FUNERAL PLANS: Iowa Code chapter 523A (1985). Chapter 523A would apply to the sale of personal property to be used under a prearranged funeral plan if the personal property is not immediately required. A prearranged funeral plan is any agreement which provides for the purchase of funeral merchandise or a funeral service or both. "Immediately required" as specified in section 523A.1 means when needed because of the death of the person for whom the property was purchased. The primary responsibility for enforcement of chapter 523A falls on the county attorney. (Cleland to Metcalf, Black Hawk County Attorney, 1-20-86) #86-1-8(L)

January 20, 1986

Mr. James M. Metcalf
Black Hawk County Attorney
B-1 Courthouse Bldg.
Waterloo, Iowa 50703

Dear Mr. Metcalf:

This letter is in response to your request for an Attorney General's opinion regarding the scope of Iowa Code chapter 523A (1985) and the jurisdiction of the Attorney General's office to investigate, enforce, or aid in the prosecution of violations of chapter 523A. Specifically, you pose the following questions:

> 1. Does the 1981 Attorney General's opinion letter to Senator Forrest V. Schwengels, 1982 Op. Att'y Gen. 14, fully and fairly represent your official interpretation of Iowa Code chapter 523A (1985)? Does the 1981 opinion mean that merely by selling funeral merchandise that the seller is thereby agreeing to a prearranged funeral plan? If an individual were to sell a fiber glass crypt bed on a preneed basis would this, in and of itself, constitute a prearranged funeral plan subjecting the seller to the requirements of chapter 523A?
>
> 2. Does the Attorney General's office have jurisdiction to enforce the provisions of chapter 523A and to investigate or aid in the prosecution of violations of that chapter?

We reaffirm our 1981 opinion concerning the scope of chapter 523A. With regard to enforcement, the primary responsibility for investigation and prosecution of violations of chapter 523A falls on the county attorney.

A. Scope of Iowa Code chapter 523A (1985)

In 1981, Iowa Code section 523A.1 provided:

> When an agreement is made by any person, firm or corporation for the final disposition of a dead human body wherein personal property is to be used under a prearranged funeral plan or the furnishing of professional services of a funeral director or embalmer in connection therewith, is not immediately required, eighty percent of all payments made under the agreement, including interest thereon, shall be and remain trust funds until occurrence of the death of the person for whose benefit the funds were paid, unless said funds are sooner released to the person making such payment by mutual consent of the parties.

In our 1981 opinion, we addressed the following questions:

1. Does chapter 523A apply to cemeteries?
2. What is a "prearranged funeral plan"?
3. Is "delivery" sufficient to take an item of personal property out of chapter 523A?

We concluded:

> . . .Chapter 523A would apply to sales of personal property made by cemeteries if all the conditions in Section 523A.1, 1979 Code are met. Secondly, a prearranged funeral plan is an agreement made by one during his or her lifetime by which he/she arranges for the disposition of his or her body after death. This type of plan need not but may include a funeral service or ceremony. A funeral plan may be accomplished merely by making arrangements to purchase funeral personal property. Finally, "immediately required" as termed in section 523A.1 means "at the time of death." Thus, the seller of personal property to be used under a prearranged funeral plan or the seller of professional services of a funeral director or embalmer must put 80 percent of the money paid preneed in trust until the time of death of the person for whom the payments were made.

We are now asked to reconsider this opinion. Following our 1981 opinion, extensive amendments were made to chapter 523A. See 1982 Iowa Acts ch. 1249. Those amendments must be considered in our analysis of the scope of chapter 523A. The following principles apply. Our goal is to determine legislative intent. Emmetsburg Ready Mix Co. v. Norris, 362 N.W.2d 498, 499 (Iowa 1985). "The spirit of the statute must be considered as well as the words. . . .A sensible, workable, practical, and logical construction should be given." Id. quoting Hansen v. State, 298 N.W.2d 263, 265-66 (Iowa 1980). "Strained, impractical, or absurd results should be avoided." Welp v. Iowa Dept. of Revenue, 333 N.W.2d 481, 483 (Iowa 1983). When construing a statute, our office considers "the language used in the statute, the object sought to be accomplished, the evils and mischief sought to be remedied, and [places] a reasonable construction on the statute which will best effect its purpose rather than one which will defeat it." Matter of Property Seized on Jan. 3, 1983, 362 N.W.2d 565, 571 (Iowa 1985).

It is presumed that "the legislature knew the existing state of the law, including judicial definitions, and intended to use those meanings absent a contrary indication in the context." Beier Glass Co. v. Brundige, 329 N.W.2d 280, 285 (Iowa 1983). There is a strong presumption that "the legislature would have specifically altered judicial interpretations of prior legislation if it so desired." State ex rel Iowa Dept. of Health v. Van Wyk, 320 N.W.2d 599, 604 (Iowa 1982); Young v. Des Moines, 262 N.W.2d 612, 615 (Iowa 1978). We believe that the same principles apply to attorney general opinions.

Legislative history may be used to determine legislative intent. Richards v. Iowa Dept. of Revenue, 362 N.W.2d 486, 488 (Iowa 1985)(court considered wording of prior statute that was amended after previous court decisions). We "may resort to legislative journals for the legislative history of a statute of doubtful meaning." Lenertz v. Municipal Court of Davenport, 219 N.W.2d 513, 516 (Iowa 1974).

"[A] wholesale or extensive statutory amendment is ordinarily an indication that the law was altered." Slockett v. Iowa Val. Community School District, 359 N.W.2d 446, 448 (Iowa 1984). There may be exceptions, such as, when a law is amended as to minor details and some disputed question is resolved. Id. Such amendment clarifies the legislature's earlier intent. Id. The striking of a provision before enactment of a statute means that that provision should not be read into the statute. Iowa State Education Association v. PERB, 269 N.W.2d 446, 448 (Iowa 1978); Lenertz, 219 N.W.2d at 516.

"[A] law providing regulations conducive to the public good and welfare, is ordinarily remedial, and as such liberally interpreted." Johnson County v. Guernsey Ass'n of Johnson County, 232 N.W.2d 84, 87 (Iowa 1975). Violations of the regulatory provisions of chapter 523A are criminal, but this fact

alone does not change the standard of statutory construction. "[T]he rule of strict construction of penal statutes is nevertheless subordinate to the rule requiring a court to give a statute a reasonable construction, having in mind the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved. . ." Iowans for Tax Relief v. Campaign Finance Disclosure Commission, 331 N.W.2d 862, 865 (Iowa 1983) appeal denied 104 S.Ct. 220 quoting State v. Newman, 313 N.W.2d 484, 486 (Iowa 1981).

Section 523A.5 was added to chapter 523A as part of the 1982 amendments. It provides:

> 523A.5 Scope of Chapter
>
> 1. This chapter applies only to the sale of funeral services, funeral merchandise, or a combination of these, pursuant to a prearranged funeral plan.
> 2. As used in this chapter:
> a. "Funeral services" means one or more services to be provided at the time of the final disposition of a dead human body, including but not limited to services necessarily or customarily provided in connection with the interment, entombment, or cremation of a dead human body, or a combination of these. "Funeral services" does not include perpetual care or maintenance.
> b. "Funeral merchandise" means one or more types of personal property to be used at the time of the final disposition of a dead human body, including but not limited to clothing, caskets, vaults, and interment receptacles. "Funeral merchandise" does not include real property, and does not include grave markers, tombstones, ornamental merchandise, and monuments.

Several other amendments were proposed during the same session, but these amendments were not successful. Amendment H-5181 would have amended section 523A.1 to add the following language:

> The purpose of this chapter is to provide security for the performance of contracts under which individuals arrange to obtain and pay in advance for goods or services to be used in connection with the final disposition of their own bodies or those of other persons after death. Except as provided in section 3 of this Act, this chapter applies to any contract that contains these provisions, including but not limited to a contract for

> the sale of goods or services as an agent or independent contractor on behalf of the buyer.

1982 H.J. 611-12. H-5294 would have exempted contracts requiring immediate delivery of all goods and services, insurance contracts, trust agreements providing for other substantial purposes, and contracts for the sale of cemetery lots, graves, grave markers, tombstones, monuments, mausoleums, crypts, turf-top crypts, niches, or columbariums, unless these items were sold in connection with included items. Prearrangement contract was defined as follows:

> a. A person promises to deliver or to secure the delivery of goods, services, or a combination of goods and services, that are to be used in the final disposition of the body of a specified individual after his or her death.
> b. The contract is executed prior to the death of the person in whose final disposition the goods or services are to be used, and delivery is or may be contingent upon the death of that person.
> c. Consideration is to be paid in advance, whether in a lump sum or in installments.

Id. Neither H-5294 nor its counterpart in the Senate, S-5465, were adopted. 1982 H.J. 629; 1982 S.J. 1118.

Amendment H-5188 provided:

> This chapter does not apply to the sale of any personal property by a person who is subject to chapter 566 or 566A.

Chapter 566 regulates cemeteries. H-5188 was defeated. 1982 H.J. 651. The same amendment was introduced in the Senate as S-5463 and S-5437, and both were later withdrawn. 1982 S.J. 1118.

It is against this background that the scope of chapter 523A must be addressed. In the 1981 opinion, we said that chapter 523A applies to the purchase or arrangement to purchase personal property from a cemetery prior to the death of the person for whose benefit the purchase was being made, provided that the purchase was part of a prearranged funeral plan. In 1982, section 523A.5 was added so that the scope of chapter 523A now specifically includes any "services necessarily or customarily provided in connection with the interment, entombment, or cremation of a dead human body" and "personal property to be used at the time of the final disposition of a dead human body, including but not limited to clothing, caskets, vaults, and interment receptacles." In addition, amendments (H-5188; S-5463; and S-5437) that would have excluded cemeteries from chapter 523A failed to win approval. 1982 H.J. 651; 1982 S.J. 1118.

We must assume that the legislature was aware of our 1981 opinion that chapter 523A applies to personal property sold by cemeteries pursuant to a prearranged funeral plan. Beier Glass Co., 329 N.W.2d at 285. The legislature could have amended chapter 523A to exclude cemeteries, but it did not do so. State ex rel Iowa Dept. of Health, 320 N.W.2d at 604. It would be a mistake to read such an exclusion into chapter 523A now. Many of the items now specifically included in section 523A.5 are items sold by cemeteries, and the rejection of amendments that would have exempted cemeteries supports our opinion. Iowa State Education Association, 269 N.W.2d at 448. The legislative intent is clear that chapter 523A applies to the sale of personal property and services made by both funeral homes and cemeteries if all the conditions in section 523A.1 are satisfied. The only items excluded would be perpetual care or maintenance, real property, grave markers, tombstones, ornamental merchandise, and monuments. Iowa Code section 523A.5 (1985).

In the 1981 opinion, we observed that a "prearranged funeral plan is an agreement made by one during his or her lifetime by which he/she arranges for the disposition of his or her body after death. This type of plan need not but may include a funeral service or ceremony. A funeral plan may be accomplished merely by making arrangements to purchase funeral personal property." Implicit in our interpretation is that it is the plan of the buyer, not the seller, that the legislature used to trigger the provisions of chapter 523A. Such a plan can be distinguished from a purchase that is made for a purpose other than the disposition of a human body. In this context, a plan is nothing more than "a method of achieving something; a way of carrying out a decision." Webster's Third New International Dictionary, 1729 (1967).

Any other interpretation of "prearranged funeral plan" would be absurd. Buyers would be denied protection under chapter 523A solely because they decided to purchase service and merchandise from several vendors rather than one. A buyer that purchases a crypt bed for the final disposition of his or her body needs just as much protection as a buyer that purchases a crypt bed under a contract that also calls for the vendor to provide the burial.

It is assumed that the legislature was aware of the definition of "prearranged funeral plan" set forth in the 1981 opinion, Beier Glass Co., 329 N.W.2d at 285, and that if the legislature disagreed with that definition, it would have provided a different definition as part of the 1982 amendments. State ex rel Iowa Dept. of Health, 320 N.W.2d at 604. Legislative silence in this case is indicative of legislative intent.

It follows that the selling of "funeral merchandise" to a buyer is part of a prearranged funeral plan if the buyer plans to use the merchandise in the final disposition of his or her body. The same result would apply if the buyer was purchasing the merchandise on a preneed basis for a third party. Funeral

merchandise includes fiber glass crypt beds. Iowa Code section 523A.5(2)(b) (1985).

The issue of whether delivery is sufficient to take an item of personal property out of chapter 523A hinges on how the language "not immediately required" in section 523A.1 is interpreted. The argument is that since the contract for merchandise provides for delivery to the customer upon receipt, the merchandise is "immediately required," and therefore, the transaction is not subject to chapter 523A. We rejected this argument in the 1981 opinion. "Immediately required" means when needed because of the death of the person for whom the property was purchased.

Several amendments to chapter 523A (H-5181, H-5294, and S-5465) were proposed during the 1982 legislative session that would have specifically excluded delivered personal property from chapter 523A. These amendments were not adopted. 1982 H.J. 637, 629; 1982 S.J. 1118. If the legislature had wanted to change chapter 523A as interpreted in the 1981 opinion to exclude delivered property, it would have done so. State ex rel Iowa Dept. of Health, 320 N.W.2d at 604.

With the appropriate safeguards, it would be possible to exclude delivered property from the trusting requirement of 523A and still protect the consumer's interest. Nevertheless, what the legislature might have done is not the issue. There is a rational basis for the legislature's decision not to exclude delivered property. Delivery may take many forms. The trade practice has been for the vendor to offer delivery to the buyer, and then agree to store the merchandise for the buyer in a warehouse provided by the vendor. This type of constructive delivery may pose substantial risks for the buyer. The vendor may sell the same merchandise more than once. Long periods of time may pass between the time of delivery and the time of need. The merchandise may not be there at the time of need. The vendor's business may fail, and if the merchandise has not been stored as promised, the buyer faces the perils of following the vendor into the bankruptcy courts. Given these risks, the legislature could reasonably conclude that delivery as it is being practiced in the industry does not provide protection equivalent to trusting 80% of the payments.

B. Scope of Attorney General's Authority to Enforce Chapter 523A.

A violation of chapter 523A is a serious misdemeanor, an indictable offense. Iowa Code section 523A.2(6) (1985). Iowa Code section 13.2(2) (1985) provides that it is the duty of the Attorney General, except as otherwise provided by law, to:

> Prosecute or defend in any other court or tribunal, all actions and proceedings, civil or criminal, in which the state may be a party or interested, when, in the attorney

> general's judgment, the interest of the state requires such action. . . .

Iowa Code section 331.756(1) (1985) is also relevant to this inquiry. It provides:

> The county attorney shall:
> 1. Diligently enforce or cause to be enforced in the county, state laws and county ordinances, violations of which may be commenced or prosecuted in the name of the state, county, or as county attorney, except as otherwise provided.

The scope of section 13.2(2) and its predecessors has always been subject to debate. In State v. Fleming, 13 Iowa 443, 444 (1862), the Supreme Court said:

> While the case is in the District Court, it is, without doubt, under the control of the District Attorney. Any agreement he may make with reference to the disposition of the cause, so far as it is proper, or within the limits of the laws, should be regarded as binding.

(Emphasis added.) In Cosson v. Bradshaw, 160 Iowa 296, 301, 141 N.W.2d 1062, 1064 (1913), the Supreme Court declared that the Attorney General has "no power to appear and prosecute a criminal case in any court except the Supreme Court, because no other power was given him by the statute." See also State v. Grimmell, 116 Iowa 596, 598, 88 N.W. 342, 343 (1901); State v. Gill, 259 Iowa 142, 143 N.W.2d 331, 332 (1966).

However, in 1983, in State v. Ohnmacht, 342 N.W.2d 838, 841 (Iowa 1983), the Supreme Court expressly disavowed the dictum in its earlier cases and provided a literal interpretation of section 13.2(2). It said: "Since [section 13.2(2)] explicitly empowers the Attorney General to prosecute and defend in all actions or proceedings, civil or criminal, before any court or tribunal whenever he feels the best interest of the state require such action, it necessarily must be read to support his motion to correct defendant's sentence." 342 N.W.2d at 843 (emphasis in original).

The Attorney General may investigate criminal violations of chapter 523A. The Attorney General may use a prosecuting attorney subpoena pursuant to Iowa R. Crim. P. 5(6) and may appear before the grand jury for the purpose of presenting evidence concerning the commission of a criminal offense. Iowa R. Cr. P. 3(4)(d); Iowa Code section 801.4 (1985); State v. Blythe, 226 N.W.2d 250, 260 (Iowa 1975); Cosson v. Bradshaw, 160 Iowa at 306, 141 N.W at 1065.

An indictable offense may be charged either by indictment or information. Iowa R. Cr. P. 4(2), 5(1). It is the duty of the grand jury to "inquire into all indictable offenses brought before it which may be tried within the county, and present them to the court by indictment." Iowa R. Cr. P. 3(4)(j). Thus, the Attorney General has the authority to initiate grand jury proceedings and to present evidence to the grand jury concerning violations of chapter 523A. Whether the Attorney General can appear for the state after an indictment is returned depends on the stage of the proceedings and the state interest at stake. See Ohnmacht, 342 N.W.2d at 842. (For example, the "State has a paramount interest in insuring that our laws, including sentence provisions, are faithfully executed.")

As already stated, an indictable offense may be charged by trial information. Iowa R. Cr. P. 5(1). The Attorney General's authority to file a trial information is limited to cases where the Attorney General has been specifically authorized by law to do so or the Attorney General is acting at the request of the county attorney. Id. After the trial information has been filed, whether the Attorney General could appear or prosecute would depend, as with a prosecution based on an indictment, on (1) the stage of the proceeding, and (2) the state interest concerned.

In any event, if the county attorney makes a request, and the Attorney General determines that action is warranted, the Attorney General's office may appear and prosecute. Such cases are usually limited, however, to serious offenses of a complex nature or to cases where the county attorney's office has a conflict of interest.

The discussion so far refers only to the theoretical authority of the Attorney General. As a rule, a case in the district court is under the control of the county attorney, and any decision the county attorney makes with reference to disposition of that case, so far as it is proper, or within the limits of the law, should be regarded as binding.

> The fair administration of public justice requires that there be no unseemly controversies between the duly constituted officers of the state, and such controversies ought to be avoided in all cases where they tend to impede or obstruct the full and complete enforcement of our criminal law.

Cosson, 160 Iowa at 303, 141 N.W. at 1064.

The county attorney is the chief law enforcement officer of the county. Moreover, a review of chapter 523A reveals clearly that the primary responsibility for enforcing chapter 523A should fall on the county attorney.

The seller of prearranged funeral plans must make available to the county attorney all records relating to trust agreements for examination at any reasonable time upon request. Iowa Code section 523A.2(1)(b) (1985). The seller must file a copy of each trust agreement with the county recorder, Iowa Code section 523A.2(1)(c) (1985), and provide notice to the county recorder of the receipt of any funds held in trust. Iowa Code section 523A.2(1)(d) (1985). The financial institution must provide notice to the county recorder that funds are being held in trust. Iowa Code section 523A.2(1)(e) (1985). All disclosures made to the county recorder are confidential, except to the county attorney or county attorney's representative. Iowa Code section 523A.2(1)(f) (1985). The seller must file an annual report with the county attorney, and the county attorney may require an audit if the county attorney has reasonable evidence that the seller is not complying with chapter 523A. Iowa Code section 523A.2(5) (1985). The audit is delivered to the county attorney. Id. The Attorney General is not mentioned in chapter 523A.

