STATE OFFICERS AND DEPARTMENTS: State Records Commission: Code Editor: §§ 14.6, 14.13, 304.3, 304.17. Any agency which is granted an exemption from the Records Management Act pursuant to § 304.17 is not subject to any of the provisions of the Act. The exemption contained in § 304.17 is conferred on the entire Department of Transportation, and not simply on the highway division of the Department of Transportation. (Fortney to Synhorst, Secretary of State 1/30/80) #80-1-20(L)

January 30, 1980

Honorable Melvin D. Synhorst
Secretary of State
State Capitol
L O C A L

Dear Mr. Synhorst:

You have requested an opinion of the Attorney General regarding exemptions from the Records Management Act, ch. 304, The Code 1979. You have specifically raised three issues, to wit:

1. Does the authority of the State Records Commission to review and approve proposed records storage systems and installations and/or micrographics equipment extend to the "exempt" agencies?

2. If the highway division of the Department of Transportation is "exempt", does this mean that all other divisions of the Department of Transportation are "not exempt", i.e., that they are directly accountable to the State Records Commission and the provisions of ch. 304?

3. What was the intent of the Legislature in exempting the highway division; is there a legal precedent for exempting the one division, and not the remainder of the Department?

It is our opinion that any agency which is granted an exemption from the Records Management Act pursuant to § 304.17 is not subject to any of the provisions of the Act. It is further our opinion that the exemption contained in § 304.17 is conferred on the entire Department of Transportation, and not simply on the

highway division of the Department of Transportation.

Your first question will be answered after addressing the second and third.

I.

The Records Management Act was adopted in 1974. Acts of the 65th G.A., 1974 Session, ch. 1176. The Act was designed to develop a uniform system for the preservation and maintenance of state records by the various units of state government. The Act created the State Records Commission charged with the administration of the Act. § 304.3, The Code 1979. Section 17 of the Act contains an exemption provision which removes certain state agencies from the jurisdiction of the Records Management Commission. As originally adopted, § 304.17 reads as follows:

> The state highway commission and the agencies and institutions under the control of the state board of regents shall be exempt from the records management manual and the provisions of this chapter. However, the state highway commission and the state board of regents shall adopt rules for their employees, agencies, and institutions which shall be consistent with the objectives of this chapter. The rules shall be approved by the state records commission and shall be subject to the provisions of chapter 17A.

Acts of the 65th G.A., 1974 Session, ch. 1176, § 17.

Also in 1974, the 65th General Assembly adopted legislation creating the state Department of Transportation. Acts of the 65th G.A., ch. 1180. The Department of Transportation was a consolidated agency which resulted in certain duties being transferred to the new department which had previously been performed by the State Highway Commission, the Aeronautics Commission, the Reciprocity Board, the State Commerce Commission, and the Department of Public Safety. The Act creating the Department of Transportation included a provision correcting various sections of the existing Code to recognize the existence of the newly created agency. (See Acts of the 65th G.A., 1974 Session, ch. 1180, § 59). This provision changed numerous references to the "highway commission", the "state highway commission", and the "Iowa state highway commission" to read the "state department of transportation". This correcting provision did not, of course, make any reference to the chapter of the Code dealing with the Records Management Act, as this Act was being considered for initial passage by the very legislative session which created the Department of Transportation.

In 1975, the Legislature dealt with all references to the Highway Commission which had not been addressed by Acts of the 65th G.A., 1974 Session, ch. 1180, § 59. Acts of the 66th G.A., 1975 Session, ch. 67, § 69 were adopted and provided: "The code editor is authorized to strike all references in the Code 1979 to 'highway commission' and to insert in lieu thereof the words 'state department of transportation.'"

Following the passage of the Acts of the 66th G.A, 1975 Session, ch. 67, § 69, the Code Editor did in fact alter the language appearing in § 304.17. However, he did not follow the express instructions of the 1975 amending language. Rather than changing the exemption provision of the Records Management Act such that the exemption which once was conferred on the Highway Commission would now be conferred on the Department of Transportation, he instead changed the exemption language so that it was only applicable to the highway division of the Department of Transportation.

The Code Editor's duties are set forth in § 14.6, The Code 1979. None of the assigned duties can be construed to authorize the action taken with regard to § 304.17. While it is to be recognized that strict compliance with the terms of the 1975 amending language would result in an expansion of the scope of § 304.17 in that the Department of Transportation encompasses governmental functions far beyond that of the previous Highway Commission, the decision to expand or constrict the applicability of a statute is a legislative function, not a function assigned to the Code Editor.

Statutes must be interpreted according to the intent of the Legislature. Jahnke v. Incorporated City of Des Moines, 191 N.W.2d 780 (Iowa 1971); State v. Guardsmark, Inc., 190 N.W.2d 397 (Iowa 1971). Likewise, a statute should be edited to reflect the intent of the Legislature. (In this regard, see § 14.13, The Code 1979). Had the Legislature intended that certain provisions of the Code be changed to read "highway division of the department of transportation", the Legislature could quite easily have employed just such language. The Legislature declined to do so.

The administrative rules adopted by the Department of Transportation are instructive in resolving this issue. Section 304.17, The Code 1979 provides that agencies exempt from the provisions of the Records Management Act are to adopt administrative rules which are consistent with the objectives of ch. 304 and that such rules are to be adopted pursuant to ch. 17A. As a result, the Department of Transportation has adopted 820 I.A.C. §[03,E] 1.1 which reads:

> The "Records Management Manual" of the Iowa state highway commission is hereby adopted as the policy and standards of the department of transportation concerning records and documents management, classification, filing and retention.

While the interpretation of any statutory provision is a question of law that is within the province of a court to decide, courts do give weight and deference to any agency's construction of a statute so long as the agency does not purport to make law or to change the legal meaning of a law. Burlington Community School District v. Public Employment Relations Board, 268 N.W.2d 517 (1978). Here the rules adopted by the Department of Transportation evidence a belief on the part of the department that the entire department, and not just the highway division, is exempt from the provisions of the Records Management Act. This construction is consistent with the language employed by the Legislature as found in the Acts of the 66th G.A., 1975 Session, ch. 67, § 69.

It is therefore our opinion that the exemption contained in § 304.17 is conferred on the entire Department of Transportation, and not simply on the highway division of the Department of Transportation.

II.

You inquired as to what was the intent of the Legislature in exempting the highway division. You also inquired whether there is a legal precedent for exempting one division and not the remainder of a particular department. Due to the disposition made of the preceeding question in Division I, there is no need to respond to these specific questions.

As it appears in the Code 1979, § 304.17 reads as follows:

> The highway division of the department of transportation and the agencies and insitutions under the control of the state board of regents shall be exempt from the records management manual and the provisions of this chapter. However the state highway division and the state board of regents shall adopt rules for their employees, agencies, and institutions which shall be consistent with the objectives of this chapter. The rules shall be approved by the state records commission and shall be subject to the provisions of chapter 17A. [Emphasis supplied].

The exemption language is explicit. It has a scope going to the totality of the chapter. It is not drawn in such a fashion to only confer an exemption from certain portions of the chapter or certain sections. The Legislature could not have been more explicit than to state that specified agencies "shall be exempt from . . . the provisions of this chapter."

A statute which is clear and unambiguous on its face need not and cannot be interpreted by a court. Only those statutes which are of doubtful meaning are subject to the process of statutory interpretation. Cowman v. Hansen, 92 N.W.2d 682 (Iowa 1958); Mallory v. Jurgena, 92 N.W.2d 387 (Iowa 1958); Dingman v. City of Council Bluffs, 90 N.W.2d 742 (Iowa 1958). Section 304.17 is a statute which can rightly be classified as one which is clear and unambiguous on its face, at least as to the breadth of the exemption provision itself. The fact that there may be dispute as to which divisions of state government are entitled to claim the exemption does not muddy the waters of the exemption itself. Consequently, any agency of state government which is granted an exemption from the Records Management Act pursuant to § 304.17 is exempt from all sections of the Act and from the jurisdiction of the commission created pursuant to § 304.3.

In summary, it is our opinion that the exemption contained in § 304.17 is conferred on the entire Department of Transportation, and not simply on the highway division of the Department of Transportation. Any agency which is granted an exemption from the Records Management Act pursuant to § 304.17 is not subject to any of the provisions of the Act.

Very truly yours,

David Fortney

DAVID M. FORTNEY
First Assistant Attorney General

DMF:sh

TAXATION: Property Acquisitions By Tax Exempt Political Subdivisions. §§427.1(2) and 441.46, The Code 1979, and 1979 Session, 68th G.A., ch. 68, §6. Section 6 of ch. 68 (Senate File 159) imposing the property tax upon property acquisitions by political subdivisions, whether those acquisitions be by voluntary transfer or condemnation, is effective for acquisitions after July 1, 1979, but is not effective for such acquisitions made in the 1978-1979 fiscal tax year. (Griger to Kenyon, Union County Attorney 1/30/80) #80-1-19(L)

January 30, 1980

Mr. Arnold O. Kenyon III
Union County Attorney
Creston, Iowa 50801

Dear Mr. Kenyon:

You have requested an opinion of the Attorney General concerning 1979 Session, 68th G.A., ch. 68, §6. Specifically, in the situation you pose, the City of Creston, pursuant to chapter 472, The Code 1979, did acquire certain land for watershed purposes in condemnation proceedings prior to July 1, 1979. The Union County Treasurer has taken the position that since the land was not tax exempt on July 1, 1978, the acquisition of the land by the City during the 1978-1979 fiscal tax year is subject to property taxes payable in 1979-1980 because of the provisions of §6 of chapter 68 (hereinafter referred to as Senate File 159). You presented three questions in your written request for an Attorney General's opinion, but we feel that your questions raise only one issue, to wit: Do the provisions of §6 of Senate File 159 apply to property acquisitions by political subdivisions, whether by voluntary transfer or condemnation, prior to July 1, 1979, the effective date of this new statute? For reasons stated in this opinion, the answer is no.

Section 6 of Senate File 159, effective July 1, 1979, provides as follows:

> Sec. 6. Chapter four hundred twenty-seven (427), Code 1979, is amended by adding the following new sections:
>
> NEW SECTION. Taxable property on the tax rolls on July first of each year is subject to all property taxes levied and payable during the fiscal year. If property which may be exempt from taxation is acquired after July first by a person or the state or any of its

> political subdivisions and the person or the state or any of its political subdivisions files for a tax exemption for the property, the exemption shall be denied for that fiscal year and the person or the state or any of its political subdivisions shall pay the property taxes levied against the property for that fiscal year. However, the seller and the purchaser may designate, by written agreement, the party responsible for payment of the property taxes due.
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> NEW SECTION. All credits for and exemptions from property taxes for which an application is required shall be granted on the basis of eligibility in the fiscal year in which the application is filed, unless otherwise provided by law. If the property which has received a credit or exemption becomes ineligible for the credit or exemption during the fiscal year for which it was granted, the property shall be subject to the taxes in a prorated amount for that part of the fiscal year for which the property was ineligible for the credit or exemption, unless otherwise provided by law.

The explanation set forth in Senate File 159, as introduced in the Senate, provided with reference to §6: "Section 6 provides that taxable property remains taxable for a full fiscal year even if purchased by a political subdivision. It also provides that taxes for exempt property that becomes taxable shall be prorated on that basis." In the event that construction of §6 of Senate File 159 is necessary, this explanation may be considered. Good Development Co. v. Horner, 260 N.W.2d 524 (Iowa 1977)

A consideration of the question presented requires an understanding of the basic Iowa property tax process for the 1978-1979 fiscal year. This fiscal year constituted a tax year commencing July 1, 1978 and ending June 30, 1979. See §441.46, The Code 1979, and Op. Att'y Gen. #77-1-12. This property tax process began with the property assessments by the assessors and review thereof by the boards of review. See chapters 428 and 441, The Code 1979. The assessments fixed the value of property as of January 1, 1978, the beginning of an assessment year equivalent to a calendar year. See §441.46. However, the values so fixed were for the fiscal tax year commencing on July 1, 1978 and ending June 30, 1979. See §441.46. After the values were established by the assessors and boards of review, the assessors submitted abstracts of assessment to the Department of Revenue disclosing aggregate values for each class of taxable property. See §441.45, The Code 1979. By November 1, 1978, the Director of Revenue determined the assessed values of residential and agricultural realty based upon the use of a formula applied to the values previously fixed by assessors and boards of review.

See §441.21, The Code 1979. Thereafter, at their March, 1979 sessions, the boards of supervisors made the property tax levies i.e. fixed the tax rates to be applied to taxable property within their respective counties. See §444.9, The Code 1979. After the tax levies were made, county auditors prepared the tax lists, denoting taxable property within their counties, the owners thereof, the valuation, and the amount of tax due for each installment. See §443.2, The Code 1979. On or before June 30, 1979, the county auditors were directed to deliver the tax lists to their respective county treasurers. See §443.4, The Code 1979. The taxes levied during the 1978-1979 fiscal year are payable in the next fiscal year (1979-1980) to these county treasurers and may be paid initially in full or in two installments. See §445.36, The Code 1979.

Under varying circumstances, the legislature has determined that property would not be subject to taxation for the 1978-1979 fiscal year, in whole or in part. In some instances, the property tax exemption must be applied for with the appropriate taxing authorities. See e.g., §427.1(23) and (24), The Code 1979 (charitable and religious property), §427.6, The Code 1979 (military service tax credit), §427A.4, The Code 1979 (personal property tax credit). In other instances, no claim for tax exemption need be applied for as a prerequisite thereto. Thus, §427.1(2), The Code 1979, provides for a property tax exemption of:

> The property of a county, township, city, school corporation, levee district, drainage district or military company of the state of Iowa, when devoted to public use and not held for pecuniary profit except property of a municipally owned electric utility held under joint ownership which shall be subject to assessment and taxation under provisions of chapters 428 and 437.

Section 441.46 provides that in the case of property for which no application for exemption is required to be filed, "the status of the property as exempt or taxable on the levy date of the fiscal year which commences during the assessment year determines its eligibility for exemption or credit." See also Op. Att'y Gen. #78-3-17.

From the aforesaid discussion, it is clear that Iowa property tax law contemplated that all events necessary to establish the status of property as taxable or exempt would be generally completed prior to the expiration of the 1978-1979 fiscal tax year. Indeed, the total taxing process to be completed during the 1978-1979 fiscal tax year was intended, by existing statutory authority, to establish the taxable property

and the tax attributable to that taxable property.[1]

Section 6 of Senate File 159 was enacted so that property acquired by political subdivisions during the fiscal year would remain taxable. See explanation for §6 of Senate File 159. Why was it necessary to make such a statutory provision? The answer would appear to be contained in a series of Attorney General's opinions in which it was held that, under the merger doctrine, the acquisition of property by a tax exempt governmental entity operated to extinguish any tax liens on the acquired property. 1964 Op. Att'y Gen. 426; 1966 Op. Att'y Gen. 409; 1970 Op. Att'y Gen. 766; 1972 Op. Att'y Gen. 36. Thus, in 1966 Op. Att'y Gen. 409, 411, it was opined:

> Although there is not direct authority in Iowa on this point, it is our view that the acquisition of the title to land by a state or other governmental body acts to extinguish prior tax liens against the property. We believe this view to be correctly expressed in State ex. rel. Peterson v. Maricopa County, 38 Ariz. 347, 300 P. 175 (1931), wherein the Court held that any tax lien existing upon property acquired by the state merges with the legal title when acquired. Also see Hoover v. Minidoka County, 50 Idaho 419, 298 P. 366 (1931), where the Idaho Supreme Court held that when the state obtained complete unconditional title to land, the title was freed from any charge of taxes, either present or past, and that all such liens on the tax records become null and subject to cancellation.

In Iowa, property taxes become a lien upon the taxable property at the time when the board of supervisors makes the tax levy at its March session pursuant to §444.9. Helvering v. Johnson County Realty Co., 128 F.2d 716 (8th Cir. 1942); United States v. 3 Parcels of Land in Woodbury Co., Iowa, 198 F.Supp. 529 (N.D. Iowa 1961); Gates v. Wirth, 181 Iowa 19, 163 N.W. 215 (1917).

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[1] For one reason or another, the board of supervisors levies, or preparation of the tax lists, as examples, may not be completed by the statutory dates, but the fact that such events occur has no bearing upon the statutory scheme as contemplated by the legislature nor upon the results reached in this opinion.

Therefore, it is clear that prior to enactment of §6 of Senate File 159, acquisition of property by a tax exempt city in the 1978-1979 fiscal tax year operated to extinguish any property tax liens upon such property.

It should be pointed out that the tax exemption provisions for cities in §427.1(2) and the merger doctrine of tax liens relate to different principles. In the event that a city's property is exempt as of the levy date, per §441.46, no tax lien could have attached to it for that tax year. However, the doctrine of merger concerns acquisitions of taxable property by tax exempt political entities (state and political subdivisions) with the result that existing tax liens for past or present tax years are extinguished. Thus, when the City of Creston acquired the property prior to July 1, 1979, any existing tax liens, whether for the 1978-1979 fiscal tax year or prior years, were extinguished.[2] Consequently, on June 30, 1979, one day prior to the effective date of Senate File 159, the property in question acquired by the City of Creston would not have been subject to property tax for the fiscal tax year 1978-1979, taxes payable in 1979-1980. There would have been no tax lien upon such property.

Section 11 of Senate File 159 amends §445.28, The Code 1979, which provided that "Taxes upon real estate shall be a lien thereon against all persons except the state" by adding the following sentence: "However, taxes upon real estate shall be a lien on the real estate against the state and any political subdivision of the state which is liable for payment of property taxes as a purchaser under the provisions of section six (6) of this Act." While this new statutory provision expressly states that the property tax constitutes a lien upon taxable real estate acquired by the state and political subdivisions, it does not expressly instate the tax lien which, as we have demonstrated, was not impressed upon the City of Creston's acquired property

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[2] In the written request for the opinion, the implication was made that the property was acquired by the City of Creston, through condemnation, in March, 1979. The statutory levy date for the 1978-1979 fiscal tax year was also March, 1979, although §444.9 does not name any particular date in March. In the event that the fiscal tax year 1978-1979 levy was actually made by the board of supervisors after the property was acquired by the city, the property would be tax exempt for that fiscal tax year, assuming the criteria in §427.1(2) was present on the levy date. In the event the levy was actually made by the board before the property was acquired by the city, the doctrine of merger would have applied and the tax lien created by such levy would have merged in the city's title, again assuming that the criteria in §427.1(2) would have existed. Under either circumstance, the property would not have been subject to property tax for the fiscal tax year 1978-1979, as Iowa property tax law existed on June 30, 1979.

on June 30, 1979. Section 14 of Senate File 159 provides that if the political subdivision does not pay the property taxes imposed by §6, the board of supervisors shall abate the taxes as provided in certain existing 1979 Iowa Code provisions. No other provisions in Senate File 159 deal directly with the provisions of §6. Therefore, §6 should be analyzed to ascertain the answer to the question presented.

Section 6, on its face, provides for a seemingly impossible situation under Iowa property tax law by stating in the first sentence that "Taxable property on the tax rolls on July first of each year is subject to all property taxes levied and payable during the fiscal year." As previously noted, the 1978-1979 taxes were levied during the 1978-1979 fiscal tax year and are payable in the 1979-1980 fiscal year. By definition, therefore, the taxes cannot be "levied and payable" in the same fiscal year. The explanation for §6 of Senate File 159 appears to pertain to only one fiscal year, and not to events occurring in two fiscal years. Moreover, consideration of the remaining provisions in the first paragraph in §6 denote a concern for consequences for the fiscal year in which the taxes were levied, and not in the year the taxes are payable. Therefore, we are convinced that the first sentence in §6 pertains to the status of the property on July 1 of the fiscal year in which the taxes were levied. In other words, the status of the property on July 1 of the fiscal tax year is deemed controlling. Historically, in Iowa, the status of the property on the levy date in the tax year has been deemed significant under various circumstances. United States v. 3 Parcels of Land in Woodbury Co., Iowa, 198 F.Supp. at 534.[3]

In the event that the position taken by the Union County Treasurer was adopted, §6 of Senate File 159 would be given a retroactive effect to July 1, 1978 to determine the taxable

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[3] An opinion of the Attorney General expressly dealt with the question of condemnations and deemed the levy date to be of controlling significance. In 1970 Op. Att'y Gen. 766, 769, it was stated:

> 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.

status of property for the 1978-1979 fiscal tax year, thereby retroactively subjecting to tax all property acquisitions by political subdivisions after July 1, 1978. Such a result could not be avoided because on June 30, 1979, as previously noted herein, the property acquired by the City of Creston was tax exempt and had no tax liens thereon. Statutes are generally considered to be prospective in operation unless expressly made retroactive. State ex. rel. Shaver v. Iowa Telephone Co., 175 Iowa 607, 154 N.W. 678 (1916); §4.5, The Code 1979. There is no clear indication in Senate File 159 that the legislature intended that §6 apply to property acquisitions by political subdivisions between July 2, 1978 and June 30, 1979. A prospective operation of §6 would make this statute effective to preclude the doctrine of merger for all fiscal tax years commencing on July 1, 1979. Thus, §6 would prospectively operate to retain in a taxable status all taxable property acquired by political subdivisions after July 1, 1979, but would not affect such property acquisitions prior thereto. Such an approach is also consistent with the Iowa property tax process whereby the establishment of the tax and tax lien are completed during the fiscal tax year. By contrast, the position of the Union County Treasurer extends the taxing process into the tax payment fiscal year in order to establish the taxable status of the property for 1978-1979.

Section 6 of Senate File 159, in essence, constitutes a taxing statute imposing property tax upon taxable property acquired by political subdivisions. To the extent that this statute is ambiguous, the rule of strict construction of tax imposition statutes is applicable. In Scott County Conservation Bd. v. Briggs, 229 N.W.2d 126 (Iowa 1975), the Court stated at 229 N.W.2d 127:

> We think the decision is controlled by the general principle that a taxing statute is construed liberally in favor of the taxpayer and strictly against the taxing body. As this court stated in Dodgen Industries, Inc. v. Iowa State Tax Commission, 160 N.W.2d 289, 296 (Iowa):
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> "Taxing statutes are strictly construed against the taxing body--liberally in favor of the taxpayer. It must appear from the language of the statute the tax assessed against taxpayer was clearly intended. (Italics added by the Court.)"

In Associated Genl. Contrs. v. State Tax Commission, 255 Iowa 673, 123 N.W.2d 922 (1963), the Court stated at 255 Iowa 680: "Section 422.42(11) is ambiguous, it may reasonably be construed both favorably and unfavorably to the intervenor. It is entitled to the more favorable construction. It follows the assessment against it is null and void." The Court also noted that "A taxpayer is entitled to more particularity in a taxing statute than we have here." 255 Iowa at 679.

Section 6 of Senate File 159 is not a model of clarity. It does not clearly make its provisions applicable to impose property tax upon property acquisitions by political subdivisions prior to the effective date of this new taxing statute. In light of the operation of the taxing process in Iowa utilized for the 1978-1979 fiscal tax year and the completion of that process prior to the effective date of Senate File 159, instating a property tax lien upon the City of Creston's property for that fiscal tax year, when there was no such lien on June 30, 1979, should be clearly provided for in this statute. But, the statute is ambiguous and is not clearly susceptible of an interpretation retroactively doing away with the merger doctrine for the 1978-1979 fiscal tax year. The statute is, however, readily susceptible to application to taxable property acquisitions after July 1, 1979 by political subdivisions and imposition of the tax for fiscal tax years commencing on and after July 1, 1979.

Therefore, it is the opinion of this office that §6 of Senate File 159 imposing the property tax upon property acquisitions by political subdivisions, whether those acquisitions be by voluntary transfer or condemnation, is effective for acquisitions after July 1, 1979, but is not effective for such acquisitions made in the 1978-1979 fiscal tax year.

Very truly yours,

Mark E. Schantz

Mark E. Schantz
Solicitor General

Harry M. Griger

Harry M. Griger
Special Assistant Attorney General

HMG:pjt

CIVIL RIGHTS: LOCAL HEARING OFFICERS. Local civil rights commissions must employ hearing officers separate from their investigators and adjudicators of discrimination at the cause determination level of the processing of a civil rights complaint. §§ 601A.15(3)(a-c); 601A.19, The Code 1979. (Herring to Carr, State Senator, 1/30/80) #80-1-18(L)

January 30, 1980

Mr. Robert M. Carr
State Senator
2030 Deborah Drive
Dubuque, Iowa 52001

Dear Senator Carr:

You have requested an opinion from this office as to the interpretation of §601A.15(3)(a-c), The Code 1979, with particular emphasis upon the necessity for the use of a hearing officer at the local commission level. In our opinion, an Iowa court would require local civil rights commissions to utilize the services of a hearing officer in the pre-hearing phase of the processing of a complaint. This hearing officer must not be one who fulfills either the investigatory or the final adjudicatory functions of the local commission. In order to fully address your inquiry, it will be necessary to examine this section and the 1978 amendments to Chapter 601A in a detailed fashion.

I. Legislative Intent

In pertinent part, the pre-hearing procedures of the Iowa Civil Rights Commission are now detailed as follows:

> a. After the filing of a verified complaint, a true copy shall be served within twenty days by certified mail on the person against whom the complaint is filed. An authorized member of the commission staff shall make a prompt investigation and shall issue a recommendation to a hearing officer under the jurisdiction of the commission, who shall then issue a determination of probable cause or no probable cause.
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> b. For purposes of this chapter, a hearing officer issuing a determination of probable cause or no probable cause under this section shall be exempt from the provisions of section 17A.17.

> c. If the hearing officer concurs with the investigating official that probable cause exists regarding the allegations of the complaint, the staff of the commission shall promptly endeavor to eliminate the discriminatory or unfair practice by conference, conciliation, and persuasion. If the hearing officer finds that no probable cause exists, the hearing officer shall issue a final order dismissing the complaint and shall promptly mail a copy to the complainant and to the respondent by certified mail. A finding of probable cause shall not be introduced into evidence in an action brought under section 601A.16.

§601A.15(3)(a-c), The Code (1979).

In The Code, 1977, the provision which was later amended and converted into the above section was §601A.14(3). With only minor revisions, this section was identical to that originally enacted in 1965; until its complete revision in 1978, the pre-hearing procedure was:

> After the filing of a verified complaint, a true copy thereof shall be promptly served by registered mail to the person against whom the complaint is filed. Then a commissioner or a duly authorized member of the commission's staff shall make a prompt investigation thereof and if such investigating official shall determine that probable cause exists for crediting the allegations of the complainant, the investigating official shall promptly endeavor to eliminate such discriminatory or unfair practice by conference, conciliation, and persuasion.

§601A.14(3), The Code (1977).

Prior to its amendment, §601A.14, The Code 1977, governed proceedings before the Commission ranging from the initiation of a complaint through its conciliation and final determination at public hearing. A complainant would file his or her complaint with the Commission, which would then obtain service

upon the respondent. A Commissioner or staff member was then required to become an "investigating official", make an investigation of the complaint, determine probable cause and proceed to conciliation. §607A.14(3), The Code 1977. If circumstances warranted further procedures upon the failure of conciliation, notice would be given and a public hearing held on the allegations of the complaint. §601A.14(5 & 6), The Code 1977.

When creating this procedural mechanism, the Legislature mandated a separation of functions. The "investigating official" could not participate in either the eventual public hearing except as a witness, or in the deliberations of the Iowa Civil Rights Commission regarding the case. §601A.14(7), The Code 1977. Commission rules interpreting this provision called for the assignment of an investigating commissioner who would make a finding or probable cause or no probable cause based upon a written report of the designated investigating staff member. 240 I.A.C. §3.5(1)(a, c, d)(1975). Of course, administrative interpretation of legislative intent as exemplified in statutes is to be given weight. Iowa Nat. Indus. Loan Co. v. Iowa State Dept. of Rev., 224 N.W.2d 437, 440 (Iowa 1974). The apparent legislative intent in the creation of the original procedure of the Commission was to impose an unbiased check upon the cause determination of the investigator. A separation of functions was created by the placing of investigatory responsibility in a commission staff member and the semi-adjudicatory function of determining probable or no probable cause in a separate person with oversight powers.

During the 1978 session of the 67th General Assembly, House File 2390 was introduced in order to effect numerous changes in both the procedural and substantive provisions of the Iowa Civil Rights Act, Chapter 601A of The Code 1977. Significant among the procedural changes was the revision of the pre-hearing stage of the processing of a complaint. The service provisions of Chapter 601A were changed to permit service by the more relaxed method of certified mail, while requiring completed service within twenty days. §601A.15 (3)(a), The Code 1979. The sole investigatory responsibility was reposed in an "authorized member of the commission staff", who was required to make a "prompt investigation." Id.

As originally written and eventually enacted, with minor revisions, this bill provided for the investigating official to make a preliminary determination of probable cause or no probable cause which would then be immediately reported to a "hearing officer under the jurisdiction of the Commission" for a final determination. §601A.15(3)(a), The Code 1979. A probable cause finding would result in the pursuit of conciliation, with a no probable cause finding resulting in dismissal of the complaint. §601A.15(3)(c), The Code 1979. As a result of this legislation, the four-step process previously used was altered to change the personnel involved in the cause determination stage. As this determination is a significant step in the procedure utilized for the disposition of civil rights complaints, it is crucial to determine how closely a local civil rights agency must track the statute in this instance.

The apparent legislative intent in the enactment of House File 2390 was to bring §601A.14 in line with the Iowa Administrative Procedure Act and to afford persons before the Commission, procedural consistency with those under the jurisdiction of other state agencies. One indication of this intent is the utilization in §601A.15(3) of the title of "hearing officer", a term which is borrowed directly from §17A.11, The Code 1977, as a label for the appropriate presiding officer at an administrative hearing. Most notably, §601A.15(7) now specifies that the hearing upon a civil rights complaint "shall be conducted in accordance with the provisions of Chapter 17A for contested cases." It is true that the cause determination stage of a civil rights complaint is not a "contested case" and not subject to the appropriate strictures of the Iowa Administrative Procedure Act. Estabrook v. Iowa Civil Rights Commission, 283 N.W.2d 306, 310-11 (Iowa 1979). Nonetheless,the legislative history of the 1978 amendments to Chapter 601A suggests a continuation of the separation of functions concept in the new law.

These amendments honed the concept of separation of functions, clarifying the role of the adjudicator and placing him or her "under the jurisdiction of the Commission" with a primary responsibility for reviewing initial determinations of probable cause. §601A.15(3)(a-c), The Code 1979. The concept of "jurisdiction" is one of power and the authority to act in a particular sphere. Heck v. George A. Hormel Co., 260 N.W.2d 421, 422 (Iowa 1977); 50 C.J.S. Jurisdiction, 1090 (1947).

The sole investigatory responsibility is placed in a member of the Commission's staff, whose recommendation is acted upon by the hearing officer. Id. This methodology is virtually identical to that originally in the bill. House File 2390, §11. A House amendment to use only a "reviewing official" appointed by the Commission and having the qualifications of a hearing officer was rejected by the Senate. The Senate amended the bill and provided for the use of a hearing officer "under the jurisdiction of the Commission" to handle the pre-hearing stage of the processing of a complaint. 1978 S.J. 1220. Therefore, it is clear that the Legislature found the separation of functions within the personnel of the Commission workable and desirable. This procedure is designed to provide some measure of protection for respondents from unwarranted complaints. The more difficult question raised by your request is whether local civil rights agencies are required to employ this new procedure as well.

II. Local Implementation

As enacted and throughout its history, the Iowa Civil Rights Act's focus has been upon the eradication of discrimination state-wide. The Commission created to deal with the problem is the "Iowa State Civil Rights Commission" and it is composed of seven members appointed to provide "geographical area representation" from throughout the state. §§601A.2(8) and .3, The Code 1979. However, the desirability of some local enforcement of this state-wide policy is recognized, for §601A.3(9), permits cooperation with "other agencies and organizations" and, most significantly, the Act permits local implementation of the policy:

> Local laws may implement this chapter. Nothing contained in any provision of this chapter shall be construed as indicating an intent on the part of the general assembly to occupy the field in which this chapter operates to the exclusion of local laws not inconsistent with this chapter that deal with the same subject matter.
>
> Nothing in this chapter shall be construed as indicating an intent to prohibit an agency of local government having as its purpose the investigation and resolution of violations of this chapter from developing procedures and remedies necessary to insure the

protection of rights secured by the Iowa civil rights Act. An agency or local government and the Iowa civil rights commission shall co-operate in the sharing of data and research, and co-ordinating investigations and conciliations in order to eliminate needless duplication.

The commission may designate an agency of local government as a referral agency. A local agency shall not be designated a referral agency unless the ordinance creating it provides the same rights and remedies as are provided in this chapter. The commission shall establish by rules the procedures for designating a referral agency and the qualifications to be met by a referral agency.

A complainant who files a complaint with a referral agency having jurisdiction shall be prohibited from filing a complaint with the commission alleging violations based upon the same acts or practices cited in the original complaint; and a complainant who files a complaint with the commission shall be prohibited from filing a complaint with the referral agency alleging violations based upon the same acts or practices cited in the original complaint. However, the commission in its discretion may refer a complaint filed with the commission to a referral agency having jurisdiction over the parties for investigation and resolution; and a referral agency in its discretion may refer a complaint filed with that agency to the commission for investigation and resolution. The commission may promulgate rules establishing the procedures for referral of complaints. A referral agency may refuse to accept a case referral to it by the commission if the referral agency is unable to effect proper administration of the complaint. It shall be the burden of the referral agency to demonstrate that it is unable to properly administer that complaint.

A final decision by a referral agency shall be subject to judicial review as provided in section 601A.17 in the same manner and to the same extent as a final decision of the commission.

> The referral of a complaint by the commission to a referral agency or by a referral agency to the commission shall not affect the right of a complainant to commence an action in the district court under section 601A.16.

§601A.19, The Code (1979)

This provision is a dramatic expansion of the plain language present in the local implementation section since the passage of the Act in 1976:

> Nothing contained in any provision of this chapter shall be construed as indicating an intent on the part of the General Assembly to occupy the field in which this chapter operates to the exclusion of local laws not inconsistent with this chapter that deal with the same subject matter.

§601A.17, The Code (1977).

In two instances prior to the 1978 amendment, the Iowa Supreme Court specifically reviewed the manner in which local implementation of the state-wide civil rights policy was to be accomplished. In Cedar Rapids Human Rights Commission v. Cedar Rapids Community School District, 222 N.W. 2d 391 (Iowa 1971), the Iowa Supreme Court held that a local human rights commission may be established by a municipality, so long as the ordinance is not inconsistent with state law. The Court's decision was based upon the Home Rule Amendment and §§ 368.2 and 601A.12, The Code 1978 [§601A.19, The Code 1979]. The court found that a local commission could exercise power in the civil rights area, but the procedure established for the exercise of that power must furnish adequate safeguards to protect those affected by administrative agency action from arbitrary and capricious conduct by agency officials. Id. at 400. Thus, although the Court found it was not essential to constitutional due process that the local ordinance follow the specific procedural mechanism established by Chapter 601A, the legislative intent was clear "that ordinances adopted for the purpose of implementing Chapter 601A must not be inconsistent." Id. at 402. Because the procedural mechanism of the city ordinance failed to provide for judicial review of the local commission's findings and therefore did not track the state statute, it was found to be invalid. Id.

This precedent was adhered to in City of Iowa City v. Iowa Civil Rights Commission, 264 N.W. 2d 771 (Iowa 1978), in which Chapter 601A was recognized as establishing "a complete and comprehensive legislative plan for processing complaints concerning discriminatory practices." Id. at 772. Finding Chapter 601A to be "detailed, complete and all-embracing" and noting the requirement that local laws not be inconsistent with the Chapter, the Iowa Supreme Court held "this to mean any municipal plan must be faithful to the legislative scheme adopted by the General Assembly in Chapter 601A." Id. at 773. The Court found that because the local procedure for the processing of a complaint deviated from the procedural outline contained within Chapter 601A, even though it sought to improve upon that scheme, it "effectively frustrates the legislative purpose of Chapter 601A" and could not stand. Id. Because Chapter 601A establishes a procedural mechanism for addressing the problem of discrimination, no locality can improve upon that mechanism or deviate from it. Id.

The Cedar Rapids and City of Iowa City cases stand for the proposition that local commissions must operate under procedures in substantial procedural conformity with those set forth in the state statute. Under the interpretations allowed by these cases, there is little doubt that separate hearing officers are required at the local commission level.

It is important to note the timing of the amendments to the Iowa Civil Rights Act and the issuance of the decisions in Cedar Rapids and the City of Iowa City. The Cedar Rapids case was decided in 1974 pursuant to the simplified version of the local implementation section of the Act. §601A.12, The Code 1973. In addition, this decision was rendered subsequent to the enactment but prior to the effective date of the Iowa Administrative Procedure Act. In April of 1978, while the Legislature was in session, but prior to the passage of House File 2390, the Iowa Supreme Court decided the case of City of Iowa City. It found the local ordinance's inconsistency with the state statute "even more glaring" than that in Cedar Rapids. City of Iowa City, 264 N.W. 2d at 773. The primary problem with the Iowa City ordinance in the court's view was that "[i]t seeks to improve on the legislative scheme by providing for judicial, rather than administrative, determination of discrimination . . .[and] effectively frustrates the legislative purpose

of Chapter 601A." Id. The timing of the actions of the Legislature in 1978 suggests the intent to modify the dicta in City of Iowa City proscribing "improved procedures."

The five paragraphs added to the local implementation section of the Act were not contained in either the original bill or the version passed by the House. On May 3, 1978, Senator Kelly introduced an amendment to add these five unnumbered paragraphs. 1978 S.J. 1221. No other changes were made in this provision and the House concurred in this amendment on May 10, 1978. 1978 H.J. 2401. The bulk of these paragraphs is addressed to the manner in which local agencies designated as referral agencies are created and delegated the duty of providing the same rights and remedies as provided in Chapter 601A. 1977 Session, 67th G.A., Ch. 1179, §21, amending §601A.17, The Code 1977. No concurrent jurisdiction by both local and state agencies is permitted; once a party has chosen his or her forum for the filing of a civil rights complaint, it must be processed by that agency unless it is referred. Id.

It is the second paragraphs of the new section which most strongly indicates the legislative intent to modify the prohibition against any local improvement upon statutorily created procedures. This paragraph provides:

> Nothing in this chapter shall be construed as indicating an intent to prohibit an agency of local government having as its purpose the investigation and resolution of violations of this chapter from developing procedures and remedies necessary to insure the protection of rights secured by the Iowa Civil Rights Act. An agency of local government and the Iowa Civil Rights Commission shall cooperate in the sharing of data and research, and coordinating investigations and conciliations in order to eliminate needless duplication. (Emphasis supplied).

§601A.19 The Code 1979

The issue then becomes whether this paragraph was intended to allow complete procedural flexibility for those local agencies which do not choose to become referral agencies. (As previously noted, a local agency which participates in the referral scheme must adopt the "same" procedures as those utilized by the state agency). The language of the amendment permits the development

of "procedures and remedies necessary to ensure the protection of rights secured by the Iowa Civil Rights Act." This language would appear to limit the flexibility accorded local agencies to those situations where the procedural change was necessary to provide more effective protection of the substantive rights guaranteed by Chapter 601A. Because the Legislature has plainly indicated that the separation of functions concept is an appropriate procedure for the protection of respondents, it could not properly be concluded by a local agency that the elimination of this protection was "necessary" to promote the substantive rights guaranteed by Chapter 601A. In other words, local agencies are free to "improve" procedures in the interest of promoting substantive rights so long as the improved procedures are not inconsistent with the protections afforded respondents by the statutory scheme.

Having determined that a hearing officer is necessary at the local level to fulfill the cause determination function, the question remains as to who may be that hearing officer. The bill originally provided that this hearing officer was to be appointed pursuant to §17A.11, The Code 1979, in the same fashion as the contested case hearing officers under the merit system in Chapter 19A. House File 2390, §11. However, later amendments altered this scenario to place the appointment of the "reviewing official" in the hands of the Commission, subject to the imposition of the minimum qualifications of the merit system. 1978 H.F. 1573. Finally, the Senate amendment prevailed and the cause determination function was placed in a "hearing officer under the jurisdiction of the commission" who was exempt from §17A.17, the ex parte communications and separation of functions provision of the Iowa Administrative Procedure Act. 1978 S.J. 1220. This was the procedure enacted as part of the revision of Chapter 601A. §601A.15(3)(a, b), The Code 1979. Of course, §17A.17 pertains only to the hearing officers in the "contested case" phase of an administrative proceeding. §17A.17, The Code 1979; Bonfield, The Definition of Formal Agency Adjudication under the Iowa Administrative Procedure Act, 63 Iowa L. Rev. 283, 287-88 (1977).

The Senate amendment and enactment of this legislation took place long after the decision in City of Iowa City. However, the issue of the procedural requisites of the various stages of the administrative process remained unresolved until the determinative case of Estabrook v. Iowa Civil Rights Commission, 283 N.W.2d 306 (Iowa 1979). This case was not decided until long after the enactment of the 1978 amendments to Chapter 601A.

The exemption of cause determination hearing officers from the requisites of §17A.17, which are not applicable to them in any case, must be taken to signal a legislative attempt to deal with the issue resolved in Estabrook. It was the apparent intent of the Legislature to free the phase of cause determination from the procedural requirements of the Iowa Administrative Procedure Act applicable to contested cases.

Thus, the concept of separation of functions at both the local and state levels remains intact. A cause determination hearing officer must neither participate in the investigations of a complaint nor in its advocacy or adjudication. Whether a local executive director may serve in this capacity depends upon the organizational structure of the local commission and the duties assigned to this official. However, it is apparent that the local commissioners who serve as cause determination hearing officers must thereafter remove themselves from the further processing of the complaint upon which they found probable cause. It might also be possible to engage the services of local attorneys or other qualified personnel upon an ad hoc basis to fulfill this role As long as the concept of separation of functions is maintained, the exact personage filling the hearing officer role is unimportant.

III. Conclusion

Therefore, it is the opinion of this office that the local commissions must employ hearing officers separate from their investigators and adjudicators of discrimination at the cause determination level of the processing of a civil rights complaint.

Respectfully submitted,

Victoria L. Herring
Assistant Attorney General

VLH:blh/ts

STATE OFFICERS AND DEPARTMENTS: Designation of smoking areas. §§ 17A.2(7)(i), 18.10, 98A.2(6), 98A.4, The Code 1979. The provisions of the Iowa Administrative Procedure Act pertaining to rulemaking apply to designation of smoking areas in public buildings by the department of general services. (Haskins to McCausland, Director, Iowa Department of General Services, 1/30/80) #80-1-17(L)

January 30, 1980

Mr. Stanley L. McCausland, Director
Iowa Department of General Services
Des Moines, Iowa 50319
L O C A L

Dear Mr. McCausland:

The "no smoking" law, Chapter 98A, The Code 1979, effective July 1, 1978, requires the person "having custody or control" of certain public buildings to post within the buildings "conspicuous signs bearing the words 'smoking prohibited by law' or words or symbols of similar effect." Section 98A.4, The Code 1979. The law permits the designation of "smoking areas" in such public buildings by "the controlling governmental body, officer or agency." Section 98A.2(6), The Code 1979. In accordance with these legislative provisions, signs warning that smoking is prohibited by law have been posted upon the state capitol complex buildings under the control of your office.

You have received a petition for rulemaking, requesting the department of general services to promulgate and adopt rules pertaining to the "criteria used to establish smoking and non-smoking areas, and . . . a mechanism by which interested persons may request to have an area so designated." The petitioner urges the adoption of such rules in accordance with Chapter 17A, the Iowa Administrative Procedure Act (IAPA), and § 18.10, The Code 1979, which, in part, provides:

> The director shall establish, publish, and enforce rules regulating and restricting the use by the public of the capitol buildings and grounds.

Petitioner asserts that the rules requested must be adopted pursuant to the IAPA, characterizing them as "use restriction" rules within § 18.10 and claiming that the express requirement of § 18.10 to establish such rules "override the exemption provided in paragraph 17A.2(7)(i)."

The petition prompted your request for an opinion of the attorney general on the following question:

> Whether the posting of signs on and within public buildings as provided for in Chapter 17A.2(7)(i) would comply with the requirements of Chapter 17A as related to [Chapter 98A]?

In general, the IAPA is designed to promote public participation in the rulemaking process and to increase public accountability of administrative agencies in the formulation of administrative rules. See, § 17A.1(2), The Code 1979. Toward that end, the provisions establish certain minimum standards and procedures to be followed by government agencies in the adoption of rules having general applicability to the public. See, §§ 17A.4 - 17A.8, The Code 1979. Fundamentally, the rulemaking procedures must be followed only if a "rule," as defined in § 17A.2(7), is involved. In parts pertinent to your inquiry, § 17A.2(7) provides:

> 'Rule' means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure or practice requirements of any agency. The term . . . does not include:
>
> i. A statement relating to the use of a particular publicly owned or operated facility or property, the substance of which is indicated to the public by means of signs or signals.

We have no difficulty in finding that the "no smoking" signs fall within the subsection (i) exemption. In explaining the subsection (i) exemption, Professor Arthur Bonfield, makes the following instructive remarks:

> It would also be impractical to apply rulemaking procedures to the tens of thousands of specific commands relating to the use of specific state facilities that are communicated to the public by signs posted at those facilities. 'Camping prohibited here,' 'throw litter there' and 'no smoking in this room' are examples of such commands. . . .
>
> Several restrictions contained in paragraph (i) of section 2(7) will limit the possibility of its being abused by agencies. First, the statement concerning the 'use of' such facility must be communicated by signs or signals. Presumably this qualification should restrict the exclusion's applicability to relatively short, simple instructions to the public. Second, the exception covers statements about the use of a 'particular' property or facility only where that 'particular' property of facility is posted with such a sign or signal. (emphasis in original) Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process, 60 Iowa L. Rev. 731, 842-843 (1975). [hereafter cited as "Bonfield"].

Guided by these comments and the statutory language of subsection (i), it is apparent that the exemption applies to the sign in question. In this situation, the statements that "smoking is prohibited by Law" or "smoking permitted in this area," while being statements which prescribe law or policy within the general definition of "rule" in § 17A.2(7), are exempted by subsection (i).

The difficulty is that, under the language of § 18.10, the signs are statements "regulating and restricting the use by the public of the capitol buildings and grounds" and thus, by virtue of that section, the designation of smoking areas embodied by the signs is the subject of rulemaking. An exemption to the scope of a "rule" under 17A is overriden by an independent duty -- here found in § 18.10 -- to promulgate a subject matter as rules. Professor Bonfield states:

> If another statute [besides 17A]. . . specifically requires an agency to make "rules" on a given subject, the statements it issues pursuant to that specific direction will be deemed "rules" even if they would otherwise not be denominated as such because of one of the exemptions found in paragraphs (a)-(k). . . .
>
> Consequently, if a different statute designates an otherwise exempted statement of general applicability prescribing law as a "rule", it must control over the IAPA definition. For example, if another statute explicitly requires an agency to make "rules" regarding matters that normally would concern "only the internal management of an agency", those statements are "rules" within the meaning of the IAPA, and are subject to all of its requirements applicable to "rules". Bonfield, at 844-845. (emphasis in original).

As a result of § 18.10, designation of smoking areas in public buildings by the direction of the department of general services is the subject of rulemaking. Thus, the provisions of Ch. 17A pertaining to rulemaking must be followed in designating such areas.

Very truly yours,

Fred M. Haskins
Assistant Attorney General

FMH:jkt

ATTORNEY GENERAL: ADVICE AND OPINIONS: § 13.2, The Code 1979. The Governor, the Lieutenant Governor, the Supreme Court of Iowa, the Iowa Court of Appeals, the Iowa District Courts (including magistrates), the Secretary of State, the Auditor of State, the Treasurer of State, the Secretary of Agriculture, and the heads of boards, commissions and departments, as listed in the Iowa Official Register are state officers to whom opinions of the Attorney General may be issued. Opinions may also be issued to county attorneys pursuant to the duty of the Attorney General to supervise county attorneys. (Fortney to Brunow, 1/22/80) #80-1-16 (L)

January 22, 1980

John B. Brunow [1]
713 S. 20th
Centerville, Iowa 52544

Dear Mr. Brunow:

We are in receipt of your request for an opinion of the Attorney General regarding the scope of § 13.2(4), The Code 1979. The section in question reads as follows:

> It shall be the duty of the attorney general, except as otherwise provided by law to: . . . (4) Give his opinion in writing, when requested, upon all questions of law submitted to him by the general assembly or by either house thereof, or by any state officer, elective or appointive. Questions submitted by state officers must be of a public nature and relate to the duties of such officer.

Section 13.2(4), The Code 1979.

You have inquired as to who is a "state officer, elective or appointive" for purposes of § 13.2(4).

[1] It is the policy of the Department of Justice to respond to proper opinion requests of state legislators who leave office while their requests are pending unless it is doubtful that the questions posed are of current public importance. In close cases, opinion requests are returned to successors in office for resubmission. Those requests not refiled are considered withdrawn. See Op. Atty. Gen. #79-3-11.

We understand the following to be state officers within the meaning of § 13.2(4): The Governor, the Lieutenant Governor, the Supreme Court of Iowa, the Iowa Court of Appeals, the Iowa District Courts (including magistrates), the Secretary of State, the Auditor of State, the Treasurer of State, the Secretary of Agriculture, and the heads of boards, commissions and departments, as listed in the Iowa Official Register. Section 13.2(4) expressly provides that such requests must relate to the duties of the officer and must be of a public nature.

In the distant past, there were occasions on which the office of the Attorney General issued what might appear to be opinions addressed to individuals who properly were not eligible to request such opinions. See 1910 Op. Atty. Gen. 173 (opinion addressed to the mayor of Diagonal, Iowa); 1910 Op. Atty. Gen. 184 (opinion addressed to a boat inspector). However, a careful reading of these earlier opinions reveals that the authors were only rendering their personal legal advice on a particular question and took steps to point out that the addressee was not an authorized requestor. The following language is informative:

> . . . I have to say that the law does not contemplate that this department shall give official opinions or advice to others than state officers and the two houses of the legislature. However, as a courtesy to you, and with the hope that I might aid you to some small degree in arriving at a correct conclusion of the proposition, I make the following personal suggestions . . .

1910 Op. Atty. Gen. 173.

There exists what might appear to be a significant exception to the earlier list of authorized opinion requestors. The Department of Justice regularly issues opinions to county attorneys. However, this is not done exclusively within the authority of § 13.2(4). Among the duties of the Attorney General is the obligation to "supervise county attorneys in all matters pertaining to the duties of their offices." § 13.2(7), The Code 1979. The authority to issue opinions to county attorneys has been derived historically from § 13.2(7). With the adoption of the Home Rule Amendment, Iowa Const. art. III, § 39A (1978), this authority should be more narrowly construed. Legal questions of largely local significance should be resolved by county attorneys' opinions. Opinion requests from county attorneys are appropriate and should be responded to when they relate to legal questions of state-wide significance, to questions of the scope of county authority under the Home Rule Amendment, and to questions of criminal law and procedure, which are by definition state-wide in significance.

In summary, the Governor, the Lieutenant Governor, the Supreme Court of Iowa, the Iowa Court of Appeals, the Iowa District Courts (including magistrates), the Secretary of State, the Auditor of State, the Treasurer of State, the Secretary of Agriculture, and the heads of boards, commissions and departments, as listed in the Iowa Official Register are state officers to whom opinions of the Attorney General may be issued. [2]

Very truly yours,

David Fortney

DAVID M. FORTNEY
First Assistant Attorney General

DMF:sh

[2] Opinion requests should be submitted in writing and be addressed directly to the Attorney General

CIGARETTES: Sales by distributors to wholesalers. Sections 98.1(12), 98.1(13), 551A.2(3), 551A.3, and 551A.5, The Code 1979. Chapter 98 licensed distributors performing wholesaler functions, as defined in §551A.2(3), can make sales to other wholesalers under the circumstances set forth in §551A.5. Op. Att'y Gen. #78-12-25 which reached a contrary result is withdrawn. (Griger to Bair, Director, Iowa Department of Revenue, 1/22/80) #80-1-15 (L)

January 22, 1980

Gerald D. Bair
Director
Iowa Department of Revenue
Hoover State Office Building
LOCAL

Dear Mr. Bair:

This will acknowledge receipt, on January 2, 1980, of your request for review by the Attorney General of a prior opinion, Op. Att'y Gen. #78-12-25 (hereinafter referred to as #78-12-25). In #78-12-25, it was opined that a cigarette distributor licensed only as a distributor under §98.13, The Code 1979, could not make sales to a licensed cigarette wholesaler under the circumstances set forth in §551A.5, The Code 1979. You question whether #78-12-25 correctly excluded such licensed cigarette distributors from the ambit of §551A.5.

Section 98.6, The Code 1979, imposes the Iowa cigarette tax initially on the distributor level. Section 98.1(12), The Code 1979, defines a distributor as follows:

> "Distributor" shall mean and include every person in this state who manufactures or produces cigarettes or who ships, transports, or imports into this state or in any manner acquires or possesses cigarettes without stamps affixed for the purpose of making a "first sale" of the same within the state.

Section 98.1(13), The Code 1979, defines a wholesaler to "mean and include every person other than a distributor or distributing agent who engages in the business of selling or distributing cigarettes within the state, for the purpose of resale."

Distributors and wholesalers, as defined in §98.1, are required to obtain cigarette licenses from the Department of Revenue. Section 98.13(1) states:

> Every distributor, wholesaler, cigarette vendor, and retailer, now engaged or who desires to become engaged in the sale or use of cigarettes, upon which a tax is required to be paid, shall obtain a state or retail cigarette permit as a distributor, wholesaler, cigarette vendor, or retailer, as the case may be.

From the above, it seems clear that a licensed distributor may perform the functions of a wholesaler, but that one licensed only as a wholesaler may not perform the functions of a distributor. See also §98.13(8), The Code 1979. Further, it is clear that under Chapter 98, a "wholesaler" as that term is defined therein does not include a distributor.

The general scheme contained in Division I of Chapter 98 was enacted by the legislature in 1939 and Chapter 551A was adopted in 1949. See 1939 Session, 48th G.A., Ch. 72 and 1949 Session, 53rd G.A., Ch. 226. Thus, Chapter 551A, the Iowa Unfair Cigarette Sales Act, was enacted ten years after adoption of Division I of Chapter 98. Chapter 551A, with certain exceptions, prevents the sales of cigarettes at the wholesale and retail levels below cost. Section 551A.3(1), The Code 1979, provides:

> It shall be unlawful for any wholesaler or retailer to offer to sell, or sell, at wholesale or retail, cigarettes at less than cost to such wholesaler or retailer, as the case may be, as defined in this chapter. Any wholesaler or retailer who violates the provisions of this section shall be guilty of a simple misdemeanor.

One of the exceptions to the §551A.3 prohibition is contained in §551A.5, concerning sales from one wholesaler to another wholesaler, which states:

> When one wholesaler sells cigarettes to any other wholesaler, the former shall not be required to include in his selling price to the latter, the cost to the wholesaler, as defined by section 551A.2, but the latter wholesaler, upon resale to a retailer, shall be subject to the provisions of the said section.

In opining that §551A.5 did not apply to Chapter 98 licensed distributors, #78-12-25 relied upon the definition of wholesaler in §98.1(13) which, as noted, excludes distributors. If the concept of wholesaler in §551A.5 is equated with the definition in §98.1(13), then #78-12-25 appears to attain a result required by legislative intent. But, if the term "wholesaler" as defined in Chapter 551A would include Chapter 98 licensed distributors, then #78-12-25 is clearly erroneous.

Section 551A.2(3) defines "wholesaler" as follows:

> "Wholesaler" means and includes any person who acquires cigarettes for the purpose of sale to retailers or to other persons for resale, and who maintains an established place of business when any part of the business is the sale of cigarettes at wholesale to persons licensed under this chapter, and where at all times a stock of cigarettes is available to retailers for resale.

It is axiomatic that a legislature is its own lexicographer and the definition of terms by it is binding. See W. J. Sandberg Co. v. Iowa State Board of Assessment and Review, 225 Iowa 103, 278 N.W. 643 (1938). Consequently, Chapter 551A contains its own definition of wholesaler and that definition, not the definition in Chapter 98, should control the interpretation of §551A.5. The definition of wholesaler in §551A.2(3) does not expressly exclude Chapter 98 licensed distributors. Indeed, if the legislature had intended distributors to be excluded from the definition of wholesaler in Chapter 551A, it could have easily incorporated the definition of wholesaler in §98.1(13) when it enacted Chapter 551A, since at the time of such enactment, §98.1(13) had been in effect for ten years. The legislature enacting Chapter 551A is presumed to have been aware of the provisions of Chapter 98. See McKinney v. McClure, 206 Iowa 285, 220 N.W. 354 (1928).

The wholesaler definition in §551A.2(3) does allude to wholesale sales of cigarettes "to persons licensed under this chapter." Chapter 551A does not contain any licensing provisions; those are set forth in Chapter 98. Obviously, such statutory provisions in §551A.2(3) pertain to wholesale sales to persons licensed under Chapter 98. Otherwise, the definition of wholesaler in §551A.2(3) would make no sense. A court would disregard the literal language in the statute in order to give effect to the manifest intent of the legislature. Northern Natural Gas Co. v. Forst, 205 N.W.2d 692 (Iowa 1973). Therefore, there is a viable, workable definition of wholesaler in Chapter 551A which should be applied in §551A.5. It was fundamentally erroneous for #78-12-25 to rely on the definition of wholesaler in §98.1(13) when there was no need to do so.

In May's Drug Stores v. State Tax Commission, 242 Iowa 319, 45 N.W.2d 245 (1950), the Iowa Unfair Cigarette Act was upheld against constitutional attack. The Court stated at 242 Iowa 334:

> The fundamental policy of the legislation is that freedom of competition is desirable and whatever substantially lessens it or tends to create a monopoly is an evil. The legislature finds that, ordinarily, sales below cost injured competitors and destroyed competition. That is sufficient justification for the prohibition of all such sales--at least in the absence of some showing that a substantial volume of sales below cost by dealers would not have such a result.

As noted, Chapter 98 licensed distributors can perform wholesaler functions. By concluding that §551A.5 does not encompass such distributors, #78-12-25 opined that these distributors were not subject to any provisions of Chapter 551A. However, as expressed in May's Drug Stores, Chapter 551A is to have a pervasive effect by precluding sales below cost, thus enhancing competition. If Chapter 98 licensed distributors who perform the same wholesaler functions as Chapter 98 licensed wholesalers in selling cigarettes to retailers are not covered by Chapter 551A, as #78-12-25 opines, the purpose of Chapter 551A would not be subserved. Since the purpose of Chapter 551A is to foster competition in the sale of cigarettes, a substantial group of persons (distributors) performing wholesaler functions should not be automatically excluded from coverage unless such a result would be clearly required on the face of the statute. A statute should be reasonably, sensibly, and fairly construed to the end that the intention of the legislature enacting it is carried out and construction resulting in unreasonableness should be avoided. Isaacson v. Iowa State Tax Commission, 183 N.W.2d 693 (Iowa 1971).

In conclusion, it is the opinion of this office that Chapter 98 licensed distributors performing wholesaler functions, as defined in §551A.2(3), can make sales to other wholesalers under the circumstances set forth in §551A.5. Op. Att'y Gen. #78-12-25 which reached a contrary result is withdrawn as clearly erroneous.

Very truly yours,

Harry M. Griger

Harry M. Griger
Special Assistant Attorney General

HMG:pjt

MUNICIPALITIES: Retirement Systems -- §§ 97B.3, 97B.7, 97B.11, 97B.42, 97B.53, 97B.68, 400.7, 400.12, 411.3 and 411.8, The Code, 1979. When a city goes under civil service, the retirement funds pursuant to Chapter 410 can be transferred to a Chapter 411 system. Seniority is determined from the date of employment. City employees under IPERS who fall within a Chapter 411 system are entitled to a refund of their accumulated contributions. (Blumberg to Readinger, State Senator, 1/22/80) #80-1-14 (L)

January 22, 1980

The Honorable David M. Readinger
State Senator
L O C A L

Dear Sentaor Readinger:

We have your opinion request of December 10, 1979, regarding pension funds for fire and police department employees. Under your facts, the City of Windsor Heights had its police officers under the Chapter 410, The Code, 1979, retirement system. New officers hired April 1, 1968 are under IPERS. The city has recently adopted civil service for the department and now the officers will be under Chapter 411, The Code, 1979. The city has prefunded the Chapter 410 retirement system. You ask the following questions:

1. Can current Chapter 410 members be included under Chaper 411 along with the current trust assets accumulated under Chapter 410 of prefunding?

2. How is service from date of employment to date of Civil Service adoption to be handled for members moving from IPERS to Chapter 411?

3. How should earned IPERS benefits be handled in regards to new 411 benefits for the affected members or would there by [sic] an asset transfer from IPERS to 411?

4. How should 410 service be handled under 411 for the affected members?

There is nothing in either Chapter 410 or 411 which addresses this issue. It is obvious from a reading of Chapter 411 that those police officers under civil service are members of the Chapter 411 retirement system. In a previous opinion, 1974 Op's Att'y Gen. 699, we held that the funds of a Chapter 410 retirement system can be transferred to a Chapter 411 retirement system when a city goes under civil service. However, we also noted that sufficient amounts should be retained in the Chapter 410 system to meet all obligations currently in existence. We see no reason to change the result of that opinion. The fact that the Chapter 410 system has been prefunded is of no consequence to this issue.

Questions two and four are similar. In each, you ask how length of service is to be computed for retirement benefits for those previously under both Chapter 410 and IPERS. Those questions are directed to Chapter 400 rather than Chapter 411. Chapter 400 concerns the establishment of civil service. Section 400.7 provides in pertinent part:

> Preference by service. Any person regularly serving in or holding any position in the police or fire department, or a nonsupervisory position in any other department, which is within the scope of this chapter on April 16, 1937, in any city, who has then five years of service in a position or positions within the scope of this chapter, shall retain his position and have full civil service rights therein.
>
> Persons in nonsupervisory positions, appointed without competitive examination, who have served less than five years in such position or positions on said date, shall submit to examination by the commission and if successful in passing such examination they shall retain their positions in preference to all other applicants and shall have full civil service rights therein, but if they

> fail to pass such examination they shall be replaced by successful applicants.
>
> Provided, that persons who have hereto been certified by the commission as eligible for appointment to any position in which they are regularly serving on said date, and persons regularly serving on said date in any position with civil service rights by reason of long and efficient service rendered prior to October, 1924, shall retain such position and shall have full civil service rights therein without further examination. Other persons regularly serving in supervisory positions in departments other than police or fire on April 16, 1937, shall be eligible for appointment to said positions after qualifying in competitive examination.

With reference to this section, and to a fact situation similar to yours, our office has held that senority dates from the time of appointment or employment, not from the time of certification. See § 400.12 and 1938 Op. Att'y Gen. 728.

The last question is more difficult. You ask, in effect, about a transfer of IPERS funds to the Chapter 411 system. IPERS is established and administered by Chapter 97B, The Code. Section 97B.7 provides that there is a special fund created for IPERS, with the State Treasurer as the custodian. The fund is administered by the Iowa Department of Job Service. § 97B.3. Pursuant to § 97B.11 both the employer and employee make contributions to the system. Both contributions are forwarded to Job Service to be deposited in the fund. Section 97B.53 concerns the return of the employees' contributions. It provides, in short, that upon termination of employment, other than by death, the employee shall receive the accumulated contributions. However, if the employee is vested in the system, he or she can leave the contributions in the system for future retirement benefits.

Although the Legislature considered employment under federal civil service in § 97B.68, it did not discuss any such consideration under the facts you have presented. Section 97B.42 provides

that one cannot be a member of IPERS and a member of another publically funded retirement system at the same time. Section 411.3 provides that members of that system shall not be required to make contributions under any other public pension system. Membership in the retirement system is mandated as a condition of employment by § 411.3. Whereas § 411.3 permits voluntary membership in another retirement system, including those of a public nature, § 97B.42 prohibits membership in any other public retirement system.

It would have been helpful if the statutes contained a direct discussion of this type of problem. However, because it does not, we must infer an equitable solution from available statutory material. Since membership in a Chapter 411 system is a condition of employment, it becomes obvious that the employees in question must be under that system. Accordingly, they cannot continue under IPERS pursuant to the language found in Chapter 97B. Although § 97B.53 speaks only to termination of employment with the employer as a means of receiving a refund of the accumulated contributions, we believe that the just and equitable solution would be to permit the employee to withdraw such contributions upon entry into the Chapter 411 system. The accumulated contributions are the property of the employees and should be returned to them.

The contributions of the employer present a different issue. Section 97B.53(8) provides that if an employee in a permanent position terminates employment within six months, the employer may file a claim with Job Service for a refund of its contributions. Stated conversely, if an employee in a permanent position works longer than six months, the contributions of the employer to IPERS are not refundable. Similarly, those contributions would not be transferable to another retirement system. There is sufficient authority in § 411.8 to fund the system without a transfer of IPERS funds.

Accordingly, we are of the opinion that:

1. The funds of a Chapter 410 retirement system can be transfered to a Chapter 411 system. Sufficient amounts should be retained in the Chapter 410 system to meet all obligations.

2. Seniority. or length of service, is determined from the date of employment, not the date of certification.

3. Those employees under IPERS are entitled to a return of their accumulated contributions. The employer cannot receive a refund of its contributions to IPERS except for an employee in a permanent position who terminates within six months of his or her appointment.

Very truly yours,

Larry M. Blumberg
Assistant Attorney General

LMB:jkt

SCHOOLS: COUNTIES AND COUNTY OFFICERS: County treasurer's duties regarding distribution of taxes collected to school corporations. Sections 298.13, 445.37, The Code 1979. 1979 Session, 68th G.A., ch. 68, § 19. County treasurers must each month distribute to school corporations their appropriate share of all tax payments received prior to the end of the preceding month. This includes tax payments made by check, if the check is received prior to the end of the month, even if the check is not actually paid to the county prior to the end of the month. (Norby to Benton, Superintendent, Department of Public Instruction, 1/18/80) #80-1-13 (L)

January 18, 1980

Robert D. Benton
Superintendent
Department of Public Instruction
L O C A L

Dear Dr. Benton:

You have requested an Attorney General's opinion concerning the distribution to local school corporations of taxes collected by county treasurers. Section 298.13, The Code 1979, provides for this distribution as follows:

> Monthly payment of taxes. Before the fifteenth day of each month in each year, the county treasurer shall give notice to the president of the board of each school corporation in the county of the amount collected for each fund to the first day of such month, and the president of each board shall draw his draft therefor, countersigned by the secretary, upon the county treasurer, who shall pay such taxes to the treasurers of the several school boards only on such draft.

Specifically, your request concerns the distribution of tax payments made by check which are received near the end of a month, but are received too late in the month for the check to be finally paid to the county before the end of the month. Apparently, some county treasurers have adopted the practice of not distributing to the schools the amount of money representing their share of the amount of taxes paid by such checks. In effect, this practice will cause this amount of money to be delayed at least thirty days in reaching the schools. This delay may cause the schools to lose money, which might have been received through investment of school funds, or may cause a school to be required to

borrow money to meet current operating expenses. In contrast to the above situation, available information indicates that the majority of county treasurers do credit the schools for their share of checks received which have not been finally paid by the end of the month. When this practice is adopted, it appears that no Iowa law or established accounting practice prevents the debiting of school accounts in future months to adjust for checks which cannot be collected. Additionally, when the necessity has arisen, some county treasurers have adopted the practice of making advances to schools from their share of currently collected taxes prior to the monthly distribution required by § 298.13.

As a corollary to your first question, you have also raised the question of whether a tax payment made by a check which is not finally paid to the county prior to the applicable deadline is delinquent. Regarding delinquency of taxes paid to county treasurers, § 445.37, The Code 1979, provides as follows:

> When delinquent. In all cases where the half of any taxes has not been paid before October 1 succeeding the levy, the amount thereof shall become delinquent from October 1 after due; and in case the second installment is not paid before April 1 succeeding its maturity, it shall become delinquent from April 1 after due.

Prior to 1979, the Code required that taxes be paid to county treasurers with legal tender, certain circulating notes of national banking associations, or other notes and certificates of the United States which circulate as currency. Section 445.33, The Code 1979. This section was repealed, and no replacement language adopted, in 1979. 1979 Session, 68th G.A., ch. 68, § 19. By implication, this repeal appears to authorize county treasurers to accept checks, although in practice checks have been accepted in the past. When checks are accepted for payment of taxes, the weight of authority provides that the payment is only conditional until the check is actually paid to the county. Morgan v. Gilbert, 207 Iowa 725, 223 N.W. 483 (1929); Fidelity and Deposit Co. of Md. v. Citizens Nat. Bank of Waco, 101 F.2d 974 (1939); General Petroleum Corp. of Calif. v. Smith, 157 P.2d 356 (Ariz. 1945); 1924 Op. Atty. Gen. 398. The payment has been considered conditional even where payment by check was expressly allowed by statute. Labrier v. Leedy, 230 P.2d 253,254 (Okla. 1924); Haga v. Grand Forks Co., 253 N.W. 849,850 (N.D. 1934); C.J.S. Taxation § 623c, p. 1244. Additionally, the rules for discharge of liability of the drawor of a check in a private transaction do not control the discharge of tax liability. Only actual payment to the county will discharge the tax liability when payment is made by check. New Amsterdam Casualty Co. v. Albia State Bank, 214 Iowa 541,546, 239 N.W. 4,6 (1931). Labrier, supra, p. 254. Although payment by

check is only a conditional payment, the weight of authority supports the relating of the date of payment back to the date the check was initially received if the check is ultimately paid. Cantlay and Tanzola, Inc. v. Ingels, 88 P.2d 141,142 (Cal. 1939); General Petroleum, supra, p. 359; C.J.S. Taxation § 623, p. 1244. Contra; American Surety Co. v. Hamrick Mills, 4 S.E.2d 308,312 (S.C. 1939). In other words, if the check is delivered to the treasurer before the appropriate date, it is not delinquent if ultimately paid. Accordingly, a payment by check is not only conditional as a payment, but can also be characterized as conditionally not delinquent. In effect, it is presumed that checks will ultimately be paid to the county.

In light of the repeal of § 445.33, coupled with the established practice of accepting checks for tax payments, it clearly appears that checks are an authorized means to pay taxes to county treasurers in Iowa. Additionally, as the concept of relating payment to the date of receipt of a check is generally accepted, it appears likely that this principle would be accepted by the Iowa Supreme Court. Accordingly, checks received, but not finally paid, before October First, or April First regarding the second installment, appear to not constitute delinquent tax payments. (This practice contrasts with redemptions from tax sales which are paid by check, where the rights of the redeemer do not arise until the check is actually paid to the county. See Op. Atty. Gen. #77-9-14). As tax payments made by check are initially presumed to be collectible and not delinquent, it must now be considered whether these tax payments are "collected" in the sense that they should be credited to the school corporations pursuant to § 298.13.

Even when the acceptance of checks for tax payments is authorized by law, this practice is characterized as being primarily adopted for the convenience of the taxpayer, and the position of the tax collecting authority cannot be prejudiced through the acceptance of checks. See Morgan at 207 Iowa 728, 223 N.W. 484. (The negligence of a county treasurer in handling a check received for taxes cannot defeat the taxing authority's right to collect the tax). Labrier, supra, P. 312; 1924 Op. Atty. Gen. 398, 400. The county treasurer in effect becomes the agent of the taxpayer, not the county, when a check is accepted for taxes. Accordingly, it appears that the school corporations should not be deprived of funds because a county treasurer has accepted checks as a convenience to the taxpayers. The possibility remains, however, that some checks will be returned unpaid, which will result in the school corporations receiving more funds than should have appropriately been distributed. But, this does not appear to present a great difficulty, in that no Code provision or accepted accounting practice appears to prevent the county treasurer from debiting the schcol corporations in future months for their appropriate share of uncollected taxes. Available information indicates

that county treasurers operating under the system of initially crediting the school corporations for all timely tax payments have not experienced difficulty in maintaining the proper distributions.

In conclusion, it appears that § 298.13 requires county treasurers to credit the school corporations for their appropriate share of the amount represented by checks received for taxes prior to the end of any month, even if these checks are not actually paid to the county before the end of that month. Although delaying distribution of this amount until the checks are actually paid might appear as a prudent measure, it appears in practice to be unnecessary. Additionally, the presumption that checks received will ultimately be paid, coupled with the ability of the county treasurers to debit accounts in proceeding months to adjust for uncollected taxes, appears to require the amount of taxes received in checks as conditional payments to be characterized as "collected" and subject to distribution pursuant to § 298.13.

Very truly yours,

Steven G. Norby

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

SCHOOLS: Educational program, requirement of a multicultural, nonsexist approach in teaching. Sections 257.9, 257.25, The Code 1979. The State Board of Education may promulgate rules to be applied in the process of approving public schools which require a multicultural, nonsexist teaching approach. These rules do not apply to nonpublic schools which seek approval by the State Board. (Norby to Carr, State Senator, 1/16/80) #80-1-12 (L)

January 16, 1980

Honorable Robert M. Carr
State Senator
2030 Deborah Drive
Dubuque, Iowa 52001

Dear Senator Carr:

You have requested an Attorney General's opinion regarding the ability of the State Board of Public Instruction (State Board) to promulgate and enforce, with regard to approved nonpublic schools, rules which require that their educational program be taught with a multicultural, nonsexist approach. The State Board has in fact promulgated such rules in terms which clearly apply to both public and nonpublic schools. 670 I.A.C. 3.5(3), (5). The statutory provision containing the multicultural, nonsexist approach requirement is Section 257.25, The Code 1979, which provides as follows:

> In addition to the responsibilities of the state board of public instruction and the state superintendent of public instruction under other provisions of the Code, the state board of public instruction shall, except as otherwise provided in this section, establish standards for approving all public and nonpublic schools in Iowa

> offering instruction at any or all levels from the prekindergarten level through grade twelve. A nonpublic school which offers only a prekindergarten program may, but shall not be required to, seek and obtain approval under this chapter. A list of approved schools shall be maintained by the department of public instruction. The state board shall promulgate rules to require that a multicultural nonsexist approach is used by school districts. The educational program shall be taught from a multicultural, nonsexist approach. The approval standards established by the state board shall delineate and be based upon the educational program described below . . .
>
> (Emphasis added.)

The above quoted language is an unnumbered, introductory paragraph which is followed by fourteen numbered subsections which constitute the "educational program" referred to in the introductory paragraph.

The resolution of your question requires consideration of the significance of the term "school district," as used in the introductory paragraph. If "school district" refers exclusively to public schools, the use of this term in § 257.25 may negatively imply that the multicultural, nonsexist requirement does not apply to nonpublic schools. Accordingly, this opinion will initially discuss the meaning of "school district" before turning to interpretation of the statute as a whole.

It appears that the term school district, as generally understood, does not embrace both public and nonpublic schools, but refers exclusively to public schools. Silver Lake Community School District v. Parker, 29 N.W.2d 214 (Iowa 1947). The term school district is used in various Code provisions which enumerate powers and jurisdiction which clearly do not apply to nonpublic schools. See Ch. 274 (School Districts in General), Ch. 296 (Indebtedness of School Corporations), and Ch. 298 (School Taxes and Bonds). The legislature must be presumed to have intended the term to be interpreted according to its well established meaning when placed in § 257.25. See § 4.1(2), The Code 1979.

Accordingly, the express authorization to promulgate rules contained in § 257.25 appears to apply exclusively to public schools. The next sentence, however, requires that the "educational program" shall be taught from a multicultural, nonsexist approach. Compliance with the educational program is obtained through the establishment of approval standards, which apply to both public and nonpublic schools that seek to be approved by the State Board. In other words, while the express provision to promulgate rules refers only to school

districts (public schools), the educational program, which applies to both public and nonpublic schools, is also required to be taught from a multicultural, nonsexist approach. Additionally, it appears that the State Board would possess the authority to promulgate these rules with regard to both public and nonpublic schools even if the express rulemaking provision had not been added. Section 257.9(2), "the general powers and duties of the State Board", provides that the State Board shall "adopt necessary rules and regulations for the proper enforcement and execution of the provisions of the school laws". As the requirement that the educational program be taught with a multicultural, nonsexist approach is a provision of the school laws, the State Board appears to have authority to enforce the requirement in public and nonpublic schools, unless the express rulemaking provision is a limitation of this authority. The legislative history of § 257.25 appears to be instructive regarding this apparent disharmony.

Prior to 1977, § 257.25 contained a requirement similar in nature to the present multicultural, nonsexist requirement. The former requirement applied only to the area of social studies, but clearly applied to both public and nonpublic schools. § 257.25(3), (4), and (6)(b), The Code 1977. In amending § 257.25 in 1977, the former language was modified and placed in the introductory paragraph, extending its effect to all academic areas. See H. F. 254, 1977 Reg. Sess. Additionally, the express rulemaking provision was added, but this provision refers to school districts exclusively.

In construing § 257.25, an effort should be made to give effect to all of the language used. See C.J.S. Statutes § 346, p. 705. It appears impossible, however, to give effect to the express rulemaking provision without narrowing the scope of the general rulemaking provision contained in § 257.9(2). The essential question, therefore, appears to be whether it is proper to consider the express rulemaking provision as a limitation on the general provision, or simply as an additional authorization to promulgate rules. If construed as the latter, the express provision appears to be superfluous. If construed in the former manner, the negative implication of the express provision will limit the express, though less specific, language of the general rulemaking provision. It is not a favored practice to construe statutory language to implicitly limit the effect of express language. See C.J.S. Statutes § 347, p. 717. It is also, however, not a favored practice to construe statutory language in a manner that renders it as surplus. See C.J.S. Statutes § 346, p. 705. Additionally, specific language is usually given effect when it is inconsistent with a broader, general provision pertaining to the same subject matter. See C.J.S. Statutes § 347b, p. 720.

Applying the principles outlined above in interpreting § 257.25, it appears proper to limit the application of the multicultural, nonsexist requirement to public schools. [1] The use of the term "school district" in § 257.25 appears to indicate a legislative intent to limit this requirement to public schools. It is true that the ability to promulgate rules to enforce this requirement with regard to nonpublic schools appears to exist through the general rulemaking provision contained in § 257.9(2), and that this ability is not expressly, but only implicitly, narrowed by the language of § 257.25. But as the legislature chose not to rely on the general provision but to add an express provision, the significance of the express provision should not be lightly disre-

[1] Although we are satisfied that the principles of statutory construction cited above properly resolve the issue in favor of the exclusion of nonpublic schools, attention might also be called to the rule that courts will construe statutes to avoid constitutional difficulties. See Iowa Nat. Indus. Loan Co. v. Iowa State Dept. of Revenue, 224 N.W.2d 436,442 (Iowa 1974); State v. Ramos, 260 Iowa 590, 149 N.W.2d 862 (1967). At least in some possible applications, a requirement that the program of nonpublic schools be taught from a multicultural, nonsexist approach might be subject to constitutional challenge. The United States Constitution protects the right of parents to educate their children in nonpublic schools, including nonpublic schools with a sectarian mission. Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). See also Yoder v. Wisconsin, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). Although the state may regulate sectarian nonpublic schools in pursuit of secular educational goals, this regulation may not unnecessarily impinge upon the sectarian mission of such nonpublic schools. Moreover, the Establishment Clause forbids excessive "entanglement" between the government and sectarian nonpublic schools. To the extent that a requirement of a multicultural, nonsexist approach might involve monitoring of teachers in nonpublic school classrooms, excessive entanglement could result. See Lemon v. Kurtzman, 403 U.S. 602, 619-20, 91 S.Ct. 2105,2114-2115, 29 L.Ed. 2d 745,759-760 (1971). We do not suggest that narrowly tailored regulations aimed at fostering a multicultural, nonsexist approach could never be constitutionally applied to nonpublic schools, we simply note the constitutional arguments that could be raised to possible applications of general regulations, were those regulations construed to apply to nonpublic schools.

garded. The legislature could have resolved the ambiguity by expressly stating that the multicultural, nonsexist requirement does not apply to nonpublic schools. But in interpreting the present language, it appears more reasonable to consider the express rulemaking provision as a limitation than as surplus language which neither adds nor detracts from the effect of the statute.

In conclusion, it appears that § 257.25 does not authorize the State Board to promulgate and enforce rules requiring a multicultural, nonsexist approach in the educational programs of approved, nonpublic schools. Accordingly, 670 I.A.C. 3.5(3), (5) are void to the extent that they purport to apply to nonpublic schools.

Very truly yours,

Steven G. Norby

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

COUNTIES AND COUNTY OFFICERS: Taxation; Iowa Const., Art. III, ch. 39A, §§ 327H.23, 332.3(32), The Code 1979. A county board of supervisors is not authorized under § 327H.23 and § 332.3(32), or under the County Home Rule Amendment of the Iowa Constitution, to abate levied railroad taxes as a means of providing financial assistance to railroads. (Mull to Kliebenstein, Grundy County Attorney, 1/15/80) #80-1-11 (L)

January 15, 1980

Mr. Don Kliebenstein
County Attorney
Grundy Center, IA 50638

Dear Mr. Kliebenstein:

You have requested an opinion of the Attorney General on the following question: "Is it permissible, under Section 327H.23 and 332.3(32) of the Iowa Code, for the county to abate the taxes levied against the railroad as a contributing share of the improvements, rather than actually appropriate an amount of money therefor from the county general fund?" Your letter notes that "Grundy County, along with several neighboring counties, is presently exploring the possibility of providing financial assistance to the Rock Island Railroad to upgrade one of its branch lines which runs through our county." In our opinion, §327H.23 and §332.3(32), The Code 1979, do not empower a county board of supervisors to abate levied railroad taxes as an alternative means of financially assisting railroads.

Section 327H.23 provides as follows:

> The board of supervisors of a county may with the approval of the state department of transportation, appropriate funds from the county general fund to the railroad assistance fund. The county may, according to the provisions of section 327H.20, receive a partial or total reimbursement for this appropriation. The money shall be used in accordance with this section and sections 327H.18 to 327H.22, 327H.24 and 327H.25

> only for conservation, restoration, or improvement of railroad branch lines within the county providing the funds. In any year the amount of money transferred to the railroad assistance fund by a county shall not exceed the amount of property taxes levied against the railroad property within the county.

Section 332.3(32) provides:

> The board of supervisors at any regular meeting shall have power:
> . . . .
> To enter into an agreement with the state department of transportation, shippers, a railroad corporation, a city or another county to provide financial assistance for railroad services. The agreement shall be administered by the state department of transportation and moneys necessary to implement the agreement shall be credited to the railroad assistance fund. However, this section shall not preclude a county from establishing an escrow fund to be used as collateral for a loan for railroad improvement, which loan shall be credited to the railroad assistance fund. Moneys appropriated pursuant to this subsection shall be from the county general fund, subject to the limitation provided in sections 327H.18 to 327H.25.

As a policy matter, authority to abate taxes would give the counties flexibility by providing an alternative to direct funding from the county fund. Moreover, such authorization would give the State an alternative means of providing matching shares for federal rail service assistance. Section 327H.21, The Code 1979, provides for acceptance of federal funds by the state department of transportation for improvement of the railroads. The federal Department of Transportation Act provides that the State's matching share for federal funds may be contributed in cash or through certain in-kind benefits. 49 U.S.C.A.§1654(c)(Supp. 1979) provides in relevant part that "The State share of the costs may be provided in cash or through any of the following benefits. . . (1) forgiveness of taxes imposed on a common carrier by railroad or on its properties."

It is well settled, however, that a county board of supervisors does not have the power to abate assessed taxes in the absence of specific authorization by statute. Bateson v. Hardin County, 199 Iowa 718, 202 N.W. 749 (1925); Lee v. Pasco County,

138 Fla.750, 190 So. 25 (1939); Graham v. Spivey, 175 Tenn. 145, 133 S.W.2d 460 (1939); Yellowstone Packing & Provision Co. v. Hays, 83 Mont. 1, 268 P. 555 (1928); People v. Kimmel, 323 Ill. 261, 154 N.E. 97 (1926); Peter v. Parkinson, 83 Ohio St. 36, 93 N.E. 197 (1910); Sacramento County v. Central P.R. Co., 61 Cal. 250 (1882); See Annot., 28 A.L.R.2d 1427 (1953).

In Bateson, the court held that although the board of supervisors had the statutory power to remit all or part of taxes on destroyed property which is not covered by insurance, the board had no such power where a destroyed building had been covered by insurance. The court reasoned that:

> The powers of the board of supervisors are marked out by statute, and they possess no powers except those given by statute and those incidentally necessary to carry out the duties put upon them . . . The section of the Code first quoted does provide that in case of destruction of the property by fire a rebate may be made on the taxes. This is as far as the Legislature has gone, and, while in the instant case it is an injustice to this plaintiff to require him to pay the taxes . . ., yet there has been no power conferred upon the board of supervisors to relieve him from this situation. As this matter rests wholly with the Legislature, we do not deem it our duty to assume its prerogative . . .

199 Iowa at 721, 202 N.W. at 751.

We are persuaded by the rationale of Bateson. Section 332.3(32) empowers the board of supervisors to enter into agreements for providing financial assistance to railroads. Both § 327H.23 and § 332.3(32) contemplate direct appropriations for the railroad assistance fund from the county general fund. The annual appropriations by a county are limited under § 327H.23 to the amount of railroad property taxes levied within the county. Neither § 327H.23 or § 332.3(32), however, contains specific authorization for abatement of railroad taxes. It is our opinion that a county board of supervisors is not empowered under § 327H.23 and § 332.3(32) to abate levied railroad taxes as a means of providing financial assistance to railroads.

With the 1978 adoption of the County Home Rule Amendment, Article III [Section 39A] of the Iowa Constitution, however, counties need no longer seek express statutory authority for each exercise of governmental power in the determination of local affairs, where such exercise is not inconsistent with state law. See 1979 Op. Atty. Gen. #79-4-7.

The County Home Rule Amendment contains four basic limitations within itself. First, counties have no power to levy and tax unless expressly authorized by the General Assembly. Second, in the event the power or authority of a county conflicts with that of a municipal corporation, a municipal corporation's power and authority prevails within its jurisdiction. Third, the home rule power exercised by a county cannot be "inconsistent with the laws of the General Assembly." Fourth, home rule power can only be exercised for local or county affairs and not state affairs.

While the county's proposed abatement of taxes may involve the power to levy a tax, we need not engage in an analysis of the first limitation to county home rule in that the proposed abatement is preempted. As evidenced by the state's extensive and pervasive property tax system and the County Home Rule Amendment's exclusion of the taxing power from local control indicates an intent to preempt the county's involvement in the exercise or abatement of property taxes. More specifically, such abatement of taxes would be inconsistent with state law. The prior analysis reviewing the express state statutes, §§ 332.3(32) and 327H.20 and .23, The Code 1979, indicates no such authorization for abatement. To the contrary, it expressly declares that said funds shall come from the county general fund with no express reference to any abatement. Such a proposal is inconsistent with state law and consequently, preempted by the state.

We are of the opinion that the county may not abate the taxes levied against the railroad as a contributing share of improvements, rather than actually appropriating an amount of money therefor from the county general fund. Sections 327H.23 and 332.3(32), The Code 1979, do not expressly authorize such a proposal and the County Home Rule Amendment, Article III [Section 39A] of the Iowa Constitution does not, in this case, allow such an action on the part of the county.

Very truly yours,

Richard E. Mull (per rh)

RICHARD E. MULL
Assistant Attorney General

REM:rh

LIQUOR, BEER AND CIGARETTES: Manufacturer's Licenses Required for Holders of Bureau of Alcohol, Tobacco, and Firearms Experimental Distilled Spirits Plant Permit. §§ 123.1, 123.2, 123.3(8), 123.3(15), 123.41, The Code 1979. The Iowa Beer and Liquor Control Act regulates and controls the production of all alcohol capable of being consumed by humans, therefore § 123.41 requiring manufacturer's licenses applies to holders of federal permits for the production of ethyl alcohol for use as fuel. (Hamilton to Gallagher, Director, Beer & Liquor Control Department, 1/11/80) #80-1-9 (L)

January 11, 1980

Mr. Rolland A. Gallagher, Director
Iowa Beer & Liquor Control Department
Valley Bank Building
L O C A L

Dear Mr. Gallagher:

You have requested our opinion as to whether holders of U.S. Bureau of Alcohol, Tobacco and Firearms (BATF) permits for the manufacture of ethyl alcohol are required to obtain a manufacturer's license pursuant to § 123.41, The Code 1979. More directly, you want to know whether persons in Iowa, particularly farmers, who make alcohol for use as fuel in their own equipment and vehicles, pursuant to a BATF Experimental Distilled Spirits Plant Permit are required to obtain a manufacturer's license pursuant to § 123.41, The Code 1979.

Unfortunately, we believe that the answer to your question is that yes, a manufacturer's license is required of any person who makes drinkable alcohol, even if they have a valid BATF manufacturer's permit.

This answer is found by a direct reading of the Iowa Beer and Liquor Control Act, Ch. 123, The Code 1979. The declaration of public policy for the Act is found in § 123.1, The Code 1979, and states that:

> ...it is declared to be the public policy that the traffic in alcoholic liquors is so affected with a public interest that it should be regulated to the extent of prohibiting all traffic in them, except as provided in this chapter.

The general prohibition of the Act is set forth in § 123.2, The Code 1979, which provides that, "[I]t shall be unlawful to manufacture for sale, sell, offer or keep

for sale, possess, or transport alcoholic liquor or beer except upon the terms, conditions, limitations, and restrictions enumerated in this chapter." For our purposes there are two important words in this general prohibition, "alcoholic liquor" and "manufacture".

Section 123.5(8), The Code 1979, defines "alcoholic liquor" as including "...every liquid or solid, patented or not, containing alcohol, spirits, or wine, and susceptible of being consumed by a human being, for beverage purposes." "Manufacture" is defined in § 123.5(15), The Code 1979, as "to distill, rectify, ferment, brew, make, mix, concoct or process any substance capable of producing a beverage containing more than one-half of one percent alcohol by volume and includes blending, bottling, or the preparation for sale." Of importance in the context of manufacturing alcohol is the provision of § 123.41, The Code 1979, Manufacture's License, which provides that:

> Upon application in the prescribed form and accompanied by a fee of three hundred fifty dollars, the director may in accordance with this chapter grant and issue a license, valid for a one-year period after date of issuance, to a manufacturer which shall allow the manufacture, storage, and wholesale disposition and sale of alcoholic liquors to the department and to customers outside of the state.

Upon reading these provisions it is clear that the emphasis of the Act is to regulate and control the production and use of alcohol that could potentially be used for beverage purposes. The distillation of grain into ethyl alcohol, even though for the purpose of the production of fuel, would seem to fall squarely within the Act since the alcohol produced is drinkable. Therefore, the Act would appear to require that producers of alcohol for use as fuel would be required to obtain a manufacturer's permit from the state.

In reviewing the provisions of the Act to find a possible exception for farm fuel production, § 123.29 which empowers the Department to issue special permits to individuals "for the purchase, possession and transportation of alcoholic liquor," at first blush would appear to offer some hope. But, after reviewing the purposes for which the special permits may be granted it becomes clear that the on-farm production of ethyl alcohol for use as a fuel does not fit into any of the listed purposes. Since the Iowa Beer and Liquor Control Department is not empowered to expand

on this list, the provisions of § 123.41, The Code 1979, as to manufacturer's licenses appear to control.

The duties imposed on the Beer and Liquor Control Department by the Act are somewhat different than those imposed by the statutes of several neighboring states, relative to the regulation of on-farm production of ethyl alcohol for fuel pursuant to a federal permit. In Illinois, the approach used is that holders of the required federal permit, that is a BATF Experimental Distilled Spirits Plant Permit, are not required to obtain any state permit, unless the alcohol is to be sold. This result is possible because the Illinois Liquor Control Act, Ch. 43, § 94 et seq., Ill.Stat.Ann. is worded differently than the Iowa Act in one significant way. Chapter 43 § 96, Ill.Stat.Ann., which sets forth the scope of the Act qualifies the general prohibition on the production of alcohol by making it apply only to alcohol which is produced "for beverage purposes." Therefore, the position taken by Illinois is to not regulate ethyl alcohol production that complies with the federal requirements since it is produced for use as a fuel not a beverage.

Other states have taken a similar approach. Nebraska does not require licenses for persons producing alcohol for fuel purposes. Because the general prohibition in the Nebraska Act, only applies to "alcoholic liquor for beverage purposes." See § 53-102, Neb.Rev.Stat. (1978). Missouri reaches a similar result in their Liquor Control Law, Title 20 § 311.010, et seq. Mo.Ann.Stat., by including in the definition of intoxicating liquor the limiting phase "and all preparation or mixtures for beverage purposes." See Title 20 § 311.020, Mo.Ann.Stat. (1959).

Additionally, Minnesota has decided that there is no need to regulate on-farm production of ethyl alcohol under the Intoxicating Liquor Act, § 340.07, et seq. Minn. Stat.Ann. (1972), because of the qualified definition of the types of liquors regulated, which requires them to be "beverages". See § 340.07 subd. 2, Minn.Stat.Ann. (1972).

In conclusion, the intent of the Iowa Legislature was manifested in the mandate to control the production of all alcohol capable of being used for beverage purposes. Although many other states only regulate alcohol manufactured for use as a beverage, the Iowa law is not limited in this manner. The distinction is determinative and requires that under current Iowa law the holder of a BATF Experimental Distilled Spirits Plant Permit must also obtain from the Iowa Beer and Liquor Control Department a manufacturer's license pursuant to § 123.41, The Code 1979.

The Iowa law was enacted in a time when the present level of interest in the on-farm production of alcohol fuels was not contemplated. While it is unfortunate that the law has to be interpreted as introducing one more costly impediment to the development of on-farm fuel production capacity, a fidelity to the law offers us no alternative but to do so. It is the hope of the Attorney General that the legislature will respond to the problem which this opinion identifies by taking action to amend Ch. 123, The Code 1979, to limit its effect on farmers desiring to manufacture ethyl alcohol for use as fuel.

Sincerely,

Neil D. Hamilton

NEIL D. HAMILTON
Assistant Attorney General
Farm Division

NDH/nay

LICENSING: Licensee reporting requirements. Chapters 116, 258A; Sections 258A.1(c), 258A.3, 258A.4(1)(f), 258A.9(2), The Code 1979; 10 I.A.C. § 15.1. A licensee of the Iowa Board of Accountancy is under a mandatory continuing obligation to report acts or omissions of another licensee of the Iowa Board of Accountancy as required by § 258A.9(2), The Code 1979, regardless of the manner in which such acts or omissions come to the attention of the reporting licensee. (Hyde to Gronewold, Chairman, Iowa Board of Accountancy, 1/11/80) #80-1-8 (L)

January 11, 1980

Harlan L. Gronewold, Chairman
Iowa Board of Accountancy
L O C A L

Dear Mr. Gronewold:

We have received your request for an opinion from this office concerning ch. 258A, The Code 1979, "Continuing Professional and Occupational Education." Specifically, your questions as set out below involve the possibility of exemption from the reporting requirements of § 258A.9(2), The Code 1979:

1. The state trade association for Iowa Certified Public Accountants, the Iowa Society of Certified Public Accountants, has a "Practice Review Committee" whose primary responsibility is to perform an independent review of reports voluntarily submitted to it by the membership. This is undertaken to promote compliance with generally accepted auditing standards and generally accepted accounting principles. In your opinion, would Practice Review Committee members, in performing such a review, be bound by Chapter 258A and the Board of Accountancy rule 15.1 relative to the reporting of acts or omissions committed by other licensees?

2. The national trade association for certified public accountants, the American Institute of Certified Public Accountants, recently established two divisions for its members. The divisions consist of those members who are registered to practice before the Securities and Exchange Commission and those who are not. The membership of each division is required to undergo peer review at regularly scheduled intervals. In your opinion, would an Iowa CPA, holding a permit to practice, who is participating in an AICPA peer review of another Iowa CPA, who also holds a permit to practice, be required to report acts or omissions revealed during the course of the peer review?

> 3. Referring to question #2 above, would an out-of-state CPA, not licensed in Iowa, conducting a peer review in Iowa be required to report acts or omissions to the Iowa Board of Accountancy?
>
> 4. Would a certified public accountant holding a current permit to practice in Iowa be required to report to the Board apparent substandard work, as defined in Board rule 15.1, on the part of another CPA in the course of doing a volunteer peer review for a public welfare agency? As an example, the Greater Des Moines United Way has in the past requested CPA's to conduct peer reviews of professional work of other certified public accountants who have been engaged to prepare financial statements for United Way funded agencies. Since the enactment of Chapter 258A, CPA's have been reluctant to volunteer for public service projects of this nature in view of their new responsibilities apparently required by the new law.

Ch. 258A, as enacted by the 1977 Session, 67th G.A., ch. 95, "requiring professional and occupational licensees to participate in a continuing education program as a condition of license renewal, delegating rulemaking authority, providing for methods and procedures for the professional review of and the imposition of disciplinary sanctions for certain acts or omissions of practitioners and providing grounds for suspension or revocation of a professional or occupational license," became effective January 1, 1978. To effectuate its purposes, § 258A.3 and § 258A.4, The Code 1979, vest broad authority in the various licensing boards listed in § 258A.1, The Code 1979, including "the board of accountancy, created pursuant to chapter 116." Section 258A.1(c), The Code 1979. Among the specific duties imposed upon the licensing boards subject to ch. 258A is a duty to:

> Define by rule acts or omissions which are grounds for revocation or suspension of a license under the provisions of section . . . 116.21, and to define by rule acts or omissions which constitute negligence, careless acts or omissions within the meaning of section 258A.3, subsection 2, which licensees are required to report to the board pursuant to section 258A.9 subsection 2; . . .

Section 258A.4(1)(f), The Code 1979.

Pursuant to this express grant of rulemaking authority, the Iowa Board of Accountancy has promulgated rule 10 I.A.C. § 15.1, defining the acts or omissions which are required by § 258A.9(2), The Code 1979, to be reported by licensees:

> 2. A licensee shall have a continuing duty to report to the licensing board by whom he or she is licensed those acts or omissions specified by rule of the board pursuant to section 258A.4, subsection 1, paragraph "f", when committed by another person licensed by the same licensing board.
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> * * *
>
> 4. A licensee who willfully fails to comply with subsection 2 or 3 of this section commits a violation of this chapter for which licensee discipline may be imposed.

This obligation to report to the Board of Accountancy those acts or omissions defined by the board in its administrative rules is mandatory. See § 4.36(a), The Code 1979. The plain language of the statute provides no exemptions. A practitioner who is deemed to be a "licensee" under ch. 258A must report acts or omissions of other "licensees" that "demonstrate a lack of qualifications which are necessary to assure the residents of this state of a high standard of professional and occupational care,", 10 I.A.C. 15.1(1).

"Licensee of a licensing board" and "licensee", § 258A.9(1)(2), The Code 1979, are not defined in ch. 258A, but clearly refer to practitioners of a trade or profession regulated by a licensing and examining board pursuant to the Code. Licensees of the Board of Accountancy would be those certified public accountants, public accountants, and accounting practitioners granted permits or licenses to practice pursuant to the requirements of ch. 116, The Code 1979. It is immaterial how that act or omission comes within the knowledge of the reporting "licensee".

On the basis of this analysis, the answers to your specific questions would be as follows:

1. Members of the Practice Review Committee of the Iowa Society of Certified Public Accountants who are "licensees" of the Iowa Board of Accountancy and who may be participating in independent "peer review" of reports voluntarily submitted by other members to promote compliance with generally accepted auditing standards and generally accepted accounting principles, are under the continuing obligation imposed by § 258A.9(2) to report acts or omissions which may come to their attention.

2. Similarly, an Iowa CPA, licensed by the Iowa Board of Accountancy, participating in an American Institute of Certified Public Accounts "peer review" of another Iowa CPA licensed by the Iowa Board of Accountancy, is required to report acts or omissions revealed during the course of the peer review.

3. An "out-of-state CPA, not licensed in Iowa" would not, however, fall within the purview of ch. 258A, The Code 1979, and cannot be required by that chapter to report acts or omissions to the Iowa Board of Accountancy.

4. A CPA licensed by the Iowa Board of Accountancy would be required to report any acts or omissions of another CPA licensed by the Iowa Board of Accountancy of which he or she became aware during the course of a volunteer peer review for a public welfare agency.

In conclusion, it is our opinion that a licensee of the Iowa Board of Accountancy is under a mandatory continuing obligation to report the acts or omissions of another licensee of the Iowa Board of Accountancy, as required by § 258A.9, The Code 1979, and specified by 10 I.A.C. § 15.1(1), regardless of the manner in which the acts or omissions come to the attention of the reporting licensee.

Very truly yours,

Alice J. Hyde ab

ALICE J. HYDE
Assistant Attorney General

AJH:sh

COMMON CARRIERS: Scheduled penalty: Chs. 327C to 327G, Code of Iowa (1979). Violations of Chapters 327D and 327F are criminal in nature. These actions should be pursued by the county attorney. (Gregerson to Connors, State Representative, 1/4/80) #80-1-5 (L)

January 4, 1980

Mr. John H. Connors
State Representative
Statehouse
Des Moines, IA 50319

Dear Mr. Connors:

This is in response to your letter requesting an opinion of the Attorney General on several provisions of the Code of Iowa. The questions you asked to be considered are as follows:

1. Are sanctions for violations of Chapters 327D and 327F civil or criminal in nature?

2. Who is responsible for initiating actions in regard to the scheduled penalties set out in section 327C.5?

A discussion of the distinctions which exist between civil and criminal law was recently undertaken in another opinion issued by this office, a copy of which is enclosed, Op.Att'yGen. #79-3-2 (Miller and Schantz to Kopecky, 3/9/79); therefore, a similar discourse will not be made here.

The resolution of these questions does necessitate a historical overview of the statutes in question. Consequently, this survey will be undertaken first.

I

Chapters 327C to 327G chiefly involve the regulation of railroads within this state in matters such as safety, rates, and relations to the public. Scattered throughout these five chapters are numerous code sections imposing sanctions

for violations thereof. With few exceptions the large majority of these sections find their origin in legislation enacted forty to eighty years ago.[1] Eight[2] such sections are found in Chapters 327D and 327F.

When these eight provisions first appeared in the Code, violations of them resulted in a wide range of monetary penalties and all but one declared a violation to be a misdemeanor. The one provision that did not specifically do so, section 327F.35, provided for a fine, which "ordinarily connotes a pecuniary punishment imposed in a criminal prosecution for redress of public wrongs." Op.Att'yGen. #79-3-2.

The first amendments to these provisions in regard to the nature of the punishments imposed occurred when the Iowa Legislature passed the new criminal code. Ch. 1245, Acts of the 66th G.A., 1976. The division entitled Coordinating Amendments, Ch. 1245(4), amended many sections throughout Chapters 327C to 327G by labelling violations misdemeanors. Three of the eight sections of Chapters 327D and 327F were not so amended. Of these, sections 327D.17 and 327F.14 already made clear that a violation was a misdemeanor. Section 327D.28 was amended to make a violation a "fraudulent practice," Ch. 1245(4), §389, which was itself specifically made a crime. Ch. 1245(1), §1408(10) (§714.8(10), The Code 1979).

Thus, as of the date of the passage of the new criminal code, there can be no doubt that a violation of the statutes was considered a crime. Other changes have occurred since, however.

The Sixty-Seventh General Assembly passed the latest series of amendments to Chapters 327C to 327G. They established a uniform system of sanctions for violations of those chapters. §327C.5, The Code 1979. More specifically, section 327C.5 sets out a tiered structure for the imposition of penalties for violations of Chapters 327C to 327G. This structure consists of

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[1] A study of the Iowa Code Annotated reveals that only a smattering of cases have reached the Iowa Supreme Court in regards to these sections. Whether this lack of judicial activity stems primarily from a failure to enforce The Code, a lack of a need to enforce it, or a capitulation at a level below the Iowa Supreme Court is not clear.

[2] §§327D.17, .27, .132; §§327F.14, .20, .28, .35, .36

five scheduled monetary penalties which begin at $100 per violation (a "schedule one" penalty) and increase in severity up to a maximum of $5,000 for a first violation (a "schedule five" penalty).

The amendments by the Sixty-Seventh General Assembly, in addition to providing for the scheduled monetary penalties, removed the language concerning misdemeanors and instead substituted the words "upon conviction."[3] This phrase has a criminal connotation which would indicate that a criminal proceeding was meant to be followed in the application of these sections.

Thus, a study of the legislative history shows no intent on the part of the Iowa Legislature to make violations of Chapters 327D and 327F civil. This last set of amendments appear to have been for the purpose of turning a hotch potch of monetary penalties into a uniform system and to remove the possibility of a jail term. They do not appear to have been intended to change the sanctions for violations of Chapters 327D and 327F from a criminal to a civil nature.

II

Since the conclusion of I, supra, is that the scheduled penalties of Chapters 327D and 327F, are intended to be criminal in nature, the initiation of actions seeking to impose section 327C.5 scheduled penalties would begin with the county attorney. This appears to be true of all the penalty provisions of Chapters 327C through 327G, with the exception of sections 327C.4 and 327C.17. Violation of either section was never explicitly made a crime. The legislative history of section 327C.4 indicates a civil action to recover the penalty was intended. Section 327C.17, along with sections 327C.18 through 327C.20, appear to contemplate an administrative sanction imposed by the Department of Transportation rather than by a judicial proceeding.

III

In conclusion then, the answer to your questions are, first,

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[3]Only two penalty sections in Chapters 327C through 327G, §327C.4 and §327C.17, do not contain this phrase. They will be discussed briefly, infra, in II. The only exception to this general amendment was section 327D.17, where the phrase "upon conviction" was already present and the explicit provision of misdemeanor was left in.

that violations of Chapters 327D and 327F are criminal in nature, and, second, responsibility for enforcement of the penalty provisions lies primarily with the county attorney.

Sincerely,

Craig Gregersen

Craig Gregersen
Assistant Attorney General

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Enc.

COUNTIES: Selection of official county newspapers. Chapter 349, Sections 349.3, 349.5, 349.6, 349.7, The Code 1979. A county board of supervisors has no authority to restrict or extend the definition of "bona fide yearly subscribers" beyond the plain language set forth in § 349.7, The Code 1979. (Hyde to Holt, State Representative, 1/4/80) #80-1-3(CL)

January 4, 1980

Honorable Lee W. Holt
State Representative
1502 Country Club Drive
Spencer, Iowa 51301

Dear Representative Holt:

We have received your request for an opinion from this office concerning the selection of official newspapers by county boards of supervisors, as set forth in ch. 349, The Code 1979. Specifically, you asked:

> Does § 349.7, The Code 1979, require a showing that a subscriber by carrier or independent carrier has, in addition to receiving the paper in question for at least six months prior to application, an express or implied contract to receive the paper for at least one year?

Your request indicated that in connection with a contest in January, 1979, the Clay County Board of Supervisors concluded that to be counted in determining the number of "bona fide yearly subscribers" as required by § 349.6, subscribers "must have (1) received the paper at least six consecutive months prior to the date of application herein, and (2) there must be a binding contract between the publisher and the buyer to cover a period of at least one year." Apparently, this resulted in the exclusion from consideration of those subscriptions to papers delivered by independent carrier where the subscribers pay on a weekly or monthly basis, have no subscription contract, and may stop receiving the paper at any time.

Chapter 349, The Code 1979, regulates the yearly selection of official newspapers by county boards of supervisors. When applications from publishers filed with the county board of supervisors exceed the number of newspapers to be selected pursuant to § 349.3, a "contest" ensues. Section 349.5 then requires each applicant to deposit with the county auditor a verified statement "showing the names of his bona fide yearly subscribers living within the county and the place at which each subscriber receives such newspaper, and the manner of its delivery." The board of supervisors may receive other evidence of circulation, and, "the . . . newspapers showing the largest number of bona fide yearly subscribers living within the county shall be selected as official newspapers." Section 349.6, The Code 1979. "Bona fide yearly subscribers" is defined in § 349.7, The Code 1979: [1]

> The board of supervisors shall determine the bona fide yearly subscribers of a newspaper within the county, as follows:
>
> 1. Those subscribers listed by the publisher whose papers are delivered, by or for him, by mail or otherwise, upon an order or subscription for same by the subscriber, and in accordance with the postal laws and regulations, and who have been subscribers at least six consecutive months prior to date of application.
>
> 2. Those subscribers, as defined as in subsection 1, whose papers are delivered by carrier regularly, or purchased from the publisher for resale and delivery by independent carrier, said independent carriers having filed with the publisher a list of their subscribers.

[1] Until 1937, "bona fide yearly subscribers" was not defined in the Code, resulting in a case-by-case development by the courts of a workable definition. See Van der Burg v. Bailey, 209 Iowa 991, 229 N.W.253 (1930); Bloomfield Davis County Messenger v. Bloomfield Democrat, 201 Iowa 196, 205 N.W.345 (1925); Kane v. Sturgis, 198 Iowa 836, 200 N.W.329 (1924); Brown v. McGuire, 181 Iowa 255, 164 N.W.600 (1917); Smith v. Rockwell, 113 Iowa 452, 85 N.W.632 (1901); Young v. Rann, 111 Iowa 253, 82 N.W.785 (1900). The present definition was adopted by 1939 Session, 48th G.A., ch. 146, § 1.

A county board of supervisors is given no express authority to conduct a ch. 349 contest pursuant to any alternative methods. In view of the express nature of the Code's provision for a newspaper selection contest, the county's ability under its extensive home rule powers to provide alternative methods has been preempted. See Op. Atty. Gen. #79-4-7. Thus, the county board of supervisors has no authority to restrict or extend the definition of "bona fide yearly subscribers" beyond the plain language set forth in § 349.7.

The purpose of publication of county business in an official newspaper is to furnish the citizen a convenient method of ascertaining just what business is being transacted by the board of supervisors, and how it is being transacted. See § 618.3, The Code 1979; 1910 Op. Atty. Gen. 223. The clear intent of ch. 349 is to provide for the selection of established newspapers with the most extensive distribution within the county so as to disseminate in the widest possible manner information that should be available to taxpayers. Any attempt by the county board of supervisors to apply a more restrictive or alternative method of selection could produce the opposite result.

For example, imposing a requirement of a showing of a binding one-year contract, as did the Clay County Board of Supervisors, would eliminate from consideration those subscribers who receive their newspapers as a result of participation in the pervasive and well-established "little merchant" system. Under that system, a subscriber places an open-ended order, terminable at any time, with the newspaper publisher. Delivery is made by an independent carrier, however, who has purchased the newspaper wholesale from the publisher and resells it at retail to the subscriber. Once a subscriber has been receiving the newspaper for at least six consecutive months, that subscriber would properly fall within the definition of a bona fide yearly subscriber set forth in § 349.7, and should be eligible for inclusion on lists drawn to determine selection of an official county newspaper.

In conclusion, it is our opinion that a county board of supervisors has no authority to restrict or extend the definition of "bona fide yearly subscribers" beyond the plain language set forth in § 349.7, The Code 1979.

Very truly yours,

Alice J. Hyde

ALICE J. HYDE
Assistant Attorney General

AJH:sh

SCHOOLS: ACCUMULATION OF SICK LEAVE. § 279.40, The Code 1979. A school district may impose a limitation on the accumulation of unused sick leave, but the limit may not be less than 90 days. School districts may contract to pay for unused sick leave, but this payment is not required by statute. (Norby to Anderson, State Representative , 2/27/80) #80-2-14 (L)

February 27, 1980

Honorable Robert T. Anderson
State Representative
State Capitol
L O C A L

Dear Representative Anderson:

You have requested an Attorney General's opinion concerning limitations on the accumulation by public school employees of unused leave days. Specifically, you have asked the following:

> May a school board deny accumulation of an employee's minimum amount of yearly leave of absence days so the total of an employee's accumulative unused portion of such days is no more than 90 days, despite the fact that the 90 days is a required minimum, not a prohibitory maximum on accumulation of leave of absence days and the fact that employees are entitled by statute to a specific number of leaves of absence days per year, regardless of their total of unused sick days?

This question requires interpreation of § 279.40, The Code 1979, the relevant portion of which provides as follows:

> SICK LEAVE. Public school employees are granted leave of absence for medically-related disability with full pay in the following minimum amounts:
>
> 1. The first year of employment . . . . 10 days.
> 2. The second year of employment . . . 11 days.
> 3. The third year of employment . . . . 12 days.
> 4. The fourth year of employment . . . 13 days.
> 5. The fifth year of employment . . . . 14 days.
> 6. The sixth and subsequent years of employment . . . . . 15 days.

> The above amounts shall apply only to consecutive years of employment in the same school district and unused portions shall be cumulative to at least a total of ninety days. The school board shall, in each instance, require such reasonable evidence as it may desire confirming the necessity for such leave of absence.
>
> Nothing in this section shall be construed as limiting the right of a school board to grant more time than the days herein specified. [Emphasis supplied].

Your inquiry involves a consideration of the nature of the rights which an employee acquires in accumulated leave under § 279.40, The Code 1979, with regard to a school district's ability to limit accumulation of this leave. As a corollary to your question, if a maximum limit may be applied, the manner in which leave attributable to a current year is counted requires clarification.

Prior to 1959, § 279.40 provided for a maximum accumulation of sick leave, in contrast to the present minimum amount. 1959 Session, 58th G.A., ch. 193, §§ 1-3. Prior to this amendment, the statute clearly did not purport to vest employees with a statutory right to unlimited leave. The present language does allow more liberal leave policies, but also does not purport to vest employees with a right to unlimited accumulation. If interpreted to allow unlimited accumulation, the second and third paragraphs of § 279.40 would be of no effect. In prior interpretations of this statute, the Attorney General has approved of the limitation of accumulation of sick leave, characterizing paid sick leave as a benefit of employment which does not vest the employee with any absolute right to take the leave or to be compensated for unused leave. See 1952 Op. Atty. Gen. 83; 1952 Op. Atty. Gen. 92; 1972 Op. Atty. Gen. 353 [concerning the continued validity of this opinion on other related points, see Bettendorf Educ. Assn. v. Bettendorf Comm. Sch. Dist., 262 N.W.2d 550 (Iowa 1978)]. This conclusion, that a maximum limitation may be applied, is consistent with the Iowa Supreme Court's decision in Bettendorf Ed. Assn. v. Bettendorf Comm. Sch. Dist., 262 N.W.2d 550 (Iowa 1978). In Bettendorf, the court considered claims for payment representing accumulated sick leave as a retirement benefit, this payment having been included in contracts with regard to one group of employees, but excluded with regard to a second group. In upholding payment of this benefit to the first group, but not the second, the court illustrates that this benefit may be provided by contract, but is not required by § 279.40. See Op. Atty. Gen. #79-6-14 (regarding the ability of a school to contract to pay for unused sick leave.) This same reasoning should apply by analogy to the accumulation of sick leave. A school district may provide for accumulation beyond the statutory minimum, but § 279.40 does not require accumulation beyond 90 days.

Your question indicates a concern that our construction of § 279.40, which allows an accumulation limitation, will have the effect of denying an accumulation of leave for a current year. We believe, however, that § 279.40 does not necessarily require a positive addition to accumulated leave for each year of employment. In other words, an employee may reach the maximum amount and, if no leave is taken, remain at that amount. The specific amounts listed in the first paragraph of § 279.40 provide for minimum amounts of leave during particular years. An employee who has accumulated a maximum amount of leave (never less than 90 days) will always exceed these minimum amounts, the greatest of which is 15 days. Our interpretation may lead to an employee reaching a plateau and, in fact, not receiving any additional leave for a current year. But this is appropriate for two reasons. First, the first paragraph of § 279.40 provides for a minimum amount of leave, not for a compulsory addition to leave for every year. Secondly, and more importantly, this type of limitation is specifically provided for by the second paragraph of § 279.40. Accordingly, it would be improper to modify this direct language through an implication arising from the first paragraph. We do believe, however, that when an employee who has reached a maximum level is required to take leave, his/her leave should be replenished. This replenishment should be provided from the amount of current leave which would have been provided had the employee not already reached the maximum level of accumulation. (This should not, however, be construed as authorizing an employee to accumulate in excess of an applicable maximum level.)

Having concluded that a maximum ceiling on accumulation may be established, the calculation of this accumulation may raise questions. For example, assume a 90-day ceiling is applicable, that an employee has reached an accumulation of 90 days, and is currently employed in a year which entitles he/she to 15 days of leave. Is this employee entitled to 90 days of leave, or to 105 days (90 days of accumulation plus 15 days for the current year)? The Attorney General has previously interpreted the language of § 279.40 to require the maximum accumulation to be inclusive of current leave. 1952 Op. Atty. Gen. 83, 84. In the above hypothetical case, the employee would therefore be entitled to 90 days of sick leave. Under the present statute, this point of interpretation has less importance than under the prior language, which imposed a maximum accumulation. To avoid confusion, however, school districts may wish to clarify whether their accumulation limit is inclusive or exclusive of leave attributable to a current year.

Sincerely,

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

PHYSICIANS AND SURGEONS; STATE OFFICERS AND DEPARTMENTS: Advanced emergency medical technicians or paramedics. §§ 147A.1(1), 147A.1(4), 147A.1(5), 147A.5(1), 147A.8(1), 147A.8(2), The Code 1979; 1978 Session, 68th G.A., Ch. 1074. An advanced emergency medical technician or paramedic may administer parenteral medications inside a hospital under the direct supervision of a physician or other specifically designated individual. Other activities within the scope of advanced emergency medical care may be performed in a hospital emergency department but only until care is provided by a physician or authorized hospital personnel. (Haskins to Saf, Executive Director, State Board of Medical Examiners, 2/27/80) #80-2-13(L)

February 27, 1980

Ronald V. Saf
Executive Director
State Board of Medical Examiners
L O C A L

Dear Mr. Saf:

Your opinion request concerns the scope of activity of an advanced emergency medical technician or paramedic.

In 1978, the legislature authorized individuals to be certified by the state board of medical examiners (the "board") as emergency medical technicians ("E.M.T.s") or paramedics. See 1978 Session, 68th G.A., Ch. 1074, codified as Ch. 147A, The Code 1979. An advanced E.M.T. or paramedic is trained to provide advanced emergency medical care[1] and is issued a certificate by the board. See § 147A.1(4), (5), The Code 1979.

You ask whether an advanced E.M.T. or paramedic may perform authorized services inside a hospital or whether he or she is is limited to rendering services prior to arrival at the hospital.

Section 147A.5(1), The Code 1979, permits authorized ambulance services or rescue squad services to utilize certified advanced

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1. "Advanced Emergency medical care" is defined in § 147A.1(1), The Code 1979, as follows:

> As used in this chapter, unless the context otherwise requires:

E.M.T.s or paramedics. It states:

> Any ambulance service or rescue squad service in this state, regularly engaged in transporting patients who may require advanced emergency medical care before or during such transportation, may apply to the department for authorization to establish a program utilizing certified advanced EMTs or paramedics for delivery of such care at the scene of an emergency, during transportation to a hospital, or while in the hospital emergency department, and until care is directly assumed by a physician or by authorized hospital personnel. The application must bear the endorsement of a physician, but that physician shall not be liable nor responsible for the actions of the ambulance or rescue squad service nor the personnel thereof. (Emphasis added).

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1. "Advanced emergency medical care" means such medical procedures as:
   a. Administration of intravenous solutions.
   b. Gastric or tracheal suction or intubation.
   c. Performance of cardia defibrillation.
   d. Administration of parenteral injections of any of the following classes of drugs:
      (1) Antiarrhythmic agents;
      (2) Vagolytic agents;
      (3) Chronotropic agents;
      (4) Analgesic agents;
      (5) Alkalizing agents;
      (6) Vasopressor agents;
      (7) Anticonvulxive agents; or
      (8) Other drugs which may be deemed necessary by the supervising physician.
   e. Any other medical procedure designated by the board, by rule, as appropriate to be performed by advanced E.M.T.s and paramedics who have been trained in the procedure.

The above section implies that an advanced E.M.T. or paramedic may perform services in a hospital emergency department until care is provided by a physician or authorized hospital personnel.

Section 147A.8, The Code 1979, sets forth the permissible scope of the activities of advanced E.M.T.s or paramedics as follows:

> An advanced EMT or a paramedic properly certified under this chapter may:
> 1. Render advanced emergency medical care, rescue, and resuscitation services in those areas for which he or she is certified as defined and approved in accordance with the rules of the board.
> 2. While employed by or assigned to a hospital or other medical facility, or an ambulance service or rescue squad service, and caring for patients in the course of that assignment, administer parenteral medications under the direct supervision of a physician or of another individual specifically designated by the responsible physician.

Subsection 1 of the above section refers to the subject matter of the areas of practice of an advanced E.M.T. or paramedic and not to the physical location of those areas. Subsection 2 authorizes a properly certified advanced E.M.T. or paramedic employed by or assigned to a hospital or other medical facility to administer parenteral medications under the direct supervision of a physician or other individual specifically designated by the physician. No limitation exists on where the parenteral medications may be administered. Under subsection 2, they need only be administered under the direct supervision of a physician or other specifically designated individual. Presumably, this could be inside a hospital. Notably, "direct supervision" in this context has been defined by rules of the board to mean physical presence of the physician or designated individual. See 470 I.A.C. § 132.1(22). This interpretation of "direct supervision" appears reasonable.

At first glance, § 147A.5(1) and § 147A.8(2) would seem to be inconsistent as to the administration of parenteral medications. Under § 147A.5(1), as part of advanced emergency medical care, administration of parenteral medications could seemingly be done only until care is directly assumed by a physician or authorized

personnel. Yet, under § 147A.8(2), administration of parenteral medications can only be done under the direct supervision of a physician or other specifically designated individual. We believe the apparent conflict can be resolved by following the more specific section--§ 147A.8(2). This means that administration of parenteral medications may be done inside a hospital under the direct supervision of a physician or specifically designated individual. As to other activities within the scope of advanced emergency medical care, they may be performed in a hospital emergency department but only until care is provided by a physician or authorized hospital personnel and not thereafter.

In sum, reading §§ 147A.5(1) and 147A.8(2) together, an advanced E.M.T. or paramedic may administer parenteral medication inside a hospital under the direct supervision of a physician or other specifically designated individual. Other activities within the scope of advanced emergency medical care may be performed in a hospital emergency department but only until care is provided by a physician or authorized hospital personnel.

Very truly yours,

Fred M. Haskins

FRED M. HASKINS
Assistant Attorney General

FMH/cmc

FINANCIAL INSTITUTIONS: Savings and Loan Association; Conflict of interest of officer, director or employee. § 534.8(1), The Code 1979. The restriction on interested transactions by an officer, director or employee of a savings and loan association does not prohibit the collection or receipt of fees, commissions or profit from the sale of property, goods or services, merely because the purchase price was borrowed from or guaranteed by the savings and loan association; § 534.8(1), The Code 1979, requires a causal connection between any specific action sought to be taken and the pecuniary benefit received. (Hyde to Pringle, Savings and Loan Supervisor, State Auditor's Office, 2/27/80) #80-2-11(L)

February 27, 1980

John A. Pringle, Supervisor
Savings and Loan Associations
State Auditor's Office
L O C A L

Dear Mr. Pringle:

We have received your request for an opinion from this office interpreting certain language of § 534.8(1), The Code 1979, making it unlawful for any officer, director or employee of a savings and loan association regulated by ch. 534, The Code 1979:

> To solicit, accept or agree to accept, directly or indirectly, from any person other than the association any gratuity, compensation or other personal benefit for any action taken by the association or for endeavoring to procure any such action.

Your letter inquired:

> In particular, we need to know if directors who are real estate agents, attorneys, builders and suppliers are in violation of this law if they receive commissions, fees and profits as the result of, or at least indirectly due to, the association granting loans. If a loan was not granted, the sale would not have been made, the commissions or fees paid, the contractor hired nor the material supplied.
>
> If such a broad prohibition as above outlined does exist, it would effectively exclude agents, attorneys, builders and suppliers from serving on savings and loan boards. This would be particularly true if the savings and loan was the only or . . . dominant real estate lender in the city.

Section 534.8(1), The Code 1979, imposes an absolute restriction on any officer, director or employee of a savings and loan association receiving any benefit derived from securing "any action taken by the association or for endeavoring to procure any such action." The prohibition codifies the common law limitation on conflict of interest:

> It is a well-established and salutory rule in equity that he who is intrusted with the business of others cannot be allowed to make such business an object of pecuniary profit to himself. This rule does not depend upon reason technical in character, and is not local in its application. It is based upon principles of reason, of morality and of public policy. It has its foundation in the very constitution of our nature, for it has authoritatively been declared that a man cannot serve two masters, and is recognized and enforced wherever a well-regulated system of jurisprudence prevails.

Wilson v. Iowa City, 165 N.W.2d 813,819 (Iowa 1969). Section 534.8(1), The Code 1979, ensures that officers, directors or employees of a savings and loan association will exercise their powers wholly in the interest of the savings and loan association, and not for their own personal interests.

Further, the restrictions are comparable to prohibitions on officers, directors or employees in their capacities, in business corporations within the private sector, see § 496A.34, The Code 1979; Holi-Rest, Inc. v. Treloar, 217 N.W.2d 517,525 (Iowa 1974), and throughout the public sector. See § 18.5, The Code 1979 (restricting state general services director); § 262.10, The Code 1979 (board of regents); § 279.32, The Code 1979 (school corporation board of directors); § 347.15, The Code 1979 (county public hospital trustees); 1968 Op. Atty. Gen. 153; § 362.5, The Code 1979 (city officer or employee); Leffingwell v. City of Lake City, 257 Iowa 1022, 135 N.W. 2d 536 (1965); § 403.16, The Code 1979 (municipal officer with urban renewal project); Wilson v. Iowa City, 165 N.W.2d 813 (Iowa 1969).

The key words of § 534.8(1), The Code 1979, and those which limit the scope of its application, are: "for any action taken" and "for endeavoring to procure any such action". These clearly denote a requirement that there be a causal connection between the action of the officer, director or employee of the savings and loan association, and the pecuniary benefit received. Certainly, the restriction of § 534.8(1), The Code 1979, prohibits influence peddling or the exploitation of position. It should not, however, extend to prohibit an officer or member of the board of directors from collecting or receiving a fee or commission or earning a profit from the sale of property, goods or services, merely because the purchase

price was borrowed from or guaranteed by the savings and loan association which he or she serves. Some further connection, such as a cause and effect relationship, must be shown between the action taken and the pecuniary benefit received.

While we cannot anticipate the specific circumstances which might invoke the application of § 534.8(1), The Code 1979, the following examples may be illustrative. The owner of a building supply business who served on the board of directors of a savings and loan association would be prohibited from receiving compensation or gifts for exerting influence in the granting of a loan to a customer, but could sell building materials to a contractor paid with money borrowed from the savings and loan association. An attorney who was an officer or a member of the board of directors of a savings and loan association would be prohibited from receiving compensation for assisting a client to secure financing for a real estate purchase from the savings and loan association, but could receive compensation for examining an abstract for a client who had arranged financing on his or her own.

In conclusion, we believe that the prohibition on interested transactions by an officer, director or employee of a savings and loan association, imposed by § 534.8(1), The Code 1979, requires a causal connection between any specific action sought to be taken and the pecuniary benefit received. Section 534.8(1), The Code 1979, does not prohibit any officer, director or employee from collecting or receiving fees or commissions or earning profits from the sale of property, goods or services, simply because the purchase price was borrowed from or guaranteed by the savings and loan association which he or she serves.

Very truly yours,

Alice J. Hyde

ALICE J. HYDE
Assistant Attorney General

AJH:sh

MUNICIPALITIES; HOME RULE; PLATS: Art. III, § 38A, Constitution of Iowa, §§ 364.2, 364.3, and Chapter 409, Code of Iowa 1979. A municipal ordinance requiring platting of land within its jurisdiction upon being subdivided into two or more parts is not thereby constitutionally inconsistent with statute requiring such platting upon division into three or more parts. (Peterson to Welsh, State Representative, 2/26/80) #80-2-9(L)

February 26, 1980

Mr. Joe Welsh
State Representative
State Capitol
L O C A L

Dear Representative Welsh:

You have requested the opinion of the Attorney General as to the validity of a provision in a recently enacted municipal ordinance requiring platting of land divided into two or more parts in view of Chapter 409, The Code 1979, which requires platting upon division into three or more parts.

We are of the opinion that the ordinance provision in question is a valid exercise of municipal home rule power and authority.

The Municipal Home Rule Amendment, Article III [38A] of the Constitution of Iowa declares:

> 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.

After enactment of the home rule amendment, the General Assembly defined its new legal relationships with municipal corporations by statute providing that a city may exercise its general home rule powers "subject only to limitations

expressly imposed by a state or city law" (§ 364.3(3), The Code), and that a city "may not set standards and requirements which are lower or less stringent than those imposed by state law, but may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise" (§ 364.2(2), The Code). Thus, the General Assembly has generally empowered a city to set standards more stringent than those imposed by state law unless the statute expressly provides otherwise.

Bryan v. City of Des Moines, 261 N.W.2d 685 (Iowa 1978) involved provisions of state law vesting authority in the Civil Service Commission to conduct promotional examinations for police officers. A resolution of the city council imposed certain education requirements. In holding that a city has authority to establish additional requirements for promotion, the court (at p. 687) stated:

> Home rule empowers a city to set standards "more stringent than those imposed by state law, unless a state law provides otherwise." § 364.3(3), The Code. Any limitation on a city's powers by state law must be expressly imposed. § 364.2(2), The Code; see Chelsea Theater Corporation v. City of Burlington, 258 N.W.2d 372 (Iowa 1977). Certain express limitations on a city's authority to establish employment qualifications are fixed by statute. See §§ 400.16, 400.17, The Code. However, those limitations are not involved here. Moreover, § 400.9 does not expressly purport to divest the city council of authority to establish educational requirements.
>
> We hold the civil service commission's sole prerogative to give promotional examinations does not constitute exclusive authority to establish promotional qualifications.

In Chelsea Theater Corporation v. City of Burlington, 258 N.W.2d 372 (Iowa 1977), cited in Bryan, supra, the court found such express limitation on a city's power to regulate in provisions of § 725.9, The Code, which provide that "...it is intended that the sole and only regulation of obscene material shall be under the provisions of [§§ 725.1 to 725.10], and no municipality, county or other governmental unit within this state shall make any law, ordinance or regulation relating to the availability of obscene materials."

Miller v. Fabius Township Board, 366 Mich. 250, 114 N.W.2d 205 (1962), involved a state statute prohibiting water skiing on inland lakes during the period one hour after sunset to one hour before sunrise. A local ordinance further limited water skiing to the period 10 a.m. to 4 p.m. The court concluded that the ordinance was not in conflict with the statute, relying on an earlier Michigan case holding that:

> ...an ordinance may not invade a field completely occupied by statute but may enter an area not pre-empted by the State act . . . that what the State law expressly permits an ordinance may not prohibit.
>
> Since the cited statutes do not expressly control the period of regulation covered by the ordinance, it must be concluded there is no conflict. The ordinance speaks only where the statutes are silent.

