract owner desires a fence to contain his pets. Chapter 113 section one (1) would seem to require joint responsibility of the adjacent landowners for the fence. At the same time Chapter 113 section five (5) contains language which seems to indicate there may be times or cases where the owner of the adjoining land 'is not liable to contribute' to the erection of a partition fence.

"The questions on which I would like your opinion:

"1. Does Chapter 113 require each of the adjoining owners to participate in the erection and maintaining of a partition fence where the adjoining tracts are widely disproportionate in size and dissimilar in usage?

"2. Does the application of Chapter 113 contemplate that both of the adjoining tracts would be a farm?

"3. Do the fence viewers have the power to declare that either property owner may be exempted from liability to participate in a partition fence?"

The statute under which your questions arise is §113.1, Code of Iowa 1966, providing as follows:

"The respective owners of adjoining tracts of land shall upon writttn request of either owner be compelled to erect and maintain partition fences, or contribute thereto, and keep the same in good repair throughout the year."

The original Act, being §2355, Code of 1897, was amended by Ch. 52, Acts of the 38th G.A., and thereby provided what is now designated as §113.1, Code of 1966. By this amendment according to the case of *Sinnott v. District Court,* 207 NW 129, 201 Iowa 292, the right was secured to one adjoining owner to compel the other to contribute to the partition fence on written request, without regard to the use to which either put his land.

This section in the case of *Sinnott v. District Court,* 207 NW 129, 201 Iowa 292, insofar as your question No. 1 is concerned, was interpreted in these words:

"The word 'compelled' was in the statute both before and after the amendment. It is clearly used in the sense of duty or obligation, not in the sense of enforcing action by superior authority. Before the amendment, the mere fact of adjoining ownership and use of the land by each for profit compelled, that is, imposed a duty upon both owners to build and repair the partition fence. After the amendment, one is compelled, that is, under a duty, to build or repair a partition fence only on the written request of the other and without regard to his use of the land. The enforcement of the duty, the actual compelling of its performance, under both statutes rested with the fence viewers in a proper case.

"The plain purpose of the statute is to impose no obligation on one landowner, enforceable by the fence viewers, to build or repair a partition fence until written request of the adjoining owner upon him to do so. The fence viewers are given authority only to determine controversies. Sectio 2356, Code of 1897; sections 1831, 1832, Code of 1924; Anderson v. Cox, 54 Iowa, 578, 6 NW 895. The landowner is not to be compelled by the fence viewers to do something he is not required by law to do, or subjected to the expense incident to calling them out until the duty to act has been imposed on him by the request of the adjoining owner. Until then there can exist, in such case, no such controversy as the statute contemplates. The written request is an essential prerequisite to the creation of the duty the fence viewers may enforce; it is essential to their jurisdiction to act at all. Without it there is nothing of which they could take jurisdiction."

I am therefore of the opinion that Ch. 113 requires each of the adjoining owners involved in the partition to participate in the erection and maintenance of a partition fence notwithstanding the fact that the adjoining tracts are widely disproportionate in size and dissimilar in usage. This conclusion is reached from the terms of the statute. The duty imposed upon both land owners was not absolute and was not conditioned by the size of the adjoining pieces of land or the use to which it was put.

Insofar as your question No. 2 is concerned, it is said in the case of

Hansen v. Kemmish, 201 Iowa 1008, 208 NW 277, while it involved a claim for damages because of personal injury suffered in a highway collision between an automobile and a boar, with respect to the obligation of restraining animals and fencing, the following:

"Nevertheless, our statutes relating to fencing and to animals grew out of and primarily were regulatory of the agricultural and live stock industry, as a reference to our decisions will demonstrate. We very early adopted the rule applicable to our habits, conditions, and necessities that cattle were free commoners. The owner was not required to fence them in. Wagner v. Bissell, 3 Iowa, 396. The owner of cultivated land, to recover for their trespassing, had to show that his fence was sufficient to turn stock. Ibid.; Frazier v. Nortinus, 34 Iowa, 82, 1 Am. Neg. Cas. 417. The owner of the stock was not chargeable with negligence merely in allowing them to run at large. Haughey v. Hart, 62 Iowa 96, 49 Am. Rep. 138, 17 NW 189.

"The state is still pre-eminently agricultural and we think that the statutes requiring animals to be restrained have reference primarily to the industry. The males specified in the statute under consideration are essential to such industry. They are not to be put upon the plane of wild animals, ferocious by nature, known to be dangerous to the community, nor, merely from their sex, on the plane of animals known or which in the exercise of reasonable care should be known to be vicious and dangerous, permitting which to be at large is of itself negligence. If such were the effect of the statute requiring male animals to be restrained it would be at least difficult to lay down a different rule in the application of the present statute, which requires all animals to be restrained. The fence laws are inseparably involved in at least some of the requirements for restraint. It cannot have been the purpose of the legislature in making particular provisions prescribing the sufficiency of fences to make them of no avail in the determination of the question of negligence, at least in the case of animals at large other than the specified males."

In answer to your No. 3, I advise that fence viewers have only such power as is conferred upon them by statute. There is no statutory authority in the fence viewers to exempt either property owner from liability to participate in a partition fence.

The statute makes the fence viewers a special tribunal for the adjudication of the rights and settlement of controversies of adjoining owners respecting the erection and maintaining of partition fences, and no action will lie in the courts for such purpose until the viewers have been applied to and acted in the premises, as prescribed by the statute. Lease v. Vance, 28 Iowa 509.

July 7, 1970

STATE OFFICERS AND DEPARTMENTS: School fund lands—§§302.15, 302.36, Code of Iowa, 1966. Permission to remove a dilapidated building on unsold school fund lands may be given by county board of supervisors if approved by Executive Council. (Nolan to Barenger, Treasurer of State, 7/7/70) #70-7-1

The Honorable Maurice E. Baringer, Treasurer of State: This replies to your letter requesting advice on procedure concerning the management of property in the school fund, in compliance with §302.15, Code of Iowa 1966, which provides:

"All property and money hereafter accrued to the school fund shall

be managed and controlled by the state treasurer, and he shall be responsible for the safekeeping, investment, reinvestment and disbursement of same."

With your letter was a copy of a letter from the City Attorney of Oskaloosa asking for permission to remove a dilapidated building from property held in the name of the permanent school fund.

Your letter states:

"In Chapter 302, Code of Iowa, reference is made to resale of property and management of property owned by the Permanent School Fund. Section 302.36 'Resale by State' does not say who is responsible to make the sale. Further, it would appear that some effort should have been made to dispose of the land by January 1, 1955."

The county board of supervisors of Mahaska County is charged by §302.36, Code of Iowa 1966, with the responsibility for the sale of lands acquired under the permanent school fund foreclosure proceedings. This section provides that "such land shall be appraised, advertised, and sold in the manner provided for the appraisement, advertisement, sale and conveyance of the sixteenth section or land selected in lieu thereof." The provisions for the sale of the sixteenth lands are set out in §§302.4 and 302.5, Code 1966, and require that the board of supervisors authorize the appraisement of such lands and "offer for sale the land to be sold." The county auditor must give at least forty days notice describing the land to be sold and the time and place of said sale.

If the land to be sold is located in a city, the land in question should be appraised by the city council of the city prior to the sale. 1940 OAG 449.

When such land has once been offered for sale by the board of supervisors at the appraised value and remains unsold, then if in the opinion of the board it is for the best interest of the school fund that the land be sold for a less price

. . . "It may instruct the auditor to transmit to the secretary of state a certified copy of its proceedings in relation to the order of sale thereof and subsequent proceedings in relation thereto, . . . and the price per acre at which the land had been appraised, which transcript the secretary of state shall submit to the executive council; and if it approves of a sale at a less sum it shall certify such approval to the auditor of the county from which the transcript came, which certificate shall be transcribed in the minute book of the board of supervisors, and thereupon said land may again be offered and sold to the highest bidder, after notice given as in case of sales in the first instance, without being again appraised." (§302.6)

In 1940 OAG 171, the attorney general advised that the board of supervisors might lease such land for oil and gas development and sell the remainder. It is our conclusion that the board of supervisors with the concurrance of the executive council has the power to give permission to the city to remove a dilapidated structure from such land. The prohibition against demolition of buildings on the capitol grounds 1968 OAG 272 is not applicable to this case because the legislature has authorized the sale of school fund lands to the highest bidder.

July 14, 1970

COURTS: Justices of the Peace: §68A.1, 68A.2, Code of Iowa, 1966, as amended by Ch. 106, Acts of the 62nd G.A. Records of Justices of the Peace Court are public and citizens have the right to examine the same subject to specific statutory exceptions. (Conlin to Carr, Delaware County Attorney, 7/14/70) #70-7-2

Mr. E. Michael Carr, County Attorney, Delaware County Court House: We have your letter wherein you request an opinion of the Attorney General as follows:

Are records of Justices of the Peace Courts public.

Section 68A Code of Iowa, 1966 as amended by Chapter 106, Acts of the 62nd G.A. 1967 deals with the examination of public records. Section 68A.1 reads in part as follows:

"Wherever used in this chapter '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."

Section 68A.2 provides that every citizen 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.

It is the opinion of the Office of the Attorney General that Chapter 68A applies to the records of Justices of the Peace and that said records are public and that any citizen may examine them subject to the specific statutory exceptions.

July 14, 1970

COUNTIES AND COUNTY OFFICERS: Platting — §409.1, Code of Iowa, 1966. An original proprietor may sell one or two lots of his original tract before he is required to fil ea plat under the terms of §409.1. (Conlin to Vanderbur, 7/14/70) #70-7-3

Mr. Charles E. Vanderbur, Story County Attorney: We have your letter of April 7, 1970, wherein you request an opinion of the Attorney General as follows:

"Does Section 409.1 regarding platting allow an original proprietor to sell one or two lots off his original tract before he must sub-divide as set out in the section?"

Section 409.1, Code of Iowa, 1966, as amended by Chapter 133, Section 3, Acts of the 58th General Assembly, 1959, provides in pertinent part:

"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 one hundred fourteen (114), of the Code, 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."

Only one case has been found which construes the words "three or more." In that case, *People v. Adams*, 1932, 351 Ill. 79, 183 N.E. 810, the court held "three or more" and "more than two" are phrases identical in meaning.

Iowa cases on statutory construction are virtually unanimous in holding that words and phrases are to be given their plain and ordinary meaning in construing a statute, *Powers v. Harten*, 1918, 183 Iowa 764, 167 N.W. 693; and further that where the language of a statute is clear and definite, the presumption is that the legislature intended the very thing it said, *Reid v. Solar Corp.*, 1946, 69 F. Supp. 626; *Corell v. Williams & Hunting Co.*, 1916, 173 Iowa 57, 155 N.W. 982.

Further, the courts of this state have held that where a statute is plain, clear and unambiguous there is no room for construction. *State ex rel Bedell v. Best*, 1938, 225 Iowa 338, 280 N.W. 338.

The pertinent language of Section 409.1 is quite clear. No more than three lots may be sold without platting. Therefore, it is the opinion of the Attorney General that an original proprietor of any tract or parcel of land may sell one or two lots without causing a registered land surveyor's plat to be made. Where the purpose of the proprietor appears to be to avoid the operation of Section 409.1, Code of Iowa, 1966, as amended by Chapter 133, Section 3, Acts of the 58th General Assembly, 1959, such a practice should be discouraged, but there is no statutory prohibition against it.

July 14, 1970

HEALTH: Disposal of Dead Bodies — §§714.22, 141.4, 141.12, 368.28, Code of Iowa, 1966. The scattering of the properly cremated ashes of a human body upon the ground in the State of Iowa is not an improper disposal thereof, unless forbidden by city ordinance, and is not prohibited by §714.22, Code of Iowa, 1966. (Conlin to Lynch, Winneshiek Coonty Attorney, 7/14/70) #70-7-4

Mr. Thomas C. Lynch, Winneshiek County Attorney: We have your letter of May 27, 1970 wherein you request an opinion as follows: "Does Iowa Code Section 714.22 prohibit the scattering of cremated remains of a human body upon the ground in Iowa?"

Section 714.22, Code of Iowa, 1966, provides as follows:

"If any person willfully and unnecessarily, and in an improper manner, indecently expose, throw away, or abandon any human body, or the remains thereof, in any public place, or in any river, stream, pond, or other place, he shall be imprisoned in the penitentiary not more than two years, or be fined not exceeding twenty-five hundred dollars, or both."

Chapter 141, Code of Iowa, 1966, deals with the disposal of dead bodies. Section 141.4, Code of Iowa, 1966, as amended by Ch. 82, §1, Acts 55th G.A. provides as follows:

"Place of burial or removal, including name of cemetery where interment is to be made, or in case of cremation, the name of the person to whom the ashes are delivered."

Section 141.12, Code of Iowa, 1966, as amended by Ch. 82, §2 Acts 55th G.A. provides that the burial permit must name the person to whom the ashes are to be delivered in the case of cremation. Section 368.28, Code of Iowa, 1966, as amended by Ch. 151, Acts 54th G.A. provides that cities and towns have the power to regulate the burial of the deal and authorize the establishment of crematories for the cremation of the dead.

No case in any jurisdiction has been found where any individual has been prosecuted for scattering the ashes of a human body on the ground. None of the above cited statutory provisions would appear to prohibit such an act. No case has been located where the phrase "or the remains thereof" has been judicially interpreted.

The intent of Section 714.22 is clearly to prevent the abuse of a corpse and to prevent any health hazard which might arise from the exposure or abandonment thereof.

It is therefore the opinion of the Attorney General that the scattering of the properly cremated ashes of a human body upon the ground in the State of Iowa is not an improper disposal unless forbidden by city ordinance and is not prohibited by Section 714.22, Code of Iowa, 1966.

July 16, 1970

COURTS: Police Judges — §§367.13, 601.131, 601.128, Code of Iowa, 1966. Police judges are not required to remit fees to the county treasury in the same manner as justices of the peace. (Cullison to Thomas, Mills County Attorney, 7/16/70) #70-7-5

Mr. James A. Thomas, Mills County Attorney: You requested an opinion of the Attorney General as to whether the compensation of a police judge in the City of Glenwood is the same as for justices of the peace. Specifically, you inquired whether the limitation upon retention of fees in excess of $1,200, applicable to certain justices of the peace, applies also to police judges. In our opinion it does not.

Section 367.13, Code of Iowa, 1966 states:

"Police judges in criminal cases under ordinances or state law 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."

We note that Section 367.13 states that police judges shall receive the same "fees" as justices of the peace receive "in similar cases".

The "fees" which justices of the peace are entitled to receive are specifically enumerated in Section 601.128, Code of Iowa, 1966. They include one dollar for docketing each case, one dollar for issuing each original notice, one dollar for drawing and approving each bond, fifty cents for issuing an attachment, fifty cents for issuing a venire for jury, fifty cents for issuing each subpoena and so forth through twenty-two specific items. These are the "fees" which Section 367.13 states police judges are entitled to receive in appropriate cases.

Section 601.131, Code of Iowa, 1966, entitled "Accounting for fees-compensation" require justices of the peace to pay various portions of the fees they collect each year into the county treasury, depending upon the population of the township in which they serve. Justices of the peace serving in townships having a population of less than ten thousand and more than four thousand are required to pay annually into the county treasury fifty percent of the fees they collect in excess of one thousand two hundred dollars.

In our opinion this section does not apply to police judges. Section 367.13 states that police judges shall receive the same fees as justices of the peace. It does not state they shall receive the same compensation or remuneration.

It may be argued that Section 361.13 relates generally to compensation of police judges, be it fees or a salary in lieu of fees, and police judges who are not paid a salary should receive the same compensation or net remuneration as justices of the peace. Perhaps this was the intended effect of the section and the draftsman over looked the fact that justices of the peace may be required by Section 601.131 to return part of the fees they collect. However, this is speculation unsupported by the words of the statute.

Section 367.13 expressly states that police judges shall receive the same fees as justices of the peace receive. It does not state they shall receive the same net compensation, nor does it require that they account for fees in the same manner as justices of the peace. Finally, the city council may provide a salary in lieu of all fees if it deems the net compensation to the police judge is inappropriate under this method.

July 16, 1970

ELECTIONS: Eighteen year old voting: Art. II, §1, Constitution of Iowa. Pending a determination as to the constitutionality of Public Law 91-285, 91st Congress, H.R. 4249, the Voting Rights Act Amendments of 1970 to the Voting Rights Act of 1965, approved June 22, 1970 which does not take effect with respect to any primary or election held on or before January 1, 1970, Iowa residents who are 18 years old should now be permitted to register in any election to be held in Iowa after January 1, 1971, and their registration should be retained in separate files until such time as the issues have been resolved. (Turner to Synhorst, Secretary of State, 7/16/70) #70-7-6

The Honorable Melvin D. Synhorst, Secretary of State: In further response to your letter of June 23, 1970 and following up my answer of June 26, 1970, I have now received a copy of Public Law 91-285, 91st Congress, H.R. 4249, the Voting Rights Act Amendments of 1970 to the Voting Rights Act of 1965, approved June 22, 1970, which among other things, secure the right to vote to citizens of the United States 18 years of age or over.

In my opinion, pending a determination as to the constitutionality of this new federal law which does not take effect with respect to any primary or election held on or before January 1, 1971, Iowa residents who are 18 years old should now be permitted to register to vote in any primary or other election to be held in Iowa after January 1, 1971, and

their registration should be retained in separate files by those responsible for accepting voter registration, until such time as the issues have been resolved.

July 23, 1970

ELECTIONS: Nominations by party committees and conventions §43.84, Code of Iowa, 1966, as amended by House File 1020, Acts 63rd G.A., Second Session (1970) and §§44.8, 45.1 and 45.4, Code of Iowa, 1966. In the case of elections for the Iowa General assembly where there were candidates on the primary ballot but none received the requisite number of votes or where a write-in candidate received one vote or more, the appropriate legislative representative central committee may make a nomination. These committees also authorized to make nominations where nominations have been made but later become vacant. Insofar as township officers are concerned there is no statutory authority for parties to make nominations in similar situations. Any nomination made by petition under chapter 45 would not go on the ballot under the party name. (Haesemeyer to Landess, Deputy Secretary of State, 7/23/70) #70-7-7

Mr. Robert C. Landess, Deputy Secretary of State: Reference is made to your letter of June 23, 1970, in which you request an opinion of the attorney general with respect to certain questions presented to you by Mr. Robert J. Barr, Hardin County Auditor. In a letter to the secretary of state dated June 17, 1970, Mr. Barr states:

"I would like to refer to Attorney General Opinion rendered September 17, 1968 #S68-9-3 and ask that these same questions be asked in regard to sub-divisions of a County such as Township Clerks and Trustees where the same circumstances as outlined in the questions answered by the previously referred to opinion and further I would like the opinion to include any Senatorial or Representative districts that are wholly or partially within a County or joint counties, that is districts that extend over county lines. I am wondering if Chapter 43, Sections 43.86 - 87 - 88 could be applied to these sub-divisions of counties.

"We in this county, as well as numerous other counties that I know of, especially this year due to the change of the primary election date have a great number of vacancies due to the failure of present office holders to file affidavits of candidacy, as well as vacancies due to moving or death that have not been filled and who did not have or receive write-in votes in the primary election sufficient to nominate them.

"I would further request that if the previously referred to sections do no apply and there is no method under any other chapter whereby nominations can be made by committees or conventions, I would like an answer as to whether or not 45.1 would then be necessary for anyone to be placed on the general election ballot, and in the event that the opinion states that this can be done by convention or committee, must they certify to the Auditor those names nominated by whatever committee or convention who so names them."

Among other things House File 1020, Acts, 63rd G.A., Second Session (1970) by §7 thereof repealed §43.84, Code of Iowa, 1966, and substituted in lieu thereof the following:

"There shall be a legislative representative central committee for each legislative district, which committee shall be composed of the same precinct members chosen for each county central committee and who reside within that part of the county located within the legislative district. A senate legislative central committee shall be composed of the two legis-

lative representative central committees from the two legislative representative districts comprising the senate district. The precinct members of the legislative representative central committee for the various parts of counties comprising the representative district shall meet and organize by election of officers, on the next Monday following their election at some convenient place within the legislative district to be chosen by the state chairman.

"The committee shall meet in convention on call of the chairman to:

"(1) Make nominations of candidates to be voted on at a special election and occasioned by a vacancy in the office of senator or representative in the general assembly.

"(2) Make nominations of candidates for the party to membership in the general assembly when no candidate for such office has been nominated at the preceding primary election by reason of the failure of any candidate to receive the legally required number of votes cast by such party therefor, if such convention is held following the preceding primary election.

"(3) Make nominations for these offices where a nomination made at a primary election has become vacant before the convening of the convention if such convention is held following the primary election.

"(4) Make nominations for such offices to fill vacancies occurring too late to file nomination papers in the primary election if such convention is held following the primary election."

This new §43.84 is patterned somewhat after §§43.97 and 43.98 (dealing with county officers) and in our September 17, 1968 opinion, a copy of which is attached, we noted that under §43.98 where there were no party primary candidates on the ballot and no write-in votes were cast no nomination may be made stating:

"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."

Like §43.98, §43.84 as amended by H.F. 1020, makes no provision for the situation where there has been a failure of a candidate to file nomination papers. Thus, where a party has no candidates for the state senate or state house of representatives on the primary ballot and there is not even one write-in vote for such office for the party no nomination may be made.

Of course under the plain language of §43.84, as amended by HF.. 1020, where there were candidates on the primary ballot but none received the requitie number of votes or where a write-in candidate received even on vote, the appropriate legislative representative central committee may make a nomination. And of course under §43.84, as amended, these committees are expressly authorized to make nominations where nominations have been made but later become vacant.

Insofar as township officers are concerned there is no statutory authority for parties to make nominations in situations similar to those discussed in the September 17, 1968 opinion. This question of township

officers was covered in an earlier opinion of the attorney general which noted that:

"Vacancies existing on township tickets by reason of a failure to make nominations at the primary, resignation of nominees or failure of nominations made to give general satisfaction may not be filled by holding township caucuses, and county auditor would have no right to place names of caucus nominees on official ballot at general election under party headings of parties entitled to make nominations at primaries." 1909 OAG 363.

Again in 1930 the attorney general said:

" . . . [T]he members of the party central committee for a subdivision of a county, composed of the township, do not have any authority to make a nomination for an elective office in said subdivision where no nomination was made in the primaries.

* * *

"[T]he members of the party central committee for a subdivision of a county, composed of a township, are given authority under Section 614 to make nominations to fill vacancies in office. The only vacancy in office which the members of the party central committee from a subdivision of a county, composed of a township, are authorized to fill would be one occasioned by the death of the present incumbent or by resignation or other disqualification which has occurred since the primaries.

* * *"

Where nominations may be made by party conventions or committees §43.88 clearly requires that such nominations be forthwith certified to the appropriate officer.

Section 45.1 to which you make reference provides:

"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."

Section 45..4 provides:

"45.4 Filing-presumption-withdrawals-objections. The time and place of filing nomination petitions, the presumption of valadity thereof, the right of a candidate so nominated to withdraw and the effect of such withdrawal, and the right to object to the legal sufficiency of such petitions, or to the eligibility of the candidate, shall be governed by the law relating to nominations by political organizations which are not political parties."

However, persons nominated by petition, pursuant to chapter 45 would not go on the ballot under the party name. *Lowery v. Davis*, 1897, 101 Iowa 236; 70 N.W. 190; 1932 OAG 181; 1909 OAG 351.

July 28, 1970

CRIMINAL LAW: Gambling devices — Chapter 726, Code of Iowa, 1966. A slot machine in which the winning combination may be in part the

result of skill for which there is no prize or reward is not a gambling device. (Cullison to Saur, Fayette County Attorney, 7/28/70) #70-7-8

Mr. Walter L. Saur, Fayette County Attorney: You requested an opinion of the Attorney General as to whether a corporation in the City of Oelwein may manufacture and franchise a machine called "Your Deal". The machine is described as having five reels, each containing ten facsimilies of playing cards. The machine has a large window through which several cards on each reel may be viewed. The cards appearing in the lower portion of this window after a playing constitute a five-card hand. The reels may be spun by pulling a lever after inserting a single five cent coin in a slot on the machine. The reels revolve for about 18 seconds while gradually losing momentum. The machine is equipped with five stop buttons that may be depressed to actuate braking devices on the reels, immediately stopping them.

The machine is intended to be operated by a single player. As the reels turn, the player can observe upcoming cards on each reel through the upper portion of the window. By skillfully manipulating the braking mechanisms, he can control the combination of cards on display in the lower part of the window when the reels are stopped.

The machine does not record free games, it has no payout unit and contains no indication that the player may become entitled to anything of value through his operation of the machine.

In our opinion of March 26, 1970, we stated that three elements must be established before a scheme may be properly considered a lottery, and that these elements are consideration, chance, and prize. The same is true of other forms of gambling.

In our opinion the device which you described does not violate Chapter 726, Code of Iowa, 1966 for the reason that no prize may be gained by the successful operation of the machine. Although the element of consideration is present, and there may be some element of chance in arriving at a winning combination, the player receives nothing of value therefore.

August 5, 1970

COUNTIES AND COUNTY OFFICERS — Salaries — Census — Board of Supervisors — Statutory Construction — §340.3, Code of Iowa, 1966, as amended by Ch. 1172, Acts of 63rd G. A. (2nd Session). County officers salaries for balance of 1970 remain unaffected by change in population as shown in official census since such action by Board of Supervisors pursuant to Ch. 1172, Acts, 63rd G. A. (2nd Session) can be taken only when there is a change in the law. (Turner to Faches, Linn County Attorney, 8/5/70) #70-8-1

Mr. William G. Faches, Linn County Attorney: I have your letter requesting an opinion in regard to the effect of the certification of the 1970 census on the computation of county officers' salaries. Your letter states:

"Recently there has been some discussion in regard to Senate File 1059 and the new census. It appears that the 1970 census will be certified by the Census Bureau and become law as per Section 26.6 of the 1966 Code of Iowa sometime in the latter part of this year.

"The question which we would like to have answered by your office is,

in light of Section 26.6 of the 1966 Code of Iowa under Chapter 40.3 of the 1966 Code of Iowa, do County Officer's Salaries remain the same until January 1, 1971, or are County Officer's Salaries adjusted at the time the 1970 census is Certified and Published?"

County officers' salaries for the balance of 1970 will not be effected by certification of the 1970 census. Such salaries are effected only by a change in the law. See §3 of Ch. 1172, Acts of the 63rd G. A., Second Session, page 231, also known as S. F. 1059. The section cited amends §340.3, Code of 1966, so that it now reads as follows:

"In December of each year, the board of supervisors shall, by resolution compute the salaries of all county officers whose salaries are based on population or taxable valuation of the county, or both, for the ensuing year. The latest current report of the Bureau of Census, United States Department of Commerce and the valuation certified by the Department of Revenue shall be used. In any year in which the compensation is changed *by a change in the law* the said computation shall also be made in the month the law becomes effective for the salaries paid for the remainder of said year from the effective date of the new law. If a vacancy occurs in any office, the person who is appointed or elected to fill the unexpired term in the office vacated, shall receive the same salary as the person vacating the office." (Emphasis added)

Neither the section set out above nor §26.6, Code of Iowa, 1966, which provides that the certified and published official census shall be used whenever the population of any county, township, city, or town is referred to in any law of this state will be changed by the certification of new census figures. Salaries are fixed by law and the duty of the supervisors with reference thereto is merely to ascertain the facts to which the law is applied. They apply the formula by resolution only in December of each year and in the month of the effective date compensation is changed by "a change in the law" — rather than merely as a consequence of a change in population. Thus, when the board of supervisors, in December, computes the salaries of the county officers for the next year (1971), it should use the new certified and published census figures, but *1970* salaries should not be recomputed then or at any other time.

August 17, 1970

CITIES AND TOWNS: Municipalities — Urban Renewal Contracts — §§403.6(1)(5), 403.9(3), as amended by Ch. 237, §1, First Session, 63rd G. A., 403.12(5) and 535.2, Code of Iowa, 1966. Municipalities may enter into an urban renewal contract with the United States Government, which contract establishes the interest on temporary project notes as that equal to the "Prevailing Federal Rate." (Turner to Lipsky, State Representative, 8/17/70) #70-8-2

The Hon. Joan Lipsky, State Representative: You have requested an opinion of the attorney general with respect to the following:

"1. Whether the powers granted to a municipality as a Local Public Agent in Section 403.6, 1966 Code of Iowa as amended, and in particular Paragraph 5 thereof, allows an Iowa municipality as a Local Public Agent to enter into an urban renewal contract with the United States Government through its Department of Housing and Urban Development, which contract establishes the interest said municipality will have to pay on temporary project as that equal to the 'Prevailing Federal Rate.'

"2. If a municipality may enter into the type of contract referred to in Question 1 above, may said municipality pay interest in excess of 7%

on temporary project loan notes if the 'Prevailing Federal Rate' exceeds 7%."

Section 403.6, Code of Iowa, 1966, provides in pertinent part as follows:

"Powers of municipality. Every municipality shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this chapter, including the following powers in addition to others herein granted:

* * *

"5. To borrow money and to apply for and accept advances, loans, grants, contributions and any other form of financial assistance from the federal government, the state, county, or other public body, or from any sources, public or private, for the purposes of this chapter, and to give such security as may be required, and to enter into and carry out contracts in connection therewith. A municipality may include in any contract, for financial assistance with the federal government for an urban renewal project, such conditions imposed pursuant to federal laws as the municipality may deem reasonable and appropriate and which are not inconsistent with the purposes of the chapter."

We find no limitations in Chapter 403 with respect to interest on monies borrowed by various means, such as notes or bonds, except that §403.9(3) as amended by Chapter 237, §1, First Session, 63rd General Assembly, imposes a limitation of 7% on revenue bonds issued to secure payment of the loan. §403.12(5) indicates that general obligation bonds may be issued in addition to the revenue bonds authorized under §403.9, and this may indicate a willingness on the part of the legislature to allow a municipality to exceed the 7% limitation imposed by the previous section.

Of course, a note is not the same as a bond and, there being no limitations in the chapter as to the interest which may be paid on notes, only the general usury section (535.2, Code of Iowa, 1966, as amended by Chapter 277, §1, First Session, 63rd G. A.,) prescribes the limitation: 9%. Thus, if a contract, agreement, note or other arrangement with the federal government provides that the municipality shall pay the prevailing federal interest rate, the municipality may pay that rate so long as it does not exceed 9%. But interest on bonds may not exceed 7%.

August 18, 1970

STATE OFFICERS AND DEPARTMENTS: Highway Commission — Appropriations, salaries — Ch. 1127 (H.F. 1103), 63rd G. A., Second Session; Ch. 30 (H.F. 823), 63rd G A., First Session; §8.39, Code of Iowa, 1966; Ch. 68 (S.F. 610), 63rd G. A., First Session. Neither the Executive Council on the one hand, nor the Comptroller and the Governor acting together on the other hand may transfer funds from the "construction" appropriation of the Primary Road Fund to the "support and maintenance" appropriation of the Primary Road Fund, and any such transfer may be made only by an appropriation of the General Assembly. (Holst to Mogged, State Senator, 8/18/70) #70-8-3

The Hon. Charles G. Mogged, State Senator: In your letter to Attorney General Turner, dated July 16, 1970, you asked that he answer the following questions:

1. In the event the Executive Council were to approve a pay plan for state employees, is there any written law, rule, or regulation which pro-

hibits any department of government, which has available funds, from making wage adjustments for its employees even though other departments might not have available funds and would consequently not be able to make wage adjustments?

2. May funds be transferred from one agency to another for the purpose of implementing pay plans for wage adjustments?

3. If the Highway Commission does not have sufficient funds specifically allocated for salaries to provide the 2.4 million dollars needed to make the proposed wage adjustments, could the funds be transferred from the Primary Road Fund without the calling of a special session of the Legislature and the specific appropriation of money for this purpose? If so, who could do this?

4. In case the 2.4 million dollars cannot be so transferred, are there any funds within the Highway Commission which could in your opinion be transferred to make the proposed wage adjustments? Who is authorized to do this?

5. May funds be transferred within the Highway Commission from appropriations for such support expenditures as Highway Maintenance to other support expenditures such as salaries for Highway Commission employees?

6. Are there any contingency funds within the executive branch of the state government which might be available to be used to implement all, or a portion, of these proposed wage adjustments?

7. In your opinion, are there any actions that can be taken by any officials in the executive branch that would enable these proposed wage adjustments to be implemented?

I will answer your questions in the order they were asked.

I.

IN THE EVENT THE EXECUTIVE COUNCIL WERE TO APPROVE A PAY PLAN FOR STATE EMPLOYEES, IS THERE ANY WRITTEN LAW, RULE, OR REGULATION WHICH PROHIBITS ANY DEPARTMENT OF GOVERNMENT, WHICH HAS AVAILABLE FUNDS FROM MAKING WAGE ADJUSTMENTS FOR ITS EMPLOYEES EVEN THOUGH OTHER DEPARTMENTS MAY NOT BE ABLE TO MAKE WAGE ADJUSTMENTS?

While Section 9, paragraph 2, of Chapter 95, Laws of the Sixty-second General Assembly, as well as Section 4.4(1) of the Rules of the Iowa Merit Employment Department, generally require that a pay scale be uniform within a job classification, they do not prohibit one or more departments with such a classification from giving salary adjustments simply because one or more of the departments has insufficient funds budgeted therefor. The classification is one thing. Sufficient funds to pay the wages authorized by the classification is another.

Rule 4.5(3) of the Iowa Merit Employment Department specifically provides for such a situation. Said Rule 4.5(3) is as follows:

"If the director is advised by the state comptroller that an agency is unable to make appointments at the minimum step (A) of the pay grade for a *class* because of budget limitations, he may authorize appointment at such step below the minimum as budgetary conditions will permit." (Emphasis added)

Therefore, for the reasons heretofore given, it is my opinion that there is no written law, rule, or regulation which prohibits any department, from making wage adjustments for a classification of employees solely because one or more other departments, having insufficient appropriated funds, may not make similar wage adjustments for their employees within the same classification.

II.

MAY FUNDS BE TRANSFERRED FROM ONE AGENCY TO ANOTHER FOR THE PURPOSE OF IMPLEMENTING PAY PLANS FOR WAGE ADJUSTMENTS?

As a general rule funds may be transferred from one department to another whenever the appropriation of one department is insufficient to properly meet the legitimate expenses of such department. This transfer of funds, however, must be made by the state comptroller with the approval of the governor, all as required by Section 8.39 of The Code of Iowa, 1966. The pertinent portion of said Section 8.39 is as follows:

". . . when the appropriation of any department . . . is insufficient to properly meet the legitimate expenses of such department . . ., 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."

This is always subject, however, to the conditions of the appropriations bill authorizing departmental or institutional expenditures. This statute, however, does not authorize transferring funds *from* the Primary Road Fund to another agency, department, or institution. House File 1103, Laws of the Sixty-third General Assembly, Second Session (1970) provides in part that:

"The provisions of . . . section eight point thirty-nine (8.39) of the Code shall not apply to funds appropriated to the commission under section three hundred thirteen point four (313.4) of the Code. . . ."

Furthermore, an attempted transfer of funds *from* the Primary Road Fund to another agency, department, or institution is prohibited by Article VII, Section 8, of the Constitution of the State of Iowa. Said Section 8 is 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." (Emphasis added)

III.

IF THE HIGHWAY COMMISSION DOES NOT HAVE SUFFICIENT FUNDS SPECIFICALLY ALLOCATED FOR SALARIES TO PROVIDE THE 2.4 MILLION DOLLARS NEEDED TO MAKE THE PROPOSED WAGE ADJUSTMENTS, COULD THE FUNDS BE

TRANSFERRED FROM THE PRIMARY ROAD FUND WITHOUT THE CALLING OF A SPECIAL SESSION OF THE LEGISLATURE AND THE SPECIFIC APPROPRIATION OF MONEY FOR THIS PURPOSE?

In my opinion, funds may be transferred within the portion of the Primary Road Fund specifically appropriated in Section 1, paragraphs 1 through 9, inclusive, of Chapter 30, Laws of the Sixty-third General Assembly, First Session, at the request of the Iowa State Highway Commission, with the written consent and approval of the governor and the comptroller, provided however that any proposed transfer from the contingent fund, described in paragraph 7, Section 1, of said Chapter 30, is subject to the further conditions precedent:

1. A written statement from the state comptroller shall be obtained, recommending expenditures from the fund for the purposes requested by the Highway Commission; and

2. The comptroller and the governor shall determine that the expenditures contemplated are in the best interest of the state, and that the purpose or project for which funds are requested was not presented to the general assembly by way of a bill and which failed to become enacted into law.

It is further my opinion that no funds may be transferred from the portion of the Primary Road Fund appropriated for highway construction, in Section 2 of said Chapter 30, to the "support and maintenance" portion of the Primary Road Fund, in Section 1 of said Chapter 30, without a further act of the General Assembly.

For the purposes of this opinion, I need not go into the history of the implementation of Section 8.39 of The Code of Iowa, 1966, or Sections 313.4, and 313.5 of The Code of Iowa, 1966, because these sections were effectively changed by the passage of House File 1103, Laws of the Sixty-third General Assembly, Second Session, which changes will be hereinafter discussed.

In the First Session of the Sixty-third General Assembly, (1969) the Legislature appropriated the entire Primary Road Fund, including both the "construction" portion and the "support and maintenance" portion. (See Chapter 30, Laws of the Sixty-third General Assembly, First Session, p. 36, et seq.) Section 1 of said Chapter 30 appropriated funds for "support and maintenance" and Section 2 thereof appropriated the balance of the Primary Road Fund for "construction" purposes. In short, the legislature broke down the "standing appropriation" provided for in Section 313.4 into two appropriations: one for "support and maintenance" and the other for "construction" purposes.

In Section 7 of said Chapter 30, the legislature provided that:

"The provisions of Chapter Eight (8) of the Code shall apply to this Act."

The pertinent portion of said Chapter Eight (8) is Section 8.39, which provides in part as follows:

". . . the governing board of any state department . . . 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."

Also in force at the time of the passage of said Chapter 30, was Section 313.5 of The Code of Iowa, 1966, the pertinent part of which is as follows:

". . . 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."

On the face of these two acts there appeared to be a conflict: Section 8.39 (together with said Chapter 30) authorized the comptroller and governor to transfer Primary Road Funds; while Section 313.5, as hitherto existing, authorized the Executive Council to transfer Primary Road Funds. How then, may we reconcile this conflict?

Section 8 of said Act 30 reconciles these two sections by providing that:

"Where any of the laws of this state are in conflict with this Act, the provisions of this Act shall govern for the biennium."

This means that as of June 20, 1969, the state comptroller and the governor had the exclusive power to transfer Primary Road Funds under the authority of said Section 8.39 and Section 7 of said Chapter 30. This state of affairs was changed, however, by the Second Session of the General Assembly.

With the passage and approval of House File 1103, on or about April 9, 1970, the General Assembly repealed said Section 313.5, which had previously authorized the Executive Council to transfer Primary Road Funds. Said House File 1103 also specifically provided that the provisions of said Section 8.39 of the Code (authorizing the comptroller and governor to transfer Primary Road Funds) shall *not* apply to said Section 313.4 (directing disbursement of the Primary Road Fund), except that the first paragraph of said Section 8.39 (authorizing the comptroller and governor to transfer funds) does and shall apply to appropriations for support of the commission and for engineering and administration of highway work and maintenance of the primary road system." In short, the Legislature made it absolutely clear that it intended to take from the Executive Council the power to transfer funds from the "construction" portion of the Primary Road Fund to the "support and maintenance" portion thereof. It provided further that neither the governor, comptroller, nor Executive Council may transfer primary road funds from the "construction" portion of the Primary Road Fund to the "support and maintenance" portion thereof, and that the governor and comptroller could authorize only the transfer of items *wholly within* the "support and maintenance" portion of the Primary Road Fund.

That being the case, if there are any unspent or unobligated funds within the "support and maintenance" portion of the Primary Road Fund, they may, with the approval of the comptroller and governor, be used for any purpose within the scope of the Highway Commission's legitimate activities, and within said "support and maintenance" appropriation, which would include duly authorized salary adjustments. This may be done without calling a special session of the Legislature.

IV.

IN CASE THE 24 MILLION DOLLARS CANNOT BE SO TRANSFERRED, ARE THERE ANY FUNDS WITHIN THE HIGHWAY COMMISSION WHICH COULD IN YOUR OPINION BE TRANSFERRED TO MAKE THE PROPOSED WAGE ADJUSTMENTS? WHO IS AUTHORIZED TO DO THIS?

If by question numbered 4 of your letter you ask what funds appropriated to the Highway Commission may be so transferred, it is my opinion that only the funds appropriated for "support and maintenance," particularly described in Section 1 of said Chapter 30, may be transferred with the approval of the comptroller and the governor in the manner hereinbefore described.

If by question numbered 4 of your letter you ask what funds balances are available for transfer, I cannot answer because the question then posed would call for accounting and fiscal conclusions which I am, under the circumstances, not in a position to make. This information, however, may be obtained from either the State Comptroller or the State Treasurer.

V.

MAY FUNDS BE TRANSFERRED WITHIN THE HIGHWAY COMMISSION FROM APPROPRIATIONS FOR SUCH SUPPORT EXPENDITURES AS HIGHWAY MAINTENANCE TO OTHER SUPPORT EXPENDITURES SUCH AS SALARIES FOR HIGHWAY COMMISSION EMPLOYEES?

I have already answered this question in my answer to, and discussion of, your question numbered 3.

VI.

ARE THERE ANY CONTINGENCY FUNDS WITHIN THE EXECUTIVE BRANCH OF STATE GOVERNMENT WHICH MIGHT BE AVAILABLE TO IMPLEMENT ALL, OR A PORTION, OF THESE PROPOSED WAGE ADJUSTMENTS?

Chapter 68, Laws of the Sixty-third General Assembly, First Session, created a General Contingent Fund. The pertinent parts of said Chapter 68 are as follows:

". . . The contingent funds 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 approve the allocation of 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 first be obtained from the state comptroller and thereupon the executive council shall determine that the proposed allocation shall be for the best interest of the state. Any allocation in excess of thirty-five thousand (35,000) dollars must be approved by the budget and financial control committee. . . ."