C. Summary

Based on the 1982 legislative amendments to chapter 523A, we have no basis to modify our 1981 opinion concerning the scope of chapter 523A. Further clarification, to the extent it is necessary or desirable, should come from the courts or the legislature. Finally, while the Attorney General's office is not precluded from enforcing the provisions of chapter 523A or investigating or prosecuting violations of that chapter, the primary responsibility for enforcement of chapter 523A falls on the county attorney. The Attorney General's intervention would require the most extraordinary circumstances.

Sincerely,

Richard L. Cleland
RICHARD L. CLELAND
Assistant Attorney General

/mr

CHILD SUPPORT RECOVERY; CLERK OF COURT: Mandatory Income Assignment. P.L. 98-378; 42 U.S.C. 666; 45 C.F.R. 303.100(a)(4); Iowa Code Sections 252D.1, 252D.2, 252D.3 (1985); 1985 Iowa Acts, ch. 100. Iowa Code Section 252D.1(3) requires the clerk of court to determine whether to issue a mandatory income assignment. (Osenbaugh to O'Brien, State Court Administrator, 1-14-86) #86-1-6(L)

January 14, 1986

Mr. William J. O'Brien
State Court Administrator
State Capitol
L O C A L

Dear Mr. O'Brien:

You have requested an opinion of the Attorney General relative to 1985 Iowa Acts, ch. 100, which provided among other things for a person entitled by court order to receive child support payments to petition the clerk of the district court for an assignment of income. Specifically, you ask:

1. Whether Iowa Code § 252D.1(3) (1985), as amended now requires the clerk of the district court, as opposed to the district court itself, to conduct a hearing on, and provide a determination of, contested mandatory assignment issues?

2. If the hearing is required to be conducted by the clerk, how is this to be reconciled with the district court's authority to hear and determine a motion to quash pursuant to Iowa Code § 252D.2(1)?

3. Is there a federal or state constitutional due process infirmity in the clerk conducting such hearing absent provisions for further review of the clerk's decision?

Because resolution of the issue requires interpretation of relevant sections of statutes, it is necessary to review the general principles that guide our analysis.

> Our ultimate goal is to determine and effectuate the intent of the legislature. Iowa

> Beef Processors, Inc. v. Miller, 312 N.W.2d 530, 532 (Iowa 1981); American Home Products Corp. v. Iowa State Board of Tax Review, 302 N.W.2d 140, 142 (Iowa 1981). We look to the object to be accomplished, the mischief to be remedied, or the purpose to be served, and place on the statute a reasonable or liberal construction which will best effect, rather than defeat, the legislature's purpose. City of Mason City v. Public Employment Relations Board, 316 N.W.2d 851, 854 (Iowa 1982); Peffers v. City of Des Moines, 299 N.W.2d 675, 678 (Iowa 1980). We avoid strained, impractical or absurd results in favor of a sensible, logical construction. Ida County Courier and The Reminder v. Attorney General, 316 N.W.2d 846, 851 (Iowa 1982); Iowa Beef Processors, Inc., 312 N.W.2d at 532. We consider all parts of the statute together, without attributing undue importance to any single or isolated portion. Iowa Beef Processors, Inc., 312 N.W.2d at 532; Peffers, 299 N.W.2d at 678. The spirit of the statute must be considered along with its words, Hansen v. State, 298 N.W.2d 263, 265 (Iowa 1980), and the manifest intent of the legislature will prevail over the literal import of the words used. Iowa Beef Processors, Inc., 312 N.W.2d at 533.

Beier Glass Co. v. Brundige, 329 N.W.2d at 283 (Iowa 1983).

The amendment in question added the following underscored language to section 252D.1(3):

> If the petition is verified and establishes that support payments are delinquent in an amount equal to the payment for one month and if the clerk of the district court determines, after providing an opportunity for hearing, that notice of the mandatory assignment of income as provided in § 252D.3 has been given, the clerk of the district court shall order an assignment of income under subsection 2.

Your first question is whether the clerk of the district court, rather than the court, is to determine contested mandatory assignment issues under the amendment to § 252D.1(3). We believe it is clear that the amendment requires the clerk, rather than

the court, to determine whether notice has been given. The relevant language unambiguously states, "... if the clerk of the district court determines, after providing an opportunity for hearing, that notice of the mandatory assignment of income as provided in § 252D.3 has been given..." Thus, the clerk makes the determination required by this section, but the determination is limited. The only requirements are that: (1) the petition is verified; (2) the petition establishes that support payments are delinquent in an amount equal to one month's payment[1], and (3) notice of the mandatory assignment of income as provided in § 252D.3 has been given.

In addition to the express language of the statute as amended, the legislative history supports the conclusion that the legislature conferred on the clerk the duty to determine the issue of notice. The statute was amended in response to federal requirements. The Child Support Enforcement Amendments of 1984, Pub.L. 98-378, 42 U.S.C. § 666, which amended Title IV-D of the Social Security Act (the Act), mandated compliance by the State of Iowa with specific child support collection methods under the threat of loss of federal AFDC funds. What has come to be known as the IV-D program requires the state to obtain an assignment of child support from AFDC recipients as a condition of eligibility. Support payments are an offset against AFDC funds expended as benefits by the State. In addition, the Act, as amended, requires the child support recovery unit, a bureau of the Department of Human Services, to offer services to non-public assistance clients in the collection of court-ordered child support. A complex system of state and county contractual cooperation has been developed which allows both the state and county treasuries to receive offsets against AFDC expenditures and additional monetary incentives proportionate to the amount of recoveries.

The 1984 Child Support Enforcement Amendments, Pub.L. 98-378, were intended by Congress to expedite and make more efficient the collection of child support benefits for both public assistance and non-public assistance clients. Just one of the methods mandated by Congress to be implemented in state law was a procedure for wage or income withholding. Specifically, § 466(a)(8) of the Act required that state procedures insure that court orders include in them the authority necessary to permit

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[1]Under Iowa Code § 252D.1(1), all support payments are to be paid to the clerk of court. Thus, the clerk's own records would establish the fact of delinquency.

wage withholding to be initiated by someone other than the IV-D agency (e.g. a private attorney). The mandate by Congress required that states have in effect implementing state statutes on or before October 1, 1985.[2]

Iowa Code § 252D.1 (1984 Acts, Ch. 1239) provided for (1) payment of all orders of support through the clerk of the district court, (2) assignment of income upon court order of a defaulting person's periodic earnings sufficient to pay the support obligation upon certification by the clerk or the child support recovery unit of delinquency, and (3) a court-ordered assignment of income upon the verified petition of a person entitled by court order to receive support payments. Subparagraphs 2 and 3 of that section address the congressional mandate that IV-D recoveries (paragraph 2) and non-IV-D recoveries (paragraph 3) be substantially similar. Subparagraph 3 specifically allows the wage assignment procedure to be available to non-public assistance child support recipients.

In accordance with § 466(b)(2) of the Act, Federal regulations found at 45 C.F.R. § 303.100(a)(4) require that the state law be designed so that withholding occurs without the need for any amendment to the support order involved or any further action by the court or entity that issued it. This blanket provision is required to be applicable to both existing and new support orders. In response to these regulations, the Iowa legislature amended § 252D.1(3). It is to be noted that § 252D.1(2) was amended in similar fashion such that the child support recovery unit on behalf of public assistance recipient clients (IV-D) issues the mandatory assignment of income to the employer once the requisite delinquency is achieved. In compliance with the federal mandate, no further court intervention is required for IV-D recipients. Section 252D.1(3) eliminates the necessity for court intervention

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[2]The Child Support Enforcement Amendments also required state statutory implementation of ministerial collection of child support, state income tax refund offset, statewide imposition of liens against real and personal property, security and bonds or guarantees for the payment of child support, information sharing with consumer reporting agencies, federal tax offsets for past due amounts, modification of the incentive formula, addition of foster care collection to the child support recovery system, expansion of 90 percent federal funding for computerized support enforcement systems, mandatory collection of spousal support, continuing IV-D services for families losing AFDC eligibility for a minimum period, and established a state commission on child support collection.

for non-public assistance recipients (non-IV-D). This amendment brings the statutory scheme into compliance with the Federal regulations.

Section 252D.1(3) as amended does require that an opportunity for hearing be provided before the determination that the required notice of assignment has been given. This does not defeat the conclusion that the clerk is to make this determination.

The determination to be made by the clerk is limited to whether the statutory notice of the mandatory assignment of income has been given as required in § 252D.3.[3] The clerk decides issues of notice in other contexts. See e.g., Iowa Code § 631.5(4) (default in small claims court); Iowa Code § 321.210A, as adopted by 1985 Iowa Acts, ch. 197, § 3 (failure to pay fine within 60 days of notice).

Whether the notice of assignment requirements in § 252D.3 have been met will appear of record where the support order was

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[3]Section 252D.3 provides for the notice of assignment as follows:

> All orders for support entered on or after July 1, 1984 shall notify the person ordered to pay support of the mandatory assignment of income required under section 252D.1. However, for orders for support entered before July 1, 1984, the clerk of the district court, the child support recovery unit, or the person entitled by the order to receive the support payments, shall notify each person ordered to pay support under such orders of the mandatory assignment of income required under section 252D.1. The notice shall be sent by certified mail to the person's last known address or the person shall be personally served with the notice in the manner provided for service of an original notice at least fifteen days prior to the filing of a petition under section 252D.1, subsection 3 or the ordering of an assignment of income under section 252D.1, subsection 2 or 3. A person ordered to pay support may waive the right to receive the notice at any time.

entered after July 1, 1984. Where the support order was entered prior to July 1, 1984, section 252D.3 would require notice by certified mail to the last known address or personal service. Thus the party petitioning for assignment of income should have physical proof that the notice of assignment requirements have been met.

The requirement of an "opportunity for hearing" does not mean that an adjudicatory hearing be held in every case. A statute requiring "an opportunity for hearing" does not require a hearing unless there are genuine issues of fact. Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 620-621, 37 L.Ed.2d 207, 217-218, 93 S.Ct. 2469 (1973). Thus the clerk would be required to provide a hearing only if there was a genuine issue of material fact as to whether notice of assignment had been given as provided in § 252D.3.

Chapter 252D, it must be remembered, is a method by which collection of a pre-existing judgment for child support is to be made. Viewed in that light, it is distinct but no different than execution and garnishment, which duties have historically been those of the clerk. Upon the rendition of judgment, which an order for child support payment is, execution may be at once issued by the clerk on the demand of the party entitled. The issuance of a mandatory assignment of income is therefore no different in kind than executions and garnishments previously entered by the clerk of court under prior existing statutes.

Section 252D.2 provides for judicial contest of the order of assignment. That section permits a person whose income has been assigned to file a motion to quash the order. The issues which can be raised by the motion to quash are not limited by the statute. We would leave it to the district courts, in ruling on motions to quash, to determine how their authority under this section is affected by the clerk's determination under § 252D.1(3). See 1968 Op.Att'yGen. 544.

You also ask whether there is a due process infirmity in the clerk conducting a hearing under § 252D.1(3) absent provisions for further review of the clerk's decision.

The United States Supreme Court decisions reiterate that "due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria Workers v. McElroy, 367 U.S. 886 (1961). "Due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471 (1972). Resolution of the issue requires, therefore, an analysis of the governmental and private interests that are affected.

> Three distinct factors must be considered: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319 (1976).

Like the recipient of disability benefits in Mathews, full retroactive relief, if the child support obligor succeeds in a motion to quash, is available to the obligor. The sole interest therefore is in the uninterrupted receipt of the income pending final decision. The availability of judicial review pursuant to § 252D.2 is expedited and strikes a fair balance between the interests of the child support recipient and the rights of the obligor. Because of the ministerial decision made by the clerk, the risk of erroneous assessment is minimal. The additional administrative burdens and other costs that would be associated with requiring an advance judicial hearing upon demand in all cases is excessive in relation to the congressionally determined need to collect child support.

> The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision making in all circumstances. ...All that is necessary is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard.

Mathews, 424 U.S. at 349. That "decision to be made" will generally be decided by a ministerial review of the clerk's own records to determine whether the statutory notice has been given and non-payment exists. A judicial hearing would add little to that process but would greatly increase costs and introduce substantial delay. The rights of the person whose income has been assigned are adequately protected by the opportunity to file a motion to quash and the expedited process which results. Risk

of error is minimal, judicial intervention is available and timely. The possible length of wrongful deprivation of income is minimal. We conclude there is no due process deprivation.

Respectfully submitted,

Elizabeth M. Osenbaugh

Elizabeth M. Osenbaugh
Deputy Attorney General

EMO/jaa

MUNICIPALITIES: Police and Fire Pensions. Iowa Code § 411.1(11) (1985); 1984 Iowa Acts, Ch. 1285, § 22. Merit pay is not to be included as earnable compensation if it is part of the regular compensation for the member's rank or position rather than special additional compensation. (Walding to Billingsley, Jasper County Attorney, 1-8-86) #86-1-5(L)

January 8, 1986

Mr. John Billingsley
Jasper County Attorney
301 Courthouse Building
Newton, Iowa 50208

Dear Mr. Billingsley:

We are in receipt of your predecessor's opinion request regarding Chapter 411 of the Code. Specifically, we are asked whether merit pay is to be included as "earnable compensation" for the purpose of setting the amount of fire and police pensions under chapter 411. The request states that the city of Newton, Iowa, provides merit pay to all employees who are eligible, with rare exception, and without any formal merit evaluations. The letter further indicates that only employees who have served nine years in a grade are eligible for the merit pay.

At the outset, we feel compelled to state the appropriate purposes of an Attorney General's opinion. While it is appropriate for this office to express an opinion on legal issues, it is improper for us to engage in judicial fact-finding in the context of an opinion. 1982 Op.Att'yGen. 353. Our review is accordingly limited.

Iowa Code § 411.1(11) (1985) provides:

> "Earnable compensation" or "compensation earnable" shall mean the regular compensation which a member would earn during one year on the basis of the stated compensation for the member's rank or position including compensation for longevity and holidays and excluding any amount received for overtime compensation or other special additional compensation, meal and travel expenses, and uniform

> allowances and excluding any amount received upon termination or retirement in payment for accumulated sick leave or vacation. [Emphasis added].

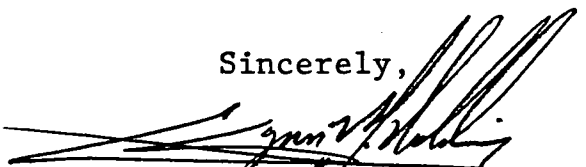
The question is whether the merit increase is part of the "regular compensation which a member would earn during one year on the basis of the stated compensation for the member's rank or position" or whether the merit increase is "special additional compensation." This is ultimately a question of fact, and we do not have all of the relevant information before us. Thus, we cannot determine whether the City of Newton must include the "merit pay" in earnable compensation.

However, we would note that the factors described in the first paragraph do suggest that the step increases are part of the regular compensation for the member's rank rather than special additional compensation. These facts would suggest that the pay is more similar to pay for longevity, which is included in earnable compensation, than it is to overtime pay and other special additional compensation.

We do not believe that the label "merit pay" is determinative. Our prior opinions on merit increases have concerned only whether a previously retired member is entitled to recomputation of benefits when a current employee gets a merit step increase. In a 1977 opinion, we held that step increases based upon merit are not to be used in the recomputation of pension. 1978 Op.Att'yGen. 55. We also held that the mere fact that a member moves up a step within the rank for merit does not require pension recomputation for individuals that retired at that particular rank or step. 1976 Op.Att'yGen. 54.

In conclusion, the label "merit pay" is not determinative of the question whether the pay is includable in earnable compensation for chapter 411 pension purposes. It is ultimately a question of fact whether the pay is part of the regular compensation for the member's rank or position or is special additional compensation.

Sincerely,



LYNN M. WALDING
Assistant Attorney General

LMW:jds

MUNICIPALITIES: Abolition of City Assessor Office and Conference Board. Iowa Code Chapter 24 (1985); Iowa Code §§ 24.2(1), 24.6, 24.9, 24.21, 331.502(5), 441.1, 441.2, 441.16. Monies in the City Assessor Fund, City Assessor Special Appraisal Fund and City Assessor Emergency Fund are to be transferred to the appropriate County Assessor's Office by the Conference Board when the City Assessor's Office is abolished. Such transfer of the emergency fund is not subject to approval by the State Appeal Board. If the Conference Board has been abolished before it declares a resolution to transfer any funds to the County Assessor's Office, the County Auditor should request that the State Appeal Board order such transfer. (DiDonato to Schlegel, Wapello County Attorney, 1-8-86) #86-1-4(L)

January 8, 1986

Mr. Richard R. Schlegel II
Wapello County Attorney
Wapello County Courthouse
Ottumwa, Iowa 52501

Dear Mr. Schlegel:

You have requested an opinion of the Attorney General regarding the procedure for transferring funds after the city assessor's office is abolished. You indicate that on June 30, 1984, the Ottumwa City Assessor's Office and the corresponding Conference Board were abolished. Funds remain in the City Assessor Expense Fund, City Assessor Special Appraisal Fund, and the City Assessor Emergency Fund. Before its abolition, the Conference Board did not pass a resolution declaring that these funds be transferred to the county assessor's office.

The questions that you have presented are:

1. What happens to these funds?

2. May they be transferred to the County Assessor funds?

3. Is approval by the State Appeal Board still required to transfer the funds in the City Assessor Emergency Fund as set out in Section 24.6, Code of Iowa?

4. If the above approval is required, who then is responsible for requesting said approval, since the Conference Board is no longer in existence?

Pursuant to Iowa Code § 441.1 (1985), a City having a population of more than ten thousand but less than one hundred twenty-five thousand may by ordinance provide for a city assessor to conduct the assessment of property within that city. A conference board, composed of the members of the city council, school board and county board of supervisors must be established. § 441.2. Each of these categorical members constitutes one unit having a single vote. § 441.2. An action by the conference board is not valid unless voted for by at least two of the three units. § 441.2. The conference board is responsible for selecting the city assessor, approving the budgets of the city assessor, the examining board, and the board of review, and for authorizing tax levies for the maintenance of the office of city assessor. § 441.16. The conference board is authorized to levy a tax for the assessment expense fund from which expenses incurred under Chapter 441 are to be paid and to certify for levy a tax for the purpose of establishing a special appraiser's fund to be used only for the employment and compensation of appraisers or other technical or expert help to assist in the valuation of property. §§ 444.16, 441.50, see 1962 Op.Att'yGen. 160. The conference board may also authorize a tax for an emergency fund, upon approval by the state appeal board. § 24.6.

Iowa Code § 24.21 (1985) establishes the procedure to be followed to provide for the transfer of funds from an abolished city assessor office to the appropriate county assessor's office. Section 24.21 provides that:

> Subject to the provisions of any law relating to municipalities, when the necessity for maintaining any fund of the municipality has ceased to exist, and a balance remains in said fund, the certifying board or levying board, as the case may be, shall so declare by resolution, and upon such declaration, such balance shall forthwith be transferred to the fund or funds of the municipality designated by such board, unless other provisions have been made in creating such fund in which such balance remains.[1]

See 1937 Op.Att'yGen. 96; 1928 Op.Att'yGen. 441.

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[1] "Municipality" is defined for purposes of Chapter 24 as "a public body or corporation that has power to levy or certify a tax or sum of money to be collected by taxation, except a county, city, drainage district, township or road district." § 24.2(1).