In Fox v. Racine, 225 Wis. 542, 275 N.W. 513 (1939), a statute prohibited endurance contests where any person participated in excess of stated periods. A city ordinance prohibited endurance contests altogether. The court held that enactments by the state in the exercise of the police power do not prohibit a municipality from additional requirements so long as there is no conflict between the two and the ordinance is otherwise lawful. The fact that an ordinance requires more than the statute requires creates no conflict unless the statute limits the requirements for all cases to its own prescriptions.

Powers v. Nordstrom, 150 Minn. 228, 184 N.W. 967 (1921), involved a Sunday closing statute prohibiting the doing of certain things on Sunday not including the indoor exhibition of motion pictures which a local ordinance prohibited. In finding the ordinance valid, the court held that an ordinance cannot authorize what a statute forbids or forbid what a statute expressly permits but it may supplement a statute or cover an authorized field of local regulation unoccupied by general legislation.

Home rule municipalities need not look to the legislature for a grant of power to act but need only look to legislative enactments to see if any express limitations have been placed on their power to act. The legislative intent to reserve to itself exclusive jurisdiction to regulate must be clearly

manifested by statute before it can be held that the state has withdrawn from cities the power to regulate in that area. See, Junction City v. Lee, 216 Kan. 495, 532 P.2d 1292 (1975); Apodaca v. Wilson, 86 N.M. 516, 525 P.2d 876 (1974); Aurora v. Martin, 181 Colo. 72, 507 P.2d 868 (1973).

See also, Gannett v. Cook, 245 Iowa 750, 61 N.W.2d 703 (1954), citing with approval 62 C.J.S. Municipal Corporations, § 143, stating the general rule with respect to enlargement of statutory provisions by local ordinance as follows:

> ...a municipal regulation which is merely additional to that of the state law does not create a conflict therewith. Where the legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipal corporation may make such additional reasonable regulations in aid and furtherance of the purpose of the general law as may seem appropriate to the necessities of the particular locality. The fact that an ordinance enlarges on the provisions of a statute by requiring more than the statute requires creates no conflict therewith unless the statute limits the requirements for all cases to its own prescriptions."

Though Chapter 409 contains 43 sections setting out required platting procedures in considerable detail, the statute contains no words of express limitation on the powers of a city with respect to such plats. On the contrary, the formal approval of the affected city council is required prior to filing the plat with the county recorder. §§ 409.7, 409.12, 409.14, 409.15, 409.16, 409.17, and 409.18.

State requirements for platting of subdivisions are triggered by § 409.1, The Code, which, insofar as pertinent to your question, provides:

> 409.1 Subdivisions or additions. Every proprietor of any tract or parcel of land of . . . any size located within a city . . ., who shall subdivide the same into three or more parts, shall cause a . . . plat of such subdivision . . . to be made by a registered land surveyor . . . .

The ordinance purports to act, with respect to the threshold or "trigger" provision in question, where the statute is silent. That is, the statute requires certain things only when a parcel of land is divided into three or more parts whereas the ordinance initiates its requirements when a parcel is divided into two or more parts. Since the statute does not expressly limit regulation to its own prescriptions (as in Chelsea Theater Corporation, supra), the city is empowered under home rule to require a plat thereof when a parcel of land is divided into two or more parts. Other provisions and requirements of the ordinance must, of course, not be inconsistent with the general law of the state, including procedures for platting of land required by Chapter 409, The Code. Where procedures in a given area are established by statute, an ordinance supplementing that statute must follow statutory procedures. See City of Iowa City v. Westinghouse Learning Corporation, 264 N.W.2d 771 (Iowa 1978); and Cedar Rapids Human Rights Commission v. Community School District, 222 N.W.2d 391 (Iowa 1974).

In summary, we are of the opinion that a municipal ordinance requiring platting of land within its jurisdiction upon being subdivided into two or more parts is not thereby constitutionally inconsistent with a statute requiring such platting upon division into three or more parts.

Sincerely,

Clifford E. Peterson

CLIFFORD E. PETERSON
Assistant Attorney General
Environmental Protection Division

CEP:rcp

TAXATION: Unapportioned Net Income Tax upon Multistate Farm Corporations. U.S.CONST. art.I,§8, cl.3 and amend XIV; Iowa Const. art.I, §9; §422.33(1), The Code 1979. Section 422.33(1), as applied to a farm corporation whose property is located entirely within Iowa and which carries on its business partly within and partly without Iowa, would produce an inherently arbitrary result and would attribute to Iowa income out of all appropriate proportion to business transacted in Iowa by subjecting such corporation to an unapportioned net income tax on its entire net income, in violation of the applicable constitutional due process and commerce clauses. (Miller and Griger to Hinkhouse and Schnekloth, State Representatives, 2/22/80) #80-2-7

February 22, 1980

Herbert C. Hinkhouse
Hugo Schnekloth
State Representatives
State Capitol
L O C A L

Dear Representatives Hinkhouse and Schnekloth:

This will acknowledge receipt of your recent letter in which you requested an opinion of the Attorney General as follows: "We request an Attorney General opinion on the constitutionality of 422.33, subsection 1 of the Iowa Code, pertaining to agricultural corporations paying income tax on products sold out of the state of Iowa."

The relevant provisions of §422.33(1), The Code 1979, imposing the Iowa income tax upon the net incomes of Iowa and foreign corporations,state:

> 1. If the trade or business of the corporation is carried on entirely within the state, or if the trade or business consists of the operation of a farm and the property is located entirely within the state, the tax shall be imposed on the entire net income, but if such trade or business is carried on partly within and partly without the state, or if the trade or business consists of the operation of a farm and the property is located partly within and partly without the state, the tax shall be imposed only on the portion of the net income reasonably attributable to the trade or business within the state, said net income attributable to the state to be determined as follows:
>
> * * *
>
> Where income is derived from the manufacture or sale of tangible personal property, the part thereof attributable to business within the state shall be in that proportion which the gross sales made within the state bear to the total gross sales.
>
> The gross sales of the corporation within the state shall be taken to be the gross sales from goods delivered or shipped to a purchaser within the state regardless of the f.o.b. point or other conditions of the sale, excluding deliveries for transportation out of the state. (emphasis supplied).

An examination of §422.33(1), as above quoted, clearly discloses that non-farm corporations carrying on their entire business activities in Iowa are required to pay Iowa income tax upon their entire net incomes, but those non-farm corporations carrying on their businesses of sale of tangible personal property partly within and partly without Iowa are required to attribute to Iowa a portion of their entire net income from such sales by use of the Iowa single sales factor formula.[1] The constitutionality of the Iowa income tax apportionment scheme contained in the Iowa single sales factor formula has been upheld

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Provision is made in §422.33(2), The Code 1979, for granting of an alternative method for division of a corporation's income earned from business or sources within and without Iowa. There is no need for this statute to be discussed in this opinion.

by the Iowa and United States Supreme Courts. Moorman Mfg. Co. v. Bair, 254 N.W.2d 737 (Iowa 1977), aff'd 437 U.S. 267, 98 S.Ct. 2340, 57 L.Ed.2d 197 (1978).[2]

Section 422.33(1), as applicable to farm corporations, requires such corporations to attribute to Iowa their entire net incomes as long as the property of such corporations "is located entirely within" Iowa. In the event that the property of farm corporations is located partly within and partly without Iowa, the farm corporations will attribute their net incomes from the sale of farm products by the same apportionment scheme utilized by non-farm corporations carrying on business partly within and partly without Iowa.

In the situation you pose, the farm corporations are presumably operating their farms entirely within Iowa and their properties are located entirely within Iowa. However, these corporations are making sales of their products outside of Iowa. For example, such corporations could be selling their products in Illinois through employee salespersons who are located there and who have authority to enter into sales agreements. Notwithstanding that such corporations may be engaged, therefore, in business activities outside of the State of Iowa in selling their farm products, as long as their properties are located wholly within Iowa, §422.33(1) requires them to pay Iowa income tax upon their entire net incomes. Under such circumstances the imposition of an unapportioned net income tax upon the entire net incomes of such multistate unitary farm corporations would be in violation of due process as required by the United States Constitution (U.S.CONST.amend XIV) and the Iowa Constitution (Iowa Const. art.1, §9) and in violation of the commerce clause (U.S.CONST.art I,§8, cl.3) of the United States Constitution. A separate analysis of the two due process clauses in the United States and Iowa Constitutions is unnecessary "under the general principle that similar constitutional guarantees are usually deemed to be identical in scope, import and purpose." Moorman, 254 N.W.2d at 745.

In Moorman, the United States Supreme Court set forth the following limitations which due process places upon a state's ability to tax net income derived from interstate business in 437 U.S. at 272-3:

> The Due Process Clause places two restrictions on a state's power to tax income generated by the

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The provisions in §422.33(1) pertaining to farm corporations were adopted in 1977 Session, 67th G.A., Ch.122,§1 (1977) and were not considered by the Courts in Moorman.

> activities of an interstate business. First, no tax may be imposed unless there is some minimal connection between those activities and the taxing state. National Bellas Hess, Inc. v. Department of Revenue, 386 U.S.753,756,18 L.Ed.2d 505, 87 S. Ct. 1389. This requirement was plainly satisfied here. Second, the income attributed to the state for tax purposes must be rationally related to 'values connected with the taxing state.' Norfolk & Western R.Co. v. State Tax Comm'n, 390 U.S.317, 325,19 L.Ed 1201, 88 S.Ct 995.

The second restriction quoted above is also a requirement under the commerce clause. In Norfolk & Western R.Co. v. State Tax Comm'n, 390 U.S.317, 88 S.Ct. 995, 19 L.Ed.2d 1201 (1968), the Supreme Court stated in 390 U.S. at 325 (footnote 5):

> We have said: 'The problem under the commerce clause is to determine what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions. Nashville, C.& St.L.R.Co. v. Browning, 310 U.S.362, 365 [84 L.ed 1254,1256, 60 S.Ct. 968]. So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing state. See Wisconsin v. J.C. Penney Co., 311 U.S.435,444 [85 L.Ed 267,270, 61 S.Ct.246,130 ALR 1229]. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the state.' Ott v. Mississippi Valley Barge Line Co., 336 U.S.169,174,93 L.Ed 585,589, 69 S.Ct 432 (1940). Neither appellants nor appellees contend that these two analyses bear different implications insofar as our present case is concerned.

Considerations underlying the use of formulary apportionment of net income of an interstate business were succinctly stated by the Iowa Supreme Court in Moorman in 254 N.W.2d at 744:

> When a corporation's trade or business is carried on partly within and partly without the state its tax base generally cannot satisfactorily be identified or segregated on a geographical basis. Due to the impracticability of so identifying or segregating the tax base of such a unitary business resort is made to apportionment formulae as a rough means of attributing a reasonable share of the tax base to the taxing state. These considerations are especially pertinent to the taxation of net income. ...

While a state is given wide leeway in its choice of an attribution of income scheme to corporate business activities connected with the taxing state, such a scheme will not be upheld if it is inherently arbitrary or attributes to the taxing state income out of all appropriate proportion to business transacted in such state. Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 41 S.Ct. 45, 65 L.Ed.165 (1920); Moorman, 437 U.S. at 274. If a farm corporation carries on its business partly within and partly without Iowa and all of its property is located entirely in Iowa, §422.33(1) would attribute to Iowa the entire net income of such corporation.[3] However, in such a situation, it cannot be maintained that all of the income producing activities of the farm corporation occurred wholly in Iowa. The principles established by the cases cited herein clearly require that a state income tax scheme make an honest effort to apportion the unitary multistate net income of farm corporations engaged in business partly within and partly without the taxing state of Iowa. As applied to such corporations, an unapportioned net income tax will not withstand scrutiny under the due process and commerce clauses.

Therefore, §422.33(1), as applied to a farm corporation whose property is located entirely within Iowa and which carries on its business partly within and partly without Iowa, would produce an inherently arbitrary result and would attribute to Iowa income out of all appropriate proportion to business transacted in Iowa by subjecting such corporation to an unapportioned net income tax on its entire net income, in violation of the applicable constitutional due process and commerce clauses.

Very truly yours,

Thomas J. Miller
Attorney General

Harry M. Griger
Special Assistant Attorney General

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[3] If farm and non-farm corporations conducted all of their business operations in Iowa and shipped their goods outside of Iowa, the mere shipment of such goods to non-Iowa destinations would not render these corporations' businesses to be partly within and partly without Iowa so as to require apportionment of income by the Iowa sales formula. Under such circumstances, the corporations' entire net incomes would be derived from business carried on exclusively in Iowa. Georgia v. Coca-Cola Bottling Co., 214 Ga.316,104 S.E.2d 574 (1958). Therefore, this opinion assumes that the farm corporation would be engaged in business activities outside of Iowa as well as within Iowa.

PHARMACY BOARD; WHOLESALE DRUG LICENSE: §§ 155.1, 155.3(5), 155.23, 155.25. Only those drug wholesalers who make direct sales to Iowa pharmacies and retailers, or who maintain manufacturing or distribution facilities in Iowa, are required to obtain an Iowa wholesale drug license. Wholesalers outside of Iowa may make sales to licensed Iowa wholesalers without obtaining an Iowa license. (Norby to Johnson, Executive Secretary, Board of Pharmacy Examiners, 2/19/80) #80-2-4(L)

February 19, 1980

Mr. Norman C. Johnson
Executive Secretary
Board of Pharmacy Examiners
217 Jewett Building
Des Moines, Iowa 50319

Dear Mr. Johnson:

You have requested an Attorney General's opinion regarding the licensing of drug manufacturers and wholesalers pursuant to ch. 155, The Code 1979. Your request was prompted in part by a New York manufacturer who questioned the legality of Iowa requiring it to obtain an Iowa "wholesale drug license", as provided in § 155.11, The Code 1979. Your request essentially requires an interpretation of the reach of the ch. 155 licensing requirement, and, if ch. 155 purports to require a license from this wholesaler, a determination of whether ch. 155 contravenes federal statutory or constitutional limits on the ability of Iowa to regulate interstate businesses.

The specific company involved herein is a New York manufacturer and wholesaler of pharmaceuticals, vitamins and food supplements. This company makes all its sales to distributors, repackers, or other manufacturers who in turn market the product to the public or to other businesses. Accordingly, the company does not directly market any products in Iowa either to members of the public or to Iowa retailers or pharmacies. See § 155.1, The Code 1979 (definition of a person engaged in the practice of pharmacy). All sales are removed from Iowa commerce by at least one intermediary business. Accepting the above factual situation to be true for the purpose of this opinion, consideration must be given first to whether ch. 155 purports to require that such a company obtain an Iowa wholesale drug license.

A wholesale drug license is required by § 155.11, which provides as follows:

> WHOLESALE DRUG LICENSE. No person shall establish, conduct, or maintain a wholesale business as defined in this chapter without a license. This license shall be identified as a wholesale drug license.

"Wholesale business" is not expressly defined in ch. 155. Several sections must be examined to arrive at a definition of this term which effectuates the chapter as a whole. It appears that a definition of a "wholesale business" may be arrived at by beginning with the definition of a "wholesaler", contained in § 155.3(5), The Code 1979, and then limiting this broad definition by the several provisions which limit the applicability of the licensing requirement. See §§ 155.3(5), 155.3(8), 155.23, 155.25, The Code 1979. Defined in this manner, "wholesale business" denotes those drug wholesalers who are required to obtain an Iowa license.

A "wholesaler" is defined in § 155.3(5) as follows:

> The term "wholesaler" shall mean any person operating or maintaining, either within or outside this state, a manufacturing plant, wholesale distribution center, wholesale business or any other business in which prescription drugs, medicinal chemicals, medicines or poisons, are sold, manufactured, compounded, dispensed, stocked, exposed or offered for sale at wholesale in this state. The term "wholesaler" shall not include those wholesalers who sell only the products defined in subsection 7. [Proprietary medicines or domestic remedies]. Nothing contained in this subsection shall in any way affect the exemptions provided in section 155.25 [certain agricultural chemicals].

The language of this definition of a "wholesaler" appears to be very broad and inclusive. A "wholesaler" includes any company whose products are "sold, manufactured, compounded, dispensed, stocked, exposed or offered for sale at wholesale in this state". In addition to companies which have an actual physical presence in Iowa, through manufacturing or distribution facilities, "wholesaler" appears to include any company involved in the manufacture or distribution of drugs which are ultimately sold in Iowa.

If all wholesalers were required to obtain an Iowa license, ch. 155 might be vulnerable to attack on federal statutory and constitutional grounds. As noted above, however, other sections of

ch. 155 limit the scope of "wholesale business", the companies actually required to obtain a license.

Section 155.23 applies to the factual situation considered herein, providing as follows:

> EXCEPTIONS. Nothing contained in this chapter shall be construed to prevent the sale of drugs, medicines, medicinal chemicals, poisons, proprietary medicines or domestic remedies at wholesale to a licensed wholesaler, or to the state department of health, or to the board of pharmacy examiners. [Emphasis supplied].

Accordingly, § 155.23 limits the application of the license requirement in regard to wholesalers whose sales are removed from Iowa sales by an intermediary company, such as a distributor or packer who is a licensed Iowa wholesale business. A wholesaler may, therefore, make sales of drugs which are ultimately sold in Iowa, as long as these sales are made to a wholesaler who is licensed in Iowa. This exception should logically extend beyond the company which sells directly to a licensed wholesaler, and include those manufacturers, packers, or distributors who are more remotely involved in the chain of distribution. (e.g., if a manufacturer and three wholesalers are involved in the distribution of a drug, only the wholesaler who makes the sale to an Iowa pharmacy or other retailer is required to have an Iowa license, provided the others are not otherwise required to obtain a license). This exception does not apply to wholesalers who sell directly to Iowa pharmacies or other retailers.

In conclusion, the company outlined in the factual situation appearing at the outset of this opinion appears to not be required to obtain a license pursuant to ch. 155. Wholesalers who are not physically present in Iowa may make sales to licensed wholesalers without having to obtain a license.

Sincerely,

Steven G. Norby

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

SCHOOLS: Sale or rental of musical instruments. Iowa Const., art. III, § 31; §§ 274.1, 274.7, 279.8, 301.28, The Code 1979. Commercial salesmen of musical instruments may, in the discretion of the local school board, be permitted access to school facilities for the purpose of displaying and disseminating information regarding sale or rental of musical instruments. The local school board may not, however, select a certain store or salesman and deny access to others. A public school music instructor may recommend a particular instrument to a student, so long as the recommendation is based on a personal or professional preference and the instructor is not acting as an agent for the seller of the instrument. (Norby to Kudart, State Senator, 2/15/80) #80-2-2(L)

February 15, 1980

Honorable Arthur Kudart
State Senator
State Capitol
L O C A L

Dear Senator Kudart:

You have requested an opinion of the Attorney General concerning the use of public school facilities for displays relating to the purchase or rental of musical instruments. Specifically, you have raised three matters of concern:

1. Can public school facilities be used for the display or for the dissemination of information relating to the purchase or rental of music instruments?

2. If public school facilities can be used for such a display as outlined in (1), can a public school also select one retail store to the exclusion of others to make such a display in the school facilities?

3. Can a public school music instructor recommend to students one particular brand of an instrument to the exclusion of other brands?

I.

Your first question appears to involve a matter of the scope of discretion of local school authorities, and additionally, and probably the matter of greater concern, the use of public school facilities by persons engaged in a private,

profit-generating activity. The Attorney General issued an opinion in 1979 which considered a question very similar to your instant request. Op. Atty. Gen. #79-4-32. This opinion approved the practice by public schools of permitting a commercial photographer to use school property for the taking of school pictures, which may be subsequently sold to the students, generating a profit for the photographer. This opinion stressed the broad grant of authority to manage school affairs which is conferred upon the local school boards by Iowa law. §§ 274.1, 274.7, 279.8, The Code 1979. Essentially, a court will not interfere with the decisions of a local board unless those decisions are arbitrary, unreasonable, or contrary to law. See Schmit v. Blair, 203 Iowa 1016, 213 N.W. 593 (1927); LaMotte Ind. Sch. Dist. v. Jackson Co. Bd. of Educ., 155 N.W.2d 423 (Iowa 1968); Cedar Rapids Community School Dist. v. City of Cedar Rapids, 252 Iowa 205, 106 N.W.2d 655 (1961).

The opinion regarding commercial photographers concluded that the traditional school pictures constitute a service which is beneficial to the school and students, and accordingly, a decision to conduct such service is within the discretion of the local board. Regarding the matter considered herein, the propriety of allowing display or dissemination of information concerning musical instruments appears to be a matter within the discretion of the local board even more clearly than is the photographer situation. Bands and orchestras are long established as academic or extracurricular activities in Iowa schools. The local authorities would clearly not abuse their discretion if they decide to allow reasonable access to commercial music businesses as a means of facilitating their music programs.

Having established that the sale or rental of musical instruments is a subject matter properly within the discretion of the local boards, it must also be considered whether this activity, as a private profit-generator, may be conducted in public school facilities. The commercial photographer opinion concluded that the private activity of the photographers did involve a "public purpose", and consequently, did not constitute a violation of Iowa Const. art. III, § 31, which provides:

> EXTRA COMPENSATION--PAYMENT OF CLAIMS--APPROPRIATIONS FOR LOCAL OR PRIVATE PURPOSES. 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 application of this constitutional provision to the situation of commercial photographers appears to be somewhat attenuated. The commercial photographers do use space in a school building which has been built with public funds. Article III, § 31, however, appears to be concerned with appropriations made directly for private purposes. We do not, however, reject the conclusion of the earlier opinion. Applying its rationale to the activity considered herein, we conclude that the display of and dissemination of information regarding musical instruments in public schools is not prohibited by any Iowa constitutional provisions. Additionally, no statute appears to prohibit this activity. This result is further supported by two Attorney General's opinions which uphold the use of space in a public building by a profit-generating entity when the public interest is served by this activity. See Op. Atty. Gen. #78-10-13; Op. Atty. Gen. #79-4-6.

II.

Your second inquiry involves the propriety of a public school selecting one music store, to the exclusion of others, to have access to the students for display or dissemination of information regarding musical instruments. Available information indicates that school officials have some concern about this activity disrupting normal school operation if some limitation is not made. It appears, however, that a private entity allowed to use public facilities may not be granted an exclusive right to this use of public facilities. Op. Atty. Gen. #79-4-6. Accordingly, it appears that although the local school board has discretion as to whether this access may or may not be allowed, once access is granted, it must be available to all. The board may limit the access of all parties if necessary to avoid disruption of school activities.

III.

Your third inquiry involves the propriety of music instructors recommending particular brands of instruments to students. This practice does not appear to be directly addressed by any provision of the Iowa Code. Section 301.28, The Code 1979, prohibits teachers from acting as agents in the procurement of "school supplies". An agency relationship requires the consent of the agent to act on the behalf of and under the control of a principle, and an implied or express agreement by the agent and principle to create this relationship. Dailey v. Holiday Distributing Corp., 151 N.W.2d 477,483 (Iowa 1967). You have clarified your question, however, stating your belief that the situation you are concerned with does not involve an agency relationship, but simply the expression of a preference by an individual teacher. If a teacher were to enter into an agency relationship

with an instrument seller, this might constitute a violation of § 301.28. The scope of the term "school supplies", however, has never been precisely defined, so it is rather unclear whether musical instruments are "school supplies" and consequently, within the purview of the § 301.28 prohibition. But it does not appear that any Iowa statute prohibits a teacher from simply recommending a particular instrument, based on a personal or professional preference, when no agency relationship is involved.

IV.

In conclusion, a public school may allow the use of school facilities for the display of musical instruments and dissemination of information regarding the sale of musical instruments. The school may not, however, limit the right to display or disseminate information in a manner which excludes a store which wishes to sell or rent instruments to the students. Teachers may recommend particular brands of instruments to students provided they are not acting pursuant to an agency relationship with the seller of the instruments.

Very truly yours,

Steven G. Norby

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

COUNTIES: Brucellosis Fund Claims. Sections 164.21, 164.23, 164.24, 164.27, The Code 1979, 1979 Session, 68th G.A., Ch. 12 § 2, 1979 Session, 68th G.A., Ch. 12 § 3. The $5,000.00 limitation on payments to individual claimants found in 1979 Session, 68th G.A., Ch. 12, § 2 applies only to moneys paid from this appropriation, and not generally to payments from county brucellosis eradication funds. (Benton to Shepard, Butler County Attorney, 2/5/80) #80-2-1 (CL)

February 5, 1980

Mr. Gene W. Shepard
Butler County Attorney
Court House
Allison, Iowa 50602

Dear Mr. Shepard:

In your opinion request of December 19, 1979, you have asked for an opinion concerning a portion of 1979 Session, 68th G.A., Ch. 12, § 2. As your letter notes, this legislation pertains to county brucellosis eradication funds established in Iowa counties pursuant to Ch. 164, The Code 1979. In its entirety, this measure provides:

> Sec. 2. BRUCELLOSIS INDEMNITY. There is appropriated from the general fund of the state to the department of agriculture for each fiscal year of the fiscal biennium beginning July 1, 1979 and ending June 30, 1981, the sum of twenty-five thousand (25,000) dollars, or so much thereof as may be necessary, to make grants to counties to pay the indemnity and the expenses of the inspection and testing of animals as provided in chapters one hundred sixty-three A (163A) and one hundred sixty-four (164) of the Code. The secretary of agriculture shall not approve a grant under this section to a county unless the board of supervisors has levied the maximum levy for the county brucellosis eradication fund under section one hundred sixty-four point twenty-three (164.23) of the Code for each of the fiscal

> years in the fiscal biennium beginning July 1, 1979 and ending June 30, 1981 and all funds in the county brucellosis eradication fund including all unobligated funds transferred from the county tuberculosis eradication fund, have been expended. However, no individual claimant, in a single county, shall receive more than five thousand (5,000) dollars in a single fiscal year. [emphasis supplied]

Referring to the concluding sentence, you ask, "Does this language limit the total amount that can be paid to a claimant in any fiscal year or does the language limit only the amount that can be paid from the special appropriation of that Act?"

The Brucellosis Indemnity bill appropriates from the state's general fund to the Department of Agriculture $25,000 for each fiscal year of the fiscal biennium commencing July 1, 1979, and ending June 30, 1981. This appropriation enables the Department of Agriculture to make grants to counties to pay the indemnity and the expenses of the inspection and testing of animals pursuant to the provisions of Chs. 164 and 163A. Under the terms of the measure however, the Secretary of Agriculture can not approve such a grant unless the county board of supervisors has levied the maximum levy for the county brucellosis eradication fund for this fiscal biennium pursuant to § 164.23, The Code 1979, and unless all funds in the county brucellosis fund have been expended including unobligated funds transferred from the county tuberculosis eradication fund. Your inquiry concerns whether the limitation found in the concluding sentence applies to all claims against a county brucellosis eradication fund during this period, or whether it applies only to moneys paid from this appropriation?

Section 164.24, The Code 1979, establishes the county brucellosis eradication fund referred to in the Brucellosis Indemnity bill. Section 164.23 requires that each county board of supervisors must each year levy a tax sufficient to provide a fund to pay an indemnity to those whose cattle are slaughtered pursuant to the provisions of Ch. 164, as well as the expenses in this chapter, and the expenses of the inspection and testing program provided in Ch. 163A, The Code 1979. Under § 163.24, the moneys derived from this levy are placed in the county brucellosis eradication fund to be used to pay the claims and expenses alluded to earlier. According to the procedure established in Ch. 164, those cattle in which reactors have been disclosed after testing

shall be quarantined. Section 164.21, The Code 1979, provides that an infected herd may be completely depopulated and indemnity paid on individual animals when the disease cannot be controlled by routine testing.

Section 164.21 goes on to provide:

> Indemnity can only be paid if money is available in the county of origin and if indemnity payment is also made by the United States department of agriculture.
>
> In the case of individual payment all animals shall be individually appraised and the amount of indemnity shall be equal to the difference between the slaughter value and the appraisal price, less the amount of indemnity paid by the United States department of agriculture. The total amount of indemnity paid by the county of origin for a grade animal or a purebred animal shall not exceed two hundred dollars. However, if a purebred animal is purchased and owned for at least one year before testing and the owner can verify the actual cost, the board of supervisors of the county of origin may, by resolution award the payment of an additional indemnification not to exceed five hundred fifty dollars or the actual cost of the animal when purchased, whichever is less.

This language is the only portion of Ch. 164 that speaks to a limitation upon the amount of indemnity an individual claimant may receive from the fund, aside from the limits imposed by the levy limitations found in § 164.24 and the prohibition on claims in excess of the cash available in the fund, found in § 164.27, The Code 1979. See Op.Att'y.Gen. #79-5-32 and Op.Att'y.Gen. #77-1-16.

Turning to your question, there are several principles of statutory construction which must guide our analysis. First, of course, is that we must seek to ascertain the legislative intent behind the ambiguous language. Doe v. Ray, 251 N.W.2d 496 (Iowa 1977). It must also be borne in mind that changes in statutory provisions by implication are not favored. Lineberger v. Bagley, 231 Iowa 937, 942, 2 N.W.2d 305 (1942). A closely related principle is that changes made by revision of a statute will not be construed as altering the law, unless

the legislature's intent to accomplish a change in its meaning and effect is clear and unmistakable. Kelly v. Brewer, 239 N.W.2d 109, 114 (Iowa 1976). A statutory amendment contemplates an alteration or change in the existing law. Mallory v. Paradise, 173 N.W.2d 264, 267 (Iowa 1969).

The existing provisions of Ch. 164 do not limit an individual claimant to $5,000.00; rather § 164.21 establishes different limitations upon the amount of indemnity which may be received for individual animals. To conclude that the legislature intended the $5,000.00 limitation to apply to all claims from the county brucellosis eradication fund requires that we conclude that the legislature intended to amend some portion of Ch. 164 through the Brucellosis Indemnity bill.

Given as noted earlier, that an amendment involves a change in an existing statute, there is no evidence to support the conclusion that the legislature intended to amend Ch. 164 through this bill. The Brucellosis Indemnity bill appears only to appropriate certain funds to the Department of Agriculture to make grants to counties to pay indemnity and other expenses when the local brucellosis eradication fund has been exhausted. If the legislature had intended to amend Ch. 164 by imposing the $5,000 limitation it surely would have included language in the bill that this was its intention. For example, 1979 Session, 68th G.A., Ch. 12 § 3 clearly states that the measure is to amend Ch. 159, The Code 1979. There is no language to that effect in the measure under our consideration here. With the principle in mind that statutory changes in existing laws by implication are not favored, we cannot conclude that the legislature intended to amend Ch. 164 through the Brucellosis Indemnity bill.

Accordingly, it is our opinion that the $5,000 limitation on payments to individual claimants in 1979 Session, 68th G.A., Ch. 12 § 2 applies only to moneys paid from this appropriation, and not generally to payments from county brucellosis eradicaton funds.

Sincerely,

Timothy D. Benton
TIMOTHY D. BENTON
Assistant Attorney General

TDB/nay

MUNICIPALITIES: Municipal Transit Systems--§§ 28E.6, 28E.17 and 284.12(10), The Code 1979. Cities can share use of a municipal transit system through Chapter 28E. The tax authorized by § 384.12(10) can only be levied if the revenues of the municipal transit system are insufficient. (Blumberg to Kirkenslager, State Representative, 3/28/80) #80-3-23(L)

March 28, 1980

The Honorable Larry Kirkenslager
State Representative
L O C A L

Dear Representative Kirkenslager:

We have your opinion request regarding a municipal transit system. You ask:

> May City A, pursuant to Section 384.12(10) of the Code, certify for it's general fund levy a tax not subject to the limit provided in Section 384.1? City A has no Municipal Transit System and no intent to establish a Municipal Transit System. City A may wish to certify such a levy, if proper, to raise funds to be paid to City B, pursuant to contract, to extend the services of City B's Municipal Transit System into City A.

Section 384.12, The Code 1979, authorizes cities to levy additional taxes over and above the general fund limit of § 384.1. Subsection ten (10) authorizes an additional tax for a municipal transit system. It provides:

> 10. A tax for the operation and maintenance of a municipal transit system, and for the creation of a reserve fund for the system, in an amount not to exceed fifty-four cents

> per thousand dollars of assessed value each year, when the revenues from the transit system are insufficient for such purposes, but proceeds of the tax may not be used to pay interest and principal on bonds issued for the purposes of the transit system.

Pursuant to this subsection, the tax may be levied "when revenues from the transit system are insufficient". Under your facts, such is not the case. That is, the levy is not to produce revenue to maintain a transit systems because the revenue raised through fares and the like is insufficient to pay all the costs. Rather, the city in question wishes to levy a tax to generate all the revenue that is needed for the system. Such is not contemplated nor permitted by § 384.12(10).

This is not to say, however, that one city cannot receive service from another municipal transit system. Section 28E.17 specifically provides for joint use of transit systems. Subsection one of that section provides that it is the public policy of this state to encourage joint cooperation for urban mass transit systems. Subsection two provides for agreements between cities, and the the joint agency created thereby may exercise through a board of trustees all rights, powers, privileges and immunities of cities, with the exception of incurring bonded indebtedness. If the city in question wishes to jointly cooperate in a joint mass transit system, it can accomplish this through Chapter 28E, specifically § 28E.17.

Establishing a system pursuant to § 28E.17 may be more than what the cities in question desire. It seems reasonable to us that something less than what is contemplated by § 28E.17 can still be set up through Chapter 28E. That is, through a general Chapter 28E agreement, the cities could contract for shared bus service. This could be done without the need of creating a separate entity as is contemplated in § 28E.17. Section 28E.6 provides for the establishment of a joint board to administer the agreement. If the cities enter into such an agreement each would be able to take advantage of § 384.12(10). However, as stated above, any tax under that section can only be levied if the revenues of the transit system are insufficient to take care of the maintenance and operation of the system.

In conclusion, the taxing authority established in § 384.12(10) only authorizes a city to levy such a tax when the revenues from

a transit system are insufficient. Cities can share use of a transit system through Chapter 28E.

Very truly yours,

Larry M. Blumberg

LARRY M. BLUMBERG
Assistant Attorney General

LMB/cmc

WEAPONS--MACE: Sections 702.7, 704.1, and 724.1, The Code 1979. Mace, which is non-lethal and leaves no permanent physical effects, may be possessed and used by non-peace officers for the purpose of self-defense. Mace is not either an offensive weapon or a dangerous weapon. Mace, furthermore, may be used as a means of reasonable force to repel an attacker. (Pottorff to Robinson, State Senator, 3/28/80) #80-3-22(L)

Senator Cloyd E. Robinson
State Senator
State Capitol
Des Moines, Iowa 50319

March 28, 1980

Dear Senator Robinson:

You have requested an Attorney General's Opinion regarding the following question:

> May non-peace officers possess and use the chemical agent mace, which is non-lethal and leaves no permanent physical effects, for the purpose of self-defense?

Mace, which is non-lethal and leaves no permanent physical effects,[1] may be possessed and used by non-peace officers for the purpose of self-defense. Mace is not either an offensive weapon or a dangerous weapon. Mace, furthermore, may be used as a means of reasonable force to repel an attacker. This result derives from an analysis of sections 702.7, 704.1, 704.3, 724.1, 724.3, and 724.4, The Code 1979.

Mace is not an "offensive weapon" under chapter 724, The Code. Section 724.3 prohibits the knowing possession of "offensive weapons" by unauthorized persons. The term "offensive weapon" is defined in section 724.1 as follows:

> 1. A machine gun. A machine gun is a firearm which shoots or is designed to shoot more than one shot, without manual reloading, by a single function of the trigger.

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[1] This opinion is premised on the representation that mace, in fact, is non-lethal and leaves no permanent physical effects. The scope of this opinion does not include any chemical agents, including chemical agents denominated as mace, which are lethal or may cause permanent physical effects when used in the manner for which they were designed. Whether a particular chemical agent is lethal or may leave permanent physical effects is a factual question which must be resolved on a case by case basis.

> 2. A short-barreled rifle or short-barreled shotgun. A short-barreled rifle or short-barreled shotgun is a rifle with a barrel or barrels less than sixteen inches in length or a shotgun with a barrel or barrels less than eighteen inches in length, as measured from the face of the closed bolt or standing breech to the muzzle, or any rifle or shotgun with an overall length less than twenty-six inches.
>
> 3. Any weapon other than a shotgun or muzzle loading rifle, cannon, pistol, revolver or musket, which fires or can be made to fire a projectile by the explosion of a propellant charge, which has a barrel or tube with the bore of more than six-tenths of an inch in diameter, or the ammunition or projectile therefor, but not including antique weapons kept for display or lawful shooting.
>
> 4. A bomb, grenade, or mine, whether explosive, incendiary, or poison gas; any rocket having a propellant charge of more than four ounces; any missile having an explosive charge of more than one-quarter ounce; or any device similar to any of these.
>
> 5. Any part or combination of parts either designed or intended to be used to convert any device into an offensive weapon as described in subsections 1 to 4 of this section, or to assemble into such an offensive weapon, except magazines or other parts, ammunition, or ammunition components used in common with lawful sporting firearms or parts including but not limited to barrels suitable for refitting to sporting firearms.
>
> . . . .

The chemical agent mace does not fall within any of these enumerated definitions of an "offensive weapon."

Mace, similarly, does not constitute a "dangerous weapon" under chapter 724, The Code. Section 724.4 prohibits any person from going "armed with a dangerous weapon concealed on or about his or her person." Under section 702.7 a "dangerous weapon" is defined as:

> any instrument or device designed primarily for use in inflicting death or injury upon a human being or animal, and which is capable

> of inflicting death upon a human being when used in the manner for which it was designed. Additionally, any instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and which, when so used, is capable of inflicting death upon a human being, is a dangerous weapon. Dangerous weapons include, but are not limited to, any offensive weapon, pistol, revolver, or other firearm, dagger, razor, stiletto, or knife having a blade of three inches or longer in length.

In evaluating whether any device is a "dangerous weapon" under this statute the device must be either: (1) "designed primarily for use in inflicting death or injury" and "capable of inflicting death upon a human being when used in the manner for which it was designed"; or (2) "used in such a manner as to indicate that the defendant intends to inflict death or serious injury" and "capable of inflicting death upon a human being." Section 702.7, The Code.

In our opinion, application of these dangerous weapon criteria to the chemical agent mace results in the conclusion that mace is not a dangerous weapon. In either of the above described alternatives the device must be "capable of inflicting death upon a human being." See State v. Nichols, 276 N.W.2d 416, 417 (Iowa 1979). Since the chemical agent mace is non-lethal and leaves no permanent physical effects, mace does not meet the criterion of being "capable of inflicting death on a human being."

Although, in our opinion, mace is not either an offensive weapon or a dangerous weapon, the use of mace as a means of self-defense is subject to the limitations of chapter 704. Section 704.3 provides that a person "is justified in the use of reasonable force when he or she reasonably believes that such force is necessary to defend himself or herself or another from any imminent use of unlawful force." Section 704.1 defines reasonable force as "that force which a reasonable person, in like circumstances, would judge to be necessary to prevent any injury or loss, and no more, except that the use of deadly force against another is reasonable only to resist a like force or threat."

On the basis of the foregoing discussion it is our opinion that mace is not an offensive weapon or a dangerous weapon the

possession and carrying of which is controlled by state law. Mace, therefore, may be used as a means of reasonable force to repel an attacker.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP/cla

GOVERNOR/ENERGY POLICY COUNCIL: Enforcement of emergency energy conservation measures. § 93.8, The Code 1979. The Code provides no authority to punish those who violate an order of the Governor to conserve energy in an acute energy shortage; absent such authority criminal sanctions cannot be imposed. The state could seek injunctive relief in individual cases to force compliance. (Ovrom to Stanek, Director, Energy Policy Council, 3/25/80) #80-3-21(a)

March 25, 1980

Mr. Edward J. Stanek
Director
Iowa Energy Policy Council
Lucas Building
L O C A L

Dear Mr. Stanek:

You requested an attorney general's opinion concerning the method by which the Governor can enforce energy conservation measures in an acute energy shortage. Specifically, you asked whether such measures can be enforced by punitive action.

Section 93.8, The Code 1979, gives the Governor power to order certain energy conservation measures if there is an acute shortage of energy in the state. These include regulating the hours of government offices and private businesses, controlling distribution of energy supplies, and curtailing transportation by promoting car pools and use of mass transit.

However Chapter 93 is silent with respect to the methods to be used to enforce any emergency energy conservation measure the Governor orders. Therefore, there is a question whether punitive action may be taken against a person or a business which violates the Governor's emergency order to conserve energy.

First of all, § 93.8 is not a criminal statute. All crimes in Iowa are statutory. State v. Robbins, 257 N.W.2d 63, 67 (Iowa 1977); State v. Coppes, 247 Iowa 1057, 1062, 78 N.W.2d 10, 13 (1956). Before one can be punished, his or her case must fit plainly and unmistakably within a statutory definition of a crime. State v. Coppes, 78 N.W.2d at 13. This rule is based on the idea that the public deserves advance warning of what conduct is criminal and how it will be punished. Id.; see also LaFave & Scott, Criminal Law, § 2 at 7, and § 24 at 177 (1977). Section 93.8 does not subject persons who violate emergency energy conservation measures to punishment of any kind. Nor do we find any other law which does so. Therefore,

violations of the Governor's orders under the statute are not crimes, and people cannot be subjected to a criminal punishment of fine or imprisonment for violating them.

The Governor's orders to conserve energy in an emergency could be enforced by injunction -- that is, by going to court to obtain an order directing a person or business entity to comply with emergency energy conservation measures. An injunction is only granted in unusual circumstances when there is no certain monetary measure of damages or other adequate remedy at law. Myers v. Caple, 258 N.W.2d 301, 304 (Iowa 1977); Miller v. Lawlor, 245 Iowa 1144, 1156, 66 N.W.2d 267, 274 (1954); Martin v. Beaver, 238 Iowa 1143, 1148, 29 N.W.2d 555, 558 (1947). Injunctions are granted to force compliance with laws and statutes. See, e.g. City of Des Moines v. Harvey, 243 N.W.2d 606 (Iowa 1976)(injunction to enforce a dumping ordinance); Town of Carter Lake v. Anderson Excavating & Wrecking Co., 241 N.W.2d 896 (Iowa 1976)(injunction to restrain violation of sanitary landfill ordinance). An injunction would therefore seem proper to enforce emergency energy conservation measures, since there is no monetary measure of damage to the public or the state. If a party violates the terms of an injunction, he or she can then be fined or jailed for contempt of court. See Harvey v. Prall, 250 Iowa 1111, 97 N.W.2d 306 (1959); Dobbs, Remedies, § 2.10, at 105 (1973).

It should be pointed out that it is impossible to state in advance whether the state would be able to obtain an injunction in a particular case. Furthermore, it involves a time-consuming legal procedure which would probably be too cumbersome to use in certain cases -- for example, the case of a person who refused to join a car pool and was driving a vehicle without other riders. Therefore, while injunctive relief might be effective in some cases to force compliance with the Governor's emergency energy conservation measures, it would definitely not be practicable in other cases.

The Governor might be able to enforce emergency energy conservation measures to some extent through permit revocations. If a person or business entity were licensed or regulated by the state, and the license or permit required compliance with state laws, the permit or license could be revoked for failure to comply with an order to conserve energy. This, of course, would depend upon the terms of the particular permit, and would not be an available remedy against non-regulated entities.

The Governor's emergency energy conservation orders would be much easier to enforce if the statute classified violations as misdemeanors, or if it imposed civil monetary penalties on violators. As stated earlier, the law requires advance warning to the public of conduct which will be punished. State v. Coppes, 78 N.W.2d at 13. At a minimum, publication of an administrative rule is necessary to provide sufficient notice to the public of conduct which will be punished. LaFave & Scott, supra, § 14, at 101. The Governor is exempt from the usual rulemaking procedures of the Iowa Administrative Procedure Act, which apply only to agencies. §§ 17A.2(1), 17A.2(7), 17A.4. See also § 93.7(10). (exempts rules promulgated by the Governor in an acute energy shortage from review and public hearing.) Therefore, he would not be statutorily required to publish his emergency energy conservation order. However, if the Governor's executive order were published in the Iowa Administrative Bulletin and the Iowa Administrative Code as agency rules are, this should provide sufficient notice to the public to constitutionally punish violations by fine or imprisonment. Alternatively, the statute could impose punishment on one who violates an order directed specifically to him or her. (One such Iowa statute is § 455B.49, The Code 1979, which imposes a $5,000 civil penalty on pollutors for each day of violation of an order of the executive director of the Department of Environmental Quality.) See LaFave & Scott, § 14, at 104.

In sum, there is no effective means of enforcing emergency energy conservation measures ordered by the Governor under § 93.8 of the Code. You may therefore wish to seek an amendment to the statute to provide such authority.

Sincerely,

Eliza Ovrom

ELIZA OVROM
Assistant Attorney General
Environmental Protection Division

EO:rcp

COUNTIES: Closing of Roads in Unincorporated Villages--§§ 306.3, 306.4 and 306.10, The Code, 1979. Counties can only close public roads under their jurisdiction and control. In order for a street or road in an unincorporated village to be public, there must be a dedication and an acceptance. (Blumberg to Hulse, State Senator, 3/25/80) #80-3-20 (L)

March 25, 1980

The Honorable Merlin D. Hulse
State Senator
L O C A L

Dear Senator Hulse:

We have your opinion request regarding the closing of streets and roads in unincorporated villages. You ask whether the county board of supervisors has such authority. An answer to your question is dependent upon the facts.

Section 306.4, The Code 1979, establishes jurisdiction of the various road classifications among the several governmental bodies. Jurisdiction and control over secondary roads is vested in the county board of supervisors. Jurisdiction and control over city streets is vested in the city council. Section 306.3 defines the various classification of roads. The agency which has jurisdiction and control over a road system has the power to alter, vacate or close any public roads. See, § 306.10. Secondary roads are public roads. Thus, a county may not maintain a road as part of its secondary road system unless such road is legally a public road. 1970 Op. Att'y. Gen. 125.

Presumably, under your situation, we are dealing with roads that, if they are public roads, are public by way of dedication. A public road can be established by any of three means: (1) statutory proceedings; (2) dedication and acceptance; (3) dedication by prescription. We are not concerned with the first. Dedication can be established by formal or statutory means, or by common-law. The former operates by way of grant and the latter by way of estoppel. Dugan v. Zurmehlen, 203 Iowa 1114 211 N.W. 986 (1927). Formal or statutory dedication vests a fee in the property to the government, whereas common law dedication vests the government or the public with an easement

for public use. Dugan, supra, 211 N.W. at 988.

The filing of a plat is the equivalent to a deed in fee simple to the streets. However, before it can be effective in creating a public street or road, it must be accepted. Bowersox v. Board of Supvr's of Johnson County, 183 Iowa 645, 167 N.W. 582 (1918). The acceptance can be formal or by implication. Formal acceptance would generally involve action by the government accepting the dedication, such as by resolution of the governing body. Acceptance can also be found by the governing body expending labor or money on the road or otherwise assuming some control over it with regard to improvements, and the like. Acceptance by implication also occurs where there is common consent by the local public or frequent use of the road by the public. See Bowersox, supra.

Common-law dedication, premised on the theory of estoppel, requires an intent on the part of the landowner to dedicate the road. Dugan, supra. The intent must be unmistakable in its purpose, and the acts upon which the intent is based must be decisive in character. Culver v. Converse, 207 Iowa 1173, 224 N.W. 834 (1929). Common-law dedication may be accepted by the public to bind the dedicator, such as by public use.

Dedication by prescription is similar to adverse possession. It will not run against the public, but rather, in favor of the public. 1924 Op. Att'y. Gen. 180. Under this theory, the dedication of a road to the public may be established without evidence of any express grant or affirmative act on the part of the owner. Long use by the public for more than ten years, and acquiescense therein by the owner are evidence of dedication and supplies the place of formal record. Kinsinger v. Hunter, 195 Iowa 651, 192 N.W. 264 (1923). Generally, though, stronger evidence is required in the case of a local or neighborhood road than if it were a thoroughfare or part of a highway system. Dugan, supra. It can be stated that dedication by prescription divests the owner of fee simple and vests it in the governing body. See Gear v. The C.C.&D.R. Co., 39 Iowa 23 (1874).

A question similar to yours was before the Court in Bowersox. There, a village was platted with streets, but was never incorporated. The issue was whether the county had the authority to close the streets. The Court held, based upon the facts, that there was no acceptance of any dedication. The street in question, therefore, never became a public road such that the county could close it.

It can clearly be seen from the above discussion that an answer to your question rests solely upon the individual set of facts regarding the streets in your unincorporated village. The authority of the board of supervisors to close those streets can only be determined by applying the facts to the above discussion to determine whether, in fact, there was a dedication and acceptance.

Very truly yours,

LARRY M. BLUMBERG
Assistant Attorney General

LMB/cmc

VITAL RECORDS-COMMON LAW NAME CHANGES. Chapter 674; Section 595.5

The Code 1979. The consistent use, by a married couple, of a hyphenated combination of their antenuptial surnames may establish that combination as the legal surname of the couple even though there was no change of name petition under Chapter 674, The Code 1979, nor was there a request for a name change on the application for a marriage license pursuant to Section 595.5 The Code. (Lindebak to Angrick, Citizens Aide/Ombudsman, 3/25/80) #80-3-18(CL)

March 25, 1980

William P. Angrick
Citizens Aide/Ombudsman
State Capital
LOCAL

The Attorney General has received your question regarding the validity of common law name changes in the state of Iowa.

Specifically, your question was whether the consistent use of a hyphenated combination of the family names of a married couple served to establish that name as the legal name of a person, if there was neither a change of name petition under Chapter 674, The Code 1979, nor a request for a name change on the application for a marriage license pursuant to Section 595.5 The Code.

The Supreme Court of Iowa has rarely dealt with a question of name changes. In Loser v. Plainfield Savings Bank, 149 Iowa 672, 128 N.W. 1101 (1910) the court stated "In the absence of any restrictive statute, it is the common-law right of a person to change his name, or he may by general usage or habit acquire a name notwithstanding it differs from the one given him in infancy." 149 Iowa at 677, 128 N.W. at 1103.

The determination upon which this issue turns is whether there is a restrictive statute in Iowa which abrogates the common law right to change one's name by general usage.

The Supreme Court in In re Staros, 280 N.W.2d 409 (Iowa 1979) decided the issue of whether a parent as next friend could petition to change the name of a minor child. The Court held that Section 674.6, The Code 1977 is restrictive in that it requires that changes of a minor's name must accompany a change in a parent's name, and further held no change of a minor's name could be accomplished without a petition for change in a parent's name under Chapter 674. Because that section is restrictive, the

court held that it abrogated the common law so far as the name change of a minor is concerned. The Court, in dicta, said "While the initial provision of Section 674.1 is permissive ("may") and may not be indicative of legislative intent to totally preempt the common law regarding name changes, we need not make such a determination." Id. at 411. The Court seemed to indicate that while the provisions of Chapter 674 relating to minors were restrictive, the general nature of the statute relating to adults was permissive. A permissive statute would provide an additional rather than exclusive means by which one can change a name. It should be noted in passing that other jurisdictions have found name change statutes to be in addition to rights at common law. See Piotrowski v. Piotrowski, 71 Mich. App. 213, 247 N.W.2d 354 (1976); Simmons v. O'Brien, 201 Neb. 778, 272 N.W.2d 273 (1978).

Section 595.5, The Code 1979 also provides a means to do exactly what has been requested in this case. That Section provides:

> "Upon marriage either party may request on the application for a marriage license a name change to that of the other party or to some other surname mutually agreed upon by the parties.... If a party requests a name change, other than a change of surname to that of the other spouse or to a hyphenated combination of the surnames of both spouses, the party shall request approval of the court pursuant to Chapter 674...."

From the language of the statute it is clear that the intent was to provide a simple way to make the name change to a hyphenated combination of the surnames of the spouses and avoid the filing of a petition under Chapter 674 unless the new name was to be completely different from either of the present names or a hyphenated combination. Section 595.5 is also permissive in giving an additional means by which to make certain name changes, including the name change at issue here. (It should be noted that the statute is probably restrictive with regard to a change of name to something other than that of one of the spouses or a hyphenated combination.)

Although the Iowa Supreme Court has never decided whether either Chapter 674, or Section 595.5 name change procedures have preempted the common law doctrine, the dicta provided in Staros, along with the plain reading of the statutes involved, would suggest that neither statute is restrictive and therefore the common law right to change one's legal name to a hyphenated combination of antenuptial surnames through common usage is intact in Iowa.

Sincerely,

Layne M. Lindebak
Assistant Attorney General

COUNTIES AND COUNTY OFFICERS; ROADS AND HIGHWAYS. Maintenance of partially closed secondary roads. Ch. 319; §§ 306.4(2), 306.10-.26, 309.67, The Code 1979. County boards of supervisors duty to maintain continuously in the best condition practicable and remove obstruction, including snow, from secondary roads under its jurisdiction extends to any portion of a road which has not been vacated and closed. (Hyde to Schwengels, State Senator, 3/21/80) #80-3-17(L)

March 21, 1980

Honorable Forrest V. Schwengels
State Senator
State Capitol
L O C A L

Dear Senator Schwengels:

We have received your request for an opinion from this office concerning county maintenance of a partially closed road. Specifically, you inquire whether a county can refuse to remove snow from that portion of a partially closed road that has not been closed or abandoned.

Section 306.4(2), The Code 1979, vests jurisdiction over secondary roads [1] in the county board of supervisors. The board of supervisors, as "the agency which has control and jurisdiction over such . . . highway system" is empowered to alter or vacate and close any road or part thereof. Section 306.10, 306.11, The Code 1979. Proceedings to vacate and close any road or part thereof under its jurisdiction must be conducted according to notice and hearing requirements set out in §§ 306.11-.26, The Code 1979, providing an opportunity for interested persons to object and claim damages. See Bricker v. Iowa County, Board of Supervisors, 240 N.W.2d 686 (Iowa 1976). This statutory procedure is the only manner in which highways can be vacated and closed. See McCarl v. Clarke County, 167 Iowa 14, 148 N.W.1015 (1914); 1964 Op. Atty. Gen. 208.

[1] "Secondary roads" are defined in § 306.3(4), The Code 1979, as "those roads, outside the boundaries of municipalities, classified as trunk, trunk collector and area service under section 306.1." See § 306.1(2)(d),(e), and (f), The Code 1979, (setting forth and defining the state highway classification system).

Thus, any secondary road or portion thereof which was not closed pursuant to § 306.11 et seq. by the county board of supervisors would remain a public highway and part of the public highway system. See Polk County v. Brown, 260 Iowa 301, 149 N.W.2d 314 (1967); 1970 Op. Atty. Gen. 125.

The board of supervisors and county engineer are charged with the duty to maintain the secondary road system.

> The county board of supervisors is charged with the duty of establishing policies and providing adequate funds to properly maintain the secondary road system. The county engineer, pursuant to section 309.21 and board policy, shall adopt such methods and recommend such personnel and equipment necessary to maintain continuously, in the best condition practicable, the entire mileage of said system. [Emphasis added].

Section 309.67, The Code 1979. See Larsen v. Pottawattamie County, 173 N.W.2d 579 (Iowa 1970). See also ch. 319, The Code 1979. (duty to remove obstructions in highways). Violation of this duty to maintain the roads in a safe condition, "open, in repair and free from nuisance" results in liability to users of the road, or persons who would be "harmed by the negligent manner in which the county performed one of its functions -- in this case, maintaining roads." See Harryman v. Hayles, 257 N.W.2d 631 (Iowa 1977); Conrad v. Board of Supervisors of Lee County, 190 N.W.2d 139 (Iowa 1972). The method in which the board of supervisors carries out its obligation for the maintenance of and removal of obstructions on roads under its jurisdiction would be, however, within its considerable discretion. See Shannon v. Missouri Valley Limestone Company, 255 Iowa 528, 122 N.W.2d 278 (1963). (Court assumed without deciding that dust caused by truck traffic constituted obstruction pursuant to ch. 319, The Code 1962).

In conclusion, it is our opinion that the county board of supervisors' duty to maintain continuously in the best condition practicable and remove obstructions from secondary roads under its jurisdiction would extend to any portion of a secondary road which has not been vacated and closed. Absent statutory provisions providing otherwise,[2] we believe snow removal would clearly fall within

[2] Section 321G.9(4), The Code 1979, has been interpreted to allow discretion on the part of the board of supervisors as to whether certain roads it has specifically designated snowmobile routes during winter months should remain unplowed. See 1974 Op. Atty. Gen. 712,714.

the county's maintenance obligation for such secondary roads. See 1974 Op. Atty. Gen. 712.

Very truly yours,

Alice Hyde

ALICE J. HYDE ah
Assistant Attorney General

AJH:sh

STATE OFFICERS AND DEPARTMENTS: Council of Social Services. §§ 4.1(36), 217.3, The Code 1979. The Council of Social Services has a statutory duty to make a recommendation of individuals qualified to be Commissioner of Social Services. (Black to Rush, Senator, 3/18/80) #80-3-16(L)

March 18, 1980

The Honorable Bob Rush
State Senator for Iowa
830 Higley Building
Cedar Rapids, IA 52401

Dear Senator Rush:

Re: Section 217.3, The Code, Relating to the Obligation of the Council of Social Services to Recommend Individuals Qualified for the Position of Commissioner of Social Services.

You have made inquiry as to the statutory responsibilities of the Council of Social Services as it relates to making recommendations to the Governor for the appointment of a Commissioner of Social Services, and in particular, inquired:

> 1. Should the council of social services make recommendations pursuant to section 217.3(8) when the governor has appointed another special committee to make such recommendations?
>
> 2. Is the council's duty to recommend pursuant to section 217.3(8) discretionary?
>
> 3. Does the word "shall" in section 217.3 mean the council "must" or "may" make recommendations in case of a vacancy in the office of commissioner of social services?
>
> 4. Under what circumstances, if any, would the council be free not to carry out

their duty to make recommendations to the governor pursuant to section 217.3(8)?

The responsibilities of the Council of Social Services to make recommendations to the Governor for the appointment of the commissioner of social services are set forth in § 217.3(8), The Code. This section was adopted by the General Assembly in 1967 as a part of the consolidation of the then existing functions of the board of social welfare, department of social welfare, board of parole, and the board of control of state institutions as well as certain other state agencies and divisions. 62nd G.A., 209, § 3.8. Section 217.3(8), about which you inquire, provides:

> 8. Recommend to the governor the names of individuals qualified for the position of commissioner of social services when a vacancy exists in the office. [C71, 73, 75, 77, § 217.3]

It should be noted at the outset that ch. 217, The Code, has not been the subject of any reported litigation in the thirteen years of its existence. Indeed, there is but one Attorney General's Opinion relating to the section, and that has to do with its constitutionality. 1976 Op.Att'yGen. 417.

The first three questions asked relate to how the word "shall" in the initial portion of § 217.3 is to be interpreted. If the "shall" is mandatory, then the Council of Social Services must carry out all of the duties enumerated in 217.3, The Code, including that contained in subparagraph 8, which is to "recommend to the governor any names of individuals qualified for the position of commissioner of social services when a vacancy exists in the office." Thus, if the word "shall" is mandatory, the answer to your second question will necessarily be that the duty is not "discretionary" and, correspondingly, the answer to your third question will be that "shall" means "must" rather than "may". In addition, unless another section of the code would apply to vitiate such mandatory duty, the answer to question number one would be that the appointment of a special committee by the Governor would not change the required duty to make a recommendation under § 217.3(8).

The Code itself in § 4.1(36)(a), The Code 1979, provides that the word "shall" imposes a duty whenever it is used in a statute enacted after July 1, 1971. The instant statute, as previously noted, was enacted before this date and the most recent amendment to it was in 1976. The interpretative provision of 4.1(36), does not, therefore, as a technical matter apply. The wording of this section is, nevertheless, persuasive.

The existing Iowa case law preceding the adoption of this statutory definition of "shall" is nearly identical in result. That case law can best be summarized in the statement that the word "shall" when used in a statute addressed to a public official is ordinarily mandatory and excludes the idea of permissiveness or discretion. Schmidt v. Abbott, 261 Iowa 886, 156 N.W.2d 649 (1968). City of Newton v. Board of Supervisors of Jasper County, 135 Iowa 27, 112 N.W. 167 (1907).

A review of ch. 217, The Code 1979, as well as ch. 209 of the 62nd G.A. (the act creating the Department of Social Services much of which is now embodied in § 217, The Code) reveals no basis for arguing that "shall" should not have its normal mandatory meaning when used in § 217.3(8), The Code, in requiring that "the Council of Social Services shall ... recommend to the governor the names of individuals qualified for the position of commissioner of social services when a vacancy exists in the office." (Emphasis added) We, therefore, conclude that the Council of Social Services has a duty to make a recommendation of individuals qualified to be Commissioner of Social Services whether or not "the governor has appointed another special committee to make such recommendations" and that such duty is not "discretionary" but "mandatory".

Your remaining question is under what circumstances, if any, the Council would not be obligated to carry out its duty to make a recommendation under § 217.3(8), The Code. We assume that this question is directed along the same lines as your question number one and is not intended to deal with emergency powers in times of war or national emergency. As indicated, our reading of the statute in question as well as the original act of which it was a part, does not give rise to any apparent basis on which duty could be abrogated, or avoided, absent an emergency situation in which it could be argued that other provisions of state or federal law would override this duty.

There is, of course, one other exception inherent in the wording of § 217.3(8), and that is that if the Council of Social Services determines that there are no qualified individuals for Commissioner, it obviously cannot make a recommendation. The statute does not specify affirmatively that the Council of Social Services has to search out the names of qualified individuals, but it would seem consistent that the Council make a reasonable effort to find potential candidates for the position of Commissioner when there is a vacancy. This responsibility was presumably assigned by the legislature for three reasons:

1) The Council members, in the course of their duties, would learn the names of qualified candidates for the position of

Commissioner of Social Services,

2) The Council members would develop contacts with experts in the field of human services who could recommend good candidates, and

3) Potential candidates should be persons with whom the Council could effectively work.

Although the making of the recommendations of qualified individuals serve as Commissioner of Social Services is a mandatory duty upon the Council of Social Services, it should be noted the Code does not require the Governor to appoint any one of the recommended individuals as Commissioner of Social Services.

Yours very truly,

John G. Black
Special Assistant Attorney General

JGB/tjb

STATE OFFICERS AND DEPARTMENTS: Soybean Promotion Board; Beef Cattle Producers Association -- §§ 17A.1(2), 25A.2(3), 25A.2(5)(b), 25A.21, 181.18, and 185.34, The Code 1979. Neither the Soybean Promotion Board nor the Beef Cattle Producers Association are state agencies. As a result, their members are not state employees covered by Chapter 25A for the purpose of defense and indemnification in the event of claims or litigation. (Mueller to Lounsberry, Secretary of Agriculture 3/17/80) #80-3-15(L)

March 17, 1980

Mr. R.H. Lounsberry
Secretary of Agriculture
Henry A. Wallace Building
L O C A L

Dear Secretary Lounsberry:

You recently requested an opinion of the Attorney General concerning the following question:

> Does a member of either the Iowa Soybean Promotion Board or the Iowa Beef Cattle Producers Association, while performing services upon request of the state, with or without compensation, fall within the purview of Chapter 25A of the Code for purposes of defense and indemnification in the event of claims or litigation?

Section 25A.21, The Code 1979, provides in pertinent part:

> Employees defended an indemnified. The state shall defend and, except in cases of malfeasance in office or willful and wanton conduct, shall indemnify and hold

> harmless any employee of the state against any claim . . .

"Claim" is defined in § 25A.2(5)(b), The Code 1979:

> Any claim against an employee of the state for money only, on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission, except an act of malfeasance in office or willful and wanton conduct, of any employee of the state while acting within the scope of his office or employment.

"Employee of the state" includes any one or more officers, agents, or employee of the state or <u>any state agency</u> and persons acting on behalf of the state or, any state agency in any official capacity, temporarily or permanently in the service of the state of Iowa, whether with or without compensation. § 25A.2(3), The Code 1979.

Section 185.34, The Code 1979, specifically provides that the "Iowa soybean promotion board shall not be a state agency." There fore, members of the Soybean Promotion Board are not members of a state agency, and thus precluded from coverage of chapter 25A.

The Code chapter dealing with the Beef Cattle Producers Association (Association), Ch. 180, does not contain a similar provision to § 185.34, which would exclude the Association from being a state agency. However, it is our opinion that the Beef Cattle Producers Association is not a state agency and the members of the Association's executive committee are not state employees covered by Chapter 25A.

First, an Attorney General opinion, 1966 Op. Att'y Gen. 375, infers as much. That opinion held that employeés of the Beef Cattle Producers Association were not state employees:

> Inasmuch as the employees of the affiliated agencies <u>are not state officers or employees and they are not a state office department, bureau or commission</u> . . . (Emphasis added).

1966 Op. Att'y Gen. 375. Therefore, even though the opinion uses the word "agencies" when describing the Association, it is clear

that the opinion did not mean the Association was a "state agency." Quite the contrary, the opinion holds that the Association is "not a state office, department , bureau or commission . . " and that the Association's employees are not state employees.

Supporting this interpretation, § 181.18, The Code 1979, provides:

> Rules. All rules of the executive committee heretofore and heretoafter promulgated shall be subject to the provisions of chapter 17A.

If the legislature had considered the Association a state agency, said provision would be meaningless--because all rules of state agencies are subject to the provisions of Ch. 17A, Iowa Administrative Procedure Act. See § 17A.1(2), The Code 1979. Therefore, the legislature must have intended that the Association not be considered a state agency; thus the members and employees of such are not state employees and are precluded from Chapter 25A.

In conclusion, neither the Soybean Promotion Board nor the Beef Cattle Producers Association are state agencies. As a result, their members are not state employees covered by Chapter 25A, for the purpose of defense and indemnification in the event of claims or litigation.

Sincerely,

James P. Mueller

James P. Mueller
Assistant Attorney General

JPM:jkt

TAXATION: Property Tax Exemption Status of Church Owned Living Quarters. §427.1(9), The Code 1979. Property of a religious institution which is used as a home by an individual, regardless whether that individual pays rent or occupies the home rent-free in exchange for janitorial services rendered to the institution, would not qualify for the property tax exemption provided in §427.1(9). (Kuehn to Small, State Senator, 3/13/80) #80-3-10(L)

The Honorable Arthur A. Small, Jr. March 13, 1980
State Senator
State Capitol
L O C A L

Dear Senator Small:

You have requested an opinion of the Attorney General regarding the exemption from property tax of a home owned by a church. The home is to be used by the church in one of two ways:

1. Renting the property, or
2. Allowing an individual to live in the home rent-free in exchange for janitorial services.

In order for property of religious institutions to be exempt from property tax, the use of the property must be "solely for the appropriate objects" of such institution. See §427.1(9), The Code 1979.

Section 427.1(9) states:

> 427.1 Exemptions. The following class of property shall not be taxed:
>
> * * * *
>
> 9. Property of religious, literary, and charitable societies. All grounds and buildings used or under construction by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in

> extent and not leased or otherwise used or under construction with a view to pecuniary profit. All deeds or leases by which such property is held shall be filed for record before the property herein described shall be omitted from the assessment. All such property shall be listed upon the tax rolls of the district or districts in which it is located and shall have ascribed to it, an actual fair market value and an assessed or taxable value, as contemplated by section 441.21, whether such property be subject to a levy or be exempted as herein provided and such information shall be open to public inspection. (Emphasis supplied.)

In Nugent v. Dilworth, 95 Iowa 49, 63 N.W. 448 (1895), the Iowa Supreme Court viewed the provisions of what is now essentially §427.1(9) as foreclosing the tax exemption in the event that the religious institution leased its property, even if the rental payments were totally dedicated to religious purposes. The Court stated in 95 Iowa at 53:

> It will be seen, by referring to the section cited, that it would not permit the plaintiff (church) to lease or otherwise use these lots with a view to obtain money for their use, even though the money should be used for the appropriate objects of the church; or, in other words, the church could not use them for pecuniary profit, and apply the profits to its appropriate object, and claim the exemption. The devotion to the objects of the church, within the meaning of the law, is limited, and not general.

In 1924 Op. Att'y Gen. 389, 390, the Attorney General reached the same conclusion as the Court in Nugent: "Land owned by a church and rented for profit, the net income from the same being devoted to the benefit of a religious institution, is subject to (property) taxation."

Clearly, therefore, if property of a religious institution is rented, that rented property does not qualify for a property tax exemption in accordance with the provisions of §427.1(9).

If the property is used as a home by a person or persons who will occupy the property rent-free in exchange for janitorial services, such occupied property will, likewise, not qualify for a property tax exemption. In Wisconsin Evangelical Lutheran Synod

v. Regis, 197 N.W.2d 355 (Iowa 1972), the Iowa Supreme Court held that a home furnished by a church to a religious day school teacher would not qualify for tax exemption under §427.1(9). The Court pointed out that since the property was used as a home by the teacher and his family with an attendant right of privacy, the property was not solely used for the appropriate objects of the church as required by §427.1(9). In Southside Church of Christ v. Des Moines Board of Review, 243 N.W.2d 650 (Iowa 1976), the Iowa Supreme Court held that a home which was built by a church and which was occupied rent-free by foster parents for the purpose of providing children with foster care in accordance with a church-sponsored plan to provide several homes for small numbers of foster children was not entitled to the property tax exemption provided for in §427.1(9). Again, the Court pointed out that the home was not solely used for the appropriate objects of the church because the foster parents received a substantial private benefit, i.e., private living quarters.

It is, therefore, the opinion of this office that property of a religious institution which is used as a home by an individual, regardless whether that individual pays rent or occupies the home rent-free in exchange for janitorial services rendered to the institution, would not qualify for the property tax exemption provided in §427.1(9).

Very truly yours,

Gerald A. Kuehn
Assistant Attorney General

GAK:pjt

JOINT EXERCISE OF GOVERNMENTAL POWERS: TORT LIABILTIY OF GOVERNMENTAL SUBDIVISIONS -- Chapters 28E and 613A, The Code 1979. The members of an agency or board, established pursuant to Chapter 28E, are subject to the coverage and protection of Chapter 613A. Therefore, pursuant to § 613A.2, this board or agency may be held liable for its torts, and those of its officers, employees, and agents acting within the scope of their employment. (Mueller to Kenyon, Union County Attorney, 3/13/80) #80-3-9 (L)

March 13, 1980

Mr. Arnold O. Kenyon, III
Union County Attorney
Courthouse
Creston, Iowa 50801

Dear Mr. Kenyon:

This is in response to the following letter from you:

> I have been requested to contact the Attorney General's Office for an opinion regarding the liability of the Law Enforcement Commission pursuant to Chapter 28(e) of the Code in regard to any accident or injury arising within the confines of the Law Enforcement Center.
>
> The Law Enforcement Commission is made up of members of the City of Creston and of the Union County Board of Supervisors. The Commission was formed for the purpose of building, operating, and maintaining the Union County Law Enforcement Center. The particular question which has been forwarded to me is in regard to the liability of the Commission itself, separate and apart from any liability which the City or County may have regarding any injuries within the Law Enforcement Center.

We assume that the Law Enforcement Commission was established pursuant to § 28E.28, The Code, 1979, which provides:

> Public safety commission. If the levy of a tax has been approved under section 28E.22, a public safety commission shall be established under section 28E.6. The public safety commission shall be responsible for administering the unified law enforcement agreement. The public safety commission shall be composed of elected officials from public agencies party to the agreement. The composition of the commission shall be determined by the terms of the agreement. A vacancy shall exist when a member of the commission ceases to hold the elected office which qualifies the member for commission membership.

This office has previously determined that members of a board or agency, established pursuant to Chapter 28E, are subject to the coverage and protection of Chapter 613A. See 1976 Op. Att'y Gen. 345. Thus, if the members of the Commission fall within the definition of "municipality", then pursuant to Chapter 613A, The Code 1979, the Commission can sue, be sued, purchase liability insurance, defend, hold harmless and indemnify its officers, employees and agents.

We should mention that the case, City of Spencer v. Hawkeye Security Co., 216 N.W. 2d 406 (Iowa 1974), has no application here. In Spencer, the Court held that §§ 613A.7 and 613A.8 required an independent and autonomous board to defend, hold harmless and indemnify its employees. The Court reserved the question of whether an independent board could sue or be sued, and whether the city itself might be liable for the acts of the independent board's employees. Since the Commission here is a "municipality", not an independent board, Spencer does not apply.

In conclusion, § 28E.3 provides that any powers, privileges, and authority that a political subdivision may exercise alone may also be exercise jointly.

As we stated in our earlier opinion, it would seem inconceivable that the Legislature would require a political subdivision to waive the protections in Chapter 613A merely because one subdivision entered into a cooperative agreement with another subdivision to provide services to the general public. Therefore, pursuant to Chapter 613A, the Law Enforcement Commission may sue, be sued, purchase liability insurance, defend, hold harmless, and indemnify its officers, employees and agents.

Sincerely,

James P. Mueller

James P. Mueller
Assistant Attorney General

JPM:jkt

TAXATION: Compromise of Taxes of a Low Rent Housing Project. §§ 427.1(34) and 445.16, The Code,1979. Boards of Supervisors do not have the authority to suspend,cancel or compromise the delinquent property taxes of a low rent housing project owned and operated by a non-profit corporation unless the requirements of §445.16 are met. (Price to Neighbor, Jasper County Attorney, 3/11/80) #80-3-6 (L)

March 11, 1980

Mr. Charles C. Neighbor
Jasper County Attorney
301 Courthouse Building
Newton, IA 50203

Dear Mr. Neighbor:

The Attorney General's Office acknowledges receipt of your letter dated January 11, 1980 in which you pose the following question:

> Does the Board of Supervisors have the authority to suspend, cancel or compromise property taxes for a low rent housing project owned and operated by a nonprofit corporation [see §427.1(34),Code of Iowa] that are delinquent and unpaid?

Low rent housing owned and operated by a nonprofit organization is exempt from taxes pursuant to section 427.1(34), The Code 1979 which provides as follows:

> Exemptions. The following classes of property shall not be taxed:
>
> * * *
>
> (34) Low-rent housing. The property owned and operated by a nonprofit organization providing low-rent housing for the elderly and the physically and mentally handicapped. The exemption granted under the provisions of this subsection shall apply only until the terms of the original low-rent housing development mortgage is paid in full or expires, subject to the provisions of subsections 23 and 24.

The provisions of subsections 23 and 24, referred to in the above-quoted statute, provide the filing requirements which must be adhered to in order for the organization claiming the exemption to be eligible therefore.

Section 427.1(23), The Code 1979, provides in relevant part:

> Statement of objects and uses filed. Every society or organization claiming an exemption under the provisions of either subsection 6 or subsection 9 of this section shall file with the assessor not later than February 1 of the year for which such exemption is requested, a statement upon forms to be prescribed by director of revenue, describing the nature of the property upon which such exemption is claimed and setting out in detail any uses and income from such property derived from such rentals, leases or other uses of such property not solely for the appropriate objects of such society or organization. ...

Section 427.1(24), The Code 1979, provides as follows:

> 24. Delayed claims. In any case where no such claim for exemption has been made to the assessor prior to the time his books are completed, such claims may be filed with the local board of review or with the county auditor not later than July 1 of the year for which such exemption from taxation is claimed, and a proper assessment shall be made either by the board of review or by the county auditor, if said property is all or in part subject to taxation.

According to the facts submitted by you the nonprofit organization did not comply with §§427.1(23) and (24). Consequently the exemption was denied and the organization now seeks to have the assessed taxes cancelled, suspended, or compromised.

Although there are several statutory provisions which allow the Board of Supervisors to cancel, suspend or compromise property taxes, only one of these provisions is applicable in the instant situation. See 1972 Op.Atty Gen.29. The applicable statute is §445.16, The Code 1979, which provides as follows:

> Compromising tax. When any property in this state has been offered by the county treasurer for sale for taxes for two consecutive years and not sold, or sold for only a portion of the delinquent taxes, then and in that event the board of supervisors of the county is hereby authorized to compromise the delinquent taxes against said property antedating any tax sale certificate; or being a part of the taxes due for the year for which such property was sold for taxes, and may enter into a written agreement with the owner of the legal title or with any lienholder for the payment of a stipulated sum in full liquidation of all delinquent taxes included in such agreement.

At first glance, it would appear that the Board of Supervisors is authorized to compromise the taxes after the property has been offered for sale for two consecutive years and not sold. However, there are several Attorney General Opinions which have held that §445.16 also requires that there must be a scavenger sale before the Board of Supervisors is authorized to compromise taxes. See 1938 Op.Att'y.Gen 699; 1936 Op. Att'y.Gen 319, and 1936 Op. Att'y Gen 255.

Since the county treasurer has neither offered the property for sale for two consecutive years, nor held a scavenger sale, it is the opinion of this office that Boards of Supervisors do not have the authority to suspend, cancel or compromise the delinquent property taxes of a low rent housing project owned and operated by a nonprofit corporation unless the requirements of §445.16 are met.

Very truly yours,

L. Joseph Price
Assistant Attorney General

COUNTIES: LEGAL SETTLEMENT: MENTAL RETARDATION: NOTICE OF LIABILITY: §§ 230.1, 252.1, 252.16, 252.17, 252.22, 252.24, 347.16 and ch. 253, The Codes 1966 and 1971; §§ 4.5, 252.16, The Code 1979. Under the 1966 and 1971 Codes of Iowa, the legal settlement of a mentally retarded minor changed with that of the parents, and the county of legal settlement was responsible for the costs of care and custody of said person at a county care facility. This liability of the county of legal settlement continued after the minor reached the age of majority, even though she may have been transferred to a county care facility in another county for care and custody. Secondly, it is the duty of the county auditor to provide notice to the county of legal settlement of a patient that it is providing for the care and custody of a charge of said county, and such notice must be given within a reasonable period of time from the date of admission of the patient. (Mann to Richards, Story County Attorney, 3/11/80) #80-3-5(L)

March 11, 1980

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

Dear Ms. Richards:

You have requested an opinion of the Attorney General concerning the responsibility for payment for the care of a mentally retarded adult residing in a county care facility. You relate, in substance, the following pertinent facts:

> A mentally retarded minor lived with her parents in Hardin County, Iowa, in 1955, and was admitted to the Glenwood State Hospital School that same year. In 1960, the parents moved to Denison, Iowa, in Crawford County. The female minor remained at the Glenwood State Hospital School until September 25, 1970, when she was placed in a facility in Missouri Valley, Iowa. On October 25, 1971, she was moved to the Story County Care Facility. In that same year she became twenty-one (21) years of age. Demand for reimbursement of costs were made against Crawford County by letter of the Story County Attorney on October 17, 1979.

In substance, you asked the following questions:

> (1) Which county has the financial responsibility for the care of a mentally retarded person where the person is committed to care in one county while still a minor, and is afforded continuing care in another county after reaching adulthood?
>
> (2) What is the impact of a host county's failure to give notice to the county of legal settlement that said county is responsible for the financial costs of care and custody of an inmate in the host's care facility as required under § 252.22 of the Iowa Code?

Under § 252.24 of the 1966 and 1971 Codes of Iowa, the county of legal settlement is liable to the county rendering relief for all reasonable charges and expenses incurred in the relief and care of a poor person. Op.Att'yGen. #78-8-1. "Poor person" as that term is used in § 252.24 and defined in § 252.1 of the 1966 and 1971 Iowa Codes include those who have mental disabilities. Thus, under § 252.24, the county of legal settlement is responsible for the financial costs of caring for a mentally retarded resident at a county care facility.

Legal settlement of a poor person under the 1966 Code was determined under ch. 252. Sections 252.16(5) and 252.17 read as follows:

> 252.16(5) Legitimate minor children take the settlement of their father, if there be one, if not, then that of the mother.
>
> 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.

It follows from the above sections that the legal settlement of a mentally retarded minor is the same as that of the parents, and that legal settlement of the minor transfers to any new legal settlement established by the parents. 1970 Op.Att'yGen. 603.

Based on the facts which you have related, the legal settlement of the mentally retarded minor involved would be the same as that of the parents, Crawford County, Iowa. You have related no facts which would indicate that the legal settlement of the parents changed either prior to or after the minor reached the age of majority.

Further, the minor in question could not establish legal settlement in Story County simply by being transferred to an institution in that county for care. Section 252.16(3) of the 1966 Code precluded that possibility. 1976 Op.Att'yGen. 400. Accordingly, legal settlement of the minor in question remained in Crawford County and consequently, liability for the costs of care and custody.

In reaching this conclusion, we find no conflict between prior opinions of the Attorney General, 1968 Op.Att'yGen. 651 and 1970 Op.Att'yGen. 603. In both of the above opinions, the legal settlement of a minor was determined under § 252.16 of the Code. However, in 1968 Op.Att'yGen. 651, this office concluded that the legal settlement of a mentally ill minor committed to any state institution, although initially determined pursuant to § 252.16, does not change with that of the parents, but remains that settlement existing at the time of admission. We believe that conclusion to be correct. State v. Clay County, 226 Iowa 885, 285 N.W. 229 (1939); Scott County v. Townsley, 174 Iowa 192, 156 N.W. 291 (1916); Polk County v. Clarke County, 171 Iowa 558, 151 N.W. 489 (1915); § 230.1, The Code 1966. We also agree that legal settlement for both a mentally ill minor and a mentally retarded minor is properly determined under § 252.16 of the Code. State v. Story County, 207 Iowa 1117, 224 N.W. 232 (1929). And, as discussed in earlier portions of this opinion, the legal settlement of a mentally retarded minor follows that of the parents.

It should further be noted that under § 252.16 of the 1979 Code, legal settlement of a minor changes with the settlement of the parents, except that the child retains the settlement that the parents have on the child's eighteenth birthday until

discharge from an institution. Even under this statute, legal settlement would remain in Crawford County on the facts involved herein. Of course, the 1979 law does not apply retroactively. Section 4.5, The Code 1979.

The second question posed inquires into the impact of the failure to meet the notice requirements under § 252.22. Section 252.22 remains the same in the present Code as it was in 1971 and 1966. It reads 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. (Emphasis added.)

The above section applied to the present facts would have required the county auditor of Story County to give notice to the auditor of Crawford County advising that a patient with legal settlement in Crawford County was receiving care at the Story County Care Facility. You relate facts which show that although the patient in question was receiving care in the Story County Care Facility from 1971 to the present, notice was not given to Crawford County until October 17, 1979, and then by letter from the Story County Attorney to the Crawford County Attorney.

We have discovered only one Iowa case which discussed § 252.22. That case, Shelby County Myrtue Memorial Hospital v. Harrison County, 249 Iowa 146, 86 N.W.2d 104 (1957), concluded that the § 252.22 notice requirement was not a prerequisite to action by a county public hospital against such county to collect reasonable costs of an indigent's hospitalization. The court relied on § 347.16 of the Code for its conclusion, finding that § 347.16 was a statute of specific application that prescribed the procedures for collection of accounts by a public hospital. Consequently, § 252.22, a general statute, did not apply.

We conclude that Shelby County Myrtue Memorial Hospital does not apply. A county care facility established under ch. 253 of the Iowa Code is not the same as a county hospital established under ch. 347 of the Code. Nor does ch. 253 prescribe a specific procedure for collection of accounts by county care facilities. Accordingly, § 252.22 applies.

Although it did not specifically discuss § 252.22, we think that State v. Clay County, 226 Iowa 885, 285 N.W. 229 (1939), is appropriate authority for disposition of this question. There the court stated the following in discussing a disputed claim arising out of a legal settlement question:

> Courts are not inclined to view with approbation claims of this character which have accumulated and laid dormant for many years . . . .
>
> The allowance of this and other similar claims might require such heavy and unanticipated expenditures from the tax funds raised for the care of insane in certain counties that said funds would for a time prove insufficient for the support of other infortunate insane persons. Such result would hamper the purpose of this humanitarian legislation.

The court went on to conclude that the doctrine of laches barred the stale claim raised in that case. Although the laches defense might be raised in an action to recover the costs of care on the facts of this case, more appropriately, however, the statutory prescription that immediate notice of claims be given to the county of legal settlement would apply. Section 252.22 requires that the county auditor give notice of a claim at once. "Under the conceded rule, 'at once' meant a reasonable time." State ex rel. Conway v. Nolte, 218 S.W. 862 (Mo. 1920); Kraner v. Chambers, 92 Iowa 681, 61 N.W. 373 (1894). We cannot conclude that a nine (9) year delay was reasonable on the facts supplied.

We note that the patient in question is continuing to receive care in the Story County Care Facility. Since the legal settlement of that patient still remains in Crawford County, and since that county is liable by statute for the costs of care, all costs and expenditures incurred since the receipt of actual notice in this matter should be honored.

In summary, under the 1966 and 1971 Codes of Iowa, the legal settlement of a mentally retarded minor changed with that of the parents, and the county of legal settlement was responsible for the costs of care and custody of said person at a county care facility. This liability of the county of legal settlement continued after the minor reached the age of majority, even though she may have been transferred to a county care facility in another county for care and custody. Secondly, it is the duty of the county auditor to provide notice to the county of legal settlement of a patient that it is providing for the care and custody of a charge of said county, and such notice must be given within a reasonable period of time from the date of admission of the patient.

Sincerely,

Thomas Mann, Jr.

Thomas Mann, Jr.
Assistant Attorney General

TM/dj

MOTOR CARRIERS: Section 327D.29, The Code 1979, does apply to motor carriers defined in Chapters 325 and 327A, The Code 1979, and the power, control and authority of the Transportation Regulation Board over railroads is imputed to the above defined motor carriers through Sections 321.4 and 327A.20, The Code 1979. (Miller to Small, State Senator, 3/11/80) #80-3-3(L)

March 11, 1980

The Honorable Arthur A. Small
State Senator
Statehouse
Des Moines, IA 50319

Dear Senator Small:

We have received your request for an Attorney General's opinion regarding the application of Section 327D.29, The Code 1979, to motor carriers as defined by Chapters 325 and 327A, The Code 1979.

In your question one, you asked whether Section 325.4, The Code 1979, extended to motor carriers the application of Section 327D.29, The Code 1979, insofar as those motor carriers are regulated by the Board.

1. The clear intent of Section 325.4, The Code 1979, is to confer upon the state the same power and authority to regulate motor carriers that it has in the regulation of railroads.[1] The Iowa Supreme Court in State ex rel. Board of Railroad Com'ns. v. Holdcroft, 207 Iowa 564, 221 N.W. 191 (1928), describes the legislative history behind the enactment of Section 325.4. There it was pointed out that the term "motor carrier" was not included in Section 7883, The Code 1924, and that it was obviously a legislative oversight. The legislature then corrected this by passing Section 2 of Chapter 5, Acts of 41 G.A., as follows:

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[1] Section 325.4, The Code 1979, states: "All control, power, and authority over railroads and railroad companies now vested in the board, insofar as the same is applicable, are hereby specifically extended to include motor carriers."

> "All control, power and authority over railroads and railroad companies now vested in the commission, insofar as the same is applicable, are hereby specifically extended to include motor carriers."[2]

The Court held that "the necessary effect of the later legislation is to confer upon the railroad commission the same 'power and authority over motor carriers' as it has over railroad carriers. . . ." Holdcroft, supra 221 N.W. at 192.

The Iowa Supreme Court has consistently ruled that the Transportation Regulation Board, hereinafter referred to as the Board, has the power of general supervision over railroads and motor carriers. This includes the power to regulate motor carriers in all matters affecting the shipping public. See, Sanford Mfg. Co. v. Western Mutual Fire Ins. Co., 229 Iowa 283, 294 N.W. 406, Iowa (1940).

Included in this is the authority to allow free or reduced rates for prescribed situations. The constitutionality for allowing free or reduced rates was established in Chicago, R.I. and P. Ry. Co. v. Ketchum, 212 F. 986, S.D. Iowa (1913). There, the District Court ruled that the state could prescribe reduced rates where it would be to the benefit of the state. The state would be exercising its powers to promote the safety, convenience and proper protection of the public.[3]

Section 327D.29, The Code 1979, specifically allows railroads to transport, haul or store particular items at free or reduced rates without violating various rate discrimination statutes. It also allows the railroads to avoid the rate posting requirements when they are acting pursuant to Section 327D.29. As such, this section sets out part of the power, authority and control that the Board has over the railroads. This is the power, authority and control vested in the Board that is imputed to motor carriers under Section 325.4.

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[2] Commission, in this statute referred to the Railroad Commission. The statute presently reads board, which refers to the Transportation Regulation Board. This was last amended in 1974.

[3] The case involved reduced rates for travel to and from Des Moines during State Fair time and whether that power extended to that particular case.

Common law statutory construction allows one statute to refer to another and to incorporate all or part of it by reference. This would include any subsequent amendments that are generally referred to.[4] Section 4.3, The Code 1979, supports this by stating: "Any statute which adopts by reference the whole or a portion of another statute of this state shall be construed to include subsequent amendments of the statute or the portion thereof so adopted by reference unless a contrary intent is expressed." The legislature has the authority to impute the power, authority and control that the Board exerts over railroads to motor carriers defined under Chapter 325, The Code 1979. This would include provisions enumerated in Section 327D.29 which allows for the transportation, hauling and storage of particular items at free or reduced rates.

In your question two, you asked whether the phrase "less than carload lots" used in Section 327D.29, as is applicable to railroads encompasses the phrase "truckload lots" as is applicable to motor carriers.

2. Carload lots and truckload lots are trade terminologies. Carload lots pertain to railroads and truckload lots pertain to the trucking industry. Neither phrase is specifically defined in either The Code or the Iowa Administrative Code. The legislative intent in Subsection 327D.29(6) was to provide free or reduced rates for less than carload lots of private property. Chapter 327D, The Code 1979, applies to railroads, so obviously, the term "truckload lots" was not used. If Subsection 327D.29(6) had been specifically restated in Chapter 325, it can be assumed that the term "truckload lots" would have been used instead of carload lots.

Legislative intent is crucial in situations like this. Trade terminologies will often be given a general interpretation where a specific interpretation could be used to destroy the legislative intent.[5] As stated in the answer to your question one, the legislature intended Section 325.4 to impute the control and authority available to the Board under Chapter 327D to the Board under Chapter 325. This obviously includes Subsection

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[4] Sands, Sutherland,Statutory Construction §51.07 (4th ed. 1973).

[5] Id. §42.27.

327D.29(6), which pertains to railroads or motor carriers carrying private goods in less than carload or truckload lots.

In your question three, you asked whether the term "liquid transport carrier" as defined in Chapter 327A, The Code 1979, was encompassed in the term "motor carrier" as defined in Chapter 325.

3. The term "liquid transport carrier" is not encompassed by the Chapter 325 definition of motor carrier.[6] Standard statutory interpretation would apply in this situation. Generally speaking, when a statute enumerates items to be included under the statutory provision, the inference is made that all omissions are intended to be excluded.[7]

Nothing in Chapter 325 was intended to be construed to include liquid transport carriers. Rather, the term "liquid transport carrier" is defined in Subsection 327A.1(1), The Code 1979.[8] The legislature obviously intended to differentiate between the two types of carriers and to establish different standards for each of them. The provisions pertaining to motor

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[6] Subsection 325.1(2), The Code 1979, states: "The term 'motor carrier' shall mean any person operating any motor vehicle upon any highway in this state." Subsection 325.1(1), The Code 1979, includes as a motor vehicle "any automobile, automobile truck, motorbus, or other self-propelled vehicle, including any trailer, semitrailer, or other device used in connection therewith not operated upon fixed rails or track . . ."

[7] Sands, Sutherland Statutory Construction §47.23 (4th ed. 1973).

[8] Subsection 327A.1(1), The Code 1979, states: "'Liquid transport carrier' shall mean any person engaged in the transportation, for compensation, of liquid products in bulk upon any highway in this state."

vehicle carriers in Chapter 325 are not intended to encompass provisions which pertain to liquid transport carriers in Chapter 327A unless specifically stated.[9]

In your question four, you asked whether the answer to question one would apply to liquid transport carriers.

4. The answer to your question one would apply to liquid transport carriers in the same way that it applies to motor vehicle carriers defined in Chapter 325. Section 327A.20, The Code 1979, uses the identical language found in Section 325.4 with the exception that it specifically applies to liquid transport carriers.[10]

In your question five, you asked whether under the circumstances prescribed in Section 327D.29, may a railroad corporation or a motor carrier legally solicit and accept freight for a carriage at less than the published tariff allowed by the Transportation Regulation Board?

5. Section 327D.29 explicitly exempts the enumerated items from charges of rate discrimination which could apply if reduced rates were given to other nonenumerated items. As already stated in the answers to your questions one and four, Section 327D.29 would be applicable to motor carriers defined in Chapters 325 and 327A. The intent of Section 327D.29 appears to be clear by stating that "nothing in this chapter shall apply to free or reduced rates for the transportation, storage or handling" of the following enumerated items. See Section 327D.29. Any item that falls within the categories stated in subparagraphs one through eight of Section 327D.29 would be exempt from normal tariff

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[9] Section 327A.3, The Code 1979, specifically provides for this by stating: "The provisions of Sections 325.7 to 325.21 insofar as applicable are hereby extended to include liquid transport carriers in relation to hearing on an application for the aforesaid certificate of convenience and necessity."

[10] Section 327A.20, The Code 1979, states: "All control, power and authority over railroads and railroad companies now vested in the board, insofar as the same is applicable, are hereby specifically extended to include liquid transport carriers."

publishing procedures.[11] A railroad or motor carrier could handle those enumerated items at rates that are either free or are less than those rates that are published with the Board.

In your question six, you asked whether under the circumstances prescribed in Section 327D.29, a railroad corporation or a motor carrier which solicits and accepts freight for carriage at less than the allowed published tariff, may do so without filing a rate change in advance of accepting the freight from or to a point from which the railroad corporation or motor carrier has existing route authority.

6. Sections 327D.78 and 327D.79, The Code 1979, require that the Board be given 30 days notice of any rate change before the new rate can go into effect. This requirement would also apply to motor carriers as defined in Chapters 325 and 327A. However, as stated in the answer to your question five, those items that are enumerated in Section 327D.29 are exempted from the normal tariff requirements. This would include the requirement for the notice of a rate change. Railroads and the above defined motor carriers could accept freight enumerated under Section 327D.29 at free or reduced rates without filing the normal rate changes with the Board.[12]

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[11] Those items are as follows: "(1) Property for the United States, this state, or political subdivisions of this state; (2) Materials to be used by public authorities in constructing or maintaining public facilities; (3) Property for charitable purposes; (4) Property for exhibition at fairs or expositions; (5) Private property or goods for the family use of such employees as are entitled to free passenger transportation; (6) Private property in less than carload lots; (7) Coal; (8) Products transported to be recycled."

[12] The Board is given special powers in the regulation of Chapter 325 motor carriers. Subsection 325.2(1), The Code 1979, states: "The Board is hereby vested with power and authority, and it shall be its duty to: (1) Fix or approve the rates, fares, charges, classifications, and rules pertaining thereto, of each motor carrier." The Board has yet to be faced with interpreting both Sections 327D.29 and 325.2 involving the circumstances set out in your questions five and six. Statutory construction would seem to dictate a nonconflicting interpretation which would allow free or reduced rates as long as the shipping public was not harmed.

In your question seven, you asked whether under the circumstances prescribed in Section 327D.29, a railroad corporation or a motor carrier must possess a certificate of public convenience and necessity issued by the board in order to accept freight for shipment at a free or reduced rate.

7. Chapter 327D does not require a railroad corporation to possess a certificate of convenience and necessity prior to accepting the transportation of items under Section 327D.29. Chapters 325 and 327A, however, specifically require that each motor carrier obtains a certificate of convenience and necessity before the transportation of any commodity or passenger for compensation. Section 325.4 and 327A.20 do not prohibit the addition of requirements that are necessary for motor carriers and not for railroads. Common statutory construction assumes "that all words in a statute are to be given effect, if possible, that parts of a statute are to be construed together, and that the legislature is presumed not to have used superfluous words."[13] The legislature obviously intended to require all motor carriers to file certificates of convenience and necessity prior to their operating for compensation.

Railroad corporations, however, have never been included in this requirement. Therefore, the Board has never had any power, authority or control over railroads in the filing of certificates of convenience and necessity. If the Board never possessed this particular power and control over railroads, then that power and control cannot be imputed to the Board through Sections 325.4 and 327A.20.

Since the power and authority of the Board under Chapter 327D does not apply to requiring certificates of convenience and necessity, Section 327D.29 cannot be used to exempt motor carriers from those requirements. Section 327D.29 only applies to powers given the Board under Chapter 327D. Motor carriers, defined under Chapters 325 and 327A that ship at free or reduced rates pursuant to Section 327D.29, must possess the necessary certificates of convenience and necessity prior to their operation. Railroads, of course, are exempt from this requirement.

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[13] Sands, Sutherland Statutory Construction §47.17 (4th ed. 1973).

In your question eight, you asked whether under the circumstances prescribed in Section 327D.29, may the state, a political subdivision, or public authorities, require public bids for transportation, storage, or handling of their property or materials to be used by them.

8. Section 327D.29 does not preclude any public body from requiring bids as is required under their respective statutes, codes, or other operating requirements. The reasoning for this is the same as set out in the answer to your question seven. Chapter 327D,and more specifically Section 327D.29, does not set out the power, control and authority of the Board with regard to public bidding requirements. Therefore, the Board has no power or authority with regard to public bidding that can be imputed to motor carriers through Sections 325.4 and 327A.20. Public bids can be required for the transportation, storage and handling of items at free or reduced rates for items enumerated under Section 327D.29 provided the motor carriers have the required certificate of convenience and necessity.

Sincerely,

James D. Miller

James D. Miller
Assistant Attorney General

ps

MOTOR VEHICLES - Special plates - Section 321.57, The Code 1979. Dealers may not loan an inventory vehicle equipped with dealer plates to customers unless the customer has a legitimate interest in either purchasing or obtaining possession of a particular vehicle and then only for testing or demonstrating that particular vehicle. (Miller to Shimanek, State Representative, 3/3/80) #80-3-2(L)

March 3, 1980

The Honorable Nancy Shimanek
State Representative
Statehouse
Des Moines, Iowa 50319

Dear Representative Shimanek:

In your question, you asked whether prosecution of a dealer can occur under Section 321.57, The Code 1979, when a loaner is being offered for service to a customer when that vehicle is in the dealer's inventory, is continually being offered for sale at retail prices and does display dealer plates?

Section 321.57, The Code 1979, specifically sets out the situations when dealer plates can be utilized. Section 321.57, states that "a dealer owning any vehicle of a type otherwise required to be registered hereunder may operate or move the same upon the highways solely for purposes of transporting, testing, demonstrating or selling the same. . . ."(emphasis added). A Departmental Rule, 820 I.A.C. 10.4(2)(a)(d), further implements this section by stating:

> "Criteria for the use of dealer plates. The following criteria shall apply to the use of dealer plates: (a) Dealer plates shall not be used on driver training vehicles loaned to schools; vehicles used for rental purposes; leased vehicles, vehicles loaned to persons for public relations or advertising or vehicles loaned to a customer whose vehicle is being repaired. (d) Dealer plates may be used for delivery, testing and demonstration." (emphasis added).

Prosecution of the motor vehicle dealer can occur any time a vehicle from that dealer's inventory, equipped with dealer plates, is used in violation of the above-quoted statute and rules. Paragraph 820-[07,D] 10.4(2)(a) I.A.C., specifically deals with situations where a dealer loans a customer a vehicle from the dealer's inventory while the customer's personal car is being serviced. Such practice is clearly illegal if the inventory car is equipped with dealer plates.

Obviously, if the customer whose car is being serviced is in the market for a different motor vehicle, the customer can test drive a vehicle which he or she has a legitimate interest in ultimately obtaining. That particular vehicle could be equipped with dealer plates and could be used by the customer even while the customer's personal vehicle is being serviced. Section 321.57, only pertains to the status of the dealer's inventory vehicles.

A different situation which may arise could be where a customer is completing a transaction for another vehicle. If the dealer allows the customer to operate a different vehicle on the highway while the newly purchased vehicle is being made road-worthy, the practice would be illegal. Section 321.57 is clear in stating that dealer plates will be allowed "solely for purposes of transporting, testing, demonstrating or selling the same." (emphasis added). Only the particular vehicle in which the customer is interested in obtaining can be operated on a highway with dealer plates and then only for the above stated purposes. See Section 321.57.

The fact that motor vehicles used by customers in the above or similar situations may be continually offered for sale at retail prices does not make the practice legal. Only motor vehicle dealers or their authorized agents may operate a vehicle equipped with dealer plates for private or business purposes. Even for that practice to be proper, the vehicle must be from the dealer's inventory; it must be continually offered for sale at retail prices; and it must display dealer plates. See 1968 Op. Att'y Gen. 341 (1967).

In view of the foregoing, it is our opinion that motor vehicle dealers may not loan an inventory vehicle equipped with dealer plates to a customer, unless the customer has a legitimate

interest in either purchasing or obtaining possession of a particular vehicle. The customer's use of the vehicle must then be restricted to testing or demonstrating that particular vehicle.

Sincerely,

James D. Miller
Assistant Attorney General

ps

GOVERNOR/STATE OFFICERS/ENERGY POLICY COUNCIL: Energy Emergency Powers; Federal Emergency Energy Conservation Act of 1979, Pub. L. No. 96-102; Art. IV, § 14, Constitution of Iowa; §§ 93.7, 93.8, The Code 1979. Governor of Iowa may not order emergency energy conservation measures under power delegated by the federal government absent authority in state law. The primary source of authority for the Governor and the Energy Policy Council to curtail energy use in case of acute shortage is contained in § 93.8, The Code 1979. (Ovrom to Stanek, Iowa Energy Policy Council, 4/25/80) #80-4-14(L)

April 25, 1980

Mr. Edward J. Stanek, Director
Iowa Energy Policy Council
Lucas Building
L O C A L

Dear Mr. Stanek:

This is in response to your request for an opinion concerning the federal Emergency Energy Conservation Act of 1979, Pub. L. No. 96-102 (hereinafter "the Federal Act"). You asked the following questions:

1. Whether the Governor of Iowa may take actions under a delegation of federal authority when he is not authorized to take such actions under state law?

2. Whether any general state statutory authority exists to allow implementation of an emergency energy conservation plan including measures not specifically authorized by statute (e.g., § 93.8. the Code, 1979?)

The Emergency Energy Conservation Act of 1979 authorizes the President, in case of a severe interruption in energy supply to the nation, to require each state to cut back energy use so that it does not exceed a specified target. Pub. L. No. 96-102, § 211(a). The Governor is required to submit a plan for the state designed to meet or exceed the conservation target in effect for the state. Pub. L. No. 96-102, § 212(a). The plan may contain voluntary conservation measures as well as mandatory measures authorized under the laws of the state.

Furthermore, the Act delegates power to the Governor to take measures for which there is no state authority. Pub. L. No. 96-102, § 212(b)(1)(B). It is this last provision which has given rise to your first question.

The federal Act states that the state plan may include measures:

> (i) which the Governor requests, and agrees to assume, the responsibility for administration and enforcement in accordance with subsection (d) [subsection (d) delegates federal authority to the Governor and sets conditions under which it will be revoked];
>
> (ii) which the attorney general of that state has found that (I) absent a delegation of authority under federal law, the Governor lacks the authority under the laws of the state to invoke, (II) under applicable state law, the Governor and other appropriate state officers and employees are not prevented from administering and enforcing under a delegation of authority pursuant to federal law; and (III) if implemented, would not be contrary to state law; and
>
> (iii) which either the Secretary determines are contained in the standby Federal conservation plan established under section 213 or are approved by the Secretary, in his discretion.

Pub. L. No. 96-102, § 212(b)(1)(B).

Basically this section attempts to delegate federal power to the Governor to take actions concerning which state law is silent, but which are not specifically prohibited by state law.

Although the specific measures for which a delegation of federal authority might be requested are not presently before us, it is our opinion that under the laws of Iowa, the Governor may not exercise powers beyond those authorized under state law.

There is almost no case law in Iowa concerning the nature and limits of the Governor's powers. The rule followed in other states is that a governor has only those powers vested in him by state constitution or state statute, and he may not

take actions not authorized therein. Holmes v. Osborn, 57 Ariz. 522, 115 P.2d 775, 783 (1941) (governor exceeded his impeachment powers); Martin v. Chandler, 318 S.W.2d 40, 44 (1958) (governor not authorized to transfer federal education funds from one state agency to another); Royster v. Brock, 258 Ky. 146, 79 S.W.2d 707, 709 (1935) (governor without power to revoke special session of legislature ordered by his own office); Herlihy v. Donahue, 161 P. 164, 166 (1916) (discussion of governor's power to suppress insurrection); Opinion of the Justices, 116 N.H. 406, 360 A.2d 116 (1976) (governor not authorized to restrict outside employment of state legislators); Rapp v. Carey, 44 N.Y.2d 157, 375 N.E.2d 745, 746, 404 N.Y.S.2d 565, 570 (1978) (governor not authorized to order public employees to file financial statements and to abstain from various political and business activities); Shapp v. Butera, 22 Pa. Commonw. Ct. 229, 348 A.2d 910, 913 (1975) (governor did not exceed his authority by requesting state officials to file financial disclosure statements). See also 81A C.J.S. States § 130 (1977); 38 Am. Jur. 2d Governor § 1 (1968). Accord State v. Beebee, 87 Iowa 636, 54 N.W. 479 (1893) (although the state constitution authorized the Governor to remit a criminal defendant's bond money, the Governor's attempt to remit court costs was void since neither state constitution nor statute authorized him to do so).

From the foregoing it is apparent that if the Governor is not expressly or impliedly authorized by Iowa Constitution or Iowa statute to take a measure, he is prevented from taking it. It is not necessary that the law specifically prohibit the Governor from taking an action before a court will find that he is prevented from taking such action. Cf. State v. Beebee, supra. The Federal Act delegates power to the Governor to take measures which the state attorney general determines are not authorized by the laws of the state, but which under state law the Governor is not prevented from administering and enforcing. We cannot make this determination, because such measures do not exist under Iowa law. Therefore, the Governor qua Governor cannot be delegated authority under the federal Act.

It could also be argued that one who is Governor of Iowa could act under authority delegated by the federal government. That is, the Governor, while exercising federal powers delegated solely under the Federal Emergency Energy Conservation Act and not pursuant to delegated state authority, would be acting as an officer of the United States Government. The Constitution of the State of Iowa provides that "No person shall, while holding any office under the authority of the United States,

or this State, execute the office of Governor. . ." Iowa Constitution, Art. IV, § 14. We feel that this prevents the Governor of Iowa from acting as a federal official by exercising powers conferred on him solely by a delegation from the federal government under the Emergency Energy Conservation Act.

We therefore determine that the Governor of Iowa may not take actions under a delegation of federal authority which he is not authorized to take under the constitution and statutes of the State of Iowa. It is our advice that any state plan prepared under the Federal Act should attempt to achieve the state's energy target through measures which are authorized under the Iowa Constitution or Iowa statutes.

We want to point out that under the laws of Iowa the Governor does have power to order energy conservation measures in case of an energy shortage. The Iowa legislature has delegated certain powers to the Governor in cases where the Energy Policy Council determines that an acute energy shortage threatens the public health, safety or welfare. These powers are set forth in § 93.8, The Code 1979, and include power to regulate operating hours of state government units, political subdivisions, private institutions and business facilities, to curtail public and private transportation which uses energy, to establish a system for distribution and supply of energy, and to provide for the temporary transfer of directors, personnel or functions of state agencies to perform emergency measures. In the rare instance where an energy shortage were not merely acute, but actually caused problems which rose to the level of a catastrophe as defined in Chapter 29C of the Code, the Governor could declare a disaster and exercise powers more sweeping than those delegated in § 93.8 under the procedure set forth in Chapter 29C, The Code 1979. See Op.Att'yGen. # 79-8-11, p. 6. In addition to these delegated legislative powers, the Governor could of course exercise any powers which inhere in his office under the Iowa Constitution and the Code of Iowa. One example of this could be the power to regulate energy use by state agencies in case of an energy shortage, which could save a significant amount of energy.

Your second question asks whether there is any state statutory authority which would authorize the Governor or the Council to implement specific energy conservation measures not expressly authorized by Iowa law. In other words, does general state authority exist to implement emergency energy conservation measures beyond the specific measures authorized by § 93.8? Our answer will necessarily be a general one, because it is impossible for us to determine

in the abstract whether or not separate authority may exist for all potential measures which might be suggested.

We noted earlier that the Governor's chief energy emergency authority is that granted by § 93.8. We also said that he could exercise any authority vested in his office by Iowa constitution and statute.

As an administrative body, the Energy Policy Council has only such powers as are specifically conferred by the statute creating it, or can be necessarily implied therefrom. Quaker Oats Co. v. Cedar Rapids Human Rights Comm., 268 N.W.2d 862, 868 (Iowa 1978). Chapter 93 of the Code is the statute which creates the Council. Our examination of that chapter leads us to conclude that other provisions of the chapter do not grant authority to implement rules restricting public use of energy beyond that contained in § 93.8. Section 93.7 lists the general duties of the Council. Section 93.7(9) arguably could provide some authority in addition to that in § 93.8. Section 93.7(9) states that the Council shall:

> Allocate state-owned or operated energy supplies to those determined to be in need. In the performance of this duty the director may, with the approval of the council, contract with fuel suppliers for the purpose of establishing a state-owned emergency fuel reserve and may co-operate with the federal government in implementing federally-mandated allocation and rationing programs for refined petroleum products.

Although the section speaks of cooperating with the federal government, the context of § 93.7 indicates that subsection (9) does not grant authority to impose emergency measures greater than that in § 93.8, other than authority to implement federal allocation or rationing programs. The other duties listed in § 93.7 are mainly concerned with gathering and disseminating information concerning energy supply and energy use in the state, and not with implementing plans to curtail energy use. Furthermore, the fact that § 93.8 specifically establishes an emergency program affirms our belief that § 93.7 refers to implementation of an allocation program only.

We find no other authority for the Council to impose emergency energy conservation measures. However, it is difficult to predict what measures might be proposed. Therefore when presented with a specific measure, it will be necessary to re-examine Chapter 93 and other provisions of the Code to

determine if the Council has the authority to implement the specific measure.

In summary, under the laws of Iowa examined by us, we conclude that the Governor may not implement measures under powers delegated by the federal government absent state authority. The primary source of authority for both the Governor and the Energy Policy Council to curtail energy use in case of acute shortages is contained in § 93.8 of the Code.

Sincerely,

ELIZA OVROM
Assistant Attorney General
Environmental Protection Division

EO:rcp

STATE OFFICERS AND DEPARTMENTS: State Conservation Commission - Migratory birds. §§ 109.38, 109.39 and 109.48, The Code 1979. The State Conservation Commission is authorized to regulate by rule the manner of taking ducks and other species of migratory birds listed in § 109.48, The Code 1979. Commission rules may be more, but not less, restrictive than federal regulations. (Peterson to Schroeder, State Representative, 4/21/80) #80-4-12(L)

The Honorable Laverne W. Schroeder
State Representative
Statehouse
L O C A L

April 21, 1980

Dear Representative Schroeder:

By letter dated February 12, 1980, you have requested the opinion of the Attorney General with respect to the authority of the State Conservation Commission to regulate the method of taking fish or game. The issue arises in the context of a proposed rule to ban the use of lead shot in duck hunting in most of Iowa. In order to respond directly to the specific area of concern expressed in your letter, we paraphrase your question as follows:

> What is the nature and extent of authority in the State Conservation Commission to regulate the manner of taking migratory birds in Iowa?

We are of the opinion that the State Conservation Commission may regulate by rule the manner of taking migratory birds enumerated in § 109.48, The Code, provided that such rules are not less restrictive than federal regulations imposed under authority of the federal "Migratory Bird Treaty Act" and "Migratory Bird Stamp Hunting Act".

The intent of the legislature is the polestar in statutory construction and the goal of the court in construing a statute is to ascertain that intent and, if possible, give it effect. Hartman v. Merged Area VI Community College, 270 N.W.2d 822 (Iowa 1978); City of Des Moines v. Elliott, 267 N.W.2d 44 (Iowa 1978); Doe v. Ray, 251 N.W.2d 496 (Iowa 1977). In discovering legislative intent, the court considers the language used in the statute, the objects sought to be accomplished, and the evils and mischief sought to be remedied, and places a reasonable construction on the statute which will best effect

its purpose rather than to defeat it. State v. Vietor, 208 N.W.2d 894 (Iowa 1973); Krueger v. Fulton, 169 N.W.2d 785 (Iowa 1969); State v. Robinson, 165 N.W.2d 802 (Iowa 1969); § 4.6, The Code. In this process, effect must be given, if possible, to every word, sentence and section. Iowa Natural Resources Council v. Van Zee, 158 N.W.2d 111 (Iowa 1968). The circumstances under which the statute was enacted may be considered in ascertaining legislative intent. § 4.6(2), The Code. Statutory language, legislative history and the statutory scheme may be looked to in the construction of statutes. United States v. Kinsley, 518 F.2d 665 (8 Cir. 1975). A legislative enactment should not be said to serve no purpose if such a result can be avoided. Georgen v. State Tax Commission, 165 N.W.2d 782 (Iowa 1969); State v. Downing, 155 N.W.2d 517 (Iowa 1968).

Constitutional considerations are of primary importance in construing statutes. In enacting a statute, it is presumed that compliance with the Constitutions of the state and of the United States is intended. § 4.4(1), The Code. Where two constructions of a statute are possible, that one will be adopted which does not lead to consequences which would serve to make the statute unconstitutional. State v. McGuire, 200 N.W.2d 832 (Iowa 1972); Graham v. Worthington, 259 Iowa 845, 146 N.W.2d 626 (1966); PPG Industries Canada Ltd. v. Kreuscher, 281 N.W.2d 762, 204 Neb. 220 (1979).

The statutory scheme in Iowa for the taking and possession of game birds and animals is found in Chapter 109, The Code. Section 109.38 makes it unlawful to take or possess any game, except as provided by the Code and administrative orders necessary to achieve biological balance, and authorizes the Commission to ". . . alter, limit, or restrict the methods or means employed and the instruments or equipment used in taking deer, raccoon, wild turkey, trout or rough fish . . ." [under the familiar inclusion/exclusion doctrine, no authority is thereby conferred upon the Commission to regulate the manner of take for species not listed. In Re Wilson's Estate, 202 N.W.2d 41 (Iowa 1972)].

Section 109.39 authorizes and requires the Commission, by administrative rule, to extend, shorten, open or close fish and game seasons and set, increase or reduce catch limits, bag limits, size limits, possession limits, or territorial limitations to maintain biological balance for each species or kind so as to assure an adequate supply of each species. The term "game" is defined in § 109.41 to mean all of the wild birds and animals specified therein, including ducks and other migratory birds.

Section 109.48 provides:

> No person, except as otherwise provided by law, shall willfully disturb, pursue, shoot, kill, take or attempt to take or have in possession any of the following game birds or animals except within the open season established by the commission: Gray or fox squirrel, bobwhite quail, cottontail or jack rabbit, duck, snipe, pheasant, goose, woodcock, partridge, coot, rail, ruffed grouse, wild turkey, or deer. The seasons, bag limits, possession limits and locality shall be established by the commission under the authority of sections 107.24, 109.38, and 109.39.
>
> The commission may adopt rules for the taking and possession of migratory birds which are subject to the federal "Migratory Bird Treaty Act" and "Migratory Bird Stamp Hunting Act" during the time and in the manner permitted under those federal Acts. The commission shall not adopt a rule for the taking or possession of a migratory bird for which an open season is not authorized by another paragraph of this section.
>
> The commission may by rule permit the taking and possession of designated raptors during the time and in the manner permitted under the federal "Migratory Bird Treaty Act".

We find no provision in Chapter 109 generally authorizing the Commission to regulate the manner[1] of taking fish and game. Rather, the commission is delegated general authority to set seasons, bag limits, size limits, possession limits, and territorial limitations and is authorized to regulate the manner of take only by a specific reference to particular species, as in § 109.38 (deer, raccoon, wild turkey, trout or rough fish), § 109.48 (migratory birds and raptors), § 109.80 (minnows), and § 109.100 (mussels).

The manner of take is, for the most part, regulated by statute, either setting out the permissible method (as in § 109.106 et seq. - nets, traps and trotlines in commercial fishing, § 109.72 - fishing with hook, line and bait, §§ 109.73 and 109.74 - trotlines and throw lines), or by

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[1] "Manner" is defined in Webster's Third New International Dictionary (1967 ed.) as ". . . the mode or method in which something is done or happens. . . ." See also, State v. Mayfield, 340 S.W.2d 631 (Mo. 1960).

prohibiting certain methods (as in § 109.53 - chasing animals from dens, § 109.54 - shooting rifle over water or highway, § 109.58 - trapping birds or poisoning animals, § 109.84 - taking frogs, § 109.90 - disturbing dens, § 109.91 - shooting or spearing certain species, § 109.92 - box traps, chemicals, explosives, etc., § 109.93 - hunting by artificial light, and § 109.120 - hunting from aircraft or snowmobiles.)

The circumstances under which § 109.48 was amended (by adding the first sentence of the second paragraph), the objects and purposes to be accomplished, and the evils to be remedied, are best expressed in the title and explanation of the 1963 amending Act, 60th G.A., Ch. 103, House File 564, which provide:

> [REGULATIONS ON MIGRATORY BIRDS]
>
> AN ACT to amend section one hundred nine point forty-eight (109.48), Code 1962, relating to the granting of permission to the state conservation commission to incorporate into state regulations by administrative order the regulations under the Federal Migratory Bird Treaty Act and the Migratory Bird Hunting Stamp Act.
>
> [EXPLANATION]
>
> State laws do not now cover the federal migratory game bird hunting regulations. Violations are subject to overcrowded federal courts. This action would make all migratory bird game regulations subject to local state courts for Iowa.

At the time House File 564 was enacted, § 109.48 listed the species of game birds and animals for which the Commission could set an open season under authority of § 109.39, not to exceed the maximum limits as to time, locality, bag and possession limits listed in a table, which was later (1972) deleted by legislative amendment. Ducks, geese and other migratory birds were listed in the table and the taking thereof thus was subject to Commission regulation under the "biological balance" provisions of § 109.39 prior to enactment of House File 564. Assuming as we must that the legislature intended House File 564 to serve some purpose, we conclude that the legislature intended to authorize the Commission to regulate the manner of taking birds.

In 1977, the Commission promulgated as an emergency rule an open season on mourning doves claiming authority therefor under § 109.48. This office issued an opinion on August 9, 1977, holding that the second paragraph of § 109.48 did not authorize the Commission to establish open seasons on game birds not enumerated in the first paragraph and an objection to the rule was filed by the Attorney General pursuant to § 17A.4(4)(a). In a subsequent court action the rule was declared invalid by the Polk County District Court for failure to follow proper rulemaking procedures under Chapter 17A. Black v. State Conservation Commission, CE 7-4025, August 16, 1977. Thereafter, while an appeal (later dismissed) was pending, the legislature amended § 109.48 by adding the second sentence to the second paragraph thereby expressly limiting rules adopted under the second paragraph to those migratory birds for which an open season is otherwise authorized in § 109.48. In that legislative process, the first sentence of the second paragraph was also amended to read as it appears in the 1979 Code.

The paramount authority for the regulation of the taking and possession of migratory birds is vested in the United States Secretary of the Interior under the provisions of 16 U.S.C.A. §§ 703-711, enacted to give effect to treaty provisions for the protection of migratory birds. The Constitution of the United States, together with laws made in pursuance thereof, and treaties made under authority of the United States, are, by the express declaration of Article VI § 2, the supreme law of the land. No act of a state legislature which is repugnant to the Constitution of the United States or laws made pursuant thereto is of any validity. Iowa Motor Vehicle Ass'n v. Board of Railroad Com'rs, 207 Iowa 461, 221 N.W. 364 (1929), aff'd 280 U.S. 529, 50 S.Ct. 151, 74 L.Ed. 595; 16 Am. Jur. 2d Constitutional Law § 70.

The crucial portions of the federal statutes are §§ 703, 704 and 708, which, in pertinent part, provide:

> Unless and except as permitted by regulations made as hereinafter provided in sections 703 to 711 of this title, it shall be unlawful at any time by any means or in any manner, to pursue, hunt, take, capture, kill . . . any migratory bird . . . included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 . . . the United States and the

> United Mexican States . . . concluded February 7, 1936, and the United States and the Government of Japan . . . concluded March 4, 1972. (§ 703)
>
> Subject to the provisions and in order to carry out the purposes of the conventions, referred to in section 703 of this title, the Secretary of the Interior is authorized and directed . . . to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting . . . [or] possession . . . of any such bird . . . and to adopt suitable regulations permitting and governing the same, . . . (§ 704)
>
> Nothing in section 703 to 711 of this title shall be construed to prevent the several States and Territories from making or enforcing laws or regulations not inconsistent with the provisions of said conventions or of said sections, or from making or enforcing laws or regulations which shall give further protection to migratory birds, their nests, and eggs, if such laws or regulations do not extend the open seasons for such birds beyond the dates approved by the President in accordance with section 704 of this title. (§ 708)

Federal regulations adopted under authority of these sections, in effect and as pertinent to your questions, prohibit the use of lead shot in taking ducks over limited areas in Iowa. 50 C.F.R. § § 20.21(4) and 20.108. The rule proposed by the State Conservation Commission (290-Chapter 105(109) I.A.C., published 4/2/80, effective 5/7/80) extends that prohibition well beyond the areas covered in federal regulations presently in effect.

Controversy over the federal steel shot regulations resulted in the restriction on use of funds appropriated to the Department of the Interior for fiscal year 1980 as follows:

> No funds appropriated by this Act shall be available for the implementation or enforcement of any rule or regulation of the United States Fish and Wildlife

> Service, Department of the Interior, requiring the use of steel shot in connection with the hunting of waterfowl in any State of the United States unless the appropriate State regulatory authority approves such implementation.

Pub. L. 96-126 § 305.

Thus, although the federal steel shot regulations remain in effect for all areas designated, the ultimate decision as to whether the regulations will be enforced is left to the affected states.

Clearly, the United States Secretary of the Interior is authorized to adopt regulations governing the manner of taking migratory birds and there is no question but that the Iowa legislature could have empowered the State Conservation Commission to further regulate the manner of taking ducks. The question is whether it has done so.

The legislative authority of this state is vested in the General Assembly (Const. of Iowa, Art. III, § 1). The principle is firmly established that a state legislature has no power to delegate any of its legislative powers to the Congress of the United States, or to a federal agency or officer, thus it may not adopt prospective federal legislation. See Wallace v. Commissioner of Taxation, 289 Minn. 220, 184 N.W.2d 588 (1971); People v. DeSilva, 32 Mich. App. 707, 189 N.W.2d 362 (1971); 16 Am. Jur. 2d Constitutional Law § 343. Thus the legislature could not directly incorporate future federal regulations into state law and we do not construe § 109.48 as merely a delegation of legislative authority to the Commission to adopt future federal regulations on an all or nothing basis, thereby doing indirectly what the legislature could not do directly.

Legislative authority cannot be delegated to a subordinate agency unless the delegation is accompanied by adequate standards and safeguards. Standards may be found in statutes in pari materia with the statute in question and may be general or specific. Board of Supervisors of Linn County v. Department of Revenue, 263 N.W.2d 227 (Iowa 1977); Warren County v. Judges of Fifth Judicial District, 243 N.W.2d 894 (Iowa 1976). See also, Note, 58 Iowa L.Rev. 974 (1973). The question then arises whether the statute prescribes adequate standards and safeguards to limit the discretion of the Commission.

General standards governing this delegation of rule-making power are found in § 107.23 assigning to the Commission the duty to " . . . protect . . . and preserve the . . . game . . . of the state . . ." and in § 109.39 requiring maintenance of a biological balance for each species or kind of wildlife such as to assure an adequate supply thereof.

This rulemaking power is subject to the Iowa Administrative Act (Ch. 17A, The Code) which requires notice and opportunity for public hearing prior to adoption and provides for judicial review. Objections to a rule may be filed by the Governor, Attorney General or the Administrative Rules Review Committee of the legislature and the Governor may rescind an adopted rule by executive order within thirty-five days of its publication.

These standards and safeguards, in our view, are sufficient to support the delegation of rulemaking power.

In State v. Olson, 123 N.W.2d 679 (Minn. 1963), on similar facts, the Minnesota Supreme Court found a legislative intent to authorize the commissioner of Conservation to limit the taking of ducks at less than that authorized by federal authority, the court stating (at 681) ". . . if we are to err in our determination of legislative intent, we prefer to err on the side of conservation rather than on the side of depletion of existing migratory birds, leaving it to the legislature to clarify the meaning of the language it has used." We concur.

In summary, we conclude that the State Conservation Commission is authorized to regulate by rule the manner of taking ducks and other species of migratory birds listed in § 109.48, The Code. Commission rules may be more, but not less, restrictive than federal regulations.

Sincerely,

Clifford E. Peterson

CLIFFORD E. PETERSON
Assistant Attorney General
Environmental Protection Division

CEP:rcp

ELECTIONS: § 39.3, Ch. 43, §§ 49.109 and 49.110, Ch. 49, The Code 1979. A precinct caucus is not considered a general election for purposes of § 49.109, The Code 1979. Employees are not entitled by § 49.109 to time off work to attend precinct caucuses. (Willits to Johnston, Polk County Attorney, 4/14/80) #80-4-8(L)

April 14, 1980

Mr. Dan L. Johnston
Polk County Attorney
Polk County Courthouse
5th & Mulberry
Des Moines, Iowa 50309

Dear Mr. Johnston:

You have requested the opinion of our office on the following question:

> Is a precinct caucus properly considered a general election for purposes of § 49.109, Code of Iowa?

This section provides, in its entirety:

> Any person entitled to vote at a general election in this state who does not have three consecutive hours in the period between the time of the opening and the time of the closing of the polls during which he is not required to be present at work for an employer, shall be entitled to such time off from his work time to vote as will in addition to his nonworking time total three consecutive hours during the time the polls are open. Application by any employee for such absence shall be made individually and in writing prior to the date of the election, and the employer shall designate the period of time to be taken. Such voter shall not be liable to any penalty nor shall any deduction be made from his regular salary or wages on account of such absence.

At the outset, it should be noted that § 49.110, The Code 1979, provides that it is a simple misdemeanor to violate § 49.109, The Code 1979:

> Any employer who shall refuse to an employee the privilege conferred by section 49.109, or shall subject such employee to a penalty or reduction of wages because of the exercise of such privilege, or shall in any manner attempt to influence or control such employee as to how the employee shall vote, by offering any reward, or threatening discharge from employment, or otherwise intimidating or attempting to intimidate such employee from exercising the employee's right to vote, shall be guilty of a simple midemeanor.

Section 49.109 and 49.110, The Code 1979, together constitute a penal statute. Statutes defining crimes are to be strictly construed and not to be held to include charges plainly without the fair scope and intendment of the language of the statute, and in the event of doubts they are to be resolved in favor of the accused. State v. Kool, 212 N.W.2d 807 (Iowa 1973). Thus, only elections clearly within the meaning of § 49.109, The Code 1979, are protected.

Section 49.109, The Code 1979, refers to a person entitled to vote at a "general election." Section 39.3(3), The Code 1979, provides:

> General election means the biennial election for national or state officers, members of Congress and of the general assembly, county and township officers, and for the choice of other officers or the decision of questions as provided by law.

Election, in turn, is defined as:

> means a general election, primary election, city election, school election or special election. § 39.3(8), The Code 1979.

Section 39.3, The Code 1979, applies these definitions to Chapter 49, The Code 1979. Further, statutory words should be construed according to approved usage of the language. Kool, Farmers Drainage Dist. v. Monroe-Harrison Drainage Dist., 246 Iowa 285, 67 N.W.2d 445 (1955).

The plain meaning and definition of the term "general election" in § 49.109, The Code 1979, does not include a

precinct caucus, as that term is used in Chapter 43, The Code 1979. Since this is a penal statute, any entitlement to time off employment for a caucus must be explicitly included in § 49.109, The Code 1979.

This view is buttressed by the language of the section itself, which refers to "the time of the opening and closing of the polls." While the language clearly applies to elections, it is not applicable to caucuses in any usual sense, since there are no polls which open and close at a specific time.

Also supporting the view that § 49.109, The Code 1979, does not apply to caucuses is the structure of the Code 1979 itself. The provision in question is contained in Chapter 49, relating to the method of conducting elections. Caucus procedures are outlined in a separate chapter, Chapter 43, The Code 1979. (See, e.g. §§ 43.4, 43.90, 43.91, 43.92, 43.93, 43.94, 43.99).

Section 43.5, The Code 1979, does provide that Chapter 49, inter alia, "shall apply, so far as applicable to all primary elections, except as hereinafter provided." But this still would not apply § 49.109, The Code 1979, to precinct caucuses. "Primary elections" are defined by § 39.3(4) as:

> Primary election means that election by the members of various political parties for the purpose of placing in nomination candidates for public office held as required by chapter 43.

This does not include caucuses since caucuses do not place in nomination candidates for public office.

In sum, the protection of § 49.109, The Code 1979, does not extend to precinct caucuses. It will require action by the legislature to do so. A precinct caucus is not considered a general election for purposes of § 49.109, The Code 1979, and employees are not by that section entitled to time off work to attend precinct caucuses.

Sincerely,

Earl M. Willits

EARL M. WILLITS
Assistant Attorney General

EMW/nay

SCHOOLS: Basic enrollment includes prekindergarten special education students. §§ 273.9, 281.2, 281.9, 282.3(2), 442.4(1). Students in prekindergarten special education programs are to be counted in calculating the "basic enrollment" figure for purposes of the school foundation program. Prekindergarten special education programs may include classroom instruction. (Norby to Benton, Superintendent, Department of Public Instruction, 4/11/80) #80-4-6(L)

April 11, 1980

Robert D. Benton, Superintendent
Department of Public Instruction
L O C A L

Dear Dr. Benton:

You have requested an Attorney General's opinion regarding whether children under the age of five may be enrolled in prekindergarten special education programs. This concern is twofold. First, your question concerns the ability of a school district to conduct prekindergarten special education programs. Secondly, funding for these programs is available through the school foundation program only if these students are included in "basic enrollment". Ch. 442, § 442.4(1), The Code 1979.

Your concern is prompted by language contained in an earlier Attorney General's opinion which directly addressed the question of whether a school district had any discretion to admit nonspecial education students at an age younger than that prescribed in § 282.3(2), The Code 1979. Op. Atty. Gen. #79-7-3. This earlier opinion concluded that no such discretion existed, a conclusion with which we still agree.

The earlier opinion refers to the special education provisions as analogous support to the above conclusion, stating that special education students "are not to be admitted to school" before they are five, concluding that educational services to prekindergarten special education students can only be provided in situations other than the classroom.

This reference to "admission" should not be construed to have any effect on the inclusion of prekindergarten special education students in the basic enrollment figure for purposes of ch. 442. Section 442.4(1) provides for inclusion of these students in basic enrollment, stating as follows:

> Basic enrollment for the budget year beginning July 1, 1979 and each subsequent budget year is determined by adding the resident pupils who were enrolled on the second Friday of September in the base year in public elementary and secondary schools of the district and in public elementary and secondary schools in another district or state for which tuition is paid by the district. For the school year beginning July 1, 1975, and each succeeding school year, pupils enrolled in prekindergarten programs other than special education programs are not included in basic enrollment. [Emphasis supplied].