To determine whether there is a chance of using any money from the General Contingency Fund for the proposed salary adjustments, we must

first determine whether the proposed salary adjustments are "contingencies." The word "contingency" has been repeatedly interpreted by this office to require that the event be "to some degree unforeseen," and that the question of whether a "contingency" exists is a question of fact to be determined by the Executive Council. See 68 O.A.G. 552, 68 O.A.G. 564 (two opinions), 68 O.A.G. 652, 68 O.A.G. 955, O.A.G. #70-3-18, Haesemeyer to Wellman, March 5, 1970.

In 68 O.A.G. 564, 565, it is said:

"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 . . . the contingent fund . . . can't be used to supplement your own appropriation. . . ."

In my opinion an increase in wages for which there has been no appropriation would create a deficiency in Highway Commission appropriations, but it certainly could not be said to be "unforseen."

On the face of it then, it does not appear that the proposed salary adjustment would constitute a contingency, and therefore the contingent fund would not be available therefor.

VII.

IN YOUR OPINION, ARE THERE ANY ACTIONS THAT CAN BE TAKEN BY ANY OFFICIALS IN THE EXECUTIVE BRANCH THAT WOULD ENABLE THESE PROPOSED WAGE ADJUSTMENTS TO BE IMPLEMENTED?

Certain actions which certain executive officials may take to implement the proposed wage adjustment are set forth in the preceeding discussion of other questions and any such actions are conditioned as provided therein.

August 19, 1970

WORKMEN'S COMPENSATION: §85.31, Code of Iowa, 1966. The extent of an employer's liability for payment of benefits on account of the death of an employee is 300 weeks of compensation paid in accordance with §85.31, plus burial expense as provided by §85.28. (Conlin to Van Roekel, State Representative, 8/19/70) #70-8-4

The Hon. Gerrit Van Roekel, State Representative: We have your letter of July 14, 1970 wherein you request an opinion of the Attorney General on whether or not a dependent of a deceased employee may receive workmen's compensation in excess of the 300 weeks provided by statute.

Section 85.31, Code of Iowa, 1966, provides as follows:

"1. When death results from the injury, the employer shall pay the dependents who were wholly dependent on the earnings of the employee for support at the time of his injury, during their lifetime, compensation upon the basis of sixty-six and two-thirds percent per week of the employee's average weekly earnings, payable in three hundred equal weekly installments commencing from the date of his injury, but not to exceed a total of fourteen thousand two hundred fifty dollars; provided further, that such weekly compensation shall not be less than eighteen dollars per week, then the weekly compensation shall be a sum equal to the full

amount of his weekly earnings. Such compensation shall be in addition to the benefits provided by section 85.27 and 85.28.

"2. When the injury causes the death of a minor employee whose earnings were received by the parent and such parent was wholly dependent upon the earnings of the minor employee for support at the time of his injury, the compensation to be paid such parent shall be the weekly compensation for an adult with like earnings. For the purposes of this section a stepparent shall be regarded as a parent only when the stepparent has actually received his principal support from the stepchild who died as a result of compensable injuries.

"3. If the employee leaves dependents only partially dependent upon his earnings for support at the time of the injury, the weekly compensation to be paid as aforesaid, shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of the injury.

"4. When weekly compensation has been paid to an injured employee and thereafter death of the employee results from such injury, the compensation to dependents shall run for a period of time which together with weekly compensation paid to the injured employee prior to death shall equal three hundred weeks of compensation, as provided in subsection 1 but not to exceed a total of fourteen thousand two hundred fifty dollars.

"5. Where an employee is entitled to compensation under this chapter for an injury received, and death ensues from any cause not resulting from the injury for which he was entitled to the compensation, payments of the unpaid balance for such injury shall cease and all liability therefor shall terminate.

"6. Except as otherwise provided by treaty, whenever, under the provisions of this and chapters 86 and 87, compensation is payable to a dependent who is an alien not residing in the United States at the time of the injury, the employer shall pay fifty percent of the compensation herein otherwise provided to such dependent, and the other fifty percent shall be paid into the second injury fund in the custody of the treasurer of state. But if the nonresident alien dependent is a citizen of a government having a compensation law which excludes citizens of the United States, either resident or nonresident, from partaking of the benefits of such law in as favorable degree as herein extended to the nonresident alien, then said compensation which would otherwise be payable to such dependent shall be paid into the second injury fund in the custody of the treasurer of state."

It is the opinion of the Attorney General that the limit of the employer's or carrier's liability is 300 weeks of payment in accordance with the above quoted statutory provision. Burial expenses are provided by Section 85.28, Code of Iowa, 1966. When the employer or his insurance carrier has complied with Section 85.31 and 85.28, Code of Iowa, no further payments are required on account of the death of the employee.

August 19, 1970

CITIES AND TOWNS: §409.1, Code of Iowa, 1966. A suburban lot is one located on land which is in the process of being presently or in the reasonably forseeable future, overflowed with the expanding population of nearby urban areas. An addition to a city or town as used in said section refers to territory contiguous to the territorial limits of said city or town. (Conlin to Faches, Linn County Attorney, 8/19/70) #70-8-5

Mr. William G. Faches, Linn County Attorney: We have your letter of May 13, 1970 wherein you request an opinion of the Attorney General as follows:

"1. What is the definition of a suburban lot as the term is used in Chapter 409.1 of the 1966 Code of Iowa?

"2. What is the definition of an addition to a city or town as used in Chapter 409.1 of the 1966 Code of Iowa?"

Section 409.1, Code of Iowa, 1966, provides in part 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. . . ."

With reference to question one, there is no direct judicial authority in the State of Iowa nor is there a pertinent statutory definition of the word "suburban." The only Iowa case dealing with the problem is *Howk v. Anderson,* 218 Iowa 358, 253 N. W. 32 at p. 33 (1934). That case is concerned with the imposition of separate speed limits within and without city limits, and is therefore not relevant to the present issue.

The Minnesota Court in the case of *State v. City of White Bear Lake,* 255 Minn. 28, 95 N. W. 2d 294 (1959) defined suburban at page 300 as follows:

"Land which is in process of being presently, or in the foreseeable future, overflowed with expanding population of nearby urban areas, as indicated by existence of more or less scattered development of small tracts and homes primarily used or intended for residential living, as distinguished from dwellings which are primarily accessory to operation of bona fide farms, is 'suburban.' . . ."

The Indiana Court dealt with the same problem in the case of *Rowland v. Greencastle,* 157 Ind. 571, 62 N. E. 474 (1902). In that case the suburban portion of the city was defined as the outlying part, remote from the center of trade and population, where the homes are more or less scattered and many of the improvements enjoyed by the central and more densely populated parts of the city are wanting. The Court further stated that the suburban part of the city may be used for business or occupied by residences or for both residence and business purposes.

It was the intent of the Legislature in promulgating Section 409.1 to promote orderly urban growth and to prevent disorderly, disorganized projects without minimal facilities and services.

Therefore, it is the opinion of the attorney general that a suburban lot as used in Section 409.1, Code of Iowa, 1966, means a lot which is located on land which is in the process of being presently or in the reasonably foreseeable future, overflowed with the expanding population of nearby urban areas.

With reference to question number two, we have found no legislative definition of the term as used therein. Other jurisdictions however have held that an addition must be contiguous in territory to the territory of the town or city to which it is added. *Neblett v. R. S. Sterling Inv. Co.,*

Tex. Civ. App., 233 S. W. 604, at p. 609 (1921); *County of Yuma v. Leidendeker*, 87 Ariz. 208, 303 P. 2d 531, at p. 533 (1956).

It is therefore the opinion of the attorney general that the definition of an addition to a city or a town as used in Section 409.1, Code of Iowa, 1966, refers to territory which is contiguous to the territorial limits of the city or town to which it is a proposed addition.

August 19, 1970

STATE OFFICERS AND DEPARTMENTS; GOVERNOR; ARBITRATION BOARD; CITIES & TOWNS; MUNICIPAL EMPLOYEES; HOSPITALS: §§90.1 and 90.2, Code of Iowa, 1966. §§90.1 and 90.2, Code 1966, do not apply to municipal corporations; Governor is without authority to appoint a board of arbitration in controversy involving nurses and municipal hospital. (Haesemeyer to Sellers, Administrative Assistant, Office of Governor, 8/19/70) #70-8-6

Mr. Michael M. Sellers, Administrative Assistant, Office of the Governor: Reference is made to your letter of July 29, 1970, in which you state:

"On July 17, 1970, a petition was presented by the Iowa Nurses Association to the governor, which was signed by 25 citizens of Ames, as to the application of Chapter 90 of the Iowa Code.

"Attempts were made on several occasions to get the parties involved together. These attempts failed. On July 23, 1970 at 7:00 a.m. resignations submitted by the nurses became effective in regards to staff nurses.

"There were a total of 93 nursing positions including supervisors and director of nursing. According to the Iowa Nurses Association's figures, a total of 52 resignations were submitted. According to the hospital's figures there were 46 resignations, of which six people have been hired since that period as replacements.

"Three of the resignations were submitted by head nurses and will not be effective until August 5, 1970. These head nurses have participated in the negotiations.

"The question now is, does Chapter 90 of the Board of Arbitration apply to the dispute between the parties involved.

"The following questions are in context:

"1. Do municipal employees come under the jurisdiction of the Arbitration Board?

"2. With the resignation of from 46 to 52 nurses, does the employee-employer relationship still exist?

"3. With the resignation of the nurses, is the welfare of the community jeopardized?"

Sections 90.1 and 90.2, Code of Iowa, 1966, provide respectively:

"90.1 When any dispute arises between any person, firm, corporation, or association of employers and their employees or association of employees, of this state, except employers or employees having trade relations directly or indirectly based upon interstate trade relations operating through or by state or international boards of conciliation, which has or is likely to cause a strike or lockout, involving ten or more wage earners, and which does or is likely to interfere with the due and ordinary course of business, or which menaces the public peace, or which jeopardizes the welfare of the community, and the parties thereto are unable to adjust the same, either or both parties to the dispute, or the mayor of

the city, or the chairman of the board of supervisors of the county in which said employment is carried on, or on petition of any twenty-five citizens thereof over the age of twenty-one years, or the labor commissioner, after investigation, may make written application to the governor for the appointment of a board of arbitration and conciliation, to which board such dispute may be referred under the provisions of this chapter; and the manager of the business of any person, firm, corporation, or association of such employers, or any organization representing such employees, or if such employees are not members of any organization, then a majority of such employees affected may make the application as provided in this chapter, but in no case shall more than twenty employees be required to join in such application.

"90.2 Notification by governor. The governor shall at once upon application made to him as herein provided, and upon his being satisfied that the dispute comes within the provisions of section 90.1, notify the parties to the dispute of the application for the appointment of a board of arbitration and conciliation and make request upon each party to the dispute that each of them recommend within three days from the date of notice, the names of five persons who have no direct interest in such dispute and are willing and ready to act as members of the board, and the governor shall appoint from each list submitted one of such persons recommended."

In an earlier opinion of the attorney general, 1936 OAG 670 the question was presented as to whether or not the arbitration provisions of §§1496 and 1497 of the 1935 Code applied to a labor dispute involving the Independent School District of the City of Des Moines. These provisions of the 1935 Code were the precursors of and in all material respects identical to §§90.1 and 90.2 of the 1966 Code. In an exhaustive and in our view a well reasoned opinion Attorney General Edward L. O'Connor concluded that the statute did not apply to municipal corporations and that therefore the governor was without authority to appoint a board of arbitration. This opinion, a copy of which is attached, is dispositive of the question you raise.

Accordingly, it is our opinion that Chapter 90 does not apply to the controversy you describe and the governor has no authority to appoint an arbitration board. This conclusion is strengthened by the fact that what is now Chapter 90 was amended in 1959 by Chapter 107, 58th General Assembly, to specifically provide for arbitration of disputes between a city and a city recognized association of employees of a paid fire department. §90.15 Expressio Unius Est Exclusio Alterius.

Since as we have concluded Chapter 90 has no application to a dispute involving a municipal corporation it is unnecessary to consider your other questions relative to the existence of an employer-employee relationship and a factual determination as to whether or not the welfare of the community is in jeopardy.

August 20, 1970

COUNTY AND COUNTY OFFICERS: County Departments of Social Services — Voluntary Employee; Tort liability of County — Ch. 405, Acts, 62nd G. A. If a voluntary employee is injured in the discharge of his responsibilities the county is liable for its torts. (Bobenhouse to Samore, Woodbury County Attorney, 8/20/70) #70-8-7

Mr. Edward F. Samore, Woodbury County Attorney: In your letter of July 2, 1970, you stated the following:

"Woodbury County Department of Social Service is desirous of providing space for a volunteer bureau consisting of volunteer citizens, who would lend assistance in the discharge of some of the administrative and stenographic processes.

"Your opinion is required as to the extent of the liability of the department. An example is should the volunteer become injured in the discharge of these responsibilities, what would the extent of the liability, if any, be, on the part of the Woodbury County Department of Social Services. These volunteers would be serving without compensation."

In answer to your question let me first say that Section 2 of Chapter 405 of the Laws of the 62nd G. A., 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."

Subsection 1 of section 1 provides:

" 'Municipality' means city, town, county, township, school district, and any other unit of local government."

Subsection 3 of section 1 provides:

" 'Tort' means every civil wrong which results in wrongful death or injury to person or injury to property and includes but is not restricted to actions based upon negligence, breach of duty, and nuisance."

Since the Woodbury County Department of Social Service is a county department and their employees are county employees, their tortious acts are within the scope of Chapter 405.

Subsection 1 of section 4 states that the municipality (county) shall be immune from tort liability imposed by Chapter 405 for:

"Any claim by an employee of the municipality which is covered by the Iowa workmen's compensation law."

In *Uhe v. Central States Theatre Corporation,* 1966, 258 Iowa 580, 139 N. W. 2d 538, the court held the employee's responsibility for payment of wages is a necessary element of employer-employee relationship under the Iowa Workmen's Compensation Act.

Accordingly, we are of the opinion that a volunteer employee of a county department of social services serving without compensation is not an employee covered by the Iowa workmen's compensation law, hence does not preclude suit in tort under Chapter 405. The county will be liable to a volunteer employee to the same extent it would be liable to a non-employee who claims damages.

August 21, 1970

STATE OFFICERS AND DEPARTMENTS: Department of Agriculture — §§169.49, 170.7, 192A.30, 198.7, 206.5, Code of Iowa, 1966; Chapter 5, Acts of the 63rd G. A. Chapter 5, Acts of the 63rd G. A. is quantitatively definite and prevails over the individual code sections which are not quantitatively definite. The legislature has inherent power to limit the amount of expenditures from the funds set up by §§169.49, 170.7, 192A.30, 198.7 and 206.5. (Conlin to Geddes, Administrative Assistant, Dept. of Agriculture, 8/21/70) #70-8-8

Mr. Mark G. Geddes, Administrative Assistant, Department of Agriculture: We have received your letter of May 4, 1970 wherein you ask what effect Chapter 5, Acts of the 63rd G. A. has on the amount of money that may be allocated from the agricultural trust funds for expenses incurred in enforcing the 1966 Code Chapters in which the trust funds are established.

The 1966 Code sections establishing the agricultural trust funds do not quantitatively restrict the amount of money that may be expended from the trust funds for expenses incurred in enforcing the Code Chapters in which the trust funds are established. These sections provide:

"169.49 Inspector-examiners fund. The examining board is authorized to employ an inspector, who shall not be a member of the examining board, at such per diem compensation as shall be fixed by the executive council and payable from a special fund in the office of the treasurer of the state known as the state board of veterinary examiners fund.

The department shall annually add four dollars to the renewal fee provided in this chapter for a person licensed to practice veterinary medicine. Such additional amount shall be considered as a part of the regular renewal fee and payment of same by a licensee shall be a prerequisite to the renewal of his license. 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 Veterinary Examiners Fund,' to be used by the examining board to assist in administering and enforcing the laws relating to the practice of veterinary medicine, and no part of such expense shall be paid out of the state treasury. Any remainder in said fund at the end of each fiscal year shall be paid into the general fund of the state. Said fund shall be subject at all times to the warrant of the state comptroller, drawn upon written requisition of the chairman of the examining board and attested by the secretary, for the payment of all salaries, per diem expense, and other expenses necessary to administer and aid in the enforcement of the provisions of law relating to the practice of veterinary medicine, but in no event shall the total expenses therefore exceed the total fees collected and deposited to the credit of said fund."

"170.7 Hotel and restaurant fund. All restaurant, hotel, motor inn, and tavern license fees shall upon receipt thereof by the department be paid to and receipted for by the treasurer of state and shall be kept by him in a separate fund to be known as the 'hotel and restaurant fund.' Such hotel and restaurant fund shall be continued from year to year and the treasurer shall keep a separate account thereof showing receipts and disbursements as authorized by law. No part of such fund shall be used for any other purpose than the administration and enforcement of the laws relating to hotels and restaurants and for conducting educational programs and sanitary training courses and for providing literature and suitable promotional work for the industries licensed under this chapter. If on July 1 of any year there is a balance remaining in said hotel and restaurant fund which, in the opinion of the secretary of agriculture, is greater than is necessary for the proper administration of such laws and for conducting and providing the services authorized under this section, the treasurer of state is hereby authorized, on the recommendation and with the approval of the secretary of agriculture, to transfer to the general fund of the state such portion of said hotel and restaurant fund as the secretary of agriculture shall deem advisable to so transfer."

"192A.30 Permit fees. [Dairy Trade Practices Fund] For the purpose of administering and enforcing the provisions of this chapter, each processor shall pay to the secretary permit fees in an amount, as from time to time set by the secretary, not to exceed five mills per hundred-weight on milk processed into dairy products as defined in section 192A.1, and

sold within the state of Iowa, except ice cream and its additive variants and nonmilk fat imitations which amount shall not be in excess of three mills per gallon thereof. Products upon which fees have been paid shall be exempt from further fees in successive transactions. The fees for each month thus computed shall be paid by the dealer to the secretary on or before the twenty-fifth day of the following month."

"198.7 Inspection fee.

1. There shall be paid by the first distributor of a commercial feed in this state to the secretary for all commercial feeds distributed in this state an inspection fee of ten cents per ton; provided, however, that the following are hereby exempted:

a. Feed ingredients if they are distributed in this state but are subsequently shipped out of this state, either as received or as components of mixed feeds.

b. Customer-formula feeds if the inspection fee is paid on the registered commercial feeds which they contain.

c. Commercial feeds distributed to manufacturers if the commercial feeds so distributed are used solely in feeds which are to be registered.

d. Persons, firms or corporations who purchase commercial feeds on which the tonnage inspection fee has been paid or has been pledged to be paid.

2. In lieu of the tonnage inspection fee on stock tonic there shall be paid a registration fee of six dollars annually.

3. Fees so collected shall constitute a fund for the payment of only the costs of inspection, sampling, analysis and administrative expenses necessary for the enforcement of this chapter. The secretary shall prepare a detailed annual report by July 31 of each year of the moneys disbursed from this fund during the preceding year, and this report shall be distributed to all registrants immediately after compilation. When it is unanimously agreed by the governor, secretary of agriculture and the comptroller that there are sufficient funds to carry out the mandates of this chapter for at least twelve months, they may direct that any excess funds be returned to the general fund."

"206.5 Applicators license.

1. All commercial applicators of pesticides shall be required to secure a license and be issued a permit and be assigned a permit number. The secretary shall require proof of competence and responsibility before issuing a license. Upon receipt of a properly executed application and payment of required fees, the secretary shall issue a license permitting a person to make commercial applications of pesticides and devices unless he has reason to believe such issuance would not be in the public interest. Every public officer or foreman who applies pesticides on public property or supervises such application by another shall also secure such license and be issued a permit in like manner but the payment of fee therefor shall be waived by the department.

2. All persons required to secure a license under this section shall initially pay a fee of ten dollars, and each year thereafter shall pay a fee of five dollars for renewal of this license and permit number. Fees collected shall be deposited in the treasury to the pesticide fund to be used for the purpose of enforcing the provisions of this chapter. The expiration date shall be the thirty-first day of October of each year. In case the original license or permit number has been lost or destroyed, a duplicate license and permit number may be obtained upon payment of a fee of five dollars."

Chapter 5, Acts of the 63rd G. A. quantitatively restricts the amount of money that may be expended from the trust funds for expenses in-

curred in enforcing the Code Chapters in which the trust funds are established. Chapter 5 provides:

"Section 1. For the following commissions, boards, and departments, there is hereby appropriated all funds received under authority of the designated chapters or sections of the Code for the biennium beginning July 1, 1969 and ending June 30, 1971. The following amounts, or so much thereof as may be necessary, are authorized to be expended from said receipts for each year of the biennium to be used in the manner designated:

1. Agriculture, department of — commercial feed fund — chapter one hundred ninety-eight (198) of the Code:

For salaries	$275,040.00
For travel	17,000.00
For equipment	8,000.00
For support, maintenance and miscellaneous purposes	15,000.00
Total	$315,040.00

2. Agriculture, department of — restaurant inspection fund — chapter one hundred seventy (170) of the Code:

For salaries	$ 87,310.00
For travel	29,400.00
For support, maintenance and miscellaneous purposes	3,000.00
Total	$119,710.00

3. Agriculture, department of — state board of veterinary examiner's fund — chapter one hundred sixty-nine (169) of the Code:

For salaries, support, maintenance, equipment and miscellaneous purposes	$ 3,500.00

4. Agriculture, department of — pesticide fund — chapter two hundred six (206) of the Code:

For salaries	$ 38,040.00
For travel	5,000.00
For equipment	1,000.00
For support, maintenance and miscellaneous purposes	5,000.00
Total	$ 49,040.00

5. Agriculture, department of — fertilizer fund — chapter two hundred (200) of the Code:

For salaries	$180,080.00
For travel	10,000.00
For equipment	11,750.00
For support, maintenance and miscellaneous purposes	8,000.00
Total	$209,830.00

6. Agriculture, department of — dairy trade practice fund — chapter

one hundred ninety-two A (192A) of the Code:

For salaries	$ 41,750.00
For travel	5,000.00
For equipment	500.00
For support, maintenance and miscellaneous purposes	9,750.00
Total	$ 57,000.00

7. Dairy industry commission, Iowa — dairy industry fund — chapter one hundred seventy-nine (179) of the Code:

For salaries	$ 25,640.00
For promotional expense	43,350.00
For payments to American dairy association	250,000.00
For support, maintenance and miscellaneous purposes	11,980.00
Total	$330,970.00"

Statutes should be harmonized if possible; that is, they should be construed neither to hide nor exaggerate conflict. *See e.g., Hardwick v. Bublitz*, 253 Iowa 49, 111 N. W. 2d 309 (1962). An example will illustrate the harmonization of Chapter 5, Acts of the 63rd G. A. with the 1966 Code sections establishing the agricultural trust funds. Section 198.7(3), above, of the 1966 Code of Iowa permits the expenditure of Commercial Feed Fund moneys for the "costs of inspection, sampling, analysis and administrative expenses necessary" for the enforcement of the Commercial Feed Chapter (198). This section places no limit on the amount of money that may be allocated from the Commercial Feed Chapter. Chapter 5, on the other hand, limits the amount of money that may be allocated from the Commercial Feed Fund for expenses incurred in enforcing the Commercial Feed Chapter to $315,040.00 each year of the biennium 1969-71.

To a certain extent, then, Chapter 5, Acts of the 63rd G. A., conflicts with the sections of the 1966 Code of Iowa establishing the trust funds. Insofar as Chapter 5 quantitatively limits the amount of money that may be expended from a given trust fund each year of the biennium 1969-71, while the Code sections establishing the trust funds expressly or impliedly limit expenditures, from a trust fund only to those "necessary" for the enforcement of the Code Chapter in which the trust fund is established, there is a conflict. However, the conflict is only partial. The requirement set forth in the Code sections establishing the trust funds that the money of a trust fund be expended only for the enforcement of the Code Chapter in which the trust fund is established is neither expressly nor impliedly repealed by Chapter 5, Acts of the 63rd G. A. Thus, none of the $315,040.00 allocated from the Commercial Feed Fund by Chapter 5 may be used for expenses incurred in enforcing the Code Chapter in which the Dairy Trade Practices Fund is established.

Repeal by implication is not favored. *See e.g., Northwestern Bell Tele. Co. v. Hawkeye State Tele. Co.*, 165 N. W. 2d (Iowa 1969). But when statutes conflict, it has been held that the specific enactment impliedly repeals the general enactment to the extent there is a conflict. *See e.g., Ritter v. Dagel*, 156 N. W. 2d 318 (Iowa 1968). So also quantitatively definite statutes impliedly repeal quantitatively indefinite statutes to the extent there is a conflict, since the legislative enactment which makes precise the intent of the legislature is preferred. In the problem at hand,

Chapter 5, Acts of the 63rd G. A. is quantitatively definite, the Code sections establishing the agricultural trust funds quantitatively indefinite. The former prevails over the latter, therefore, and should in our opinion, be followed by the Department of Agriculture.

In arriving at this conclusion, Section 7 of Chapter 5, Acts of the 63rd G. A., to wit:

"Where any of the laws of this state are in conflict with this Act, the provisions of this Act shall govern for the biennium."

was not considered since such provisions are virtual nullities in Iowa. *See e.g., Kruse v. Gains*, 258 Iowa 983, 139 N. W. 2d 535 (1967); *Iowa Power & Light Co. v. Iowa State Highway Commission*, 254 Iowa 534, 117 N. W. 2d 425 (1962).

August 24, 1970

ELECTIONS, CONSTITUTIONAL LAW, Terms Defined, right of electors who have moved to continue to vote — Art. II, §1, Constitution of Iowa; S.F. 665, Acts, 63rd G. A., Second Session (1970); Chaps. 44, 49, 52 and 53, Code of Iowa, 1966. (1) The term "state officer" as used in S.F. 665 includes state legislators, (2) The term "federal officers" as used in S.F. 665 includes members of congress, (3) Under §6 of S.F. 665 the secretary of state is authorized to prescribe the form of application and ballot for elections in addition to presidential elections, (4) If at a non-party convention or caucus nominations for president and vice president only were made the certificates required by §44.3 of the code, as amended by §14, S.F. 665, would not have to include the name and address of each delegate. However, if a convention or caucus named candidates for any state office there would have to be compliance with §14 of the Act even though the same convention or caucus also nominated persons for the offices of president and vice president, (5) The secretary of state may prescribe the manner in which the required numbers are to be affixed to applications and ballot envelopes for absentee ballots, (6) For absentee voting purposes spouses and dependents residing with or accompanying members of the armed forces are to be treated the same as such members of the armed forces, (7) A special absentee ballot will have to be provided for residents of Iowa who have moved out of state and wish to vote for president and vice president pursuant to §1 of S.F. 665. Under §§2, 3, 4 and 5 of S.F. 665 intrastate movers who otherwise qualify may for up to the period of time prescribed in such sections vote either in person or by absentee ballot on all questions and for all candidates upon or for which they would have been entitled to vote had they not moved, (8) §§1, 2, 3, 4 and 5 of S.F. 665 are not unconstitutional. (Haesemeyer to Synhorst, Secretary of State, 8/24/70) #70-8-9

The Hon. Melvin D. Synhorst, Secretary of State: Reference is made to your letter of May 12, 1970, in which you state:

"Senate File 665, relating to election reforms, has been recently signed by the Governor. Several questions have arisen, in regard to this bill, as to the administration of the law by this office. We are hereby requesting a legal interpretation, in the form of an Attorney General's opinion, on the following points:

"1. We shall need a definition of the word 'state office' as used in Sec. 2 of the Act. If the word 'state office' includes state senators and state representatives, a person who moves out of a representative and senatorial district to another place, who does not meet the residency requirements in the place to which he has moved, might still be able to vote in the old district.

"2. There is a similar question on persons who move from one congressional district to another. May they vote for Representative in Congress in the old district?

"3. Who has responsibility for preparing application and ballot forms for other than presidential elections, where voter who has moved retains old residence temporarily for voting purposes? The Act does not cover this.

"4. The Act requires listing of the name and address of each person in attendance at conventions of nonparty organizations where nominations are made for state offices. Will there be no such requirements when nominations are made for President and Vice President? Nominations are usually made by nonparty organizations for the latter and not for state offices.

"5. The Act requires that all applications for an absentee ballot and all ballot envelopes shall have a serial number affixed thereto. What about voting by members of the armed forces? Supplies have already been printed and delivered to county officers for voting by members of the armed forces this year for both the Primary and General Elections. Will new ballot envelopes have to be printed? Furthermore, regular application forms are not used by members of the armed forces in applying for ballots. They may apply by letter, post card, etc.

"6. Does Sec. 48 of the Act, in effect, place qualified Iowa voters, their spouses and dependents, who are temporarily residing outside the territorial limits of the United States and the District of Columbia, under the legal definition of members of 'armed forces of the United States' as is defined in Sec. 53.37 of the Code of Iowa? This raises questions as to the entitlement of this group to free postage. Also, should the application for ballots submitted by these persons and/or the ballot envelopes be numbered under requirements of Sections 39 to 46, inclusive, of the Act?

"7. Will special ballots have to be prepared in all counties to allow for all of the possible voting contingencies that might arise under Sec. 2 and Sec. 5 of the Act? Or could the auditor use the regular ballot and mark out all of the offices for which the voter would not be eligible to cast a ballot?

"We would appreciate your attention to this matter, as this bill becomes effective July 1, and will affect the General Election. We, therefore, shall need sufficient time to advise all county auditors of your opinion."

Subsequently in a letter dated June 1 you stated:

"This is to confirm our oral conversation raising the question of the constitutionality of Section 1, 2 and 5 of Senate File 665, as passed by the Sixty-third General Assembly. We particularly raise this question in view of Article II of the Constitution of the State of Iowa, which sets out residency requirements for the right of suffrage.

"This is in conjunction with our previous request concerning the above described enactment, in our letter of May 12, 1970."

Thereafter you orally asked us to consider the constitutionality of §3 of Senate File 665.

We shall address ourselves first to the question of statutory construction presented by your first letter and thereafter consider the constitutional questions which your subsequent communications raise.

1. Sections 1, 2, 3, 4 and 5 of Senate File 665, Acts 63rd G. A. (1970) provide:

"Section 1. For the purposes of any general election in which votes

are to be cast for the office of president of the United States or electors for president, any resident of Iowa who has moved to another state shall be presumed to be and remain a resident of Iowa and a resident of the county and precinct of which he was a resident immediately preceding such move, until he meets the residence requirements for electors in the place to which he has moved; but such presumption shall not continue for more than one year after such move. However, if he is eligible to vote he shall be permitted to vote only for the offices of president and vice-president of the United States or electors for said offices. He shall vote by absentee ballot and shall make an application indicating that he is eligible only for a presidential and vice-presidential ballot. The secretary of state shall prescribe the form of application and ballot. The county auditor shall cause such applications and ballots to be printed and furnished.

"Sec. 2. For the purposes of any general election or primary election in which votes are to be cast for any state or federal office, any resident of Iowa who has moved to a different county or precinct within the state shall be presumed to be and remain a resident of the county and precinct of which he was a resident immediately preceding such move, until he meets the residence requirements for electors in the place to which he has moved.

"Sec. 3. For the purposes of any school election, any resident of Iowa who remains a resident of the same school district but who has moved to a different county or precinct shall be presumed to be and remain a resident of the county and precinct of which he was a resident immediately preceding such move, until he meets the residence requirements for electors in the place to which he has moved.

"Sec. 4. For the purposes of any city or town election, any resident of Iowa who remains a resident of the same city or town but who has moved to a different precinct shall be presumed to be and remain a resident of the precinct of which he was a resident immediately preceding such move, until he meets the residence requirements for electors in the place to which he has moved.

"Sec. 5. For the purposes of any special election or other election which is not governed by sections one (1) through four (4), inclusive, of this Act, any resident of Iowa who remains a resident of the area or territory within which such election is conducted but who has moved to a different county or precinct shall be presumed to be and remain a resident of the county and precinct of which he was a resident immediately preceding such move, until he meets the residence requirements for electors in the place to which he has moved."

While we have been unable to find any Iowa decisions holding that a member of the general assembly is or is not a "state officer" there is abundant authority from other jurisdictions judicially defining this term to include state legislators. *In Re Anderson,* 1916, 159 N. W. 559, 560; 164 Wis. 1, and cases cited in 40 Words and Phrases, "State Officers," pp. 91, 92. Accordingly, it is our opinion that state representatives and senators are state officers within the meaning of S.F. 665 and a person who moves out of a representative or senatorial district to another place who does not meet the residency requirements in the place to which he has moved would if §2 is constitutional still be able to vote in the old district.

2. Section 2 of S.F. 665 speaks, in addition to state officers, of federal officers. Plainly, members of congress are federal officers. *Danielson v. Fitzsimmons,* 1950, 44 N. W. 2d 484, 486; 232 Minn. 149. While it is true that §2 speaks only of persons who move from one county or precinct to another we think that in view of the manifest purpose of the Act taken

as a whole that such section applies as well to removal from one district to another. At the present time, of course, the problem is only academic since precincts are not split in forming districts and a voter could not move from one district to another without leaving the precinct of his former residence. However, this is not likely to continue to be true in the future. *In the Matter of the Legislative Districting of the General Assembly of Iowa*, 1970, ____Iowa____, 175 N. W. 2d 20.

3. Section 6 of the Act provides:

"Sec. 6. The secretary of state shall prescribe reasonable rules and regulations for the administration and implementation of the election laws of this state. Chapter seventeen A (17A) of the Code shall apply to the rules. All public officials and election workers shall comply with and aid in the implementation of the rules."

In our opinion this section provides sufficient authority for the secretary of state to prescribe the form of application and ballot for elections in addition to presidential elections subject, of course, to statutory requirements already in the code. In this latter connection see e.g., §§49.42-49.45, 52.7, 52.10, 52.12, Code of Iowa, 1966. Of course, the county auditor would continue as before to have charge of the printing of the ballots. §49.51.

4. Section 14 of the Act provides:

"Sec. 14. Section forty-four point three (44.3), Code 1966, is hereby amended by adding at the end thereof the following new subsection:

" 'The name and address of each delegate or voter in attendance at a convention or caucus where a nomination is made for a state elective office.' "

This language is clear beyond doubt. Plainly, if at a nonparty convention or caucus nominations for president and vice president only were made the certificate required by §44.3 of the code would not have to include the name and address of each delegate. However, if a convention or caucus named candidates for any state office these would have to be in compliance with §14 of the Act even though the same convention or caucus also nominated persons for the offices of president and vice president.

5. Section 40 of the Act provides:

"Sec. 40. Section fifty-three point five (53.5), Code 1966, is hereby amended by adding at the end thereof the following:

" 'All applications for absentee ballots shall have a serial number affixed thereto.' "

It is to be observed that this is an amendment to §53.5 of the code and elsewhere in chapter 53 §53.5 is expressly made inapplicable to absentee voting by members of the armed forces. Thus, §53.39 in part and §53.49, as amended by §48 of S.F. 665, Acts, 63rd G. A. (1970), provide respectively:

"53.39 Request for ballot. The provisions of sections 53.2, 53.4 and 53.5 shall not apply in connection with the primary and general elections in the case of a qualified elector of the state of Iowa serving in the armed forces of the United States; in any such case an application for ballot as provided for in said sections shall not be required and an absent voter's

ballot shall be sent or made available to any such voter upon a request being made therefor as provided for in this division. . . ."

"53.49 Applicable to armed forces only. The provisions of this division as to absent voting shall apply only to absent voters in the armed forces of the United States as defined for the purpose of absentee voting in section 53.37. The provisions of sections 53.1 to 53.36, inclusive, shall apply to all other qualified voters not members of the armed forces of the United States.

"However, citizens of the United States temporarily residing outside the territorial limits of the United States and the District of Columbia and their spouses and dependents when residing with or accompanying them shall be accorded the privilege of absentee voting in the same manner as members of the armed forces."

However, by §49 of the Act the following new section is added to chapter 53:

"All applications for an absentee ballot and all ballot envelopes shall have a serial number affixed thereto. Such numbers shall be affixed in such manner and in such place as prescribed by the secretary of state. Such numbers shall be affixed when the applications and ballot envelopes are printed."

This section would apply alike to members of the armed forces and other absentee voters.

It is true as you point out that applications for ballots by members of the armed forces need take no particular form. And it is also true under §49 of the Act that the numbers are to be affixed to the ballot envelopes and applications when they are printed. However, under such §49 the secretary of state is authorized to prescribe the "manner" in which the number is affixed. Thus, it seems to us that the answer to your question is as much a practical as it is a legal one. A number of possibilities suggest themselves. At the time a card or letter is received from a serviceman the auditor could attach the same to a blank prenumbered application form and send the serviceman the correspondingly numbered ballot envelope, or he could either manually or by means of a numbering device number the card or letter, send the ballot envelope bearing the same number and discard the related application form. Another possibility would be to affix by a numbering device numbers to both the card or letter and the ballot envelope.

6. Section 48 of the Act added the following new paragraph to §53.49 of the code:

"However, citizens of the United States temporarily residing outside the territorial limits of the United States and the District of Columbia and their spouses and dependents when residing with or accompanying them shall be accorded the privilege of absentee voting in the same manner as members of the armed forces."

While this obviously does not amend §53.37 of the code the legal effect is the same.

Insofar as postage is concerned §53.48 provides:

"53.48 Postage on ballots. In the event the government of the United States or any branch, department, agency or other instrumentality thereof shall make provision for sending of any voting matter provided for in this division through the mails postage free, or otherwise, the election

officials of the state of Iowa and of the several counties of the state are authorized to make use thereof under the direction of the Iowa servicemen's commission."

The federal law with respect to federal absentee voting assistance is found in 50 U.S.C.A., chapter 30, §§1451-1476. 50 U.S.C.A., §§1451 and 1472 provide respectively:

"§1451. State enactment of absentee voting legislation. The Congress expresses itself as favoring, and recommends that the several States take, immediate legislative or administrative action to enable every person in any of the following categories who is absent from the place of his voting residence to vote by absentee ballot in any primary, special, or general election held in his election district or precinct, if he is otherwise eligible to vote in that election:

"(1) Members of the Armed Forces while in the active service, and their spouses and dependents.

"(2) Members of the merchant marine of the United States, and their spouses and dependents.

"(3) Citizens of the United States temporarily residing outside the territorial limits of the United States and the District of Columbia and their spouses and dependents when residing with or accompanying them."

"§1472. Free postage. Official post cards, ballots, voting instructions, and envelopes referred to in this chapter, whether transmitted individually or in bulk, shall be free of postage, including air-mail postage, in the United States mails."

The applications for ballots and ballot envelopes of these persons should be numbered but not under §§39 to 46 of the Act. They should be numbered under §49 of the Act in such manner and in such place as the secretary of state may prescribe. Sections 39 to 46 are amendments to §§53.4, 53.5, 53.9, 53.10, 53.11, 53.12, 53.18 and 53.20 of the code. As pointed out in your answer to your question number 5 and because of §53.49 the provisions of §§53.1 through 53.36 do not apply to members of the armed forces.

7. Under §1 of the Act if a resident of Iowa moved out of the state he could still vote for a period of up to one year but only for the offices of president and vice president. The Act specifically states that such voting shall be by absentee ballot. Obviously, a special ballot would be required to accommodate such voters.

Under §2 of the Act as we have interpreted it a person who remained in the state but moved out of a congressional district; state senatorial and/or state representatative district could still vote for all of these offices the same as if he had not moved and assuming under §§3, 4 and 5 that he could still vote for all the other offices and propositions on the ballot no special ballots would be required. At this point it should perhaps be observed that §2, unlike §1, contains no specific provision that voting be by absentee ballot and presumably if a voter chose to do so he could return to the voting place of his old residence and vote in person. In fact the author of a note entitled, "Election Laws as a Legal Roadblock to Voting" appearing in the February, 1970 issue of the Iowa Law Review seems to have adopted the view of S.F. 665 that the question is not whether a voter in these circumstances could vote in person but whether he could vote by absentee ballot, 55 Iowa Law Review 616, 630. In our view he could vote in either manner.

Unlike §§1 and 2, the wording of §§3, 4 and 5 varies somewhat and would appear to allow individuals to vote at their old residence only when the officials to be elected are common to both the voters' new and old residences. It is at this point that the Act begins to create a myriad of possible ballot combinations and thereby becomes virtually unworkable and impossible to administer. Thus, a voter might move from one county to another and under §§1 and 2 be able to vote for national, federal and state offices but not county offices and below. Or he might stay within the county but change townships. Considering that such problems would be likely to occur in all of the state's 99 counties the number of special ballots which could conceivably be required becomes staggering. The practical difficulties would be compounded by the fact that a voter might wish to return to his old polling place and vote in person. Where voting machines are in use certain levers would have to be locked off for each of such voters. But I understand that some of the older voting machines may not be sophisticated enough for this to be done. It is no answer to suggest that the county auditor use paper ballots and strike or block out certain offices. While this might be feasible in the case of absentee ballots it would strike at the concepts of secrecy of the ballot and that no extraneous marks may be made on a ballot so as to identify it. See §49.107. Apart from this there is no statutory authority for this practice.

There does appear to be some basis for separate ballots for township offices in certain circumstances (§§49.27, 49.30 and 49.52) but not for ballots which exclude county offices. It may be that the broad language of §5 of the Act would be sufficient to authorize the secretary of state to prescribe the forms for the many special ballots that might be required but the administrative task of anticipating all conceivable ballot requirements would be monumental.

Moreover, to give §§3, 4 and 5 a literal interpretation would in all probability result in their being found unconstitutional and void on the ground of unworkability. *Davidson Bldg. Co. v. Mulock*, 1931, 212 Iowa 730, 235 N. W. 45. Bearing in mind the manifest purpose running throughout S.F. 665 that everyone should be permitted to vote somewhere and the practical difficulties which would be created in attempting to sever these sections from the rest of the statute it is our opinion that citizens who move out of their county or precinct to another location within the state may vote on all propositions and for all offices on the ballot in the place of their former residence and that they may do so either in person or by absentee ballot. This construction of S.F. 665 not only makes it possible to implement these sections but is consistent with the well settled doctrine that where a statute is open to two constructions, one of which will render it constitutional and the other unconstitutional or of doubtful constitutionality, the construction by which the statute may be upheld will be adopted. *State ex rel Fulton v. Scheetz*, 1969, ____Iowa ____, 166 N. W. 2d 874. The construction of any statute must be reasonable and must be sensibly and fairly made with a view of carrying out obvious intentions of the legislature enacting it and a construction resulting in unreasonable and absurd consequences should be avoided, i.e., a statute should be given a construction which will make it workable. *Janson v. Fulton*, 1968, ____Iowa____, 162 N. W. 2d 438. While speculation as to the legislative intent of the 63rd General Assembly in enacting these sections of S.F. 665 should be undertaken only with diffidence it

would seem safe to assume that the intention was not to enact a statute which in practical operation and effect would be unworkable and therefore void.