The conference board's actions regarding tax levies and expenditures are subject to the requirements of Chapter 24, the Local Budget Law. §§ 441.16(4), 24.9. The conference board is the certifying board for purposes of Chapter 24. § 441.16(4). Therefore, the conference board is the body with the duty to take action providing for the transfer of any remaining funds to the county assessor's office when the city assessor's office is terminated. It is clear that in this situation, the funds should be transferred to the county assessor's office. 730 I.A.C. § 71.19(1)(c) provides that whenever the city assessor's office is abolished, funds in the assessment expense and special appraiser funds shall be transferred to the appropriate accounts in the county assessor's office. Although no provision is made in the Iowa Department of Revenue administrative rules for the transfer of the city assessor emergency funds to the county assessor's office, clearly that is the appropriate action to take as the intent is to transfer the funds to the body now undertaking the same duties as the abolished office.

Pursuant to § 24.21, the appropriate procedure for the conference board to follow upon its abolition when funds remain is to declare by resolution its abolition, that funds remain and that such funds are to be transferred to the appropriate county assessor's office. In the absence of the required action by the conference board, it is the opinion of this office that the State Appeal Board, pursuant to the exercise of its general supervisory power over the certifying and levying boards of all municipalities, has the authority to order that funds from an abolished city assessor's office be transferred to the appropriate county assessor's office.[2] Because the county auditor is responsible for keeping the records of the assessor's office funds, that official would be the appropriate individual to bring this request before the State Appeal Board. §§ 441.16(4), 331.502(5).

Sincerely,

Ann DiDonato

ANN DiDONATO
Assistant Attorney General

AD:rcp

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[2] It should be noted that approval by the State Appeal Board for transfer of moneys in the Assessor Emergency Fund is not required by § 24.6 when the transfer is made because the city assessor office is abolished. Section 24.6 requires approval for transfer of an emergency fund when it is made for the purpose of meeting a deficiency of any other fund of the municipality.

COUNTIES AND COUNTY OFFICERS: Drainage Districts. Iowa Code Sections 4.1(36), 455.45, 455.50, 455.56, 455.87, 455.136, 455.218 (1985); 1985 Iowa Acts, ch. 267, § 3. The word "may" as utilized in 1985 Iowa Acts, ch. 267, § 3, should be construed as conferring a discretionary power. Consequently the Executive Council, under the amended version of § 455.50, has the discretion as to whether to pay drainage assessments on land owned by the State Conservation Commission. (Benton to Fogarty, State Representative, 1-8-86) #86-1-3(L)

January 8, 1986

The Honorable Daniel P. Fogarty
State Representative
Iowa State House
LOCAL

Dear Representative Fogarty:

Your letter of October 1, 1985 requests our opinion concerning 1985 Iowa Acts, ch. 267, § 3, an act which amended Iowa Code section 455.50 (1985). The amendment altered those portions of § 455.50 which concerned the assessment of lands within drainage districts under the jurisdiction of the Conservation Commission. Unnumbered paragraphs three and four of § 455.50 had provided:

> When any state-owned lands under the jurisdiction of the state conservation commission are situated within a levee or drainage district the commissioners to assess benefits shall ascertain and return in their reports the amount of benefits and the apportionment of costs and expenses to such lands and the board of supervisors shall assess the same against such lands.
>
> Such assessments against land used by the fish and game division of the state conservation commission shall be paid by the state conservation commission from the state fish and game protection fund on due certification of the amount by the county treasurer to said commission, and against lands used by the division of lands and waters from the state conservation funds.

By contrast, section 3 of the amendment provides:

> When any state-owned lands under the jurisdiction of the state conservation commission are situated within a levee or drainage district, the commissioners to assess benefits shall ascertain and return in their report the amount of benefits and the apportionment of costs and expenses to such lands and the board of supervisors shall assess the same against such lands. However, the commissioners shall not assess benefits to property below the ordinary high water mark in a sovereign state-owned lake, marsh or stream under the jurisdiction of the state conservation commission.
>
> The assessments against lands under the jurisdiction of the state conservation commission may be paid by the executive council on certification of the amount by the county treasurer. There is appropriated from any funds in the general fund not otherwise appropriated amounts sufficient to pay the certified assessments. (Emphasis Supplied).

The amendment, S.F. 575, changed § 455.50 so that classification commissioners are prohibited from assessing benefits to property below the ordinary high water mark in a sovereign state-owned lake, marsh or stream under the jurisdiction of the State Conservation Commission.

However, your letter focuses on the last paragraph of the amendment which also significantly changes § 455.50. Under the previous version of the statute, assessments against Conservation Commission lands within drainage districts were paid by the Commission itself, from either the fish and game fund or state conservation funds. The statute now provides that these assessments be paid from a standing appropriation. Moreover, under the old law it was clear that such assessments "shall" be paid; that is there was a clear requirement the Commission pay these levies. The amendment shifted the responsibility for the assessments to the Executive Council and provided that the Council "may" pay such assessments.

It is this latter change which gives rise to your letter. Some drainage district attorneys have stated, according to your letter, that if the Executive Council declines to pay the assessment, those costs will have to be paid by the landowners

within the district. Your letter states that you do not believe that this was the intent of the bill, and consequently you ask our opinion to clarify the amendment's effect.

Before turning specifically to your letter, it may be helpful to briefly outline the assessment procedures for drainage districts under chapter 455. After a drainage district has been established the governing board of the district appoints a panel of commissioners to assess the benefits received by the lands within the district from the drainage work and to classify the lands affected by the drainage improvement. § 455.45. The classification serves as the basis for all future assessments unless the governing body reclassifies the property. § 455.56. Under § 455.136, the costs of repairs or improvements to drainage districts are paid out of drainage district funds, however if those funds are insufficient to pay the expense the board must levy an assessment to pay the indebtedness and leave a balance as a sinking fund for maintenance and repair expenses. If an assessment for repair work is insufficient, the board shall make an additional assessment. § 455.87. Should S.F. 575 be read as granting the Executive Council the discretion whether or not to pay assessments on Conservation Commission lands, other landowners may face an increased financial burden if the Council declines to pay the levy. This result would be a marked change from the present § 455.50 which, as we noted earlier, treats state-owned lands essentially the same as privately-owned land for purposes of drainage assessments.

Of course the goal in construing this amendment as in all statutory construction is to determine the legislature's intent and to give a sensible, workable, practical construction to the provision which avoids inconvenience or absurdity. Emmetsburg Ready Mix Co. v. Norris, 362 N.W.2d 498, 499 (Iowa 1985). In determining legislative intent, we may consider the object sought to be attained, the common law or former statutory provisions, and the consequences of a particular construction. Smith v. Linn County, 342 N.W.2d 861, 863 (Iowa 1984). Our search for the legislature's intent here involves a determination of whether by utilizing the term "may" in its amendment to § 455.50, the legislature meant to give the Executive Council discretion to pay drainage assessments on state-owned property within drainage districts, rather than making such payments mandatory. The terms "may" and "shall" in statutory construction have generally been afforded opposite meanings. Iowa Code section 4.1(36) (1985) for example, provides:

> 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" imposes a duty.
> b. The word "must" states a requirement.
> c. The word "may" confers a power.

This statute codifies the common law rule of construction which generally imposed two distinct meanings on the terms "shall" and "may." The word "shall" appearing in statutes has generally been construed as mandatory. Wisdom v. Board of Supervisors of Polk County, 236 Iowa 669, 679, 19 N.W.2d 602 (1945). The verb "may," on the other hand, usually is employed as implying permissive or discretional rather than mandatory action or conduct. John Deere Tractor Works v. Derifield, 252 Iowa 1389, 1392, 110 N.W.2d 560 (1961). Under the application of the general rule, the term "may" as used in § 3 of the amendment, would vest the Executive Council with the discretion whether to pay drainage district assessments on lands under the jurisdiction of the Conservation Commission. We believe that the traditional rule should be followed here.

Our conclusion that "may" should be construed as discretionary is supported by an analysis of S.F. 575 itself. The bill in the first instance amended § 455.50 by eliminating the term "shall" from the payment provision and substituting "may." We must assume that the legislature, in adopting the amendment, intended to make some change in the existing law, and in construing the amendment we must attempt to give it some effect. 82 C.J.S. Statutes § 384 p. 904 (1953). In this instance, where the legislature has amended a statute by substituting "may" for "shall," there is a strong presumption that it intended to change a mandatory obligation to a discretionary one. As one authority has written:

> Where a section of a statute is amended by striking out 'may' and inserting 'shall' in lieu thereof, an intent is shown to alter the directory nature of the law and render it mandatory; and, conversely, an amendment substituting 'may' for 'shall' manifests a clear intent to make the act referred to optional and permissive instead of mandatory.

82 C.J.S. Statutes § 380 p. 879 (1953).

Moreover, the legislature retained the word "shall" in other portions of the amendment. For example, the amendment provides that the appraisal commissioners "shall" ascertain the amount of benefits to lands within the district, and that the board of supervisors "shall" assess the costs and expenses against lands situated within the district. The legislature has shown it knew the difference between the two terms, and by substituting the term "may" for "shall" in the payment provision the inference is clear that it intended to alter the state's obligation in this context. The Iowa Supreme Court in Green v. City of Mt. Pleasant, 256 Iowa 1184, 1219, 131 N.W.2d 5 (1964), stated the principle in a different way:

> . . . it should be noted that the words 'shall' and 'may' appear frequently throughout the Act and the close proximity to each other, so that it appears that the legislature was consciously using these words in the ordinary sense; that is, 'shall' as mandatory and 'may' as permissive . . .

With "shall" and "may" appearing together in this amendment, it appears that the legislature was intending to use these terms in the usual, ordinary sense. Consequently "may," as the term is used in the amendment, should be construed as conferring a discretionary power.

There are circumstances in which "may" may be given a mandatory meaning. Iowa Nat. Indus. Loan Co. v. Iowa State, Etc., 224 N.W.2d 437, 440 (Iowa 1974). This exception has been employed where it appears that the legislature intended to impose a mandatory duty; for example, a mandatory construction will be given "may" when the public interest is concerned. See Bechtel v. Board of Supervisors, 217 Iowa 251, 254, 251 N.W.633 (1933); Whitfield v. Grimes, 229 Iowa 309, 313, 234 N.W. 346 (1940). In light of the evidence of the legislature's intent in this context, however, we are convinced that the exception is inapposite here. As we discussed earlier, there is no evidence of a legislative intent here to alter the basic rule. In fact, our analysis points to the conclusion that the General Assembly intended to follow the general rule and not the exception.

In construing the amendment, we are required to harmonize it with other provisions dealing with the same subject matter. In Interest of E.C.G., 345 N.W.2d 138, 141 (Iowa 1985). Section 455.218 provides in part:

> Any levee or drainage district organized, or in the process of being organized, under the law of this state may occupy and use land owned by the State of Iowa, upon first obtaining permission to do so from the state or state agency controlling the same.
>
> * * *
>
> The state of Iowa, its agencies and subdivisions shall be financially responsible for drainage and special assessments against land which they own, or hold title to, within existing drainage districts.

This provision states in general terms that the State of Iowa and its agencies are to be financially responsible for drainage assessments. We do not believe that the amendment to § 455.50 is in conflict with this provision. While § 455.218 states a general requirement for all state-owned property within drainage districts, the amendment specifies a payment procedure solely for lands under the jurisdiction of the Conservation Commission. Accordingly the amended version of § 455.50 is not in conflict with § 455.218.

Because your letter was prompted by concern that other landowners would bear an increased financial burden if the Executive Council in its discretion declines to pay a drainage assessment, we should address that situation. As we noted earlier, the possibility could exist that other landowners within the drainage district would face a higher cost if the Executive Council would decline to pay a bill. However, we understand that a letter has been sent to all county auditors and treasurers from the director of the Conservation Commission informing them of the change affected by S.F. 575, and further advising them that drainage districts should notify the Executive Council of any proposed work prior to letting contracts. We also understand that some auditors and treasurers have adopted this practice. This approach should at least help to prevent a situation in which other landowners within a district would face a prohibitive assessment for drainage work. In terms of the remedies available if the Executive Council declines to pay an assessment, we assume that the judicial review provisions of the Iowa Administrative Procedure Act, Iowa Code Chapter 17A (1985), would apply.

In conclusion, it is our view that the amendment to § 455.50 manifested an intent to alter the payment procedure for lands under the jurisdiction of the Conservation Commission from a mandatory obligation for the Commission to a discretionary function for the Executive Council. Consequently under the amended version of § 455.50, the Executive Council has discretion as to whether to pay drainage assessments on lands under the jurisdiction of the Conservation Commission.

Sincerely,

Timothy Benton

TIMOTHY D. BENTON
Assistant Attorney General

TDB:bac

SCHOOLS: Rulemaking: Competitive Bidding. Iowa Code §§ 301.7, 279.8 and 279.12 (1985). A school board may require by rule that students wear uniforms for gym class. Competitive bidding requirements do not apply to purchase of gym uniforms for resale to students. (Fleming to Connolly, State Representative, 1-8-86) #86-1-2(L)

January 8, 1986

The Honorable Michael W. Connolly
State Representative
3458 Daniels Street
Dubuque, Iowa 52001

Dear Representative Connolly:

You have asked for our opinion with respect to the authority of a school district board of directors to make rules and the application of bidding requirements to the purchase of gym uniforms for resale to students. The specific questions you present are as follows:

1. May the school board require students to wear a standard uniform for gym class?

2. If the answer to No. 1 is "yes" may the school district purchase the uniforms and resell them to the students at cost?

3. If the answer to No. 2 is "yes" is the school district required to solicit bids for the uniforms under Iowa Code § 301.7 or any other Iowa statute? In other words, are uniforms "supplies" as that word is used in Iowa Code ch. 301?

4. May the school district purchase and resell the uniforms to the students if there is not a requirement that students wear the uniforms for gym class? In other words, is there any legal reason why the school district may not purchase the uniforms and offer them for sale to any interested student?

The General Assembly has granted school district board of directors the power to make rules for its own government and that of "directors, officers, employees, teachers and pupils, . . .". Iowa Code § 279.8 (1985). Rulemaking by school boards involves the exercise of judgment and discretion. Bunger v. Iowa High Athletic Ass'n., 197 N.W.2d 555, 559 (Iowa 1972). Rules must, of course, be reasonable. Sims v. Colfax Com. Sch. Dist., 307 F.Supp. 485, 487 (S.D. Iowa 1970). We have no reason to believe that a requirement of a uniform for gym class is an unreasonable rule; indeed we are aware that such a requirement is common in Iowa schools. In short, the response to your first question is: yes, a school board may, pursuant to its rulemaking power,[1] require students to wear a standard uniform for gym class.

It is our opinion that the school district may purchase such uniforms and resell them to the students at cost. It is our understanding that the practice of providing a variety of items to students at cost, as a matter of convenience to the student, the school or both is common. Given the authority of school boards to make rules pursuant to § 279.8, to contract pursuant to § 279.12, and to operate the educational program pursuant to ch. 280, we know of no reason in law or logic to prevent resale of uniforms to students.

Your inquiry as to whether the school district must submit bids for uniforms under Iowa Code § 301.7 or any other statute presents more complex issues than your first two questions. The requirement in § 301.7 that textbooks and other school supplies must be obtained by school districts in a competitive bidding process is a long standing requirement. See Iowa Code §§ 2826 and 2828 (1897). The original legislation which authorized school boards to purchase textbooks and required competitive bidding for such purchases included "school supplies" as well as textbooks. Cf. 1890 Iowa Acts, ch. 24, §§ 1, 2 and 5.

The Iowa Supreme Court has ruled that the absence of a statutory mandate to utilize competitive bidding procedure leaves

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[1] Such rules may not, of course, interfere with the right to obtain an exemption to physical education or health courses if a course conflicts with religious beliefs as provided by Iowa Code § 257.25(b)(j).

purchasing decisions within the discretion of a governmental body. Fischer and Company, Inc. v. Hayes, 364 N.W.2d 237, 240 (Iowa 1985). Iowa school districts are required to utilize competitive bidding procedures of Iowa Code §§ 23.2 and 23.18 in the construction and repair of school buildings if the cost exceeds $25,000. Iowa Code § 297.7 (1985).[2] Obviously, purchase of gym uniforms is not controlled by § 297.7. The other relevant statute is ch. 301, particularly Iowa Code § 301.7, which requires the use of competitive bidding procedures for purchases of textbooks and supplies. Thus, your inquiry requires a determination as to whether the term "school supplies" includes gym uniforms.

We mentioned above that the requirements of ch. 301 are long standing. The specific authority of a school board to purchase, inter alia, property insurance, maps and charts, as well as textbooks is found in Iowa Code § 279.28. But the competitive bidding chapter refers only to textbooks and school supplies or necessary supplies.

We have found only two cases that define "school supplies." The first, Affholder v. State, 51 Neb. 91, 70 N.W. 544 (1897), was decided during the period the Iowa statute was enacted, and the court stated that "school supplies" means maps, charts, globes and other necessary apparatus. Id. at 193, 70 N.W. at 545. However, another case, Brine v. City of Cambridge, 265 Mass. 452, 164 N.E. 619 (1928), is even more relevant to your inquiry. There the court ruled that basketball uniforms were not "school supplies." Id. at 455, 164 N.E. at 620. The court in Brine relied on Affholder to decide the question. In light of those cases we conclude that the term "school supplies" does not include gym uniforms, i.e.,[3] clothing which is purchased and resold to students at cost.

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[2] Certain exceptions exist, for example, in emergencies. Iowa Code § 297.8 (1985). See also Iowa Code §§ 297.22 - 297.24 and 297.19 (sale or lease of school lands).

[3] This office has addressed the concept of school supplies in the context of the imposition of a fee for "consumables." 1980 Op.Att'yGen. 532. In that opinion, the issues were whether certain items fall within the category of things that must be provided free to students under the right to schooling "free of tuition," Iowa Code § 282.6, and whether the school district could assess a fee for "consumables" that was not based directly on actual cost for the items that a particular student used. The concerns of the earlier opinion were very different. Our conclusion that the term "school supplies" does not include clothing is not in conflict with the earlier opinion.

Finally, we are of the opinion that the school district may purchase and resell the uniforms to students even if students are not required by rule to wear particular uniforms for gym class. Many schools may have pencils, pens, paper, or other items available as a convenience but students are not compelled to purchase such items from the school. In other words, our response is based on the concept of reasonableness. See V. L. Dodds Co. v. Consolidated School Dist. of Lamont, 220 Iowa 812, 817, 263 N.W. 522, 524 (Iowa 1935); Sims v. Colfax Com. Sch. Dist., 307 F.Supp. at 487.

We do not wish to be understood as stating that the use of competitive bidding processes to purchase gym uniforms or other items is prohibited. There are strong public policy reasons for using such procedures. Fischer and Company, 364 N.W.2d at 239. Many governmental units utilize such processes for most purchases even though they are not required to do so. We merely conclude that Iowa Code ch. 301 does not require a school district to utilize competitive bidding procedures when purchasing gym uniforms for resale to students. School boards may, by rule, require students to wear uniforms for gym classes.