Additionally, § 281.2(1) defines "children requiring special education" to include children under five, providing as follows:

> "Children requiring special education" means persons under twenty-one years of age, including children under five years of age, who are handicapped in obtaining an education because of physical, mental, emotional, communication or learning disabilities or who are chronically disruptive, as defined by the rules of the department of public instruction.

The above language appears to have been specifically adopted to make explicit that children under five were to be provided special education services, as the present language was adopted following an Attorney General's opinion which stated that special education could not be provided to children under five. 1962 Op. Atty. Gen. 340. In light of this statutory amendment, the conclusion of that opinion is now erroneous.

Section 281.2 provides that financing of special education shall be provided for as prescribed in §§ 273.9, 281 and 442. In addition, § 281.9 provides that a child requiring special education shall be counted in enrollment as provided in ch. 442. These references to ch. 442 with regard to special education, which do not specify any age distinctions, provide additional support to the language of § 442.4(1) to the effect that all children requiring special education, including those under five years of age, should be counted in the basic enrollment figure.

In addition, it appears that the recent opinion (#79-7-3), erroneously states that prekindergarten special education cannot be conducted in a classroom setting. Section 281.2(2) defines special education to include "classroom, home, hospital or other instruction designed to meet the needs of children requiring special education". Accordingly, prekindergarten special education programs may be conducted in the school classroom.

In conclusion, the reference to not "admitting" prekindergarten students to school before age five should not be construed to exclude them from basic enrollment for purposes of ch. 442, and was erroneous in that classroom instruction may be provided to prekindergarten special education students.

Sincerely,

Steven G. Norby

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

COUNTIES; COUNTY HOME RULE AMENDMENT: Iowa Const., art. III, § 39A; §§ 47.5(3), 47.7, The Code 1979. County home rule does not extend authority to a county to contract for periods of more than one year for provision of data processing services in connection with voter registration. (Hyde to Pavich, State Representative, 4/11/80) #80-4-5(L)

April 11, 1980

Honorable Emil S. Pavich
State Representative
State Capitol
L O C A L

Dear Representative Pavich:

We have received your request for an opinion from this office concerning the authority of a county, under its home rule powers, to authorize bid-letting for multiyear contracts for purchase of voter registration services from a private vendor.

With the 1978 adoption of the County Home Rule Amendment, Iowa Const., art. III, § 39A, counties need no longer seek express statutory authority for each exercise of governmental power in the determination of local affairs, where such exercise is "not inconsistent with the laws of the general assembly". This important limitation has been termed one of "preemption", i.e., where it is determined that an express statutory limitation on county power or evidence clearly implying an intent to vest exclusive jurisdiction with the state exists. See Op. Atty. Gen. #79-4-7.

Pursuant to § 47.7, The Code 1979, any county may use its own data processing facilities for voter registration record-keeping and utilization functions, or may arrange for the performance of such functions by the state registrar of voters. The specific circumstances and procedures whereby a county may purchase by competitive bidding data processing services which are needed in connection with the registration of voters are set forth in § 47.5(3), The Code 1979, which provides in part:

> Each contract for the furnishing of data processing services, necessary in connection with the administration of elections, by any person other than the registrar or an employee of the county shall be executed

> with the contractor by the board of supervisors of the county purchasing the services, but only after the contract has been reviewed and approved by the registration commission. Such contract shall be of not more than one year's duration. [Emphasis added.]

The Legislature has clearly limited the duration of any contract with a private vendor for the provision of data processing services to one year. In light of this express statutory limitation, any attempt by a county to extend its authority to contract for a longer period of time would expressly conflict with an existing statute and would be "inconsistent" with the laws of the General Assembly.

Very truly yours,

Alice J. Hyde

ALICE J. HYDE
Assistant Attorney General

AJH:sh

SCHOOLS: Prohibition of smoking by students in school buildings or on school grounds. §§ 98A.2(6), 98A.3, 279.9, The Code 1979. A local school board may not designate smoking areas for adult high school students in school buildings or on school grounds. (Norby to Rapp, State Representative, 4/9/80) #80-4-4.(L)

April 9, 1980

Honorable Stephen J. Rapp
State Representative
State Capitol
L O C A L

Dear Representative Rapp:

You have requested an opinion of the Attorney General regarding the ability of a school board to designate smoking areas for adult high school students in school buildings or on school grounds. The resolution of this question requires interpretation of § 279.9 and ch. 98A, The Code 1979.

Section 279.9 requires, as a part of the rulemaking responsibility of local school boards to govern students and care for schoolhouses and grounds, that the boards prohibit the use of tobacco by students, providing as follows:

> Such rules shall prohibit the use of tobacco and the use or possession of alcoholic liquor or beer or any controlled substance as defined in section 204.101, subsection 6, by any student of such schools and the board may suspend or expel any student for any violation of such rule.

Section 98A.2(6), The Code 1979, provides as follows:

> Smoking is prohibited in: A public building owned by or under the control of this state or any of its political subdivisions, except in areas designated by the controlling governmental body, officer, or agency as smoking areas.

The ability to designate smoking areas pursuant to § 98A.2(6), standing alone, might appear to authorize a local board to designate smoking areas for adult students. Section 98A.3, however, provides as follows:

> The person or persons authorized to designate smoking areas pursuant to section 98A.2 shall not so designate an area where smoking is prohibited by any other statute, ordinance, or lawful rule of the United States, this state, or any of its political subdivisions.

Accordingly, it appears that § 98A.2(6) was not intended to modify § 279.9, or any other specific prohibitions on smoking. A local school board may not, therefore, designate smoking areas for adult students in the school building or on school grounds.

Sincerely,

Steven G. Norby

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

HIGHWAYS: WEEDS: Section 319.14 does not prevent the burning or spraying of right-of-way. Chapter 317 does not prevent destruction of weeds on right-of-way by adjoining landowners. (Gregerson to Gallagher, State Senator, 4/9/80) #80-4-3 (L)

April 9, 1980

The Honorable James V. Gallagher
State Senator
State Capitol

LOCAL

Dear Senator Gallagher:

You have requested an opinion of the Attorney General regarding the interpretation of section 319.14, The Code 1979. The specific question asked is whether that section, which prohibits generally the making of physical changes in highway right-of-way, also proscribes burning or spraying the right-of-way by someone other than the particular governmental entity which has control thereof. Your question implicitly raises the issue of what restrictions exist on burning or spraying right-of-way. While obviously related, these questions will be discussed and answered separately in the order just presented.

I.

The portion of section 319.14 pertinent to your specific inquiry provides:

> Permit required. A person shall not excavate, fill or make any physical change within the right-of-way of a public road or highway without obtaining a permit from the highway authority having jurisdiction of such public road or highway. Any work performed under the permit shall be performed in conformity with the specifications prescribed by the highway authority. Utility companies are exempt from the provisions of this section.

Section 319.14 was added to chapter 319 as a new provision in 1974. Acts of the 65 G.A., ch. 1182, §4. Familiar rules of

statutory construction require amended acts "'to be construed as if the original statute had been repealed, and a new and independent act in the amendment form had been adopted in its stead. Benschoter v. Hakes, 232 Iowa 1354, 1359, 8 N.W.2d 581, 585.'" State v. McEwen, 250 Iowa 721, 729, 96 N.W.2d 189, 194 (1959). Additionally, "[i]n construing any particular clause or words of a statute, it is expecially necessary to examine and consider the whole statute, including the title, and gather, if possible, from the whole the expressed intention of the legislature. It cannot be resolved from isolated words taken out of context." (Citations omitted). State v. McEwen, 250 Iowa at 725, 96 N.W2d at 191.

Chapter 319, The Code 1979, is entitled "Obstructions in Highways" and is, quite naturally, generally addressed to problems of right-of-way obstructions. "Obstructions" specifically mentioned include fences and utility poles, §§319.2,5, open ditches, §319.7, billboards, §319.10, and abandoned automobiles, §§319.12,13. Procedures are set out in various portions of that chapter governing removal of those obstructions. The intent behind this chapter seems quite obviously to ensure an unobstructed view of the roadway and a roadway free of hazards to the motoring public. See §§319.8,13.

With those thoughts in mind, it is clear that section 319.14 does not preclude the burning or spraying of right-of-way. Such practices as a matter of course would clear right-of-way of obstructions caused by weeds. Rather, that statute is directed at preventing any change in the topography of the right-of-way which might cause an obstruction or hazard. It is for this reason that a permit is required and specifications mandated before a change in terrain can be made. The answer to your question is, therefore, no.

II.

Implicit within your inquiry regarding burning or spraying of right-of-way is the broader question of what constraints exist on such activities. The answer to this question is found in chapter 317, entitled "Weeds," and will require a somewhat lengthy explanation of that chapter.

The purpose of chapter 317 is twofold: (1) to ensure a right-of-way safe for vehicular traffic, see §317.10; and (2) to control or eliminate weeds, see, e.g., §§317.3,13. To accomplish these twin aims, the statute quite legitimately divides the property of this state into public and private lands and places primary responsibility for weed control on those properties in the hands of the agency or person responsible therefor. See §§317.4, 6,9-12,14,18.

For example, responsiblity for the destruction of noxious weeds, as defined in sections 317.1,8(2), on primary roads is vested in the Department of Transportation. The various county boards of supervisors are responsible for the destruction of such weeds on secondary roads. §317.11. On the other hand, owners and tenants are required to keep their lands free of noxious weeds and any growth which would make the right-of-way adjoining such lands unsafe for travel. §317.10.

In addition to these provisions, chapter 319 provides for the appointment by the board of supervisors of a county weed commissioner, §317.3, whose basic responsibility is the control and destruction of noxious weeds, §317.4. This authority extends not only to public lands, §§317.5,9, but also to private property whose owner or tenant exhibits a recalcitrance to comply with the mandates of the statute, and the program of weed control promulgated by the board of supervisors, §§317.6,13,16.

As a final measure to implement this chapter, section 317.18 provides that an order may be issued by the board of supervisors to landowners requiring "all weeds other than noxious weeds, on all county trunk and local county roads and between the fence lines thereof to be cut, burned, or otherwise destroyed to prevent seed production thereof . . . ." §317.18.

With this framework in mind, the broader, implied question may be answered. Two features of chapter 317 should be kept in mind. First, adjoining landowners may be required to destroy weeds on certain roadways. §317.18. Second, "[n]othing [in chapter 317] shall prevent the landowner from harvesting, in proper season the grass grown on the road along his land." §317.11.

It would seem somewhat anomalous, as well as inconsistent with the general scheme of chapter 317, to require the landowner or tenant to await an order of the board of supervisors before proceeding to destroy weeds present on adjoining right-of-way. This is not to say, however, that such destruction could not be restrained as to time and manner by the board of supervisors in order to assure maximum potential seed destruction, control erosion, or, perhaps, even facilitate propagation of wild game. See §§317.3,13,14,18. It would also seem anomalous to allow landowners to harvest the grass growing on right-of-way, §317.11, but not allow them to destroy weeds, at least by mowing.

To hold that landowners could not destroy weeds on the roadway adjoining their property would also be inconsistent with the early history of the provisions of chapter 317. At one point in time an affirmative duty was placed upon landowners to destroy weeds of all types on any right-of-way adjoining their property.

> Each owner and each person in the possession or control of any lands, including railroad lands, shall:
>
> * * *
>
> Cause all weeds on the streets or highways adjoining said lands to be cut or destroyed in the manner and at the time prescribed by the board of supervisors. Nothing herein shall prevent the landowner from harvesting, in proper season, the grass grown on the road along his land.

§4819(2), The Code 1927.

The above-mentioned duty was removed from the Code in 1931 when the legislature struck the first sentence and substituted the following: "Canada thistle, sow thistle, and quack grass growing in the secondary roads shall be destroyed by the board of supervisors and Canada thistle, sow thistle, and quack grass growing in the primary roads shall be destroyed by the highway commission." Acts of the 44th G.A., ch. 11,§1.

A more limited, but like, duty was then reimposed on landowners by the 47th General Assembly in 1937, which rewrote the chapter on "Weeds" and enacted the forerunner of present Code section 317.18, quoted above. Under this provision, landowners are responsible only for the destruction of non-noxious weeds and then only on certain roadways. The latter lessened duty resulted from a change in the board of supervisors' jurisdiction in the new act. Compare §4817, The Code 1935, with §4829.11, The Code 1939.

To conclude, then, no express statutory prohibition exists in chapter 317 to prevent landowners from destroying weeds in the right-of-way adjoining their properties. No express grant of authority exists either which allows such actions. The intent, framework, and history all indicate, however, that such actions are permissible.

CONCLUSION

In conclusion, section 319.14 does not prohibit burning or spraying of right-of-way. Nor does chapter 317 prevent such actions although they may be restrained by the board of supervisors.

Sincerely,

Craig Gregersen
per M.S.

Craig Gregersen
Assistant Attorney General

ps

COUNTY ATTORNEY: Child Support Recovery Units and 28E Agreements. §§ 28E.1, 28E.4, 28E.12, 252B.7, The Code 1979. The county attorney, pursuant to an agreement under ch. 28E, The Code, may handle child support recovery duties for another county. The agreement may not, however, commit the full time of the county attorney to child support recovery duties. Robinson to O'Meara, Page County Attorney, 4/2/80) #80-4-1(L)

Stephen Patrick O'Meara, Esq.
Page County Attorney
Page County Courthouse
Clarinda, IA 51632

April 2, 1980

Dear Mr. O'Meara:

You recently requested an Attorney General's Opinion concerning the appropriateness of the Page County Attorney handling child support recovery duties for both Page and Taylor Counties under a 28E Agreement as follows:

> As a continuation of recent changes with regard to the Page County Attorney, this office and the Board of Supervisors are contemplating returning the duties of child support recovery to the Page County Attorney. (These duties are presently contracted to a private attorney in the area.) Page County is presently a part of a multi-county child support recovery operation, under a 28E Agreement with Taylor County. The proposal is to have the Page County Attorney fulfill the legal duties under the existing 28E Agreement, with Page County continuing to serve as the "host county" (all budget items and administrative decisions not made by the 28E Board being handled by Page County).

> I have examined this proposal and believe that it would be neither a conflict of interest nor contrary to public policy to have the Page County Attorney provide legal services under this 28E Agreement between Page and Taylor Counties. The Page County Attorney would receive no additional remuneration from the 28E contract, but would continue to receive only the salary established by Page County. Services rendered (even in Taylor County) would actually be rendered on behalf of Page County in fulfillment of Page County's obligation under the 28E Agreement.
>
> Even though I have reached the above conclusion, I deemed it advisable to consult with the Attorney General concerning this matter. Therefore, pursuant to Section 13.2(7), Code of Iowa, I am requesting your opinion concerning the appropriateness of the Page County Attorney handling child support recovery duties for both Page and Taylor Counties under the 28E Agreement explained above.

From our examination of the Agreement, the applicable statutory considerations, from The Code, are:[1]

> 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 to co-operate in other ways of mutual advantage. This chapter shall be liberally construed to that end.
>
> 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

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[1]We are not sure that another legal entity is always necessary. You may wish to consider § 28E.12, The Code.

> to carry out the purpose of the agreement. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involves shall be necessary before any such agreement may enter into force.

Based upon these statutory authorizations, it is, in our opinion, appropriate for the Page County Attorney's Office to handle child support recovery duties for both Page and Taylor Counties under a 28E Agreement. The Iowa Supreme Court has held that political subdivisions of the state may join together to perform public services and by agreement create a separate legal or administrative entity to render such services. Goreham v. Des Moines Metropolitan Area Solid Waste Agency, 179 N.W.2d 449 (Iowa 1970).

Further, in our opinion, there is not a conflict of interest between the duties pursuant to the 28E Agreement and that of a county attorney. In fact, ch. 252B, The Code, which establishes the child support recovery unit within the Department of Social Services also provides for legal services in § 252B.7. The unnumbered paragraph following subsection (d) of this section, maintains the county attorney's duties in this regard with the following language:

> For the aforesaid purposes, the attorney general shall have the same power to commence, file and prosecute any action or information in the proper jurisdiction, which the county attorney could file or prosecute in that jurisdiction. This shall in no way relieve any county attorney from his or her duties, or the supervisory power of the attorney general, in recovery of child support. (Emphasis added)

This section clearly shows the legislative intent to continue with the involvement of the county attorney and disposes of any possible conflict of interest argument.

Article IV of the § 28E Agreement which you provided causes us some concern. It states:

> The purpose of this agreement is to designate the Board [multi-county child support enforcement board] as a service agency for the purpose of establishing, financing and maintaining a full time attorney and secretary to assist the County Attorneys in each of the counties which are

> parties to this agreement in the legal Court establishment and enforcement of child support obligations as enumerated in Chapter 151, Section 7, Laws of the First Session of the 66th General Assembly of the State of Iowa 1975. [Now § 252B.7, The Code]

There would, of course, be a public policy problem if the full-time attorney contemplated in article IV, above, was the county attorney himself. There are many statutory duties prescribed for the county attorney throughout the Code. His main duties are outlined in ch. 336, The Code 1979. These statutory obligations must be met. A county attorney may not contract to give his full time as an attorney for a child support enforcement board. An assistant county attorney or other employee of the county attorney may, however, fulfill this obligation. Another alternative is to change this provision of the 28E Agreement. We find nothing in the statutes, ch. 252B, The Code; 42 U.S.C. § 651 et seq., nor the rules and regulations, 770 IAC chs. 95, 96; 45 C.F.R. § 304.22, which would prohibit this change.

In summary, the county attorney, pursuant to an agreement under ch. 28E, The Code, may handle child support recovery duties for another county. The agreement may not, however, commit the full time of the county attorney to child support recovery duties.

Sincerely,

Stephen C. Robinson
Assistant Attorney General

SCR/tjb

CRIMINAL LAW: BRIBERY; PUBLIC OFFICIALS; GIFTS AND GRATUITIES. Chapter 68B, 722, §§ 68B.5, 722.1-2, The Code 1979; 1980 Session, 68th G.A., House File 687, §§ 6, 8, 63, 64. The acceptance of a trip to a foreign country with expenses paid by the foreign government could likely result in a member of the General Assembly being found to have accepted a gift in violation of § 68B.5, The Code 1979. Such acceptance would, in the usual circumstances, not likely be found to constitute a bribe pursuant to §§ 722.1-2, The Code 1979. After July 1, 1980, the receipt of such a trip would not likely be found to constitute a violation of ch. 68B, as amended, in that such trip would not be a "gift". Likewise, in the absence of an agreement or understanding that such trip is given to influence the actions of the legislator, a violation of §§ 722.1-2, as amended effective July 1, 1980, would not likely be found to have occurred. (Fortney to Bisenius, State Senator, 5/23/80) #80-5-17(L)

May 23, 1980

Honorable Stephen W. Bisenius
State Senator
244 First Ave., West
Cascade, Iowa 52033

Dear Senator Bisenius:

You have requested an opinion of the Attorney General regarding the propriety of a member of the General Assembly accepting an invitation by the government of a foreign nation to visit the foreign nation. You have indicated that the expenses of the visit, including transportation and lodging, would be borne by the host government. Your question involves the application of both the gift law (ch. 68B, The Code 1979) and the bribery statute (ch. 722, The Code 1979). As both of these statutes were recently amended by 1980 Session, 68th G.A., House File 687, which is effective July 1, 1980, we will respond to your question in two divisions. Division I will analyze the problem under the current statutes. Division II will address the situation as it will exist after July 1.

I.

A. THE GIFT LAW

Section 68B.5, The Code 1979, reads as follows:

> 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 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 an official, employee, member of the general assembly, or legislative employee which has a value in excess of twenty-five dollars. Nothing herein shall preclude campaign contributions or gifts which are unrelated to legislative activities or to state employment

Strictly construed, § 68B.5 prohibits any state officer from receiving anything having a value equal to or greater than twenty-five dollars regardless of the form of the gift.[1] Previous opinions of the Attorney General have placed an interpretation on the concept of "gift" which arguably represents a shift away from application of this strict construction. For example, an opinion issued August 6, 1976 sanctioned attendance by a member of the General Assembly at an out-of-state conference on juvenile justice reform. Expenses for the senator's attendance were to be reimbursed by the conference sponsor with LEAA funds. The opinion contained the following interpretation of chapter 68B:

> Upon examining the Act in its entirety, it is discernable that the manifest purpose of the Act was to prevent and inhibit the legislators and other state officers and employees from receiving gifts which might affect the independence of judgment which they ought to bring to bear in the performance of their official duties. Thus, insofar as members of the general assembly are concerned, it is not all gifts which are prohibited but only those which would be likely and intended to have the effect of influencing legislative action.

1976 Op.Att'yGen. 702, 703 citing 1968 Op.Att'yGen. 752, 753.

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[1] The only statutory exceptions to this prohibition are for campaign contributions and for gifts received by a public official which are unconnected to his/her public activities or duties.

In contrast, it has often been stated that payment of travel expenses of state officials by outside interests are in most cases prohibited. 1974 Op.Att'yGen. 437, 1972 Op.Att'yGen 276; 1970 Op.Att'yGen. 319.

A review of the interpretations given to § 68B.5 indicates that the varying opinions are difficult, if not impossible, to reconcile. Given the ambiguity which has attached to the question of travel expenses under § 68B.5, and given the fact that the Legislature has acted to completely amend the section effective July 1, 1980, it is our opinion that it would be advisable for a member of the General Assembly to decline to accept such a "gift" of travel prior to July 1, 1980. The cost of transportation to a foreign county, as well as the lodging, assuredly exceeds the twenty-five dollar limit imposed by the statute. As such, acceptance of such a gift by a member of the General Assembly may constitute a violation of § 68B.5. Consequently, we would caution against acceptance of the gift at the present time.

B. THE BRIBERY STATUTE

Section 722.1, The Code 1979, reads as follows:

> A person who offers, promises or gives anything of value or any benefit to any person who is serving or has been elected, selected, appointed, employed or otherwise engaged to serve in a public capacity, including any public officer or employee, any referee, juror or venireman, or any witness in any judicial or arbitration hearing or any official inquiry, or any member of a board of arbitration, with intent to influence the act, vote, opinion, judgment, decision or exercise of discretion of any person with respect to his or her services in such capacity commits a class "D" felony. In addition, any person convicted under this section shall be disqualified from holding public office under the laws of this state.

The companion statute to the foregoing section is § 722.2, The Code 1979, which reads:

> Any person who is serving or has been elected, selected, appointed, employed or otherwise engaged to serve in a public capacity, including any public officer or employee, any referee, juror or venireman, or any witness in any judicial or arbitration hearing or any official inquiry, or any member of a board of arbitration who shall solicit or knowingly receive any promise or anything of value or any benefit given with the intent to influence the act, vote, opinion, judgment, decision or exercise of discretion of such person commits a class "C" felony. In addition, any person convicted under this section shall be disqualified from holding public office under the laws of this state.

It is our opinion that a member of the General Assembly who accepts a visit to a foreign nation with expenses paid by that nation's government would not likely be found to be in violation of § 722.2. In order to obtain a conviction under § 722.2, a prosecutor must establish the following elements - that the defendant:

A. Knowingly

B. Solicits or receives

C. A promise or thing of value or benefit

D. Given with intent

E. To influence the act or vote or opinion or judgment or decision or exercise of discretion of such person.

When one applies the foregoing criteria to the question you raise, the likelihood of finding a violation of § 722.2 is questionable. Obviously, the member of the General Assembly is receiving a thing of value; indeed, he or she would be receiving a thing of significant value. Likewise, the official has knowledge of the gift's receipt. It is likely that a judge or jury would find that, at a minimum, the foreign government made the offer with the intent to enhance the official's perception or attitude regarding the host country. However, the final element of the crime appears to be absent from the situation you describe. In order to obtain a conviction, it must be demonstrated, at least by circumstantial evidence, that the donor sought to "influence the act, vote, opinion, judgment, decision or exercise of discretion" of the

donee. Barring the unusual circumstance in which a foreign government was interested in a matter pending before the General Assembly, it is highly unlikely that a foreign government would seek to influence the official actions of a member of the Assembly.

We are not unmindful that §§ 722.1-2 prohibit attempts to influence the opinion of a public officer or employee. However, we feel compelled to believe that the use of the word "opinion" was not intended as a meaning so broad as to encompass one's attitude, regard or feeling for someone or something. Rather, we believe that the term "opinion" was chosen to refer to official opinions such as the opinion rendered by a court of law or a hearing examiner. This conclusion is supported by the context in which the word is used. It appears as part of a series of terms all of which clearly refer to official action. Section 4.1(2), The Code 1979, provides:

> 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.

Whether one views "opinion" as having a "peculiar" legal meaning, or whether one simply considers the context in which the word is used in §§ 722.1-2, the conclusion is the same, i.e., it refers to an opinion which is rendered or delivered by an official acting in that capacity. In addition, the statutes being construed are penal in nature and consequently are to be narrowly construed. Finally, it would appear that the intent of the Legislature in enacting §§ 722.1-2 was to protect the public from the consequences of official action taken in an atmosphere tainted by conflict of interest. This purpose is not impeded by the construction we have placed on the term "opinion". Indeed, our construction addresses the problem confronted by the Legislature in ch. 722, i.e., tainted decision-making by officials.

Due to the construction we have placed on the term "opinion", it is unlikely that a member of the General Assembly would be found in violation of § 722.2 if such member accepted a visit to a foreign nation with the expenses paid by the host government. However, if such travel were accepted in a context wherein the host government was interested in some matter pending before the General Assembly and sought to influence a member with regard to such matter, said member would likely be found to violate § 722.2.

On at least three occasions during the preceding year, this office has issued opinions on the receipt of gifts by public officials, with particular attention addressed to potential violations of § 722.1-2. We feel a brief review of the situations

presented by the previous opinions will provide a useful backdrop against which the situation you present will assume its proper perspective.

In Op. Atty. Gen. #79-4-27, we opined that bribery was unlikely to occur when public officials received pencils, letter openers, calendars and the like from businesses which also gave these items to past customers and friends. We stated that "where the value of the gift is very small, is given to a large group of people and not exclusively to public officials, and has obvious advertising benefits, we think it highly unlikely that a jury or judge would find the required intent necessary to obtain a criminal conviction under the bribery statutes." Later, Op. Atty. Gen. #79-10-19 expressed the belief that it was appropriate for a member of the General Assembly to receive free publications or newsletters from interest groups where the general public would be assessed a nominal subscription fee. We concluded that "where the value of the publications is small and where the publications contain political expression that may aid a state legislator in the exercise of his or her responsibilities, no violation of Iowa's bribery statute is present." Finally, we expressed an opinion that it was permissible for public officials to receive free food and beverages at a public open house where the food and beverages were available to the general public. The opinion additionally expressed the belief that it was appropriate for a public official to receive a free meal in connection with the giving of a speech. However, this latter opinion, Op. Atty. Gen. #79-11-8, cautioned that "as the value of the gift increases and the focus on public officials becomes more intense, . . . the risk of potential liability . . . increases."

A review of the three opinions discussed above indicates that the factors one examines to determine whether a violation of §§ 722.1-2 is likely to have occurred are as follows: 1) the value of the gift; 2) whether the gift is made available to the general public or only to public officials; and 3) whether there are First Amendment aspects to the gift. As discussed earlier, the value of a trip to a foreign country is not small. Also, the "focus" of the gift is clearly directed toward public officials. Finally, First Amendment rights accrue to the people of the United States, not to foreign governments. However, underlying each of these opinions is the assumption that the requisite intent to influence the act, decision or opinion of the public official could be demonstrated. As discussed earlier, it would be an unusual circumstance in which a foreign government would be interested in official actions taken by a legislator qua legislator. While it can readily be seen that an Iowa-based interest group may have significant interest in the official actions of a state legislator, it is unlikely that a judge or jury would find a similar situation to exist with a foreign government. The reader should be cautioned that if special circumstances existed in which a particular member of the General Assembly was in a position to take official action on a matter in which the foreign government was interested, acceptance of an expense-paid visit to the foreign nation may indeed constitute a violation of § 722.2.

II.

A. THE GIFT LAW

Section 68B.5 has been amended effective July 1, 1980. 1980 Session, 68th G.A., House File 687, § 8 struck the former § 68B.5 and substituted in lieu thereof the following:

> An official, employee, local official, local employee, member of the general assembly, candidate, or legislative employee shall not, directly or indirectly, solicit, accept, or receive any gift having a value of fifty dollars or more in any one occurrence. A person shall not, directly or indirectly, offer or make any such gift to an official, employee, local official, local employee, member of the general assembly, candidate or legislative employee which has a value in excess of fifty dollars in any one occurrence.

As applied to the question you have raised, the amendment of § 68B.5 has effected two relevant changes. The value of permissible gifts has been raised from twenty-five dollars to fifty dollars. However, given the scope of the gift in question, i.e., a trip to a foreign country, the analysis in Division I, A would remain the same. However, the second relevant change in § 68B.5 results in an outcome differing from that obtained under the current section. Presently, § 68B.5 prohibits gifts in excess of twenty-five dollars regardless of the form of the gift. The General Assembly has deleted this provision as to the form of the gift. It has been replaced with a definition of "gift". 1980 Session, 68th G.A., House File 687, § 6 amends § 68B.2 to add a new subsection as follows:

> "Gift" means a rendering of money, property, services, discount, loan forgiveness, payment of indebtedness, or anything else of value in return for which legal consideration of equal or greater value is not given and received. However, "gift" does not mean any of the following:
>
> a. Anything received by a donee whose official action or lack of official action will potentially have no material effect, distinguishable from material effects on the public generally, on the interests of the donor.
>
> b. Campaign contributions.
>
> c. Informational material relevant to a public servant's official functions, such as books, pamphlets, reports, documents, or periodicals.

d. Anything received from a person related within the fourth degree by kinship or marriage, unless the donor is acting as an agent or intermediary for another person not so related.

e. Anything which is donated within thirty days after its receipt to a public body or to a bona fide educational or charitable organization, without the donation being claimed at any time as a charitable contribution for tax purposes.

f. An inheritance.

g. Anything available to or distributed to the public generally without regard to official status of the recipient.

h. Reimbursement for or payment of actual expenses incurred for public speaking engagements or other formal public appearances.

Receipt of a trip to a foreign country with expenses paid by another party is certainly "a rendering of money, property, services, discount, loan forgiveness, payment of indebtedness, or anything else of value in return for which legal consideration of equal or greater value is not given or received." A review of the exceptions to this general definition of "gift" indicates that the trip under discussion would not fall within exceptions (b) through (h). We thus turn our attention to exception (a): "anything received by a donee whose official action or lack of official action will potentially have no material effect, distinguishable from material effects on the public generally, on the interests of the donor." The question presented thus narrows to the following issue: can the action of a member of the General Assembly materially affect the interests of the foreign government in question? Keeping in mind that the effect on the foreign government's interests must be shown to be of a material nature, it is rather improbable that such a showing could be demonstrated.

Our conclusion is bolstered by the history behind exception (a). On September 14, 1977, by Executive Order No. 27, Governor Robert D. Ray created the Iowa Task Force on Government Ethics. The following February, the Task Force reported to the Governor on the result of their work. The report proposed legislation which included a comprehensive redraft of ch. 68B. Included in the proposal was a definition of "gift", followed by various exceptions or exclusions from the general definition. With one exception, [2] the language adopted by the Legislature to

[2] The Task Force definition of "gift" provided that something could be a gift whether it was "tangible or intangible". See "Report of Iowa Task Force on Government Ethics", p. 16, February, 1978.

define "gift" was the language proposed by the Task Force. Furthermore, exception (a) as passed by the General Assembly is a near verbatim adoption of the language suggested by the Task Force. [3] In the portion of the report wherein the Task Force explains what the recommended legislation provides, there is found the following:

> A prohibition against acceptance of gifts from any person who might be affected by the official actions of a public official. The bill contains certain narrowly defined exemptions where prohibition of acceptance was not felt to be necessary to protect the public interest. This provision is designed to protect the public's right to equal access to public officials, and to decisions based solely on the merits. To protect the public from the results of decisions tainted by illegal gifts, the bill provides the same voidability as is provided under the conflict-of-interest provision, for any nonlegislative decision made within one year after acceptance of an illegal gift, if the decision could have a material effect on the source of the gift.

As discussed previously, a foreign government would not be "affected by the official actions" of a member of the General Assembly. Consequently, the public interest is unlikely to be affected by the member's decision-making following receipt of a "gift" from a foreign government. Nor is the public's access to the member likely to be affected. Furthermore, if the actions of the official could have an effect on the interests of the foreign government, the effect is unlikely to be of a material nature.

Barring the existence of a unique set of circumstances on which we do not speculate, it is our opinion that a trip to a foreign country at the expense of the foreign government does not constitute a "gift" pursuant to 1980 Session, 68th G.A., House File 687, § 6, as such trip falls within exclusion (a) to the general definition of "gift". Consequently, a violation of ch. 68B would not occur if a member of the General Assembly were to receive such a trip.

B. THE BRIBERY STATUTE

1980 Session, 68th G.A., House File 687, § 63 amended § 722.1 to read as follows:

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[3] The Task Force employed the words "public servant" in exception (a). The General Assembly substituted the word "donee". See "Report of Iowa Task Force on Government Ethics", p. 16. This substitution is irrelevant for purposes of the present discussion as the substantive scope of the exclusion is unchanged.

> A person who offers, promises or gives anything of value or any benefit to any person who is serving or has been elected, selected, appointed, employed or otherwise engaged to serve in a public capacity, including any public officer or employee, any referee, juror or venireman, or any witness in any judicial or arbitration hearing or any official inquiry, or any member of a board of arbitration, pursuant to an agreement or arrangement or with the understanding that the promise or thing of value or benefit will influence the act, vote, opinion, judgment, decision or exercise of discretion of such person with respect to his or her services in such capacity commits a class "D" felony. In addition, any person convicted under this section shall be disqualified from holding public office under the laws of this state.

1980 Session, 68th G.A., House File 687, § 64 amended § 722.2 to read as follows:

> Any person who is serving or has been elected, selected, appointed, employed or otherwise engaged to serve in a public capacity, including any public officer or employee, any referee, juror or venireman, or any witness in any judicial or arbitration hearing or any official inquiry, or any member of a board of arbitration who shall solicit or knowingly accept or receive any promise or anything of value or any benefit given pursuant to an understanding or arrangement that the promise or thing of value or benefit will influence the act, vote, opinion, judgment, decision or exercise of discretion of such person with respect to his or her services in that capacity commits a class "C" felony. In addition, any person convicted under this section shall be disqualified from holding public office under the laws of this state.

In order to obtain a conviction under § 722.2, as amended by 1980 Session, 68th G.A., House File 687, a prosecutor must establish the following elements -- that the defendant:

A. Knowingly

B. Solicits or accepts or receives

C. A promise or thing of value or benefit

D. Given pursuant to an understanding or arrangement

E. That the promise or thing of value or benefit will influence the act or vote or opinion or judgment or decision or exercise of discretion of such person

F. With respect to his or her services in that capacity

The critical change which has been effected in §§ 722.1-2 is that a violation of the bribery statutes will not occur in the absence of an understanding, arrangement or agreement between the parties to the transaction in question. If such an understanding can be established, in conjunction with the other elements outlined above, a conviction would be possible.

The discussion set forth in Division I, B is basically applicable to the amended versions of § 722.2, with the additional need to establish an understanding or agreement. The prior discussion need not be repeated here. However, we feel it advisable to point out the type of evidentiary showing which may satisfy the amended sections, particularly as to the element of "understanding". The question naturally arises whether a prosecutor is required to demonstrate that the parties agreed or understood that the donee-official would be influenced in a particular, specific act or decision, or whether it is adequate to demonstrate that the official would be predisposed in a generally favorable manner toward issues of concern to the donor and that such predisposition was the result of the thing given. In other words, must it be proven that a quid pro quo was involved? Must it be proven that the official expressly agreed to take "Action A" in exchange for the receipt of "Item B"? We do not believe that such a quid pro quo need be established. A review of earlier versions of § 722.2 supports this belief. Prior to the general revision of the criminal code in 1976, acceptance of a bribe by a public official was addressed by § 739.2, The Code 1977. It provided:

> If any executive or judicial officer or member of the general assembly accept any valuable consideration, gratuity, service, or benefit whatever, or any promise to make the same or to do any act beneficial to such officer or member, under the agreement or with the understanding that his vote, opinion, decision, or judgment shall be given in any particular manner or upon any particular side of any question, cause, or other proceeding which is or may by law be brought before him in his official capacity, or that in such capacity he will make any particular nomination or appointment, he shall be imprisoned in the penitentiary

> not more than ten years, or be fined not more than two thousand dollars and imprisoned in the county jail not more than one year. [Emphasis supplied.]

Section 739.2 clearly required a prosecutor to establish a quid pro quo in order to obtain a conviction. One needed to show that the official had agreed to act in a particular manner with regard to a particular matter. When the criminal code was revised in 1976 and the subject matter of § 739.2, The Code 1977 was transferred to § 722.2, The Code 1979, this quid pro quo requirement was deleted. It has not been reintroduced via 1980 Session, 68th G.A., House File 687. A prosecutor must only establish an agreement or understanding to be influenced on the part of the public official in his or her official actions. It is no longer necessary to demonstrate an agreement to be influenced in a particular act.

As discussed in Division I, B, barring the unusual circumstance in which a foreign government was interested in a matter pending before a state legislature, it is highly unlikely that a foreign government would seek to influence a member of the General Assembly with regard to actions taken in an official capacity. At most, a foreign government which offered a legislator an expense-paid visit to its country would be seeking to enhance the legislator's personal opinion and regard for the foreign country. As discussed in Division I, B, such an attempt to influence a legislator's personal opinion does not run afoul of the bribery statute. However, if such travel were accepted in a context wherein the host government was interested in some matter pending before the General Assembly, a different conclusion would ensue. In that context, a violation of § 722.2 would be more probable. However, in the usual circumstances, it is our opinion that a member of the General Assembly who accepts a visit to a foreign nation with expenses paid by that nation's government would not likely be found to be in violation of § 722.2, as amended by 1980 Session, 68th G.A., House File 687.

III.

In conclusion, the acceptance of a trip to a foreign country with expenses paid by the foreign government could likely result in a member of the General Assembly being found to have accepted a gift in violation of § 68B.5, The Code 1979. Such acceptance would, in the usual circumstances, not likely be found to constitute a bribe pursuant to §§ 722.1-2, The Code 1979. After July 1, 1980, the receipt of such a trip would not likely be found to constitute a violation of ch. 68B, as amended, in that such trip would not be a "gift". Likewise, in the absence of an agreement or understanding that such trip is given to influence the actions of the legislator,

a violation of §§ 722.1-2, as amended effective July 1, 1980, would not likely be found to have occurred.

Very truly yours,

David Fortney

DAVID M. FORTNEY
First Assistant Attorney General

DMF:sh

COUNTIES; REAL PROPERTY/SUBDIVISION PLATTING. §§ 409.1, 441.65, The Code 1979. A rural landowner who subdivides land for sale as garden plots is required to file a plat in accordance with Chapter 409, The Code 1979; if the landowner fails to do so the county auditor may order the plat under § 441.65. Ovrom to Mahaffey, Poweshiek County Attorney, 5/20/80) #80-5-15 (L)

May 20, 1980

Mr. Michael W. Mahaffey
Poweshiek County Attorney
405 East Main
Montezuma, Iowa 50171

Dear Mr. Mahaffey:

This is in response to your request for an opinion dated March 17, 1980 and your subsequent letter dated April 30, 1980.

You describe a situation where a rural landowner outside a two-mile radius of a town has conveyed away three parcels of land from a ten-acre lot without filing a subdivision plat. The three parcels are L-shaped; the long parts of the L are approximately 50 feet wide by 800 feet long and the short parts are approximately 50 by 200 feet. They are intended to be used as garden plots. The landowner did not file a subdivision plat before selling off the parcels. You ask if this is sufficient cause for the county auditor to invoke the platting requirements of § 441.65, The Code 1979? It is our opinion that the answer is yes.

Section 441.65 states in relevant part:

> [W]henever the proprietor of any subdivision of land has sold or conveyed any part thereof, or invested the public with any rights therein, and has failed to file for record a plat as provided in chapter 409, the county auditor by certified mail shall notify all of the owners, and demand compliance. If the owners fail to execute and file the plat within sixty days after the issuance of such notice to execute and file said plat for record, the auditor shall cause a plat to be made as the auditor deems appropriate in accordance with the provisions of chapter 409 . . . (emphasis added)

This provision requires the auditor to order a plat when the subdivision proprietor has failed to file a plat as provided in Chapter 409, The Code 1979.

Chapter 409 establishes three categories of proprietors of land: 1) proprietors of any tract or parcel of land of 40 acres or less; 2) proprietors of more than 40 acres if divided into parcels any of which is less than 40 acres; and 3) proprietors of any tract or parcel of land of any size located within a city or within two miles of a city of over 25,000 population or smaller towns which have adopted Chapter 409 by ordinance. §§ 409.1, 409.14, The Code 1979. When a proprietor in any of these categories subdivides into three or more parts, Chapter 409 requires the proprietor to "cause a registered land surveyor's plat . . . to be made . . ." The landowner you describe fits into the first category set forth above as he has subdivided a tract of 40 acres or less into more than three parts. Therefore, he was required to make and record a plat in accordance with Chapter 409. The only remaining question is whether the proprietor is exempted from filing a plat under Chapter 409 because the parcels are sold for garden plots and not for a housing development.

It is our opinion that the legislature intended Chapter 409 to apply to all proprietors of land set forth in § 409.1 who subdivide into three or more parts, regardless of the use to which the subdivided land will be put. There are several reasons for this.

First, the language of Chapter 409 is not limited in any way to a particular type of subdivision. "Subdivide" is defined in Webster's Unabridged New Twentieth Century Dictionary (2nd Ed. 1970), as "1. to divide further after previous division has been made. 2. to divide (land) into small parcels for ready sale." See also Black's Law Dictionary, Revised 4th Ed. 1968, for similar definition. Since Chapter 409 does not define "subdivide" or restrict its platting requirements to housing subdivisions, it appears that the legislature intended the chapter to apply to all subdivisions of land. Our interpretation is also consistent with the purposes of Chapter 409. Two apparent purposes of that chapter are to provide that small parcels of subdivided land have clear title and to have plats on file which accurately describe small parcels for taxation. See §§ 409.2, 409.3, 409.9, The Code 1979. These purposes indicate that a plat should be filed whether the land is sold for garden plots or for housing lots - clear title and an accurate description are equally important for both types of parcels of land.

It is therefore our opinion that under Chapter 409 the proprietor should have filed a plat before he subdivided his ten-acre lot into three or more parts for garden plots. Since he failed to do so, the auditor may proceed to order a plat in accordance with § 441.65, The Code 1979.

Sincerely,

ELIZA OVROM
Assistant Attorney General
Environmental Protection Division

EO:dlt

JOINT EXERCISE OF GOVERNMENTAL POWERS: REGIONAL PLANNING COMMISSIONS--Chapter 473A, The Code 1979. The political subdivisions creating the regional planning commission, an independent political instrumentality, are not obligated to assume the commission's liabilities and debts. (Mueller to Van Gilst, State Senator, 5/20/80). #80-5-14(L)

May 20, 1980

Bass Van Gilst
State Senator, Forty-Sixth District
R. R. #4
Oskaloosa, IA 52577

Dear Senator Van Gilst:

This is in response to the following opinion request from you:

> The Area 15 Regional Planning Commission is in serious financial trouble and may have to stop operations. The local governments involved with the Commission are concerned about any liability they might incur for Commission deficits.
>
> Section 473A.1 appears to be the only Code provision relating to the status of regional planning commissions. That section provides that "The joint planning commission shall be separate and apart from the governmental units creating it". The cities involved have received assistance from the commission and contributed to the Commission's annual budget. No contracts or agreements have been made between the cities and the Commission providing for the cities to assume any liabilities. The anticipated deficits would be the result of unpaid bills and possible claims from the Federal government for return of grant funds on uncompleted projects.

> I request your opinion on the obligation of a city to pay a deficit or a regional planning commission under the above circumstances.

Section 473A.1, The Code 1979, provides, in pertinent part:

> The joint planning commission shall be separate and apart from the governmental units creating it, may sue and be sued, contract for the purchase and sale of real and personal property necessary for its purposes, and shall be a juristic entity as the term is used in section 97C.2, subsection 6. (Emphasis added.)

In addition, § 97C.2(6), The Code 1979, reads as follows:

> The term "political subdivision" includes 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 juristic 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 subdivisions. (Emphasis added.)

In State v. Des Moines County, 260 Iowa 341, 149 N.W.2d 288 (1967), the Iowa Supreme Court defined "juristic entity" as meaning "some legally recognizable or identifiable political body, unit, organization, or instrumentality of the state or of any one or more of its political subdivisions."

The above language suggests that the legislature intended the planning commissions, created pursuant to Chapter 473A, to be separate and independent from the political subdivisions creating them. Just as a county is not liable for the obligations of an independent political subdivision within its borders, likewise it would seem that political subdivisions should not be liable for the obligations of their regional planning commission, also an independent political instrumentality. Therefore, because the planning commission is "separate and apart from the governmental units creating it", it is our opinion that the political subdivisions creating the commission are not obligated to assume its liabilities and debts.

Furthermore, in support of this conclusion, § 473A.3, The Code 1979, provides, in pertinent part:

> The expenditures of the commission, exclusive of gifts or grants to the commission or its contract receipts, shall be within the amount appropriated or provided to the commission by the governing bodies of the area served by the commission, who are empowered to determine, agree upon, and appropriate funds for the payment of the expenses of the commission of their respective share thereof.

First, it should be noted that statutory limits are placed on the commission's expenditures. The commission's spending is limited to the amount provided by the governing bodies, except for "gifts or grants to the commission or its contract receipts." The Code section provides for the governing bodies to appropriate and provide a certain amount of funds--enough to pay for the commission's operating expenses. The language of § 473A.3 suggests that the governing bodies are to make a determination of how much the commission will need to operate, and then the commission is to stay within those "amounts appropriated or provided," except for the specified exclusions. Therefore, it is obvious that the legislature intended to limit the governing political subdivisions' liabilities (expenses) to that which they budgeted and appropriated the commission in the first instance.

Sincerely,

James P. Mueller

JAMES P. MUELLER
Assistant Attorney General

JPM/cmc

TAXATION: SALES TAX: Taxable Status of Gross Receipts Involving Exchange of Coins at Enhanced Value. §§422.42(2) and 422.42(6), The Code 1979, and §422.43, The Code 1979, as amended by 1979 Session, 68th G.A., ch. 96, §1. 1980 Iowa Adm. Bull. 1083, containing Department of Revenue proposed rule 15.18, which includes in taxable gross receipts subject to Iowa retail sales tax the amount of coins exchanged at greater than face value for merchandise in value equivalent to the enhanced value of the coins would, if adopted and made effective, be valid. (Griger to Bair, Director of Revenue, 5/15/80) #80-5-13 (L)

Gerald D. Bair, Director
Iowa Department of Revenue
Hoover State Office Building
LOCAL

May 15, 1980

Dear Mr. Bair:

In your letter of April 21, 1980, you requested an opinion of the Attorney General as follows:

> The Department of Revenue filed proposed rule 730-15.18 relating to sales tax liabilities when a value is given to coins which is greater than common currency value and the coins are used to purchase merchandise from a retailer. The proposed rule was published in the March 19, 1980 Iowa Administrative Bulletin under Notice as ARC 0952.
>
> When the Administrative Rules Review Committee met on Thursday, April 10, 1980 to consider proposed rule 15.18, they felt the rule exceeded statutory authority because it did not give any credence to the "trade-in" exemption found in Section 422.42(6)(b) of the Iowa Code. Instead of filing a formal objection to the rule, the Committee asked the Department to petition your office regarding the validity of the rule by asking for an "Attorney General's Opinion."
>
> The question that we are presenting is whether proposed rule 730-15.18 exceeds statutory authority because it does not give any consideration to the "trade-in" exemption provided by section 422.42(6)(b) of the Iowa Code?

1980 Iowa Adm. Bull. 1083 (hereinafter referred to as proposed rule 15.18 or proposed rule) sets forth the proposed rule as follows:

> Pursuant to the authority of sections 421.14 and 422.68(1), The Code, the Department of Revenue hereby proposes rules relating to coins and other currency exchanged at greater than face value.
>
> Amend chapter 15 of the department's rules by adding the following new rule:
>
> 730-15.18(422,423) Coins and other currency exchanged at greater than face value. Any exchange, transfer or barter of merchandise for a consideration paid in gold, silver, or other coins or currency shall be subject to tax to the extent of the agreed upon value of the coins or currency so exchanged. This agreed upon value constitutes the gross receipts or purchase price subject to tax. Coins or currency become articles of tangible personal property having a value greater than face value when they are exchanged for a price greater than face value. However, when a coin or other currency, in the course of circulation, is exchanged at its face value, the sale shall be subject to tax for the face value alone. Losana Corp. v. Porterfield, 236 N.E.2d 535, 14 Ohio St.2d 42 (1968).
>
> EXAMPLE 1. Taxpayer operates a furniture store. He or she offers to exchange furniture for silver coins at ten times the face value of any coins dated prior to 1-1-65. Upon any exchange pursuant to such offer, the value of the coins for purposes of determining the tax on the exchange will be equivalent to the value as agreed upon by the parties without regard to the face value of the coins.
>
> EXAMPLE 2. Taxpayer operates a hardware store. In the regular course of business, he or she receives silver coins dated prior to 1-1-65. Taxpayer has received the coins at face value for the sales price and only that value is subject to tax.
>
> This rule is intended to implement section 422.42(6), The Code.

Section 422.43, The Code 1979, as amended by 1979 Session, 68th G.A., ch. 96, §1, imposes the Iowa retail sales tax in relevant part as follows:

> There is hereby imposed a tax of three percent upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this division, sold at retail in the state to consumers or users;... [Emphasis supplied.]

Section 422.42(2), The Code 1979, defines "sales" for sales tax purposes as "any transfer, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration."

Section 422.42(6), The Code 1979, defines "gross receipts" for sales tax purposes in relevant part as follows:

> 6. "Gross receipts" means the total amount of the sales of retailers, valued in money, whether received in money or otherwise; provided, however,
>
> * * * *
>
> b. That in all transactions in which tangible personal property is traded toward the purchase price of tangible personal property of greater value, the gross receipts shall be only that portion of the purchase price represented by the difference between the total purchase price of such tangible personal property of greater value and the amount of such tangible personal property traded. [Emphasis supplied.]

The statutory definitions of "sales" and "gross receipts," set forth above, are applicable to and control the meaning of those terms as used in §422.43 imposing the Iowa sales tax. W. J. Sandberg Co. v. Iowa State Board of Assessment and Review, 225 Iowa 103, 278 N.W. 643 (1938); S & M Finance Co. Fort Dodge v. Iowa State Tax Comm'n, 162 N.W.2d 505 (Iowa 1968). These definitions and §422.43 are relevant for purposes of resolving your inquiry into the validity of proposed rule 15.18.

Proposed rule 15.18 seems to deal with the sales tax implications in two situations where merchandise is purchased and paid for in "gold, silver, or other coins or currency" (hereinafter collectively and individually referred to as coins). First, the proposed rule deals with a situation where coins are

exchanged, on the basis of their numismatic or other value greater than face value, for merchandise. Such an exchange does not, in the proposed rule, involve payment of any coins at face value as money. This situation is further expressed in the rule by "EXAMPLE 1."[1] Second, the rule is concerned with a situation where coins are exchanged, on the basis of their face value as money, for merchandise. This circumstance is expressed in "EXAMPLE 2."[2] Clearly, this second example involves the payment of money for the purchase of tangible personal property and does not involve any "trade-in."

When coins contain a value greater than face value and are sold or exchanged in connection with such enhanced value, they do not constitute "money" as such, but instead they are considered to be tangible personal property. Losana Corp. v. Porterfield, 14 Ohio St.2d 42, 236 N.E.2d 535 (1968). When tangible personal property is exchanged for other tangible personal property, a "sale" as defined in §422.42(2) has occurred. Indeed, the authorities which have considered this question have uniformly held that property exchanges constitute "sales" in interpreting sales tax statutes similar to §422.42(2). See, e.g., Olympic Motors, Inc. v. McCroskey, 15 Wash.2d 665, 132 P.2d 355 (1942); 68 Am.Jur.2d Sales and Use Taxes §132.

Given that an exchange of coins for merchandise which has a sales price in excess of the face value of the coins constitutes a "sale" under §422.42(2) and that such coins constitute tangible personal property in that situation, the question is whether, under such circumstances, the provisions of proposed rule 15.18 are consistent with the definition of "gross receipts"

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[1] In concrete figures, the Department is saying that if the furniture store accepts twenty silver dollars in exchange for a chair with a sale price of two hundred dollars, the Iowa sales tax will be computed on the two hundred dollar price and, at the present three percent rate, will be six dollars.

[2] In concrete figures, this example states that if the hardware store sold an item with a sales price of two hundred dollars and received from the purchaser two hundred silver dollars as payment, the Iowa sales tax will be computed on the two hundred dollar price and, as a consequence, will be six dollars.

in §422.42(6). In this regard, "gross receipts" are statutorily defined to constitute "money or otherwise." Such a sales tax provision has been uniformly interpreted to include exchanged tangible personal property as well as cash. Hawley v. Johnson, 58 Cal. App.2d 232, 136 P.2d 638 (1943); General Tire Co. v. Oklahoma Tax Commission, 188 Okla. 607, 112 P.2d 407 (1941); State v. Hallenberg-Wagner Motor Co., 341 Mo. 771, 108 S.W.2d 398 (1937). Thus, in the absence of a contrary statutory provision, tangible personal property "traded-in" toward the sales price of other tangible personal property becomes a part of the gross receipts derived from such sale.

However, §422.42(6)(b) excludes from taxable gross receipts "the amount of such tangible personal property traded" toward the purchase price of other tangible personal property "of greater value."[3] But, if the "trade-in" consists of an exchange of tangible personal property for other tangible personal property of equal value, the trade-in exclusion in §422.42(6)(b) would be inapplicable.

The provisions of proposed rule 15.18 appear only to deal with circumstances where the coins and merchandise exchanged are of equal value, irrespective whether the coins are utilized for their enhanced value or their face value. Since the proposed rule does not, therefore, purport to include in taxable gross receipts any tangible personal property traded toward the purchase price of other tangible personal property of greater value, as opposed to such an exchange or trade for equal value, the proposed

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[3] For example, assume that the furniture store in "EXAMPLE 1" sold a chair for two hundred dollars and, in doing so, accepted from the purchaser coins with a face value of nineteen dollars and ten dollars in cash (money). In this circumstance, the coins would constitute tangible personal property with a value of one hundred and ninety dollars and would be traded toward the purchase price of other tangible personal property of greater value. Therefore, pursuant to §422.42(6)(b), the value of the coins would be excluded from taxable gross receipts and the sales tax would be computed on the ten dollars of gross receipts so that the tax would be thirty cents.

rule is not, in our opinion, in conflict with the trade-in provisions of §422.42(6)(b). Since the proposed rule, as written, is not in conflict with the trade-in provisions of §422.42(6)(b), such a conflict cannot be artificially created simply because the rule does not expressly mention trade-in of coins for merchandise in excess of the enhanced value of the coins thereby requiring the purchaser to make up the difference by payment of money.[4]

It is the opinion of this office that the Department of Revenue's proposed rule 15.18 which includes in taxable gross receipts subject to Iowa retail sales tax the amount of coins exchanged at greater than face value for merchandise in value equivalent to the enhanced value of the coins would, if adopted and made effective, be valid.

Very truly yours,

Harry M. Griger
Special Ass't Attorney General

HMG:pjt

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[4] A search of the Department's sales tax rules discloses that the Department has not adopted a sales tax rule pertaining to "trade-ins." This subject is mentioned in the Department's use tax rules. See 730 I.A.C. §28.3 in which "trade-ins" are excluded from the purchase price of tangible personal property subject to the tax. Presumably, this use tax rule is intended to exclude such "trade-ins" only when tangible personal property is traded toward the purchase of other tangible personal property of greater value. The Department's published "Iowa Sales and Use Tax Information Booklet," July 1979 at 1-2 states: "When tangible personal property is traded toward the purchase price of tangible personal property of greater value, the tax is imposed on the selling price after the allowance for the trade-in." This booklet is made available to the public. Therefore, the Department has publicly taken the position that, for Iowa sales tax purposes, it will recognize the application of the trade-in exclusion contained in §422.42(6)(b).

COUNTIES: County Zoning Ordinances. Iowa Const., art. III, §§ 38A, 39A; Ch. 358A, §§ 349.16, 362.2(1), 362.3, 380.6, 380.7, The Code 1979. County zoning ordinances must be published in full as part of the proceedings of the county board of supervisors. (Hyde to Jesse, State Representative, 5/15/80) #80-5-12(L)

May 15, 1980

Honorable Norman G. Jesse
State Representative
1021 Fleming Building
Des Moines, Iowa 50309

Dear Representative Jesse:

We have received your request for reconsideration of an opinion issued by this office in 1967 concerning publication of county zoning ordinances, 1968 Op. Atty. Gen. 423. You have restated the questions presented in the earlier opinion as follows:

1. Upon adoption of zoning ordinances, is publication in full of the ordinance, amendment or additional ordinance section required in order to make them effective or is publication of a summary of the minutes of the meeting at which the ordinance or amendment is adopted sufficient?

2. With reference to the question above, is any different standard of publication required to effectuate criminal penalties under the zoning ordinance?

The November 21, 1967 opinion, which concluded that county zoning ordinances must be published in full, relied on two premises. First, such ordinances must be published in full as a part of the proceedings of the board of supervisors, pursuant to § 349.16, The Code 1966. Second, publication would be a necessary condition for effectiveness pursuant to § 366.7, The Code 1966, which set forth detailed requirements concerning the publication or posting of ordinances adopted by a "municipal corporation". Language in Wapello County v. Ward 257 Iowa 1231, 1235, 136 N.W.2d 249,251 (1965), provided that a county " . . .

is treated the same [as a municipal corporation] in such legislation as is here involved [imposition of criminal penalties for zoning violations] and the same rules that would govern the legislative authority of a municipal corporation under a zoning law would govern a county."

As your request noted, the foundation of this second premise has altered after the 1968 adoption of Municipal Home Rule, Iowa Const., art. III, § 38A and subsequent extensive revisions to the Iowa city code. Ch. 366, The Code 1966, "Ordinances" was repealed by 1972 Session, 64th G.A., ch. 1088, § 199, and generally replaced by ch. 380, The Code 1979, "City Legislation". Section 380.6, The Code 1979, now requires a "city" to publish in full all ordinances and amendments prior to the time they become law. See §§ 362.3, 380.7, The Code 1979. Section 362.2(1), The Code 1979, defines city as "a municipal corporation, but not including a county." [Emphasis supplied.]

Thus, a county may no longer be considered a "quasi municipal corporation" within the context of the Iowa Code for purposes of recognizing or extending its power to regulate zoning or impose criminal penalties for violations. Further, with the 1978 adoption of the County Home Rule Amendment, Iowa Const., art. III, § 39A, such analogy may not be necessary. Counties now need no longer seek express or implied statutory authority for each exercise of governmental power in the determinations of local affairs, where such exercise is not inconsistent with state law. See Op. Atty. Gen. #79-4-7.

A county's powers should be broadly construed and subject to liberal interpretation, absent express statutory conflict. Ch. 358A, The Code 1979, which provides for enactment of county zoning ordinances and requires a public hearing process prior to adoption, contains no "publication in full" requirement with which a county must comply to make an ordinance effective. See 101 C.J.S. Zoning, § 47.

The requirement that the proceedings of the board of supervisors be published pursuant to § 349.16, The Code 1979, has not, however, been amended so as to erode the alternate basis of the 1967 opinion. The purpose of publication of county business in an official newspaper is to furnish the citizen a convenient method of ascertaining just what business is being transacted by the board of supervisors, and how it is being transacted. See § 618.3, The Code 1979; Op. Atty. Gen. #80-1-3. Publication in full of zoning ordinances in final form as adopted by a county's governing body may be the only way that a citizen will have notice of laws with which they must comply. See 1910 Op. Atty. Gen. 223; 1970

Op. Atty. Gen. 17. The provision contained in § 349.16, The Code 1979, is the only publication requirement with which a county must comply, while other legislating authorities are subject both to publication and collection or codification requirements. See ch. 3, The Code 1979, (General Assembly); § 380.6, The Code 1979 (cities). The publication of an abbreviated or summary version of a comprehensive zoning ordinance would provide less than the full and complete information necessary for a taxpayer or resident, particularly when there is no convenient method of ascertaining the entire contents of such an ordinance.

In Choate Publishing Company v. Schade, 225 Iowa 324, 328, 280 N.W. 540,542 (1938), the Iowa Supreme Court held that the publication of a summary version of the grant of homestead exemptions by the board of supervisors was "a substantial compliance with the provisions of the statute." (Section 5411, The Code 1935, the predecessor of § 349.16, The Code 1979.) The use by the Court of the term "substantial compliance" indicates that the statute requires something more than a summary publication to effect actual compliance. The Court in Choate determined that under the circumstances presented, publication falling short of actual compliance was permissible, particularly when the cost of publication in full would negate any savings to county residents which the homestead exemption was enacted to benefit. The approval of specific homestead exemptions would not have the county-wide impact that the adoption of a comprehensive zoning ordinance would, however, and all citizens of the county should have an interest in and bear any cost burden in the publication of an ordinance equally. We believe that to effect publication in this instance that would give a taxpayer or resident full and complete information requires publication of the entire body of any ordinance adopted. See 1970 Op. Atty. Gen. 17.

The express language of § 349.16, The Code 1979, does not require publication of the proceedings of the board of supervisors in full, and arguably, a differing interpretation could be made from the standard established in the 1967 opinion. In light of the arguments above, any error in interpretation should be made on the side of full publication effecting notice to all citizens. It is the announced policy of this office that earlier opinions will not be overruled unless they are determined to be clearly erroneous. We cannot say that, in this context, the November 21, 1967 opinion was clearly erroneous.

In conclusion, it is our opinion that the conclusion of 1968 Op. Atty. Gen. 423 remains valid and county zoning ordinances must be published in full as part of the proceedings of the county board of supervisors.

Very truly yours,

Alice J. Hyde

ALICE J. HYDE
Assistant Attorney General

AJH:sh

OPEN MEETINGS: Electronic Meetings. Sections 28A.2(2), 28A.8, 372.13(5), The Code 1979. The special requirements of § 28A.8 for electronic meetings are applicable only when a majority of the governmental body are separately participating by electronic means. Whether a physically absent member may insist upon participating by electronic means is to be determined by reference to local city council rules. (Schantz to O'Kane, State Representative, 5/15/80) #80-5-11(L)

May 15, 1980

The Honorable Jim O'Kane
State Representative
1815 Rebecca Street
Sioux City, Iowa 51103

Dear Representative O'Kane:

You have recently sought an opinion of the Attorney General concerning the interpretation of § 28A.8, The Code 1979, relating to the application of the electronic meeting provisions of the Open Meetings Law. Specifically, you posed the following fact situation: a five-member city council conducted a meeting with three members physically present in the council chambers and another member participating from a hospital room via a two-way telephone communication system connected to a public address system in the council chambers. Your question is whether § 28A.8(1) poses a legal obstacle to this practice. In our view it does not.

Section 28A.8 provides:

> A governmental body may conduct a meeting by electronic means only in circumstances where such a meeting in person is impossible or impractical and only if the governmental body complies with all of the following:
>
> (a) The governmental body provides public access to the conversation of the meeting to the extent reasonably possible.
>
> (b) The governmental body complies with section 28A.4. For the purpose of this paragraph, the place of the meeting is the place from which the communication originates or where public access is provided to the conversation.

(c) Minutes are kept of the meeting.

The minutes shall include a statement explaining why a meeting in person was impossible or impractical.

The term "electronic means" is not defined, but would rather clearly include telephonic communications. The term "meeting" is defined in § 28A.2(2) as follows:

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

For present purposes, the critical portion of the definition is that a "meeting" of a governmental body requires a "majority of the members." It would appear to follow that the requirements of § 28A.8 would come into play only when a majority of council members are separately participating by electronic means as opposed to collective physical presence in the council chambers. This interpretation seems consistent with the purpose of § 28A.8, viz. permitting conference calls among members of a governmental body when necessary, subject to procedural requirements that will present the use of the telephone as a subterfuge to avoid the requirements of the open meetings law.

You also inquire whether a council member may insist upon participation in a council meeting via electronic means when his presence is not necessary for a quorum. We can find nothing in the code which would grant that privilege to a council member as of right or conversely would prohibit the council from extending that privilege. Section 372.13(5) provides that a city council shall determine its own rules. In our view, that provision would control this question and one would need to consult council rules to determine whether the practice was permitted or even required.

Sincerely,

Mark E. Schantz

Mark E. Schantz
Solicitor General

MES:ab

SOCIAL SERVICES: ADC BENEFITS: § 239.5, The Code 1979. The treatment by the Iowa Department of Social Services of OASDI benefits of some minor parents as income is inconsistent with the court's decision in Griffith v. Burns. (Morgan to Reagen, Commissioner, Dept. of Social Services, 5/15/80) #80-5-10(L)

May 15, 1980

Michael V. Reagen, PhD
Commissioner, Iowa Department
of Social Services
Hoover State Office
L O C A L

Dear Commissioner Reagen:

You have requested an attorney general's opinion regarding the Iowa Department of Social Services ("Department") treatment of Old Age, Survivers, and Disability Insurance benefits in light of the decision in Griffith v. Burns, No. C77-2012 (N.D. Iowa, filed Nov. 12, 1977). Specifically, you ask this question:

> Whether the Department's treatment of Social Security Old Age, Survivers, and Disability Insurance (OASDI) benefits received

by or on behalf of a minor parent in the ADC Program is consistent with the treatment of income required by the court's decision in Griffith v. Burns.

The Griffith case holds that the Iowa policy of presuming conclusively that OASDI benefits paid to a representative payee are available income for determining the ADC grant of the beneficiary's dependent child violates the Supremacy Clause of the United States Constitution. A class of plaintiffs was certified in the Griffith case and class-wide declaratory and injunctive relief was granted by the court. This opinion does not attempt to review the steps taken by the Department to implement any class-wide relief following the Griffith decision. Rather than attempting to envision every factual situation in which this case may apply, we have examined the Department's present rules and policies in light of the Griffith decision. Based on this examination, we have determined that the Department's present policies are inconsistent with the Griffith decision in at least one respect. As a result we recommend that rules and policies of the ADC program regarding minor parents be reexamined and revised to comply with the federal court order in Griffith.

Within the Aid to Dependent Children (ADC) program the current availability of income and resources to eligible family members is evaluated to determine the family's need. 45 CFR §233.20(a)(3)(ii)(D). The United States Supreme Court has ruled that to presume that income is available absent a demonstration of actual availability violates the Supremacy Clause. Van Lare v. Hurley, 421 U.S. 338, 95 S.Ct. 1741, 44 L.Ed.2d 208 (1975)(practice of reducing allowance for non-paying boarders voided); Shea v. Vialpando, 416 U.S. 251, 94 S.Ct. 1946, 40 L.Ed.2d 120 (1974) (requiring states to allow actual work expenses rather than a standard allowance); King v. Smith, 392 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442, (1970)(income of substitute father counted only as actually available.)

Social Security OASDI benefits which are paid to a representative payee for the use of a minor are restricted to the use and benefit of the designated minor. 20 CFR §404.1603. In the ADC Program, the excess of benefits over need for the beneficiary cannot be presumed to be available to other eligible members (the "eligible group"). Johnson v. Harder, 383 F.Supp. 174 (D.Conn. 1974), aff'd. 512 F2d 1188 (2nd Cir. 1975), cert. den. 423 U.S. 876 (1975); Howard v. Madigan, 363 F.Supp. 351 (D.S. Dak. 1973). In the Howard

case the court required the department to demonstrate that OASDI benefits to a child in the eligible group were actually available for the use of other family members. The court required the state to give the ADC recipient the option of excluding a child receiving OASDI benefits from the eligible group.

The court in Griffith extends the principle of Johnson v. Harder and Howard v. Madigan, supra, to a child who is also a minor parent with dependent children. Harry Griffith was the representative payee for the OASDI benefits of his daughter, Cynthia, a minor parent, who resided with and was supported by him. An application for ADC was made for Cynthia and her dependent child. Since Cynthia was being supported by her father, the Department applied her OASDI benefits to her dependent child's needs on a theory that the regulations permitted such an expenditure and that a minor parent was legally responsible for a dependent child's support. The application for ADC was denied because the OASDI benefits exceeded the amount of need for one person. The court reversed the Department and found the Department policy to be illegal, stating:

> It is concluded that the Iowa plan by presuming conclusively that OASDI benefits payable to a third person as a representative payee are actually available as income to the beneficiary for the purpose of reducing an otherwise available AFDC grant to a dependent of the beneficiary violates the Supremecy Clause, (citation omitted), and is therefore invalid.

Griffith v. Burns, unpublished opinion at p.6.

Subsequent to the decision, administrative appeals have revealed decisions regarding client eligibility for ADC which are inconsistent with the Griffith decision.

Department rules define the composition of the eligible group in the ADC case to include eligible children and the natural or adoptive parent when living together. 770 I.A.C. §41.8(1). A child who would otherwise be eligible for ADC may be excluded at the parent's election if the child has income restricted to his own use or benefit. 770 I.A.C. §41.8(2)b. The same election is available to a minor parent living with parents, 770 I.A.C. §41.7(5)a and b, but is not available to the minor parent living apart from parents, 770 I.A.C. §41.7(5)c.

Under present Department rules, the OASDI benefits of a minor parent who lives independently or resides with a non-parental relative, are counted as income to the eligible group of parent and dependent children. The minor parent does not have the option of being excluded from the eligible group, but is required to apply restricted OASDI benefits to meet the dependent child's needs as well as for her or his own use and benefit. 770 I.A.C. §41.7(5)c.

In implementing the Griffith decision a distinction was made by the Department between a minor parent living with persons legally responsible for his or her support and one living independently or with others who are not bound to support him or her. Sec. 770 I.A.C. §41.7(5)a and c. Although the Griffith case involved a minor parent living with her legally responsible parent, the distinction made by the Department between the child living with parents and non-parents is inconsistent with the court's reasoning in Griffith. The court found fault with the conclusive presumption of income as available to the child. The relationship between the minor parent and the representative payee upon which present policy rests is irrelevant to the determination of availability of income.

> This determination (of availability of income) contemplates a rather individualized consideration of the available resources, not the affixation of a conclusive presumption of availability as Iowa has done. (Citation omitted.) Clearly, recent supreme court decisions show that the placement of such a presumption against the applicant is illegal. See Van Lare v. Hurley, 421 U.S. 338, 346 (1975); King v. Smith, 392 U.S. 309 (1968).

Griffith v. Burns, C.77-2012, at pages 5-6.

The Griffith decision does not prohibit the Department from examining the income actually available to the ADC eligible group. The representative payee is permitted to make some OASDI benefits available to the dependent children of the beneficiary, 20 CFR §404.1607, and any sums actually available for current expenses may be applied to the child's grant.

Although a factual distinction can be made between the minor parent who resides with persons responsible for his or her support and other minor parents, it is unlikely that a distinction based on the relationship between the minor parent and persons with whom he or she lives would survive a constitutional challenge. For that reason we recommend that Department rules be adjusted to permit an individual consideration of the availability of OASDI benefits to dependent children of the beneficiary. In the alternative, we recommend that the minor parent whose OASDI benefits exceed need, be permitted to remove him or herself from the eligible group.

Sincerely yours,

Candy Morgan

Candy Morgan
Assistant Attorney General

CM/co

STATE GOVERNMENT; DEPARTMENT OF PUBLIC HEALTH. Nonpublic water wells. Chapter 135.11, Chapter 455B, The Code 1979. The Department of Health under Section 135.11(1) and 135.11(15) The Code 1979, has the authority to establish and enforce rules establishing minimum standards for construction of nonpublic water wells which will be used as sources of drinking water. (Lindebak to Pawlewski, Commissioner of Public Health, 5/12/80) #80-5-9 (L)

May 12, 1980

Norman L. Pawlewski
Commissioner of Public Health
Lucas State Office Building
LOCAL

Dear Commissioner Pawlewski:

The Attorney General has received your question concerning the authority of the Department of Health to establish rules for the construction of nonpublic water wells.

Specifically your question was whether the Department of Health (department), under Section 135.11(1) and 135.11(15), The Code 1979, has the authority to promulgate rules which establish minimum standards for construction of nonpublic water wells and installation of pumping equipment.

Section 135.11(15) confers upon the department the authority to:

> Establish, publish, and enforce rules not inconsistent with law for the enforcement of various laws, the administration and supervision of which are imposed upon the department.

Whether or not the department has authority to promulgate rules depends upon whether the subject matter of proposed rules falls within the delegation of authority to the agency. Section 135.11(1) gives the department the authority to:

> Exercise general supervision over the public health, promote public hygiene and sanitation, and unless otherwise provided, enforce laws relating to the same.

The legislature has specifically delegated to the department the authority to supervise sanitation. Since "sanitation" is not a term defined in the statute, the ordinary meaning of the word applies. See Section 4.1(2) The Code 1979. "Sanitation" has been defined as "The application of measures to make environmental conditions favorable to health." Webster's Third International Dictionary, (Unabridged, 1971)

The rules proposed by the department would regulate nonpublic water supply systems so as to eliminate or diminish the possibility of a contaminated water supply by providing for the location, material specifications, standards for well construction, disinfection, and water analysis. Nonpublic water supply is defined as a system with fewer than fifteen service connections or serves less than twenty-five people, or one that has more than fifteen service connections or services more than twenty-five people for less than sixty days a year. It should be noted that public water supply systems are defined and regulated by the Department of Environmental Quality pursuant to Chapter 455B, The Code 1979, and Chapter 400 of the Iowa Administrative Code. In order for a system to come under the aegis of Chapter 455B it must have at least fifteen service connections or regularly serve at least twenty-five individuals. See Section 455B.30(20) The Code 1979. The department's proposed rules would regulate areas which are not covered by Chapter 455B. Chapter 455B does not apply to systems which are not "public" by definition of that chapter.

The legislature has given to the Natural Resources Council jurisdiction over all water resources in the state. See Section 455A.18, The Code. A permit is required for any withdrawal of water which will provide for, among other things, the location of a particular withdrawal. That permit will not be affected by the proposed rules. While it appears from the proposed rules that the intent is to regulate wells which will serve as sources of drinking water, the definition of "nonpublic water supply" does not clearly provide that supplies which will not be used as a source of drinking water will not be regulated. There is a question whether the department can regulate wells which will not serve as a source of drinking water, as there may be a conflict with the subject matter delegated to the Natural Resources Council. That question need not be specifically addressed in this opinion as it has been indicated to us that the department will amend the definition of "nonpublic water sources" to clarify the intent to regulate only sources of drinking water.

The elimination of contaminated drinking water supplies appears to fall under the general delegation of authority to supervise public health and promote public sanitation found in Section 135.11(1).

This argument is strengthened by the requirement of Section 135.11(14) which provides that the department shall "Establish and maintain such divisions in the department as are necessary for the proper enforcement of the laws administered by it, including... a division of sanitary engineering...." (Emphasis added).

Sanitary engineering is defined as "a branch of civil engineering concerned primarily with the maintenance of environmental conditions (as pure water supply, waste disposal, insect control, nuisance abatement) conducive to public health." (Emphasis added) Webster's Third International Dictionary, Unabridged. The proposed rules should clarify that "nonpublic water supplies" refers only to sources of drinking water.

Having expressed the opinion that sufficient authority to regulate nonpublic water supplies is found in Section 135.11(1), it follows that the department, pursuant to Section 135.11(15), has the authority to establish rules not inconsistent with law to enforce the authority conferred by 135.11(1). Rules which establish minimum standards for nonpublic water wells are not inconsistent with either Chapter 135, Chapter 455B, or Chapter 455A so long as the rules will regulate drinking water supplies. Therefore, the Department of Health under Section 135.11(1) and 135.11(15) The Code, 1979, has the authority to establish and enforce rules establishing minimum standards for construction of nonpublic water wells used as drinking water supplies.

Sincerely,

Layne M. Lindebak

Layne M. Lindebak
Assistant Attorney General

LML/ln

COUNTIES: Aid to nonprofit historical societies. Iowa Const., art. III, § 31; 1979 Session, 68th G.A., ch. 39. A tax levied by a county for support of nonprofit historical societies may not be used for construction or maintenance of a building. A county may not make an appropriation for construction of a building to be owned by a nonprofit historical society without the approval of two-thirds of the General Assembly. (Norby to Anderson, Dickinson County Attorney, 5/9/80) #80-5-7(L)

May 9, 1980

Allen Arthur Anderson
Dickinson County Attorney
710 Lake Street
Spirit Lake, Iowa 51360

Dear Mr. Anderson:

You have requested an Attorney General's opinion concerning county financial aid to nonprofit historical societies. Resolution of your questions involves, in part, interpretation of 1979 Session, 68th G.A., ch. 39, which provides for a county to levy a tax to aid nonprofit historical societies as follows:

> The [county] board of supervisors at any regular meeting shall have power:
>
> To levy a tax, subject to the provisions of this subsection and not to exceed three cents per thousand dollars of assessed value, with the amount of tax collected not to exceed five thousand dollars in a county with a population of less than thirty-five thousand, fifteen thousand dollars in a county with a population of thirty-five thousand or more but less than one hundred thousand, or twenty-five thousand dollars in a county with a population of one hundred thousand or more, for the use of local, nonprofit historical societies, 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, artifacts, places, and structures 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 there are two or more nonprofit historical societies in the county, the board shall apportion the funds available under this subsection as it determines. The county board of supervisors shall require the historical society to submit to the board as a prerequisite to receiving funds under this subsection a proposed budget including the amount of available funds and estimated expenditures. A local historical society receiving funds under this subsection shall present to the county board of supervisors an annual report describing in detail its use of the funds received.

Specifically, your questions are as follows:

1. Is the maintenance and/or construction of an addition to a museum owned and operated by a nonprofit historical society a purpose within the scope of ch. 39?

2. Is the limit on money which can be provided through the ch. 39 tax levy an overall limit on county aid to a nonprofit historical society? In other words, can a county aid such a society through appropriation from the general fund?

3. Can any money raised, through the ch. 39 levy or otherwise, be accumulated beyond a current year toward a building fund?

I.

Your first question requires interpretation of the scope of activities which could be financed through tax monies collected pursuant to ch. 39. These purposes are listed in ch. 39 as follows:

> . . . collecting and preserving historical materials, artifacts, places and structures 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.

Construction and maintenance of a building are not expressly listed among these purposes. In addition, we do not believe that expenditure for maintenance or construction can be implied as a part of any of the listed activities. An activity such as construction of a building would appear to be of such importance that an express statutory authorization should be provided. The listed activities appear to be related to the preservation of historical items, research, and dissemination of information. This list of activities is of a scholarly nature in contrast to capital expenditures. In addition, the amount of aid allowed per year ($5,000-$25,000) indicates that ch. 39 was not designed to meet large capital needs. Also of interest, is § 345.1, The Code 1979, which requires voter approval of construction of county buildings where the cost will exceed a specified amount. While § 345.1 does not control the expenditure contemplated herein, as a county building is not involved, we believe § 345.1 indicates that authority for large capital expenditures should not be lightly inferred. Similarly, building maintenance does not appear to be encompassed within the scope of ch. 39.

When the power to tax is conferred upon a city or county government, the power to levy this tax is strictly construed in favor of the taxpayer. See Great Northern R.R. v. Board of Supervisors of Plymouth Co., 197 Iowa 903, 196 N.W. 284 (1923). This principle should embrace not only the power to levy a tax, but also the purposes for which the tax is spent. The County Home Rule Amendment, Iowa Const., art. III, § 39A, does not grant the counties any greater power in the area of taxation than existed prior to passage of County Home Rule. 1976 Op. Atty. Gen. 31, Op. Atty. Gen. #79-4-7. For these reasons, we do not believe that monies collected through a ch. 39 tax levy may properly be used for construction of a building or maintenance of a building owned by a nonprofit historical society.

II.

Your second question is twofold. First, whether a county could make an appropriation to a nonprofit historical society, and if so, does ch. 39 provide any limitation on such an appropriation.

The first aspect of this question requires an inquiry as to whether a county appropriation for construction of a building for a nonprofit historical society is an appropriate use of public funds. The Iowa Constitution prohibits the use of public money for a private purpose unless such purpose is approved by two-thirds of the General Assembly. Iowa Const., art. III, § 31, provides as follows:

> 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. [Emphasis supplied.]

This principle of constitutional law extends to approprations by cities and counties as well as those of the General Assembly. Love v. City of Des Moines, 210 Iowa 90, 230 N.W. 373 (1930). The extension of home rule to counties does not affect the limitation imposed by art. III, § 31. 1976 Op. Atty. Gen. 31, Op. Atty. Gen. #79-4-7.

The Attorney General has on two prior occasions considered local government appropriations similar in nature to the appropriation considered herein. 1972 Op. Atty. Gen. 395, 1976 Op. Atty. Gen. 31. These opinions stated that local governments could not appropriate money for a privately controlled recreation center or hospital and clinic. In reaching these conclusions it was stated that, despite the fact that the work of the institutions may be charitable or educational, the entities were subject to private control and would owe no duty to the state beyond those already imposed by law. 1972 Op. Atty. Gen. 395, 56 Am.Jur.2d, § 591. These considerations appear to also be of concern in the instant situation. While construction of a building for use by a nonprofit historical society is potentially a proper public purpose, some degree of public control is necessary to ensure continued use for this purpose. See State Ex Rel. La Follette v. Rueter, 153 N.W. 2d 49,58 (Wis. 1967). In contrast to this appropriation as presently proposed, those funds provided pursuant to ch. 39 must be used for specified purposes and are subject to control through the requirement of annual reports to the county board of supervisors, as well as promulgation of rules by the county board of supervisors for such continued funding. While the terms of ch. 39 do not necessarily provide an exhaustive list of the public aid that may be provided to a nonprofit historical society, ch. 39 does provide an illustration of the specification of purpose and means of control that are necessary. As these two elements are missing in the instant case, this appropriation cannot be made without the approval of two-thirds of the General Assembly.

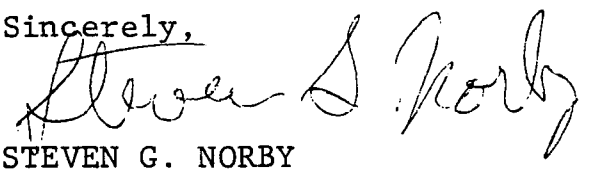
While this project as presently proposed cannot be undertaken without approval of two-thirds of the General Assembly, with some provision for insurance of continued use for a public purpose, the project might be appropriate without such approval. For example, a building owned by the county might be leased to the historical society with a provision that the building be used only for specified purposes. A building might be constructed with county funds and conveyed to a historical society provided that continued use for a public purpose is assured by the instrument which conveys the building to the society. These two ideas are provided only as suggestions and are not intended as a list of the exclusive means by which this project could be accomplished.

Having determined that this appropriation may not be made, it is not necessary to consider whether ch. 39 limits the amount of the appropriation.

III.

The answers to the first two questions determine the answer to the third. As no money can be used for construction or building maintenance, whether provided through a ch. 39 levy or an appropriation from the general fund, a fund from these sources could not be accumulated in either the county treasury or in an historical society treasury for these purposes.

Sincerely,



STEVEN G. NORBY
Assistant Attorney General

SGN:sh

TAXATION: SALES, USE, AND MOTOR FUEL TAX STATUS OF COMMUNITY ACTION AGENCIES: Sections 324.3 and 422.45(5), The Code 1979. Each Iowa community action agency must be judged on its own particular set of facts to determine whether or not it is a political subdivision, governmental instrumentality or governmental agency, and, as a consequence, within the provisions of §422.45(5) providing for a sales and use tax exemption or within §324.3 providing for a motor fuel tax exemption or refund. (Donahue to Calhoun, State Senator, 5/9/80) #80-5-5(L)

May 9, 1980

The Honorable James Calhoun
State Senator
1109 8th Street
Sioux City, Iowa 51105

Dear Senator Calhoun:

You have requested an opinion of the Attorney General as to whether community action agencies, located in Iowa, are political subdivisions, governmental instrumentalities or governmental agencies which are exempt from sales and use tax under §422.45(5), The Code 1979, and further, whether they are entitled to a refund of motor fuel taxes under §324.3, The Code 1979.

In 1976 Op. Att'y Gen. 823, 824, the Attorney General explained the nature and purposes of community action agencies by stating:

> Community Action Agencies (CAA), like Operation Threshold, were established pursuant to Title II of the Economic Opportunity Act of 1964, Public Law 88-452, 78 Stat. 508 (1964), (42 U.S.C. 2790 et seq.) as amended in 1967, 1970 by the Green Amendment, and 1975 by Public Law 93-644. Section 210(a) of the Act provides that a CAA shall be "a State or political subdivision of a State (having elected or duly appointed governing officials), or a combination of such political subdivisions, or a public or private nonprofit agency or organization which has been designated by a State or such

a political subdivision..." Subsection (d) provides that a public or private nonprofit agency may be designated as a CAA in lieu of one that is the State or a political subdivision. Section 211 sets forth the make up of the agency's board. It is the same whether a State or political subdivision, or a public or private nonprofit agency, and consists of one-third being elected public officials, one-third as representatives of the poor, and one-third as members of business, industry, religious organizations and other such groups.

Section 201 states the purpose of the Act, which include (1) the strengthening of community capabilities for planning and coordinating Federal, State and other assistance related to the elimination of poverty; (2) the better organization of a range of services related to the needs of the poor; (3) the greater use of new types of services; (4) the development and implementation of all programs and projects designed to serve the poor or low-income areas; and, (5) the broadening of the resource base of programs directed to the elimination of poverty. Pursuant to §212(b) a CAA shall have at least the following functions: planning for and evaluating the program as to the problems and causes of poverty; encouraging agencies active in the CAA program to plan for, secure and administer assistance; undertaking actions to improve efforts to attack poverty; initiating and sponsoring projects responsive to the needs of the poor; establishing procedures by which the poor and other residents will be able to influence the character of programs; and, joining with and encouraging business, labor and the like to undertake, with public officials and other agencies, activities in support of a community action program. Finally, §221(a) provides for financial assistance to CAAs for the planning, conduct, administration and evaluation of community action programs and components. The components may involve activities designed to assist participants to secure and retain employment, to attain adequate education, to make better use of income, to provide and maintain adequate housing, to provide family planning, to obtain services for the prevention of drug and alcohol abuse, to obtain emergency assistance; to help solve personal and family problems, to achieve greater participation in community affairs, and the like.

Section 422.45(5), The Code 1979, provides for the following sales and use tax exemption:

> Exemptions. There are hereby specifically exempted from the provisions of this division and from the computation of the amount of tax imposed by it, the following:
>
> * * * * *
>
> 5. The gross receipts or from services rendered, furnished, or performed and of all sales of goods, wares or merchandise used for public purposes to any tax-certifying or tax-levying body of the state of Iowa or governmental subdivision thereof, including the state board of regents, state department of social services, state department of transportation, any municipally owned solid waste facility which sells all or part of its processed waste as fuel to a municipally owned public utility and all divisions, boards, commissions, agencies or instrumentalities of state, federal, county or municipal government which have no earnings going to the benefit of an equity investor or stockholder except sales of goods, wares or merchandise or from services rendered, furnished, or performed and used by or in connection with the operation of any municipally owned public utility engaged in selling gas, electricity or heat to the general public.
>
> The exemption provided by this subsection shall also apply to all such sales of goods, wares or merchandise or from services rendered, furnished, or performed and subject to use tax under the provisions of chapter 423. [Emphasis supplied.]

Section 324.3, The Code 1979, states with reference to the motor fuel tax:

> 324.3 Levy of excise tax-exemptions-credits. For the privilege of operating motor vehicles in this state an excise tax of...ten cents per gallon beginning July 1, 1979 is hereby imposed ...however, that no tax shall be imposed or collected under this division with respect to the following:
>
> * * * * *
>
> 2. Motor fuel sold the United States or any agency or instrumentality thereof.

* * * * *

4. ...

> Motor fuel shall be sold tax paid to the state of Iowa, any of its agencies, or to any political subdivision of the state. Tax on fuel which is used for public purposes shall be subject to refund.... [Emphasis supplied.]

Clearly, to the extent that a community action agency is established by the State of Iowa or the United States or by an Iowa or federal political subdivision, as opposed to being a private nonprofit corporation, it would be entitled to sales and use tax exemption under §422.45(5), and motor fuel tax exemption or refund under §324.3, The Code 1979.

A community action agency, which is a private nonprofit corporation, is not the State of Iowa, the United States, or a political subdivision. See 1976 Op. Att'y Gen. 823.

If the community action agency is a private nonprofit corporation, it becomes a question of fact whether or not it is an instrumentality or agency of the State of Iowa, the United States, or a political subdivision. The answer to this factual question cannot be determined in this opinion. See 1976 Op. Att'y Gen. at 827 where the Attorney General stated:

> From the above discussion it is apparent that Operation Threshold and similar CAAs are not political subdivisions since they lack most of the requisites. This is not to say that they are not instrumentalities of political subdivisions. Whether or not Operation Threshold is such an instrumentality is a fact question. We cannot nor will we make a determination whether Operation Threshold is such an instrumentality. The most we can do is indicate what the law is in this area.
>
> In order to determine what is an instrumentality or agency of a government each case must be determined by its own set of facts. This was so stated in Unemployment Comp. Com'n v. Wachovia Bank & T. Co., 1939, 215 N.C. 491, 2 S.E.2d 592, 595-596:

> Perhaps it is impossible to formulate a satisfactory definition of the term "instrumentalities of government" which would be applicable in all cases. At least it is unwise to undertake to do so. Each case must be determined as it arises. Generally speaking, however, it may be said that any commission, bureau, corporation or other organization, public in nature, created and wholly owned by the government for the convenient prosecution of its governmental functions, existing at the will of its creator, is an instrumentality of government; and that any state created corporation or association, privately owned, and organized and doing business primarily for profit, which is granted certain incidental duties or privileges by the Federal Government is not. The enjoyment of a privilege conferred by either a national or a state government upon an individual, association or corporation operating primarily for profit in a private enterprise, even though to promote some governmental policy, does not convert such individual, partnership or corporation into an instrumentality of government....
>
> In the border line cases in which it does not clearly appear that the agency is or is not an instrumentality of government important factors, among others, which must be considered in determining that such agency is an instrument of government are: (1) it was created by the government; (2) it is wholly owned by the government; (3) it is not operated for profit; (4) it is primarily engaged in the performance of some essential governmental function; (5) the proposed tax will impose an economic burden upon the government, or it serves to materially impair the usefulness or efficiency of the agency or to materially restrict it in the performance of its duties. While perhaps, no one of the factors is sufficient, and the presence of all is not required to constitute any given agency an instrumentality of government, the presence or absence of either requires serious consideration. If the tax in fact is to be paid out of government money, thus placing an economic burden on the government, or if it constitutes an undue interference with the agency in the performance of its governmental functions, the agency may usually be classed as a governmental instrumentality. [Emphasis supplied.]

Although it is a fact situation whether a community

action agency is or is not an instrumentality or agency, the courts have generally held that community action agencies are not federal instrumentalities or agencies. See United States v. Orleans, 425 U.S. 807 (1976); Vincent v. United States, 513 F.2d 1296 (8th Cir. 1975); and Hines v. Cenla Community Action Committee, Inc., 474 F.2d 1052 (5th Cir. 1973). In Kelly v. Action for Boston Community Development, 419 F.Supp. 511 (1976), the Court held that the community action agency's firing of a teacher was not a state action. The Court found in Hauth v. Southeastern Tidewater Opportunity Project, 420 F.Supp. 171 (1976), that the community action agency was not a "municipal corporation" performing a governmental function, and was, therefore, not entitled to sovereign immunity in a negligence action.

The aforementioned Attorney General's Opinion and court cases clearly indicate that each Iowa community action agency must be judged on its own particular set of facts to determine whether or not it is a political subdivision, governmental instrumentality or governmental agency, and, as a consequence, within the ambit of §422.45(5) providing for a sales and use tax exemption or within §324.3 providing for a motor fuel tax exemption or refund.

Very truly yours,

Thomas M. Donahue

Thomas M. Donahue
Assistant Attorney General

TMD:pjt

MUNICIPALITIES: Volunteer Fire Fighters--§§ 362.5 and 372.13(8), The Code 1979. City employees and officers can be volunteer fire fighters and receive payment for same. Membership in a city volunteer fire department is not city employment. (Blumberg to Johnson, State Auditor, 5/6/80) #80-5-4(L)

May 6, 1980

Honorable Richard D. Johnson, CPA
Auditor of State
L O C A L

Dear Mr. Johnson:

We have your opinion request regarding members of volunteer fire departments. You ask the following questions:

1. Is a member of a volunteer fire department considered to be a public employee when the member is paid on a per call basis? From public funds?

2. Would an elected or appointed local government official or employee be allowed to receive payment for services in the above situation?

3. Would a conflict of interest exist by virtue of an elected local government official also being a member of a volunteer fire department which receives funding from that local government?

In conversation with members of your staff, we understand that your question only concerns those volunteer fire departments established by cities, where the city may own the building or the equipment, and where the city pays each member a certain amount per call. In other words, we are not concerned with volunteer fire associations which enter into contracts with a city. It is apparent, from our conversations, that you are mainly concerned with whether volunteer fireman status constitutes "city employment" for purposes of § 372.13(8), and whether such

status is in any way modified or exempted by § 362.5(8), The Code 1979.

We have previously held that there is no incompatibility of offices when a city council member serves as a volunteer fire fighter. See, Op.Att'yGen. #77-12-7, and 1972 Op.Att'y Gen. 594. Although those opinions only concerned incompatibility, the result is the same in answer to your questions.

Section 372.13(8) provides, in pertinent part, that no elected city official shall receive any other compensation for any other city employment during the term of office. Section 362.5 generally prohibits city officers and employees from contracting with the city. Subsection eight (8) of that section provides an exception for volunteer fire fighters. Section 362.5 prohibits city officials and employees from acting, for example, as an independent contractor with the city. In this respect, membership on a volunteer fire department fighting fires for the city and receiving payment for same is similar to an independent contractor. This section, including subsection eight (8), provides that a city employee or officer is not prohibited from being a volunteer fire fighter and receiving payment for same. This is so, not because volunteer fire fighters are city employees, but rather because they are not.

In further support of our reasoning one need look no further than the Workers' Compensation laws. In Heiliger v. City of Sheldon, 236 Iowa 146, 18 N.W.2d 182 (1945), the issue was whether a volunteer fire fighter was entitled to workers' compensation. In answering the question in the negative, the Court concerned itself with the applicability of Chapter 85, The Code. The Court placed its reliance on the fact that the then Industrial Commissioner had interpreted that chapter to exclude volunteer fire fighters because there was no employment contract or weekly earnings upon which to base payments. Since the Legislature was aware of these interpretations and had not amended the chapter, the Court reasoned that volunteer fire fighters were not covered by Chapter 85. Since they would have been covered if they were, in fact, city employees, it was fair to state that volunteer fire fighters were not city employees.

Soon after the Heiliger decision, the Legislature amended Chapter 85 to specifically provide for volunteer fire fighters. See, Ch. 75, Acts of the 51st G.A. (1945). Said amendments are now found in §§ 85.1(4)[1] and 85.36(10), The Code 1979. Said amendments do not provide that volunteer fire fighters are city employees. They only provide that volunteer fire fighters are eligible for workers' compensation.

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1. § 85.1(4) was amended by Ch. 30, Acts of the 68th G.A. (1979).

With the above analyses in mind, it becomes apparent that § 372.13(8) has no application to volunteer fire fighters. That is, city council members can be volunteer fire fighters and receive compensation therefor.

Accordingly, we are of the opinion that members of a municipal volunteer fire department are not city employees nor are they in city employment as that term is used in § 372.13(8). Elected or appointed city officers and city employees are permitted to receive compensation for fire fighting duties. No conflict of interest exists by virtue of a city council member being paid for services as a volunteer fire fighter.

Very truly yours,

Larry M. Blumberg

LARRY M. BLUMBERG
Assistant Attorney General

LMB/cmc

PUBLIC EMPLOYEES: COLLECTIVE BARGAINING: Chapter 20, §§ 4.1(2), 20.9, 20.28, 79.23, as amended by 1979 Iowa Acts, Chapter 2, § 42, The Code 1979; 1979 Iowa Acts, Chapter 2, § 43; 1977 Iowa Acts (Ex. Sess.), Chapter 1, § 35. Section 79.23, The Code 1979, as amended by 1979 Iowa Acts, Chapter 2, § 42 provides that both organized and unorganized public employees are eligible to receive a cash payment for unused sick leave upon retirement. However, organized employees covered by a collective bargaining agreement negotiated under Chapter 20, The Code 1979, can "bargain away" this benefit if their contract contains an express waiver of the benefit. In the absence of such a waiver, the organized employees retain entitlement to the benefit. Organized employees retiring on or after July 1, 1977 and before July 1, 1979 are expressly excluded from this benefit by 1979 Iowa Acts, Chapter 2, § 43. (Fortney to Brandt, State Representative, 5/6/80) #80-5-3(L)

May 6, 1980

Honorable Diane Brandt
State Representative
2507 Willow Lane
Cedar Falls, Iowa 50613

Dear Representative Brandt:

You have requested an opinion as to whether University of Northern Iowa faculty members who are covered by a collective bargaining agreement negotiated under Chapter 20, The Code 1979, are eligible to receive a cash payment for unused sick leave upon retirement pursuant to § 79.23, The Code 1979, as amended by 1979 Iowa Acts, Chapter 2, § 42. If such employees are eligible for the benefit, you ask whether those retired after July 1, 1977, are eligible for the benefit retroactively.

State employees' eligibility for sick leave, the conditions under which it may be taken, accrual of sick leave, and credit for sick leave accrued are all established in Chapter 79, The Code 1979. Section 79.23, as amended by 1979 Iowa Acts, Chapter 2, § 42, provides:

> CREDIT FOR ACCRUED SICK LEAVE. Commencing July 1, 1977, when a state employee, excluding an employee covered under a

> collective bargaining agreement which provides otherwise, retires under the provisions of a retirement system in the state maintained in whole or in part by public contributions or payments, the number of accrued days of active and banked sick leave of the employee shall be credited to the employee. When an employee retires, is eligible and has applied for benefits under a retirement system authorized under chapter ninety-seven A (97A) or ninety-seven B (97B) of the Code, including the teachers insurance annuity association (TIAA) and the college retirement equity fund (CREF), the employee shall receive a cash payment for the employee's accumulated, unused sick leave in both the active and banked sick leave accounts except when, in lieu of cash payment, payment is made for monthly premiums for health or life insurance or both as provided in a collective bargaining agreement negotiated under chapter twenty (20) of the Code. The payment shall be calculated by multiplying the number of hours of accumulated, unused sick leave by the employee's hourly rate of pay at the time of retirement. However, the total cash payment for accumulated, unused sick leave shall not exceed two thousand dollars and is payable upon retirement. Banked sick leave is defined as accrued sick leave in excess of ninety days. A state employee who retired on or after July 1, 1977, but before July 1, 1979, may file claims for the employee's accrued sick leave credit authorized in this section. The claim of a state employee paid through the state comptroller's centralized payroll system and the department of transportation payroll system shall be filed with the state comptroller on forms provided by the state comptroller. The claim for an employee of the state board of regents shall be filed with the state board of regents on forms provided by the board.

The concept of receiving payment for unused sick leave upon retirement was initiated in the extra session of the 67th General Assembly when the Legislature originally passed § 79.23, which read:

> CREDIT FOR ACCRUED SICK LEAVE. Commencing July 1, 1978, when an employee retires under the provisions of a retirement system in the state maintained in whole or in part by public contributions or payments, the current value of accrued days of active and banked sick leave of the employee shall be credited to the employee. For the purpose of this section, the "current value of accrued days of active and banked sick leave" means an amount equal to the product of the accrued days of active and banked sick leave multiplied by the bi-weekly regular salary of the employee divided by ten. 1977 Iowa Acts (Ex. Sess.), Chapter 1, § 33.

At the same time, the Legislature directed the Legislative Council and the State Comptroller to study the cost of providing alternative benefit programs based on the value of the unused sick leave. See 1977 Iowa Acts (Ex. Sess.), Chapter 1, § 35.

Section 79.23, The Code, was subsequently amended by the 67th General Assembly, 1978 Session, as follows: (additions are underlined, deletions are crossed through)

> CREDIT FOR ACCRUED SICK LEAVE. Commencing July 1, ~~1978~~ 1977 when an employee who is not covered under the provisions of a collective bargaining agreement negotiated under the provisions of chapter twenty (20) of the Code retires under the provisions of a retirement system in the state maintained in whole or in part by public contributions or payments, the ~~current-value~~ number of accrued days of active and banked sick leave of the employee shall be credited to the employee. ~~For-the-purpose-of-this-section, the-"current-value-of-accrued-days-of~~ Active and banked sick leave" means an amount equal to the product of the accrued days of active and banked sick leave multiplied by the bi-weekly regular salary of the employee divided by ten. Until the general assembly provides a program of credit for accrued sick leave, the number of accrued days credited to an employee upon retirement shall be the same as at the time of the employee's retirement. 1978 Iowa Acts, Chapter 1048, § 33.

Again in the 1979 Session of the 68th General Assembly, a change was proposed in § 79.23 via Senate File 499, which stated in part:

> CREDIT FOR ACCRUED SICK LEAVE. Commencing July 1, 1977, when ~~an~~ a state employee ~~who is not covered under the provisions of a collective bargaining agreement negotiated under the provisions of chapter 20~~ retires under the provisions of a retirement system in the state maintained in whole or in part by public contributions or payments, the number of accrued days of active and banked sick leave of the employee shall be credited to the employee. ~~Until the general assembly provides a program of credit for accrued sick leave, the number of accrued days credited to an employee upon retirement shall be the same as at the time of the employee's retirement.~~ When an employee retires, is eligible and has applied for benefits under a retirement system authorized under chapter ninety-seven A (97A) or ninety-seven B (97B) of the Code, including the teachers insurance annuity association (TIAA) and the college retirement equity fund (CREF), the employee shall receive a cash payment for the employee's accumulated, unused sick leave in both the active and banked sick leave accounts except when, in lieu of cash payment, payment is made for monthly premiums for health or life insurance or both as provided in a collective bargaining agreement negotiated under chapter twenty (20) of the Code. The payment shall be calculated by multiplying the number of hours of accumulated, unused sick leave by the employee's hourly rate of pay at the time of retirement. However, the total cash payment for accumulated, unused sick leave shall not exceed two thousand dollars and is payable upon retirement. Banked sick leave is defined as accrued sick leave in excess of ninety days. A state employee who retired on or after July 1, 1977, but before July 1, 1979, may file claims for the employee's accrued sick leave credit authorized in this section. The claim of a state employee paid through the state comptroller's centralized payroll system and the department of

> transportation payroll system shall be filed with the state comptroller on forms provided by the state comptroller. The claim for an employee of the state board of regents shall be filed with the state board of regents on forms provided by the board.

Prior to passage, the section was amended to add language to the first sentence so that in its final form, the sentence read:

> Commencing July 1, 1977, when a state employee, excluding an employee covered under a collective bargaining agreement which provides otherwise, retires under the provisions of a retirement system in the state maintained in whole or in part by public contributions or payments, the number of accrued days of active and banked sick leave of the employee shall be credited to the employee . . . Chapter 2, 1979 Iowa Acts, § 42.

Section 43 of the same chapter is pertinent to the question of legislative intent. It states:

> The provisions of section seventy-nine point twenty-three (79.23) of the Code relating to the cash payment to state employees upon retirement for accumulated, unused sick leave shall not apply to persons who were covered under a collective bargaining agreement and who retired on or after July 1, 1977, and before July 1, 1979, unless the collective bargaining agreement provides for the cash payment. [Emphasis supplied.]

In order to determine whether the organized faculty at the University of Northern Iowa is entitled to the benefit created by § 79.23, the question which must be addressed is the meaning of the following language of § 79.23 as amended: " . . . excluding an employee covered under a collective bargaining agreement which provides otherwise." In other words, must a collective bargaining agreement specifically state that the statutory benefit has been waived in order for organized employees to be excluded from the benefit of § 79.23 as amended in the 1979 Acts, § 42?

The rules of statutory construction require that "words and phrases shall be construed according to the context and the approved usage of the language", § 4.1(2), The Code 1979.

It is apparent that § 79.23 as originally passed applied to all state employees regardless of whether or not they were organized under Chapter 20 and covered by a collective bargaining agreement. Even if a collective bargaining agreement contained a contrary provision, § 79.23 would have superceded the contract because § 20.28, The Code 1979, provides that whenever a conflict arises between a Code provision and a collective bargaining agreement, the Code provision prevails unless the Legislature provides otherwise.

The 1978 amendment made the benefit of § 79.23 applicable to every state employee except those covered by <u>any</u> collective bargaining agreement.

Chapter 20, The Code 1979, grants certain rights to certain public employees who vote to organize under the Chapter. Organized public employees have the right (among others) to negotiate with their employer over the topics listed in § 20.9, The Code 1979. Included in this list of topics are the terms "leaves of absence", "wages", and "supplemental pay". If labor and management are unable to agree on a collective bargaining agreement covering topics listed in § 29.9, The Code 1979, either party may submit the dispute to an arbitrator for a decision which becomes the parties agreement.

Public employees not organized under Chapter 20, The Code 1979, have no statutory rights to collectively bargain with their employer. By distinguishing between organized and unorganized state employees, in 1970 Iowa Acts, Chapter 2, § 42, the Legislature recognized that employees organized under Chapter 20 should be treated differently, otherwise they could have granted the benefit to all state employees. At the same time, the Legislature apparently did not want to prohibit all organized state employees from receiving the benefit as they had previously done in § 79.23 prior to the latest amendment.

Section 79.23, as amended by Chapter 2, § 42 of the 1979 Iowa Acts, confers a benefit on state employees in general, be they organized or unorganized. However, as to organized employees, the section recognizes the realities of the bargaining table and authorizes such employees to bargain away the benefit which § 79.23 confers. Organized employees may determine that it is economically advantageous to enter into a contract which waives the benefit conferred. Indeed, waiving this statutory benefit may result, in the context of a labor negotiation, in the receipt of some alternative benefit which the employees deem more desirable. This is the give and take of negotiating and § 79.23 recognizes this reality. Should organized employees bargain away the benefit conferred by § 79.23 and agree to a contract which expressly waives the benefit, they will then be "covered under a collective bargaining agreement which provides otherwise". Absent such an express waiver, organized

employees, like unorganized employees, are entitled to the benefit.

Chapter 2, § 43 of the 1979 Iowa Acts states clearly that organized employees who retired on or after July 1, 1977 and before July 1, 1979 are not entitled to the benefit unless the collective bargaining agreement provides for the cash payment. As with § 42, such contractual provision must be an express provision. It can be presumed that such exclusion from benefits (in the absence of an express provision to the contrary) was the result of budgetary considerations. This belief is bolstered by the cost study ordered by the Legislature in 1977. See 1977 Iowa Acts (Ex. Sess.), Chapter 1, § 35.

We do not consider it appropriate to render an opinion as to the interpretation of a collective bargaining agreement. Such a function is more properly performed by an arbitrator. However, if it is concluded that if the contract is silent on the matter of a cash payment for unused sick leave, the University of Northern Iowa faculty would be eligible to receive the payment.

Sincerely,

David Fortney

DAVID M. FORTNEY
First Assistant Attorney General

DMF:sh

COUNTIES AND COUNTY OFFICERS: Incompatibility and Conflict of Interest. §§ 230A.3, 230A.12, 230A.13, 230A.16, 230A.17, 230A.18, 331.1, 332.3, 504A.14, 504A.17, The Code 1979; S. F. 2015, 68th G.A., 1980 Session. A member of the board of directors of a nonprofit corporation organized under Chapter 504A to administer a community mental health center is not a public officer and therefore is not barred by the doctrine of incompatibility of offices from concurrently occupying a position on the county board of supervisors. Such concurrent service is not directly violative of § 230A.16. An individual who concurrently occupies the positions of county supervisor and director of a nonprofit corporation administering a community mental health center is, however, subject to a conflict of interest objection. (Stork to Neary, Palo Alto County Attorney, 6/27/80) #80-6-21 (L)

June 27, 1980

H. Michael Neary
Palo Alto Co. Attorney
Courthouse
Emmetsburg, Iowa 50536

Dear Mr. Neary:

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

1. Is the position of a member of a county board of supervisors and a member of the board of directors of a community mental health center organized under Chapter 230A, The Code 1979, incompatible?

2. If the positions are not incompatible, does the appointment of two elected officials to the board comply with § 230A.16(2)?

Chapter 230A, The Code 1979, sets forth a framework for the delivery of mental health services at the county level. Section 230A.1 provides:

> A county or affiliated counties having a total or combined population of thirty-five thousand or more may by action of the board or boards of supervisors, with approval of the Iowa mental health authority, establish a community mental health center to serve the county or counties.

Under the provisions of Chapter 230A, a county may establish a system providing diagnostic and treatment services to persons suffering from mental illness, mental retardation, emotional disorders, and other debilitating psychiatric conditions.

Services may be provided on either an inpatient or outpatient basis, and may include emergency treatment, prehospitalization assistance, and aftercare or rehabilitative help.

A county electing to establish a community mental health center pursuant to § 230A.1 has two methods by which to organize the center. First, a county may directly establish a center and delegate the responsibility for its daily administration to an elected board of trustees. § 230A.3(1), The Code 1979. The powers and duties of the trustees are enumerated by statute. § 230A.10, The Code 1979. Alternatively, a county may contract with a nonprofit corporation, organized under either ch. 504 or ch. 504A of the Code, for the establishment and administration of the center. § 230A.3(2), The Code 1979. A county electing to establish a center by this method becomes a party to a contractual agreement under the provisions of § 230A.3. The affairs of the center are then managed by a corporate board of directors. §§ 504.14 and 504A.17, The Code 1979.

In the event that a board of supervisors elects to contract for mental health services from a private nonprofit corporation, ch. 230A does confer upon the board certain important and continuing responsibilities. Initially, it must establish an agreement with the board of directors of the mental health center pursuant to § 230A.12. The agreement must include terms for the length of the contract, the services to be provided, the standards relating to a fee scale for services rendered, and policies regarding the availability of services to noncounty residents. Section 230A.13 gives the board of supervisors authority to review and approve the center's annual budget. Section 230A.15 mentions that approval of the board of supervisors is necessary before a community mental health center may undertake provision of a "comprehensive community mental health program". Pursuant to § 230A.17, the board of supervisors may require the committee on mental hygiene to review and evaluate the operations of the community mental health center. Finally, § 230A.18 indicates that if a review is made under § 230A.17 and the center's response to recommendations by the reviewing team is either untimely or unsatisfactory, the committee's "ultimate sanction" consists of contacting the board of supervisors on the matter. The board of supervisors presumably may then take further corrective action. The board does not otherwise assume any special control over the corporation or its board of directors.

With this understanding of the statutory relationship between the board of supervisors and a community mental health center organized under ch. 230A, the question of incompatibility of offices can be examined. In the leading case on this question, State ex rel. Crawford v. Anderson, 155 Iowa 271, 273, 136 N.W. 128, 129 (1912), the Iowa Supreme Court set forth the following standards:

> The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard to the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Catell, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other "and subject in some degree to its revisory power," or where the duties of the two offices "are inherently inconsistent and repugnant." State v. Bus, 135 Mo. 338, 36 S.W. 639, 33 L.R.A. 616; Attorney General v. Common Council of Detroit, supra. [112 Mich. 145, 70 N.W. 450, 37 L.R.A. 211]; State v. Goff, 15 R.I. 505, 9 A. 226, 2 Am.St.Rep. 921. A still different definition has been adopted by several courts. It is held that incompatibility of 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".

See also, State ex rel. LeBuhn v. White, 257 Iowa 606, 133 N.W.2d 903 (1965). A recent opinion of the Attorney General applied the standards set forth in the Crawford case to determine that a member of a board of supervisors could not simultaneously occupy a position on either a county board of health or a county fair board. Op. Atty. Gen. #79-4-4. The basis of this determination was that a member of the board of supervisors who is also a member of either of the latter boards would be exercising a revisory power over himself or herself in contradiction to the standards of Crawford.

The positions of county supervisor and director of a community mental health center, organized under ch. 504A, would appear to be incompatible in light of the statutory scheme set forth in ch. 230A and the standards applied in the Crawford decision.

The board of supervisors, for example, has certain fiscal control over the board of directors of a community mental health center since § 230A.13 gives the former approval authority over the center's annual budget. The board of supervisors has additional authority with respect to review and evaluation of a center's administration. See §§ 230A.17 and 230A.18. You indicate also that, with respect to the Spencer community mental health center, the corporate bylaws give the board of supervisors further authority in the selection and replacement of members of the center's board of directors. Based on these facts, the board of directors of the Spencer community mental health center would appear to be subordinate in certain respects to the county board of supervisors. A more basic consideration, however, makes the incompatibility standards inapplicable to an individual serving on both the county board of supervisors and the board of directors of a corporation organized to administer a community health center under ch. 230A.

In order for the incompatibility standards to apply, a person must simultaneously hold two public offices. See Op. Atty. Gen. #79-6-5; 63 Am.Jur.2d Public Officers and Employees, § 64 (1972). The Iowa Supreme Court has held that five essential elements are required to make public employment a public office:

1. The position must be created by the constitution or legislature or through authority conferred by the legislature.

2. A portion of the sovereign power of government must be delegated to that position.

3. The duties and powers must be defined, directly or impliedly, by the legislature or through legislative authority.

4. The duties must be performed independently and without control of a superior power other than the law.

5. The position must have some permanency and continuity, and not be only temporary and occasional.

State v. Taylor, 260 Iowa, 634, 144 N.W.2d 289, 292 (1967); Hutton v. State, 235 Iowa 52, 16 N.W.2d 18, 19 (1947).

Application of these elements to the present facts indicates that a member of the board of directors of a private nonprofit corporation organized under ch. 504A to administer a community mental health center does not hold a public office and therefore is not a public officer subject to the standards of incompatibility of offices.

A member of the board of directors of a nonprofit corporation administering a community mental health center established under ch. 230A manages the affairs of that center solely by virtue of an agreement between the private nonprofit corporation and a board of supervisors. Where an employment arises out of a contract and where authority for the employment is conferred by contract, the employment itself cannot be regarded a public office, notwithstanding the fact that a provision for the employment is made by statute. 67 C.J.S. Officers §§ 10, 13 (1978). Since the position of a member of the board of directors for a community mental health center is established through an agreement, rather than through force of law, an essential element of a public office is lacking. 63 Am.Jur.2d Public Officers and Employees, §§ 7, 12 (1972).

There is no indication in ch. 230A that the Legislature intended to confer the position of a director of a nonprofit corporation with the status of a public office. Quite the contrary seems evident. Section 230A.3 provides a county with a clear choice in the establishment and administration of a community mental health center. One alternative involves direct establishment of the center by the public and administration of the center by an elected board of trustees whose responsibilities are expressly defined by statute. The individuals elected to administer the center under this alternative have enumerated powers and duties (§230A.10), must take oaths of office (§230A.6), and are bound by statutory conflict of interest restrictions (§ 230A.11). The other alternative, involving the county's agreement with a private corporation to establish and manage the center, eliminates direct public involvement and contains none of the incidents of public office identified with the board of trustees. Since a member of the board of directors of a nonprofit corporation organized to administer a community mental health center under ch. 230A cannot be considered a public officer, the standards for incompatibility of offices do not apply and therefore do not prohibit that individual from concurrently occupying a position on the board of supervisors.

If the positions are not incompatible, you inquire whether the appointment of two elected officials to the board complies with § 230A.16(2). Section 230A.16 requires the Iowa mental health authority to formulate, adopt, and revise standards for community

mental health centers and comprehensive community mental health programs. Section 230A.16, subsection 2, states that unless a community mental health center is governed by a board of trustees elected or selected under sections 230A.5 and 230A.6, the center must be governed by a board of directors which adequately represents interested professions, consumers of the center's services, socio-economic, cultural and age groups, and various geographical areas in the county or counties served by the center. The apparent intent of this subsection is to ensure that a nonprofit corporation organized to administer a community mental health center is governed by a representative board of directors. Whether this purpose can be adequately served when members of the board of supervisors also serve on the corporation's board of directors is essentially a factual question. Pursuant to § 230A.16, the proper authority to determine this question appears to be the Iowa mental health authority, with approval of the committee on mental hygiene.

Although the standards for incompatibility of offices do not apply to a member of the board of directors of a nonprofit corporation organized under ch. 230A, the situation you have presented raises an important question as to whether concurrent service on the board of supervisors would subject the individual to a conflict of interest. No constitutional or statutory provision prohibits such concurrent service. The common law limitation on conflicts of interest therefore applies and, with respect to this limitation, the Iowa Supreme Court has stated the following:

> We doubt if any rule of law has more longevity than that which condemns conflict between the public and private interests of governmental officials and employees nor any which has been more consistently and rigidly applied.
>
> 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. 10 McQuillin, Municipal Corporations, section 29.99, page 483; Bay v. Davidson, 133 Iowa 688, 694, 111 N.W. 25, 27, 9 L.R.A., N.S., 1014; James v. City of Hamburg, 174 Iowa 301, 313, 156 N.W. 394, 398; Krueger v. Ramsey, 188 Iowa 861, 868, 175 N.W. 1, 3; Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal.App. 592, 229 P. 1020, 1022.

> These rules, whether common law or statutory, are based on moral principles and public policy. They demand complete loyalty to the public and seek to avoid subjecting a public servant to the difficult, and often insoluble, task of deciding between public duty and private advantage.
>
> It is not necessary that this advantage be a financial one. Neither is it required that there be a showing the official sought or gained such a result. It is the potential for conflict of interest which the law desires to avoid. [Emphasis in original.]

Wilson v. Iowa City, 165 N.W.2d 813, 822 Iowa (1969). A member of the board of directors of a private nonprofit corporation has the statutory duty to manage the affairs of the corporation. § 504A.17, The Code 1979. A director accordingly occupies a position of trust and fiduciary responsibility toward the corporation. A member of the county board of supervisors, on the other hand, is a public officer elected by qualified members of the public. § 331.1. The supervisor has the statutory duty to manage the general business affairs of the county. § 332.3. He or she therefore occupies an important position of trust with respect to the general public in the county. Pursuant to the standards set forth in Wilson, the supervisor must demonstrate complete loyalty to the public and thereby avoid even the potential for a conflict of interest.

A supervisor who becomes a member of the board of directors of a nonprofit corporation organized to administer a ch. 230A community mental health center unavoidably subjects himself or herself to a potential conflict of interest. Pursuant to § 230A.3, the person would represent both parties to the agreement for the establishment of the center. The person would be responsible for both the preparation of the annual budget as director of the corporation and approval of the budget as a county supervisor. § 230A.13. Additionally, as a corporate director, the person would make important decisions for the operations of the center yet would have authority in deciding whether those operations should be reviewed and evaluated by the committee on mental hygiene. § 230A.17. In each instance, the person must serve the interests of a private corporation on the one hand and the interests of the general public on the other hand. The person must therefore serve two masters in contradiction to the common law rule against conflicts of interest, the purpose of which was succinctly stated by the Iowa Supreme Court in the Wilson case:

> This rule does not depend upon reason technical in character, and is not local in its application. It is based upon principles of reason, or morality and of public policy. It has its foundation in the very constitution of our nature, for it has authoritatively been declared that a man cannot serve two masters, and is recognized and enforced wherever a well-regulated system of jurisprudence prevails.

165 N.W.2d at 819. Given the statutory framework for the administration of a community mental health center under ch. 230A, we conclude that a potential conflict of interest does exist for a member of a county board of supervisors serving concurrently as a member of the board of directors of a nonprofit corporation organized to operate the center.

The effect of such a conflict of interest is significant and must be distinguished from the situation where an individual occupies two public offices that are incompatible. The result of incompatibility is well settled:

> [I]f a person, while occupying one office accepts another incompatible with the first, he ipso facto vacates the first office, and his title thereto is thereby terminated without any other act or proceeding.

State ex rel. LeBuhn v. White, 257 Iowa 606, 609, 133 N.W.2d 903, 904 (1965); State ex rel. Crawford v. Anderson, 155 Iowa 271, 272, 136 N.W. 128, 129 (1912). A conflict of interest does not affect an individual's ability to serve concurrently in two positions. Rather, it voids both the vote of the individual having the conflict on the matter under consideration and the result reached by the public body on the matter, regardless of whether the individual's vote was needed to obtain that result. Wilson v. Iowa City, 165 N.W.2d 813, 820 (Iowa 1969). In order to avoid these consequences, an individual having a potential conflict of interest must at least abstain from a vote on any matter in which the conflict may exist. For example, a county supervisor who is also serving as a director of a community mental health center should abstain from voting on the approval of the center's budget.

The decision in White also suggests, however, that an individual should not even participate in the discussion of a matter in which he or she may have a conflict of interest. The Court cites the language of a New Jersey decision as follows:

> * * * The infection of the concurrence of the interested person spreads, so that the action of the whole body is voidable. * * This is the general rule. * * * It is supported by a twofold reason, viz.: First, the participation of the disqualified member in the discussion may have influenced the opinion of the other members; and, secondly, such participation may cast suspicion on the impartiality of the decision. * * * It being impossible to determine whether the virus of self-interest affected the result, it must needs be assumed that it dominated the body's deliberations, and that the judgment was its product.

Id. If an individual does decide to participate in the discussion of a matter in which he or she has a potential conflict of interest, public policy would seem to demand that the individual disclose the nature of the conflict. Such disclosure is, for example, required of public officials elected to the state legislature. See Ethics Rules for the 68th General Assembly: Senate Rule 5; House Rule 5 (1979-80). Additionally, the individual should disclose such a conflict in abstaining from a vote, which is a procedure established by statute for elected city officials. § 362.6, The Code 1979.

We note that the 1980 session of the 68th General Assembly did pass legislation in Senate File 2015 which allows county supervisors to serve concurrently on certain appointive boards, commissions, and committees. Specifically, the bill provides:

> Unless otherwise provided by law, a county supervisor may serve concurrently as a member of any appointive board, commission or committee of this state or a political subdivision of this state.

The bill allows concurrent service only on appointive boards, commissions, or committees "of this state or a political subdivision of the state." In order to come within this protective legislation, a community mental health center would have to qualify as a political subdivision since obviously it is not a state board, commission, or committee. The question of what constitutes a political subdivision received detailed analysis in an earlier opinion of the Attorney General issued on November 9, 1976. Op. Atty. Gen. #76-11-3. That opinion concluded that a community action agency organized under federal law

was not a political subdivision. Such an agency was not, for example, a geographical portion of the state to which was delegated governmental functions. Incorporating by reference the rationale utilized in the earlier opinion, we conclude that a community mental health center is not a political subdivision; Senate File 2015 is therefore inapplicable to such a center.

Very truly yours,

Frank J. Stork

FRANK J. STORK
Assistant Attorney General

FJS:sh

FIREWORKS: § 727.2 of 1979 Code of Iowa. The devices known as Champagne Party Poppers, Ozark Smoke Bombs and Pop-Its are catagorized as fireworks prohibited under § 727.2 of the 1979 Code of Iowa. (Ormiston to Poppen, Wright County Attorney, 6/25/80) #80-6-19 (L)

June 25, 1980

Mr. Lee E. Poppen
Wright County Attorney
Wright County Courthouse
Clarion, IA 50525

Dear Mr. Poppen:

You have requested an opinion of the Attorney General regarding the application of § 727.2 of the 1979 Code of Iowa, which defines and sets penalties for the sale of fireworks, to certain items presently being sold in Iowa, to wit:

1. Champagne Party Popper, an item which contains .25 grains of black powder and emits a sharp bang as small pieces of confetti are propelled into the air.

2. Ozark Smoke Bomb, an item which flares brightly when lit and which showers sparks.

3. Pop-It, an item which is apparently powder which fires and produces a bang when thrown, stamped upon or otherwise subjected to concussion.

It would appear that the answer to your inquiry is found within the clear language of the statute, which states in pertinent part:

> The term "fireworks" shall mean and include any explosive composition, or combination of explosive substances, or article prepared for the purpose of producing a visible or audible effect by combustion, explosion, deflagration or detonation, and shall include blank

> cartridges, firecrackers, torpedoes, skyrockets, roman candles, or other fireworks of like construction and any fireworks containing any explosive or inflammable compound, or other device containing any explosive substance. The term "fireworks" shall not include goldstar-producing sparklers on wires which contain no magnesium or chlorate or perchlorate, no flitter sparklers in paper tubes that do not exceed one-eighth of an inch in diameter, nor toy snakes which contain no mercury nor caps used in cap pistols.

§ 727.2, 1979 Code of Iowa

Quite clearly, the items subject to this opinion fall within the broad range of fireworks as defined by the statute. The Champagne Party Popper, the Ozark Smoke Bomb and the Pop-It depend upon explosive substances prepared for the purpose of producing audible and/or visible effects by combustion, deflagration or detonation. Since these items are not among the exceptions enumerated within the text of the statute, they must certainly fall within the catagory of fireworks prohibited in the State of Iowa.

Sellers of these items within the state would therefore be subject to a possible charge of serious misdemeanor for violations of the statute.

Sincerely yours,

Tam B. Ormiston

TAM B. ORMISTON
Assistant Attorney General

cf

COUNTIES AND COUNTY OFFICERS: Eligibility of a private nonprofit corporation to receive federal revenue sharing funds from a county. 31 U.S.C. §§ 1221-1245 (1976) (Supp. 1980), 31 C.F.R. §§ 51.0-51.225 (1977), Iowa Const., art. III, § 39A. A private nonprofit corporation is eligible to receive federal revenue sharing funds from a county, as well as from another unit of local government or the state. The transfer of such funds must, however, be permitted by both state and local law and is subject to continuing compliance by the recipient corporation with certain federal revenue sharing regulations. (Stork to Arends, Humboldt County Assistant Attorney, 6/25/80) #80-6-18(L)

June 25, 1980

Marc D. Arends
Assistant County Attorney
Humboldt County
520 Sumner Avenue, P. O. Box 672
Humboldt, Iowa 50548

Dear Mr. Arends:

We have received your request for an opinion on whether a private nonprofit corporation, organized under Chapter 504A, The Code 1979, is eligible to receive federal revenue sharing funds from a county. You indicate that the Humboldt Area Improvement Corporation is a private, nonprofit corporation, which is organized for the general promotion and advancement of local community interests. The corporation has requested revenue sharing funds from Humboldt County.

The question posed requires a brief examination of the federal enabling legislation for the distribution of revenue sharing funds. Commonly known as the Revenue Sharing Act, Title I of the State and Local Fiscal Assistance Act of 1972, as amended by the State and Local Fiscal Assistance Amendments of 1976, provides for the distribution of federal funds to units of state and local government. 31 U.S.C. § 1221 et. seq. (1976). The amounts distributed to each recipient are based upon application of a set of formulas to descriptive data pertaining to each recipient. Id. §§ 1225-1228. One-third of the funding going to each state is allocated to the state government and the remaining two-thirds is apportioned to units of local government within the state. Id. § 1226. There are detailed requirements in the Act for the distribution of revenue sharing funds, including provisions with respect to reports, hearings, and audits,

Id. §§ 1241, 1243. The Secretary of the Treasury, or his delegate, is authorized to prescribe regulations to carry out the provisions of the Act. Id. §§ 1261, 1262. Accordingly, the Secretary has established an Office of Revenue Sharing to ensure the general administration of the Act through published rules and regulations. 31 C.F.R. § 51.1 (1977).

In order to qualify for any revenue sharing payment on or after January 1, 1973, a state government or unit of local government is required to establish certain assurances with respect to the expenditure of its revenue sharing funds. 31 U.S.C. § 1243. One such assurance is to "provide for the expenditure of amounts received under subtitle A only in accordance with the laws and procedures applicable to the expenditure of its own revenues . . ." . Id. § 1243(a)(4). Pursuant to this statutory authorization for expenditure of revenue sharing funds, the Office of Revenue Sharing has adopted regulations and rulings concerning the transfer of such funds from a state government or unit of local government to a secondary recipient. One such regulation essentially repeats the authorization in § 1243(a)(4) and requires a recipient government to provide for the expenditure of funds in accordance with laws and procedures applicable to the expenditure of its own revenues. 31 C.F.R. § 51.100(c). Another primary regulation on the subject provides:

> Those prohibitions and restrictions set forth in Subparts D, E, and F of this part which are applicable to a recipient government's entitlement funds continue to be applicable to such funds if they are transferred to another governmental unit or private organization. A violation of Subparts D, E, and F of this part by a secondary recipient shall constitute a violation by the recipient government and the applicable penalty shall be imposed on the recipient government.

Id. § 51.4. This section, together with the statutory directive for the expenditure of funds set forth in § 1243 of the Revenue Sharing Act, establishes the basis for the transfer of revenue sharing funds from a primary recipient, i.e., a unit of state or local government, to a secondary recipient, such as a nonprofit corporation. The meaning and application of these sections have been clarified by the Office of Revenue Sharing.

Subsequent to the adoption in 1972 of the original Revenue Sharing Act, the Office of Revenue Sharing issued a limited number of letter rulings to assist state and local governments in the

implementation of the legislation. A ruling published by the Office in March, 1974 is particularly instructive on the question of whether a private nonprofit corporation can receive revenue sharing funds:

> Section 51.5 of the regulations permits a recipient government to transfer its revenue sharing funds to secondary recipients. Secondary recipients of revenue sharing funds must be another governmental unit or a private organization. The prohibitions and restrictions imposed by Subpart D of the regulations are applicable to revenue sharing funds transferred to the secondary recipient. A violation of those prohibitions and restrictions by the secondary recipient will be considered a violation by the secondary recipient and the primary recipient government.
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> Definition
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> Section 51.5 of the regulations refers to a secondary recipient as another governmental unit or private organization which receives a recipient government's revenue sharing funds. Thus, a "secondary recipient" is an entity which is separate and distinct from that of the recipient government itself.
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> Civic Center Authority
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> A civic Center Authority is a permissible secondary recipient of revenue sharing funds.
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> Private Corporations as Secondary Recipients
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> A private corporation is a permissible secondary recipient of revenue sharing funds. For revenue sharing purposes, a private corporation may be either a profit or a non-profit corporation.