The situation presented by §§3, 4 and 5 of S.F. 665 is in some respects similar to that with which we had to contend in an opinion of the attorney general of fairly recent date, 1968 OAG 259. There words of express repeal inadvertently left in S.F. 283, Acts, 62nd G. A., would have abolished certain judicial nominating commissions and the terms of office of the commissioners would have been cut short. In this lengthy opinion we looked to the manifest purpose of the statute as a whole and found authority to ignore express words of repeal and generally to patch up the statute so that it made sense and was workable. We think we must take similar liberties with S.F. 665.

8. Turning next to the constitutional questions you raise, the Constitution of Iowa, Art. II, §1 provides:

"Electors — qualifications. 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."[1]

Under this provision, the relevant portions of which have been in the constitution for more than a hundred years, to be an elector and eligible to vote an individual, in addition to being a citizen of the United States and twenty-one years of age, must have been a resident of this state for six months next preceding the election and of the county in which he claims his vote sixty days.

Over the years as a result of numerous court decisions the meaning of the term "resident" (or "residence") has come to have a well settled common law meaning. In Iowa the word "residence" used in election statutes and in Article II, §1 of the Constitution means domicile. *Dodd v. Lorenz*, 1930, 210 Iowa 513, 231 N. W. 422; *Vanderpoel v. O'Hanlon*, 1880, 53 Iowa 246, 5 N. W. 119; *State v. Savre*, 1905, 129 Iowa 122, 105 N. W. 387. 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*, 1927, 205 Iowa 108, 215 N. W. 661. This common law definition is not unique to Iowa but is found in the decisions of the courts of virtually all the states. Moreover, it is a definition which was well settled in the common law at the time Article II, §1 was first adopted.

A prior attorney general's opinion, 1911-1912 OAG 710 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.

[1] 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.

"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."

See also 1968 OAG 950.

Thus, it might be argued that §§1, 2, 3 and 5 of S.F. 665 seek to substitute for the present common law subjective criteria of domicile, intention to return, and inquiry into the voter's mind as to what he regards as his residence, a statutory presumption of continued residence despite an intention to abandon his old residence and to establish a new domicile at his new residence in the new county or state as the case may be; that is to say, what the legislature is seeking to do in these sections of S.F. 665 is substitute a new meaning of "resident" as that term has come to be defined over the years.

However, we must bear in mind the well settled proposition that every presumption is indulged in favor of the constitutionality of a statute and that it must be upheld unless its invalidity is manifest beyond a reasonable doubt. *State ex rel Fulton v. Scheetz*, 1969, ____Iowa____, 166 N. W. 2d 874; *Hale v. Iowa State Bd. of Assessment and Review*, 1937, 271 N. W. 168, 223 Iowa 321, affirmed 58 S. Ct. 102, 302 U. S. 95, 82 L. Ed. 72. Indeed the judicial branch of government has no power to declare a statute void unless it is plainly and without doubt repugnant to some constitutional provision and if the constitutionality of a statute is merely doubtful or fairly debatable the courts will not interfere. *Graham v. Worthington*, 1966, 259 Iowa 845, 146 N. W. 2d 626. Moreover, it is well settled that 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, 258 Iowa 277, 138 N. W. 2d 909. The constitution is not a grant of power to the legislature, but it is a limitation of its general powers. *Pruezell v. Smidt*, 1866, 21 Iowa 540.

In a case involving the authority of the general assembly to legislate with respect to qualifications of electors the Iowa supreme court had this to say:

". . . [T]he Constitution, as applied to the legislative department, is a

limitation and not a grant of power. Or, in other words, if the legislature is not restricted, it has full power to provide who shall have the right of suffrage, and prescribe the time, place and manner of its exercise; for the legislature clearly has the power to legislate on all rightful subjects of legislation, unless expressly prohibited from so doing, or where the prohibition is implied from some express provision." *Morrison v. Springer*, 1866, 15 Iowa 304.

Applying the foregoing teaching of the court to Art. II, §1 of the constitution it is clear that the only limitation on the legislative power is directed to new residents. There is no restriction on the authority of the general assembly to allow voters, once qualified to continue to vote. In *Morrison v. Springer*, supra, the supreme court of Iowa rejected the contention that Art. II, §1 permits votes to be cast only by persons physically present in the county on election day and permitted Iowans in military service during the Civil War to cast absentee ballots. Thus, absentee voting was long ago approved despite the not unreasonable argument that the words "county in which he claims his vote" requires an elector to vote in person on election day. But if absentee voting is constitutional it seems to us that S.F. 665 is also valid. While we think the legislature can extend the franchise once obtained it certainly must be conceded that the legislature could not shorten the residency requirements for new residents. In apparent recognition of this fact the Sixty-Second and Sixty-Third General Assemblies passed Chapter 465, 62nd G. A. (1967) and Chapter 326, 63rd G. A., First Session (1969), both of which provide in identical terms:

"Constitutional Amendment on Qualifications Of Electors (Second time passed)

S.J.R. 1

"A Joint Resolution proposing a constitutional amendment relating to qualifications of electors.

"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 one (1) of Article two (II) of the Constitution, as amended in eighteen hundred sixty-eight (1868), is hereby repealed and the following is hereby adopted in lieu thereof:

" 'Section 1. Every citizen of the United States at the age of twenty-one (21) years, who shall have been a resident of this State for such period of time as shall be provided by law and of the county in which he claims his vote for such period of time as shall be provided by law, shall be entitled to vote at all elections which are now or hereafter may be authorized by law. The General Assembly may provide by law for different periods of residence in order to vote for various officers or in order to vote in various elections. The required periods of residence shall not exceed six (6) months in this State and sixty (60) days in the county.'

"Sec. 2. The foregoing proposed amendment, having been adopted and agreed to by the Sixty-second General Assembly, thereafter duly published, and now adopted and agreed to by the Sixty-third 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 seventy in the manner required by the Constitution of the State of Iowa and the laws of the State of Iowa."

If at the general election this November the people approve this proposed amendment the legislature will have ample latitude to shorten the

period of residence required and in that event S.F. 665 will have only limited application. In the event of the approval of this proposed constitutional amendment the Iowa legislature will then be in a position to adopt, as a number of other states have done, the Uniform Act for Voting by New Residents in Presidential Elections (9C Uniform Laws Annotated 198, Supp. 1967) or similar legislation. According to a note entitled "Residence Requirements for Voting in Presidential Elections" appearing in the Winter 1970 issue of The University of Chicago Law Review seven states have adopted the uniform act and eleven others have adopted substantially similar legislation. 37 U. Chi. L.R. 359, 365. In 1954 Wisconsin adopted a measure which would allow a new resident to vote for president and vice president if he would have been qualified to vote in the state of his prior residence had he remained there until the election. Twelve other states have followed this so-called Wisconsin "New Resident" approach. Id. at 364. In 1953 Connecticut approved a statute extending the state's absentee voting privileges to former residents in presidential elections. This is essentially similar to §1 of S.F. 665. The Connecticut "absentee" approach has since been followed by eight other states in addition to Iowa. Id. at 362. Thus, insofar as it extends the franchise in presidential elections to interstate movers there is nothing novel or unique about S.F. 665. There is abundant literature and discourse on the general subject. See e.g. 58 Ky. L.J. 300, 1969-70; 38 Geo. Wash. L.R. 92, O '69; 18 Vand. L.R. 337, 43 Ind. L.J. 901. However, inso far as allowing intrastate movers to vote is concerned the states have made virtually no effort to extend the franchise. 37 U. Chi. L.R. 359, 367. It is apparent, therefore, that in this regard S.F. 665 may well be breaking new ground.

In any event for the reasons previously stated herein it is our opinion that §§1, 2, 3, 4 and 5 are not unconstitutional, and the last four of these sections permit an intrastate mover to continue to vote on all questions and for all candidates upon or for which he would have been entitled to vote had he not moved.

August 27, 1970

SCHOOL ELECTIONS: Voter Registration—Terms of Board Members—§§275.13, 275.36, 275.38 and 277.24, Code of Iowa, 1966. (1). Affidavit showing the number of qualified electors is to be signed by a qualified elector residing in the school district. (2). Terms of incumbent directors are not cut short by a change in method of election of directors. (3). Newly elected directors shall be chosen for three year terms. (4). The school board submits to the voters the proposition of whether the method of election shall be changed. (Nolan to Griffin, State Senator, 8/27/70) #70-8-10

The Hon. Jim Griffin, State Senator: In your letter requesting an opinion on matters concerning the reapportionment of the Lewis Central Community School District you presented several questions as follows:

"1. What constitutes a qualified elector in the Lewis Central School District in view of the latest state requirement for blanket registration of all voters?

"2. Who shall sign the affidavit verifying the numbers of qualified electors in the school district?

"3. Are any of the incumbent school board retained if the electors vote in favor of a change in the method of election?

"4. How are the terms of a newly elected board allowed by the change in the method of election established?

"5. Are the County Superintendent and the County Board or Boards of Education in the case of territory of the school district in two counties, involved in a 'change in the method of election' the same as if there were a 'change in boundaries' as provided in Chapter 275.14, 275.15, or 275.16 of the 1966 Code of Iowa?"

The first question is answered by the opinion of this date to Mr. Rodenburg in the Pottawattamie County attorney's office. A copy is enclosed.

In answer to your second question, the language of §275.13, Code of Iowa 1966, is quite explicit in providing that the petition shall be accompanied by an affidavit showing the qualified number of electors living in each affected district or a portion thereof described in the petition and *signed by a qualified elector residing in the territory.* Where the school district includes territory in more than one county, the affidavit "shall show separately as to each county, the number of qualified electors in the part of the county included in the territory described." It is our view that the number of electors in each county may be shown separately on one affidavit, or one affidavit may be submitted for each county included in the district. The Iowa Supreme Court in *Zilske v. Albers,* 1947, 238 Iowa 1050, 29 N. W. 2d 189, stated:

"We have held emphatically that the statutes here in question are to be liberally construed. . . . Courts will go no further than to see that the methods pursued are in substantial accord with those prescribed by statute."

In *State Ex Rel. Brown v. Community School District,* 1958 249 Iowa 1226, 91 N. W. 2d 571, the court held that §275.13 of the code "is obviously a directional provision, and failure to follow it constituted merely an irregularity. It was intended as an aid to the county superintendent in considering whether it was his duty to proceed under the petition." (249 Iowa at page 1230).

Your third question is answered by the language of §275.38, if the established school district changes its method of election from directors at large to sub-dividing the district into director districts, then the two directors elected with the fewest number of votes serve until the next regular election; the two directors elected with th next fewest number of votes serve until the second regular election, and the remaining director or directors serves until the third next regular election. However, if the method of election of directors is changed from director districts to election of directors at large, (as distinguished from a change creating director districts referred to is §275.38) there would be no necessity to cut short the terms of the incumbent directors and in similar situations such incumbent members are retained. See §6 of Ch. 218, Acts of the 63rd G. A., First Session, as amended by §1, Ch. 1165, Acts of the 63rd G. A., Second Session.

Further provision appears in §277.24. The newly elected members of the school board "shall be chosen at the regular election for a term of three years to succeed those whose terms expire at the organization of the board, the third Monday in September immediately following, and shall hold office for the term for which elected and until their successors are elected or appointed and qualified . . ."

Once the district is established, and the petition for change in method of election of directors is filed with the school board pursuant to §275.36, it is the school board which submits such proposition to the voters. Therefore, your fifth question must be answered in the negative.

August 27, 1970

SCHOOL ELECTIONS: Voter registration. Voter and qualified elector defined — §§275.13 and 275.36, Code of Iowa, 1966. (Nolan to Rodenburg, Pottawattamie County Assistant County Attorney, 8/27/70) #70-8-11

Mr. Lyle A. Rodenburg, Assistant County Attorney, Pottawattamie County: This is in reply to your letter of July 2, 1970, submitting two questions for an attorney general's opinion. Your letter asks:

1. "Who is a 'voter' as that term is used in Section 275.36 of the Iowa Code in light of the new voter registration requirements passed by the 1970 Legislature (63rd G. A., 2nd Session)?

2. "Who is a 'qualified elector' as that term is used in Section 275.13, again respective to the voter registration legislation above mentioned?"

The two sections of the code referred to provide for the method of election and the circulation of the necessary petitions to call for such election for the changing of boundary of director districts within the school district:

"275.13 Affidavit — presumption. Such petition shall be accompanied by an affidavit *showing the number of qualified electors living in each affected district* or portion thereof described in the petition and signed by a qualified elector residing in the territory, and if parts of the territory described in the petition are situated in different counties, the affidavit shall show separately as to each county, the number of qualified electors in the part of the county included in the territory described. The affidavit shall be taken as true unless objections to it are filed on or before the time fixed for filing objections as provided in section 275.14 hereof." [Emphasis added]

"275.36. Submission of change to electors. If a petition for a change in the number of directors or in the method of election of school directors, describing the boundaries of the proposed director districts, if any, *signed by at least one-third of the voters residing within the school district* and accompanied by affidavit as required by section 275.13 be filed with the school board of a school district, not earlier than six months and not later than two months before a regular or special school election, the school board shall submit such proposition to the voters at such election." [Emphasis added]

You also state in your letter that in your opinion a voter and a qualified elector have the same meaning within the above cited section. Further, this means a person registered to vote under a permanent registration system and also a person who voted in the June 2nd primary in the county and town areas in Pottawattamie County where registration was not previously required, since by voting in the primaries these persons are registered under the voting registration Act which became effective July 1, 1970. Thus, in your view, "qualified electors" and "voters" are those persons who are duly registered and whose names may be obtained from the voting commissioner of the city or county where there is permanent registration.

Ordinarily, whenever the word "elector" is used in legislation without qualification or explanation the word may be assumed to have reference to persons authorized by the Constitution to exercise the elective franchise. *Piuser v. City of Sioux City*, 220 Iowa 308, 262 N. W. 551, 100 ALR 1298. The Piuser case states:

We reach the conclusion, therefore, that, under the provisions of section 6242, subd. 1, the term 'qualified electors' has reference to those persons having the qualifications prescribed in article II, section 1, of the Constitution of this state, without regard to whether or not their names appear on the registration records of the city in which they may reside."

It is generally held that the word "voter" has two meanings, persons who perform the act of voting and persons who have the qualifications entitling them to vote. 44A Word and Phrases, page 13. Its meaning depends on the connections in which it is used, and it is not always equivalent to "electors." *Mills v. Hallgren*, 146 Iowa 216, 124 N. W. 1077, 1079. In *Buchmeier v. Pickett*, 1966, 258 Iowa 1224, 142 N. W. 2d 426, the Iowa Supreme Court states:

"The meaning of 'electors' is not subject to arguments, it is a word of art which we have construed to refer to the definition in Article II, section 1 of the Iowa Constitution . . .

* * *

"The word 'voter' is not defined by the Iowa Constitution. It is not a word of art with a precise and unchanging definition."

Buchmeier holds that in matters of reorganization of school districts laws will be liberally construed with the view of effectuating legislative intent; and it is not logical to assume the legislature intended electors could defeat a proposed merger by signing protest petitions and yet be unable to vote because of not being registered. §277.12, Code of Iowa 1966, as amended by Ch. 1025, Acts of the 63rd G. A., Second Session — (S.F. 1083) now provides in pertinent part:

"To have the right to vote at a school election a person shall have the same qualifications as for voting at a general election and must have been for ten days prior to such school election an actual resident of the corporation and precinct or subdistrict in which he offers to vote.

"In school districts embracing areas in more than one county, the county residence requirement respecting electors qualification shall be considered to have been met if the elector or electors have resided in the school district for a period of sixty days next preceding the election, even though such sixty days of residence may not have been established in the county where such elector or electors reside at the time of the election."

Section 277.16 provides:

"In corporations where registration is required, except in those corporations where permanent registration is otherwise provided for by statute, the board may consolidate precincts into registration districts as provided by law applicable to registration for general elections and shall designate suitable and convenient places for such registration."

If the school district extends into a county where there is no permanent registration, the eligible voters must be determined by other means, and in fact even where there is permanent registration the total number of qualified electors cannot be determined by registration lists until the cut-off date for registration. In other sections of the code this problem

has been avoided by reference to the number of votes cast in the last election for governor (§45.1), or 20 percent of the eligible voters or five hundred voters, whichever is the smaller number (§275.12), or a given number of resident freeholders (§347.1).

Since permanent registration is now required for all of Pottawattamie County for general elections it must now be determined whether or not the directors of the community school district have made the provisions of the current registration chapter applicable to the community school district as provided in Ch. 93, §1, Acts of the 63rd G. A., First Session. This law enacted in 1969 provides:

"The provisions of this chapter [Ch. 48] shall not apply to any election conducted by community school districts which have been divided into director districts and in which each member of the board of directors is elected by the voters of the director district of which he is a resident, unless the board of directors of any such community school district shall by resolution make the provisions of this chapter applicable to elections within the district."

This section is not amended by the provisions of the Act requiring permanent registration in all counties having a population of fifty thousand or more. See Ch. 93, Acts of the 62nd G. A., Second Session (H.F. 1097).

September 4, 1970

ELECTIONS: Political party county central committees, removal of members — §§43.99, 43.100, 66.1, Code of Iowa, 1966. A member of a county central committee may only be removed by the county central committee pursuant to the provisions of §43.99 and for one of the grounds specified in such section. Chapter 66 dealing with removal of public officers is not applicable. (Haesemeyer to Hill, State Senator, 9/4/70) #70-9-1

The Hon. Eugene M. Hill, State Senator: Reference is made to your letter of June 5, 1970, in which you state:

"An official opinion by the Attorney General is requested. The situation necessitating the request is described herewith.

"Troubled by poor attendance at County Central Committee meetings, the County Central Committee is preparing to adopt a by-law which will allow the County Central Committee to declare the office of township or precinct committeeman or committeewoman vacant if the committeeman or committeewoman is absent from more than two consecutive meetings of the County Central Committee. The vacant office would then be filled by appointment of the county chairman with the approval of the County Central Committee.

"A question as to the legality of such action has been raised. Election of political party officers is provided for in Chapter 43, Section 43.4, Code 1966 and related sections. Does this regulation of political party organizations by the State carry with it the further requirement that duly elected party officers, in particular township or precinct committeemen or committeewomen, are subject to removal from office only as provided in Chapter 66, Code 1966 which sets forth the procedure for removal from office of appointive or elected officers?"

Section 43.99, Code of Iowa, 1966, provides:

"Party committeemen. A man member and a woman member of the county central committee for each political party shall, at the precinct caucuses, be elected from each precinct. The term of office of a member shall begin immediately following the adjournment of the county conven-

tion and shall continue for two years and until his or her successor is elected and qualified, unless sooner removed by the county central committee for inattention to duty, incompetency, or failure to support the ticket nominated by the party which elected such member."

It is to be observed that this code section deals specifically with members of county central committees and specifies the grounds for which they may be removed by the county central committee among which is inattention to duty.

The applicability of Ch. 66 on the other hand is governed by §66.1 which provides:

"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.
2. For willful misconduct or maladministration in office.
3. For corruption.
4. For extortion.
5. Upon conviction of a felony.
6. For intoxication, or upon conviction of being intoxicated."

Apart from the fact that it is doubtful that mere absence from more than two meetings would constitute one of the six grounds for removal specified in §66.1 we do not consider a member of a county central committee to be holding a "public office in the state or in any division or municipality thereof." Accordingly, it is our opinion that a member of a county central committee may only be removed by the county central committee pursuant to the provisions of §43.99 and for one of the grounds specified in such section. Presumably each county central committee has a good deal of latitude in adopting bylaws to govern its own affairs and could adopt a bylaw which would allow the county central committee to declare the office of township or precinct committeeman or committeewoman vacant for absence from more than two consecutive meetings of the county central committee.

Ch. 43 also prescribes the manner of filling vacancies on county central committees. Thus, §43.100 provides:

"Central committee — vacancies. The county central committee shall organize on the day of the convention, immediately following the same.

"Vacancies in such committee may be filled by majority vote of the committee, but no two members thereof from the same precinct shall be of the same sex."

I trust the foregoing answers the questions you have raised.

September 4, 1970

CRIMINAL LAW: Desecration of the flag — §§32.1 and 32.2, Code of Iowa, 1966. A green and white flag of the ecology movement does not "evidently purport" to be the "flag, color, ensign, shield or other in-

signia of the United States" and would not amount to desecration of the flag. (Haesemeyer to Fenton, Polk County Attorney, 9/4/70) #70-9-2

Mr. Ray A. Fenton, Polk County Attorney: Reference is made to your letter of July 21, 1970, in which you state:

"This office has received a few complaints concerning the flying of a green and white flag, which is a symbol of the ecology movement. A thermofax copy of a picture of said flag is enclosed with this letter for you to see. The dark stripes and the field is a dark green color, the light stripes and the stars are white.

"Specifically, is the flying or parading of such a flag a violation of Section 32.1 of the 1966 Code of Iowa, and, in particular that portion thereof which reads:

" 'or who shall publicly . . . cast contempt upon, satirize, deride or burlesque?'

"Also enclosed are copies of other materials being exhibited. Do either of them come within the above quoted section?"

Section 32.1, Code of Iowa, 1966, to which you make reference provides in its entirety:

"32.1 Desecration of flag or insignia. Any person who in any manner, for exhibition or display, shall place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color, ensign, shield, or other insignia of the United States, or upon any flag, ensign, great seal, or other insignia of this state, or shall expose or cause to be exposed to public view, any such flag, standard, color, ensign, shield, or other insignia of the United States, or any such flag, ensign, great seal, or other insignia of this state, upon which shall have been printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose any article or substance, being an article of merchandise or a receptacle of merchandise or article or thing for carrying or transporting merchandise, upon which shall have been printed, painted, attached or otherwise placed, a representation of any such flag, standard, color, ensign, shield, or other insignia of the United States, or any such flag, ensign, great seal, or other insignia of this state, to advertise, call attention to, decorate, mark, or distinguish the article or substace on which so placed, or who shall publicly mutilate, deface, defile or defy, trample upon, cast contempt upon, satirize, deride or burlesque, either by words or act, such flag, standard, color, ensign, shield, or other insignia of the United States, or flag, ensign, great seal, or other insignia of this state, or who shall, for any purpose, place such flag, standard, color, ensign, shield, or other insignia of the United States, or flag, ensign, great seal, or other insignia of this state, upon the ground or where the same may be trod upon, shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding one hundred dollars or by imprisonment for not more than thirty days and shall also forfeit a penalty of fifty dollars for each such offense, to be recovered, with costs, in a civil action or suit in any court having jurisdiction."

In addition §32.2 provides:

"32.2 Actions for penalty. Such action or suit may be brought by and in the name of the state, on the relation of any citizen thereof, and such penalty, when collected, less the reasonable cost and expense of action or suit and recovery, to be certified by the clerk of the district court of the county in which the offense is committed, shall be paid into

the county treasury for the benefit of the school fund, and two or more penalties may be sued for and recovered in the same action or suit."

The answer to the question you raise presumably depends on whether or not the flags involved "evidently purport" to be the "flag, standard, color, ensign, shield or other insignia of the United States." Since one actually thinks of the United States flag as being red, white and blue we do not think that it could be said that a dark green and white flag evidently purports to be the beloved stars and stripes. Moreover, while it is not entirely clear it appears from materials you sent us that the flags in question contain in lieu of the stars or superimposed thereupon the hated so-called peace symbol.

September 4, 1970

ELECTIONS: Registration, voting in primary constitutes — §48.6, Code of Iowa, 1966; §9, Chapter 1037, 63rd G. A., Second Session (1970). Any person who voted in the June 2, 1970 primary is automatically and *ipso facto* considered to be permanently registered under the provisions of Chapter 48 and regardless of the fact that in order to vote in such primary election it was not necessary for such voters to furnish the information required by the permanent registration law. (Haesemeyer to Faches, Linn County Attorney, 9/4/70) #70-9-3

Mr. William G. Faches, Linn County Attorney: You have requested an opinion of the attorney general with respect to the following:

"House File 1097, Section 9 of the Acts of the 63rd General Assembly, 1970 Session, states:

" 'Any person voting in the Primary Election of June 2, 1970, shall be a permanently registered voter of any county where voter registration is required under the provisions of chapter forty-eight (48) of the Code.'

"At the time of the June 2nd Primary, the Linn County Auditor's Office did not have available for persons voting at the June 2nd Primary application blanks for registration, nor did the Auditor's Office have available for the voters the permanent registration cards showing the voter's name, address, birth place, birth date, and other pertinent data required by the Permanent Registration Law.

"At the present time, the Auditor is contacting those people in Linn County who voted in the June 2nd Primary, said people not having made application for permanent registration nor having filled in permanent registration cards, and is attempting to have these people fill out said application forms and permanent registration cards. Some of the voters are now refusing to sign application forms and permanent registration cards insisting that since they have voted in the June 2nd Primary, they are automatically eligible to vote in the November General Election.

"My questions are as follows:

"1. If a person voted in the June 2, 1970, Primary Election, is he automatically qualified to vote in the November General Election?

"2. If a person voted in the June 2, 1970, Primary Election and has not filled out an Application for Registration nor has signed a Permanent Registration Card, can said person be denied the right to vote in the November General Election because of his failure to fill out an Application for Registration and sign a Permanent Registration Card?"

As you point out the permanent registration law, Chapter 48, Code of Iowa, 1966, as amended, requires that certain rather extensive informa-

tion be obtained from each applicant for permanent registration. Thus, §48.6, provides:

"For the purpose of expediting the work of the commissioner of registration, for uniformity, and for preparation of abstracts and other forms in use by the election boards, the registration records shall be substantially as follows:

"Suitable card index devices shall be provided. There shall also be provided suitable index cards of sufficient facial to contain in plain writing and figures the data required thereon. The following information concerning each applicant for registry shall be entered on the card:

"1. Ward.

"2. Election precinct.

"3. If a man:

a. The name of the applicant, giving surname and Christian names in full.

b. Residence, giving name and number of the street, avenue, or other location of the dwelling, and such adidtional clear and definite description as may be necessary to give the exact residence of the applicant.

c. Date of birth.

d. Term of residence in the United States; in the state; in the county; in the precinct.

e. Nativity.

f. Citizenship. (If natuarilzed give date of papers and court; also date of naturalization of parents.)

g. Date of application for registration.

h. Signature of voter. (The applicant after registration shall be required to sign his name on both the original and duplicate registration lists.) Except that the signature shall be required only on the original registration list where the duplicate registration list is prepared by electrical, mechanical or similar data process.

"4. If a woman:

a. The information requested shall be the same as for the males, with such additional information as may be necessary to determine the qualifications of the applicant for registration. Provided, that, after such original registration, whenever any change of name shall occur, due to marriage or divorce, such applicant shall not be allowed to vote until she has reregistered; and after such reregistration, the previous registration card shall be removed from the files.

"5. Party affiliation. (No Party if preferred.)"

Yet as you also point out under §9 of Chapter 1037, H.F. 1097, 63rd G. A., Second Session (1970) any person who voted in the June 2, 1970 primary is automatically and ipso facto considered to be permanently registered under the provisions of Chapter 48 and regardless of the fact that in order to vote in such primary election it was not necessary for such voters to furnish the information required by the permanent registration law. While we can certainly appreciate that this creates quite a dilemma for some of the county auditors we can not ignore the plain language of §9 and must conclude that with nothing more mere voting in the June 2, 1970 primary is sufficient to qualify an individual to vote in the November general election and that if any individual who did vote in

such primary election now refuses to fill out an application for registration and signing permanent registration card there is little the auditor can do except hope that the next session of the general assembly will take steps to straighten the matter out.

September 4, 1970

ELECTIONS: Voters declaration of eligibility completion mandatory — §49.77, Code of Iowa, 1966, as amended by §29, Chapter 1039, 63rd G. A., Second Session (1970). Completion of the required form of Voter's Declaration is a prerequisite to the right to vote. (Haesemeyer to Lynch, Winneshiek County Attorney, 9/4/70) #70-9-4

Mr. Thomas C. Lynch, Winneshiek County Attorney: Reference is made to your letter of August 20, 1970, in which you state:

"Your opinion is requested on an interpretation of Iowa Code Section 49.77 as amended by Chapter 1039, Acts of the 63rd G. A., 2nd Session. Section 29 of S.F. 665 deletes the words 'and, if required * * *' so as to appear to make the signing of a Voter's Declaration of Eligibility MANDATORY as to every person desiring to vote, rather than discretionary with the Judges. Your opinion as to whether the completion of a Voter's Declaration is a prerequisite to a right to vote is urgently requested.

"This information is required in time for the September 14th School Elections. If a mandatory requirement, then the same number of declaration forms will be required as ballots, and time is limited for the printing of that quantity of forms."

Section 49.77, Code of Iowa, 1966, prior to the adoption of Chapter 1039, 63rd G. A., 2nd Session (1970) merely provided:

"49.77 Ballot furnished to voter. 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."

However, §29 of Chapter 1039 amended such §49.77 as follows:

"Sec. 29. Section forty-nine point seventy-seven (49.77), Code 1966, is hereby amended by striking all of such section after the word 'name' in line five (5) and inserting in lieu thereof the following:

" 'and address to the judges, and shall sign a voter's declaration provided by the judges of the election, in substantially the following form:

VOTER'S DECLARATION OF ELIGIBILITY

I do solemnly swear or affirm that I am a resident of the_____ precinct,_____ward or township, city or town of_____, county of_____, Iowa. I have been a resident of the state of Iowa for at least six months, of said county for at least sixty days, and of said precinct for at least ten days. I am lawfully eligible to vote in said precinct and county in the_____election to be held on _____, 19____. I have not voted and will not vote in any other precinct in said election.

(For primary election only:) I am affiliated with the_____ party.

I understand that any false statement in this declaration is a criminal offense punishable as provided by law.

Signature of Voter

Address

Approved:

Judge or Clerk of the Election

" 'In precincts where the judges of the election are furnished computerized registration lists, the person desiring to vote, except a person legally blind, shall also provide some form of identification upon which the signature or mark of such person appears. If identification is established to the satisfaction of the judges of the election, the person may then be allowed to vote.

" 'If the voter has no identification, his identity may be attested to by a judge of the election.

" 'All voters' declarations may then be seen by the challengers of each political party, at the request of such challengers.' "

In our opinion the use of the word "shall" in §49.77 as so amended is mandatory and completion of the required form of Voter's Declaration is a prerequisite to the right to vote. The word "shall" in a statute is ordinarily to be construed as mandatory. *Gibson v. Winterset Community School District*, 1965, 258 Iowa 440, 138 N. W. 2d 112.

September 4, 1970

ELECTIONS: School elections, voter registration applies — §§48.2, 48.28, 277.17, Code of Iowa, 1966. Voter registration does apply to school elections. The county auditor should furnish registration books and records and pollbooks for all townships in the school districts and the judges of election in the school election should determine the eligibility of those seeking to vote. (Haesemeyer to Fenton, Polk County Attorney, 9/4/70) #70-9-5

Mr. Ray A. Fenton, Polk County Attorney: Reference is made to your letter of August 12, 1970, in which you state:

"This office has received a request for opinion from the Saydel Consolidated School District. Since their problem may be one of state-wide interest, I am requesting an opinion from you.

"In the past, voters in a school election voted in the precinct in which they resided within the school district. School districts, in many instances, lie in whole and in part in more than one township.

"Under the new registration law, the following questions arise:

"1. Does voter registration apply to school elections?

"2. If so, must registration be accomplished by precinct in the school district as well as a different precinct in the general election in the event the boundaries and numbers of the precincts are not co-terminus?

"3. Who is to furnish and certify those eligible to vote in special school elections?"

Section 48.2, Code of Iowa, 1966, and §48.28, Code of Iowa, 1966, as amended by Chapter 93, §1, 63rd G. A., 1st Session (1969) provide respectively:

"48.2 Definitions. For the purpose of this chapter, the word 'elections' shall be held to mean general, municipal, special, school, or primary elec-

tions, and shall include state, county, and municipal elections."

"48.28 Chapter not applicable to certain community school districts. The provisions of this chapter shall not apply to any election conducted by community school districts which have been divided into director districts and in which each member of the board of directors is elected by the voters of the director district of which he is a resident, unless the board of directors of any such community school district shall by resolution make the provisions of this chapter applicable to elections within the said district."

Unless the Saydel Consolidated School District falls within the exception contained in §48.28 it would seem clear that voter registration does apply to school elections. In this connection see also a recent attorney general's opinion, dated August 27, 1970, Nolan to Rodenburg, Pottawattamie County Assistant County Attorney, a copy of which is attached.

Section 277.17, Code of Iowa, 1966, provides:

"277.17 Registrars appointed. The board of directors of school corporations where registration is required at general elections, except where permanent registration is required, shall, not less than ten days prior to the school election, appoint two registrars in each of the registration districts of such school corporation for the registration of voters therein who shall have the same qualifications as registrars appointed for general elections and shall qualify in the same manner and receive the same compensation to be paid by the school corporation. The person in custody of the registration books, records, and pollbooks for the general election shall furnish the same to the board of directors which shall distribute them to the proper registrars and judges and they shall be used for registration for school elections the same as the general elections, and shall, within ten days after the school election, be returned to the proper custodian."

Referring to this section an earlier opinion of the attorney general, 1925-1926 OAG 294 said:

"A reading of this section clearly answers the first of your inquiry in that it is provided that the registration and pollbooks used for the general election shall be furnished to the board of directors of the school district for use at the school election. We are of the opinion that it is the duty of the registrars appointed by the school board to perform the duties in respect to registration the same as the registrars appointed under the general election laws, and thus to copy the names in the registry book."

Accordingly, it would be our view that the county auditor should furnish registration books and records and pollbooks for all townships in the school districts and that the judges of election in the school election should determine the eligibility of those seeking to vote.

September 8, 1970

ELECTIONS: Vacancies in office and in nominations occasioned by resignation and withdrawal — §§43.59, 69.11, 69.12 and 69.13, Code of Iowa, 1966. Where the democratic incumbent county attorney resigns his office and withdraws as his party's nominee for reelection, (1) The board of supervisors is authorized to appoint someone to fill the office of county attorney only for the period from September 1, 1970 until the November, 1970 General Election, (2) Both parties may nominate candidates for the short term but under §43.59 only the democratic county central committee can nominate a candidate for the full term commencing January 1, 1971, (3) There is no time limit on when certifications may be made so long as they are received in time to be printed on the ballot. 1968 OAG 884. (Haesemeyer to Synhorst, Secretary of State, 9/8/70) #70-9-6

The Hon. Melvin D. Synhorst, Secretary of State: Reference is made to your letter of August 4, 1970, with which you forwarded a letter dated August 3, 1970, from Pocahontas County Auditor Marie Pavik. This latter letter states:

"I would appreciate some help and information for the correct procedure I need to follow in Pocahontas County, relative to a vacancy in County office.

"The Pocahontas County Attorney, J. Desmond Crotty, a Democrat, is resigning from said office as of Aug. 31, 1970. He was also nominated for said office in the Primary Election June 1970, for a 2 yr. term commencing Jan. 1, 1971.

"He is aware of Sec. 43.59, pg. 2, and will withdraw his name from the nomination within the required time prior to the General Election Nov. 1970.

"Question #1: The Board of Supervisors must name someone as Co. Atty. effective Sept. 1, 1970, to the Gen. Election Nov. 1970 only, is this correct, or do they name him from Sept. 1, 1970 to Jan. 1, 1971?

"#2: Sec. 43.59, Pg. 2, says appropriate county central committee shall designate a person to fill such vacancy etc. Does this mean the Democratic county central committee only, or both party central committees?

"#3: If this or both parties can or do name a candidate, for what term? Is it from Gen. Election 1970 to Dec. 31, 1970 and also for a full 2 yr. term beginning Jan. 1, 1971? Or can a candidate be elected by write in, in Gen. Election only?

"#4: If party central committee or committees can name a candidate, by what date must this be certified to County Auditor, for me to put said name on Gen. Election ballot?"

1. The board of supervisors is authorized to appoint someone to fill the office of county attorney only for the period from September 1, 1970 until the November, 1970 General Election. §§69.11, 69.12 and 69.13, Code of Iowa, 1966.

2. Both parties may nominate candidates for the short term but under §43.59 only the democratic county central committee can nominate a candidate for the full term commencing January 1, 1971. Presumably the republican party has a nominee for the office for the full term who was nominated at the primary election this year. However, if they do not it may still be possible to nominate a candidate under certain circumstances. In this connection see the attached opinion of the attorney general, 1968 OAG 884, as supplemented by the further opinion of the attorney general dated July 23, 1970.

3. My answer to your question #2 above includes the answer to your third question.

4. There is no time limit on when certifications may be made so long as they are received in time to be printed on the ballot. 1968 OAG 884.

September 9, 1970

ELECTIONS: Voting machines, write-in votes — §49.99, Code of Iowa, 1966. Where due to a malfunction there is no paper in a voting machine for writing the names of write-in candidates and certain electors wrote the name of their candidate on the metal part of the machine instead of calling the malfunction to the attention of election officials the votes were not validly cast and the name of the write-in candidate may not be placed on the ballot. (Haesemeyer to Faulkner, Mahaska County Attorney, 9/9/70) #70-9-7

Mr. Hugh V. Faulkner, Mahaska County Attorney: You have requested an opinion of the attorney general with respect to the following:

"At the primary election on June 2, 1970, in East Des Moines Township, six people claim to have written in the name of a candidate to be nominated for Township Trustee on the Republican ticket. The names were written in on a metal part of the voting machine because the paper roll in the machine was not properly threaded so that the voters could write on the paper. The defect was not discovered until the polls were about to be closed. I have advised the Canvassing Board that I do not see how they can count these votes where there is nothing to show for whom the write-in ballot was cast. These people are desirous of making an affidavit and will do so as to their write-in vote for a certain candidate for said office.

"Please give us your opinion as to whether there is any method by which the write-in vote can be registered so that the name of the candidate receiving the vote can be placed on the ballot in the general election in November of this year."

Section 49.99, Code of Iowa, 1966, 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."

The requirements of the foregoing section are plain. In order to cast a write-in vote an elector must write in the name of the person for whom he desires to vote and also place a cross in the square opposite such name. In the instances you describe the six voters were apparently prevented from writing in the names of the candidate for whom they wished to vote due to a malfunction of the machine. Regardless of this it is nevertheless our opinion that these write-in votes were not validly cast and may not now be counted and the name of the write-in candidate for whom they claim to have voted can not be placed on the ballot.

Chapter 52 dealing with voting machines contains provisions calculated to see to it that the machines are kept operational during the course of an election. See e.g., §52.20. Nevertheless it is possible that an occasional malfunction such as you describe may occur. The situation is not unlike that presented where a voter spoils his paper ballot. The electors in question should at that time have brought the matter to the attention of the proper election officials so that the machine could have been repaired rather than trying to write a name on a metal part of the machine. Having failed to do this there is no way that their write-in votes can be registered.

September 14, 1970

STATE OFFICERS AND DEPARTMENTS — Merit employment rules and regulations, vacation entitlement and sick leave — §79.1, Code of Iowa, as amended by Chapter 1045, 63rd G. A., Second Session (1970); §9(18), Chapter 95, 62nd G. A. (1967). The merit employment department does have authority to institute and enforce a uniform accrual policy of vacation entitlement for the agencies and employees under the merit system. The merit department would be authorized to require vacation entitlement and accrual records to be kept on a work day basis.

The merit employment department could adopt a rule permitting an appointing authority to allow the taking of vacations in amounts less than one week. §79.1 does not permit any discretion in the appointing authority to pay employees terminated for cause for any vacation accrued by the employees during the twelve months prior to termination. The merit employment commission can make and promulgate reasonable rules relative to the carryover of vacation entitlement for all covered employees. Sick leave is considered in terms of calendar days. It would not be contrary to §79.1 for the merit employment department to make rules relative to the granting of sick leave and he accrual of up to ninety days of such leave. (Turner to Keating, Director, Iowa Merit Employment Department, 9/14/70) #70-9-8

Mr. W. L. Keating, Director, Iowa Merit Employment Department: Reference is made to your letter of August 10, 1970, in which you state:

"The Iowa Merit Employment Commission respectfully requests the opinion of the Attorney General of Section 79.1, Chapter 79, Code of Iowa, 1966, as amended by H.F. 1197, Chapter 1045, 2nd Regular Session, 63rd G. A.

"Section 9, sub. 18, Chapter 95, 62nd G. A. provides the Commission shall adopt rules relative to 'annual sick leave and vacation time' and that such shall be 'in accordance with' Section 79.1 of the Code. Over the years many interpretations have resulted in a 'hodge podge' of implementation. The Commission wishes to adopt a uniform application for departments within the Merit System in accordance with the Attorney General's interpretation.

"Specifically, first, reference is made to lines 1 through 45 of section 79.1, as amended. The Commission has interpreted the entitlement to be as follows:

One week of vacation after one year of employment;

Two weeks of vacation after the second year of employment and through the fifth year of employment;

Three weeks of vacation after the fifth year of employment through the twelfth year of employment;

And, four weeks of vacation after the twelfth year of employment and for all subsequent years.

"However, any employee entitled to such aforementioned vacation, who does not complete the full year shall accrue vacation under the following:

Three and one-half days for each complete calendar quarter during the second year and through the fifth year of employment;

Five and one-quarter days for each completed calendar quarter during the sixth year of employment and through the twelfth year of employment;

And, seven days for each completed calendar quarter during the thirteenth year and all subsequent years.

"Obviously, there is little problem relative to the one week of vacation after the completion of the first year of employment. Thereafter, however, there are as many implementation policies as there are agencies. This seemingly is based upon lines 19 through 23 which provide:

'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.'