Sincerely,

Merle Wilna Fleming

MERLE WILNA FLEMING
Assistant Attorney General

MWF/cjc

LAW ENFORCEMENT ACADEMY: Law Enforcement; Policemen and Firemen; Psychological Testing. Iowa Code § 80B.11 (1985), as amended by 1985 Iowa Acts, Ch. 208, § 2. The Law Enforcement Academy has authority to determine by rule whether a certified law enforcement officer transferring to a new agency must retake cognitive or personality tests. (Osenbaugh to Yarrington, 1-8-86) #86-1-1(L)

January 8, 1986

Mr. Ben K. Yarrington, Director
Iowa Law Enforcement Academy
Post Office Box 130
Johnston, Iowa 50131

Dear Mr. Yarrington:

You have asked this office for its opinion regarding the effect of Iowa Code § 80B.11 (1985), as amended by 1985 Iowa Acts, Ch. 208, § 2, which provides in pertinent part:

> The director of the [Iowa law enforcement academy, subject to the approval of the [Iowa law enforcement academy] council, shall promulgate rules in accordance with the provisions of this chapter and chapter 17A, giving due consideration to varying factors and special requirements of law enforcement agencies relative to the following:
>
> * * * *
>
> 5. Minimum standards of mental fitness which shall govern the initial recruitment, selection and appointment of law enforcement officers. The rules shall include, but are not limited to, providing a battery of psychological tests to determine cognitive skills, personality characteristics and suitability of an applicant for a law enforcement career. However, this battery of tests need only be given to applicants being considered in the final selection process for a law enforcement position. Notwithstanding any provision of chapter 400, an applicant shall not be hired if the employer determines from the tests that the applicant does not possess sufficient cognitive skills, personality characteristics, or suitability for a law enforcement career. The director of the academy shall, beginning July 1, 1986,

> provide for the cognitive and psychological examinations and their administration at no cost to the law enforcement agencies, and shall identify and procure persons who can be hired to interpret the examinations.

With regard to this statute, you have asked the following questions:

> 1. Does the statute require a previously certified officer to take cognitive and psychological tests before the officer can be hired as a law enforcement officer by a new agency?
>
> 2. If so, may the Iowa Law Enforcement Academy exempt previously certified officers from the requirement of the statute by promulgation of a rule?

It is our view that the statute confers primary jurisdiction in the Council to determine when or if previously certified applicants must take cognitive and psychological tests. Section 80B.11(5) expressly grants rulemaking authority to the agency to establish minimum standards of mental fitness.

Administrative rules have the force of law and are presumed valid; Richards v. Iowa Department of Revenue, 360 N.W.2d 830, 833 (Iowa 1985). An agency may not promulgate a rule unless authorized by statute. Iowa Auto Dealers Ass'n. v. Iowa Dept. of Revenue, 301 N.W.2d 760, 762 (Iowa 1981); Patch v. Civil Service Com'n. of Des Moines, 295 N.W.2d 460, 464 (Iowa 1980); Motor Club of Iowa v. Iowa Dept. of Transportation, 251 N.W.2d 510, 518 (Iowa 1977). The authority to promulgate a rule can be implied when an agency can rationally conclude that the rule is within its statutory authority. Iowa Auto Dealers Ass'n. v. Iowa Dept. of Revenue, 301 N.W.2d at 762; Hiserote Homes, Inc., v. Riedeman, 277 N.W.2d 911, 913 (Iowa 1979). However, a rule is invalid if inconsistent with statutory language or legislative intent. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 196 (Iowa 1980).

The Council's current rules require that "any person hereafter . . . selected or appointed as a law enforcement officer" must have performed satisfactorily in a cognitive test. 550 Ia.Admin.Code 2.2. The rules also permit the transfer of personality test scores to a new hiring agency for one year and the transfer of cognitive test scores for two years. 550 Ia.Admin.Code 2.2(3). Those rules also define "applicant" as "all individuals seeking an entry level position as a law

enforcement officer. This shall not include individuals who are being promoted within a department." 550 Ia.Admin.Code 1.1.

We believe that the Council can reasonably apply the test requirements to previously certified officers who have previously passed these tests and are now seeking a transfer to another agency. However, we do not believe this result is mandated by the statute.

The statute requires that the Council's rules provide for a battery of tests to determine the suitability "of an applicant for a law enforcement career." The statute does not, however, specify the circumstances in which such tests must be given. While the statute requires standards of mental fitness for initial recruitment, selection, and appointment and states that the rules shall provide for a battery of tests, the statute does not expressly state whether the tests are to be required once in a career, for any transfer to a new agency, etc.[1] Indeed, while the present Council rules require tests for every selection or appointment, those rules permit tests to carry over for one to two years. 550 Ia.Admin.Code 2.2. We believe that the legislature delegated to the Council authority to reasonably determine by rulemaking whether to require that a certified officer transferring to a new agency re-take the cognitive or personality tests. The Council has the primary jurisdiction to determine this question based on its expertise and on the information obtained through notice and comment rulemaking.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:mlr

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[1] In contrast to § 80B.11(4) requiring standards of physical fitness for recruitment, selection and appointment, § 80B.11(5) requires that standards of mental fitness shall govern the initial recruitment, selection and appointment of law enforcement officers. The limitation of § 80B.11(5) to initial recruitment suggests that the rules applying mental standards were intended to apply to a less inclusive group than would the standards for physical fitness. However, it is not necessary for us to determine the meaning of the term "initial recruitment" because your question concerns only when tests must be given.

COUNTIES; Board of Supervisors; County Sheriff; Authority of supervisors to disapprove elected county officer's appointment of an employee who is related to another employee in the same office. Iowa Code ch. 341A (1985); §§ 331.903(1); 331.903(2); 331.904(1); 331.904(4). A county board of supervisors should not adopt a policy absolutely prohibiting elected county officers from hiring persons who are related to other persons in the same office. Instead, approval of such appointments should be made on a case by case basis in accordance with the guidelines set forth herein. (Weeg to McCormick, Woodbury County Attorney, 2-28-86) #86-2-9(L)

February 28, 1986

Mr. Patrick C. McCormick
Woodbury County Attorney
3rd Floor, Courthouse
Sioux City, Iowa 51101

Dear Mr. McCormick:

You have requested an opinion of the Attorney General on two questions arising from the following factual situation. The Woodbury County sheriff hired a person to serve as jailer. The board of supervisors refused to approve that appointment on the ground that the appointee was the brother of a current employee in the sheriff's department and would in fact be supervised to some degree by that employee. You have asked the following questions:

> 1. As to an office of county government headed by an elected official, may the County Board of Supervisors establish a specific policy prohibiting such elected official from employing a person who otherwise meets all qualification for the position but who is related to another employee within the same office?
>
> 2. In the absence of an established policy prohibiting the hiring of persons related to employees of an office headed by an elected official, may the Board of Supervisors prohibit such elected official from employing such applicant assuming said applicant has met all other criteria to assume employment in that position?

These questions raise the issue of the relationship between a county's board of supervisors, its elected officials, and employees in those elected officials' offices, an issue which is

generally addressed by statute, and has been discussed by the Iowa Supreme Court and this office on numerous occasions.

However, before turning to these authorities, a preliminary matter must be addressed. One issue which affects the conclusions to your questions is whether the appointee in question is a civil service deputy or is an employee in the sheriff's office not covered by the civil service provisions of Iowa Code ch. 341A (1985). Because this is a factual issue, we cannot resolve it even were we to have the relevant facts before us, which we do not. See 120 Iowa Admin. Code § 1.5(3)(c). We have previously opined as to the general requirements for the position of deputy sheriff in Op.Att'yGen. #84-2-6(L), a copy of which is enclosed for your review, as it may be helpful in resolving this issue.

However, in the event this appointee is to assume a civil service position, we held in 1980 Op.Att'yGen. 523 that appointments of civil service deputies do not require the approval of the board of supervisors. As discussed in that opinion, this conclusion is consistent with the procedure for selection of deputy sheriffs set forth in Iowa Code ch. 341A (1985). If the appointee is to serve not as a civil service deputy but as an assistant or clerk in the sheriff's office, the board of supervisors exercises the approval authority set forth in § 331.903(1).

That section provides that elected county officers may appoint deputies, assistants, or clerks in a number approved by the supervisors, and that such appointments are to be approved by the board. The elected official has sole authority to terminate such appointments. See § 331.903(2). Salaries for these appointees are set by the elected official. See § 331.904(1). Section 331.904(4) provides that the board is to determine the compensation "of extra help and clerks appointed by the principal county officers."

Two Iowa Supreme Court cases have discussed the applicability of these statutes in particular situations. First, in Smith v. Newell, 254 Iowa 496, 117 N.W.2d 883 (1962), the supervisors disapproved the sheriff's appointment of several persons as bailiffs and deputy sheriff on the ground that these persons were beyond the compulsory retirement age, even though a statute gave an employer the discretion to continue a person's employment beyond that age. With regard to the bailiffs, the court concluded that under the specific statute governing appointment of bailiffs the supervisors had no authority over bailiffs and that all employment decisions with regard to those positions were therefore left to the sheriff's discretion. With regard to the deputy sheriff, the court concluded that the statutory language governing appointment of deputies, discussed above, did give the

supervisors authority to approve appointments of deputy sheriffs, but that authority must be exercised in a reasonable manner. The court stated as follows:

> In granting to the Sheriff and other County Officers the power to appoint deputies, bailiffs, and other employees it was the intention of the legislature that the elected Sheriff could secure as deputies, able and loyal people for public service.
>
> In stating that such appointments were subject to approval of Board of Supervisors, it was also the legislative intent that common sense could be used by the Board. In approving or failing to approve the Board could not reject an appointee on frivolous, trivial, minimal, arbitrary or capricious grounds. For example they could not reject the Sheriff's appointments because they did not like the color of the hair of the appointee, nor because of his politics, religious affiliation, nor age, unless the matter of age was contrary to statute.

117 N.W.2d at 887.[1]

In this case the sheriff outlined the importance of this deputy's work and that this deputy was healthy and continued to perform his duties capably. The court concluded that the supervisors' decision in withholding approval for this deputy's appointment on the ground that he had reached the compulsory retirement age was "trivial and arbitrary, and not effective." Id.

In McMurry v. Board of Supervisors of Lee County, 261 N.W.2d 688 (Iowa 1978), the board of supervisors attempted to impose a number of employment policies on all county employees, including deputies and clerks in the offices of elected county officers.

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[1] Enactment of the civil service system for deputy sheriffs in 1973 would likely affect the result of this decision in that under civil service the supervisors' approval of deputy sheriffs' appointments is not required. See 1980 Op.Att'yGen. 523. However, the rationale underlying the court's conclusions is equally applicable to appointments made by other elected officers. Indeed, as set forth above, the court discussed the authority of "the sheriff and other county officers" to appoint employees. (emphasis added).

These policies included: 1) a requirement that a person have two years' experience before being appointed as a deputy to a county officer; 2) specific salary guidelines for deputies; 3) vacation and sick leave rules for all county employees. Acting pursuant to these policies, the board disapproved the appointment of a deputy in the clerk's office for failure to meet the employment experience requirement.

The court reviewed the above-named statutes, inter alia, and held that "authority over personnel matters relating to deputies resides with the elected principals unless a statute expressly gives authority to the board." 261 N.W.2d at 691. Accordingly, the two-year experience requirement and the salary guidelines were invalidated, as was the board's decision disapproving the deputy's appointment. With regard to the latter conclusion, the court referred to the above-cited language from its decision in Smith v. Newell in once again setting forth the scope of the supervisors' approval authority with regard to appointment of deputies. Finally, the court found the vacation and sick leave policy invalid as applied to deputies but valid with regard to all other county employees.[2] [3]

We believe these decisions, and opinions from this office reaffirming the principles expressed therein,[4] set forth as

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[2] But see Smith v. Board of Supervisors of Des Moines County, 320 N.W.2d 589 (Iowa 1982), in which the court upheld a county ordinance requiring all county officials to follow centralized purchasing procedures developed by the board of supervisors against a challenge that the county home rule amendment, under which this ordinance was adopted, was unconstitutional. This decision did not refer to either the Smith v. Newell or McMurry decisions. We distinguished this case from the Smith v. Newell and McMurry decisions in Op.Att'yGen. #85-6-3.

[3] The McMurry court concluded that the supervisors do not have the authority to set salaries for deputies, assistants, and clerks of elected officials, but do have the authority to set salaries for other employees in those offices because of the specific provisions of sections 331.904(1) and 331.904(4). The court viewed vacation and sick leave policy as part of these employees' compensation.

[4] See, e.g., Op.Att'yGen. #85-6-3 (supervisors have only limited authority to disapprove claims submitted by elected county officers); Op.Att'yGen. #84-10-5 (supervisors may not enter into ch. 28E agreement to perform certain law enforcement functions without approval of sheriff); and Op.Att'yGen. #83-11-4(L) (supervisors may not initiate discipline against employees of elected county officers).

clearly as is possible the guidelines a board of supervisors must follow in approving or disapproving appointments of employees by elected county officers. In sum, such decisions are subject to a reasonableness standard, and because the reasonableness of each decision will depend on the specific facts of each case, these decisions must be made on a case-by-case basis. This office cannot resolve issues of fact, so therefore would be unable to render an opinion in this or any other case as to whether the board's failure to approve this particular appointment was reasonable. See 120 Iowa Admin. Code § 1.5(3)(c).

Turning now to your specific questions, you first ask whether the supervisors have the authority to establish a policy prohibiting elected officials from hiring persons related to other persons in the same office. In light of the Smith v. Newell and McMurry decisions, we believe adoption of such a broad policy would be unwise, at least as to employees of elected county officers. This is in part due to the limited scope of the board's approval authority as set forth in these opinions and in part due to the peculiarly factual nature of this issue. For this latter reason, it may be more advisable for the supervisors to address each case individually rather than adopt a general policy. For example, it would seem to us to be more reasonable to disapprove an appointment when the appointee would be directly supervised by a relative also employed in that office than it would be to disapprove an appointment where the two related persons would have the same rank in the office and no supervisory relationship would exist. Other factors that would be relevant in determining reasonableness would vary from case to case, but could include the degree to which the parties are related and the job responsibilities of each position.

As discussed above, we are unable to provide an answer to your second question because an answer depends on the specific facts of this case and because this office cannot resolve issues of fact. However, we hope through this opinion to have provided the supervisors with some guidance to make this determination.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

Enclosure

LANDLORD-TENANT: Termination of Mobile Home Leases. Iowa Code § 562B.10(4) (1985). A mobile home space rental agreement may not be terminated under Iowa Code § 562B.10(4) during the one-year term of the rental agreement. But see Iowa Code § 562B.22-.25, .31. After the one-year rental period is concluded, the tenancy becomes a tenancy at will and the tenancy may be terminated with sixty days written notice as provided in § 562B.10(4). Such rental agreements may not be cancelled for the sole purpose of making the tenant's mobile home space available for another mobile home or for a reason prohibited by other federal or state laws. (Tobin to Rosenberg, State Representative, 2-26-86) #86-2-7(L)

February 26, 1986

The Honorable Ralph Rosenberg
State Representative
State Capitol
L O C A L

Dear Representative Rosenberg:

You have requested an opinion from this office concerning the interpretation of Iowa Code § 562B.10(4) (1985). Specifically, you have asked 1) whether rental agreements for one year may be terminated in the middle of the lease by the provision of sixty days written notice by either party or if the sixty days notice refers to extension of the lease and 2) whether a landlord may cancel an agreement for any purpose other than solely for the purpose of making the space available for another home.

The Iowa Mobile Parks Residential Landlord and Tenant Act states in pertinent part:

> 562B.10 Terms and conditions of rental agreement.
>
> * * *
>
> 4. Rental agreements shall be for a term of one year unless otherwise specified in the rental agreement. Rental agreements shall be cancelled by at least sixty days' written notice given by either party. A landlord shall not cancel a rental agreement solely for the purpose of making the tenant's mobile home space available for another mobile home.

In determining the legislative intent behind an ambiguous statute the legislative history may be considered. Iowa Code § 4.6 (1985). The Iowa Mobile Home Parks and Residential Landlord and Tenant Act (chapter 562B) was enacted in 1978. A

subsequent law review article described one of the modifications made by the Iowa Legislature to section 562B.10(4).

> Section 10(4) of House file 2135, as introduced, amended and passed by the House provided as follows:
>
> > Rental agreements shall be for a term of one year and shall be automatically renewed on a yearly basis unless otherwise specified in the original written or oral rental agreement or any renewal thereof or may be cancelled by at least sixty days' written notice given before the expiration of any such lease by either party. A sixty-day notice to cancel a rental agreement initiated by a landlord shall be for just cause.
>
> This provision provided for a one-year lease automatically renewable and, while the lease could be cancelled upon sixty days' written notice, the landlord could only cancel for just cause. Unfortunately for tenants, neither of these provisions prevailed when the legislation reached the Senate. The state government committee of the Senate offered amendment S - 5400B to the Bill which was ultimately passed by the House. This amendment struck subsection 10(4) in its entirety and inserted in its place the language in present section B.10(4). The amendment passed as proposed and H.F. 2135, as amended, was passed by the Senate. The House subsequently concurred with the Senate version of H.F. 2135.
>
> * * *
>
> The legislature obviously elected to take a hesitant step toward a minimum one-year lease term, a step that will be for naught if mobile home park owners develop their own standard form lease specifying a fixed term, or even a periodic tenancy. This section is silent with regard to the renewal of tenancies, in contrast to the original text which made the one-year term automatically renewable on a yearly basis. In light of the changed text, it seems likely that a tenant who continues to reside on a mobile home space after the expiration of his term without a specific agreement will

> be subject to termination under the sixty days' written notice procedure prescribed by this section. This change of course doubles the traditional notice requirement in the consensual holdover situation and apparently also in the periodic tenancy. It falls short, however, of the security of tenure that seems warranted in light of the substantial expense involved in relocating a mobile home and a shortage of mobile home spaces to rent.

Lovell, The Iowa Uniform Residential Landlord and Tenant Act and the Iowa Mobile Home Parks Residential Landlord and Tenant Act, 31 Drake L. Rev. 253, 308-10 (1981-82) (footnotes omitted).

It is informative to review the types of traditional real estate tenancies that have been codified. Tenancies at will or tenancies for a term are two common forms of tenancies in Iowa. "Any person in the possession of real estate, with the assent of the owner, is presumed to be a tenant at will until the contrary is shown." Iowa Code § 562.4 (1985). This presumption is one of fact, not law, and is not conclusive; consequently, it may be shown that the tenancy was for a term. McCarter v. Uban, 166 N.W.2d 910, 912 (Iowa 1969). A thirty day termination notice is statutorily required in a tenancy at will for tenancies other than mobile homes rental agreements under § 562B.10(4). Iowa Code § 562.4.

A tenancy for a fixed period is a tenancy for a term. If there is an agreement for a termination date, the tenancy is for a term and is not a tenancy at will. Benschoter v. Hakes, 232 Iowa 1354, 1358, 8 N.W.2d 481, 484 (1943). Iowa Code § 562.6 (1985) provides that "[i]f an agreement is made fixing the time of the termination of the tenancy, whether in writing or not, the tenancy shall cease at the time agreed upon, without notice."

If the parties to the mobile home rental agreement do not agree otherwise, the rental agreement, by statute, will be for one year. This creates a tenancy for a term and the tenant and landlord are assured of that term. However, at the end of the one-year rental agreement the tenant may well choose to remain. Once again, in the absence of an agreement to the contrary or of notice of termination by the landlord, the tenant would be allowed to stay. However, from that time forward the tenancy would be a tenancy at will.

A tenancy at will is normally terminable by thirty days notice. Iowa Code § 562.4. Section 562B.10(4) expands the notice period for termination of mobile home rental agreements to sixty days. Therefore, while the rental agreement may not be terminated in the first year of the rental agreement under

section 562B.10(4), it may be terminated with sixty days notice at any time after one year.

The second issue presented is whether a landlord can cancel an agreement for any purpose other than solely for the purpose of making the space available for another home. The legislative history of chapter 562B shows section 10(4) of House File 2135 stated that "a sixty day notice to cancel a rental agreement initiated by a landlord shall be for just cause." However, this section was deleted in the Senate and the Senate version was ultimately passed and signed into law. Because the "just cause" requirement was deleted and the provision disallowing cancellation "solely for the purpose of making the tenant's mobile home space available for another mobile home" was included, the statute apparently contemplates other reasons for cancellation. The use of the word "solely" also leads to the conclusion that other reasons for cancellation would be allowed.