Treas. Dec. IV-D, p. 2 (March 1974). The state coordinator for the Office of Revenue Sharing has advised this office that § 51.5

of the regulations was revised in 1977 in accordance with the amendments adopted by Congress in 1976 to the original Revenue Sharing Act. See 31 U.S.C. §§ 1221 et. seq. (Supp. 1980). Pursuant to such revision, former § 51.5 became present § 51.4. The only material change in the substance of the former section was the language making Subparts E and F of the revenue sharing regulations applicable to secondary recipients. Section 51.4 is otherwise identical to former § 51.5. The state coordinator has further advised that the above ruling does represent an official and viable interpretation by the Office of Revenue Sharing concerning permissible transfers of revenue sharing funds. In summary, the provisions of the Revenue Sharing Act, as interpreted by the Office of Revenue Sharing, clearly do anticipate the transfer of revenue sharing funds to private nonprofit corporations.

The eligibility of a nonprofit corporation to receive and use revenue sharing funds is, however, subject to an important qualification. State and local law must permit the transfer of such funds from a governmental unit to a nonprofit corporation. 31 U.S.C. § 1243(a)(4); 31 C.F.R. § 51.100(c).

Humboldt County, for example, receives revenue sharing funds under §§ 1221 and 1227 of the Revenue Sharing Act. Pursuant to § 1243(a)(4) of the Act, the county can transfer those funds to a secondary recipient in accordance with the laws and procedures applicable to the expenditure of its own revenues. In Iowa, the ultimate authority of a county to make expenditures is governed by Article III, section 39A of the Iowa Constitution. Section 39A, relating to county home rule, was added to the Constitution in 1978 to provide that counties need not seek express statutory authority for each exercise of governmental power in the determination of local affairs, provided such exercise is not inconsistent with state law. We find no specific authorization or prohibition in either the Iowa Constitution or the Code of Iowa concerning the authority of a county to transfer federal revenue sharing funds to a private nonprofit corporation. We conclude, therefore, that Article III, section 39A of the Constitution allows a county to make such a transfer. The permissibility of the transfer is, however, further subject to any applicable local law or procedure. 31 U.S.C. § 1243(a)(4); 31 C.F.R. § 51.100(c). In making a transfer of revenue sharing funds to a nonprofit corporation, a county must therefore adhere to its own rules or criteria for making expenditures, including compliance with any prohibitions concerning those expenditures. Id.; see also Treas. Dec. IV-D, pp. 2-3 (March 1974).

If a private nonprofit corporation is permitted to receive revenue sharing funds under both state and local law, the corporation must comply with certain provisions established in Subparts D, E, and F of the revenue sharing regulations administered by the Office of Revenue Sharing. 31 C.F.R. § 51.4. Subpart D prescribes certain prohibitions and restrictions on the use of revenue sharing funds appropriated or budgeted before January 1, 1977. These funds can be used only for "priority expenditures" defined in the regulations. Such expenditures include "ordinary and necessary maintenance and operating expenses" for public safety and transportation, health, recreation, and libraries and "ordinary and necessary capital expenditures authorized by law." Id. § 51.41. A specific regulation further indicates that the funds cannot be used, directly or indirectly, as a contribution in order to obtain federal matching funds. Id. § 51.40. Additionally, a regulation in Subpart D prohibits the use of revenue sharing funds for payment of any lobbying activities, which include but are not limited to the following:

1) Personal solicitation of individual members of a legislative body to influence legislation regarding the General Revenue Sharing Program by personal interview, letter, financial constributions, and other means.

2) To employ a lobbyist to engage in proscribed activities.

Id. § 51.44.

Subpart E of the regulations contains nondiscrimination provisions applicable to programs supported by revenue sharing funds. The subpart provides that no person shall, on the grounds of race, color, national origin, or sex, be excluded from participation under, denied the benefits of, or be subjected to discrimination under any program or activity of a recipient of revenue sharing funds. Id. § 51.52. The prohibition extends to any discrimination with respect to age under the Age Discrimination Act of 1975, the handicapped under the Rehabilitation Act of 1973, and religion under either the Civil Rights Act of 1964 or the Civil Rights Act of 1968, as well as any exemption from the prohibition against religious discrimination contained in the Civil Rights Acts. 31 C.F.R. §§ 51.50-51.52. Subpart E then sets forth detailed provisions concerning the administration and enforcement of the discrimination prohibitions.

Subpart F of the regulations prescribes fiscal procedures and auditing requirements. Generally, the state or local government transferring revenue sharing funds to a secondary recipient must ensure that such funds are expended in accordance with the

expenditure of the government's own revenues. Id. § 51.100(c). Section 51.103 of the regulations also sets forth a mandatory audit procedure when a unit of government transfers, during its fiscal year, $25,000 or more of revenue sharing funds to a single secondary recipient. The governmental unit must conduct such an audit pursuant to the regulations and the "Audit Guide and Standards for Revenue Sharing Recipients" published by the Office of Revenue Sharing.

A state or local governmental unit that transfers revenue sharing funds to a secondary recipient, such as a private nonprofit corporation, is nevertheless responsible for the recipient's compliance with Subparts D, E, and F. 31 C.F.R. § 51.4. This section expressly provides that a violation of these subparts by a secondary recipient constitutes a violation by the governmental unit itself and that the applicable penalty must be imposed on the latter. The state or local governmental unit therefore has considerable responsibility, and incentive, in ensuring that the secondary recipient comply with applicable regulations concerning the expenditure of revenue sharing funds.

In conclusion, a private nonprofit corporation is eligible to receive federal revenue sharing funds from a county, as well as from either another unit of local government or the state. The transfer of such funds must, however, be permitted by both state and local law and is subject to continuing compliance by the recipient corporation with certain federal revenue sharing regulations.

Very truly yours,

FRANK J. STORK
Assistant Attorney General

FJS:sh

ELECTIONS; SCHOOLS: Campaign Finance Disclosure Commission. Ch. 56, §§ 56.2(6), 274.1, 296.3, 298.32, The Code 1979. A school district is not subject to the campaign finance disclosure requirements of ch. 56, The Code 1979, since it has no authority to engage in activity that would bring it within the definition of a political committee, i.e., accept contributions, make expenditures or incur indebtedness exceeding $100 in any one calendar year to support or oppose a candidate for public office or ballot issue. (Hyde to Eisenhauer, Executive Director, Campaign Finance Disclosure Commission, 6/24/80) #80-6-17(L)

June 24, 1980

Cynthia P. Eisenhauer
Executive Director
Campaign Finance Disclosure Commission
State Capitol
L O C A L

Dear Ms. Eisenhauer:

We have received your request for an opinion from this office concerning the applicability of reporting provisions of ch. 56, The Code 1979, to a school district. Your letter indicated that school district funds of the Davis County Community School District were spent on publication and distribution of a brochure promoting a ballot issue, i.e., the authorization to issue bonds to finance a school building program.

Chapter 56, The Code 1979, imposes reporting and disclosure requirements on organizations or entities deemed to be a "political committee", as defined by § 56.2(6), The Code 1979:

> 6. "Political committee" means a committee, but not a candidate's committee, which shall consist of persons organized for the purpose of accepting contributions, making expenditures, or incurring indebtedness in the aggregate of more than one hundred dollars in any one calendar year for the purpose of supporting or opposing a candidate for public office or ballot issue.

An analysis of the language of § 56.2(6), The Code 1979, leads us to conclude that it is highly unlikely the Legislature intended this definition to encompass public agencies, such as school districts or their governing bodies, school district

boards of directors. A school district is not a voluntary organization of "persons organized for the purpose of accepting contributions, making expenditures, or incurring indebtedness . . ." . Rather, a school district is a statutorily created arm or agency of the state, endowed only with specifically enumerated powers, as provided in § 274.1, The Code 1979:

> Each school district shall continue a body politic as a school corporation, unless changed as provided by law, and as such may sue and be sued, hold property, and exercise all the powers granted by law, and shall have exclusive jurisdiction in all school matters over the territory therein contained.

More importantly, a school district has no authority to carry out the activities that would bring it within the definition of a political committee, i.e., accept contributions, make expenditures or incur indebtedness for the purpose of supporting or opposing a candidate for public office or ballot issue. A school district, as an arm of the state and part of its political organization, has no rights, function, or capacity except those conferred upon it by the Legislature. The only powers of a school district are those expressly granted or necessarily implied from the statutes by which it is governed. See City of Bloomfield v. Davis County Community School District, 254 Iowa 900, 119 N.W.2d 909 (1963); Independent School District of Danbury v. Christiansen, 242 Iowa 963, 49 N.W.2d 263 (1951); Silver Lake Consolidated School District v. Parker, 238 Iowa 984, 29 N.W.2d 214 (1947).

We can find nothing in the Code chapters governing school districts, generally ch. 274-302, The Code 1979, empowering a school district, through its board of directors, to expend public funds to promote or oppose a ballot issue. Further, we believe such an expenditure raises serious questions concerning unauthorized expenditure of public funds. The school district board of directors is responsible for calling an election to present questions concerning the issuance of school building bonds to the electors of the district. See §§ 296.2, 296.3, 298.21, The Code 1979. Implied within that responsibility may be authority to expend public funds to disseminate information to the electors concerning reasons for construction, needs, plans, and anticipated costs. See, e.g., 1976 Op. Atty. Gen. 507. Expenditure of public funds to urge a particular vote on a ballot issue would no longer be serving an informative purpose, however, and would appear to be beyond the specific authority of the school district. It cannot be expected that a proposal to incur indebtedness by issuance of bonds will have unanimous support within a school district, particularly in the recent economic climate.

> Public funds entrusted to the board belong equally to the proponents and opponents of the proposition, and the use of the funds to finance not only the presentation of facts merely but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint . . . [S]imple fairness and justice to the rights of dissenters require that the use by public bodies of public funds for advocacy be restrained within . . . limits in the absence of a legislative grant in express terms of the broader power.

Citizens to Protect Public Funds v. Board of Education, 98 A.2d 673, 677-8 (N.J. 1953). See generally Powell v. San Francisco, 62 Cal. App.2d 291, 144 P.2d 617 (1944); Elsenau v. Chicago, 334 Ill. 78, 165 N.E. 129 (1929); Mines v. Del Valle, 201 Cal. 273, 257 P. 530 (1927); Shannon v. Huron, 9 S.D. 356, 69 N.W. 598 (1896).

In conclusion, it is our opinion that a school district is not subject to the campaign finance disclosure requirements of ch. 56, The Code 1979, since its board of directors, in their official capacity, has no authority to engage in activities that would bring it within the definition of a "political committee", i.e., accept contributions, expend funds, or incur indebtedness exceeding $100 in any one calendar year to promote or oppose a candidate for public office or ballot issue.

Very truly yours,

Alice Hyde (ab)

ALICE J. HYDE
Assistant Attorney General

AJH:sh

PUBLIC EMPLOYEE: Grievances: U.S. Const. amend. I, Sections 20.10(2)(e), 20.10(2)(f), 20.14, 20.15, 20.16, 20.17, 20.17(1), The Code 1979. A public employee may seek to adjust an individual complaint with a public employer. A public employer is under no duty to meet with an individual employee. A public employer may not prohibit public employees from speaking at public meetings. (Powers to Hansen, State Senator 6/24/80) #80-6-16 (L)

June 24, 1980

Senator W. R. "Bill" Hansen
1917 Waterloo Road
Cedar Falls, IA 50613

Dear Senator Hansen:

In your letter of April 16, 1980, you ask the question whether aggrieved employees at the University of Northern Iowa may discuss their grievances or complaints with either the administration or the Board of Regents without violating the law or a collective bargaining agreement.

The Public Employment Relations Act, Chapter 20, The Code 1979, (hereafter The Act) grants public employees the right to engage in collective bargaining with their employer over certain designated employment conditions. § 20.9, The Code 1979. Collective bargaining is conducted by the exclusive bargaining representative who has been elected by a majority of the public employees to represent their interests to the employer. §§ 20.14 - 20.17, The Code 1979.

The principle of exclusive representation is central to the collective bargaining concept. Individual employee desires must yield to the will of the majority which is expressed through the exclusive bargaining representative. Of course, the exclusive bargaining representative is charged with the duty of representing all employees in the bargaining

unit fairly, § 20.17(1), The Code 1979. The Act imposes on the employer the duty to bargain collectively with the exclusive bargaining representative. § 20.16, The Code 1979; and it is a prohibited practice for an employer to refuse to bargain with the exclusive representative. §§ 20.10(2)(e) and (f), The Code 1979. See Akron Education Association, P.E.R.B. Case No. 1161 (1977).

However, the Act also recognizes that an individual employee has a right independent of the exclusive representative to present grievances and complaints to the employer. Section 20.17(1), The Code 1979, enunciates the rights of the exclusive representative and the individual employee:

> The employee organization certified as the bargaining representative shall be the exclusive representative of all public employees in the bargaining unit and shall represent all public employees fairly. However, any public employee may meet and adjust individual complaints with a public employer.

Your question concerns the balance between the individual's right to approach the employer with individual complaints versus the exclusive bargaining representative's right to speak on behalf of all employees in the bargaining unit.

The language of § 20.17(1) is similar to that of § 9(a) of the federal Labor Management Relations Act, 29 U.S.C. § 159A, which states:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all of the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining agreement and provided further that the bargaining representative has been given an opportunity to be present at such adjustment.

While the language of § 17(1) of the Act is not identical to the language of the federal proviso, and the Iowa Act does not specifically prohibit an adjustment which is inconsistent with the collective bargaining agreement nor discuss the presence of the exclusive bargaining representative, I believe the intent of the sections is similar. Regardless of the Iowa Act's silence regarding inconsistencies that might occur, it would be anomalous to interpret the second sentence of § 20.17(1) to permit individual adjustments that might be inconsistent with the collective bargaining agreement. To do so would negate the exclusive bargaining representative status of the employee organization and undermine the collective bargaining process. Professor Lawrence Pope made a similar observation when he stated,

> It would be destructive of the whole theory of collective bargaining if employees were able to negotiate individual contracts in opposition to the collective bargaining agreement . . . . The employee organization would be irreparably thwarted in its statutory duty to be the "exclusive" bargaining representative.

Pope, An Analysis of the Public Employment Relations Act, 24 Drake L.Rev. 1 (1974). Thus, § 20.17(1), The Code 1979, while not identical to the federal language, should be interpreted in the same manner.

The federal language has been interpreted in several cases. The Second Circuit court stated in one case:

> Despite Congress' use of the word "right" (in 29 U.S.C. § 159A) which seems to import an indefeasible right mirrored in a duty on the part of the employer, we are convinced that the proviso was designed merely to confer upon the employee the privilege to approach his employer on personal grievances when his union reacts with hostility or apathy. Prior to the adoption of this proviso in section 9(a), the employer had cause to fear that his processing of an individual's grievance without consulting the bargaining representative would be an unfair labor practice; section 9(a) made the union the exclusive representative of the employees in the bargaining unit, and section 8(a) (5) made a refusal to bargain with the exclusive representative an unfair

> labor practice. The proviso was apparently designed to safeguard from charges of violation of the act the employer who voluntarily processed employee grievances at the behest of the individual employee, and to reduce what many had deemed the unlimited power of the union to control the processing of grievances.

Black-Clauson Company, Inc. v. International Association of Machinists Lodge 355, 313 F.2d 179 (2d Cir. 1962); See also Emporium Capwell v. Western Addition Community Organization, 420 U.S. 50 (1975); Broniman v. Great Atlantic & Pacific Tea Company, 353 F.2d 559 (6th Cir. 1965).

An individual may seek adjustment directly with the employer of any matter whether or not it is the subject of a collective bargaining agreement. National Labor Relations Board v. Kearney & Trecker Corp., 237 F.2d 416 (7th Cir. 1956). However, it has been held that when such an adjustment raises a question concerning the meaning or coverage of the collective bargaining agreement the exclusive bargaining representative should participate but may not preclude the individual from handling his own grievance. Hughes Tool Co. v. National Labor Relations Board, 147 F.2d 69 (5th Cir. 1945).

However, the employer does not commit an unfair labor practice by refusing to adjust the grievance or complaint outside of the collective bargaining agreement's procedures. Emporium Capwell v. Western Addition Community Organization, 420 U.S. 50, n. 12 (1975).

Michigan has a provision similar to the federal language permitting individual adjustment of complaints for certain public employees. The statute states:

> . . . Provided, that any individual employee at any time may present grievances to his employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect, provided that the bargaining representative has been given opportunity to be present at such adjustment. M.C.L.A. § 423.211 (Stat. Ann. 1968 Rev.)

The Michigan Court of Appeals interpreted the section in a case where a teacher who was covered by a collective bargaining agreement containing a grievance procedure chose to file a

grievance directly with the school board without following the contractual procedures. In rejecting her absolute right to a hearing before the board, the Michigan court adopted the Black-Clauson rationale for the language but recognized the employer's right to refuse the adjustment. Mellon v. Board of Education of Fitzgerald Public Schools, 1 CCH PBC ¶10,318 (Mich. Ct.App. 1970).

Even though the Iowa Act does not require an adjustment of an individual grievance which is consistent with the collective bargaining agreement, the employer might be subject to a refusal to bargain charge under ¶ 20.10(2)(e), The Code 1979, if it negotiates on mandatory subjects with anyone other than the exclusive bargaining representative. There is a fine line between individual bargaining which is a violation of the duty to bargain and adjusting an individual complaint. Akron Education Association & Akron Community School District, P.E.R.B. Case No. 1161 (1977). But the question of whether in any given case an employer is requested to adjust a complaint or engage in negotiations is a factual determination which should be made by the Public Employment Relations Board pursuant to a complaint filed with the agency.

One other issue must be mentioned in passing. That is the First Amendment right of public employees to present their complaints to a public employer. In a recent case the U. S. Supreme Court held that the Madison, Wisconsin School Board could not prohibit employees from appearing and speaking before the Board in the same manner as other citizens. City of Madison, Joint School District No. 8 v. WERC, 429 U.S. 167, 97 S.Ct. 421 (1975). Thus, while it is not a prohibited practice for an employer to decline to adjust an individual complaint outside the collective bargaining agreement, the employer cannot discriminate against employees who desire to express their views as ordinary citizens at a public meeting.

In summary, the Act would permit the employer to meet with the individual employee who seeks to adjust an individual complaint without the intervention of the exclusive bargaining representative, but the employer is under no obligation to do so. If the employer decides to make an adjustment it risks committing a prohibited practice under § 20.10, The Code 1979, for engaging in individual bargaining or for refusing to bargain with the exclusive representative.

In answer to your question, subject to the above explanation, an individual employee may seek to meet with the public employer and adjust an individual grievance. A public employer is under no duty to meet with the employee and may

decide to abide by the procedures established in the collective bargaining agreement. However, a public employer may not prohibit employee/citizen input at public meetings.

Yours very truly,

NANCY D. POWERS
Assistant Attorney General

NDP/maw

PUBLIC BONDS: SCHOOLS; BONDS. 1980 Session, 68th G.A., S. F. 500; § 296.1, The Code 1979. The increased interest rates payable on school bonds may not be paid on bonds authorized by an election held prior to the effective date of S. F. 500. The prior limitation contained in § 296.1, The Code 1979, applies to bonds authorized by elections held prior to the effective date of S. F. 500, which was April 12, 1980. (Norby to Tieden, State Senator, 6/24/80) #80-6-15(L)

June 24, 1980

Honorable Dale L. Tieden
State Senator
R. R. #2
Elkader, Iowa 52043

Dear Senator Tieden:

You have requested an opinion of the Attorney General regarding the applicability of 1980 Session, 68th G.A., S. F. 500 to school bond elections which were held prior to the effective date of this statute. (The effective date of S. F. 500 was April 12, 1980.) Senate File 500 raises the maximum interest rate which may be paid on certain public bonds. In regard to these bonds, the maximum interest rate which may be paid to the bondholders is raised by three percent per annum over the prior limitation for projects of five million dollars or less, and the maximum limit is removed for larger projects. Prior to April 12, 1980, bonds of school districts were limited to a maximum rate of seven percent. Section 296.1, The Code 1979. Accordingly, S. F. 500 will permit rates of ten percent on issues of less than five million dollars, and no limit on larger issues. The essence of your question is whether bonds authorized by the electors prior to April 12 may be sold at the new increased rates or may only be sold at a rate not exceeding seven percent. As discussed below, these bonds may not be sold at a rate exceeding seven percent. A new election is necessary for school bonds to be sold at the rates authorized by S. F. 500.

The ballot ordinarily submitted to the voters in a school bond issue election states only the principal amount to be raised and the purpose for which this amount will be expended. This does not, however, imply that all other terms of bonds are left open to change by the Legislature after the election. Jurisdictions

which have considered legislation increasing a maximum interest rate after an election, but prior to sale of the bonds, have stated that the bonds may not be sold at the increased rates. Peery v. City of Los Angeles, 203 P. 992 (Cal. 1922); Miller v. Ayres, 211 Va. 69, 175 S.E.2d 253 (1970); Taxpayers of Milan v. Tennessee Central Railroad Co., 11 LEA (79 Tenn.) 329 (1883); Wallace v. Ball, 205 Ala. 623, 88 So. 442 (1927), 64 Am.Jur.2d § 186. In Wallace v. Ball, the court stated that bonds could be sold only at the maximum rate authorized at the time of the election even though subsequent legislation expressly provided for retroactive application of increased rates. Jurisdictions considering a closely related issue, post-election legislation authorizing sale of bonds at less than par value where prior legislation required sale at par, have uniformly held that such legislation could not operate retroactively by authorizing sale of unsold bonds at less than par value. David v. Timon, 183 S.W. 88 (Texas 1916); Wallace.

The results of the above cases appear to rest upon the premise that the approval of a public bond creates a pact between voters and public officials that is of the nature of a contract. Accordingly, retroactive legislation affecting the terms of bonds has been considered analogous to unilateral modification of contract terms. David v. Timon. Considering the election to create a pace analogous to a contract, several principles apply which preclude application of S. F. 500 to elections conducted prior to April 12, 1980.

Initially, while the rate of interest to be paid on school bonds is not specified on the ballot, the voters are presumed to have knowledge of the statutes which affect the terms of the bonds. Neal v. Bd. of Supervisors of Clark Co., 53 N.W.2d 147 (Iowa 1952); Nalle v. City of Austin, 85 Tex. 520, 22 S.W. 668 (1893); Perry, 203 P. at 996; Taxpayers of Milan, 11 LEA (79 Tenn.) at 325; Miller v. Ayres, 175 S.E.2d at 254; 91 A.L.R. 12. Accordingly, while the school bond election ballots did not state that the bonds could be sold at a maximum rate of seven percent, the voters are presumed to have known that this maximum limitation existed.

Having established that the voters are chargeable with knowledge of the applicable maximum rate, this raises the question of whether the voters may justifiably rely on the current rates being applied to any bonds sold pursuant to the election. Stated conversely, may this reliance be upset by legislation enacted after the election. The essential determinate for this question appears to be whether the change brought about by the legislation should be characterized as a material or nonmaterial

change. A nonmaterial change may be made retroactively. City of Louisville v. Kesselring, 257 S.W.2d 599 (Ky. 1953); 64 Am. Jur.2d § 186. A change in the maximum interest rate, however, appears to constitute a material change which may not be made retroactively. Miller v. Ayres, 91 A.L.R. 20. In Miller v. Ayres, the Court listed four major criteria involved in a bond election.

1. The project--the purpose for which the money is being borrowed;

2. The amount of the proposed bond issue--the cost of the project;

3. The duration of the bond issue--how and when the money being borrowed is to be repaid;

4. The interest on the bonds--how much the money being borrowed is costing the taxpayers.

The Iowa statutory scheme for sale of bonds appears designed to apprise the voters of the important terms of bonds proposed to be issued, including the four major criteria listed above. Initially, no public bond may be sold at less than par value. Section 75.5, The Code 1979. The maturity of public bonds is limited. §§ 76.1, 76.7, 28F.8, 37.1, 111A.6, 280A.20, The Code 1979. The maximum interest rate is either set by statute, or must be specified on the ballot. §§ 37.6, 37.28, 75.12, 111A.6, 145A.17, and see other statutes listed in S. F. 500, § 2, which provide maximum limits; § 345.6 (which requires that the interest rate appear on the ballot). See also § 384.26. (In circumstances where bonds may be issued without an election, the required public notice must state the maximum rate of interest. Additionally, ten percent of eligible electors may petition to require that the issue be abandoned or submitted to the electors.) While these requirements may not allow an exact calculation of the cost of a bond issue prior to an election, they do allow a voter to estimate the cost. Particularly when a prior maximum limit is increased, we believe the voters would be denied the opportunity to make an informed decision if a new election is not required. In essence, legislation which increases a statutory maximum interest rate limitation may only

operate prospectively. The election authorizing the bond issue is the appropriate time from which to determine whether the change will operate prospectively or retrospectively, not the date of sale of the bonds.[1] Accordingly, the rates of interest specified in S. F. 500 apply only to bonds authorized by elections held after the effective date of S. F. 500.

Sincerely,

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

[1]Senate File 500, § 4, which concerns assessment bonds, purports to allow sale of bonds at rates exceeding the statutory rate in effect at the time of adoption of the resolution of necessity by the appropriate city council. See § § 384.51, 384.59, 384.60, The Code 1979. In light of the principles discussed in this opinion regarding retroactivity, it is questionable whether such an increase may be made.

COUNTY AND COUNTY OFFICERS: County attorney's duties. §§ 29A.34, 336.2(1)(11), The Code 1979. County attorney is afforded some discretion in the decision whether to bring action to recover military property or its value, when asked to do so by Iowa Army National Guard company commander. Costs of bringing action are treated in same manner as costs in other civil actions brought by county attorney. (Hyde to Riepe, Henry County Attorney, 6/19/80) #80-6-13 (L)

June 18, 1980

Michael A. Riepe
Henry County Attorney
205 1/2 W. Monroe
Mt. Pleasant, Iowa 52641

Dear Mr. Riepe:

We have received your request for an opinion from this office concerning the obligation of a county attorney to take legal action to collect small amounts of money at the request of the local company commander of the Iowa Army National Guard. Your specific questions and our responses are set out below:

1. Is the county attorney required by statute upon direction of a company commander to bring action in the name of the State of Iowa against any person for the recovery of any property issued by said company commander, regardless of the amount claimed?

Section 29A.34, The Code 1979, provides:

> The commanding officer of a company receiving clothing or equipment for the use of his command shall distribute same to the members of his command, taking receipts and requiring the return of each article at such time and place as he shall direct.
>
> Upon the direction of any company commander it shall be the duty of the county attorney to bring action in the name of the state of Iowa against any person for the recovery of any property issued by said company commander or his predecessor, or for the value thereof as set forth in the price list promulgated by the federal government.

> All sums so collected shall be paid to such company commander and used for the replacement of military property charged to the organization. [Emphasis added.]

The language of § 29A.34 is identical to introductory language contained in § 336.2, The Code 1979, setting forth the duties of the county attorney:

> It shall be the duty of the county attorney to:
>
> 1. Diligently enforce or cause to be enforced in his county, all of the laws of the state, actions for a violation of which may be commenced or prosecuted in the name of the state of Iowa, or by him as county attorney, except as otherwise specially provided.
>
> * * *
>
> 5. Enforce all forfeited bonds and recognizances, and to prosecute all proceedings necessary for the recovery of debts, revenues, moneys, fines, penalties, and forfeitures accruing to the state or his county . . .
>
> * * *
>
> 11. Perform other duties enjoined upon him by law. [Emphasis added.]

A literal reading of these sections would lead to the conclusion that these duties are compulsory, with no provision for the exercise of discretion. "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 excludes the idea of discretion." Consolidated Freightways Corporation v. Nicholas, 258 Iowa 115, 121, 137 N.W.2d 900, 904 (1965). "Duty denotes an obligation; it is compulsory." Kerrigan v. Errett, 256 N.W.2d 394, 399 (Iowa 1977).

Judicial construction of the mandate to enforce the law, however, has led to almost limitless discretion on the part of the county attorney in the criminal realm, e.g., deciding whether or not to initiate prosecution of a suspect. See State v. Kyle, 271 N.W.2d 689, 693 (Iowa 1978); State v. Hospers, 147 Iowa 712, 714, 126 N.W. 818, 819 (1910). Earlier opinions from this office recognized the need for the exercise of discretion in other county attorney responsibilities:

> It is our opinion that this section [§ 5180, The Code 1935, now § 336.2, The Code 1979] vests in the county attorney a broad discretion as to the manner in and the means by which the laws of the state shall be enforced. He is an elected official accountable to no one except the electorate.

1940 Op. Atty. Gen. 5; 1940 Op. Atty. Gen. 211. Indeed, given the often limited resources available to a county attorney to fulfill the numerous obligations imposed on the office by the Code, some discretion must be extended a county attorney in the execution of his or her responsibilities. When the value of military property sought to be recovered is minimal, compared to the time and office resources required to pursue an action, it is our opinion that the county attorney is not required to bring an action pursuant to § 29A.34, The Code 1979. We believe the decision whether to initiate such a claim would be within the discretion of the county attorney.

2. Is the county attorney or some other government agency responsible for payment of costs of litigation including: filing fees, costs of service of notice, mailing expenses, etc. incurred in connection with any action for recovery of property?

Ch. 29A, The Code 1979, contains no provision for the advance of litigation costs incurred in a recovery action. Since § 29A.34, The Code 1979, requires an action to be brought "in the name of the state of Iowa", costs of those actions which you do institute under § 29A.34, The Code 1979, should be handled in the same manner as in other civil actions initiated by the county attorney pursuant to § 336.2(1), The Code 1979. There appears to be no prohibition on a county attorney seeking to waive some costs, such as filing fees, or to assess costs against a defendant. See ch. 625, The Code 1979.

3. Are there guidelines issued to company commanders setting forth a minimum amount of controversy before such claims are to be referred to the county attorney for collection?

Neither ch. 29A nor ch. 336, The Code 1979, contain a minimum value restriction on the county attorney's obligation to bring an action to recover property pursuant to § 29A.34, The Code 1979.

Colonel Robert E. Barker of Camp Dodge has indicated that no specific guidelines have been set by the Iowa Army National Guard by which local company commanders determine whether to refer a claim to the county attorney for action pursuant to § 29A.34, The Code 1979.

In conclusion, it is our opinion that the county attorney is afforded some discretion in the decision whether to bring action to recover property or its value pursuant to § 29A.34, The Code 1979, when asked to do so by a local company commander of the Iowa Army National Guard. Costs in litigation should be handled in the same manner as other civil actions brought by the county attorney.

Very truly yours,

Alice J. Hyde

ALICE J. HYDE
Assistant Attorney General

AJH:sh

AGRICULTURE: Property Law: Criminal Law. Recordation of Contract Sales of Agricultural Real Property; Criminal Prosecution for Failure to Record Conveyances and Leases of Agricultural Property. § 558.44, The Code 1979. A contract sale of agricultural real property is a conveyance within the meaning of § 558.44, The Code 1979. The action to enforce the provisions of § 558.44, The Code 1979, is a criminal prosecution. (Willits to Frisk, Harrison County Attorney 6/19/80) #80-6-12 (L)

June 19, 1980

Mr. Judson L. Frisk
Harrison County Attorney
P.O. Box 128
Logan, Iowa 51546

Dear Mr. Frisk:

You have requested our opinion on two issues concerning § 558.44, The Code 1979:

> 1. Is a real estate contract a conveyance that must be recorded within 180 days of the date of the conveyance?
>
> 2. The county attorney must prosecute violations of this section in the district court. Is the prosecution a civil action or a criminal action?

I

The first question has been answered in the Op.Atty. Gen. #79-9-8 (Hamilton to Harbor, State Representative, 9/13/79). A copy of that opinion is enclosed for your information. At Section V, page 7, that opinion holds that a contract sale is a conveyance within the meaning of § 558.44, The Code 1979:

> One final question concerning § 558.44 is the meaning of 'conveyance' and when it occurs for the purpose of the running

> of the one hundred eighty day period. Section 558.43(3) defines 'conveyance' as 'all deeds and all contracts for the conveyance of an estate in real property except those contracts to be fulfilled within six months from date of execution thereof'.
>
> This definition clearly encompasses the vast majority of transactions in which an estate in real property is transferred to another, including land sales by installment contract. For purposes of the § 558.44 one hundred eighty-day period, the date of conveyance is the day that the transaction is completed, i.e. when the documents are executed. This date would generally appear on the deed, contract or lease.

II

The second question has not been directly addressed previously. Unnumbered paragraph four (4) of § 558.44, The Code 1979, reads as follows:

> Failure to record a conveyance or lease of agricultural land required to be recorded by this section by the grantee or lessee within the specified time limit is punishable by a fine not to exceed one hundred dollars per day for each day of violation. The county recorder shall record a conveyance or lease of agricultural land presented for recording even though not presented within one hundred eighty days after the date of conveyance or lease. The county recorder shall forward to the county attorney a copy of each such conveyance or lease of agricultural land recorded more than one hundred eighty days from the date of conveyance. The county attorney shall initiate action in the district court to enforce the provisions of this section. Failure to timely record shall not invalidate an otherwise valid conveyance or lease. [Emphasis supplied.]

The term "fine" ordinarily refers to a pecuniary punishment which may be legally imposed or assessed only by a lawful tribunal in a case wherein it has jurisdiction, properly invoked, of the offense charged and of the person of the accused. It is the sentence pronounced by the court for the violation of a criminal law, the amount of which may be fixed by law or left in the discretion of the court. Marquart v. Maucker, 215 N.W.2d 278, 282 (Iowa 1974).[1] State v. Belle, 92 Iowa 258, 60 N.W. 525, (1894). It appears to be well settled that the term "fine" is a word of art referring to the punishment for conviction of a crime. See, e.g. Schick v. U.S., 195 U.S. 65, 24 S.Ct. 26, 49 L.Ed. 99 (1904); In re Acker, 66 F. 290 (1894); Sinner v. State, 128 Neb. 759, 260 N.W. 275 (1935); Frezier v. Terrill, 65 Ariz. 131, 175 P.2d 438 (1946). Thus, it is our opinion the action referred to in § 558.44, The Code 1979, is a criminal prosecution for violations of the section.

Sincerely,

Earl M. Willits

EARL M. WILLITS
Assistant Attorney General

EMW/nay

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[1]For an extensive discussion of the distinction between criminal fines and civil penalties, see Op.Atty.Gen. #79-3-2, Miller and Schantz to Kopecky, 3/9/79, concerning Ch. 1061, Acts of the 67th G.A. (1978), "An Act Prohibiting Smoking in Certain Public Areas and Providing a Civil Penalty."

SCHOOLS: Employment of legal counsel. § 279.37, The Code 1979; 1980 Session, 68th G.A., S. F. 426. A school board has discretionary power to employ legal counsel to represent a superintendent or principal before the Professional Teaching Practices Commission. (Norby to Robinson, State Senator, 6/19/80) #80-6-11(L)

June 19, 1980

Honorable Cloyd Robinson
State Senator
404 Cherry Hill Road, S. W.
Cedar Rapids, Iowa 52404

Dear Senator Robinson:

You have requested an opinion of the Attorney General regarding the ability of a school board to authorize payment of legal expenses of a superintendent or principal in connection with an appearance before the Professional Teaching Practices Commission. As discussed below, it appears that this type of expenditure may be made in the discretion of the school board.

Authorization for school boards to employ legal counsel is contained in § 279.37, The Code 1979, which provides as follows:

> In all cases where actions may be instituted by or against any school officer to enforce any provision of law, the board may employ counsel, for which the school corporation shall be liable.

This provision has been amended effective January 1, 1981, to provide as follows:

> A school corporation may employ an attorney to represent the school corporation as necessary for the proper conduct of the legal affairs of the school corporation.

1980 Session, 68th G.A., S. F. 426. The effect of this amendment on your question is discussed later in this opinion.

Initially, § 279.37, The Code 1979, is not limited to only actions brought against a school district itself, but applies as well to actions brought against school officials individually. Rural Independent School District of Eagle v. Daley, 201 Iowa 286, 207 N.W. 124 (1926); 1936 Op. Atty. Gen. 373; 1968 Op. Atty. Gen. 539. While 1912 Op. Atty. Gen. 502, at 504 states that counsel may not be employed except where the school district is the real party in interest, we believe that this interpretation is erroneously narrow if read to limit employment of counsel to actions where a school district is named as a party. Accordingly, employment of counsel is not prohibited because a school official is personally named in a proceeding.

The primary element in determining whether employment of counsel is appropriate is whether the proceeding involves a controversy related to the exercise of the official duties of the school official involved. 1936 Op. Atty. Gen. 373. Regarding the situation presented here, the quality of professional practices of school officials appears to be a matter clearly involving the official duties of a superintendent or principal and accordingly an appropriate matter for employment of legal counsel by the school board.

In Scott v. Ind. District of Hardin, 91 Iowa 156, 59 N.W. 15 (1894), the Court appears to suggest that a determination on the merits of a proceeding against the school official involved should preclude payment of legal fees by the school district. It does not appear, however, that § 279.37, The Code 1979, provides for such a prohibition. Rather, the decision to employ counsel is placed in the discretion of the school board, and while this discretion may be subjected to review, a failure to prevail on the merits of the action does not per se indicate an abuse of discretion by the school board.

As noted above, § 279.37 was amended by 1980 Session, 68th G.A., S. F. 426. Senate File 426 appears designed to broaden the circumstances in which a school board may retain counsel. Section 279.37 allowed retention of counsel only in connection with proceedings actually instituted. 1968 Op. Atty. Gen. 154. In contrast, S. F. 426 allows retention of counsel "as necessary for the proper conduct of the legal affairs of the school corporation". While S. F. 426 does refer to representation of the "school corporation", in contrast to § 279.37 which refers specifically to actions instituted by or against school officers, we do not believe this change restricts employment of counsel to actions in which a school district is a named party. On the contrary, the broad language "legal affairs of the school corporation" would appear to encompass proceedings instituted against school officials.

In conclusion, legal counsel may be employed by a school district in the discretion of the school board to represent a superintendent or principal in a proceeding before the Professional Teaching Practices Commission.

Sincerely,

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

CONSTITUTIONAL LAW; Private Use of City Property; IOWA CONST. art. III, § 31, § 721.2(5), The Code 1979, § 903.1(2), The Code 1979, § 740.20, The Code 1977. Absent the vote of two-thirds of the members of each branch of the General Assembly, a city may not, consistent with the Iowa Constitution, authorize the use of city property by city employees for their private use. (McNulty to Rush State Senator, 6/18/80) #80-6-10

June 18, 1980

The Honorable Bob Rush
State Senator
830 Higley Building
Cedar Rapids, Iowa 52401

Dear Senator Rush:

You have requested the opinion of this office regarding the meaning of Iowa Code section 721.2(5). This section provides that any public officer or employee, or any person acting under color of such office or employment who knowingly "[u]ses or permits any other person to use the property owned by the state or any subdivision or agency of the state for any private purpose and for personal gain, to the detriment of the state or any subdivision thereof" is guilty of a serious misdemeanor. [1]

You ask whether a city, consistent with section 721.2(5), may authorize the use of city-owned equipment by city employees for their own purposes as a fringe benefit of their employment. You note that the prior criminal statute on private use of public property, section 740.20, The Code 1977, [2] had been interpreted by this office to prohibit such authorization. See 1978 Op.Att'y Gen. 191.

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[1] A serious misdemeanor is punishable by imprisonment not to exceed one year, or a fine not to exceed one thousand dollars, or both. § 903.1(2), The Code 1979.

[2] 740.20 Private use of public property. No public officer,

In contrast to section 740.20 of the 1977 Code, present Code section 721.2(5) requires proof of personal gain and detriment to the governmental body in addition to the existence of a private purpose to establish a criminal violation. Regardless of the effect section 721.2(5) has on the continued validity of our prior opinion concerning section 740.20 of the 1977 Code, we have concluded that the Iowa Constitution generally prohibits a city from authorizing the use of city-owned property by city employees for their own purposes. Article III, section 31 of the Iowa Constitution 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. [Emphasis added].

This constitutional provision is applicable to cities. Love v. City of Des Moines, 210 Iowa 90, 101, 230 N.W. 373, 378 (1930). The constitution makes no attempt to define private purpose nor has the Supreme Court of Iowa articulated a concrete definition. What is clear, however, is that the use to which the property is put determines, in large part, its private or public nature. See 81A C.J.S. States § 205 (1977). See also 63 AM. JUR. 2d Public Funds § 59 (1972). Otherwise stated, an appropriation of public money or property, to be valid, must be utilized by the governing body in the exercise of its governmental functions. 81A C.J.S. States § 205 (1977). It cannot be gainsaid that the use of city-owned equipment by city employees for their

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FN. No. 2 continued for Page One

> deputy or employee of the state or any governmental subdivision, having charge or custody of any automobile, machinery, equipment, or other property, owned by the state or a governmental subdivision of this state, shall use or operate the same, or permit the same to be used or operated for any private purpose.

own use is private in nature. No governmental functions are involved. It is irrelevant that a resolution authorizes such use as a fringe benefit. The private nature of the use remains the same. Moreover, the benefits that would flow to the public from such use of city equipment, e.g., city employee morale, seem indirect and remote. Therefore, absent the vote of two-thirds of the members of each branch of the General Assembly, it is unconstitutional for a city to authorize its employees to use city equipment for their own purposes.

Such authorization and use is impermissible whether or not particular facts give rise to criminal liability under section 721.2(5), The Code 1979. The fact that a city council feels that certain private use of city property is not detrimental to the city is not binding on a trier of fact at a criminal trial.[3] See State v. Striggles, 202 Iowa 1318, 1320, 210 N.W. 137, 138 (1926). Cf. John R. Grubb, Inc. v. Iowa Housing Finance, 255 N.W.2d 89, 93 (1977) (legislative declaration of public purpose is not final, binding, or conclusive on the courts).

Sincerely,

Patrick McNulty
Assistant Attorney General

PM:jkt

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[3] A report from the Citizen's Aide/Ombudsman's Office has been provided to us regarding the private use of city property by a city employee in Center Point. We express no opinion on the application of section 721.2(5) to that situation.

MOTOR VEHICLES - Vehicle registration and drivers licensing - Nonresident Exemptions. §§47.4(4), 321.53, 321.54, 321.55, 321.174, 321.176. While considerable weight should be accorded a declaration of residency in Iowa for voting purposes, it does not automatically deny an individual nonresident status regarding vehicle registration and drivers licensing exemptions. (Dundis to Kelly, Jefferson County Attorney, 6/18/80) #80-6-9(L)

June 18, 1980

Mr. Ed Kelly
Jefferson County Attorney's Office
P.O. Box 603
Fairfield, IA 52556

Dear Mr. Kelly:

In your letter of April 4, 1980, you question whether an individual who declares himself/herself to be a resident within this state for voting registration purposes is automatically subject to the Iowa resident vehicle registration and driver's license requirements. Sections 321.53 through 321.55, The Code 1979, provide for non-resident exemptions from vehicle registration (as long as the vehicle is registered in another state), and §321.176, The Code 1979, provides a similar exemption from driver licensing requirements.

There is no uniform definition of the term "resident" to be found in the Iowa Code nor court decisions. Rather, it ". . .is an elastic word with varied statutory meaning, dependent upon the context of the statute in which it is used and the purpose and object to be attained." Pittsburgh-Des Moines Steel v. Town of Clive, 249 Ia. 1346, 1348, 91 N.W.2d 602, 604 (1958).

The areas of voting registration and motor vehicle law do not share the same statutory definition of "resident." Section 47.4(4), The Code 1979, states that, "A person's residence, for voting purposes only, is the place which he declares is his home with the intent to remain there permanently or for a definite

or indefinite, or undeterminable length of time." Chapter 321, The Code 1979, on the other hand, simply describes a nonresident as "[e]very person who is not a resident of this state." §321.1(37), The Code 1979. Accordingly, then, there must be a comparison of the purposes and objects to be attained through both statutes.

Paulson et al., vs. Forest City Community School District in Winnebago et al., Counties, Iowa, et al., 238 N.W.2d 344 (Iowa 1976), explored some of the reasoning behind §47.4(4). The Court recognized an underlying object in voting registration to be maintenance of a "political community." Id. at 347. However, the Court ruled that, although acknowledging their "hometown" or "family home" to be outside the school district, their stay in the district for educational purposes and of a potentially temporary nature, and various other "out-of-district" contacts, Waldorf College students could participate in a Forest City Community School District bond issuance election. Id. at 348-49.

It was concluded that a home for voting purposes might arguably be either of two places, and that a person's intent as expressed by his or her §47.4(4) declaration could, as with the Waldorf students, tip the scales toward residency in any one location.

Discussing the term "definite," in §47.4(4), the Court observed that the legislature had "opened the door to persons who intend to live at a place until a certain time such as students - if the persons otherwise qualify." Id. at 349. The Court itself left that door open by refusing to set any minimum time limits:

> Plaintiffs argue that this interpretation means a mere transient who intends to travel on two days later would be qualified. But plaintiffs overlook requirement (a) that the place be 'home.' Moreover, we will deal with case of intention to stay a very short time when they come before us. . . .

Id. at 349. Although a person declaring a two or three-month voting residency being allowed to vote seems an improbable situation, the important point is that Paulson leaves it a possibility depending upon particular circumstances.

An individual staying in Iowa for only a very short period of time, such as the hypothetical two or three month residency possibility under §47.4(4) and Paulson, might argue the nonresident vehicle registration exemption of §321.54, The Code 1979 for a variety of reasons. The objects to be obtained under both statutes are of course different. The vehicle registration

laws of this state were enacted, first, "to regulate their use upon the streets and highways" of Iowa. 1911 Session, 34th G.A., Chap. 72, Preamble, p. 69; 1907 Session, 30th G.A., Chap. 53, Preamble, p. 44. That regulation involves supervision of vehicles, their movement and control, and establishing their identity in relation to the public and to any resultant damage or injury they may occasion. 7 Am.Jur.2d "Automobiles and Highway Traffic," §§50-53, (1980). Registration also protects purchasers of motor vehicles, and impedes the sale of stolen or other unregistered vehicles. 60 C.J.S., "Motor Vehicles," §§58-59 (1969).

Additionally, as provided by the Eighteenth Amendment to the Iowa Constitution, vehicle registration fees provide financing for construction and maintenance of Iowa highways:

> 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.

Iowa Const., Art. VII, §8 (1942). Vehicle registration requirements, then, are part of the state's police power, enacted for the public welfare, while the resultant fees over and above administration costs, help provide and pay for highways by those who use them.

Since vehicle registration in another state is required for a nonresident exemption, §321.53, The Code 1979, Iowa could manage identification of an out-of-state vehicle through the other state, at least temporarily. The impetus for providing a source of funding for highways through registration would grow less as the percentage of out of state operating time during any one year became quite large. Iowa's desire for reciprocity for its citizens traveling or living briefly in other states would of course be a factor. These arguments also presuppose the validity of the short term intentions.

Drivers licenses are also not demanded of nonresidents as long as they are licensed in their home state. §321.176 The Code, 1979. Licensing requirements, as with those for vehicle registration, are part and parcel of the state's police power:

> In other words, the fundamental purpose underlying the enactment of such statutes is to insure a minimum of competence and skill on the part of drivers of motor vehicles generally, so as to protect third persons who might otherwise be injured or else have their property damaged by the negligent or reckless operation of vehicles on the public highways. Such statutes are also a device for the more efficient enforcement of the many and varied police regulations that govern the case of the highway.

7 Am.Jur.2d "Automobiles and Highway Traffic," §§93-94, p. 666 (1980). Determination of residency for drivers licensing, as well as vehicle registration, is rooted in different considerations than those for voting. Requiring driver licensing in another state insures at least a minimum of competence and skill on the part of a nonresident. Considering the validity of the short term intentions and the desire for reciprocity once again, a temporary allowance of nonresident status might very well be allowed.

In summary, it is clear that declaration of residence within Iowa for voting purposes under §47.4(4) is an important factor to be considered in determining residency for vehicle registration and drivers licensing purposes. However, residency definitions are not uniform - each must be viewed in light of the statute it is part of and the underlying purposes behind it. Consideration of §47.4(4), and cases interpreting it in relation to the relevantmotor vehicle statutes, leads to the conclusion that a declaration of voting residency in Iowa does not automatically deny an individual nonresident status regarding vehicle registration and drivers licensing exemptions. It is a matter that must be determined on a case-by-case basis.

Sincerely,

Stephen P. Dundis

Stephen P. Dundis
Assistant Attorney General

PUBLIC RECORDS; SCHOOLS: §§ 68A.1, 68A.7, 68A.8, 68A.9, The Code 1979; 20 U.S.C. 1232g. Names and addresses of students contained in public records in the custody of public schools are not confidential, for purposes of § 568A.7, and therefore, are open to public inspection. 20 U.S.C. 1232g, as incorporated by § 68A.9, however, requires that the school provide parents of students or adult students with an opportunity to inform the school that they do not want this information to be released without their prior consent. (Norby to Benton, Superintendent, Department of Public Instruction, 6/18/80) #80-6-8 (L)

June 18, 1980

Robert D. Benton, Ed. D.
Superintendent
Department of Public Instruction
L O C A L

Dear Dr. Benton:

You have requested an opinion of the Attorney General concerning the release by public schools of the names and addresses of students. Specifically, the following two questions are of interest:

1. Whether local public school officials may release the names and addresses of students;

2. If the answer to Number 1 is in the affirmative, under what conditions may the names and addresses of students be released.

These questions primarily involve application of ch. 68A, The Code 1979, "Examination of Public Records" and 20 U.S.C. 1232g, "The Family Educational Rights and Privacy Act". This federal statute provides for loss of federal funds if certain guidelines are not followed regarding release of student information. See 20 U.S.C. 1232g(a)(1)(A), (b)(1), (b)(2), (f). As virtually all of Iowa's public school districts receive federal funds, the possibility of loss of these funds provides an incentive to comply with 12 U.S.C. 1232g. Additionally, § 68A.9 provides for suspension of the application of ch. 68A to the extent necessary to prevent loss of federal funds otherwise available to state agencies. The 20 U.S.C. 1232g guidelines are therefore incorporated into ch. 68A with regard to federal funds that are received by the State Department of Public Instruction.

Several points should be made initially. First, records containing student names and addresses are clearly "public records" for purposes of ch. 68A. See § 68A.1. Accordingly, records of

names and addresses are open to public inspection unless a Code provision expressly limits public inspection. Section 68A.2, The Code 1979; Des Moines Register and Tribune v. Osmundson, 248 N.W.2d 493,502 (Iowa 1976). The exception which may apply to records containing names and addresses of students is contained in § 68A.7(1), which provides as follows:

> The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information.
>
> Personal information in records regarding a student, prospective student, or former student of the school corporation or educational institution maintaining such records. [Emphasis supplied.]

Accordingly, even if a record is properly classified as confidential, such a record can be opened to examination by the public in the discretion of the lawful custodian. Section 68A.7, The Code 1979. The lawful custodian would appear to be the head administrator of a school. In other words, a student's entire record might be released by the lawful custodian and the student would not have a basis for protection afforded by § 68A.7. But see § 68A.8. In other words, § 68A.7 does not directly protect an individual from disclosure of confidential records, but does provide a basis upon which a lawful custodian may exercise discretion in maintaining confidentiality of records. Chapter 68A does not, however, provide any criteria to guide the custodian in regard to when confidential records should be open to inspection. Accordingly, release of confidential student records appears to be left to the discretion of the custodian under § 68A.7. Any attempt to limit access to some members of the public after access has been provided to others, however, would require a strong justification. See Quad-City Community News Service, Inc. v. Jebens, 334 F.Supp.8 (S.D. Iowa 1971).

Turning first to the federal legislation, the information considered herein (student names and addresses) appears to fall within the scope of "directory information", as defined in 12 U.S.C. 1232g(a)(g)(A). Directory information includes the following:

> For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities

> and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student. [Emphasis supplied.]

A prohibition of the release of student records is contained in 12 U.S.C. 1232g(b)(2), but directory information is exempted from the scope of this prohibition. Accordingly, release of student names and addresses would not subject a school to loss of federal funds. 12 U.S.C. 1232g(a)(5)(B), however, requires that a school which desires to make directory information available must give public notice of what information has been designated as directory information and allow parents or adult students a reasonable time in which to notify the school that they do not want this information released without their prior consent. Failure to comply with this procedure will also subject a school to loss of federal funds.

Turning now to the Iowa law, the central issue involved in application of ch. 68A is an interpretation of the scope of the "personal information" exception contained in § 68A.7(1). The language of § 68A.7(1) indicates that personal information constitutes something less than the entire record of a student, otherwise the exception would call for total exemption of student records. As you have noted, the Attorney General has previously issued an opinion stating that under § 68A.7(1), a record of the names of students is a public record, and consequently, open to public inspection, but addresses of students and parents are confidential records, and therefore could be afforded confidential status by the custodian. 1972 Op. Atty. Gen. 192. Subsequent to this opinion, the Attorney General issued an opinion which contradicts this earlier conclusion. 1974 Op. Atty. Gen. 430. This latter opinion states that names and addresses of state employees are public records and that no statutory limitation exempts them from public inspection. 1974 Op. Atty. Gen. 430, 432. Additionally, the latter opinion cites with approval a Wisconsin Supreme Court decision which states that teachers' names and addresses are public record, and not subject to any confidentiality exception under Wisconsin statutory law. 1974 Op. Atty. Gen. 430, 432, citing Board of School Dir. of City of Milwaukee v. Wisc. Emp. Relations Com., 42 Wis. 2d 637, 168 N.W.2d 92, 101 (1969).

State employees' records are subject to an exemption from public record status under § 68A.7(11), which is very similar to the exemption in § 68A.7(1) provided for students. Section 68A.7(11) provides as follows:

> The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information:
> Personal information in confidential personnel records of public bodies including but not limited to cities, boards of supervisors and school districts.

While the latter opinion makes no reference to the earlier student record opinion, the two opinions appear to be irreconcilable. The differences in language between § 68A.7(1) and § 68A.7 (11) do not appear to be significant. Section 68A.7(11) is relatively unhelpful as a definition in that "confidential" records are defined as personal information in "confidential" personnel records.

Having pointed out the above inconsistency, it remains to be decided what is the proper scope of the confidential record exception. The federal legislation discussed above indicates a Congressional determination that both names and addresses of students are generally not entitled to the protection accorded other student records. 12 U.S.C. 1232g(b)(1), (b)(2). While the Iowa Supreme Court has not considered the public record status of student records, it has indicated that ch. 68A should be construed liberally against exceptions to public access to public records. Osmundson; Howard v. Des Moines Register and Tribune, 283 N.W.2d 299 (Iowa 1979). The language of § 68A.7(1), however, is not subject to an easy application. Section 68A.7(1) refers to "personal" information. "Personal" is defined as follows in Webster's New World Dictionary, 2nd College Edition: "of or peculiar to a certain person; private; individual." It is apparent that § 68A.7(1) has been given an interpretation which stresses privacy as a guide to what constitutes "personal information". See 1974 Op. Atty. Gen. 430, 433; Note: Iowa's Freedom of Information Act: Everything You Always Wanted to Know About Public Records But Were Afraid to Ask, 57 Ia.L.Rev. 1163, 1179. Accordingly, the defining of personal information for purposes of § 68A.7(1) appears to require a consideration of the balance of the public's right to know versus the individual's right to privacy, although these criteria are not spelled out in § 68A.7(1). Compare § 68A.8. While public access to students' names and addresses might be inappropriate in certain circumstances, it does not appear that the potential for abuse is so great that these records should be afforded confidential status in all circumstances. The protections afforded by § 68A.8 and 12 U.S.C. 1232g(a)(5)(B) should be sought in cases of abuse of access.

In conclusion, answers to your specific questions are as follows:

1. Records of students' names and addresses are public records open to public examination, and such records are not confidential under § 68A.7(1). However, 12 U.S.C. 1232g (a)(5)(B) requires schools receiving federal funds to provide parents and adult students the opportunity to prevent release of names and addresses without prior consent.

2. As noted above, a parent or adult student may request that a student's name and address not be released without prior consent. Absent such a request, records containing student names and addresses must be open to public inspection. No discretion is placed with the school administration regarding who may inspect or for what reason.

Sincerely,

Steven R. Norby

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

TAXATION: Property Acquisitions by the Iowa Department of Transportation. 1979 Session, 68th G.A., ch. 68, §6 (Senate File 159): §449.1, The Code 1979. The Department of Transportation is subject to the provisions of §6 of Senate File 159, when property is acquired for use as a public highway after July first of each year and the property so acquired was taxable property on the tax rolls on July first. In the event that the Department acquires only a portion of a real estate tract assessed as one item, the Department and the seller may agree how the tax shall be payable between themselves or, if no agreement was made, application can be made to the board of supervisors for apportionment of the tax obligation. Real estate taxes are not a personal obligation of the property owner. (Price to Kassel, Director, Dept. of Transportation, 6/18/80) #80-6-7(L)

June 18, 1980

Mr. Raymond Kassel, Director
Iowa Department of Transportation
800 Lincoln Way
Ames, Iowa 50010

Dear Mr. Kassel:

You have requested an opinion of the Attorney General concerning 1979 Session, 68th G.A., ch. 68, §6 (hereinafter referred to as Senate File 159). In your request, three questions were presented: (1) Does Senate File 159 apply to the Department of Transportation's property acquisitions for use as public highways? (2) In the event that the answer to the first question is yes, then would the Department be responsible for the payment of all real estate taxes assessed as one item on a forty acre tract when the highway acquisition amounted to only two acres? (3) Are the property taxes attributable to such property acquired for highway purposes the personal obligation of the property owners so as to render them liable to the taxing authorities for such taxes?

Section 6 of Senate File 159, effective July 1, 1979, provides as follows:

> Sec. 6. Chapter four hundred twenty-seven (427) Code 1979, is amended by adding the following new sections:
>
> NEW SECTION. Taxable property on the tax rolls on July first of each year is subject to all property taxes levied and payable during the fiscal year. If property which may be exempt from taxation is acquired after July first by a person or the state or any of its political subdivisions and the person or the state or any of its political subdivisions files for a tax exemption for the property, the exemption shall be denied for that fiscal year and the person or the state or any of its political subdivisions shall pay the property taxes levied against the property for that fiscal year. However, the seller and the purchaser may designate, by written agreement, the party responsible for payment of the property taxes due.

A consideration of the first question presented requires a construction of §6 of Senate File 159 as it applies to the Department of Transportation. "(A) statute should be given a sensible, practical, workable and logical construction." Northern Natural Gas Co. v. Forst, 205 N.W.2d 692, 695 (Iowa 1973).

Section 6 of Senate File 159 makes all taxable property on the tax rolls on July first of each year subject to all property taxes levied and payable during the fiscal year.[1] The status of

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[1]This language in §6 of Senate File 159 was construed in Op. Att'y Gen. #80-1-19. The opinion stated:

> "Section 6, on its face, provides for a seemingly impossible situation under Iowa property tax law by stating in the first sentence that "Taxable property on the tax rolls on July first of each year is subject to all property taxes levied and payable during the fiscal year." As previously noted, the 1978-1979 taxes were levied during the 1978-1979 fiscal tax year and are payable in the 1979-1980 fiscal year. By definition, therefore,

the property as taxable or exempt on July first of each year determines whether the property taxes levied during the fiscal year are payable in the next fiscal year. If the property is acquired by the state after July first the state would be obligated to pay the property taxes levied during the fiscal year irrespective of whether the state files for a tax exemption. Therefore, if the Department of Transportation acquires property for use as a public highway after July first, and the property so acquired was taxable property on the tax rolls on July first, the provisions of Senate File 159 would apply and the property would be taxable for the fiscal tax year of acquisition.

In your opinion request, you point out that Senate File 159 contains language presupposing that the state and its political subdivisions will file an application for an exemption but since §427.2, The Code 1979, automatically exempts from property taxation all real estate occuppied as a public road, you feel that Senate File 159 would not apply to the Department's property acquisitions for highways. However, the state and its political subdivisions do not apply or file with any taxing official for a property tax exemption in any other circumstances. See §§427.1 (1) and 427.1(2), The Code 1979. Obviously, the legislature intended in Senate File 159 to retain taxable property acquired by the state and its political subdivisions after July first of the fiscal tax year in a taxable status for that year. Op. Att'y Gen. #80-1-19. The manifest intent of the legislature always prevails over literal import of statutory language used. Northern Natural Gas Co., 205 N.W. 2d at 695.

> the taxes cannot be "levied and payable" in the same fiscal year. The explanation for §6 of Senate File 159 appears to pertain only to one fiscal year, and not to events occurring in two fiscal years. Moreover, consideration of the remaining provisions in the first paragraph in §6 denote a concern for consequences for the fiscal year in which the taxes were levied, and not in the year the taxes are payable. Therefore, we are convinced that the first sentence in §6 pertains to the status of the property on July 1 of the fiscal year in which the taxes were levied. In other words, the status of the property on July 1 of the fiscal tax year is deemed controlling. Historically, in Iowa, the status of the property on the levy date in the tax year has been deemed significant under various circumstances. United States v. 3 Parcels of Land in Woodbury Co., Iowa, 198 F.Supp. at 534."

With reference to your second question, Senate File 159 additionally provides that "the seller and the purchaser may designate, by written agreement, the party responsible for payment of the property taxes due."[2] Therefore, the seller and the Department of Transportation could designate in writing which party would be responsible for paying the property taxes due. Presumably, this language would also encompass the situation where the Department of Transportation acquired 2 acres of a 40 acre tract, i.e. the parties could agree that the state would be responsible for 5 per cent of the total property taxes with the seller being responsible for the remaining 95 per cent. In the event that the seller and the state cannot agree as to what portion of the total tax each portion of the property should bear, either party may file a written application with the board of supervisors for the apportionment of said tax.[3]

The answer to your third question is that the taxing authorities cannot obligate property owners to pay real estate taxes as a personal obligation. The tax sale in Iowa is the only means of collecting delinquent real property taxes where payment is not made voluntarily. In re Estate of McMahon, 237 Iowa 236, 21 N.W.2d 581 (1946). Therefore, in the event of nonpayment, the state may have to pay the delinquent property taxes due. However, if the state did not pay the taxes, it would appear that the taxes could be abated under 1979 Session, 68th G.A. ch. 68, §14.

Very truly yours,

L. Joseph Price
Assistant Attorney General

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[2]This statutory provision merely confirms what private parties to a real estate transaction commonly do, namely, setting forth between themselves how the real estate taxes will be paid. Such agreements are not binding on the taxing authorities.

[3]Section 449.1, The Code, 1979 provides:

> "When a tract of real estate has been assessed and taxed as one item of property, and thereafter and before the tax is paid, the title to different portions of said real estate becomes vested in different parties in severalty, and the said owners are unable to agree as to what portion of the total tax each portion of the real estate should bear, any of said parties may file with the board of supervisors a written application for the apportionment of said tax."

MENTAL HEALTH: MOTOR VEHICLES: Entitlement to a Driver's License. Sections 228.7, 229.9, 229.30, 321.177(5), The Code 1975; §§ 218.95, 229.2, 229.13, 229.27(1)(3), 229.39(1)(2), 321.177(5)(7), The Code 1979. Persons who were involuntarily committed to a mental health facility and discharged therefrom prior to the enactment of present chapter 229 may be denied a license under § 321.177(5), unless discharged from the facility in good mental health, or may be denied a license where good cause exists for such denial under § 321.177(7). Persons voluntarily admitted to and discharged from a mental health facility prior to present chapter 229 are entitled to a driver's license unless, under § 321.177(7), the Department of Transportation obtains substantial evidence that their ability to operate a motor vehicle is impaired. Persons admitted to a mental health facility, either voluntarily or involuntarily, prior to the enactment of present chapter 229, but who have been or will be discharged subsequent to its enactment, may not be denied a license on the basis of mental incompetency, unless specifically adjudged to be incompetent, or unless good cause for the denial is established by substantial evidence. (Mann to Reagen, Commissioner, Department of Social Services, 6/17/80) #80-6-6 (L)

June 17, 1980

Commissioner Michael V. Reagen
Iowa Department of Social Services
Fifth Floor
Hoover State Office Building
L O C A L

Dear Commissioner Reagen:

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

> If an individual was hospitalized for mental illness prior to the effective date of the present Chapter 229, under what circumstances may he/she be issued a driver's license pursuant to § 321.177(5), Code of Iowa? In responding to this question, please distinguish, if necessary, between those individuals released from hospitalization before and after the effective date of Chapter 229.

Your inquiry raises a concern for two groups: (1) those persons who were committed for treatment and were discharged therefrom prior to the enactment of present chapter 229, and (2) those persons committed for treatment prior to the enactment of present chapter 229, but who were discharged subsequent to its enactment. The privilege of obtaining or retaining a driver's license requires a different analysis for each group, but the starting point is the intent of the legislature as expressed or implied in the statutes.

> Although a license to operate a motor vehicle upon the highways is a mere privilege, and not a property or contract right, an administrative agency may not deny, suspend, revoke, or cancel a license arbitrarily or capriciously, but may do so in the manner, and on the grounds, permitted by statute.

Danne, "Denial, Suspension, or Cancellation of Driver's Licenses Because of Physical Disease or Defect," 38 A.L.R.3d 452, 455 (1971).

The statutes applicable to the first group that you are concerned about, those persons committed for treatment and discharged prior to the enactment of present ch. 229, are §§ 321.177(5) and (7), The Code 1975. Those sections read as follows:

> 321.177 Persons not to be licensed. The Department shall not issue any license hereunder:
>
> 5. to any person, as an operator or chauffeur, who has previously been adjudged to be afflicted with or suffering from any mental disability or disease and who has not at the time of application been restored to competency by methods provided by law. Provided, however, that the department may issue such license when said mentally ill person is placed on parole or convalescent leave, when advised in writing

> that the medical staff and superintendent of the institution in which the person has been hospitalized recommend the issuance of said license.
>
> 7. To any person when the director has good cause to believe that such person by reason of physical or mental disability would not be able to operate a motor vehicle with safety upon the highways. (emphasis added).

Pursuant to the above section, the Iowa Department of Transportation adopted administrative rules in July of 1975, which are still in effect at the present time. These rules, found at § 820--[07,C]13.2(321), the Iowa Administrative Code, read as follows:

> 820--[07,C]13.2(321) Persons not to be licensed. The department shall not issue a license to any person as outlined in section 321.177 of the Code.
>
> 13.2(1) The department shall not consider the issuance of a license to any person who has been committed to any prison, asylum, hospital or similar institution whether public or private because of insanity, neurological disorder, the psychoes [sic], feeblemindedness or other mental disorder or disease until such person can provide the department with a sworn statement signed by the head of the institution to which such person was committed, stating that such person was discharged as cured. If such person is on parole or convalescent leave, such person will be considered for licensing if the department is advised

in writing by the medical staff and institution that issuance of a license is recommended from a medical viewpoint. Whenever the department receives a record of commitment from an institution for a person licensed to drive in Iowa, the department shall suspend such license on the grounds that such person is incompetent. If the person does not have enough time remaining on the license to give the required advance notice as provided in section 321.210, the person will be denied further licensing. The effective date of such denial will be when the license is no longer valid for driving. Such persons shall not be considered for licensing until the aforementioned statement or recommendation is provided to the department. In addition, such persons must provide the department with a satisfactory medical report. Any person denied or suspended pursuant to this rule must meet the visual standards for licensing, pass the required knowledge examination(s) and pass the required driving test before a license will be granted.

13.2(3) The department shall not consider the issuance of a license to a person when the department has cause to believe that a person by reason of physical or mental disability or disease would not be able to operate a motor vehicle safely. When the department has good cause, a person licensed to drive in Iowa will have driving privileges suspended, on grounds that such person is incompetent. If such person does not have

> enough time remaining on the license to give the required advance notice as provided in section 321.210, the person will be denied further licensing. The effective date of such denial will be when the license is no longer valid for driving. If such persons are making application for an Iowa license and do not have a valid license, then denial will be effective when notice is served. The department may require submission of a medical report favorable toward licensing when the department has reasonable cause to believe that a person is or may by reason of physical or mental disability, disease, or ability be unable to drive a motor vehicle safely. Any person suspended or denied pursuant to this rule must meet the visual standards for licensing, pass the required knowledge examination(s) and pass the required driving test before licensing can be granted.

In construing a statute, one must ascertain and give effect to legislative intent. In doing so, one should look to what the legislature said, rather than what it should or might have said. Iowa State Education Association v. Public Employees Relations Board, 269 N.W.2d 446 (Iowa 1978); Kelly v. Brewer, 239 N.W.2d 109 (Iowa 1976); Steinbeck v. Iowa District Court, 224 N.W.2d 469 (Iowa 1974). An administrative agency's interpretation of a statute is entitled to some weight but is not binding. Iowa State Education Association.

Section 321.177(5), The Code 1975, authorized the Department of Transportation to deny, suspend, or revoke the license of any person who had been adjudged to be mentally incompetent. The word "adjudge" means to decide or rule upon as a judge or with judicial or quasi-judicial powers. Vasquez v. Courtney, 272 Or. 477, 537 P.2d 536 (1975); State v. Overby, 4 N.C.App. 280, 166 S.E.2d 461 (1969); Black's Law Dictionary 63 (4th rev. ed. 1968).

The power to adjudicate the issue of mental illness was lodged in a Commission of Hospitalization under the pre-1975 mental health statute. Sections 228.7, 229.9, The Code 1975. Thus, once a decree of mental illness was issued by the commission of hospitalization, the Department of Transportation was authorized to deny, suspend, or revoke the license of a person, unless and until that person was restored to competency pursuant to the provisions of § 229.30, The Code 1975. Section 321.177(5), The Code 1975.

In addition to the power to deny, suspend, or revoke a license, the legislature gave the Department of Transportation the power to issue a license to a person adjudged to be affected by mental illness where that person was either on parole or convalescent leave from a mental health institution, and when advised in writing that the medical staff and the superintendent of a mental health institution recommended the issuance of a license.

It is clear then that the legislature, by the language of § 321.177(5), The Code 1975, only intended that persons adjudged to be affected by mental illness be denied a license, and that under prescribed conditions even those persons could receive a license.

The Department of Transportation, however, drafted an administrative rule that exceeded the scope of the authority given in § 321.177(5), The Code 1975. Section 820--[07,C] 13.2, The Iowa Administrative Code 1975, contains the rules drafted by the department pursuant to § 321.177(5). Section 12.2(1) requires that a person be discharged from a mental health institution as cured, whereas § 321.177(5), pursuant to § 229.30, The Code 1975, merely required that for purposes of discharge, the commission of hospitalization find "that cause no longer exists for the care" of a person hospitalized as a mentally ill person, and that "such person is in good mental health". The requirement that a person be cured imposes a higher standard that the one imposed by statute, and perhaps one that cannot be met because of the inability of the psychiatric profession to claim infallible prophetic powers. Accordingly, in adopting § 13.2(1), the department exceeded the scope of the authority granted in § 321.177(5), The Code 1975. Administrative bodies have only such power as is specifically conferred, or is to be necessarily implied by statute. Quaker Oats Co. v. Cedar Rapids Human Rights Commission, 268 N.W.2d 862 (Iowa 1978). We find nothing in § 321.177(5) that either conferred or implied that the department had authority to require that a discharged mental patient be cured instead of in good mental health as required by § 229.30, The Code 1975. Section 13.2(1) is therefore invalid.

Although § 13.2(1) exceeded the scope of the statute, the statute itself provides guidance in determining who is entitled to a driver's license. By the language of § 321.177(5), the Department of Transportation must deny a license to any person previously judged to be affected by mental illness and not restored to competency, unless advised in writing by appropriate medical authority that the person is a proper candidate for a license.

In addition, § 321.177(7), The Code 1975 and § 820--[07,C]13.2(3), The Iowa Administrative Code, authorized the denial of a driver's license where good cause existed to believe that a person's ability to operate a motor vehicle was impaired by reason of physical or mental disability.

"Good cause" is similar to "compelling public necessity". O'Hagen v. Board of Zoning Adjustment, 96 Cal.Rptr. 484, 490, 19 C.A.3d 151 (1971). It requires a showing by substantial evidence that a person could not operate a motor vehicle safely.

> . . .[I]n order to support the administrative denial or withdrawal of driving privileges upon the statutory ground of physical disability, there must be competent, substantial evidence of the existence of some tangible disease or defect which bears, adversely upon the particular motorist's capacity to drive safely. It follows that an administrative deprivation of driving privileges which has been predicated solely upon a suspicion that the motorist is suffering from a disabling infirmity--in the absence of substantial evidence of the actual existence thereof--will not be sustained. . . .

Danne, "Denial, Suspension, or Cancellation of Driver's License Because of Physical Disease or Defect," 38 A.L.R.3d 452, 457 (1971).

Evidence that a person has been admitted to a mental health facility is not substantial evidence that a person is affected by some disease or defect which bears adversely upon that person's ability to drive safely. Any presumption of disability arising from the admission of a person to a mental health facility would be defeated by the person's subsequent discharge. The appropriate rule has been stated as follows:

> The discharge of a person from an insane asylum on his restoration to sanity has been held to be prima facie evidence that the patient is restored to reason or prima facie evidence that the person was improperly committed; at least under the decisions, any presumption of insanity arising from the mere commitment is removed by the discharge in the manner prescribed by law . . . . The presumption of sanity arising out of discharge, nothing appearing to the contrary, is a continuing one, but it is rebuttable.

44 C.J.S. Insane Persons, § 72(c)(1945). Cf. Davis v. Jenness, 253 N.W.2d 610, (Iowa 1977); Foy v. Metropolitan Life Ins. Co., 220 Iowa 628, 263 N.W. 14 (1935); Swartz v. Superior Court, 105 Ariz. 404, 466 P.2d 9 (1970); People v. Catholic Home Bureau, 34 Ill.2d 84, 213 N.W.2d 507 (1966); Poling v. City Bank & Trust Company, 167 So.2d 53 (Fla.App. 1964); State v. Cockrell, 309 P.2d 316 (Mont. 1957).

Thus, the necessity for evidence of inability of the applicant to safely operate a motor vehicle cannot be supplanted by mere conclusions drawn from the fact that a person has been hospitalized for mental illness.

We, therefore, conclude that persons involuntarily committed to a mental health facility and discharged therefrom prior to the enactment of present chapter 229 may be denied a license under § 321.177(5), unless discharged from the facility in good mental health, or may be denied a license where good cause exists for such denial under § 321.177(7). Persons voluntarily admitted to

and discharged from a mental health facility prior to present chapter 229 are entitled to a driver's license, unless under § 321.177(7) the Department of Transportation obtains substantial evidence that their ability to operate a motor vehicle is impaired.

The status of the second group of affected persons, those persons committed for treatment prior to the enactment of present ch. 229, but who have been or will be discharged subsequent to its enactment, is determined by reference to ch. 229 itself. Section 229.39(1) and (2), The Code 1979, reads as follows:

> 229.39 Status of persons hospitalized under former law.
>
> 1. Each person admitted or committed to a hospital for treatment of mental illness on or before December 31, 1975 who remained so hospitalized, or was on convalescent leave or was receiving care in another facility on transfer from such hospitalization, on or after January 1, 1976 shall be considered to have been hospitalized under this chapter, and its provisions shall apply to each such person on and after the effective date of this section, except as otherwise provided by subsection 3.
>
> 2. Hospitalization of any person for treatment of mental illness, either voluntary or involuntary, on or before December 31, 1975 shall not be deemed to constitute a finding of or to equate with nor raise a presumption of incompetency, or to cause the person who was so hospitalized to be deemed a lunatic, a person of unsound mind, or a person under legal disability for any purpose, including but not limited to the circumstances enumerated in section 229.27, subsection 1. Nothing in this subsection shall be construed to invalidate any specific declaration

> of incompetence of a person who was so hospitalized if the declaration was made pursuant to a separate procedure authorized by law for that purpose, and did not result automatically from the person's hospitalization. (emphasis added)

In addition to adopting the above statute in 1975, the legislature amended § 321.177(5). That amendment as found in the 1979 Code, reads as follows:

> 321.177 Persons not to be licensed. The department shall not issue any license hereunder:
>
> 5. To any person, as an operator or chauffeur, who has previously been adjudged to be incompetent by reason of mental illness and who has not at the time of application been restored to competency by the methods provided by law.

When construing amendments to statutes, one must assume that the amendment sought to accomplish some purpose and was not simply a futile exercise of legislative power. State v. One Certain Conveyance, 211 N.W.2d 297 (Iowa 1973). It appears the the legislature decreased the authority of the Department of Transportation to issue a license by the 1975 amendment to § 321.177(5). The major change in the amendment was to eliminate the power of the department to issue a license to a person adjudged imcompetent based upon the recommendations of the medical staff or superintendent of the institution where a person had been hospitalized. This decrease in authority to issue a license under § 321.177(5) to persons adjudged incompetent must be harmonized with the clear § 229.39(2) policy against presuming incompetent a person treated at a mental health facility.

When statutes relate to the same subject matter or to closely allied subjects they are said to be in pari materia and must be construed, considered and examined in the light of their common purpose and intent so as to produce a harmonious system or body of legislation. Iowa Department of Transportation

v. Nebraska-Iowa Supply, 272 N.W.2d 6 (Iowa 1978); Chicago, Rock Island and Pacific Railroad Co. v. Iowa State Highway Commission, 182 N.W.2d 160 (Iowa 1970). Each statute should be afforded a field of operation. Thus, repeal of a statute by implication is not favored and will not be upheld unless absolutely necessary. Iowa State Highway Commission.

It is clear that § 321.177(5) would deny a license to a person adjudged to be incompetent by reason of mental illness and not restored to competency at the time of application for the license. On the other hand, § 229.39(2) would preclude a presumption of incompetency from arising from either voluntary or involuntary admission to a mental health facility, unless there was a specific declaration of incompetency of a person so hospitalized. It is clear, then, that the legislature intended that an adjudication of "serious mental impairment" not be synonymous with the term "incompetency", but rather that incompetency is a specific status that must be specifically determined pursuant to a hearing conducted for that purpose as required by § 229.27(3), The Code 1979. Section 229.27(3) requires that a competency hearing be held when: (a) the court on its own motion proposes to find incompetent a person whose involuntary hospitalization has been ordered and who contends that s(he) is not incompetent, and (b) a person previously found incompetent petitions the court for a finding that s(he) is no longer incompetent. Incompetency, then, is a status that must be specifically determined and cannot be equated with a finding of "serious mental impairment" under § 229.13, The Code 1979. This conclusion is supported by § 218.95(1), The Code 1979, which specifically states that the hospitalization of any person for treatment of mental illness shall not constitute a finding of or create a presumption of incompetence.

It follows that a person could be seriously mentally impaired and not incompetent. It also follows that § 321.177(5) can only apply to those persons adjudicated incompetent. In those instances, the Department of Transportation is authorized to deny a license to the incompetent applicant and may continue to do so until such person is restored to competency pursuant to the provisions of § 229.27(3).

As to those persons not adjudged to be incompetent under § 229.27, but adjudged to be seriously mentally impaired and involuntarily committed for treatment under § 229.13, or voluntarily admitted for treatment under § 229.2, the department may not deny a driver's license based on § 321.177(5).

The department may, however, rely on § 321.177(7) for authority to deny a license to a person where good cause exists to believe that such a person would be unable to safely operate a motor vehicle because of a physical or mental disability. Section 321.177(7) does not create a presumption that a person affected by mental illness is incompetent to operate a motor vehicle and does not, therefore, conflict with §§ 229.27(1) and 229.39(2). But it does authorize the department to deny a license where good cause exists.

As previously discussed, good cause for the denial of a license exists where substantial evidence of the applicant's inability to operate a motor vehicle safely is established. Evidence that a person has been either voluntarily or involuntarily admitted to a mental health facility for treatment of mental illness does not give rise to a presumption of incompetency pursuant to §§ 229.27(1) and 229.39(2), and, standing alone, does not constitute good cause for the denial of a license. It does not constitute substantial evidence of inability to operate a motor vehicle safely. Without more, without medical evidence that the applicant's mental disability would affect his/her driving ability, the department could not deny a license to the applicant if all other requirements are satisfied.

The same would be true of evidence of discharge from a mental health facility. Without more, without evidence that the applicant was discharged in poor mental health, and evidence that that condition would preclude the applicant from safely operating a motor vehicle, the department could not deny a license to the applicant, if all other requirements are satisfied.

We, therefore, conclude that those persons committed to treatment prior to the enactment of present ch. 229, but who have been or will be discharged subsequent to its enactment, could not be denied a license on the basis of mental incompetency, unless specifically adjudged to be incompetent, or unless good cause for the denial is established by substantial evidence.

We are, of course, not unaware of the concerns of the Department of Transportation with respect to possible allegations of negligence in the issuance of a driver's license. The department has a responsibility to exercise due care to protect the public from unsafe drivers in the issuance of a license. Davis v. Jenness, 253 N.W.2d 610 (Iowa 1977). In

Jenness, the department suspended Jenness' license pursuant to § 321.210(4), The Code 1971, for lack of mental competence based on the fact that Jenness was a patient at the Veteran's Administration Hospital at Knoxville. On November 10, 1972, Jenness was discharged therefrom and was furnished a certificate of discharge from the hospital director stating, "Marvin V. Jenness is discharged, I believing him, this day, to be restored in mind." On December 11, 1972, the suspension of Jenness' driver's license was terminated or "lifted", and the license was reissued on January 2, 1973, based on § 321.212, The Code 1971, which required that a license suspended because of incompetency to drive a motor vehicle remain suspended until the department received satisfactory evidence that the former holder thereof was again competent to operate a motor vehicle. Jenness' certificate of discharge was considered satisfactory evidence of restored competency.

Subsequent to reissuance of his license, Jenness was involved in an automobile accident in which Ruth Ann Davis was killed. Davis' husband brought suit against the department alleging that the department negligently reissued a license to Jenness. The Iowa Supreme Court held that the reissuance of the license based on the certificate of discharge did not constitute negligence, but in a concurring opinion (McCormick, Justice, concurring specially) implied that the department may have a greater responsibility to inquire more thoroughly into the competency of a discharged mental patient to operate a motor vehicle.

The facts of the Jenness case arose prior to the adoption of present chapter 229. The court, therefore, did not have before it and did not consider the impact of policy changes dictated by the legislature with respect to the treatment of persons alleged to be mentally impaired. Specifically, the court did not consider the impact of §§ 229.27 and 229.39, both of which prohibit the kind of presumption of incompetency that the court implied should occur when the department considers the request for a discharged mental patient for a license. It is, therefore, our conclusion that where the legislature declares by statute that persons committed to a mental health facility are not to be presumed incompetent and are not to be considered under any legal disability for any purpose, the department cannot by policy or practice deem such persons incompetent or unable to operate a motor vehicle.

In summary, then, persons involuntarily committed to a mental health facility and discharged therefrom prior to the enactment of present chapter 229 may be denied a license under § 321.177(5), unless discharged from the facility in good mental health, or may be denied a license where good cause exists for such denied under § 321.177(7). Persons voluntarily admitted to and discharged from a mental health facility prior to present chapter 229 are entitled to a driver's license, unless under § 321.177(7) the Department of Transportation obtains substantial evidence that their ability to operate a motor vehicle is impaired. Persons admitted to a mental health facility, either voluntarily or involuntarily, prior to the enactment of present ch. 229, but who have been or will be discharged subsequent to its enactment, may not be denied a license on the basis of mental incompetency, unless specifically adjudged to be incompetent, or unless good cause for the denial is established by substantial evidence.

Sincerely,

Thomas Mann, Jr.

Thomas Mann, Jr.
Assistant Attorney General

TM/jam

STATE OFFICERS AND DEPARTMENTS: County Board of Supervisors--City Airport Commission: Chapters 329, 330, and 332, The Code 1979. The positions of airport commissioner and county supervisor are not incompatible. (Mueller to Martens, Emmet County Supervisor, 6/5/80) #80-6-3 (L)

June 5, 1980

John G. Martens
Emmet County Attorney
120 North Seventh Street
Esterville, Iowa 52334

Dear Mr. Martens:

This is in response to the following opinion request from you:

> I would like to have an Attorney General's Opinion regarding the following matter.
>
> We presently have a party running for the Emmet County Board of Supervisors who has a position at present on the Estherville Airport Commission. The Estherville Airport Commission is a sub-body of the municipality of Esterville. The members of this Estherville Airport Commission are appointees of the mayor of Estherville with approval of the city council. The duties of the Estherville Airport Commission would be to run the Estherville Municipal Airport. The airport is located east of Estherville and it consists of the airport itself plus farmland located around the airport. The Airport Commission manages the airport and leases the airport to a private operator for its day to day operation.

The question to be addressed is whether being a member of the Emmet County Board of Supervisors would be incompatible with also holding the appointed position on the Estherville Airport Commission.

The Airport Commission is an independent or autonomous board or commission of a municipality having authority to disburse funds for a particular municipal function without approval of the governing body. Op.Att'y.Gen. #78-5-1. The Commission has all the power granted to a municipality under Chapter 330, except power to sell the airport. § 330.21, The Code 1979. All funds derived from taxation or otherwise for airport purposes shall be under the full and absolute control of the commission for the purposes prescribed by law. § 333.21. If the Airport is abolished under § 330.17, its contractual agreements legally made by the commission would be binding upon the city owning the airport. Op.Att'y.Gen. #78-5-1.

The Commission is comprised of three to five city voters, appointed by the city's governing body. Members of the Airport Commission serve without compensation. § 330.20, The Code 1979.

The county is a governmental subdivision, granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs. Iowa Const. art. III, § 39A. The board of supervisors is the governing body of the county. The powers and duties of the board of supervisors are enumerated in § 332.3, The Code 1979. The office of board of supervisors has been found to be incompatible with the following offices: member of city council, 1934 Op.Att'y.Gen. 118; mayor, 1919-20 Op.Att'y.Gen. 639; and city zoning commissioner, 1968 Op.Att'y.Gen. 1016. Membership on the board of supervisors is not incompatible with membership on the board of directors of a school corporation. 1930 Op.Att'y.Gen. 140.

Neither Chapter 332, The Code 1979, pertaining to the duties of member of the board of supervisors, nor Chapter 330, The Code 1979, pertaining to the qualifications and duties of the members of airport commissions,contain any specific prohibition against a person holding both offices at the same time. Therefore, in the absence of statute, the common law rule of incompatibility must be examined. The test to be applied in such a situation, is set forth by the Iowa Supreme Court in State ex rel. LeBuhn v. White, 257 Iowa 606, 133 N.W.2d 903 (1965), wherein the court ruled that a person cannot serve as a member of a local school board and the county board of education, as follows:

> But 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.". . . .
>
> It is held that incompatibility in office exists "where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both." State ex rel. Crawford v. Anderson, 155 Iowa 271, 273, 136 N.W. 128, 129.

133 N.W.2d at 905.

Section 330.2, The Code 1979, provides that counties and townships may acquire, establish, improve, maintain and operate airports within or without their territorial limits. The fact that only counties and townships are mentioned in most of Chapter 330 does not exclude a city from exercising the same power because of home rule. See Op.Att'y.Gen. #77-2-4. The Airport Commission has all of the powers granted to cities, counties and townships under chapter 330. § 330.21. The Commission is to manage and control the airport. § 330.17. The word "airport" includes "landing field, airdrome, aviation field, or other similar term used in connection with aerial traffic." § 330.1. Also, a need, on the Commission's part, to control surrounding land, areas adjacent to the runways (more land than is physically necessary to locate hangars, runways, and terminals), with particular attention to heighth of surrounding structures, is inherent in their statutory grant of authority. See 1968 Op.Atty.Gen. 816.

Therefore, it is quite likely that the Commission would be exercising control of property outside the city's limits, and within the county territorial limits. Although this may be true, we are of the opinion that the test of incompatibility is not met here. Neither offices are subordinate to the other, each being a part of a different political subdivision. Nor are the two offices "inherently inconsistent and repugnant." The area where there is the most potential for conflict is zoning. However, both the Commission and the board would be subject to Chapter 329, entitled "Airport Zoning", which should remedy any zoning conflicts. Also, there are comprehensive federal and state aviation regulations which would control areas of possible inconsistent positions. This is not to say that there may not

be factual situations, where an individual holding both offices might have a conflict of interest which would keep him/her from participating in the discussion and voting on certain matters. An example: an attempt by the commission to acquire land adjacent to the airport owned by the county.

In conclusion, we are of the opinion that a position on the airport commission would not be incompatible with being a member of the county board of supervisors.

Sincerely,

James P. Mueller

JAMES P. MUELLER
Assistant Attorney General

JPM/cmc

COUNTIES: Drainage Districts. Sections 4.1(36)(a), 455.10, 455.164, 455.166, 455.169, 462.1, 462.2, 462.3, 462.27, The Code 1979. When private individuals enter an unauthorized contract to perform those legal services attendent upon the transfer of control of a drainage district from the Board of Supervisors to a panel of trustees, the Board of Supervisors may, in its discretion choose to ratify the contract and pay those expenses incurred before the transfer of control of the district from the Board to the trustees from the drainage district funds. Absent such ratification, an attorney is not entitled to collect from drainage district funds for changes for his employment pursuant to that contract and prior to the transfer. If the Board chooses not to ratify the agreement, the County Auditor may refuse to certify those charges incurred prior to the election of the panel of trustees, even if those charges have been approved by the trustees. (Benton to Martens, Emmet County Attorney, 6/3/80) #80-6-2(L)

June 3, 1980

Mr. John G. Martens
Emmet County Attorney
P.O. Box 22
120 North Seventh Street
Estherville, Iowa 51334

Dear Mr. Martens:

In your letter of April 4, 1980, you requested an opinion from this office concerning the payment of attorney's fees from a drainage district within Emmet County. According to your letter, until recently the Emmet County Board of Supervisors managed drainage district No. 40. In September, 1979, a petition was filed with the Board seeking to transfer control of the district to a panel of three trustees. The Board of Supervisors set the election for trustees on November 29, 1979, and since that election, the three trustees elected have managed the district. On January 24, 1980 an Estherville attorney submitted a bill to the trustees for certain legal services, including preparation of the petition seeking transfer of control to the panel of trustees. A number of these services were performed before November 29, 1979 when control of the district was transferred to the trustees. The trustees approved payment of the fees in their entirety on February 12, 1980 and a bill was subsequently presented to the county auditor for payment. Your letter notes that the attorney involved here was hired by private individuals to perform the legal services prior to the election of November 29, when those individuals were elected trustees. The county auditor has now questioned whether, under these circumstances, the attorney may be compensated from drainage district funds for work performed for these

individuals before control of the district was transferred to them as trustees. More specifically, you have raised two questions based upon these facts:

> 1. Was the attorney entitled to collect from drainage district funds for charges for his employment prior to the formation of the drainage trustees on November 29, 1979, since he was not hired by the Board of Supervisors as trustees of that drainage district as drainage attorney prior to the formation of the trustees as the governing body of this drainage district?
>
> 2. If it is determined that the charges for services provided prior to November 29, 1979 would be unauthorized as expenses of Drainage District No. 40, should the Emmet County Auditor refuse to certify those charges prior to November 29, 1979, for payment even though they have been approved for payment by the Trustees of Drainage District No. 40?

At the outset, it may be helpful to describe those provisions through which the management and control of drainage districts are transferred to the panel of three trustees. The initial jurisdiction for the creation and maintenance of drainage districts rests with the county board of supervisors pursuant to Section 455.1, The Code 1979. However, once the original construction has been completed and paid for, control of the district may pass from the supervisors to a panel of three trustees elected by persons owning land within the district. Section 462.1, The Code 1979. The trustees are chosen at an election set by the board of supervisors after a petition has been filed in the county auditor's office signed by a majority of persons owning land within the district. Sections 462.2, 462.3, The Code 1979. Significantly, once chosen the panel of trustees may exercise a control over the district which is co-extensive with that which could be exercised by the board of supervisors. Section 462.27, The Code 1979, provides in pertinent part:

> Trustees shall have control, supervision, and management of the district for which they are elected and shall be clothed with all of the powers now conferred on the board or boards of supervisors for the control, management, and supervision of drainage and levee districts under the laws of the state... .

Based upon this statute, we would conclude that those provisions within Chapter 455 empowering the supervisors to employ counsel, and providing for the payment of expenses should apply to the trustees managing a district pursuant to Chapter 462.

Your first question in essence asks whether District No. 40 must pay for legal services performed for private individuals to effect the transfer of the district to trustee management? Chapter 462 is silent as to whether these types of expenses may be charged to the district. Turning to Chapter 455, Section 455.166, The Code 1979, speaks to the employment and payment of counsel in the following terms:

> The board is authorized to employ counsel to advise and represent it and drainage districts in any matter in which they are interested. Attorney's fees and expenses shall be paid out of the drainage fund of the district for which the services are rendered, or may be apportioned equitably among two or more districts. Such attorneys shall be allowed reasonable compensation for their services, also necessary traveling expenses while engaged in such business. Attorneys rendering such services shall file with the auditor an itemized, verified account of all claims therefore, and statement of expenses, and the same shall be audited and allowed by the board in the amount found to be due.

At least two conclusions emerge from the application of this language to your first inquiry. First, the panel of trustees, once elected, has clear authority to hire counsel to perform legal services for the district. Second, the board of supervisors may contract with counsel to perform those legal services attendent upon the transfer of the district to control by the trustees, such as those services for which the Estherville attorney now in part seeks compensation. However, in this case the attorney had no contract with the Emmet County Board of Supervisors, who until the November 29th election had control of the district. Rather than a contract with the Board of Supervisors, the attorney had what was essentially a private contract with the individuals who desired the transfer of control. Although the contract could be characterized as private in nature, and although the individuals contracting with the attorney had no authority at that time to bind the drainage district, the work which the attorney performed was

done for the drainage district in the sense that the district benefited from his work. Because the district received the benefit of the attorney's services through the private agreement, it may be possible for the attorney to be compensated from drainage district funds.

Under these facts, we believe that a claim for those services performed before the November 29th election could be presented to the Board of Supervisors, and that the Board could allow such a claim if they chose to do so. The Board's authority to consider this claim is derived from the principle that local governments may ratify contracts otherwise irregularly executed or executed without authority, provided that the governmental body has the original power to enter the contract itself. 56 Am.Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 508, p. 559 states the rule in this manner:

> The general rule is that municipal corporations may ratify contracts made on their behalf which they have authority to make. Thus, it is competent for a municipal corporation to ratify a contract and thereby to make it a binding obligation, acting through its authorized agencies and in the manner prescribed by law for making contracts of such a character, if the contract was within its general corporate powers but was invalid because defectively or irregularly executed, or because the officer or agent who purported to execute it on behalf of the municipality had not the requisite authority. On the other hand, where a municipal corporation has no original power to enter into a particular contract, or where a contract is invalid by reason of being in violation of law it cannot be ratified. It is only where the corporation has the power to enter into the contract but the power is exceeded in the method of its exercise, or has been exercised by some unauthorized officer or representative, that a municipal corporation can ratify the unauthorized contract. Ratification of an unauthorized act by a municipal official may be by the principal or its authorized agent.

The present case would seem to fall squarely within this rule. First, the individuals who employed the attorneys were at that point unauthorized agents of the district, with no authority to bind the district. Secondly, the

district would itself have the power to contract to employ counsel. Sections 455.166 and 462.27. We would conclude that the Board of Supervisors, who controlled the district at the time when the contracts were entered, would have authority to ratify the contract.

There remains to be considered however, the question of how the Board could accomplish the ratification. The authorities suggest that where a mandatory mode of execution of a contract is prescribed by statute, the ratification of an unauthorized contract must follow the provisions of the statute governing the original contract. See 56 Am.Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 510, p. 560. Section 455.166 does not provide such a formal statutory mechanism. Ratification could be accomplished, however, through acceptance of the service and recognition of the obligation, rather than by any express means. See 56 Am.Jur 2nd, Municipal Corporations, Counties, and Other Political Subdivisions, § 510, p. 560. We would suggest that payment of the expenses incurred before the November 29th election would amount to such recognition. In Butte County v. Gaver, 49 N.W.2d 466, 74 S.D. 134 (1951) the South Dakota Supreme Court considered a situation in which a county engineer, without authority to do so, entered a contract to purchase a parcel of land for the county. The Court, in holding that the county acquired title to the land through the unauthorized contract, noted that the county could ratify the contract, and:

> This it did by going into possession and removing gravel from the land and approving the voucher for the purchase price. Butte County at p. 468. [Emphasis added]

The Emmet County Board has the authority to consider a claim for the legal expenses incurred before the November 29th election, and could, at its discretion, ratify such a contract through payment of that portion of the attorney's claim.

Although the Iowa Supreme Court has never explicitly delineated the acts necessary to constitute ratification of an unauthorized contract, it has considered ratification as a component of an implied contract to pay for such unauthorized services, including an implied contract to perform legal services for a drainage district. See Fouke et al. v. Jackson County, 84 Iowa 616, 51 N.W. 71 (1892), which held that the county was not liable upon an implied contract for legal services performed for the county absent knowledge on the part of the board of supervisors in its

official capacity that the attorneys were acting for the county and expecting compensation for their services. A series of Iowa cases has considered the issue of whether a county may be liable upon an implied contract to perform services for the county. First Nat. Bank of Red Oak v. City of Emmetsburg, 157 Iowa 555, 138 N.W. 451 (1912); Johnson County Sav. Bank v. City of Creston, 212 Iowa 929, 231 N.W. 705 (1930); Madrid Lumber Co. v. Boone County, 255 Iowa 380, 121 N.W.2d 523 (1963). The Iowa Court has not found the existence of an implied contract, unless the local government possessed the original power to contract, and has accepted or ratified the unauthorized agreement pursuant to which the governmental body received the benefits. In Voogd v. Joint Drain. Dist. Kossuth & Winnebago Cos., 188 N.W.2d 387 (Iowa 1971), the Iowa Court in dictum stated that an engineer who performed work for a drainage district pursuant to a contract made by the county beyond its powers or in contravention of an express statute could not receive compensation. Voogd at 393.

Although Voogd would seem distinguisable on the basis that the Board clearly has the statutory authority to retain counsel, your question does not require that we determine whether under these circumstances an implied contract was created which would bind the Board. It is sufficient to note here that the Board has at least the option to pay for these expenses from the funds of the drainage district.

Absent a decision by the Board to ratify this contract and to pay for the expenses incurred prior to November 29, we would conclude that those legal expenses incurred in transferring control of the drainage district to the trustees must be borne by the private individuals who hired the attorney. Absent such ratification by the Board, their contract with attorney was a private one and they could not bind the district through it. Stated another way, if the Board is presented with a claim for these expenses and declines to pay the cost, the attorney is not entitled to collect from drainage district funds for charges for his employment prior to the formation of the drainage trustees on November 29, 1979.

Your second question asks whether the Emmet County Auditor should refuse to certify charges prior to November 29, 1979, for payment even though they have been approved for payment by the trustees of Drainage District No. 40? We will consider this question assuming that the Board does not ratify the contract involved here.

Again, a provision within Chapter 455 is apposite to this problem. Section 455.169, The Code 1979, provides:

> All compensation for services rendered, fees, costs, and expenses when properly shown by itemized and verified statement shall be filed with the auditor and allowed by the board in such amounts as shall be just and true, and when so allowed shall be paid on order of the board from the leveee or drainage funds of the district for which such services were rendered or expenses incurred, by warrants drawn on the treasurer by the auditor.

Our office has previously opined that a county auditor acts as a ministerial officer in the matter of issuing county warrants. 1950 Op.Att'y.Gen. 197, 199. A ministerial act has been defined as one which is to be performed upon a given state of facts, in prescribed manner, in observance of the mandate of legal authority and does not require the person or board charged with the duty of performing the act to exercise his or its own judgment. Headid v. Rodman, 179 N.W.2d 767, 769 (Iowa 1979); Gibson v. Winterset Comm. Sch. Dist., 258 Iowa 440, 444, 138 N.W.2d 112 (1966). Further, Section 455.169 employs the term "shall", which is to be construed as imposing a duty. Section 4.1(36)(a), The Code 1979. The word "shall" when used in a statute is ordinarily to be construed as mandatory. Gibson at p. 444. The consequence of the classification of a statute as mandatory relates to whether the failure to perform an admitted duty will have the effect of invalidating the governmental action which the requirement affects. Taylor v. Department of Trans., 260 N.W.2d 521, 523 (Iowa 1977). At first glance, an examination of Section 455.169 under these principles would seem to indicate that once the trustees have approved the compensation, the auditor is bound to issue the warrant. However our inquiry does not stop here, since we have determined that it would be improper to compensate this attorney from district funds for work performed before November 29, 1979.

There is no case law in Iowa which directly addresses the question of whether a county auditor must issue a warrant upon order of a board to pay what the auditor determines to be an unauthorized expense. This issue has been confronted by the South Dakota Supreme Court in South Dakota Employers Protective Ass'n. v. Poage, 272 N.W. 806, 65 S.D. 198 (1937). In that case the county had entered a contract with the plaintiff which called for the payment of certain monies. The plaintiff filed a claim with the county auditor, which claim had been approved by the county commissioners. The auditor refused to issue the warrant, claiming the contract was ultra vires and beyond the county's power to enter. In upholding the dismissal of the plaintiff's mandamus action, the South Dakota court first found that the contract was in fact ultra vires. The Court then stated:

> If the defendant auditor had reasonable grounds for believing that the county

> commissioners in the instant case were exceeding their powers, it was her duty to refuse to countersign and attest the warrants described in plaintiff's petition. Poage at p. 810.

In Miller Tractor Co. v. Hope, 218 Iowa 1235, 257 N.W. 312 (1934), the Iowa Supreme Court considered whether mandamus would lie against a county auditor who refused to issue a warrant based upon the belief that the county lacked sufficient funds to pay the claimant. The Court expressly found that sufficient funds existed to pay the claims so that mandamus would lie. However the Court noted implicitly that circumstances might exist, such as if funds were insufficient to pay the claim even though allowed by the board, under which the auditor might refuse to issue the warrant.

We believe that under the facts of this case, the rule in the Poage case should apply, and the auditor need not issue a warrant for those expenses prior to November 29. In construing Section 455.169, we would not interpret it so as to impose an absolute duty wich would militate against the interest of District No. 40. See 63 Am.Jur 2d, Public Officers and Employees, § 274 p. 790. Moreover, the auditor's duty under this statute must be squared with a like duty to expend public moneys only for lawful purposes, even if their duties are ministerial. See 63 Am.Jur. 2d, Public Officers and Employees, § 322 p. 821. If the Board does not choose to ratify the contract entered by the private individuals and pay the expenses, the charge for services provided prior to November 29, 1979 are unauthorized expenses of Drainage District No. 40, and we would conclude that the Emmet County Auditor may refuse to certify those charges prior to November 29, 1979.

Sincerely,

Timothy D. Benton

TIMOTHY D. BENTON
Assistant Attorney General

TDB/nay

PUBLIC BONDS: SCHOOLS. 1980 Sess., 68th G.A., S.F. 500; 1980 Sess., 68th G.A., S.F. 2282; 1970 Sess., 63rd G.A., ch. 1120; 1969 Sess., 63rd G.A., ch. 192; §§ 3.7, 75.12, 256.1, 258.22, The Code 1979. School bonds for projects of five million dollars or less issued subsequent to April 12, 1980, the effective date of S.F. 500, may bear an interest rate not to exceed ten per cent. School bonds for projects exceeding five million dollars issued subsequent to April 12, 1980, may bear an interest rate to be determined by a school district board of directors. School bonds issued subsequent to June 11, 1980, the effective date of S.F. 2282, may bear an interest rate to be determined by a school district board of directors. (Schantz to Tieden, State Senator, 7/23/80) #80-7-20 (L)

July 23, 1980

Honorable Dale L. Tieden
State Senator
Rural Route 2
Elkader, Iowa 52043

Dear Senator Tieden:

You recently requested an opinion of the Attorney General regarding the applicability of S.F. 500, enacted in the 1980 Session of the 68th General Assembly and effective April 12, 1980, to school bond authorization elections held prior to the effective date of the statute. Senate File 500 temporarily raised the maximum interest payable on school bonds from 7 per cent to 10 per cent for projects of five million dollars or less. Senate File 2282 subsequently made permanent changes in the rates of interest payable on interest-bearing obligations issued by public agencies. Section 11 thereof effectively removes the statutory limitation by providing that the issuing authority, in this instance the school district board of directors, may set the rate of interest on general obligation bonds. Senate File 2282 became effective June 11, 1980.

In an opinion issued June 24, 1980, we concluded that bonds authorized by an election held prior to April 12, 1980, could not be sold at a rate exceeding the 7 per cent ceiling in effect at the time of the election and that a new election would be necessary for school bonds to be sold at interest rates authorized by S.F. 500.

We have since been urged to reconsider and modify our June 24 opinion by various public agencies who have issued bonds subsequent to April 12 or who have authorized issues pending. These agencies, through their bond counsel, have presented to us certain authorities and lines of analysis which were not fully considered in our prior opinion. After a careful review of the whole problem, we are now satisfied that our prior opinion should be modified in

respects which reverses the result of our June 24 opinion. We now hold that school bonds for projects of five million dollars or less issued after April 12, 1980, may bear a rate of interest not to exceed 10 per cent and that school bonds for projects exceeding five million dollars issued subsequent to April 12, 1980, and school bonds issued after June 11, 1980, may bear a rate of interest to be determined by a school district board of directors.

Although we believe it important that this modification be issued promptly, we will briefly sketch the rationale for our conclusion. In our opinion of June 24, 1980, we focussed upon whether the statutory ceiling on interest rates, although not required to be stated on the ballot submitted to the voters in a school bond election, constituted a "material" factor with respect to voter approval of a bond issue. Available authority indicated that the maximum interest rate is a material factor and we so concluded. We continue to believe that conclusion is correct, although it now appears it is not dispositive of your question.

If a statutory interest rate ceiling is a material factor in bond elections, that would suggest, all other things being equal, that the legislature did not intend to make the higher ceiling applicable to bonds authorized prior to the effective date. This suggestion was based on authority from jurisdictions in which voter approval of certain bond issues is constitutionally required. See Miller v. Ayres, 211 Va. 69, 175 S.E.2d 253 (1970); Wallace v. Ball, 205 Ala. 623, 88 So. 442 (1927); Peery v. City of Los Angeles, 203 P. 992 (Cal. 1922). There is no such constitutional requirement in Iowa. It follows that the General Assembly has plenary authority to require voter approval or not as it deems prudent and to require voter approval in certain instances and not in others, so long as it legislates by rational classification. See Baker v. Unified School District, 206 Kan. 581, 480 P.2d 409 (1971); Eastern Municipal Water District v. Scott, 1 Cal.App.3d 129, 81 Cal. Rptr. 510 (1969). Therefore, the determinative issue is not whether the legislature could apply the higher interest rate ceiling to bonds authorized by elections held prior to the effective date of S.F. 500, but whether the legislature did manifest such an intent. We did not directly address that issue in our previous opinion. We now conclude that the legislature intended to apply the new ceiling to previously authorized bonds and indeed find that was the principal purpose of the temporary change effected by S.F. 500.

Senate File 500 does not speak with directness to this issue, but legislative intent emerges rather clearly from consideration of the language and history of interest rate ceiling statutes, from the circumstances surrounding the adoption of S.F. 500 and from the terms employed in S.F. 2282.

In the law of public finance, a rather sharp distinction is drawn between the initial stage of the process at which the voters, or a designated agency, "authorize" the sale of securities for a specified public purpose, and the ultimate stage at which a public agency "issues" particular securities at a specified rate of interest, in specified denominations and with specified maturities. See Ch. 75, The Code 1979. Compare 64 Am.Jur.2d, Public Securities and Obligations, §§ 124-177 with §§ 206-217. Iowa statutes limiting the rate of interest which public securities may bear focus upon the "issuance" stage of the proceedings. For example, § 75.12 provides:

> Unless otherwise provided by law, the maximum rates of interest on all bonds issued by a city shall be as follows:
>
> 1. General obligation bonds or other evidences of indebtedness payable from general taxation may bear interest at a rate not exceeding seven percent per annum.
>
> 2. Revenue bonds or obligations, the principal and interest of which are to be paid solely and only from the revenue derived from the operations of the project for which the bonds or obligations are issued may bear interest at a rate not exceeding seven and one-half percent per annum. This subsection shall not apply to revenue bonds issued pursuant to chapter 419.
>
> 3. Special assessment bonds or certificates, the principal and interest of which are payable from special assessments levied against benefited properly may bear interest at a rate not exceeding seven percent per annum. (Emphasis added.)

Seven per cent has not always been the interest rate ceiling. A decade ago it became necessary to raise the ceiling from 5 per cent to 6 per cent and then from 6 per cent to 7 per cent in order to sell public obligations. See 1969 Sess., 63rd G.A., ch. 192; 1970 Sess., 63rd G.A., ch. 1120. In both instances, the legislature merely amended §§ 296.1 and 298.22 by striking the existing interest rate and substituting a higher interest rate. In both instances, the legislature provided that the changes were effective upon publication. We are advised that bonds were issued at the higher rates of interest in situations where the authorization by the voters preceded the effective date of the rate increase. While an administrative construction of a statute cannot be determinative, this history suggests the legislature would have addressed the question explicitly if it objected to the repetition of history.

The fact that S.F. 500 and S.F. 2282 both were made effective upon publication is quite significant here as well. The general rule is that statutes ordinarily become effective on July 1 following their enactment. Section 3.7, The Code 1979. Statutes are generally effective on publication only if there is some urgency in their application. Unless there were previously authorized bond issues which it was felt were unlikely to be sold at prevailing interest rates, there would be little reason to accelerate the effective date of S.F. 500.[1] The fact that the rates specified in S.F. 500 are denominated "temporary rates" underscores this felt necessity. Although the legislature was aware that a "permanent solution" (S.F. 2282) was in the hopper, it nonetheless enacted S.F. 500, apparently because it was unwilling to risk the possibility that S.F. 2282 would not be enacted during the current session. S.F. 500 should not be construed in a manner which nullifies this legislative expression of urgency.

Finally, the plain language of S.F. 2282 makes clear that the increased rates of interest are applicable to bonds issued after its effective date. Section 11 of S.F. 2282 provides in pertinent part:

> INTEREST RATES FOR PUBLIC OBLIGATIONS. Except as otherwise provided by law, the rates of interest on obligations issued by this state, or by a county, school district, city, special improvement district, or any other governmental body or agency are as follows:
>
> 1. General obligation bonds, warrants, or other evidences of indebtedness which are payable from general taxation or from the state's sinking fund for public deposits may bear interest at a rate to be set by the issuing governmental body or agency. (Emphasis added.)

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1 Although we have previously indicated that disputed questions of adjudicative fact cannot be resolved in an Attorney General's Opinion, we are, of course, prepared to take judicial notice of legislative facts in those instances in which we conclude a court would do so. We believe a court would take judicial notice that in the early months of 1980 a number of public agencies who had secured voter approval of a bond issue were unable to sell bonds at rates within the seven per cent ceiling.

Subsection 2 of Section 9 of the bill makes clear that the legislature employs the terms "authorize" and "issue" as words of art. It is thus appropriate to rely upon the choice of terms employed in Section 11. Although S.F. 2282 was enacted after and supercedes S.F. 500, it is appropriate to construe them in pari-materia because they deal with the same subject matter and were enacted so closely in time. Indeed, if S.F. 500 were construed differently from S.F. 2282 in this respect, it would have no practical field of operation, i.e. there would be no bonds to which it might apply. Absurd constructions are, of course, to be avoided.

Taken together, these factors manifest a sufficiently clear legislative intent to make the higher interest rates applicable to bonds issued[2] after the effective date to negate any inference we might otherwise draw from the general statutory requirement of voter authorization. For the foregoing reasons, the opinion issued June 24, 1980, is modified and, to the extent it is inconsistent with the conclusions expressed herein, is hereby overruled.

Sincerely,

Mark E. Schantz
Solicitor General

MES:ab

2 It has been stated that "bonds are not issued until they are sent out, delivered or put into circulation." Baker v. Unified School District, 206 Kan. 581, 480 P.2d 409, 413 (1971).

JAILS: Conversion of county jail to county detention facility - §§ 332.3(4), 332.3(13), 356A.1, 356A.7, Code of Iowa, 1979. A board of supervisors may convert a county jail established under the provisions of chapter 356 to a county detention facility as provided by chapter 356A. Williams to Holien, Marshall County Attorney, 7/23/80) #80-7-17(L)

July 23, 1980

Sandra J. Holien
Marshall County Attorney
Marshall County Courthouse
Marshalltown, IA 50158

Dear Ms. Holien:

This letter is in response to your request for an opinion regarding the power of the board of supervisors to establish a county detention facility utilizing the present county jail facility established under chapter 356 of the Code of Iowa. Specifically, you asked the following questions:

1. May the board of supervisors under the provisions of section 356A.1 assume operational control of the jail?

2. If the board of supervisors may assume operational control of the county jail, what procedure would have to be followed?

3. You have submitted materials relating to a special election held on December 30, 1968, and wish to know if those materials would require the sheriff to maintain his residence at the county jail and, if so, would that requirement in the bond issue foreclose the supervisors from designating the jail as a county detention facility.

Major code sections relating to your question are 332.3(4), 332.3(13), 356A.1, 356A.3, and 356A.7. These sections read in relevant portions as follows:

> 332.3 GENERAL POWERS. The board of supervisors at any regular meeting shall have power . . . .
>
> 4. To make such orders concerning the corporate property of the county as it may deem expedient, and not inconsistent with law . . . .

> 13. When any real estate, buildings or other property are no longer needed for the purposes for which the same were acquired by the county, to convert the same to other county purposes . . . .

> 356A.1 COUNTY SUPERVISORS MAY ACT - COUNTY HALFWAY HOUSES. A county board of supervisors may, by majority vote, establish and maintain by lease, purchase, or contract with a public or private nonprofit agency or corporation, facilities where persons may be detained or confined pursuant to a court order as provided in section 356.1. The facilities may be in lieu of or in addition to the county jail. . . . The sheriff shall not have charge or custody of a person detained or confined in such facility or transferred thereto. . . .

(Emphasis added.)

> 356A.7 CONTRACT WITH ANOTHER COUNTY. A county board of supervisors may further contract with another county or a city maintaining a jail meeting the minimum standards for the regulation of jails established pursuant to acts of the 68th General Assembly, 1979 Session, Chapter fifty-three (53), Section four (4), for detention and commitment of persons pursuant to section 356.1. . . .

Taken together, it is clear that these sections permit the board of supervisors to close the county jail and further to designate the premises as a county detention facility. Any need for a county jail may then be met by contract with another county pursuant to section 356A.7.

Your second question asks the procedure to be followed. There is no requirement expressed in the Code for any unusual procedures in accomplishing this matter, so such may be done in the normal manner by majority vote of the board at any of its regular meetings.

In your final question you asked whether the authorization by the electors of Marshall County some twelve years ago for the expenditure of the sum not to exceed $98,000 for the purpose of constructing and equipping county jail facilities constitutes a bar to converting those facilities to use as a county detention facility.

While the board probably would have had the power to convert the jail facility at any time it deemed appropriate, the repeal of section 356.37, which used to mandate that the board of supervisors provide safe and suitable jails, makes it clear that a board of supervisors could find the county jail to no longer be needed in its present form, thereby allowing conversion of the property as authorized by section 332.3(13).

Sincerely,

Richard A. Williams

RICHARD A. WILLIAMS
Assistant Attorney General

RAW/bje

PUBLIC FUNDS: INTEREST COLLECTED UNDER RETAINAGE STATUTES. Sections 384.57, 452.10, 453.7, 573.12, The Code 1979. A governmental unit may collect interest on funds retained pursuant to a contract for a public improvement. Such interest belongs to the governmental unit in most cases. (Stork to Johnson, State Auditor, 7/17/80) #80-7-15(L)

July 17, 1980

Honorable Richard D. Johnson, C.P.A.
Auditor of State
State Capitol
L O C A L

Dear Mr. Johnson:

You have requested an opinion on the following questions concerning the holding of retainage by a governmental unit:

1. Can a governmental unit collect interest on retainage under sections 384.57 and 573.12 of the Code of Iowa, 1979?

2. If interest can be collected, does it belong to the governmental unit, the contractor, or to the retainage fund to be used to cover any claims against it with the balance to the contractor upon successful completion of the job?

Chapter 384, The Code 1979, sets forth various separate divisions relating to city finance. Section 384.57 is contained within Division IV concerning special assessments and provides:

> The city may contract to pay not to exceed ninety percent of the engineer's estimated value of the acceptable work completed during the month to the contractor at the end of each month. Payment may be made in warrants drawn on any fund or funds from which payment for the work may be made.

> The warrants, unless paid upon presentation, draw interest at a rate not to exceed seven percent per annum from and after the date of presentation for payment. If such funds are depleted, anticipatory warrants may be issued, which do not constitute a violation of section 384.10, even if the collection of taxes or special assessments or income from the sale of bonds applicable to the public improvement is after the end of the fiscal year in which the warrants are issued. If the city arranges for the private sale of anticipatory warrants, they may be sold and the proceeds used to pay the contractor. Such warrants may also be used to pay other persons furnishing services constituting a part of the cost of the public improvement.

Section 384.57 became effective on July 1, 1972, and has not received any formal interpretation by the Supreme Court or the Attorney General. By its express terms, the section does provide that warrants issued by a city for services rendered by a contractor may draw interest if the city cannot ensure payment of such warrants upon their presentation by the contractor. Under Chapter 384, for example, the city may anticipate income from a special assessment in order to pay the contractor and may not have sufficient income during a particular month to pay the contractor for services rendered during the month. The amount due can earn interest not to exceed seven percent. Any interest earned on the unpaid warrants up to and including ninety percent of the engineer's estimated value of the acceptable work completed each month presumably would belong to the contractor since the funds upon which the interest is paid belong to the contractor. Section 384.57 is, however, silent as to the drawing of interest on the ten percent of the contract price retained by the city.

Chapter 573 sets forth procedures for the payment of labor and material under contracts for the construction of public improvements. Section 573.12 provides:

> Payments made under contracts 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 percent of each said monthly estimate by the public corporation; provided, however, that if the contract is for more than fifty thousand dollars, and if the public corporation at any time after fifty 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.

An instructive analysis of the legislative history of § 573.12 appears in a law review article published in 1945:

> [This section] creates a different procedure in the case of a public contract from the case of a private contract . . . The House Journal itself does not give any information as to the legislative intent except by reference to the Code Revision Bill. This bill cites as the main reason for the enactment the fact that the mechanics' lien statute only covers <u>private</u> improvements and that the bill is intended to draft a comprehensive measure covering claims for labor and materials on <u>public</u> improvements "with S.C.C. 8427 as the basis of the bill".

> This "basis of the bill" required the insertion of a clause in every contract that only if the principal (contractor) faithfully performed the contract on his part, satisfying all claims and demands, incurred for the same, indemnifying the owner (public corporation) for any cost and damage arising and paying all persons who have contracts directly with the principal for subcontractors, for labor or materials--then the obligation of the surety should be null and void; otherwise it should remain in full force and effect. The clause was required as a compulsive insertion in every contract.
>
> Here we have the declaration of legislative intent. It may be summarized as follows: The Iowa legislature intended:
>
> 1. To issue a remedial statute indemnifying laborers and materialmen for possible loss from the impossibility to secure their work by mechanics' liens:
>
> 2. To protect the public corporation against the inability of the contractor to perform his obligation.
>
> These are the basic foundations of the statute; the rest are regulations to insure performance. The percentage retained is obviously provided for in the interest of workers and materialmen and--secondarily--the surety. [Emphasis in original]

Comment, 30 Iowa Law Review 568, 571-72 (1945). Section 573.12 therefore serves an important public purpose by ensuring a source of funds to pay claimants who have provided labor or material on a public improvement but have not been properly reimbursed by a contractor. Since the language of § 384.57 is very similar to that of § 573.12, the former would appear to serve the same type of public purpose as the latter. Both provisions ultimately serve and protect the interests of the governmental unit by insulating the unit from any liability resulting from a contractor's inability to perform obligations owed to laborers or materialmen. Section 384.57 applies, however, only to municipal public improvements which are supported by special assessments, whereas § 573.12 applies to all public corporations, including the state, all counties, cities, and public school corporations making public improvements through various tax-supported means.

Neither § 384.57 nor § 573.12 expressly provides for the collection of interest on funds retained by a governmental unit pursuant to a contract for a public improvement. The funds retained by a governmental unit under either section are nevertheless public funds and, therefore, are subject to the deposit requirements of Chapter 453 and § 452.10, The Code 1979. Section 452.10 authorizes the treasurer of a political subdivision to invest public funds not needed for operating expenses in bank passbook savings accounts, certificates of deposit, and other enumerated investments. Chapter 453 provides general requirements for the deposit of public funds. Sections 453.6 and 453.7 both authorize the payment of interest on certain deposits of public funds. Section 453.7 provides in relevant part:

> 2. Interest or earnings on investments and time deposits made in accordance with the provisions of sections 12.8, 452.10, 453.1 and 453.6 shall be credited to the general fund of the governmental body making the investment or deposit, with the exception of specific funds for which investments are otherwise provided by law, constitutional funds, or when legally

> diverted to the state sinking fund for public deposits. Funds so excepted shall receive credit for interest or earning derived from such investments or time deposits made from such funds. Such interest or earnings on any fund created by direct vote of the people shall be credited to the fund to retire any such indebtedness after which the fund itself shall be credited.

This section, together with § 452.10 and the other sections in Chapter 453, clearly do anticipate that, as public funds properly deposited or invested, the funds retained by a governmental unit pursuant to a contract for a public improvement may earn interest.

Your second question, concerning who is entitled to the interest, is also answered in part by the express terms of § 453.7(2), which states that interest or earnings "shall be credited to the general fund of the governmental body making the investment or deposit" unless enumerated exceptions apply. No such exceptions apply to funds retained by a governmental unit pursuant to §§ 384.57 and 573.12. Section 453.7(2) therefore provides statutory authorization for a government unit to claim the interest received on funds retained under a public improvement contract. No similar authorization exists with respect to a contractor or any other person in connection with such a contract.

The Iowa Supreme Court has not considered the precise issue of whether § 453.7(2) permits the governmental unit to claim such interest to the exclusion of any other claimant. Decisions from other jurisdictions, however, indicate that such interest belongs to the governmental unit rather than the contractor because the funds retained belong to the public body when interest is earned thereon. See 65 Am.Jur.2d, Public Works and Contracts, § 143 (1972). Two exceptions are noted: 1) if stipulations in a contract expressly provide

to whom interest is to be paid; 2) if payment of the retained funds is unduly delayed after acceptance of the work by the public body. Id.

Pursuant to the Iowa Supreme Court's decision in Southern Surety Co. v. Jenner Bros., 212 Iowa 1027, 237 N.W. 500 (1931), another type of exception may apply in some cases. In Southern Surety, an action was brought by a surety company against a contractor to determine the surety's liability on a bond and the rights of certain claimants to the ten percent of the contract price retained by the governmental unit pursuant to statute. The aggregate claims allowed for labor and material exceeded the amount of the funds retained; the parties making such claims nevertheless contended that they were entitled to any interest earned on the funds. Emphasizing that the funds retained were insufficient to pay the total of the claims made against the contractor and surety, the court stated:

> Undoubtedly the appellees are entitled to interest from the contractor, Jenner Brothers. But the state highway commission, or the public fund, are not obligated to pay interest. Liability on the part of the public officers and commissions is simply to pay to Jenner Bros., the contractors, the contract price under the terms of the statute. Under certain circumstances, such duty to pay the principal sum is not to the contractor, but to laborers and materialmen within the statutory provision. However, as before seen, interest is not to be paid by the public officers or commissions under the statute either to the contractor or to the fund retained for laborers and materialmen.

> No doubt interest could be obtained if the fund were sufficient to pay in full all the original claims entitled to participate therein . . . .
>
> Prejudice would arise to the other claimants, in the case at bar, if one of them were permitted to take interest out of a fund not sufficient to pay the principal to each. Interest is not authorized by the public improvement statute itself. Funds accumulated by retaining portions of the contract price, however, are provided to protect laborers and materialmen. It is contemplated by statute that each laborer and materialman shall partake of the principal of that fund according to the amount and time of filing his claim. Such participation contemplates the principal of the fund without any deduction because of interest. Of course, if, as aforesaid, the fund were sufficient to pay both principal and interest, there then would be no objection to the payment of interest. Therefore, because the fund here is insufficient, the district court properly denied the interest. In bank receivership cases, we have adopted the rule that interest is not applicable unless the principal is sufficient to pay all preferred creditors. Leach v. Sanborn State Bank (Iowa) 213 N.W. 497, 69 A.L.R. 1206.

237 N.W. at 506. The court's language in Southern Surety must be considered in light of the distinct factual situation in the case, i.e., possible depletion of the retainage fund

by the payment of interest on certain claims when the fund itself was insufficient to pay all claims made. The court states that, if the fund was sufficient to pay all claims of laborers and materialmen, interest on those claims could be permitted. The court does not, however, indicate that a governmental unit has any affirmative duty to pay interest to either the contractor or the contractor's unpaid laborers and materialmen. Rather, the court suggests that the protection afforded unpaid laborers and materialmen by a retainage statute may be furthered by allowing interest on their claims provided the retained percentage is not itself depleted to pay such interest.

The court in Southern Surety observed that the retainage statute neither authorized nor prohibited payment of interest on retained funds to unpaid laborers and materialmen. Accordingly, the court concluded that such claimants could, in some cases, recover the interest. This conclusion comports with the court's interpretation of the legislative intent of present § 573.12:

> Considering ch. 452 [present ch. 573] as a whole, it seems apparent that the legislature intended to protect claimants for labor and material by incumbering for their benefit at least 10 percent of the contract price until at least 30 days after the completion and acceptance of the improvement..
>
> In addition, the contractor is required to furnish a bond conditioned upon the payment of such claims when they are not satisfied out of the retained percentage. The remainder of the estimates become payable forthwith to the contractor.

Sinclair Refining Co. v. Burch, 235 Iowa 594, 599-600, 16 N.W.2d 359, 362 (1944).

In light of the express terms of § 453.7(2), the legislative purpose in enacting retainage statutes, and the judicial interpretation of such statutes, we conclude that, in most instances, a governmental unit is entitled to claim the interest collected on funds retained by the unit in connection with a public improvement contract. Three exceptions may apply. First, the parties to a public improvement contract may expressly stipulate that the contractor, or some other party, shall be entitled to such interest. Second, equity may preclude a governmental unit from collecting the interest if the unit has acted unfairly in withholding payments from a contractor. Third, if the ten percent retained by a governmental unit is not sufficient to pay all claims of unpaid laborers and materialmen, the interest collected on the retainage may be used to pay such claims. Pursuant to the Supreme Court's reasoning in the Southern Surety case, such payment is entirely within the discretion of the governmental unit.

In summary, a governmental unit may both collect and claim the interest earned on funds retained in connection with a contract for a public improvement. The unit may, in its discretion, permit the payment of such interest to unpaid claimants of the contractor for the improvement. The contractor may claim such interest only if the contract for the public improvement so provides or a court determines that the governmental unit has unfairly withheld payment of retained funds from the contractor.

Sincerely,

Frank J. Stork

Frank J. Stork
Assistant Attorney General

FJS/jam

COURTS, STATUTORY CONSTRUCTION; Effect of H.F. 2598 on §805.9 Court Costs, §§4.8, 602.63, 805.6, 805.9 and 805.11, The Code 1979; H.F. 2598, 68th G.A. (1980). The manifest intent of the General Assembly in the enactment of H.F. 2598 includes the increase of §805.9 court costs from five to six dollars. (Hayward to Miller, Commissioner of Public Safety, 7/23/80) #80-7-14(L)

July 23, 1980

Mr. William D. Miller, Commissioner
Iowa Department of Public Safety
3rd Floor, Wallace State Office Building
LOCAL

Dear Commissioner Miller:

You have asked this office for an Opinion regarding the effect and application of H.F. 2598, passed by the recent General Assembly, upon court costs in cases initiated by the Uniform Citation and Complaint as contemplated by §805.6 et seq., The Code (1979). §805.6(1)(a) which prescribes the form requirements for a Uniform Citation and Complaint, as amended by §41 of the bill reads in pertinent part:

> The Commissioner of public safety and the state conservation director, acting jointly, shall adopt a uniform, combined citation and complaint which shall be used for charging all local regulation or ordinance, and which shall be used for charging all other violations which are designated by section 805.8 to be scheduled violations. . . . The uniform citation and complaint shall contain. . . a statement that the court costs in scheduled offense cases, whether or not a court appearance is required or demanded, shall be six dollars. . . .(emphasis added.)

§602.63, The Code (1979), was amended by §38 of H.F. 2598 to read as follows in pertinent part:

> All costs in criminal cases shall be assessed and distributed as in Chapter 606, except for the costs of filing and docketing of a complaint or information for a nonindictable misdemeanor shall be six dollars which shall be distributed pursuant to section 602.55. (emphasis added.)

In both instances, the costs were set at five dollars prior to these amendments.

While the General Assembly did amend the court cost provisions in §602.63, supra, and did amend the requirements of the Uniform Citation and Complaint form to include a statement that court costs for scheduled violations would be six dollars, it did not amend several subsections of 805.9, The Code (1979), which refer to court costs in specific situations. They include when the defendant wants to mail in the amount of the fine plus costs, 805.9(1)-(2), when the officer allows the defendant to mail in the amount of the fine plus costs in lieu of arrest, 805.9(3)(a), or when the defendant appears in court and admits the violation and the fine is not suspended, 805.9(4)-(5). Those sections still state that court costs are five dollars.

Also relevant to the discussion are §§805.6(1)(c) and 805.9(3)(b), The Code (1979) which set forth the method of computing an unsecured appearance bond. The formula in each case includes the addition of five dollars, rather than six dollars, in court costs. §805.6(1)(c)(2) was completely rewritten by Senate File 278, also passed by the recent General Assembly. Yet the legislature retained the five dollar figure.

Attention should be given to 805.9(6), The Code (1979), which states:

> The five dollars in costs imposed by this section shall be the total costs collectible from any defendant upon either an admission of a violation without a hearing, or upon a hearing pursuant to subsection 4. Fees shall not be imposed upon or collected from any defendant for the purposes specified in 606.15 subsection 9, 10 or 20. [Extra charges for entering final judgment, taxing costs and entering satisfaction of judgment respectively.]

However, §805.11, The Code (1979), states in pertinent part:

> If the defendant is convicted of a scheduled violation, the penalty shall be the scheduled fine, without suspension of the fine prescribed in section 805.8 together with costs assessed and distributed as prescribed by §602.63. . . .
>
> Upon the conviction of a defendant of a violation specified in sections 805.8 or 805.10, fees shall not be imposed or collected for the purposes specified in section 606.15, subsection 9, 10 or 20. (emphasis added)

As noted above, the cost provision of §602.63 regarding filing and docketing fees was amended by H.F. 2598.

Section 2 of H.F. 2598 appropriates $720,000 to the judicial retirement fund. The explanation in the draft of the bill indicates that this money was the approximate amount to be generated by the increased court fees in the act. This explanation of the appropriation is supported by a memorandum dated March 5, 1980, from Gary Kaufman, Legislative Service Bureau Legal Counsel, to Rep. Reid Crawford. That memorandum indicates that with an extra dollar added to court costs for nonindictable misdemeanors, the state would incur approximately $732,000 in increased revenue. Section 37 of the act changes the state's share of these fees from three fifths to two thirds.