"The dictionary definition: Individual choice of judgment; power of free decision or latitude of choice within certain legal bounds has been taken literally. At the present time, under 'discretion,' some Appointing

Authorities granted vacation on a monthly entitlement; some after the completion of a calendar quarter; others at the end of the year at the anniversary date; and, many at the beginning of the year. In adidtion, where there is a general rule of accrual followed, this is varied as to individual cases or circumstances.

"The following questions are submitted:

1. Can the Merit Employment Commission institute and enforce a uniform accrual policy of vacation entitlement?

2. What is the meaning of one, two, three or four weeks vacation? Does this mean work days or calendar days? If it means work days, does this mean charged for days ordinarily worked or could it be interpreted to mean five days for a vacation period so that one employee on a six day work schedule would not be charged more on a period of vacation than one who worked only five days?

3. Does the vacation entitlement mean vacation must be taken in one continuous period of a week or may the employee be allowed to use the vacation, at the Appointing Authority's convenience as needed a day or so at a time.

4. Does the wording in lines 23 through 28 require mandatory withholding of vacation from an employee discharged for cause or is this discretionary with the Appointing Authority?

5. Do the words 'for any vacation which may have accrued to him during the twelve months immediately prior,' lines 29 through 31 mean, as some Appointing Authorities have applied it, that vacation accrual cannot be carried over from one twelve month period to the next — you lose the vacation you did not take during the year of entitlement?

6. Or, does the interpretation of Section 9, subsection 18, Chapter 95, 62nd G. A., lend itself to mean the Iowa Merit Employment Commission may within the limitations set forth in Section 79.1 of the Code make rules, as approved by the Attorney General and the Legislative Departmental Rules Review Committee, on an overall implementation basis?

"Secondly, reference is made specifically to lines 57 through 63 of Section 79.1 of the Code, the following questions are submitted:

1. Does day mean calendar or work days? If calendar day, does this mean an employee who is off Friday, but returns to work Monday (on a five day schedule), is charged for the two days of the weekend or not?

2. Again, because of the words 'in the discretion of the head of any department,' lines 58 and 59, there are many interpretations of the meaning of the accrual of 'thirty days per year.' Some grant this at the time the employee goes to work; many at the end of the year; and others so much per month. Can the Commission prescribe accrual of sick leave at so many days per month up to the accrual of ninety total sick days?"

Section 9, Chapter 95, 62nd G. A. (1967), provides in relevant part:

"Sec. 9. The merit employment commission shall adopt and may amend rules for the administration and implementation of this Act in accordance with chapter seventeen A (17A) of the Code. The director shall prepare and submit proposed rules to the commission. The rules shall provide:

* * *

"18. For attendance regulations, and special leaves of absence, with or without pay, or reduced pay in the various classes of positions in the classified service. Annual sick leave and vacation time shall be granted in accordance with section seventy-nine point one (79.1) of the Code.

* * *"

Section 79.1, Code of Iowa, 1966, as amended by Chapter 1045, 63rd G. A., Second Session (1970) provides in pertinent part:

"All employees of the state including highway maintenance employees of the state highway commission are granted one week's vacation after one year's employment and two weeks' vacation per year after the second and through the fifth year of employment, and three weeks' vacation per year after the fifth and through the twelfth year of employment, and four weeks' vacation after the twelfth 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 three and one-half (3½) days pay for each completed calendar quarter during the second and through the fifth year of employment, and at the rate of five and one-fourth days pay for each completed calendar quarter during the sixth through the twelfth and seven days pay for each completed calendar quarter during the thirteenth and all subsequent years of employment.

* * *

"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. Provided, however, that notwithstanding the foregoing limitations, state highway commission maintenance employees, uniformed members of the division of highway safety and uniformed force and members of the division of criminal investigation and bureau of identification, except clerical workers, of the department of public safety may upon the recommendation of the commissioner with the approval of the executive council, be granted additional leave of absence with pay, for injuries sustained in line of duty. It is further provided that employees of institutions under the state board of regents who are employed for nine months or more in any twelve-month period shall be entitled, in the discretion of the board, to a leave of absence with pay of two and one-half days for each month of employment when necessary by reason of sickness or injury, and such portion as is unused may be accumulated to a total of ninety days acquired over a period not exceeding four consecutive years or consecutive twelve-month periods."

1. As you correctly point out §79.1 in its present and past forms has, because of its vague and imprecise wording, given rise to many differing, conflicting and oftentimes inconsistent interpretations by various state agencies and departments. In our opinion, §9(18) of Chapter 95 does give the merit employment department authority to institute and enforce a uniform accrual policy of vacation entitlement for the agencies and employees under the merit system. However, any rules and regulations must be consistent with and do no great violence to §79.1.

2. The almost universal practice in private industry and elsewhere is to deal with vacation accrual in terms of work days rather than calendar weeks. The problems inherent in the calendar week approach are obvious.

For example, suppose an employee takes a week's vacation during a week containing a holiday. It seems manifestly unjust to deprive him of the holiday because his vacation was scheduled during that week. Or suppose an employee takes vacation in units of less than a week. What is to be done about the weekends? How many days is he to be charged? To avoid the problem by requiring that all vacations be scheduled in multiples of a week would serve the convenience neither of the employer nor the employee. Yet there is some indication that §79.1 as amended is geared to calendar weeks. For example, an employee who has completed two through five years of employment is entitled to "two weeks of vacation." Yet for purposes of computing the vacation entitlement of those persons who do not complete a full year the statute provides that they shall be entitled to three and one-half days for each completed calendar quarter. For four quarters that would be fourteen days or two calendar weeks. Employees who have completed five through twelve years of employment receive three weeks' vacation and their part year accrual is at the rate of five and one-quarter days per quarter or twenty-one days per year, which is of course the same as three calendar weeks. Those employees who have worked twelve or more years are entitled to four weeks vacation and here again a quarterly accrual rate works out to twenty-eight days for four calendar quarters. It seems to us that this may indicate that the legislature in speaking of "weeks" vacation meant calendar weeks. In this connection it is interesting to note that prior to the 1970 amendment to §79.1 the part year accruals converted to equivalents in terms of work days, i.e., an individual entitled to two weeks' vacation accrued at the rate of ten days per year and so forth.

Nevertheless, because of the serious practical problems alluded to hereinbefore it is our opinion that the merit department would be authorized to require vacation entitlement and accrual records to be kept on a work day basis. Thus, calendar weeks would be converted to work weeks and employees who ordinarily worked five days a week, if they took their vacation by days would get off five, ten, fifteen or twenty days as the case might be and an employee who normally worked six days a week would get six, twelve, eighteen and twenty-four normal working days off depending on length of service. It should be noted that the part year accruals relate only to computing the amount to be paid to terminating employees for vacation accrued in the year they terminate. Hence, it may well be that these accruals should be made on a calendar basis in accordance with the statutory formulae.

3. We can discern no statutory requirement in §79.1 that vacations be taken in units of a week or more. In many instances it is most convenient and desirable for the employer and/or employee to take vacation in lesser amounts and in our opinion the merit employment department could adopt a rule permitting an appointing authority to allow the practice.

4. The statutory language of §79.1 does not, in our opinion, permit any discretion in the appointing authority to pay employees terminated for cause for any vacation accrued by the employee during the twelve months prior to termination.

5 and 6. Since the statute gives the appointing authority discretion as to scheduling and granting vacations, it would be manifestly unfair to

conclude that vacation not taken is lost especially where an employee does not take his vacation because of the work requirements or at the request of his employer. On the other hand it would not be in the best interests of the operations and budgeting of most appointing authorities to permit an employee to accumulate vacation indefinitely and then take it all at once or as terminal leave. Viewing the matter realistically and practically it is our opinion that the merit employment commission can make and promulgate reasonable rules relative to the carry-over of vacation entitlement for all covered employees.

7. Your question as to whether "leave of absence of thirty days per year" means calendar days or work days has been answered in a prior opinion of the attorney general. 1954 OAG 28. In our view this opinion is correct and dispositive of the matter. The statute is of no assistance in answering your question as to what should be done about the weekend in the case of an employee who is off on Friday but returns on Monday. The most we can do here is suggest that under Chapter 95, §9(18) the merit employment department make reasonable rules and regulations to cover this situation bearing in mind the fact that sick leave is considered in terms of calendar days.

8. In our opinion the words "in the discretion of the head of any department" relate only to the decision as to whether or not to grant the sick leave and that it would not be contrary to §79.1 for the merit employment department to make rules relative to the granting of sick leave and the accrual of up to ninety days of such leave.

September 14, 1970

STATE OFFICERS AND DEPARTMENTS: Merit employment department, liquor control commission, political activity — §123.14, Code of Iowa, 1966; §18, Chapter 95, 62nd G. A. (1967). The rules promulgated by the merit employment department pursuant to Chapter 95 would have application to all nonexempt state employees including employees of the liquor control commission but the employees of that agency would in addition be bound by the requirements of §123.14. (Haesemeyer to Keating, Director, Merit Employment Dept., 9/14/70) #70-9-9

Mr. W. L. Keating, Director, Merit Employment Department: You have requested an opinion of the attorney general with respect to the following:

"The Merit Employment Commission respectfully requests the opinion of the Attorney General relative to the correctness of the Commission's interpretation of the Merit Act relative to political activity and conflicts that now appear in the statutes; specifically, as to Chapter 123.14, Code of Iowa, 1966 (Iowa Liquor Control Act).

"Chapter 123.14 specifically prohibits 'member, officer or employee' of the commission from holding public office, serving on committees of political parties, etc. Certain of these provisions are in conflict with Chapter 95, Section 18, 62nd G. A. Section 8, Chapter 79, 1st Regular Session of the 63rd G. A. contains a specific reference providing the Merit Act shall 'prevail over any inconsistent provisions of the Code.'

"In addition, Section 18, Chapter 95, 62nd G. A. provides:

"'. . . The Commission shall adopt any rules necessary for further restricting political activities of persons holding positions in the classified

service, but only to the extent necessary to comply with Federal standards. . . . In any event all employees shall retain the right to vote as they please and to express their opinions on all subjects.'

"In compliance with Section 18, Chapter 95, 62nd G. A. rules have now been prepared covering 'political activity' (copy enclosed). These will be discussed with the agency representatives and then presented to the Merit Employment Commission this month. In these proposed rules, you will note provision is made to comply with the Hatch Act for the grant-in-aid agencies of Employment Security, Department of Health, welfare activities of the Social Services Department and Civil Defense Division; but, the remainder of the rules reflect the more liberal provisions of Section 18, Chapter 95, 62nd G. A. and the latest legislative expression of prohibited political activity.

"It is noted more restrictive provisions could be adopted in accordance with the last sentence of the aforementioned Section 18, but the Commission feels the present proposed rules reflect the legislative intent and should include all state agencies within the Merit Act, except the special restrictive political activities made necessary for certain agencies to comply with the Federal Hatch Act. Is this interpretation correct?"

The proposed rules attached to your letter are included herewith as an attachment. §123.14, Code of Iowa, 1966, provides:

"123.14 Prohibition on members and employees. No member, officer or employee of said commission shall, while holding such office or position, hold any other office or position under the laws of this state or of any other state or of the United States, and shall not engage in any occupation or business inconsistent and/or interfering with the duties of such employment; and no such member, officer or employee shall, while holding such office or position, serve on or under or be a member of any committee of any political party, and shall not, directly or indirectly, use his influence to induce any other officer or officers, employee or employees, elector or electors of this state to adopt his political views or to favor any particular candidate for office, nor shall any such member, officer or employee contribute in any manner, directly or indirectly, any money or other things of value to or for any person or persons, committee or committees, for campaign or election purposes. Any such member, officer or employee who violates any of the terms and/or provisions of this section shall be deemed guilty of corruption."

Section 18, Chapter 95, 62nd G. A. (1967) provides:

"Sec. 18. 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.

"No person holding a position in the classified service shall, during his working hours or when performing his duties or when using state equipment or at any time on state property, take part in any way in soliciting any contribution for any political party or any person seeking political office, nor shall such employee engage in any political activity that will impair his efficiency during working hours or cause him to be tardy or absent from his work. The provisions of this section do not preclude any employee from holding any office for which no pay is received or any office for which only token pay is received.

"No person shall seek or attempt to use any political endorsement in connection with any appointment to a position in the merit system.

"No person shall use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position in the merit system, or an increase in pay or other advantage in employment in any such position, for the purpose of

influencing the vote or political action of any person or for any consideration.

"No employee shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof.

"Any officer or employee in the merit system who violates any of the provisions of this section shall be subject to suspension, dismissal, or demotion subject to the right of appeal herein.

"The commission shall adopt any rules necessary for further restricting political activities of persons holding positions in the classified service, but only to the extent necessary to comply with federal standards in order that the present Iowa merit system council shall be absorbed by the Iowa merit employment department. In any event all employees shall retain the right to vote as they please and to express their opinions on all subjects.

"Any officer or employee in the merit system 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."

Section 8, Chapter 79, 63rd G. A., First Session (1969) provides:

"Sec. 8. Chapter ninety-five (95), Acts of the Sixty-second General Assembly, is hereby amended by adding the following new section:

" 'The provisions of this Act, including but not limited to its provisions on employees and positions to which the merit system apply, shall prevail over any inconsistent provisions of the Code, including the Acts of the Sixty-second General Assembly, and all subsequent Acts unless such subsequent Acts provide a specific exemption from the merit system.' "

Chapter 95 is the merit employment chapter. It has application to all state employees, except those specifically exempted by law. §18 of the above mentioned chapter has basically the same prohibitions as does §123.14 of the code; but, the prohibitions are in broader and more general terms referring to all employees and not specifically to the liquor commission employees.

It is an axiomatic rule of statutory interpretation that where a broad or general statute is in conflict with a specific statute the latter ordinarily prevails whether enacted before or after the general statute. *Kruse v. Gaines*, 1966, 258 Iowa 983, 139 N. W. 2d 535.

Another established principal, as stated in *Hardwick v. Bublitz*, 1961, 253 Iowa 49, 111 N. W. 2d 309, is that unless statutes are directly in conflict with each other they will be read together and if at all possible harmonized.

Section 8 of Chapter 79 may be characterized as a general repealing clause. In *State v. Blackburn*, 1946, 237 Iowa 1019, 22 N. W. 2d 821, and *Kruse v. Gaines*, supra, the supreme court of Iowa has said of such clauses that it is doubtful if they really add anything at all in the form of any repeal. Quoting from *Sutherland on Statutory Construction*, Third Edition, §2013 in 139 N. W. 2d 535 at 537:

"An express general repealing clause to the effect that all inconsistent enactments are repealed, is in legal contemplation a nullity. Repeals must either be expressed or result by implication. A general repealing

clause cannot be deemed an express repeal because it fails to identify or designate any act to be repealed. It cannot be determinative of an implied repeal for it does not declare any inconsistency but conversely, merely predicates a repeal upon the condition that a substantial conflict is found under application of the rules of implied repeal. If its inclusion is more than mere mechanical verbage, it is more often a detriment than an aid to establishment of a repeal, for such a clause is construed as an express limitation of the repeal to inconsistent acts."

In any event it is unnecessary to consider the effect of §8 of Chapter 79 because in our opinion §123.14 and §18 of Chapter 95 are not inconsistent.

The rules laid down in the *Kruse* and *Hardwick* cases, supra, indicate the proper procedure at this point. Both statutes should be read together in harmony with the emphasis on §123.14 of the code insofar as the members of the Iowa liquor control commission and their employees are concerned since it is more specific and the intent of the legislature is clearly expressed.

The rules promulgated by the merit employment department pursuant to Chapter 95 would have application to all non-exempt state employees including employees of the liquor control commission but the employees of that agency would in adidtion be bound by the requirements of §123.14.

It may be that you would want to add a paragraph to the proposed rules to point out the fact that liquor control commission personnel are in adidtion governed by §123.14 but whether this is done or not it would be our opinion that they are nevertheless bound by such statutory requirements.

PROPOSED:

CHAPTER 16 — MERIT EMPLOYMENT DEPARTMENT RULES

CHAPTER 16

POLITICAL ACTIVITY

16.1 Classified employees, whether full-time or part-time, temporary, provisional, intermittent, probationary or permanent, shall be prohibited from:

16.1(1) Engaging in any partisan political activity during scheduled working hours, while on duty, when using state equipment, or on state property;

16.1(2) Neglecting his or her assigned duties or responsibilities or being absent from or tardy to work because of permitted political activities;

16.1(3) Wearing badges or other representation of political preference during working hours, while on duty, when using state equipment or on state property;

16.1(4) Using his or her office, public position, public property or supplies to secure contributions or to influence an election for any political party or any person seeking political office;

16.1(5) Soliciting or receiving anything of value as a partisan political contribution or subterfuge for such contribution from any other person for any political party or any person seeking political office during scheduled working hours, while on duty, when using state equipment or on state property;

16.1(6) Promising or using influence, to secure public employ-

ment or other benefits financed from public funds as a reward for political activity;

16.1(7) Discriminating in favor of, or against, an officer, employee, or applicant on account of his or her political contribution or permitted political activity at any level of State government;

16.1(8) Being a candidate for any partisan elective office for remuneration while on active duty. This does not prohibit a classified employee from holding any office which is not paid or for which token pay is received.

16.2 In addition to 16.1, employees of the so-called grant-in-aid agencies such as Employment Security Commission, Department of Health, certain areas of Social Services and Civil Defense, shall be subject to the applicable provisions of the Federal Hatch Act. These provisions shall be made known to employees of such agencies by the Appointing Authorities concerned and compliance adhered to.

September 16, 1970

STATE OFFICERS AND DEPARTMENTS: State Geologist — Compensation of state employees — Ch. 305, §79.1, both Code of 1966. There is no authority in the State Geologist to compensate other state employees receiving fixed salaries from the state for services rendered to State Geologist. (Strauss to Wellman, Sec., Executive Council, 9/16/70) #70-9-10

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: Reference is herein made to yours of August 11, 1970, in which you enclosed two proposed retainer agreements between the Iowa Geological Survey and Dr. George McCormick and Dr. Lyle Sendlein respectively, for projects relevant to the overall program of the survey. The State Geologist, on August 10, 1970, described to the council the work to be done under these retainer agreements in these words:

"Attached are two retainer agreements drawn between the Iowa Geological Survey and Dr. George McCormick and Dr. Lyle Sendlein respectively. The two projects described are highly specialized and have genuine relevance to the overall program of the Survey. Both men are professors, Sendlein at Ames and McCormick at Iowa City. The type of work that we have asked these men to do is beyond that which our staff is normally called upon to perform. I think that the cost of these projects is reasonable especially when the alternative of hiring a staff member to perform them is considered. Funds for the projects are available in our Salary Account."

I advise the following: The Iowa Geological Survey is a state agency controlled now by the provisions of Ch. 305, Code of 1966. This agency is of long standing. It was created by the 24th General Assembly, the statutory provisions thereof first appeared in the Code of 1897, Ch. 10 consisting of seven sections some of which appear in the same terms as used in Ch. 305, Code of 1966. §2497 creates the Geological Survey in the following terms:

"The geological survey of the State shall be under the direction of the geological board, consisting of the governor, the auditor of state and the presidents of the agricultural college, the state university and the Iowa academy of sciences."

And §2498, Code of 1897, provides for the appointment of a state geologist in the following terms:

"Such board shall appoint a state geologist and such expert assistants,

recommended by him, as may be necessary, and annually furnish for publication a report of the operations of the survey."

It is a fair assumption that both Dr. George McCormick and Dr. Lyle Sendlein are employed at annual salaries by their respective university employers.

I find no necessity for passing upon your authority to enter into the agreement to the foregoing agreement in view of the following:

It has been the view of the department that persons in the employ of the state working for a stated salary are not entitled to other compensation from the state unless expressly so provided by statute. Authority for the foregoing is an opinion of the department appearing in the report for 1922 at page 286 where it is said:

"Mr. Geo. L. McCaughan, Secretary of Railroad Commisisons: This department is in receipt of a letter from you dated August 30th, in which you state that one R. G. Nourse, who is in the employ of the State College of Agriculture and Mechanic Art at Ames, Iowa, who was a witness for the state before the interstate commerce commission at the hearing of the western grain and hay rate case, has filed his expense account for the trip to Washington, and has included a charge of $25.00 per day for each day that he served as a witness.

"You desire to be advised in this connection as to whether Mr. Nourse, whom you state is drawing a stated salary from the college at Ames, is entitled to pay for his time in addition to his traveling expenses.

"Persons in the employ of the state, working for a stated salary, are not entitled to other compensation from the state unless it is expressly provided for by statute.

"As we understand the facts in the matter submitted to us, Mr. Nourse was drawing a salary from the state of Iowa for the time covered by his trip to Washington, and it would be against public policy for him to be allowed a per diem compensation for that same time for which he had once been paid by the state. It would be optional with him, however, in my judgment, to forego his stated salary and draw a per diem in case he desired to do so, but he cannot draw both the per diem and the salary for the same time, from the public treasury.

"You would be justified, therefore, in denying him the per diem asked for in the event that he received a salary covering the period for which he now presents claim."

The foregoing rule of law became statutory, by adoption, by the 49th General Assembly, Ch. 90, providing so far as pertinent the following:

"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 . . ."

This is codified now as part of §79.1, Code of 1966.

September 17, 1970

STATUTORY CONSTRUCTION: Schools, Open meetings, Athletic Council Iowa State University – Ch. 98, 62nd G. A. Athletic Council at Iowa State University is not a public agency under the provisions of Ch. 98, Acts of the 62nd G. A. (Nolan to Gibbons, Story County Attorney, 9/17/70) #70-9-11

Mr. Bill Gibbons, Story County Attorney: This replies to a letter submitted by Mr. Vanderbur requesting an opinion on whether or not the athletic council at Iowa State University is a public agency within the meaning of Ch. 98 of the 62nd General Assembly.

The pertinent parts of Ch. 98, 62nd G. A., are 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:

"1. Any board, council, or commission created or authorized by the laws of this state.

"2. Any board, council, commission, trustees, or governing body of any county, city, town, township, school corporation, political subdivision, or tax-supported district in this state.

"3. Any committee of any such board, council, commission, trustees, or governing body.

"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.

"Section 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.

"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 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.

"Section 4. Each public agency shall give advance public notice of the time and place of each meeting, by notifying the communications media or in some other way which gives reasonable notice to the public. When it is necessary to hold an emergency meeting without notice, the nature of the emergency shall be stated in the minutes."

The athletic council at Iowa State is not "created or authorized" by statute as prescribed in §1 of Ch. 98, supra. It exists under a constitution adopted by the council April 7, 1965, its membership consists of twelve persons: four of which are elected by the faculties of the colleges of Agriculture, Engineering, Sciences and Humanities and Veterinary Medicine, two elected at large by the general faculty, the Big Eight Conference faculty representative who is appointed by the President of Iowa State University, three alumni representatives selected by the Alumni Association of the university, and two students, one elected by the Varsity "1" Club and the other elected by the Senate of the Government Stu-

dent Body. The athletic director is secretary and the university treasurer is ex officio treasurer of this council. All are responsible to the President of the university.

In 1968 OAG 911, an opinion was issued by this office which advised that a study group appointed by the State Board of Regents is subject to the open meetings requirement of Ch. 98, Laws of the 62nd G. A. The activities of that committee were to review the pertinent information, findings, conclusions and tentative recommendations of a consulting firm and to make recommendations as to the soundness of the basic study prior to its presentation to the Board of Regents. There the law of Iowa clearly authorized the creation of such committee by the Board of Regents. (§262.12, Code 1966). Consequently such committee did come within the broad scope of public agencies as defined in Ch. 98, supra.

The status of the athletic council at Iowa State University is not so well defined. We have been unable to find any instance where the Board of Regents has designated such council to serve as a committee pursuant to §262.12 supra, or any other law, although we do find transfers of university funds for the council's use. While the Athletic Council is organized with a constitution stating its name, authority, policy, objectives, membership, associate membership and provisions for amending the constitution, such document standing alone is not sufficient to make the council a "public agency."

The council, according to the letter, was "set up back in 1913," apparently by the president of Iowa State University. It still owes its continued existence to the pleasure of the president. Traditionally, its activities have been regarded as pertaining to internal operation and management functions of the university. It has no final legislative, adjudicatory or administrative power. It is merely an arm of the president. It appears to operate only on the level of a campus organization like Bomb Year Book, Campus Chest, Iowa State Memorial Union, Iowa State University Press, Iowa State Daily, Music Council and others of similar kind. Its counterpart at the University of Iowa is the board in control of athletics.

Thus, although the council's past refusals to conduct its meetings openly seem to violate the spirit of the law and the liberal trend, particularly because the council influences the expenditure of public funds, such refusals do not violate the letter of the law.

The athletic council at Iowa State University is not a public agency under the Act in question. Whether or not such a council in the interest of public relations should maintain a policy of open meetings is, of course, not for this office to decide.

September 21, 1970

CITIES AND TOWNS: Platting — §409.1, Code of Iowa, 1966. An original proprietor may sell one lot and retain one lot of his original tract, but if he sells two lots and retains one lot he is required to file a plat under the terms and conditions of §409.1. (Conlin to Riley, 9/21/70) #70-9-12

Mr. Philip T. Riley, Corporation Counsel: In our recent phone conver-

sation you requested clarification of our opinion of July 14, 1970 to Charles Vanderbur, Story County Attorney. That opinion dealt with Section 409.1, Code of Iowa, 1966, which provides in pertinent part 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 one hundred fourteen (114), of the Code, 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."

The above quoted statutory provision requires the original proprietor of a tract or parcel of land to plat any subdivision of three or more lots. Therefore it would appear that whenever an original proprietor sells two such lots and retains one for his own use he has effectively subdivided his parcel into three parts and is required to plat the same as required by Section 409.1, Code of Iowa, 1966.

Therefore, it is the opinion of the Attorney General that an original proprietor of any tract or parcel of land may sell one lot and retain one lot without causing a registered land surveyor's plat to be made. However, if an original proprietor sells two lots and retains one lot for his own use he must file a registered land surveyor's plat in compliance with Section 409.1, Code of Iowa, 1966.

September 28, 1970

STATUTES: Banking, Savings and Loan. §528.51, Code 1966, 12 U.S.C.A. §36, §1461, S.F. 225, 63rd G. A. State by legislation may not regulate federal instrumentalities but state laws may be absorbed as guidelines by the applicable federal law. (Nolan to Fischer, State Representative, 9/28/70) #70-9-13

The Hon. Harold O. Fischer, State Representative: Prior to adjournment of the 63rd G. A. you requested an opinion as to whether or not, under the provisions of S.F. 225 (63rd G. A., Second Session) the state of Iowa has authority to regulate federal savings and loan associations and national banks. Shortly after your request was received the legislature adjourned without any action taken on the S.F. 225 and it appeared that the question was moot.

Your continued interest in the subject, however, has prompted further study of the matter. The answer to your specific question is that a federal saving and loan association organized under the Home Owners' Loan Act 1933 (as amended, 12 U.S.C.A. 1461 et seq.) cannot be regulated by the state since Congress has pre-empted the field of supervision. *People v. Coast Federal Savings & Loan Association,* DC Cal. 1951, 98 F Supp 311.

In the *Central Savings & Loan Association of Chariton, Iowa v. Federal Home Loan Bank Bd.* DC Iowa 1968, 293 F Supp 617 it was decided that the Federal Home Loan Bank Board has power to authorize estab-

lishment and operation of mobile facilities and such matter is committed to its exclusive discretion. Affirmed 8 Cir. 422 F2d 504. This decision also made reference to the fact that the state law was silent on the subject.

On the other hand in a recent U. S. Supreme Court decision striking down the authorizing of armored car service for a national bank in the state of Florida which prohibits branch banking, it was observed that while the policy of competitive equality is firmly embedded in statutes governing the national banking system and while Congress has absolute authority over national banks, state law has been utilized by the Congress to provide certain guidelines to implement its legislative policy. The case then held that Congressional policy giving deference to state standards is not open to modification by the comptroller of currency. *First National Bank in Plant City, Florida v. Fred O. Dickinson, et al,* decided December 9, 1969, 38 LW 4027. 90 S Ct 337.

The bill proposed as S.F. 225 supra, contained the following language:

"An Act to prohibit the operation of mobile units by banks and other financial institutions.

"Section 1. No bank, savings and loan association, or other financial institution shall commence or maintain the operation of a self-propelled or vehicular-towed mobile unit facility, which operates in different cities or towns at different times where moneys or creidts are received as deposits, as payments or shares, as payments in exchange for obligations, or as payments for investments from members of the public. Provided that such a financial institution may arrange for messenger service by means of an armored car, or otherwise, to operate within the corporate limits of the city or town where the moneys or credits are to be deposited with or paid to the financial institution pursuant to a written agreement wherein it is specified that the messenger is the agent of the customer rather than the financial institution."

In answer to your second question of whether or not such proposed legislation in present form would have the same equal regulatory effect on federal savings and loans and national banks as compared with state savings and loan and state banks, we advise tht it would not.

However, institutions authorized under the National Bank Act of June 3, 1864, 13 Stat 100 as amended, Title 12 U.S.C.A. 21 et seq., and the Home Owners Loan Act, supra, are governed by policies of convenience and necessity. The objectives of stability and safety are matters of public interest which are federal objectives as well as state objectives. Consequently while the supervision of federal institutions is not dependent on state law, where determinations of "need" are to be made, should the state provide guidelines for protecting community prosperity (local thrift) against the withdrawal of deposits without offsetting local loans and the loss of local property tax such legislation would undoubtedly be given weight in any federal determination relating to whether or not the public is being served.

Under Title 12 U.S.C.A. §1464(e) the Home Loan Bank Board in establishing federal savings and loan associations and promulgating regulations for the operation of branch and mobile offices is required to find that there will be no "undue injury to properly conducted existing local thrift and home financing institutions." Subsequent to the district court ruling in *Central Savings & Loan Association of Chariton,* supra, the regulations of the Federal Home Loan Bank Board amended the eligibility requirements and limitations for mobile operation in areas not

otherwise provided with savings and loan services *locally*. 12 CFR 545. 14-4(c) effective March 14, 1969.

The conditions under which the Comptroller of the Currency may authorize branches for national banks are set out in Title 12 U.S.C.A. §36. This section permits branch banking in states when branch banking is permitted. The rule is now well established that accomplishment of a policy of greater liberality in allowing expansion of facilities of national banks should be left to legislative branches of the national and state governments and not be brought about by executive fiat. *American Bank & Trust Company v. Sutton*, C.A. Mich. 1967 373 F2d 283.

In *State of South Dakota v. National Bank of S. D.*, D.C.S.D. 1964, 335 F2d 444 (Cert. Den. 85 SCt. 667, 379 U. S. 90, 13 LEd2d 562), it was stated at page 449:

"Courts must base their decisions upon existing law. If the public interest calls for further restrictions upon branch banking and bank holding companies expansion, the remedy lies in appropriate legislation."

In such cases restrictions which are expressly made part of a state's banking policy are "absorbed" by the provisions of the federal statute. *First National Bank of Logan, Utah v. Walker Bank & Trust Co.*, 1966 87 SCt. 492, 385 U. S. 252, 17 LEd2d 343, rehearing denied, 87 SCt. 738. *Ramapo Bank v. Camp*, CA NJ, 1970, 425 F2d 22.

According to the preliminary 1970 federal census, the current population of Iowa is 2,789,893. It stands third among the states in total number (675) of banks (570 state and 105 national) and nineteen in total number (90) of savings and loan institutions (45 state and 45 federal). In addition, as of December 31, 1969 there are 24 savings and loan branches (12 federal, 12 state) plus a mobile facility authorized for one federal institution to three locations until February 1971. The state of Iowa with its 99 counties has more than 112,000 miles of public roads and streets but less than a dozen and a half cities of over 30,000 population. In this state branch banking is prohibited (§528.51 Code 1966) but offices may be established for the limited purposes prescribed in the statute. There is no statutory prohibition against state savings and loan associations having branch offices but each application therefore is subject to the approval of the Executive Council. 1966 OAG 377. These matters should also be considered in relation to the questions you have submitted.

October 5, 1970

TAXATION: Property taxes — Exemption of bovine female cows — §24.3, Code of Iowa, 1966; §427.3, Code of Iowa, 1966, as amended by Ch. 351, Acts 62nd G. A., Ch. 253, Acts 63rd G. A., 1st Session, and Ch. 425, Code of Iowa, 1966; Ch. 1205, §22, Acts 63rd G. A., 2nd Session; and 1966 OAG 433. Bovine female cows, three years of age or older, are to be excluded from the valuation of a taxing district. (Griger to Letz, Hardin County Attorney, 10/5/70) #70-10-1

Mr. Carl R. Letz, Hardin County Attorney: This will acknowledge receipt of your letter of July 7, 1970, wherein you have requested the opinion of the Attorney General on the question of whether bovine female cows, three years of age or older, are to be included or excluded from the assessed valuation of property in a taxing district.

Section 22, Chapter 1205, Acts of 63rd G. A., Second Session, provides as follows:

"Section four hundred twenty-seven point thirteen (427.13), subsection two (2), Code 1966, is hereby amended by inserting after the period in line two (2) the following:

'However, for the purposes of the personal property tax imposed on cattle, bovine females three years of age or older shall be exempt.

'A tax credit shall be allowed each taxing district for each bovine female that was assessed as a three-year-old, or older as of January 1, 1970. Such tax credit shall commence for the tax year 1971 and each year thereafter based upon those assessed as of January 1, 1970.

'On or before January 1, 1971, and each year thereafter, the auditor of each county shall prepare a statement listing for each taxing district in the county all bovine females that were three years old, or older, and assessed as of January 1, 1970. The statement shall show the tax rates of the various taxing districts and the total amount of taxes which were not collected for the year 1970 and each year thereafter by reason of the exemption herein granted based upon those bovine females assessed as of January 1, 1970. The auditor shall certify and forward copies of the statement to the state comptroller and the director of revenue not later than January fifteenth of each year. The director of revenue shall compute the applicable tax credit each year and certify to the state comptroller the amount due to each taxing district, which amount shall be the dollar amounts which would be payable if such cattle were taxed, based upon those assessed as of January 1, 1970.

'The amounts due each taxing district shall be paid in two equal payments by the state comptroller on March fifteenth and September fifteenth of each year, drawn upon warrants payable to the respective county treasurers. The county treasurer shall pay the proceeds to the various taxing districts in the county.

'In the event that the amount appropriated for reimbursement of the taxing districts is insufficient to pay in full the amounts due to each of the taxing districts, then the amount of each payment shall be reduced by the State comptroller according to the ratio that the total amount of funds to be paid to each taxing district bears to the total amount to be paid to all taxing districts in the state.'

"There is hereby appropriated from the general fund of the state of Iowa to the state comptroller for the fiscal year beginning July 1, 1970 and ending June 30, 1971 the sum of one million five hundred thousand (1,500,000) dollars, or so much thereof as may be necessary, to carry out the provisions of this section."

As you will note, the Legislature has exempted from the property tax certain cows and has appropriated a sum of money to reimburse each taxing district for the loss of property taxes which would have otherwise been collected by that taxing district but for the tax exemption. In *McKinney vs. McClure*, 1928, 206 Iowa 285, 220 N. W. 354, the Iowa Supreme Court stated at 206 Iowa 289 that "taxable property is property that may be taxed — property which is not exempt from taxation."

Since the above-described bovine females are exempt from taxation, the reimbursement to the taxing districts are from sources other than taxation as denoted in §24.3, Code of Iowa, 1966, pertaining to the local budget law. In the absence of a statute to the contrary, the local budget law is applicable. *Dyer vs. Des Moines*, 1941, 230 Iowa 1246, 30 N. W. 2d 562. Since the local budget law is controlling, it is clear that the budget

askings of each taxing district must be reduced in proportion to which the taxing districts are reimbursed for the loss of property taxes that otherwise would have been collected on the bovine females in 1971.

In addition, you will note that the military service tax credit is a tax exemption whereas the homestead tax credit is a credit against the tax, not valuation, assessed on an eligible homestead. See §427.3, Code of Iowa, 1966, as amended by Chapter 351, Acts of 62nd G. A., Chapter 253, Acts of 63rd G. A., First Session, and Chapter 425, Code of Iowa, 1966. Taxable valuation would, thus, include the total assessed valuation of property eligible for the homestead tax credit, but would not include the valuation of property exempt from taxation because of the military service tax credit. 1966 O.A.G. 433.

It is clear that bovine females, three years of age or older, are exempt from property taxation for the year 1970 and thereafter. There is no statutory authority to subject such cows to any form of property taxation. Therefore, the valuation of these cows is to be excluded from the valuation of a taxing district because such valuation should only include property which is subject to a tax thereon.

October 5, 1970

STATE OFFICERS AND DEPARTMENTS: Auditor — Banking — Savings & Loan Application — Executive Council action on application for branch — Ch. 534, Code 1966. On review of application by state savings and loan association for branch office executive council must find that applicants are persons of good character, ability and responsibility, that there is a reasonable necessity for such branch in the community to be served and that no existing local thrift and home financing institution will be unduly injured by the establishment of such branch. (Nolan to Wellman, Secretary, Executive Council, 10/5/70) #70-10-2

Executive Council of Iowa: Pursuant to the request of Governor Ray, I have set out the following items which must be considered by you in arriving at your determination on the application of Marion County Savings and Loan for which hearing was held on Friday, September 25, 1970.

If you find that the application is in conformity with law and based on a plan equitable in all respects to the members of the association, and if from accompanying documents as well as the information presented at the hearing you find that a) the applicant has good character, ability and responsibility; b) that there is a reasonable necessity for such new office in the community to be served; c) that it can be established and operated without undue injury to existing local thrift and home financing institutions; d) that the proposed name for such office is not similar to that of any other association operating in the same community, and is not misleading or deceitful, you should approve the application.

The term "community to be served" has not been expressly defined by Ch. 534, Code of Iowa 1966. However, §534.2(5) as amended by Ch. 382, Acts of the 62nd G. A., provides:

" 'Regular lending area' shall mean the county in which the home office of an association is located, and the counties of the state or adjoining state immediately adjoining and abutting on such county, or any addition-

al area within one hundred miles from the home office, whether within or without the state, whichever is the greater."

§534.2 of the Savings and Loan Association Chapter defines "association" as a corporation organized under the provisions of this chapter to promote thrift and home ownership by providing for its members a cooperative and mutual plan for saving money and investing money so saved in home loans to its members. The definition also make reference to "foreign companies" which are other savings and loan associations or building and loan associations or organizations incorporated under the laws of other states or countries. The definition section does not, however, contain a definition of the term "existing local thrift and home financing institutions," and therefore, you should consider whether or not the applicant can operate without undue injury to any institution existing in the locality for which the branch office has been requested, which receives savings deposits and makes loans for home construction.

If on the other hand, you find from the facts that the community is presently being adequately served by existing home financing institutions; or if you find that existing home financing institutions in the community will be caused undue injury by the establishment and operation of the branch office applied for, then you should deny the application.

If you approve the application, the minutes should reflect your approval and the certificate of approval should be entered upon the Articles of Incorporation of the applicant.

In 1966 OAG 377, this office advised the state auditor that branch offices are contemplated by Ch. 534, Code of Iowa, and may be approved by the Executive Council. The power to branch cannot be exercised without prior approval of the executive council and mere amendment of the corporate articles is not sufficient to authorize a branch — the requirements of §534.3(3)(a) must be met.

October 5, 1970

MOTOR VEHICLES: Mobile homes, registration of trucks that pull same, combined gross weight of same, special trucks — §§321.122(1), 321.123(5) as amended by Acts 63rd G. A., §§321.1(71), 321.1(68), 321.1(24), 321.1(25), 321.1(9), 321.1(10) of 1966 Code of Iowa. Trucks that pull mobile homes or house trailers exclusively are not "Special Trucks" as defined by statute, but even so in registering said trucks under §321.122(1), they are not required to have added to their weight the weight of the mobile home, for the reason the "combined gross weight" referred to in §321.122(1) as well as §321.123(5) is defined by statute applying to trailers and semitrailers which are defined as being designed for "carrying" as opposed to mobile homes defined as being for human habitation. (Garretson to Stephens, State Senator, 10/5/70) #70-10-3

The Hon. Richard L. Stephens, State Senator Eighth District: This is in reply to your letter of April 2, 1970 requesting an opinion as to whether wrecker-towing trucks which deliver house trailers for a fee would be considered "special trucks" under Chapter 213, subsection 5, of the Acts of the 63rd General Assembly, which might also be referred to as I.C.A. 321.122(1).

Please be advised that it is the opinion of this office that same would

not be considered "special trucks." Acts of the 63rd General Assembly, Chapter 213, Section 7 codified as 321.1(71), defines "special trucks" for purposes of Chapter 321 as follows:

"A 'special truck' means a motor truck not used for hire with a gross weight registration of eight through twelve tons, inclusive, used by a person engaged in farming to transport commodities produced only by the owner, or to transport commodities purchased by the owner for use in his own farming operation."

Your inquiry goes on, however, to question whether the license of such wrecker-tow trucks delivering house trailers must be increased to cover the total weight of the tow trucks and "house trailer" being delivered. You use the term house trailer and it is assumed you mean "mobile home." The term "house trailer" is not defined as such in Chapter 321 of the current Iowa Code. The term mobile home is defined at Iowa Code 321.1(68), the pertinent portion of which is as follows:

" 'Mobile home' means any vehicle without motive power used or so manufactured or constructed as to permit its being used as a conveyance upon the public streets and highways and so *designed*, constructed, or reconstructed as will permit the vehicle to be used as a place for *human habitation* by one or more persons."

Pertinent parts of Iowa Code 321.122(1), as amended by Acts 1969 (63rd G. A.) Chapter 213, Section 5, now reads as follows:

"321.122 *Truck tractors, road tractors, semi-trailers, and trucks*

1. The annual registration fee for motor trucks except special trucks, truck tractors, or road tractors, shall be based on the *combined gross weight* of any combination of vehicles. All trucks, truck tractors, semi-trailers, or road tractors shall be registered for a gross weight equal to or in excess of the unladen weight of the vehicle or combination of vehicles . . ."