In fact, chapter 562B allows the tenant to terminate under certain circumstances for the landlord's material noncompliance with the rental agreement, failure to deliver possession of the mobile home space or unlawful ouster, exclusion or diminution of services. Iowa Code § 562B.22-.24 (1985). The landlord may terminate under certain circumstances for the tenant's material noncompliance with the rental agreement. Iowa Code § 562B.25 (1985). Both the tenant and landlord may terminate for the other's abuse of access. Iowa Code § 562B.31 (1985).

A tenant taking advantage of section 562B.10(4) to defend an eviction notice would apparently need to show that the sole reason for the termination of the rental agreement was to make the space available for another mobile home. This would be a fact question for the court to determine. Other limitations that exist on the cancellation of rental agreements would remain including, for example, anti-discrimination restrictions.

In summary, a rental agreement may not be terminated under Iowa Code § 562B.10(4) during the one-year term of the rental agreement. But see Iowa Code § 562B.22-.25, .31. After the one-year rental period is concluded, the tenancy becomes a tenancy at will and the tenancy may be terminated with sixty days written notice as provided in § 562B.10(4). Such rental agreements may not be cancelled for the sole purpose of making the tenant's mobile home space available for another mobile home or for a reason prohibited by other federal or state laws.

Sincerely,

Terrence M. Tobin

TERRENCE M. TOBIN
Assistant Attorney General

/kz

ENVIRONMENTAL PROTECTION: Bottle Redemption. Iowa Code §§ 455C.3(2), 4.1(2), 455C.3(1), 455C.2(1) (1985), and 900 Iowa Admin. Code § 107.2(18). Distributors are under no duty to accept beverage containers which are not the type the distributor sells. (Lorentzen to Daggett, State Representative and Boswell, State Senator, 2-25-86) #86-2-6(L)

February 25, 1986

The Honorable Horace Daggett
State Representative
State Capitol
L O C A L

The Honorable Leonard L. Boswell
State Senator
State Capitol
L O C A L

Dear Representative Daggett and Senator Boswell:

We have received your request for an Attorney General's opinion concerning the redemption of beverage containers by distributors as discussed in Iowa Code section 455C.3(2). You have specifically asked:

> Whether a distributor of a particular soft drink can decline to accept a particular type of bottle on the grounds that the bottle is made of a different material than the type used at the distributor's facility, even though the product itself is the same.

Iowa Code chapter 455C provides for the recycling of certain beverage containers and the manner in which such containers are to be redeemed by dealers and distributors. You have stated that some distributors have declined to redeem glass beverage containers because the distributor only bottles or sells beverage containers made of plastic. Iowa Code section 455C.3(2) states:

> A distributor shall accept and pick up from a dealer served by the distributor or a redemption center for a dealer served by the distributor . . . any empty beverage container of the kind, size and brand sold by the distributor . . .

The word "kind" is not defined in the Code, and therefore, must be construed "according to the context and the approved usage of the language." Iowa Code section 4.1(2). The word "kind" is defined in Webster's Dictionary as "fundamental nature or quality: essence; a group united by common traits category; a specific or recognized variety; the equivalent of what has been offered or received." Webster's New Collegiate Dictionary 629 (6th ed. 1979). The phrase "of the kind" modifies the noun "container" in this section. From this construction, therefore, it is clear that distributors are only obliged to accept the same class or sort of container which the distributor sells.

It is noted that such language is also incorporated in the preceeding section which states that a dealer must accept from a consumer "any empty beverage container of the kind, size and brand sold by the dealer." Iowa Code section 455C.3(1). A pertinent distinction which amplifies this Code section is found in 900 Iowa Admin. Code 107.2(18) when read in conjunction with Iowa Code section 455C.2(1). A redemption center must accept all beverage containers, regardless of type, whereas a dealer running a redemption center has the voluntary option to accept those containers which are not the kind which he sells.

Distributors are under no duty to accept beverage containers which are not the type they sell to dealers. If a distributor does not sell glass containers, it is under no obligation to accept them under Iowa Code chapter 455C.

Sincerely,

ELIZABETH LORENTZEN
Assistant Attorney General

EL:jds

PROBATION AND PAROLE: Costs of Probation and Parole. Iowa Code §§ 907.6, 910.2, 906.1, 906.3 (1985); 291 Iowa Admin. Code § 45.2 (1985). Probationers can be required as a probation condition to pay the costs of probation. Those already on probation cannot be subsequently required to pay the costs of probation. Parolees cannot be required to reimburse the costs of parole absent a modification of 291 Iowa Admin. Code § 45.2. If the rule were modified, a condition requiring reimbursement of parole costs could be imposed on those already on parole. (Coats to Rosenberg, State Representative, 2-5-86) #86-2-3(L)

February 5, 1986

Honorable Ralph Rosenberg
State Representative
Capitol Building
L O C A L

Dear Representative Rosenberg:

In your request for an opinion of the Attorney General, you posed the following question:

> . . . whether probationers or parolees may be assessed fees, either on a daily or monthly basis. . . . The fees would be required and collected by either the local department of correctional services or by the local community groups which provide probation services. Conceivably, the fees would be ordered as part of the contracts signed by the probationer or parolee.

In a subsequent telephone conversation, you defined "fees" as an assessment for the costs of providing services to those on parole or probation, including the salaries of the probation or parole officers. In that telephone conversation, you also inquired as to whether such an assessment of fees could be made a condition of parole or probation and, finally, if such fees may be assessed, whether those already on parole or probation can be "grandfathered" into such a requirement. The following opinion considers the authority for allowing the imposition of these conditions rather than the wisdom of doing so.

I. PROBATION

Under certain circumstances, judicial district departments of correctional services can require reimbursement of probation costs as a condition of probation, subject to the approval of the court. Additionally, the court itself can impose such a

condition. However, the assessment of such a fee could pose significant legal problems.

Under Iowa Code § 907.6,

> [Probationers] are subject to the conditions established by the judicial district department of correctional services subject to the approval of the court, and any additional reasonable conditions which the court may impose to promote rehabilitation of the defendant or protection of the community. Conditions may include but are not limited to adherence to regulations generally applicable to persons released on parole and including requiring unpaid community services allowed pursuant to section 907.13.

Iowa trial courts are thus granted considerable discretion in fashioning or approving conditions of probation, and, in doing so, are encouraged to use "the innovation required by sound public policy, even if the condition involves the assessment of a fee against the probationer."[1] State v. Rogers, 251 N.W.2d 239,

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[1]In Rogers, a probationer challenged a probation condition that he repay the costs of prosecution, including court-appointed attorney's fees. The condition was imposed prior to the revision of Iowa Code § 910.2 (which now provides for the restitution of these costs to the county of conviction if the offender is able to pay). The probationer argued that requiring repayment of these costs was "improper" without specific legislative authorization. The Iowa Supreme Court rejected this argument, stating that "...there is no indication the legislature ever considered, much less rejected, the concept that...payment of these fees on a reasonable installment basis could not be imposed as a condition of probation." Rogers, id. at 243.

At least one state, California, has rejected conditioning probation on the repayment of the costs of probation without statutory authorization. In People v. Baker, 113 Cal.Rptr. 248, 253 (App. 1974), the California Court of Appeals noted that "[j]urisdictions that permit imposition of such costs generally do so under explicit authorization of statute...[s]ince we view imposition of costs of prosecution and of probation as neither reparation nor a reasonable condition of probation [under the California Penal Code]", the condition mandating the repayment of these costs could not stand. California has since enacted a

(Footnote continued)

246 (Iowa 1977). See also 1982 Op.Att'yGen. 437, 438. Since requiring the probationer to pay for costs incurred by virtue of his conviction could conceivably contribute to his rehabilitation, this condition could be well within the court's discretion.

In addition to conditions established by the court, Iowa Code § 906.7 also provides for "conditions established by the judicial district department of correctional services" which are subject to the approval of the court. It is unclear from this provision whether these conditions are also limited to those which "promote rehabilitation of the defendant or protection of the community." In interpreting a statute, "the object sought to be attained" should be considered [Iowa Code § 4.6(1)], which, in this instance,[2] is primarily the rehabilitation of the probationer. Any conditions established by the judicial district departments of correctional services, including a requirement that the probationer pay the costs of providing probation services, must promote the rehabilitation of the defendant or protection of the community.

While the repayment of the costs of probation could conceivably be made a condition of probation, the difficulties involved in actually assessing this cost raise substantial legal problems. Conditions of probation, of course, cannot be unreasonable or arbitrary. Id. at 243; 21 Am.Jur.2d Criminal Law § 570 at 932-933; 24 C.J.S. Criminal Law § 1571(8) at 472-473, § 1618(8) at 889-893 (1961). Since the "uncertainty of such costs [of probation] imposes on each defendant a potentially unlimited penalty for his crime", Baker, 113 Cal.Rptr. at 254, such a probation condition might be found arbitrary or unreasonable by an appellate court. See also Constitutional Primer on Modern Probation Conditions, 8 New England on Prison Law 367, 387 (1982) (discussing the problems of requiring restitution as a condition of probation). Requiring a probationer to pay part of the costs

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(Footnote continued)
statute authorizing California courts to require probationers to pay the costs of probation.

[2]"In all jurisdictions,...probation is a criminal penalty imposed only upon those convicted of violating a penal statute; hence, probation conditions should at least further the general aims of criminal law, in the context of the probationer's particular offense." (Emphasis added.) Judicial Review of Probation Conditions, 67 Col.L.Rev. 181, 198-9 (1967). See also 21 Am.Jur.2d Criminal Law § 570 at 932 (1981): "The broad objectives sought by probation are education and rehabilitation and, subject to specific statutory provisions, the conditions of probation should promote those objectives."

of his probation would involve a complex task of determining how much of the probation services the probationer would use prior to the actual probation. If the complexity suggests an arbitrary reduction, the condition imposed is illegal. "The chase may not be worth the prize." Rogers, 251 N.W.2d at 243.

Furthermore, such a condition of probation could be subject to equal protection challenges. Just as it is "fundamentally unfair to revoke probation" when a probationer is unable to pay a fine or restitution, Bearden v. Georgia, 461 U.S. 660 (1983), it is likewise fundamentally unfair to deny probation to one who is unable to pay both the costs of his probation and the mandatory restitution payments under Chapter 910 of the Iowa Code.[3] Any imposition of a condition of probation requiring repayment of the costs of probation must therefore be accompanied by the safeguards provided in Rogers, 251 N.W.2d at 245:

> (1) The requirement of repayment is imposed only on a convicted defendant.
>
> (2) The court does not order payment of this expense unless the convicted person is or will be able to pay it without undue hardship to himself or dependents, considering the financial resources of the defendant and the nature of the burden payment will impose.

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[3] Iowa Code § 910.2 states, in relevant part, that

> [i]n all criminal cases except simple misdemeanors under chapter 321, in which there is a plea of guilty, a verdict of guilty, or special verdict upon which judgment of conviction is rendered, the sentencing court shall order that restitution be made by each offender to the victims of the offender's criminal activities and, to the extent that the offender is reasonably able to do so, to the county where conviction was rendered for court costs, court-appointed attorneys fees or the expense of a public defender when applicable.

(3) Revocation of probation shall occur only if defendant willfully fails to make payment, having financial ability to do so.

(4) Defendant may petition sentencing court to adjust the amount of any installment payments, or the total amount due, to fit a changing financial condition.

If these safeguards are utilized, and if the imposition of this condition is related to the goal of rehabilitation, then repayment of reasonable probation costs as a condition of probation can be imposed.

You asked whether those already on probation could be "grandfathered" into a requirement to pay for the costs of probation services. Doing so would, of course, require a modification of the plan of probation by the court. While a "court which has legally placed a prisoner on probation has the vested right to revoke or modify any condition...authority to modify...does not authorize the adding of a new condition to the order...." 24 C.J.S. Criminal Law § 1618(8) at 892-893 (1961). The only statutory authorization for court modification of a plan of probation is found in Iowa Code § 910.4, which authorizes the court to modify a plan of restitution. We are not aware of any other statutory authority allowing the court to later add a probation condition requiring a probationer to pay for the costs of probation.

II. PAROLE

Iowa Code § 906.1 provides, in relevant part, that "[p]arole. . .is subject to supervision by the district department of correctional services, and on conditions imposed by the district departments." This provision seemingly grants the district departments considerable discretion in formulating conditions of parole.[4] This discretion, however, is tempered by administrative rules

Several standard conditions of parole are set forth in 291 Iowa Admin. Code § 45.2(1), none of which allow the imposition of a parole condition requiring repayment of the costs of

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[4]Iowa Code § 906.3 requires the Board of Parole to "adopt rules regarding a system of paroles from correctional institutions. . . ."

parole. However, 291 Iowa Admin. Code § 45.2(2) allows further conditions to be imposed:

> Special conditions may be imposed at any time and shall only be imposed in accordance with the needs of the case as determined by the judicial district department of corrections, the department of corrections, or the Iowa Board of Parole. Special conditions shall be handled in the following manner:
>
> . . .
>
> b. Additions. Additional conditions may be imposed. The additional conditions shall be clearly indicated on all copies of the parole agreement and shall be signed and dated by the parolee and supervising agent. The department of corrections and the parole board shall be notified of the additional conditions in writing.

The "special conditions" section of the Iowa Administrative Code accords the judicial district departments of correctional services, the department of corrections, and the Iowa board of parole a fair amount of discretion in imposing the special conditions; however, these conditions are limited to those that fulfill the needs of a particular case. Unlike Iowa Code § 907.6 which allows for reasonable probation conditions that generally promote rehabilitation of the defendant or protection of the community, the "special conditions" section regarding parole is more restrictive. While repayment of the costs of parole can promote rehabilitation, it is unlikely that such a condition would actually be 'needed' in a particular case. The "special conditions" section of 291 Iowa Admin. Code § 45.2(2) was apparently intended to allow for conditions that would help an individual parolee readjust to being a member of society, such as mandatory attendance at AA meetings, drug therapy, or mental health counseling.

The administrative code therefore precludes the district departments from requiring parolees to reimburse the costs of parole. However, since Iowa Code § 906.1 grants the district department of correctional services broad discretion in formulating conditions of parole, the district departments could require reimbursement if 291 Iowa Admin. Code § 45.2 were modified to either incorporate reimbursement as a standard condition of parole or if the "special conditions" section were modified to

grant the district departments authority to order reimbursement as a condition of parole.[5]

According to 291 Iowa Admin. Code § 45.2(2), "[s]pecial conditions may be imposed at any time. . . ." (Emphasis added.) Therefore, if the "special conditions" section of the Iowa Administrative Code were modified to allow for a parole condition requiring reimbursement of the costs of parole, that requirement could be incorporated into the parole agreements of those already on parole. However, any attempt to "grandfather" current parolees into this requirement should be accompanied by the procedural safeguards outlined in Section I of this opinion to insure that a parole is not revoked due to a parolee's inability to pay the costs of his or her parole.

Sincerely,

Sarah J. Coats
Assistant Attorney General

SJC/jlf3

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[5]Of course, requiring a parolee to reimburse the costs of parole raises the same sort of legal problems as requiring a probationer to reimburse the costs of probation (see previous section). A condition requiring reimbursement could be found arbitrary and unreasonable and violative of the parolee's equal protection rights.

STATE DEPARTMENTS AND OFFICERS: Judicial hospitalization referees. Iowa Code §§ 25A.2(3), 229.21 (1985); Op.Att'yGen. # 84-6-9(L). Judicial hospitalization referees appointed pursuant to Iowa Code § 229.21 are employees of the state within the meaning of § 25A.2(3), the State Tort Claims Act. (McCown to Riepe, Henry County Attorney, 2-4-86) #86-2-2(L)

February 4, 1986

Mr. Michael A. Riepe
Henry County Attorney
205½ West Monroe
P.O. Box 69
Mt. Pleasant, Iowa 52641

Dear Mr. Riepe:

You have requested an opinion concerning whether the Attorney General would provide representation to a judicial referee or an alternate referee in suits arising out of actions in that capacity. In summary, the Attorney General would be able to represent a judicial referee in suits arising out of actions in that capacity. We conclude that judicial referees are state employees for purposes of Chapter 25A, the State Tort Claims Act.

Pursuant to Iowa Code § 25A.21, the state is required to defend, and if need be, indemnify state employees against whom a Chapter 25A claim is filed. A 25A claim is one for money damages arising from property damages, personal injury, or wrongful death as a result of the negligent or wrongful acts or omissions of any employee of the state while acting within the scope of their employment. Iowa Code § 25A.2(5)(b). Under Section 25A.2(3), a state employee includes:

> any one or more officers, agents or employees of the state ... and persons acting on behalf of the state ... in any official capacity, temporarily or permanently in the service of the state of Iowa, whether with or without compensation.

Under Iowa Code § 229.21 (1985), the district court has the exclusive right to appoint a judicial hospitalization referee and any alternate. A person who is appointed as a referee by a court pursuant to law or court rule to exercise a judicial function, is

subject to the supervision of the judicial officer making the appointment.[1] Iowa Code § 602.6602 (1985). We would conclude that the judicial hospitalization referees, like the mental health advocates in Op.Att'yGen. # 84-6-9(L), are state employees as defined in § 25A.2(3). See also, Gabrielson v. State, 342 N.W.2d 867, 869 (Iowa 1984); Iowa Code § 602.1201 (1985).

In sum, a judicial referee or an alternate referee would be defended by the Attorney General's office, in the event that an action is commenced against them for acts within the scope of the employment as provided in Chapter 25A.

Sincerely,

Valencia Voyd McCown

Valencia Voyd McCown
Assistant Attorney General

VVM/jaa

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[1]Iowa Code § 229.21 specifically vests with the district court the exclusive right of control over the work done by a judicial hospitalization referee. The purpose of the appointment of judicial hospitalization referees is to discharge the duties imposed upon district judges and magistrates by § 229.7 to § 229.19 or § 125.75 to § 125.94, when no district judge or magistrate is available. Upon discharging those duties, referees are required to transmit to the court a statement of the reasons for the referee's actions and a copy of the orders issued. Iowa Code § 229.21(3) (1985).

SCHOOLS; Area Education Agencies, Administrators. 1985 Iowa Acts ch. 217; 1985 Iowa Code Supp. § 260.8. The new Code section, codified as 1985 Iowa Code Supp. § 260.8 , which requires completion of staff development programs every five years, applies to all elementary and secondary school and area education agency administrators including those who hold permanent certificates with endorsements issued before July 1, 1985. Adoption of rules to implement and monitor the requirements of § 260.8 would be appropriate. (Fleming to Benton, Commissioner of Public Education, 2-4-86) #86-2-1(L)

February 4, 1986

Robert D. Benton, Ed.D.
Commissioner of Public Instruction
L O C A L

Dear Commissioner:

You have asked for our opinion concerning the operation of a statute enacted by the 1985 session of the General Assembly. The new statute, codified as Iowa Code § 260.8, imposes a requirement that elementary, secondary and area education agency administrators complete staff development programs every five years.[1]

The new statute provides as follows:

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[1] The statute is comparable to many others which require individuals who are licensed in professions or occupations to participate in continuing education as a condition of certification or licensure. See e.g., Iowa Code § 258A.1 (1985) (list of boards that must require continuing education as a condition to licensee renewal); Iowa Court Rules 123 through 123.8 and Regulations of the Commission on Continuing Legal Education.