House File 2598 has apparently created a conflict as to the amount of court costs properly assessed in criminal actions involving scheduled offenses.

In light of these developments you have asked the following questions:

(1) Is §805.6(1)(a) of The Code as amended by H.F. 2598 controlling as to the amount of court costs assessed in cases involving scheduled offenses charged under the provisions of Chapter 805 on Uniform Citations and Complaints, and

(2) If H.F. 2598 is not controlling and court costs in such cases remain set at five dollars, should the uniform citation and complaint form be changed in accordance with that bill despite the fact that such information regarding costs would in fact be erroneous, confusing and misleading?

The answer to your question is a qualified yes. §805.6(1)(a), The Code (1979), as amended, is not controlling over the court cost provisions in §805.9. It is evidence of the legislature's intent to include an increase of §805.9 fees within the general fee increase from five to six dollars provided by §38, H.F.2598, as it amends §602.63, The Code (1979). In construing H.F. 2598, all of its provisions must be considered to determine its proper construction. It is axiomatic that the ultimate goal in statutory construction is to determine the intent of the legislature and to give effect to that intent whenever possible, Doe v. Ray, 251 N.W.2d 496, 500 (Iowa, 1977). A careful analysis of the provisions of H.F. 2598 indicates a clear legislative intent to raise §805.9 fees to six dollars.

The following sections are indicative of such an intent:

1. Section 2 of the act appropriates $720,000.00 to the judicial retirement fund. The above described memorandum from the Legislative Service Bureau to Representative Crawford indicates that the computation of this appropriation included the State's share of an additional dollar in §805.9 fees.

2. Section 37 of the act changes the State's share of filing fees and forfeiture of bail, including §805.9 fees, from three-fifths to two-thirds, or, in fact, from three to four dollars. The legislature is making sure that the State's share comes out to an even dollar amount. It also reinforces the finding that this increase is for the benefit of the judicial retirement fund, because none of the increase goes to the county, and, therefore, that §805.9 fees are to be increased by this act.

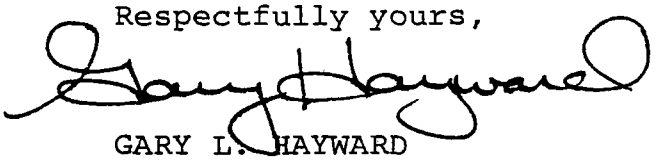
3. Section 38 of the act amends §602.63, The Code (1979), to increase filing and docketing fees for all nonindictable misdemeanors from five to six dollars. The amendment of this section must be viewed as controlling over §805.9 fees if the legislature's intent is to be effected. §602.63 is primarily concerned with court costs. §805.9 is primarily concerned with procedure for scheduled offenses. The legislature apparently views the provisions of §805.9 to mean that if a defendant complies with the conditions set in that section, court costs will be limited to the costs of filing and docketing the action. This construction, of course, would be much easier had the legislature chosen to either expressly tie §805.9 court costs to the §602.63 filing fee amount or to amend §805.9 along with the other provisions amended by H.F. 2598. In any event, §805.11 does tie court costs in cases involving scheduled offenses to the fees prescribed by §602.63. The conflict between §§805.9 and 805.11 is discussed below.

4. Section 41 of the act requires the Commissioner of Public Safety and the Director of Conservation to adopt a form for charging scheduled offenses stating that court costs for such offenses shall be six dollars if the defendant complies with §805.9. Prior to this amendment the form was to indicate that such costs were five dollars. If the legislature did not actually intend to raise §805.9 court costs to six dollars, it would have never enacted this provision. To conclude that the General Assembly intended to mandate this change in the Uniform Citation and Complaint form without an accompanying change in the underlying costs is to conclude that the General Assembly intended to confound and confuse the courts, the police and the public. This would be inconsistent with any notion of a reasonable legislature which is the basis for all statutory construction.

As the Code now stands, §805.9 states that court costs for scheduled offenses are five dollars and §805.11 states that they are in the amount provided by §602.63. Since H.F. 2598 has gone into effect §805.11 calls for costs in the amount of six dollars. Because court costs must be set at a specific figure, these provisions are wholly irreconcilable. Because they both apply to the same circumstances one cannot be interpreted as being more specific than the other. §4.8, The Code (1979), provides that in this situation, the provision latest in date of enactment by the general assembly prevails. The recent amendment to §602.63 by H.F. 2598 was in effect an amendment of §805.11. Therefore, to the extent that §§805.9 and 805.11 are in conflict regarding costs, §805.11 is controlling.

For the above stated reasons, we therefore believe that §§805.6(1)(c) and §805.9 are amended by implication to raise court costs from five to six dollars in applicable cases. Amendment by implication is not a favored mode of statutory construction. See: Caterpillar Davenport Emp. Credit Union v. Huston, 292 N.W.2d 393, 396 (Iowa, 1980). Nonetheless, where, as in this situation, another construction would result in an absurd or unreasonable result and, further, would defeat the clear and manifest intent of the General Assembly, no other construction would be proper. See: State v. Conner, 292 N.W.2d 682, 686 (Iowa, 1980); Janson v. Fulton, 162 N.W.2d 438, 442 (Iowa, 1968); §4.4(3), The Code (1979).

Respectfully yours,



GARY L. HAYWARD
Assistant Attorney General
Public Safety Division

GLH:dkl

COUNTIES AND COUNTY OFFICERS; MUNICIPALITIES; CITY ASSESSOR: Payment for expenses. ch. 441; §§ 441.1, 441.2, 441.16, The Code 1979. The County auditor does not have the authority to deny claims submitted by the city assessor for payment nor does the county board of supervisors serve in a supervisory capacity over the assessor. The city assessor is not subject to the same rules and procedures as the rest of the subdivisions of county government, however, the conference board may establish rules and regulations governing expenditures of funds by the city assessor. (Bennett to Davis, Scott County Attorney, 7/17/80) #80-7-12(L)

July 17, 1980

William E. Davis
Scott County Attorney
416 West Fourth Street
Davenport, IA 52801

Dear Mr. Davis:

This office is in receipt of your request for an opinion concerning the ability of the Scott County Board of Supervisors to establish rules and regulations regarding payment for expenses incurred by the City Assessor. Specifically you ask the following questions:

1. Is the City Assessor subject to the same rules and procedures as the rest of the subdivisions of county government in light of Section 441.16, the Code?

2. Does the Auditor's Office have the right to audit the City Assessor's claims and deny such payments if they are in violation of either county or state laws?

3. If the Auditor and the County Board of Supervisors do not have authority to deny claims submitted by the Assessor, can the conference board establish rules and regulations governing the expenditures of funds by the City Assessor?

Section 441.1, The Code 1979, provides for the creation of the office of city assessor in cities with a population of between ten thousand and one hundred twenty-five thousand. Pursuant to §441.2, The Code 1979, in each city which has an assessor, a conference board is established which consists of the members of the city council, school board and county board of supervisors. The conference board is the certifying board for all budget expenditures of the city assessor's office and is subject to the provisions of ch. 24, The Code 1979. Under §441.16, The Code 1979, the assessor, the examining board, and the board of review, each prepare a budget for all expenses for the next year which is filed with the conference board. To be included in the budget is an itemized list of the proposed salaries of the assessor and each deputy, the amount

required for field personnel and other personnel, their number and their compensation; the estimated amount needed for expenses, printing, mileage and other expenses necessary to operate the assessor's office,....

§441.16, The Code 1979.

Each fiscal year a meeting of the conference board is held. The purpose of that meeting is to fix and adopt the budget in which are specifically itemized the proposed expenses of the city assessor for the proceeding year. Among the items authroized are provisions for office equipment and travel expenses. Once the budget is approved, §441.16, The Code 1979, provides that a tax for the maintenance of the assessor's office be levied. The county treasurer credits the sums received from the levy in an assessment expense fund from which all expenses incurred by the city assessor are to be paid. That section further provides that the "county auditor shall keep a complete record of said funds and shall issue warrants thereon only on requisition of the assessor."

It appears from ch. 441, The Code 1979, that the office of the city assessor is to operate independently from other county offices. The budgeting process for the city assessor differs from the county assessor as illustrated by the make-up of their respective conference boards. As set out above, the county auditor issues warrants only on requistion of the city assessor for expenses incurred by that office. In addition, §441.16, The Code 1979, give the assessor the latitude to "transfer funds budgeted for specific items for the operation of the assessor's office from one unexpended balance to another...."

For the above reasons, it is this office's opinion that your first question would be answered in the negative. The city assessor is not subject to the same rules and procedures as the rest of the subdivisions of county government. The other offices of the county appear to serve the city assessor in a non-regulatory capacity only as indicated by the provision that makes it mandatory for the auditor to issue warrants drawn on the assessment expense fund when so requested by the assessor. Similarly, because of the statutory relationship of the auditor to assessor, the county auditor would not have the authority to audit the city assessor's claims nor deny such payments if they contravene state or county law. Mr. William Kelso, Supervisor of County Audits of the State Auditor's office, concurs in this analysis. According to Mr. Kelso, any problems concerning illegal expenditures would be discovered during the state audit of the city assessor and any appropriate repayments would be directed at that time. Also, the State Auditor's office reviews the certified budget prior to the tax levy to fund it and since the budget is itemized it would be likely that any questionable items would be addressed by the auditor at that time.

Your third question concerns whether the conference board may adopt rules which govern the expenditure of funds by the city assessor. Because that board is given the responsiblity to adopt the budget for the assessor it would seem reasonable as a basis for such approval that the board have some assurance that the budget will be handled in a responsible and appropriate manner by the assessor. The adoption of such rules could serve to eliminate allegations of fiscal irresponsibility which might arise if there are no regulations governing expenditure of the funds of the assessor's office.

In conclusion, it is the opinion of this office that the county auditor acts only as an administrator for the city assessor's budget and does not have the authority to deny claims submitted by the assessor for payment, nor does the county board of supervisors serve in a supervisory capacity over the assessor. The city assessor is not subject to the same rules and procedures as the rest of the subdivisions of the county government because of its independentlystatutory function. However, the conference board may establish rules and regulations governing expenditures of funds by the city assessor.

Very truly yours,

Barbara Bennett

BARBARA BENNETT
Assistant Attorney General

BB/bb

STATE OFFICERS AND DEPARTMENTS: Authority of the Citizens' Aide/Ombudsman to administer a prisoner legal assistance program. Chapter 601G, The Code 1979; 1978 Session, 67th G.A., ch. 1018, § 6(e); 1979 Session, 68th G.A., ch. 8, § 11; H. F. 2580, 68th G.A., 1980 Session. The Citizens' Aide/Ombudsman's Office has no present statutory authority or responsibility to administer a prisoner legal assistance program. The Office may participate in such program only to the extent permitted by the appropriation made in Chapter 1018, § 6(e), of the Acts of the 67th General Assembly, 1978 Session. (Stork to Angrick, Citizens' Aide/Ombudsman, 7/11/80) #80-7-11(L)

July 11, 1980

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

Dear Mr. Angrick:

You have requested an opinion of the Attorney General concerning the authority and responsibility of the Office of the Citizens' Aide/Ombudsman, hereinafter referred to as Citizens' Aide Office, to administer certain aspects of a prisoner legal assistance program pursuant to directives contained in appropriations bills passed by the Iowa General Assembly during the past three years. Your inquiry requires an examination of both the general statutory authority of the Citizens' Aide Office and the nature of the authority granted to the Office by the recently-passed appropriations bills.

The Citizens' Aide Office, established by the Iowa General Assembly in 1972, has enumerated powers under Chapter 601G, The Code 1979. The Citizens' Aide/Ombudsman is appointed by the Legislative Council with the approval and confirmation by a constitutional majority of the members of each house of the General Assembly. § 601G.3. The individual appointed then employs and supervises employees for the Office in such positions and at such salaries as are authorized by the Legislative Council. Id. The powers of the Citizens' Aide Office are defined in § 601G.9:

> 1. He may investigate, on complaint or on his own motion, any administrative action of any agency, without regard to the finality of the administrative action, except that he shall not investigate the complaint of an employee of an agency in regard to that employee's employment relationship with the agency.

> 2. He may prescribe the methods by which complaints are to be made, received, and acted upon; determine the scope and manner of investigations to be made; and, subject to the requirements of this chapter, he may determine the form, frequency, and distribution of his conclusions and recommendations.
>
> 3. He may request and shall be given by each agency such assistance and information as may be necessary in the performance of his duties. He may examine the records and documents of all agencies not specifically made confidential by law. He may enter and inspect premises within any agency's control.
>
> 4. He may issue a subpoena to compel any person to appear, give sworn testimony, or produce documentary or other evidence deemed relevant to a matter under his inquiry. The citizens' aide, his deputy and his assistants shall have the power to administer oaths to persons giving testimony before them. If a witness either fails or refuses to obey a subpoena issued by the citizens' aide, the citizens' aide may petition the district court having jurisdiction for an order directing obedience to the subpoena. In the event the court finds that the subpoena should be obeyed, it shall enter an order requiring obedience to the subpoena, and refusal to obey such court order shall be subject to punishment for contempt.

The 1978 session of the 67th General Assembly passed Senate File 2163, which in part appropriated $25,000 for a legal assistance program for inmates of the Iowa State Penitentiary, the Iowa State Reformatory, and the Iowa Women's Reformatory. 1978 Session, 67th G.A., ch. 1018, § 6(e). The appropriation was made with the following qualification:

> It is the intent of the general assembly that a legal assistance program be established for inmates of the institutions identified in this paragraph. The purpose of the program shall be to provide civil legal assistance to inmates in matters of child custody, bankruptcy and dissolution of marriage. The office of the citizens' aide ombudsman shall maintain a list of attorneys under the program funded by this subsection.

Id. Upon approval by the Governor and in accordance with this legislative directive, the Citizens' Aide Office and the Division of Adult Corrections for the Department of Social Services entered into an agreement to ensure civil legal assistance to inmates in the matters identified above.

House File 755, passed during the 1979 session of the 68th General Assembly, made additional appropriations of $25,000 for fiscal years 1979-80 and 1980-81 with respect to the same type of legal assistance program identified in Chapter 1018, § 6(e). Unlike Senate File 2163, House File 755 did not specifically provide for involvement by the Citizens' Aide Office in the administration of the program. See 1979 Session, 68th G.A., ch. 8, § 11.

The 1980 session of the 68th General Assembly passed House File 2580 which, in § 53, amended ch. 8, § 11 as follows (amended portion is underlined):

> 11. For a legal assistance program to provide civil legal assistance to inmates of the Iowa correctional system in matters of child custody, bankruptcy and dissolution of marriage $25,000 $25,000
>
> Expenditures shall be authorized by the citizens' aide office, and may include the costs of transporting prisoners, secretarial support and administrative oversight.
>
> It was and is the intent of the general assembly that this program was established for and be continued for expenditure for civil matters of inmates, which matters occurred outside the state's institutions. Thus it is the intent of the general assembly that funds from the appropriation shall not be used for civil matters in which the inmate and the state of Iowa are adverse parties.

On May 26, 1980, the Governor vetoed this section for the following reasons:

> Section 53 revises several appropriations approved last year for adult corrections. One of these revisions would transfer certain administrative authority of an executive agency, the Department of Social Services, to a legislative agency, the Citizens'

> Aide Office, for the legal assistance program for inmates. Article III of the Iowa Constitution clearly sets forth the powers of each branch of state government. Granting administrative authority for the legal assistance program to a legislative agency would violate that separation. This item would remove from the Department of Social Services and its prison wardens a substantial amount of control over residents of their institutions.
>
> In pursuing the civil legal assistance this section provides to inmates, the Citizens' Aide Office would be empowered to authorize expenditures for transporting prisoners, secretarial support and administrative oversight. An executive agency cannot operate effectively if it must first secure the approval of a legislative agency to carry out its day-to-day operations any more than the legislature could operate if an executive agency could step in daily to amend unilaterally bills that are being debated.
>
> As the initiator of the Citizens' Aide Office, I support and encourage its work. However, I do not believe that its duties include administration of the executive agencies. The administrators of the Department of Social Services indicate that they will be amenable to recommendations from the Citizens' Aide Office for the use of the legal assistance fund. This item veto leaves the original appropriation for the legal assistance program intact. With cooperation between the agencies, hopefully we will have the results desired without violating the separation of power.

Letter from Robert D. Ray, Governor, to Melvin D. Synhorst, Secretary of State, pp. 4-5 (May 26, 1980). As a consequence of the Governor's veto, any participation in the prisoner legal assistance program by the Citizens' Aide Office must be founded upon an authorization contained in either Chapter 601G or Chapter 1018, § 6(e), of the session laws of the 67th General Assembly.

The powers of the Citizens' Aide Office as set forth in § 601G.9 generally relate to the investigation of certain administrative actions by state agencies. Appropriate subjects for investigation by the Office are listed in § 601G.11. These sections clearly emphasize that the role of the Citizens' Aide Office concerns the investigation of state agency actions.

The Office attempts to ensure, for example, that agency action is not unfair, unreasonable, or contrary to law; it thereby serves a watchdog function on behalf of the public interest.

Chapter 601G does not authorize the Citizens' Aide Office to administer any particular program. The only reference to prisoner assistance is set forth in the second paragraph of § 601G.6, which provides that the Citizens' Aide shall appoint an assistant responsible for investigating complaints relating only to penal or correctional agencies. This section expressly grants the assistant the limited authority of investigation as opposed to advocacy or general administration of specific penal or correctional matters.

Section 601G.6 does not appear to authorize implicitly the participation by the Citizens' Aide Office in a prisoner legal assistance program. Such participation, in fact, seems contrary to the investigatory role of the office since it would require the office to act, at least indirectly, as an advocate of particular individual rights. The language of Chapter 601G repeatedly affirms the distinct role of the Citizens' Aide Office as investigator of agency action for the benefit of the public interest. Since the Chapter contains no authorization, express or implied, for the Office to participate in the administration of a prisoner legal assistance program, such participation must be based upon the authorization set forth in Chapter 1018, § 6(e).

Section 6(e) evidences a clear legislative intent that the Citizens' Aide Office participate in the prisoner legal assistance program funded by an initial appropriation of $25,000. The Office was given the responsibility both to maintain a list of attorneys willing to participate in the program and to appoint those attorneys to individual cases. It is well settled in Iowa that the General Assembly may qualify an appropriation in this manner. See Welden v. Ray, 229 N.W.2d 706 (Iowa 1975), in which the Iowa Supreme Court recognizes the Legislature's inherent power to specify how an appropriation must be spent. Id. at 709-10. Subsequent sessions of the General Assembly have continued funding for the program. In making a biennial appropriation for the program, however, the 1979 session of the 68th General Assembly did not indicate whether the Citizens' Aide Office was to continue its participation. The 1980 session of the 68th General Assembly clarified this matter in House File 2580 by specifically providing for the continued and expanded participation by the Office in the program; the Governor vetoed this item on May 26, 1980. Consequently, the issue now is whether Chapter 1018, § 6(e), adopted by the 1978 session of the 67th General Assembly, provides a sufficient basis for the Citizens' Aide Office to continue its participation in the prisoner legal assistance identified in that section.

An appropriation is a formal act by the Legislature, in a duly enacted law, to set apart public funds for a special use or purpose. Iowa Const. art. III, § 24; 63 Am.Jur.2d Public Funds § 46 (1972). A condition requiring the performance of certain acts in connection with an appropriation does not amount to a distinct item of an appropriation bill but is only a part of the item appropriated. 63 Am.Jur.2d Public Funds § 53 (1972). Accordingly, if the Governor desires to veto the condition, he must veto the accompanying appropriation as well. Welden v. Ray, 229 N.W.2d 706, 713 (Iowa 1975). In Welden, the Iowa Supreme Court cited language from various other jurisdictions which emphasize the indivisibility of an appropriation and any qualification on that appropriation. Id. at 710-13.

Present authority for the Citizens' Aide Office to participate in the prisoner legal assistance program is based solely upon the qualification relating to the initial $25,000 appropriation for the program. Since a qualification of an appropriation is indivisible from the appropriation itself, there appears to be no statutory authorization for continued involvement by the Citizens' Aide Office in the prisoner legal assistance program. Such involvement is strictly limited to the initial $25,000 appropriation made to the program in 1978.

In conclusion, the Citizens' Aide Office appears to have no present statutory authority or responsibility to administer a prisoner legal assistance program. The Office may participate in the program only to the extent permitted by the appropriation made in Chapter 1018, § 6(e), of the Acts of the 67th General Assembly, 1978 Session.

Very truly yours,

Frank J. Stork

FRANK J. STORK
Assistant Attorney General

FJS:sh

COUNTIES AND COUNTY OFFICERS: Authority of officers designated by county conservation board. Section 111A.5, The Code 1979. Officers designated by county conservation boards have all of the powers conferred by law on police officers, peace officers, or sheriffs but their bailiwick is limited to the areas under the control of the county conservation board. (Osenbaugh to Fagerland, Acting Director, State Conservation Commission, 7/11/80) #80-7-9(L)

July 11, 1980

Mr. Robert G. Fagerland
Acting Director
Iowa Conservation Commission
Wallace Building
L O C A L

Dear Mr. Fagerland:

You have requested the opinion of the Attorney General with respect to "the power of persons appointed under Chapter 111A.5 whether qualified under Chapter 80B or not to enforce the laws of the state of Iowa regardless of where violations occur."

We are of the opinion that persons designated as police officers by a county conservation board have all the powers conferred by law on police officers, peace officers, or sheriffs in the enforcement of the laws of the state of Iowa and the apprehension of violators thereof, within the territorial boundaries of properties under the control of the county conservation board.

Iowa law does not differentiate between certified and non-certified peace officers with respect to the territorial boundaries within which a particular officer exercises jurisdiction. Certification under the provisions of Chapter 80B, The Code 1979, may be crucial in determining the scope of a particular officer's authority (e.g., administering a test for alcoholic content of blood under Chapter 321B) but it is not relevant to a determination of the territorial limits within which the powers of a particular officer may be exercised. See Op.Att'yGen. #79-7-5.

An authoritative article by Professor Rollin M. Perkins uses the term "bailiwick" in describing the place where the powers of a peace officer may be exercised:

> The word "jurisdiction" (to speak the law) has reference to the authority of a judge or court. It is sometimes used to refer to territory recognized for other purposes and it is not improper to speak of the "jurisdiction" of a peace officer; but there is a better word for the latter purpose, the use of which tends to avoid confusion. This word is "bailiwick" (bailiff's village) which, although it once had a narrower meaning, now refers to the special district or territory of a peace officer. Thus the bailiwick of a state agent may be the state, the bailiwick of a sheriff, his county, and the bailiwick of a policeman, his town or city.

25 Iowa L.Rev. 214, 222 (1940), quoted in 1950 Op.Att'yGen. 72, 73.

Generally, a peace officer appointed for a particular territory or bailiwick may not exercise official powers beyond that bailiwick unless a statute so provides. "In the absence of statute the power of a sheriff or officer is limited to his own county; he is to be adjudged a sheriff in his own county, and not elsewhere. He cannot, therefore, execute a writ [unless authorized by statute] out of his own county, and if he actually does so, he becomes a trespasser." 61 A.L.R. 378, quoted in 1950 Op.Att'yGen. 72, 73. "An officer who seeks to make an arrest without warrant outside his territory must be treated as a private person." 5 Am. Jur. 2d Arrest § 50 at 742, quoted in State v. O'Kelly, 211 N.W.2d 589, 595 (Iowa 1973), cert. denied, 417 U.S. 936, 94 S.Ct. 2652, 41 L.Ed.2d 240, reh. den. 95 S.Ct. 160, 419 U.S. 887, 42 L.Ed.2d 131. See also, City of Cincinnati v. Alexander, 54 Ohio 2d 248, 375 N.E.2d 1241 (1978); People v. Alvorado, 208 Cal. App. 2d 629, 25 Cal. Rptr. 437, cert. denied 374 U.S. 840, 83 S.Ct. 1891, 10 L.Ed.2d 1060.

We confirm our statement in Op.Att'yGen. #79-9-7 that "the exercise of the official powers of a peace officer is limited to that geographical and political unit comprising his or her bailiwick, unless expressly expanded by statute." The question then becomes one of determining the "bailiwick" of the officers designated by a county conservation board.

Section 801.4, The Code 1979, defines the term "peace officers" as including, inter alios, sheriffs and their regular deputies who are subject to mandated law enforcement training, marshals and policemen of cities, conservation officers as authorized by § 107.13, and "Such persons as may be otherwise so designated by law."

Section 111A.5 provides:

> Rules and regulations--officers. The county conservation board may make, alter, amend or repeal rules and regulations for the protection, regulation and control of all museums, parks, preserves, parkways, playgrounds, recreation centers, and other property under its control. No rules and regulations adopted shall be contrary to, or inconsistent with, the laws of the state of Iowa. Such rules and regulations shall not take effect until ten days after their adoption by said board and after their publication once a week for two weeks in at least one paper circulating in the county and after a copy thereof has been posted near each gate or principal entrance to the public ground to which they apply. After such publication and posting, any person violating any provision of such rules and regulations which are then in effect shall be guilty of a simple misdemeanor. The board may designate the executive officer and such employees as the executive officer may designate as police officers who shall have all the powers conferred by law on police officers, peace officers, or sheriffs in the enforcement of the laws of the state of Iowa and the apprehension of violators thereof.

The cardinal principle of statutory construction is to ascertain legislative intent and, if possible, to give it effect. Hartman v. Merged Area VI Community College, 270 N.W.2d 822 (Iowa 1978); City of Des Moines v. Elliott, 267 N.W.2d 44 (Iowa 1978); Doe v. Ray, 251 N.W.2d 496 (Iowa 1977).

As stated in a prior opinion Op.Att'yGen. #79-9-7:

> . . . a peace officer's bailiwick is usually limited to that geographical unit over which his or her employing political subdivision exercises governmental control.

County conservation boards exercise governmental control only over specified county properties, §§ 111A.4, 111A.6, The Code. This limitation of control to county parks, preserves, etc., differs from the power of the State Conservation Commission to regulate the taking of fish and game throughout the State on both private and public land. See, e.g., § 109.32, The Code. We find nothing in Chapter 111A or elsewhere which expands the bailiwick of these officers beyond the county park system. Section 111A.5, The Code, confers upon these officers all of the powers of peace officers but does not specify the territorial jurisdiction. Absent any specific grant of broader territorial jurisdiction, we must apply the general rule. We would, therefore, conclude that the bailiwick of county conservation board officers is limited to those county properties under the control of the county conservation board under § 111A.4.

Under this construction a county conservation board officer would have no official authority as a peace officer for violations occurring outside the county park system. The more difficult question is whether a county conservation board officer may arrest one outside the park for violations occurring within the park. The Iowa Supreme Court has not determined whether the common law doctrine of hot pursuit (which allows an officer to pursue a suspect into another jurisdiction and arrest him or her there) applies to misdemeanors. Given the potential personal liability for false imprisonment if such an arrest were made and it is found that the officer was not acting under his authority as a peace officer, we would caution officers that they may well be acting as mere private citizens when they make arrests outside the park for misdemeanors occurring within the park. See 5 Am. Jur. 2d, Arrest, § 51, p. 743. We therefore recommend that county conservation board officers not rely on any official authority to arrest simple misdemeanants outside county park areas. Where it is necessary to effectuate an arrest outside the park for a violation occurring inside the park, the county conservation board officer should rely on the county sheriff or other law enforcement authority with jurisdiction.

While this construction limits the ability of conservation board officers to apprehend violators outside of park boundaries, we would note that Chapter 28E provides a mechanism by which county conservation boards can enter into cooperative agreements with other public agencies to expand the jurisdiction of its officers to allow them to exercise some or all of the jurisdiction of such other public agency by cooperative efforts.

We would conclude then that the bailiwick of county conservation board officers is limited to those areas subject to county conservation board control.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Assistant Attorney General
Environmental Protection Division

EMO:rcp

COUNTIES, HIGHWAYS: Necessity for speed limit signs: §§ 321.285, 321.289, 321.290, 321.293, 321.295, 321.482. The Code 1979. The speed limits generally set by § 321.285 need not be posted to be enforceable. Failure to post signs regarding speed limits required by § 321.289 does not render the speed limit unenforceable. Exceptions to the general speed limits set pursuant to § 321.285(7), 321.290, 321.293 or 321.295 must be posted to be in effect and enforceable. (Hayward to Van Maanen, State Representative, 7/10/80) #80-7-6 (L)

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

July 10, 1980

Dear Representative Van Maanen:

You have asked this office for an opinion regarding the enforceability of the speed limit set by §321.285(7), The Code (1979), for motor vehicles on the secondary road system in this State. Specifically you want to know whether that speed limit must be posted to be enforced. It is our opinion that no such posting is generally required unless the board of supervisors determines that specific conditions require a limit less than is normally applicable to such roads.

Section 321.285 sets the speed limit for secondary roads as follows:

> Any person driving a motor vehicle on a highway shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing, and no person shall drive any vehicle upon a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead, such driver having the right to assume, however, that all persons using said highway will observe the law.
>
> The following shall be the lawful speed except as hereinbefore or hereinafter modified, and any speed in excess thereof shall be unlawful:
>
> ********
>
> 7. Reasonable and proper, but not greater than fifty-five miles per hour at any time between sunrise and sunset, and not greater than fifty miles per hour at any time between sunset and

> sunrise, on secondary roads unless such roads are surfaces with concrete or asphalt or a combination of both, in which case the speed limits shall be the same as provided in subsection 5 of this section. [Fifty-five miles per hour from sunset to sunrise and fifty-five miles per hour from sunrise to sunset.] Whenever the board of supervisors of any county shall determine upon the basis of an engineering and traffic investigation conducted by the department [of transportation] 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, the board shall determine and declare a reasonable and proper speed limit thereat. Such speeds as determined by the board of supervisors shall be effective when appropriate signs giving notice thereof are erected by the board of supervisors at such intersection or other place or part of the highway.

(Other provisions allowing the setting of speed limits lower than the general rules provided in §321.285, The Code (1979), not applicable to secondary roads, also require the posting of the lower speed limit before it goes into effect. §§321.290 and 321.295, The Code (1979). Also, §321.293, The Code (1979), allows for higher speed limits than generally applicable, not to exceed fifty-five miles per hour, on through streets in cities. These higher limits too are effective only after posting signs.)

Whenever the board of supervisors determines in accordance with §321.285(7), that conditions exist on a secondary road in its county which require a lower speed limit than otherwise applicable under that section, the new limit is not effective until it is posted. Therefore, it is not enforceable until it is posted. The posting requirement in that section is not applicable to roads when the general speed limit on secondary roads is in force. Support of the proposition that the general secondary road speed limit must be posted to be enforceable, must be found in a source outside §321.285.

There is no such provision in The Code. Violation of §321.285(7) is a simple misdemeanor. There is no requirement that such violation be knowing, willful or intentional. §321.482, The Code (1979). Everyone is presumed to know the law. State v. Sonderleiter, 251 Iowa 106, 109, 99 N.W.2d 393 (1959). Therefore, absent some specific legislative requirement, notice of speed limit laws need not be

posted as a condition precedent to their enforcement. §§321.285(7), 321.290, 321.293, 321.295, supra, demonstrate that the General Assembly has indicated instances when posting the speed limit is such a condition precedent. It follows that if such a condition were intended to apply to the enforcement of the general speed limit set by §321.285(7), the legislature would have so provided. Absent such provision, the general speed limit set by §321.285(7) for secondary roads is enforceable whether or not signs giving notice thereof are posted.

Another provision requiring the posting of signs may be relevant. §321.289, The Code (1979), states:

> The department [of transportation] shall furnish and place on primary roads or on extensions of primary roads within any city suitable standard signs showing the points at which the rate of speed changes and the maximum rate of speed in the district which the vehicle is entering. On all other main highways the city shall furnish and erect suitable signs giving similar information to traffic on such highways.

The Iowa Supreme Court in Waldman v. Sanders Motor Co., 214 Iowa 1139, 243 N.W.555 (1932), found in a civil case that negligence could be found if a driver exceeded the speed limits within a city despite the failure by that city to post signs in accordance with this provision.

> [T]here is nothing in the statute to indicate that a driver of an automobile is not negligent in driving at a higher speed than is allowed by the statute in a residential district even though there are no warning signs posted.

This position is bolstered by the provisions cited above where the legislature stated that in certain circumstances speed limits were not in effect until posted. Again, in the absence of such a provision in §321.289, it appears that posting signs is not a condition precedent to the enforcement of speed limits in cities unless otherwise provided.

In conclusion, whenever the speed limit on a road or highway is that limit generally provided for such a road by §321.285, The Code (1979), posting of signs indicating the maximum legal speed is not a condition precedent to the enforceability of such speed limit. Furthermore, failure of the Department of Transportation or of a city to post signs required by §321.289, The Code (1979),

does not render the speed limit on that road unenforceable. However, whenever the appropriate authority determines, in accordance with §§321.285(7), 321.290, 321.293 or 321.295 that conditions existing at a specific location render the general speed limit provided by §321.285 unsafe or otherwise impracticable, the alternate speed limit enacted is not effective until suitable signs are posted informing the travelling public of the exception from the general rule.

Respectfully yours,

GARY L. HAYWARD
Assistant Attorney General

GLH:ko

CIVIL RIGHTS/CONCILLIATION/BACK PAY. 601A.15(3)(d), 601A.15(5), 601A.15(8)(a)(1), The Code 1979; 96.3 as amended by 1979 Session, 68th G.A., chapter 33, § 5. Sections 601A.15(3)(d) and 601A.15(5) require that further concilliation efforts cannot be bypassed until the thirtieth day following the initial concilliation meeting, regardless of a respondent's intransigence. 601A.15(3)(a)(1), The Code 1979, requires that a complainant's back pay award be reduced by the total amount of unemployment compensation benefits received during the back pay period. This achieves the object to be attained by § 96.3 The Code as its provisions for recovering unemployment compensation benefits from complainants who receive a back pay award pursuant to § 601A.15(8)(a)(1) The Code 1979. (Nichols to Reis, Executive Director, Iowa Civil Rights Commission, 7/8/80) #80-7-5(C)

July 8, 1980

Ms. Artis Van Roekel Reis
Executive Director
Iowa Civil Rights Commission
8th Floor - Colony Building
507 Tenth Street
Des Moines, Iowa 50319

Dear Ms. Reis:

You have submitted two questions to this office for our opinion regarding the prerequisites for bypassing conciliation and the deduction of umemployment compensation benefits from a back pay award under the Iowa Civil Rights Act.

First, you ask whether § 601A.15(3)(d), The Code 1979, permits conciliation to be bypassed before the expiration of thirty days following the initial conciliation meeting if the respondent, before or after the initial meeting, refuses to conciliate? It is our opinion that §§ 601A.15(3)(d) and § 601A.15(5), The Code 1979, do not permit the bypassing of further conciliation efforts until the thirtieth (30) day after the initial conciliation meeting regardless of the respondent's intransigence.

Second, you ask whether § 601A.15(8)(a)(1), The Code 1979, in conjunction with § 96.3, The Code 1979, as amended by 1979 Session, 68th G.A., ch. 33, § 5, requires that a complainant's back pay damages be reduced only by those unemployment compensation benefits received during the back pay period which are attributable to the respondent as a base period employer? It is our opinion that § 601A.15(8)(a)(1), The Code 1979, requires that all unemployment compensation benefits received by a complainant during the back pay period be deducted from the award.

I. PREREQUISITES FOR BYPASSING CONCILIATION

The conciliation process is triggered when a complaint filed with the Iowa Civil Rights Commission (hereinafter "Commission") is credited with probable cause. At that point, §§ 601A.15(3)(d) and 601A.15(5), The Code 1979, become operative:

> The commission staff must endeavor to eliminate the discriminatory or unfair practice by conference, conciliation, and persuasion for a period of thirty days following the initial conciliation meeting between the respondent and the commission staff after a finding of probable cause. After the expiration of thirty days, the director may order the conciliation conference and persuasion procedure provided in this section to be bypassed when the director determines the procedure is unworkable by reason of past patterns and practices of the respondent, or a statement by the respondent that the respondent is unwilling to continue with the concilia-

> tion . . . .
> § 601A.15(3)(d), The Code 1979 (Emphasis added).
>
> When the director is satisfied that further endeavor to settle a complaint by conference, conciliation, and persuasion is unworkable and should be bypassed, and the thirty-day period provided for in subsection 3 has expired without agreement, the director with the approval of a commissioner, shall issue and cause to be served a written notice specifying the charges in the complaint. . . and the reasons for bypassing conciliation, if the conciliation is bypassed. . . .
> § 601A.15(5), The Code 1979 (Emphasis added).

The legislative history of §§ 601A.15(3)(d) and 601A.15(5), The Code 1979, reveals that the Legislature intended to establish a mandatory conciliation period of at least thirty days in order to encourage the resolution of civil rights complaints. The provisions quoted supra were enacted in 1978 Session, 67th G.A., ch. 1179, §§ 12, 14. They replaced §§ 601A.14(3), 601A.14(5), and 601A.14(6), The Code 1977. Significantly, those stricken provisions of the Iowa Civil Rights Act did not impose a minimum time period for conciliation. Discontinuation of conciliation was a discretionary matter:

> When the investigating official is satisfied that further endeavor to settle a complaint by conference, conciliation, and persuasion shall be futile, the official shall report the same to the commission. . . . § 601A.14(6), The Code 1977.

The current law, § 601A.15(3)(d), The Code 1979, expressly prohibits the Commission from bypassing conciliation

until "the expiration of thirty days" "following the initial conciliation meeting". Id. This minimum thirty-day conciliation period is reiterated in § 601A.15(5), The Code 1979.

The Commission's rules are consistent with the mandatory thirty-day conciliation period imposed by the Legislature:

> Upon the commencement of conciliation efforts, the commission must allow at least thirty days for the parties to reach an agreement. After the passage of thirty days the executive director may order further conciliation attempts bypassed if (s)he determines that the procedure is unworkable. The director must have the approval of a commissioner before bypassing conciliation.
> 240 I.A.C. § 1.5(1)(h), effective 1/1/79.

Section 601A.15(5), The Code 1979, requires that the minimum thirty-day conciliation period lapse before the executive director serves notice of the charges in the complaint on the respondent. This minimum concilation period is not obviated by a respondent's intransigence. Whether the respondent's intransigence surfaces before or after the initial conciliation meeting is immaterial; further conciliation cannot be bypassed until the thirtieth day following the initial meeting. §§ 601A.15(3)(d) and 601A.15(5), The Code 1979.

Thus, the current law represents a substantial departure from the conciliation termination procedure formerly codified in § 601A.14(6), The Code 1977. The latter provision clothed the investigating official with discretion to discontinue conciliation whenever further efforts were deemed futile. The current law circumscribes the scope of the Commission's discretion; the conciliation process cannot now be bypassed until the thirtieth day after the initial meeting even if the respondent's actions render the process futile. §§ 601A.15(3)(d) and 601A.15(5), The Code 1979.

Therefore, it it the opinion of this office that conciliation cannot be bypassed until the thirtieth day following the initial conciliation meeting despite a respondent's refusal to compromise or attend the initial meeting.

II. BACK PAY AND UNEMPLOYMENT COMPENSATION BENEFITS

Section 601A.15(8)(a)(1), The Code 1979, states that:

> If upon taking into consideration all of the evidence at a hearing, the commission determines that the respondent has engaged in a discriminatory or unfair practice, the commission shall state its findings of fact and conclusions of law and shall issue an order requiring the respondent to cease and desist from the discriminatory or unfair practice and to take the necessary remedial action as in the judgment of the commission will carry out the purposes of this chapter. . . .
>
> a. For the purposes of this subsection and pursuant to the provisions of this chapter "remedial action" includes but is not limited to the following:
>
> (1) Hiring, reinstatement or upgrading of employees with or without pay. Interim earned income and unemployment compensation shall operate to reduce the pay otherwise allowable. (Emphasis added).

The above-quoted provision was enacted in 1978 Session, 67th G.A., ch. 1179, § 16, striking § 601A.14(12), The Code 1977, quoted infra:

> If, upon taking into consideration all the evidence at hearing, the commission shall find that a respondent has engaged in or is engaging in, any discriminatory or unfair practice as defined in this chapter, the commission shall state its findings of fact and shall issue and cause to be served upon such respondent an order requiring such respondent to cease and desist from such discriminatory or unfair practice and to take such affirmative action, including, but not limited to, hiring, reinstatement, or upgrading

> of employees, with or without back pay, . . . as in the judgment of the commission shall effectuate the purposes of this chapter.

Unlike § 601A.14(12), The Code 1977, § 601A.15(8)(a)(1), The Code 1979, prescribes that "unemployment compensation shall operate to reduce the pay otherwise allowable." The latter provision makes no distinction between unemployment compensation benefits attributable to a respondent base period employer versus unemployment compensation benefits generally. The inescapable conclusion is that the Legislature intended to reduce a complainant's back pay award by the total amount of unemployment compensation benefits received during the back pay period. Had the Legislature intended to deduct from a complainant's back pay award only the unemployment compensation benefits received which were attributable to a respondent-employer, it could have so modified the phrase "unemployment compensation" in § 601A.15(8)(a)(1), The Code 1979.

Therefore, it is the opinion of this office that § 601A.15(8)(a)(1), The Code 1979, requires that a complainant's back pay award be reduced by the total amount of unemployment compensation benefits received during the back pay period.

II B. IMPACT OF § 96.3, THE CODE 1979, ON § 601A.15(8)(a)(1), THE CODE 1979.

New subsection "Back Pay", enacted in 1979 Session, 68th G.A., ch. 33, § 5, amended § 96.3, The Code 1979, by adding the following thereto:

> BACK PAY. If an individual receives benefits for a period of unemployment and subsequently receives a payment for the same period from the individual's employer in the form of or in lieu of back pay, the benefits shall be recovered. The department, in its discretion, may reach an agreement with the individual and the employer to allow the employer to deduct the amount of the benefits from the back pay and remit a sum equal to that amount to the unemployment compensation fund and the balance to the individual, or may recover the amount

> of the benefits either by having a sum equal to that amount deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to that amount . . . .

Whenever statutes address a related subject matter, they are construed in pari materia so as to produce a harmonious body of legislation. Doe v. Ray, 251 N.W.2d 496 (Iowa 1977); Rush v. Sioux City, 240 N.W.2d 431 (Iowa 1976). The court accords to the statutes a reasonable and liberal construction which will best effectuate the intended legislative purpose rather than a construction which will defeat that purpose. State ex rel. Turner v. City of Altoona, 274 N.W.2d 366 (Iowa 1979); Hanover Insurance Co. v. Alamo Motel, 264 N.W.2d 774 (Iowa 1978).

Section 96.3, The Code 1979, as amended, supra, and § 601A.15(8)(a)(1), The Code 1979, both relate to the receipt of back pay. Therefore, these statutory provisions are to be construed in pari materia.

The manifest legislative purpose in enacting 1979 Session, 68th G.A., ch. 33, § 5, is to prevent an individual from retaining unemployment compensation benefits for a period in which the individual subsequently receives a back pay award. The recovery provision therein is designed to prevent such double-dipping.

With respect to civil rights complainants, the object to be attained by § 96.3, The Code 1979, as amended supra, is achieved by applying § 601A.15(8)(a)(1), The Code 1979, as construed supra. The back pay awarded to the complainant is already diminished by the amount of unemployment compensation benefits received during the back pay period. The complainant cannot retain the benefits without a corresponding reduction in the back pay award. Thus, the operation of § 601A.15(8)(a)(1), The Code 1979, remedies the evil addressed by the recovery provisions in § 96.3, The Code 1979, as amended by 1979 Session, 68th G.A., ch. 33, § 5.

Were the recovery provisions of § 96.3, The Code 1979, as amended supra, to be applied without regard to § 601A.15(8)(a)(1), The Code 1979, an unreasonable result would obtain.

By virtue of the latter provision, the complainant's back pay award would be pared by the amount of the unemployment compensation benefits received during the back pay period. Then, by applying the recovery provisions of § 96.3, The Code 1979, as amended supra, the complainant's back pay award would be reduced by twice the amount of benefits received during the back pay award. This result is inconsistent with the Legislature's intent to prevent a back pay recipient from simultaneously enjoying unemployment compensation benefits received during the back pay period and a full back pay award.

Therefore, it is the opinion of this office that the recovery provisions of § 96.3, The Code 1979, as amended supra, are not applicable to complainants who have been awarded back pay in accordance with § 601A.15(8)(a)(1), The Code 1979.

CONCLUSION

In summation, it is the opinion of this office that §§ 601A.15(3)(d) and 601A.15(5), The Code 1979, preclude bypassing of further conciliation until the thirtieth day following the initial conciliation meeting, regardless of a respondent's intransigence. Second, this office construes § 601A.15(8)(a)(1), The Code 1979, as requiring the diminution of back pay awards by the total amount of unemployment compensation benefits received during the back pay period. Finally, this office regards the recovery provisions of § 96.3, The Code 1979, as amended by 1979 Session, 68th G.A., ch. 33, § 5, as inapplicable to complainants who have been awarded back pay pursuant to § 601A.15(8)(a)(1), The Code 1979.

Sincerely,

Scott H. Nichols
Assistant Attorney General

SHN/jam

COUNTIES AND COUNTY OFFICERS: Sale of county real property. Sections 306.22-306.25, 331.3(13), The Code 1979. Sale of county real property no longer required for highway purposes under authority of §§ 306.22-306.25, The Code 1979, must be conducted according to procedures set out in § 331.3(13), The Code 1979. (Hyde to Folkers, Mitchell County Attorney, 7/8/80) #80-7-3 (L)

July 8, 1980

Jerry H. Folkers
Mitchell County Attorney
515 State Street
Osage, Iowa 50461

Dear Mr. Folkers:

We have received your request for an opinion from this office concerning the sale of county real property. Specifically, you have asked:

> Must the procedures set forth in § 332.3(13), The Code 1979, be followed by a county when selling property under authority of §§ 306.22-.25, The Code 1979?

Section 306.22, The Code 1979, provides in part:

> When title to any tract of land has been or may be acquired for the construction of any highway, and when in the judgment of the agency in control of the highway, the tract will not be used in connection with or for the improvement, maintenance, or use of the highway, the agency in control of the highway may sell the tract for cash.

The county board of supervisors as an "agency", i.e., the "governmental body which exercises jurisdiction" and "control over secondary roads", §§ 306.2(2), 306.4(2), The Code 1979, is empowered to sell real property which is no longer required for highway purposes. The board of supervisors must provide notice of such sale to the present owner of adjacent land from

which the tract was originally bought or condemned and give preference to an offer to purchase by such landowner which equals or exceeds other offers received, § 306.23, The Code 1979, and can finalize the sale only upon certain conditions contained in the written conveyance. Sections 306.24, 306.25, The Code 1979. No other specific procedure for conduct of the sale, however, is provided.

It is our opinion that the general authority for sale of real property, under the method set forth in § 332.3(13), The Code 1979, must then apply.

> When any real estate, buildings, or other property are no longer needed for the purposes for which the same were acquired by the county, to convert the same to other county purposes or to sell or lease the same. Real property sold under this section shall be sold at public auction and not by use of sealed bids, but only after notice has been published once in a newspaper of general circulation in the county in which the property is located, stating the description of the property to be sold and the date, time, and place of the sale. The notice shall be published not less than fifteen days nor more than twenty-five days prior to the date of the sale. If after being offered once at public auction, such property is not sold, the board of supervisors may dispose of the property by selling it to a person or persons submitting sealed bids to the board. Sale by bids may only be effected thirty days after public notice of the proposed sale of such property.

The authority under the general powers of the county board of supervisors to sell county property, other than that acquired by tax deed, no longer needed for the purposes for which it was acquired by the county, is not limited to property acquired for any specific purpose. It is likely the Legislature felt no need to delineate any special procedure for the sale of property when it specifically authorized the county board of supervisors to sell highway property; it surely intended that the procedures under § 331.3(13) be followed. See Reed v. Muscatine-Louisa Drainage District No. 13, 263 N.W.2d 548, 551 (Iowa 1978). There is no

conflict between the notice and conditions of sale under ch. 306, The Code 1979, and the procedure set out by § 331.3(13), The Code 1979, which would prevent both provisions from being carried out. Further, the liberal interpretation of implied county powers mandated by the adoption of the county home rule amendment, Iowa Const., art. III, § 39A, would not apply to extend unlimited authority to sell certain county property in any manner the board of supervisors deems best, where § 331.3(13), The Code 1979, specifically limits or preempts the authority of the board of supervisors. See Op. Atty. Gen. #79-4-7.

In conclusion, it is our opinion that the sale of county real property no longer required for highway purposes pursuant to § 306.22, The Code 1979, must be conducted according to procedures established by § 331.3(13), The Code 1979.

Very truly yours,

Alice J. Hyde

ALICE J. HYDE
Assistant Attorney General

AJH:sh

ELECTIONS: Definition of "ballot issue". Ch. 56, The Code 1979. A proposed question becomes a "ballot issue" for purposes of triggering disclosure requirements of ch. 56, The Code 1979, when the government entity charged with the responsibility of presenting the measure to the electorate complies with its statutory duty to call an election or cause the measure to be submitted at a scheduled election. (Hyde to Rush, State Senator 7/8/80) #80-7-2 CL)

THOMAS J. MILLER
ATTORNEY GENERAL

ADDRESS REPLY TO:
HOOVER BUILDING
DES MOINES, IOWA 50319

July 8, 1980

Honorable Bob Rush
State Senator
830 Higley Building
Cedar Rapids, Iowa 52401

Dear Senator Rush:

We have received your request for an opinion from this office concerning an interpretation of ch. 56, The Code 1979, to determine specifically:

1. When does an issue become a "ballot issue"?

2. When does a group raising or expending funds in support of the issue become subject to the requirements of chapter 56?

Section 56.2(6), The Code 1979, defines a political committee as:

> . . . a committee, but not a candidate's committee, which shall consist of persons organized for the purpose of accepting contributions, making expenditures, or incurring indebtedness in the aggregate of more than one hundred dollars in any one calendar year for the purpose of supporting or opposing a candidate for public office or ballot issue. [Emphasis supplied.]

Every committee as defined in ch. 56, The Code 1979, which promotes or opposes a "ballot issue", must file a statement of organization within ten days from the date of its organization, pursuant to § 56.5, The Code 1979, and becomes subject to disclosure requirements set forth in § 56.6, The Code 1979. Despite the frequent use of the term "ballot issue" throughout ch. 56, The Code 1979, it is not defined.

Initially, we note that your request refers to a ballot issue as submission to the electors of a proposition to amend the Constitution of Iowa pursuant to Iowa Const., art. X, § 1 and ch. 6, The Code 1979. Ch. 56, The Code 1979, applies, however, not only to questions to be submitted to the voters on a statewide basis, but to questions submitted in any election held by a political subdivision of the state. See § 56.4, The Code 1979. The index to the 1979 Code lists at least twenty-seven "questions submitted to voters" in township, municipal, county, school district or other elections, varying from approval of a merger plan creating an area hospital pursuant to ch. 145A, The Code 1979, to authorization of a county tax levy for weather modification programs, pursuant to ch. 361, The Code 1979. The determination of when an issue which may be the subject of public interest or debate becomes a "ballot issue", triggering any financial disclosure requirements of ch. 56, The Code 1979, will differ from issue to issue, and it would be impracticable for us to precisely define each such instance in this opinion.[1] We believe a general guideline could be applied to determine the point in time at which an issue or proposal becomes a "ballot issue" for purposes of ch. 56, The Code 1979.

It is our opinion that when statutory requirements concerning the initiation of submission of any question to the electors of the state or one of its political subdivisions have been met by the governing entity charged with the responsibility to see that the question is presented to the voters at an election, the "question" has become a ballot issue. A determination that an issue of public interest or controversy that attracts proponents and opponents to public debate is a "ballot issue" at some earlier point could markedly chill participation in the political process. It is unlikely that the Legislature intended ch. 56, The Code 1979, to prohibit political discussion or organization generally, especially during election time. Rather, the object of ch. 56, The Code 1979, should be viewed as enlarging or opening up the political process by encouraging participation by all citizens and shedding light on the financial support of groups attempting to influence the voters. An interpretation of "ballot issue" which would require any group of persons to formally organize and file

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1 In any specific instance, any person may seek a declaratory ruling pursuant to § 17A.9, The Code 1979, from the Campaign Finance Disclosure Commission, which administers ch. 56, The Code 1979. A declaratory ruling would be subject to judicial review under § 17A.19, The Code 1979.

disclosure reports anytime they attempted to publicize their views on a subject of public controversy which may have been proposed to the Legislature or other governing entity but which may never actually find its way to the ballot could result in a sharp decline of participation in the political process.[2]

For example, the General Assembly is charged with the responsibility to present a proposed amendment to the Iowa Constitution after it has been approved by two succeeding Legislatures:

> 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 . . . [Emphasis supplied.]

Iowa Const., art. X, § 1. See § 6.2, 6.4, The Code 1979. At the time the proposed amendment is "agreed to" by a majority of both houses of the Legislature, it "shall be the duty" of the Legislature to ensure that the question of whether the Constitution should be so amended is placed on the ballot and presented to the electors. There is no discretion afforded the Legislature; it has an obligation to submit the amendment to a "vote of the entire people of the state." See § 6.2 et seq., The Code 1979. Once the proposed amendment has passed the Legislature a second time, any taxpayer may bring an action "challenging the validity, legality,

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2 Such an interpretation would also be administratively unenforceable. The Campaign Finance Disclosure Commission's Declaratory Ruling implemented December 22, 1976, defined ballot issue similarly to the definition set forth in this opinion. That ruling noted that any funds contributed prior to the date a proposed bond issue became a "ballot issue", but expended subsequent to that date for the purpose of supporting or defeating the issue at election, would be reportable, under § 56.6, The Code 1979.

or constitutionality of such amendment, or the procedure connected therewith" which may result in an injunction preventing "submitting such constitutional amendment" to the electorate. Section 6.10, The Code 1979.

The approval of the proposed amendment for the second time by the Legislature establishes the point at which that amendment becomes a "ballot issue" within the meaning of ch. 56, The Code 1979. There may be subsequent procedural steps, such as publication of notice, certification of the amendment, or issuance of a proclamation by the Governor, to be met, but the proposed amendment will be submitted to the electors and has ripened into a "ballot issue. [3] Funds which have been raised or expended to oppose or support a proposal in its initial stages for the purpose of seeking representation of views that the question should or should not be submitted to the voters now become funds to oppose or support a ballot issue, and subject to disclosure under § 56.6, The Code 1979.

Another example illustrates the application of this general guideline as to when a proposal becomes a ballot issue to an election concerning only a political subdivision of the state. Voters are authorized to petition the county board of supervisors to call an election to alter the supervisor representation plan in a county:

> The board of supervisors, when petitioned by ten percent of the number of qualified electors of the county having voted in the last previous general election . . . , shall cause a special election to be held within the county for the purpose of selecting the supervisor representation plan enumerated in section 331.8 under which such county board shall thereafter be elected.
>
> Such petition shall be filed with the county auditor by January 1 of any general election year . . . [Emphasis supplied.]

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[3] Procedural requirements, such as statutory directions as to time and manner of giving notice of an election, are treated as directory and liberally construed after an election has been held. Knorr v. Beardsley, 240 Iowa 828, 38 N.W.2d 236 (1949).

Section 331.9, The Code 1979. Funds raised or expended to promote the collection of signatures on any petition would not be considered funds supporting a ballot issue for purposes of ch. 56, The Code 1979, even though organizers of the petition campaign intend to have the question of supervisor representation placed on the ballot. Only when the county board of supervisors adopts a resolution accepting a petition and setting a special election does the question become a "ballot issue" within the meaning of ch. 56, The Code 1979.

In conclusion, it is our opinion that a proposed question to be submitted to voters becomes a "ballot issue" for purposes of triggering organizational reporting and disclosure requirements of ch. 56, The Code 1979, when the government entity charged with the responsibility of presenting the measure to the electorate complies with its statutory duty to call an election or cause the measure to be submitted at a scheduled election.

Very truly yours,

Alice J. Hyde

ALICE J. HYDE
Assistant Attorney General

AJH:sh

SAVINGS AND LOAN ASSOCIATIONS: Sale of home performance insurance. 1980 Session, 68th G.A., H. F. 2492, § 3. A savings and loan association may charge an inspection fee in connection with the sale of home performance insurance, and this fee is not considered as part of loan processing fees as long as purchase of the insurance is not a contingency to approval of a loan. (Norby to Pringle, Supervisor, Savings and Loan Associations, State Auditor's Office 7/8/80) #80-7-1 (L)

July 7, 1980

John A. Pringle, Supervisor
Savings and Loan Associations
State Auditor's Office
L O C A L

Dear Mr. Pringle:

You have requested an opinion from the Attorney General regarding the ability of a savings and loan association to sell a type of insurance known as a home performance policy. This type of insurance protects against defects and poor workmanship in new homes. It is understood that savings and loan personnel involved in the sale of this insurance must comply with the requirements of the Code regarding licensing and regulation of insurance agents. Additionally, the insurance is only to be offered to loan applicants; no loans will be made contingent upon purchase of the insurance. There will be, however, an inspection fee (estimated at forty to fifty dollars) charged to borrowers who successfully obtain a loan and desire to purchase a home performance policy. Your question involves the propriety of this inspection fee with regard to the limits placed on a lender's ability to charge processing fees or other types of fees in connection with loans.

The whole area of loan processing fees, commonly referred to as "points", has been a subject of much attention in recent years. The attention has concerned both the types of services for which a charge may be made and the overall limit which may be charged. The concern in this area appears to have been raised initially by an Attorney General's opinion which concluded that processing fees must be considered in determining the rate of interest of a loan for purposes of ch. 535, The Code 1977, the Iowa usury statute. Op. Atty. Gen. #78-4-19. Since that time, the Iowa Legislature has acted several times to provide for limitations in this area. § 535.8(2)(b), The Code 1979; 1979 Session, 68th G.A., ch. 130, § 22(2); 1980 Session, 68th G.A., H. F. 2492, § 3.

The provision now in effect, H. F. 2492, provides as follows:

> A lender may collect, in connection with any loan made pursuant to a written agreement executed by the borrower on or after the effective date of this Act, or in connection with any loan made pursuant to a written commitment by the lender mailed or delivered to the borrower on or after the effective date of this Act, a loan processing fee which does not exceed two percent of an amount which is equal to the loan principal, except that in the event of an assumption or refinancing of a prior loan the lender may collect a loan processing fee which does not exceed an amount which is a reasonable estimate of the expenses of processing the loan assumption or refinancing but which does not exceed one percent of the amount assumed or refinanced. As used in this subsection, the term "loan" means as defined in section five hundred thirty-five point eight (535.8), subsection one (1), of the Code. The provisions of this subsection supersede conflicting provisions of section five hundred thirty-five point eight (535.8), subsection two (2), paragraph a, Code 1979 Supplement, but no other provision of this section is intended to affect any other subsection or paragraph of section five hundred thirty-five point eight (535.8) Code 1979 Supplement.

The trend of this legislation appears to show an intent to limit the charging of points and to cause disclosure of the charges actually involved. To fall within the scope of H. F. 2492, however, a charge must be a "loan processing fee". We believe this term should be defined to cover all charges actually required to close a loan. This would not include the inspection fee charged in connection with a home performance policy so long as purchase of such a policy was not a requirement of loan applicants and loan approval is not in any way contingent upon purchase of the insurance. If these conditions are met, the insurance is in essence a separate service available through the lender and not a part of the loan transaction. Accordingly, this inspection fee

is not prohibited by H. F. 2492 nor should it be included in calculating the loan processing fee for purposes of H. F. 2492.

Sincerely,

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

COUNTIES AND COUNTY OFFICERS: SHERIFFS - WEAPONS PERMITS: U.S. CONST. amend. II; Sections 724.9, 724.11, The Code 1979. Sheriffs have implied authority to require weapons permit applicants to satisfactorily complete written and firing tests which are reasonably designed to measure the applicant's ability to use firearms safely. Requiring applicants to take such tests does not violate either the Iowa or United States Constitution. (Staskal to Rush, State Senator, 8/28/80) #80-8-16(L)

August 28, 1980

Senator Bob Rush
830 Higley Building
Cedar Rapids, Iowa 52401

Dear Senator Rush:

You have requested an opinion from the Attorney General concerning the authority of a sheriff to require weapons permit applicants to complete certain types of tests in order to obtain such a permit. Specifically, you pose the following questions;

> 1. Does a sheriff have authority under Chapter 724, The Code 1979, to require successful completion of written and firing tests by applicants for nonprofessional permits to carry weapons?
>
> 2. If a sheriff does have such authority, is it nevertheless unconstitutional to require nonprofessional applicants to successfully complete written and firing tests in order to obtain a weapons permit?

The specific statutory provision which controls in answering your first question is § 724.9, The Code 1979, which provides, in relevant part, as follows:

> A training program to qualify persons in the safe use of firearms shall be provided by the issuing officer of

> permits, as provided in section 724.11. The commissioner of public safety shall approve the training program, and the county sheriff or the commissioner of public safety conducting the training program within their respective jurisdictions may contract with a private organization or use the services of other agencies, or may use a combination of the two, to provide such training. Any person eligible to be issued a permit to carry weapons may enroll in such course. A fee sufficient to cover the cost of the program may be charged each person attending. Certificates of completion, on a form prescribed and published by the commissioner of public safety, shall be issued to each person who successfully completes the program. No person shall be issued either a professional or nonprofessional permit unless he or she has received a certificate of completion or is a certified peace officer.

This provision, along with other provisions in Chapter 724 governing the issuance of permits to carry weapons,[1] was enacted as part of the Iowa Criminal Code, a comprehensive revision of Iowa's criminal laws, and became effective on January 1, 1978. 1976 Session, 66th G.A., ch. 1245, §§ 101, 2405-2411. Section 724.9 along with its companion provisions replaced §§ 695.4-695.13, The Code 1977. The purpose of the new provisions was "to put an end to the indiscriminant issuance of weapons permits . . ." and to generally tighten the regulations concerning the carrying of weapons. J. Yeager and R. Carlson, Iowa Practice: Criminal Law and Procedure, §§ 526, 527 at 134 (1979).

Section 724.9, set out above, represents one of the means by which the legislature sought to accomplish this purpose. That section requires every weapons permit applicant to complete "[a] training program to qualify persons in the safe use of firearms . . . ." Section 724.9 further states that this program "shall be provided by the issuing officer of permits . . . ." (Emphasis added.) It is important to note that

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[1] See §§ 724.6-724.8, 724.10-724.11, The Code 1979.

the use of the word "shall" in this context must be construed to impose a duty to act on the designated actor as opposed to the grant of a permissive or discretionary power to act. Section 4.1(36), The Code 1979; Consolidated Freightways Corp. of Del. v. Nicholas, 258 Iowa 115, 121, 137 N.W.2d 900, 904 (1965). Thus, it is clear that § 724.9 imposes a duty on the "issuing officer of permits" to provide a training program for weapons permit applicants. In most cases, this duty rests on the sheriff. This is so because, with respect to applicants who are residents of Iowa and whose need to go armed does not arise out of state employment, the "issuing officer of permits" is the sheriff of the county in which the applicant resides.[2] Section 724.11, The Code 1979.

Having determined that the sheriff has some duty under § 724.9, the answer to your first question lies in an examination of the nature and scope of that duty. However, one point must be made clear prior to engaging in that examination.

Section 724.9 requires that any training program provided by a sheriff must be approved by the commissioner of public safety. Thus, even if a sheriff has authority under § 724.9 to require applicants to complete written and firing tests as component parts of a training program he or she is providing, that authority may not be exercised unless the content of the program, and the tests administered thereunder, has been approved by the commissioner of public safety.[3] We deem your question to recognize the need for such approval and to ask, in effect, whether the commissioner may approve any training program which requires applicants to pass a written and firing test.

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[2]In the case of applicants who are nonresidents of Iowa or whose need to go armed arises out of state employment, the "issuing officer of permits" is the commissioner of public safety. Section 724.11, The Code 1979.

[3]The commissioner of public safety has developed two training programs, one for professional and one for nonprofessional applicants. 680 I.A.C. § 4.3(2). However, § 724.9 does not require a sheriff, where he or she is the "issuing officer of permits", to utilize the commissioner's programs. Section 724.9 merely requires that the program provided by the sheriff be approved by the commissioner. The commissioner will approve training programs other than his own "if [the program] is substantially similar to or exceeds the requirements" of the commissioner's own programs. 680 I.A.C. § 4.3(4). The commissioner has developed his own programs because, with respect to certain applicants, he is the "issuing officer of permits." See footnote 2, supra.

It is now necessary to examine the nature of the duty imposed on sheriffs under § 724.9.

That duty is twofold. First, the sheriff must "provide" the training program mandated. Second, the training program provided must be "[a] training program to qualify persons in the safe use of firearms . . . ." As to the first duty, § 724.9 specifically enables the sheriff to "contract with a private organization or use the services of other agencies, or [a combination of both] . . ." to provide the training program.

The sheriff's second duty is to provide a training program which is designed "to qualify persons in the safe use of firearms . . . ." A corollary aspect of the duty to provide a certain type of training program is the duty to insure that persons issued permits have first demonstrated an ability to use firearms safely. This corollary aspect can be seen to emerge from a close reading of § 724.9 in its entirety.

First, the use of the word "qualify" in describing the type of training program required shows a legislative intent that applicants must exhibit a certain skill as a result of participation in the program. Second, § 724.9 states:

> Certificates of completion [of the training program] . . . shall be issued to each person who successfully completes the program. No person shall be issued either a professional or non-professional permit unless he or she has received a certificate of completion or is a certified peace officer. (Emphasis added.)

The use of the word "successfully" to condition the requirement of completion of the program clearly imposes a duty on the permit issuing sheriff to determine that applicants have acquired the skill to use firearms safely before issuing a permit. That is, a person who "successfully" completes a "training program to qualify persons in the safe use of firearms" is a person who is qualified to use a firearm safely. And since the sheriff cannot issue a permit unless the applicant has successfully completed the program, he or she has a duty to determine that the applicant can safely use firearms. Finally, the existence of this corollary duty is perfectly consistent with the legislative purpose in enacting the new provisions regarding issuance of weapons permits; that is, to insure that weapons permits are not indiscriminantly issued. Yeager & Carlson, Iowa Practice: Criminal Law and Procedure, §§ 526, 527 at 134 (1979). Requiring the sheriff to determine that an applicant can safely use a firearm is one means by which this purpose can at least partially be effectuated.

While the legislature imposed on sheriffs the duty to provide a certain type of training program and the corollary duty of insuring that applicants are qualified to use firearms safely after completing the program, § 724.9 does not prescribe the means by which sheriffs are to accomplish those duties. That is, the legislature prescribed neither the particular content of the training program, nor the method by which the sheriff is to determine whether the program has been successfully completed. However, it is a well established principle that if a law imposes a duty upon an officer to accomplish some purpose, the law also confers by implication any particular power necessary or proper to accomplish that purpose. State ex rel. Martin v. Michell, 188 So.2d 684, 687 (Fla. 1966); Cf. Elk Run Telephone Co. v. General Telephone Co., 160 N.W.2d 311, 315 (1968) (means to accomplish legislative purpose may be left to administrative officials). It is only necessary that the particular means adopted under the officer's implied powers be reasonably and legitimately related to accomplishing the statutory objective from which the implied authority to act derives. Gilchrist v. Bierring et al., 234 Iowa 899, 907, 14 N.W.2d 714, 728 (1944); State Bd. of Barber Examiners v. White, 29 Colo.App. 471, 485 P.2d 928, 930 (1971).

Applying these principles to your first question, the answer clearly emerges as yes. That is to say, a sheriff has implied authority under § 724.9 to require weapons permit applicants to successfully complete tests which are designed to measure the applicant's skill in safely using a firearm.[4] The sheriff's authority to require such tests is a necessary derivative of his or her duty to determine the safety skills of the applicant.

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[4]We do not purport to comment on the propriety of the content of any particular tests, written or firing. First, we do not know the content of any particular test. Second, as noted earlier, it is the specific statutory duty of the commissioner of public safety to approve the content of particular training programs utilized by sheriffs. See p. 3, supra. We merely comment on the sheriff's implied authority to use tests whose contents we assume are reasonably designed to determine an applicant's ability to use a firearm safely.

Having said that a sheriff has authority to require such tests, the question remains as to what the proper format of those tests should be. The simple answer is that no particular format is prescribed, and no particular format is, therefore, wrong. In terms of your question, there is nothing about a written test which makes it inherently unreasonable as a means of determining safety skills. Indeed, in determining how an applicant would react under certain circumstances, it would seem necessary to present those circumstances in a written format; it is probably impossible to physically create such circumstances for every applicant or, in some cases, for any applicant. Further, it may be necessary for the applicant to demonstrate knowledge of the legal implications of using a weapon, or of having a weapons permit. The written format is particularly suited to determining such knowledge. Neither is there anything inherently unreasonable in the use of a firing test. Just as a driving test is reasonably suited to determining whether an individual has the ability to operate a motor vehicle safely, so a firing test is reasonably, and obviously, suited to determining an individual's ability to use a firearm safely. See § 321.186, The Code 1979.

Your second question concerns the constitutionality of requiring weapons permit applicants to pass written and firing tests in order to obtain permits. As already discussed, the legislature has delegated statutory authority to sheriffs to require such tests. You do not question the constitutional authority of the legislature to delegate this function to the sheriff. Rather, your question is whether the legislature may constitutionally, acting through the sheriff, place these restrictions on the ability of citizens to carry weapons.

The Second Amendment to the United States Constitution provides as follows:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

This Amendment is a limit only on the power of the federal government and does not, therefore, have any effect on legislation adopted by the Iowa legislature as a means of regulating the possession of firearms. Miller v. Texas, 153 U.S. 535, 14 S.Ct. 874, 38 L.Ed. 812 (1894); Olander v. Hollowell, 193 Iowa 979, 188 N.W. 667 (1922); Commonwealth v. Davis, 343 N.E.2d 847 (Mass. 1976). Even if the Second Amendment were held to be applicable to the States, its protection extends only to use or possession of arms which "has some reasonable relationship

to the preservation or efficiency of a well regulated militia." United States v. Miller, 307 U.S. 174, 178, 59 S.Ct. 816, 818, 83 L.Ed.2d 1206, 1207 (1939); State v. Rupp, 282 N.W.2d 125, 130 (Iowa 1979). The requirements of § 724.9 have no impact on the preservation of a well regulated militia. The Iowa Constitution does not contain any provision guaranteeing the right to bear arms or limiting the legislature's authority to regulate the possession of firearms.

The source of the legislature's power to regulate the possession of weapons is its general police power. Regulation of the right of citizens to go armed is reasonably related to protecting the public safety, and is, therefore, a legitimate subject for the exercise of that power. Eaton County Deputy Sheriff's Association v. Smith, 37 Mich.App. 427, 195 N.W.2d 12 (1971); Galvan v. Superior Court of City and County of San Francisco, 76 Cal.Rptr. 642, 452 P.2d 930, 940 (1969) (en banc). The due process clause of the Fourteenth Amendment to the United States Constitution only requires that "[a]ny use of the [state's] police power must be reasonable and not arbitrary or capricious." Green v. Shama, 217 N.W.2d 547, 555 (Iowa 1974).

Requiring a person who desires to carry a weapon to demonstrate that he or she can safely use a firearm, through the administration of written and firing tests reasonably designed to make that determination, is not an arbitrary, unreasonable or capricious exercise of the police power. Such a requirement is rationally related to the purpose of regulating the possession of dangerous weapons; that is, protecting the safety of the public. In effectuating that purpose the legislature has acted reasonably by preventing persons who cannot use firearms safely from obtaining permits to carry such weapons.

In conclusion, the answer to your first question is yes. The legislature has granted county sheriffs implicit authority, under § 724.9, to require weapons permit applicants to successfully complete written and firing tests designed to determine whether the applicant can safely use a firearm. The answer to your second question is no. Nothing in the United States or Iowa Constitution prevents the legislature from requiring, through the delegation of implicit authority to permit issuing officers, that weapons permit applicants demonstrate an ability to safely use firearms in order to obtain a weapons permit.

Sincerely,

Douglas F. Staskal

DOUGLAS F. STASKAL
Assistant Attorney General

DFS:mlr

COUNTIES: Benefited Fire Districts. § 357B.5, The Code 1979. The total number of signatures on the petition necessary to dissolve a benefited fire district must equal at least a number calculated as 35% of the total number of persons who pay taxes on property located in the district, whether or not those taxpayers are also residents of the district. (Hyde to Corey, State Representative, 8/22/80) #80-8-15 (L)

August 22, 1980

Honorable Virgil E. Corey
State Representative
R. R. #2
Morning Sun, Iowa 52640

Dear Representative Corey:

We have received your request for an opinion from this office concerning an interpretation of certain language in § 357B.5, The Code 1979. That section provides for the dissolution of a benefited fire district, as follows:

> Upon petition of a number of registered voters residing in a district at least equal to thirty-five percent of the property taxpayers in such district, the board of supervisors may dissolve a benefited fire district and dispose of any remaining property, the proceeds of which shall first be applied against any outstanding obligation of the district. Any remaining balance shall be applied as a tax credit for the property owners of the district. The board of supervisors shall continue to levy an annual tax after the dissolution of a district not to exceed forty and one-half cents per thousand dollars of assessed value of the taxable property of the district until all outstanding obligations of the district are paid. [Emphasis supplied.]

You have indicated that there is some disagreement concerning exactly how the formula determining the number of petition signers is to be applied. Section 357B.5, requires any

individual petition signer to be both a registered voter and a resident of the benefited fire district. The total number of signers of the petition necessary to dissolve the district should be equal to a number calculated to be 35% of the total number of persons who pay taxes on property located in the district, whether or not those taxpayers are also residents of the district. Section 357B.5, The Code 1979, makes no requirement that only property taxpayers who are also residents of the district be counted toward determining the total number of petition signatures needed. For example, if county rolls list 2,000 property taxpayers in a benefited fire district, although only 1,500 of those taxpayers reside in the district, the clear language of § 357B.5, The Code 1979, requires that the number of petition signers must equal a number totalling 35% of all 2,000 property taxpayers, i.e., 700 signatures are required on a petition to dissolve the district.

Very truly yours,

Alice J. Hyde (ah)

ALICE J. HYDE
Assistant Attorney General

AJH:sh

MOTOR VEHICLES - Definition of electrically motorized bicycles and tricycles within Chapter 321 of the Iowa Code. §§4.2, 4.4(3), 4.6(5), 321.1(1), 321.1(2), 321.1(3)(a), 321.1(3)(b), 321.382, The Code 1979. Bicycles and tricycles, when electrically operated without pedal assistance, are "motor vehicles" as defined by §321.1(2). They are further designated as §321.1(3)(b) "motorized bicycles" or "motor bicycles". (Dundis to Ritsema, State Representative, 8/22/80) #80-8-14(L)

August 22, 1980

The Honorable Doug Ritsema
Iowa State Representative, District Two
223 Boston Avenue, N.E.
Orange City, IA 51041

Dear Representative Ritsema:

In a letter dated June 3rd, you ask whether bicycles and tricycles equipped with electric motors are classified as "motor vehicles" in Chapter 321 of the Iowa Code.

Section 321.1(2), The Code 1979, defines a "motor vehicle" as "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 term "'vehicle' means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway" except, among other things, "any device moved by human power." §321.1(1), The Code 1979.

You state that the bicycle and tricycles in question can be self-propelled by a battery-operated electric motor that is usually attached to the front wheel, or, can be pedaled by the passenger in the usual manner. Maximum speed, you say, generally falls into the 10-20 m.p.h. range.

We think it is clear that these devices, when powered by an electric motor, are motor vehicles as defined by §321.1(2), if they are capable of being propelled without pedal assistance. It

is correct that without the motors they become a device moved by human power, creating an exception to the definition of "vehicle" and therefore "motor vehicle." However, there is nothing preventing these conveyances from falling both within and without the exception depending on the mode in which they are operated. In their motorized mode they could not to be operated on the highways of this state if unable to meet the requirements of §321.382, The Code 1979.

You also ask whether a motorized bicycle, tricycle, or devices consisting of two bicycles hooked together side-by-side with a motor in between would constitute "motorized bicycles" within the meaning of §321.1(3)(b), The Code 1979.

This particular section of the Code has been amended, effective July 1, 1980. 1980 Session, 68th G.A., Senate File 2361, §3. Accordingly, I shall address myself to that wording, which reads as follows:

> 'Motorized bicycle' or 'motor bicycle' means a motor vehicle having a saddle or a seat for the use of a rider and designed to travel on not more than three wheels in contact with the ground, with an engine having a displacement no greater than fifty cubic centimeters and not capable of operating at a speed in excess of twenty-five miles per hour on level ground unassisted by human power.

First, the two bicycle hookup, when operated as a single unit, has four wheels and is thus automatically excluded from the above definition.

As for the electrically operated bicycles and tricycles you mention, they would have a saddle or seat for the rider, they would have not more than three wheels, and would seem not capable of going faster than twenty-five miles per hour. There is a fourth requirement, however - they must not have an engine displacement greater than fifty cubic centimeters.

Unlike the term "engine" (which could refer to any type of motor) the term "displacement" is commonly associated with the internal combustion engine. Therefore, the application of §321.1(3)(b) to vehicles having electrical motors might be considered ambiguous. It can be argued, of course, that the electrical motors we are talking about do indeed have a displacement no greater than fifty cubic centimeters since they have none at all. This, I believe, is the correct interpretation, and one that represents the intent of the legislature.

A statute's "provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice," §4.2, The Code 1979, with a just and reasonable result presumed in its enactment §4.4(3) The Code 1979. The intent of the legislature is of key importance in the interpretation of a statute; the manifest intent of that statute will prevail even over the literal import of its wording. Janson v. Fulton, 162 N.W.2d 438 (Iowa 1968). In determining that intent, the consequences of a particular construction must be considered. §4.6(5) The Code 1979. A statute should be given a sensible practical, workable construction. Olson v. Jones, 209 N.W.2d 64 (Iowa 1973).

Sincerely,

Stephen P. Dundis

Stephen P. Dundis
Assistant Attorney General

COUNTIES: Bonds. §§ 74.1, 174.2, 174.9, 174.13, 174.15, 174.17, 174.18, 345.1, The Code 1979. County bonds, as provided for in ch. 345, may not be used to finance construction of a building which will be under the control of a county fair board. (Norby to Robbins, Boone County Attorney, 8/22/80) #80-8-13(CL)

August 22, 1980

Mr. Jim Robbins
Boone County Attorney
Courthouse
Boone, Iowa 50036

Dear Mr. Robbins:

You have requested an opinion of the Attorney General as to whether county bonds, provided for in ch. 345, The Code 1979, can be issued on behalf of a county fair board for construction of a building on land owned by the fair board. As discussed below, we do not believe that county bonds may be issued for this purpose.

Chapter 345 provides for issuance of bonds for construction of courthouses, jails, county hospitals, county care facilities or any other county building or facility. § 345.1, The Code 1979. Chapter 332 provides for the board of supervisors to acquire title to real estate necessary for county purposes and to manage this property. §§ 332.2(6)(12), The Code 1979. We believe these two characteristics, title in the name of the county and management by the board of supervisors, are necessary for a building to properly be called a "county building". In light of these provisions, the ability to use ch. 345 bonds to aid construction of a building under the control of a fair board appears to depend upon whether such a building can be characterized as a county building or facility.

Chapter 174, The Code 1979, provides for the establishment and financing of county fair boards. While a fair board is a private nonprofit corporation, §§ 174.1, 174.2, it may receive both state and county aid. §§ 174.9, 174.13. This aid includes provision for the levying of a county tax to purchase real estate for a fair board and to make permanent improvements on this real estate. §§ 174.13, 174.15, 174.17, 174.18. While title to such real estate or improvement is taken in the name of the county, the control and management of these assets is not placed in the board of supervisors, but is placed in the fair

board. § 174.15, The Code 1979. Accordingly, we do not believe a building constructed on a county fairground can be characterized as a county building. County bonds cannot, therefore, be issued to aid construction of such a building.

Sincerely,

Steven D. Norby

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

MUNICIPALITIES: Social Security Coverage--Ch. 97C and 410, The Code 1979; 1971 Session, 64th G.A., Ch. 108, § 3. The failure of a city covered by Chapter 410 in 1953, to establish that chapter's retirement system does not affect the applicability of that retirement system. Such a city is exempt from social security coverage. (Blumberg to Hall, State Representative, 8/20/80)
80-8-10(L)

August 20, 1980

The Honorable Hurley W. Hall
State Representative
2865 McGowan Blvd.
Marion, Iowa 52302

Dear Representative Hall:

We have your opinion request regarding social security for members of the Marion police and fire departments. You ask whether those members are within the social security system. The state entered into an agreement with the Federal Government for social security coverage effective July 1, 1953, pursuant to Chapter 97C, The Code. Section 218 of the Social Security Act provided that social security did not apply to those covered by a retirement system as of the date of the agreement.

In 1953, the City of Marion had paid fire and police departments. The city had not established any retirement system pursuant to either Chapter 410 or 411, The Code. In 1954, Marion formally came under the provisions of Chapter 411, and established that retirement system. However, the members of the police and fire departments had already been included within the social security system because they were not considered to be under any retirement system in 1953. In 1971, the Legislature changed the applicability of Chapter 410 by 1971 Session, 64th G.A., Ch. 108, § 3, so that it no longer applied to any members who were hired after March 2, 1934.

An issue developed in the 1970's as to whether the members of those departments could be excluded from social security coverage. On April 23, 1974, the district manager for the Social Security Administration sent a letter to Job Service indicating

that if Marion was actually under Chapter 410 in 1953, federal case law provided that it would be exempt from social security coverage. An opinion request was then sent to our office asking whether Marion was exempt from social security coverage. That opinion, 1974 Op. Att'y. Gen. 617, held that Chapter 410 was applicable to a city if it met the requirements of that Chapter, even though it never established the retirement system by establishing a board of trustees and having contributions made to the pension funds. However, the opinion went on to hold that the 1971 amendment was retroactive back to 1953. It was concluded therein that a city, such as Marion, could not use the existence of Chapter 410 in 1953 as a basis for exemption from social security. On the basis of that opinion, the Social Security Administration denied Marion the exemption. On further review, we are clarifying and modifying that opinion.

As stated in that opinion, the fact that a city did not establish a retirement system under Chapter 410 was not dispositive of the issue of whether that chapter was applicable. See Johnson v. City of Red Oak, 197 N.W.2d 548 (Iowa 1972). Therefore, because Marion met the requirements of that chapter,[1] it must be held that Chapter 410 was applicable to Marion in 1953.

Because Marion fell within Chapter 410 in 1953, would it have been under social security since that time? There are two federal cases which address this point. In Secretary of Health, Education and Welfare v. Snell, 416 F.2d 840, 843 (5th Cir. 1969), it was held:

> A "position covered by a state retirement system" cannot be transmitted into a position not covered by failure of the state to collect contributions from those holding the position. The statutory scheme does no more than give the state an opportunity to act so as to trigger federal benefits for its employees not receiving state benefits. We cannot infer from this a congressional guarantee of federal benefits where the state so fails to operate its system that those who are in covered positions and should receive state benefits do not do so. The thrust of the statute is opportunity for the state to bring its employees within reach of benefits, either state or federal, by an effectual state-triggered meshing of the systems. It is

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1. Marion had a paid fire and police department which was required by § 410.1.

> not one of federal commitment to close every state benefits system. . . . The short answer to this problem is that the state's failure to treat the position of bus driver in Tangipahoa Parish as "covered" and its failure to amend the 1952 agreement so as to bring within the ambit of federal benefits persons such as Snell who are "covered" but disqualified, are matters between the state and its citizens.

A similar result was reached, with reliance on Snell, in State of West Virginia v. Richardson, Unempl. Ins. Rep. (CCH) para. 16455 (S.D. W.Va. 1971). There a city's police department had been within the social security system since 1951, when the State entered into an agreement with the Federal Government. Although a state statute at that time required that the city establish a retirement system, no such system was established. In 1967, HEW determined that the members of the police department should not have been included within the social security system, and discontinued coverage. The Court concluded that the police officers were in positions covered by a retirement system in 1951. Thus, they were never entitled to social security coverage at any time. The Court upheld the decision of HEW.

The Richardson facts are indistinguishable from those involving the City of Marion. Based upon Richardson and Snell, we conclude that the city of Marion's police and fire departments were covered by a retirement system (Chapter 410) in 1953 so that they should not have been included in the social security system. What effect then, if any, does the 1971 Amendment have?

The 1971 Amendment only provided that those employed after March 2, 1934, were no longer covered by Chapter 410. It only had effect on those cities which, in 1971, were still operating under that chapter. Nowhere in that amendment is there any indication that the Legislature intended to have the amendment applied in such a manner that chapter 410 would be treated as though it never existed. In any case, eligibility for Social Secuirty coverage presents a question of federal law. The Iowa General Assembly would be powerless to modify unilaterally and retroactively the implied terms of the 1953 agreement. In an opinion issued at the time of the amendment, 1972 Op. Att'y. Gen. 618, we indicated that the amendment prevented members of the Chapter 410 system from receiving any benefits thereunder if they were employed after March 2, 1934, except if they were vested. We did not believe at that time, nor do we believe now, that Chapter 410 should have been treated as though it never existed.

If in 1953, a member of the police or fire departments had qualified for a benefit, it would have been granted as provided in Johnson v. City of Red Oak. The amendment had no effect on Marion because it was under Chapter 411 in 1971.

Accordingly, we are of the opinion that the members of the Marion police and fire departments were covered by a retirement system in 1953, thus excluding them from social security coverage. The 1971 amendment to Chapter 410 does not alter this result. Although we cannot state with any certainty what the Social Security Administration will do, we believe that the members of the police and fire departments should be excluded from social security coverage, and that state officials should take the necessary steps to advise the appropriate federal officials that the City of Marion was covered by Chapter 410 in 1953.

Very truly yours,

Larry M. Blumberg

LARRY M. BLUMBERG
Assistant Attorney General

LMB/cmc

TAXATION: Tax Exempt Status of Property of Cemeteries. §§427.1(7), The Code 1979, as amended by 1980 Session, 68th G.A., Senate File 2369, and 427.1(10), The Code 1979. Section 427.1(7), as amended by Senate File 2369, exempts from property tax the burial grounds, mausoleums, buildings and equipment which are owned and operated by all cemeteries, whether profit-making or nonprofit, provided such properties are used exclusively to maintain and care for cemeteries devoted to interment of human bodies and human remains, and are not used for the practice of mortuary science. Personal property of cemeteries is exempt pursuant to §427.1(10), The Code 1979. This tax exemption inures to the benefit of all profit-making or nonprofit cemeteries, regardless of the nature of their ownership. (Griger to Representative Smalley and Senator Palmer, 8/12/80) #80-8-9 CL)

August 12, 1980

The Honorable Douglas R. Smalley
State Representative
1603 Forty-eighth Street
Des Moines, Iowa 50310

The Honorable William D. Palmer
State Senator
1340 East Thirty-third
Des Moines, Iowa 50317

Dear Representative Smalley and Senator Palmer:

You have requested the opinion of the Attorney General concerning the amendment to §427.1(7), The Code 1979, by 1980 Session, 68th G.A., Senate File 2369. Specifically, you raise two questions, which are: 1) In light of Senate File 2369, is any realty or personalty owned by cemetery associations subject to Iowa property tax? 2) What constitutes a cemetery association for purposes of the tax exemption granted by Senate File 2369?

As a backdrop to your first question, it would be helpful to examine some of the legislative history of §427.1(7), The Code. An examination of §6944(7), The Code 1927, reveals that property of cemetery associations was tax exempt as follows: "7. Property of cemetery associations. All grounds and buildings used by cemetery associations and societies for cemetery purposes." This statute was construed by the Attorney General to include profit-making cemetery associations within the parameters of the exemption. See 1932 Op. Att'y Gen. 69; 1946 Op. Att'y Gen. 14.

In 1973, the legislature amended §427.1(7), The Code 1973, to provide for a property tax exemption for nonprofit cemetery associations as follows:

> 7. Property of nonprofit cemetery associations. Burial grounds, mausoleums, buildings and equipment owned and operated by nonprofit cemetery associations and used exclusively for the maintenance and care of the cemeteries devoted to interment of human bodies and human remains.

1973 Session, 65th G.A., ch. 253.

Section 1 of Senate File 2369, enacted in 1980, changed the scope of the tax exemption for cemetery association property by deleting the restriction that the exemption would only be applicable to nonprofit cemetery associations and denying the exemption to property used in the practice of mortuary science. The statute, as so amended, now provides for the exemption as follows:

> 7. Property of cemetery associations. Burial grounds, mausoleums, buildings, and equipment owned and operated by cemetery associations and used exclusively for the maintenance and care of the cemeteries devoted to interment of human bodies and human remains. The exemption granted by this subsection shall not apply to any property used for the practice of mortuary science.

Senate File 2369 exempts from property tax the burial grounds, mausoleums, buildings and equipment which are owned and operated by cemeteries, whether profit-making or nonprofit, provided such properties are used exclusively to maintain and care for cemeteries devoted to interment of human bodies and human remains, and are not used for the practice of mortuary science. Personal property of such cemeteries has historically been and is presently exempt pursuant to §427.1(10), The Code 1979, as long as such cemeteries are entitled to exemption pursuant to §427.1(7).

By your second question, you ask what exactly is a cemetery association for purposes of Senate File 2369. An examination of the Iowa Code discloses that the term "cemetery association" is only mentioned once, in §504.8, The Code 1979, pertaining to the incorporation of nonprofit cemetery associations. But, the term is not defined in the Iowa Code. Moreover, we did not find any Iowa cases defining this concept.

Prior to 1973 and the adoption of 1973 Session, 65th G.A., ch. 253, the Department of Revenue and the local taxing authorities generally took the position that real and personal property owned and operated for human cemetery purposes was exempt from property tax pursuant to §§427.1(7) and 427.1(10), The Code. Thus, property owned and operated by cemeteries where human remains were buried or to be buried was considered to be

tax exempt, irrespective of the nature of the ownership of such cemeteries. The legislature is presumed to be aware of this administrative interpretation placed upon §427.1(7) by the taxing authorities. John Hancock Mutual Life Ins. Co. v. Lookingbill, 218 Iowa 373, 253 N.W. 604 (1934).

In 1973, the legislature expanded the type of property of cemeteries heretofore tax exempt, i.e. grounds and buildings, to include mausoleums. The legislature also retained the exemption for "cemetery associations" but restricted it to only nonprofit ones. Therefore, the legislature, in 1973, evidenced an intention to limit the exemption to nonprofit cemeteries but did not purport to change the administrative construction that the exemption would apply to cemeteries, irrespective how ownership of cemeteries was maintained.

In 1980, as noted, the legislature, in Senate File 2369, enlarged the scope of the exemption by removing the restriction for only nonprofit cemetery associations, and it also denied the exemption for property used in the practice of mortuary science. In doing so, however, the legislature did not indicate any intention to change the administrative interpretation of §427.1(7) concerning ownership of cemeteries.

Consequently, in view of this legislative and administrative history, it appears that it was the intention of the legislature, when it acted in 1973 and in 1980, to grant the tax exemption to cemetery property as set forth in the statute, without regard to the nature of property ownership. Given this situation, a cemetery association, for the purposes of the tax exemption in §427.1(7), would be equated with a profit-making or nonprofit entity which operated a cemetery devoted to interment of human bodies and human remains.

It is the opinion of this office that §427.1(7), as amended by Senate File 2369, grants a property tax exemption to the property which is owned and operated by all profit-making or nonprofit cemeteries and exclusively used as set forth in the statute.

Very truly yours,

Harry M. Griger
Special Ass't Attorney General

HMG:pjt

STATE OFFICERS: Compensation of legislators serving on the state functional classification review board. Sections 2.10, 306.6, 312.2, The Code 1979; H. F. 2168, 68th G.A., 1980 Session. Under § 306.6, as amended by House File 2168, state legislators serving on the state functional classification review board may not receive compensation for per diem and expenses incurred in the performance of their official duties as members of the board. (Stork to Spear, State Representative, 8/6/80) #80-8-7(L)

August 6, 1980

Honorable Clay Spear
State Representative
1914 River
Burlington, Iowa 52601

Dear Representative Spear:

You have requested an opinion of the Attorney General as to whether state legislators appointed to the state functional classification review board under § 306.6, The Code 1979, should serve without compensation for expenses in light of House File 2168 passed during the 1980 Session of the 68th General Assembly.

Section 1 of House File 2168 amends § 306.6(2), unnumbered paragraph 1, as follows (amended portion is underlined):

> There is created a state functional classification review board which shall consist of one state senator appointed by the president of the senate, one state representative appointed by the speaker of the house of representatives, one supervisor appointed by the Iowa state association of county supervisors, one engineer appointed by the Iowa county engineers' association, two persons appointed by the league of Iowa municipalities, one of whom shall be a licensed professional engineer, and two persons appointed by the department, one of whom shall be a commissioner and the other a staff member. This board shall select a permanent ~~chairman~~ <u>chairperson</u> and all

> members of the board shall serve without additional compensation except that the supervisor appointed by the Iowa state association of county supervisors, the engineer appointed by the Iowa county engineers' association, and the two persons appointed by the league of Iowa municipalities shall be reimbursed for their actual and necessary expenses incurred in the performance of their official duties as members of the board. All expenses shall be paid from funds allocated under section two (2) of this Act.

Section 2 amends § 312.2, The Code 1979, and directs the Treasurer of State to credit annually to the primary road fund, from the road use tax fund, the sum of $5,000 to be used by the State Department of Transportation for payment of expenses as authorized under § 1 of House File 2168.

The Iowa Supreme Court has summarized certain principles of statutory construction that are instructive with respect to your inquiry:

> The goal [of statutory construction] is to ascertain legislative intent in order, if possible, to give it effect. Words are to be given their ordinary meaning unless defined differently by the legislative body or possessed of a peculiar and appropriate meaning in law. Effect is to be given to the entire statute. Its terms are not to be changed under the guise of construction. In searching for legislative intent, we consider the objects sought to be accomplished as well as the language used and place a reasonable construction on the statute which will best effect its purpose.

State ex rel. State Highway Comm'n. v. City of Davenport, 219 N.W. 2d 503, 507 (Iowa 1974). The terms of § 306.6, as amended, do not authorize legislators to be reimbursed for their actual and necessary expenses incurred in the performance of their official duties as members of the board. The legislative intent and purpose of the amendment seems clear: only the four individuals specifically enumerated may receive such reimbursement, which is paid as provided under § 312.2, as amended by House File 2168, § 2.

These specific terms may not be changed "under the guise of construction"; accordingly, legislators serving on the board may not claim reimbursement for expenses from the funds allocated in § 312.2, as amended.

Section 2.10(6), The Code 1979, contains the basic authority by which state legislators are reimbursed for expenses incurred while serving on statutory boards, commissions, or councils:

> In addition to the salaries and expenses authorized by this section, members of the general assembly shall be paid forty dollars per day, except the speaker of the house who shall be paid sixty dollars per day, and necessary travel and actual expenses incurred in attending meetings for which per diem or expense are authorized by law for members of the general assembly who serve on statutory boards, commissions, or councils, and for standing or interim committee or subcommittee meetings subject to the provisions of section 2.14, or when on authorized legislative business when the general assembly is not in session. However, if a member of the general assembly or the lieutenant governor is engaged in authorized legislative business at a location other than at the seat of government during the time the general assembly is in session, payment may be made for the actual transportation and lodging costs incurred because of the business. Such per diem or expenses shall be paid promptly from funds appropriated pursuant to section 2.12.

This provision sets forth three distinct situations in which members of the General Assembly may receive payment for per diem and necessary travel and actual expenses in addition to the basic legislative salaries and expenses authorized by § 2.10. One situation involves service on standing or interim committee or subcommittee meetings subject to the provisions of § 2.14, which governs payment for such meetings that are held when the General Assembly is not in session. Second, legislators may receive payment for per diem and expenses "when on authorized legislative business when the general assembly is not in session." The provision does not define "authorized legislative business"; consequently, this determination is made by the presiding officers and chief administrative officers in each house who approve payment of legislative expenditures under §§ 2.12 and 2.13. Section 2.10(6) further provides when payment for "authorized legislative business" can be made during a legislative session:

> However, if a member of the general assembly or the lieutenant governor is engaged in authorized legislative business at a location other than at the seat of government during the time the general assembly is in session, payment may be made for the actual transportation and lodging costs incurred because of the business. Such per diem or expenses shall be paid promptly from funds appropriated pursuant to section 2.12.

The final situation involves legislative service on statutory boards, commissions, or councils. Unlike the other situations, the authorization for payment of per diem and expenses in this situation does not specifically provide that payment is to be made only in connection with meetings or business conducted when the General Assembly is not in session. A legislator serving on a statutory board apparently could, for example, claim $40 per diem for attending a board meeting during a legislative session provided such payment is otherwise authorized by law. This payment would be in addition to the legislator's salary and expense of office provided in § 2.10(1).[1]

Under § 2.10(6), legislators who attend meetings of statutory boards, commissions, or councils on which they serve as members may receive per diem pay and reimbursement for expenses only as authorized by law. Section 306.6, as amended by House File 2168, does not provide such authorization. It should, therefore, be distinguished from similar statutes which establish boards, commissions, and councils and which specifically provide that legislators who are members may receive per diem and expenses pursuant to §§ 2.10 and 2.12. See § 18A.5 (Capitol Planning Commission), § 28B.4 (Interstate Cooperation Commission), § 80B.8 (Iowa Law Enforcement Academy), § 93.5 (Energy Policy Council), § 235A.24 (Council on Child Abuse Information), § 249B.6 (Commission on Aging), § 261.4 (College Aid Commission), and 1979 Session, 68th G.A., ch. 41, § 2 (Commission on Professional and Occupational Regulation). Unlike these statutes, § 306.6 expresses a legislative intent to exclude the legislative members from the list of persons entitled to receive reimbursement for expenses incurred in the performance of official duties as members of the board.

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[1] In light of the apparent intent and the other provisions of § 2.10, which do not permit payment of per diem and expenses during a legislative session, both houses of the General Assembly have adopted administrative policies that allow legislators serving on statutory boards, commissions, or councils to receive payment for per diem and expenses only in connection with meetings conducted when the General Assembly is not in session.

In summary, under § 306.6, as amended by House File 2168, legislators serving on the state functional classification review board may not receive additional compensation, i.e., per diem and reimbursement for actual and necessary expenses, incurred from attending meetings of the board.

Very truly yours,

Frank J. Stork

FRANK J. STORK
Assistant Attorney General

FJS:sh

MORTGAGES; LOAN PROCESSING FEES; 1980 Session, 68th General Assembly, H.F. 2492; Chapter 535, The Code 1979. Loan processing fees are limited to two percent of the principal amount of a loan. A fee in excess of this amount may not be collected by a lender, regardless of who pays the fee. (Norby to Carr, State Senator, 8/1/80) #80-8-6 (CL)

August 1, 1980

Honorable Robert Carr
State Senator
2030 Deborah Drive
Dubuque, Iowa 52001

Dear Senator Carr:

You have requested an opinion of the Attorney General regarding a particular arrangement for home financing. Under this arrangement, individual home buyers will pay a maximum loan processing fee of two percent of the loan principal or two points. In addition, however, the builder or seller of the house will contribute an additional amount to the loan processing fee, which may raise the amount of the loan processing fee above two percent of the loan principal. This additional fee will be paid only in connection with individual loans to borrowers who are approved by the lender. Accordingly, we do not believe this arrangement constitutes a reservation or commitment of funds by the lender to the seller. See 1979 Session, 68th G.A., ch. 130, § 22(5), unnumbered paragraph 2. Your concern is whether this arrangement is consistent with the Iowa usury statute, ch. 535, The Code 1979, as amended.

1980 Session, 68th G.A., H. F. 2492, § 3 provides as follows:

> A lender may collect in connection with any loan made pursuant to a written agreement executed by the borrower on or after the effective date of this Act, or in connection with any loan made pursuant to a written commitment by the lender mailed or delivered to the borrower on or after the

> effective date of this Act, a loan processing fee which does not exceed two percent of an amount which is equal to the loan principal, except that in the event of an assumption or refinancing of a prior loan the lender may collect a loan processing fee which does not exceed an amount which is a reasonable estimate of the expenses of processing the loan assumption or refinancing but which does not exceed one percent of the amount assumed or refinanced. As used in this subsection, the term "loan" means as defined in section five hundred thirty-five point eight (535.8), subsection one (1), of the Code. [See 1979 Session, 68th G.A., ch. 130, § 22(1).] The provisions of this subsection supersede conflicting provisions of section five hundred thirty-five point eight (535.8), subsection two (2), paragraph a, Code 1979 Supplement, but no other provision of this section is intended to affect any other subsection or paragraph of section five hundred thirty-five point eight (535.8) Code 1979 Supplement. [Emphasis supplied.]

As noted by the emphasized language, loan processing fees on new homes are limited to two points. This section does not limit the amount of the fee which can be paid by the borrower, but limits the amount which the lender can collect. Accordingly, the source of the fee does not affect the maximum limitation. The lender is therefore limited to two points regardless of who pays the processing fee.

Recent legislation which affects the ability of lenders to collect loan processing fees shows a trend toward limitation of the amount of these fees. See § 535.8(2)(b), The Code 1979; 1979 Session, 68th G.A., ch. 130, § 22(2); 1980 Session, 68th G.A., H. F. 2492, § 3; 1978 Op. Atty. Gen. 526; 1980 Op. Atty. Gen. #80-7-1. In light of this history, we do not believe that H. F. 2492, § 3 should be construed to allow a processing fee from two sources to exceed two percent without specific reference to such a combination.

Sincerely,

Steven G. Norby

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

TAXATION: Designation of an urban revitalization area for property tax exemption. 1979 Session, 68th G.A., ch. 84 (H.F. 81). The governing body of a city may, by ordinance, designate an area of a city as a revitalization area eligible for property tax exemption when the buildings, improvements, or structures of the area can no longer be put to a suitable use if said area meets all the other criteria set forth in H.F. 81. Furthermore, a single building or structure cannot be designated as a revitalization area. (Kuehn to Ned L. Chiodo, State Representative, 8/1/80) #80-8-5(L)

August 1, 1980

The Honorable Ned L. Chiodo
State Representative
3410 S.W. 12th St. Place
Des Moines, Iowa 50316

Dear Representative Chiodo:

You have requested an opinion of the Attorney General concerning the meaning of certain language of 1979 Session, 68th G.A., ch. 84 (hereinafter referred to as H.F. 81). In your written request, you state:

> In 1979 the General Assembly enacted House File 81, which authorizes cities to grant property tax exemptions for property on which improvements have been made in designated revitalization areas. Since that time, the urban revitalization law has been implemented in several cities, raising questions concerning the interpretation of several provisions of the law.
>
> I ask your opinion on two questions which concern me:
>
> (1) May a city designate an area as a revitalization area for reasons of "economic blight," i.e., the real property in the area is structurally safe and sound, but is suitable only for certain limited development purposes for which there is no apparent interest?

(2) May a city designate a single building as a revitalization area, even if the building is structurally safe and sound?

Section one of H.F. 81 provides as follows:

Section 1. NEW SECTION. The governing body of a city may, by ordinance, designate an area of the city as a revitalization area, if that area is any of the following:

1. An area in which there is a predominance of buildings or improvements, whether residential or nonresidential, which by reason of dilapidation, deterioration, obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, the existence of conditions which endanger life or property by fire and other causes or a combination of such factors, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency or crime, and which is detrimental to the public health, safety, or welfare.

2. An area which by reason of the presence of a substantial number of deteriorated or deteriorating structures, predominance of defective or inadequate street layout, incompatible land use relationships, faulty lot layout in relation to size, adequacy, accessibility or usefulness, unsanitary or unsafe conditions, deterioration of site or other improvements, diversity of ownership, tax or special assessment delinquency exceeding the actual value of the land, defective or unusual conditions of title, or the existence of conditions which endanger life or property by fire and other causes, or a combination of such factors, substantially impairs or arrests the sound growth of a municipality, retards the provision of housing accommodations or constitutes an economic or social liability and is a menace to the public health, safety, or welfare in its present condition and use.

3. An area in which there is a predominance of buildings or improvements which by reason of age, history, architecture or significance should be preserved or restored to productive use. [Emphasis supplied]

The resolution to your first question is contained within the definition of the word "obsolescence" as used in H.F. 81. Webster's New World Dictionary of the American Language 982 (2nd college ed. 1972), defines the word "obsolescence" as follows: "in the process of becoming obsolete." Immediately following the definition of obsolescence is a definition of the word "obsolete" which is defined to include: "1. no longer in use or practice; discarded 2. no longer in fashion; out-of-date; passé."

The situation you pose in your first question would come within the definition of "obsolescence" because the real property you describe is no longer of any use to anyone because of the lack of interest in it. Therefore, the governing body of a city may, by ordinance, designate such an area of a city as a revitalization area, provided that all other criteria of H.F. 81 are met. See, e.g., §2 of H.F. 81.

The resolution to your second question is also contained in §1 of H.F. 81. Section one continually refers to the revitalization area as an area with a "substantial number" or a "predominance of buildings", "structures" or "improvements" which must meet certain criteria. Webster's New World Dictionary of the American Language 73 (2nd college ed. 1972), defines the word "area" to include: "a part of the earth's surface; region; tract." Said dictionary defines "predominance" at p. 1121 to include: "1. having ascendancy, authority, or dominating influence over others; superior 2. most frequent, noticeable, etc.; prevailing; preponderant." Therefore, any area or tract proposed as a revitalization area cannot be composed of only a (single) building because the words "substantial number" and "predominance" clearly presuppose that said area or tract is composed of more than one building, improvement or structure. In addition, §1 of H.F. 81 purposely refers to "buildings," "improvements," or "structures" in the plural.

House File 81 is a tax exemption statute. Therefore, to the extent that any doubt may exist as to whether an urban revitalization area may only contain one building, that doubt must be resolved against exemption and in favor of taxation. Jones v. Iowa State Tax Commission, 247 Iowa 530, 74 N.W.2d 564 (1956); Iowa Methodist Hospital v. Board of Review of City of Des Moines, 252 N.W.2d 390 (Iowa 1977).

Based upon the foregoing, it is the opinion of the Attorney General that the governing body of a city may, by ordinance, designate an area of a city as a revitalization area eligible for property tax exemption when the buildings, improvements, or structures of the area can no longer be put to a suitable use, if said proposed revitalization area meets all the other criteria set forth in H.F. 81. Furthermore, a single

building or structure cannot be designated as a revitalization area because the statutory language of H.F. 81 refers to the revitalization area as containing more than one building, improvement, or structure.

Very truly yours,

Gerald A. Kuehn

GAK:pjt

MUNICIPALITIES: Use of Funds from Rental and Sale of City property -- §§ 76.2, 76.4, 384.2, 384.24 and 384.25, The Code 1979. Monies derived by a municipality from the rental and sale of city property can generally be used for any government purpose. The monies need not be used to pay off general obligation bonds issued to acquire the property. (Blumberg to Lura, State Representative, 8/1/80) #80-8-4 (L)

August 1, 1980

The Honorable Mick Lura
State Representative
911 South 11th Avenue
Marshalltown, Iowa 50158

Dear Representative Lura:

We have your opinion request of June 20, 1980, regarding the use of funds from sale of property. You indicated the following facts. The city, as part of a flood control project, issued general obligation bonds in order to acquire property. Among the property acquired was an apartment building. The city continued to rent the apartments, and has accumulated $55,000 in rents. The apartment was sold by the city, and the proceeds from that sale amounted to $260,000. The city wishes to use these funds for the remodeling of its police station.

Bonds issued for flood control are an essential corporate purpose. Section 384.24(3)(i), The Code 1979. Therefore, an election is unnecessary. Section 384.25. Taxes to pay the interest and principal of the bonds must be levied on all property within the city. See §§ 76.2 and 384.32. Section 76.4 provides that a city may appropriate funds on hand from sources other than taxation to the payment of the interest and/or principal. There is nothing in the Code which we can find which requires a city to use funds derived from property acquired by general obligation bonds to pay off those bonds. Such payment is made from the tax levied for that purpose.

Section 384.3 provides that all money received for city government purposes from taxes and other sources must be deposited in the general fund, with the exception of certain other funds, not relevant here. Once in the general fund, those monies can be used for any governmental purpose unless forbidden by statute. We know of no prohibition applicable here.

Accordingly, we are of the opinion that the monies received from the rental and sale of city property can generally be used for other city purposes, including renovation of the police station.

Very truly yours,

Larry M. Blumberg

Larry M. Blumberg
Assistant Attorney General

LMB:jkt

COUNTIES: Title to Vacated Streets in Unincorporated Areas--Art. III, § 39A, Const. of Ia., §§ 306.10-206.17, 332.3, The Code 1979. Fee title to streets in unincorporated villages ordinarily remains with the abutting landowner, subject to an easement for the street. Upon vacation of the street, operation of law terminates the interest of a county in the land covered by the street. (Willits to Hulse, State Senator, 8/1/80) #80-8-2 (L)

August 1, 1980

The Honorable Merlin D. Hulse
State Senator
Rural Route
Clarence, Iowa 52216

Dear Senator Hulse

On behalf of Richard L. Kemmann, Cedar County Auditor, you have requested our opinion regarding the following question:

> "What happens to the land, which was formerly a street, in an unincorporated village? What is the authority of a county to convey or assign any interest it has in vacated streets?

At the outset, it should be pointed out that the procedure for vacating highways, which includesplatted streets in unincorporated villages, is set forth in §§ 306.10-306.17, The Code 1979. These sections contain no specific statutory procedure for disposition of the land from a vacated street. General powers of a county board of supervisors to buy and sell real estate are set forth at subsections 332.3(12) and (13). Further, broad discretion of counties to manage their own affairs has been granted by the county home rule amendment of 1978 to Article III, Sec. 39A, Constitution of the State of Iowa. This office has previously taken an expansive view of county home rule powers. (See Op.Atty.Gen. #79-4-7, Miller and Hagen to Representatives Danker, Binneboese, Hullinger, and Hansen, 4/6/79).

The manner of disposal of land from vacated streets depends on how that land came to be a street. In rare instances land may have been conveyed in fee simple absolute to a county and the county would continue to have title even if the land were no longer a street. In these cases, the land can be sold by the county pursuant to subsection 322.3(13), The Code 1979.

By far the more common situation arises where streets were dedicated, either by formal (statutory) or common law proceedings. (See discussion of this in Op.Atty.Gen. #80-3-20, Blumberg to Hulse, State Senator, 3/35/80). The general rule is that, in the absence of statutes affecting the rule, the public acquires only an easement in the highway and title to the fee remains in the owner, subject to the easement. In the absence of evidence to the contrary, title to the fee is presumed to be in the abutting landowner, and this title extends to the center of the way, subject to the easement. 39A C.J.S., Highways § 136; 39 Am.Jur.2d, Highways, Streets, and Bridges §§ 157-160. The owner of land encumbered with a highway easement has a right to sell it, subject to that encumbrance. 39Am.Jur.2d, Highways, Streets and Bridges § 162.

Under Iowa law, the filing of a plat within an incorporated city is a tender of conveyance of title to the streets in fee, not a mere easement, to the incorporated city. This is contrasted with the situation of filing a plat dedicating a highway (street) in an unincorporated village. In this instance, such dedication does not convey a fee interest in the highway, but only an easement. The fee remains with the original owner of the land and, when the street is vacated, reverts to the original owner, the same as all other public highways outside of incorporated cities and towns. State v. F.W. Fitch Co., 236 Iowa 208, 211, 17 N.W.2d 380 (1945); Clare v. Wogan, 204 Iowa 1021, 216 N.W. 739, 740 (1927); Town of Kenwood Park v. Leonard, 177 Iowa 337, 158 N.W. 655 (1916); Town of Kenwood Park, supra; Kitzman v. Greenhogh, 164 Iowa 166, 169, 145 N.W. 505 (1914).

In Iowa, succeeding owners of lots in platted unincorporated villages become the owners of the street, subject to the public easement for use of the street as such. Iowa State Highway Comm'n. v. Dubuque Sand & Gravel Co., 258 N.W.2d 153 (Iowa 1977).

Generally, when a highway (or street) is abandoned, the absolute title to the land covered by the highway reverts to the owner of the fee without any further action of the highway authorities, except where the fee to the highway has passed to the public [emphasis supplied] 39A C.J.S., Highways §§ 129 and 137, 39 Am.Jur.2d, Highways, Streets and Bridges § 184.

Thus, when a street is vacated in an unincorporated area, title to the land covered by the street reverts to the owner(s) of the fee by operation of law, without any formal conveyance by the county. This is true whether the street was established by formal platting, dedication and acceptance or by dedication by prescription. After a street, road or highway in an unincorporated area is vacated, the county no longer has any interest in that land to convey. A county may, of course, quit claim any interest in the land from a vacated street, road, or highway, but this is not necessary for its interest to be terminated.

In sum, fee title to streets in unincorporated villages ordinarily remains with the abutting landowner, subject to an easement for the street. Upon vacation of the street, operation of law terminates the interest of a county in the land covered by the street. If adjoining landowners desire, the county may quit claim any interest in vacated streets.

Sincerely,

EARL M. WILLITS
Assistant Attorney General

EMW/nay

CHILD ABUSE: Chapter 232. Sections 232.27, 232.1, 232.67, 232.68 232.68(1), 232.69, 232.70, 232.71, 232.72, 232.73, 232.74, 232.75, 232.76, 232.77, The Code, 1979. The mandatory reporting and investigation provisions contained in Chapter 232, Division III, Part 2, to suspected abuse of human fetuses. (Hoyt to Reagen, Commissioner of Social Services, 8/1/80) #80-8-1(L)

August 1, 1980

Michael V. Reagen
Commissioner
Iowa Department of Social Services
Hoover Building
Des Moines, Iowa 50319

Dear Commissioner Reagen:

You have requested an official Attorney General's opinion concerning Iowa's Child Abuse Statute. Specifically, you have asked whether it provides for the reporting and investigation of suspected abuse with regard to human fetuses.[1]

Generally speaking, states have broad authority to legislate for the maintenance, care, custody, and protection of children coming within their borders under the doctrine of parens patriae. Pursuant to that authority, the Iowa Legislature enacted Sections 232.67-232.77, The Code, 1979. These sections fall under the sub-heading Child Abuse Reporting, Investigation and Rehabilitation. They are found in Division III of Iowa's Juvenile Code.

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1. The terms "embryo" and "fetus" are medical terms, which refer to specific stages of gestation; Embryo 0-3 months and Fetus 3-9 months. The term "unborn child" describes all stages of gestation from conception to live birth.

Section 232.68 defines the terms relating to child abuse reporting and investigation. Section 232.68(1) defines "child":

> (1) "Child" means any person under the age of eighteen years.

This definition of "child" is consistent with those found elsewhere in The Code.

The key determination in responding to your question is whether the legislature intended the word "person" as used in Section 232.68(1) to include the unborn. If it did so intend, the child abuse provisions outlined thereafter are applicable to human fetuses. If not, the subsequent provisions apply only to children who have been born. In making this determination, it is necessary to consider relevant court decisions, basic principles of statutory construction, and policy considerations bearing upon legislative intent.

The questions of whether the term "person" as it is commonly used in statutes includes the unborn and whether the term "child" as it is commonly used in statutes includes human fetuses have been frequently addressed by the courts.

Federal courts have consistently held that the term "person" as commonly used in statutes does not include the unborn.

In Roe v. Wade, 410 U.S. 413, 93 S.Ct. 705, 35 L.Ed.2d 147, a pregnant single woman challenged the constitutionality of the Texas criminal abortion statute which proscribed providing an abortion except for the purpose of saving the mother's life. Relevant here is the response of the United States Supreme Court to the assertion by Texas that a "fetus" is a "person" within the scope and meaning of the Fourteenth Amendment. After an examination of the many references to "person" in the United States Constitution, the Supreme Court concluded that the use of the word had no pre-natal application. Specifically, the Court held that the word "person" as used in the Fourteenth Amendment does not include the unborn.

Burns v. Alcala, 420 U.S. 575, 95 S.Ct. 1180, 43 L.Ed.2d 469, involved a class action brought on behalf of ADC applicants who challenged the State of Iowa's denial of welfare benefits

to conceived but unborn children. The United States Supreme Court held that words in a statute are to be given their ordinary meaning absent persuasive reasons to the contrary and thus the term "dependent child" for the purpose of Iowa welfare eligibility benefits refers to children already born and does not include the unborn.

Similarly, in Wisdom v. Norton, 507 F.2d 750, 2d Cir. (1974), the United States Court of Appeals for the Second Circuit faced the issue of whether welfare benefits extend to the unborn. The court held that they did not because the word "child" is commonly and ordinarily understood to mean a born child and not a fetus.

Recently, pursuant to a challenge to the constitutionality of the Illinois abortion statute, the United States Court of Appeals for the Seventh Circuit held that, absent an explicit legislative statement, the term "child" does not include a fetus. Wynn v. Carey. 599 F.2d 193 (7th Cir. 1979).

Various state supreme courts have frequently faced the question of whether the term "person" includes the unborn in wrongful death actions. At present, state courts are split as to whether to allow recovery for an unborn child.[2]

The position of the Iowa Supreme Court was set forth in McKillip v. Zimmerman, 191 N.W.2d 706 (Iowa 1971). There, the Court was asked to decide whether a fetus was a person as the term was used by the legislature in Iowa's Wrongful Death Statute, §611.20, The Code 1979. The Court stated:

> "In construing statutes, we search for the legislative intent as shown by what the legislature said rather than what it should or might have said. If the language of a statute when given its plain and rational meaning is precise

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2. At common law, the unborn fetus was not a person. Many states, however, have subsequently allowed an unborn fetus to recover for wrongful death. Many of the cases holding that an action may be maintained, as well as those holding to the contrary, are listed and discussed in Anno. 15 A.L.R. 3rd 995, 999. In addition, a thorough discussion of the various theories on each side is set forth in State ex rel Hardin v. Sanders, 538 S.W.2d 336 (Mo. 1976).

> and free from ambiguity, no more is necessary to apply the words their ordinary sense in connection with the subject considered. Maguire v. Fulton, Iowa 1979 N.W.2d 508. These rules are applicable here. We hold "person" as used in Code section 611.20 means only those born alive."

Many other state supreme courts have joined Iowa in holding that the word "person" as used in wrongful death statutes does not include a fetus. Hamly v. McDaniel, 559 S.W.2d 774 (Tenn. 1974), Egbert v. Wenzl, 260 N.W.2d 480 (Neb. 1977), Hardin v. Sanders, 538 S.W.2d 336 (Mo. 1976), Kilmer v. Hicks, 527 P.2d 706 (Ariz. 1975).

The rationale supporting these decisions is best summarized in Justus v. Atchison, 139 Cal. Rptr. 97 (Cal. 1977), where the California Supreme Court stated:

> "We conclude from the foregoing that when the Legislature determines to confer legal personality on unborn fetuses for certain limited purposes, it expresses that intent in specific and appropriate terms; the corollary, of course, is that when the Legislature speaks generally of a "person", as in section 377, it impliedly but plainly excludes such fetuses."

More relevant to our present consideration is Reyes v. Superior Court of California, 141 Cal. Rptr. 912 (1977). In that case, Margaret Reyes was addicted to the use of heroin while she was pregnant. She was warned by a public health nurse that if she continued to use heroin and failed to seek pre-natal care, the health and life of any child born to her would be endangered. Nevertheless, she continued to use heroin and failed to seek pre-natal care during the final two months of pregnancy. She later gave birth to twin boys. They were both addicted to heroin and suffered withdrawal. Ms. Reyes was charged with two counts of felony "child-endangering" under the California statute.[3] She moved to

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3. §273a. Willful cruelty or unjustifiable punishment of a child; endangering life or health

set aside the information on the ground that the word "child" as used in the statute did not include the unborn. The California Supreme Court held that the word "child" as used in the statute was not intended to refer to an unborn child and thus the defendant's conduct did not constitute child-endangering under the statute.

In construing the present statute, we must also be guided by familiar principles of statutory construction. The polestar is legislative intent. The goal is to ascertain that intent and, if possible, give it affect. Doe v. Ray, 251 N.W.2d 496 (Iowa 1977).

A statute should be accorded a sensible, practical and workable construction. Matter of Estate of Bliven, 236 N.W.2d 366 (Iowa 1975). Finally, as the Iowa Supreme Court said in McKillip, we must search for the legislative intent in what the legislature said rather than what it should or might have said.

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3. con't. "(1) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment in the county jail not exceeding 1 year, or in the state prison for not less than 1 year nor more than 10 years.

(2) Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health may be endangered, is guilty of a misdemeanor." (Emphasis added)

Section 232.1 sets forth rules of construction for Iowa's Juvenile Code.

> 232.1 Rules of construction. This chapter shall be liberally construed to the end that each child under the jurisdiction of the court shall receive, preferably in his or her own home, the care, guidance and control that will best serve the child's welfare and the best interest of the state. When a child is removed from the control of his or her parents, the court shall secure for the child care as nearly as possible equivalent to that which should have been given by the parents. (Emphasis added).

The emphasized language of this section, combined with the language contained in Sections 232.67-232.77, clearly indicate that the word child as used throughout the statute has a post-natal reference.

Moreover, it would be extremely difficult to apply the statutory provisions contained in Sections 232.70-232.77 to the unborn. For example, what "lawful action" could be taken to protect a child still in the womb? Further, identification of the nature, cause and extent of injuries to an unborn child would require a medical expertise not found in the child protective worker.

Based upon the post-natal use of the word "child" throughout the statute and the problems which would result from a pre-natal application of the statute's provisions, it seems clear that the Iowa legislature did not intend sections 232.67-232.77 to be applied to human fetuses. Rather, it appears the legislature intended the word "person" as used in Section 232.68(1) to be given its ordinary and commonly understood meaning. Had the legislature intended to prescribe minimum standards for proper maternal health care and enforce them through the child abuse statute, it surely would have expressed that intent in specific and appropriate terms. For example, in Sections 707.7 and 707.8, The Code, 1979, the Iowa Legislature used such specific and appropriate terms in dealing with feticide and the non-consensual termination of human pregnancy.

In summary, basic rules of statutory construction dictate that words in a statute be given their ordinary and commonly understood meaning. The Iowa Supreme Court has held that the word "person" as used in a statute is not commonly understood to include the unborn. Absent an expressed intent to the contrary, we conclude that the Iowa Legislature intended the word "person" as used in Section 232.68(1) to be accorded its commonly understood meaning. Thus, the provisions relating to the reporting and investigation of child abuse contained in Sections 232.67-232.71 should not be applied to human fetuses.

Sincerely yours,

Francis C. Hoyt, Jr.

Francis C. Hoyt, Jr.
Assistant Attorney General

FCH/co

PUBLIC RECORDS: Confidentiality of library circulation records. Ch. 68A, §§ 68A.1, 68A.2, 68A.7, The Code 1979; 1980 Session, 68th G.A., H. F. 2240. A court, the lawful custodian or another person duly authorized to release information is empowered to release at their discretion library circulation records required to be kept confidential by § 68A.7, The Code 1979. The "lawful custodian" of library circulation records is the person entrusted to compile and maintain such records, or generally the head or chief librarian, unless otherwise specified by the Code or rules promulgated by the library governing body pursuant to statutory authority. The lawful custodian may designate some other person as "another person duly authorized to release information." (Hyde to Porter, State Librarian, 9/30/80) #80-9-19(L)

September 30, 1980

Barry L. Porter
State Librarian
State Library Commission of Iowa
Historical Building
L O C A L

Dear Mr. Porter:

We have received your request for an opinion from this office concerning the exemption of library circulation and registration records from the public records law. A 1979 opinion of the Attorney General concluded that circulation records of a public library were public records to be open for inspection and copying by the public as required by ch. 68A, The Code 1979. 1979 Op. Atty. Gen. #79-8-25. During its 1980 Session, the 68th G.A. enacted H. F. 2240, effective upon publication, to except library circulation records from the public records law.

Section 68A.7, The Code 1979, now reads in relevant part:

> 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.
>
> * * *
>
> NEW SUBSECTION. The records of a library which by themselves or when examined with other public records, would reveal the identity of the library patron checking out or requesting an item from the library.

For convenience, library records as defined above will be referred to as "circulation records" throughout this opinion.

In light of this amendment, you have asked the following specific questions:

1. In the case of libraries, who would be considered "the lawful custodian of the records" under Section 68A.7? Until we hear otherwise, we are assuming the governing body (board of trustees, board of regents, school boards, etc.) holds this responsibility.

2. Who would be considered "another person duly authorized to release information" under § 68A.7? The librarian (if the librarian is not considered the "lawful custodian")? To what extent can the governing body designate their authority to the librarian?

3. To what extent can the governing body exempt themselves from compliance? Can they vote to open any or all of their records at any time?

4. Many libraries still use the system of writing patrons' names on book cards and placing those in a book pocket in the book. This system allows anyone to review the names on the card to see who has read the book. Are library staffs who maintain this type of system in violation of the law because they do not make conscientious efforts to protect the privacy of readers?

Public records are defined in § 68A.1, The Code 1979, as "all records and documents of or belonging to this state or any county, city, town, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing." Section 68A.2, The Code 1979, confers on any Iowa citizen the right to examine and copy any public records, unless a statutory exemption specifies otherwise. Certain express and specific limitations on this right of access are contained in § 68A.7, The Code 1979.[1] See Howard v. Des Moines Register and Tribune Co., 283 N.W.2d 289, 299 (Iowa 1979). The general tendency has been, as the Court in Howard noted, to establish a liberal policy of access for which departures are to be made only under discrete circumstances. Id. And even when records can be determined to fall within the scope of a § 68A.7 exception, discretion is vested in a court or the custodian to authorize release: "The following public records shall be kept

[1] Other statutory exemptions may be found elsewhere in the Code. See, for example, §§ 258A.6 or 692.18, The Code 1979. In some instances, the § 68A.7 exemption for library circulation records may not be the only provision applicable allowing confidentiality.

confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information. [Emphasis supplied.]

Section 68A.7, The Code 1979, enumerates no standards by which a court or lawful custodian of the records may determine that exception from confidentiality would be appropriate in any particular case; it appears to be left to the discretion of the custodian. See 1980 Op. Atty. Gen. #80-6-8. Accordingly, the lawful custodian or another authorized person may allow examination of public library circulation records which are to be kept confidential pursuant to § 68A.7, The Code 1979.

The terms "lawful custodian of the records" and "another person duly authorized to release information" are not defined in ch. 68A, The Code 1979. Neither the decisions of the Iowa Supreme Court nor opinions issued from this office, when interpreting ch. 68A, have specifically or directly defined the terms, although it has been implied that the "lawful custodian" is the public official in possession of the records. See Howard, 283 N.W.2d at 300 (documents in governor's files are in his "lawful possession"); 1980 Op. Atty. Gen. #80-6-8 (head administrator of school is lawful custodian of student records); 1978 Op. Atty. Gen. 282 (hospital claim records in Iowa Industrial Commissioner's Office are in custody of Commissioner).

Since the Legislature did not define "lawful custodian of the records", and no guidance has been offered by the Iowa Supreme Court, we must look to the ordinary, everyday usage of the term. "Words are to be given their ordinary meaning unless defined differently by the legislative body or possessed of a peculiar and appropriate meaning in law." State ex rel. State Highway Commission v. City of Davenport, 219 N.W.2d 503, 507 (Iowa 1974); see § 4.1(2), The Code 1979. "Custodian" is defined in Webster's New Collegiate Dictionary, 1979 edition as: "one that guards and protects or maintains, especially one entrusted with guarding and keeping property or records . . ." . "Lawful" means "constituted, authorized, or established by law." The language used thus refers not to a governing board or agency, but to one individual or person who is delegated the responsibility of compiling and preserving the records in question. Given the definition of these terms, we conclude that the "lawful custodian" of library circulation records is the library officer or employee entrusted with the responsibility to make and maintain such records. Ordinarily, that individual would be the head or chief librarian, or person occupying a similar position, in each specific library where circulation records are maintained.

We believe other considerations lend support to this conclusion. The Legislature did not require that the governing or policy-making body entrusted with the management of a library determine whether circulation records should be released. We note that there are numerous libraries established by the "state or any county, city, town, township, school corporation, political subdivision, or tax-supported district" in Iowa, or "any branch, department, board, bureau, commission, council or committee of any of the foregoing." Section 68A.1, The Code 1979. The § 68A.7 exception would apply not only to circulation records maintained by those libraries usually thought of as serving the public, i.e., the state historical library or city and county libraries, but to libraries operated by school districts, Board of Regents institutions, or state penal institutions. In fact, the circulation records of libraries operated by state agencies and departments for the convenience of employees, such as the law library within the Attorney General's office, appear to fall within the new § 68A.7 exception. A determination that some individual or governing entity other than the librarian who keeps the records is the "lawful custodian of the records" would appear to exceed the Legislature's mandate and would at the least engender great confusion. A governing policy-making board or officer whose powers or duties include management of a publicly supported library may designate itself or some individual as lawful custodian, or may adopt a policy setting guidelines to aid in making a determination of appropriate cases to release circulation records. The order to release such records properly comes from the librarian as lawful custodian.

For example, the county board of library trustees is generally charged with the supervision of a free county public library, pursuant to ch. 358B, The Code 1979, and is authorized to employ a librarian, and other assistants and employees. Ordinarily, that librarian is the individual who undertakes to compile, maintain and preserve circulation records, and is the "lawful custodian" who may order the release of the confidential information. The county board may designate some other individual or itself as lawful custodian or establish guidelines to aid in making a determination of appropriate cases to release circulation records, pursuant to its power in § 358B.8(7), The Code 1979: "[T]o make and adopt, amend, modify, or repeal bylaws, rules, and regulations, not inconsistent with law, for the care, use, government, and management of such library and the business of said board, fixing and enforcing penalties for the violation thereof." The librarian, as lawful custodian, may carry out that policy and maintain as confidential or release library circulation records. An assistant, employee, or other person, if duly authorized to release information, may make a similar determination.

As another example, the lawful custodian of school library circulation records generally would be the school librarian who keeps such records. Although policies concerning release of circulation information may be set by the school principal, the

chief administrative officer of the school district, or the elected school district board of directors, the librarian, as the person entrusted with the records, must order the release under § 68A.7, The Code 1979. Similarly, in libraries operated within public institutions such as correctional facilities or hospitals, the librarian is the lawful custodian of circulation records, as contemplated by § 68A.7, The Code 1979. Other governing entities may be responsible for establishing institutional policies; in fact, in most cases, a "chain of command" may emanate upward from the employee designated "librarian", and charged with the maintenance of circulation records. Despite this, the order to release the confidential information must come from the librarian as lawful custodian. If the librarian releases or refuses to release information in contravention of a policy of the body charged wtih the supervision of the institution which encompasses the library, it may become an internal matter of employee discipline.