While there seems no doubt that a mobile home is defined as a vehicle and in this respect could be considered as a part of a "combination of vehicles," we must look to the meaning of the words *"combined gross weight"* as contained in Iowa Code 321.122(1). This is defined at Section 321.1(25) of the 1966 Code of Iowa as meaning:

" 'Combined gross weight' shall mean the gross weight of a motor vehicle plus the gross weight of a *trailer or semitrailer* to be drawn thereby."

Gross weight is defined at 321.1(24) as meaning:

". . . empty weight of a vehicle plus the maximum *load* to be carried thereon . . ."

The word "trailer" and "semitrailer" respectively are defined at 1966 Code of Iowa, Sections 321.1(9) and 321.1(10) as meaning:

". . . every vehicle without motive power designed for *carrying* . . ."

We must look, therefore, to the *purpose* of the vehicle. The definition of mobile home at Iowa Code 321.1(68) is a place for *human habitation*, and is not a trailer or semitrailer *designed for carrying*. Thus the mobile home is not a vehicle considered to be *laden* with a "maximum load," as defined in Section 321.1(24) of the 1966 Code of Iowa.

An argument could be made, however, that it is intended to be covered

by Section 321.123(5) of the Iowa Code, which, as amended, reads as follows:

"5. Motor trucks pulling trailers shall be registered for the *combined gross weight* of the motor truck and the *trailer;* except that motor trucks registered for six tons or less pulling trailers registered as provided in this section shall not be subject to registration for the gross weight of such trailer."

The same argument that prevails above prevails here, namely that Section 321.123(5) of the Code refers to "combined gross weight" which is restricted by 321.1(25) to "trailers" and "semitrailers" designed for "*carrying,*" as distinct as from mobile homes, used as a "place for *human habitation.*"

Further, Section 321.123(5) shown above was added by amendment by Acts 1969 (63rd G. A.) Chapter 213, Section 9. The Legislature has left out in this amendment any reference to *mobile homes,* and specifically refers to *trailers* only, even though Section 321.123 deals otherwise generally with "trailers and mobile homes," and in fact this section is so *entitled.* The fact is that it appears quite evident it was not the intention of the Legislature that such mobile home tow trucks be registered under Iowa Code 321.123(5).

It should be added that historically the motor vehicle department of the State of Iowa has not registered trucks that pull mobile homes by adding the weight of the mobile homes to the trucks, so this opinion is consistent with the present practice.

Accordingly, it is the opinion of this office that trucks used only for the purpose of delivering mobile homes would not have their license increased to cover the total weight of the truck and mobile home being delivered.

October 5, 1970

STATUTORY CONSTRUCTION: Definition — parcel — counties — auditor — fees — §335.15(1), 1966 Code of Iowa. Term "parcel" as used in §335.15(1) means contiguous land, described, used and assessed as a unit at the time of conveyance. (Nolan to Samore, Woodbury County Attorney, 10/5/70) #70-10-4

Mr. Edward F. Samore, Woodbury County Attorney: This is in reply to your request for an opinion defining the term "parcel" as used in §333.15(1), of the 1966 Code of Iowa, as amended by Ch. 1170, Acts of the 63rd G. A., Second Session (H.F. 1018). The section referred to, supra, provides:

"The county auditor shall be entitled to charge and receive the following fees:

"1. For transfers made in the transfer books, one dollar for each separate parcel of real estate described in any deed, or transfer of title certified by clerks of district courts, provided, however, if several parcels are described in any one such instrument and the parcels are contiguous or separated only by public streets or highways, the fee shall not exceed five dollars. A parcel of real estate outside of the limits of cities and towns shall be all unplatted land described in any deed or transfer of title lying within one numbered section of land."

Your letter asks:

"is the word 'parcel' synonymous with the word 'lot'? Does the word 'parcel' mean any group of lots which are contiguous and involved in the same deed?"

These questions were previously presented to this office and answered by opinions of May 15, 1945, 1946 OAG 47, and July 16, 1953, 1954 OAG 68 which advise:

"What is meant by the use of the term 'parcel?' "

Land included in a parcel should be (1) contiguous, for the Legislature so intended by the use of the words 'separate parcel'; (2) be described, used and assessed as a unit in order that the transfer by the auditor may be handled as one act. It is, therefore, our opinion that the Legislature intended by the use of the term 'parcel' contiguous land described, assessed and used as a unit at the time of the conveyance. If the parcel is assessed as a unit, the auditor may presume that it is so used. Under this definition of a parcel, one owning two one-half lots used as a unit as, for example, the East ½ of Lot 1 and the West ½ of Lot 2, Block 6, would, if assessed as one unit and not separated by land owned by another such a street, highway or alley, be one parcel. It is our further opinion that the Legislature intended to include in the terms 'public streets or highways' the term 'alleys' as it is used in the same connection when referred to in the Code in chapters pertaining to cities and towns. It is land owned by another, and in most cases by the city or town for the use and benefit of the public. It separates the parcels and they are not contiguous. The Legislature's intent is to waive the separation by streets, highways, and alleys only when counting the parcels that are otherwise contiguous, to determine the maximum fee to be charged by the auditor." (1946 OAG 47).

". . . there is to be taxed as costs the sum of fifty cents for each parcel of real estate described in the certification, subject, however, to a maximum charge of two and one-half dollars where several parcels are described in any one such instrument and the parcels are contiguous and separated only by public streets or highways. This department has previously defined the term 'parcel' as used in section 333.15. See opinion of the Attorney General appearing in the 1946 report, page 47. (1954 OAG 69)

Although the Second Session of the 62nd G. A. amended §333.15 to increase from fifty cents to one dollar the amount which the county auditor may charge for transfer of a parcel, issuing a certificate of redemption for land sold for taxes or certificate for land sold on payment of taxes, and increased from two and one half to five dollars the maximum which may be charged for transfer of contiguous parcels the amendment did not otherwise change the substance of §333.15, nor further define the term "parcel." Accordingly, we agree with the former opinions that the word "parcel" in §333.15 means contiguous land described, used and assessed as a unit at the time of conveyance.

October 6, 1970

STATE OFFICERS AND DEPARTMENTS: Law Enforcement Academy, located at Camp Dodge. §§4 and 14, Chapter 112, 62nd G. A. (1967) as amended. The Law Enforcement Academy must be located at Camp Dodge. There is no authority for moving the Academy elsewhere and using its present facilities for another purpose. (Haesemeyer to Kruck, member Iowa Law Enforcement Academy Council, 10/6/70) #70-10-5

Mr. Warren J. Kruck, Member, Iowa Law Enforcement Academy Council: In your capacity as a member of the Iowa law enforcement academy council you have orally requested an opinion of the attorney general as to whether or not the law enforcement academy can be moved from its present location at Camp Dodge.

Section 4, chapter 112, 62nd G. A. (1967), as amended by §1, chapter 103, 63rd G. A., first session (1969), provides:

"There is hereby created the Iowa law-enforcement academy as a central law-enforcement training facility, in order to serve the best interests of the state in carrying out the intent and purpose of this Act. *The academy shall be situated at Camp Dodge* and the council shall enter into an agreement with the adjutant general which agreement shall provide for the use of certain of the facilities at Camp Dodge, for the remodeling and conversion of existing structures to classrooms and dormitory space, and for the use of land for the site of an administration building. The agreement shall be on such terms and conditions as are necessary to carry out the purpose of this chapter." (Emphasis added)

Section 14 of such chapter 112 provides in relevant part:

". . . There is hereby further appropriated to the department of public safety from the general fund of the state the sum of one hundred fifty thousand (150,000) dollars for capital expenditures for the construction of an administration building and remodeling of existing structures *at Camp Dodge.* . . ." (Emphasis added)

In our opinion the underlined language in the foregoing statutory provisions unmistakably manifest legislative intent that the law enforcement academy was to be located at Camp Dodge and nowhere else.

Moreover, it appears that the Congress of the United States in enacting Public Law 90-444, 90th Congress, S. 3495, July 30, 1968, 82 Stat. 461, did so for the express purpose of permitting the construction of a law enforcement academy and not to permit the use of the Camp Dodge facility for some other purpose. Such Public Law 90-444 provides in part:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Army is authorized to modify on behalf of the United States the land use restriction applicable to a tract of land constituting a portion of a larger tract of State-owned land and also a portion of lands heretofore conveyed by the United States to the State of Iowa pursuant to the Act entitled 'An Act to direct the Secretary of the Army to convey certain property located in Polk County, Iowa, and described as Camp Dodge and Polk County Target Range, to the State of Iowa,' approved June 1, 1955 (69 Stat. 70), *so that such tract with respect to which such modification is given may be used by such State for law enforcement academy purposes.*" (Emphasis added)

Pursuant to this grant of authority the secretary of the army and the adjutant general of Iowa executed a release and agreement releasing the designated areas from the condition in the quitclaim deed from the United States to Iowa "requiring that the area be used solely for the training of the National Guard and for other military purposes, and that such aforementioned Tracts shall be for the primary use of the Iowa Law Enforcement Academy subject to joint use by the Iowa National Guard for training in connection with civil disturbance and by the United States in the event of war or national emergency for the duration of such war

or national emergency and up to six months thereafter, . . ." This would seem to indicate, even apart from the plain language of the Iowa law requiring the law enforcement academy be located at Camp Dodge, that further act of congress and another release and agreement would be required before the property could be used for non-law enforcement academy purposes.

October 6, 1970

SOCIAL SERVICES: Mentally Retarded — §222.78, 1966 Code of Iowa, as amended by Ch. 157, 63rd G. A., 1st Session, imposes involuntary liability upon parents to partially reimburse counties for care in "special units" defined in Ch. 157; Ch. 162, 63rd G. A., 1st Session, did not amend §222.78, 1966 Code of Iowa to require reimbursement for care in facilities outside state institutions; however, parents may voluntarily reimburse the counties in part or in full under §222.78, 1966 Code of Iowa, for care described in either Ch. 157 or 162, 63rd G. A., 1st Session. (Williams to Wood, Hamilton County Attorney, 10/6/70) #70-10-6

Mr. Carroll Wood, Hamilton County Attorney: You have requested an Attorney General's Opinion concerning the interpretation of Chapter 162, Laws of the Sixty-Third General Assembly, First Session. In your request, you state:

"The main question confronting our Board of Supervisors is concerning the cost or expense of the program for treatment of the persons mentioned in the Act, and if the County does pay the State Institution, or public or private facility, is this chargeable to the parents under Section 222.78, Code of Iowa."

Section 222.78, 1966 Code of Iowa, reads in part as follows:

"222.78 Parents and others liable for support. The father and mother of any person admitted or committed to a hospital-school as either an inpatient or an outpatient, and any person, firm, or corporation bound by contract hereafter made for support of such person shall be and remain liable for the support of such person. Such person and those legally bound for the support of the person shall be liable to the county for all sums advanced by the county to the state under the provisions of sections 222.60 and 222.77. . . ."

This section was amended by Chapter 157, §41, Laws of the Sixty-Third General Assembly, First Session. Chapter 157, entitled Special Mental Retardation Unit added the words "special unit" in providing that counties may be reimbursed from the parents when care in a special unit is provided the retarded person. In §7 of that Chapter "special unit" is defined as a special mental retardation unit established *at a state mental institute.* Although the legislature at the same session enacted Chapter 162 which permits the Board of Supervisors to provide services "from public or private agencies for the special need of children, including but not limited to psychiatric services, supervision, specialized group, foster homes and institutional care, *whether within or without the State,*" it did not amend §222.78 to provide reimbursement to the county in the absence of voluntary payment.

The legislature in both Chapters 157 and 162, however, amended §222.60 requiring the county to pay for the "costs 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, or in a special unit, or any public or private facility in or without the state, approved by the Commissioner of the Department of Social Services."

It is interesting to note that in both Chapters dealing with care for the retarded persons, §222.60 was amended to make the county liable, but only in Chapter 157 relating to "special unit" was there an amendment to §222.78 providing for reimbursement by the parents.

This might have been an oversight on the part of the legislature to require reimbursement to the county from the parents in the one instance and not the other, or it may have been by legislative intent. However, whether it is care in a "special unit" or other facilities for the mentally retarded whether within the state or without the state there is nothing to prevent parents from making *voluntary* payments for either a part or all of the actual cost as established by the Board. The last sentence in §222.78 does not limit the care which the Board establishes for a mentally retarded person to that specifically stated in §222.78 as amended by Chapter 157, §41, Sixty-third G. A., First Session.

It is for the legislature, by further legislation, to resolve the question of *mandatory* liability upon parents to reimburse the counties for care provided a mentally retarded person outside state institutions within or without the State of Iowa, however.

October 7, 1970

COUNTY AND COUNTY OFFICERS: Iowa Commission on Alcoholism — Cities and Towns — Costs of Patient's Care in Alcoholism Treatment Facility — §§128.3, 128.4, 128.5, 128.8, 128.22, 63rd G. A., 1st Session; §§252.16, 252.17, 349.16, Code of Iowa, 1966; §§98.1, 98.2, 62nd G. A. Patients and spouses are primarily liable for total costs in such facilities. Counties of legal settlement are liable for one-half of such cost; and as funds are available the Commission is liable for one-half; cities and towns authorized to make contribution; as county board of supervisors meetings are open to the public, proceedings including those relating to legal settlement and names of patients must be published. (Williams to Atherton, Assistant Director, Iowa Commission on Alcoholism, 10/7/70) #70-10-7

John R. Atherton, Assistant Director, Iowa State Commission on Alcoholism: This will acknowledge receipt of your letter requesting an opinion regarding the following questions:

"1. This office is taxed with the responsibility of determining legal settlement when a county has disputed claims arising out of an alcoholic treatment facility. Our question is: How, under this statute, do we determine legal settlement of transitory alcoholics? Since many of these men have not had a legal residency for years in any one county, who will pay their claims after a treatment facility has exhausted all the Commission funds in any given month?

"2. What are the duties of each county in relation to claims sought by treatment facilities, if a client has made precedent requirements under the statute, yet the county refuses to pay the claim? E.g., Wright County refuses to pay claims for four men at the Fort Dodge facility and have gone on record in the newspaper stating their refusal and listing claimants names. Does the county have the right to publish these names in the newspaper?

"3. Is it necessary for the Board of Supervisors to approve each individual seeking treatment prior to their entering the facility and if that is the case, can they refuse claims because of this?

"4. Under Section 5 of Senate File 525 the counties are faced with paying one-half the remaining costs. Does this mean that they pay one-half the cost of each alcoholic from their county, or just up to the amount the Commission has paid?"

I

In answer to your first question, Section 252.16, 1966 Code of Iowa entitled "Settlement — how acquired" reads in part as follows:

"252.16 Settlement — how acquired. 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 settlement in that county.

"2. 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. . . ."

Section 252.17, 1966 Code of Iowa, reads as follows:

"252.17 Settlement continues. A legal settlement once acquired shall so remain until such person has removed from this state for more than one year or has acquired a legal settlement in some other county or state."

If an individual had established a legal settlement in a county by residing in a county for a period of one year that settlement continues until the individual establishes settlement in another county.

Chapter 128, Section 6, Laws of the 63rd General Assembly, First Session, provides:

"Sec. 6. The facility shall, when an alcoholic is admitted, or as soon thereafter as it receives the proper information, determine and enter upon its records whether the legal settlement of such alcoholic is in the county where the facility is located, or in some other county, state, or country, or is unknown."

As provided by the foregoing section, the initial responsibility of determining legal settlement of the alcoholic rests with the facility. In the event a dispute arises as to legal settlement, the Commission is required to conduct a detailed investigation to determine in which county the patient has legal settlement.

Section 7 of said Chapter reads in part as follows:

"Sec. 7. In the event any county to which certification of the cost of care, maintenance, and treatment of an alcoholic is made, disputes that such alcoholic has his legal settlement in that county, it shall immediately notify the facility that such dispute exists. The commission shall immediately investigate the facts and determine in which county the patient has legal settlement. The commission shall certify its determination to the county wherein it is found the patient has legal settlement and to the facility . . ."

Methods of investigative procedure on the part of the Commission can

consist of checking tax records, real estate records, police records, automobile licensing, city and county directories, voting registration, divorce records at either the county or state level.

You also ask who will pay the claims after a treatment facility has exhausted all the Commission funds in any given month. Primarily the total cost of the care, maintenance, and treatment of an alcoholic is to be borne by the alcoholic, his or her spouse and any other person, firm, corporation, or insurance company bound by contract to provide support, hospitalization, or medical services for the alcoholic. This is found in Section 8 of said Chapter which reads in part as follows:

"Sec. 8. The alcoholic, his or her spouse, and any person, firm, corporation, or insurance company bound by contract to provide support, hospitalization, or medical services for the alcoholic shall be legally liable for the total amount of the cost of providing care, maintenance, and treatment for the alcoholic while a voluntary patient in a facility . . ."

This liability for payment of the total cost becomes a lien on the real estate owned by the alcoholic or his spouse in favor of the county of legal settlement under Section 10 and 11 of said Chapter.

Section 10 of said Chapter reads in part as follows:

"Sec. 10. The total cost of providing the care, maintenance, and treatment for an alcoholic pursuant to this Act shall be a lien on any real estate owned by the alcoholic or owned by his spouse. . . ."

Section 11 of said Chapter reads in part as follows:

". . . The indexing and the record of the account of such alcoholic in the office of the county auditor shall constitute notice of such lien. . . ."

A possible additional source of revenue to finance and aid in financing a facility would be for municipalities to allocate a portion of the liquor control tax for this purpose.

Section 22 of said Chapter reads as follows:

"Sec. 22. It is hereby deemed a lawful municipal purpose for cities and towns to allocate a portion of the liquor-control tax funds for the purpose of financing or aiding in the financing of an alcoholic facility or detoxification center. The facility or center may use any funds so allocated for the treatment, rehabilitation and education of alcoholics in this state."

II

In answer to your second question, the duties of a county in relation to claims sought by treatment facilities are set forth in Chapter 128, Sections 5 and 9, Laws of the 63rd General Assembly, First Session, which reads in part as follows:

"Sec. 5. Counties shall pay for the remaining one-half of the cost of the care, maintenance, and treatment of an alcoholic from its state institutions fund as provided in section four hundred forty-four point twelve (444.12) of the Code. The facility shall certify to the county of the alcoholic's legal settlement once each month one-half of the unpaid cost of the care, maintenance, and treatment of an alcoholic who has been confined as a voluntary patient. Such county shall pay the cost so certified to the facility from its state institutions fund. A facility may, upon approval of the county board of supervisors, submit to a county a billing

for the aggregate amount of all care, maintenance, and treatment of alcoholics for each month. The board of supervisors may demand an itemization of such billings at any time or may audit the same."

"Sec. 9. The county auditor upon receipt of such certification by the facility shall enter the same to the credit of the facility and issue a notice to the county treasurer, authorizing him to transfer the amount from the state institutional fund to the state general fund, which notice shall be filed by the treasurer as his authority for making such transfer, and shall include the amount transferred in his next remittance to the facility."

The word "shall" is mandatory. Thus, the county *must* pay.

Regarding the question of whether a county newspaper can publish the names of individuals being treated in a facility when such names were mentioned in the official record of the meeting of the Board of Supervisors, we wish to point out that in Chapter 98, Laws of the 62nd General Assembly it is provided that the proceedings of the Board of Supervisors are public.

Chapter 98, Section 1, Laws of the 62nd General Assembly, reads in part 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:

* * *

"2. Any board, council, commission, trustee, or governing body of any county, city, town, township, school corporation, political subdivision, or tax-supported district in this state. . . ."

Section 3 of said Chapter reads in part as follows:

"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. . . ."

As provided by Section 349.16, 1966 Code of Iowa, it is mandatory that the official proceedings are to be published in each official newspaper selected by the Board of Supervisors.

Section 349.16, 1966 Code of Iowa, reads in part as follows:

"349.16. What published. There shall be published in each of said official newspapers at the expense of the county during the ensuing year:

"1. The proceedings of the board of supervisors, excluding from the publication of said proceedings, its canvass of the various elections, as provided by law; witness fees of witnesses before the grand jury and in the district court in criminal cases; the transcripts of justices of the peace, including their proceedings and cost; the county superintendent's report. . . ."

We do not believe that this type of information is within the exceptions. Publishing information contained in such proceedings is not confidential.

These meetings are open meetings and by legislative mandate the proceedings must be published.

We find no prohibition as to publishing the names of individuals being treated in the facility and the county may make known their names by publication in a newspaper.

III

In reply to your third question, Section 5 of said Chapter 128, supra, creates liability on the county of legal settlement for the remaining one-half of the cost of the care, maintenance, and treatment of an alcoholic from its state institution fund. Nevertheless, when the patient seeks admission, prior approval of the Board of Supervisors is not required under law and claims cannot be refused on account of their lack of approval.

IV

In connection with your fourth question, Chapter 128, Section 3, Laws of the 63rd General Assembly, First Session, reads as follows:

"Sec. 3. No later than July first of each year the commission shall allocate any moneys appropriated by the general assembly or otherwise available for such purposes, and any federal funds so available, among treatment services to be provided an alcoholic while confined as a voluntary patient in a qualified facility with which the commission has contracted to provide such treatment and other rehabilitative services."

The funds allocated to the facility by the Commission are intended to pay for one-half the cost of the care, maintenance, and treatment of an alcoholic.

Section 5 of said Chapter 128, supra, reads that the counties shall pay the remaining one-half cost. This is a mandatory directive and even though the monthly allocation of funds from the Commission has been exhausted and the Commission is unable to pay one-half of the care for alcoholics for the balance of the month, this does not relieve the county from its financial responsibility. As pointed out in the answer to your first question, the facility will need to look to obtaining private funds or money from the city or municipality as provided in Section 22 of this Chapter to be reimbursed for the costs which exceed the Commission's allocations.

October 7, 1970

STATE OFFICERS AND DEPARTMENTS: Dept. of Social Services — Juveniles — Contributing to Juvenile Delinquency — Criminal action for failure to support — §233.1(5), 1966 Code of Iowa, as amended by Ch. 205, 62nd G. A. A father can be prosecuted for wilfully failing to support his child under eighteen years of age pursuant to a court order to pay temporary support pending final hearing in a separate maintenance action under §233.1(5), 1966 Code of Iowa, as amended by Chapter 205, 62nd G. A. (Williams to Morrison, Henry County Attorney, 10/7/70) #70-10-8

Mr. James L. Morrison, Henry County Attorney: You have requested an opinion of the Attorney General regarding the following question:

"Can a father who is under a temporary order to pay temporary allowances and child support to his wife pending final hearing on a separate maintenance action be prosecuted under Section 233.1(5) if he in fact fails to make payments under the temporary allowances ordered?"

You refer to §233.1(5), Code of Iowa, 1966, as amended by the Sixty-second General Assembly. Under Chapter 205, Section 2, Laws of the Sixty-second General Assembly, effective July 1, 1967, it is unlawful for a parent to fail to provide support for his minor children under the age of eighteen years.

Section 233.1 as thus amended now reads in part as follows:

"233.1 Contributing to delinquency. It shall be unlawful to:

* * *

"5. For a parent willfully to fail to support his child under eighteen years of age whom he has a legal obligation to support."

We believe the fact that the father is under a temporary order to pay temporary allowances and child support, and fails to do so would have no bearing, in and of itself, on this question, whether or not he is subject to punishment for contempt of court. In other words, he can be prosecuted under this section, though not in contempt. His responsibility cannot be *lessened* by an order of court to do what the law otherwise compels him to do.

October 8, 1970

ELECTIONS: Hours polls are open — §49.73 and Chapter 48, Code of Iowa, 1966, as amended by Chapter 1037, 63rd G. A., Second Session (1970). The polls are required to be open at 7:00 A.M. rather than 8:00 A.M. only in cities of population of 10,000 or more. In counties of 50,000 or more but outside such cities polls need not be opened until 8:00 A.M. (Haesemeyer to Synhorst, Secretary of State, 10/8/70) #70-10-9

The Hon. Melvin D. Synhorst, Secretary of State: Reference is made to your letter of October 7, 1970, in which you state:

"We have had several requests for information regarding the time the polls should be open on election day for residents of counties having a population of 50,000 or more.

"Chapter 1037 extended voter registration to all residents of counties with a population of 50,000 or more. Prior to that time, registration was required in cities with a population of 10,000 or more.

"Section 49.73, Code of Iowa, 1966, states:

'Time of opening and closing polls. At all elections the polls shall be opened at eight o'clock in the forenoon, except in cities where registration is required, when the polls shall be opened at seven o'clock in the forenoon, or in each case as soon thereafter as vacancies in the places of judges or clerks of election have been filled. In all cases the polling places shall be closed at eight o'clock in the evening.'

"This section was not amended by any legislation to include the residents of counties where registration applies.

"What time are the polls to open in counties with a population of 50,000 outside of the cities located in such counties which have a population of 10,000?"

The effect of Chapter 1037, 63rd G. A., Second Session (1970), was as

you point out to extend voter registration to all residents of counties with a population of 50,000 or more. Thus, §48.1, Code of Iowa was amended by such Chapter 1037, by adding the following:

"There is further created the office of commissioner of registration in all counties that now or hereafter have a population of fifty thousand or more. The county auditor of each such county is hereby constituted the commissioner of registration in his county. The county auditor shall register only those residents of his county who reside outside of the corporate limits of all cities in his county with a population of ten thousand or more. The city clerk of all cities with a population of ten thousand or more shall register the residents of his city."

The result of this and the other amendments to Chapter 48 of the Code effected by Chapter 1037 was to establish two systems of permanent registration in counties of 50,000 or more with the county auditor registering all electors outside the city limits of cities with a population of 10,000 or more and the city clerk registering all voters within such corporate limits.

Section 49.73 of the Code set forth above only requires that the polls be open at seven A.M. rather than eight A.M. "in cities where registration is required." It is true that §47.1, Code of Iowa, 1966, as amended by Chapter 1037 permits any city having a population in excess of 4,000 to and including a population of 10,000 to by ordinance require the registration of all voters. However, in our opinion where the word "required" is used in §49.73 it should be taken to mean required by the statutes of the state of Iowa and not by locally enacted ordinances. Moreover, we do not think it is reasonable to interpret §49.73 as requiring the earlier opening of polls in cities of less than 10,000 population which may also be located in counties of 50,000 or more population. Registration in such cities is required not because of their status as cities but because of the fact that they happen to be situated in counties where registration is required. Thus, in answer to your question the polls are required to be open at seven A.M. rather than eight A.M. only in cities with a population of 10,000 or more.

October 13, 1970

COUNTY AND COUNTY OFFICERS: County Conservation Board—Appropriations — County Historical Society — Ch. 1068, 63rd G. A., 2nd Session. County conservation board is authorized to appropriate from conservation fund up to $2,000 per year for historical society use in collecting and preserving collections and materials of the area and which may be used to relocate and restore a log cabin. The historical society shall file an annual report of expenditures of such appropriations. (Nolan to Nielsen, State Representative, 10/13/70) #70-10-10

The Hon. Alfred Nielsen, State Representative: This refers to your telephone request for an opinion on two questions pertaining to Ch. 1068 (H.F. 633), Acts of the 63rd G. A., Second Session, authorizing a county conservation board to give a county historical society up to $2,000.00 in aid for historical purposes.

Your questions are:

"1. Can the county historical society move in a log cabin and spend the money to fix it up?

"2. Do we have to report expenses each month or at the end of the year?"

Ch. 146, Acts of the 62nd G. A., authorized county conservation boards to establish and maintain public museums. The act in question amends §111A.4, Code of 1966, which is the section of the code prescribing the powers and duties of the county conservation board, and which as amended, provides in pertinent part as follows:

"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:

"1. To study and ascertain the county's museums, park, preserve, parkway, and recreation and other conservation facilities, and need for such facilities. . . .

"2. To acquire in the name of the county by gift, purchase, lease, agreement or otherwise, in fee or with conditions, suitable real estate within or without the territorial limits of the county areas of land and water for public museums, parks, preserves, parkways, playgrounds, recreation centers, forests, wildlife and other conservation purposes. . . . The state conservation commission, the county board of supervisors, or the governing body of any city, town or village may, upon request of the county conservation board, designate, set apart and transfer to the county conservation board for use as museums, parks, preserves, parkways, playgrounds, recreation centers, . . . and other recreational purposes, any land and buildings owned or controlled by the state conservation commission or such county or municipality and not devoted or dedicated to any other inconsistent public use. In acquiring or accepting land, due consideration shall be given to its scenic, historic, archaelogical, 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.

* * *

"To appropriate from the conservation fund created pursuant to section one hundred eleven A point six (111A.6) of this chapter an amount, not to exceed two thousand dollars per annum, for the use of a local, nonprofit historical society, organized pursuant to chapter five hundred four (504) or chapter five hundred four A (504A) of the Code, for the purpose of collecting and preserving historical materials of the area, maintaining a historical library and collections, conducting historical studies and researches, issuing publications, providing public lectures of historical interest, and otherwise disseminating a knowledge of the history of the area to the general public. If such appropriation is made, the historical society shall present to the county conservation board an annual report describing in detail its use of the funds appropriated."

(§111A.4 as amended by Chapters 146 and 147, Acts of the 62nd G. A., and Ch. 123, Acts of the 63rd G. A., First Session, and Ch. 1068, Acts of the 63rd G. A., Second Session).

Inasmuch as Ch. 1068, supra, authorizes the appropriation of not to exceed $2,000.00 to the local non-profit historical society for the purpose of "collecting and preserving historical materials of the area" it appears that the historical society would be authorized to relocate and restore a log cabin if a suitable cabin can be obtained in the area.

Your second question is answered by the last sentence of §1, Ch. 1068,

supra, "if such appropriation is made, the historical society shall present to the county conservation board an *annual report* describing in detail its use of the funds appropriated." [Emphasis added]. Therefore, it is not necessary to report the expenses at the end of each month.

October 13, 1970

CONSERVATION: Iowa Water Pollution Control Commission — Sewage Works Construction Fund — Necessity of Federal Participation in Funding — §§8 through 14 of Chapter 1205, Acts of the 63rd G. A., Second Session. This Act allows state grants to municipalities if matching federal funds would have been available in attributable year, as well as if such funds are currently available. (Davis to Vermeer, Administrative Assistant, Office of Governor, 10/13/70) #70-10-11

Mr. Elmer H. Vermeer, Administrative Assistant, Office of the Governor: Reference is made to your request for an opinion of this office as follows:

"Chapter 1205, Acts of the Second Regular Session of the 63rd General Assembly, Sections 8 through 14 deal with monies appropriated to the Sewage Works Construction Fund. If the federal government does not participate in the retroactive funding can the state funds be used retroactively? If so, on what basis?"

The sections of the law relative to the relationship between state and federal funding read:

"Sec. 8. There is hereby established a fund to be known as the 'sewage works construction fund.' All moneys appropriated to and deposited in the sewage works construction fund are hereby appropriated for and shall be used by the Iowa water pollution control commission in carrying out the purposes of sections eight (8) through fourteen (14), inclusive, of this Act.

"1. Definitions. When used in sections nine (9) through fourteen (14), inclusive, of this Act, and unless the context requires otherwise:

"a. 'Treatment works' means any plant . . . or other works . . . which qualify for federal grants pursuant to the federal water pollution Act of 1956, as amended, or any other federal act or program.

* * *

"d. 'Eligible project' means a project for construction of sewage treatment works:

* * *

"(2) Which is, in the judgment of the commission, eligible for federal pollution abatement assistance, whether or not federal funds are then available for such purpose. Eligible projects shall be those which the construction contract therefor shall have been entered into subsequent to July 1, 1966.

* * *

"f. 'Federal pollution abatement assistance' means funds available to a municipality, either directly or through allocation by the state, from the federal government as grants for construction of sewage treatment works pursuant to the federal water pollution Act of 1956 as amended.

"Sec. 9. The commission may make grants available to any municipality to assist such municipality in the construction of sewage treatment works.

"Sec. 10. The commission shall accept and administer all funds granted by the state pursuant to sections eight (8) through fourteen (14), inclusive, of this Act.

"In allocating state grants under sections eight (8) through fourteen (14), inclusive, of this Act, the commission shall give consideration to:

"1. The public benefits to be derived by the construction.

"2. The ultimate cost of constructing and maintaining the works.

"3. The public interest and public necessity for the works.

"4. The adequacy of the provisions made or proposed by the municipality for assuring proper and efficient operation and maintenance of the treatment works after the completion of construction thereof.

"5 The applicant's readiness to start construction, including financing and planning.

"Sec 11. The commission may, in the name of the state, contract with any municipality concerning eligible projects. Any such contract . . . shall include, in substance, the following provisions:

* * *

"2. An agreement by the commission to pay to the municipality . . . an amount equal to one-half of . . . cost . . . that is not paid by the federal government but not less than twenty-five percent of the cost as determined

* * *

"Sec. 13. . . . All payments by the state . . shall be used for the payment of costs of construction of an eligible project. However, if such costs have been paid by the municipality, then such payment may be used by the municipality for:

"1. The payment of outstanding bonds or obligations incurred for any such eligible project.

"2. Any improvement or extension of an eligible project.

"3. Any other lawful municipal purpose determined to be necessary, reasonable, and in the interest of public welfare.

"Sec. 14. There is hereby appropriated from the general fund of the state to the sewage works construction fund the sum of seven million two hundred thousand (7,200,000) dollars *for matching federal funds which are or would have been available* for eligible projects attributable to the fiscal year ending June 30, 1970, and prior." (Emphasis added)

In considering any legislative enactment, what the language of the statute says, is the interpretation that must be given a law. *Simmons Warehouse Co. vs. Board of Review of Sioux City*, 1940, 229 Iowa 191, 294 N. W. 286. Only if there are ambiguities must other considerations, such as legislative intent expressed in consideration of the bill before enactment, be considered. *Jones v. Thompson*, 1949, 240 Iowa 1024, 38 N. W. 2d 672; *Miller Oil Company vs. Abramson*, 1961, 252 Iowa 1058, 109 N. W. 2d 610.

Despite broader language in other sections above, the appropriation in Section 14 is limited to *matching federal funds which are or would have been available*. If there are matching federal funds available as determined by the commission for any eligible project attributable to the fiscal year ending June 30, 1970, a state grant may be offered for such projects under the guidelines as established by the legislature in Section 10 of the

Act If there are matching federal funds available, as determined by the commission, for eligible projects attributable to prior fiscal years then grants may be offered for such projects under the Section 10 guidelines.

If for an eligible project on which the construction contract was entered into subsequent to July 1, 1966, there are no matching federal funds available currently, but the commission finds that matching federal funds would have been available had Iowa then had an appropriate program such as the "sewage works construction fund" program, then such project, which is otherwise eligible, may be offered a contract for a state grant.

Which municipalities may be offered grant contracts under the provisions above are totally in the discretion of the commission subject to the guidelines in Section ten (10) of the Act. No sequential priority is established for matching federal funds which are or would have been available for eligible projects attributable to fiscal years ending on June 30, 1970, and prior.

The basis for state participation is 50 percent of the eligible costs of the project not paid by the federal government but not less than 25 percent, as delineated in Section 11(2) of the Act.

October 15, 1970

STATE OFFICERS AND DEPARTMENTS: Vacations, merit system — §79.1, Code of Iowa, 1966, as amended by Chapter 1045, 63rd G. A., Second Session (1970); §§11 and 20, Chapter 95, 62nd G. A. (1967). Merit system director may make reasonable rules relative to vacation entitlement and such rules apply uniformly to all agencies of the state covered by the merit system. (Haesemeyer to Van Drie, State Representative, 10/15/70) #70-10-12

The Hon. Rudy Van Drie, State Representative: Reference is made to your letter of October 8, 1970, in which you state:

"I have received several reports that state agencies have different interpretations of H.F. 1197 concerning vacations for state employees.

"I believe that all eligible state employees should be treated equally and should be entitled to the benefits of this legislation.

"Please give me your official opinion in a documented schedule."

Attached is a copy of an opinion of Attorney General Turner to Mr. Wallace Keating, Director, Iowa Merit Employment Department, dated September 14, 1970. This opinion goes into a number of problems which were involved in making and promulgating rules and regulations relative to vacation entitlement in the various state agencies and departments under the merit system. You will notice that on page 7 thereof is to be found the following statement:

"As you correctly point out §79.1 in its present and past forms has, because of its vague and imprecise wording, given rise to many differing, conflicting and oftentimes inconsistent interpretations by various state agencies and departments. In our opinion, §9(18) of Chapter 95 does give the merit employment department authority to institute and enforce a uniform accrual policy of vacation entitlement for the agencies and employees under the merit system."

Pursuant to Chapter 17A Mr. Keating submitted to the attorney general for his approval certain proposed rules among which are those relating to vacation and leave which are found in Chapter 14 of such rules. Since in our opinion these proposed rules comply with the statutes and are within the power of the merit employment department to make and promulgate they were approved by the attorney general. Enclosed is a copy of our letter of October 7, 1970 returning the approved rules to Mr. Keating with a copy of such rules attached. I do not know if the rules have been approved by the legislative rules review committee but if and when they are and after they have been filed in the office of the secretary of state in accordance with Chapter 17A the rules will be in full force and effect and binding on all state agencies subject to the merit system.

The merit employment law, Chapter 95, Acts, 62nd G. A. (1967) contains a number of enforcement provisions. For example §20 makes it a misdemeanor to wilfully violate any rule adopted in accordance with the Act. §11 provides in part:

"The director may institute and maintain any action or proceeding at law or in equity that he considers necessary or appropriate to secure compliance with this Act and the rules and orders thereunder."

If you know of any instances where state departments are not complying with the duly adopted rules of the merit employment department I would suggest that you advise the director, Mr. Keating, so that appropriate remedial action may be taken.

October 16, 1970

CRIMINAL LAW: Consumer Frauds — §713.24(2a), Code of Iowa, 1966. The violation of the provisions of §713.24(2a) when read in conjunction with §§687.6 and 687.7, 1966 Code of Iowa, constitutes a criminal act prosecutable as such. The investigatory and information gathering powers conferred upon the Attorney General by the provisions of §§3 and 4a of the Act do not constitute a violation of the Fifth Amendment to the United States Constitution regarding the prohibition against self-incrimination when §§3 and 4a are read in connection with §§4b and 4c, which provide that such information as may be gathered under the provisions of §§3 and 4a cannot be used against the individual so producing in any criminal prosecution which may be brought against him. (Carlson to Jenkins, Monroe County Attorney, 10/16/70) #70-10-13

Mr. James D. Jenkins, Monroe County Attorney: This is in reply to your letter of September 3, 1970, wherein you request an opinion as to whether a violation of §713.24(2a), 1966 Code of Iowa, read in conjunction with §687.6 and §687.7, 1966 Code of Iowa, is a criminal violation. You further pose the question that if a violation of §713.24(2a) is construed as a criminal act what affect does this have on the investigative powers conferred on the Attorney General by other portions of the *Consumer Fraud Act* in light of the Fifth Amendment to the United States Constitution regarding the prohibition against self-incrimination.

The pertinent section of the statute in question is §§2a of §713.24, 1966 Code of Iowa, which reads as follows:

"2a. The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or ommission of any material fact with intent that

others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been mislead, deceived or damaged thereby, is declared to be an unlawful practice."

Section 687.6 and 687.7 as contained in Chapter 687, Public Offenses, read as follows:

"687.6 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.

"687.7 Punishment for Indictable Misdemeanors. Every person is convicted of a misdemeanor, the punishment of which is not otherwise prescribed by any statute of this state, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."

The question in regard to §§2a of the *Iowa Consumer Fraud Act* then becomes whether or not it imposes any penalty for the violation thereof, or if no such penalty is imposed does it invoke the provisions of §687.6 and §687.7.

The only provisions of the *Consumer Fraud Act* which could possibly be construed as providing any type of penalty for a violation thereof are the provisions of §§7 of the *Consumer Fraud Act* which, taking into consideration the amendment thereto as made by House File No. 719, 63rd G. A., Second Session, page 399, states as follows:

"Section 713.24(7) Whenever it appears to the attorney general that a person has engaged in, is engaging in, or is about to engage in any practice declared to be unlawful by this Act, he may seek and obtain in an action in a district court an injunction prohibiting such person from continuing such practices or engaging therein or doing any acts in furtherance thereof. The court may make such orders or judgments as may be necessary to prevent the use or employment by a person of any prohibited practices, or which may be necessary to restore to any person in interest any monies or property, real or personal, which may have been acquired by means of any practice in this Act declared to be unlawful including the appointment of a receiver in cases of substantial and willful violation of the provisions of this Act."

As can be seen by examining the language of §§7 what the law basically provides as civil relief is that an alleged violator who is established in court to have violated the provisions of §§2a of the Act is prohibited by injunction from continuing the illegal practices, and also may be ordered by the court to restore monies obtained by him by the means of the illegal practices. It cannot be said that being enjoined from continuing illegal practices or being ordered to restore monies illegally gotten is a penalty as the word penalty is used in §687.6 and §687.7. The provisions of §§7 basically provide for the halting of the illegal practices and for an equitable restitution to the defrauded parties.

The term penalty in the State of Iowa is described as a punishment imposed by statute as a consequence of the commission of an offense. *State of Iowa v. Chicago*, etc., R. Co., C. C., 37 F. 497, 3 L.R.A. 544.

To constitute a punishment or penalty it is usually accepted in law that there must be a deprivation of property or some right. *State v. Cowen*, 231 Iowa 1117, 3 N. W. 2d 176, 179, 182.

From examining the definition of the word penalty as contained in the above referred to Iowa cases, it is clear that merely ordering a halt to illegal practices and ordering a refund of monies illegally held is not the deprivation of any right so as to constitute a penalty under Iowa law. Therefore the civil provisions of §§7 of the *Consumer Fraud Act* do not constitute a penalty, and a violation of §§2a of the *Consumer Fraud Act* as read in conjunction with §687.6 and §687.7 is a criminal act prosecutable as such.

Turning to your second question as to what affect treating a violation of §§2a as a criminal act has on the constitutionality of the investigative powers conferred upon the Attorney General by the *Consumer Fraud Act*, when considered in regard to the Fifth Amendment to the United States Constitution regarding the prohibition against self-incrimination, a reading of the further provisions of the *Consumer Fraud Act* answers this question.