> Section 1. NEW SECTION. 260.8 ADMINISTRATIVE ENDORSEMENTS. The board of educational examiners shall develop and adopt a staff development program for individuals receiving endorsements as administrators or certified as area education agency administrators. Administrative endorsements and certificates are valid for five years from issuance. Successful completion of the staff development program is required every five years before the endorsement or certificate is renewed by the board.
>
> Sec. 2. This Act is effective for all administrative endorsements and certificates issued by the board of educational examiners. However, for individuals who have been issued an administrative endorsement or certificate before July 1, 1985, the staff development program must be successfully completed by July 1, 1990.

1985 Iowa Acts ch. 217. Your questions pertain particularly to the application of this statute to administrators who hold permanent professional certificates with administrative endorsements issued prior to July 1, 1985.

Your first question is:

> Must administrators, who hold permanent certificates issued before July 1, 1985, successfully complete the staff development program each five years after 1990, even though their certificates are not subject to renewal?

It is our opinion that the new Code section does require all administrators (see section two set out above) to complete staff development programs every five years, including those whose certificates are not subject to renewal.

We discussed similar issues in a recent opinion, Op.Att'yGen. #85-5-6(L) (Hamilton to Brown). The leading case with respect to state licensure of persons who practice a profession is Dent v. West Virginia, 129 U.S. 114 (1889). The Supreme Court upheld the right of a state to impose conditions for practicing a profession and in addition explained that a state may impose additional conditions on the right to practice a profession as advances in knowledge in the profession occur. Id. at 123. Surely if the state holds power to require barbers, real estate salespersons, nurses, doctors and audiologists, inter alia, to complete continuing education programs, it holds power to impose similar requirements on administrators of educational institutions.

State authority over certification standards and status is continuing in nature so that certification requirements may be altered from time-to-time both with regard to existing, as well as to renewed or higher certificates. Valente, Education Law, Public and Private, § 12.3, page 227 (West). See also Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S.Ct. 1774, 32 L.Ed.2d 119 (1972); Last v. Board of Education, 37 Ill.App.2d 159, 185 N.E.2d 282 (1962).

The purpose of continuing education requirements is well summarized in the first sentence of Iowa Court Rule 123.1: "Only by continuing their legal education throughout their period of the practice of law can attorneys fulfill their obligation completely to serve their clients." That purpose applies with equal force to administrators of Iowa schools and area education agencies.[2]

Your second question is:

> If administrators whose permanent certificates were issued prior to July 1, 1985, must complete staff development programs, may the state board require a different staff development program for those administrators than for administrators certified after July 1, 1985?

The board of educational examiners has been granted power to develop and adopt a staff development program for administrators. 1985 Iowa Acts ch. 217, § 1, set out above. The General Assembly delegated authority to the board in keeping with the concept that the board has the expertise to develop appropriate programs. It seems clear to us that if the board of educational examiners determines that persons who were issued an administrator's endorsement prior to July 1, 1985, need a staff development program that is different from those whose endorsements were received later, such a determination would be upheld if it were reasonable. Agency action is subject to the standards provided by Iowa Code § 17A.19(8) (1985). If the board determines, for

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[2] The General Assembly, in 1985, imposed additional continuing education requirements on all certificated school employees in 1985 Iowa Acts ch. 173 §§ 3-5 (mandatory child abuse reporters, including certificated school employees, must complete two hours of child abuse identification and reporting training every five years). This provision is codified as 1985 Iowa Code Supp. § 232.69.

example, that those who have been trained recently to be administrators have received training that was different, the board could create different staff development programs for the two categories. We are under the impression that a variety of programs are made available for persons who must complete continuing education programs as a condition for continuing to practice a profession.

Your third question is whether the state board must adopt rules regarding evidence of compliance by administrators.

In our opinion, Iowa Code § 257.10(11) (1985) and Iowa Code ch. 260, as amended by 1985 Iowa Acts ch. 217, grants the board of educational examiners ample power to promulgate rules to permit the Department of Public Instruction to monitor compliance with the new staff development requirement for administrators. Where a board is vested with broad power to promulgate rules that it decides are necessary, we are somewhat reluctant to state that such a board must adopt rules on a particular topic. Suffice it to say that promulgation of rules to implement the requirements of 1985 Iowa Code Supp. § 280.8 would be most desirable. Agency rules are subject to challenge, of course, as provided by Iowa Code ch. 17A (1985). The applicable standard for reviewing a rule is whether a "rational" agency could conclude that a rule is within its delegated authority. Davenport Com. Sch. Dist. v. Iowa Civ. Right Com'n., 277 N.W.2d 907, 910 (Iowa 1979).

In summary, 1985 Iowa Code Supp. § 260.8, which requires completion of staff development programs every five years, applies to all elementary and secondary school and area education agency administrators including those who hold permanent certificates with endorsements issued before July 1, 1985. Adoption of rules to implement and monitor the requirements of § 260.8 would be appropriate.

Sincerely,

Merle Wilna Fleming

MERLE WILNA FLEMING
Assistant Attorney General

MWF/cjc

COUNTIES: Board of Supervisors; Payroll Deductions; Home Rule. Authority of board of supervisors to provide payroll deductions and impose limitations on such deductions. Iowa Constitution, art. III, § 39A; Iowa Code Ch. 509A; §§ 331.301(2); 331.324; 331.324(1)(L); 331.324(1)(o); 509A.1; 509A.3; 509A.11; 509A.12; 514.16; 514B.21. The board of supervisors is required to provide a payroll deduction program upon the request of county employees under sections 509A.12 (deferred compensation); 514.16 (non-profit health service plans); and 514B.21 (health maintenance organizations). Pursuant to the county's home rule authority, additional payroll deductions may be administered at the discretion of, and within the limitations set by, the board of supervisors, subject to the cautions expressed in this opinion. (Weeg to Schroeder, 3-26-86) #86-3-4(L)

March 26, 1986

John E. Schroeder
Keokuk County Attorney
Keokuk County Court House Annex
101½ South Jefferson
P.O. Box 231
Sigourney, Iowa 52591

Dear Mr. Schroeder:

You have requested an opinion of the Attorney General on a number of questions as to the limitations the county may impose on the availability of voluntary payroll deductions. Your questions are set forth in your request as follows:

> 1. To what extent is the county required to administer voluntary payroll deductions?
>
> 2. To what extent may the county impose restrictive limitations upon the availability of voluntary payroll deductions administered by the county? For example, may the county require as a condition precedent that there be at least some specified minimum number of participating employees before it will administer a particular voluntary payroll deduction program?
>
> 3. If the county may impose such restrictions, must it continue to administer a voluntary payroll deduction program which does not satisfy those minimum participating

employee requirements? For example, if the county currently administers such a program which it is not required to do by statute, and which has only one participating employee, and the county hereafter imposes a minimum participation of five employees, may the county then terminate that voluntary payroll deduction program?

4. Finally, if the county is able to impose restrictive limitations upon the availability of voluntary payroll deductions administered by the county, is the decision to do so that of the county auditor who operates the county payroll department as an inner office administrative decision or is it the county board of supervisors as a county wide policy decision?

You state in your opinion request that you assume the county must administer the payroll deductions provided for in Iowa Code sections 509A.3 (group insurance); 509A.12 (deferred compensation); 514.16 (non-profit health service plans);and 514B.21 (health maintenance organizations). However, it is our opinion section 509A.3 is inapplicable to counties. Section 509A.1 provides that "the governing body of the state, school district, or any institution supported in whole or in part by public funds" may establish group insurance plans. "Governing body" is defined in section 509A.11. Before its amendment in 1981 Iowa Acts, ch. 117, sections 1085 and 1086, section 509A.1 contained a reference to counties and section 509A.11 included boards of supervisors within the definition of "governing body." These amendments occurred as part of the complete revision of county law resulting from passage of Iowa Constitution, art. III, section 39A, the County Home Rule Amendment. Thus, we conclude that the legislature intended by its 1981 amendments to sections 509A.1 and 509A.11 to grant the counties home rule authority to determine whether, and in what manner, to allow its employees to participate in a payroll deduction program for group insurance.[1]

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[1]This conclusion is supported further by section 331.324(5), which states: "If a board provides group insurance for county employees, it shall also provide the insurance to" certain home extension office assistants. This language is consistent with the view that provision of group insurance is within the discretion of the supervisors.

However, section 509A.12 later provides that "the governing body or the board of supervisors shall" upon request provide employees the opportunity to participate in a deferred compensation program. (emphasis added) This section provides for a payroll deduction program separate and distinct from that discussed in the preceding sections of chapter 509A. It is our opinion section 509A.12, by referring specifically to the supervisors and using the mandatory language "shall," is mandatory on the counties. See § 4.1(36)(a).

Additional payroll deduction programs are described in sections 514.16 and 514B.21 and authorize any employee of the county (§ 514.16) or political subdivision of the state (§ 514B.21), among others, to authorize the deduction from the employee's salary or wages the amount of payment for these programs in the manner provided by those sections. It is our opinion these statutes require the counties to administer these payroll deduction programs if their employees so elect. See 1982 Op.Att'yGen. 111 (#81-5-7(L)) (sections 509A.3, 509A.12, 514.16, and 514B.21 all "place an affirmative duty on the governing body to withhold certain monies from an employee's wages and to pay over the proceeds of the deductions to the provider in question.") The reference to section 509A.3 may be explained by noting this opinion was issued prior to the amendments of ch. 509A discussed above.

Apart from the statutes discussed above, we have found no other statutory provisions requiring counties to allow payroll deduction for specific purposes, nor are there any general statutory guidelines governing the limitations the counties may impose on the availability of such deductions. Therefore, it is our opinion that, aside from the programs discussed above, the county has home rule authority to decide what payroll deductions will be made available to county employees, and under what conditions.[2] See 1982 Op.Att'yGen. 271 (#81-10-9(L)) (relying on 1982 Op.Att'yGen. 146 to conclude that a board of supervisors may provide group insurance benefits to elected county officers). Therefore, in response to your specific questions, it is a matter of policy for the county to decide whether a minimum number of employees must participate before a particular program is implemented.

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[2]But see 1982 Op.Att'yGen. 111 (#81-5-7(L)) (county may not assess a service charge for processing county payroll deductions).

We do note that the United States Supreme Court addressed the First Amendment issue raised by the government's alleged denial of the right to solicit charitable contributions in Cornelius v. NAACP Legal Defense and Educational Fund, 473 U.S ____, 87 L.Ed.2d 567, 105 S.Ct. 3439 (1985). In that case, the plaintiff challenged the federal government's restrictions on the organizations allowed to solicit charitable donations from federal employees, either in the form of lump sum payments or payroll deductions. Only organizations that provided direct health and welfare services to the needy were allowed to participate in the charitable donation drive. Defendants were denied the opportunity to participate in the drive because, as legal defense and advocacy organizations, they did not meet the program's guidelines. The Court concluded that charitable solicitation is protected speech under the First Amendment, but that in this situation, which involved a non-public forum, the federal government had only to satisfy a reasonableness standard to justify its restriction of the speech in question. The Court, after reviewing a number of the government's justifications for its restrictions, held that the government had met that burden in this case.

We suggest you review this case in the event any of the payroll deduction programs the county is considering may involve First Amendment considerations.

Finally, you ask if the county does impose limitations on the availability of payroll deduction programs, whether the auditor or the board of supervisors has the authority to decide what limitations should exist. It is our opinion the supervisors have the authority to decide as a matter of policy what limitations should be imposed. Section 331.301(2) provides that the power of the county is vested in the board of supervisors, and that "a duty of a county shall be performed by or under the direction of the board except as otherwise provided by law." While several exceptions to this general rule exist, most notably with regard to the express statutory functions to be performed by the various elected county officers,[3] we believe the supervisors are the appropriate body to make this policy decision. The

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[3]See McMurray v. Board of Supervisors of Lee County, 261 N.W.2d 688 (Iowa 1978) (discussing autonomy of elected county officers). See also Op.Att'yGen. #84-10-5 (supervisors may not enter into Ch. 28E agreement concerning law enforcement without sheriff's approval); Op.Att'yGen. #83-11-4(L) (supervisors may not initiate discipline against employees of elected county officers); Op.Att'yGen. #83-6-9(L) (supervisors may provide longevity pay to certain county employees but not deputies of elected county officers).

supervisors serve the function of employer in a number of situations involving county employees, as set forth in section 331.324. Specifically, the supervisors set the salaries of deputies and assistants of elected county officers, section 331.324(1)(l) and 331.904, and other county and township officers and employees if not otherwise fixed by law, section 331.324(1)(o).[4] Furthermore, this question involves setting county policy rather than exercising an administrative or ministerial function. We therefore believe it is appropriate for the supervisors to establish this policy rather than the auditor, whose duties are specifically detailed in sections 331.502 through 331.512, but do not include performing this particular duty.

In conclusion, it is our opinion the board of supervisors are required to provide a payroll deduction program upon the request of county employees under sections 509A.12 (deferred compensation); 514.16 (non-profit health service plans); and 514B.21 (health maintenance organizations). Pursuant to the county's home rule authority, additional payroll deductions may be administered at the discretion of, and within the limitations set by, the board of supervisors, subject to the cautions expressed in this opinion.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:mlr

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[4]Though the supervisors do not set the salaries of elected county officers, see sections 331.905-331.907, this office has previously held that the supervisors may provide group insurance benefits to elected county officers, 1982 Op.Att'yGen. 271, and that if the county provides group insurance, these benefits are not to be included in the determination of compensation for these officers, 1982 Op.Att'yGen. 146.

COUNTIES: Clerk of Court; Filing Fees. Iowa Code §§ 79.5, 252A.10, 602.8105(1). There is no $35.00 filing fee under Iowa Code § 602.8105(1)(a) for suits brought under the Uniform Support of Dependents Law if the action is brought by an agency of the state or county by operation of Iowa Code § 252A.10. The state or county is not required to pay in advance the $25.00 fee for various services and docketing procedures under Iowa Code § 602.8101(1)(b) but would be required to pay these if either became the losing party to which the costs are assessed. (Robinson to Norland, 3-11-86) #86-3-2(L)

March 11, 1986

Mr. Phillip N. Norland
Worth County Attorney
99 7th Street North
Northwood, IA 50459

Dear Mr. Norland:

Your recent request for an opinion of the Attorney General referenced our attention to Iowa Code § 602.8105(1). This statute directs the clerk to collect, in subsection (a), a thirty-five dollar filing fee and, in subsection (b), an advance of twenty-five dollars for various services and docketing procedures. Iowa Code § 252A.10 (Uniform Support of Dependents Law) provides, among other matters: "Where the action is brought by an agency of the state or county, there shall be no filing fee."

You are correct in assuming that the State or county would never be required, in this instance, to pay the thirty-five dollar filing fee under subsection (a). Your question is whether an agency of the state or county, in a uniform support action under chapter 252A, should pay in advance the twenty-five dollar fee for the various services and docketing procedures required in § 602.8105(1)(b), and whether the fee under subsection (b) is a "filing fee."

Our answer is no to both questions. The first answer is based primarily on the application of Iowa Code § 79.5, which provides:

> 79.5 Fees payable in advance.
>
> All fees, unless otherwise specifically provided, are payable in advance, if demanded, except in the following cases:
>
> 1. When the fees grow out of a criminal prosecution.

> 2. When the fees are payable by the state or county.
>
> 3. When the orders, judgments, or decrees of a court are to be entered, or performed, or its writs executed.

(Emphasis added.) Iowa Code § 602.8105(1)(b) provides:

> 602.8105 Fees -- collection and disposition.
>
> 1. The clerk shall collect the following fees:
>
> a. For filing and docketing a petition. . . , thirty-five dollars.
>
> b. For payment in advance of various services and docketing procedures, excluding small claims, twenty-five dollars.
>
> . . .

(Emphasis added.) Both sections 79.5 and 602.8105(1)(b) indicate the payment of fees in advance. Is there a conflict between these two statutes when we consider the exceptions contained in § 79.5? We think not.

The Iowa Supreme Court has stated that statutes should be accorded a sensible, practical, workable, and logical construction. Also, when more than one statute is pertinent to inquiry, we can consider all portions of the statute together in an attempt to harmonize them. Office of Consumer Advocate v. Iowa State Commerce Comm., 376 N.W.2d 878, 881 (Iowa 1985). These statutes can be harmonized with the recognition of the public policy factor that the state or county should not be required to pay court costs in advance. This would require the relatively costly procedure of obtaining a warrant to pay these advanced fees when it is manifestly obvious that both the state and county will be available to pay these costs should they be assessed to them at the conclusion of the judicial proceeding. To state it another way, governmental bodies should not be required to pay themselves in advance. It is not unreasonable, however, to require this of other entities.

As to whether the fee under subsection (b) is a "filing fee", the answer is based on a straightforward interpretation of the two statutes here involved. Subsection (a) clearly states

that the thirty-five dollars is for filing the petition while the twenty-five dollars under subsection (b) is for various services and docketing procedures. We recognize that both subsections (a) and (b) contain the word "docketing" which accounts for some confusion. Fees collected under subsections (b) through (t) are "deposited in the court revenue distribution account established under section 602.8108. . . ." Iowa Code § 602.8105(2). Only four dollars of the thirty-five dollars under subsection (a) are so deposited. Thirty-one dollars are paid to the state treasury. Thus, what is commonly lumped together under the heading of a "filing fee" is really two distinct fees with differing effects when this statute interacts with other statutes.

In summary, there is no thirty-five dollar filing fee under Iowa Code § 602.8105(1)(a) for suits brought under the Uniform Support of Dependents Law if the action is brought by an agency of the state or county by operation of Iowa Code § 252A.10. The state or county is not required to pay in advance the twenty-five dollars for the various services and docketing procedures under Iowa Code § 602.8101(1)(b) but would be required to pay this if either became the losing party to which the costs are assessed. The state or county would not be required to pay the filing fee of thirty-five dollars under subsection (a) as "there shall be no filing fee" for the state or county in this limited case because of § 252A.10.

Sincerely,

Stephen C. Robinson
Assistant Attorney General

SCR/j1f2

BARBERS AND COSMETOLOGISTS. Iowa Code §§ 157.1, 157.2, 157.2(4), 157.2(6), 157.6, 157.13(1) (1985). A statutory provision to limit a licensed cosmetologist from practicing in any place other than a licensed beauty salon or licensed school of cosmetology is constitutional in that it bears a reasonable relationship to the state's interset in monitoring sanitary conditions to insure the health welfare and safety of the public. A licensed cosmetologist may, however, practice in his or her residence if a room other than living quarters is established as a beauty salon and equipped for that purpose. (Vasquez to Stromer, State Representative, 3-6-86) #86-3-1(L)

March 6, 1986

The Honorable Delwyn Stromer
State Representative
State Capitol
L O C A L

Dear Representative Stromer:

You have requested an opinion of the Attorney General concerning the ability of a licensed cosmetologist to practice on an occasional basis out of her home without a residential license. Your concern is centered around the constitutionality of Iowa Code § 157.13(1) (1985), which states, in relevant part, that "[i]t is unlawful for a licensed cosmetologist to practice cosmetology with or without compensation in any place other than a licensed beauty salon or licensed school of cosmetology. . . ." According to this particular Code section, an individual licensed by the State of Iowa as a cosmetologist is prohibited from performing services in his or her home, unless, under Iowa Code § 157.6, a beauty salon is established in a room other than the living quarters and is subject to local zoning ordinances and sanitation requirements of the health department.

An argument could be made, and apparently is being made, that an individual not licensed as a cosmetologist is free to perform services in his or her home that a licensed cosmetologist is prohibited from performing. Specifically, you are posing the

question of whether or not licensed cosmetologists are being discriminated against in the State of Iowa.