In a library where patrons' names are recorded on a card which is maintained in the book, steps should be taken to remove that information, which "would reveal the identity of the library patron checking out or requesting an item from the library, ", from public inspection, ["records shall be kept confidential"]." Section 68A.7, The Code 1979. If, however, the librarian as lawful custodian determines that circulation information may be released and no other statutory provision requires the information to be kept confidential[2], the cards may remain in the books, available for public inspection and copying. The librarian as lawful custodian may determine that the cards may remain in all books or only certain books. Section 68A.7, The Code 1979, contains no standards or guidelines as to when confidential information may be released; it it solely within the discretion of those authorized to release information.

In conclusion, it is our opinion that the "lawful custodian" of library circulation records is the person entrusted to compile and maintain such records, or generally the librarian, unless otherwise specified by the Code or rules promulgated by the library governing body pursuant to statutory authority. The lawful custodian may designate some other person as "another person duly authorized to release information." Section 68A.7, The Code 1979, empowers a court, the lawful custodian or another person duly authorized to release information to release library circulation records in their discretion.

Very truly yours,

Alice Hyde (ad)

ALICE J. HYDE
Assistant Attorney General

AJH:sh

[2] See, for example, 20 U.S.C. § 1232g, "The Family Educational Rights and Privacy Act."

JUVENILE LAW: Confidentiality of Complaints Alleging Delinquency. Iowa Code Chs. 232.2(7), 232.2(33), 232.28, 232.147, 1981; 1982 Session, 69th G.A. HF 2460. The legislature intended to expand public assess to filed complaints alleging juvenile delinquency. However irrespective of age of the child or gravity of the delinquent act alleged, all complaints - alleging delinquency remain public records under Iowa Code Section 232.147, 1982. (Allen to Short, Lee County Attorney, 9/27/82) #82-9-18(L)

Mr. Michael P. Short
Lee County Attorney
609 Blondeau Street
Keokuk, IA 52632

September 27, 1982

Dear Mr. Short:

We have received your request for an opinion of the Attorney General concerning the exemption, if any, granted to initial complaints on juveniles alleging a delinquent act from the confidentiality provisions of Iowa Code Chapter 232, commonly referred to as the Juvenile Code. A 1979 Attorney General's Opinion concluded that complaints, as Official Juvenile Court records, as that term is defined in the statute, are public records and are exempt from the confidentiality provisions of Iowa Code Section 232.147. (1979 Op.Att'yGen. #79-9-20) During its 1982 session, the 69th General Assembly enacted House File 2460 to specifically provide that a juvenile delinquency complaint under certain circumstances shall not be confidential under § 232.147.

Iowa Code Section 232.28 now reads in relevant part:

> 1. Any person having knowledge of the facts may file a complaint with the court or its designee alleging that a child has committed a delinquent act. A written record shall be maintained of any oral complaints received.
> 2. The court or its designee shall refer the complaint to an intake officer who shall consult with law enforcement authorities having knowledge of the facts and conduct a preliminary inquiry to determine what action should be taken.
> NEW SUBSECTION. A complaint filed with the court or its designee pursuant to this

> section which alleges that a child fourteen years of age or older has committed a delinquent act which if committed by an adult would be an aggravated misdemeanor or a felony shall be a public record and shall not be confidential under section 232.147.

In light of this amendment adding the new subsection, you have asked the following specific question:

> Did the legislature by passing House File 2460 intend to restrict or expand public access to filed complaints alleging juvenile delinquency?

We have interpreted your question to be one of effect of the amendment as well as legislative intent.

Iowa Code Section 232.2(7), 1981, defines a complaint as follows:

> Complaint means an oral or written report which is made to the juvenile court by any person and alleges that a child is within the jurisdiction of the court.

House File 2460 to which your question is addressed also substituted: ". . . an oral . . ." for ". . . a verbal . . ." in this section. It is our opinion this amendment is irrelevant to the question you pose.

Iowa Code Section 232.2(33), 1981, defines official juvenile court records to include:

> "Official juvenile court records" or "official records" means official records of the court of proceedings over which the court has jurisdiction under this chapter which includes but is not limited to the following:
> . . .
> b. Complaints, petitions, . . .

"Complaint" and "petition" are different and distinctive. A complaint is the initial referral of a factual situation to the juvenile court. A petition formally initiates judicial proceedings in the juvenile court and may only be filed by the county attorney.

Iowa Code Section 232.147(2) states:

Official juvenile court records in cases alleging delinquency shall be public records, subject to sealing under § 232.150.

The 1979 Opinion of the Attorney General concluded, and we reiterate here, that juvenile court records in cases alleging delinquency are public records, and since complaints are part of official juvenile court records, all initial complaints on juveniles are public records.

Iowa Code Section 232.28, 1981, as amended by House File 2460, requires that a "written record shall be maintained of any oral complaint received". Nevertheless, the distinction between this written record and a complaint as statutorily defined is continued. As subsection 1 of Iowa Code Section 232.28, 1981, makes clear, the complaint, whether oral or written, is "filed" with the court while the written record of an oral report is "maintained". In our opinion then, the addition of the new subsection in Iowa Code Section 232.28, 1981, does not alter the basic definition of complaint, nor does it alter the definition of filing of that complaint with the juvenile court. The additional requirement that a written record be maintained, while administratively wise and justified, is in our opinion irrelevant to a determination of the confidentiality of that initial complaint.

Although House File 2460 amended Iowa Code Section 232.147, 1981, which, as noted, is the section dealing with the confidentiality of juvenile court records, the legislature nevertheless did not alter subsection 2 thereof. That subsection, in our opinion expressed in 1979 and continuing to this date, makes public records of all complaints alleging delinquency.

The Iowa Supreme Court has often said that the intent of the legislature is the polestar of statutory interpretation. Shinrone Farms, Inc. v. Gosch, 319 N.W.2d 298 (Iowa 1982). The Court also recognizes that the legislature may be its own lexicographer, defining its own terms. State v. Thomas, 275 N.W.2d 422 (Iowa 1979). In construing the language, we observe the principle that statutes should be given a construction which is sensible, practical, workable, and logical. Hansen v. State, 298 N.W.2d 263, 265-66 (Iowa 1980).

It is our opinion that the legislature by the passage of House File 2460 intended to expand public access to filed complaints alleging juvenile delinquency. Had the legislature intended to restrict public access, an amendment to Iowa Code Section 232.2(33), 1981, which defines official juvenile court records or an amendment to Iowa Code Section 232.147(2), 1981,

which makes all official juvenile court records in cases alleging delinquency public records, or optimally, both subsections would have been amended. House File 2460 left intact both subsections. We can only conclude that the legislature sought to remedy a perceived misunderstanding of their prior statute. The legislature in our view has now plainly and unquestionably placed juvenile delinquency complaints alleging that the child is at least fourteen years of age or older and that the act committed by the child would be an aggravated misdemeanor or felony if committed by an adult, in the public domain. This age and gravity offense distinction is consistent with similar distinctions drawn in other areas of Chapter 232, most notably right to counsel. However, in our opinion, juvenile delinquency complaints, irrespective of age or gravity of the offense, remain public records under Iowa Code Section 232.147, 1981.

Sincerely,

Gordon E. Allen
Special Assistant Attorney General

GEA/sm

PUBLIC RECORDS: §§ 17A.2, 17A.3, 68A.1, 68A.2, 68A.7, 68A.9, 692.1, 692.18. A police department operation manual is a "public record" within the meaning of § 68A.1, The Code 1979, and is subject to inspection by the public. Fortney to Kirkenslager, State Representative, 9/29/80) #80-9/17(L)

September 29, 1980

The Honorable Larry Kirkenslager
State Representative
615 South Garfield
Burlington, Iowa 52601

Dear Representative Kirkenslager:

You have requested an opinion of the Attorney General regarding the public's right to examine a police department operations manual.[1] It is our opinion that such a document is a "public record" within the meaning of § 68A.1, The Code 1979, and is subject to inspection by the public.

Our analysis of your inquiry follows the framework set forth by the Iowa Supreme Court in Howard v. Des Moines Register and Tribune Co., 283 N.W.2d 289 (Iowa 1979). As stated by the Court:

> The intent of chapter 68A, and thus the manner of its construction, are manifest in organizational concepts underlying the statutory format.

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1. It is our understanding that a police operations manual contains such information as chain of command, departmental rules and regulations, policies regarding the issuance of citations, procedures to be followed by officers while conducting their duties, investigative procedures, and the like.

> The first of the chapter's four identifiable thrusts establishes the statutory definition of 'public records', and is meant to be the *sine qua non* of the process of decision leading to access to public records. Following this definition of public records, the statute delineates a broad grant of inspection rights applicable to all public documents subject only to express limitations found elsewhere in the Code. The third step in the statutory scheme establishes a list of express and specific limitations on the right of access. The final organizational construct permits concealment of public records under circumstances where public access would cause substantial and irreparable harm to any individual and no public interest would be served. By this format, the statute would appear to establish a liberal policy of access from which departures are to be made only under discrete circumstances.

283 N.W.2d 289, 299.

The analysis set forth in Howard is applicable to documents in the control of a police department. 1976 Op.Att'yGen. 559. We begin the analysis with the definition of "public record" as found in § 68A.1:

> all records and documents of or belonging to this state or any county, city, 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.

It would seem to be clear that an operations manual of a municipal police department is included within "records and documents of or belonging to . . . [a] city . . . or [a] department . . . of [said city]." As such, a police operations manual is a "public record" within the meaning of § 68A.1.

Section 68A.2 confers on any Iowa citizen the right to inspect any public record. The section provides:

> Every citizen of Iowa shall have the right to examine all public records and to copy such records, and the news media may publish such records, unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential. The right to copy records shall include the right to make photographs or photographic copies while the records are in the possession of the lawful custodian of the records.

(Emphasis supplied.)

Therefore, unless it is possible to identify a statutory exception to § 68A.2, any Iowa citizen would have the right to inspect a police operations manual and the news media would have the right to publish such manual.

The exceptions to the right of inspection are set forth in § 68A.7. There are only 13 in number.[2] Only two of

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2. These exceptions include personal information in a student's school records, a patient's hospital and medical records, trade secrets, attorney work product, peace officers' investigative reports, certain reports filed with governmental agencies, certain appraisal information, certain information of the Iowa Development Commission, criminal identification files, military personnel records, governmental personnel records and certain financial statements filed with the Iowa Commerce Commission. House File 2240, 68th G.A., 1980 Session, added an exemption for library records.

these exceptions are arguably applicable to a police operations manual. Section 68A.7(5) provides an exception for "police officers investigative reports, except where disclosure is authorized elsewhere in this Code." Section 68A.7(9) excludes "criminal identification files of law enforcement agencies. However, records of current and prior arrests shall be public records." There is no indication that an operations manual contains information of a nature such that it falls within either exception. An operations manual would not contain information obtained as a result of an investigation; rather it could obtain directions on how an officer should conduct an investigation. Likewise, the manual would not contain information relative to particular criminals. It might, however, contain policies on the gathering or maintenance of such information. Given the observation of the Iowa Supreme Court that chapter 68A "would appear to establish a liberal policy of access from which departures are to be made only under discrete circumstances," Howard, 283 N.W.2d 289, 299, we feel compelled to limit the exceptions found in § 68A.7 to the scope drawn by the legislature. Consequently, it is our opinion that a police operations manual does not come within the exceptions set forth in § 68A.7. The inquiry must then focus on whether some other statutory provisions exempts such a document from public inspection.

Section 17A.2(7) defines the concept of "rule" for purposes of the Iowa Administrative Procedures Act. An exception from this definition is provided for internal operation manuals which set enforcement criteria or operational tactics. See § 17A.2(7)(f). Agency policies falling within the exception found in § 17A.2(7)(f) are not subject to public inspection unless some other statutory or constitutional provision so requires or if inspection occurs under the Iowa procedural rules, civil or criminal. See § 17A.3(1)(c).[3] As concerns the operations

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3. It may appear that §§ 17A.2(7)(f) and 17A.3(1)(c) are in conflict with the provisions of chapter 68A. Chapter 17A would seem to prevent inspection of a police operations manual unless another statute permits inspection. Chapter 68A would seem to allow inspection unless otherwise prohibited. The two statutes appear to create a never-ending *renvoi*.

manual of a municipal police force, the provisions of chapter 17A are totally ineffective in preventing inspection. These provisions are applicable only to "agencies" as defined by § 17A.2(1) and this definition expressly excludes political subdivisions of the state from the purview of the chapter. Thus, while these provisions may arguably be relevant to an operations manual maintained by the Department of Public Safety, they are not relevant to a manual maintained by local law enforcement personnel.

Section 692.18, The Code 1979, exempts "criminal history data" and "intelligence data" from the provisions of chapter 68A. However, as these terms are defined by § 692.1(3) and (11), they would not include a police operations manual. See also 1976 Op.Att'yGen. 103.

Should the custodian of a police operations manual believe that the release of the manual would be contrary to the public interest, he or she has the option of seeking an injunction restraining examination of the document. Section 68A.8 permits the issuance of an injunction if a district court finds that "examination would clearly not be in the public interest and would substantially and irreparably injure any person or persons." § 68A.8. Unless such an injunction is obtained, an operations manual maintained by a local police force is a "public record" which is open to inspection.

Yours truly,

David Fortney

David Fortney
First Assistant Attorney General

DF/jam

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3. (cont). However, this is resolved by viewing chapter 68A as permitting disclosure of such a record unless an injunction is obtained. Sections 17A.2(7)(f) and 17A.3(1)(c) provide a policy argument which can be utilized by an agency seeking to meet the standards established by § 68B.8 for obtaining an injunction. If a document falls within the provisions of §§ 17A.2(7)(f) and 17A.3(1)(c), it will generally be found to meet the criteria for issuance of an injunction under § 68A.8. See Bonfield, The Iowa Administrative Procedure Act, 60 Iowa L. Rev. 731, 790-791 (1975).

CRIMINAL LAW, SELLING BEER OR ALCOHOLIC LIQUOR TO MINOR: Sections 123.47, 123.49(2)(h), 123.50, 123.90, The Code 1979. Violation of § 123.47 prohibiting the sale of beer or alcoholic liquor to minor is a serious misdemeanor provided defendant is over the legal age. (Cleland to George, Magistrate, 9/29/80) #80-9-16 (CL)

September 29, 1980

Mr. Emmit J. George, Jr.
Judicial Magistrate
326 S. Clinton Street
P.O. Box 1937
Iowa City, Iowa 52244

Dear Mr. George:

You have requested an Attorney General's Opinion regarding the following question:

> Is selling beer to a minor in violation of § 123.47, The Code 1979, a simple misdemeanor or serious misdemeanor?

The answer to your question is that it is a serious misdemeanor for someone over the legal age to sell beer to a minor.

Section 123.47, The Code 1979, provides as follows:

> No person shall sell, give, or otherwise supply alcoholic liquor or beer to any person knowing or having reasonable cause to believe him to be under legal age, and no person or persons under legal age shall individually or jointly have alcoholic liquor or beer in his or their possession or control; except in the case of liquor or beer given or dispensed to a person under legal age within a private home and with the knowledge and consent of the

> parent or guardian for beverage or medicinal purposes or as administered to him by either a physician or dentist for medicinal purposes and except to the extent that a person under legal age may handle alcoholic beverages and beer during the regular course of his or her employment by a liquor control licensee or beer permittee under this chapter.

Section 123.90, The Code 1979, provides as follows:

> Unless other penalties are herein provided, any person, except a person under legal age, who violates any of the provisions of this chapter, or who makes a false statement concerning any material fact in submitting an application for a permit or license, shall be guilty of a serious misdemeanor. Any person under legal age who violates any of the provisions of this chapter shall upon conviction be guilty of a simple misdemeanor.

(Emphasis added).

Section 123.47 does not provide for a penalty; therefore, it is our opinion that pursuant to § 123.90, if the defendant is over the legal age, a violation of § 123.47 is a serious misdemeanor.

You note that a violation of § 123.49(2)(h), The Code 1979, prohibiting a person or club holding a liquor control license or retail beer permit from selling beer or alcoholic beverages to a minor, is a simple misdemeanor. See § 123.50, The Code 1979. In our opinion, it is not unreasonable to classify a violation of § 123.47 as a serious misdemeanor and a violation of § 123.49 as a simple misdemeanor. The criminal penalty provided in § 123.90 is the only control the state has over a person not holding a liquor control license, whereas a person holding a liquor control license is subject, in addition to the penalty provided under § 123.50(1), to the penalties provided in § 123.50(3). Therefore, a person who does not have a liquor control license is punished more

severely than a person with a liquor control license because, in the former case, the criminal penalty is the only deterrent to the prohibited conduct.

Sincerely,

Richard L. Cleland

RICHARD L. CLELAND
Assistant Attorney General

RLC:rcp

SHERIFF: A sheriff may not be paid a fixed fee per meal for feeding prisoners. Sections 338.1, 338.2, The Code 1979. A sheriff may not be compensated based upon a flat fee per meal for providing provisions for prisoners. A sheriff may only be reimbursed for actual expenses incurred which are documented to the satisfication of the board of supervisors for these expenses. (Williams to Johnson, Auditor of State, 9/26/80) #80-9-15(L)

September 26, 1980

Richard D. Johnson
Auditor of State
State Capitol
L O C A L

Dear Sir:

You have requested a formal opinion of the Attorney General relating to the following question:

> May a sheriff be paid a flat per-meal fee for the provision of food to prisoners of the county jail without documenting to the board of supervisors the actual cost of such meals?

The following sections of the 1979 Code are pertinent:

> Section 338.1 PRISONERS - DUTY OF SHERIFF. The duty of the sheriff to board and care for prisoners in his custody in the county jail shall be performed by the sheriff without compensation, reimbursement or allowance therefor except his salary as fixed by law. However, the board may reimburse the sheriff for the actual cost of board furnished prisoners directly by the sheriff, upon presentation of sufficient documentation showing the actual cost and may compensate the spouse or a relative of the sheriff for services rendered in aiding the sheriff in carrying out the provisions of this section.

(Emphasis added).

> Section 338.2 PURCHASE OF SUPPLIES. The board of supervisors may, in such manner and under such regulations as it may deem fit, furnish to the sheriff at the county jail and at the expense of the county all supplies, wholesome provisions, and utensils, including gas, fuel, electricity and water, or may contract for the goods and services, which in its judgment are necessary to enable the sheriff to discharge his duty.

The question which you have asked is very similar to one which was answered by the Attorney General several years ago (Nolan to Long, Wright County Attorney, 10-2-73), where the question asked dealt with the payment of a fixed amount of board per prisoner per day. That opinion is still valid despite the minor change in section 338.1 since that time.

Section 338.1, in the portion emphasized above, makes it clear that the board may only reimburse the sheriff for the actual cost of provisions for operation of the jail and that they may do so only upon presentation to the board of documentation showing the actual cost of the supplies. For the board to compensate the sheriff in excess of that amount is tantamount to paying the sheriff a fee for acquiring the supplies. All services of the sheriff in connection with the board and care of prisoners are a part of his duty as sheriff and must be performed without compensation, reimbursement or allowance except for his salary. If a sheriff were to submit claims in excess of the amount actually expended, he would probably be in violation of section 721.2(3) of the Iowa Criminal Code (nonfelonious misconduct in office) and perhaps would be violating section 714.1(3) defining theft by deception.

Sincerely,

Richard A. Williams

RICHARD A. WILLIAMS
Assistant Attorney General

RAW/bje

MOTOR VEHICLES - MOTORIZED BICYCLES: Any vehicle that falls within the legislature's definition is a "motorized bicycle" whether or not the vehicle is equipped with additional features. Section 321.1(3)(b), The Code. (Ferree to Bruner, State Representative, 9/22/80) #80-9-12(L)

September 22, 1980

The Honorable Charles Bruner
State Representative
Forty-First District
Statehouse
Des Moines, IA 50319

Dear Representative Bruner:

I have received your letter of July 5, 1980 in which you inquire about the definition of "motorized bicycle" contained in section 321.1(3)(b), The Code, as amended by 1980 Session, 68 G.A., Ch. 1094 §3(b). The definition now reads:

> "Motorized bicycle" or "motor bicycle" means a motor vehicle having a saddle or a seat for the use of a rider and designed to travel on not more than three wheels in contact with the ground, with an engine having a displacement no greater than fifty cubic centimeters and not capable of operating at a speed in excess of twenty-five miles per hour on level ground unassisted by human power.

Your question is whether by the use of the term bicycle the legislature intended to require the vehicle to have the common attributes of a bicycle, referring specifically to pedals.

Implicit in the question is the assumption that all proper bicycles have pedals. The first inquiry should be whether this is a valid assumption. As you point out, Webster's New Collegiate Dictionary 108 (1977), defines a bicycle as "a vehicle with two wheels tandem, a steering handle, a saddle seat, and pedals by which it is propelled." Were we to accept this as the authoritative definition of a bicycle, the legislature's concept of a bicycle propelled by a motor would be absurd because, by definition, a bicycle is propelled by pedals not by a motor.

The Random House Dictionary of the English Language, The Unabridged Edition 145 (1966) retreats from Webster's strict requirement by stating that a bicycle is "a vehicle with two wheels in tandem, usually propelled by pedals. . .." Completing the development, The American Heritage Dictionary of the English Language 129 (1975) provides that a bicycle "has a seat, handlebars for steering, and two pedals or a small motor by which it is driven." (Emphasis Added) There is, therefore, among lexicographers no generally agreed upon definition of a bicycle as regards pedals.

Delving into the etymology of the word bicycle one discovers that it is composed of the root "bi", being Latin for two, and "cycle", being derived from the Greek word "kyklos" or "kuklos" meaning wheel. Bicycle then is literally "two-wheeled". Its essence is two wheels. It is perhaps appropriate to note here that the first bicycles had no pedals but were propelled by pushing with the feet. The pedals were developed as adjuncts for locomotion as the above quoted dictionaries recognize, and are not integral to the idea of a bicycle. Rand McNally Encyclopedia of Transportation 48 (1976). One cannot, therefore, assume that by the use of the term bicycle the legislature intended to require that the vehicle have pedals, especially where another means of locomotion is provided for in the statute. One must determine what the legislature actually intended by the use of the term.

The legislative intention is the polestar of statutory interpretation. Hartman v. Merged Area VI Community College, 270 N.W.2d 822 (Iowa 1978). The search for that intent begins with an examination of "what the legislature said, rather than what it should or might have said." Iowa R.App.P. 14(f)(13). It is axiomatic that the legislature is not bound by dictionary definitions of words. It may define as it wishes to best achieve its purpose. Cedar Rapids Community School District v. Parr, 227 N.W.2d 486, 495 (Iowa 1975); Young v. O'Keefe, 246 Iowa 1182, 69 N.W.2d 534, 537 (1955); 1A Sutherland Statutory Construction §27.02 (4th ed. 1972).

Statutes relating to motorized bicycles involve the licensing of drivers and the equipping and registration of the vehicles. §§321.109, .189, .275, .288, .386, .430, The Code. "Motorized bicycle" was defined as above quoted to include those vehicles the General Assembly wanted subject to the regulations. The definition is the product of a legislative inventiveness that has created a motorized bicycle and allowed it three wheels. In light of the objective of the law and the seeming irrelevence of pedals to it one can only assume the omission to mention them was intentional. The result is that any vehicle that falls within the legislature's definition is a "motorized bicycle" whether or not the vehicle is equipped with additional features.

You next ask whether the Department of Transportation could establish a more stringent definition of "motorized bicycle." The controlling principle is that an administrative body may promulgate rules within its delegated authority but not in contravention of legislative intent.

To determine whether an agency rule violates that principle one must look to the rule promulgated, to the statute granting the agency's rule-making authority and to the legislative intent in the statute being interpreted by the agency. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 196 (Iowa 1980). Davenport Community School District v. Iowa Civil Rights Commission, 277 N.W.2d 907, 910 (Iowa 1979); Hiserote Homes, Inc. v. Riedemann, 277 N.W.2d 911, 913 (Iowa 1979).

One must first, therefore, note that the Department of Transportation is delegated authority under §307.10, The Code, to "adopt rules. . .as it may deem necessary to transact its business and for the administration and exercise of its powers and duties." This is a broad grant of power and if the proposed rule comports with what was determined above to be the general legislative intent of promoting the licensing of drivers, the registration of vehicles used on the highway and the safety of the traveling public it will probably stand. At this point the analysis must reach an impasse. There is no rule to compare and one cannot define the agency's authority in the abstract.

Sincerely,

David A Ferree

David A. Ferree
Assistant Attorney General

PUBLIC RECORDS: JUVENILE RECORDS: § 232.147(2), The Code 1979. The inspection and publication of official juvenile court records is permitted from the date of filing. (Morgan to Jay, State Representative, 9/15/80) #80-9-11(C)

September 15, 1980

Daniel J. Jay
State Representative
Moulton, Iowa 52572

Dear Mr. Jay:

You request our opinion with respect to the following question:

> Does Section 232.147(2), The Code 1979 allow the inspection and publication of juvenile court records at the time a petition is filed alleging delinquency?

We are of the opinion that both inspection and publication of official juvenile court records (as defined in § 232.2(33), The Code 1979) is permitted from the time of filing with the juvenile court.

This question must be viewed in the general context of the Iowa laws regarding public records found generally at Chapter 68A, The Code 1979. Unless expressly closed by statute, all records and documents belonging to public agencies

are available for examination and publication. Sections 68A.1 and 68A.2, The Code 1979. Until the new juvenile justice bill became effective July 1, 1979, the names and official court papers of juvenile delinquents were available to the public from law enforcement agencies or through the courts. Sections 232.56 and 232.54, The Code 1977. Historically, sensitive information regarding the families and personal backgrounds of juveniles constituted an exception to Ch. 68A in order to protect the children and families who are subject to juvenile court jurisdiction from the adverse impact of labelling delinquent behavior.

The new juvenile justice bill (Chapter 232, The Code 1979) represented a major change in limiting public access to juvenile records in the possession of law enforcement agencies and the juvenile records exception to Ch. 68A was broadened. By adopting a policy of removing juvenile law enforcement records from public view, Iowa joins the majority of states. Op.Att'yGen. #79-9-20.

The new bill denotes official juvenile delinquency records as public documents. Section 232.147, The Code 1979.

> Official juvenile court records in cases alleging delinquency shall be public records, subject to sealing. . . . (Emphasis added)

Section 232.147(2), The Code 1979.

Official juvenile court records include the docket, the complaint and pleadings, the transcript, summons and court orders in delinquency matters. Section 232.2 (33), The Code 1979. Since the complaint and pleadings become official records "when filed with a court", we believe they become public information at that time. Section 232.2 (33), The Code 1979. Chapter 68A indicates that public records may be published as well as examined, § 68A.2, The Code 1979, and we see no other limits on either the inspection or publication of the name of a juvenile, provided that it appears in the complaint or other pleadings.

Section 232.17, The Code 1979, provides that a court may close juvenile court hearings to the public at any time during the course of proceedings and that section was recently

amended to make secret a transcript of hearings closed to the public. Section 28, Chapter 56, Acts of the 68th G.A., 1979 Session. Only the transcript and hearing are protected by this amendment and any pleadings and orders remain open for public inspection.

The major change in Iowa's previous practice of releasing names of juvenile delinquents which the new Chapter 232 precipitated was the prohibition on release of names of juveniles by law enforcement agencies. It can be argued that the Iowa policy is rational because of the absence of procedural safeguards available to juveniles at the moment of apprehension by law enforcement agencies. The screening process required for filing complaints, petitions and other official documents with the court, § 232.28 et seq., The Code 1979, assures that persons taken into custody by mistake or those for whom no complaint is filed will never come to public attention. Rather, only those juveniles against whom a complaint or petition is filed with the juvenile court will be subjected to the adverse affects of public labelling in the juvenile court process. See Davis v. Alaska, 415 U.S. 308, 319, 94 S.Ct. 1105, 39 L.Ed.2d 347, 355 (1974), for a discussion of the negative effects of labelling for juveniles.

While juvenile officials at all levels need to be aware of the confidential nature of much of the information with which they work, it is also important that Iowa's statute be construed narrowly because of the basic policy favoring open records in Iowa and because of the First Amendment protection for the news media in publishing names of juveniles lawfully obtained. See generally, Smith v. Daily Mail Publishing Co., 442 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979); Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975).

We enclose two recent opinions of the Attorney General regarding release of information under the new juvenile justice bill for your further information and note that a recent law review article discusses a number of questions regarding release of juvenile information which may be of interest to you. 68 Iowa Law Review, 1471 (July 1980); Freedom of the Press vs. Juvenile Anonymity: A Conflict Between Constitutional Priorities and Rehabilitation.

Sincerely,

Candy Morgan

Candy Morgan
Assistant Attorney General

CM/co
Enclosures

COUNTIES AND COUNTY OFFICERS: Clerk of the District Court. §633.31(2)(k), The Code 1979. The Clerk of District Court must assess conservatorships the costs required by §633.31(2)(k) when he or she performs statutory duties under §633.31, except where actions are brought by or against the administrator, guardian, trustee, or person acting in a representative capacity. (Donahue to Cady, Franklin County Attorney, 9/12/80) #80-9-9(L)

September 12, 1980

Mr. G.A. Cady III
Franklin County Attorney
P.O. Box 456
91st St. S.W.
Hampton, IA 50441

Dear Mr. Cady:

You have requested an opinion of the Attorney General as to whether the Clerk of District Court who has performed his or her statutory duties under §633.31, The Code 1979, should assess costs against conservatorships as provided in §633.31(2)(k), which provides as follows:

"633.31 Calendar-fees in probate.

"2. The clerk shall charge and collect the following fees, in connection with probate matters, all of which shall be paid into the county treasury for the use of the county:

"k. For other services performed in the settlement of the estate of any decedent, minor, insane person, or other persons laboring under legal disability, except where actions are brought by the administrator, guardian, trustee, or person acting in a representative capacity or against him, or as may be otherwise provided herein, where the value of the personal property and real estate of such a person falls within the following indicated amounts, the fee opposite such amount shall be charged.

Up to $3,000.00	5.00
3,000.00 to 5,000.00	10.00
5,000.00 to 7,000.00	15.00
7,000.00 to 10,000.00	20.00
10,000.00 to 15,000.00	25.00
15,000.00 to 25,000.00	30.00
For each additional $25,000.00 or major fraction thereof.	20.00"

(Emphasis Supplied)

The first sentence of §633.31(2)(k) which states: "For other services performed in the settlement of the estate of any decedent, minor, insane person, or other persons laboring under legal disability . . .", clearly would include services provided for a conservatorship.

The Iowa Supreme Court in Iowa National Industrial Loan Co. v. Iowa State Department of Revenue, 224 N.W.2d 437 at 440 stated:

"(3) Where language is clear and plain, there is no room for construction. In re Johnson's Estate, 213 N.W.2d 536,539 (Iowa 1973); McKillip v. Zimmerman, 191 N.W.2d 706,709 (Iowa 1971); In re Brauch's Estate v. Beeck, 181 N.W.2d 132, 134 (Iowa 1970)." (Emphasis Supplied)

Under a clear and plain reading of §633.31(2)(k), the Clerk of District Court who has performed his or her statutory duties under §633.31(2)(k) would be required to charge the conservatorship the fees in the manner set out in the above quoted statute. The clerk would not charge fees under §633.31(2)(k) where actions are brought by or against the administrator, guardian, trustee or person acting in a representative capacity.

In your letter you mentioned that you have been informed that some clerks of court are charging conservatorships fees provided in §633.31(2)(k) and that some are not. For this reason, the question of whether or not clerks of court have discretion to decide whether or not conservatorships will be assessed fees as provided for in §633.31(2)(k) will now be discussed.

Section 633.31(2) states in pertinent part: "The clerk shall charge and collect the following fees, ..." (Emphasis Supplied).

Section 633.31(2)(k) states in pertinent part: ". . ., where the value of the personal property and real estate of such a person falls within the following indicated amounts, the fee opposite such amount shall be charged." (Emphasis Supplied).

The Iowa Supreme Court has generally held that when addressed to a public official the word "shall" is ordinarily mandatory, excluding the idea of permissiveness or discretion. See Schmidt v. Abbott, 261 Iowa 886, 156 N.W.2d 649 (1968); Wisdom v. Board of Sup'rs of Polk County, et al, 19 N.W.2d 602,608 (Iowa 1945).

It is the opinion of this office that the Clerk of District Court must assess conservatorships the costs required by §633.31(2)(k) when he or she performs statutory duties, under §633.31, except where actions are brought by or against the administrator, guardian, trustee, or person acting in a representative capacity.

Very truly yours,

Thomas M. Donahue

Thomas M. Donahue
Assistant Attorney General

MOTOR VEHICLES; CRIMINAL LAW: Lack-of-knowledge defense in a §321.220 prosecution. §321.220, The Code 1979. Knowledge that a driver is not licensed to operate a motor vehicle is not a necessary element of a section 321.220 offense. Persons may be convicted of authorizing an unlicensed driver to operate a motor vehicle owned by them or under their control without having knowledge that the driver is unlicensed. (Huber to Green, O'Brien County Attorney, 9/12/80) 80-9-8(L)

September 12, 1980

Mr. Bruce A. Green
O'Brien County Attorney
Primghar, IA 51245

Dear Mr. Green:

You ask whether a person, to be convicted under section 321.220, The Code 1979, need have knowledge that the person who operated his or her motor vehicle was not authorized by law to operate the vehicle. Though two cases contain dicta that knowledge of the operator's disability is a necessary element of a section 321.220 offense, McCann v. Iowa Mutual Liability Ins., 231 Iowa 509, 515, 1 N.W.2d 682, 686 (1942), Twogood v. American Farmers Ins. Ass'n., 229 Iowa 1133, 1143, 296 N.W. 239, 244 (1941), the criminal responsibility of the automobile owner was not an issue in either case. McCann and Twogood are not, therefore, binding authority on the issue here presented.

Section 321.220 reads:

> Permitting unauthorized person to drive. No person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be driven upon any highway by any person who is not authorized hereunder or in violation of any of the provisions of this chapter.

Violation of the statute is a simple misdemeanor. §321.493, The Code 1979.

The legislature may forbid the doing of an act and make its commission a crime without regard to the intent or knowledge of the doer. State v. Dunn, 202 Iowa 1188, 1189, 211 N.W. 850, 851 (1927); State v. Sonderleiter, 251 Iowa 106, 108, 99 N.W.2d 393, 395 (1959); Iowa City v. Nolan, 239 N.W.2d 102, 104 (Iowa 1976); City of Des Moines v. Lavigne, 257 N.W.2d 485, 488 (Iowa 1977); State v. Dahnke, 244 Iowa 599, 603, 57 N.W.2d 553, 556 (1953); 21 Am.Jur.2d, Criminal Law, §89, p. 169. In the interest of public welfare, acts otherwise innocent may be declared criminal and "he who shall do them do them at his peril and will not be heard to plead in defense good faith or innocence." Dunn, 211 N.W.2d at 851, quoting United States v. Balint, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604.

Whether guilty knowledge is an essential element of a statutory offense is to be determined as a matter of construction from the language of the act, in connection with its manifest purpose and design. State v. Conner, 292 N.W.2d 682, 685 (Iowa 1980), citing Dunn, 211 N.W.at 851.

Applying this rule, the court has frequently found that, absent statutory language making it material, guilty knowledge is not an element of a "public welfare offense." Sonderleiter, 99 N.W.2d at 395. See Dunn, supra; Dahnake, supra; Nolan, supra. This "public welfare doctrine," discussed at length in Nolan, 239 N.W.2d at 103-105, has been applied to violations of motor vehicle laws. See Sonderleiter, supra (knowledge of suspension not an element of statute making it a misdemeanor to drive while license suspended), citing 99 N.W.2d 393,395, what is now 61A C.J.S., Motor Vehicles, §591, p. 265; Dunn, supra (knowledge of defacement not an element of the statutory crime of possessing a motor vehicle, the serial or engine number of which has been defaced, altered or tampered with); Nolan, supra (knowledge that a vehicle is parked illegally not an element of municipal parking regulation violation). But see State v. Drummer, 254 Iowa 324, 117 N.W.2d 505 (1962) (knowledge that car is being driven without the owner's consent an implied element of crime of operating a motor vehicle without the owner's consent).

The language of section 321.220 does not make knowledge that the operator is unlicensed a necessary element of the offense. The statute distinguishes between "authorizes" and "knowingly permits"; a person can authorize a person to operate his or her motor vehicle without knowing that the operator is unlicensed or otherwise unauthorized. An Ohio court, construing a statute almost identical to section 321.220, reasoned:

> Under Section 4507.33 of the Revised Code must the State prove that the defendant "knowingly" permitted operation of his vehicle by an unlicensed operator? In view of the clear way in which the statute is constructed, the answer must be no. The statute states that "no person shall authorize or knowingly permit," the entire section being set out in full above. There can be no obscurity about the meaning of the word "authorize". For the purpose of this statute, it is simply the lending of a motor vehicle to another with permission, voluntarily and purposely, to be driven by the borrower. Since the Legislature has used the disjunctive "or", the prosecution is not required to prove both authorization and knowledgeable permission, proof of authorization only being sufficient. To prove "knowingly permit" ordinarily would seem to place a heavier burden upon the prosecuting authority than to prove simple authorization. However, assuming only for the sake of argument, that the state has to prove knowledgeable permission in prosecutions under this section, I think the Legislature's intent is plain that a defendant should not be allowed successfully to defend by putting on a blindfold, as it were, and making no reasonable attempt to learn whether the borrower has a valid operator's license. . .
>
> Defendant urges that the statute should be read as if it were written "knowingly authorize or knowingly permit". I cannot subscribe to this interpretation. The Legislature has only used the word "knowingly" once and it is before "permit" and not before "authorize". To add the word "knowingly" before "authorize" would amount to judicial legislation.

State v. Miller, 5 Ohio Misc. 122, 34 Ohio Ops.2d 183, 211 N.E.2d 102, 103-104 (Munn. Ct. 1965) (emphasis added). Cf. Gray v. District of Columbia, 165 A.2d 481 (Mun. App. 1960)(knowledge that operator is unlicensed not an element of a statute making it illegal for an owner to "allow or permit" his or her motor

vehicle to be operated by an unlicensed driver). Compare People v. Shapiro, 4 N.Y.2d 597, 176 N.Y.S.2d 632, 152 N.E.2d 65 (1958) (knowledge that operator is unlicensed an element of a statute making it illegal for an owner to "knowingly authorize or permit" his or her motor vehicle to be operated by an unlicensed driver).

The public safety purpose of section 321.220 would be subverted if knowledge of the operator's disability were an implied element of the offense. The means of ascertaining the status of a proposed driver's operating privileges are available. See §§321.174, 321.176, 321.189(3), 321.199, 68A.2, The Code 1979. The statute obviously imposes the duty to make such an inquiry upon those who contemplate lending a motor vehicle. If the statute were construed to require the accused to have knowledge of the driver's disability, only those making inquiry could be found guilty of the offense; those making no attempt to discern the status of the proposed driver would have a complete defense. Such a construction would encourage people to forego inquiry and would thus be counterproductive to public safety.

A motor vehicle is a dangerous instrument in the wrong hands. The person owning or controlling it is in the best position to prevent it from being operated by an unlicensed person and thus assumes the weighty responsibility of denying unlicensed drivers access to that motor vehicle. Persons who authorize others to operate a motor vehicle owned by them or under their control do so at their peril.

Sincerely,

Robert J. Huber

ROBERT J. HUBER
Assistant Attorney General

DEPARTMENT OF PUBLIC SAFETY, PUBLIC EMPLOYEES; Legality of minimum activity work standards for Iowa State Troopers on road duty: §§17A.2 (7)(a), 20.7, 80.4, 80.5, 80.9, 321.2, The Code (1979). The minimum activity work standards for Iowa State Troopers set by the Iowa Department of Public Safety are legal and proper. Such standards are within the authority of a public employer to direct, regulate and discipline public employees and to maintain the efficiency of government operations. The standards as set do not create a hierarchy of offenses and need not result in a lack of assistance of motorists in need of help or in unequal and unfair law enforcement. Such work standards are not rules for purposes of the Iowa Administrative Procedure Act. (Hayward to Gallagher, State Senator and Welsh, State Representative, 9/12/80) #80-9-7 (L)

The Honorable James V. Gallagher
State Senator
4710 Spring Creek
Jesup, Iowa 50648

September 12, 1980

The Honorable Joe Welsh
State Representative
R.R. #2, Box 37
Dubuque, Iowa 52001

Gentlemen:

You have expressed concern over the recently publicized "work standards" or "quotas" promulgated by the Iowa Department of Public Safety, Iowa State Patrol Division, for State Troopers. Senator Gallagher has asked the following questions:

1. Is a minimum work standard as administered by the Department of Public Safety authorized by law, and is it binding on the officers?

2. Can implementation of the system be construed as going beyond the authority of the Department of Public Safety in determining which types of crimes the officers should consider of greater importance?

3. Can such a system adversely affect the priorities of the Patrol to the detriment of the motorist needing the assistance of a patrol officer?

4. Should the Department of Public Safety promulgate rules before implementing such a system?

Representative Welsh has asked the following question:

5. Does the use of the "quota system" in issuing traffic citations allow for a fair and equal application of Iowa's traffic laws?

I. THE STANDARDS SET FOR INDIVIDUAL TROOPER ACTIVITY.

The Iowa State Patrol has issued an Order, #L792-87, setting a minimum work standard for Troopers assigned to road duty. In the twelve month period between January 1 and December 31, 1980, State Troopers are to average six "contact points" per day of road duty. To the nearest tenth of an hour, time spent assigned to the following duties will be deducted from the time to which this standard applies: office, instructional attendance, investigations, State Fair, firearms training and competitive pistol shoots, safety programs, personal security, civil disturbance, grievance hearing, or headquarter assignments.

One contact point is given for citations (scheduled traffic offenses), faulty equipment, memoranda (warnings), warrants served and police demand orders served. Five contact points are given for an OMVUI arrest, accident investigated, livestock certificate, motor vehicle inspection, felony arrest, serious and aggravated misdemeanor arrest, abandoned vehicle removed and pickup of a wanted person, stolen vehicle, missing person or runaway.

The order concludes:

> Due to the Federally mandated 55 mph. speed limit, it is expected a significant number of citations will be written for speed. Also, a minimum of five OMVUI's per calendar year. (sic) Although motorist assists are no longer included as a contact (sic), we will continue to provide this service as in the past and record them on daily reports.
>
> A minimum work standard does not pre-empt the supervisor's authority to establish higher standards from road Troopers in geographical areas where higher activity could normally be expected.

It can be seen that the standard for "contacts" is based primarily upon the amount of time a particular activity can be expected to take, rather than upon the significance the Patrol leadership places upon a certain activity. Otherwise, apparently, speeding citations would result in more credit than another similar violation. However, except for OMVUI arrests,

which result in the investment of a considerable amount of time, all traffic citations result in one contact point, despite the inference that speed laws should receive more intensive enforcement than other classifications of traffic offenses. The same credit is given for the issuance of warnings.

Although the word "quota" may provide a convenient shorthand term for the system of minimum standards created in this order, it is not an altogether accurate one. That word implies a set proportional share or numerical requirement assigned for a specific activity. The only true quota in the order is the requirement that each Trooper on the road make five OMVUI arrests per year. The remaining requirements in the order allow each officer to do his or her job by performing a wide variety of tasks. Also, by setting up a system requiring an average number of daily "contacts" at the end of a year, it allows for the inevitable days when little happens.

II. THE STATUTES APPLICABLE TO THE MINIMUM ROAD TROOPER WORK STANDARDS

The duties of the Department of Public Safety, Iowa State Patrol Division, are set in §80.9, The Code (1979), which states in pertinent part:

> a. To enforce all state laws;
> b. To enforce all laws relating to traffic on the public highways of the state, including those relating to the safe and legal operation of passenger cars, motorcycles, motor trucks and buses; to see that proper safety rules are observed and to give first aid to the injured;
> * * * *

Also, §321.2, The Code (1979), states in pertinent part:

> The division of the highway safety patrol of the department of public safety shall enforce the provisions of this chapter [Motor Vehicles and Law of the Road] relating to traffic on the public highways of the state, including those relating to the safe and legal operation of passenger cars, motorcycles, motor trucks and buses, and to see that proper safety rules are observed.

§80.4, The Code (1979), states, "The patrol shall be under the direction of the commissioner [of public safety]." §80.5, The Code (1979), authorizes the commissioner to appoint "a chief, a first and second assistant and all other supervisory officers of said patrol."

Troopers are parties to the collective bargaining agreement between the State and the State Peace Officers Councils. The general rights of management are codified in §20.7, The Code (1979), and specifically made applicable to this situation. That section states in pertinent part:

> Public employers shall have, in addition to all rights established by constitutional provision, statute, ordinance, charter, or special act, the exclusive power, duty and the right to:
>
> 1. Direct the work of its public employees.
>
> * * * *
>
> 3. Suspend or discharge public employees for proper cause.
>
> 4. Maintain the efficiency of governmental operation.
>
> * * * *
>
> 6. Determine and implement methods, means, assignments, and personnel by which the public employee's operations are to be conducted.
>
> 7. Take such actions as may be necessary to carry out the mission of the public employer.
>
> * * * *

This language is incorporated into Article III of the collective bargaining agreement.

Finally, §17A.2(7)(a), The Code (1979), excludes from the definition of "rule" in the Iowa Administrative Procedures Act:

> A statement concerning the internal management of an agency which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof.

III. AN ANALYSIS OF THE LAW APPLICABLE TO THE WORK STANDARDS

§80.4, The Code (1979), creates the Iowa State Patrol under the direction of the Commissioner of Public Safety. §80.5 allows the Commissioner to appoint a Chief and other supervisory officers to manage and direct the Patrol. §§80.9 (2)(a),(b) and 321.2 set specific duties for the Patrol. These primarily include law enforcement, especially with regard to traffic law, and assisting the injured. Although not specifically mentioned in the Code, it is generally accepted that the Patrol's responsibilities regarding the maintenance of highway safety include the assistance of stranded motorists or other individuals requiring their help. This duty is acknowledged in the order at issue in this opinion.

The Commissioner does not have the resources available to him which would be required to enforce all the laws of this State. His ability to do so is limited implicitly by the various appropriations allotted to his use and explicitly by §80.4, The Code (1979), stating that the Patrol shall consist of no more than 410 persons. It is, therefore, generally recognized that a law enforcement agency, through its command staff, must be able to allocate its resources in the manner they feel best designed to accomplish its goals and perform its functions.

In Walters v. Hampton, 14 Wash. App. 548, 543 P.2d 648 (1975), suit was brought against a city and county by a shooting victim who claimed that the various officials involved should have arrested her assailant (her husband) on prior occasions and that their failure to do so resulted in her injury. The case against the city and county was dismissed. The appeals court affirmed stating in part:

> [T]he amount of protection afforded by any individual police department is necessarily determined by the resources available to it. The determination of how these resources can be most effectively used is a legislative-executive decision. 543 P.2d at 651.

Also, in United States v. Wilson, 342 A.2d 27, 31 (D.C.App. 1975), the court found no discrimination in the impact of the methods used by the police in enforcement of prostitution laws, because they were properly based on "the discretion vested in police to

rationally allocate their resources." See also Davis, 2 Administrative Law Treatise, (2d Ed. 1979); Allen, The Police and Substantive Rule Making: Reconciling Principle and Expediency, 125 U.Pa.L.Rev. 62, 110, 111-112 (1976).

Section 20.7, The Code 1979, codifies and clarifies this authority with respect to employees involved in a collective bargaining unit. Iowa State Troopers are such employees. The authority to direct staff and allocate personnel of course existed before that section's enactment. §20.7 makes it clear that this authority was preserved by the State when it enacted Chapter 20 allowing for collective bargaining with its employees. It exists as a matter of common sense and management necessity.

A. The Department of Public Safety Need Not Promulgate Rules to Set Work Standards.

Because the Patrol's work standards are not rules, as defined in §17A.2(7), The Code (1979), the Department of Public Safety did not need to go through the rule-making procedure of the Iowa Administrative Procedures Act when it made them. Section 17A.2(7)(a), supra, makes statements concerning only internal management and not substantially affecting the legal rights of or procedures available to the public exempt from the rule making procedures of that chapter. These work standards fall within this exception.

The Patrol's work standards are designed to require that the individual Troopers are performing their jobs with a minimal level of activity and to provide a system for monitoring that performance. These standards do not in any manner affect the legal rights or procedures available to the public. They may, in effect, cause a small number of officers, who have not been as active as the Patrol wants or who have been skirting the edge of the Patrol's expectations, to be more active or vigilant in their law enforcement efforts.

This does not, however, change or affect the substantive law of the state. Neither does it change or affect the legal procedures available to the public. No one can argue that the public has a right, either collectively or individually, to violate the laws of this State or to create hazards to the public safety until such time as a peace officer intervenes to terminate such conduct. Internal management procedures of law enforcement agencies designed to assure that their officers will in fact intervene in illegal and dangerous conduct, therefore, do not substantially affect any legal rights of the public.

Theoretically, the Patrol could decide that some rules are necessary to place greater restriction on the discretion of Troopers which would substantially affect the legal rights of the public. Such rules could clearly define when activity violative of the letter of a criminal statute is to be overlooked and when an arrest or citation is required. The Davis Treatise cited above advocates this sort of rule making to some extent. The Allen article, also cited above, rejects the Davis stand in part on constitutional grounds which will be discussed below. The sort of rule advocated by Professor Davis would not be a "rule", as that term is used in the Iowa Administrative Procedures Act, and therefore need not be promulgated in accordance with the terms of Ch. 17A, The Code (1979). This is because §17A.2(7)(f) The Code (1979), excludes such decisions from the definition of "rule" when their disclosure would:

> (1) Enable law violators to avoid detection; or (2) facilitate disregard of requirements imposed by law; or (3) give a clearly improper advantage to persons who are in an adverse position to the state.

However, the order at issue here does not address these sorts of issues. It only requires that Troopers on road duty be actively engaged while on patrol. The precise mix of activities performed remains primarily up to the individual officer. So, for reasons already stated, this order does not substantially affect the legal rights of the public and, therefore, it need not be promulgated as a rule pursuant to the Iowa Administrative Procedures Act.

B. <u>These Work Standards Do Not Go Beyond the Authority of the Department of Public Safety in Determining Which Types of Crime the Officers Should Consider of Greater Importance</u>.

The answer to your question of whether these standards go beyond the Department's authority by determining a hierarchy of offenses is no. As is stated above, the allocation of contact points is based primarily upon the amount of time a particular activity will take. These standards make no specific offense more important than another on any other basis. All traffic citations, whether for speeding, reckless driving or a defective tail light, result in one contact point. Arrests for misdemeanors and felonies alike result in five contact

points. An officer gets the same credit for a warning as for a citation. The present standards of the Patrol are not based upon any sort of consideration by the department as to which laws are or are not to be enforced or in what circumstances charges will or will not be brought.

The extent to which the Patrol can go in defining the activities of its officers is subject to some debate, as has been noted. There should be little doubt that the Commissioner, and the Patrol's command staff, can determine what areas of enforcement need emphasis and which do not. The Davis treatise, cited above, favors the promulgation of rules guiding or restricting the individual officer's discretion in whether or not to file charges in a given situation, when to warn, when to cite, when to arrest, or when to ignore the situation. The Allen article expresses the opinion that this could violate the system of separation of powers which exists in this country.

Police agencies must be circumspect in adopting policies or promulgating rules which would expressly, or in effect, narrow the definition of what constitutes an act or omission which can lead to arrest or the filing of charges. The order at issue makes no such distinctions as to what laws are or are not to be enforced or as to limits of enforcement. Therefore, it does not approach this constitutional question. The order does not create a hierarchy of offenses and does not restrict the scope or effect of any criminal statute. In this sense it is well within the authority of the Department of Public Safety.

C. <u>The Minimum Work Standards As Administered by the Department of Public Safety are Authorized by Law and Are Binding on Its Officers</u>.

As is discussed above, Patrol supervisors as managers of the force have the authority, right and responsibility to direct the work of the Patrol's officers and employees, to suspend or discharge staff for proper cause, to maintain the efficiency of the Patrol's operations, to determine and implement methods, means, assignments and personnel to perform such operations, and to take such steps as are necessary to carry out the Patrol's assigned mission. The determination of how much discretion an officer ought to have or needs to have in a given situation or, stated otherwise, how much direction or policy ought to or needs to be adopted and enforced by super-

visory personnel, is a problematic one. Traditionally the individual officer has had a full range of discretion, at least in theory. In regard to law enforcement agencies, Davis states in his Treatise, "Perhaps no other organization, private or governmental, makes policies primarily at the bottom of the organization instead of at the top." Davis, supra, § 9:16 at 285.

The order involved here is an appropriate means of exercising the authority of Patrol supervisors to direct their staff of officers and to require the efficient use of state time and resources. Also, if a Trooper must be disciplined or discharged for neglect of duty, such work standards make such judgments less susceptible to claims of arbitrary and capricious decision making. These standards are within the authority of the Department of Public Safety and binding upon affected officers.

D. The Work Standards Need Not Affect the Priorities of the Patrol to the Detriment of the Motorist Needing the Assistance of a Patrol Officer.

The effect, if any, of the work standards at issue in this opinion upon Troopers' willingness to assist motorists is a question of fact which is not a proper subject of an Opinion of the Attorney General. What is more, it is a question of fact which is yet to be determined by practice and experience. An accurate answer to this question is not possible at this time from any source. Even when the annual report figures are compiled, a smaller figure of reported motorist assists may just as easily reflect a lessened interest in reporting such activity as an actual decline in such activity.

In any event, it is not necessary for the Chief of the Patrol to set a performance standard for each possible sort of activity a Trooper may be called upon to perform. Order #L792-87 reiterates the Patrol's policy that, regardless of points credited or not credited, Troopers are to assist motorists who need their help. One can only presume that should it occur that these policies result in a decline in highway safety from any cause, stranded motorists or otherwise, the Department of Public Safety will adjust its policies and practices to alleviate the problem. However, the specific policies and practices to be employed are within the discretion of that department.

E. The Work Standards Should Not Result in Unfair or Unequal Enforcement of Iowa's Traffic Laws.

There is no reason to believe that Patrol Order #L792-87 need result in unfair or unequal law enforcement. The crux of this question is whether the standards are reasonable, and they appear to be so. Unless the standards are clearly unreasonable, the Attorney General must defer to the department because he does not have access to the data on which the standards are based. However, because of the discretion and leeway built into this order, it does not appear that the standard creates unreasonable expectations of performance on the part of Troopers. So, it should not follow that Troopers will need to engage in illegal, improper or unprofessional methods to meet these criteria.

Also, the standards promote equality in enforcement by encouraging all Troopers to at least reach a minimal level of activity. Equality is not promoted when a law breaker evades the law because the officer on duty at that time and place prefers a course of nonintervention and another law breaker in another place or at a different time, engaged in similar misconduct, suffers the full consequences of the law. To the extent these standards promote a modicum of uniformity in enforcement, they promote equality and fairness. The other means of creating a modicum of uniformity, the setting of maximum activity standards, would tend to bring officer activity down toward a lowest common denominator. This would clearly not be in the interest of public safety.

As with the question of the standards' affect upon motorists in need of assistance on the road, the question of their effect on equitable and fair law enforcement on the State's roads will have to be watched by supervisors in the patrol. Should the ultimate effect be that the standards are unreasonable and result in improper law enforcement practices, the Department of Public Safety will have to review them and adapt them to practical reality. It is, however, completely within the authority of that department to set such standards.

III. CONCLUSION

Reasonable minimum activity standards for peace officers which allow them to professionally perform their job are not illegal or improper. The Department of Public Safety is empowered to set such standards for road Troopers by §20.7, The Code (1979), and they are binding on the officers affected.

The standards which have been set do not create a hierarchy of offenses, so there should be no impression that they classify offenses by a perception of importance. Motorists needing assistance need not be adversely affected by the implementation of the work standards. Whatever effect they have on such motorists can only be determined through practical experience and not through speculation. The same is true as to whether it would result in unfair or unequal law enforcement. However, there is no reason to believe that such adverse consequences will, or ought to, result from these standards. The Department of Public Safety need not promulgate its work standards in accordance with the rule making procedures of Ch. 17A, The Code (1979).

It is the conclusion of this Opinion that the work standards set for the Iowa State Patrol in Order #L792-87, are within the bounds set by law for exercise of managerial discretion by the Commissioner and the command staff of the Patrol. The bounds of discretion involved are created by statute and can be limited or altered by statute. Opinions of the Attorney General do not serve a remedial function. If the General Assembly determines that the exercise of managerial discretion in a certain manner or direction is contrary to the policy or goals desired by the General Assembly, the remedy lies in amending The Code to conform with the will of the General Assembly.

Respectfully yours,

GARY L. HAYWARD
Assistant Attorney General
Public Safety Division

GLH:dkl

COUNTIES: COUNTY EMPLOYEES; REIMBURSEMENT FOR MILEAGE EXPENSE. Sections 317.3, 331.22, 332.3, The Code 1979. A county weed commissioner is not entitled to reimbursement for mileage expense incurred while commuting between residence and the county courthouse. (Stork to Richards, Story County Attorney, 9/12/80) #80-9-6 (L)

September 12, 1980

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

Dear Ms. Richards:

You have requested an opinion of the Attorney General concerning whether a county weed commissioner may receive reimbursement for mileage expense incurred from driving between his or her residence and the county courthouse each working day. You indicate that the Story County Board of Supervisors has taken the position that county employees may receive mileage reimbursement only for travel to and from their place of work during working hours, which does not include mileage to and from their residences. You note that, pursuant to an earlier opinion of the Attorney General, county supervisors do receive mileage reimbursement for travel between residence and courthouse "while engaged in official duties . . .". 1970 Op. Atty. Gen. 404. You inquire whether the same rationale applies to the "necessary travel expenses" payable to county weed commissioners under § 317.3.

Section 331.22, The Code 1979, provides that a county supervisor is entitled to "reimbursement for mileage expense incurred while engaged in the performance of official duties." Under § 332.3, attendance at a regular or adjourned session of a board of supervisors is an official duty for which mileage compensation may be claimed. 1970 Op. Atty. Gen. 404; 1968 Op. Atty. Gen. 446. Thus, while traveling between residence and courthouse to attend an official meeting of the board, a supervisor is engaged in an official duty required by statute and may receive reimbursement for mileage expense incurred thereby.

Section 317.3, The Code 1979, provides in part that, in addition to compensation, a county weed commissioner and deputies, if any, "shall be paid their necessary travel expenses from the county general fund or the weed eradication and equipment fund."

Prior opinions of this office have interpreted the word "necessary" to mean "actual." 1934 Op. Atty. Gen. 53; 1934 Op. Atty. Gen. 305. This interpretation means that a travel expense must in fact be incurred by the individual claiming it. 1928 Op. Atty. Gen. 306. Also, by implication, the expense must be incurred while traveling on public business or in connection with the discharge of official duties. See 63 Am.Jur.2d, Public Officers and Employees, § 389 (1972).

Chapter 317 contains several sections which define the official duties of a county weed commissioner, and/or deputy. Section 317.4 provides that each county weed commissioner and deputy shall, subject to directions and control by the county board of supervisors, have supervision over the control and the destruction of all noxious weeds in the commissioner's county. The section further states that in the performance of such duties a commissioner or deputy may enter upon any land in the county at any time and may hire necessary labor and equipment. Section 317.5 states that the commissioner shall spray weeds growing in abandoned cemeteries as often as needed to keep such weeds under control. Section 317.7 requires the commissioner to make a written report to the board of supervisors each year concerning both the performance of his duties and recommendations for future control of noxious weeds.

Mileage expense is allowable only to the extent permitted by law; authority to collect reimbursement for such expense may not be implied. 67 C.J.S., Officers, § 225 (1978). Accordingly, unless the Legislature has expressly and explicitly included in the expenses to be allowed public officers and employees, the cost of travel from their homes to their places of work, such expenses should not be reimbursed. Id.

Chapter 317 does not provide that a county weed commissioner, or the commissioner's deputy, is engaged in an official duty while traveling between residence and the courthouse. Section 317.3 in no way indicates that such travel constitutes "necessary travel expense" connected with specific duties defined in Chapter 317. A weed commissioner's travel between residence and the county courthouse should therefore be distinguished from such travel by a county supervisor who is attending an official meeting of the board. Section 332.3 clearly contemplates reimbursement for mileage expense in the latter situation.

In conclusion, it is our opinion that neither a county weed commissioner nor the commissioner's deputy is entitled to

receive reimbursement for mileage expense incurred while commuting from the individual's residence to the county courthouse each working day.

Very truly yours,

Frank J. Stork

FRANK J. STORK
Assistant Attorney General

FJS:sh

MUNICIPALITIES: Urban Renewal -- Iowa Const. art. 3, § 38A; §§ 364.1, 364.2(3), 403.2, 403.3, 403.4, 403.5, 403.6 and 403.12, The Code 1979. A city cannot use Community Block Grant funds for the rehabilitation of property in slum and blighted areas without meeting the requirements of Chapter 403. (Blumberg to O'Kane, State Representative, 9/12/80) #80-9-5 (L)

September 12, 1980

The Honorable Jim O'Kane
State Representative
1815 Rebecca Street
Sioux City, IA 51103

Dear Representative Kane:

We have your opinion request of July 7, 1980, regarding urban renewal powers of a city. You specifically asked:

> "Utilizing Community Development Block Grant Funds, can a city perform urban renewal type work, including:
>
> 1. Scattered site rehabilitation (rehabilitation of one or two structures in a specific locale),
>
> 2. City-wide concentrated rehabilitation (one or two blocks in a number of locations scattered throughout the city),
>
> 3. An emergency repair program (limited rehabilitation to remove a hazardous condition).
>
> without the benefit of Chapter 403? Would these activities be available under the Home Rule provisions of Chapter 364?

Home Rule provides, in general, that municipalities have authority, not inconsistent with the laws of the General Assembly, to determine their local affairs. Iowa Const. art 3, § 38A. Thus, a municipality may, except as expressly limited by the Constitution, and if not inconsistent with a state law,

exercise any power and perform any function to protect and preserve the rights, privileges, and property of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents. § 364.1, The Code 1979. An exercise of a municipal power is not inconsistent with a statute unless it is irreconcilable with the state law. §364.2(3), The Code 1979. The type of Home Rule we have in Iowa is limited, self-executing. Green v. City of Cascade, 231 N.W.2d 882 (Iowa 1975); Bechtel v. City of Des Moines, 225 N.W.2d 326 (Iowa 1975); Scheidler, Implementation of Constitutional Home Rule in Iowa, 22 Drake L.Rev. 294, 302.

Section 403.2, The Code 1979, sets forth the urban renewal policy of the State. Subsection two refers to certain slum or blighted areas, or portions thereof that may require acquisition, clearance and disposition as provided in the chapter. Section 403.3(2) provides that the workable program of the city may include the rehabilitation or conservation of slum or blighted areas or portions thereof. Section 403.3(3) provides that the workable program may include the clearance of slum and blighted areas or portions thereof. The powers of the municipality set forth in §§ 403.6 and 403.12 include the authority to execute contracts; to inspect property; purchase, lease, accept by gift, grant or otherwise any property including the holding, clearance and improvement of same; to accept federal funds and comply with federal requirements to the extent they are deemed reasonable and consistent with the purposes of the chapter; conduct surveys and make plans; close, vacate, plan or replan streets; dedicate, sell, convey or lease its interest in property; require public buildings and facilities to be furnished.

Section 403.4 requires that no municipality shall exercise the authority in the chapter until a resolution for the same has been adopted. A public hearing is required by § 403.5. It appears that the use of the Block Grant funds as you have stated above falls squarely within Chapter 403. In a prior opinion, 1978 Op. Att'y. Gen. 801, we were faced with a similar situation for these Block Grant Funds. There, we held that such a program did not fall within Chapter 403A. We indicated that the fact the federal legislation did not tie the Block Grant funds to any urban renewal project did not mean that chapter 403 was not applicable. We now find that such projects, as you have indicated, do fall within Chapter 403.

Many purposes of the Block Grant funds, as we understand it, are clearly within the purposes of urban renewal. Since a municipality cannot exercise any of the authority in Chapter 403 without meeting the requirements of §§ 403.4 and 403.5, a muni-

cipality cannot use the Block Grant funds for the purposes outlined above without falling within that Chapter. In fact, 24 C.F.R. § 570.1 et seq., which contains the regulations for these Block Grant funds, specifically § 570.307(a), specifically requires that the applicant for these funds must provide assurance that it possesses the legal authority to apply for the grant and execute the proposed program. In Iowa, with respect to those things you listed in your question, such authority is found in Chapter 403. The existence of Home Rule does not affect this result since Chapter 403 is quite specific as to what a municipality must do. Any city action in these matters outside of Chapter 403 would be inconsistent with Chapter 403.

Very truly yours,

Larry M. Blumberg

LARRY M. BLUMBERG
Assistant Attorney General

LMB/cmc

COUNTIES: Article III [Sec. 39A] of the Iowa Constitution, Sections 17A.2(1), 17A.19, 170A.2(5), 170A.3, 170A.4, 358A.12, The Code 1979, 5 USC § 551. The Black Hawk County Health Department does not act as an agent of the Iowa Department of Agriculture when the former assumes the enforcement of Chapter 170A, The Code 1979 pursuant to an agreement with the Department. Black Hawk County is not bound by the procedural provisions of Chapter 17A in its enforcement of the Iowa Food Service Sanitation Code through its Health Department. The County's enforcement of Chapter 170A must still be based upon procedural guidelines found in due process and the federal food and drug administration food service sanitation ordinance. In those instances where no procedure is apparent a Court may turn to Chapter 17A and employ the equivalent of one of its provisions in that situation. [Benton to Burk, Assistant Black Hawk County Attorney, 9/3/80) #80-9-2(L)

September 3, 1980

Mr. Peter W. Burk
Assistant County Attorney
Black Hawk County Attorney's Office
309 Courthouse Building
Waterloo, Iowa 50703

Dear Mr. Burk:

This is in response to your letter of May 28, 1980 which requested the opinion of this office concerning the legal relationship of Black Hawk County to the Iowa Department of Agriculture, and the applicability in certain instances of Chapter 17A, The Code 1979 to the County. Before turning directly to your questions, it is necessary to briefly describe the legal and factual background which gives rise to them. The legislature in 1978 enacted the Iowa Food Service Sanitation Code, Chapter 170A, The Code 1979. Under the terms of the Act, the Iowa Secretary of Agriculture is given exclusive authority to regulate, license, and inspect food service establishments within the state, with these establishments defined as, "...any place where food is prepared and intended for individual portion service, and includes the site at which individual portions are provided." Section 170A.2(5), The Code 1979. The Act further adopts the federal food and drug administration food service sanitation ordinance as the criteria by which food service establishments are to be evaluated. Section 170A.3, The Code 1979. Section 170A.4, The Code 1979 provides in part that:

> If a municipal corporation wants its local board of health to license, inspect, and otherwise enforce the Iowa food service sanitation code within its jurisdiction, the municipal corporation may enter into an agreement to do so with the secretary.

Pursuant to this provision Black Hawk County entered an agreement with the Department of Agriculture to enforce Chapter 170A. Your questions to this office were prompted after the county attempted the emergency closing of an establishment for failure to comply with the Act, and the suspension of the establishment's license. A lawsuit was initiated against both the Department and Black Hawk County seeking to enjoin the suspension on the grounds that the County had not acted in compliance with Chapter 17A, The Code 1979, The Iowa Administrative Procedures Act. Your letter indicates that the lawsuit has now been resolved, pursuant to an agreement between the parties.

Based upon this scenario, your letter raises three questions for our consideration:

1. Whether or not, under the provisions of Chapter 170A of the Code, Black Hawk County is an agent of the Iowa Department of Agriculture with respect to the enforcement of the Code (See Chapter 170A.4)?

2. If the County acts as agent for the Department of Agriculture under the provisions of the Iowa Food Service Sanitation Code, is the County bound by the provisions of Chapter 17A?

3. Even if the County is not the agent of the Department of Agriculture, is it still bound by the provisions of Chapter 17A, or may it rely entirely upon the Food Service Sanitation Ordinance for enforcement regulations (See Chapter 170A.2(12)?

Your first inquiry is both complex in the analysis it requires and important in its ramifications. The import of the first question is significant because, if the County is found to be an agent of the Department, the Department could be liable for the County's actions. Under Iowa law, a principal may be liable for the tortious acts of its agent. Graham v. Worthington, 259 Iowa 845, 146 N.W.2d 626, 640 (1966); Turner v. Zip Motors, 245 Iowa 1091, 65 N.W.2d 427, 430 (1954); See also 3 Am.Jr.2d, Agency § 267 at 631. The complexity generated by your first question rises from the differing analyses which have been utilized to determine whether a local governmental entity acts as an agent of the state. The first analysis attempts to determine if the local entity functions as an "arm of the state", in which case it is characterized as the state's agent. By contrast, the second analysis examines the relationship between the local entity and the state to determine if that relationship gives rise to a principal-agent relation under traditional criteria. With these methodologies at hand, we turn to your first question.

Concerning the first analysis, many state courts have found that where the powers of local governments are confined to those expressly conferred upon them, they are in effect "arms of the state" and as such act as agents of the state. City of Pittsburgh v. Commonwealth, 360 A.2d 607, 610 (Pa. 1976); Town of Gila Bend v. Hughes, 477 P.2d 566, 567 (Ariz. App. 1971); McKenzie v. City of Florence, 108 S.E.2d 825, 827 (S.C. 1959); Wommack v. Lesh, 180 Kan. 548, 305 P.2d 854, 857 (1957); City of Hillsboro v. Public Service Commission of Oregon, 97 Or. 320, 192 P. 390, 391 (1920); See also, McQuillin Municipal Corporations (3rd ed.) § 34.03 at 9-10.

Prior to the enactment of the County Home Rule Amendment, Article III [Sec. 39A] of the Iowa Constitution, it was settled law in Iowa that counties were mere instrumentalities of the state. As the Iowa Supreme Court stated in Mandicino v. Kelly, 158 N.W.2d 754, 758 (Iowa 1968):

> Political subdivisions of states, such as counties, are not sovereign entities; they are subordinate governmental instrumentalities created by the state to assist in carrying out state governmental functions.

See also, Larsen v. Pottawattamie County, 173 N.W.2d 579, 581 (Iowa 1970); Woodbury County v. Anderson, 164 N.W.2d 129, 134 (Iowa 1969); and Graham v. Worthington, 259 Iowa 845, 146 N.W.2d 626, 632-633, which noted in dicta that ordinarily political subdivisions of the state are classified as "arms of the state", while holding in part that political subdivisions of the state are not agencies of the state within the Iowa Tort Claims Act, Chapter 25A, The Code 1979.

It seems clear that with the enactment of the County Home Rule Amendment counties are no longer to be regarded as mere "instrumentalities" of the state, but, with certain limitations, are free to exercise their own powers independent of any state authorization. For a detailed analysis of the County Home Rule Amendment and its effects, see Op.Atty.Gen. #79-4-7. Even in Mandicino at 760, a case which pre-dates the Amendment, the Court found after examining the statutes delegating power to county government that:

> "...the legislature itself does not regard the county as solelythe administrative arm of state government."

As a consequence, we find that analysis which concludes that local governments are agents of the state because they are mere arms of the state to be inapposite to your question. Black Hawk County can no longer be regarded as merely an arm of the State of Iowa. We therefore turn to examine

whether the County is an agent of the Department under the criteria utilized to determine whether a principal-agent relationship has been created.

As noted earlier, even if a local government is not considered an "arm of the state", an agency relationship may nonetheless exist between the state and the local entity. Courts in various jurisdictions have considered whether or not a local government has acted as an agent of the state in the context of determining whether liability may be imposed upon the state for the acts of the local government. The federal courts have also considered whether states who receive grants from the federal government for certain projects are as a consequence rendered agents of the federal government. Those courts which have considered this question have uniformly held that such cooperative efforts, even when accompanied by Federal guidelines, do not make the states agents of the Federal government. D.R. Smalley & Sons, Inc. v. United States, 372 F.2d 505, 507 (Ct. Cl. 1967). Eden Memorial Park Association v. United States, 300 F.2d 432, 439 (9th cir. 1962); See also Hejl v. United States, 449 F.2d 124, 126 (5th Cir. 1971).

In Pantess v. Saratoga Springs Authority, 225 App. Div. 426, 8 N.Y.S.2d 103 (1938), the New York Court of Appeals considered whether the State of New York could be held liable for an alleged tort committed by the defendant Authority, a corporate body created by the State to administer medical treatments with the Saratoga Springs waters. The Court in Pantess held that the state was not liable for the torts committed by the Authority. Pantess at p. 106. The New York Court based its conclusion upon a distinction between those situations in which the State has delegated a function to local government, in which case no liability could be imposed, and those situations where the State acts directly although through an intermediate entity, in which case liability may be imposed. The Court in Pantess utilized this language:

> Where the State assumes to act directly in the carrying out of its governmental function, even though it create and use a corporation for that purpose, it assumes responsibility for the conduct of its agent. Thus the State may choose to create and maintain a state system of parks, and thereby subject itself to liability for the negligence of its officers and employees, (citations omitted); or with like liability, it may provide for the imprisonment of young delinquents, and commit their custody to an authorized institution for that purpose (citations omitted). But when the State delegates the governmental power for the perfor-

> mance of a state function, the agency exercises its independent authority as delegated, as does a city, and its responsibility for its acts must be determined by the general law which has to do with that class of agent and corporate activity, apart from liability on the part of the state. That is the case when the State delegates its state function of education to a school board, its public health function to a local board of health, when it delegates broader governmental functions to a county, city or village. In such instances, there is no authority for making claim against the State, but the agency exercising the delegated authority must respond for its own actionable conduct. Pantess at p. 105.

However, as noted in Kenai Peninsula Borough v. State, 532 P.2d 1019, 1022 (Alaska 1975), the distinction between a function delegated to a local government and the exercise of a function by a political subdivision as a part of the state is often elusive and difficult to delineate. In Kenai, the Court considered whether the State of Alaska could be liable for an accident between the plaintiff and an employee of a local school district. Under statute, the state had contracted with the district to furnish amounts for the expenses of transporting students by bus, with the district administering the program in accordance with state guidelines. Rather than draw a distinction between a local government's actions pursuant to a delegated power and actions undertaken as a part of the state, the Court in Kenai employed a more traditional test to determine if an agency relationship existed. The Court described the criteria in this manner:

> The distinction would appear to be one of degree of control. If a political subdivision acts with a substantial degree of independence under authority delegated by the state, liability may not be imposed on the state as a result of such activity. If, on the other hand, an executive department specifically makes a political subdivision its agent to act on its behalf and subject to its control, it may be subjected to liability based on acts of the political subdivision. Kenai at 1022.

Implicit in this analysis, is the necessity of employing traditional criteria to determine whether the state has made the political subdivision its agent. In fact, in holding that the school district was not acting as an agent

of the state, Kenai at 1027, the court noted:

> Where political subdivisions are involved, however, we shall apply a much stricter test than when other forms of entities are utilized as to the type of control required to create liability on the part of the state.

With these criteria in mind, we can now attempt to determine if the Department has made Black Hawk County its agent in the enforcement of Chapter 170A, The Code 1979.

In Pillsbury Co. v. Ward, 250 N.W.2d 35, 38 (Iowa 1977), the Iowa Supreme Court defined agency as:

> ...a fiduciary relationship which results from (1) manifestation of consent by one person, the principal, that another, the agent, shall act on the former's behalf and subject to the former's control and (2) consent by the latter to so act.

See Walnut Hills Farms v. Farmers Co-op, etc., 244 N.W.2d 778, 780-781 (Iowa 1976). The broadest and traditional test as to whether the agency relationship has been created turns on the right to exercise control of the actions and conduct of another. Houlahan v. Brockmeier, 258 Iowa 1197, 1202, 141 N.W.2d 545, supplemented 258 Iowa 1197, 141 N.W.2d 924 (1966); Brown v. Schmitz, 237 Iowa 418, 22 N.W.2d 340, 345 (1946); 2A C.J.S., Agency § 6 at 560-561. This test has been refined and broken down into three characteristics in other jurisdictions. For example, in Westinghouse Elec. Corp. v. Rio Algome Ltd., 448 F.Supp. 1284, 1301-1303 (N.D. Ill. 1978), the District Court stated:

> The first characteristic indicative of an agency relationship is that an agent has the power to effect the legal relations of the principal and others... The second characteristic is that an agent is a fiduciary who works on behalf of his principal and primarily for his benefit... the third characteristic of an agency relationship, ...is the fact [that] a principal has the right to control the conduct of the agent.

In contrast to the agency relationship, where the principal has the right to control the details of the work performed by the agent, the independent contractor is free to determine for himself the manner in which the specified result shall be

accomplished. Daggett v. Nebraska-Eastern Exp. Inc., 252 Iowa 341, 348, 107 N.W.2d 102 (1961). A Texas Court stated the distinction as follows:

> The Texas cases stress the right of control. Where one has the right to control the end sought to be accomplished but not the means and details of the accomplishment; that is, only what shall be done, not how it shall be done, the person employed acts as an independent contractor and not as an agent. First Nat. Bank of Fort Worth v. Bullock, 584 S.W.2d 548, 551 (Texas 1979).

The question of whether Chapter 170A, The Code 1979 creates an agency relationship between the Department and Black Hawk County would seem to turn on the degree of control which the Department exercises over the County.

To determine the degree of control present in this relationship we can examine both Chapter 170A, The Code 1979 and the Memorandum of Understanding between the Department and the County. Section 170A.4, The Code 1979 provides that if the secretary enters an agreement with a municipal corporation under which the latter is to enforce Chapter 170A, the secretary shall cause the inspection practices of the municipal corporation to be spot checked on a regular basis. In addition, this section requires each local board of health responsible for enforcing the statute to make an annual report to the secretary furnishing information such as the number of licenses granted during the year. The secretary is further required to monitor the local board under Section 170A.4 to determine if they are enforcing the statute. If the secretary determines that the local board is enforcing the law, "...such enforcement shall be accepted in lieu of enforcement by the department in that jurisdiction." Section 170A.4. If the secretary determines that the local entity is not enforcing the law, he may rescind the agreement. Section 170A.4. Section 170A.5 provides that license fees collected by the municipal corporation shall be retained by it. Chapter 170A does not displace the discretion of the local board to determine whether an establishment is in violation of the food service sanitation ordinance or to initiate action against an establishment if it finds such a violation.

The Memorandum of Understanding between the Department and the County Health Department in large part reflects the statutory obligations of each party. In addition to those obligations, the local board is required by the agreement

to inspect food service establishments at least once every six months. The County Health Department is also required to notify the Department, within a reasonable time, of any administrative actions taken by the board, "...resulting in, or intended to result in, the deferral, suspension or revocation of said license...". Under the basic agreement, the county retains the discretion to determine whether an establishment has violated the statute, and if a violation has occurred, whether to initiate action against the licensee. The agreement also provides the County Board's agents or employees are not to be agents or employees of the Department, and the Department's agents or employees are not to be considered agents of the County.

Applying the strict test of control articulated in the Kenai case, we would conclude that the Department has not made the Black Hawk County Health Department its agent in the enforcement of Chapter 170A. Granted that the Department retains a degree of supervisory control over the local board, it is clear that the County Health Department assumes an independent discretion in the licensing and enforcement functions required by the statute. As the federal authority discussed above observed, the mere existence of guidelines and even financial assistance are insufficient to create an agency relationship. Under Section 170A.4, the Department may rescind the agreement if it determines that the board is inadequately enforcing the provision. If the Secretary determines that such enforcement is adequate, it must be accepted in lieu of enforcement by the Department. Analogizing to the law of agency, the Department thus retains control over the end to be achieved, the enforcement of Chapter 170A. However the details of the accomplishment, the actual licensing, inspection, and if necessary revocation, are to be performed by the County Health Department. In that sense, the County's function appears to be most analogous to that of an independent contractor rather than an agent. See Daggett at 348. Therefore, in answer to your first question, we conclude that the Black Hawk County Health Department does not serve as the agent of the Department of Agriculture in the enforcement of Chapter 170A.

Given our response to your first question, we may turn directly to your third, which asks:

> Even if the County is not the agent of the Department of Agriculture, is it still bound by the provisions of Chapter 17A, or may it rely entirely upon the Food Service Sanitation Ordinance for enforcement regulations (See Chapter 170A.2(12)?

As the preceding discussion has demonstrated, the County Health Department acts in lieu of the Department in the enforcement of Chapter 170A. It would be helpful under these circumstances, to re-phrase your question as, whether the provisions of Chapter 17A should apply to a political subdivision which assumes, pursuant to an agreement, the function of a state agency in the enforcement of a state law? This is, as far as we can determine, a question of first impression in Iowa.

The applicability of Chapter 17A to governmental units turns on whether or not those units fall within the definition of "agency" within Section 17A.2(1), The Code 1979. This section provides:

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

Although other jurisdictions have adopted statutory definitions of "agency" which would encompass local political subdivisions, it is clear that in Iowa local entities such as Black Hawk County do not fall within this definition of "agency", and hence are not subject to Chapter 17A. Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process, 60 Iowa L.Rev. 731, 762 (1975).

This analysis is consistent with the decisions of state courts who, in considering the applicability of their administrative procedure statutes to local governments or boards,have focused on the statutory definition of "agency" and have refused to apply the statute where the local entity fell outside the pertinent definition. See, e.g., County of Westchester v. Rent Guidelines Board of Westchester County, 419 NYS 2d (N.Y. 1979); Frawley Ranches, Inc. v. Lasher, 270 N.W.2d 366 (S.D. 1978); Knoeffler Honey Farms v. Just, 270 N.W.2d 354 (N.D. 1978); Van Pelt v. State Bd. for Community Colleges, Etc., 577 P.2d 265 (Colo. 1978); Halldorson v. State School Const. Fund, 224 N.W.2d 814 (N.D. 1974); Town v. Land Use Commission, 524 P.2d 84 (Hawaii 1974); Corbin v. Special School District of Fort Smith, 465 S.W.2d 342 (Ark. 1971); Trask v. Johnson, 452 P.2d 575 (Okl. 1969); Colorado State Board of Optometric Exam. v. Dixon, 440 P.2d 287 (Colo. 1968).

Similarly, at the federal level, there appears to be no authority which would apply the Administrative Procedure Act to a non-agency outside the statutory definition of 5 U.S.C. § 551. Rather, the federal cases focus on attempting to discern whether a given entity falls within the federal definition. See, e.g., Clardy v. Levi, 545 F.2d 1241 (9th Cir. 1976), and Ranier v. Saxbe, 522 F.2d 695 (D.C. Cir. 1975), which reached opposite conclusions as to whether the Bureau of Prisons was an "agency" so that its rule-making procedures would be subject to the APA.

Despite the clarity of the Section 17A.2(1) exclusion, there is authority in Iowa which could support the application of Chapter 17A to entities otherwise not considered "agencies". For example, in Maquoketa Valley, etc. v. Maquoketa Valley Ed., 279 N.W.2d 510 (Iowa 1979) the Iowa Supreme Court decided that arbitration of a collective bargaining impasse, by a panel of arbitrators not a part of the Public Employment Relations Board, is agency action reviewable only pursuant to Section 17A.19, The Code. The Court went on to note that:

> 'Agency action' means, among other things all or part of an agency decision or its equivalent. § 17A.2(9). If the arbitration panel was composed of PERB members, officials, or employees, its decision would be agency action. There is no logical reason why the same decision by a panel of arbitrators should be viewed differently. Maquoketa at 512.

However, in our view, Maquoketa Valley should not be read to imply that the requirements of Chapter 17A would be applicable to Black Hawk County in this context. Maquoketa Valley is distinguishable from the instant case in that here, the governmental unit under consideration is expressly excluded from the definition of agency in Section 17A.2(1), while the arbitration panel involved in Maquoketa Valley was not. Our conclusion that Black Hawk County is not subject to the IAPA is not therefore altered by the Court's language in Maquoketa Valley.

To conclude, as we have, that Chapter 17A does not apply to the County does not mean that this local governmental unit, or others similarly situated, could enforce Chapter 170A without procedural guidelines. In Citizens, Etc. v. Pottawattamie Cty. Bd. of A., 277 N.W.2d 921, 923 (Iowa 1979), the Iowa Supreme Court held that the failure of the county board of adjustment to promulgate rules as required by Section 358A.12, The Code 1979 and a local zoning ordinance invalidated the board's issuance of a permit to construct a sanitary landfill. Although the

Court's holding was not based upon the application of Chapter 17A as the source of the requirement that the local adopt rules, the Court spoke to the necessity of procedural guidelines even for those entities not covered by the IAPA in the following terms:

> The importance of having administrative agencies adopt and publish rules has been emphasized in recent years by the adoption of administrative procedure acts in many states, including Iowa. The Iowa Administrative Procedure Act (Ch. 17A, The Code) does not apply to county zoning boards. However, its provisions concerning rules are significant on the matter before us. It sets up requirements for the adoption of agency rules of practice "setting forth the nature and requirements of all formal and informal procedures available to the public." It provides for publication of the rules adopted. It provides that no rule shall be effective until it has been available for public inspection as required by the rule. It provides means by which interested persons may submit views and arguments concerning proposed rules. See § 17A.3, 17A.4, The Code. In view of the careful safeguards set up in the adoption of the Administrative Procedure Act, we find it difficult to permit other governmental agencies, even though not covered by that statute, to operate with no rules and without established procedural guidelines. Citizens Etc. at p. 924 [Emphasis supplied].

Given the necessity of enforcing Chapter 170A under procedural guidelines,the question remains as to the source of those guidelines if Chapter 17A is inapplicable. The most obvious source would be those procedures required to comport with due process. The Due Process Clause is clearly applicable in the area of licensing. Dixon v. Love, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977); Bell v. Bursue, 402 U.S. 535, 91 S.Ct. 586, 29 L.Ed.2d 90 (1971); Wonder Life Company v. Liddy, 207 N.W.2d 27, 31 (Iowa 1973). An exact determination of what due process requires in a given context must involve an analysis of the private interest affected by the board's action, the risk of erroneous deprivation and the probable value of additional procedural safeguards, and the local board's interest in the procedure employed. Matthews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The actions of Black Hawk County Health

Department in enforcing Chapter 170A must comply with the procedural guidelines of due process.

The federal food and drug administration food service sanitation ordinance, which has been adopted as part of the Iowa food service sanitation code pursuant to Section 170A.3, and which the Health Department has agreed to enforce under its contract with the Department of Agriculture, provides an additional source of procedural guidelines. For example, Section 10-104 requires that before the local board attempts to revoke a license it must provide notice and opportunity for hearing. Section 10-103 provides that the board may suspend a license without notice, although a hearing must be provided to the licensee upon his request. The board is required, under Section 10-106, to make its final findings at its hearings upon a complete hearing record, and any oral testimony given at the hearing must be reported verbatim with the board's presiding officer required to make provision for sufficient copies of the transcript. The procedural guidelines of the food service sanitation ordinance are clearly applicable to Black Hawk County Health Department, both under statute and contract.

This analysis concerning the sources of procedural guidelines to be applied to local governmental units is not to suggest that a Court in some instances might not apply the substantial equivalent of the IAPA to such entities when questions appear as to what guidelines should be followed. Certain questions might arise, for example, concerning the timing and manner of judicial review of a local unit's actions. In those instances, a Court may by analogy, turn to Chapter 17A and apply a procedure equivalent to that which would be required under the IAPA. One example of this process occurred in Justewicz v. Hamtramck Civil Service Com'n., 237 N.W.2d 555, 558 (Mich. 1976), in which the Michigan Court held that the City Civil Service Commission had the burden of producing a transcript necessary for judicial review, a requirement found in the Michigan APA, even though that statute is not directly applicable to local civil service commission proceedings. The Court rationalized its result by noting that although the state APA is ordinarily inapplicable to local proceedings, it could be applied by analogy in certain cases. Justewicz at 558. The court felt it should be applied to local administrative bodies, since the means of providing the transcript was more readily available to the local body. Justewicz at 558. See also F. Cooper, State Administrative Law at 105. Analogizing to the IAPA to impose a guideline which is equivalent to one of its procedural requirements, is not the same as determining that Chapter 17A governs the activities of local governmental units. Rather, the courts may find in-

stances where due process or the food service ordinance do not provide a procedure, in which case a procedure may be applied which is similar to one found in the IAPA.

In summary, Black Hawk County is not bound by the procedural provisions of Chapter 17A in its enforcement of the Iowa Food Service Sanitation Code through its Health Department. This enforcement must still be accompanied however, by procedural guidelines which may be found in the Due Process Clause and the food service sanitation ordinance itself. Moreover, there may be instances where a Court would employ the equivalent of a procedure found in the IAPA if necessary when it is unclear as to which procedures apply.

Sincerely,

Timothy D. Benton

TIMOTHY D. BENTON
Assistant Attorney General
Farm Division

TDB/ny

COOPERATIVES: Corporate, partnership, and trust membership. § 4.1(13) and Chapters 497, 498, and 499, The Code 1979. Corporations, partnerships and trusts are eligible for membership in cooperatives organized under Chapters 497, 498, and 499, The Code 1979. (Willits to Hansen, State Representative 9/2/80) #80-9-1

September 2, 1980

The Honorable Ingwer L. Hansen
State Representative
201 S. 8th Ave. E.
Hartley, Iowa 51346

Dear Representative Hansen:

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

> Is a corporation, partnership, or trust eligible to be a member of an Iowa cooperative under each of the cooperative laws, i.e., Chapters 497, 498 and 499 of the 1979 Code of Iowa?

Chapters 497 and 498, The Code 1979, apply only to cooperatives organized prior to July 4, 1935, and will be treated here separately from Chapter 499, The Code 1979.

Section 497.1, The Code 1979, states:

> Any number of persons, not less than five, may associate themselves as a cooperative association, society, company or exchange, for the purpose of conducting any agricultural, dairy, mercantile, mining, manufacturing or mechanical business on the cooperative plan. For the purposes of this chapter, the words 'association', 'company', 'corporation', 'exchange', 'society', or 'union', shall be construed to mean the same. [Emphasis supplied].

Section 498.2, The Code 1979, provides:

> Any number of persons, not less than five, may associate themselves as a co-operative association, without capital stock, for the purpose of conducting any agricultural, livestock, horticultural, dairy, mercantile, mining, manufacturing, or mechanical business, or the constructing and operating of telephone and high tension electric transmission lines on the co-operative plan and of acting as a co-operative selling agency. Co-operative livestock shipping associations organized under this chapter shall do business with members only. [Emphasis supplied]

Section 498.10, The Code 1979, states:

> Under the terms and conditions prescribed in its bylaws, an association may admit as members persons engaged in the production of the products, or in the use or consumption of the supplies, to be handled by or through the association, including the lessors and landlords of lands used for the production of such products, who receive as rent part of the crop raised on the lease premises. [Emphasis supplied].

In the cited sections, the key word is "persons". This word describes those who may form a cooperative and be its members under Chapters 497 and 498.

Section 4.1(13) defines "Person" as follows:

> Unless otherwise provided by law 'person' means individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity.

There is nothing in Chapters 497 or 498, The Code 1979, to provide any change in this definition as it relates to those chapters. Thus, since the statutory definition of "person" includes a corporation, trust, or partnership, those entities, and any others in the definition, may be members of cooperatives organized under Chapters 497 or 498, The Code 1979. They, of course, must meet the other criteria for membership provided by statute and/or the Articles of Incorporation of a cooperative.

A more difficult question arises under Chapter 499, The Code 1979. Chapter 499, The Code 1979, applies to any cooperative organized after July 4, 1935, or to any cooperative existing before that date which has elected the pro-

visions of Chapter 499, pursuant to Section 499.43, The Code 1979. We would note that most cooperatives are now organized under Chapter 499, The Code 1979.

A 1945 opinion of the Attorney General held that neither ordinary corporations for profit nor partnerships are eligible for membership in cooperatives under what is now Chapter 499 (1946 Op.Att'y.Gen. 20). We believe that opinion is erroneous and specifically overrule it in this opinion.

Pertinent sections of Chapter 499, The Code 1979, include the following:

> 499.2
> A 'co-operative association' is one which, in serving some purpose enumerated in section 499.6, deals with or functions for its members at least to the extent required by section 499.3, and which distributes its net earnings among its members in proportion to their dealings with it, except for limited dividends or other items permitted in this chapter; and in which each voting member has one vote and no more.
>
> * * *
>
> 'Member' refers not only to members of nonstock associations but also to common stockholders of stock associations, unless the context of a particular provision otherwise indicates.
>
> § 499.5. Five or more individuals, or two or more associations, may organize an association. All individual incorporators of agricultural associations must be engaged in producing agricultural products, which term shall include landlords and tenants as specified in section 499.13.
>
> § 499.13. No membership or share of common stock shall ever be issued to, or held by, any party not eligible to membership in the association under its articles. Individuals may be made eligible only if they are engaged in producing products marketed by the association, or if they customarily consume or use the supplies or commodities it handles, or use the services it renders. Farm tenants, and landlords who receive a share of agricultural products as rent, may be made eligible to membership in agricultural associations as producers. Other associations engaged in any directly or indirectly related activity may be made eligible member-

> ship. Federated associations may be formed whose membership is restricted to co-operative associations.
>
> § 499.14. Membership in associations without capital stock may be acquired by eligible parties in the manner provided in the articles, which shall specify the rights of members, the issuing price of memberships, and what, if any, fixed dividends accrue thereon. If the articles so provide, membership shall be of two classes, voting and nonvoting. Voting members shall be agricultural producers, and all other members shall be nonvoting members. Nonvoting members shall have all the rights of membership except the right to vote.

Interestingly, Chapter 499 contains no clear statutory limitation or statement on who may and may not be members, such as Section 498.10, The Code 1979, provides for cooperatives organized under Chapter 498. The definition of "member", set forth above, simply makes clear that "member" includes both members of nonstock associations and common stockholders of stock associations.

Section 499.5, The Code 1979, does limit organizers to individuals or associations, which are defined in §499.2 as cooperatives formed under Ch. 499. The word 'individual' is not a statutorily defined term, so must be given its ordinary and commonly understood meaning. City of Fort Dodge vs. Iowa Public Employment Relations Board, 275 N.W.2d 393 (Iowa 1979). Black's Law Dictionary states that the word "individual" is very commonly used to distinguish a natural person from a partnership, corporation or association, but, in proper cases, it can include artificial persons.

We do not believe the term "individuals" in § 499.5, The Code 1979, includes artificial persons. The Iowa statutory definition of "person", set forth above, includes "...individual, corporation, ...trust, partnership...". The fact that individual is listed separately from corporations, trusts, partnerships and other artificial entities would indicate it does not include those entities. Thus, organizers of cooperatives must be five or more natural persons or two or more cooperatives.

While it is difficult to ascertain, since the reasoning is, at best, incomplete, the 1945 opinion on this subject seems to be in error in that it assumed that if organizers must be natural persons or two other cooperatives, members must be natural persons or other cooperatives, and corporations or partnerships cannot be members. Organizers and members should be distinguished.

We find no restrictions in Chapter 499, The Code 1979, which prohibit corporations, partnerships, or trusts from becoming members of cooperatives, once the cooperative is formed. The statutory membership limitations occur at §§ 499.13 and 499.14, The Code 1979, set out above. Nowhere in those sections are any limitations on corporate, partnership, or trust membership in a cooperative. Such restrictions are in the discretion of each cooperative in its articles.

It should be noted that in 1945, the corporation was not a common method of organizing the farm business. Thus, it is not surprising that the opinion did not focus on this question more clearly. Today the family farm corporation, as defined in Chapter 172C, The Code 1979, is a common method of organizing the farm business, both for estate and business planning and tax reasons.

In conclusion, for the reasons stated, it is our opinion that there is no statutory impediment to corporate, partnership, or trust membership in cooperatives organized under Chapter 499, The Code 1979.

Sincerely,

Earl M. Willits

EARL M. WILLITS
Assistant Attorney General

EMW/ny

COUNTIES: Article III [Sec. 39A] of the Iowa Constitution; Sections 332.3(21), 351.26, 351.37, 351.41, The Code 1979. A county ordinance providing a three day holding period for stray or at large dogs without any type of identification is a valid exercise of the county's Home Rule power which has not been preempted by nor is in conflict with the state statute providing a seven day holding period for dogs without rabies vaccination tags. (Benton to Gentleman, State Senator, 10/31/80) #80-10-16 (CL)

October 31, 1980

The Honorable Julia Gentleman
State Senator
2814 Forest Drive
Des Moines, Iowa 50312

Dear Senator Gentleman:

You have requested an opinion from this office concerning the legality of a Polk County ordinance regulating abandoned or at large dogs. Your letter focuses on the impoundment period for such dogs as provided in the ordinance. Part I of the ordinance requires that no person abandon or cause to be at large any dog in any non-agricultural, unincorporated area of Saylor, Bloomfield, Allen, or Delaware Townships of Polk County. The Polk County Board of Supervisors, under Part II of the ordinance, are required to affect the taking up and impounding of any dog found to be at large within the areas described in Part I, and are further required to give notice of the impoundment in not less than two days to the dog's owner if the owner's name can be determined. Part III of the ordinance, concerning the impoundment period states:

> All dogs found without a license, collar or similar identification shall be kept for not less than three days after being impounded unless sooner redeemed by the owner in accordance with this sub-chapter. Dogs with identification shall be kept not less than seven days after being impounded unless sooner redeemed by the owner. Any owners given notice by the health officer within 48 hours prior to the appropriate expiration date will be allowed 48 hours in which to redeem the dog.

Your letter notes both the seven day impoundment period in Section 351.37, The Code 1979, and the three day period within the ordiance. Implicit in your inquiry as to the legality of the ordinance is the question of whether this discrepancy in impoundment periods creates a conflict between the ordinance and the statute.

Article III, [Sec. 39A] of the Iowa Constitution, the County Home Rule Amendment, provides as follows:

> Counties or joint county-municipal corporation governments 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 general assembly may provide for the creation and dissolution of joint county-municipal corporation governments. The general assembly may provide for the establishment of charters in county or joint county-municipal corporation governments.
>
> If the power or authority of a county conflicts with the power and authority of a municipal corporation, the power and authority exercised by a municipal corporation shall prevail within its jurisdiction.
>
> The proposition or rule of law that a county or joint county-municipal corporation government possesses and can exercise only those powers granted in express words is not a part of the law of this state.

In a comprehensive opinion which dealt in depth with the Amendment and its implications regarding the relationship between state and county governments, our office noted that with the enactment of the Amendment, counties are free to exercise and determine their local affairs and government without the necessity of express state legislation. Op.Att'y. Gen. #79-4-7, 18.

Within the Amendment itself are four limitations upon the powers of counties to regulate their own affairs. First, counties may not levy any tax absent express authorization by the General Assembly. Second, in those instances where the power or authority of a county conflicts with that of a municipal corporation, a municipal corporation's power and author-

ity prevails within its jurisdiction. Third, the Home Rule power exercised by a county pursuant to this Amendment cannot be "inconsistent with the laws of the General Assembly". Fourth, County Home Rule may be exercised only for local or county affairs and not for state affairs. In construing these limitations, we may be guided by the Iowa Supreme Court's construction of the Municipal Home Rule Amendment. Op.Atty. Gen. #79-4-7, 18. It is apparent that, based upon the Court's construction of the Municipal Home Rule Amendment the four limitations should be narrowly construed and the county's powers should be broadly construed and subject to liberal interpretation absent express statutory conflict. Op.Atty. Gen. #79-4-7, 18.

Given the expansive authority granted Iowa counties by the Amendment it is apparent that Polk County has the power to enact the ordinance regulating abandoned or at large dogs unless its terms contravene one of the four limitations. Considering the Polk County Ordinance in light of these constraints, it appears that the only limitation apposite to its terms is that which proscribes counties from exercising powers "inconsistent with the laws of the General Assembly". In Op.Atty.Gen. #79-4-7, 9 our office described this constraint in the following manner:

> This limitation can be termed one of 'preemption'. That is to say that in any given area the state, by broad and comprehensive legislation, has intended to exclusively regulate the subject matter. Where 'preemption' is applicable, any local government regulation regardless of content, is inconsistent with the pervasive state legislation.

The question as to whether a statute has preempted a local measure turns on the legislature's intent. For example, in construing the Municipal Home Rule Amendment, the Iowa Supreme Court has found a municipal ordinance regulating the sale of obscene materials preempted by a state statute covering the same subject matter. In Chelsea Theater Corporation v. City of Burlington, 258 N.W.2d 372, 373 (Iowa 1977), the Court found that the statute plainly expressed a legislative intent to deny local political subdivisions the power to enact any ordinance relating to the availability of obscene material. Similarly, in Bryan v. City of Des Moines, 261 N.W.2d 685, 687 (Iowa 1978) the Court examined the pertinent statutes for express statutory language manifesting an intent

by the legislature to limit municipality's powers in that area. Reading Chelsea Theater and Bryan together, and applying these principles to the County Home Rule Amendment, it appears that after enactment of the Amendment, counties in Iowa appear to be clearly limited only by an express statutory limitation or legislative history which clearly implies an intent to vest exclusive subject matter jurisdiction with the state. See Op.Att'y.Gen. #79-4-7, 11. Therefore, to determine whether state law has preempted the Polk County Ordinance we must examine Ch. 351 to discern whether the legislature has demonstrated an intent that the state occupy the field of dog regulation to the exclusion of county governments.

Chapter 351 of the Code concerns generally the licensing and regulation of dogs. Within this chapter there is no express manifestation of legislative intent to occupy exclusively this area of canine regulation. Section 351.26, The Code 1979, for example states in regard to unlicensed dogs that:

> It shall be lawful for any person, and the duty of all peace officers within their respective jurisdictions unless such jurisdiction shall have otherwise provided for the seizure and impoundment of dogs to kill any dog for which a license is required, when such dog is not wearing a collar with license tag attached as herein provided. [Emphasis supplied].

This section clearly contemplates that local entities be empowered to seize and impound unlicensed dogs. This indirect grant of authority is consistent with Section 332.3(21), The Code 1979, which empowers county boards of supervisors, "to provide, by contract or otherwise, for the seizure, impoundment and disposition of dogs in accordance with chapter 351.". Similarly, Section 351.41, The Code 1979, states:

> Nothing in these sections shall be construed to limit the power of any city to prohibit dogs from running at large, whether or not they have been vaccinated for rabies, or to limit the power of any city to provide additional measures for the restriction of dogs for the control of rabies.

It is apparent that not only has the legislature not expressly occupied this field, it has gone further and granted local governments the authority to regulate unlicensed dogs through seizure and impoundment. Of course, such authorization is no longer required under County Home Rule. Under the Chelsea Theater and Bryan tests, we must conclude that the state has

not preempted the Polk County ordinance.

However, as your letter notes, Section 351.37, The Code 1979, mentions an impoundment period of seven days, while Part III of the local ordinance provides for an impoundment period of three days for certain dogs. This raises a question closely related to that of preemption, for if a local ordinance directly conflicts by its own terms with a state statute, the former is "inconsistent" with state law and cannot stand.

The basic test used to determine whether a local ordinance conflicts with a state statute is whether the ordinance permits or licenses that which the statute forbids,or prohibits that which the statute authorizes. Junction City v. Lee, 216 Kan. 495, 532 P.2d 1292, 1297 (1975). In either circumstance, a conflict would exist, and the local ordinance would be invalid. However, where both an ordinance and the statute are prohibitory and the only difference is that the ordinance goes further in its prohibition but not counter to the prohibition in the statute, and the city does not attempt to authorize by the ordinance that which the legislature has forbidden, orforbid that which the legislature has expressly authorized, there is no conflict between the ordinance and statute. Junction City at 1298. Stated another way, as long as the standards or requirements of the local ordinance do not contradict the express standards or requirements of the statute there is no conflict, and the ordinance may in fact go further than the statute in imposing additional regulation of a given conduct without conflicting with the state law. Voyles v. City of Nampa, 97 Idaho 597, 548 P.2d 1217, 1221 (1976); McQuillen, Municipal Corporations (3rd.Ed.), § 21.35, p. 255.

Section 351.37 provides:

> Any dog found running at large and not wearing a valid rabies vaccination tag and for which no rabies vaccination certificate can be produced shall be apprehended and impounded.
>
> When such dog has been apprehended and impounded, the official shall give written notice in no less than two days to the owner, if known. If the owner does not redeem the dog within seven days of the date of the notice, the dog may be humanely destroyed or otherwise disposed of in accordance with law. An owner may redeem a dog by having it immediately vaccinated and by paying the cost of impoundment.
>
> If the owner of a dog apprehended or

> impounded cannot be located within seven days, the animal may be humanely destroyed or otherwise disposed of in accordance with law.
>
> [Emphasis supplied].

The seven day holding period within this provision applies by its own terms only to dogs without valid rabies vaccination tags. By contrast, the three day holding period within the Polk County ordinance covers dogs, "...without a license, collar or similar identification...". The local ordinance does not permit that which the statute forbids and does not proscribe that which the statute authorizes. Rather, the Polk County ordinance is more stringent than the statute, in effect going further and regulating canines not covered by Section 351.37, that is dogs without any means of identification. As an ordinance which imposes additional regulation, on dogs without identification, the Polk County ordinance does not conflict with Section 351.37. See State v. White, 67 Idaho 309, 177 P.2d 472, 473 (1947); King v. Arlington County, 195 Va. 1084, 81 S.E.2d 587, 591 (1954). Accordingly, absent such a conflict, we would conclude that the Polk County ordinance providing a three day holding period for dogs without any identification is a valid one and not inconsidtent with state law.

In summary, the Polk County ordinance is a valid exercise of the county's powers under the Home Rule Amendment, and Part III of the ordinance is not in conflict with, nor has been preempted by Section 351.37 of the Code.

Sincerely yours,

Timothy D. Benton

TIMOTHY D. BENTON
Assistant Attorney General

TDB/ny

MUNICIPALITIES: General Obligation Bonds - §§ 384.24(3)(f); 384.25, 384.27 and 384.28, The Code 1979. General obligations bonds issued for the refunding of other bonds are within the meaning of "essential corporate purpose." As such, no election is required for their issuance, even if the bonds to be refunded were subject to an election. (Blumberg to O'Kane, State Representative, 10/30/80) #80-10-15(L)

The Honorable Jim O'Kane
State Representative
1815 Rebecca St.
Sioux City, IA 51103

October 30, 1980

Dear Representative O'Kane:

We have your opinion request of September 12, 1980, regarding the issuance of refunding bonds. You specifically ask:

> Can the legal indebtedness of a city, which is in the form of bonds, whether they be general obligation or not, be refunded with general obligation bonds pursuant to Section 384.24(3)(f) and 384.25 and 384.27 of the 1979 Code of Iowa, as amended, without subjecting the new general obligation bond issue to a referendum?
>
> Further, can this be done when the original bond issues, which will now be refunded as provided for in Section 384.24(3)(f), were subject to a referendum under Section 384.24(3)(q).
>
> Further, does the "combination" language of Section 384.28 refer to the "purposes" of the old bonds being refunded or to the "purposes" of the new refunding bonds?

Section 384.24(3)(f), The Code 1979, defines "Essential Corporate purpose" to include

> The settlement, adjustment, renewing, or extension of any part or all of the legal indebtedness of a city, whether evidenced by bonds, warrants, or judgments, or the funding or refunding of the same, whether or not such indebtedness was created for a purpose of which general obligation bonds might have been issued in the original instance.

Section 384.25 provides that a city may issue general obligation bonds for an essential corporate purpose without an election. However, the city must issue a notice of the proposed action and the date and time of the meeting at which the issuance of the bonds is to be considered by the council. Section 384.27 provides:

> 1. A city may sell general obligation bonds at public or private sale in the manner prescribed by chapter 75.
>
> 2. General obligation funding or refunding bonds issued for the purposes specified in section 384.24, subsection 3, paragraph "f," may be exchanged for the evidences of the legal indebtedness being funded or refunded, or such funding or refunding bonds may be sold in the manner prescribed by chapter 75 and the proceeds applied to the payment of such indebtedness. Funding or refunding bonds may bear interest at the same rate as, or at a higher or lower rate or rates of interest than the indebtedness being funded or refunded.

From these sections it is clear that cities may issue general obligation bonds to settle an indebtedness, whether such indebtedness is evidenced by bonds, warrants or judgments, or to refund the same whether or not the indebtedness was created for a purpose for which general obligation bonds may have been originally issued. Such bonds are for an essential corporate purpose. As such, no election is required.

Nothing in § 384.24(3)(f) distinguishes the types of general obligation bonds which can be refunded. Section 384.24 establishes two types of general obligation bonds: general corporate purpose and essential corporate purpose. General obligation bonds for general corporate purposes require an election pursuant to § 384.26. Again, general obligation bonds for essential corporate purposes need no election. We do not believe that the fact the bonds to be refunded were issued after an election has any bearing on the issuance of bonds for refunding purposes.

Your final question makes reference to § 384.28, which provides:

> A city may issue general obligation bonds pursuant to a resolution adopted at a regular or special meeting by a majority of the total

> number of members to which the council is entitled. Each paragraph of section 384.24, subsections 3 and 4 describes a separate category. Separate categories of essential corporate purposes and of general corporate purposes may be incorporated in a single notice of intention to institute proceedings for the issuance of bonds, or separate categories may be incorporated in separate notices, and after an opportunity has been provided for filing objections, or after a favorable election has been held, if required, the council may include in a single resolution and sell as a single issue of bonds, any number or combination of essential corporate purposes or general corporate purposes. If an essential corporate purpose is combined with a general corporate purpose in a single notice of intention to institute proceedings to issue bonds, then the entire issue is subject to the referendum requirement provided in section 384.26.

You ask whether the language of the last sentence refers to the "purposes" of the new bonds issued for refunding the old bonds, or if it refers to the old bonds. In substance, this section provides that a city may issue more than one bond at a time, and that the bonds may be for both essential and general corporate purposes. In other words, a city may wish to issue more than one bond at a time, all of said bonds being for an essential purpose, or all of said bonds being for a general purpose. Also, a city may wish to issue more than one bond at a time, some of which are for essential purposes and some for general purposes. This section authorizes such conduct. However, if an essential purpose bond is issued with a general purpose bond, both must be on the ballot. There is no indication that the Legislature was speaking to anything other than the bonds a city currently wishes to issue.

Accordingly, we are of the opinion that bonds issued pursuant to § 384.24(3)(f) for refunding prior bonds fall within the meaning of "essential corporate purpose." As such, no election is required. This result is the same even if the bonds to be refunded were approved at an election. Finally, § 384.28 refers only to the bonds a city currently wishes to issue.

Very truly yours,

Larry M. Blumberg

LARRY M. BLUMBERG
Assistant Attorney General

LMB/cla

MOTOR VEHICLES--Conviction records--Section 321.491, The Code 1979, and 1980 Session 68th G.A., H.F. 2501 §2. Magistrates and clerks of court are required to forward to the Department of Transportation records of conviction or forfeitures of bonds for either indictable or nonindictable traffic offenses. Conviction and disposition data, referred to in H.F. 2501, §2, must be forwarded to the arresting agency only if the traffic violation is an indictable offense. (Miller to Larsen, State Representative, 10/30/80) #80-10-14(CL)

October 30, 1980

The Honorable Sonja Larsen
Iowa State Representative
1016 North Court St.
Ottumwa, IA 52501

Dear Representative Larsen:

We have received your request for an Attorney General's Opinion regarding the application of Section 321.491, The Code 1979, to the newly inacted 1980 Session, 68th G.A., H.F. 2501, §2.

In your first question, you asked whether the requirements incumbent upon clerks of court and magistrates to report traffic violation convictions are satisfied by the conviction records being forwarded to the arresting agency rather than the Iowa Department of Transportation.

The answer to your question is no. Conviction records of all traffic violations must be forwarded to the Iowa Department of Transportation. Section 321.491, The Code 1979, states in part that:

> "Every district court judge, district associate judge, and judicial magistrate shall keep a full record of every case in which a person is charged with any violation of this chapter or of any other law regulating the operation of vehicles on highways.

> Within ten days after the conviction or forfeiture of bail of a person upon a charge of violating any provision of this chapter or other law regulating the operation of vehicles on highways every said magistrate of the court or clerk of the court of record in which such conviction was had or bail was forfeited shall prepare and immediately forward to the department an abstract of record of said court covering the case in which said person was so convicted or forfeited bail. . .." (emphasis added).

As used in this chapter, Subsection 321.1(33), The Code 1979, defines department as the state department of transportation.

The 1980 Session, 68th G.A., H.F. 2501, §2 (hereinafter H.F. 2501, §2) amends Section 692.2, The Code 1979, by requiring that "the clerk of the district court shall forward conviction and disposition data to the criminal justice agency making the arrest within thirty days of final court disposition of the case."

At first glance, it may appear that this newly enacted amendment would be in conflict with Section 321.491. However, statutory construction dictates "that a statute should be accorded a logical, sensible construction which gives harmonious meaning to related sections and accomplishes the legislative purpose." McSpadden v. Big Ben Coal Co., 288 N.W.2d 181,188 (Iowa 1980). Only when part of the statute is "irreconcilably repugnant" to the whole statute will the court refuse to give effect to that part. Iowa Department of Transportation v. Nebraska-Iowa Supply Co., 272 N.W. 2d 6,11 (Iowa 1979).

With this in mind, H.F. 2501, §2 is not in conflict with Section 321.491. Section 321.491 specifically requires records of all convictions or forefeiture of bonds involving traffic violations be forwarded to the Department. H.F. 2501, §2 does not circumvent nor alter this. Rather, the new requirements imposed by H.F. 2501, §2 are in addition to the forwarding requirements set out in Section 321.491. Clerks of court and magistrates will still be required under Section 321.491 to forward records of all traffic convictions or forfeiture of bonds to the Department, irrespective of the requirements set out in H.F. 2501, §2.

In your second question, you asked whether the provisions of H.F. 2501, §2 would apply to nonindictable offenses committed under either Chapter 321 or local traffic ordinances.

H.F. 2501, §2 only affects conviction and disposition data which are defined in Section 692.1, The Code 1979. "'Conviction data' means information that a person was convicted of or entered a plea of guilty to a public offense and includes the date and location of commission and place and court of conviction." Subsection 692.1(5), The Code 1979. (emphasis added). "'Disposition data' means information pertaining to a recorded court proceeding subsequent and incidental to a public offense arrest and includes dismissal of the charge, suspension or deferral of sentence." Subsection 692.1(6), The Code 1979. (Emphasis added).

For purposes of Chapter 692, conviction and disposition data are applicable only to public offenses. Public offenses as defined in Subsection 692.1(8), The Code 1979, specifically exempts "nonindictable offenses under either chapter 321 or local traffic ordinances" from Subsections 692.1(4), (5) and (6). An indictable offense is any criminal offense where "punishment exceeds a fine of one hundred dollars or exceeds imprisonment for thirty days . . .." Iowa R.Crim.P. 4(2). In other words, H.F. 2501, §2 has no effect on offenses committed under Chapter 321 or local traffic ordinances that do not meet the criteria of an indictable offense as set out in Iowa R.Crim.P. 4(2).

Clearly, nonindictable offenses under Chapter 321 and local traffic ordinances were not intended to come under the requirements established in H.F. 2501, §2.

In your third question, you asked whether it is necessary for clerks of court and magistrates to forward records of conviction to both the Iowa Department of Transportation and to the arresting agency if H.F. 2501, §2 does apply to nonindictable offenses under either Chapter 321 or local traffic ordinances.

Since it has been determined that nonindictable traffic offenses do not apply to H.F. 2501, §2, the answer to your third question is no. Records of conviction or forfeiture of bond for nonindictable offenses under Chapter 321 or local traffic ordinances should be forwarded only to the Iowa Department of Transportation. However, if a traffic violation is an indictable offense as established by Iowa R.Crim.P. 4(2), then the record of conviction would have to be forwarded to both the Iowa Department of Transportation and the arresting agency. Since only nonindictable offenses under Subsection 692.1(8) are excluded

from public offenses, an indictable offense under either Chapter 321 or local traffic ordinances would be considered a public offense. As such, the requirements set out in both Section 321.491 and H.F. 2501, §2 would have to be complied with for indictable offenses committed under Chapter 321 or local traffic ordinances.

Sincerely,

James D. Miller
Assistant Attorney General

pa

RESTAURANT INSPECTION; Restaurant inspection fees. Sections 170A.2 and 170A.5, The Code 1979. Sales of beer and alcoholic beverages are included in annual gross sales for purposes of calculating the license fee under § 170A.5, The Code 1979. (Willits to Byerly, State Representative, 10/30/80) #80-10-13(L)

October 30, 1980

The Honorable Richard L. Byerly
State Representative
7555 Northwest 16th
Ankeny, Iowa 50021

Dear Representative Byerly:

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

> Are sales of alcoholic beverages to be considered in calculating a license fee for a food service establishment under Ch. 170A of the Code?

It is our opinion that the answer to this question is "yes" for the following reasons:

"Food" is defined as follows by Section 170A.2(4), The Code 1979:

> 'Food' means any raw, cooked, or processed edible substance, ice, beverage, or ingredient used or intended for use or for sale in whole or in part for human consumption.

"Food service establishment" is defined in § 170A.2(5) as:

> 'Food service establishment' means any place where food is prepared and intended for individual portion service, and includes the site at which individual portions are provided. The term includes any such place regardless of whether consumption is on or off the premises and

> regardless of whether there is a charge for the food. The term also includes delicatessen-type operations that prepare sandwiches intended for individual portion service and food service operations in schools and summer camps. The term does not include private homes where food is prepared or stored for individual family consumption, retail food stores, the location of food vending machines, and supply vehicles. The term does not include child day care facilities, food service facilities subject to inspection by other agencies of the state and located in nursing homes, health care facilities, or hospitals.

Finally, the license fees are set out in § 170A.5, The Code 1979:

> Either the department or the municipal corporation shall collect the following annual license fees:
>
> 1. For a mobile food unit or pushcart, ten dollars.
>
> 2. For a temporary food service establishment per fixed location, ten dollars.
>
> 3. For a food service establishment with annual gross sales of under fifty thousand dollars other than a mobile food unit, pushcart, or temporary food service establishment, forty dollars.
>
> 4. For a food service establishment with annual gross sales of between fifty thousand and one hundred thousand dollars other than a mobile food unit, pushcart, or temporary food service establishment, seventy dollars.
>
> 5. For a food service establishment with annual gross sales of more than one hundred thousand but less than two hundred fifty thousand dollars other than a mobile food unit, pushcart, or temporary food service establishment,

one hundred twenty-five dollars.

6. For a food service establishment with annual gross sales or two hundred fifty thousand dollars or more, one hundred fifty dollars.

Fees collected by the department shall be deposited in the general fund of the state. Fees collected by a municipal corporation shall be retained by it and for its use.

The term "annual gross sales" as used in § 170A.5, The Code 1979, is not statutorily defined. Words used in a statute are to be given their ordinary and commonly understood meanings, unless a contrary intention is evident. City of Ft. Dodge v. Iowa Public Employment Relations Bd., 275 N.W.2d 393 (Iowa 1979).

The phrase "food service establishment with annual gross sales of...dollars", as in § 170A.5, The Code 1979, must be given its ordinary and commonly understood meaning. It is significant that no distinction is made between food and alcoholic beverages or beer. An ordinary and reasonable interpretation of this phrase would include all gross sales of the food service establishment, including beer and alcoholic beverages.

This view is supported by the statutory definition of food set forth above. This definition is, of course, incorporated into the term "food service establishment". Food includes, inter alia, any "beverage, or ingredient used or intended for use or for sale in whole or in part for human consumption." § 170A.2(4). This is a very broad definition of food and clearly includes alcoholic beverages and beer since they are beverages intended for human consumption. Thus, a "food service establishment" includes an establishment serving alcoholic beverages or beer. Given this definition, it is only logical that the gross sales of beer and alcoholic beverages be included in "gross annual sales" calculations for determining the cost of a license under § 170A.5, The Code 1979.

It should be noted that a beer or liquor license is issued for the privilege of selling beer or liquor in this state. No inspections for sanitation result from this license. The Iowa Beer and Liquor Control Department has no duty or power to inspect for sanitation under Ch. 123, The Code 1979. The duty to inspect food service establishments,

including bars and food service establishment holders of liquor or beer licenses falls to the Department of Agriculture under Ch. 170A.

Sincerely,

Earl M Willits

EARL M. WILLITS
Assistant Attorney General

EMW/ny

ELECTIONS: Absentee voters; primary elections. Sections 39.3, 43.5, 43.41, 43.42, 48.2, 48.3, 48.11, 53.1, 53.2, 53.8, 53.11, 53.13, 53.14, The Code 1979. A written, mailed request for an absentee ballot in a primary election does not itself constitute a written declaration of a change of party affiliation under § 53.51. A qualified elector applying for an absentee ballot in person after the close of registration for a primary election may not cast the ballot for the nominee of a party for which he or she is not registered, except as provided in § 43.42, which permits the elector to change or declare a party affiliation only at the polls on election day. The procedures set forth in §§ 43.41 and 43.42 do not involve a denial of equal protection for absentee voters in primary elections. (Stork to Roberts, Buchanan County Attorney, 10/30/80) #80-10-12

October 30, 1980

Daryl E. Roberts
Buchanan County Attorney
Buchanan County Courthouse
Independence, Iowa 50644

Dear Mr. Roberts:

You have requested an opinion of the Attorney General concerning the procedure required for a voter to change his or her political party affiliation in the event that the voter expects to vote by absentee ballot in a primary election. Specifically, you pose the following questions:

1. Does a mailed-in written request for an absentee primary ballot of a political party for which the requesting party is not registered constitute by itself a "written declaration" of change of affiliation within the meaning of Section 43.41, or must the requesting party execute a separate declaration of change?

2. May a voter applying for an absentee primary ballot in person after the deadline for registration has passed be permitted to cast the ballot of a party for which he/she is not registered? In other words, can the terms "polls" and "election day" in Section 43.42 be construed to include voting by absentee ballot at the office of the commissioner of elections, enabling the voter to execute the affidavit under that section at the time he/she casts his/her absentee ballot?

3. If the answer to question number two is in the negative, is it a denial of equal protection to foreclose to would-be absentee voters in a primary election one of the two means available to other voters to change their party affiliation?

Your questions must be examined in light of the interrelationship of Chapter 43, concerning primary elections, and other Code provisions that govern elections in Iowa. Section 43.5, The Code 1979, provides:

> Applicable statutes. The provisions of chapters 39, 47, 48, 49, 50, 51, 52, 53, 56, 57, 58, 59, 61, 62 and 735 shall apply, so far as applicable, to all primary elections, except as hereinafter provided.

A distinction must first be made between an "eligible elector" and a "qualified elector". An eligible elector is a person who possesses all of the qualifications necessary to entitle him or her to be registered to vote, whether or not that person is in fact registered. § 39.3(1), The Code 1979. A qualified elector is a person who is registered to vote pursuant to Chapter 48, The Code 1979. § 39.3(2). The provisions of Chapter 43 concerning primary elections and of Chapter 53 concerning absentee voting apply only to qualified electors. Hence, an eligible elector must register to vote before he or she is qualified either to vote in a primary election or to utilize the absentee voters law in a primary or general election.

Section 43.41 authorizes a qualified elector to change or declare a party affiliation before a primary election by filing a "written declaration" with the county commissioner:

> Change or declaration of party affiliation before primary. Any qualified elector who desires to change or declare his or her political party affiliation, may, before the close of registration for the primary election, file a written declaration stating the change of party affiliation with the county commissioner of registration who shall enter a notation of such change on the registration records.

Neither § 43.41 nor any other statutory provision precisely defines what constitutes a "written declaration".

Pursuant to § 43.5, the provisions of Chapter 53 govern absentee voting at primary elections to the extent that the provisions are applicable to such elections. Section 53.2 sets forth basic procedural requirements for application for an absentee ballot:

> Application for ballot. Any qualified elector, under the circumstances specified in section 53.1, may on any day, except election day, and not more than seventy days prior to the date of the election, make written application to the commissioner for an absentee ballot.
>
> Nothing in this section shall be construed to require that a written communication mailed to the commissioner's office to request an absentee ballot, or any other document except the absent voter's affidavit required by section 53.13, be notarized as a prerequisite to receiving or making an absentee ballot or returning to the commissioner an absentee ballot which has been voted.
>
> Each application shall contain the name and signature of the qualified elector, the address at which he is qualified to vote, and the name or date of the election for which the absentee ballot is requested, and such other information as may be necessary to determine the correct absentee ballot for the qualified elector. If insufficient information has been provided, the commissioner shall, by the best means available, obtain the additional necessary information.

Other sections in Chapter 53 establish how the change or declaration of party affiliation is made by absentee ballot. Section 53.8(1) states that, when sent to an applicant, an absentee ballot must be enclosed in an unsealed envelope bearing a serial number and an affidavit. [1] Section 53.13 indicates that the

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[1] Section 53.8(1) further describes the procedure for mailing:

> The absentee ballot and unsealed envelope shall be enclosed in a carrier envelope which bears the same serial number as the unsealed envelope. The absentee ballot, unsealed envelope, and carrier envelope shall be enclosed in a third envelope to be sent to the qualified elector.

state commissioner of elections has the statutory duty to prescribe the affidavit form that must be printed on the unsealed envelope. Section 53.14 further provides:

> Party affiliation. Said affidavit shall designate the voter's party affiliation only in case the ballot enclosed is a primary election ballot.

The requirement of designating party affiliation by affidavit is mandatory under this section. By expressly providing a procedure for designating party affiliation by absentee ballot in a primary election, § 53.14 and other accompanying provisions of Chapter 53 imply the exclusion of other procedures for making such designation. See In re Estate of Wilson, 202 N.W.2d 41, 44 (Iowa 1972). Accordingly, in response to your first question, a mailed, written request for an absentee ballot in a primary election does not itself constitute a "written declaration" of a change of party affiliation under § 53.41. Rather, a qualified elector voting by absentee ballot in a primary election must designate party affiliation on the affidavit form supplied by the state commissioner of elections.

You inquire also about the meaning of § 43.42 with respect to voting by absentee ballot. Section 43.42 provides:

> Change or declaration of party affiliation at polls. Any qualified elector may change or declare a party affiliation at the polls on election day and shall be entitled to vote at any primary election. Each elector doing so shall sign an affidavit which shall be in substantially the following form:
>
> CHANGE OR DECLARATION OF PARTY AFFILIATION
>
> I do solemnly swear or affirm that I have in good faith changed my previously declared party affiliation, or declared by party affiliation, and now desire to be a member of the . . . . . party.
>
> . . . . . .
> Signature or Elector
>
> . . . . . .
> Address
>
> Approved:
>
> . . . . . .
> Precinct election official

> Each change or declaration of a qualified elector's party affiliation so received shall be reported by the precinct election officials to the commissioner of registration who shall enter a notation of the change on the registration records.

Utilization of § 43.42 is contingent upon the operation of several distinct elements. The section may be utilized only by an elector who is "qualified", i.e. registered to vote pursuant to Chapter 48. Concerning place and time requirements, the section indicates that a change or declaration may be made "at the polls" and "on election day." Additionally, the section sets forth the type of affidavit that must be completed and signed by a qualified elector desiring to vote at a primary election. By allowing party affiliation to be changed or declared on election day, § 43.42 basically ensures that all qualified electors will be able to vote at a primary election. In order to utilize the section, however, a qualified elector clearly must appear in person at the polls to vote. Accordingly, the procedure established by § 43.52 has no application to a qualified elector who intends to vote by absentee ballot in a primary election. Rather, such voting is controlled by § 43.41 in conjunction with the provisions of Chapters 48 and 53, governing registration and absentee voting respectively.

Section 53.1 sets forth the conditions for voting by absentee ballot:

> Right to vote--conditions. Any qualified elector may, subject to the provisions of this chapter, vote at any election:
>
> 1. When he expects to be absent on election day during the time the polls are open from the precinct in which he is a qualified elector.
>
> 2. When, through illness or physical disability, the elector expects to be prevented from going to the polls and voting on election day.

Subject to these conditions, a qualified elector may "on any day, except election day, and not more than seventy days prior to the date of the election" make written application for an absentee ballot. § 53.2, The Code 1979. In the event that an application is mailed, § 53.8 states that, upon receipt of the application, the commissioner shall mail an absentee ballot to the applicant within

24 hours. [2] The ballot must be enclosed in an unsealed envelope bearing a serial number and an affidavit, which must designate the voter's party affiliation if the ballot is a primary election ballot. §§ 53.8(1), 53.13, 53.14. Section 53.8(2) establishes specific disclosure requirements with respect to late applications:

> If an application is received so late that it is unlikely that the absentee ballot can be returned in time to be counted on election day, the commissioner shall enclose with the absentee ballot a statement to that effect. The statement shall also point out that it is possible for the applicant to personally deliver his completed absentee ballot to the office of the commissioner at any time before the closing of the polls on election day.

Alternatively, § 53.11 provides for the personal delivery of an absentee ballot:

> Personal delivery of absentee ballot The commissioner shall deliver an absentee ballot to any qualified elector applying in person at his office not more than forty days before the date of the general election and the primary election, and for all other elections, as soon as the ballot is available. The qualified elector shall immediately mark the ballot, enclose it in a ballot envelope with proper affidavit, and return the absentee ballot to the commissioner. The commissioner shall record the numbers appearing on the application and ballot envelope along with the name of the qualified elector. The commissioner of any county in which there is located a city of five thousand or more population, which is not the county seat, may permit qualified electors to appear in person at some designated place within each such city and there cast an absentee ballot in the manner prescribed by this section.

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[2] Section 53.8(3) contains one exception to this procedure with respect to patients in hospitals or residents of health care facilities in the county. In these situations, § 53.22 (balloting by confined persons) generally applies.

The only time restrictions in Chapter 53 concern when application for absentee ballots may not be made: 1) more than 70 days when mailed; 2) more than 40 days when applied for in person; 3) on election day. No time restrictions in Chapter 53 otherwise govern the ability of the commissioner of elections to receive and deliver absentee ballots to qualified electors. Section 43.41, however, specifically requires that a qualified elector change or declare a party affiliation for a primary election by filing a written declaration "before the close of registration for the primary election." The provision does not itself establish a date for the close of registration. Consequently, since Chapter 48 governs primary elections to the extent its provisions are applicable, reference is made to § 48.11:

> Registration time limits. The county commissioner of registration shall register, on forms prescribed by the state commissioner of elections, electors for elections in a precinct until the close of registration in the precinct. An elector may register during the time registration is closed in the elector's precinct but the registration shall not become effective until registration opens again in his precinct.
>
> Registration shall close in a precinct at five o'clock p.m., ten days before an election, except as provided in section 48.3. The commissioner's office shall be open from eight o'clock a.m. until at least six o'clock p.m. on the day registration closes prior to each regularly scheduled election.