The investigatory and information requiring provisions of the *Consumer Fraud Act* are §§3 and §§4a which authorizes the Attorney General to issue subpoenas and require an individual to produce information upon order of the Attorney General in connection with an investigation of practices believed to be violations of §§2a. Subsection 4b and 4c of the *Consumer Fraud Act* states as follows:

"b. No information or evidence provided the attorney general by a person pursuant to subsections three (3) and four (4) of this Act shall be admitted in evidence, or used in any manner whatsoever, in any criminal prosecution. If a criminal prosecution under the provisions of this Act is initiated in a state court against a person who has provided information pursuant to subsections three (3) and four (4) of this Act, the state shall have the burden of proof that the information so provided was not used in any manner to further the criminal investigation or prosecution."

The provisions of §§4c of the *Consumer Fraud Act* were added in 1970 by the enactment of House File No. 719, 63rd G. A., Second Session, page 399, and reads as follows:

"c. In any civil action brought pursuant to this chapter, the attorney general shall have the right to require any defendant to give testimony, and no criminal prosecution based upon transactions or acts about which he is questioned and required to give testimony shall thereafter be brought against such defendant."

From reading the provisions of §§4b and §§4c of the *Consumer Fraud Act*, it is clear that the Act provides ample protection against self-incrimination and is thus not in conflict with the Fifth Amendment's prohibition against self-incrimination.

October 19, 1970

ELECTIONS: Hospital trustees, qualification for office — §63.1, §347.9, Code of Iowa, 1966. Registered nurses are licensed practitioners within the meaning of §347.9 and as such ineligible to hold office as county hospital trustees. However, since their disability might be removed through resignation and surrender of their licenses before seeking to qualify for office their names should be printed on the ballot. (Haesemeyer to Sloan, Keokuk County Attorney, 10/19/70) #70-10-14

Mr. Raymond A. Sloan, Jr., Keokuk County Attorney: Reference is made to your letter of October 14, 1970, in which you state:

"I am requesting an opinion with respect to 1966 Iowa Code Section 347.9 and an Opinion issued by your office on August 15, 1962, regarding eligibility of registered nurses to serve as County Hospital Trustees.

"In this county, we currently have a situation where two registered nurses have in all other respects qualified themselves to have their names appear on the ballot for election as a County Hospital Trustee. However, in view of your aforementioned Opinion, it appears that if elected, neither of such women would be eligible to serve as a Trustee.

"The question I am raising to your office is whether under these circumstances this office, or any other county office, has authority, in view of the aforecited authority, to disqualify these candidates and cause their names to be omitted from the printing of the ballots for the election of such Trustees."

The earlier opinion of the attorney general to which you make reference, 1962 OAG 234 concluded that a registered nurse was a licensed practitioner and therefore ineligible to serve on the board of trustees of the county hospital. Such opinion states:

"This will acknowledge your requests for an opinion as to whether either a registered nurse or a funeral director is eligible to election to the board of trustees of a county hospital.

"Section 347.9, 1962 Code of Iowa, provides:

" 'Trustees-appointment-terms of office. * * * the board shall appoint seven trustees chosen from the resident citizens of the county * * * none of whom shall be physicians or licensed practitioners.'

"The foregoing statute excepts from the holding of office of trustee of the county hospital board physicians or licensed practitioners. Chapter 147, Code of 1962, includes among others deemed to be practitioners, a nurse.

"In view of the foregoing statute, I am of the opinion that a registered nurse is a practitioner within the terms of the statute and therefore would not be eligible to the office of county hospital trustee.

"The question of eligibility of a funeral director has arisen before and was answered by an opinion issued to Mr. David I. Grimes, Monroe County Auditor, 1958 O.A.G. 90. That opinion, advising that a funeral director is not eligible, is hereby confirmed."

Section 347.9 of the 1966 Code is identical to the same numbered section of the 1962 Code and accordingly the 1962 opinion of the attorney general is reaffirmed.

However, there is no authority for the omission of the two registered nurse candidates from the ballot. There appears to be ample authority for the proposition that unless the statute specifically provides otherwise that the requisite qualifications to hold a public office need not exist at the time of election but only at the time of qualification. *State v. Huegle*, 1907, 135 Iowa 100, 112 N. W. 234; *State ex rel Perine v. Van Beek*, 1893, 87 Iowa 569, 54 N. W. 525; 1928 OAG 294.

In the *Perine* case cited above it was held that though a sheriff, at the time of his election, was an alien and therefore ineligible to hold office his subsequent naturalization as a citizen before his induction to office removed the disability and entitled him to the office.

In the 1928 opinion of the attorney general it was held that a law stu-

dent who had not passed the bar could run for county attorney in the June primary since he might be qualified for office by the time the date for his induction came around.

In the case of the nurses, while perhaps not very likely, it is still remotely possible that they could resign whatever employment they have and surrender their licenses prior to the time they must qualify for office and in that event they could serve on the board of trustees.

In the event that they are elected and do not take steps to remove their disability they will not be eligible to serve and they should not be administered the oath provided in §63.1, Code of Iowa, 1966. Instead the offices should be declared vacant and filled in accordance with law.

October 28, 1970

ELECTIONS: Counting and receiving boards — §§49.12, 51.1, 51.3, 51.4 and 51.7, Code of Iowa, 1966. There is no statutory authority for the appointment of more than one counting board. However, under certain circumstances two receiving boards can be appointed and after the polls close these receiving boards may join with the counting board in counting and tabulating the vote. (Haesemeyer to Johnson, Ass't. Fayette County Attorney, 10/28/70) #70-10-15

Mr. J. G. Johnson, Assistant Fayette County Attorney: You have requested an opinion of the attorney general with respect to the following:

"We have received a request from the Fayette County Auditor for an opinion in regard to the number of counting boards allowed in a precinct. The fourth ward in Oelwein, Iowa is very large, and it takes a great deal of time to count the ballots. For many years this precinct has used a double election board as provided by Chapter 51. However, there is still a great deal of time required for counting all of the ballots, and it has been suggested that perhaps Section 49.12 would provide for the appointment of a third counting board.

"It will be noted that 49.12 states that an adidtional election board may be named, and this section specifically states that nothing in Chapter 49 should change or abrogate any of the provisions of law relating to double election boards (Chapter 51). Therefore, our question is whether or not a precinct using double election boards under the provisions of Chapter 51 might not also be able to have an additional, or third, election board as provided by Section 49.12.

"If such a third board is allowed, could this board operate as a counting board and start work at 9:00 A.M. or 1:00 P.M. as provided by Section 51.7, or would it have to be treated as the receiving board and not be able to start counting ballots until after the polls have closed as also provided by Section 51.7?"

Sections 49.12, 51.1, 51.3, 51.4 and 51.7, Code of Iowa, 1966, provided respectively:

"49.12 Election boards. Election boards shall consist of three judges and two clerks. Not more than two judges and not more than one clerk shall belong to the same political party or organization, if there be one or more electors of another party qualified and willing to act as such judge or clerk. In all election precincts with voters in excess of one thousand an additional election board may be named. Nothing in this chapter shall change or abrogate any of the provisions of law relating to double election boards. In any precinct using voting machines in which more than three such machines are used, the board of supervisors is authorized to name one adidtional judge for said precinct for each such

additional machine, maintaining the bipartisan political balance hereinbefore referred to."

"51.1 Election counting board. In all election precincts the board of supervisors may appoint for each primary and general election three additional judges and two additional clerks to be known as the election counting board."

"51.3 'Receiving' and 'counting' boards defined. The judges and clerks of election as provided in existing law shall be known as the receiving board and it shall be their duty to supervise the casting of ballots at said election, and the judges and clerks provided for in sections 51.1 and 51.2 shall be known as the counting board."

"51.4 Selection of counting board — duties. The counting board shall be chosen from the two political parties casting the highest number of votes at the last general election. Not more than two judges nor more than one clerk shall belong to the same political organization, provided that two of such judges shall be chosen from the political party casting the highest number of votes at the last preceding general election. The receiving board shall perform all the functions of judges and clerks of election as now provided by law except as to counting and certifying the vote as by this chapter provided."

"51.7 Duties of double boards. The counting boards shall proceed to the respective voting places to which they have been appointed, at one o'clock p.m., or in any precinct in which the board of supervisors shall deem it necessary, at such earlier hour after nine o'clock a.m., as such board of supervisors may direct, and shall take charge of the ballot box containing the ballots already cast in that precinct. It shall retire to a partitioned space or room provided for that purpose and there proceed to count and tabulate the ballots as it shall find them deposited in the ballot box. The receiving board shall continue to receive the votes of electors in the other box provided, until such time as the counting board shall have finished counting and tabulating the ballots cast in the first ballot box. The two boards shall then exchange the first box for the second box and so continue until they have counted and tabulated all the votes cast on that election day. When the hour arrives for closing the polls, the receiving board shall certify to all matters pertaining to casting of ballots and shall then unite with the counting board in the counting of ballots. The judges shall then divide the ballots not counted and each group of judges an dclerks shall proceed to canvass their portion of the same. When the canvass has been completed the judges and clerks shall report the result of their canvass by telephone or telegraph or in person to the county auditor of the county in which said voting place is located immediately after completion thereof, which report shall be incorporated in the returns provided by law."

Under §49.12 under certain specified circumstances an additional election board may be named. However, because of the language in §51.3 it is clear that any such additional board would be a receiving rather than a counting board. And §51.7 makes it clear that a receiving board is not to participate in the counting and tabulating of the ballots until the hour arrives for closing the polls.

October 29, 1970

ELECTIONS: Residence requirements, students — §§49.79, 49.80 as amended by §31, Chapter 1039, 63rd G. A., Second Session (1970), 49.81 as amended by §32, Chapter 1039, and 49.82, 49.104, Code of Iowa, 1966. A student, like any other person seeking to vote who after being challenged and examined under oath subscribes the oath prescribed by law should be permitted to vote and the state may look for its remedy in prosecuting the voter for false swearing. Residence for voting pur-

poses means domicile which is largely a matter of intent. A student may very well intend to make a city where his college is located, or where his home is located while he is attending college, his domicile or permanent residence after he leaves college. But if he intends to move from that city soon after completing his college, or simply doesn't know what he is going to do and has no intention, whatsoever, then that place is not his residence. (Turner to Synhorst, Secretary of State, 10/29/70) #70-10-16

The Hon. Melvin D. Synhorst, Secretary of State: Many people have expressed to me, and I presume also to you, their concern that some college students may attempt and be permitted to vote at polling places in their college communities at the forthcoming general election on November 3, 1970, although not actually qualified electors of those communities. You have requested an opinion of the attorney general setting forth the law applicable to student voting, particularly with reference to age and residence requirements.

Several reasons have been given as to why unqualified students may attempt to vote but it is enough for purposes of this opinion to mention only two. First, a new federal law recently enacted (P.L. 91-285, 91st Congress, H.R. 4249, approved June 22, 1970) lowers the voting age in all states to 18 years. It has recently been reported that a three judge federal district court in the State of New York has upheld the constitutionality of this new federal law. It has also been widely reported that the constitutionality of the new federal law has been directly attacked in the United States Supreme Court by several states and that there will be no ruling forthcoming before the election on November 3rd. Moreover, on July 16, 1970, I furnished you an opinion stating that pending a determination of the constitutionality of this new federal law Iowa residents who are 18 years old should now be permitted to *register* to vote in any primary or other election to be held in Iowa after January 1, 1971, and that their registrations should be retained in separate files by those responsible for accepting voter registrations, until such time as the constitutional issues have been resolved. That opinion antedated the decision of the three judge federal court. Doubtless, confusion has arisen on account of all this. Nevertheless, as I pointed out in the July 16th opinion, the new federal law by its own terms does not take effect, in any event, until January 1, 1971. Accordingly, no student or other person under 21 years old may vote in the Iowa general election on November 3, 1970.

Second, a new Iowa law enacted in 1970, Chapter 1039, 63rd General Assembly, Second Session, concerning elections, creating a presumption of continuous residency, etc., coupled with the new registration provisions therein and the new federal law, may be causing additional confusion. Mobile deputy registrars were provided in this new law and apparently have registered many students on college campuses.

Of course, being a college student on an Iowa college campus does not of itself qualify a student to vote. Nor does the mere fact that he has been registered so qualify him. Such a college student, to be qualified, must, at the polling place on election day, sign an affidavit or "voter's declaration of eligibility" swearing that he is a resident of the precinct, ward or township, city or town of the particular county, in Iowa, in which said polling place is located; that he has been a resident of the State of Iowa for at least six months, of the county for at least sixty days, and of

the precinct or township for at least ten days; that he is lawfully eligible to vote in the said precinct; that he has not voted and will not vote in any other precinct in said election and that he understands that any false statement in his declaration is a criminal offense punishable as provided by law. §29, Chapter 1039, 63rd G. A., Second Session (1970).

The overwhelming majority of college students today are honest, honorable and idealistic. Few would dishonor themselves by lying, swearing falsely or committing perjury. Nevertheless, the law makes provision for the machinery for challenging at the polling places the qualifications of any voter. §§49.79, 49.80 as amended by §31, Chapter 1039, 63rd G. A., Second Session (1970), 49.81 as amended by §32, Chapter 1039, and 49.82, 49.104, Code of Iowa, 1966, provide respectively:

"49.79. Challenges. Any person offering to vote may be challenged as unqualified by any judge or elector; and it is the duty of each of the judges to challenge any person offering to vote whom he knows or suspects not to be duly qualified. No judge shall receive a ballot from a voter who is challenged, until such voter shall have established his right to vote."

"49.80. Examination on challenge. When any person is so challenged, the judges shall explain to him the qualifications of an elector, require such person to sign an affidavit as set forth in section 49.77, and may examine him under oath touching his qualifications as a voter."

"49.81. Oath in case of challenge. If the person challenged be duly registered, or if such person is offering to vote in a precinct where registration is not required, and insists that he is qualified, and the challenge be not withdrawn, one of the judges shall tender to him the following affidavit and such person shall read and sign the same:

"I do solemnly swear or affirm that I am a citizen of the United States, a resident of Iowa for six months, a resident of this county for sixty days, and a resident of this precinct for ten days next preceding this election, and that I am at least twenty-one years of age, and I have not voted in this election. I am lawfully eligible to vote in Iowa and in this county and precinct.

"I understand that any false statement in this declaration is a criminal offense punishable as provided by law.

Signature of Voter

Address

"If such person signs the affidavit and is examined by the judges concerning his qualifications, his vote shall then be received unless further challenged."

"49.82. Voter to receive one ballot — endorsement by judge. One of the judges of election shall give the voter one ballot and only one, on the back of which a judge shall endorse his initials, in such manner that they may be seen when the ballot is properly folded. No ballot without said official endorsement shall be deposited in the ballot box. The voter's name shall immediately be checked on the registry list."

"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."

Thus, if a person takes such an oath after he has been examined under oath as to his qualifications, his vote shall be received "unless further challenged." §49.81, Code 1966 as amended. The words "unless further challenged" were added by this new law of the 63rd General Assembly. Prior thereto, under the 1966 Code, the vote was received after the oath whether or not there was a further challenge. Now, no provision is made as to what shall be done if there is a "further challenge" and in absence of such provision, the vote in my opinion should be received and the State may look for its remedy in prosecuting the voter for false swearing.

You have asked whether the term "residence" can be further clerified, specifically with reference to college students. In 1968 OAG 950, Turner to Christensen, State Representative, a copy of which is attached, I said that residence for voting purposes means domicile which is largely a matter of intent. Of course, college students have the same rights — no more and no less — as anyone. A student may very well intend to make a city where his college is located, or where his home is located while he is attending college, his domicile or permanent residence after he leaves college. But if he intends to move from that city soon after completing his college, or simply doesn't know what he is going to do and has no intention, whatsoever, then that place is not his residence. *Vanderpoel v. O'Hanlon,* 1880, 53 Iowa 246, 5 N. W. 119. See also 1938 OAG 832 and 1928 OAG 388. However, it is not necessary that he intend to spend the rest of his life in the community in order to be a resident there for voting purposes — only some substantial period during which time he expects that will be his true domicile. See *Dodd v. Lorenz,* 1930, 210 Iowa 513, 231 N. W. 422 at 525.

While this test of residency is rather subjective and inquiry into a person's state of mind somewhat difficult, the student can be asked, when examined under oath by the challengers, questions such as where he lived before attending college, where he has lived since, where he has spent his vacations, what place he listed as his home when he last registered for college, where his automobile is registered, where he pays his income tax, with what local board he's registered for the draft, whether he has an Iowa driver's license and what address is shown thereon, where he intends to live after leaving college, and to produce anything he is carrying on his person to substantiate his testimony.

If he is only newly registered in the college, and has shown the city of the college to be his residence, he may not have been a resident of the State for six months nor of the county for sixty days next preceding the election, in which case he is not qualified to vote there. Article II, §1, Constitution of Iowa. If he has been a student of the college for some

time, and his college has been interrupted by summer vacations between semesters, and he claims he changed his residence to the college community during the previous semester, he may be hard put to explain a conflicting residence if in the interim he has re-registered for college showing his old home town as his home.

October 29, 1970

ELECTIONS: Disposition of pollbooks, makeup of jury lists — §§43.46, 50.17, 50.18, 50.19, 609.1, 609.2 and 609.9, Code of Iowa, 1966. In the case of primary elections all pollbooks must be returned from the township to the county auditor. But where a general election is involved one pollbook is delivered to the county auditor and the other to the township clerk. A person need not have voted, nor his name be found on the pollbooks to make him eligible to serve on a jury. (Haesemeyer to Ramsey, Clarke County Attorney, 10/29/70) #70-10-17

Mr. Richard R. Ramsey, Clarke County Attorney: Reference is made to your letter of October 27, 1970, in which you state:

"I respectfully request your opinion on the following matters:

"1. *Poll Books.* Reference Sections 50.17, 50.18 and 43.46, of the 1966 Code of Iowa. In a Primary or General Election, should *all* Poll Books be returned from a Township to the County Auditor?

"2. *Juror Lists.* Reference Sections 609.1(2), 609.2(1), 609.9. May the Judges of Elections referred to in Section 609.9 of the 1966 Code of Iowa select persons to serve as Grand and Petit Jurors who did not vote in the last election?"

1. Sections 43.46, 50.17, 50.18 and 50.19, Code of Iowa, 1966, provide respectively:

"43.46 Delivering returns. Said judges and clerks shall deliver said pollbooks, tally sheets, certificates, envelopes containing ballots, and all unused supplies to the county auditor within twenty-four hours after the close of the polls. Said auditor shall carefully preserve said returns and envelopes in the condition in which received and deliver them to the county board of canvassers."

"50.17 Return of pollbook and registration book. In each precinct, one of the pollbooks containing the aforesaid signed and attested tally list, and one of the registration books, if any, shall be delivered by one of the judges within two days to the county auditor."

"50.18 Return of remaining poll and registration books. The other of said pollbooks and the other registration book, if any, shall be forthwith delivered by one of the judges to the township, city, or town clerk, depending on whether the precinct is a township, city, or town precinct."

"50.19 Preservation of books — when destroyed. The receiving officer shall file said books, and the registry books and lists and other papers pertaining to registration, in his office, and preserve the same for three years and until the determination of any contest then pending, after which they shall be destroyed."

Section 43.46 applies to primary elections and §§50.17, 50.18 and 50.19 apply to general elections. 1940 OAG 542. Thus, the answer to your question is that in the case of primary elections all pollbooks must be returned from the township to the county auditor. But where a general election is involved one pollbook is delivered to the county auditor under §50.17 and the other to the township clerk under §50.18. The county

auditor and township clerk must each then retain the books for a period of three years. §50.19.

2. Sections 609.1, 609.2 and 609.9, Code of Iowa, 1966, provided respectively:

"609.1 Jury lists. The appointive jury commission shall, on the second Monday after the general election is held in each even-numbered year, meet at the courthouse in rooms provided by the county, and, in accordance with the certificate of apportionment furnished by the county auditor, prepare, select, and return on blanks furnished by the county, the following lists, to wit:

"1. Grand jurors. A list of names and addresses of one hundred fifty electors from which to select grand jurors.

"2. Petit jurors. A list of names and addresses of electors equal to one-eighth of the whole number of qualified electors in said county who voted in the last preceding general state election as shown by the pollbooks, from which to select petit jurors.

"3. Talesmen. A list of the names and addresses of electors equal to fifteen percent of the whole number of qualified electors who voted at the last preceding general election, as shown by the pollbooks, in the city or town in which the district court is held and in the township or townships in which such city or town is located (but in no case exceeding five hundred names) from which to select talesmen."

"609.2 Noneligible names. The appointive commission, in the preparation of said lists, shall not place thereon the name of any person:

"1. Who is not an elector of the state.

"2. Who is not of good moral character.

"3. Who is not of sound judgment.

"4. Who is not in full possession of the senses of hearing and seeing.

"5. Who cannot speak, write, and read the English language.

"6. Who has served in said county and in the district court as a grand or petit juror since the first day of January preceding the last general election.

"7. Who by reason of the condition of his or her health, business, domestic duties, or other circumstances will probably be unable to serve as a juror.

"8. Who has, directly or indirectly, requested that his or her name be placed on said lists, or on any of them.

"9. Who has been exempted by law from jury service."

"609.9 Duties of judges of election. The judges of election of the several precincts shall make selection of the requisite number of persons to serve as grand and petit jurors, and of talesmen, if any, and return separate lists of the names so selected to the county auditor with the return of the election, but shall not place on said lists the name of any person described in section 609.2, or judges or clerks of the election."

The distinction between the terms "voter" and "elector" is well settled in Iowa. Although voters must be electors, the converse is not true. *Buchmeier v. Pickett,* 1966, 258 Iowa 1224, 142 N. W. 2d 426.

Thus, a person need not have voted, nor his name be found on the pollbooks to make him eligible to serve on a jury. *State v. Harris,* 1904, 122 Iowa 78, 97 N. W. 1093; *State v. Pierce,* 1894, 90 Iowa 506, 58 N. W. 891. As a practical matter, because of the provisions of §609.9, it seems likely that the list of names of persons to serve as jurors submitted by the judges of election to the county auditor would be made up of persons who

had voted. However, in our opinion there is no requirement that a person has voted or has to be registered to have his name placed on the list of prospective jurors. Indeed, if judges of election made it a point to make up their jury lists from the names of persons who did not vote as well as those who did, the practice would probably have the salutary effect of increasing citizen participation in the electoral process since it is apparently true that many people stay away from the polls so they will not be selected for jury service.

October 30, 1970

CONSTITUTIONAL LAW: Cities, Towns, Counties, County Boards, Home Rule, Townships — Art. III, Constitution of Iowa, §363.1, Code 1966. Home Rule Amendment applies only to cities and towns. (Nolan to Samore, Woodbury County Attorney, 10/30/70) #70-10-18

Mr. Edward F. Samore, Woodbury County Attorney: This is in response to your letter requesting an opinion as to whether or not the Home Rule Amendment applies to any, or all of the following:

"1. County Board of Supervisors
2. County Conservation Board
3. Drainage District
4. County Health Board
5. County Zoning Commission
6. County Board of Education
7. County Board of Health
8. Townships
9. County Board of Social Welfare"

It is our opinion that the Home Rule Amendment has no application to any of the boards and political sub-divisions set out above. The Home Rule Amendment adopted by the voters of Iowa in 1968, amends Art III of the Constitution of the State of Iowa by adding the following new section:

"Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government except that they shall not have power to levy any tax unless expressly authorized by the general assembly.

"The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state."

Municipal corporations in strict and proper sense include only cities and towns. *Board of Park Commissioners v. City of Marshalltown*, 1953, 244 Iowa 844, 58 N. W. 2d 394. Quasi corporations such as counties and school districts are to be distinguished from municipal corporations proper such as cities which are more amply endowed with corporate functions for the advantage and convenience of the inhabitants thereof. *Boyer v. Iowa High School Athletic Ass'n.*, 1964, 256 Iowa 337, 127 N. W. 2d 606.

In §363.1, Code of Iowa 1966, as amended by Ch. 311, Acts of the 62nd G. A., the following language appears:

"The form of government of a municipal corporation shall be one of the following:

"1. Mayor-council form.
2. Commission form.
3. Council-manager-at-large form by popular election.
4. Council-manager-ward form by popular election."

At the time the constitutional amendment was adopted by the people of Iowa, only the cities and towns had the form of government of a municipal corporation. Therefore, we must conclude that the Home Rule Amendment applies only to cities and towns.

October 30, 1970

COUNTY AND COUNTY OFFICERS: Hospital Trustees: Board of Supervisors: Nursing Homes — Chapter 347, Ch. 332, Code 1966. There is no present authority for Board of Supervisors to operate a nursing home in Dubuque County. Hospital Trustees may operate a nursing home in existing facilities under their control. (Nolan to McCauley, Dubuque County Attorney, 10/30/70) #70-10-19

Mr. Michael S. McCauley, Dubuque County Attorney: This responds to your request for an opinion on the legality of operation of a nursing home by the Dubuque County Board of Supervisors or Board of Hospital Trustees. The factual situation as presented in your letter is as follows:

"On June 4, 1957, a Resolution was adopted by the Dubuque County Board of Supervisors which approved a lease arrangement with the Dubuque County Board of Hospital Trustees giving Dubuque County possession, control and management of the County Hospital grounds, buildings, furniture, fixtures, equipment and facilities for the operation of a County Nursing Home upon said premises. The effective date of the lease was July 4, 1957, coinciding with the effective date of House File 508 of the Fifty-Seventh General Assembly, which became Section 347.13 (13) of the Iowa Code Annotated. After the effective date of the lease Dubuque County no longer had any facility designated as a County Hospital. Since said date the facilities have been operated as a Nursing Home, the management of which has been under the direct authority of the Board of Supervisors."

In addition to the above, it appears that the Hospital Trustees constructed a one hundred bed addition to the building and that the addition has not been put to use because the lease under which the supervisors have operated the home expired in 1969 and the supervisors now question their authority and responsibility in respect to the premises.

The questions presented are:

"1. Is the County Board of Supervisors authorized by Chapter 332 of the Iowa Code to operate a Nursing Home and charge patients for their care and keep, and if not, is it so authorized by virtue of I.C.A. Section 347.13(13)?

"2. In the absence of a County Hospital can the Board of Hospital Trustees operate the nursing home?"

I

Ch. 332, Code of Iowa 1966, which prescribes the powers and duties of county supervisors contains no specific reference to the operation of a county nursing home at which patients are charged for their care.

The governmental powers of county boards of supervisors are essentially legislative rather than administrative. *Mandicino v. Kelly*, 1968, ...

Iowa_____, 158 N. W. 2d 754. A county is a creature of statute and its officials have only such powers as are expressly conferred by statute or necessarily implied from the powers conferred. *Woodbury County v. Anderson*, 1969, _____Iowa_____, 164 N. W. 2d 129.

Dubuque County is the record title owner of the tract of land upon which a county hospital was constructed and maintained pursuant to vote of electors November 7, 1916. The hospital was operated as a tuberculosis sanitorium by a board of trustees under Ch. 347, Code of Iowa 1954 and prior codes until 1957 when it was determined the hospital facilities were "no longer needed for the uses provided or permitted under said Ch. 347." [Abstract, Item 22]. Thereupon, the hospital was transferred to the Board of Supervisors pursuant to §347.13(13) Code of Iowa which provides:

"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 sanitorium 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." [Emphasis supplied].

It was recognized at the time that a title owner cannot also be lessee. However, the board of supervisors in accepting the transfer of possession, control and management of the county hospital grounds, buildings and equipment as of July 4, 1957 determined "it was clearly the intent of the legislature to authorize the use of said facilities for such public purpose as the board of trustees of the hospital deems proper." Abstract, supra. The agreement between the Board of Trustees and the Board of Supervisors provides that "the Board of Supervisors through its employees and agents, shall conduct and maintain a county nursing home upon the premises. . . ." The agreement ran for a period of five years beginning July 4, 1957.

One effect of the agreement was to avoid the application of §135B.5, Code which requires that all hospitals be licensed by the State Department of Health since under §135B.15 Code, county homes managed by the county board of supervisors were exempt from the license requirements. Presumably the nursing home was licensed pursuant to §135C.6, Code. On August 1, 1964, a new five year agreement was executed by the president of the hospital trustees and the chairman of the board of supervisors. Under the second agreement, the landlord hospital trustees purported to lease the premises to the tenant supervisors for "hospital purposes" only. [Par. 3, Use, Lease and Agreement]. However, the second agreement also provides:

"(10) The operation of the Dubuque county hospital and nursing home on said premises shall be under the control and direction of the tenant, its agents and employees."

The term specified in the second agreement expired August 1, 1969, and there has been no renewal or new agreement authorizing continued operation by the board of supervisors. This being so, it is my view that the board of hospital trustees now has sole management and control of the county hospital buildings and grounds (§347.13) and the trustees are responsible for the property until such time as another suitable agree-

ment is reached or the voters of the county authorize the sale of the facilities. (§347.13(12)).

II

In §347.14(12), Code, there is authority for the board of trustees to operate a nursing home in conjunction with a county hospital. The operation of the Dubuque county hospital was abandoned in 1957 when the building was made available to the county supervisors for a nursing home. A nursing home is not a hospital in the medically accepted use of the term or under the terms of most hospitalization insurance policies. *Words and Phrases,* Permanent Edition Vol. 19A pages 414, 417. Further, the definition of a nursing home in Ch. 135C, Code of Iowa, specifically excludes hospitals and custodial homes. However, a hospital is ordinarily an institution where the sick and injured are cared for and which nurses its patients and gives them medical attention. *Hull Hospital v. Wheeler,* 1933, 250 N. W. 637, 216 Iowa 1394. And the fact remains that the board of hospital trustees does not go out of existence when a hospital building is leased for a period of years. Consequently the trustees retain statutory powers and duties with respect to the hospital, even if merely to execute another lease upon expiration of the old.

In answer to your question of whether the trustees may operate a nursing home in absence of a county hospital, I am of the opinion that the phrase "in conjunction with the hospital" as used in §347.14(12) or the language of §347.26 authorizing the operation of a nursing home in an existing hospital does not preclude the trustees from using the hospital building as a nursing home when, for one reason or another, the operation of the hospital has ceased. The trustees are given broad power by §347.14(10) to do all things necessary for the management, control and government of the county hospital. *Phinney et al v. Montgomery,* 218 Iowa 1240, 257 N. W. 208. Trustees have the same powers and duties in the control and management of a nursing home established pursuant to Ch. 347 Code, as they have for county hospitals. 1964 OAG 115.

Operation of a nursing home in the hospital building appears to me to be in accord with the uses and purposes specified in Ch. 347 and may be fairly implied from the powers granted to the trustees under §347.14(10) and (12) until the state legislature provides otherwise, since that section authorizes the trustees to do all things done by other (private) hospital trustees and not specifically denied or expressly charged by Ch. 347.

October 30, 1970

STATE OFFICERS AND DEPARTMENTS: Arts Council — Contracts — Ch. 249, Acts, 62nd G. A. Iowa Arts Council is composed of 15 members appointed by the Governor, an executive director, administrative staff and advisory committee appointed by the executive director. To maintain control over films purchased under agreement limiting use it is advisable to have a council member or staff member supervise each presentation of such film. (Nolan to Olds, Executive Director, Iowa Arts Council, 10/30/70) #70-10-20

Mr. Jack E. Olds, Executive Director, Iowa Arts Council: This is in answer to your request for an opinion on a problem relating to the sched-

uling of a film series entitled "Civilisation" purchased jointly with the Des Moines Art Center and Drake University, from Time-Life Films, New York.

Your letter states that the film series comprising thirteen films are being scheduled into Iowa recreation centers, art centers and schools. You further state that Time-Life objects to the lending of the film series to such organizations and advised that the delivery and acceptance of the films constituted a license from the seller to show the films under conditions specified on the invoice including the condition that they not be lent or given to any other institution or organization.

Your questions then are stated as follows:

"1. With the information before you, can Time-Life legally stop the Iowa Arts Council from lending or giving another institution the films to show? What constitutes a legal contract?"

A legal contract is a mutual understanding between the parties supported by consideration. It appears that the films were purchased under one of several options (Plan I) offered by the owner of the copyright. The owner was entitled to impose restrictions upon the use of the films. Under the circumstances described in your letter, I think you are clearly prohibited from relinquishing control of such films by lending them out to other organizations.

"2. If we can be barred, might we contact institutions to ask if the Iowa Arts Council could present the film series at that place, no rental admission to be charged. If permission is received we can then ship the films based on a schedule to the institution for a showing to the general public. Publicity must state the Iowa Arts Council presents 'Civilisation' at....."

The film series was purchased under the following option:

"*Plan I — Outright Purchase $7,000.00 for a complete set.* The purchase of a set of prints entitled you to use it within the confines of your Council for educational and cultural purposes. It may be shown in courses your Council sponsors as well as to the general public. At no time may admission be charged to see the films."

It is my opinion that the Arts Council or one of the other two joint purchasers must at all times have control and supervision of the film, and that any presentation thereof must be in accordance with Plan I. That is, it must be shown for educational and cultural purposes under the sponsorship of the Council or the other joint purchasers, and at no time may admission be charged to see the films. To have control over the showing of the films it would be advisable for a member of the Council or you or your staff to supervise each presentation given by the Council.

"3. What legally constitutes the Iowa State Arts Council?

"a. all tax-exempt institutions and organizations in Iowa?

"b. all state affiliated institutions and agencies (as the state universities and area colleges)?

"c. current members (15) of the Arts Council appointed by the governor?"

The Iowa State Arts Council is established by Chapter 249, Acts of the 62nd G. A. It is composed of the 15 members appointed by the Governor. It has an executive director approved by the Senate, an administrative

staff and such advisory members as the executive director may designate. The Arts Council is directed by law to encourage the presentation of artistic and cultural programs in all parts of the State of Iowa.

November 10, 1970

CONSTITUTIONAL LAW: Counties and county officers — Office of County Attorney not abolished — Ch. 468, § 1, 62nd G. A. and Ch. 327, § 1, 1st Sess., 63rd G. A.; § 39.17, Code of Iowa, 1966. Repeal of the constitutional provision creating the office of county attorney does not abolish the office where statutory provision for the office exists. (Turner to Martinson, Buchanan County Attorney, 11/10/70) #70-11-1

Mr. Kenneth W. Martinson, Buchanan County Attorney: You have requested an opinion of the attorney general as to whether the constitutional amendment adopted by the people of Iowa in the general election on November 3, 1970, repealing Article V, § 13, Constitution of Iowa, as amended by amendment No. 4 of the amendments of 1884, has abolished the office of county attorney in Iowa. See Chapter 468, § 1, 62nd General Assembly and Chapter 327, § 1, First Session, 63rd General Assembly.

Section 13, as so amended and prior to said repeal, provided:

"The qualified electors of each county shall at the general election in the year 1886, and every two years thereafter elect a County Attorney, who shall be a resident of the county for which he is elected, and shall hold his office for two years, and until his successor shall have been elected and qualified."

Section 39.17, Code of Iowa, 1966, third paragraph provides:

"There shall be elected in each county, at each general election, a county attorney, who shall hold office for a term of two years."

This statute has not been expressly repealed by the General Assembly. Your question is whether repeal of the constitutional provision creating the county attorney also carries with it and repeals by implication § 39.17. In my opinion it does not.

It is true that the legislature cannot abolish a constitutional office, even indirectly, such as by taking away the duties and emoluments of the office. Constitutional offices may be abolished only by the people through a constitutional amendment. 42 Am. Jur. 906, Public Officers § 34. But this does not necessarily mean that the legislature cannot, in absence of a specific constitutional prohibition, create an office which has been abolished by the people through the constitutional amendment process.

Article XII, §§ 1 and 2, Constitution of Iowa, provide:

"Supreme law — constitutionality of acts. Section 1. This Constitution shall be the supreme law of the State, and any law inconsistent therewith, shall be void. The General Assembly shall pass all laws necessary to carry this Constitution into effect.

"Laws in force. Sec. 2. All laws now in force and not inconsistent with this Constitution, shall remain in force until they shall expire or be repealed."

Section 39.17 is not in my view, and in absence of a specific constitutional prohibition against statutory creation of the office, inconsistent with the repeal of Article V, § 13. And, what is more important, it is not

inconsistent with the constitution as now amended. Not being inconsistent, § 39.17 cannot be said to have been repealed by implication. Moreover, repeals by implication are not favored and will not be found unless the intent to repeal clearly and unmistakably appears from the language. *Northwestern Bell Telephone Co. V. Hawkeye State Telephone Co.*, 1969, ...Iowa....., 165 N. W. 2d 771.

As bearing upon or analogous to this issue, see *Scott v. City of Davenport*, 1872, 34 Iowa 208; 16 Am. Jur. 2d 219, Constitutional Law § 49, and the several cases holding that the provision of the Iowa Constitution prohibiting the creation of special charter cities did not upon its adoption abrogate the special charters already in existence. *Talarico v. City of Davenport*, 1932, 215 Iowa 186, 244 N. W. 750; *Ulbrecht v. City of Keokuk*, 1904, 124 Iowa 1, 97 N. W. 1082; *Warren v. Henly*, 1870, 31 Iowa 31; *Lytle v. May*, 1878, 49 Iowa 224.

To my knowledge, no person has ever suggested, either prior to the election on November 3rd or during the two successive sessions in which this constitutional amendment was proposed, either that the State should be left without prosecuting attorneys, or that it would be. On the contrary, the publicized purpose of the repeal was not to abolish the office but rather to facilitate the ease of changing it by statute. The terms of the other elected county officials, none of whom were constitutional officers, had previously been increased from two years to four years and, but for the necessity of amending the constitution, the terms of the county attorneys would probably also have been similarly increased. Consideration was also given by the last General Assembly to creation of the office of district attorney and it may well have been felt by some that § 13 was an obstacle thereto. While the purpose and considerations of the General Assembly in proposing repeal of § 13 may be too speculative to have any bearing upon what the people intended in adopting it, they nevertheless tend to refute the preposterous theory that the people's only purpose was to rid themselves of all prosecutors.

November 20, 1970

STATE OFFICERS AND DEPARTMENTS: State traveling library, executive council, approval of book purchases — §§ 19.18, 303.18 and 303.19, Code of Iowa, 1966. Executive council approval is not required for the purchase of books by the state traveling library on behalf of local libraries. (Haesemeyer to Grafton, Director, Iowa State Traveling Library, 11/20/70) #70-11-2

Ms. Ernestine Grafton, Director, Iowa State Traveling Library: You have requested an opinion of the attorney general and state:

"We would like to request an opinion regarding the necessity of action by the Executive Council to approve payment of invoices to vendors of books, such payments to be made from funds deposited by Iowa public libraries with the State Treasurer.

"As background information, the State Traveling Library has contracts with the Boards of Trustees of seven of the larger public libraries (cooperative system headquarters) in Iowa to provide services to other public libraries within their geographical areas. These services are paid for with funds paid by the participating libraries (who may at their option, contract for such services) and from federal funds available to the State Traveling Library through the Library Services and Construction Act

(LSCA). These contracts and services are in accordance with our State Plan as approved by the Governor's office and your office.

"The cooperative system member libraries contract with the cooperative system headquarters libraries to expend a percentage of their annual operating budgets, normally 15 percent, for books and other library materials, to be purchased through the system headquarters libraries. As the local tax funds are available, this percentage is deposited by the members with the headquarters. The headquarters will then deposit these funds, minus a small percentage withheld for services, with the Centralized Library Automation Service System (CLASS, which is a division of the State Traveling Library) to the account of the member library. CLASS will then deposit these funds, minus a small percentage withheld for services, with the State Treasurer to the account of the member library.

"Member libraries will send to CLASS lists of books which they want ordered. CLASS will input these lists into the State Comptroller's computer which will generate purchase orders to be sent to vendors. The books ordered will be shipped to CLASS where they will be processed and mailed to the ordering member library. CLASS will then receive the invoices for these books and when the invoice can be approved for payment, we would like for CLASS to be able to forward the invoice, certified for payment, with the original computer-generated purchase order, to the Comptroller to prepare a check for payment.

"We expect to be expending at least $300,000 per year in this manner to a large number of vendors which will generate a large amount of paperwork and some delay if each of these invoices and a separate, typed purchase order must be processed by the Executive Council. Since this project is geared for a rapid turnover of materials by CLASS, delays in payment to vendors could endanger the entire program of service.

"Although the majority of books processed by CLASS will be purchased with local tax funds from member libraries, some federal funds will be deposited to CLASS, almost entirely to the accounts of the member libraries, for several LSCA grant programs administered by the State Traveling Library.

"The entire purchase order, invoice, and internal accounting system to be used by CLASS is built into a computer system to be operated by the Comptroller's Data Processing Department. All necessary internal checks and balances are built into this system and there will be a Fiscal Officer on the staff of CLASS to handle the system."

The proposition that executive council approval may be required for purchases of the type in question is predicated upon § 19.18, Code of Iowa, 1966, which provides in relevant part:

"The executive council may contract for . . . supplies for . . . the various departments of the state government at the seat of government."

While it may be arguable that the books in question are supplies it does not appear to us that they are supplies which are purchased for a state department at the seat of government since CLASS is merely acting as a conduit and the books are in fact purchased for the various library members of the cooperative systems. Moreover, the board of the state traveling library is given rather broad powers with respect to the acquisition and loaning of books as well as the administration of funds derived from state appropriation, the federal government and any other sources. See §§ 303.18 and 303.19, Code of Iowa, 1966.

In light of the foregoing and under all the circumstances it is our opinion that executive council aproval is not required for the book purchases described in your letter.

November 20, 1970

EMINENT DOMAIN: Senate File 1171 passed by 63rd General Assembly, Second Session, amending Chapter 472 of Code of Iowa, 1966. S.F. 1171 is constitutional. Removal costs required to be paid by § 7 do not constitute an additional element of damage and should be computed by measuring the value of the land without buildings increased by the sum attributable to the cost of moving plus the depreciation attributable to relocation. The governmental agency exercising the power of eminent domain is not required to remove buildings or fences but may condemn them in their entirety if public interest is best served, or allow the property owner to remove them. A binding decision regarding removal can be made within a specific time by the governmental agency through appropriate language in its Notice of Condemnation. (Kiener to Coupal, Director of Highways, Iowa State Highway Commission, 11/20/70) #70-11-3

Mr. J. R. Coupal, Jr., Director of Highways, Iowa State Highway Commission: Reference is made to your recent letter concerning the implementation of Senate File 1171 passed by the 63rd General Assembly, Second Session, amending Chapter 472 of the Code of Iowa, 1966. Your letter contains numerous questions regarding eminent domain proceedings which can be briefly summarized as follows:

1. Is Senate File 1171 constitutional?

2. What is the measure of damages when buildings or fences are removed pursuant to § 7 of Senate File 1171? and

3. Can the Highway Commission elect to condemn buildings or fences rather than remove them or set a time limit within which the landowner is required to remove them?