From the outset it is important to remember that individuals are not permitted to practice cosmetology without first being licensed. Iowa Code § 157.1 defines cosmetology and details those services or practices which it entails. Iowa Code § 157.2 states that it is "unlawful for a person to practice cosmetology with or without compensation unless the person possesses a license. . . ." Therefore, an individual practicing cosmetology without a license, whether it be in his or her own home or in a salon, is in violation of the state law. In order to perform all the services that fall within the definition of cosmetology a person has to be licensed, and once licensed, that person is subject to the same rules and regulations as are all cosmetologists. In that sense the law is not discriminatory.

Nevertheless, a question that naturally follows is why some individuals are able to perform practices listed in section 157.1, such as cutting, bleaching, and perming hair, without being in violation of the law. That question is answered by the exceptions listed under Iowa Code § 157.2. Six specific exceptions are listed. Practices listed under section 157.1, when performed by those individuals who fall within the exceptions, are not defined as the practice of cosmetology.

While all of the exceptions are to be given equal weight, your particular inquiry is best answered by focusing on two of the listed exceptions. Iowa Code § 157.2(4) exempts from licensure "[p]ersons who perform without compensation any of the practices listed in section 157.1 on an emergency basis or on a casual basis." Another noteworthy exception is that of section 157.2(6). "Persons who perform any of the practices listed in section 157.1 on themselves or on a member of the person's immediate family" are likewise exempt from licensure. As you can see, under the current law, it is possible to perform various cosmetic services without licensure and in a home so long as it is done, for example, on a casual basis or on a member of the family. What constitutes the basis for application of these exceptions is a question of fact, one which an Attorney General's opinion does not resolve. 1978 Op.Att'yGen. 109.

You have asked us to address the constitutionality of a requirement that limits the practice of cosmetology to licensed salons or licensed schools of cosmetology.

If a reasonable relationship can be established between the regulation and the governmental interest it seeks to protect, then an equal protection challenge will fail. In Bishop v. Eastern Allamakee Community School Dist., 346 N.W.2d 500, 505

(Iowa 1984), a terminated teacher argued that a statute violated equal protection in that it "arbitrarily discriminated against persons seeking judicial review in teacher termination cases by subjecting them to a ten-day notice requirement that no other litigants must satisfy in order to perfect an appeal to district court." Id. The Iowa Supreme Court stated that the requirement must be sustained unless the party challenging it could demonstrate that it was arbitrary and bore no rational relationship to a legitimate governmental interest. Id. "Under the rational basis test, a legislative classification is upheld if any conceivable state of facts reasonably justify it." Id. As this case demonstrates, it is within the wisdom of the legislature to decide what conditions to impose.

Illustrating that limitations on cosmetologists are within the police power of the state is the case of Green v. Shama, 217 N.W.2d 547 (Iowa 1974). There the court upheld a statute prohibiting cosmetologists from cutting men's hair without a barber license. 217 N.W.2d at 555. The court recognized that while a citizen has a right to hire and work where he wishes and to earn his livelihood by any lawful calling, that right is "subordinate to the right of the state to limit such freedom of action by statutory regulation where the public health, safety or welfare of society may require." Id.

Under Iowa Code § 157.6, the health department is given the authority to prescribe sanitary rules for beauty salons and schools of cosmetology. The individual's freedom to pursue an occupation is subject to the state's efforts to insure the health, welfare, and safety of the public by monitoring sanitary conditions at salons and schools of cosmetology. However, the licensed cosmetologist is not totally precluded from practicing in his or her own home. According to Iowa Code § 157.6 "a beauty salon may be established in a residence if a room other than the living quarters is equipped for that purpose."

In conclusion, it is the opinion of this office that the statutory provisions restricting the practice of cosmetology to those areas specified in the Iowa Code are constitutional.

Sincerely,

ROSE A. VASQUEZ
Assistant Attorney General

RAV/cjc

COUNTIES; COUNTY COMPENSATION BOARD; Board of Supervisors; County Attorney; Change in status of county attorney; Authority to set initial salary: Iowa Code §§ 331.752; 331.752(4); 331.907; and 331.907(2) (1985). The salary set by the board of supervisors for the county attorney in a § 331.752 change of status resolution is effective only until the compensation board meets in December and submits a recommended salary for this position to be effective the following July 1st, even if those recommendations are submitted before the change of status resolution is effective. (Weeg to Carr, State Senator, 4-18-86) #86-4-5(L)

April 18, 1986

The Honorable Robert M. Carr
State Senator
State Capitol
L O C A L

Dear Senator Carr:

You have requested an opinion of the Attorney General on the question of whether the county compensation board may change the initial full-time salary of the county attorney, set originally by the board of supervisors, when the change to full-time status is delayed for one year. You set forth the facts leading to your request as follows:

> 1. On March 18, 1985, the Dubuque County Board of Supervisors adopted a resolution changing the status of the Dubuque County Attorney from a part-time to a full-time County Attorney, and establishing an initial salary for a full-time County Attorney at $37,800 annually.
>
> 2. On July 1, 1985, the incumbent County Attorney objected to the change in status and stated that the objection would result in full-status commencing on January 1, 1987, as outlined in Chapter 331.752 of the Code.
>
> 3. On December 19, 1985, the Dubuque County Compensation Board met and began the process of recommending salaries for elected officials for the FY 1987. Their recommendation includes a proposed salary for a part-time County Attorney as well as a recommendation for salary for a full-time County Attorney at $41,000.

> It had been the understanding of the Board of Supervisors that when they established the initial salary that the salary they set would be the salary of the full-time County Attorney as of January 1, 1987.

Iowa Code § 331.752 (1985) sets forth the procedure by which the board of supervisors may change the status of the county attorney from a full-time position to part-time, or vice versa. In particular, subsection (4) provides in relevant part as follows:

> The resolution changing the status of a county attorney shall state the initial annual salary to be paid to the county attorney when the full-time or part-time status is effective. The annual salary specified in the resolution shall remain effective until changed as provided in section 331.907. . . .

This section thus provides that the supervisors are to set the initial salary for the new position, and that salary is to remain in effect until changed by the county compensation board as provided in § 331.907.

Subsection (1) of § 331.907 requires the compensation board to meet annually to review the salaries of elected county officers and to establish a final recommended salary schedule following notice and public hearing. Subsection (2) then provides:

> Annually during the month of December, the county compensation board shall transmit its recommended compensation schedule to the board of supervisors. The board of supervisors shall review the recommended compensation schedule and determine the final compensation schedule for the elected county officers which shall not exceed the recommended compensation schedule. In determining the final compensation schedule if the board of supervisors wishes to reduce the amount of the recommended compensation schedule, the annual salary or compensation of each elected county officer shall be reduced an equal percentage. A copy of the final compensation schedule adopted by the board of supervisors shall be filed with the county budget at the office of the state comptroller. The final

> compensation schedule takes effect on July 1 following its adoption by the board of supervisors.

(emphasis added). This section makes clear that the compensation board's recommendations are to be submitted to the supervisors in the December prior to the July 1 effective date of any salary changes for the new fiscal year.

This office has issued a number of opinions interpreting these sections in factual situations similar to that which you presented. In 1980 Op.Att'yGen. 26, the facts were that the compensation board submitted its salary recommendations in December of 1978, to be effective July 1, 1979. These recommendations included a recommended salary for a full-time county attorney, but were submitted prior to the supervisors adopting a resolution pursuant to Iowa Code § 332.62 (1979) changing the status of the county attorney from part-time to full-time. We held as follows:

> . . . Although the applicable sections are void of any provisions affecting this type of situation, we believe that the salary set by the supervisors should control until such time following the change in status that the compensation board again makes its recommendations to the supervisors. In this case, that would be December, 1979, to become effective July 1, 1980.

Section 332.62 was subsequently recodified as § 331.752 and amended to add the language clarifying that the annual salary specified by the supervisors "shall remain effective until changed as provided in section 331.907." See 1981 Iowa Acts, ch. 117, § 751.

In 1980 Op.Att'yGen. 365 we concluded that the supervisors set the initial salary of the county attorney after a change in status in that position from full-time to part-time, but that thereafter the compensation board sets that salary. Again, this opinion was issued prior to enactment of the clarifying language.

Most recently, in Op.Att'yGen. #83-3-16(L), we again held that the initial salary set by the supervisors following a change in status resolution remains effective until the compensation board's next scheduled annual salary recommendations become effective pursuant to § 331.907(2).

It is our opinion the law provides that the salary specified by the supervisors in a change of status resolution is in effect

only until the compensation board has an opportunity to gather at its next regularly scheduled meeting and recommend a change. This is consistent with the statutory scheme set forth in sections 331.905 through 331.907, which establish that the compensation board has primary jurisdiction over the salaries of elected county officers. While the supervisors exercise some authority with regard to the compensation board's recommendations, § 331.907(2), that authority is limited.

We believe section 331.752(4) acknowledges this statutory scheme. Due to the fact the compensation board meets only annually and a change in status may be made in the county attorney's position at any time, it was necessary to devise an alternative procedure for setting the salary for that position. That procedure is set forth in section 331.752(4). We believe the legislature clearly intended this alternative be effective only so long as necessary, i.e., until the compensation board's regular functions may be resumed, by expressly stating the salary specified by the supervisors "shall remain effective until changed as provided in section 331.907." This language indicates that the usual scheme for setting elected officer's salaries be preferred.

In the present case the supervisors' change in status resolution was passed March 18, 1985. The county attorney's objection to that resolution resulted in its effective date being moved to January 1, 1987. The compensation board met December 19, 1985, to submit recommendations for salary changes to be effective July 1, 1986, through July 1, 1987. Because the compensation board was able to meet and submit a recommended salary before the effective date of the change in status, the salary set by the supervisors for the new full-time position will not have a chance to go into effect. Instead, it is our opinion the salary set for the county attorney by the compensation board for the 1986-1987 fiscal year will be the effective salary.

This conclusion is inconsistent with the result we reached in Op.Att'yGen. #83-3-16(L). In that case the change in status resolution was passed by the supervisors on November 23, 1982, but was to be effective January 22, 1983. The compensation board met on December 8, 1982, and submitted a salary for the county attorney that was less than that specified by the supervisors in their resolution. Based on the effective date specified in that resolution, we concluded that the salary set by the supervisors would remain in effect until the compensation board's next salary recommendations, as approved by the supervisors, became effective on July 1, 1984. As in the present case, in that opinion the compensation board met after the change in status resolution was passed but before the change of status became effective. Because the compensation board had an opportunity to meet and recommend

the county attorney's salary for the period July 1, 1983, to July 1, 1984, that recommendation should have been effective July 1, 1983, rather than July 1, 1984. The salary specified in the supervisor's resolution should have been in effect only until that date. Thus, to the extent this conclusion is inconsistent with our prior opinion, that opinion is hereby overruled.

In conclusion, it is our opinion that the salary set by the board of supervisors for the county attorney in a § 331.752 change of status resolution is effective only until the compensation board meets in December and submits a recommended salary for this position to be effective the following July 1st, even if those recommendations are submitted before the change of status resolution is effective.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

TAXATION; COUNTY TREASURER: Errors in special assessment book. Iowa Code §§ 384.60, 443.6, 445.11, 445.12, 445.14, 445.23 and 455.24 (1985). County treasurer has authority and duty to correct errors in special assessment book and make corresponding entries on general tax list. However, treasurer may not make entry on general tax list to show additional interest due as part of special assessment installment that was paid in amount shown on treasurer's tax statement. (Smith to Swaim, Davis County Attorney, 4-7-86) #86-4-4(L)

April 7, 1986

Mr. R. Kurt Swaim
Davis County Attorney
105 E. Locust Street
Bloomfield, Iowa 52537

Dear Mr. Swaim:

You have requested an opinion of the Attorney General concerning whether county officials have authority to collect special assessment installment interest which the county treasurer failed to collect in prior years. Based on information accompanying your request, we assume that in 1981 a city clerk certified to the county auditor a special assessment schedule for a city street paving project pursuant to Iowa Code § 384.60, and that either the county auditor or treasurer made corresponding entries in the special assessment book as required by Iowa Code §§ 445.11 and 455.12.[1] The county employee who made the entries in the special assessment book erroneously used an annual interest rate of one percent rather than the correct interest rate of ten percent in calculating the amount of interest payable with each special assessment installment.

Accordingly, the special assessment book substantially understated the interest amounts due with each installment payment. The error was not discovered until 1985 when the installment interest amounts in the special assessment book were corrected. For unpaid installments, the treasurer corrected the entries to show interest amounts based on ten percent of unpaid

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[1]The duty of entering special assessment information in the special assessment book was transferred from the county auditor to the county treasurer on July 1, 1981, by operation of 1981 Iowa Acts, ch. 117, § 1221, which amended Iowa Code § 455.11 (1981). Additionally, Iowa Code § 384.60 was amended by 1982 Iowa Acts, ch. 1104, § 16, to provide that the city clerk must certify a special assessment schedule to the county treasurer rather than county auditor.

balances. For paid installments, the treasurer made marginal notations showing the interest amount that should have been shown in the original entries.

The resulting question may be restated as whether the county treasurer has authority to retroactively correct a clerical error that substantially understated interest amounts due with special assessment installments. If additional interest can be collected, a related question concerns whether it may be apportioned over future installments by increasing the amount of each future installment.

In responding to your request it is helpful to discuss the relationship between special assessments and general real estate taxes. The relationship is not simple and has been summarized by the caveat that in Iowa special assessments are taxes for some purposes but not necessarily for others.[2] The county treasurer is required by the last paragraph of Iowa Code § 384.60 (1985) to place on the tax list the amounts to be assessed against each lot in a municipal special assessment district as certified by the city clerk. This process includes maintaining the special assessment book described in §§ 445.11 and 445.12, and transcribing into the general tax list unpaid special assessments as required by § 445.14. Errors in the tax list may be corrected by the county auditor pursuant to § 443.6, but only before the taxpayer has fully paid the taxes. First National Bank of Guthrie Center v. Anderson, 196 Iowa 587, 594, 192 N.W. 6, 10 (1923); Op.Att'yGen. #84-1-6. The authority of the auditor to correct errors in the tax list is not expressly made applicable to the special assessment books which since July 1, 1981, have been maintained in the office of the treasurer. Since neither the auditor nor assessor have any function in entering municipal special assessments in county tax records, § 443.6 should not be interpreted as impliedly authorizing the auditor to correct errors in the special assessment records maintained by the treasurer.

Authority of the county treasurer to correct his or her own errors in calculating special assessments is inherent in the office of treasurer. See, e.g., the discussion of county assessor's inherent powers in 1968 Op.Att'yGen. 991, 993, cited with approval in Tiffany v. County Bd. of Rev. in and for Greene County, 188 N.W.2d 343, 349 (Iowa 1977).

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[2]Hayes, Special Assessments for Public Improvements in Iowa, Part I, 12 Drake L. Rev. 3, 4-5 (1962).

After correcting errors in the special assessment book, the corrected amounts that are due or past due should be entered by the treasurer in a special column on the general tax list pursuant to Iowa Code § 445.14 (1985), which states the following:

> The county treasurer shall each year, upon receiving the tax list referred to in section 445.10 indicate upon the tax list, in a separate column opposite each parcel of real estate upon which the special assessment remains unpaid for any previous year that a special assessment is due.

However, in determining what amounts may be entered on the general tax list as unpaid special assessments, we must consider the effect of §§ 445.23 and 445.24. These sections enable an interested person to obtain from the county treasurer a written statement of the entire amount of taxes and assessments due upon a parcel of real estate, and to obtain a receipt upon payment of all the taxes specified in the statement. Section 445.24, in pertinent part, states the following:

> The statement received under section 445.23, with the treasurer's receipt showing the payment of all the taxes specified in the statement . . . is conclusive evidence for all purposes, and against all persons, that the parcel of real estate in the statement and receipt described was, at the date of the receipt, free and clear of all taxes and assessments . . . .

Sections 445.23 and 445.24 appear to treat special assessments in the same manner as general taxes, i.e., after taxes and assessments shown in the treasurer's statement have been paid, the property is free and clear of the stated taxes and assessments.

Accordingly, we conclude that after the county treasurer has miscalculated the amount of installment interest due on a municipal special assessment, the treasurer has the authority and duty to correct the special assessment book and make corresponding entries on the general tax list pursuant to Iowa Code § 445.14 (1985) to assure that special assessment installments remaining unpaid will be listed in amounts accurately derived from the special assessment schedule certified to the county treasurer. However, the treasurer may not make an entry on the general tax list to show additional interest due as part of a special

assessment installment that has been paid in the amount shown on the treasurer's tax statement.

Sincerely,

Michael H Smith

MICHAEL H. SMITH
Assistant Attorney General

MHS:jds

INCOMPATIBILITY; County hospital trustee; county board of review: Iowa Code §§ 347.13, 347.14, 441.31-441.37, 441.42 (1985). The offices of county hospital trustee and county board of review are not incompatible. (McGuire to Schroeder, Keokuk County Attorney, 4-7-86) #86-4-3(L)

April 7, 1986

Mr. John E. Schroeder
Keokuk County Attorney
P.O. Box 231
Sigourney, Iowa 52591

Dear Mr. Schroeder:

You have requested an opinion of the Attorney General as to whether an incompatibility or conflict of interest exists between the offices of the county public hospital trustee and county board of review. It is our opinion that these two offices are not incompatible.

This office has addressed the question of incompatibility of public offices on various occasions and in 1982 Op.Att'yGen. 220 gave a comprehensive review of the doctrine of incompatibility. A question of incompatibility of offices is resolved by analyzing the statutory duties of the offices involved. 1982 Op.Att'yGen. 220, 223.

The offices in the present case are that of county public hospital trustee authorized by Iowa Code § 347.9 and a member of the county board of review authorized by § 441.31. To determine whether incompatibility exists, the respective statutory duties are compared using the following guidelines:

> . . . the test of incompatibility is whether there is an inconsistency in the function of the two [offices], as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' (citations omitted) A still different definition has been adopted by several courts. It is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from consider-

> ations of public policy, for an incumbent to retain both.' (citations omitted)

1982 Op.Att'yGen. 220, citing State v. Anderson, 155 Iowa 271, 136 N.W. 128, 129 (1912).

A review of the respective statutory duties do not appear to include supervisory or revisory power over each other, nor are the duties seemingly inconsistent and repugnant.

The statutes authorizing each of these offices sets forth criteria for holding these offices. See § 347.9 (county hospital board members cannot be physicians or licensed practitioners) and § 441.31 (board of review must have real estate broker, architect or other person experienced in construction and, in some cases, a farmer). There are no express statutory requirements that would preclude an individual from being on both boards.

The powers and duties of the county hospital board are found in §§ 347.13 and 347.14. These duties provide generally for the maintenance and operation of a county hospital.

The powers of the board of review are found in §§ 441.35-441.37, and 441.42. The board of review has the power to revalue assessments of real property in the county, add property to the rolls, and exercise appellate review of assessor's action.

There does not appear to be any overlapping or interrelated duties of the two offices. Rather, the county hospital board has jurisdiction over the operations of the county hospital and the review board has jurisdiction over property tax assessments.

A prior opinion of this office found both a conflict and incompatibility in the offices of board of review and city council board member on the fact that the city council budget is affected by property tax assessments. 1982 Op.Att'yGen. 188. Although the result in that opinion is correct, we do not adhere to the legal analysis. The two offices are incompatible because the board of review is appointed by the conference board and in cities having an assessor, members of the city council are on the conference board. §§ 441.2 and 441.31. The opinion was premised on the fact that the city council budget is based on property taxes which can be affected by actions of the board of review. This does not, in and of itself, make the two offices incompatible. To that extent, the analysis of 1982 Op.Att'yGen. 188 does not apply in this case. See 1968 Op.Att'yGen. 370 (offices of county assessor and county civil defense director not incompatible).