Section 48.2 provides for voter registration in person while § 48.3 permits registration by mail as follows:

> Registration by mail. As an alternative to the method of registration prescribed by section 48.2, any person entitled to register under that section may submit a completed voter registration form to the commissioner of registration in the person's county of residence by postage paid United States mail. A registration form or the envelope containing one or more registration forms for the use of individual registrants who are related to each other within the first degree of consanguinity or affinity and who reside at the same address shall be postmarked by

> the twenty-fifth day prior to an election or the reigstration will not take effect for that election. A separate registration form shall be signed by each individual registrant. Within five working days after receiving a registration by mail, the commissioner shall send the registrant a receipt of the registration by first class mail marked "do not forward". If the receipt is returned by the postal service the commissioner shall treat the registration as prescribed by section 48.31, subsection 7. An improperly addressed or delivered registration form shall be forwarded to the appropriate county commissioner of registration within two working days after it is received by any other official.

Pursuant to §§ 48.3 and 48.11, a qualified elector may change or declare a party affiliation under § 43.41 either in person before 5:00 p.m. ten days before a primary election or by mail provided the written declaration is postmarked by the 25th day prior to the election. This time scheme precludes a qualified elector from changing or declaring a party affiliation during the nine days immediately prior to a primary election. Chapter 53 does not contain similar time restrictions for a qualified elector voting by absentee ballot. The provisions of §§ 43.41, 48.3 and 48.11 therefore conflict with those of Chapter 53. The former provisions apply specifically to primary elections and contain specific time restrictions for changing or declaring party affiliation in such elections, whereas the latter provisions generally govern voting by absentee ballot in all elections. According to well established principles of statutory construction, related statutes must be read in para materia and the terms of a specific statute or statutes control over those of a general statute or statutes. Berger v. General United Group., Inc., 268 N.W.2d 630, 638 (Iowa 1978). Sections 43.41, 48.3 and 48.11, which contain specific time restrictions for voting in a primary election, therefore do control over the more general provisions in Chapter 53 and do not permit qualified electors, after the close of registration for a primary election, to change or declare party affiliation when applying in person for absentee ballots under § 53.11. Consequently, in response to your second question, we conclude that a qualified elector applying for an absentee ballot in person after the close of registration for a primary election may not cast the ballot for the nominee of a party for which he or she is not registered.

Since the answer to your second question is in the negative, you question whether the procedures established under §§ 43.41 and 43.42 constitute a denial of equal protection. We observe that these sections do not establish separate classifications or procedures for absentee voters; rather, the procedures for changing or declaring a political party affiliation apply equally to absentee voters and all other qualified electors. The fact that certain voters may not be able to utilize the provisions of § 43.42 is not based upon a statutory classification of a discriminatory nature. See, e.g., Luse v. Wray, 254 N.W.2d 324 (Iowa 1977), in which the Iowa Supreme Court held that the statutory classification of § 53.17, which requires absentee ballots to be delivered to patients in hospitals in health care facilities by one member of each of the two major political parties but contained no such requirement for other absentee voters, did not deny equal protection under either the "rational basis" or the "compelling state interest" test. Nothing in either § 43.41 or § 43.42 indicates an invidious attempt to hinder voting on the basis of race, wealth, or other improper basis. Id. Accordingly, we conclude that the provisions of §§ 43.41 and 43.42 do not constitute a denial of equal protection for absentee voters.

In summary response to your questions, we conclude the following:

1. A written, mailed request for an absentee ballot in a primary election does not itself constitute a written declaration of a change of party affiliation under § 43.41.

2. A qualified elector applying for an absentee ballot in person after the close of registration for a primary election may not cast the ballot for the nominee of a party for which he or she is not registered, except as provided in § 43.42, which permits the elector to change or declare a party affiliation only at the polls on election day.

3. The procedures set forth in §§ 43.41 and 43.42 do not involve a denial of equal protection for absentee voters in primary elections.

Very truly yours,

Frank J. Stork

FRANK J. STORK
Assistant Attorney General

FJS:sh

SCHOOLS: Self-insurance programs for teachers. §§ 279.12, 279.13, The Code 1979. A school district and teachers may contract for the establishment of a self-insurance program as a benefit of employment. Establishment of such a program by contract is not prohibited by the Code. (Norby to Murray and Hutchins, State Senators, 10/30/80) #80-10-11 (L)

October 30, 1980

Honorable John S. Murray
State Senator
2330 Lincoln Way
Ames, Iowa 50010

Honorable Bill Hutchins
State Senator
202 Prairie Street
Guthrie Center, Iowa 50115

Dear Senators Murray and Hutchins:

You have requested an opinion of the Attorney General regarding the ability of a school district to establish a medical insurance plan for employees involving a combination of self-insurance with conventional insurance to cover aggregate claims exceeding a specified amount. In other words, instead of purchasing insurance for all claims, the district itself would pay for all claims until a specified aggregate limit was reached. With regard to these claims, the district must either administer payment itself or hire a third party. The district would purchase insurance to compensate for the amount by which claims exceed the specified limit. The system would operate similarly to any type of insurance which provides for payment by the insured of a deductible amount. This type of plan is designated by its proponents as a "self-funded" plan, in contrast to a true self-insurance plan where all claims would be absorbed by the employer. [1]

[1] Material submitted which describes self-funding advises that the plan be structured so that the limits of self-insurance and the cost of insurance for claims exceeding the aggregate limit be less than the amount required for payment of premiums for conventional group health insurance.

It appears that a self-funded insurance plan might possibly be accomplished pursuant to one of two sources of authority: 1) The authority of a school board to establish group insurance plans under § 279.12, The Code 1979; and 2) the authority to contract with teachers under § 279.13, The Code 1979. [2]

As discussed below, we do not believe self-funded insurance plans constitute group health insurance, but we do believe that such a plan may be provided for by contract as a form of teacher compensation.

With regard to group insurance plans, § 279.12 provides, in relevant part, as follows:

> The board shall carry into effect any instruction from the regular election upon matters within the control of the voters, and shall elect all teachers and make all contracts necessary or proper for exercising the powers granted and performing the duties required by law, and may establish and pay all or any part thereof from school district funds the cost of group health insurance plans, nonprofit group hospital service plans, nonprofit group life insurance plans adopted by the board for the benefit of employees of the school district . . .

In addition to § 279.12, ch. 509A provides for school districts to establish group health insurance plans. In determining whether the self-funded insurance plan may be established pursuant to this authority, it must be determined whether this plan is in fact a "group health insurance" plan. In this regard,

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2 Material submitted for consideration in the drafting of this opinion suggests that state laws which prohibit self-insurance plans are preempted by the Employee Retirement Income Security Act. See 29 U.S.C. 1144. While expressing no opinion as to the effect of this federal act on private self-insurance plans, we believe the provisions of this Act are expressly not applicable to government employee insurance plans. 29 U.S.C. 1002(32), 1003(b)(1).

the self-funded plan must be scrutinized in light of the requirements of ch. 509, The Code 1979, which provides numerous requirements for group insurance plans. While "group insurance" is not expressly defined in ch. 509, a review of this chapter reveals several provisions which show that the self-funded insurance plan cannot be considered group insurance for purposes of ch. 509.

Initially, with regard to the portion of the self-funded plan which requires the school district to pay claims, the district itself would appear to be the insurer. Section 509.5, The Code 1979, authorizes only chartered insurance companies to issue group insurance policies. Clearly, school districts do not possess the ability to become chartered insurance companies. In addition, § 509.3 provides a number of requirements for group insurance policies. Section 509.3(4) requires that, if certain criteria are met, an insured person may retain coverage after terminating employment with the school district. It would appear unfeasible and potentially very expensive for a district to continue self-insurance coverage for all former employees. But if such coverage cannot be continued, the former employee is deprived of an important right provided by ch. 509. For these reasons, we do not believe that self-funded insurance plans can be defined as group health insurance as this term is used in the Code.

Having decided that a self-insurance plan may not be established as a group insurance plan, it remains to be considered whether such a plan may be provided as a form of teacher compensation pursuant to contract under § 279.13(1). In relevant part, this section provides as follows:

> Contracts with teachers . . . shall be in writing and shall state the number of contract days, the annual compensation to be paid, and any other matters as may be mutually agreed upon. The contract may include employment for a term not exceeding the ensuing school year, except as otherwise authorized. [Emphasis supplied.]

The Iowa Supreme Court has on several occasions considered whether different forms of teacher compensation were authorized under § 279.13(1). Miner v. Lovilia Independent Sch. Dist., 212 Iowa 973, 234 N.W. 817 (1931); Ashby v. School Township of Liberty, 98 N.W.2d 848 (Iowa 1959); Barnett v. Durant Community Sch. Dist.,

249 N.W.2d 626 (Iowa 1977); Bettendorf Education Ass'n. v. Bettendorf Comm. School Dist., 262 N.W.2d 550 (Iowa 1978). Each of these cases interprets § 297.13 to require contracts to contain certain mandatory provisions but to not prohibit the inclusion of various other contract provisions. For example, in Ashby, the Court approved inclusion in a contract of a provision calling for termination of a teacher if enrollment in the class dropped below six. In Miner, a contract clause providing for termination upon twenty days' notice by either party was found to be valid. While these particular contract provisions appear to now be prohibited by mandatory requirements of § 279.13, these cases do support the principle that no disability is placed upon the freedom of contract outside of the statutorily required terms.

As § 279.12 provides for establishment of group health insurance plans, it might be contended that this provision implies exclusion of alternatives, such as self-insurance, to provide essentially the same type of service. The two most recent cases construing the scope of contracting authority, Barnett v. Durant Comm. Sch. Dist. and Bettendorf Education Ass'n. v. Bettendorf Comm. School Dist., appear to refute this type of implication. In Barnett, the Court considered a challenge to a contract provision which provided for reimbursement for tuition expended by teachers on approved graduate study. In refuting the contention that the mandatory contract requirements prohibited this type of compensation, the Court states as follows:

> The legislature did not enumerate all the provisions which could be included in "contracts necessary or proper for exercising the powers granted." However, defendant contends that because § 279.13 requires teacher contracts to state the weekly or monthly rate of compensation, the legislature necessarily excluded methods of compensation like tuition reimbursement which are not part of the stated periodic salary. This view of § 279.13 is contrary to our prior holdings. [Citing Miner and Ashby.]

249 N.W.2d at 628. In Bettendorf Education Ass'n., the Court considered a contract clause providing for payment representing accrued sick leave as a retirement or death benefit. The theory asserted by the school district was that § 279.40, which provided a minimum schedule of sick leave, required that sick leave only be granted for illness and could not be the basis of a lump sum benefit. The Court did not accept this theory, but reemphasized the scope of freedom to contract, stating as follows:

> This authority [to contract for a lump sum benefit based on accrued sick leave] is not dependent upon the terms of § 279.40 which mandates a schedule of minimum sick leave benefits for public school employees. The payments at issue here were not disability pay. They were a reward to teachers who did not use up sick leave. Defendant's acknowledged purpose was to discourage teacher absenteeism, which is an appropriate objective of school districts.
>
> The lump sum benefits . . . were a form of teacher compensation like tuition reimbursement and step salary increases. We hold defendant had authority to contract to pay them.

In light of these authorities, we believe that teachers and administrators are free to contract for provision of a self-funded medical insurance program. We do not believe that the ability of a board to establish group insurance plans contained in § 279.12 implies a prohibition of the ability to contract for a self-funded plan. It must be strongly emphasized, however, that this plan may be instituted only through a contract mutually agreed upon. There exists no authority for a board to unilaterally institute a self-funded plan. We also caution teachers and administrators to carefully weigh the advantages and disadvantages of a self-funded plan in comparison to conventional group health insurance.[3] In conclusion, however, we believe a self-funded insurance plan, as described at the beginning of this opinion, may be instituted if mutually agreed upon by teachers and administrators and included in teacher contracts.

Sincerely,

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

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3 As mentioned in the body of this opinion, it appears that an insured will not have the right to continued coverage after termination of employment, as required in group insurance plans, if a self-funded plan is established. Additionally, it is unclear whether administration of the self-insurance portion of a self-funded plan will not be regulated by the Insurance Department.

CITIES AND TOWNS: City officers, official misconduct - §§ 362.5, 372.13(8), 721.2(6), 721.11, The Code 1979. A "knowing" violation of the requirements for compensating elected city officials contained in § 372.13(8), The Code 1979, could constitute nonfelonious misconduct in office in violation of § 721.2(6) of the Code. Acceptance of payments by elected city officials pursuant to an interest in a contract to furnish anything of value to the city, in the absence of open, public and competitive bidding, is a serious misdemeanor in violation of § 721.11, The Code 1979. The authority to seek collection of payments made in violation of § 362.5 or § 372.13(8), The Code 1979, rests with the city attorney. (Dallyn to Johnson, State Auditor, 10/29/80) #80-10-10

October 29, 1980

Honorable Richard D. Johnson
Auditor of the State of Iowa
State Capitol Building
L O C A L

Dear Mr. Johnson:

You have requested an Attorney General's Opinion concerning compensation and payments made to elected city officials pursuant to §§ 362.5 and 372.13(8), The Code 1979. Specifically, you pose the following questions:

1. With respect to § 362.5 of the Code, does acceptance of payments by elected officials for work performed for the city, not connected to the duties of the position to which the official was elected, and without benefit of competitive bids in writing, constitute a public offense or official misconduct?

2. If the compensation of elected officials is not set by the city council in accordance with the requirements of § 372.13(8) of the Code, does payment of that compensation by the council constitute a public offense or official misconduct?

3. Does the authority to seek restitution of payments made in violation of § 362.5 or § 372.13(8) of the Code rest with the county attorney or with other officials?

Your first question involves § 362.5, The Code 1979, which prohibits any city officer or employee from having "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 city." This section standing alone does not make a violation of its prohibition a crime, nor does it provide for fine or imprisonment as a sanction. Hence, a violation of § 362.5 is not a "public offense" on its face as defined in § 701.2, The Code 1979, nor is it a simple misdemeanor by operation of § 701.8 of the Code. Contra § 372.13(6), The Code 1979 ("Failure by the clerk to make publication is a misdemeanor").

Under the pre-revised criminal code, however, a violation of § 362.5 would have been an indictable misdemeanor by operation of §§ 687.6 and 687.7, The Code 1977 (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 an indictable misdemeanor). See Leffingwell v. Lake City, 257 Iowa 1022, 135 N.W.2d 536, 539 (1965). Furthermore, with the advent of the new criminal code, the prohibition of § 362.5 was incorporated into § 721.11, Supplement to the Code 1977. Section 721.11, The Code 1979, now provides that any officer of any subdivision of the state who is directly or indirectly interested in any contract to furnish anything of value to the subdivision where such interest is prohibited by statute, and where such contract is not the result of open, public and competitive bidding, commits a serious misdemeanor. Thus, in answer to your first question, a violation of the prohibition against private interests in public contracts contained in § 362.5 of the Code constitutes a serious misdemeanor by operation of § 721.11, The Code, a crime punishable by imprisonment not to exceed one year, or a fine not to exceed one thousand dollars, or both. See § 903.1, The Code 1979.

Your second question refers to § 372.13(8), The Code 1979, which provides in part:

> By ordinance, the council shall prescribe the compensation of the mayor, council members, and other elected city officers, but a a change in the compensation of the mayor shall not become effective during the term in which the change is adopted, and the council shall not adopt such an ordinance changing the compensation of the mayor or council members during the months of November and December immediately following a regular city election. A change in the compensation of council members shall become effective for all council members at the beginning of the term of the council members elected at the election next following the change in compensation.

As with § 362.5 discussed above, § 372.13(8) does not on its face make a violation of its requirement a "public offense" or simple misdemeanor. Moreover, there does not appear to be a section of the new criminal code which adopts the specific language of § 372.13(8) and makes a violation of its requirements a criminal offense.

It does appear, however, that a "knowing" violation of the requirements of § 372.13(8) could, in the right factual situation, constitute nonfelonious misconduct in office in violation of § 721.2(6), The Code 1979. Section 721.2(6) provides that any public officer who knowingly fails to perform any duty required of him or her by law commits a serious misdemeanor. Section 372.13(8), while perhaps discretionary in the sense that it does not mandate that a city council initially act to compensate each and every elected official in the city, is mandatory once the decision to compensate has been made. That is, if the council decides to compensate city officials, the council is under a duty to set and pay such compensation only in accordance with § 372.13(8). See § 362.2(11) The Code 1979 (The use of the word "shall" in the city code of Iowa imposes a duty). Thus, for example, compensation may only be prescribed by enactment of an ordinance, and any change in the compensation of council members shall only be made effective as of the beginning of the term next following that in which the change was made.

In an early case construing a forerunner of § 372.13(8), the Supreme Court heard the appeal of city council members who had voted to increase their salaries for the same year in which they had voted, in violation of the city charter and Laws 6th G.A., Ch. 210, § 5. The defendants claimed that, in voting to increase their salaries, they were acting in a judicial or quasi-judicial capacity and, therefore, were not criminally liable for any error or mistake of law. In rejecting this claim, the Court addressed the question of the council's duty as follows:

> Defendants were presumed to know the law, and it will be assumed that they put a proper interpretation upon the provisions . . . relating to their duties and disabilities. * * * The crime consists in a perversion of their powers and duties . . . . (emphasis added)

State v. Shea, 106 Iowa 735, 738, 72 N.W. 300 (1897).

In light of this precedent, together with the definition of "shall" as used in the city code, the duty placed upon city council members by operation of § 372.13(8) would appear to be enforceable by the criminal sanction of § 721.2(6), The Code 1979. Of course, any failure to perform any of these duties required by law must be done "knowingly." Section 721.2 deals only with intentional misconduct, which means that the person must have acted with actual, positive knowledge of the facts surrounding his or her act or failure to act. See Op.Att'y Gen. # 79-9-15, at 8. These facts must be such as would have made a reasonable person aware of the duty, and the person must have intentionally disregarded this duty or the facts giving rise to it.

Your third question asks, in effect, who is the real party in interest entitled to restitution for unlawful payments and, therefore, whose legal representative has authority to initiate judicial or other proceedings for collection of these payments. Where city funds have been dispersed in violation of § 362.5 or § 372.13(8), The Code 1979, it is the municipal entity (the city) itself who is the party with standing to seek recovery of its funds. Thus, the question becomes what official is authorized to act on behalf of the city.

As an initial matter, it is clearly not the county attorney (who would prosecute any serious misdemeanor violations of § 721.2(6), The Code 1979). In civil actions for recovery of funds, § 336.2 restricts the appearance of the county attorney to those actions in which the state or county is a party.

The most obvious answer, of course, is that the city attorney would initiate any proceedings to recover payments improperly made under § 362.5 or § 372.13(8), The Code 1979. This is only logical, as it is the duty of the city attorney to represent the city in litigation pending in court. See Rankin v. City of Chariton, 160 Iowa 265, 139 N.W. 560, 563 (1913).

In summary, a "knowing" violation of the requirements for compensating elected city officials contained in § 372.13(8), The Code 1979, could constitute nonfelonious misconduct in office in violation of § 721.2(6) of the Code. Acceptance of payments by elected city officials pursuant to an interest in a contract to furnish anything of value to the city, in the absence of open, public and competitive bidding, is a serious misdemeanor in violation of § 721.11, The Code 1979. The

authority to seek collection of payments made in violation of § 362.5 or § 372.13(8), The Code 1979, rests with the city attorney.

Sincerely,

SL Dallyn

SELWYN L. DALLYN
Assistant Attorney General

SLD/bje

COUNTIES AND COUNTY OFFICERS; MUNICIPALITIES; CITY ASSESSOR: Salary, office hours, supervision. ch. 441; §§441.1, 441.2, 441.6, 441.16, The Code 1979. The conference board fixes the salary of the city assessor. The city assessor may set the hours for which that office will be open to the public. (Bennett to Yenger, State Senator, 10/29/80) #80-10-9(L)

October 29, 1980

The Honorable Sue Yenger
Iowa Senate
Capitol
LOCAL

Dear Senator Yenger:

This office is in receipt of your letter requesting an opinion concerning the salary, the office hours, and the supervision of a city assessor.

Section 441.1, The Code 1979, provides for the creation of the office of city assessor in cities with a population of between ten thousand and one hundred twenty-five thousand. Pursuant to §441.2, The Code 1979, in each city which has an assessor a conference board is established which consists of the members of the city council, school board and county board of supervisors. The conference board is the certifying board for all budget expenditures of the city assessor's office. Section 441.16, The Code 1979, requires that each year the assessor prepare a budget which is to include all expenses for the following year. The budget is then filed with the conference board. Included in the budget is a listing of the proposed salaries of the assessor and each deputy; the number and compensation of field personnel and other personnel; and the estimated amount needed for expenses such as printing, mileage, and other items necessary for the operation of the assessor's office. §441.16, The Code 1979. The conference board holds a meeting each fiscal year in order to adopt the budget. Therefore, the answer to your question in respect to who determines the salary of the city assessor is found in The Code. It is the conference board which fixes and adopts the budget for the city assessor's office and that budget includes the salary of the assessor and each of the assessor's employees.

In an opinion issued earlier this year our office noted that it appeared from ch. 441, The Code 1979, that the office of the city assessor operates independently from other county offices. This office determined that "the city assessor is not subject to the same rules and procedures as the rest of the subdivisions of county government." Op.Att'yGen. #80-7-12 p.2. Consequently, there are no county officials which have the authority to determine the office hours of the city

assessor. In an another opinion this office concluded that regarding appointed county officials (which would include the county assessor) such offices are "autonomous in their organization and administration engaged in the performance of a specific statuatory duty and, therefore, are . . . entitled to determine the hours that their office shall be open to the public." 1949 Op.Att'yGen. 112. The city assessor is in analogous situation. While the conference board fixes the budget of the city assessor and also, pursuant to §441.6, The Code 1979, appoints the city assessor, the city assessor like the county assessor performs specific statutory duties and is, therefore, entitled to determine the hours that the office will be open to the public.

In conclusion, The Code provides that the conference board establish the salary of the city assessor. Secondly, the city assessor may set the hours for which that office will be open to the public for business.

Yours very truly,

Barbara Bennett
Assistant Attorney General

BB/clm

TAXATION: Eligibility of Reservists and National Guard Personnel for Military Service Tax Exemption. § 427.3(4), The Code 1979; 1978 Session, 67th G.A. ch. 1040, § 1. The repeal of Chapter 35C, The Code 1977 and 1978 Session, 67th G.A., ch. 1040, § 1 did not affect or change the concept of "active duty" as that term is defined in § 427.3(4) through incorporation by reference to § 35C.2, The Code 1977, so that reservists and guard personnel whose active duty in military service during the Vietnam Conflict only consisted of active duty for training are not eligible to claim the military service tax exemption for property tax purposes. (Griger to Gilbert, Major General of Iowa National Guard, 10/14/80) #80-10-7(L)

October 14, 1980

Roger W. Gilbert, Maj. Gen., Iowa ANG
The Adjutant General
Iowa National Guard
Camp Dodge
R.R. #1
Grimes, Iowa 50111

Dear General Gilbert:

You have requested an opinion of the Attorney General as to whether reservists and national guard personnel who participated in "Active Duty for Training in Federal Status" (hereinafter referred to as active duty for training) during the period of the Vietnam Conflict, as set forth in §427.3(4), The Code 1979, would, because of such participation, be eligible to claim military service tax exemption for property tax purposes.

Section 427.3(4) provides for a property tax exemption in relevant part:

> The property, not to exceed one thousand eight hundred fifty-two dollars in taxable value of any honorably separated, retired, furloughed to a reserve, placed on inactive status, or discharged soldier, sailor, marine, or nurse...who served on active duty during the Vietnam Conflict beginning August 5, 1964, and ending June 30, 1973, both dates inclusive, and as defined in section 35C.2. [Emphasis added]

Section 35C.2, The Code 1977, prior to its repeal in 1978 Session, 67th G.A., ch. 1040, §1, defined "active duty" for purposes of the Vietnam veterans bonus, as follows:

> "Active duty" in the armed forces of the United States means full-time duty in the armed forces of the United States, excluding active duty for training purposes only and excluding any period a person was assigned by the armed forces to a civilian institution for a course of education or training which was substantially the same as established courses offered to civilians, or as a cadet or midshipman, however enrolled, at one of the service academies. [Emphasis added]

In essence, then, §427.3(4), by incorporating by reference the definition of "active duty" in §35C.2, appears to exclude from eligibility for the military service tax exemption those reservists and national guard personnel whose only active military duty served during the Vietnam Conflict consisted of active duty for training.

You raise the question of whether the legislative repeal of Chapter 35C operated to excise the referenced provisions of §35C.2 from §427.3(4) so that these reservists and guard personnel who did participate in active duty for training would, because of such participation, be eligible to claim the tax exemption. For the reasons which follow, it is our opinion that the repealed provisions of §35C.2 must still be applied in order to determine eligibility for the exemption.

In 1970 Op. Att'y Gen. 293, the Attorney General opined that §427.3(4), The Code, as it existed in 1969, made reservists and guard personnel who participated in active duty for training during an enumerated period, including the Vietnam Conflict, eligible to claim the military service tax exemption. In 1969, §427.3(4) provided for the exemption in relevant part:

> 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 Vietnam 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 during the time of the Vietnam Conflict.

The opinion set forth the "active duty" requirements, as defined by federal law, in 1970 Op. Att'y Gen. at 294-5:

"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 [sic] to general usage than the definition in 50:91(b), which excludes active duty for training from the general concept of activity 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 Training 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)

Active duty for training for those who enlisted in the reserves or national guard constituted what is commonly referred to as "basic training" or "boot camp."

In 1973, the legislature enacted the Vietnam veterans bonus law whereby residents of Iowa who were eligible veterans could claim certain compensation for military service during the Vietnam Conflict. See 1973 Session, 65th G.A., ch. 64. Section 3 of this law which defined "active duty" became §35C.2, The Code 1977.

In 1974, the legislature amended §427.3(4). See 1974 Session, 65th G.A., ch. 1231 §128. This amendment and its effect were discussed in 1976 Op. Att'y Gen. 44, 48, as follows:

> Section 128 of Chapter 1231 amended §427.3(4) in relevant part to now provide for the exemption as follows:
>
> > "The property, not to exceed one thousand eight hundred fifty-two 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...or those who served on active duty during the Vietnam Conflict beginning August 5, 1964, and ending on June 30, 1973, both dates inclusive, and as defined in chapter sixty-four (64), section three (3), Laws of the Sixty-fifth General Assembly, 1973 Session." (emphasis supplied on language of amendment in Session Laws)
>
> Section 128 of Chapter 1231 clearly accomplishes several purposes, first, it converts the value of the exemption to conform to the provisions of Chapter 1231 which makes the assessed value of tax-

> able property one hundred percent of actual value. Second, an ending date is now stated for the Vietnam Conflict of June 30, 1973. Third, "active duty" is defined by reference to the Vietnam Veterans Bonus Act, now found in Chapter 35C, Code of Iowa, 1975. This definition of "active duty" is found in §35C.2 of the 1975 Code and it excludes from the term "active duty for training purposes only." As a consequence those reservists and national guardsmen who were considered to be eligible for the military service tax exemption for the Vietnam Conflict, as stated in §427.3(4) of the 1973 Code solely because of their participation in "active duty for training in federal status" will lose this exemption commencing in the year 1975. See 1970 O.A.G. 293 for a discussion of this active duty for training concept and eligibility for the military service exemption.

As noted, in 1978, the legislature repealed Chapter 35C, The Code 1977.

In summary, the Attorney General opined in 1969 that reservists and guard personnel whose only active military duty had consisted of active duty for training during enumerated periods, including the Vietnam Conflict, set forth in §427.3(4) were eligible to claim the military service tax exemption. Thereafter, in 1974, the legislature made such persons so serving during the Vietnam Conflict ineligible for the tax exemption by amending §427.3(4) to incorporate by reference a specific statutory definition of the term "active duty" as set forth in a statute enacted by the legislature in 1973. This referenced statute (§35C.2) was subsequently repealed in 1978, but no express legislative mention was made in the repealing statute of the adopting statute (§427.3(4)). Since the legislature chose to incorporate by reference a definition of "active duty" in §427.3(4), the question arises as to the effect on the incorporating statute of a subsequent repeal of the referenced statute.

In Union Cemetery v. City of Milwaukee, 13 Wis.2d 64, 108 N.W.2d 180 (1961), the city sought to assess the cemetery association for street improvements. The cemetery contended that the assessment was invalid because its special charter was granted under a statute which incorporated by reference certain specific statutes which exempted cemetery associations from all public taxes and assessments. These referenced statutes were subsequently repealed by the legislature so that there no longer existed any independent statutory exemption for cemetery associations. The court held that the exemption applied and stated in 108 N.W.2d at 181-2:

The question in this case is what is the effect on the incorporating statute of a subsequent repeal of the incorporated statute. If there is a repeal of the incorporated statute, does such repeal flow back through the reference and excise from the incorporating statute the repealed statute so as to leave the incorporating statute bereft of its reference? In the absence of legislative intent which does not appear in the special charter, resort must be had to rules of construction. In formulating these rules, this court has followed the common-law rules developed by the American cases and has distinguished specific and general references. When the adopting statute incorporates an earlier statute or a limited and a particular provision thereof by specific reference, such incorporation takes the statute as it existed at the time of incorporation and does not prospectively include subsequent modifications or a repeal of the incorporated statute or portions thereof. Mueller v. City of Milwaukee, 1949, 254 Wis. 625, 37 N.W.2d 464; Milwaukee County v. Milwaukee Western Fuel Co., 1931, 204 Wis. 107, 235 N.W. 545; Flanders v. Town of Merrimack, 1880, 48 Wis. 567, 4 N.W. 741; Sika v. Chicago & North Western Railway, 1867, 21 Wis. 370. However, when a statute incorporates the general law on a particular subject, the reference is construed to mean that such statute as it exists at the time of incorporation and at any given time thereafter is incorporated. Thus a general reference adopts prospectively the future alterations and even the repeal of the incorporated law. George Williams College v. Village of Williams Bay, 1942, 242 Wis. 311, 7 N.W.2d 891, Hay v. City of Baraboo, 1906, 127 Wis. 1, 105 N.W. 654, 3 L.R.A., N.S., 84. These rules of construction are discussed in 2 Sutherland, Statutory Construction (3d Ed.), p. 548, sec. 5208; 82 C.J.S. Statutes §301, p. 517; 168 A.L.R. 628; and 50 Am.Jur., Stats., p. 58, sec. 39. In England, the distinction between a specific and general reference is not recognized. There the incorporating reference, unless the adopting statute provides otherwise, does not carry changes thereafter made in the adopted statute. See Legislation--by Reference, 1950 Wis. Law Review 726.

> The distinction between a general and a specific reference lies in the manner of reference and what is incorporated. A specific reference refers specifically to a particular statute by its title or section number and incorporates only a part of the law on a subject. A general reference refers generally to the law on a subject and incorporates the entire subject matter. 2 Sutherland, Statutory Construction (3d Ed.), p. 547, sec. 5207; George Williams College v. Williams Bay, supra. The charter of the plaintiff referred to the specific section 15 of Chapter 67, Revised Statutes of 1858, which dealt only with exemption from taxation and special assessments of cemeteries incorporated under Chapter 67. The reference was not to the law of cemeteries generally. It, therefore, follows that the reference being specific, the repeal of Chapter 67 of the Revised Statutes of 1858 by the Revised Statutes of 1878 did not repeal the exemption granted to the plaintiff.

See also 73 Am. Jur.2d Statutes §29, pages 284-5.

In applying the principles of incorporation by reference set forth in Union Cemetery to the instant situation, it is clear that in 1974 the legislature, in enacting §128 of Chapter 1231, incorporated by reference a specific statute, enacted in 1973. Under such circumstances, a subsequent mere repeal of the specifically referenced statute (§35C.2) would have no effect on the incorporating statute (§427.3(4)). Thus, according to the doctrine of incorporation by reference, the repeal of Chapter 35C would have no effect upon the provisions of §427.3(4) and repealed §35C.2 remains incorporated in the military service tax exemption law by reference.

In reaching this conclusion, we have not ignored the existence of §4.3, The Code 1979, which provides as follows:

> Any statute which adopts by reference the whole or a portion of another statute of this state shall be construed to include subsequent amendments of the statute or the portion thereof so adopted by reference unless a contrary intent is expressed. [Emphasis added]

By its terms, §4.3 only purports to be concerned with amendments to the incorporating statute or the referenced statute, and not with the mere repeal of the referenced statute. A "repeal" of an entire statute does not constitute an "amendment" since a repeal of an entire statute means that it is completely abrogated

whereas an amendment to a statute alters an existing law, leaving some part still standing. Assetts Reconst. Corp. v. Munson, 81 Cal. App 2d 363, 184 P.2d 11 (1947); State v. Moore, 339 Mo. 492, 99 S.W.2d 17 (1936); Little v. State ex. rel. Huey, 137 Ala. 659, 35 So. 134 (1903). Thus, the repeal of Chapter 35C did not constitute an "amendment" to the referenced statute (§35C.2) within the meaning of §4.3.

Finally, it should be remembered that the military service tax credit constitutes a statutory tax exemption. The Iowa Supreme Court has held that §427.3(4), as a tax exemption statute, must be strictly construed and that the exemption claimant must clearly demonstrate that the exemption applies with all doubts resolved against the exemption and in favor of taxation. Jones v. Iowa State Tax Commission, 247 Iowa 530, 74 N.W.2d 563 (1956); Cress v. State Tax Commission, 244 Iowa 974, 58 N.W.2d 831 (1953); Lamb v. Kroeger; 233 Iowa 730, 8 N.W.2d 405 (1943). It does not clearly appear that the legislature intended that reservists and guard personnel whose active duty served during the Vietnam Conflict only consisted of active duty for training would now be eligible to claim the military service tax credit.

It is the opinion of this office that the repeal of Chapter 35C, The Code 1977 did not affect or change the concept of "active duty" as that term is defined in §427.3(4), The Code 1979, so that reservists and guard personnel whose active duty in military service during the Vietnam Conflict only consisted of active duty for training are not eligible to claim the military service tax exemption.

Very truly yours,

Harry M Griger

Harry M. Griger
Special Ass't Attorney General

HMG/bm

COURTS: Actions to Establish Paternity: Blood test. Ch. 675, Code of Iowa 1979; H.F. 2516, 68th General Assembly; §§ 675.39, 675.40, Code of Iowa 1981. H.F. 2516 relating to the custody and visitation rights of a child born out of wedlock and the use of blood tests in actions to establish paternity may have an effect on cases filed before January 1, 1981, the effective date of the act. The important factor is when the application to the court is made. The application must be made after January 1, 1981, but the case may be filed before that date. (Robinson to Kenyon, Union County Attorney, 10/10/80) #80-10-6 (L)

Mr. Arnold O. Kenyon, III
Union County Attorney
Union County Courthouse
Creston, IA 50801

October 10, 1980

Dear Mr. Kenyon:

You recently asked for an opinion of the Attorney General as follows:

> The Child Support Recovery Attorney for the eight counties in Southwest Iowa has requested an opinion stating whether or not House File 2516, which takes effect on January 1, 1981, shall have effect on cases filed before January 1, 1981.
>
> There are different views on this subject among attorneys who practice in this area. I would appreciate your opinion on this matter.

House File 2516 was passed in the 1980 session of the 68th General Assembly. It is an act relating to the determination of the parent-child relationship and the obligation of parents to their children. It amends Ch. 675, The Code 1979, by adding two new sections. The first new section gives the mother of a child born out of wedlock whose paternity has not been acknowledged and who has not been adopted sole custody of the child unless the court orders otherwise. It also provides that if judgment of paternity is entered, the father may petition for rights of visitation or custody in an equity proceeding separate from any action to establish paternity.

Section 3 of House File 2516 (the second new section to Ch. 675, The Code 1979) provides:

> Sec. 3. NEW SECTION. BLOOD TESTS. In any proceeding to establish paternity in law

> or in equity the court may on its own motion, and upon request of a party shall, require the child, mother, and alleged father to submit to blood tests. If a blood test is required, the court shall direct that inherited characteristics, including but not limited to blood types, be determined by appropriate testing procedures, and shall appoint an expert qualified as an examiner of genetic markers to analyze and interpret the results and to report to the court. Blood test results which show a statistical probability of paternity are admissible and shall be weighed along with other evidence of the alleged father's paternity. If the results of blood tests or the expert's analysis of inherited characteristics is disputed, the court, upon reasonable request of a party, shall order that an additional test be made by the same laboratory or an independent laboratory at the expense of the party requesting additional testing. Verified documentation of the chain of custody of the blood specimens is competent evidence to establish the chain of custody. A verified expert's report shall be admitted at trial unless a challenge to the testing procedures or the results of blood analysis has been made before trial. All costs shall be paid by the parties in proportions and at times determined by the court.

As we understand the present practice, Rule of Civil Procedure 132 which provides for the physical and mental examination of persons is currently being used in paternity cases. The Rule provides:

> 132. Physical and mental examination of persons. When the mental or physical condition (<u>including the blood group</u>) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending <u>may</u> order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. <u>The order may be made only on motion for good cause shown</u> and upon notice to the person to be examined and to all parties and shall specify the

> time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. (Emphasis added)

Some judges have refused or are reluctant to order blood tests or have doubts as to their admission into evidence. Similarly, some judges allow visitation to the natural fathers while others do not. Thus, the need for this clarifying legislation. The practical effect that House File 2516 will have on cases after January 1, 1981 will be to take the discretion away from the court in ordering blood tests as provided in Iowa R.Civ.P. 132, and make it mandatory upon the application of a party under this new legislation. However, a statute passed by both houses of the legislature and approved by the Governor is without force before the date it takes effect, Butters v. City of Des Moines, 202 Iowa 30, 209 N.W. 401 (1926). In our opinion, the important factor is not when the case is filed, but when the application for the blood test or custody and visitation is made. After January 1, 1981, the ordering of blood tests is mandatory upon application of a party even though the suit was filed before January 1, 1981. Obviously, the court still has the discretion whether or not to grant custody or visitation rights after 1981 under H.F. 2516.

Because of the contempt powers given the court in Ch. 675, The Code 1979, an argument might be made that House File 2516 has ex post facto implications contrary to Article I, Section 10 of the United States Constitution and Article I, Section 21 of the Iowa Constitution. In our opinion, the courts would hold that there is no ex post facto claim for the reasons expressed in the case of In the Interest of Ponx, 276 N.W.2d 425, 428-432 (Iowa 1979).

Section 26 of Article III of the Iowa Constitution states that no public law of the general assembly passed at a regular session shall take effect until July 1 after passage, unless by publication. House File 2516 does not have a publication clause nor does it take effect on July 1 after passage. At first blush, this would appear to be a violation of the above constitutional provision. Nevertheless, the Iowa Supreme Court has held that the general assembly may make laws passed at a regular session effective later than July 1 after passage without a publication clause. Green v. City of Cascade, 231 N.W.2d 882, 888 (Iowa 1975). Sampson v. City of Cedar Falls, 231 N.W.2d 609, 615 (Iowa 1975); Santo v. State, 2 Iowa 165 (1855).

Sincerely,

Stephen C. Robinson
Assistant Attorney General

SCR/tjb

MUNICIPALITIES: Licensing of Security Guards--§§ 80A.1, 80A.3, 80A.4, 80A.8, 364.1, and 364.2, The Code 1979. Municipalities may require gun registration for armed security guards. Municipalities may not require armed security guards furnishing such work for hire to obtain a city license in order to perform services within the city. (Blumberg to Connors, State Representative, 10/6/80) #80-10-4(L)

October 6, 1980

The Honorable John H. Connors
State Representative
1316 East 22nd Street
Des Moines, IA 50317

Dear Representative Connors:

We have your opinion request regarding a City of Des Moines Ordinance for the licensure of armed security guards. That ordinance requires licenses for four classes of security guards. It also contains a provision for the registration of guns used by the security guards. You asked about the legality of a city weapons permit. The letter attached to your request questioned the legality of the city licensing armed security guards.

Section 9-110.03 of the ordinance requires that all guns used by armed security guards shall be registered with the police department. This is not a weapons permit law. There is nothing in the Constitution or the Iowa Code which speaks to the registration of guns for security guards. Therefore, there is no prohibition for a city to require the same. Accordingly, municipalities can, through their home rule powers, require the registration of guns, assuming such ordinances are otherwise reasonable, and fall within appropriate constitutional guidelines.

However, the opposite result must be reached with regard to the provision of the ordinance requiring licensing of armed security guards. Section 9-107 provides that no person shall perform the duties, services or work of an armed security guard without obtaining a license from the city council. Section 9-108(2) sets forth an exception to licensure for private detectives and private detective agencies licensed by the State. "Private detectives" and "private detective agencies" are defined in section

9-106(4) to mean any person or firm licensed by The Iowa Department of Public Safety pursuant to Chapter 80A, The Code.

Section 80A.1(1) defines "Private detective business or profession" to include, in pertinent part:

> the business of furnishing for hire, reward, or gratis guards or other persons to protect persons or property; or to prevent the theft or the unlawful taking or use of real or personal property, or the business of performing the services of such guard or other person for any of said purposes. [Emphasis added]

The above definition comports with the definition of "security" guard found in section 9-106(5), (6), (7), (8), and (9) of the ordinance. Sections 80A.3 and 80A.4 provide that private detectives and private detective agencies shall be licensed by the Department of Public Safety.

The exception in section 9-108(2) of the ordinance is of interest. While there is no question that private detectives licensed by the State do not have to be licensed by the city, it is maintained by the city that the exception for them and detective agencies does not provide an exception for detective agents employed by licensed agencies. In other words, according to the city's interpretation, detective agents would have to be licensed by the city.

Home Rule, adopted in 1968, provides that cities can do for their citizens what is not inconsistent with state law. Section 364.1, The Code, provides:

> A city may, except as expressly limited by the Constitution, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the city or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents. This grant of home rule powers does not include the power to enact private or civil law governing civil relationships, except as incident to an exercise of an independent city power.

Section 364.2(3) provides that an exercise of city power is not inconsistent with a state law unless it is irreconcilable with the state law.

Iowa's form of Home Rule for municipalities is the limited, self-executing type. Scheidler, Implementation of Constitutional Home Rule in Iowa, 22 Drake L.Rev. 394, 302. That is, the municipalities have home rule power subject to limitations imposed by the legislature, which retains a residual power to intervene or legislate in a given area. The legislature retains the "upper hand" on what municipalities may do. See also, Green v. City of Cascade, 231 N.W.2d 992, 885 (Iowa 1975); Bechtel v. City of Des Moines, 225 N.W.2d 326 (Iowa 1975).

The provisions of § 364.2(3) are an aid to construction when a state law is laid beside an ordinance. Green v. City of Cascade, 231 N.W.2d at 890. "Inconsistent" means incongruous, incompatible, irreconcilable. "Irreconcilable" means impossible to make consistent or harmonious. Green v. City of Cascade, supra.

Chapter 80A is clear in that it authorizes licensed detective agencies to employ detective agents. Section 80A.1(2), 80A.4 and 80A.8, The Code. "Employ" is defined, in part, "to make use of. . .to use or engage in the services of. . . ." Webster's New Collegiate Dictionary, p. 370 (1979). Thus, by being licensed by the State, detective agencies have the authority to use the services of detective agents. The city ordinance requiring licensure of those detective agents who do armed security work acts as a bar to those agencies who employ agents to work in the city. It is at this point that the ordinance is irreconcilable with a state statute. A city cannot, by ordinance, prevent the practice of a business or profession which a state law already controls and permits.

Chapter 80A sets forth a uniform system for the licensing of those who furnish security work for hire. No person who holds him or herself out as such can do such work without either being licensed as a private detective or working for a licensed detective agency. Pursuant to Chapter 80A, a person who qualifies for licensure, or who works for an agency that is licensed is permitted to do security work anywhere in the State. A municipality, under the guise of home rule, cannot take away in this instance what the legislature has granted.

There are several examples of uniform system that the Legislature has established where home rule does not apply. Our office has consistently held that opinion polls or referenda on public interest questions are not permissible. See 1972 Op. Att'y. Gen. 263, 520; 1976 Op. Att'y. Gen. 681. In the 1972 opinions, the questions were whether a city could submit questions of public interest to the voters at a regular municipal election or at a special election. The 1976 opinion concerned whether a city, by adopting a home rule charter, could have the electorate adopt, amend or repeal ordinances. In all these opinions we held that the system of elections was uniform statewide and under complete control of the Legislautre. Only those elections indicated by the Legislature could be held, regardless of home rule. In 1976 Op. Att'y. Gen. 847, we held that the legislature had preempted the field of licensure of moblile home parks. Other examples are the fencing laws under Chapter 113, and the licensing of professionals such as doctors, nurses, lawyers and the like.

The state, in any given area, such as those listed above, by broad and comprehensive legislation, may manifest an intent to exclusively regulate an area. See, Op. Att'y. Gen. # 79-4-7, (Miller to Danker, et al.). It is also stated therein that where "preemption" is applicable, "any local government regulation regardless of content, is inconsistent with the pervasive state legislation." Although a city is allowed to set standards more stringent than those imposed by State law [see, e.g., Bryan v. City of Des Moines, 261 N.W.2d 685 (Iowa 1978) concerning local requirement for promotion under civil service], it would not be allowed to legislate in an area where there is pervasive legislation by the State.

In City of Iowa City v. Westinghouse Learning Corp., 264 N.W.2d 771 (Iowa 1978), the issue was whether a local civil rights ordinance was inconsistent with Chapter 601A, The Code. Chapter 601A authorized municipalities to establish civil rights commissions and gave them the power to handle complaints. Section 601A.17 provided that nothing within that chapter shall be construed as an indication of an intent of the Legislature to occupy the field of civil rights to the exclusion of local laws "not inconsistent with this Chapter that deal with the same subject matter." The Court held that Chapter 601A establishes a complete and comprehensive legislative plan for processing civil rights complaints. Thus, the city ordinance which transferred the task of originally deciding whether a violation exists to the courts was inconsistent with Chapter 601A which placed that task with an administrative body. The existence of sections 364.2 and

364.6 did not save the ordinance. In short, the Court found a pervasive scheme by the Legislature which could not be changed by a local ordinance, even though the city sought to improve the system.

There are areas of licensing which have traditionally been left to the regulation of municipalities. These include plumbers and electricians. The Legislature has never established a statewide scheme for the licensure of them. However the licensing of security guards has never been part of the local licensing tradition.

It is generally held that municipal ordinances are inferior to the laws of the state. What is allowed by the general laws of the state cannot be prohibited by ordinance. A city may not enforce restrictions or regulations which are in conflict with the plain mandate of a legislative enactment. E. McQuillen, Municipal Corporations § 15.20 (3rd ed. 1979). As a general rule, a charter provision, whether or not of a home rule city, does not supersede or prevail over a conflicting general statute dealing with matters of a statewide concern. Thus, a general law enacted by the legislature and applicable alike to all cities is supreme over any conflicting charter provision. The state remains supreme in all matters not purely local. An example of matters of statewide concern where general laws have prevailed over conflicting local laws is the imposition of licenses. 6 E. McQuillen, Municipal Corporations § 21.30 (3rd Ed. 1979). The legislature's preemption or full occupation of the field is one of the tests of whether a given subject is of statewide concern. Any doubt as to whether a matter is a municipal affair must be resolved in favor of the legislative authority of the state. 2 E.McQuillen, Municipal Corporations § 4.88 (3rd Ed. 1979). Municipal regulation of businesses, trades or occupations must conform and not conflict with state statutes and penalties. 7 E. McQuillen, Municipal Corporations § 24.323 (3rd Ed. 1968). State legislation may operate to exclude municipal licensing, or to allow it concurrently. However, municipal licensing legislation in conflict with state law is void unless the state law provides otherwise. 9 E. McQuillen, Municipal Corporations § 26.23a (3rd Ed. 1978).

California uses the statewide concern versus municipal affairs distinction. In Ex parte Hitchcock, 34 Cal.App. 111, 166 P. 849 (1917), the state licensed private detectives and private detective agencies. The city had an ordinance for the licensure of private patrol services. The state constitution provided that cities may make and enforce all local regulations not in conflict with general laws. The court held that the licensure of local patrol services was purely a municipal affair and therefore proper. This view was upheld in Stewart v. County of San Mateo, 246 Cal.App.2d 273, 54 Cal.Rptr. 599 (1966), even though the legislature had enacted a statute prohibiting cities from

such licensure. It appears that the constitutional home rule powers in California are such that municipal regulations are supreme in the field of municipal affairs, regardless of state statutes. Butterworth v. Boyd, 12 Cal.2d 140, 82 P.2d 434 (1938).

The California Courts hold the opposite when faced with an area of statewide concern. In Horwith v. City of Fresno, 74 Cal.App. 898, 168 P.2d 767 (1946), the state had a statute for the licensing of general contractors. The city provided for licensure of electricians. It was held that the licensure of contractors was of a statewide concern because the legislature had adopted a broad and comprehensive plan for licensure. The Court stated (168 P.2d at 770):

> The State license implies permission to the licensee to conduct his business at any place within the State. This permission should not be circumscribed by local authorities.

We are unable to distinguish this case from Hitchcock and Stewart. However, it is apparent that Home Rule in California is of a different nature than that in Iowa. Consequently, we do not believe that the Hitchcock and Stewart cases are persuasive.

Chapter 80A first appeared in the 1950 Code in substantially the same form as now. At that same time, municipalities did not enjoy home rule. They operated under the Dillon Rule, which provided that municipalities only possessed such powers as were specifically enumerated by the Legislature, or necessarily implied. Chapter 368, The Code 1950, specifically sections 368.5 through 368.8, listed the specific powers of regulation and licensure that municipalities possessed. Hotels, eating establishments, certain engineers, peddlers, pawnbrokers, and the like were listed, Section 368.17 specifically provided for the licensure of plumbers. Nowhere was there any mention of guards. In fact, electricians were not added until sometime later. See, § 368.6, The Code 1973. Therefore, prior to home rule in 1968, municipalities could not legally license guards. Such licensing authority was limited to the State by its licensing of private detectives and private detective agencies.

The adoption of Home Rule in 1968, although granting municipalities more authority to handle their local affairs, did not automatically restrict or limit other governmental powers. That is, the existence of Home Rule does not automatically limit the effect of other laws that may have an impact on cities. The repeal of §§ 368.5, .6, .7, .8 and .17, effective in 1975, did not change the character of chapter 80A, or any other state licensing law. From 1950 until 1968, the Legislature preempted the field of licensure of private detectives and detective

agencies. There is nothing in the Home Rule Amendment or the subsequent statutory changes in the City Code of Iowa which evidences any intent on the part of the Legislature to give up its preemption.

The City bases its ordinance in part on the fact that detective agents are not licensed by the State. It is therefore reasoned that Home Rule affords it the authority to license them. This reasoning clearly misses the effect of Chapter 80A. It is correct that Chapter 80A does not require the licensure of detective agents. Although we have nothing before us indicating whether the Legislature has made a conscious decision that detective agents should not be licensed in any manner, we can presume from the Chapter itself that the Legislature has so intended. Since 1950 detective agents have been permitted to perform work for licensed agencies without licensure. The Legislature, during that time, has never amended Chapter 80A relative to the licensure or qualifications of a detective agent.

Licensed agencies perform work through the individuals they hire. Sections 80A.4 and 80A.8 specifically provide that detective agents can perform work for licensed agencies within the private detective business. Licensed detective agencies can perform their business anywhere in this State. It therefore follows that detective agents working for licensed agencies can perform this work wherever the licensed agency can. There is nothing in Chapter 80A, or in its history, which indicates a legislative intent that detective agents are limited in any manner in the type or location of the work they perform. The city ordinance frustrates the state statutory scheme by not permitting the detective agents from working where the licensed agency can otherwise perform work. The licensing of detective agents by the city is tantamount to licensing the agency. Such a result, of course, could not be sustained by the City since such agencies are already licensed by the state.

There is an exception to the above. Not all those who perform security work must be licensed by the state or work for a licensed agency. There are many companies which hire their own personnel to perform security work for them. Since those individuals are not furnishing security work to others for hire, they do not fall within the definition of "private detective business or profession" in § 80A.1(1). Consequently, the State has not preempted the licensing of those individuals. Therefore, a municiaplity, through its Home Rule powers, may license such individuals.

We believe that the licensing of private detectives and detective agencies and the authority for detective agents to do work for licensed agencies is such a pervasive and uniform system as indicated above. All persons who furnish private

detective work for hire are under the same standards throughout the State. Since the licensed agencies can perform work anywhere in the state, the persons employed by them would, of necessity, have to be able to work anywhere in the State. The licensure of security guards by municipalities would effectively render useless the statutory authority for these agencies and agents. We must presume that the Legislature intended to establish a statewide, uniform system for the licensure and work of these agencies. This is especially true in light of the absence of any indication to the contrary.

Accordingly, we are of the opinion that a municipality may not adopt an ordinance for the licensure of armed security guards when the same is covered by a uniform and pervasive state legislative system. A municipality may, however, establish gun registration requirements.

Very truly yours,

Larry M. Blumberg

LARRY M. BLUMBERG
Assistant Attorney General

LMB/cmc

COUNTY OFFICERS; State Conservation Commission; Writing Fees. §§ 106.5, 106.44, 106.53, 321G.4, 321G.6, The Code 1979. Section 106.53 requires that the writing fees contained therein be charged in addition to the other writing fees contained in Chapter 106. (Ovrom to Rush, State Senator, 10/3/80) #80-10-3(L)

October 3, 1980

Mr. Bob Rush
State Senator
Statehouse
L O C A L

Dear Senator Rush:

You requested an Attorney General's opinion concerning a recent amendment to Chapters 106 and 321G, The Code, which raises the writing fees county recorders can charge on certain boat and snowmobile registrations. The amendment is contained in Senate File 2125, 68th G.A. The writing fees are set forth in §§ 106.5(1), (3), (4) and (6), 106.44, 106.53, 321G.4 and 321G.6, The Code 1979. You state that the purpose of the amendment was to make these fees uniform. Unfortunately, only §§ 106.5(1), 106.53 and 321G.4 were amended. This leaves some of the writing fees at 25 cents or 50 cents and raises others to $1.00.

Further confusion has arisen from the language of § 106.53, which was amended as follows:

> In addition to the other fees provided by this chapter, the county recorder shall collect from the boat owner, at the time of the transaction, the following writing fees:
>
> 1. For a new registration, ~~fifty cents~~ one dollar.
>
> 2. For a renewal of a registration, ~~fifty cents~~ one dollar.
>
> 3. For a duplicate registration, ~~twenty-five cents~~ one dollar.

4. For a new registration upon . . . a change of name . . . ~~twenty-five cents~~ one dollar.

You ask if the county recorder is to collect the writing fee listed in the appropriate section plus the writing fee listed in § 106.53? We think the answer is yes.

Our answer is based on the language of § 106.53. It says the writing fees listed therein are to be collected "in addition to the other fees provided by the Chapter." (emphasis added) Other fees are provided in §§ 106.5(1), (3), (4) and (6), and § 106.44. The language is clear and requires charging two fees.

We understand that in the past most county recorders and the State Conservation Commission considered § 106.53 to have superceded the other writing fee provisions and therefore the recorders charged only the fees contained in § 106.53. We realize that this opinion suggests that they should change this practice by charging the 106.53 fees in addition to the other fees in Chapter 106. However, the language of § 106.53 clearly requires these as additional fees, and the prior practice was not in strict accordance with the "in addition to" language.

To effectuate the uniform one dollar writing fee which was apparently intended by S.F. 2125, Chapter 105 should be amended again. All references to writing fees should be deleted except those in § 106.53, which should be amended by deleting the sub-categories contained therein and providing that all registration transactions are subject to a writing fee of one dollar.

Sincerely,

Eliza Ovrom

ELIZA OVROM
Assistant Attorney General
Environmental Protection Division

EO:rcp

CHILD ABUSE: § 232.68(6), The Code 1979. A "babysitter" falls within the definition of "person responsible for the care of the child" and reports of child abuse made with regard to babysitters should be initially investigated by the Department of Social Services. (Morgan to Reagen, Commissioner, Department of Social Services, 10/2/80) #80-10-1(L)

October 2, 1980

Michael V. Reagen, PhD
Commissioner, Iowa Department
of Social Services
Hoover State Office
L O C A L

Dear Commissioner Reagen:

You requested a formal opinion on the following question:

> Is a "babysitter" a person responsible for the care of the child within the meaning of Section 232.68(6), The Code 1979?

We have determined that under Iowa law under many common circumstances a "babysitter" falls within the definition of a "person responsible for the care of the child", § 232.68(6), and, that reports made with regard to babysitters should be initially investigated by the Department. In making this response, we rely upon the relevant statutes, applicable case law, and American Bar Association standards for child abuse reporting. We rely to a great extent in this analysis on a previous opinion of the attorney general which finds that teachers are not subject to investigation under Chapter 232. Op.Att'yGen., #79-7-13.

Iowa's receipt of certain funds under the Federal Social Security Act is contingent on a state procedure for

> (t)he reporting of known and suspected instances of child abuse and neglect; (and) an investigation . . . initiated promptly to substantiate the accuracy of the report.

42 U.S.C. § 5103(b)(2)(b) and (c). The Iowa statutes which meet this portion of the federal requirement are found at Section 232.67 and following sections, The Code, 1979. Sections 232.67 through 232.77 require certain persons including health practitioners, social workers, certain employees of schools, day care facilities, mental health centers, and peace officers to report known or suspected instances of abuse of children. A scheme of investigation into the merits of the report along with court supervised intervention is provided for the reports of abuse received. The Iowa Department of Social Services is largely responsible for implementation of the law.

The law requires reports of harm or threatened harm occurring through nonaccidental physical injuries, sexual abuse, or neglect, as a result of the acts, omissions or failure of a person responsible for the care of the child. Section 232.68(2), The Code, 1979.

The law defines a "person responsible for the care of the child" to mean

> a) A parent, guardian, or foster parent.
>
> b) A relative or any other person with whom the child resides, without reference to the length of time or continuity of such residence.
>
> c) An employee or agent of any public or private facility providing care for a child, including an institution, group home, mental health center, residential treatment center, shelter care facility, detention center or child care facility.

Section 232.68(6), The Code, 1979.

The purpose of this opinion is to examine whether care provided by "babysitters" is to be investigated by the Department, if reported. Presumably, the Department investigates as abuse only these reports of non-accidental injury occurring through the acts or omissions of persons responsible for care. You have requested us to discuss the requirement to investigate reports of child abuse made against babysitters because of the numerous reports of this nature. We examine this question solely in the context of the responsibility of the Iowa Department of Social Services to investigate reports of child abuse.

For purposes of this opinion, we have adopted a rather broad definition of babysitter, which includes persons giving temporary care to children in a wide variety of physical locations, for varying amounts of time, with varying frequency, and most importantly, with varying degrees of authority having been delegated by the child's parent. Under some circumstances the babysitter may be standing in loco parentis, while in others only the most fleeting arrangements are made for care. It is the wide variety of circumstances in which children receive child care services which makes the question difficult to resolve.

Three factors are critical to the concept of person responsible for the care of the child in abuse investigations. Op.Att'yGen., #79-7-13. First, it appears that most authorities emphasize the occurrence of abuse within the family. Because of the child's emotional and psychological dependence on other family members, the child is vulnerable when abuse occurs and may be reluctant to accuse other family members of injuries. Unless the babysitter were an immediate family member, the child would be less hesitant to speak out against the perpetrator of the abuse, assuming that he is capable of doing so. However, many children are so young or so seriously injured that it is impossible for them to identify the nature of abuse or the perpetrator. Compelling reasons can be given for requiring the investigation of reports of injuries occurring outside the immediate family depending on the age of the child and the extent of injuries. A very young child left for several days with a babysitter may need state intervention to survive if abuse has occurred. In addition, the statute identifies certain persons as responsible persons who are not family members, for example, employees of public or private child care facilities. Section 232.68(6),

The Code 1979. Reports should be investigated about non-family abuse by babysitters even though most of the literature identifies the family as an important part of abuse.

Second, in a typical situation where the child spends some time with a babysitter, but a substantial portion of each day in the company of parents or others, the child has other persons to observe possible injuries and to intervene in changing child care arrangements if problems arise. This is an important distinction because a principal concern giving rise to the development of child abuse reporting statutes was the secret nature of many intra-family injuries to children. Depending on the length of the child care arrangement, the secret nature of the act giving rise to injury may or may not be important in determining whether a babysitter should be considered a responsible person.

Third, the residential or custodial aspect of care is important. The lack of a residential setting distinguished public school teachers from those persons responsible for the care of the child within the meaning of Section 232.68(6). Op.Att'yGen., supra. If the child is residing with the perpetrator, abuse is more difficult to detect and the psychological dependence of the child on those with whom he is living become an important factor. The duration of the child care arrangement and the amount of parental authority delegated are controlling.

As suggested by the American Bar Associations standards relating to abuse and neglect, we recommend that a practical analysis be made to determine whether the alleged perpetrator of the abuse is exercising control over the child in a manner essentially equivalent to a parent. Standards Relating to Abuse and Neglect, Juvenile Justice Standards Project, Institute of Judicial Administration, American Bar Association (1977) at 11. Our previous opinion adopts this functional standard and states:

> . . . (W)e think that the best view is that while it may not be necessary for a person to have legal custody over a child to be within the scope of "care or custody" style child abuse laws, functionally equivalent control over the child must be exercised by the de facto custodian.

Op.Att'yGen., supra.

In many child care situations provided by "babysitters", the person providing care to the child stands in the place of a parent for many hours of the day. If the child is subjected to non-accidential injury, sexual abuse, or neglect at the hand of the babysitter, the child may be powerless to extract himself from that situation without State intervention and it is appropriate that the Department of Social Services investigate reports in those situations where a young child spends a substantial amount of time in the care and control of the babysitter.

Of course, if a child is reported to be abused by the acts or omissions of a babysitter and the child's parents do not take action to correct the situation, a second reportable abuse may occur.

We rely on the broad contours of the Iowa reporting requirements in making this analysis. The Iowa Statute requires reports to be made of suspected cases of abuse by a wide variety of mandatory reporters and the criminal and civil penalties for failure to report balance the statute in favor of over-reporting rather than under-reporting. Sections 232.1 and 235A.12, The Code 1979. It is for this reason that we recommend that you investigate matters of abuse when a babysitter is the alleged person responsible for the care of the child.

We would anticipate that strong arguments to the contrary could be made on behalf of a mandatory reporter charged with failure to report injury through the acts or omissions of a babysitter if the age of the child, the amount and frequency of child care services provided, and a minimal delegation of authority from the parent were involved. The term babysitter is so ill-defined as to give rise to multiple analyses.

We would encourage you to select the area of reports alleging abuse by babysitters as an area of study so that further procedure or legislation on this point will be based on a strong factual analysis of the scope of the problem. We think that there are enough similarities between babysitters and other persons responsible for the care of the child that you would be wise to err on the side of caution and investigate those reports.

Sincerely yours,

Candy Morgan

Candy Morgan
Assistant Attorney General

CM/co

BEER AND LIQUOR: Class "C" beer permit Sunday sales privilege. §§ 17A.18(1), 123.3(4), 123.15, 123.29, 123.32, 123.134, The Code 1979. No authority exists for local authorities to deny the privilege of Sunday beer sales to the holder of a valid class "C" beer permit. No hearing need be held regarding the extension of the privilege of Sunday beer sales to the holder of a valid class "C" beer permit. (Norby to DeKoster, State Senator, 11/26/80) #80-11-11(L)

November 26, 1980

The Honorable Lucas J. DeKoster
State Senator
Hull, Iowa 51239

Dear Senator DeKoster:

You have requested an opinion of the Attorney General regarding the procedures involved in issuance of permits to sell beer. Specifically, you are interested in whether local authorities[1] have any power to deny the privilege of selling beer on Sunday to a person holding a valid class "C" beer permit[2]. As discussed below, there appears to be no ability for a local authority to deny the privilege of Sunday sales to a class "C" permittee, nor is it necessary for a local authority to even consider this question as an issue in their permit hearings.

Class "C" beer permits may be issued to "grocery stores" and "pharmacies," these establishments being defined in § 123.129, The Code 1979. A class "C" permit holder is allowed to sell beer only in original containers for consumption off of the permittee's premises. The authority

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[1] Local authorities are defined in § 123.3(4), The Code 1979, to include city councils and county boards of supervisors. Section 123.32 provides for approval of beer permits by local authorities.

[2] The analysis of this opinion also applies to persons who have made initial or renewal applications for class "C" beer permits and qualify for the permit.

for sale of beer on Sundays by class "C" permittees is contained in § 123.134(5), The Code 1979, which provides in relevant part, as follows:

> Any class "C" beer permittee may sell beer for consumption off the premises between the hours of noon and ten p.m. For the privilege of selling beer on Sunday the beer permit fees of the applicant shall be increased by twenty percent of the regular fees prescribed for the permit pursuant to this section and the privilege shall be noted on the beer permit.

Section 123.134(5) indicates that a holder of a valid class "C" permit need only pay an additional fee to obtain the Sunday sales privilege.[3] In contrast to Sunday sales by a class "B" beer permittee or class "A", "B" or "C" liquor control licensee, no factual question must be determined prior to issuance of the Sunday sales privilege to a class "C" beer permittee. See §§ 123.36(6), 123.134(5), The Code 1979. In addition, local authorities do not have power to prohibit Sunday sales through a local ordinance or regulation. § 123.39(6), The Code 1979. Accordingly, there appears to be no valid basis upon which a local authority can deny the Sunday sales privilege to an otherwise qualified class "C" permittee.

In light of the above discussion, it does not appear that any hearing is required to be held by local authorities regarding a request of a class "C" beer permittee for the privilege of Sunday sales. Section 123.32 provides that local authorities initially approve or disapprove applications for new or renewal of retail beer permits and class "A", "B", or "C" liquor control licenses. Neither 123.32 nor any other section of Ch. 123 appears to expressly provide for a hearing on the question of Sunday sales. Section 17A.18(1), The Code 1979, however, requires that the contested case proceedings of Ch. 17A be applied to licensing proceedings if required by constitution or statute. A request for the privilege of Sunday sales by a class "C" beer permittee

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[3] A class "C" beer permit, absent the Sunday sales privilege, authorizes sale of beer only during certain hours on Monday through Saturday. §§ 123.49(2)(b), 123.132, The Code 1979.

does not present a question requiring factual determination, and Ch. 123 does not require an evidentiary hearing on this question. Accordingly, it appears that an evidentiary hearing on the question of Sunday sales by a class "C" beer permittee is neither constitutionally nor statutorily required. Neither the local authorities nor the Department of Beer and Liquor Control should hold a hearing on this question.

As we understand the procedure currently being followed, applications for the Sunday sales privilege by class "C" beer permittees are received initially by local authorities and the twenty percent additional fee is tendered to the local authorities. This procedure does facilitate the fee collection process as local authorities retain all fees collected for retail beer permits. § 123.143, The Code 1979. The local authorities have no ability, however, to deny the privilege of Sunday sales to the holder of a valid class "C" beer permit who requests this privilege and tenders the additional fee. In such a situation the local authority should only forward the request for Sunday sales to the Iowa Beer and Liquor Control Department with verification that the additional fee has been tendered by the permittee. The Sunday sales privilege should then be noted upon the requestor's class "C" permit.

Sincerely,

Steven D. Norby

STEVEN G. NORBY
Assistant Attorney General

SGN:rcp

SCHOOLS: Transfers from the general fund to schoolhouse fund. §§ 278.1, 291.13, ch. 442, The Code 1979. A transfer of funds from the general fund to the schoolhouse fund may not be authorized, either by vote of the school board or electorate. (Norby to Patchett, State Representative, 11/26/80) #80-11-10(L)

November 26, 1980

Honorable John E. Patchett
State Representative
P. O. Box 190
North Liberty, Iowa 52317

Dear Representative Patchett:

You have requested an opinion of the Attorney General regarding the ability of the voters of a school district to approve a transfer of funds from a school's general fund to the schoolhouse fund for the purpose of constructing a hot lunch facility. In addition, you have requested an opinion regarding the ability in general to make any transfers from the general fund to the schoolhouse fund, whether through approval by a school board or by vote of the electorate. Specifically, you have asked the following:

1. May a school district's board of directors authorize a transfer of money from the general fund to the schoolhouse fund?

2. May a transfer be made from the general fund to the schoolhouse fund if approved by the voters of a school district? Additionally, may such a transfer specifically be made for the purpose of constructing a school lunch facility?

Your first question has been addressed in a previous Attorney General's opinion. Op. Atty. Gen. #10-20-79. This opinion concluded that a school board may not, by its own vote, authorize a transfer from the general fund to the schoolhouse fund. With this conclusion we still concur. Although the request for this earlier opinion did not require determination of the question of whether such a transfer may be made if approved by the electorate, the opinion suggests that such a procedure may be appropriate. As discussed below, however, we

do not believe that a transfer of funds from the general fund to the schoolhouse fund may be made even if approved by the electorate.

Section 278.1, The Code 1979, contains ten express powers which may be exercised by the voters at a regular election. The absence in § 278.1 of express authority for a general to schoolhouse fund transfer does appear to be significant as the listing of specific powers generally should be construed to exclude other powers. See Charles City Community School District v. Public Employee Relations Board, 275 N.W.2d 766, 772 (Iowa 1979). In the context of school funds, this principle appears to be particularly applicable, as illustrated by the following summary:

> Where school moneys are separated into distinct funds established for different purposes, they must be administered separately by the officers in charge thereof. A general school fund may be used for general school purposes, and the same is true of any unappropriated fund not raised for a specific purpose, but ordinarily funds raised or set aside for particular purposes cannot be diverted to other purposes without the sanction of the board or officers empowered so to do. This restriction on diversion of funds may apply even though the purpose for which the fund was established has been satisfied so that the moneys therein represent a surplus, and, in the absence of statutory authority therefor, the transfer of surplus money in one fund to another may be improper, but it has also been held that the surplus remaining in a special fund after all of the obligations thereof have been discharged may be used for general school purposes.

70 C.J.S. Schools, § 338. [Footnotes omitted.]

A review of the provisions of the Code pertaining to the general and schoolhouse funds shows that the funds are created from different sources and are expended for different purposes. These differences show that the two funds are not interchangeable. In other words, one type of transfer may affect a district's finances differently than the opposite type of transfer. These differences lend further support to the principle that the

ability to direct a transfer between funds should not be implied in the absence of express statutory authority.

Section 291.13, The Code 1979, provides for the creation of the schoolhouse and general funds, stating as follows:

> The money collected by a tax authorized by the electors or the proceeds of the sale of bonds authorized by law or the proceeds of a tax estimated and certified by the board for the purpose of paying interest and principal on lawful bonded indebtedness or for the purchase of sites as authorized by law, shall be called the schoolhouse fund, and, except when authorized by the electors, may be used only for the purpose for which originally authorized or certified. All other moneys received for any other purpose shall be called the general fund. The treasurer shall keep a separate account with each fund, paying no order that fails to state the fund upon which it is drawn and the specific use to which it is to be applied.

As the above statutory language indicates, the schoolhouse fund consists in large part of funds received from taxes or the sale of bonds authorized by election, §§ 278.1(7), 296.1, The Code 1979, and may be spent only for the purpose authorized in the election. § 275.32, The Code 1979. (Section 297.5, as amended by 1980 Session, 68th G.A., S. F. 108 does, however, grant school boards the authority to levy a tax for certain purposes without an election.) The voters may, however, transfer any surplus in the schoolhouse fund to the general fund. § 278.1(5).

In contrast to the schoolhouse fund, the general fund consists primarily of funds collected as property taxes and as state school foundation aid. See §§ 442.1, 442.2 and 442.5. The collection of these funds is provided for by statute. No vote of the electorate is necessary to establish the general fund. The general fund may be described as providing the normal operating expenses of a school district. § 442.5. In addition, a number of specific expenditures from the general fund are authorized by statute. See §§ 262.30, 272.5(4), 280.7, 280.10, 280.11, 282.20, 290.4, 298.22, The Code 1979.

Having reviewed the source and purpose of these two funds, we believe it is apparent that a transfer from the general fund to the schoolhouse fund differs significantly from a schoolhouse surplus to general fund transfer. Accordingly, we believe the

express authorization of the latter should not be interpreted to imply authorization of the former. Accordingly, we do not believe that the electors have the power to direct a transfer of funds from the general fund to the schoolhouse fund for any purpose. We do not, however, intend this opinion to address the question of whether school lunch facilities may be acquired or equipped by an expenditure from the general fund. Section 283A.9 does authorize four methods of financing the acquisition and equipping of school lunch facilities. We do not, however, wish to express a view as to whether this list of methods implies the exclusion of other methods of financing. Our conclusion here is limited to the discussion of the lack of ability to make a transfer from the general fund to the schoolhouse fund even if authorized by the electorate.

Sincerely,

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

SHERIFF - A spouse or relative of a sheriff may be compensated on a fixed fee per-meal basis for feeding prisoners. Constitution of Iowa, § 39A, §§ 338.1, 338.2, The Code 1979. (Williams to Barry, Assistant Muscatine County, 11/18/80 # 80-11-7(L)

November 18, 1980

Edmund D. Barry
Assistant Muscatine County Attorney
112 East Third Street
West Liberty, Iowa 52776

Dear Mr. Barry:

You have requested a formal opinion of the Attorney General relating to the following question:

> May a county board of supervisors contract with a spouse or relative of the county sheriff to provide meals for prisoners at the county jail?

The following sections of the 1979 Code of Iowa are pertinent:

> Section 338.1 PRISONERS - DUTY OF SHERIFF. The duty of the sheriff to board and care for prisoners in his custody in the county jail shall be performed by the sheriff without compensation, reimbursement or allowance therefor except his salary as fixed by law. However, the board may reimburse the sheriff for the actual cost of board furnished prisoners directly by the sheriff, upon presentation of sufficient documentation showing the actual cost and may compensate the spouse or a relative of the sheriff for services rendered in aiding the sheriff in carrying out the provisions of this section.

(Emphasis added.)

> Section 338.2 PURCHASE OF SUPPLIES. The board of supervisors may, in such manner and under such regulations as it may deem fit, furnish to the sheriff at the county jail and at the expense of the county all supplies, wholesome provisions, and utensils, including gas, fuel, electricity and water, or may contract for the goods and services, which in its judgment are necessary to enable the sheriff to discharge his duty.

This office has answered a similar question concerning the provision of meals by the sheriff himself in a recent opinion. (Williams to Johnson, Auditor of State, 9/26/80; Opinion #80-9-15.) The provision of meals on a flat per-meal basis by the spouse of a sheriff is not subject to the same restrictions that are imposed upon the sheriff for several reasons:

The sheriff, basically, is prohibited from participating in the preparation of meals for additional fees beyond his salary because he may not be compensated by the county for acts relating to his official duties beyond his salary and allowance. A spouse or other relative of the sheriff, of course, is not subject to this limitation.

Section 338.1 allows the board to reimburse the sheriff for the actual cost of board furnished directly by the sheriff; it does not address the topic of compensating a spouse or other relative for the actual cost of board which might be furnished by that individual and not purchased by the sheriff.

This interpretation is also supported by the Counties Home Rule Amendment, Article III, § 39A, Constitution of the State of Iowa. In another recent opinion (Miller and Hagan to Representatives Danker, Binneboese, Hullinger, Hansen, 4-6-79, #79-4-7) the matter of conflicts between State Legislation and the Constitutional provision for County Home Rule was carefully analyzed and it is clear that a county's powers should be broadly construed and subject to liberal interpretation absent express statutory conflict. If §§ 338.1 and 338.2 are to be considered ambiguous in their seemingly conflicting provisions, that conflict should be resolved by construing these sections to provide the county with greater power to control its own local affairs.

Considering the Counties Home Rule Amendment as well as § 338.2 which permits the board of supervisors to furnish the sheriff with wholesome provisions in any manner it deems fit, it is clear that the board of supervisors has the power to enter into a contract with a spouse or relative of a sheriff to provide both provisions and labor for the preparation of provisions necessary to serve meals to inmates.

Sincerely,

Richard A Williams

RICHARD A. WILLIAMS
Assistant Attorney General

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PUBLIC EMPLOYEES: Leave of Absence for Military Duty. Ch. 29A, The Code 1979; §§Y 29A.1, 29A.9, 29A.28, 29A.43, 1980 Session, 68th G.A., H. F. 2518. A non-temporary employee of the state or its political subdivisions, including municipalities who is a member of the National Guard, organized reserves, or any component part of the military, naval or air forces or nurse corps of Iowa or the United States, who is ordered by the proper authority to military duty or training which can be classified as "active state service" or "federal service", as those terms are defined in §§ 29A.1(5) and (6), is entitled to a military leave of absence without loss of pay for the first 30 days of such service in any year. When a state employee receives a full day's pay from federal sources for duty in the National Guard, the state employee is required to count the hours lost from work as a full day of leave for military duty, or may elect to expend eight hours of compensatory time which the state employee may have accrued. The first 30 days of leave in a year which a state employee may elect to take are to be received without loss of regular pay. (Hyde to Keating, Director, Iowa Merit Employment Department, 11/5/80) #80-11-5(L)

W. L. Keating, Director
Iowa Merit Employment Department
L O C A L

November 5, 1980

Dear Mr. Keating:

We have received two letters from you requesting opinions from this office concerning weekend military duty of state employees. Your first letter indicates past conflicting interpretations of § 29A.28, The Code 1979, which authorizes military leave of absence for civil employees. You have questioned the continuing validity of an opinion from this office issued August 10, 1978, 1978 Op. Atty. Gen. 608, which concluded that National Guard weekend training, competitions or other training sessions attended by a public employee which fall within the definition of "active state service" or "federal service" and are ordered by the proper authority may be counted within the 30 days leave of absence without loss of pay authorized by § 29A.28, The Code 1979.

Your second letter refers to major revisions to ch. 29A, The Code 1979, the Military Code of Iowa, recently enacted by the Legislature as 1980 Session, 68th G.A., H. F. 2518, which are set forth in part below.

Section 29A.28, The Code 1979, the primary provision on which your inquiry focuses, was not amended in 1980, and provides:

> All officers and employees of the state, or a subdivision thereof, or a municipality other than employees employed temporarily for six months or less, who are members of the national guard, organized reserves or any component part of the military, naval, or air forces or nurse corps of this state or nation, or who are or may be otherwise inducted into the military service of this state or of the United States, shall, when

> ordered by proper authority to active state or federal service, be entitled to a leave of absence from such civil employment for the period of such active state or federal service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence. The proper appointing authority may make a temporary appointment to fill any vacancy created by such leave of absence.

The terms "active state service" and "federal service", as used in § 29A.28, The Code 1979, are terms of art defined in § 29A.1(5) and (6), The Code 1979, amended by 1980 Session, 68th G.A., H. F. 2518, § 2. Prior to amendment, "active state service" and "federal service" were defined as:

> 'Active state service' shall mean service on behalf of the state in case of public disaster, riot, tumult, breach of the peace, resistance of process, or whenever any of the foregoing is threatened, whenever called upon in aid of civil authorities, or under martial law, or at encampments ordered by state authority, or upon any other state duty requiring the entire time of the organization or person. Active state service does not include and shall not mean training or duty required or authorized under Title 32, United States Code, sections 502 through 505, or any federal regulations duly promulgated thereunder; nor shall such service mean any other training or duty required or authorized by federal laws and regulations.
>
> 'Federal service' shall mean service exclusively under federal laws and regulations.

H. F. 2518, § 2 struck these definitions and inserted in lieu thereof the following:

> 'Active state service' means service on behalf of the state when public disaster, riot, tumult, breach of the peace or resistance of process occurs or threatens to occur, when called upon in aid of civil authorities or when under martial law or at encampments ordered by state authority. Active state service also includes serving as adjutant general, deputy adjutant general, state quartermaster and administrative orders officer, but does not include training or duty required or authorized under U.S.C.

> §§ 502-505, [sic] or any other training or duty required or authorized by federal laws and regulations.
>
> 'Federal service' means duty authorized and performed under the provisions of 10 U.S.C. or 32 U.S.C., §§ 502-505 which includes unit training assemblies commonly known as 'drills', annual training, rifle marksmanship, full-time training for school purposes and recruiting.

H. F. 2518, § 5 also added a new unnumbered paragraph providing: "A state employee shall take either a full day's leave or eight hours of compensatory time on any day in which the state employee receives a full day's pay from federal sources for national guard duty." to § 29A.9, The Code 1979. That section now reads in full:

> Field training. The governor may order the national guard into camp for field training for such period or periods as he may direct. He may, in his discretion, order such organizations or personnel of the national guard, or persons who have retired from the national guard, both army and air, as he may deem proper, to active state service, or duty, or to assemble for purposes of drill, instruction, parade, ceremonies, guard and escort duty, and schools of instruction, and prescribe all regulations and requirements therefor.
>
> The governor shall also provide for the participation of the national guard, or any portion thereof, in field training at such times and places as may be designated by the secretary of defense.
>
> A state employee shall take either a full day's leave or eight hours of compensatory time on any day in which the state employee receives a full day's pay from federal sources for national guard duty.
>
> A member of the national guard shall be considered to be on duty when he or she is called to testify about an incident which the member observed or was involved in while that member was on duty.

Finally, H. F. 2518, § 2 struck the definition of "on duty" contained in § 29A.1(7), The Code 1979, and substituted the following:

> 'On duty' means unit training assemblies, all other training, and service which may be required under state or federal law, regulations, or orders, and the necessary travel of an officer or enlisted person to the place of performance and return home after performance of that duty, but does not include federal service under 10 U.S.C.

In light of these amendments to ch. 29A, The Code 1979, you have indicated the following areas of concern:

1. H. F. 2518, § 5 specifically amends only § 29A.9, The Code 1979. This section refers to Field Training of the National Guard. How does this affect state employees under § 29A.28, The Code 1979?

2. The unnumbered paragraph in H. F. 2518, § 5 contains the words "shall take". By construction, § 4.1(35)(a), The Code 1979, "the word 'shall' imposes a duty" and seemingly the state employee, who is a member of the Iowa National Guard, must take a "full day's leave or compensatory time" under stated circumstances. Do the words "full day's pay" have a specific meaning of vacation leave or can this also mean leave without pay for the day at the employee's choice? Or, if the meaning is vacation leave or compensatory leave only and no such leave is available to the employee, does the employee then have to take leave without pay, contra to § 29A.28, The Code 1979?

3. Does the language of new unnumbered paragraph, § 5, H. F. 2518 and § 29A.28, The Code 1979, stand separately and apply only to specific circumstances; or does the new unnumbered paragraph supersede § 29A.28, The Code 1979, when there is a conflict?

It has been the consistent opinion of this office that § 29A.28, The Code 1979, (or its predecessors) entitles non-temporary officers or employees of the state, or its political subdivisions, including municipalities, to a leave of absence from employment without loss of status or efficiency rating, and without any loss of pay for the first 30 days of leave in any calendar year, when

fulfilling active military duty obligations. [1] See 1978 Op. Atty. 618; 1978 Op. Atty. Gen. 68; 1974 Op. Atty. Gen. 31; 1974 Op. Atty. Gen. 234; 1974 Op. Atty. Gen. 404; 1968 Op. Atty. Gen. 895; 1956 Op. Atty. Gen. 179; 1956 Op. Atty. Gen. 166; 1944 Op. Atty. Gen. 134; 1942 Op. Atty. Gen. 136; 1942 Op. Atty. Gen. 130; 1942 Op. Atty. Gen. 41; 1940 Op. Atty. Gen. 587; 1940 Op. Atty. Gen. 245; 1936 Op. Atty. Gen. 619.

The 1936 opinion, the first to construe the leave without loss of pay provision, noted:

> The legislative background for Section 467-f25 [The Code 1935, from which § 29A.28, The Code 1979, derives] providing that public employees when called into active service as members of the National Guard shall be entitled to leave of absence without loss of pay during the first thirty days,

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[1] A similar provision directed to private employers is found in § 29A.43, The Code 1979, which provides in pertinent part:

> Any member of the national guard or organized reserves of the armed forces of the United States ordered to temporary active duty for the purpose of military training or ordered on active state service, shall be entitled to a leave of absence during the period of such duty or service from the member's private employment, other than employment of a temporary nature, and upon completion of such duty or service the employer shall restore such person to the position held prior to such leave of absence, or employ such person in a similar position, provided, however, that such person shall give evidence to the employer of satisfactory completion of such training or duty, and further provided that such person is still qualified to perform the duties of such position. Such period of absence shall be construed as an absence with leave, and shall in no way affect the employee's rights to vacation, sick leave, bonus, or other employment benefits relating to the employee's particular employment. Any person violating any of the provisions of this section shall be guilty of a simple misdemeanor.

See 1968 Op. Atty. Gen. 715.

> is that the members of the National Guard are state troops, and that since the state has the benefit of their services, it is a form of service to the state, and that such service shall be encouraged and not penalized or discouraged. The legislative intent seems to be that no public employee shall be discouraged from joining the National Guard because of any loss of pay, status or efficiency rating that might ensue by absence caused thereby, and that during such absences everything shall continue so far as his regular employment is concerned, as though not interrupted by such absences. All statutes are to be interpreted in the light of legislative intent, and with a view of not defeating such legislative intent by a narrow, grudging and hampering construction.

1936 Op. Atty. Gen. at 620. See 1940 Op. Atty. Gen. 245 ("It is observed that the evident purpose of the legislature was to recognize the patriotic service of state and municipal employees in the national guard by granting to them certain privileges during their first thirty (30) days of leave because of national guard service.");see also Gibbons v. City of Sioux City, 242 Iowa 160, 164, 45 N.W.2d 842, 844 (1951) ("The purpose of the . . . statute . . . is to protect the employee who enters the service, and should be liberally construed.").

Pursuant to this guideline of liberal construction, prior opinions have determined that the 30 days leave is to be available annually. 1940 Op. Atty. Gen. 245. It is not necessary for an employee to ask for or be granted leave for military service for the provisions of § 29A.28 to become effective. 1944 Op. Atty. Gen. 28; 1942 Op. Atty. Gen. 41. An employee is not required to take vacation during attendance at military field training, 1936 Op. Atty. Gen. 619; leave with pay is granted to attend field training, 1940 Op. Atty. Gen. 245. Employees are entitled to leave with pay even when military service was actively sought by and may be of benefit to the employee. 1974 Op. Atty. Gen. 234. Thus, to receive 30 days annual leave with pay, a permanent public employee need only be ordered by the proper authority, to duty which falls within the definition of "active state service" or "federal service". This is also the conclusion reached by the 1978 opinion you question, and which we believe correctly and consistently interprets § 29A.28:

> The key to the applicability of § 29A.28 is the phrase ' when ordered by proper authority'. Although we have not so stated, we have presumed and accepted that weekend training in the National Guard has been ordered by the proper

> authority and is considered either active state or federal service. [See 1974 Op. Atty. Gen. 31] . . . [W]e are of the opinion that if weekend training, competitions, or other training sessions fall within §§ 29A.1(5) or (6) [defining 'active state service' and 'federal service'] and are ordered by the proper authority, § 29A.28 is applicable.

1978 Op. Atty. Gen. 608, 609.

In fact, the recent amendments to ch. 29 include new and more extensive definitions of "active state service" and "federal service". The majority of training sessions which must be attended by a member of the National Guard are required by 32 U.S.C. §§ 502-505 and the regulations promulgated thereunder. Active duty and training requirements for members of the reserve forces are set forth throughout Title 10 of the United States Code. "Active state service" which would entitle a public employee to leave with pay is defined in § 29A.1(5), The Code 1979, as amended, to specifically exclude such duty or training. "Active state service" . . . does not include training or duty required or authorized under U.S.C. §§ 502-505 [sic] or any other training or duty required or authorized by federal laws and regulations." The definition of "federal service", however, now specifically includes "duty authorized and performed under the provision of 10 U.S.C. or 32 U.S.C. §§ 502-505 which includes unit training assemblies commonly known as 'drills', annual training, rifle marksmanship, full-time training for school purposes and recruiting", and a public employee is entitled to 30 days leave of absence with pay for either active state service or federal service ordered by the proper authority.

Accordingly, pursuant to § 29A.28, The Code 1979, an employee of the state, or its political subdivisions, including municipalities, is entitled to 30 days annual leave of absence without loss of pay, to fulfill military duty or training obligations which may be considered "active state service" or "federal service", as those terms are defined by §§ 29A.1(5) and (6), The Code 1979. While this may lead to situations where a public employee is compensated twice, by his or her employer, and by military authorities, for one day's service, it must be assumed that this was within the contemplation of the Legislature in enacting § 29A.28. Ordinarily, military training requirements, such as drills and rifle marksmanship, may be met through attendance during evening hours or weekends, and most employees may require paid leave only during annual summer encampments. When a public employee works shifts that require duty during evening or weekend hours, the leave provisions of § 29A.28, The Code 1979, may take on added significance. The consistent interpretation which best effectuates the legislative intent to promote military service while protecting employees who offer such service, requires that employees be entitled to 30 days paid leave, regardless of when that leave is taken. Thus, 1978 Op. Atty. Gen.

608 specifically disapproved a municipality's plan to allow police department employees leave for summer training encampments, while not permitting leave for weekend service which conflicts with weekend patrol shifts. As long as a public employee is ordered by the proper authority to duty or training which can be classified as "active state service" or "federal service", that employee is entitled to leave without loss of pay from his or her employer for the first 30 days of such service in a year. The possibility of abuse by an employer has been negated, since any attempt to restrict or limit the leave made available by § 29A.28, The Code 1979, may result in discrimination rendered impermissible by § 29A.43, The Code 1979, which provides in part:

> No person, firm, or corporation, shall discriminate against any officer or enlisted person of the national guard or organized reserves of the armed forces of the United States because of his membership there. No employer, or agent of any employer, shall discharge any person from employment because of being an officer or enlisted person of the military forces of the state, or hinder or prevent the officer or elected person from performing any military service such person may be called upon to perform by proper authority . . . Any person violating any of the provisions of this section shall be guilty of a simple misdemeanor.

A public employer, i.e., the state, a political subdivision of the state, or a municipality, is not completely prohibited from ameliorating the effects of the loss of services of an employee who takes leave with pay to fulfill military obligations. Section 29A.28, The Code 1979, provides: "The proper appointing authority may make a temporary appointment to fill any vacancy created by such leave of absence." Clearly, the employer is not required to leave a position vacant for any length of time that an employee may be on military leave. The replacement appointment is only temporary, however, and the permanent employee is entitled to return to employment at the conclusion of the leave without loss of status or efficiency rating, and without loss of pay for the first 30 days. While it is unlikely that a public employer would appoint a temporary replacement for an employee on leave for one weekend or even two weeks in the summer while that employee is attending an annual training encampment, the employer is entitled to "schedule around" the military duty or training obligations of its employees. 1974 Op. Atty. Gen. 31 concluded that it would not be discriminatory for a public employer to require that an employee furnish it with a schedule of military training meetings

which the employee plans to attend, so that the employer may determine the most efficient schedule of duty, i.e., by attempting to schedule weekend or evening shift work by an employee with military obligations to take place when no military duty or training is scheduled, as long as there is no diminution in compensation to the employee. 1974 Op. Atty. Gen. at 33. If such a schedule is not possible, however, the employee remains entitled to military leave, the first 30 days of which are to be compensated.

The possibility of employee abuse of military leave provisions may have led to the insertion of the new unnumbered paragraph in § 29A.9, The Code 1979, which provides:

> A state employee shall take either a full day's leave or eight hours compensatory time on any day in which the state employee receives a full day's pay from federal sources for national guard duty.

1980 Session, 68th G.A., H. F. 2518, § 5. Initially, it must be noted that this new paragraph refers only to "state employees" who receive pay for "national guard duty"[2]; by its own terms it has no application to employees of a political subdivision of the state, including a municipality, or to employees who are members of the organized reserves or any component part of the military, naval, or air forces or nurse corps of the state or nation. Cf. § 29A.28, The Code 1979. Further, the new unnumbered paragraph of § 29A.9, The Code 1979, requires that an employee take "either a full day's leave or eight hours compensatory time" when receiving a full day's pay from federal sources. It does not specify that the leave taken be with or without regular compensation or pay. A "leave" generally connotes permission to be away from a particular place for a stated time with the supposition of returning, Gibbons, 242 Iowa at 165; some further provision must indicate whether the employee is to receive his or her regular compensation while away and therefore not performing normal duties. Similarly, "compensatory time" is generally thought of as hours an employee is entitled to be absent from normal work hours without loss of regular pay, as compensation for work performed during "overtime" hours for which the employee receives no compensation.

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[2] "National guard" is defined in § 29A.1(2), The Code 1979, as amended by 1980 Session, 68th G.A., H. F. 2518, § 2, as:
" 'National Guard' means the Iowa units, detachments and organizations of the army national guard of the United States and the air national guard of the United States and the air national guard of the United States as those forces are defined in the National Defense Act and its amendments, the Iowa army national guard and the Iowa air national guard."

While your questions indicate that the language of the new unnumbered paragraph of § 29A.9 may be in conflict with the provisions of § 29A.28, we do not believe that this is the case. "When statutes relate to the same subject matter or to closely allied subjects, they are said to be pari materia and must be construed, considered, and examined in light of their common purpose and intent so as to produce a harmonious system or body of legislation." Rush v. Sioux City, 240 N.W.2d 431, 445 (Iowa 1976). Consequently, § 29A.9, including its new language, must be construed, considered, and examined in light of other statutes in ch. 29A, particularly §§ 29A.28 and 29A.43.

Section 29A.28 sets out the clear and long-standing policy of allowing public employees thirty days of leave without loss of pay each year while fulfilling military duty or training obligations, i.e., when ordered by the proper authority to duty or training which falls within the definition of "active state service" or "federal service", including unit training assemblies commonly known as drills, annual training, rifle marksmanship, full-time training for school purposes, and even recruiting. Section 29A.9, as amended, now requires that when an employee receives a "full day's pay from federal sources" for duty in the national guard, whether or not the military service consumes a full eight-hour work day, the employee must count the hours lost from state employment as a full day of leave for purposes of determining the number of days an employee is on military leave. The first 30 of these leave days in any one year are to be received by the employee without loss of pay.[3] Alternatively, an employee may elect to expend eight hours of compensatory time which the employee may have accrued when absent from work to fulfill military obligations. Cf. 1936 Op. Atty. Gen. 619 (an employee is not required to take vacation during attendance at field training.) While § 29A.9 is couched in mandatory terms ("A state employee shall take . . ."), the choice of alternatives appears to be left to the employee. It should not be considered discriminatory for a public employer to require employees entitled to the benefits of 30 days paid military leave to avail themselves of such benefits in a consistent and equitable manner. See § 29A.43, The Code 1979; 1974 Op. Atty. Gen. 31.

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[3] Construed literally, the new language of § 29A.9 could require that a state employee who works an eight-hour daytime shift for his or her public employer and attends an evening national guard training session for which the employee receives "a full day's pay" from federal sources, take leave or compensatory time for the day the employee was actually available to work. It is extremely doubtful that the Legislature intended this absurd result. It is more likely that the Legislature intended that only employees who actually miss work or are unavailable for work during their required shifts due to military obligations be required to take leave or compensatory time.

We believe the new unnumbered paragraph of § 29A.9, when viewed in this light, is entirely consistent with the provisions of § 29A.28, and may have little actual impact on the military leave practices of public employers. It requires only that state employees who are unavailable for work during regular employment hours because they are fulfilling military obligations for which they receive a full day's pay (which may require military duty for less than 8 hours), count the absence from work as a full day of military leave. In that way, a state employee will be paid for no more than 30 days leave for military duty, as authorized by § 29A.28, The Code 1979.

In conclusion, it is our opinion that 1978 Op. Atty. Gen. 608 expresses a valid interpretation of the military leave provisions of § 29A.28, The Code 1979, and is consistent with numerous prior opinions from this office. A non-temporary employee of the state or its political subdivisions, including municipalities, who is a member of the National Guard, organized reserves, or any component part of the military, naval or air forces or nurse corp of Iowa or the United States, who is ordered by the proper authority to military duty or training which can be classified as "active state service" or "federal service", as those terms are defined in §§ 29A.1(5) and (6), The Code 1979, is entitled to a military leave of absence without loss of pay for the first 30 days of such service in any year. When a state employee receives a full day's pay from federal sources for duty in the National Guard, the state employee is required to count the hours lost from work, whether or not they total an entire work day, as a full day of leave for military duty, or may elect to expend eight hours of compensatory time which the state employee may have accrued. The first 30 days of leave in a year which a state employee may elect to take are to be received without loss of regular pay.

Very truly yours,

Alice J. Hyde

ALICE J. HYDE
Assistant Attorney General

AJH:sh

CIVIL RIGHTS/CONFIDENTIALITY/ADMINISTRATIVE RELEASE. §§ 601A.15 (4), 601A.16, The Code 1979. The §601A.15(4) duty of confidentiality imposed on the Iowa Civil Rights Commission is not a privilege which bars the admission of evidence contained in Commission case files in district court actions authorized by §601A.16, The Code 1979. Upon the commencement of a §601A.16 action, the parties may obtain access to information in the relevant Commission case file by employing discovery techniques allowed under the Iowa Rules of Civil Procedure. (Nichols to Reis, Executive Director, Iowa Civil Rights Commission, 11/5/80) #80-11-4(L)

November 5, 1980

Ms. Artis Van Roekel Reis
Executive Director
Iowa Civil Rights Commission
507 Tenth Street
Des Moines, Iowa 50319

Dear Ms. Reis:

You have submitted a request to this office for our opinion regarding whether §601A.15(4), The Code 1979 prohibits the parties in a civil action authorized by §601A.16, The Code 1979 from obtaining any information contained in the relevant Iowa Civil Rights Commission's (hereinafter "Commission") file. It is our opinion that §601A.15(4), The Code 1979 does not bar the parties to litigation pursuant to §601A.16, The Code 1979 from discovering information contained in the relevant Commission case file.

I. The Duty of Confidentiality

Section 601A.15(4), The Code 1979, states that:

> The members of the commission and its staff shall not disclose the filing of a complaint, the information gathered during the investigation, or the endeavors to eliminate such discriminatory or unfair practices by conference, conciliation, and persuasion, unless such disclosure is made in connection with the conduct of such investigation.

The above-quoted confidentiality provision has been in effect since the Commission's inception in 1965. The Commission

cannot divulge the filing of a complaint or the contents of a case file to anyone unless one of the following conditions in rule 240 IAC §1.16 exists:

> The disclosure of information whether a charge has been filed or not, or revealing the contents of any file is prohibited except in the following circumstances:
>
> 1.16(1) If a final decision per subrule 1.1(6) has been reached, [i.e. "no probable cause", "satisfactorily adjusted", "no jurisdiction," or "administratively closed"] a party or a party's attorney may, upon showing that a petition appealing the commission action has been filed, have access to the commission's case file on that complaint.
>
> 1.16(2) If a case has been approved for public hearing and the letter informing parties of this fact has been mailed, any party or party's attorney may have access to file information through prehearing discovery measures provided in subrule 1.6(9).
>
> 1.16(3) If a decision rendered by the commission in a contested case has been appealed, any party or party's attorney may, upon showing that the decision has been appealed, have access to the commission's case file on that complaint.
>
> The fact that copies of documents related to or gathered during an investigation of a complaint are introduced as evidence during the course of a contested case proceeding does not affect the confidential status of all other documents within the file which are not introduced as evidence.

Despite the apparent breadth of its language, the duty of confidentiality expressed in §601A.15(4), The Code 1979 is not absolute. Section 601A.15(7), The Code 1979 requires that: "The hearing shall be conducted in accordance with the provisions of chapter 17A for contested cases. . .". It is therefore necessary to construe §601A.15(4), The Code 1979 in pari materia with the Iowa Administrative Procedure Act.

Section 17A.13(1), The Code 1979 subordinates the Commission's duty of confidentiality to the need of the parties in a contested case to pursue discovery:

> Discovery procedures applicable to civil actions shall be available to all parties in contested cases before an agency. . . .

The Commission's rule 240 IAC §1.6(9) recognizes that, upon commencement of a contested case, the duty of confidentiality yields to pre-hearing discovery by the parties:

> Subsequent to notification to a respondent of the approval of a hearing upon the merits of a complaint, legal counsel, staff and respondent may employ prehearing discovery measures set forth in the Iowa Administrative Procedure Act, in addition to oral interviews and informal requests for documents and other material and information. . . .

Rule 240 IAC §1.16(2), quoted supra at p.2, leaves no doubt that the parties to a contested case are entitled to have access to the relevant case file.

The Commission's duty of confidentiality also yields to the parties' statutory right to offer the information discovered at the contested case hearing: "Evidence obtained in such discovery may be used in the hearing before the agency if that evidence would otherwise be admissible in the agency hearing. . .". §17A.13(1), The Code 1979. The admissibility of

evidence in contested case hearings is governed by §17A.14(1), The Code 1979:

> Irrelevant, immaterial, or unduly repetitious evidence should be excluded. A finding shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial. Agencies shall give effect to the rules of privilege recognized by law. . . .

The Commission, by rule, excludes the following evidence from contested case hearings:

> No testimony or evidence shall be offered or received at any hearing concerning offers or counter-offers of adjustment during efforts to conciliate an alleged unlawful discriminatory practice, except that evidence presented by respondent of such offers or counter-offers shall constitute a waiver of the provisions of this subsection. 240 IAC §1.9(10).

Apart from the rule quoted supra, all relevant and material evidence discovered by the parties in the Commission's case file is admissible at the contested case hearing. §17A.14(1), The Code 1979. In fact, §601A.15(7), The Code 1979 permits the Commission's "investigating official" to testify as a witness at the hearing.

It is therefore clear that §601A.15(4), The Code 1979 was not intended to create a "rule of privilege" within the meaning of §17A.14(1), The Code 1979. The concept of an evidentiary privilege evolved at common law to protect confidential communications between (1) attorney and client and (2) husband and wife. See 81 Am.Jur.2d, Witnesses §141. Professor Wigmore, in his classic treatise on evidence, emphasizes that an expectation that the confidence will not be disclosed is essential to

the privilege doctrine. 8 Wigmore Evidence §2285 (1961), cited with approval in State v. Hartman, 281 N.W.2d 639 (Ia. App. 1979). Obviously, the fact that the Commission's investigator is expressly authorized to testify at the hearing destroys any expectation that communications made to him or her will not be disclosed.

Rather than creating a privilege, the §601A.15(4) duty of confidentiality provides an exception to the Chapter 68A provisions regarding examination of public records. Section 68A.2, The Code 1979 announces that:

> Every citizen of Iowa shall have the right to examine all public records and to copy such records, and the news media may publish such records, unless some other provision of the Code expressly. . .requires such records to be kept secret or confidential. . . . [Emphasis added.]

The Commission's duty to preserve the confidentiality of its files is designed to protect the complainant and respondent from adverse publicity. In addition, the parties can attempt to resolve their dispute through conciliation with greater efficacy knowing that their negotiations are shielded from public disclosure. These policy reasons in favor of confidentiality disappear once the complaint becomes a contested case. At that juncture, conciliation has proven to be unworkable. §§ 601A.15 (3)(d) and 601A.15(5), The Code 1979. Concomitantly, the Commission's need to foster a climate conducive to conciliation no longer exists.

The remaining question is whether the Commission's duty of confidentiality precludes parties to a §601A.16, The Code 1979 district court action from discovering information in the Commission's case file.[1]

II. The Administrative Release

The Legislature enacted §601A.16, The Code 1979 in 1978 Session, 67th G.A., ch.1179, §1:

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1. Unlike appeals of agency action under chapter 17A, the Commission is not a party to a district court action commenced under § 601A.16, The Code, 1979. The latter provision contemplates an action brought by the complainant against the respondent in which "the commission shall be barred from further action on that complaint." § 601A.16(3).

601A.16 One hundred twenty-day administrative release.

1. A person claiming to be aggrieved by an unfair or discriminatory practice must initially seek an administrative relief by filing a complaint with the commission in accordance with section 601A.15. A complainant after the proper filing of a complaint with the commission, may subsequently commence an action for relief in the district court if all of the following conditions have been satisfied:

a. The complainant has timely filed the complaint with the commission as provided in section 601A.15, subsection 12; and

b. The complaint has been on file with the commission for at least one hundred twenty days and the commission has issued a release to the complainant pursuant to subsection 2 of this section.

2. Upon a request by the complainant, and after the expiration of one hundred twenty days from the timely filing of a complaint with the commission, the commission shall issue to the complainant a release stating that the complainant has a right to commence an action in the district court. A release under this subsection shall not be issued if a finding of no probable cause has been made on the complaint by the hearing officer charged with that duty under section 601A.15, subsection 3, or a conciliation agreement has been executed under section 601A.15, or the commission has served notice of hearing upon the respondent pursuant to section 601A.15, subsection 5.

> 3. An action authorized under this section is barred unless commenced within ninety days after issuance by the commission of a release under subsection 2 of this section or within one year after the filing of the complaint, whichever occurs first. If a complainant obtains a release from the commission under subsection 2 of this section, the commission shall be barred from further action on that complaint.
>
> 4. Venue for an action under this section shall be in the county in which the respondent resides or has its principal place of business, or in the county in which the alleged unfair or discriminatory practice occurred.
>
> 5. The district court may grant any relief in an action under this section which is authorized by section 601A.15, subsection 8 to be issued by the commission. The district court may also award the respondent reasonable attorney's fees and court costs when the court finds that the complainant's action was frivilous (sic).
>
> 6. It is the legislative intent of this chapter that every complaint be at least preliminarily screened during the first one hundred twenty days. [67GA, ch.1179, §1].

If a complainant meets the conditions specified in §601A.16(2), The Code 1979, he or she is entitled to an administrative release from the Commission. This gives the complainant "a right to commence an action in the district court," id., which must be "commenced within ninety days after issuance [of the] release. . .or within one year after the filing of the complaint,

whichever occurs first. . .". §601A.16(3), The Code 1979. Upon issuing the administrative release, "the commission shall be barred from further action on that complaint." Id.; see also 240 IAC §1.5(4)(d).

The district court has original jurisdiction over the parties to a §601A.16 action. Section 601A.16(5), The Code 1979 expressly authorizes the court to grant any relief which the Commission would have been empowered to grant under §601A.15(8), The Code 1979. The court is also authorized to "award the respondent reasonable attorney's fees and court costs" if the complainant files a frivolous action. §601A.16(5), The Code 1979. Thus, a §601A.16 proceeding does not place the district court in the role of an appellate tribunal reviewing "final agency action" under §17A.19, The Code 1979.

It should be noted that there will be a hiatus between the time that a complainant obtains an administrative release and the commencement of a district court action authorized by §601A.16. During this hiatus there is no statutory provision or Commission rule which entitles the complainant to gain access to his or her Commission case file.

If the complainant commences an action in district court after obtaining an administrative release, the Iowa Rules of Civil Procedure apply to that action. Iowa R. Civ. P. 1. The action is commenced when the complainant files a petition with the district court. Iowa R. Civ. P. 48.

Upon the commencement of a district court action, the parties may utilize the discovery methods enumerated in Iowa R. Civ. P. 121. The scope of discovery extends to "any matter, not privileged, which is relevant to the subject matter involved in the pending action. . .". Iowa R. Civ. P. 122(a). The applicable Commission case file is clearly relevant to a district court action brought pursuant to §601A.16, The Code 1979. Furthermore, §601A.15(4), The Code 1979 does not constitute a privilege which limits the scope of discovery under Iowa R. Civ. P. 122(a). See Division I, supra.

Iowa R. Civ. P. 129(a) entitles any party to an action to serve on any other party a request to produce documents which fall within the scope of Iowa R. Civ. P. 122(a). Iowa R. Civ. P. 130 governs the timing and prerequisites of such a request:

> The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the original notice on that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. . . .

Although the Commission is not a party to a district court action brought under §601A.16, The Code 1979, it is nevertheless subject to a request to produce documents:

> Rules 129 and 130 do not preclude an independent action against a person not a party for production of documents. . . . Iowa R. Civ. P. 131.

Of course, if the time, place, manner, or extent of the request for production of documents served on the Commission by a party to §601A.16 litigation is unreasonable, the Commission may move that the district court enter a protective order pursuant to Iowa R. Civ. P. 123.

In summation, once an action authorized by §601A.16, The Code 1979 is commenced in district court, the discovery techniques enumerated in the Iowa Rules of Civil Procedure may be utilized by the parties thereto. The parties may serve a request for production of documents upon the Commission "with or after service of the original notice on" the Commission. Iowa R. Civ. P. 130, 131. The Commission may move for a protective order pursuant to Iowa R. Civ. P. 123. Nevertheless, the Commission cannot maintain that §601A.15(4), The Code 1979 constitutes an evidentiary privilege which places the relevant Commission case file beyond the ambit of discovery.

CONCLUSION

The duty of confidentiality imposed on the Commission by §601A.15(4), The Code 1979 is not a privilege which bars the admission of evidence subsumed therein in contested cases or district court actions authorized by §601A.16, The Code 1979. Upon the commencement of the latter, the parties to the action may obtain access to the relevant Commission case file by utilizing rules 129(a), 130, and 131 of the Iowa Rules of Civil Procedure. The Commission may move for a protective order pursuant to Iowa R. Civ. P. 123 if it objects to the time, place, manner, or extent of discovery.

Respectfully,

Scott H. Nichols

Scott H. Nichols
Assistant Attorney General

SHN:blh

COUNTIES AND COUNTY OFFICERS: Payment of Judgments--Ia. Const. Art. VII, § 8, §§ 24.22; 309.8, 309.9, 310.3, 310.4, 312.1, 312.2, 312.3, 312.5, 332.36, 332.40, 613A.10, Chapters 74 and 346, The Code 1979. A county cannot pay a judgment against it from the road funds or the county indeminification fund. (Blumberg to McGuire, Howard County Attorney, 11/3/80) #80-11-3(L)

November 3, 1980

Mr. Kevin C. McGuire
Howard County Attorney
110 North Park Avenue
P. O. Box 379
Cresco, Iowa 52136

Dear Mr. McGuire:

We have your opinion request regarding a judgment entered against the county and two supervisors. The plaintiff was terminated as county engineer. He alleged a cause of action against the county for breach of contract and was awarded a judgment of $40,000.00. He alleged slander against one board member and was awarded actual and punitive damages. Another allegation pursuant to 42 U.S.C. § 1983, was made against both board members, wherein he was awarded actual and punitive damages and attorney fees. Both allegations against the board members alleged willful and malicious conduct. You asked the following questions:

1. Judgment was rendered against Howard County on count one of plaintiff's petition for $40,000.00. There is no insurance to pay this judgment. What State funds are available to pay the judgment? What other funding steps will have to be taken by Howard County?

2. The plaintiff obtained a judgment against Leo Caffrey under count three of the petition in the amount of $2,500.00 compensatory damages and $2,500.00 exemplorary damages. Must Howard County pay this judgment under the provisions of 613a of the Code of Iowa, or is Leo Caffrey individually responsible for the payment of judgment?

3. The plaintiff obtained a judgment against Leo Caffrey and Melvin Cannon jointly and severally under count four of the petition in the amount of $10,000.00 compensatory damages and $5,000.00 exemplorary damages. Must the County pay this $15,000.00 judgment under the provisions of 613a of the Code of Iowa or are Leo Caffrey and Melvin Cannon responsible to pay the judgment?

4. The plaintiff obtained a judgment for $8,000.00 for reasonable attorney fees arising out of the prosecution of count four but doesn't specify whether the attorney fees were assessed against the two supervisors individually or against them as acting in their capacity as members of the Howard County Board of Supervisors. The prayer of count four for judgments against two supervisors individually as defendants. The prayer of count four prayed for judgments against two supervisors individually as defendants. Must Howard County pay the $8,000.00 as provided under the provisions of 613a of the Code of Iowa or must the individual supervisors Cannon and Caffrey pay the judgment?

You also indicated that there is presently a case before the Howard County District Court seeking an injunction against the county from paying any judgment rendered against the board members. On November 6, 1978, the Court ordered that the county be temporarily enjoined from paying any attorney fees, expenses of suit, court costs or judgments with regard to the two board members, until a final determination is made. On May 7, 1979, the temporary order was modified, permitting the County to pay attorney fees for the board member's attorneys. The County was still enjoined from paying the judgments of the the board members. It appears that no additional orders or rulings have been made since that time.

Questions 2, 3, and 4 of your request concern whether the county must pay the judgments of the board members, and whether it must pay the award of attorney fees made pursuant to 42 U.S.C. § 1983. It has been a long standing policy of this Office not to issue opinions on matters in litigation. Accordingly, we are unable to provide answers to your last three questions.

Your first question is how the County is to pay the judgment, plus interest, in the absence of any insurance.

In your request you mentioned the county indemnification fund. In a subsequent phone conversation you asked about the possibility of using part of the road use fund of the County. The problem has arisen because the County lacks available money to pay the judgment against it.

Section 613A.10, The Code 1979, provides that when a judgment is entered against a county, payment shall be made and the same remedies shall apply in the case of nonpayment as in the case of other judgments against the county. If the judgment is unpaid at the time of the adoption of the annual budget, the county shall budget an amount sufficient to pay the judgment. A tax may be levied in excess of any statutory limitation. The problem here, however, is that the final judgment has come down after the last annual budget was made, and considerably before the next one will be made.

Section 332.36 established the County Indemnification Fund. It provides:

> There is created in the office of the treasurer of state a fund to be know as "the county indeminification fund" to be used to indemnify and pay on behalf of any county officer, any township trustee and any deputies, assistants or employees of the county or the township, all sums that such officers, deputies, assistants or employees are legally obligated to pay because of their errors or omissions in the performance of their official duties, except that the first five hundred dollars of each such claim shall not be paid from this fund. [Emphasis Added]

Our office has issued several opinions on this section. See, 1978 Op. Atty Gen. 168, 210, 463, and 654; and, March 26, 1979, 79-39-9. In each one of those it was presumed that this section only covered officers and employees, not counties. The wording of this section is quite explicit on this. Sections 332.40 .41 and .42 further support this. Because the county indemnification fund does not apply to judgments against the county, it is not available to Howard County to pay the judgement against it.

You next asked about the road funds of the County. The secondary road fund is established by § 309.8. Section 309.9 sets forth the purpose to which the fund can be used. All

those purposes concern only the construction and maintenance of secondary roads. Chapter 310 concerns farm-to-market roads. A fund is established by § 310.3. These funds, pursuant to § 310.4, can only be used for farm-to-market road establishment, construction, repair, maintenance and the like.

Section 312.1 creates the road use tax fund. It consists of proceeds from motor vehicle registrations under Chapter 321, motor fuel tax or license fees under Chapter 324; revenues from the use tax under Chapter 423; and any other funds which by law are credited to the fund. Pursuant to § 312.2, proceeds of the fund are allocated to the counties and cities. The proceeds from this fund are allocated to counties through the secondary and farm-to-market road funds. See also, § 312.3 and 312.5. Article VII, section 8 of the Iowa Constitution, Amendment 18 (1942), provides that all motor vehicle registration fees and all license and excise taxes on motor vehicle fuel shall be used exclusively for the construction, maintenance and supervision of the highways or the payment of bonds for the same.

It is apparent from the above that the proceeds of any county road funds cannot be used to pay this judgment. Payment can be made from funds on hand or by the levy of taxes. Section 24.22 allows the temporary or permanent transfer of funds from one fund to another with the approval of the State Appeal Board. Chapter 346 provides for the issuance of bonds when the outstanding indebtedness of a county exceeds five thousand dollars on the first of January, April, June or September of any year. Chapter 74 provides for the stamping of warrants. Such warrants can be paid off by the issuance of bonds or by the receipts of future revenues. The county can pay the judgment through any of these means.

Accordingly, we are of the opinion that a judgment against a County cannot be paid from the county indemnification fund or the road funds. The judgment can be paid from a tax levied pursuant to § 613A.10; funds on hand not otherwise limited; the transfer of funds; the stamping of warrants; or the issuance of bonds.

Very truly yours,

Larry M. Blumberg

LARRY M. BLUMBERG
Assistant Attorney General
Tort Claims Division

bkj

MUNICIPALITIES: Amendments to Zoning Ordinances--§§ 362.2(18), (19), (20); 280.3; and 414.5, The Code 1979. Amendments to municipal zoning ordinances cannot be made by resolution. The requirements of § 380.3 must be met before such amendments are valid. (Blumberg to Holden, State Senator, 11/3/80) #80-11-2(L)

November 3, 1980

The Honorable Edgar H. Holden
State Senator
2246 E. 46th Street
Davenport, IA 52807

Dear Senator Holden:

We have your opinion request of August 18, 1980, regarding amendments to the zoning ordinances of Eldridge, Iowa. Under that city's procedure, recommendations regarding amendments to the zoning ordinances are made to the City Council by the Planning and Zoning Commission. The Council then holds a public hearing on those recommendations. If the application for an amendment is granted by the Council it is in the form of a resolution which is voted on only once. Based upon these facts you ask:

1. Is rezoning more properly accomplished by resolution or by amendment to the zoning map which is part of the zoning ordinance?

2. Does Code of Iowa, § 380.3 describe the procedure the Council must follow on rezonings, i.e., considerations and votes prior to final passage unless the requirement is suspended by three-fourths vote?

3. If the procedure the City has been following is incorrect, of what force and effect are rezonings that have been made under the procedure?

Section 414.5, The Code 1979, provides that zoning regulations may be amended, changed, modified or repealed. "Ordinance" is

defined in § 362.2(18) as a city law of a general and permanent nature. "Amendment" is defined in subsection (19) as a revision or repeal of an existing ordinance. "Resolution" is defined in subsection (20) as a council statement of policy or a council order for action to be taken.

It is apparent from these definitions that zoning regulations are ordinances. It is also apparent that there is a difference between amendments and resolutions. Amendments to zoning ordinances are therefore different than resolutions.

Section 380.3 provides that a proposed ordinance or amendment must be considered and voted on for passage at two council meetings before it is finally passed, unless this requirement is suspended by a three-fourths vote of the council members. If the proposed ordinance or amendment is published pursuant to § 362.3 prior to its first consideration, and if copies of it are available at the office of the city clerk, then only one passage prior to the final passage is required.

We can find nothing in Chapter 414 which exempts zoning regulations and amendments from Chapter 380. Therefore, in answer to your first two questions, the amendments to the zoning ordinances should not be made by resolution. Passage of such amendments must conform to the requirements of § 380.3.

Your last question is of what affect are the amendments to the zoning ordinances that have been approved by the Council only by resolution and a single vote. Generally, city legislation which must meet the requirements of § 380.3 are not effective until such requirements are met. That is, an ordinance or amendment that has only been voted on once is not of any force and effect until the subsequent votes are taken, except if that requirement is suspended by the Council.

Statutory provisions prescribing the manner of enacting ordinances are usually considered mandatory. 62 C.J.S. Municipal Corporations, § 416(b) (1949). Thus, the power of a municipal corporation to legislate must be exercised in the manner prescribed or the enactment will be considered void.

In State v. Livermore, 192 Iowa 626, 185 N.W.1 (1921), a city ordinance was adopted after only one reading, and without a suspension of the three-reading requirement. It was held that the failure to follow the three-reading requirement was fatal to the validity of the ordinance. Other cases have held similarly with respect to other requirements. See Farmers Telephone Co. v. Washta, 157 Iowa 447, 133 N.W. 361 (1912), (failure to record yeas and nays). Cook v. City of Independence,

133 Iowa 583, 110 N.W. 1029 (1907) (failure to record yeas and nays); Markham v. City of Anamosa, 122 Iowa 689, 98 N.W. 493 (1904) (failure to record yeas and nays); State v. O. & C.B. Ry Co., 113 Iowa 30, 84 N.W. 983 (1901) (failure to properly publish ordinance). In Cook, it was stated that the requirements for passage of an ordinance are mandatory. See also Markham.

Based upon the above, the amendments to the zoning ordinances are invalid if not passed pursuant to § 380.3.

Accordingly, we are of the opinion that changes in municipal zoning ordinances can only be made by amendment. A resolution is insufficient. Section 380.3 is applicable. If the requirements of that section are not met, the amendment is not valid.

Very truly yours,

Larry M. Blumberg

LARRY M. BLUMBERG
Assistant Attorney General

LMB/cmc

PHYSICIANS AND SURGEONS: Ophthalmia Propylactics for New Borns - Religious Exemption - § 140.13, The Code 1979. The religious exemption to § 140.13 may include a sincere and meaningful belief based on ethical, moral or religious concepts, held with the strength of traditional religious convictions. A physician should not question those beliefs, and need not examine the parents any more than is necessary to ascertain the sincerity of the belief. It would be wise for a physician to have the parents sign some type of document when exercising the religious exemption. (Blumberg to Pawlewski, Commissioner of Public Health, 11/3/80) #80-11-1CL)

Norman L. Pawlewski
Commissioner of Public Health
State Department of Health
Lucas State Office Building
L O C A L

November 3, 1980

Dear Mr. Pawlewski:

We have your opinion request regarding ophthalmia prophylactics for infants. You asked:

> Specifically asked is the question, "Would a physician be liable in a suit by a minor on reaching adulthood for damage to the eyes as a result of his not instilling Silver Nitrate in the eyes when the mother has objected on religious grounds?" The second question revolves around the interpretation of the phrase "of any person who is a member of a church or religious denomination and whose religious convictions, in accordance with the tenets and principles of his church's religious denomination, are against medical prophylaxis or treatment for disease."
>
> Physicians have expressed their concern when a parent raises this objection and yet accepts other medical therapy for herself and her child. It would seem that if she was a bona fide member of a religious sect which objected to medical prophylaxis or treatment, then she would not accept other medical treatment for herself or her child; yet she rejects the concept of Silver Nitrate being instilled in the infant's eyes.
>
> Should a parent raise this question, how would one document this in the medical chart and what proof of such an affiliation needs to be documented by the physician and/or hospital?

Section 140.13, The Code 1979, provides:

> Each physician attending the birth of a child, shall cause to be instilled into the eyes of the newly born infant a prophylactic solution approved by the state department of health. This section shall not be construed to require medical treatment of the child of any person who is a member of a church or religious denomination and whose religious convictions, in accordance with the tenets or principles of his church or religious denomination, are against medical prophylaxis or treatment for disease.

This is a mandatory provision. That is, unless the parent objects to the treatment upon religious grounds, the physician must perform the procedure.

We cannot state what a court in the future would hold with respect to a physician's liability. Each case is dependent upon its own set of facts. The Court, however, will be looking to the reasonableness of the acts or omissons of the physician.

The first question, then, concerns the parents' rights to make religious and medical decisions for their children. It is obvious that a new born child is incapable of making such a decision on its own. The right of a parent with regard to the religious training of minor children is constitutionally protected. Wisconsin v. Yoder, 406 U.S. 205, 96 S.Ct. 1526, 32 L.Ed.2d 15 (1972); Wilder v. Sugerman, 385 F.Supp. 1013, 1025 (S.D.N.Y. 1974); Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202 (1918); 59 Am.Jur.2d Parent and Child § 21 (1971); 67A C.J.S. Parent and Child § 14 (1978). Similarly, the parent has the duty to provide the minor child with necessary medical care. 59 Am.Jur.2d Parent and Child § 15 (1971). Within this is the decision making authority of the parent as to what is actually necessary for the child. This decision making authority is, of course, dependent upon the reasonableness of the decision.

Although the duty of physicians pursuant to § 140.13 is mandatory, there is a "religious" exemption based upon the beliefs of the parents. What, therefore, is meant by this exemption? The words themselves are clear. The exemption by the parent must be based on religious convictions in accordance with the tenets or principles of the parent's church or religious denomination. However, these words are actually broader than they appear.

United States v. Seeger, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965), is a case concerning conscientious objector status to

military service. The statutory exemption in question exempted from military service those persons who by reason of their religious training and belief are conscientiously opposed to participation in war. "Religious training and belief" was defined in 50 U.S.C. App. § 456(5) as a person's belief in relation to the Supreme Being involving duties superior to those arising from any human relation. The exemption did not include essentially political, sociological or philosophical views or merely a personal moral code. In defining the "test" to determine whether a belief fell within the exemption, it was stated (380 U.S. at 176, 13 L.Ed.2d at 743):

> The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.

In a subsequent case, Welsh v. United States, 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308 (1970), the Court further explained Seeger. It is stated therein that the Seeger Court made it clear that "these [sincere] and meaningful beliefs" that prompt the registrant's objection to war "need not be confined in either source or content to traditional or parochial concepts of religion." 398 U.S. at 339, 26 L.Ed.2d at 318. What was necessary in Seeger was that the opposition to war stem from a moral, ethical or religious belief about what is right and wrong, and that such beliefs be held with the strength of traditional religious convictions.

Both Seeger and Welsh were grounded in the First Amendment.[1] In effect, the Court there was saying that to literally interpret the statute would result in underinclusiveness.[2] Therefore

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[1]The First Amendment to the U.S. Constitution provides, in pertinent part, that Congress shall make no law respecting the establishment of religion or prohibiting the free exercise of religion.

[2]In this instance the underinclusiveness was that only those whose deep moral convictions were grounded in a belief in a Supreme Being were included in the exemption, while others with a similar depth of conviction were excluded.

the Courts judicially expanded the statutes to comport with First Amendment rights. Section 140.13 should be similarly construed. To interpret that statute literally would fly in the face of the parents' First Amendment rights. Thus, something other than membership in or adherence to a religious denomination or church is sufficient for the religious exemption in § 140.13.

The next question is the responsibility of the physician when a parent exercises the religious exemption. In Seeger, it was held (380 U.S. at 184-85, 13 L.Ed.2d at 747):

> The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's "Supreme Being" or the truth of his concepts. But these are inquiries foreclosed to Government. As Mr. Justice Douglas stated in United States v. Ballard, 322 U.S. 78, 86, 88 L.Ed. 1148, 1154, 64 S.Ct. 882 (1944): "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others." Local boards and courts in this sense are not free to reject beliefs because they consider them "incomprehensible." Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.

We therefore do not feel that a physician should question the parents' beliefs. Although, according to Seeger, the sincerity of the beliefs may be questioned, we do not believe that a physician, under the circumstances attending a birth, is in a position to do an in-depth examination of the parents' sincerity. A physician, under those circumstances, should fully inform the parents about the prophylactic treatment and the need for it. However, we do not feel that a physician should examine the parent beyond the determination that a "religious" belief is involved. Obviously, if the parent merely states that the objection is based upon reasoning other than religion, e.g. a belief that the treatment is medically unsound, the physician is under a statutory duty to treat the infant.

Because of a realistic concern that the physician may be sued in the future for not giving the treatment, there should

be some means of documenting the parents' choices. The Department of Health uses such documentation with regard to immunizations. Something similar for use by the physicians may be appropriate. In any event, the physician should have some type of document which the parents must sign indicating that their "religious" beliefs prevent them from allowing the treatment. It would be wise to also have the parents acknowledge that they have been informed about the treatment, that it is required by statute, and that their "religious" beliefs are sincere. Although no statute requires this type of documentation, we feel it would be the best policy to have such a document.

In conclusion, we are of the opinion that a parent's "religious" beliefs can include a sincere and meaningful belief not necessarily confined in either source or content to traditional or parochial concepts of religion. Such a belief may stem from moral, ethical or religious considerations about what is right and wrong, and should be held with the strength of traditional religious convictions. The physician should not question the beliefs, and need not examine the parents any more than is necessary to ascertain that the belief is sincere. Some type of documentation of the parents exercise of the religious exemption should be used. Although we cannot state whether a physician would be liable in the future to the infant for not giving the prophylactic treatment, a physician who follows the procedures set forth above should have a viable defense to any such claims.

Very truly yours,

LARRY M. BLUMBERG
Assistant Attorney General

LMB/cla

PHYSICIANS AND SURGEONS: Family Planning Services. Sections 148.1, 152.1, 234.21, 234.22, 234.27, The Code 1979. Section 234.22 requires that a patient be referred to a licensed physician for a physical examination but does not require the physician to perform personally every aspect of the examination. While § 234.22 also requires that a patient be referred to a physician for a prescription, the statute does not require the physician to follow any particular procedure in making the prescription. (Stork to Saf, State Board of Medical Examiners, 12/24/80) #80-12-25(CL)

December 24, 1980

Mr. Ronald V. Saf, Executive Director
Iowa State Board of Medical Examiners
L O C A L

Dear Mr. Saf:

You have requested a clarification of § 234.21, The Code 1979, concerning the function of family planning services. Specifically, you request an opinion of this office on the following questions.

1. When a patient seen at a family planning service needs a physical examination, does that patient have to be referred to a licensed physician for that examination?

2. Can a physician, telephonically or otherwise, delegate the authority to conduct a physical examination to a registered nurse or licensed practical nurse?

3. If the physician can delegate the authority to make the physical examination, can he also prescribe drugs for the patient in the same phone conversation which would occur prior to the patient being examined?

Section 234.21 provides:

> The state division may offer, provide, or purchase family planning and birth control services to every person who is an eligible applicant or recipient of service or any financial assistance from the department of social services, or who is receiving federal supplementary security income as defined in section 249.1.

When statutes relate to the same subject matter or to closely allied subjects, they are said to be pari materia and must be construed, considered, and examined in light of their common purpose and intent so as to produce a harmonious system or body of legislation. Rush v. Sioux City, 240 N.W.2d 431, 445 (Iowa 1976). Accordingly, the nature of the family planning services to be promulgated pursuant to § 234.21 must be examined in light of other relevant statutes governing family planning services, specifically §§ 234.22 through 234.28. Section 234.22 sets forth the extent of services permitted:

> Such family planning and birth control services may include interview with trained personnel; distribution of literature; referral to a licensed physician for consultation, examination, tests, medical treatment and prescription; and, to the extent so prescribed, the distribution of rhythm chart, drugs, medical preparations, contraceptive devices and similar products.

Section 234.22 enumerates several functions that must be referred to a licensed physician for execution. These include an examination. Accordingly, in response to your first question, we conclude that the express language of § 234.22 requires a patient who is receiving family planning services under § 234.21 to be referred to a licensed physician if a physical examination of the patient is necessary.

Your second question relates to the authority of a physician, under § 234.22, to delegate a specific duty listed therein. Based upon the facts you have presented, the fundamental issue appears to be whether § 234.22 requires a physician personally to perform all duties enumerated in the section or, rather, requires that certain duties may not be performed until a patient is referred to a physician, who has the discretion to determine precisely how those duties will be carried out. Under the latter construction, for example, a physician would be ultimately responsible for the supervision and completion of a physical examination but would have authority to direct a registered nurse or a licensed practical nurse to conduct certain aspects of the examination.

Familiar rules of statutory construction are applicable to resolve the issue. The goal is to ascertain legislative intent in order, if possible, to give it effect. State ex rel. State Highway Comm. v. City of Davenport, 219 N.W.2d 503, 507 (Iowa 1974). Words are to be given their ordinary meaning unless defined differently by the legislative body or possessed of a peculiar and appropriate meaning in law. Id. Additionally, to resolve any ambiguity with respect to precisely what § 234.22 demands, we may, in determining the intention of the Legislature, consider the common law or other statutory provisions on the same or similar subjects, the object sought to be attained, any statement of policy regarding the section, and the consequences at a particular construction. § 4.6 The Code 1979.