In answer to your questions concerning the constitutionality of Senate File 1171, it is clear the act is constitutional. Numerous cases could be cited upholding the constitutionality of similar legislative enactments. One such case regarding the power of eminent domain in acquiring off-street parking is *Ermels v. City of Webster City*, 1965, 246 Iowa 1305, 1308, 71 N. W. 2d 911, wherein the Court stated:

"Applying the rule that 'when constitutional questions are raised all reasonable intendments must be indulged in favor of the validity of the statute,' Central States Theatre Corp. v. Sar, 245 Iowa 1254, 1258, 66 N. W. 2d 450, 452, we have no difficulty in finding the statutes in question to be within the constitutional power and authority of the legislature to enact."

See further *Graham v. Worthington*, 1966, 259 Iowa 845, 146 N. W. 2d 626, and *Lee Enterprises v. Iowa State Tax Commission*, 1968, 162 N. W. 2d 730.

In 4 Nichols on Eminent Domain on page 355 (4th Ed., 1962), § 13.11 (1), the text provides as follows:

"There is nothing unconstitutional in a statute which provides that when a building, though affixed to the soil, can be moved it shall not be taken and that the damages shall be the cost of removing and readjusting it, or that the value as removed shall be deducted from the award."

The remaining questions enumerated in your opinion request are con-

cerned with interpreting § 7 of Senate File 1171 which provides as follows:

"Sec. 7. When real property or an interest therein is purchased or condemned for highway purposes and a fence or building is located on such property, the governmental agency shall be responsible for all costs incurred by the property owner in replacing or moving the fence or moving the building onto property owned by the landowner and abutting the property purchased or condemned for highway purposes, or the governmental agency may replace or move the fence or move the building. Such costs shall not constitute an additional element of damages which would permit unjust enrichment or a duplication of payments to any condemnee."

Your second inquiry concerns how damages are computed by virtue of the above amendment to Iowa's law of eminent domain. A concise statement of the rule regarding the measure of damages for removal costs is contained in *United States v. Bobinski*, 2nd Cir., 1957, 244 F. 2d 299, 303:

"We think the proper approach is to measure the value of the land without the building and to add to that sum the cost of removing the structure to its new location, plus the depreciation of the building attributable to relocation, e.g., State (Mangles) v. Hudson County Board of Chosen Freeholders, supra, 55 N.J.L. 88, 25 A. 322, 17 L.R.A. 785."

The cost of removing fences has for many years been considered in Iowa under the prevailing case law and § 7 appears merely to codify the rule. As stated in the case of *Randell v. Iowa State Highway Commission*, 1932, 314 Iowa 1, 11, 241 N. W. 658:

"So, in the case at bar, it was proper for the appellees to introduce evidence indicating the necessity for the removal and replacement of the fence. Such fact has a direct bearing on the value of the farm immediately before and immediately after the condemnation. The cost of removing and replacing the fence had a materiality and relevancy to the final question to be determined by the jury."

The cost of removal of fixtures in leasehold situations has likewise been considered by the Iowa Supreme Court. In *Des Moines Wet Wash Laundry v. City of Des Moines*, 1924, 197 Iowa 1082, 198 N. W. 486, removal costs were allowed as part of the just compensation in the condemnation of the leasehold interest. The opinion at 197 Iowa 1086, 1087 provides:

"The term 'just compensation,' as found in Constitution and statute, has no technical or purely legal significance. The words express in a general way the meaning intended. The real right of which plaintiff is deprived in the exercise of eminent domain by the defendant, and for which, under the Constitution of the state, he is entitled to be compensated, is the right to remain in undisturbed possession and enjoyment to the end of the term.

"The loss resulting from the deprivation of this right is what he is entitled to recover. The value of the right he is forced to sell cannot ordinarily be measured by its market price, for there is no market for it; nor can it always be measured by the difference between the rent reserved and the rental value if the lease should be a favorable one. If, as was the case here, a tenant engaged in a business requiring the use of heavy machinery and appliances should secure a new place equally well adapted to his business, and at the same rent, he would still be at the expense of removal, and at a loss because of the stoppage of his business. These are matters to be considered in connection with others, not as substantive elements of damage, but as tending to prove the value of the leasehold interest."

A reading of the plain meaning of the statute itself reveals that the legislature did not create any additional element of damages nor intend a duplication of payments that would result in unjust enrichment to the property owner.

The statute is new in that it now permits the removal of buildings and fences prior to the commencement of the highway improvement and the payment of costs therefor. The need for such a statutory enactment is pointed out in 4 Nichols on Eminent Domain, 4th Ed., 1962, Pages 653-654, § 14.2471 (1):

"Ordinarily, unless there is statutory authorization therefor of the condemnor and the owner have agreed with respect thereto, the owner has not the right nor has the condemnor the obligation to remove buildings, fixtures or other permanent improvements upon real property which has been condemned."

Therefore, the third matter posed in your questions concerning who can or must remove and within what time period must be considered.

The legislature in enacting § 7 of Senate File 1171 did not require that the governmental agency remove any fences or buildings. The statute provides ". . . the governmental agency may replace or move the fence or move the building." The word "may" in the statute does not require mandatory removal by the governmental agency but grants to it a privilege or discretionary power to remove. The rule of statutory construction applicable in the interpretation of this part of § 7 of Senate File 1171 is contained in *John Deere Waterloo Tractor Works v. Derifield,* 1961, 252 Iowa 1389, 110 N. W. 2d 560, 562:

"The verb 'may' usually is employed as implying permissive or discretional rather than mandatory action or conduct. It imports a grant of opportunity or power and is never used in a denial, a restriction or a limitation except in connection with the word 'not.' 57 C.J.S. May, pages 457 and 458."

When the cost of removal exceeds the value of the improvements, the governmental agency may condemn the property in its entirety. In this respect 4 Nichols on Eminent Domain, (4th Ed., 1962), Pages 355-356, § 13.11 (1) provides:

"The cost of removing buildings upon land taken for the public use is not allowed as an additional element of damages, but as an effort to reduce the damages. In the ordinary case the cost of removing the buildings is frequently equal to the value of the materials, and the owner is then entitled to recover the full value of the buildings."

A binding decision within a specified time requiring the landowner to remove the fence or buildings or have the compensation commission assess damages against the building's full value can be made in the Notice of Condemnation. Such a procedure was followed in *United States v. Bobinski,* 2d Cir., 1957, 244 F. 2d 299, 302, where the taking was limited in the following manner:

"The Declaration of Taking which covered this tract was filed October 31, 1952, and described the estate taken as follows: 'the fee simple title subject to existing public utility easements and the right of the public to use [two roads] and the following rights in [this parcel] (a) possession

of the buildings with grounds around and within a reasonable distance thereof, including gardens and pasture lands, rent free, until January 1, 1953; (b) right to harvest, before January 1, 1953, all crops growing thereon and (c) right to remove, on or before January 1, 1953, any and all improvements of any nature and kind whatsoever and to make such disposition of the same as absolute owner without obligation to raise, level off, fill in, cover up, or grade over, the ruins, excavations, cellars, or openings caused by the removal of said buildings and structures; * * *.'

"The commissioners found that all the buildings were located on the land 'on the date and at the time of the taking herein;' and they found that they were removed between October 1 and November 15, 1952."

The Notice of Condemnation in Iowa must be limited in a similar fashion since the taking of a fee title in Iowa includes all appurtenances. See *Henderson v. Iowa State Highway Commission*, 1967, 260 Iowa 891, 151 N. W. 2d 473.

In summary, it is my opinion that Senate File 1171 as enacted by the 63rd General Assembly, Second Session, is constitutional; that the measure of damages under § 7 of the Act is the value of the land without fences or buildings increased by the sum of the cost of removal plus depreciation attributable to relocation. In addition, the governmental agency is not compelled to remove buildings or fences by virtue of § 7 and can require the landowner to make a binding decision within a specified time electing to remove or accept compensation in lieu of removal.

November 20, 1970

HIGHWAYS: Relocation Assistance, Eminent Domain, Condemnation — Senate File 1055 enacted by 63rd General Assembly, Second Session. The Iowa Relocation Assistance Bill provides for payments separate from and in addition to just compensation payable in condemnation proceedings. Adjustments in such relocation assistance payments are required to prevent unjust enrichment when a property has been condemned, and Departmental Rules may be formulated as provided in § 9 of Senate File 1055. (Kiener to Coupal, Director of Highways, Iowa State Highway Commission, 11/20/70) #70-11-4

Mr. J. R. Coupal, Jr., Director of Highways, Iowa State Highway Commission: By your letter of May 14, 1970, you have requested an opinion of this office with reference to an interpretation of Senate File 1055 enacted by the 63rd General Assembly, Second Session, entitled "An Act to Provide Advisory Assistance Program and Relocation Payments to Persons Displaced by Highway Projects."

Your questions can be summarized as follows:

1. Are payments of removal costs required by Senate File 1171 of the Acts of the 63rd General Assembly, Second Session, deducted from or a part of the expenses payable under Senate File 1055?

2. Are payments under the above two acts required to be adjusted in any manner to prevent duplicate payments to property owners?

In answer to your first question, Senate File 1055 provides for payment independently of Senate File 1171. Moving expenses contemplated by Section 7 of Senate File 1171 are not part of relocation assistance as a reading of this section reveals:

"Section 7. Where real property or interest therein is purchased or condemned for highway purposes and a fence or building is located on such property, the governmental agency shall be responsible for all costs incurred by the property owner in replacing or moving the fence or moving the building onto property owned by the landowner and abutting the property purchased or condemned for highway purposes, or the governmental agency may replace or move the fence or move the building. Such costs cannot constitute an additional element of damages which would permit unjust enrichment or a duplication of payments to any condemnee."

Senate File 1171 pertains to legislative directives in assessing just compensation under Chapter 472 of the Code of Iowa, 1966. Section 8 of Senate File 1055 regarding relocation assistance specifically provides:

"Nothing in this act shall be construed to create any additional element of damage in any condemnation proceedings for highway projects, and in order to prevent unjust enrichment or a duplication of payments to any condemnee, the courts of this State, when determining just compensation in condemnation proceedings, shall not allow any damages which duplicate any of the benefits provided under the provisions of this Act."

In addition, duplication of payment is prohibited under Subsection 1 of § 4 of Senate File 1055 which provides:

"No payment is required if the owner-occupant receives a payment required by the law of condemnation which is determined by the commission to have substantially the same purpose in effect as this section."

From a reading of the plain meaning of the above sections, it is evident that eligibility for relocation assistance cannot be determined until after court disposition of the condemnation matter. If the property owner is made whole through a condemnation proceeding, no eligibility for relocation assistance will attach.

In answer to your second question, it is apparent that a person who has received an award by virtue of a condemnation proceeding may not be entitled to relocation assistance or may be eligible for a reduced amount of such assistance in order to prevent unjust enrichment.

Numerous factual situations will no doubt concern the Highway Commission in this regard. It is my opinion, some adjustments will be required under appropriate circumstances to prevent unjust enrichment of the property owner. Certainly, departmental rules may be drafted consistent with the intent and purposes of the legislature in the passing of the Relocation Assistance Bill.

Section 9 of Senate File 1055 provides:

"Sec. 9. The commission may make rules and regulations necessary to effect the provisions of this Act and to assure:

1. The payments authorized by this Act are fair and reasonable and as uniform as practicable;

2. A displaced person who makes proper application for a payment authorized by this Act is paid promptly after a move or, in hardship cases, is paid in advance; and

3. Any person aggrieved by a determination as to eligibility for a payment authorized by this Act, or the amount of a payment, may have his application reviewed by the commission.

All rules shall be subject to the provisions of chapter seventeen A (17A) of the Code."

The above section does not mean that the Highway Commission can by rule, contract or otherwise limit a person's right to seek just compensation. The Highway Commission can, however, make such rules and provisions as will prevent unjust enrichment. In this regard the Iowa Supreme Court in *Shadle v. Borrusch*, 1963, 255 Iowa 1122, 1126-1127, 125 N. W. 2d, 507 defined unjust enrichment as follows:

"The Gard opinion quotes this from Restatement, Restitution, section 1: 'A person who has been unjustly enriched at the expense of another is required to make restitution to the other.' And this from the comment thereunder: 'A person is unjustly enriched if the retention of the benefit would be unjust. A person obtains restitution when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money.'

Another statement of the doctrine of unjust enrichment which is frequently found is that a person should not be allowed to profit or enrich himself inequitably at another's expense. It is also stated that unjust enrichment of a person occurs when he retains money or benefits which in justice and equity belong to another."

In conclusion, it is my opinion that relocation assistance provided in Senate File 1055 and moving expenses provided in Senate File 1171 are separate, with removal costs being part of just compensation guaranteed by Article 1, § 18 of the Constitution of the State of Iowa, and relocation costs an additional statutory authorization over and above just compensation. Adjustments in relocation assistance payments are required by specific statutory direction set out above to avoid unjust enrichment, which adjustments may be formulated by way of Departmental Rules to carry out the purposes and intent of Senate File 1055.

November 20, 1970

HIGHWAYS: § 306.13, Code of Iowa, 1966, as amended by Sec. 2, S.F. 1157, 63rd G. A., 2nd Session. Acquisition of Property Rights — Establishment of Alternate Access Facility. Amendment requires that an alternative access facility be provided in those instances where abutting property has been denied direct access through action of a board or commission. Expenditure of primary road funds for such purposes is not in violation of either the Statutes or of the Constitution of Iowa. Amendment does not change method of acquiring property, but merely describes another area to be considered when highway construction is undertaken. In proper situations necessary land may continue to be acquired by easement. (Schroeder to Coupal, Director of Highways, Iowa State Highway Commission, 11/20/70) #70-11-5

Mr. J. R. Coupal, Jr., Director of Highways, Iowa State Highway Commission: In a letter of recent date you requested an opinion with regard to § 306.13, Code of Iowa, 1966, as it has been amended by Section 2, S.F. 1157, 63rd G. A. 2nd Session. Said statute now reads as follows:

"Purchase or condemnation of right of way — procedure. In the maintenance, relocation, establishment or improvement of any road, including the extension of such road within cities and towns, the commission or board having jurisdiction and control of such road shall have authority to purchase or to institute and maintain proceedings for the condemnation of the necessary right of way therefor. Such board or commission

shall likewise have power to purchase or institute and maintain proceedings for the condemnation of land necessary for highway drainage, for weighing stations, or land containing gravel or other suitable material for the improvement or maintenance of highways, together with the necessary road access thereto. *Whenever such board or commission condemns or purchases property rights or otherwise denies direct access to a road or highway from abutting property, the board or commission shall establish and maintain an alternative access facility to an alternate road or highway to the extent that said access facility shall connect with any lane or driveway in existence at the time of the condemnation or purchase, or if none exists after condemnation, then said access facility shall connect at another place as agreed to by the parties. The alternative access facility so constructed shall meet the minimum standards for local secondary roads with all-weather surfacing and shall be maintained in the same manner and to the same extent. Compensation for any property rights taken in the establishment of any alternative access shall be paid as in any other purchase or condemnation of property.* Proceedings for the condemnation of land for any highway shall be under the provisions of chapter 471 and chapter 472 or as said chapters may be amended. Provided that, in the condemnation of right of way for secondary roads, the board of supervisors may proceed as provided in sections 306.22 to 306.31, both inclusive." (Amendment italicized)

Answers to each of the questions posed are based upon the view that the purpose expressed in this amendment is that every abutting property which previously had an access facility, and which is now denied direct access to a road, (as a result of condemnation, purchase or otherwise) shall be provided with an alternate facility to an alternate highway. Said facility is described as one necessary to connect said alternate highway with the existing drive, or if none remains (after condemnation) at another place as agreed by the parties.

1. Do the establishment or maintenance requirements of the amendment require the expenditure of primary road funds for private, as opposed to public purposes, in violation of the Code or the State Constitution?

No. Section 306.13, Code of Iowa, as amended by Sec. 2, Senate File 1157, simply adds one more area of interest (access) which a board or commission shall have the power to acquire by purchase or condemnation. This section previously gave such bodies the power to acquire *necessary* right of way for road purposes. In addition they have been empowered to acquire land necessary for drainage purposes, weigh stations and as a source for material to be devoted to highway use.

Recognition of the power of a board or commission to establish an alternate access facility when existing access has been taken or denied, would appear to be codification of past practices followed by such bodies, in the exercise of their implied power so to do.

The term *alternative access facility* as used herein, is within the meaning of *service road.* Construction and maintenance of such described road is recognized as a legitimate expenditure of primary road funds (see Chapter 306A, §§ 5 & 8, Code of Iowa). Additionally, the Iowa Supreme Court in *Iowa State Highway Commission v. Smith,* 1957, 248 Iowa 869, 85 N. W. 2d 755, while recognizing the right of access in an abutting property, said "It (Iowa State Highway Commission) has the undoubted right in the interest of public safety to regulate the means of access to abutting property provided its regulations are reasonable and strike a

balance between the public and private interest." I see no conflict with our existing Code sections or with the Iowa Constitution in constructing and maintaining such access facilities. The expenditure of necessary funds will be upon public not private property, and would be for highway purposes.

2. Does this amendment require the establishment of an alternate access facility in those situations where access rights purchased or condemned require an abutting property owner to move an existing entrance to a new location on the abutting owner's land?

No. The purpose of the amendment is to insure that access to an abutting property is provided. If the property owner has moved an existing entrance to a new location, and assuming an access facility to the highway has been constructed by the concerned board or commission, yet another access facility would not be required. Only where all direct access is denied, does this amendment require an alternative facility. If the relocated entrance is on the road in question, "direct access" has not been denied; if the entrance has been relocated and connected to an alternate road, the alternate requirement of access has been met.

3. Does this amendment require the establishment of an alternate access facility in those situations where the property owner's right to maintain all but one of several existing entrances are acquired?

No. The language of the amendment includes the following, ". . . denies direct access to a road or highway." While the number of access facilities has been restricted in the question posed, access has not been denied. The establishment of an alternate facility is not required by the amendment except in those situations where all right of access has been extinguished.

4. Does this amendment require the establishment of an alternate access facility in those cases where no access rights are purchased or condemned but fill, cut, or other construction features of the project make it impossible for an abutting property owner to obtain direct access to the highway?

Yes. The language ". . . or otherwise denies direct access to a highway," would encompass the circumstance posed by this question. If direct access is denied an abutting property owner, then this amendment requires that an alternate facility be established.

5. Does this amendment require the establishment of an alternate access facility where existing access to the subject highway is relocated and limited to a public road within or along the adjacent property and exiting on the subject primary highway?

No. The language of the amendment with reference to denial of direct access states, ". . . the board or commission shall establish and maintain an alternative access facility to an alternate road or highway . . . ." In the situation described in your question, an alternative access facility has been established on an alternate road through relocation which meets the requirements of the statute. It would not be required that yet another alternative access facility be established.

6. May the Commission acquire land necessary for the establishment of alternate access facilities by easement?

Qualified yes. Since the question refers to the Commission only, the answer need not concern itself with action that might be taken by a local board.

The amendment does not change the method of acquiring property, but rather describes an additional area to be considered whenever the Commission undertakes any highway changes. Therefore, in those situations involving Chapter 306A of the Code of Iowa, it would be required to take title to land acquired in fee. However, in those situations where an easement only has been required for highway purposes in the past, I would know of no reason why this practice couldn't be continued into the future. The same degree of judgment would have to be exercised in future takings, as is required in the present when alternative methods are available.

November 24, 1970

STATE OFFICERS AND DEPARTMENTS: Constitutional law, compatibility of offices of member of general assembly and member of Mississippi River Parkway Commission and county conservation board. Art. III, § 22, Constitution of Iowa; §§ 308.1 and 111A.2, Code of Iowa, 1966. Membership in the Iowa house of representatives is not incompatible with the offices of member of the Mississippi River Parkway Commission and member of a county conservation board. (Haesemeyer to Norpel, State Representative Elect, 11/24/70) #70-11-6

Mr. Richard J. Norpel, Sr., State Representative Elect: Reference is made to your letter of November 6, 1970, in which you indicate that you were elected to the Iowa house of representatives in the November election and then state:

"I am a member of the Mississippi Parkway Commission and the Jackson County Conservation Board. I would appreciate an opinion from you whether I would have to resign from these positions or whether I can continue to serve on them, now that I am a member of the State Legislature."

Article III, § 22, of the Constitution of Iowa, provides:

"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."

Members of the Mississippi River Parkway Commission serve without pay as do members of county conservation boards. §§ 308.1 and 111A.2. Hence, these are not lucrative offices and do not fall within the constitutional prohibition.

Consideration must also be given, however, to the possibility that the offices might be incompatible at common law. In Iowa the common law test of incompatibility is found in the case of *State v. White*, 1965, 257 Iowa 606, 133 N. W. 2d 903. There the supreme court said:

"The test of incompatibility is whether there is an inconsistency of 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 officers are inherently inconsistent and repugnant."

A comparison of the duties of a member of the Mississippi River Parkway Commission with those of a member of the general assembly do not in our opinion disclose any conflict or inconsistency sufficient to make the two offices repugnant. Generally speaking the Mississippi River Parkway Commission was created to aid and assist in the planning of a national parkway along the Mississippi River pursuant to Acts of the United States Congress. § 308.2, Code of Iowa, 1966.

Chapter 111A relates to county conservation boards. The duties of members of the boards are set forth in § 111A.4. Such duties involve the establishment and overseeing of recreational areas within the respective counties. § 111A.6 states that the funds for the acquisition, maintenance, and development of such county recreational areas are to come from the counties' general funds, taxes levied pursuant to such section and the sale of bonds. Accordingly, there would be no appropriation from the legislature to such county conservation boards for the furtherance of their duties and in our opinion the office of a member of such board is not incompatible with membership in the legislature.

November 24, 1970

STATE OFFICERS AND DEPARTMENTS: Commission on the Aging, Merit Employment System, exempt position — § 249B.5, Code of Iowa, 1966; chapter 95, 62nd G. A. (1967); chapter 79, 63rd G. A., first session (1969). The office of executive secretary of the commission on the aging is exempt from the merit system. (Haesemeyer to Blue, Chairman, Commission on the Aging, 11/24/70) #70-11-7

The Honorable Robert D. Blue, Chairman, Commission on the Aging: Reference is made to your letter of November 12, 1970, in which you request an opinion of the attorney general and state:

"In a recent meeting with the federal State Merit Systems people the question arose on the status of the executive secretary's position on the Commission on the Aging in Iowa. We request the Attorney General's opinion on whether or not this position is classified under the State Merit Employment System (which the State Merit Employment Commission recognizes). Perhaps it is exempt.

"We call your attention to Section 249B.5, Code of Iowa 1966."

Chapter 249B, Code of Iowa, 1966, enacted as Chapter 225, 61st General Assembly (1965) created the Commission on the Aging and § 249B.5 thereof provides:

"249B.5 Executive secretary. The commission shall appoint an executive secretary subject to the state merit system and shall prescribe the duties, powers, and authority of the appointee. The executive secretary shall serve as an executive officer and shall be a full-time employee of the commission."

Chapter 95, 62nd General Assembly (1967) established a new Iowa merit employment department and a new Iowa merit employment commission to supplant the old merit system council established pursuant to § 8.5(6) and § 23 of such chapter 95 in fact repeals such § 8.5(6). Moreover, § 8 of chapter 79, 63rd General Assembly, First Session (1969) added the following section to chapter 95:

"The provisions of this Act, including but not limited to its provisions on employees and positions to which the merit system apply, shall prevail

over any inconsistent provisions of the Code, including the Acts of the Sixty-Second General Assembly, and all subsequent Acts unless such subsequent Acts provide a specific exemption from the merit system."

Section 3(15) of chapter 95 as enacted contains the following language:

"All merit systems now in effect including the present joint merit system in state agencies expending federal funds shall remain in full force and effect so far as it applies to such agencies, until such time as the plan and rules promulgated under the provisions of this Act are approved by the appropriate federal agencies. At that time, such state agencies shall be subject to all provisions of this Act. Any employee who has received appointment under the Iowa merit system shall retain his position or a position of comparable status and pay."

This language was regarded as a transitional provision and was omitted by the code editor from subsection 15 in the annotated code where chapter 95 appears as chapter 19A.5. Presumably the language will also be omitted from the 1971 code of Iowa when it is issued. Section 3 of chapter 95 also provides in part:

"The merit system shall apply to all employees of the state and to all positions in the state government now existing or hereafter established except the following:

* * *

"2. All board members and commissions whose appointments are otherwise provided for by the statutes of the state of Iowa, and one (1) stenographer or secretary for each member of such board and commission, and one (1) principal assistant or deputy in each department.

* * *"

It seems clear beyond doubt that the executive secretary of the commission on the aging is the principal assistant or deputy of that agency within the meaning of § 3(2) of chapter 95 and that § 8 of chapter 79 removed the requirement found in §249B.5 of the code that he be subject to the state merit system. It is my understanding that the plan and rules promulgated under chapter 95 have been approved by the appropriate federal agency (in this case Health, Education and Welfare), and under the transitional language of § 3(15) of chapter 95 quoted above the commission on the aging is now subject to all of the provisions of chapter 95 including the provision that the principal assistant or deputy is exempt.

Finally, I am also advised that some time ago the Department of Health, Education and Welfare removed any requirement that the position of executive secretary be subject to a merit system.

In view of all the foregoing it is our opinion that the executive secretary of the commission on the aging is the principal assistant or deputy in that commission and as such is exempt from the provisions of chapter 95.

November 25, 1970

ELECTIONS: Special school elections, applicability of permanent registration laws — §§ 48.2, 48.26, 277.33, Code of Iowa, 1966; and § 1, chapter 93, 63rd G. A., First Session (1969). Chapter 48 of the code including the provisions relative to branch registration and extra hours for registration apply to special school elections in areas where permanent registration applies. (Haesemeyer to Synhorst, Secretary of State, 11/25/70) #70-11-8

The Honorable Melvin D. Synhorst, Secretary of State: Reference is made to your letter of November 13, 1970, with which you forwarded a request from the Clinton city clerk for clarification of certain questions relative to special school elections. Specifically, the questions with respect to such elections are these:

1. Are additional hours required?
2. Are branch registration places required?
3. Does section 48.11 apply in special school elections?

Section 48.2, Code of Iowa, 1966, provides:

"48.2 Definitions. For the purposes of this chapter, the word 'elections' shall be held to mean general, municipal, special, school, or primary elections, and shall include state, county, and municipal elections."

The requirement for branch registration offices and for extra hours is found in § 48.26, Code of Iowa, 1966, as amended by § 8, chapter 1037, 63rd General Assembly (1970) and applies in any city or county "where permanent registration applies" and to "any election for which registration is required." By its own terms, therefore, all of the provisions of chapter 48 including the requirements for extra hours and branch registration places would apply to your school elections in Clinton.

However, § 1, chapter 93, 63rd G. A., 1st session (1969) provides:

"Section 1. Chapter forty-eight (48), Code 1966, is hereby amended by adding thereto the following new section:

" 'The provisions of this chapter shall not apply to any election conducted by community school districts which have been divided into director districts and in which each member of the board of directors is elected by the voters of the director district of which he is a resident, unless the board of directors of any such community school district shall by resolution make the provisions of this chapter applicable to elections within the said district.' "

If the particular elections to which the Clinton city clerk has reference are the type described in such § 1 of chapter 93 then of course chapter 48 would not apply.

Consideration must also be given to § 277.33, Code of Iowa, 1966, which provides:

"277.33 Application of general election laws. So far as applicable all laws relating to the conduct of general elections and voting thereat and the violation of such laws shall, *except as otherwise in this chapter provided,* apply to and govern all school elections." (Emphasis added)

Section 277.17 does make provision for the appointment of registrars and the conduct of registration in certain school elections and it might be argued that this amounts to other provision in chapter 277. Unfortunately, however, § 277.17 does not apply "where permanent registration is required." Hence, we are back to chapter 48 and as previously indicated herein it is our opinion that all of the provisions of that chapter would apply to your special school elections unless they meet the requirements of § 48.28.

December 7, 1970

TAXATION: PROPERTY TAX EXEMPTION: Property acquired by State or County Conservation Board — Chapters 111 and 111A, Code of Iowa, 1966, as amended; §§ 427.1(1), 427.1(2), 444.9, 445.28 and

445.30. Code of Iowa, 1966. Real estate purchased by the State of Iowa or county conservation board is exempt from past, present and future property taxes which are unenforceable against the property or the seller, notwithstanding that the seller retains a life estate in the property and notwithstanding that the property is purchased after the levy date. Real estate taxes may be satisfied from the condemnation award if the title to the condemned property passes to the state or county after the date of the levy of such taxes. (Griger to Pahlas, Clayton County Attorney, 12/7/70) #70-12-1

Mr. Harold H. Pahlas, Clayton County Attorney: This will acknowledge receipt of your letter in which you have requested the opinion of the Attorney General with regard to the following questions:

"1. When a seller to the State or County Conservation Commission retains a life lease, does the seller have to pay taxes? If the seller does not pay the taxes, is the State or County Conservation Commission responsible for the taxes?

"2. When the land is sold to the State or County Conservation Commission late in a year, such as November or December, does the seller have to pay the taxes of that year payable the next year?

"3. Does the fact that the land was taken by condemnation alter the result as asked in prior questions?

"4. Should the county continue to levy and collect taxes in the same manner it does on other properties and would a forefeiture of the life tenant's interest by reason of a tax sale also forefeit the interest of the State or County Conservation Commission?

"5. Does the State and County Conservation Commissions have the authority to take care of the taxes under the above circumstances, both for current taxes when the sale is made late in the year and subsequent taxes levied on the property?"

1. Neither the state, county nor the seller is required to pay property taxes upon property purchased by the State of Iowa or County Conservation Boards, regardless whether the seller retains a life estate and regardless whether the property is conveyed before or after the tax levy date in the year of the sale.

The theory of real property taxes was expressed by the Iowa Supreme Court in the case of *Laubersheimer v. Huiskamp*, 1967, 260 Iowa 1340, 152 N. W. 2d 625, at 260 Iowa 1340:

"Land taxes are a tax against the land and unpaid taxes are a lien against that particular tract of land. Section 445.28."

In *Crews v. Collins*, 1961, 252 Iowa 863, 109 N. W. 2d 235, the Court held that a life estate in land was not subject to the property tax.

Section 427.1, Code of Iowa, 1966, provides in part as follows:

"The following classes of property shall not be taxed:
"1. Federal and state property. The property of the United States and this state, . . .
"2. Municipal and military property. The property of a county . . . when devoted to public use and not held for pecuniary profit."

In *Helvering v. Johnson*, 1942, 8th Cir., 128 F. 2d 716, the Federal Court of Appeals noted at 128 F. 2d 717:

"Taxes on real estate in Iowa constitute an in rem claim. They are not a debt for which the owner of the land against which they are

assessed is personally liable. Plymouth County v. Moore, 114 Iowa 700, 87 N. W. 662; Lucas v. Purdy, 142 Iowa 359, 120 N. W. 1063, 1066, 24 L.R.A., N.S., 1294, 19 Ann. Cas. 974."

In *C.R.I. & P.R. Co. v. City of Davenport*, 1879, 51 Iowa 451, 1 N. W. 720, the city assessed a property tax against the railroad's interest in the use of a bridge spanning the Mississippi River. It was shown that title to the bridge was vested in the United States government, an entity exempt from Iowa property tax. The Court held that the bridge, in such circumstances, could not be taxed in whole or in part to the railroad.

Property tax liens upon real estate subsequently acquired by a county are extinguished and cease to be liens upon the property. 1964 O.A.G. 426. Lands acquired by the state or its agency before or after the levy of taxes are not subject to property taxes. 1966 O.A.G. 409. Property taxes are generally levied, annually, in September, pursuant to § 444.9, Code of Iowa, 1966, as amended.

2. As indicated above, the answer to your second question is no. Taxes on real estate are not a personal obligation of the seller, but constitute an in rem claim. *Helvering v. Johnson*, supra. Where a governmental body obtains title to the property, said title is free from any charge of taxes, *either present or past*, and all tax liens upon the property become void and subject to cancellation. 1966 O.A.G. 409.

3. The answer to your third question is found in an opinion by Judge Graven rendered in *United States v. 3 Parcels of Land in Woodbury County, Iowa*, 1961, N.D. Iowa, 198 F. Supp. 529. In this case, the United States instituted condemnation proceedings for land located in Woodbury County. It was conceded that after title to the land in question vested in the United States, real estate tax liens against the property would be extinguished and unenforceable against the property itself. However, Judge Graven held, after a careful analysis of the cases and statutes, that the condemnation award could be impressed with the property tax lien provided that the taxes had become a lien against the real estate before its condemnation. Section 445.28, Code of Iowa, 1966, provided then, as it does now, that taxes upon real estate are a lien thereon against all persons except the state. Section 445.30, Code of Iowa, 1966, provided then, as it does now, that as against a purchaser, such tax liens shall attach to real estate on and after December 31 in each year. The real estate was condemned on November 28, 1960, which was after the levy date of the taxes by the County Board of Supervisors. The former owners of the property contended that the tax lien for 1960 would become a lien on the property on December 31 and, therefore, no lien had attached to the condemnation award. The county contended that the taxes became a lien upon the property condemned at the time of the levy which was October 3, 1960. Judge Graven cited the Iowa cases of *Cornelius v. Krominga*, 1917, 179 Iowa 712, 161 N. W. 625, and *Gates v. Wirth*, 1917, 181 Iowa 19, 163 N. W. 215, wherein the Court specifically stated that taxes upon real estate become a lien thereon from the date of the levy. Judge Graven noted that two Attorney General opinions, 1936 O.A.G. 202, and 1938 O.A.G. 692, stated that real estate taxes attached as liens against the land on December 31, but that neither of these opinions made refer-

ence to *Cornelius v. Kromminga*, supra, or *Gates v. Wirth*, supra, and, consequently, he rejected these opinions of the Attorney General as inconsistent with the holdings of the Iowa Supreme Court. Since Judge Graven held that the lien for the 1960 taxes on the condemned land attached prior to the time title thereto passed to the government, he concluded that such tax lien attached to the condemnation award and must be satisfied from such award. Judge Graven also noted that the former owners were not personally liable for the payment of the property taxes. Section 445.30 of the Iowa Code was construed to merely specify the date in determining whether the vendor or the purchaser should bear the tax, *as between themselves* only.

Thus, the answer to your third question is that if the land is taken by condemnation with title vesting in a governmental body whose property is exempt from taxation, the real estate taxes can only be satisfied from the condemnation award and in that event only if the title to the property vests in the governmental body after the taxes thereon have been levied by the County Board of Supervisors.

4. Your fourth question has been answered in the negative by the answers to your first and second questions. The property, after title has passed to the governmental body, is exempt from taxation by operation of law. 1964 O.A.G. 426; 1966 O.A.G. 409; 1966 O.A.G. 411.

5. With reference to your last question, when the state acquires title to real estate, whether by purchase, gift, or condemnation, that property is exempt from taxation. Similarly, when a county so acquires such property which is devoted to public use and not held for pecuniary profit, no taxes can be enforced against such property. Chapters 111 and 111A, Code of Iowa, 1966, as amended, provide the statutory authority for the State of Iowa and the County Conservation Boards to acquire property. There is no statutory authority granted to either the State Conservation Commission or the County Conservation Boards to pay property taxes upon property which, by operation of law, is tax exempt and which is freed of any charges or liens for taxes, either past, present or future. 1926 O.A.G. 352.

December 14, 1970

STATE OFFICERS AND DEPARTMENTS: Vacation entitlement — § 79.1, Code of Iowa, 1966, as amended by Chapter 1045, 63rd G. A., Second Session (1970). A state employee is entitled to take one week's vacation during his second year of employment, two weeks during his third through fifth year of employment, three weeks during his sixth through twelfth years of employment and four weeks each year thereafter. (Haesemeyer to Keating, Director, Iowa Merit Employment Dept., 12/14/70) #70-12-2

Mr. W. L. Keating, Director, Iowa Merit Employment Department: Reference is made to your letter of December 3, 1970, in which you state:

"The Iowa Merit Employment Department respectfully requests the opinion of the Attorney General for the proper interpretation and uniform application of paragraphs 1 and 2 of section 79.1, Chapter 79, Code of Iowa, 1966, as amended by H.F. 1197, Chapter 1045, 2nd Regular Session, 63rd G. A. Your previous opinion of September 14, 1970 relative to the same section clarified the questions asked and answered in that opinion. However, there are still some points of controversy relative to vacation granted and the meaning of certain terms.

"As amended, 79.1 provides:

"'* * * 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 fifth year of employment, and three weeks vacation per year after the fifth and through the twelfth year of employment, and four weeks vacation after the twelfth year and all subsequent years of employment, with pay.

"'Vacation allowances for any period of less than one year shall be computed as having accrued at the rate of three and one-half days pay for each completed calendar quarter during the second and through the fifth year of employment, and at the rate of five and one-fourth days pay each completed calendar quarter during the sixth and through the twelfth and seven days pay for each completed calendar quarter during the thirteenth and all subsequent years of employment.'

"During the years agencies have held and followed various interpretations as to how much vacation is earned; the point at which the number of weeks vacation is changed; the resolution of the difference between the paragraphs; and, the meaning of certain words used.

"There is no question raised as to one weeks vacation; this is only granted after the completion of one year of employment. From there on the meaning of words gives rise to many interpretations. The first paragraph states 'two weeks vacation after the second and through the fifth year.' So, some state this means you cannot take two weeks vacation until you have completed the second year of employment. However, the second paragraph provides vacation is accrued 'at the rate of three and one-half days for each completed calendar quarter during the second and through the fifth year of employment.' So, if you completed the year you could take two weeks, but not before the completion of the second year. However, if you completed two calendar quarters and quit, you would be given seven days pay. Others take the position the first paragraph governs and 'granted' means the giving for a particular purpose. Since the second year is the only specific reference, all other years can be given at the beginning of the year and the calendar quarters only come into effect if the employee does not complete the year. Still others apply this to the second, as well as all other years. And, others grant on a monthly, quarterly or yearly basis of accrual.

"A second area of dispute is when does vacation allowed change. Many feel 'through' means from one end to the other; beginning to the end; to completion of. This is reinforced by the definition of 'after'; 'subsequent to and in view of; subsequently to the time when; or, later in time.' So, 'after the second and through the fifth year of employment' means two weeks for the second, third, fourth and fifth years of employment and you do not gain three weeks until the sixth year. Others, interpret the section to mean two weeks for the second, third and fourth year and for the fifth year only if you fail to complete the fifth year; but, if you complete the fifth year you are entitled to three weeks for the fifth year. The same dispute takes place with the interpretation of 'after the fifth year and through the twelfth year.'

"So, we ask the Attorney General:

"1. Is vacation granted at the beginning of the year, at the end of the year, on a monthly accrual or a quarterly accrual basis?

"2. Which is correct as to entitlement?

a) 2 years ..... 2 weeks
3 years ..... 2 weeks
4 years ..... 2 weeks
5 years ..... 2 weeks
6 years ..... 3 weeks

7 years	3 weeks
8 years	3 weeks
9 years	3 weeks
10 years	3 weeks
11 years	3 weeks
12 years	3 weeks
13 years	4 weeks, and so on.

OR

b)

2 years	2 weeks
3 years	2 weeks
4 years	2 weeks
5 years	3 weeks
6 years	3 weeks
7 years	3 weeks
8 years	3 weeks
9 years	3 weeks
10 years	3 weeks
11 years	3 weeks
12 years	4 weeks
13 years	4 weeks, and so on."

In our opinion to you of September 14, 1970, we observed:

"As you correctly point out § 79.1 in its present and past forms has, because of its vague and imprecise wording, given rise to many differing, conflicting and oftentimes inconsistent interpretations by various state agencies and departments."

We had hoped that this prior opinion and the departmental rules which you promulgated after review and approval by us would finally lay the matter to rest and bring about some uniform practice regarding vacation. However, apparently this is not the case.

In the September 14, 1970, opinion we said: "It should be noted that the part year accruals relate only to computing the amount to be paid to terminating employees for vacation accrued in the year they terminate." Hence we do not think there is any basis for *granting* vacations on a monthly accrual or quarterly basis. The language of § 79.1 seems quite clear so far as the granting of vacations is concerned. Thus, when the statute says "all employees . . . are granted . . . two weeks vacation per year after the second and through the fifth year of employment," it means at any time during the third, fourth, and fifth years of employment an employee may be granted two weeks vacation.

If I understand your first question correctly, the answer would be that the vacation may be taken at the beginning of the year for which it is granted. This, however, is not to be taken to mean the same thing as the year during which the vacation is earned.

The attached chart will illustrate and at the same time answer your second question.

Upon completion of employment for	An employee is entitled to a vacation of	Which he earned during the following year of employment	To be taken during the following year of his employment
One Year	One Week	First	Second
Two Years	Two Weeks	Second	Third
Three Years	Two Weeks	Third	Fourth

Four Years	Two Weeks	Fourth	Fifth
Five Years	Three Weeks	Fifth	Sixth
Six Years	Three Weeks	Sixth	Seventh
Seven Years	Three Weeks	Seventh	Eighth
Eight Years	Three Weeks	Eighth	Ninth
Nine Years	Three Weeks	Ninth	Tenth
Ten Years	Three Weeks	Tenth	Eleventh
Eleven Years	Three Weeks	Eleventh	Twelfth
Twelve Years	Four Weeks	Twelfth	Thirteenth
Thirteen Years	Four Weeks	Thirteenth	Fourteenth

and so on.