Section 234.22 specifically provides that a patient is to be referred to a licensed physician "for consultation, examination, tests, medical treatment and prescription . . ." [Emphasis added]. The term "referred" is not defined in Chapter 234.22; consequently, it must be construed according to the context and approved usage of the language. § 4.1(2), The Code 1979. In the context of medical services, the term is defined as sending or directing for treatment, aid, information, or decision. Webster's New Collegiate Dictionary (1979). The definition implies that the individual to whom a patient is referred will have the responsibility for the performance of necessary services. It does not, however, indicate that individual must personally perform all aspects of such services. The Legislature did not further define the manner in which the services listed in § 234.22 are to be performed.

Statutory provisions establish the scopes of practice of the medical professions under consideration. The practice of medicine and surgery is defined as follows:

> Persons engaged in practice. For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of medicine and surgery:
> 1. Persons who publicly profess to be physicians or surgeons or who publicly profess to assume the duties incident to the practice of medicine or surgery.
> 2. Persons who prescribe, or prescribe and furnish medicine for human ailments or treat the same by surgery.
> 3. Persons who act as representatives of any person in doing any of the things mentioned in this section.

§ 148.1, The Code 1979. The Iowa Board of Medical Examiners has, by rule, further defined the practice of medicine and surgery:

> 'The practice of medicine and surgery' shall mean holding one's self out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical or mental condition and who shall either offer or undertake, by any means or methods, to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical or mental condition. The rule shall not apply to licensed podiatrists, chiropractors, physical therapists, nurses, dentists, optometrists, and pharmacists who are exclusively engaged in the practice of their respective professions.

470 I.A.C. § 135.1(6). The practice of medicine and surgery does not include the practice of nursing, which involves both the professions of a registered nurse and a licensed practical nurse. § 152.1(1)(a). The practice of the profession of a registered nurse permits an individual to perform the following:

* * *

> a. Formulate nursing diagnosis and conduct nursing treatment of human responses to actual or potential health problems through services, such as case finding, referral, health teaching, health counseling, and care provision which is supportive to or restorative of life and well-being.
> b. Execute regimen prescribed by a physician.
> c. Supervise and teach other personnel in the performance of activities relating to nursing care.
> d. Perform additional acts or nursing specialties which require education and training under emergency or other conditions which are recognized by the medical and nursing professions and are approved by the board as being proper to be performed by a registered nurse.
> e. Apply to the abilities enumerated in paragraph 'a' through 'd' of this subsection scientific principles, including the principles of nursing skills and of biological, physical, and psychosocial sciences.

§ 152.1(2), The Code 1979. "Nursing diagnosis" means "to identify and use discriminatory judgment concerning physical and psychosocial signs and symptoms essential to determining effective nursing intervention. § 152.1(4), The Code 1979.

The practice of a licensed practical nurse is also defined by statute and authorizes an individual to do the following:

* * *

> a. Perform services in the provision of supportive or restorative care under the supervision of a registered nurse or a physician.

> b. Perform additional acts under emergency or other conditions which require education and training and which are recognized by the medical and nursing professions and are approved by the board, as being proper to be performed by a licensed practical nurse.

§ 152.1(3), The Code 1979.

Case law in Iowa concerning the scopes and interrelationship of the above-described professions is scarce. The Iowa Supreme Court has, however, provided the following analysis of the practice of medicine and surgery:

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

State v. Hughey, 208 Iowa 842, 846, 226 N.W. 371, 373 (1929). Accordingly, neither a registered nurse nor a licensed practical nurse could, while performing any services at a family planning clinic, publicly profess to assume duties incident to the practice of medicine and surgery, which includes medical diagnosis and corresponding treatment. Section 152, however, plainly authorizes a licensed nurse and a licensed practical nurse to perform certain types of medical services otherwise reserved for a physician, provided the latter maintains appropriate supervision. We understand, for example, that physicians in private practice commonly do direct nurses to "execute regimen" and to "formulate nursing diagnosis" in the performance of various aspects of physical examinations. Consequently, the delegation of certain medical duties by a physician to a nurse is not only supported by statutory language but appears to reflect a necessary and accepted medical practice. It seems unlikely that the Legislature would have intended to modify, by implication, the practice of nursing solely with respect to family planning services.

Section 234.21 identifies the object sought to be attained by the family planning legislation, i.e., to offer, provide, or purchase family planning and birth control services to every person who is eligible under applicable state and federal law.

Section 234.27 sets forth a statement of legislative policy regarding family planning services:

> The general assembly hereby finds, determines, and declares that this division is necessary for the immediate preservation of the public peace, health, and safety.

This policy, as well as the object sought to be attained by the family planning legislation, articulates a legislative intent to ensure the provision of necessary family planning and birth control services to members of the public. Plainly, this intent is furthered when a physician has the discretion to delegate some functions to trained personnel, and thereby provide more services to a greater number of people. At the same time, the physician remains personally responsible for the safe and competent delivery of those services.

If § 234.22 is construed to require a licensed physician personally to perform every aspect of every necessary physical examination, fewer individuals are likely to be served by the statute. Additionally, such a construction would, by implication, restrict the ability of a licensed nurse or a licensed practical nurse to perform generally accepted medical services under the supervision of a physician. We doubt that the Legislature intended § 234.22 to effect either of these consequences, especially in light of the object sought to be attained by the legislation as expressed in § 234.21.

Finally, you question whether a physician may, prior to the examination of a patient under § 234.22, prescribe drugs for that patient. The physician apparently would make such a prescription by telephone and without ever personally seeing the patient. The question of precisely when, or how, a physician should make a prescription is not specifically addressed in § 234.22. Instead, the section requires only that a patient be referred to a physician for a prescription and does not dictate the procedures for making that prescription. Thus, although a physician's practice of prescribing by telephone may have legal ramifications, its propriety is essentially a factual rather than a legal question. While it may involve a questionable medical practice, it is not proscribed under § 234.22. We emphasize, however, that the prescription of drugs does constitute the practice of medicine and surgery and that only a physician can engage in such activity. §§ 147.2, 148.1, The Code 1979; State v. Hughey, 208 Iowa 842, 846, 226 N.W. 371, 373 (1929). A physician has no statutory authority to delegate the responsibility nor does a registered nurse or a licensed practical nurse have authority to engage in such practice.

In light of all the factors discussed above, we make the following conclusions concerning the questions you have raised. First, § 234.22 does require that a patient be referred to a licensed physician for a physical examination.

Second, while the physician remains legally responsible for both the performance and results of the examination, he or she may direct a registered nurse or a licensed practical nurse to perform necessary acts pertaining to that examination. Section 234.22 does not prohibit the physician from delegating such responsibilities, telephonically or otherwise. We make no observation, however, as to whether delegating responsibilities constitutes good medical practice, which is essentially a factual determination for the individual physician to make.

Third, § 234.22 requires only that a patient be referred to a physician before drugs may be prescribed. The physician must personally make such a prescription and may not delegate this responsibility. The question of precisely how the prescription is made, however, also involves a factual matter for the individual physician to decide within the parameters of what constitutes acceptable medical practice.

Very truly yours,

Frank J. Stork

FRANK J. STORK
Assistant Attorney General

FJS:sh

MUNICIPALITIES: Special Assessments--§§ 4.7, 4.8, 384.60, 384.65 and 384.68(5), The code 1979. A property owner may pay the assessment in full at any time after starting payment by installment. If paid in full after July 1, the interest accrues to December 1 of the following year. A property owner may not make payments of more than one installment at a time if less than full payment. A property owner is not entitled, by statute, to a refund of any excess payments. There is no difference in special assessments if a city pays for improvements from existing funds rather than by the issuance of bonds. (Blumberg to Johnson, State Auditor, 12,24,80) #80-12-24(L)

December 24, 1980

The Honorable Richard D. Johnson
State Auditor
L O C A L

Dear Mr. Johnson:

We have your opinion request regarding the payment of special assessments found in Chapter 384, The Code 1979. You ask the following questions:

1. If advance special assessments installments are paid between July 1 and December 1, to fully repay the assessment, should interest be paid to December 1 in the year of payment or December 1 in the year following payment?

2. If interest must be paid to December 1 of the year following payment, would the increased effective annual interest rate, if in excess of the legal rate be in violation of Chapter 384.60 of the Code?

3. What different conditions, if any, would exist if the advance special assessment installments did not fully repay the assessment?

4. If interest must be paid to December 1 of the year following payment, would the property owner have any priority claim to the default and deficiency balance remaining after completion of bond redemption, since a portion of the balance may be due to interest paid by the property owner which did not have to be paid on outstanding bonds?

5. What additional considerations, if any, would apply if the assessed project was financed by available funds rather than through issuance of special assessment bonds?

In further discussion with Mr. Jenkins of your office, question three was clarified to ask whether a property owner can pay more than one installment at a time, and, if so, what happens with regard to the interest. Question five was clarified as asking whether there is a difference in treatment of the special assessments if the city uses funds on hand rather than issuing bonds.

Cities can specially assess property owners for certain public improvements. See Division IV of Chapter 384. Section 384.60 provides, in part, that the council adopt by resolution a final assessment schedule which shall provide for interest as allowed by law and direct the clerk to notify the property owners of the payment schedule for the assessments set forth in § 384.65. Section 384.65 provides:

> 1. The first installment of each assessment, or the total amount if less than fifty dollars, is due and payable on July 1 next succeeding the date of the levy, unless the assessment is filed with the county auditor after May 31 in any year. The first installment shall bear interest on the whole unpaid assessment from the date of acceptance of the work by the council to the first day of December following the due date.
>
> 2. The succeeding annual installments, with interest on the whole unpaid amount, to the first day of December following the due date, are respectively due on July 1 annually, and must be paid at the same time and in the same manner as the September semi-

annual payment of ordinary taxes.

3. All future installments of an assessment may be paid on any date by payment of the then outstanding balance, plus interest to December 1 following the due date of the next maturing installment.

4. Each installment of an assessment with interest on the unpaid balance is delinquent after the thirtieth day of September next after its due date, and bears the same delinquent interest with the same penalties as ordinary taxes. When collected, the interest and penalties must be credited to the same fund as the special assessment.

5. From the date of filing of a certified copy of the resolution of necessity, the plat, and the schedule of assessments as provided in section 384.51, all special assessments with all interest and penalties become and remain a lien on the benefited properties until paid, and have equal precedence with ordinary taxes, and are not divested by any judicial sale.

6. Any property owner may elect to pay one-half of any annual installment of principal and interest of a special assessment in advance, with the second semiannual payment of ordinary taxes collected in the year preceding the due date of such installment. The county treasurer shall accept such partial payment of the special assessment, and shall credit the next annual installment of such special assessment to the extent of such payment, and shall remit the payments to the city.

> 7. Each installment of an assessment shall be equal to the amount of the unpaid assessment as computed on the thirty-first day after the certifications of the assessment divided by the number of annual installments into which the assessment may be divided as adopted by the council pursuant to section 384.60.

Section 384.65 provides a complete answer to your first question. If the special assessment is paid in full within thirty days after the date of certification; no interest is due. § 384.60(5). If the special assessment is paid in full after the thirty day limit, in one payment, interest accrues from the date of the council's acceptance of the work until December 1 of that year.[1] §384.65(1). Section 384.65(3) provides that if the special assessment is paid in full after the first installment has been paid, interest accrues on the unpaid balance to December 1 following the due date of the next maturing installment. Thus, if the installment is due on July 1, 1980, payable in September 1980 (§ 384.65(2)), and the remainder is paid in full before July 1, 1980, interest accrues to December 1, 1980. If the remainder is paid in full after July 1, 1980, interest accrues to December 1, 1981.

With respect to the above example, you ask whether the payment of interest until December 1, 1981, would result in a violation of the maximum annual interest rate set by § 384.60(3), as amended by 1980 Session, 68th G.A., Ch. 1025, § 56. We do not believe that a violation of that section would occur.

It appears that the Legislature is requiring property owners to pay interest for two years if the full payment is made after July 1, and for only one year if paid before July 1. That does not mean that the annual rate has been increased. We find no conflict between the two sections. In any event, if the interest accrual in § 384.65(3) were to be in conflict with § 384.60(3), the general rules of statutory construction would apply. Pursuant to § 4.7 and 4.8 the provisions of § 384.65(3) would control either as being a special statute, or because it is the latter listed of the two.

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1. If the assessment is not filed until after May 31, it is not payable until July 1 of the following year, and the interest would accrue until December 1 of that year.

With respect to your third question, there is no statute which speaks to paying more than one installment at a time, if less than full payment is made. It would not be unreasonable for a property owner to want to pay the assessment in such a manner. A property owner not only has a duty to pay the assessment, but also a right. Hubbell Son & Co. v. Hammill, 187 Iowa 1083, 175 N.W. 41 (1919). There, it was held that a taxpayer had the right to pay the assessment ahead of schedule to stop the interest and discharge the lien on his property. Similar considerations would be applicable here. The problem, however, is technical. For instance, what interest is due on such a payment? Is it similar to that accrued pursuant to § 384.65(3)? The greatest obstacle, however, would be bookkeeping problems of the county auditors. The Legislature has specifically set forth how payments are to be made in full or by installments. It could easily have included how lump sum payments of more than one installment at a time were to be handled. The fact that it did not do so is an indication that such payments are not permitted. In fact, at one time the Code did provide for such a payment. Section 6033, The Code 1924, provided: "Any or all installments not yet paid together with accrued interest thereon may be paid on the due date of any installment." Our office has made reference to such payments in conformity with that section. See 1925-26 Op. Att'y. Gen. 222. Because that provision is no longer in the Code, we must state that such payments are not now permitted.

Your fourth question is whether the property owners would be able to receive a refund from the default and deficiency balance if there is money left over because the special assessments were paid off early. Section 384.68(5) provides:

> Any excess of proceeds from special assessments remaining after all of the bonds for a particular improvement have been paid with interest may be credited to the fund from which deficiencies for the improvement could have been paid. However, any excess in a default fund established for a public improvement authorized in seciton 384.38, subsection 2, shall be held by the city in a special fund to guarantee other improvement bonds which may be issued by the city for public improvements authorized under that section.

Accordingly, pursuant to this section, property owners are not entitled to any such refunds.

The last question is whether there is a difference in treatment of the special assessments if the city pays for the improvements out of funds on hand rather than by bonds. A review of Division IV indicates that the Legislature has made no distinction with regard to how a city pays for the improvements. Therefore, whether the city pays for the improvements from existing funds or by the issuance of bonds, the obligations of the property owners for special assessments are the same.

In summary, we are of the opinion that if the special assessment, being collected by installment payments, is paid in full after July 1 of any year, the interest accrues until December 1 of the following year. Such a procedure is permissible. A property owner must either pay the assessment in full or pay it by single installments. Property owners are not entitled, by statute, to a refund of excess payments. Finally, there is no distinction between a city paying for improvements out of existing funds and payment from the issuance of bonds.

Very truly yours,

LARRY M. BLUMBERG
Assistant Attorney General

LMB/cmc

ADMINISTRATIVE LAW--CONSTITUTIONAL LAW: Probationary Operator's License: §321.178(2), The Code 1979; Iowa Const., Art. I, §6; U.S. Const. Amend XIV. Iowa Department of Transportation rule 820 I.A.C. [07,C]13.5(4) is an ultra vires promulgation insofar as providing for renewal of probationary operator's licenses issued pursuant to section 321.178(2). Section 321.178(2) does not violate the uniform application of laws provision of the Iowa Constitution nor the equal protection clause of the fourteenth amendment to the United States Constitution. (Gregersen to Hummel, State Representative, 12/24/80) #80-12-23 (L)

Representative Kyle Hummel
House of Representatives
Statehouse
Des Moines, IA 50319

Dear Representative Hummel:

You have requested an opinion concerning section 321.178(2), The Code 1979, and Iowa Department of Transportation (Department) rule 820 I.A.C. [07,C]13.5(4)(hereafter rule 5(4)). Section 321.178(2) provides as follows:

> 2. Youths not attending school-no driver education required.
> a. Any person between sixteen and eighteen years of age who is not in attendance at school or in a public or private school where an approved driver education course is offered or available, may be issued a one-year probationary operator's license without having completed an approved driver education course. Such person shall not have a probationary operator's license revoked or suspended upon re-entering school prior to age eighteen provided the student enrolls in and completes the classroom portion of an approved driver education course as soon as a course is available.
> b. The department shall cancel a probationary operator's license upon proof of a conviction for a moving traffic violation.

Rule 5(4) provides, in pertinent part:

> Probationary operators license. A probationary operator's license and an operator's license are the same kind of license as to validity for driving purposes.
> a. Persons under the age of eighteen, but at least sixteen, who are not attending a high school level institution shall not be required to complete a driver eductaion course prior to being considered for licensing as a probationary operator. . .
>
> * * *
>
> b. A probationary operator's license may be issued when a person at least sixteen years of age attends a high school level school in which an approved course in driver education is not offered or cannot be obtained through another school. The fact that a person is not able to take driver education due to scheduling or limited offering shall not be construed to mean that driver education is not available.
>
> * * *
>
> c. A first issue probationary operator's license shall be issued to expire one year from the date of issuance. . .
>
> d. In situations where the holder of a probationary operator's license is not yet eighteen and the license is to expire and the person is still eligible for such, the license may be renewed to expire on the person's eighteenth birthday. . .

You have raised two questions concerning these provisions.

1. Whether promulgation of rule 5(4) exceeded the statutory authority of the Department.

2. Whether the rule violates article I, section 6, of the Iowa Constitution or the fourteenth amendment to the United States Constitution.

I

To focus the analysis of your first question, it must first be broken down into its two subparts. Specifically, you ask whether the Department has acted without legal authority in promulgating rule 5(4) (1) because it seems to exempt people who are not attending school from ever having to take an approved driver education course or (2) because the rule allows renewal of the probationary license.

With regard to the first branch of the issue, two things should be noted. First, section 321.178(2) and rule 5(4) allow only sixteen and seventeen year olds to operate a motor vehicle without successfully completing a drivereducation course. Anyone eighteen years of age or older may be licensed notwithstanding whether he or she was ever enrolled in a driver education course, let alone successfully completed it. §321.177(1). Second, these two provisions are constructed so that sixteen and seventeen year olds may avoid driver education only in two ways: (1) the individual applying for a probationary license foregoes driving until age seventeen and then applies; or (2) the individual receives a probationary license before age seventeen and then renews it.

The first method of avoiding driver education, while perhaps of concern, presents a situation impossible to police since the probationary license is valid for one year. The second method in effect allows people to begin driving at age sixteen and to continue to drive without taking a driver education course. The narrow issue is, then, whether the rule providing for renewal of a probationary license is valid.

In a judicial review of an administrative rule validity is presumed and the burden of proving invalidity lies on the challenger. Davenport Community School District v. Iowa Civil Rights Commission, 277 N.W.2d 907, 909 (Iowa 1979). The Iowa Supreme Court has stated that:

> [W]hen a 'rational' agency could conclude that a rule is within its delegated authority, a reviewing court should not reach a contrary conclusion. This, of course, would not allow an administrative body to act beyond or in contravention to its enabling act or contrary to legislative intent. . . but would allow the operation of its expert discretion.

Id. at 910.

The issue in restated form is, then, whether a rational agency could believe that section 321.178(2) authorized renewal of a probationary operator's license. The statute as originally enacted, 1970 Session, 63d G.A., ch. 1146, §5, and as presently in effect provides for the issuance of "a one-year probationary operator's license." No provision for renewal is made in the statute. In fact, of all the license types[1] issued by the Department, renewal of chauffeur and operator licenses only is specifically provided for by statute. §§321.196 (renewal of operator's license); 321.197 (renewal of chauffeur's license). Rules promulgated by the Department provide for renewal of only operator, chauffeur, and probationary licenses.[2] Thus, unless there is an ascertainable legislative intent which would lead to the conclusion that probationary licenses should be treated differently from the other license types where no provision for renewal is made, it appears as though rule 5(4) is invalid.

Section 321.178 governs the offering of driver education courses and the issuance of probationary licenses. The purpose behind requiring driver education for those under age eighteen who wished to be licensed is two-fold. First, it is a safety measure designed to protect the public from inexperienced, immature drivers. See, e.g., State v. Duke, 409 A.2d 1102, 1105, 1106, (Me. 1979); Sedlacek v. Ahrens, 530 P.2d 424, 426 (Mont. 1975); Lopez v. Motor Vehicle Divison, 538 P.2d 446, 449 (Colo. 1975); Hayes v. Texas Dept. of Public Safety, 498 S.W.2d 35, 37, 38 (Tex. 1973); State ex rel. Oleson v. Graunke, 229 N.W. 329, 330 (Neb. 1930). Second, it is also designed to protect those under the age of eighteen from their own inexperience and excesses. To further these purposes, and to facilitate carrying them out, the public schools are required to offer driver education to all people between the ages of fifteen and twenty-one years who reside in the school district. §321.178(1). In addition, the fact that schools must also offer the course to those between eighteen and twenty-one, id., when those over eighteen may be licensed without it, §321.177(1), is an indication of the legislature's belief in the importance of driver education per se.

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[1] The license types presently available include (1) probationary operator's licenses, §321.178(2); temporary instruction permit, §321.180(1); chauffeur's instruction permit, §321.180(2); temporary permit, §321.181; operator's license, §321.189(1); chauffeur's license, §321.189(1); motorized bicycle license, §321.189(1), (2); and minors' school licenses, §321.194.

[2] 820 I.A.C. [07,C]13.5;13.10.

By enacting subsection 321.178(2), however, the legislature recognized that not all those under age eighteen find taking driver education a task easily performed. Some schools do not offer a driver education course. This obviously complicates one's ability to take the course. In addition, many teenagers leave school. To facilitate their entry into society as productive members, the legislature decided to grant them the opportunity to drive, at least initially, free of the restriction that a driver education course be completed before they drive on their own. Recognition of these circumstances did not mean, however, that those people were to escape driver education. A probationary license can facilitate attendance at a driver education course as well as a job.

That an "escape" from driver education was not intended can be seen in the statute itself. First, the legislature could have provided explicitly for renewal of a probationary license, but did not. Second, the legislature could have made the probationary license valid for two years, but did not. Third, instead of providing for cancellation of the license upon failure to enroll in a driver education course after re-entering school, §321.178(2), the legislature could have made a license once issued valid at all times regardless of the circumstances.

Further evidence that renewal of the probationary license was not intended can be found in the early history of the administration of the statute by the Department of Public Safety.[3] On July 1, 1970, the date the probationary license provision became effective, a Public Safety Policy Letter was issued defining a probationary operator's license as "a non-renewable license, valid for only one year, which will allow the licensee to operate a motor vehicle, as an operator." Department of Public Safety Policy Letter No. 32 Section I (Emphasis added).[4]

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[3]Prior to creation of the Department of Transportation in 1974, 1974 Sess., 65th G.A., ch. 1180, §2, jurisdiction over the various motor vehicle operator licenses was vested in the Department of Public Safety.

[4]This directive was rescinded one year later and replaced with one defining a "one-year probationary operator's license" as a "temporary driving permit" as described in section 321.181, The Code 1971. Iowa Department of Public Safety Policy Letter No. 60. That directive also allowed persons issued a probationary operator's license pursuant to Policy Letter No. 32 to apply for a temporary driving permit when the former expired.

Finally, it should be noted that this state has a long history of strong support for education. Allowing renewal of the probationary license would run counter to that record because it would remove one incentive for remaining in contact with the educational atmosphere. If a dropout is required to attend a driver education course to continue driving, he or she would at least keep in touch with an academic environment and counselors who could encourage completion of secondary school.

The answer to your first question, then, is yes; that portion of rule 5(4) providing for renewal of probationary licenses constitutes an ultra vires promulgation on the part of the Iowa Department of Transportation. In summary, the reasons for this conclusion are (1) the lack of specific statutory language providing for renewal; (2) disparity in the treatment of probationary operator's licenses and other types of driving permits; (3) the legislative intent behind the statute; and (4) the early history of administration of the statute.

II

As a second issue you question the validity of section 321.178(2) when measured against the federal equal protection guarantee, U.S. Const. Amend XIV, and the Iowa uniform application of laws provision, Iowa Const., Art. I, §6. Quite generally, it can be stated that these provisions protect the citizenry from unjustifiable class legislation. See generally Tussman and tenBroek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341 (1949). "The essence of that doctrine can be stated with deceptive simplicity. The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require in its concern for equality that those who are similarly situated be similarly treated." Id. at 344 (footnote omitted).

The scope of these two constitutional guarantees is not co-extensive. Compare Bierkamp v. Rogers, 293 N.W.2d 577 (Iowa 1980) (holding the Iowa guest statute, §321.494, The Code 1979, a violation of Iowa Const. Art. I, §6) with Silver v. Silver, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (1929) (holding that the Connecticut guest statute, Conn. Gen. Stat. ch. 308 (1927), does not violate the equal protection clause of the fourteenth amendment) and Hill v. Garner, 434 U.S. 989, 98 S.Ct. 623, 54 L.Ed.2d 486 (1977) (dismissal for want of a substantial federal question of an appeal challenging on equal protection grounds the Oregon guest statute, Ore. Rev. Stat. §30.115 (1975)).

Absent a suspect class or an infringement of fundamental rights, it is agreed, however, that the test to be applied is the rational basis test. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312-13, 49 L.Ed.2d 520, 524, 92 S.Ct. 2562 (1976); Rudolph, 293 N.W.2d at 557; Lunday v. Vogelman, 213 N.W.2d 904, 907 (Iowa 1973).

In Rudolph the Iowa Supreme Court cited with approval a United States Supreme Court statement of the rational basis test:

> The constitutional safeguard [of equal protection] is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. State legislatures are presumed to have acted within their constutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Rudolph, 293 N.W.2d at 558, quoting McGowan v. Maryland, 366 U.S. 420, 425-26, 81 S.Ct. 1101, 6 L.Ed.2d 393, 399 (1966). When a statute is challenged on the ground that it denies equal protection, the burden is on the challenger to prove the statutory classification "is wholly irrelevant to the achievement of the state's objective." Rudolph, 293 N.W.2d at 558.

The classifications established by section 321.178(2) are (1) people "between sixteen and eighteen years of age who [are] not in attendance at school or in a public or private school where an approved driver's education course is offered or available," id., and (2) all other people between the ages of sixteen and eighteen.

Two things should be noted about these classifications. First, those people not in school are not similarly situated when compared to those in school. Those not in school would most likely find attending a driver education course a difficult task at best. With respect to the other group entitled to receive probationary licenses--those sixteen to eighteen year olds attending "a public or private school where an approved driver education course is offered or available"--again, they are not similarly situated when compared to those in school where an approved course is offered. The lack of a readily available driver education course distinguishes the two groups.

Even assuming similarly situated classes, such a classification is not "wholly irrelevant to the achievement of the state's objective." Rudolph, 293 N.W.2d at 558. As noted in part I, the rationale behind requiring driver education is to further highway safety. Requiring sixteen and seventeen year olds to complete a driver education course is not indicative of a legislative belief that they are incompetent to operate a motor vehicle. See §321.178(2); §321.194. Again, as noted in part I, the legislature obviously believes that completion of the course, even by those over age eighteen, would enhance the safety of the public highways. See §321.178(1).

Allowing those persons specified in section 321.178(2) to obtain a one-year probationary operator's license furthers that purpose by facilitating attendance at a driver education course by those who might otherwise be unable to attend. In addition, the issuance of a probationary license enables those who have left secondary school to enter the job market. In sum, the classification is relevant to the achievement of the state's objective. The statute, therefore, "passes" the rational basis test and offends neither the federal nor state constitutional provisions.

III

In conclusion then, the answers to your questions are (1) rule 5(4) is an ultra vires promulgation and thus void insofar as it provides for renewal of a probationary operator's license and (2) section 321.178(2) is not unconstitutional when measured against either state or federal constitutions.

Sincerely,

Craig Gregersen
Assistant Attorney General

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COUNTIES: Drainage Districts. Sections 455.9, 455.10, 455.11, 455.12, 455.33, 455.132, 455.134, 455.135, 455.136, 455.164, The Code 1979. Sections 106.031, 106.501, 106.511 M.S.A., Sections 46-20-8, 46-20-16 S.D. Comp. Laws Ann. The petitioners for an improvement to a drainage district are ultimately liable for the preliminary expenses incurred when the improvement is not completed even though they have posted no bonds. Pursuant to Section 455.164 the county should initially pay these preliminary expenses out of the county general fund. The county is empowered to seek reimbursement from the petitioners within the district for the amount of preliminary expenses which the county pays. (Benton to Soldat, Kossuth County Attorney, 12/24/80) #80-12-22 (L)

Mr. Mark S. Soldat
Kossuth County Attorney
714 East State Street
Algona, Iowa 50511

Dear Mr. Soldat:

This is written in response to your request for an Attorney General's opinion concerning the payment of certain preliminary expenses incurred in determining whether to improve a portion of a drainage district when the Board of Supervisors subsequently determines that the improvement should not be made. To briefly restate the facts of the situation as outlined in your letter, it appears that a portion of Drainage District No. 65 in Kossuth County lies within the city of Burt. Some residents of Burt, apparently also landowners within District No. 65, filed a petition with the County Drainage Clerk requesting that the Board construct an improvement to improve the drainage in their area. The Board of Supervisors contracted with an engineer to determine what work would be involved in the improvement and at what cost. After examining the engineer's estimate of repairs, the Board determined that the cost would be too high for the benefits received and in effect denied the petition by deciding not to proceed with the work. The engineer submitted a bill of $5,000.00 to the Board, representing the costs of his preliminary study.

The Board subsequently, pursuant to Section 455.136, The Code 1979, has assessed the cost of this $5,000.00 fee back against all of the landowners in District No. 65 based upon the original cost of establishing the district. As a consequence many residents of the district whose land lies outside

the city and who did not petition for the improvement have been assessed costs ranging from $200.00 to $400.00 per landowner, and in one instance in excess of $600.00. The petitioners within the city have been assessed the statutory minimum assessment of $2.00 under § 455.136.

Based upon these facts, your question is: Where petitioners have filed a request for a repair or improvement to the drainage district and the engineer studies the situation and does not file a report but verbally tells the Board what the cost will be, and the Board decides that the cost would be too great in proportion to the benefits to be received and dismisses the proceedings, should the cost of the engineer's services be assessed against all of the land in the drainage district pursuant to § 455.136, or should they be assessed to the petitioners in accordance with § 455.132 read together with § 455.33, or is there still an alternative method of assessing the cost?

As your letter suggests, Ch. 455 does not address specifically who should be liable for preliminary expenses incurred if the improvement or repair is not completed. The Board has assessed the preliminary expense of the engineer's fee against all of the landowners in the district under § 455.136. This section provides:

> The costs of the repair or improvements provided for in section 455.135 shall be paid for out of the funds of the levee or drainage district. If the funds on hand are not sufficient to pay such expenses, the board within two years shall levy an assessment sufficient to pay the outstanding indebtedness and leave the balance which the board determines is desirable as a sinking fund to pay maintenance and repair expenses. Any assessment made under this section on any tract, parcel or lot within the district which is computed at less than two dollars shall be fixed at the sum of two dollars.
>
> If the board deems that the costs of the repairs or improvements will create assessments against the lands in the district greater than should be borne in one year, it may levy the same at one time and provide for the payment of said costs and assessments in the manner provided in sections 455.64 to 455.68; provided that assessments may be collected in less than ten installments as the board may determine.

Following this procedure has resulted in a rather severe discrepancy between the amounts paid by those who did not request the improvement and those within the city who did. Aside from this inequity however, it is our view that § 455.136 may not be properly involved to cover preliminary expenses when a contemplated improvement is not finalized. First, the statute speaks of the, "...costs of the repair or improvements provided for in § 455.136...", but does not speak of preliminary expenses to be paid if the repair or improvements are not completed, suggesting that the assessment procedure of this provision is inapplicable in that eventuality. Secondly, in Iowa it is settled law that no assessment may be made on account of an improvement against another district in the absence of proof of benefit to such other district. Mayne v. Board of Sup'rs. of Pottawattamie County, 215 Iowa 221, 225, 241 N.W. 29 (1932). Under this principle, it must follow that landowners within a district who have not petitioned for a repair or an improvement should not be assessed the preliminary expenses incurred for an improvement which is never consummated. Accordingly, § 455.136 should not be utilized to pay for such preliminary expenses.

Given the inapplicability of § 455.136 to the payment of these preliminary expenses it is necessary to turn elsewhere within Ch. 455 to determine how the amount should be paid. Your letter draws attention to § 455.132, The Code 1979. This section provides:

> When proceedings have been instituted for the establishment of a drainage district or for any change or repair thereof, or the change of a natural watercourse, and the establishment thereof has failed for any reason either before or after the improvement is completed, the board shall have power to re-establish such district or improvement and any new improvement in connection therewith as recommended by the report of the engineer. As to all lands benefited by such re-establishment, repair, or improvement, the board shall proceed in the same manner as in the establishment of an original district, using as a basis for assessment the entire cost of the proceedings, improvement, and maintenance from the beginning; but in awarding damages and in the assessment of benefits account shall be taken of the amount of damages and taxes, if any, heretofore paid by those benefited, and credit therefor given accordingly. All other proceedings shall be the same as for the original establishment of the district, making of improvements, and assessment of benefits.

Section 455.132 concerns the board's power to re-establish a district or improvement should the original establishment have failed for any reason. The section concludes that all proceedings, other than the assessment procedure, shall be the same as for the original establishment of the district. Similarly, § 455.134, which concerns those situations when a new district is established and covers an old district, concludes that except for the assessment procedures, the same proceedings should be followed as those required for the original establishment of a drainage district. Reading these provisions together leads to the conclusion that, concerning the payment of preliminary expenses for improvements or repairs which are not completed, the same procedure should be followed as is utilized when preliminary expenses are incurred for the original establishment of drainage districts which are not completed. This conclusion is consistent with the principle that in construing a statute it should be harmonized if possible with other statutes relating to the same subject. Doe v. Ray, 251 N.W.2d 496, 501 (Iowa 1977).

Proceedings for the establishment of drainage districts are commenced by the filing of a petition accompanied by a bond in an amount approved by the county auditor. Sections 455.9 and 455.10, The Code 1979. No preliminary expense may be incurred in an amount in excess of the bond. Section 455.11, The Code 1979. Should an expense in excess of that amount be required, the board is authorized to require the filing of an additional bond. Section 455.11. Moreover, the engineer appointed by the board to examine the proposed district is also required to post a bond which is to be used for the petitioners if the district is not established. 455.12, The Code 1979. Section 455.33, The Code 1979 provides that if the board determines not to establish the district, it shall dismiss the petition and assess the costs to the petitioners and their bondsmen. As § 455.10 states, the bonds are conditioned for the payment of all costs and expenses incurred in the proceedings in case the district is not established. These provisions dealing with the establishment of districts indicate clearly that the petitioners for the establishment of the district and their bondsmen must bear ultimate liability for preliminary expenses if the district is not established. Therefore, following the logic of our conclusion that the same procedure should apply for the repair or improvement of districts as applies in their creation, the petitioners for the improvement to District No. 65 are ultimately liable for the engineer's fee.

However, under Iowa law a distinction must be drawn between the ultimate liability for preliminary expenses and their initial payment. Specifically, § 455.164 provides:

> If the proposed district is all in one county, the board of supervisors is authorized to pay all necessary preliminary expenses in connection therewith from the general fund of the county. If it extends into other counties, the boards of the respective counties are authorized to pay from the general fund thereof, such proportion of said expenses as the work done or expenses created. Said amounts shall be ascertained and reported by the engineer in charge of the work and be approved by the respective boards which shall, as soon as paid, charge the amount to said district in favor of the general fund of the counties, as their interest may appear, as soon as the said district is established. If said district shall not be established, the said amounts shall be collected upon the bond or bonds of the petitioners. [Emphasis supplied].

Construing this section with the others dealing with the establishment of districts, it appears that in Iowa the payment of preliminary expenses in the event a district is not established or an improvement not made, is a two-step procedure. First, the board must pay the preliminary expenses out of the county general fund. Secondly, in the event the district is not established, the board must collect these expenses upon the bonds of the petitioners. It is clear that counties may maintain actions against petitioners and their bondsmen for the recovery of preliminary expenses which the county has in the first instance paid. Warren County v. Slack, 192 Iowa 275, 277-278, 182 N.W. 664 (1921). This procedure is applicable to the payment of preliminary expenses incurred for repairs or improvements which are not completed, given our earlier conclusion that the same procedure should apply for the payment of these expenses for improvements or repairs as for the establishment of the district. Consequently, the engineer's fee here should be paid from the county general fund. The county may then seek to recover this amount from the petitioners for the improvement.

To better understand this mechanism, it may be instructive to compare the Iowa statute with those of two neighboring states, Minnesota and South Dakota. In contrast to Iowa's statutory procedure, under Minnesota law the petitioners for a drainage improvement are responsible in the first instance for the payment of preliminary expenses. For example, § 106.031 M.S.A. provides that the petition to establish the drainage system:

> "...shall state that the petitioners will pay all costs and expenses which may be incurred in case the proceedings are dismissed or for any reason no contract for the construction thereof is let."

Section 106.041 M.S.A. requires that the petitioners post a bond in case the proceedings are dismissed. The Minnesota statute concerning the construction of improvements addresses directly both the manner in which the proceedings are to be initiated and who must pay preliminary expenses should the proceedings be dismissed. Section 106.501 M.S.A. states that the petition for the establishment of the improvement:

> "...shall contain an agreement by the petitioners that they will pay all costs and expenses which may be incurred in case the proceedings are dismissed."

The petitioners for an improvement must also post bond as required for the original establishment of the district. Section 106.511 M.S.A. Under Minnesota's procedure, the petitioners for either the establishment of the district or the creation of an improvement must in first instance pay for all costs should the proceedings fail, rather than have the counties pay the initial expenses and then seek to recover those amounts from the petitioners and their bondsmen, as is the case in Iowa. The distinction it should be stressed, is one of procedure and not as to who bears the ultimate liability, for in both Minnesota and Iowa, the petitioners must bear ultimate liability. In Minnesota, counties are empowered to recover the expenses of failed drainage proceedings, from the petitioners who initiate those proceedings if the petitioners do not pay the amounts. County of Dodge v. Martin, 271 Minn. 489, 136 N.W.2d 652, 656 (1965). However, unlike Iowa, in Minnesota counties are not compelled to pay those expenses themselves and then seek to recover them from the petitioners.

The South Dakota statutes dealing with the establishment of drainage districts are similar to those in Iowa. In particular, § 46-20-16 S.D. Comp. Laws Ann. is very similar to § 455.164 of the Iowa Code. The South Dakota provision states:

> All claims for compensation or expenses of publishing legal notices, inspecting the proposed route, the payment of engineer's and attorney's fees, and other expenses incurred prior to the establishment of the drainage shall be paid from the general fund of the county, and for

> all such payments the county treasurer shall reimburse the general fund from the assessments provided for in this chapter and chapter 46-21, if the drainage shall be established and assessments made therefor; if the petition for the establishment of such drainage shall be denied; then the petitioners shall reimburse the county for the preliminary expenses as specified herein and shall be liable therefor in an action upon the bond as provided for in § 46-20-8.

In contrast to the Minnesota procedure, counties in South Dakota must pay the preliminary expenses out of their respective general funds, but the petitioners must reimburse the county for these expenses and the counties may sue the petitioners to recover the amounts expended. Brookings County v. Sayre, 53 S.D. 350, 220 N.W. 918, 920 (1928). The South Dakota and Iowa mechanisms concerning the payment of preliminary expenses should the district or improvement not be completed are basically identical: the counties must first pay the preliminary expenses, such as the engineer's fee in the instant case, from the general fund. The petitioners for the improvement are ultimately liable for this expense however, and therefore must reimburse the county for these expenses. Finally, counties in both states are empowered to bring actions to collect these amounts from the petitioners.

Although your letter does not address the point, it appears that the petitioners for the improvement have not posted bonds for the preliminary expenses. Assuming that the petitioners have not filed bonds for the protection of the county, the question arises as to whether the county may still seek reimbursement from them for the fees involved here. As noted earlier, the provisions dealing with the establishment of districts make clear that counties may seek reimbursement from petitioners if the establishment is unsuccessful, however those provisions also require the petitioners to post bonds for the protection of the counties. Unlike the Minnesota provision dealing with improvements, Iowa law does not require that petitioners for an improvement post bond, as is required for the establishment of the district.

Despite the fact that no bonds have been filed here to protect the county should the improvement not be completed, in our judgment the county may still be reimbursed from the petitioners for the expense of the engineer's fee which the county must in the first instance pay. Section 455.164 states that if the district is not established, the amounts (preliminary expenses) shall be collected, "...upon the bond or bonds of the petitioners." Read alone, this might lead to the conclusion that no bond having been posted, there would be no way the county could be reimbursed. However, § 455.33 pro-

vides that if the petition is dismissed the board is to "...assess the costs and expenses to the petitioners and their bondsmen..." [Emphasis supplied]. Reading these sections together, it appears that the county should seek reimbursement first from the petitioners' bondsmen, but may also seek to recover the expenses from the petitioners themselves if the bond is inadequate. In County of Dodge v. Martin, 271 Minn. 489, 136 N.W.2d 652 (1965), the Minnesota Supreme Court considered whether certain petitioners who had not signed bonds required by the statute could be held liable for the preliminary expenses along with those petitioners who had signed bonds. The Court held that those petitioners who had not signed the bonds were also liable for the preliminary expenses. County of Dodge at 656. The Court's rationale was based upon the conclusion that the legislature intended that those who wished to have their property benefited by ditch and drainage improvements should assume the burden of paying the expenses themselves. County of Dodge, at 655. Further, the Court stated:

> The statutes requiring the filing of the bonds do not suggest that such bonds take the place of the obligation imposed by section 106.031 or absolve those petitioners from the burden they assumed when they petitioned for the improvement. County of Dodge at 655.

Similarly, we conclude that petitioners for improvements, such as those involved here must assume responsibility for those preliminary expenses incurred after they petitioned for the improvement. This responsibility exists although no bonds have been filed. Accordingly, the county may seek reimbursement from the petitioners for the preliminary expenses of this project, that is the engineer's fee.

To summarize, the Iowa Code does not address directly the question as to who should pay the preliminary expenses incurred should an improvement or repair not be completed. However, it appears that § 455.136 should not be utilized to pay these expenses. Rather, analogizing to the mechanism employed for the establishment of drainage districts, it appears that under 455.164 the county should pay the preliminary expenses out of the county general fund. The county is then clearly empowered to seek reimbursement from the petitioners within Drainage District No. 65. These petitioners are liable for the amount paid by the county even though no bond has been filed.

Sincerely,

Timothy D. Benton

TIMOTHY D. BENTON
Assistant Attorney General

TDB/ny

COUNTIES: Conservation board - rules for park management. §§ 111.27, 111.34, 111.46, 111.49, 111A.5 and 111A.10, The Code 1979. Camping spaces in a county-owned park may be occupied for whatever period is specified by board rules. In the absence of a board rule, the two-week limit specified in § 111.49 applies. Camping spaces on state-owned land cared for and maintained by county conservation board pursuant to § 111.27 agreement are subject to two-week limit specified in § 111.49, which limit may not be extended by board rule. (Peterson to Hutchins, State Senator, 12/18/80) #80-12-20(L)

December 18, 1980

Honorable C.W. Bill Hutchins
State Senator
902 Prairie Street
Guthrie Center, Iowa 50115

Dear Senator Hutchins:

You have requested the opinion of the Attorney General as follows:

> "Chapter 111.49 specifically limits the time that any camper can occupy a camping space in a state park to two weeks. I raise the question as to whether there is a similar limit by law applicable to county parks and furthermore would chapter 111.49 apply to a state park which is maintained and operated by a county conservation board?"

We are of the opinion that the time limit for occupying a camping space specified in § 111.49, The Code 1979, applies to county parks under the control of a county conservation board until and unless the board adopts a rule governing same. State-owned lands cared for and maintained by a county conservation board are subject to the time limit imposed in § 111.49, which limit may not be extended.

Of particular relevance to your inquiry are §§ 111.27, 111.46, 111.49, 111A.5 and 111A.10, The Code 1979, which provide:

> 111.27 Management by municipalities. The commission may enter into an agreement or arrangement with the board of supervisors of any county or the council of any city whereby such county or city shall undertake the care and maintenance of any lands under the jurisdiction of the commission.

Counties and cities are authorized to maintain such lands and to pay the expense thereof from the general fund of such county or city as the case may be.

111.46 Closing time. Except by arrangement or permission granted by the director or his authorized representative, all persons shall vacate state parks and preserves before ten-thirty o'clock p.m. Areas may be closed at an earlier or later hour, of which notice shall be given by proper signs or instructions. The provisions of this section shall not apply to authorized camping in areas provided for that purpose.

111.49 Time limit. No camping unit shall be permitted to camp for a period longer than that designated by the commission for the specific state park or preserve, and in no event longer than for a period of two weeks.

111A.5 Rules and regulations - officers. The county conservation board may make, alter, amend or repeal rules and regulations for the protection, regulation and control of all museums, parks, preserves, parkways, playgrounds, recreation centers, and other property under its control. No rules and regulations adopted shall be contrary to, or inconsistent with, the laws of the state of Iowa. . . .

111A.10 Statutes applicable. The provisions of sections 111.35 through 111.57, inclusive, shall apply to all lands and waters under the control of any county conservation board, in the same manner as if such lands and waters were state parks, lands, or waters. Wherever used in said sections, the words "state conservation commission", "conservation commission", and "commission" shall include a county conservation board,

> and the words "state conservation director" shall include a county conservation board or its executive officer, with respect to any lands or waters under the control of a county conservation board. However, the provisions of said sections may be modified or superseded by rules and regulations adopted as provided in section 111A.5.

The provisions of Chapter 111 set out above were in effect in substantially their present form long prior to enactment of the 1955 statute authorizing the creation of county conservation boards. Under the provisions of § 111.34, counties were authorized to establish parks outside the limits of cities, and when established without state funding, such parks were under the control of the county independently of the state.

In 1955, the legislature first authorized the creation of county conservation boards and prescribed their powers and duties. See Acts 56th G.A., ch. 12, now codified as §§ 111A.1 through 111A.9. Upon creation of a county conservation board, custody, control and management of county parks vested in that board (§ 111A.4) and the board was empowered to adopt rules and regulations for the protection, regulation and control thereof (§ 111A.5). The statute did not require the adoption of rules nor did it provide a penalty for violation of any rule adopted. The second sentence of § 111A.5 (no rules and regulations adopted shall be contrary to, or inconsistent with, the laws of the state of Iowa) does not impose on county parks the requirements and limitations of §§ 111.35 through 111.57, which expressly apply to state parks.

In this setting, the 62nd General Assembly amended Chapter 111A to impose a penalty for violation of board rules (§ 111A.5) and to add a new section (§ 111A.10) imposing the management requirements of §§ 111.35 through 111.57 on county parks under the control of county conservation boards where such requirements were not modified or superseded by board rule. Acts 62 G.A. Ch. 148.

The polestar of statutory construction is legislative intent, and the goal of the courts in construing a statute is to ascertain that intent and, if possible, give it

effect. City of Des Moines v. Elliott, 276 N.W.2d 44 (Iowa 1978); Doe v. Ray, 251 N.W.2d 496 (Iowa 1977). In searching for legislative intent, the court must consider the language used in the statute, the object to be accomplished, the evils and mischief sought to be remedied, and that construction must be placed on the statute which will best effect its purpose. State v. Prybil, 211 N.W.2d 308 (Iowa 1973); Northern Natural Gas Co. v. Forst, 205 N.W.2d 692 (Iowa 1973). The intent of the legislature is to be gleaned from the statute read as a whole. Hartman v. Merged Area VI Community College, 270 N.W.2d 823 (Iowa 1978); Georgen v. State Tax Commission, 165 N.W.2d 782 (Iowa 1969); Durant-Wilton Motors, Inc. v. Tiffin Fire Ass'n, 164 N.W.2d 829 (Iowa 1969). The court must be mindful of the state of the law when it was enacted and the evil it was designed to remedy, and it must be harmonized, if possible, with other statutes relating to the same subject. Egan v. Naylor, 208 N.W.2d 915 (Iowa 1973).

In applying these principles to the statutes involved, we conclude that the legislature intended to make all lands and waters under the control of a county conservation board subject to the provisions of §§ 111.35 through 111.57 in the same manner as if they were state park lands or waters unless and until other requirements are adopted by board rule. Thus, state rules for the protection and management of park lands are in effect for the period following creation of the county conservation board until such time as local control is effected by board rule. The penalty imposed by § 111.57 for violation of the management provisions of the statute apply until those provisions are supplanted by board rule, at which time the penalty imposed by § 111A.5 for violation of board rule applies.

However, agreements entered into pursuant to § 111.27 whereby the county agrees to undertake the care and maintenance of lands under the jurisdiction of the state conservation commission are not within the ambit of either § 111.34 or § 111A.10 since state funds are involved and such areas remain under the control of the state conservation commission. See 1974 Op.Att'yGen. 48, copy enclosed. We note also that each such agreement contains a provision requiring the local entity to maintain said property as a

recreation area for the citizens thereof and for the people of Iowa in substantially the same manner as state recreation areas are cared for, maintained, and managed by the state conservation commission. Such areas thus are subject to the management provisions relating to state parks set out in §§ 111.35 through 111.57 both by statutory provision and by the terms of the agreement itself.

In summary, and in direct response to your questions, we are of the opinion that:

(1) A camper may occupy a camping space in a park under the control of a county conservation board for whatever period is specified by board rules. In the absence of a board rule, the two-week limit specified in § 111.49 applies.

(2) Persons occupying camping units on state-owned lands cared for and maintained by a county conservation board pursuant to a § 111.27 agreement are subject to the two-week limit specified in § 111.49, which limit may not be extended by board rule.

Sincerely,

Clifford E. Peterson

CLIFFORD E. PETERSON
Assistant Attorney General
Environmental Protection Division

CEP:rcp

Enclosure

SOCIAL SERVICES: JUDICIAL DISTRICT DEPARTMENTS OF CORRECTIONAL SERVICES: §§ 4.1(36), 28E.12, 905.4 and 905.5, The Code 1979. Unwillingness of counties in the judicial district to serve as administrative agent for the judicial district department of correctional services does not authorize the district department to act as its own administrative agent. After designating a county as administrative agent, the judicial district department may enter into an agreement with the designated county pursuant to § 28E.12, The Code 1979, under which the district department performs the functions of administrative agent. (Golden to Rush, 12/12/80) #80-12-19(L)

December 12, 1980

The Honorable Bob Rush
State Senator
Fifteenth District
830 Higley Building
Cedar Rapids, Iowa 52401

Dear Senator Rush:

We have received your opinion request dated September 10, 1980, concerning the designation of counties as administrative agents for judicial district departments of correctional services.

Specifically you request advice concerning the following questions:

1. Can a judicial district department of correctional services enter into a 28E agreement with the county that has been designated administrative agent for the district department of correctional services to serve as its own administrative agent?

2. If it is your opinion that a 28E agreement may be used, must the board of directors designate a county to serve as administrative agent and then enter an agreement with the county that provides for the district department of correctional services to be its own administrative agent?

3. If none of the counties in the district will serve as the administrative agent, may the district department of correctional services serve as its own administrative agent?

Analysis of section 905.4 and ch. 28E, The Code 1979, in light of the General Assembly's directions for statutory construction as outlined in ch. 4, The Code 1979, suggests that a judicial district department of correctional services may enter into a 28E agreement with a county under which the actual administrative responsibilities are assigned to the judicial district department. However, such an agreement may only be entered into with a county which is designated by the judicial district as its administrative agent. Lastly, there is no authority for a judicial district department to act as its own administrative agent in cases where none of the counties in the district is willing to so act.

For purposes of analysis, your questions will be addressed in inverse order. Iowa Code § 905.4 is entitled "Duties of the Board". It indicates that "the board shall" and then lists nine paragraphs of specifics. The third paragraph referred to in your letter provides for a duty of the board to "designate one of the counties in the judicial district to serve as the district department's administrative agent and to provide in that capacity, all accounting, personnel, facilities, management and supportive services needed by the district department, on such terms as may be mutually agreeable in regard to advancement of funds to the county for the added expense it incurs as a result of being so designated."

This section clearly contemplates that the designation of a county as administrative agent is mandatory. Under section 4.1(36), The Code 1979, "unless otherwise specifically provided by the general assembly, whenever the following words are used in a statute enacted after July 1, 1971, their meaning and application shall be: (a) The word shall impose a duty . . ." For the judicial district department of correctional services to be its own administrative agent would be contrary to the express mandate of the General Assembly.

Furthermore, section 905.5, The Code 1979, imposes several specific obligations on the county designated as

administrative agent. For the district department of correctional services to assume these responsibilities would be contrary to this statutory mandate.

One question that arises is what the district department can do if all the counties in the judicial district "refuse" to act as fiscal agent. The Code does not require the county's permission prior to their designation as fiscal agent. Thus, there is serious doubt that counties have the right to "refuse" this designation. It seems clear that under the Code once it is designated by the district department it must perform the function of fiscal agent. A court order would appropriately be available if the county "refuses".

Unfortunately, this does not resolve the problem because section 905.4(3) contemplates mutual (and presumably voluntary) agreement on reimbursement to the county for its expenses. The Code does not address a procedure for resolving any disagreements about the amount of reimbursement for specific services. Since reimbursement is only available under section 905.4(3) for "increased costs" arising from service as a fiscal agent, the district department arguably could bring a district court action to force the county to refrain from making demands beyond increased cost. However, there is some doubt that this would be a satisfactory solution. Existence of policy reasons for doing so would not, however, permit rewriting the clearly stated intent of the General Assembly. Thus, the district department must designate a county as administrative agent, and may not fail to do so because of a county's reluctance.

The answer to your second question is that if a 28E agreement were to be utilized, it would be necessary for the district department to first designate a county as its administrative agent. Ch. 28E, The Code 1979, is a procedure under which public agencies jointly exercise their power or under which one public agency contracts with another agency for the performance of either's powers. Under section 905.4(3) and 905.5, certain powers are vested by the Code in the county designated as administrative agent. If the district department did not first designate a county, it could not perform these functions pursuant to ch. 28E. 28E agreements cannot expand the powers of contracting parties beyond those possessed by at least one party to the agreement.

Lastly, in response to your first question, ch. 28E, The Code 1979, would permit a judicial district department of correctional services to enter into an agreement under which the responsibilities of the administrative agent are fulfilled by the district department. Under § 28E.12, "any one or more public agencies may contract with any one or more other public agencies to perform any governmental services, activity or undertaking which any of the public agencies entering into the contract are 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."

In order for this provision to be applicable to an arrangement under which a judicial district department of correctional services and a designated county agree that the department will act as its own fiscal agent, a designated county and judicial district must be public agencies. Clearly the county is a public agency as a political subdivision of the State. The judicial district departments of correctional services are also public agencies being so described by § 905.2, The Code 1979. Thus, ch. 28E is applicable to an agreement between a designated county and a judicial district department of community correctional services. Also, the designated county has the authority under §§ 905.4(3) and 905.5 to serve as administrative agent. Thus, since one of the two agencies has the power, a contractual arrangement under 28E.12 is permissible.

In conclusion, if a voluntary agreement to use § 28E.12 to contract the duties of administrative agent can be obtained, it is legitimate. There may still be an impasse, however, if none of the counties are either willing to enter into a 28E agreement or to fulfill the duties of administrative agent under reasonable compensation arrangements.

Sincerely,

Jonathan Golden

Jonathan Golden
Assistant Attorney General

JG/jam

REAL PROPERTY/Subdivision Platting. § 409.1, The Code 1979. When a landowner sells a tract to which § 409.1 applies so that the seller keeps part of it, and the buyer buys part on contract and part by deed so that he can obtain financing, it is reasonable to conclude that there is not a subdivision into three or more parts under § 409.1. If the contract is forfeited and seller sells off that part of the real estate to a third party, seller has subdivided into three parts under § 409.1. (Ovrom to Murray, State Senator, 12/12/80) #80-12-17(L)

December 12, 1980

Honorable John S. Murray
State Senator
2526 Chamberlain
Ames, Iowa 50010

Dear Senator Murray:

This is in response to your request for an opinion on the subdivision platting law, Chapter 409, Code of Iowa, 1979.

You ask whether a conveyance by deed to a portion of a larger parcel which is being sold on contract, followed by a contract forfeiture of the larger parcel and resale to a third party, is a subdivision within the meaning of § 409.1, The Code 1979, and if so, at what time. In our opinion there is a subdivision into three or more parts when the buyer forfeits and the seller resells to a third party.

You described a practice among people selling large tracts of real estate on contract which results in two deeds being given to the buyer. Initially, the seller deeds a small parcel to the buyer which is used as a home or building site. The conveyance by deed is effected so that the buyer can mortgage the property to borrow money to build on it. The seller retains title to the remainder of the tract until the buyer has completed the contract payments. Later, when the buyer successfully performs the terms of the contract and completes payment, the seller conveys the remainder of the tract to the buyer by warranty deed. If the buyer does not successfully carry out the terms of the

contract so that it is forfeited, the seller still owns the large parcel and can sell to a third party. You ask if this is a subdivision under Chapter 409, and if so, when does it occur?

Section 409.1 requires the proprietor of certain tracts to file a subdivision plat when he or she subdivides a tract or parcel of land "into three or more parts." When a landowner conveys away two lots and keeps one for him or herself it is considered a subdivision. 1980 O.A.G. 713. In order for the situation you describe to raise the issue whether there is a subdivision, the owner of the original tract would have to retain a part of that tract for him or herself.

Assuming that the landowner does keep part of the original tract, and it is a tract to which § 409.1 applies (e.g., one in a city or a rural tract of 40 acres or less), we think the situation you describe could create a "subdivision into three or more parts" under § 409.1. Clearly a division into three parts occurs if the buyer forfeits and the proprietor sells the forfeited tract to a third party. At that point the proprietor owns part of the land, the contract buyer owns part of it, and the third party owns part of it. This is a subdivision into three parts. The seller would be required to comply with the platting requirements of Chapter 409 prior to sale of the forfeited parcel to the third party.

A more difficult question is whether a subdivision occurs when the proprietor retains part of the land, deeds a small parcel to the buyer, and sells the remainder on contract to the buyer. In that situation the proprietor owns part of the land, the buyer owns a small parcel, and the proprietor retains legal title to the parcel being sold on contract while the buyer holds equitable title to and has use of that parcel. One could certainly argue that this is a subdivision into three or more parts. The proprietor is keeping one parcel, and is conveying away the remainder of the land in two separate instruments under two separate legal descriptions. It would be easy for the buyer to sell off the small parcel he holds by deed, which would result in the original tract being divided into three parts - the situation the legislature intended to be covered by § 409.1.

However, we think it would be reasonable to conclude that this is actually a division of the seller's tract into two parts rather than three, so § 409.1 would not apply. Two apparent purposes of Chapter 409 are to provide for the orderly subdivision of land and to have plats on file which accurately describe small parcels for taxation and conveyances. See §§ 409.4 (subdivisions in a city shall be laid out in blocks with streets), 409.3 (reference to lot number on plat is sufficient for taxation or conveyances). Since the buyer in your hypothetical situation intends to use all the land he purchases as a unit, and presumably will convey it as a unit when he sells it, it would not be contrary to these purposes if no subdivision plat were filed in this situation. We would therefore view the transaction as only one conveyance by the seller which is made in two instruments to aid the buyer in financing the purchase.

Our opinion is limited to the facts of this particular situation, and is based on the assumption that the parties are acting in good faith with no intention to circumvent the subdivision platting law. We recently advised a county attorney that it violated the subdivision platting law for a landowner to create a subdivision by sales and reconveyances through a strawman. A copy of that letter is enclosed.

In summary, when a buyer purchases a small part of a larger parcel by deed and the remainder on contract, and the transaction is done as a method of financing, there is not a subdivision into three or more parts within the meaning of § 409.1, The Code 1979. If the buyer forfeits the portion being purchased on contract and the seller resells it to a third party, this creates a subdivision into three or more parts, and a Chapter 409 subdivision plat would be necessary.

Sincerely,

ELIZA OVROM
Assistant Attorney General

EO:rcp

Enclosure

LABOR/EMPLOYMENT: Iowa Department of Job Service. 29 U.S.C. §§ 49-49i; §§ 96.5(3)(b)(1), 96.11(11), 731.3, The Code 1979. The Iowa Department of Job Service is obligated under Chapter 96 of the Iowa Code to follow certain provisions of federal law and regulations established by the United States Department of Labor. Such provisions and regulations, which preclude Job Service from making referrals of job applicants to employers involved in labor disputes, control over any potentially conflicting provisions in Iowa's "right-to-work" law set forth in Chapter 731. (Stork to Miller, State Representative, 12/11/80) #80-12-16(L)

December 11, 1980

Honorable Kenneth D. Miller
State Representative
Rt. #1
Independence, Iowa 50644

Dear Representative Miller:

You have requested an opinion concerning the legality of certain procedures of the Iowa Department of Job Service with respect to making referrals of job applicants to employers involved in labor disputes. Specifically, you question whether, in light of Iowa's "right-to-work" law contained in Chapter 731, The Code 1979, Job Service must make referrals to an employer company regardless of whether that company is engaged in a labor dispute, which may include an employee strike.

Section 731.3 provides:

> Contracts to exclude unlawful. It shall be unlawful for any person, firm, association, corporation or labor organization to enter into any understanding, contract, or agreement, whether written or oral, to exclude from employment members of a labor union, organization or association, or persons who do not belong to, or who refuse to join, a labor union, organization or association, or because of resignation or withdrawal therefrom.

Unless otherwise provided by law, "person" includes "government or governmental subdivision or agency . . ." § 4.2(13), The Code 1979. Accordingly, the Department of Job Service would generally fall within the proscription established by § 731.3 concerning the entering into any understanding or agreement to exclude from employment any person who does not belong to, or refuses to join, a labor union, organization, or association, or because of resignation or withdrawal therefrom. Other provisions of both state and federal law, however, apply to the question you have raised.

Chapter 96, The Code 1979, sets forth responsibilities of the Iowa Department of Job Service. Section 96.11(11) provides in relevant part:

> State-federal co-operation. In the administration of this chapter, the department shall co-operate with the United States department of labor to the fullest extent consistent with the provisions of this chapter, and shall take such action, through the adoption of appropriate rules, regulations, administrative methods and standards, as may be necessary to secure to this state and its citizens all advantages available under the provisions of the Social Security Act that relates to unemployment compensation, the federal Unemployment Tax Act, the Wagner-Peyser Act, and the Federal-State Extended Unemployment Compensation Act of 1970.
>
> In the administration of the provisions of section 96.29 which are enacted to conform with the requirements of the Federal-State Extended Unemployment Compensation Act of 1970, the department shall take such action as may be necessary to insure that the provisions are so interpreted and applied as to meet the requirements of such federal Act as interpreted by the United States department of labor, and to secure to this state the full reimbursement of the federal share of extended benefits paid under this chapter that are reimbursable under the federal Act.
>
> * * *

The Wagner-Peyser Act referred to above is formally the "Federal Employment Service Act" contained in 29 U.S.C. §§ 49-49i. Under this Act, the State of Iowa is eligible to and does receive federal funds for the "establishment and maintenance" of public employment offices, such as Job Service of Iowa. In order to obtain such funds, a state must accept certain provisions of the Act, including "Sections 49 to 49c, 49d, 49g, 49h, 49j and 49k of this title and section 338 of Title 39 and designate or authorize the creation of a state agency vested with all powers necessary to cooperate with the United States Employment Service under said sections." See also 20 C.F.R. § 602.20,which requires each state receiving benefits under the Wagner-Peyser Act to submit detailed plans for carrying out the provisions of the Act to the Secretary of Labor (or designee). If such plans are in compliance with the Act and its rules, the state is approved for funding. The Employment Service is a federal agency created under § 49 to administer the Act. Under § 49k the Secretary of Labor is authorized to make such rules and regulations as are necessary to carry out the provisions of the Act. Such rules and regulations are administered by the Employment Service and include the following:

> It is the policy of the United States Employment Service:
>
> * * *
>
> (i) To make no referral which will aid directly or indirectly in filling a job:
>
> (1) Which is vacant because the former occupant is on strike or is being locked out in the course of a labor dispute; or
>
> (2) The filling of which is an issue in a labor dispute; but, with respect to positions not covered by paragraph (i)(1) of this section or this paragraph (i)(2), an individual may be referred to a place of employment on which a labor dispute exists provided he is given written notice of such dispute prior to or at the time of his referral.

20 C.F.R. § 604.1.

The federal Unemployment Tax Act and the Federal-State Extended Unemployment Compensation Act of 1970 are both contained in Title 26 of the Internal Revenue Code of 1954. Specifically, § 3304(a)(5) of the former states in relevant part:

> (a) Requirements. The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that --
>
> * * *
>
> (5) compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:
> (A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;
>
> * * *

In accordance with this provision, § 96.5(3)(b)(1), The Code 1979, provides:

> b. Notwithstanding any other provision of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:
>
> (1) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;
>
> * * *

This provision satisfies one condition of approval by the Secretary of Labor which permits employers in this State to be eligible for the 90 percent credit on their federal unemployment tax liability. 26 U.S.C. § 3304(a).

Section 96.11(11) evidences a clear legislative intent that the Iowa Department of Job Service is to cooperate with the United States Department of Labor so that the citizens of Iowa are able to share in the advantages of enumerated federal statutes, including receipt of federal funds and the availability of federal tax credits. This cooperation requires compliance with federal rules and regulations such as those set forth by the United States Employment Service. You question whether such compliance violates Iowa's right-to-work law and, to that extent, is unlawful. I advise, for the following reasons, that the right-to-work law is not controlling and therefore does not require Job Service to make referrals of prospective employees to employers involved in labor disputes.

First, § 731.3 was enacted by the General Assembly in 1947 and has not been amended since that time. The first three paragraphs of § 96.11(11), on the other hand, were enacted in 1971. Assuming that the two statutes are indeed in conflict and irreconcilable, the statute latest in date of enactment prevails. § 4.8, The Code 1979. Accordingly, § 96.11(11) would prevail and would support Job Service's adherence to federal regulations in not making job referrals to employers involved in labor disputes.

Second, in enacting the statutes in question, it is presumed that the public interest is favored over any private interest. § 4.4, The Code 1979. Chapter 96 contains a specific declaration of state public policy:

> Guide for interpretation. As a guide to the interpretation and application of this chapter, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his or her family. The achievement of social security requires protection gainst this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legis-

> lature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

§ 96.2, The Code 1979. Section 96.11(11), and the federal law adopted thereunder, constitutes an express part of this public policy. See also § 96.12(1). Chapter 731, on the other hand, contains a declaration of policy that protects essentially private interests, i.e., the right of an individual to pursue his or her chosen occupation irrespective of membership in a union. To the extent that the provisions of Chapters 96 and 731 conflict with one another, the public interest served by the former is presumed to prevail.

Third, the consequences of a particular statutory construction is an important element in determining legislative intent. § 4.6, The Code 1979. If § 731.3 is deemed to preclude the job referral practices of Job Service, the State of Iowa would lose substantial financial benefits available under various federal statutes. Included in such loss would be distinct advantages to employers who presently are able to take credits against their federal unemployment tax liability. The result would be considerable financial hardship to individual citizens of the state as well as increased financial burdens for employers. If, however, § 96.11(11) takes precedence over Iowa's right-to-work law insofar as job referrals from Job Service are concerned, the most serious consequence appears to be that certain employers, who are involved in labor disputes, are not as likely to contact, or be contacted by, individuals who need and desire employment. The less burdensome construction for the citizens of Iowa favors the conclusion that § 731.3 does not apply to job referral policies mandated by federal law and required for the continued receipt of federal benefits.

Finally, although there are legal questions concerning whether and how Chapter 731 applies in individual cases, the actual determination that a particular understanding, contract, or agreement violates § 731.3 is essentially a factual question for a court to decide. The necessity and importance of a judicial determination is evidenced by the enforcement provisions, which include a criminal penalty and injunctive relief. §§ 731.6 and 731.7.

My research does indicate that at least one state supreme court has upheld the validity of the job referral policy established by the Secretary of Labor. See De Giorgio Fruit Corp. v. Department of Employment, 362 P.2d 487, 13 Cal.Rptr. 663 (1961). This case did not, however, involve the additional issue of a possible violation of a state right-to-work law. I have enclosed a copy of this decision for your convenience.

If I may be of further assistance in this matter, please feel free to contact me.

Very truly yours,

FRANK J. STORK
Assistant Attorney General

FJS:sh

Enclosure

BEER AND LIQUOR: Tax on liquor licensees. §§ 123.3(10), 123.96, 442.42, The Code 1979. A municipality which holds a liquor control license is subject to the same tax applied to private licensees on liquor purchases from state liquor stores. (Norby to Correll, Black Hawk County Attorney, 12/10/80) #80-12-15(L)

December 10, 1980

Mr. David H. Correll
Black Hawk County Attorney
309 Courthouse Building
Waterloo, Iowa 50703

Dear Mr. Correll:

You have requested an opinion of the Attorney General concerning payment by a city of the fifteen percent tax applied to purchases of alcoholic liquor from state liquor stores by holders of liquor control licenses. This question arises from the following situation. The City of Waterloo owns a civic center which, as a part of its operations, makes sales of liquor to the public. Just as other licensees, the city must purchase its liquor from a state liquor store. Your question requires consideration as to whether the status of being a municipality exempts payment of the tax imposed on other licensees. Section 123.96(1), The Code 1979, which imposes this tax, states as follows:

> There is imposed on every person licensed to sell alcoholic beverages for consumption on the premises where sold, a special tax equivalent to fifteen percent of the price established by the department on all alcoholic beverages for general sale to the public. Such tax shall be paid by all licensees at the point of purchase from the state on all alcoholic beverages intended or used for resale for consumption on the premises of retail establishments. Such tax shall be in lieu of any other sales tax applied at the state store and shall be shown as a separate item on special sales slips provided by the department for purchases by licensees.

(A person, as defined for purposes of Ch. 123, includes a municipal corporation operating a coliseum or auditorium. § 123.3(10)).

As a municipality is involved in the situation considered herein, the possibility of exemption from payment of this tax arises. Chapter 422, The Code 1979, which imposes the retail sales tax, contains two possible rationales for exemption from sales tax on liquor purchases.[1] The application of these exemptions, however, is limited to exemption from the sales tax imposed by Ch. 442. See § 442.5. The language of § 123.96, however, expressly states that the fifteen percent tax " . . . shall be in lieu of any other sales tax . . ." . The specific language of § 123.96 relating to sales of liquor should prevail over the general language of Ch. 442 relating to sales of tangible personal property. Doe v. Ray, 251 N.W.2d 496 (Iowa 1977). In addition, the language of § 442.5 does not purport to create an exemption from any tax other than that imposed by Ch. 422. It should also be noted that no presumption of exemption from taxation exists for Iowa municipalities. See State v. Woodbury Co., 222 Iowa 488, 269 N.W. 449 (1936). In conclusion, § 123.96(1), in conjunction with § 123.3(10), clearly provides for application of a tax of fifteen percent of the established price of liquor purchases from state liquor stores by cities holding liquor licenses.

Sincerely,

Steven G. Norby

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

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1 Initially, the sales tax imposed in § 422,43 applies only to retail sales. A retail sale is defined in § 422.42(3) to exclude a sale of personal property for resale. As liquor sales to a licensed city, or any licensee, are made for the purpose of resale, this might appear to exempt payment of sales tax. Additionally, § 422.45(5) exempts payment of sales tax in connection with sales to municipal corporations.

BEER AND LIQUOR CONTROL DEPARTMENT: ownership of liquor license or beer permit by Department employees. §§ 123.17, 123.45, The Code 1979. An employee of the Iowa Beer and Liquor Control Department may not hold a liquor license or a beer permit, and may not own stock in a corporation which holds a license or permit. Spouses and children of Department employees may generally hold a license or permit and own stock in a corporation holding a license or permit. (Norby to Gallagher, 12/10/80) #80-12-14(L)

December 10, 1980

Rolland Gallagher, Director
Beer and Liquor Control Department
L O C A L

Dear Mr. Gallagher:

You have requested an opinion of the Attorney General on two questions concerning prohibitions of certain activities of Iowa Beer and Liquor Control Department employees and their families. Your questions are as follows:

1. Does Section 123.45, The Code, prohibit an employee from our department from holding a liquor control license or a beer permit, or owning stock in a corporation which holds a liquor license or beer permit?

2. Does Section 123.45, The Code, prohibit spouses and children of an employee of this department from holding a liquor control license or a beer permit, or owning stock in a corporation which holds a liquor license or beer permit?

Regarding your first question, it does appear that Department employees are prohibited from holding a liquor control license or beer permit or owning stock in a corporation which holds a license or permit. This prohibition is contained in § 123.45, The Code 1979, which provides in relevant part as follows:

> No council member or department employee shall, directly or indirectly, individually, or as a member of a partnership or shareholder in a corporation, have any interest in dealing in or in the manufacture of alcoholic liquor or beer nor receive any kind of profit nor have any interest in the purchase or sale of alcoholic liquor or beer nor receive any kind of profit nor have any interest in the purchase or sale of alcoholic liquor or beer by person so authorized under this chapter except that this provision shall not prevent any such member or employee from lawfully purchasing and keeping alcoholic liquor or beer in his possession for personal use. [Emphasis supplied.]

This prohibition appears broad enough to include any ownership interest, regardless of the form or extent of the interest, in a business which holds a license or permit. The inclusion of an express authorization allowing employees to purchase beer or liquor for personal use would appear to indicate legislative intent that the prohibitory language of the section be of broad application. A violation of the provisions of this section would be a serious misdemeanor and would also subject the employee to suspension or discharge from employment.

In addition to § 123.45, the prohibition contained in § 123.17, The Code 1979, has application to the ability of Department employees to hold beer permits or liquor licenses. Section 123.17 provides as follows:

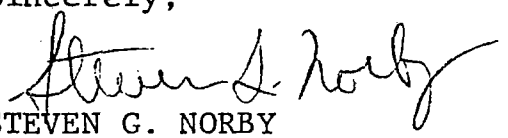
> Council members, officers and employees of the department shall not, while holding such office or position . . . engage in any occupation, business, endeavor, or activity which would or does conflict with his duties under this chapter; . . . Any officer or employee violating this section or any other provisions of this chapter shall, in addition to any other penalties provided by law, be subject to suspension or discharge from his employment. Any council member shall, in addition to any other penalties provided by law, be subject to removal from office as provided by law.

This provision was construed in a past Attorney General's opinion as barring a city council member from holding a liquor control license as city council members are involved in the license application procedure. 1964 Op. Atty. Gen. 280. Similarly, engaging in the business of the sale of beer or liquor would be likely to present a conflict with the duties of some Department employees. The application of § 123.17 would require a review of the individual employee to determine if their business activity in fact conflicts

with their duties in the Department. Violation of § 123.17 is a serious misdemeanor and carries the additional sanction of suspension or discharge from employment with the Department.

Regarding your second question, the § 123.45 prohibition would not prohibit a spouse or children of a Department employee from holding a license or permit or owning stock in a corporation which holds a license or permit. This section expressly applies only to the individual Department employee. In contrast, an individual and his/her spouse are treated as one person in § 123.3(10)(f) for purposes of that section. This contrast shows that if spouses or family members are intended to be treated as one person, such intent can be expressly shown. A particular situation, however, might require an examination concerning where the beneficial ownership of the stock really exists. For example, if a child of an employee owned stock as part of a trust, and the employee was trustee of this trust, this might violate § 123.45. We would advise a case-by-case look at situations which raise the possibility of control of ownership by a Department employee. Absent such questions, a child or spouse of a Department employee may own stock in a corporation which holds a license or permit.

Sincerely,



STEVEN G. NORBY
Assistant Attorney General

SGN:sh

CRIMINAL LAW; IMPLIED CONSENT: Authority of peace officer to compel assistance of a physician in OMVUI case. §321B.5, The Code 1979. A physician has no duty to certify the death or unconsciousness of a driver to enable a peace officer to obtain a body specimen for purposes of chemical testing for alcohol. (Huber to Pope, State Representative, 12/10/80) #80-12-13 (L)

December 10, 1980

Mr. Lawrence Pope
State Representative
State Capitol
Des Moines, Iowa 50319

Dear Mr. Pope:

You have asked whether a physician can be compelled to assist a peace officer in obtaining a body specimen from a dead or unconscious person for the purpose of chapter 321B chemical testing. More specifically, you ask whether, under the authority of section 321B.5, a physician can be forced to certify a driver's death or unconsciousness.

Chapter 321B establishes that a driver impliedly consents to submit to chemical testing for alcohol in return for the privilege of using the public highways. §321B.3, The Code 1979. The evidence obtained by this testing is admissible in any civil or criminal action arising out of the acts allegedly committed while driving under the influence of an intoxicating beverage. §321.10, The Code 1979. If the driver refuses a request to submit to the testing, no test is given. State v. Hitchens, 294 N.W.2d 686, 688 (Iowa 1980). The state acquiesces in the refusal rather than obtain the evidence by force as would be permitted by Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908 (1966). The state, however, sanctions the driver who refuses, revoking his or her driving privileges temporarily. §321B.7, The Code 1979. Proof of the refusal is admissible in any civil or criminal action arising out of the acts allegedly committed while driving under the influence of an intoxicating beverage. §321B.11, The Code 1979.

Persons who are not capable of exercising their "right" to refuse are not exempt from the implied consent law:

> Any person who is dead, unconscious or who is otherwise in a condition rendering him incapable of consent or refusal shall be

> deemed not to have withdrawn the consent provided by section 321B.3; provided that a licensed physician shall certify in advance that such person is dead, unconscious or otherwise in a condition rendering him incapable of consent or refusal....

§321B.5, The Code 1979. A peace officer, therefore, can gather evidence of blood alcohol content from a dead or unconscious driver, but not without the written certification of a physician. State v. Boner, 186 N.W.2d 161 (Iowa 1971). If a physician is unavailable or unwilling to certify the driver's incapability, then the state is denied the evidence of the alcoholic content of the driver's blood.

The question presented here, whether a physician is required to certify a driver's incapability, is not very different from a question posed in an earlier Attorney General's Opinion. In concluding that a peace officer possesses no authority to compel a physician to withdraw blood from a driver arrested for OMVUI who consents to the chemical testing of his or her blood, the opinion states:

> At common law all citizens of the county were bound to attend the sheriff on his command to pursue a fellow when the "hue and cry" was raised. Those failing to respond were subject to possible fine or imprisonment. 1 HOLDSWORTH, HISTORY OF ENGLISH LAW, 294 (4th Ed., 1931); 1 BLACKSTONE COMMENTARIES 343. In Iowa this common law has been replaced by certain specific statutory provisions. Peace officers have been given the power to compel assistance for service of process. (Section 742.2, Code of Iowa, 1973); to compel assistance for dispelling an unlawful assembly. (Section 743.5, Code of Iowa, 1973); and to summon aid to effect an arrest. (Section 755.11, Code of Iowa, 1973). Nowhere in the Code, however, is there a grant of authority to peace officers to compel assistance in aiding in the collection of evidence, or any other "non-emergency" situation, nor have any powers been judicially construed.

1974 Op. Att'y Gen. 653 (construing section 321B.4). No statutory enactment or amendment since that opinion has extended that authority to evidence-gathering. See §§719.2, 719.3, 804.17, The Code 1979.

There being no authority outside section 321B.5 that would require a physician to certify a driver's incapability, any such authority must be found within section 321B.5 itself. The question here presented, therefore, is whether section 321B.5 grants peace officers the authority to compel physicians to certify a driver's death, unconsciousness or other incapability.

A peace officer could compel the certification of a physician only if a refusal to assist were a criminal offense. Because a criminal offence cannot be established by implication, State v. Coppes, 247 Iowa 1057, 1062, 78 N.W.2d 10, 13-14 (1956), the "shall certify" language of the statute is itself insufficient to create a crime:

> As a general rule, disobedience of a statutory prohibition is not a crime unless some statute so prescribes. On the other hand, the legislature creates a criminal offense when it prescribes a punishment by fine or imprisonment for performance of an act, and a statute which imposes punishment for a course of conduct, practices, habits, mode of life, or a status is sufficient to make the same a crime without any express declaration to that effect. In other words, where the statute either makes an act unlawful or imposes a punishment for its commission, this is sufficient to make the act a crime without any express declaration to that effect; and is not necessary to declare an act to be a misdemeanor, but it is sufficient to declare it to be unlawful and prescribe a penalty.

22 C.J.S., Criminal Law, §24(3), p. 86. Section 321B.5 neither declares unlawful a physician's refusal to certify nor prescribes a penalty for that refusal. A physician, therefore, has no legal duty to certify the death or unconsciousness of a driver upon the request of a peace officer.

In summary, the language of section 321B.5 mandating certification before the withdrawal of a body specimen is a restriction upon the peace officer and meant for the driver's protection. It imposes no duty upon the attending physician.

Sincerely,

Robert J. Huber
Assistant Attorney General

STATE OFFICERS AND DEPARTMENTS: Department of Social Services, Bureau of Community Correctional Services, Presentence Reports. 21 U.S.C. § 1175; 42 U.S.C. § 4582; 42 C.F.R. §§ 2.12, 61; Chapter 905, The Code 1979; §§ 905.2, 905.4(9), §§ 68A.2; 68A.7; Chapter 901; §§ 901.2, 901.3, 904.4; § 125.37; Chapter 692; §§ 692.1, 692.2, 692.3, 962.4, 692.7, 692.18. A pre-sentence investigation report submitted to the courts by the judicial district department of correctional services must be kept confidential. Section 901.4, The Code 1979, grants the courts authority to disclose its contents under limited circumstances. Reports containing a client's medical or psychiatric treatment records are confidential and must be sealed by the court. Reports containing information relative to a client's treatment for substance abuse are confidential and may be disclosed in limited circumstances pursuant to applicable state and federal law. Reports containing client criminal history data are confidential and may be redisseminated only in accordance with the applicable provisions of Chapter 692, The Code 1979. The judicial district departments of correctional services are not liable for violations of confidentiality by the courts. (Brenneise to Reagen, Commissioner Dept. of Social Services, 12/10/80) #80-12-12(L)

Michael V. Reagen, Ph.D., Commissioner
Iowa Department of Social Services
Fifth Floor, Hoover Building
Des Moines, Iowa 50319

December 10, 1980

Dear Commissioner Reagen:

You have requested an opinion of the Attorney General regarding the confidentiality requirements which govern information compiled by the eight Iowa Judicial Departments of Correctional Services about their pre-institution clientele. Specifically, you have requested an opinion on the following questions:

(1) What is the confidentiality status of pre-sentence investigations and other reports to the court prepared by Judicial District Departments of Correctional Services?

(2) When, if ever, does the responsibility for preserving confidential data leave the hands of the Judicial District Departments of Correctional Services?

(3) Are Judicial Districts liable for the release or nonprotection of confidential data by the courts?

A brief discussion of the Iowa community based corrections program is necessary to place your questions in the appropriate context.

Chapter 905, The Code 1979, establishes the Iowa community based correctional program. This program is a state-wide correctional plan created to supervise and assist individuals who have been charged with or convicted of a felony, an aggravated misdemeanor or a serious misdemeanor, or who have been placed on probation. Section 905.2 provides for the establishment of a department of correctional services (hereinafter referred to as "district department") in each of the eight judicial districts which must furnish or contract for services necessary for the development and maintenance of the community-based corrections program. These services generally involve resources such as job training, general, special or remedial education, psychiatric and marriage counselling, and drug/alcohol abuse treatment and counselling. § 905.4(9).

Each district department is governed by a board of directors who employ a director to administer the program. § 905.2. The director is primarily responsible for the development of the plan which implements the program. This plan must conform to the various guidelines established by the Iowa Department of Social Services or state funds will not be allocated for its implementation. § 905.8. These guidelines have been promulgated in Chapter 770-25(905) IAC.

Section 770-25.4(6)(905) IAC requires each district department to maintain files on individuals participating in the program. Typically, these files are composed of reports containing highly sensitive and personal information which must be submitted to the courts as part of the sentencing process. A pre-sentence investigation report, for example, may contain criminal history data, psychiatric evaluations, or drug/alcohol abuse information. Similarly, probation violation reports and treatment progress reports which contain sensitive information about a client are routinely submitted by the district departments to the courts. Accordingly, the Iowa Department of Social Services has promulgated a rule aimed at preserving the confidentiality of client records. This rule, § 770.25.4(10) IAC, provides as follows:

> The director shall ensure that there are written procedures governing the handling and dissemination of information, including access by the client, and the confidentiality of client records which comply with applicable state and federal laws. § 770-25.4(10) IAC. (Emphasis added).

Your questions will thus be analyzed in terms of the confidentiality standards established by both state and federal law.

I.

Your first question inquires as to the confidentiality status of pre-sentence investigation and other reports submitted to the court by district departments. Discussion of the confidentiality standards under which the district departments operate must first begin with the Iowa Open Records Law (Ch. 68A, The Code 1979). As a general rule in our democratic system of government, the public has a "right to know". This right is consistent with the public's status as a decisional unit separate from government. It is reflected in the provisions of Chapter 68A.

Section 68A.2 gives each Iowa citizen the right to examine and copy and the media the right to publish all records and documents of state agencies unless other statutes expressly require them to be kept confidential. Several statutes create exceptions to the general rule of public access to district department records. We will analyze these statutes by dealing with their application to the various reports division departments submit to the courts.

A. THE PRE-SENTENCE INVESTIGATION REPORT

The pre-sentence investigation report is specifically governed by the provisions of Chapter 901, The Code 1979. Section 901.2 provides in pertinent part:

> "Presentence investigation. Upon a plea of guilty, a verdict of guilty, or a special verdict upon which a judgment of conviction of any public offense may be rendered, the court shall receive from the. . . judicial district department of correctional services . . . any information which may be offered which is relevant to the question of sentencing. . . The court shall order a presentence investigation when the offense is a class "B", class "C", or class "D" felony. The court may order a presentence investigation when the offense is an aggravated or serious misdemeanor.

> The court may withhold execution of any judgment or sentence for such time as shall be reasonably necessary for an investigation with respect to deferment of judgment, deferment of sentence, or suspension of sentence and probation. The investigation shall be made by the judicial district department of correctional services." (Emphasis added.)

Section 901.3 states as follows:

> "Presentence investigation report. Whenever a presentence investigation is ordered by the court, the investigator shall promptly inquire into: The defendant's characteristics, family and financial circumstances, needs, and potentialities; the defendant's criminal record and social history; the circumstances of the offense; the time the defendant has been in detention; and the harm to the victim, the victim's immediate family, and the community. All local and state mental and correctional institutions, courts, and police agencies shall furnish to the investigator on request the defendant's criminal record and other relevant information. With the approval of the court, a physical examination of the defendant may be ordered, or the defendant may be committed to a psychiatric facility for an evaluation of his or her personality and mental health. The results of any such examination shall be included in the report of the investigator."

Section 901.2 requires each district department to submit to the court a pre-sentence investigation report as part of the sentencing process. Since this report often contains psychiatric, medical or other information of a highly personal nature, statutory standards have been established to ensure the confidentiality of that report. Section 901.4 states in pertinent part:

> Presentence investigation report confidential. The court may, in its discretion, make the presentence investigation report or parts of it available to the defendant, or the court may make

> the report or parts of it available while concealing the identity of the person who provided confidential information. . . . In any case where the defendant is committed to the custody of the division of adult corrections and is not a class "A" felon, a copy of the presentence investigation report shall be sent to the director at the time of commitment."

Section 901.4 requires the pre-sentence investigation report to be held confidential. The legislative history of the section reveals that throughout the process of enactment, the section contained the heading "Report confidential". See 1973 Session, 65th G.A., ch. 295, § 49. Thus, the heading was enacted in the same manner as the rest of the section.

Where headings are enacted as a part of an act and the meaning of the act is ambiguous, resort may be had to the headings as an aid to the legislative intent. State v. Linsig, 178 Iowa 484, 159 N.W. 995 (1916). Read without the aid of the heading, § 901.4 is ambiguous as to whether the pre-sentence investigation report is to be held confidential. However, since the heading was present throughout the enactment process, the General Assembly clearly intended the report to be confidential.

Despite the confidential status of pre-sentence investigation reports, § 901.4 grants the courts limited authority to release them. The statute has provided two specific instances when the report may be released. First, the director of the Iowa Department of Social Services' Division of Adult Corrections is entitled to receive a copy of the report when a non-class "A" felon is committed to his custody. Second, a client may obtain access to the report or portions thereof if the Court determines the client should be permitted to do so. 1/ Such access is not to be granted as a matter of right. See State v. Waterman, 214 N.W.2d 621, 624 (Iowa 1974).

1/ When information contained in a report is received from an informant, § 901.4 allows the court to balance the interest of the client in receiving the information with the interest of the informant in remaining confidential. If the informant's safety interest outweighs the client's interest, the court may disclose the information but only after the informant's identification has been concealed.

B. REPORTS CONTAINING MEDICAL OR PSYCHIATRIC RECORDS

Beyond peradventure, the most deeply private information accumulated about an individual is that contained in medical and psychiatric records. Historically, disclosure of this type of information has been considered reprehensible in light of the Hippocratic Oath and accepted practice. See Schiffres, Doctor--Disclosure of Information, 20 A.L.R. 3d 1109 (1968).

However, the confidentiality of medical or psychiatric records is not a constitutional right of the individual. It is a statutorily recognized right. Section 68A.7 The Code, 1979, requires that "Hospital records and medical records of the condition, diagnosis, care or treatment of a patient or a former patient, including outpatient, shall be kept confidential." Given the statutory nature of this right, the legislature may modify it if it chooses to do so. 16 Am. Jur. 2d Constitutional Law § 318 (1979).

The legislature has modified the right of a division department client to have his medical or psychiatric records held strictly confidential. Section 901.4 provides that:

> ". . . The report of any medical examination or psychiatric evaluation shall be made available to the attorney for the state and to the defendant upon request. Such reports shall be part of the record but shall be sealed and opened only on order of the court. . . ."

The plain language of § 901.4 thus makes it clear that only the defendant, the attorney for the state, or the director of the division of adult corrections, Iowa department of social services, 2/ may obtain access to medical and psychiatric reports in the absence of a court order.

2/ The director is entitled to obtain access to a client's medical or psychiatric report if it is contained as part of the pre-sentence investigation report. § 901.4 The Code, 1979.

It is equally clear that medical and psychiatric reports are not public records. Although Section 901.4 requires these reports to be made part of the record, they must be sealed by the court and opened only pursuant to court order.

C. REPORTS CONTAINING INFORMATION CONCERNING TREATMENT FOR DRUG/ALCOHOL (SUBSTANCE) ABUSE

Participation by an individual in a treatment program is at times made a condition of that individual's release from confinement. Substance abuse treatment is one such program available to district department clientele. Because of the personal nature of substance abuse treatment, both state and federal law establish confidentiality standards which govern records maintained pursuant to those treatment programs.

Section 125.37, The Code 1979, requires that the "registration and other records of facilities" treating substance abusers shall be kept confidential. Accordingly, client records received from such facilities must be treated as confidential.

Section 125.37, however, does not grant an unlimited right of confidentiality. Information may be disclosed pursuant to a client's written consent. Information may also be disclosed to medical personnel in a medical emergency without the client's consent (§ 125.37(3)), and for purposes of research so long as the client's identity is not revealed, either directly or indirectly. § 125.37(2).

The corresponding federal statutes providing for the confidentiality of substance abuse treatment records are 21 U.S.C. § 1175 (Drug Abuse Prevention and Treatment Act) and 42 U.S.C. § 4582 (Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act). Section 21 U.S.C. 1175(a) provides for the confidentiality of patient records

> ". . . which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States. . . ."

Section 42 U.S.C. 4582(a) provides for the confidentiality of patient records

> ". . . which are maintained with the performance of any program or activity relating to alcoholism or alcohol abuse education, training, treatment, rehabilitation, or research which is conducted, regulated or directly or indirectly assisted by any department or agency of the United States. . . ."

Both statutes are applicable to records of division department clientele. Since the state of Iowa is a recipient of revenue sharing and other unrestricted funds from the federal government, all of the programs and activities of state or local government are thereby indirectly assisted. Such assistance has been determined to be sufficient to meet the statutory criteria for coverage. Town of Huntington v. New York State Drug Abuse Control Commission, 84 Misc. 2d 138, 373 N.Y.S. 2d 728 (1975); 42 C.F.R. § 2.12(a)(3).

Sections 21 U.S.C. 1175 and 42 U.S.C. 4582 do not grant an absolute right of confidentiality. Both statutes create several identical exceptions. Information may be released to anyone pursuant to the client's written consent. 21 U.S.C. § 1175(b)(1); 45 U.S.C. § 4582(b)(1). Information may also be released to medical personnel during a medical emergency, without the client's consent (21 U.S.C. § 1175(b)(2)(A); 45 U.S.C. § 4582(b)(2)(A)), and for purposes of research, audits, and evaluations so long as the client's identity is not revealed, either directly or indirectly. 21 U.S.C. § 1175(b)(2)(B); 42 U.S.C. 4582 (B)(2)(B). Finally, a court may order disclosure. Subsections (b)(2)(C) of 21 U.S.C. 1175 and 42 U.S.C. 4582 empower the courts, in appropriate circumstances, to authorize disclosures which would otherwise be prohibited. The applicable federal regulation (42 C.F.R. § 2.61), has interpreted subsection (b)(2)(C) as allowing the disclosure of information only upon the basis of a court order obtained pursuant to a subpoena or other appropriate legal process. The order may not be issued unless the record indicates that the court has determined the need for disclosure outweighs any injury to the client and the treatment process. 42 C.F.R. § 2.61(d). In addition, the order must provide appropriate limits as to who gets the information and how much is released. 42 C.F.R. § 2.61(g).

In summary, then, both state and federal law require a division department client's substance abuse treatment records to be held confidential, except where (1) the client gives

written consent for disclosure, (2) the information is disclosed for research or statistical purposes, (3) a medical emergency exists, or (4) the information is disclosed pursuant to an appropriate order of the court.

D. REPORTS CONTAINING CRIMINAL HISTORY DATA

Division departments frequently submit to the courts, client criminal history information. The legislature has determined that such information is to be protected from improper disclosure. Accordingly, Chapter 692, The Code 1979 was enacted to control its dissemination.

Section 692.2 sets forth who may receive criminal history data.3/

> "[The Department of Public Safety (DPS) and the Bureau of Criminal Investigation (BCI)] may provide copies or communicate information from criminal history data only to criminal justice agencies, or such other agencies as are authorized by the confidential records council.
>
> Authorized agencies and criminal justice agencies shall request and may receive criminal history data only when:
>
> 1. The data is for official purposes in connection with prescribed duties, and,
>
> 2. The request is based upon name, fingerprints, or other individual identifying characteristics."

Division department submission of criminal history data to the courts meets this criteria. Both the division departments and the courts are criminal justice agencies as defined in Section 692.1(10):

> "'Criminal Justice Agency' means any agency or department of any level of government which performs as its principal function the apprehension, prosecution, adjudication, incarceration, or rehabilitation of criminal offenders." (emphasis added).

3/ Section 692.1 defines criminal history data in broad terms. Such data would include, for example, client activity

Once a criminal justice agency receives criminal history records originating from DPS or BCI, the redissemination requirements of Section 692.3 apply. Section 692.3 states in relevant part:

> "A . . . criminal justice agency . . . shall not redisseminate criminal history data, within or without the agency, received from the department or bureau, unless:
>
> 1. The data is for official purposes in connection with prescribed duties of a criminal justice agency, and
>
> 2. The agency maintains a list of the persons receiving the data and the date and purpose of the dissemination, and
>
> 3. The request for data is based upon name, fingerprints, or other individual identification characteristics.
>
> A . . . criminal justice agency . . . shall not redisseminate intelligence data, within or without the agency, received from the department or bureau or from any other source, except as provided in subsections 1 and 2."

In addition, a criminal justice agency may disseminate criminal history data for statistical purposes so long as individual identities are protected. § 692.4.

It is apparent, then, that neither the division departments nor the courts may redisseminate criminal history data unless (1) the recipient is another criminal justice agency as defined in § 692.1(10) and (2) the requirements of § 692.3 have been met or the information is released for statistical purposes. Disclosure in any other manner may constitute a criminal violation. See § 692.7. 4/

3/ (con't) information contained in a violation report submitted to the court. In addition, all criminal history data is exempt from the provisions of Chapter 68A. § 692.18, The Code 1979.

4/ It should be noted, however, that if criminal history data is included in the pre-sentence investigation report, it may be released to those persons authorized to receive the report pursuant to § 904.1, The Code 1979.

As a brief summary of our response to your initial question, we reach the following conclusions:

(1) The pre-sentence investigation report is a statutorily protected document. It generally must be kept confidential. However, the courts may disclose it to a limited number of individuals as outlined in § 901.4, The Code 1979.

(2) Division department reports containing a client's medical or psychiatric treatment records are confidential. When submitted to the court, they must be sealed. They may only be re-opened pursuant to court order.

(3) Any report containing information regarding a client's treatment for substance abuse must be kept confidential. State and federal legislation exists which sets forth the limited circumstances under which such information may be disclosed.

(4) Reports containing client criminal history data must be kept confidential unless redisseminated in accordance with the applicable provisions of Chapter 692, The Code, 1979.

II.

The second question you have raised inquires as to when the responsibility for preserving confidential data leaves the hands of the division departments. It is our opinion that this responsibility is discharged when the applicable confidentiality requirements have been met and the information has been disclosed pursuant to those requirements.

Each division department has an affirmative duty to submit to the court any information which is relevant to a client's sentencing. Section 901.2, The Code 1979, states, in pertinent part:

> ". . . the court shall receive from the . . . judicial department of correctional services, . . . any information which . . . is relevant to the question of sentencing. . . ."
> (Emphasis added.)

The word "shall" imposes a duty when used in a statute addressed to a public body. Schmidt v. Abbott, 261 Iowa 886, 156 N.W.2d 649 (1968). City of Newton Board of Supervisors of Jasper County, 135 Iowa 27, 112 N.W. 167 (1907). It is mandatory and excludes the concept of discretion. Therefore,

whenever the division departments receive information which is relevant to judgment and sentencing procedures, two duties must be fulfilled. First, each division department must submit the information to the courts. Second, submission must comport with applicable confidentiality standards. Once appropriate submission has occurred, both duties are fulfilled and responsibility for preserving confidentiality is discharged. The burden then shifts to the courts to adhere to applicable confidentiality standards.

III.

Your third question asks whether the division departments are liable for the release or non-protection of confidential data by the courts. In order for there to be an actionable claim based on the violation of a statutorily imposed duty, the duty must have been unperformed or disregarded. Disbrowe v. Tucker, 211 N.W.2d 318, 320 (Iowa 1973). We have concluded in our response to your second question that division department responsiblity to preserve confidentiality is discharged once appropriate submission to the courts has occurred. Accordingly, the division departments are not liable for violations of confidentiality by the courts.

Sincerely,

Craig S. Brenneise

Craig S. Brenneise
Assistant Attorney General

CSB/co

STATE OFFICERS AND DEPARTMENTS: Iowa Department of Transportation. Chapter 17A, 307, 307A, 327H, §§ 17A.1(2), 17A.2(7), 17A.2(7)(a), 17A.3(1)(b), 17A.4, 17A.7, 307.26(6), 307.10(5), 307A.2(13), 327H.18. If any agency statement of policy, practice or procedure substantially affects the legal rights or procedures of the public or a segment thereof, the agency is required to promulgate administrative rules instead of only adopting a policy. (Goodwin to Waldstein, State Senator, 12/9/80) #80-12-11(L)

December 9, 1980

The Honorable Arne Waldstein
State Senator
Statehouse
Des Moines, IA 50319

Dear Senator Waldstein:

You have asked for an Attorney General's opinion on whether the adoption of policies relating to railroad improvement by the Iowa Department of Transportation (DOT) should have been in the form of Departmental Rules under Chapter 17A, Code of Iowa.

On February 6, 1979, the DOT Railroad Division requested and received DOT Commission approval of an "Iowa DOT Policy for Use of Federal and State Funds on Railroad Improvement Programs." The agenda item for that DOT Commission action stated as follows:

> Since 1974, $13.4 million in State funds have been committed for upgrading nearly 800 miles of branch lines in Iowa. Prior to October, 1978, Federal funds were available only for providing assistance on abandoned rail lines.
>
> Recent passage of the Local Rail Services Act of 1978 has made financial assistance available prior to abandonment. Under the new federal law, the State has the flexibility to determine eligible projects and all financial terms and conditions of the upgrading contracts.

With these changes, the Iowa DOT may utilize approximately $2.5 million in Federal funds for upgrading projects in FY 1979.

The current policy and procedure governing the administration of Branch Line Assistance Funds already provides for the receipt and use of Federal funds. Federal funds will be in the form of a grant to the railroad and will be used on a matching basis with State (when available), shippers, local government, and railroads participating. The present Branch Line Rehabilitation Funding philosophy shown below will continue:

1. All parties share in costs and benefits.

2. Retains the flexibility in contract negotiations and administration.

3. Retains the loan-grant provision.

4. Utilizes State and Federal funds on priority rail projects.

The DOT Commission did on that date approve the new DOT Policy for Use of Federal and State Funds on Railroad Improvement Programs. The new DOT Policy continued the existing policy of upgrading branch lines as opposed to railroad mainlines.

It is noted that the DOT in March, 1978, published its Iowa Rail Plan, which is a book consisting of approximately 100 pages. The Iowa Rail Plan at pages 43-63 sets forth the DOT's guidelines for branch line assistance and federal rail service assistance.

To summarize, the DOT has adopted policies and has published its Iowa Rail Plan, which set forth the guidelines for railroad assistance to be administered by the DOT; but such guidelines have not been enacted in the form of administrative rules.

Under Chapter 327H, Code of Iowa, the DOT is to administer the railroad assistance fund for "the restoration, conservation and improvement of railroad branch lines," §327H.18, Code of Iowa. The DOT enters into agreements wherein the railroads are

to repay the assistance, §327H.20, Code of Iowa. Also, the Railroad Division of the DOT is empowered to "apply for, accept, and expend federal, state or private funds for the improvement of rail transportation," §307.26(6), Code of Iowa. This code section does not limit the expenditure of such funds to only branch lines.

The Code of Iowa further empowers the DOT to adopt departmental rules "as it may deem necessary to transact its business and for the administration and exercise of its powers and duties," §307.10(5), Code of Iowa. See also §307A.2(13), Code of Iowa, which states that the DOT Commission "shall adopt such rules and regulations in accordance with the provisions of Chapter 17A as it may deem necessary to transact its business and for the administration and exercise of its powers and duties."

The words "as it may deem necessary" cannot logically be construed to mean that the DOT can choose to ignore the requirement of Chapter 17A, Code of Iowa, to promulgate administrative rules. Instead, the statutes [§§307.10(5) and 307A.2(13)] must be read in their entirety, i.e., the DOT is to adopt departmental rules "as it may deem necessary . . . for the . . . exercise of its . . . duties." One of its duties is to have administrative rules if a statement of its policy, practice or procedure would substantially affect the legal rights or procedures available to the public or a segment thereof. See Attorney General's opinion Fortney to Welsh, June 17, 1980.

One of the purposes of Chapter 17A, the Iowa Administrative Procedure Act is "to increase public participation in the formulation of administrative rules," §17A.1(2), Code of Iowa. The Administrative Procedure Act requires each state agency to "adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available to the public," §17A.3(1)(b), Code of Iowa. A rule is defined as a "statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure or practice requirements of any agency," §17A.2(7), Code of Iowa. (Emphasis added) However, a rule does not include "a statement concerning only the internal management of an agency and which does not substantially affect the legal rights of, or proecedures available to, the public or any segment thereof," §17A.2(7)(a), Code of Iowa.

In view of the above, it does appear that the existing DOT policies pertaining to branch line assistance do substantially affect the legal rights of or procedures available to the public or a segment thereof, and that the DOT policies for branch line assitance should, therefore, be in the form of administrative rules.

This opinion is also being provided to the Iowa Department of Transportation Commissioners and Director for their consideration and action in accordance with the provisions of the Iowa Administrative Procedure Act.

Very truly yours,

Robert W. Goodwin

Robert W. Goodwin
Special Assistant Attorney General
and Counsel to the Iowa DOT

RWG:jsb

STATE OFFICERS AND DEPARTMENTS: Board of Nursing--Denial of a License--§§ 147.3, 147.4, 147.55, 152.1, 152.10, The Code 1979. The Board of Nursing can determine whether the refusal to administer blood to patients on religious or other grounds is the failure to conform to the minimum standards of the acceptable and prevailing practice of nursing. If it so finds, it may deny an applicant a license on that basis. Such should not constitute unlawful discrimination. (Blumberg to Illes, Executive Director, Iowa Board of Nursing, 12/9/80) #80-12-8(L)

December 9, 1980

Mrs. Lynne M. Illes
Executive Director
Iowa Board of Nursing
L O C A L

Dear Mrs. Illes:

We have your opinion request regarding denial of a license. Under your facts a nursing student has indicated that her religious beliefs prevent her from administering blood to patients. She is willing to take all required courses in this area, but will not perform such work if licensed. You wish to know whether the Board may deny such a person a license. You appear to be concerned about whether such a person will be able to meet the minimum standards of nursing.

Chapters 147 and 152, The Code 1979, regulate the licensure of nurses. Section 147.3 provides that an applicant for a license to practice a profession, such as nursing, shall not be ineligible because of religion. Sections 152.1(2), (3) define both registered and licensed practical nurses:

> 2. The "practice of the profession of a registered nurse" means the practice of a natural person who is licensed by the board to do all of the following:
>
> a. Formulate nursing diagnosis and conduct nursing treatment of human responses to actual or potential health

problems through services, such as case finding, referral, health teaching, health counseling, and care provision which is supportive to or restorative of life and well-being.

b. Execute regimen prescribed by a physician.

c. Supervise and teach other personnel in the performance of activities relating to nursing care.

d. Perform additional acts or nursing specialties which require education and training under emergency or other conditions which are recognized by the medical and nursing professionans and are approved by the board as being proper to be performed by a registered nurse.

e. Apply to the abilities enumerated in paragraph "a" through "d" of this subsection scientific principles, including the principles of nursing skills and of biological, physical, and psychosocial sciences.

3. The "practice of a licensed practical nurse" means the practice of a natural person who is licensed by the board to do all of the following:

a. Perform services in the provision of supportive or restorative care under the supervision of a registered nurse or a physician.

b. Perform additional acts under emergency or other conditions which require education and training and which are recognized by the medical and nursing professions and are approved by the board, as being proper to be performed by a licensed practical nurse.

[Emphasis added.]

Section 152.10(g) provides for licensee discipline for the failure to conform to the minimum standard of acceptable and prevailing

practice of nursing. Section 147.55(3) provides for licensee discipline for practice harmful or detrimental to the public. Rule 1.2(3)(b), 590 I.A.C., provides that professional incompetency within § 147.55(3), includes deviation from the standards of learning or skill ordinarily possessed and applied by other nurses, and, the failure to conform to the minimum standard of acceptable or prevailing practice of nursing.

A board may deny a license to a person otherwise qualified on any grounds for which a license may be revoked by the district court. Such authority for the courts is found in § 147.55.

The problem with which the Board is presently faced is that when a license is issued, it is assumed, and may be even presumed, that the nurse is capable of performing and will perform all procedures and functions of a nurse. The fact that the Board knows that a nurse will not perform an often necessary procedure to protect and sustain the life of a patient, is distressing to it. The concern of the Board about denying a license to an applicant who is otherwise qualified is understandable. So is the concern of the Board regarding its own liability to a third person because it issued a license to such an individual with prior knowledge it now has.

The liability issue is not as difficult as the denial of a license. If, under Iowa or Federal law, the Board has a duty to issue a license to such a person, if otherwise qualified, we can see no liability that would attach. Such would not constitute a negligent or wrongful act or omission. One should not be held liable merely for doing an act which the courts or a statute require to be done. The real issue, however, is whether the Board may legally deny a license on what may be, in actuality, a religious basis.

Again, § 147.3 prohibits a licensing board from denying a license on the basis of religion. We are therefore faced with this provision and § 147.4, permitting denial of a license for the same grounds as revocation. The real issue, then, is not whether this constitutes a ground for denial, but rather whether this ground, if the basis for a denial, violates § 147.3 or any other state or federal statute concerning civil rights.

The problem is that even though we are convinced that the Board's action, if any is taken, will concern only an applicant's failure to fully perform the duties of a nurse, and will not focus on the religion aspect, the issue of religion, nevertheless, will raise its head. We have been unable to find any cases specifically dealing with this fact situation.

Freedom of religion, contained in the First Amendment to the United States Constitution, is one of the cornerstones of American constitutional law. The Amendment embraces two concepts,--freedom to believe and freedom to act. The freedom to believe is absolute, but not the freedom to act. Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244 (1879); Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 54 L.Ed. 1213 (1940). The absolute freedom of belief is clearly set forth in Abood v. Detroit Board of Education, 431 U.S. 209, 234-235, 97 S.Ct. 1782, 52 L.Ed.2d 261, 284 (1977):

> [A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will . . . .

The fact that the freedom to act is not absolute is evident in Reynolds; Cantwell; Wisconsin v. Yoder, 406 U.S. 205, 925 S.Ct. 1526, 32 L.Ed.2d 15 (1972); Feiner v. New York, 340 U.S. 315, 71 S.Ct. 303, 95 L.Ed. 295(1951); and American Communication Asso. v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925 (1950).

In determining infringments of First Amendment rights, the courts apply a strict scrutiny and compelling State interest test. Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). The question then becomes whether there is a compelling state interest in denying a license based upon your facts. We believe there is.

In employment discrimination cases, a bona-fide occupational qualification (BFOQ) can be a defense to allegations of discrimination based on religion, sex or age. In Iowa Dept. of Social Serv. V. Iowa Merit Emp. Dept., 261 N.W.2d 161 (Iowa 1977) the Court recognized that a BFOQ could be a defense to a discrimination case.

Southeastern Community College v. Davis, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979), is a case more clearly on point. There the petitioner sought entrance to a nursing program. Because of a hearing difficulty which prevented the petitioner from understanding others without reading lips, the director of the State Board of Nursing advised the school not to accept the petitioner into the nursing program because she would not be able to function fully as a nurse. Concern was expressed about the safety of the patients if the nurse was not able to hear orders from doctors. The District Court[1] was especially concerned with this when it sustained the school's

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1. 424 F.Supp. 1241 (E.D.N.C. 1976).

action. that Court held that the school's decision was not discriminatory. The Court of Appeals reversed the District Court[2] and the Supreme Court granted certiorari. Adhering to the findings of the District Court, the Supreme Court reversed the Court of Appeals, thereby affirming the school's action.

The District Court held (424 F.Supp at 1345):

> The major problem with the plaintiff's contention is that her handicap actually prevents her from safely performing in both her training program and her proposed profession. The trial testimony indicated numerous situations where plaintiff's particular disability would render her unable to function properly. Of particular concern to the court in this case is the potential of danger to future patients in such situations. [Emphasis added.]

Throughout these opinions is evidence of concern for the safety of patients. Whether one relies upon a BFOQ or on concern for the safety of others, the result is the same. Denying someone educational opportunities, licensure or employment is not necessarily discriminatory, especially when the safety of others is of great concern.

Concern for the safety of patients is evident here. Pursuant to the scope of practice of nursing in Iowa, the administration of blood is an integral part of the practice of that profession. The unwillingness to practice nursing fully may be found by the Board to constitute a failure to meet the minimum standards of the prevailing and acceptable practice of nursing. Such a decision rests solely with the Board, and, according to our analysis, will not constitute unlawful discrimination on the basis of religion.

The next concern is whether these grounds are sufficient, under the law, for the denial of a license. Section 258A.5(1)(f) mandates that the licensing boards, which include the Board of Nursing pursuant to § 258A.1(1)(n), define by rule the acts or omissions which are grounds for licensee discipline under § 147.55 Rule 1.2(3)(b), 590 I.A.C., of the Board of Nursing is the result of that mandate. In other words, the grounds for discipline by a district court in § 147.55(2) include failure to conform to the minimum standards. In any event, there is no implicit or explicit guarantee in the federal or state constitution for the right to

2. 574 F.2d 1158 (4th Cir. 1978).

practice a profession. See, State ex rel. Schneider v. Liggett, 223 Kan. 610, 576 P.2d 221 (1978).

Accordingly, we are of the opinion that if the Board of Nursing concludes that the refusal of an applicant to administer blood to a patient under any circumstances is a failure to conform to minimum standards, it can deny an application for licensure. Such a denial, based upon the facts of this situation and concern for the safety of patients, should not constitute discrimination based on religion. It is a fact question whether the Board could be held liable to a third person who suffers damage from the failure to be administered blood by a nurse licensed by the Board. A court would have to determine the prior knowledge. We are not in a position to fully answer that question.

Very truly yours,

Larry M. Blumberg

LARRY M. BLUMBERG
Assistant Attorney General

LMB/cmc

MUNICIPALITIES: Benefits for Surviving Spouses -- § 411.6(8)(c), The Code 1979. Surviving spouses shall receive a benefit under § 411.6(8)(c) so long as they remain unmarried. Once they remarry, the benefit ceases and cannot be restarted, even if the subsequent marriage ends. (Blumberg to Anstey, Appanoose County Attorney, 12/5/80) #80-12-5(L)

December 5, 1980

Mr. W. Edward Anstey
Appanoose County Attorney
Appanoose County Courthouse
Centerville, Iowa 52544

Dear Mr. Anstey:

We have your opinion request regarding § 411.6(8)(c), The Code 1979. Pursuant to your facts, a woman was receiving a benefit under Chapter 411 as the surviving spouse. She subsequently remarried and the benefits stopped. This second marriage has now ended, and she again wants benefits as the surviving spouse from the first marriage to begin. You ask whether she is again eligible for such benefits.

Section 411.6(8)(c) provides that upon the death of a member there shall be paid a benefit to "the spouse to continue so long as said party remains unmarried . . . ." In a previous opinion, 1978 Op. Atty Gen. 785, we held that a surviving spouse receives a benefit until remarriage, at which time the benefit ends.

The key to the resolution of this question involves the meaning of the term "remains unmarried". In Schloemer v. Uhlenhopp, 237 Iowa 279, 21 N.W.2d 457 (1946), the issue was the meaning of the term "remain inviolate". There, the plaintiff contended that the above term, contained in Article I, section 9 of the Iowa Constitution, which provided that the right of trial by jury shall "remain inviolate", had a different meaning than the Seventh Amendment to the United States Constitution, which provides that the right of a trial by jury shall

be "preserved". It was held that both had the same meaning. In other words, "preserving" a right and holding or keeping it inviolate were the same.

"Remain" is defined in Webster's New Collegiate Dictionary, p. 970 (1979), to mean: "to continue unchanged". Synonyms for "remain" include "continue", "linger", "go on", "keep on", "carry on", "never cease", and "endure". Roget's International Thesaurus, § 143.3, p. 68 (3rd ed. 1963).

A surviving spouse "remains unmarried" from the time of death of the member until a remarriage. At the time of the remarriage, the surviving spouse has no longer remained unmarried. Nothing from that point on can place that spouse in a position where he or she remains unmarried from the time of death of the member. There is no language in § 411.6(8)(c) or elsewhere in Chapter 411 which demands an interpretation other than what is contained here. The language of § 411.6(8)(c) is clear.

Accordingly, we are of the opinion that when surviving spouses remarry they cannot continue to receive a benefit under § 411.6(8)(c), nor can they requalify for the benefit when the subsequent marriage ends.

Very truly yours,

Larry M. Blumberg

Larry M. Blumberg
Assistant Attorney General

MUNICIPALITIES: Transit Systems -- §§ 364.4 and 384.12(10), The Code 1979. A city may extend its transit system service outside the city limits upon a contract. The use of taxes levied pursuant to § 384.12(10) for the operation and maintenance of a transit system that has been so extended is not prohibited. (Blumberg to Kirkenslager, State Senator, 12/5/80) #80-12-6(L)

December 5, 1980

The Honorable Larry Kirkenslager
State Senator
615 South Garfield Street
Burlington, Iowa 52601

Dear Senator Kirkenslager:

We have your opinion request regarding a tax levy for bus service. In a previous opinion to you of March 28, 1980, we stated that the city of West Burlington could not levy a tax under § 384.12(10), The Code 1979, to help pay for the Burlington municipal transit system. You now reverse the question. You ask whether Burlington, which levies a tax under § 384.12(10) to help maintain its municipal transit system, can use any of those funds to provide bus service to West Burlington residents.

Section 364.4(2) provides that a city may, by contract, extend services to persons outside the city. Thus, a city can extend its transit service to persons outside the city. More specifically, Burlington can extend its bus service to West Burlington residents. However, such cannot be done unless there is a contract for the extension of the service.

There is nothing within § 384.12(10) which limits the use of the tax revenues to the city limits. The only limitation therein is that the tax can be levied only when the revenues of the transit system are insufficient for the operation and maintenance of the system.

Accordingly, Burlington can extend its bus service to West

Burlington. The use of taxes levied pursuant to § 384.12(10) for the operation and maintenance of the transit system with the extended service is not prohibited. However, Burlington cannot extend the service absent a contractual arrangement.

Very truly yours,

Larry M. Blumberg

Larry M. Blumberg
Assistant Attorney General

LAW ENFORCEMENT, POLICEMEN AND FIREMEN, SHERIFF, Authority of reserve peace officers, §§80B.2, 80B.3(3), and 321B.2, The Code 1979, and 1980 Session, 68th G.A., Ch. 1191, §§1, 3, 4, 6, 8, 9, 10; Reserve peace officers have the authority to serve papers and, if properly certified, to invoke implied consent coextensive with regular peace officers employed by the same law enforcement agency. The Iowa Law Enforcement Academy Council need not admit reserve peace officers to academy programs. (Hayward to Swanson, Asst. Montgomery Co. Atty., 12/5/80) #80-12-4(L)

December 5, 1980

Mr. Mark D. Swanson
Assistant Montgomery County Attorney
Red Oak, Iowa 57566

Dear Mr. Swanson:

You have requested the issuance of an Opinion of the Attorney General concerning the scope of authority granted to reserve peace officers by 1980 Session, 68th G.A., Ch. 1191. Specifically you have asked:

> 1. May Reserve Deputy Sheriffs, while on duty, serve original notices and other civil papers exactly as Regular Deputy Sheriffs, and
>
> 2. May Reserve Deputy Sheriffs, who have otherwise met all requirements, receive training in the Iowa Law Enforcement Academy sponsored Implied Consent School and after successful completion of said training invoke, while on duty, the procedures under §§321B.1 - 321B.6, The Code 1979?

I. A General Overview of Ch. 1191, 68th G.A. (1980).

1980 Session, 68th G.A., Ch. 1191, codifies and defines qualifications, authority, responsibilities and benefits of reserve peace officers in this State. Reserve officer or auxiliary forces have long been a part of local law enforcement in Iowa. Chapter 1191 is the first time that the General Assembly has systematically addressed the practice.

There is some reference to the employment of irregular law enforcement officers in Iowa even predating statehood. The early references concern a sheriff's authority to enlist

the aid of citizens in the transportation of prisoners, §55.6, Revised Statutes of the Iowa Terr. (1843), and of sheriffs, judges and justices of the peace to enlist such aid in dispersing illegal assemblies. §49.6 (Second Class Offenses), Revised Statutes of the Iowa Terr. (1843). Sections 173 and 2793 - 2802, The Code 1851, continue and somewhat expand upon the sheriff's authority in this regard.

These sections of early Iowa statutes do not address the specific question of organized irregular or reserve peace officer forces. They specifically address the authority of a sheriff to summon the assistance of an individual citizen or of the power of the county, i.e. posse comitatus, on an ad hoc basis. To a large extent these provisions still exist in the current Code. Section 337.1, The Code 1979 states in pertinent part:

> The sheriff, by himself or deputy, may call any person to his aid to keep the peace or prevent crime, or to arrest any person liable thereto, or to execute process of law; and when necessary, the sheriff may summon the power of the county.

Section 742.2, The Code 1977, which defined "calling the power of the county" was repealed when the criminal code was revised. 1976 Session, 66th G.A., Ch. 1245, Ch. 4, §526. Similar authority is invested in magistrates and peace officers in general by §719.2, The Code 1979, which states in pertinent part:

> Any person who is requested or ordered by any magistrate or peace officer to render the magistrate or officer assistance in making or attempting to make an arrest, or to prevent the commission of any criminal act, shall render assistance as required.

Although none of the provisions cited above directly authorize the establishment of organized irregular law enforcement forces, the practice has long been established. The tacit acceptance of this practice can be seen in §337.2, The Code 1979, which states:

> The sheriff of each county may, with the cooperation of the Commissioner of Public Safety, annually hold a conference and school of instruction

> for all peace officers, including regularly organized vigilantes under his jurisdiction, within his county, at which time instruction may be given in all matters relating to the duties of peace officers.

The General Assembly has set out on a course of upgrading law enforcement in Iowa. One step toward more professional employment was mandatory training of regular peace officers at the Iowa Law Enforcement Academy. Ch. 80B, The Code 1979. 1980 Session, 68th G.A., Ch. 1191, is another step on that path. It sets standards for the hitherto unregulated "regularly organized vigilante forces" in Iowa. It also places statutory limits on the scope of the authority of irregular officers.

All irregular officers, whether members of units called posses, auxiliary police or reserve police, are for purposes of this act called "reserve police officers". The sole exception is for auxiliary civil defense officers meeting federal standards, 1980 Session, 68th G.A., Ch. 1191, §15. Section one of the act states in part:

> A reserve peace officer is a volunteer, nonregular, sworn member of a law enforcement agency who serves with or without compensation, has regular police powers while functioning as an agency's representative and participates on a regular basis in the agency's activities including those of crime prevention and control, preservation of the peace and enforcement of the law.

This provision exempts individuals who due to exigent circumstances are enlisted to assist law enforcement pursuant to §§337.1 or 719.2, The Code 1979, from the personal and training standards of the act. Such persons would not be volunteers.

Section six of the act states in part:

> While in the actual performance of official duties, reserve peace officers shall be vested with the same rights, privileges, obligations, and duties of any other peace officers.

Section eight of the act states:

> Reserve peace officers shall act only in a supplementary capacity to the regular force and shall not assume full-time duties of regular peace officers without first complying with all requirements for regular peace officers.

Section nine of the act states in part:

> Reserve peace officers shall be subordinate to regular peace officers, [and] shall not serve as peace officers unless under the direction of regular peace officers. . . .

Section ten of the act states:

> The governing body shall not reduce the authorized size of a regular law enforcement department or office because of the establishment or utilization of reserve peace officers.

Section three of the act states:

> The chief of police, sheriff, or commissioner of public safety, as the case may be, shall establish minimum training standards requiring at least thirty hours of instruction for members of the reserve force.

Section four of the act provides more information regarding training and states in part:

> Training for individuals appointed as reserve peace officers shall be provided by that law enforcement agency, but may not be obtained in a merged area school or other facility selected by the individual and approved by the law enforcement agency.

II. Reserve Peace Officers when acting in an official capacity may serve any papers which a regular officer of the same law enforcement agency can serve.

Your first question, whether a reserve deputy sheriff can serve papers without the physical presence of a regular deputy sheriff, must be answered in the affirmative. Section six of the act, set out above, states that reserve officers, when performing official duties, have the same "rights, privileges, obligations, and duties" as regular peace officers. The language in section nine which states that reserve officers may act as peace officers only "when under the direction of regular peace officers" should not be construed to limit reserve peace officer activities to situations when they are under the direct supervision of a regular officer.

When construing a statute, the intent of the legislature should be the primary consideration. Hartman v. Merged Area VI Community College, 270 N.W.2d 822, 825 (Iowa 1975). The clear intent of the General Assembly is that reserve peace forces be an option existing for law enforcement agencies to assist them in the performance of their duties. Requiring the physical presence of a regular officer at all times would tend to frustrate that intent.

Reading such a requirement into the act would also be inconsistent with the generally accepted meaning of "under the direction of". That phrase indicates something short of immediate supervision. Ross v. Long, 219 Iowa 471, 258 N.W. 94 (1935). However, it also means more than "ultimately responsible to". It infers a requirement of knowing control by a supervisory regular peace officer.

It is well within the limits of section nine of the act for a reserve peace officer to perform a relatively uncomplicated and specific act, such as service of process, without the presence of a regular peace officer. Of course, original notices and subpoenas can be served by persons who are not any sort of peace officer. Iowa R. Civ. P. 52 and §622.63, The Code 1979. Such papers could be served by any employee, representative or agent of a law enforcement agency. In the case of such papers it would be absurd to state that a reserve peace officer has less authority while on duty than off duty. With regard to papers, such as executions and garnishments, which must be served by the sheriff or his deputy, a reserve deputy sheriff is vested with the same authority when acting in an official capacity.

The act also specifically refers to the process serving function of peace officers. Section nine provides that reserve peace officers are to be in uniform unless the sheriff or chief of police "designates alternate apparel for use when engaged in. . . civil process. . . ."

For these reasons, it seems relatively clear that a reserve deputy sheriff may, when acting in an official capacity, serve papers with the same authority as a regular deputy sheriff. Similarly, when so engaged a reserve deputy sheriff need not be under the immediate supervision of a regular deputy.

III. Reserve Peace Officers, when properly certified, may invoke implied consent, but the Iowa Law Enforcement Academy is not required to provide training for that purpose.

If properly trained and certified, reserve peace officers may invoke the Implied Consent Act, Ch. 321B, The Code 1979. Sections 321B.3 - 321B.7, The Code 1979, make it clear that any peace officer may invoke the provisions of Ch. 321 B after arresting a person for operating a motor vehicle while under the influence of an alcoholic beverage. Section 321B.2, The Code 1979 states:

> As used in this chapter the words "peace officer" mean:
>
> 1. Members of the highway patrol.
> 2. Police officers under civil service
> 3. Sheriffs
> 4. Regular deputy sheriffs who have had formal police training.
> 5. Any other law enforcement officer who has satisfactorily completed an approved course relating to motor vehicle operators under the influence of alcoholic beverages at the Iowa law enforcement academy or a law enforcement training program approved by the department of public safety.

Reserve peace officers are "law enforcement officers". Also, 1980 Session, 68th G.A., Ch. 1191, §6, quoted above, clearly states that while actually engaged as peace officers, reserve

officers are vested with the same authority as regular peace officers. Therefore, if properly certified, reserve peace officer may invoke implied consent under Ch. 321B, The Code 1979.

Section 321B.2, The Code 1979, quoted above, states that in order to have authority to invoke implied consent, officers must complete appropriate courses at the Iowa Law Enforcement Academy, or at some other training program approved by the Department of Public Safety. Only the latter alternative is available to reserve peace officers, unless the Iowa Law Enforcement Academy Council chooses to admit them to the academy.

The Iowa Law Enforcement Academy was established primarily for the training of regular peace officers. It has no obligation to provide training for reserve peace officers. Section 80B.2, The Code 1979, sets forth the General Assembly's intent in the creation of the academy. It states:

> It is the intent of the legislature in creating the academy and the council to maximize training opportunities for law enforcement officers, to co-ordinate training and to set standards for the law enforcement service, all of which are imperative to upgrading law enforcement to professional status. (emphasis added.)

Section 80B.3(3), The Code 1979, defines "law enforcement officer" for purposes of Ch. 80B as follows:

> "Law enforcement officer" means an officer appointed by the state conservation commission, a member of a police force or other agency or department of the state, county or city 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, and all individuals, as determined by the [Iowa law enforcement academy] council, who by the nature of their duties may be required to perform the duties of a peace officer. (emphasis added.)

The academy council could, in its discretion, admit reserve officers, but it need not do so if it chooses otherwise.

Furthermore, 1980 Session, 68th G.A., Ch. 1191, §4, quoted above, makes it clear that the appointing law enforcement agency, and not the state, is responsible for providing training for reserve officers. If the academy council does not elect to admit reserve peace officers into its programs, and a local agency wants its reserve officers certified to invoke implied consent, the local agency must devise, either alone or in concert with other such agencies, a training program which meets with the approval of the Department of Public Safety.

Nothing in this Opinion should be construed to state that reserve peace officers can or cannot legally be allowed to patrol streets and highways alone. It is limited to their potential authority to invoke implied consent. As stated above, it is clear that reserve officers may perform specific uncomplicated tasks without immediate supervision, and still be "under the direction of regular peace officers". What limits that phrase places on the activities of a reserve peace officer depends on the specific circumstances surrounding a given situation. Of course, in light of a reserve officer's limited training and of the potential liability for their actions, affected agencies would be well advised to be circumspect in allocating discretion to them.

IV. Conclusion

Reserve officers, when acting in their official capacity as such, have all the rights, authority, duty and responsibilities of regular peace officers employed by the same law enforcement agency. They can serve civil process without the immediate supervision of regular peace officers when directed to do so. They can invoke implied consent when properly trained and supervised. Training of reserve officer is primarily the responsibility of the appointing law enforcement agency. The Iowa Law Enforcement Academy could choose to admit reserve officers to the academy but is under no legislative mandate to take such action.

Sincerely,

GARY L. HAYWARD
Assistant Attorney General
Public Safety Division

GLH:dkl

MOTOR VEHICLES: Schools; §321.372(1), The Code 1979. Section 321.372(1) requires the driver of a school bus to use the flashing warning lights and to extend the stop arm when loading or unloading students at a school. (Mull to Miller, State Senator, #80-12-3 (L)

December 5, 1980

Honorable Charles P. Miller
State Senator
Forty-Second District
Statehouse
Des Moines, IA 50319

Dear Senator Miller:

You have requested an opinion of the Attorney General regarding the interpretation of a particular school bus regulation. The question presented is whether certain safety measures of §321.372(1), The Code 1979, are required when a driver of a school bus is receiving or discharging students at a school. In our opinion, the provisions of §321.372(1) are fully applicable when pupils are being loaded or unloaded from a bus at a school.

Section 321.372(1), The Code 1979, as amended by 1980 Session, 68th G.A., Ch. 1082, §2 provides in relevant part as follows:

> The driver of any school bus used to transport children to and from a public or private school shall, when stopping to receive or discharge pupils, turn on flashing warning lamps at a distance of not less than three hundred feet nor more than five hundred feet from the point where the pupils are to be received or discharged from the bus. At

> the point of receiving or discharging pupils the driver of the bus shall bring the bus to a stop, turn off the amber flashing warning lamps, turn on the red flashing warning lamps, and extend the stop arm. After receiving or discharging pupils, the bus driver shall turn off all flashing warning lamps, retract the stop arm and proceed on the route. Except to the extent that reduced visibility is caused by fog, snow or other weather conditions, a school bus shall not stop to load or unload pupils unless there is at least three hundred feet of unobstructed vision in each direction.

A school is clearly a "point of receiving or discharging pupils" within the meaning of §321.372(1). Moreover, as a policy matter, the precautions of using flashing warning lights and extending the stop arm should promote the safe loading and unloading of students from the bus at the school. Thus, in our opinion, §321.372(1) requires the driver of a school bus to use the flashing warning lights and to extend the stop arm when loading or unloading students at a school.

Sincerely,

RICHARD E. MULL
Assistant Attorney General