December 16, 1970

STATE OFFICERS AND DEPARTMENTS: Department of Social Services — Community Mental Health Centers — Treatment of Drug Addicts — Chapters 224, 225B, §§ 230.24, 444.12, 1966 Code of Iowa; Chapter 209 § 148, Chapter 202 § 2, 62nd G. A.; Chapter 128 § 18, Chapter 157 § 47, Chapter 162 § 6, 63rd G. A., 1st Session. Mental Health Centers are authorized to provide psychiatric examination and treatment for drug addicts in need thereof and can potentially receive funds through the Iowa Mental Health Authority, the State Institution fund, and County Boards of Supervisors. (Adams to Hansen, State Representative, 12/16/70) #70-12-3

Honorable Willard R. Hansen, State Representative: In your letter of August 5, 1970 you requested an Opinion of the Attorney General as to (1) Can Mental health facilities be used for the treatment of drug abusers and drug addicts? (2) Can mental health centers seek and/or receive federal funds for the purpose of treating drug abusers and addicts?

Mental health centers are established under, and governed by, § 230.24, Code of Iowa 1966, which provides:

"*County fund for mental health — psychiatric treatment — mental health center.* The board of supervisors shall, annually, levy a tax of one mill or less, as may be necessary, for the purpose of raising a fund for the support of such mentally ill 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, which shall be known as the county fund for mental health, and shall be used for no other purpose than the support of such mentally ill persons and for the purpose of making such additions and improvements as may be necessary to properly care for such patients as are ordered committed to the county home.

"The county board of supervisors are authorized to expend from the county fund for mental health as provided in this section funds for psychiatric examination and treatment of persons in need thereof or for professional evaluation, treatment, and habilitation of mentally retarded persons, in each county where they have facilities available for such treatment, and any county not having such facilities may contract through its board of supervisors with any other county, which has facilities for psychiatric examination and treatment or for professional evaluation, treatment, and habilitation of mentally retarded persons for the use thereof. Any county now or hereafter expending funds from the county fund for mental health for the psychiatric examination and treatment of persons in a community mental health center may levy an additional tax of not to exceed one-half mill.

"A county, or affiliated counties, desiring to establish an incorporated

mental health center and having a total or combined population in excess of thirty-five thousand according to the last federal census, may establish such new mental health centers in conjunction with the Iowa mental health authority. In establishing such mental health center, the board of supervisors of each such county is authorized to expend therefor from the state institution fund an amount equal to, but not to exceed, two hundred fifty dollars per thousand population or major fraction thereof. Such appropriation shall not be recurring and shall not be applicable to any mental health center established prior to January 1, 1963."

In an Attorney General's Opinion dated August 11, 1969, the Attorney General stated at page 2:

"The only language in § 230.24 tending to define or limit the services that a mental health center may offer is contained in the second paragraph; notably it is provided that county funds may be expended 'for psychiatric examination and treatment of persons in need thereof.' While there is no specific authorization for treatment of alcoholics, it takes no straining of the statutory language to hold that an alcoholic can be *a person in need of phychiatric examination and treatment.* Indeed, most people today feel that alcoholism is a form of mental illness, or at least that it is rooted in mental and personality disturbances which are amenable to psychiatric treatment. . . ."

While this opinion concerns itself with alcoholism, we feel the same reasoning, by analogy, would apply to drug addiction. The legislature, in Chapter 224, 1966 Code of Iowa, combines excessive use of intoxicating liquors and narcotic drugs in providing the authority to the county commissioners of hospitalization to commit alcoholics and drug addicts to institutions.

Section 224.1, 1966 Code of Iowa, as amended by Chapter 209, § 148, 62nd G. A. provides:

"Commitment. Persons addicted to the excessive use of intoxicating liquors, morphine, cocaine, or other narcotic drugs may be committed by the commissioners of hospitalization of each county to such institutions as the commissioner of the state department of social services may designate."

Section 224.2, 1966 Code of Iowa provides:

"Statutes applicable. 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 liquors."

In accordance with the above, the answer to your first question regarding authority of mental health centers to treat drug addicts is as follows: They may treat drug addicts as part of their services "for psychiatric examination and treatment of persons in need thereof."

As to your second question, it is our opinion that a mental health center has no authority of its own to apply for funds for treatment of drug addicts. It may use funds acquired through the following channels:

Iowa Mental Health authority under § 230.24 (quoted earlier), mental health centers are established "in conjunction with" the mental health authority which in turn is charged with "directing the benefits of Public Law 487, 79th Congress of the United States and amendments thereto." (§ 225B.1, 1966 Code of Iowa) Section 225B.4, 1966 Code of Iowa provides:

"*Supervision.* All authorized funds of the mental health authority shall

be disbursed under the supervision of the state board of regents and programs of the Iowa mental health authority shall be administered according to policies established by the committee on mental hygiene."

Funds supplied through the mental health authority can be used in treatment of drug addicts so long as it is consonant with any restrictions of the Federal law and of the state agencies mentioned above.

There are two sources of local funds available for possible use by a mental health center: The county fund for mental health, and the state institution fund.

According to § 230.24 (quoted above) the former fund can be used for the support of mentally ill persons and for psychiatric examinations and treatment of persons in need thereof. This fund, which can be sustained by a levy of as much as one and one-half mills, can be used for the support of drug addicts who are mentally ill and for the psychiatric examinations and treatment of drug addicts who are in need thereof. For an analagous set of facts, see 1968 OAG 898.

The state institution fund is governed primarily by § 444.12, 1966 Code of Iowa as amended, Acts of the 62nd G. A., Chapter 202 § 2. It may be used for the establishment of a community mental health center pursuant to § 230.24, and it can be used on a continuing basis for support of mentally ill persons. Section 444.12 [as amended by the 62nd G. A., Chapter 202 § 2; Chapter 128 § 18, 63rd G. A., First Session; Chapter 157 § 47, 63rd G. A., First Session; Chapter 162 § 6, 63rd G. A., First Session] reads in part as follows:

"*State institution fund.* 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 expenses in the coming year of maintaining county patients . . . and for the establishment of a community health center as provided in § 230.24 and for the support of such mentally ill or mentally retarded persons as one committed and treated locally pursuant to § 229.9 of the Code or in any alternate public or private facility within or without the state approved by the commissioner of the department of social services for the care of the mentally ill or mentally retarded, shall levy a tax therefor . . ."

It is our opinion the state institution fund may be used for treatment of drug addicts in a mental health center which has undertaken specialized programs therefor, and any federal funds may also be used when made available by appropriation.

December 18, 1970

TAXATION: SALES TAX — CASUAL SALES — AUCTIONS AND GARAGE SALES — §§ 422.42(12), 422.43 and 422.45(6), Code of Iowa, 1966, as amended. The gross receipts of tangible personal property sold by an owner on a nonrecurring basis, whether by auctioneer or other agent, at a farm going out of business sale or a "garage" sale of used household goods, furniture and clothing, etc., where at the time of sale the owner is not engaged for profit in the business of selling tangible goods or services, are exempt from the sales tax as casual sales. (Turner to Schaben, State Senator; Harbor, Speaker of the House; Stephens, State Senator, 12/18/70) #70-12-4

Honorable James F. Schaben, State Senator; Honorable William H. Harbor, Speaker of the House; Honorable Richard F. Stephens, State Senator: Each of you has requested an opinion of the attorney general as to whether the sales tax is applicable to farm going out of business sales

transactions and, in addition, we have had oral inquiries from Senator James Briles, Representatives Harold O. Fischer, John Camp and other legislators. Since Senator Schaben's request was the first received, and cites district court authority, we set it forth as follows:

"Enclosed is a circular dated October 23, 1970, which I have recently received from the State of Iowa, Department of Revenue. This circular reaches a conclusion that all sales by an auctioneer are subject to an Iowa sales tax with five exceptions and that the auctioneer is charged with the duty of collecting and remitting the tax.

"The conclusion of the Department is contrary to the ruling of an Iowa district court in a case in which I participated some years ago. I will either enclose a copy of the papers in that case or forward them to you separately depending upon the mail delivery.

"It seems to me that the exceptions noted by the department are not all of the exceptions set forth in the Iowa Statute and, in particular, do not include the exception for casual sales.

"The farm sale is my especial interest. Here, the farmer is selling out — employing an auctioneer, and usually a bank clerk, as agent to assist him in disposing of his possessions. This sale will not, of course, be repeated. The view has been that this is a casual sale by the farmer and is not subject to the sales tax. Is this correct?

"It would be helpful if you would define the status of the auctioneers in all sales so that they may be informed of their relationship to the parties who employ their services and their liability to collect and pay this tax, if any."

You have also furnished us with a copy of a decision by the District Court of Harrison County, filed June 8, 1961, wherein you were the plaintiff in an action versus the then Iowa State Tax Commission contesting a sales tax assessed against you by the Commission on closing out sales of farm machinery for former farmers who had discontinued the farming business. In that case, Judge Harold E. Davidson, on the question as to whether or not these sales were "casual sales," concluded as a matter of law as follows:

"Rule 30 of said rules and regulations in substance and among other things provides that receipts from casual or isolated sales are not subject to sales tax as where a farmer sells his farm machinery, implements or other farm equipment the same would be casual or isolated sales.

"The court finds as a matter of law that the sales conducted by the plaintiff and appellant herein were as much casual sales when so conducted as they would have been if the sale had been held on the premises formerly occupied by the farmer discontinuing his operations as such."

The facts in that case were, that because of bad road conditions, several farmers who were going out of business, brought their equipment to your place of business and you acted as an agent for them in selling said equipment. It was found that the equipment was set apart and separately identified as being owned by a certain farmer and that each sale of the individual farmer's equipment was a separate identified transaction, and hence was "casual" as far as the owner was concerned even though several sales were made by you at your place of business within a short period of time. Also, implicit in the court's determination was the fact that while you were acting as the agent for the "owner" of the property, the exemption created by the rule was effective.

The Tax Commission did not appeal this ruling by the District Court and we must therefore assume that they found that the decision was in accord with their then Rule 30 which defined "casual sales."

In the following year, 1962, Rule 30 was once again before the Court in Iowa in a case where the Tax Commission had assessed a sales tax against a railroad company which had sold certain railroad equipment and salvage items to its subsidiary company, which sales were fourteen in number and took place during the years 1953, 1956 and 1957. The testimony indicated that these were fourteen separate sales. The tax payer contended that the disposal of this salvage and obsolete property was casual or isolated sales and were therefore not subject to the retail sales tax. The trial court disagreed with the tax payer and stated:

"The *statute* provides for no exemption of this sort of sale in the circumstance shown in this case, * * *." (Emphasis added)

We cannot conclude from this holding by the trial court that it paid any attention to the time, scope or character of the sales since he merely stated that *there was no statutory exemption* for these sales.

This case was appealed to the Iowa Supreme Court and appears as *Des Moines and Central Iowa Railway Company* v. *Iowa State Tax Commission*, 1962, 253 Iowa 994, 115 N. W. 2d 178. The Supreme Court agreed with the trial court and stated in part as follows:

"It (tax commission) has no power to impose a tax nor to grant an exemption from a tax (citing cases) * * * Rule 30 purport(s) to grant an exemption from the tax imposed, * * * by stating casual or isolated sales are not subject to the tax. Both rules (Rules 10 and 30) are inconsistent with section 422.43. They *are not included in the specified exemptions in section 422.45.* * * * When the legislature wished to exclude certain merchandise from being included in a definition, it used plain language, e.g., 'but does not include commercial fertilizer or agricultural limestone or materials,' subsection 3, section 422.42, in the definition of retail sale. The same is true of section 422.45 granting certain exemptions. This is not a case of debatable interpretation. There is no basis for it." (Emphasis added).

This decision by the Iowa Supreme Court of course necessarily meant that there were no exemptions for "casual sales" under the Iowa Sales Tax Law, since the exemption had been created by a rule of the Tax Commission and not by a statute properly enacted by the legislature. This holding of course would overrule the decision made by Judge Davidson in your case in 1961 since the court in that case based your nonliability squarely upon the then existing Rule 30. At this point I might add that it is the opinion of this writer that under the same factual situation, Judge Davidson's decision is correct under the present statute *defining* and *exempting* "casual sales."

The above decision by the Iowa Supreme Court doing away with the "casual sales" rule was decided on May 8, 1962. On August 10, 1962, Rule 30 was recinded by the Tax Commission and the Commission cited for its reason the Des Moines & Central Iowa Railway Company case. The following year, 1963, the Sixtieth General Assembly met and enacted Senate File Nine which appears as Chapter 263 of the Sixtieth G. A. This act contained a publication clause and the record indicates that it was last published on March 20, 1963 and has been the law since that date.

"CHAPTER 263
CASUAL SALES EXEMPTED FROM SALES TAX
S.F. 9

"AN ACT to exempt casual sales by persons not regularly engaged in the business of selling from sales tax.

Be it Enacted by the General Assembly of the State of Iowa:

"SECTION 1. Section four hundred twenty-two point forty-two (422.42), Code 1962, is hereby amended by adding thereto the following new subsection:

'Casual Sales' means:

"1. Sales of tangible personal property by the owner of a non-recurring nature, if the seller, at the time of sale, is not engaged for profit in the business of selling tangible goods or services taxed under section four hundred twenty-two point forty-three (422.43) of the Code.

"SEC. 2. Section four hundred twenty-two point forty-five (422.45), Code 1962, is hereby amended by adding thereto the following new subsection:

'The gross receipts from "casual sales."'

"SEC. 3. This Act being deemed of immediate importance shall be in full force and effect from and after its publication in the Lake Mills Graphic, a newspaper published at Lake Mills, Iowa, and in the Algona Kossuth County Advance, a newspaper published at Algona, Iowa."

In the 1966 Volume of the Iowa Departmental Rules at Page 711 therein, the following appears:

"Casual sales. Effective March 21, 1963, 'Casual sales' have been legislatively defined and exempted from sales tax. This excludes any individual, partnership, corporation or association which is a retailer under the sales tax law from collecting or reporting sales tax on the sale of tangible personal property where such sales are on a nonrecurring basis and are for other than profit purposes.

"This rule is intended to implement chapter 263, sections 1 and 2, Acts of the 60th General Assembly."

In 1968 the Iowa Supreme Court had the provisions of the casual sales amendment before it in the case of *S & M Finance Company Fort Dodge v. Iowa State Tax Commission*, 1968, 162 N. W. 2d 505. The tax payer in this case was a finance company which occasionally repossessed automobiles from the owners thereof under the terms of their financing agreement, and, would at a later date sell these vehicles to consumers or users. The Tax Commission audited these sales over a period of five years prior to the assessment. The evidence disclosed that in those years approximately fifty sales per year were made by the tax payer. The trial court found that these sales were not retail sales within the definitions of the Sales Tax Law, that the sales were casual sales and exempt from sales tax under the provisions of Section 422.45 (6). In reversing the trial court the Iowa Supreme Court did not concern itself with the relationship between the owner of the vehicle and the finance company which was allegedly making the sale. After setting out the provisions of the casual sales exemption, and after concluding from the testimony that approximately fifty sales per year were made, the Court decided that these sales were not "casual" within the meaning of the applicable law. Judge LeGrand stated as follows:

"The statutory definition of casual sales requires that two conditions be met. We assume, although we do not hold, that plaintiff is not engaged in selling tangible goods for profit as part of its business. Nevertheless we hold these transfers were not casual sales because plaintiff cannot satisfy the second requirement of the definition — that the sales be nonrecurring. Webster's New International Dictionary, Second Ed., defines recur as to 'occur, take place, or appear again.' Synonymous listed are return, repeat, reoccur and reappear.

"In construing section 422.42 (13) we give the words used their usual and ordinary meaning. We also adhere to the rule that the plain, obvious meaning is always preferred over one which is strained and artificial. *Bruce Motor Freight, Inc. v. Lauterbach*, 247 Iowa 956, 970, 77 N. W. 2d 516, 621.

"An exemption statute is strictly construed against the taxpayer, who has the burden of proving clearly that he comes within its provisions. Fischer Artificial Ice Company v. Iowa State Tax Commission, 248 Iowa 497, 499, 81 N. W. 2d 437, 439, and citations. Plaintiff has failed to meet that burden here.

"It would indeed take a 'strained and artificial' interpretation of the statute to say these were nonrecurring sales when they occurred over a long period of time on a one-each-week average.

"We conclude the sales in question were not casual sales within the provisions of section 422.42 (13) and are therefore not exempt under section 422.45 (6)."

Of the two conditions that the Supreme Court mentioned that must be present in order for "casual sales" to qualify under the exemption, the Court obviously paid most attention to the second condition in deciding the finance company case. This writer would agree with the Court when it says it would take a "strained and artificial" interpretation of the statute to say that these were nonrecurring sales when they occurred over a long period of time on a one each week average. The Court has correctly interpreted the meaning of "nonrecurring" as found in the statute under the facts that it had before it. However, we do not subscribe to the theory that an auctioneer who conducts a "going out of business" sale for a disclosed or known principal could be said to be making "recurring" sales as an agent for that individual.

For the purposes of this opinion we will assume that you are now conducting your business as an auctioneer under the same factual situation that existed in 1961 when your case was tried by Judge Davidson in Harrison County. We might also assume from what you have mentioned in your letter that your ordinary farm sale is for the purpose of assisting the farmer in the disposal of his possessions after you have entered into an agreement with the farmer. Your sole purpose then is conducting an auction only and that your interest in the property being sold is a percentage of the price you are able to obtain from the sale of the various items owned by him. You can in no sense of the word be considered the "owner" or a "retailer" of the property sold. Your relationship is merely an agent for the owner.

The status of an auctioneer has been defined in 7 C.J.S. Auctions and Auctioneers, § 6, at page 1247 in part as follows:

"An auctioneer, in making a sale, whether of personalty or realty is, by virtue of his employment to make the sale, primarily the agent of the seller, and has been declared to be the agent of the seller alone until the

fall of the hammer; he must act in good faith and in the interest of his principal, and the sale must be made in accordance with the latter's instructions."

Until the fall of the hammer, your principal is the owner of the property sold, and assuming he meets the other requirements of Section 422.42 (12), the "gross receipts" paid for the property are not subject to the sales tax. You, as agent, only for the purpose of *conducting* the sale, are not "making the sale" of the property. Only the "owner" can give title and for the purpose of Section 422.42 (12) the farmer is the owner and clearly entitled to the exemption.

If these above assumptions are correct, then it would take a "strained and artificial" interpretation to say that the final "going out of business" sale of his equipment by a farmer, even though conducted by you, can be a recurring sale by the owner of said property.

We will also assume under your set of facts that the farmer was in the business of farming and selling farm products on the market and that he was not in the business of selling farm equipment or other itmes for a profit. In such a fact situation the gross receipts from these casual sales are exempt from sales tax under the provisions of Section 422.45 (6). Furthermore, under the clear wording of Section 422.42 (12) (this section is cited as 422.42 (13)) in the *S & M* case but was renumbered (12) by the Code Editor. See, Iowa Code Annotated, 1970 Pocket Parts, pp. 46, 47). Your principal, while making the above nonrecurring sales, is a person and owner of tangible personal property who is not engaged for profit in the business of selling goods taxed under Section 422.43. Section 422.43 states in part as follows:

"Tax Imposed. There is hereby imposed a tax of three per cent 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; . . ." (Emphasis added).

The language of Section 422.45 (6) is also quite capable of *not* being misunderstood.

"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:

(6) The gross receipts from 'casual sales.' "

To correctly interpret a statute we must give attention to all of the words used by the Legislature especially when concerned with the same subject matter. Therefore, under the factual situation we have assumed herein, you have been retained as an agent for the purpose of conducting a sale for the owner of personal property which sales wil be nonrecurring. The seller, your principal, is not in the business of selling these particular items for profit and the gross receipts received by the seller are not taxable under Section 422.43 since it is "otherwise provided" in Section 422.45 (6), that said receipts are exempt. Even if it could be said that you are a retailer and are making sales at retail under the definitions found in Section 422.42 you could not be held liable for the tax posed under Section 422.43 since you are selling non-taxable items. We therefore conclude that while conducting auction sales for a farmer who meets

the requirements of Section 422.42 (12), the sales are casual and no sales tax should be collected by you, your clerk, or your principal.

The same reasoning applies to the so-called "garage" sale or sale of used household goods, furniture, clothing and other articles, and to other sales of a like nature, by an owner not engaged in the business of selling tangible goods and who is not doing so on a basis regularly recurring in time. Such are casual sales and exempt from the sales tax under Section 422.45 (6), Code of Iowa, 1966, as amended.

In making the above conclusion we are aware of the general rule that applies to taxation, i.e., he who would urge that he is entitled to an exemption must bring himself clearly within the statutory language in order to be successful. We are also aware that the provisions of Section 422.42 (12) defines a class of persons who must bring themselves within the statutory provisions before the exemption can be allowed. We think the language in said statute, coupled with the language in the exemption statute, Section 422.45 (6), is not open for search of legislative intent. We do not consider the language ambiguous and we are therefore adopting the rule often quoted by the Iowa Supreme Court, in their rules of construction when examining a statute:

IRCP Rule 344 (f) (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."

In your request for an opinion you have also asked that we "define the status of auctioneers in all sales so that they may be informed of their relationship to the parties who employ their services and their liability to collect and pay this tax, if any." It would be extremely difficult to generalize an answer to this question since the exemption statute you refer to clearly outlines the status that the person seeking the exemption must have. It is when an auctioneer in conducting a sale as you have outlined and as we have assumed are the facts that this exemption for "casual sales" is available. However, in a factual situation where an auctioneer is not only selling tangible personal property of a farmer going out of business, but is also selling property that he might have some ownership interest in at the same auction, the sales of property owned by the auctioneer are taxable. This of course should cause no confusion since in making a sales tax return the gross receipts from casual sales of the farmer would be deducted by the auctioneer when reporting his own taxable sales. It also necessarily follows that when acting as an agent for one who is in the business of making recurring sales for profit, a sales tax must be collected.

December 21, 1970

ELECTIONS: Justices of the Peace — holdover — §§ 63.7, 63.8 and 69.11, Code of Iowa, 1966. Where no person was a candidate for Justice of the Peace in the November 1970 general election, the person appointed to complete the term ending December 31, 1970 is entitled to hold over and must qualify anew. (Haesemeyer to Sloan, Keokuk County Attorney, 12/21/70) #70-12-5

Mr. Raymond A. Sloan, Jr., Keokuk County Attorney: Reference is made to your letter of December 10, 1970, in which you request an opinion of the attorney general and state:

"This will confirm our telephone conversation yesterday when I requested an opinion of you regarding eligibility of a certain Justice of the Peace to continue in office.

"As I then advised, we have a Justice of the Peace who was appointed by our Board of Supervisors. He was appointed to complete the term of a Justice of the Peace, elected in general election of November, 1968, to serve a two year term from January, 1969, through December 31, 1970, the elected Justice of the Peace having resigned in the spring of 1970. No person was a candidate for Justice of the Peace in the November 1970 general election for such Township to serve as Justice of the Peace.

"The question I raised was whether the appointed Justice of the Peace could continue to serve by authority of 1966 Iowa Code Section 63.7 on the theory he was a 'holdover.' It was my understanding, from our telephone conversation, it was your opinion the aforecited Code Section was sufficient authority for the Justice of the Peace to continue to serve in office subsequent to December 31, 1970. Would you please confirm the above as to whether my understanding is correct."

Section 69.11, Code of Iowa, 1966, 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.*"

It is clear beyond doubt that the justice of the peace is "an office which is filled by election of the people." § 39.21. And since the individual you described is filling a vacancy in that office he is entitled to hold over until a successor is elected and qualified under § 69.11.

Further support for this conclusion is found in §§ 63.7 and 63.8 which provide:

"63.7 Officer holding over. When it is ascertained that the incumbent is entitled to hold over by reason of the nonelection of a successor, or for the neglect or refusal of the successor to qualify, he shall qualify anew, within the time provided by section 63.8.

"63.8 Vacancies — time to qualify. Persons elected or appointed to fill vacancies, and officers entitled to hold over to fill vacancies occurring through a failure to elect, appoint, or qualify, as provided in chapter 69, shall qualify within ten days from such election, appointment, or failure to elect, appoint, or qualify, in the same manner as those originally elected or appointed to such offices."

I trust the foregoing answers the question you have raised.

December 21, 1970

CITIES AND TOWNS: Industrial Revenue Bond Issue — Ch. 419, Code of Iowa, 1966, as amended by Ch. 345, Acts, 61st G. A. (1965) and Ch. 339, Acts, 62nd G. A. (1967). After acquisition of a "project" under Ch. 419, Code of Iowa, 1966, the disposition of funds by the seller of said project is not within the control of the local governing body issuing the revenue bonds. The proceeds of the sale are safely within the control of the seller and may be used by him for any legal purpose. (Conlin to Crabb, State Car Dispatcher, 12/21/70) #70-12-6

Mr. Frank Crabb, State Car Dispatcher: We acknowledge receipt of your correspondence requesting an opinion of the Attorney General concerning the legality of the proposed revenue bond issue of the City of Spencer on behalf of and for the benefit of Spencer Foods, Inc. We note that you were, at the time of your request, a State Representative.

The facts as presented to us and which we assume to be true and correct for the purpose of this opinion are as follows:

Spencer Foods, Inc. is a corporation doing business in the State of Iowa. The City of Spencer is a municipal corporation organized and existing under the laws of the State of Iowa. On or about September 21 the City Council of the City of Spencer adopted a bond resolution authorizing the issuance of $4,000,000 of Industrial Development Bonds of said city under and pursuant to the provisions of Chapter 419, Code of Iowa, 1966, as amended by Ch. 345, Acts 61st G. A. (1965), and by Ch. 339, Acts 62nd G. A. (1967). The bond proceeds are to be applied as follows:

"1. $250,000 to pay underwriting commissions and other expenses of the bond issue.

"2. $3,000,000 to Spencer Foods, Inc. for the purchase of the existing facility, said purchase price being no greater than the fair appraised value of such existing facility.

"3. The balance of $750,000 to be placed into a construction and improvements fund to be held by the trustee and to be disbursed in payment of costs of renovation, improvements, extensions and new equipment for the Spencer plant * * * it is estimated that the programmed renovation and improvements will increase the capacity of the Spencer plant by 40% and will permit its continued operation as a competitive facility."

The facilities in question will be leased back to Spencer Foods, Inc. at a rate which shall be equal to the amount payable as interest and principal on the bonds in question. At the end of the term, the City will sell the facilities back to Spencer Foods, Inc. for a nominal consideration.

The pertinent provisions of Chapter 419, Code of Iowa, 1966 as amended are:

"419.1 (2) 'Project' means any land, buildings or improvements, whether or not in existence at the time of issuance of the bonds under authority of this Chapter, which shall be suitable for the use of any private college or university, whether for the establishment or maintenance of such college or university, or of any industry or industries for the manufacturing, processing or assembling of any agricultural or manufactured products, even though such processed products may require further treatment before delivery to the ultimate consumer. 'Improve,' 'Improving' and 'Improvements' shall embrace any real property, personal property or mixed property of any and every kind that can be used or that will be useful in a private college or university enterprise or an industrial enterprise including, without limiting the generality of the foregoing, rights of way, roads, streets, sidings, foundations, tanks, structures, pipes, pipelines, reservoirs, utilities, materials, equipment, fixtures, machinery, furniture, furnishings, improvements, instrumentalities and other real, personal, or mixed property of every kind, whether above or below ground level."

"419.1 (5) 'Equip' means to install or place on or in any building or improvements or the site thereof, equipment of any and every kind, including, without limiting the generality of the foregoing, machinery, utility service connections, building service equipment, fixtures, heating equipment and air conditioning equipment."

"419.2 In addition to any other powers which it may now have, in the event that local capital is not available for the development of industrial projects or private college or university projects, each municipality shall have the following powers: (1) To acquire, whether by construction, purchase, gift or lease, and to improve and equip, one or more projects. Such project shall be located within this State, may be located within or near the municipality, but shall not be located more than eigth (8) miles outside the corporate limits of the municipality, provided that ancillary improvements necessary or useful in connection with the main project may be located more than eight (8) miles outside the corporate limits of the municipality. (2) To lease to others any or all of its projects for such rentals and upon such terms and conditions as a governing body may deem advisable, but in no case shall the rentals be less than the average rental cost per square foot for like or similar facilities within the competitive commercial area. (3) To issue revenue bonds for the purpose of defraying the cost of acquiring, improving and equiping any project and to secure payment of such bonds as provided in this Chapter."

The court decided the constitutionality of the Act in the case of *Green* v. *City of Mt. Pleasant*, 256 Iowa 1184, 131 N. W. 2d 5 (1964). While that case was decided prior to the amendments enacted in 1967, we do not reach the question of constitutionality of said amendments.

Numerous cases from other jurisdictions have allowed the acquisition of existing facilities without regard to the disbursements of proceeds of the sales by the seller. See *Massey* v. *City of Franklin*, 384 S. W. 2d 505 (Ky. 1964); *State* v. *Kemp*, 151 S. E. 2d 680 (W. Va. 1966); and *Frickes* v. *Missoula County*, 470 P. 2d 287 (Montana 1970).

Closely analagous factually to the instant case is *Uhls* v. *State*, 429 P. 2d 74 (Wyoming 1967). The court summarized the facts beginning at page 77 as follows:

"* * * under an ordinance passed by the City it proposed to issue revenue bonds for the purpose of acquiring the Frontier Refining Project (which would promote the economic welfare of Cheyenne by increasing employment, stimulating industrial activity, augmenting sources of tax revenues, fostering economic stability, and improving the balance of the City's economy), the land, buildings, machinery. etc., then owned and operated by the refining company, being suitable for the project; that the proceeds from the bond sale would be deposited with the trustee, who would disburse the proceeds as directed by the City under the provisions of the indenture and lease agreement; that the total acquisition figure would be $23,189,495, plus an amount sufficient to defray all expenses in connection with the authorization, sale and issuance of the bonds in the sum of $18,689,495, being the amount to be paid the refining company initially and $4,500,000 to be expended for modernization and expansion of the project, essential to refinery's continued operation; that the modernization and expansion of the refinery will result in the hiring of additional employees; and that Frontier is the only oil refinery in the City of Cheyenne; that the City would be the owner of a project suitable for operation as a manufacturing or industrial project and lease it to the Frontier Refining Company; that the purchase agreement covered certain realty, personal property, and leaseholds now held by the refinery company; that by the lease agreement that company was to pay rental revenues sufficient to cover all payments of principal and interest on the revenue bonds, all costs, fees, expenses, and premiums incident to the issuance, administration and prior redemption or payment of the revenue bonds, and all taxes, special assessments, insurance, utilities repairs, maintenance and ground rents of the project; and that the indenture of mortgage and deed of trust provided for the establishment of four separate accounts with the trustee, the project acquisition account, the Frontier Project bond principal and interest fund, the Frontier Project ad-

ministration fund and maintenance fund, and that additional series of bonds might be issued subject to prescribed earnings limitations."

In dealing with the question of public purpose the court on the above case stated:

"Whether a particular act or conduct is a 'public purpose' is a matter of law for judicial determination and not a question of fact; however, where the legislative judgment as to a 'public purpose' is apparent, that judgment will not be interfered with by the courts unless the judicial mind conceives it to be without reasonable relation to the public interest and welfare. Polanski v. Town of Eagle Point, 30 Wis. 2d 507, 141 N. W. 2d 281, 285; City of Tulsa v. Williamson, Okl., 276 P. 2d 209, 214; Fairfax County Industrial Development Authority v. Coyner, 207 Va. 351, 150 S. E. 2d 87, 93; and Faulconer v. City of Danville, 313 Ky. 468, 232 S. W. 2d 80, 82-83."

Our own court in the *Green* case, *supra*, dealt with a similar contention at page 17 wherein they quoted approval from the case of *Faulconer* v. *City of Danville*, 313 Ky. 468, 232 S. W. 2d 80:

"In enacting the statute under which the present venture is undertaken, the legislature deemed the acquisition and ownership by a city of an 'industrial building' to be a public project. The legislative determination of what is a public purpose will not be interfered with by the courts unless the judicial mind conceives it to be without reasonable relation to the public interest or welfare and to be within the scope of legitimate government. The concensus of modern legislative and judicial thinking is to broaden the scope of activities which may be classed as involving a public purpose. 37 Am. Jur., Municipal Corporations, Sec. 132. It reaches perhaps its broadest extent under the view that economic welfare is one of the main concerns of the city, state and the federal governments. This is manifested by the great bulk of recent social security programs of the nation and the state. Of special pertinence are those providing for unemployment insurance and security, thus decreasing what the Tennessee Supreme Court calls 'unemployment's twin offspring, hunger and crime.' Azbill v. Lexington Manufacturing Co. (188) Tenn. (477) Sup., 221 S.W. 2d 522, 524. With reference to this concern of government, Mr. Justice Stone, later Chief Justice, writing for the Supreme Court, in holding constitutional an Alabama statute levying taxes and providing for their use, said: 'The evils of the attendant social and economic wastage permeate the entire social structure. Apart from poverty, or a less extreme impairment of the savings which afford the chief protection to the working class against old age and the hazards of illness, a matter of inestimable consequence to society as a whole, and apart from the loss of purchasing power, the legislature could have concluded that unemployment brings in its wake increase in vagrancy and crimes against property, reduction in the number of marriages, deterioration of family life, decline in the birth rate, increase in illegitimate births, impairment of the health of the unemployed and their families and malnutrition of their children.' Carmichael v. Southern Coal & Coke Co., 301 U. S. 495, 57 S. Ct. 868, 875, 81 L. Ed. 1245, 109 A.L.R. 1327. See also Spahn v. Stewart, 268 Ky. 97, 103 S. W. 2d 651; Shaw v. Kentucky Unemployment Compensation Commission, 297 Ky. 815, 181 S. W. 2d 697."

The court applied that reasoning to Chapter 419 and found at page 17:

"In addition to what is said in the Faulconer case a casual reading of chapter 247 reveals the purpose of the General Assembly was to promote the general interest and serve the public purpose. The fact it is not stated in so many words is of no importance."

It is most seriously urged that in some manner, the local governing body retains some control over disbursements of the proceeds of sale of

the property by the seller. No support for that proposition has been found within the statute nor has any case been brought to our attention which so holds. The finding of public purpose while a question of law, was made by the legislature in the statute itself. The question of availability of local capital is one of fact for the determination of the local governing body.

The mechanics of purchase and lease are not herein questioned, nor do they appear questionable.

An example may further serve to illustrate the scope of local government control. If the city purchased vacant land from a private citizen, under Chapter 419, it would have no interest in nor concern for disposition of the proceeds by the individual. He would clearly not be subject to any prohibition on his use thereof under this statute. Spencer Foods, Inc., is in the same position with respect to its facilities as the above private individual and is not subject to any control by the city over the disposition of the funds from the sale of said property.

In conclusion, after examining Chapter 419 and similar statutes and cases decided thereunder, and assuming the facts to be as presented to us, we are of the opinion that the proposed Industrial Revenue Bond Issue and the proposed disposition of the funds thereby received is legal and proper.

December 22, 1970

CITIES AND TOWNS: Compensation of Park Commissioners—§ 368A.21, Code of Iowa, 1966, prohibits those park commissioners in office as of August 15, 1967, from obtaining the increased salary authorized by the legislature in Ch. 321, § 1, 62nd G. A. (1967). (Turner to Dutton, Black Hawk County Attorney, 12/22/70) #70-12-7

Mr. David J. Dutton, Black Hawk County Attorney: This will acknowledge receipt of your letter of August 14, 1970, requesting an opinion on the salaries of present park commissioners in light of Chapter 321, § 1, Acts of the 62nd General Assembly (1967).

The 1966 Code of Iowa, § 368A.21 provides:

"Ineligibility — change of compensation. No member of any city or town council shall, during the time for which he has been elected, be appointed to any municipal office which has been created or the emoluments of which have been increased during the term for which he was elected, *nor shall the emoluments of any city or town officer be changed during the term for which he has been elected.* No person who shall resign or vacate any office shall be eligible to the same during the time for which he was elected, when, during the time, the emoluments of the office have been increased." (Emphasis added.)

Your question, then is whether the above quoted Code section prohibits present park commissioners from receiving the increase in salary approved by the legislature. Chapter 321, § 1, 62nd General Assembly (1967) authorized the city council to increase the pay for park commissioners from a maximum of ten to a maximum of twenty dollars for each thousand population or fraction thereof, or one thousand dollars, whichever is smaller. But this statute did not, of itself, raise or fix the pay.

It is our opinion that § 368A.21 forbids the park commissioner, in office during the increase in salary, to receive the additional wage. Section 368A.21 is clearly unambiguous and not in conflict with the aforementioned Chapter 321. It forbids the increase of emoluments for any elected town officer during his term of office. It must be assumed that the legislature was aware of this section when they passed Chapter 321 during the 62nd General Assembly. Similar legislation has been passed increasing salaries with express legislative intent to apply the new Act to present officials. Chapter 272, § 4, 58th General Assembly (1959) provided:

"The salaries of the mayor and councilmen may be increased in accordance with this Act immediately upon the effective date hereof, anything in section three hundred sixty-eight A point twenty-one (368A.21) of the Code or any other statute to the contrary notwithstanding."

The same provision was made in Chapter 188, § 2, 56th General Assembly (1955).

In the new Act, the legislature made no provision to authorize a wage increase for those park commissioners already in office. Thus, the increase is applicable only to those park commissioners elected after the effective date of Chapter 321, § 1, 62nd General Assembly (August 15, 1967). This interpretation is in line with *City of Council Bluffs v. Waterman*, 86 Iowa 688, 53 N. W. 289 (1892).

December 30, 1970

ELECTIONS: Justice of the Peace, write-in votes — § 49.99, Code of Iowa, 1971. Where under the caption on the ballot "For Justice of the Peace (Vote for Two)" there are two columns and write-in votes are cast for an individual in both columns the total votes cast in both columns are combined in determining the number of votes cast for the write-in candidate. (Haesemeyer to Letz, Hardin County Attorney, 12/30/70) #70-12-8

Mr. Carl R. Letz, Hardin County Attorney: Reference is made to your letter of November 30, 1970, in which you state:

"At the most recent general election, held on November 3, 1970, in Etna Precinct, Hardin County, Iowa, there were two vacancies in the office of Justice of Peace for Etna Township, Hardin County, Iowa.

"Two candidates were duly nominated for the two offices of Justice of Peace. Phillis Glaze was nominated as a Republican Candidate for one of the offices and Frank Glaze was nominated as a Democratic Candidate for one of the offices.

"Upon receiving the nominations, the Hardin County Auditor, pursuant to Section 49.35 of the Code arranged the ballot for the general election. In arranging the ballot, Frank Glaze ran unapposed for one office of Justice of Peace as a Democratic Candidate, and Phillis Glaze ran unapposed for one office of Justice of Peace as a Republican Candidate.

"At the general election Phillis Glaze received 237 votes as the Republican Candidate unopposed for one office and Frank Glaze received 164 votes as the Democratic Candidate for the second office unopposed.

"At the general election a write-in campaign was conducted by Steve Schachterle. Mr. Schachterle received 88 write-in votes in the column placing him in opposition to Frank Glaze for one Justice of Peace office and Mr. Schachterle received 81 votes in the column placing him in opposition to Phillis Glaze for the second Justice of Peace office.

"The question presented here is whether or not the matter resolves itself into a three-way race for the two separate and distinct offices? May Mr. Schachterle's votes be added together giving him a total of 169 votes, which in a three-way race would declare him a winner over Frank Glaze who only received 164 votes? If this be the case Phillis Glaze would be elected to one separate and distinct office of Justice of Peace for Etna Township and Mr. Schachterle would be elected to one separate and distinct office of Justice of Peace.

"For your consideration I have enclosed a copy of the ballot showing the positioning of the names and the votes received in the respective columns for each candidate.

"Section 49.99, Code of Iowa, 1966, 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.'

"In the case of Voorhees v. Arnold, 108 Iowa 77, the court at page 84 states, 'it is proper to state here the law does not recognize the writing of a name on a ballot except by inserting it in the ballot in the proper place.' This decision was rendered in April, 1899, by the Iowa Supreme Court.

"Based upon Section 49.99 and the case of Voorhees v. Arnold, I ruled that there were two separate and distinct offices. That the matter must be treated in approximately the same manner as if the County Auditor and the County Treasurer were running for election, and a write-in campaign was conducted by an individual and he received votes for the County Auditor and County Treasurer. Obviously the votes could not be combined to produce him as the winner of either of the offices of Auditor or Treasurer unless he received the requisite vote to win the office in each race. The total vote could not be combined to produce him as a winner.

"The Hardin County Auditor does not agree with my opinion and in telephone conference with the Secretary of State, the Secretary of State cited Attorney General's Opinion 1924 at page 168 as authority for the proposition that the votes of Steve Schachterle should be combined, thereby making him the successful candidate for one office.

"An opinion of very similar nature is Attorney General's Opinion 1920 at page 463.

"It is my opinion that neither of these Attorney General's Opinions are applicable as all of the candidates were running for the same office. The obvious distinction here is that they were two separate and distinct offices.

"Would you please give the matter your immediate consideration as certificates of election are being withheld pending opinion from your office."

Attached to your letter was a copy of the ballot in question. Under the caption "For Justice of Peace (Vote for Two)" are two columns. In the right hand column opposite the Republican Party designation is a box and beneath it the words "Phyllis Glaze." In the left hand column opposite the Democratic Party designation is a box and the name "Frank Glaze." Opposite the designation "Write In" in both columns is a box and no name but space for a write-in candidate to be designated.

In our opinion the Hardin County Auditor and the Secretary of State

are correct, the earlier opinions of the attorney general referred to by you control and the votes cast for Steve Schachterle in both columns should be combined. As in the case of those opinions the candidates in the instant situation are both running for the same office, i.e., justice of the peace. The fact that there are two justices of the peace to be elected does not make any difference.

A different situation which could be presented is illustrated by Columns 14 and 15 on the sample ballot you sent. There under the designation "For Member Board of Supervisors" there are two columns, one captioned "4-yr. Term 1971-1974 (Vote for One)" and the other designated "Unexpired Term 1969-1972 (Vote for One)." There write-in votes in both columns could not be combined for while the office is the same the terms are different.

Suppose for example that there were ten party candidates for justice of the peace and as a consequence ten columns were provided on the ballot. Under those circumstances it would be practically impossible for any write-in candidate to be elected under your interpretation unless the supporters of a particular write-in candidate all got together before the election and decided which of the ten columns they were going to use for their write-in votes.

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