Therefore we conclude that the two offices are not incompatible. But see 1980 Op.Att'yGen. 202 (membership on county hospital board incompatible with office of supervisor).

We would caution you that, even though the two positions may not be incompatible, there may be situations in which a conflict of interest problem could arise.[1] A question of conflict of interest is resolved through an examination of the facts surrounding the conduct of a particular office holder. Thus, we cannot address this question at this time. Please note the discussion on conflict of interest in 1982 Op.Att'yGen. 220.

Sincerely,

Maureen McGuire
MAUREEN MCGUIRE
Assistant Attorney General

MM:jds

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[1]Such an instance could arise if the property of the county hospital were assessed a property tax, although a county hospital is generally exempt from property taxes. The county hospital board could choose to appeal. The appeal would be to the board of review pursuant to § 441.37.

COUNTIES: County Officers and Employees; Board of Supervisors; Sheriff; Deputy Sheriffs; County Civil Service Commission; Collective Bargaining; Authority of supervisors to serve as public employer for collective bargaining purposes; authority to determine number of ranks and grades of deputy sheriffs; Iowa Code chapters 20 and 341A; sections 20.3(1); 331.324(1)(a); 331.903(1); 341A.6(9); and 341A.7 (1985). The county board of supervisors, rather than the sheriff, carries out the duties of a public employer under chapter 20 for collective bargaining with deputy sheriffs. The board of supervisors has no authority to decide the number of various ranks and grades for deputy sheriffs in the sheriff's office. (Weeg to Metcalf, 4-7-86) #86-4-2(L)

April 7, 1986

James Metcalf
Black Hawk County Attorney
P.O. Box 2215
Waterloo, Iowa 50704

Dear Mr. Metcalf:

You have requested an opinion of the Attorney General on two questions concerning the authority of the board of supervisors to negotiate a collective bargaining agreement with deputy sheriffs and to limit the number of various ranks in the sheriff's department. Specifically, your questions are:

> 1. Is a collective bargaining agreement between Sheriff's deputies and the Black Hawk County Board of Supervisors binding on the Sheriff if he was not consulted and did not participate in the formulation and signing of the agreement?
>
> 2. May the Black Hawk County Board of Supervisors, by resolution, place limits on the numbers of the various ranks within Black Hawk County's Sheriff's Department--or is this the exclusive domain of the Sheriff and the Civil Service Commission, so long as the Sheriff remains within his budgetary constraints?

With regard to your first question, it is our opinion the supervisors may negotiate a collective bargaining agreement with deputy sheriffs without consulting the sheriff. There is no requirement that the sheriff participate in the formulation and signing of such an agreement.

Iowa Code chapter 20 (1985) governs collective bargaining for public employees. Section 20.3(1) defines "public employer" for the purposes of this section as:

> . . . the board, council, or commission, whether elected or appointed, of a political subdivision of this state, including school districts and other special purpose districts, which determines the policies for the operation of the political subdivision.

More directly, section 331.324(1)(a) in the County Home Rule Act provides that one of the supervisors' duties with regard to county officers and employees is to:

> Carry out the duties of a public employer to engage in collective bargaining in accordance with chapter 20.

We believe these sections clearly authorize the supervisors to serve in the role of public employer of all county employees for collective bargaining purposes.

On its face, this conclusion may appear to be inconsistent with two decisions of the Iowa Supreme Court and a line of opinions from this office generally holding that the elected county officers, rather than the board of supervisors, have authority over matters within the scope of their official duties. See McMurry v. Board of Supervisors of Lee County, 261 N.W.2d 688 (Iowa 1978); Smith v. Newell, 254 Iowa 496, 117 N.W.2d 883 (1962); Op.Att'yGen. #85-6-3 (supervisors have only limited authority to disapprove claims submitted by elected county officers); Op.Att'yGen. #84-10-5 (supervisors may not enter into ch. 28E agreement to perform certain law enforcement functions without approval of sheriff); and Op.Att'yGen. #83-11-4(L) (supervisors may not initiate discipline against employees of elected county officers). But see Smith v. Board of Supervisors of Des Moines County, 320 N.W.2d 589 (Iowa 1982) (all county officials required to follow centralized purchasing procedures developed by board of supervisors). We distinguished the Des Moines County case from those previously cited in Op.Att'yGen. #85-6-3.

However, while the general rule of law discussed in the above-cited authorities is that the board of supervisors do not exercise control over elected county officers and the functions of those offices, none of those authorities involved a specific statute to the contrary, as exists in the present case. Because of the specificity of section 331.324(1)(a), the general rule is clearly inapplicable in this case. Compare § 4.7 (if a general statute is inconciliable with a specific statute, the specific statute prevails).

II.

With regard to your second question, it is our opinion that the supervisors may not place limits on the number of various ranks in the sheriff's office. Section 331.903(1) authorizes the supervisors to determine the number of deputies, assistants, and clerks that may be employed by elected county officers. This section clearly vests the supervisors with the authority to decide the total number of deputy sheriffs the sheriff may employ, but does not address the question of authority to determine the number of various ranks of those employees.

Chapter 341A governs civil service for deputy sheriffs. In particular, section 341A.6(9) provides that one of the duties of the county civil service commission is:

> To classify deputy sheriffs and subdivide them into groups according to rank and grade which shall be based upon the duties and responsibilities of the deputy sheriffs.

At the least, this statute vests the civil service commission with the authority to determine the types of clarifications of deputy sheriffs. A question exists as to whether the commission also has the authority under this section to set the actual number of deputies within each classification, or whether that authority may be exercised by the sheriff as one of the functions of that office. See § 341A.8. In any event, your question is whether the board of supervisors may exercise the authority to determine the number of various ranks and grades of deputy sheriff. We believe for the reasons set forth above that the supervisors do not have this authority. We do note that the ranks of chief deputy and second deputy, when applicable, are exempt from civil service by operation of section 341A.7, and therefore our conclusions do not effect these positions.

In conclusion, it is our opinion that the county board of supervisors, rather than the sheriff, carries out the duties of a public employer under chapter 20 for collective bargaining with deputy sheriffs. Second, the county civil service commission, rather than the board of supervisors or the sheriff, decides the number of various ranks and grades for deputy sheriffs in the sheriff's office.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:mlr

STATE OFFICERS AND DEPARTMENTS: Iowa Pork Producers Council; State Comptroller. Iowa Code § 181.12 (1985), Iowa Code Supp. 183A.1(3), 183A.6, 183A.7, 183A.8, 183A.9, 184A.8, 185.27, 185C.27, 324.17(10) (1985). Refunds of pork producer assessments may be assigned by the producer, and in that event, those refunds should be remitted to the assignee. (Benton to Krahl, State Comptroller, 4-7-86) #86-4-1(L)

April 7, 1986

William Krahl
State Comptroller
State Capitol
L O C A L

Dear Mr. Krahl:

This is in response to your request for our opinion concerning a provision included in the recent legislation creating the Iowa Pork Producers Council. As your letter notes, the Council administers a pork promotion fund consisting of assessments deducted from the purchase price of porcine animals.[1] The Council is also required to refund these assessments upon the

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[1] In the Food Security Act of 1985, Pub. L. 99-198, 99 Stat. 1354 (1985), the Congress created a National Pork Board with the authority to administer a national pork assessment. Although section 1628 of the Act specifically provides that the statute is intended to preempt any state legislation, preemption is to apply only after the commencement of the collection of assessments under the federal law and is to end on the date of the termination of the collection of assessments. Accordingly, the federal legislation does not render your question completely moot.

request of the producer, and your office is responsible for issuing the warrants for the refunds upon the requisition of the Council. According to your letter, the Council has received a request for a refund from a third party, to whom several pork producers have assigned their interests in a refund, requesting that the refunds be made payable to the third party. You have also enclosed with your request a form upon which the third party apparently relies as authorizing it to receive the refund. Since your office is responsible for actually issuing the refund warrants, your letter asks whether, under the statute authorizing the refunds, the Council is legally permitted to refund a producer's assessment to another party to whom the producer has assigned his interest, based upon the written authorization provided with your letter.

The General Assembly established the Iowa Pork Producers Council in 1985, Iowa Code chapter 183A (1985), to aid in the promotion of the state's pork industry. 1985 Iowa Acts, ch. 199. The Pork Producer's Council joined other commodity groups sanctioned by Iowa law to promote various aspects of the state's agricultural economy. The Council's promotional efforts are funded through an assessment under § 183A.6, which is made at the time the animals are delivered for sale and is deducted by the first purchaser from the price paid to the producer. The first purchaser in turn pays the assessment to the Council. The assessments imposed under the chapter and collected by the Council are deposited in a pork promotion fund. § 183A.7. After the costs of the referendum held under the chapter are deducted, the remaining funds are allocated to various promotional groups such as the National Pork Producers Council for use not inconsistent with market development. § 183A.7. Section 183A.9 establishes a procedure for a producer referendum to determine whether to continue or terminate the assessments. The refund provision to which your letter refers is found at § 183A.8, which provides:

> A producer from whom the assessment has been deducted, upon written application filed with the council within thirty days after its collection, shall have that amount refunded by the council. Application forms shall be given by the council to each first purchaser when requested and the first purchaser shall make the application available to any producer. Each application for a refund by a producer shall have attached a proof of assessment deducted. The proof of assessment deducted shall be in the form of the original purchase invoice by the first purchaser. The council shall have thirty days from the date the application for refund is received to remit the refund to the producer.

This provision states explicitly that the refund is to be remitted "to the producer." Section 183A.1(3) defines a producer as: ". . . a person engaged in this state in the business of producing and marketing porcine animals in the previous calendar year."

The document which you enclosed with your letter is entitled, "Member Delivery Notice For Livestock." The document's language purports to create an agency relationship between the livestock seller and a third party, and authorizes the third party as agent for the seller to require the buyer to pay the proceeds of the sale to a trust. The trust is, in turn, authorized to make deductions from the sale proceeds for items such as marketing expenses and membership dues, and to then remit the net proceeds to the seller. The agreement also permits the seller to direct and authorize the agent to request a refund of his contribution, "as required by law." This language would apparently, in effect, authorize the seller to assign his interest in the refund to the agent, and direct the agent to use the money in the seller's "best interest." This agreement has generated your question as to whether, under § 183A.8, you may remit the refund to the producer's assignee.

This question is one of first impression in Iowa. Although other commodity promotion statutes provide that an assessment may be refunded upon the producer's request, for example, Iowa Code §§ 181.12, 184A.8, 185.27, 185C.27, we could find no authority in these statutes on the question you have raised. Similarly, although other states have statutes concerning agricultural promotion groups, see 12 Harl, Agricultural Law, § 113.04, p. 113-55 (1982), there is no authority in these states on the question of whether a promotional group may refund an assessment to an assignee. In the absence of any direct authority, we must turn to any analogous authority on the question of assignability of claims against government bodies.

The general rule is that, in the absence of any statute barring such an assignment, certain claims against the government for refund of moneys are assignable. 6 Am.Jur.2d, Assignments, § 66, p. 249 (1963); 18A C.J.S. States, § 267, p. 869 (1977). This rule has been applied in other states in situations in which an assignee of a tax refund has sought to compel the taxing body to remit the refund to it. The principle that claims for tax refunds are assignable where not expressly prohibited by statute has been followed even where the refunding statute provided only that the refund be paid to the person making the overpayment of the tax. 72 Am.Jur.2d, State and Local Taxation, § 1076, p. 339 (1974). Although the Council is a hybrid entity, a state agency for some purposes and not for others, see § 183A.5, we believe that this line of authority concerning tax refunds should be followed here.

In People ex rel. Stone v. Nudelman, 376 Ill. 535, 34 N.E.2d 851 (1940), the Illinois Supreme Court considered whether a tax refund could be assigned in the absence of a statutory prohibition on such an assignment. In holding that the refund could be assigned, the Court wrote:

> Nothing in the act provides what may be done with a credit memorandum after it is issued, other than its application to succeeding taxes. The act provides nothing about its assignment. Its assignability or non-assignability, therefore, is to be determined by the general law on the subject of assignments. The general rule, in the absence of language of the statute prohibiting it, is that claims against the government are assignable.

Nudelman, 34 N.E.2d at 853.

The rule that tax refunds are assignable unless prohibited by statute was followed in State ex rel. Great Northern Ry. Co. v. State Board of Equalization, et al., 121 Mont. 583, 194 P.2d 627, 631 (1948); Slater Corp. v. South Carolina Tax Com'n., 314 S.E.2d 31, 33 (S.C. Ap. 1984); Laing v. Forest Tp., 139 Mich. 159, 102 N.W. 664, 665 (1905). See also Hillsdale Distributing Co. v. Briant, 129 Minn. 223, 152 N.W. 265, 267 (1915) (claim for a license fee refund may be assigned).

Section 183A.8 does not bar the assignment of a producer's refund. There is no prohibition against the assignment of a producer's refund in Iowa Code ch. 539 (1985), the general statute on assignments. Under the application of the general rule, therefore, claims for these assignments may be assigned. The Legislature has in other statutes proscribed the assignment of certain claims. For example, Iowa Code § 324.17(10) prohibits the assignment of claims for refunds of the motor fuel tax. In our view, absent such a prohibition, the refund of an assignment levied on a pork producer under chapter 183A may be refunded to the producer's assignee.

Sincerely,

Timothy D. Benton

TIMOTHY D. BENTON
Assistant Attorney General

TDB/cjc

HIGHWAYS; Conflict of Interest; Public Officers and Employees; Counties; Board of Supervisors: Iowa Code section 314.2 (1985). The fact that a person is a member of a county board of supervisors does not per se invalidate all contracts entered into by that person's employer for highway construction with governmental bodies other than that county. (Weeg to Tekippe, Chickasaw County Attorney, 5-29-86) #86-5-7(L)

May 29, 1986

Richard P. Tekippe
Chickasaw County Attorney
206 North Chestnut
New Hampton, Iowa 50659

Dear Mr. Tekippe:

You have requested an opinion of the Attorney General as to whether Iowa Code section 314.2 (1985) prohibits a person from serving as a member of the Chickasaw County board of supervisors when that person's employer may be involved in highway construction or repair contracts with other governmental entities outside of Chickasaw County.

Section 314.2 provides as follows:

> No state or county official or employee, elective or appointive, shall be directly or indirectly interested in any contract for the construction, reconstruction, improvement or maintenance of any highway, bridge, culvert, or the furnishing of materials therefor. The letting of a contract in violation of the foregoing provisions shall invalidate the contract and such violation shall be a complete defense to any action to recover any consideration due or earned under the contract the time of its termination.

This section specifically provides that the letting of a contract in violation of its provision invalidates the contract, and the violation is a complete defense to any action to recover payment. Nothing in section 314.2 proports to bar any person from holding office. Cf. 1982 Op.Att'yGen. 220 (comparing

*Ed. note: The statutory citation in the headnote was corrected on July 19, 1990.

doctrine of incompatibility and doctrine of conflict of interest.)[1]

Accordingly, we do not address the question of whether this person may hold public office, but instead address the question of whether this individual's membership on the board of supervisors of one county would invalidate all contracts entered into by its employer for highway construction with governmental bodies other than the county.

A similar question has been addressed by this office on two previous occasions; an intervening set of opinions generally reviewed the provisions of section 314.2 and its predecessor statutes and discussed the "direct or indirect interest" language of that statute. In 1920 Op.Att'yGen. 257, the question was whether a county engineer could "take contracts in his own name in other counties in the state." We found no statute expressly prohibiting such an act, but then we reviewed a statute which provided as follows:

> No member of the highway commission, their deputies, or assistants, or any other person in the employ of the commission, no county supervisor, township trustee, county engineer, road superintendent or any person in their employ or one holding an appointment under them, shall be, either directly or indirectly, interested in any contract for the construction or building of any bridge or bridges, culvert or culverts or any improvement of any road or parts of road coming under the provisions of this act.

We concluded that though this statute applied throughout the state, "yet it was undoubtedly the intention of the legislature to limit the prohibition of the county engineer to road contracts within the county for which he has been appointed engineer."

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[1]The doctrine of incompatibility of public officers bars a person from holding two public offices that are incompatible. That doctrine is inapplicable in the present case because two public offices are not involved; instead, the question involves a public office and a private position of employment. See 1982 Op.Att'yGen. 220.

(emphasis added) Id. at 258.[2] We did suggest that if the supervisors wished to limit the county engineer's outside employment, they could specifically provide that the position of county engineer be full-time.

Next, in 1956 Op.Att'yGen. 57, we reviewed the statutory history of section 314.2 in generally holding that state and county officials and employees are not prohibited from selling materials to contractors for highway construction and repair unless the person is directly or indirectly interested in the contract. A corollary opinion, 1956 Op.Att'yGen. 59, discussed what constituted a direct or indirect interest under section 314.2 before concluding that public officers and employees are not prohibited under this section from selling materials to highway construction contractors provided there is no understanding prior to the time the contract is entered into that the contractor will purchase materials from such officer or employee. These opinions did not refer to 1920 Op.Att'yGen. 257.

Finally, in 1970 Op.Att'yGen 479, we opined after brief analysis that section 314.2 prohibits a county engineer from bidding on contracts for highway construction or repair "in any and all counties" when that person is a majority stockholder of a corporation contracting for such work. Again, this opinion did not cite our opinion to the contrary, 1920 Op.Att'yGen. 257, nor did it refer to 1956 Op.Att'yGen. 57 or 1956 Op.Att'yGen. 59.

Because our 1920 opinion has not been overruled, it is precedent for the question you raise. Further, we find the 1920 opinion to be persuasive and believe it leads to the fairest result. Accordingly, 1970 Op.Att'yGen. 479 is hereby overruled.

The rationale behind section 314.2 is clearly to prevent a public official or employee from taking advantage of this public position to benefit privately. This rationale is certainly served by prohibiting county officials and employees from entering into highway construction contracts with their own counties, for these situations are where these persons wield official authority and could potentially exercise that authority for personal gain. However, this rationale is much less clearly served when persons holding county office in employment enter into contracts with other counties or governmental entities. In these situations these persons generally have no official

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[2]While 1920 Op.Att'yGen. 257 clearly holds that the county engineer was not prohibited from entering into road contracts outside the county in which he served as engineer, the headnote to that opinion states: "County engineer cannot take contracts for road work in other counties." This headnote is in error.

authority which could be improperly used to influence the award of contracts. To prohibit these contracts would likely result only in personal hardship rather than promoting any worthwhile public policy.

While it is our opinion section 314.2 does not per se invalidate highway contraction contracts with other governmental bodies entered into by county officers or employees acting in their private capacity, a question may nonetheless exist as to whether that officer or employee is directly or indirectly interested in that particular contract. Such a determination must necessarily be based on the specific facts of each situation, and therefore must be considered on a case-by-case basis. See Wilson v. Iowa City, 165 N.W.2d 813 (Iowa 1969); 1982 Op.Att'yGen. 220; 1956 Op.Att'yGen. 57; 1956 Op.Att'yGen. 59.

In conclusion, the fact that a person is a member of a county board of supervisors does not per se invalidate all contracts entered into by that person's employer for highway construction with governmental bodies other than the county.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:mlr

COUNTIES AND COUNTY OFFICERS; County Attorney, Objection to change in status resolution: Iowa Code section 331.752 (1985). The county attorney-elect, and not the outgoing county attorney, may object under section 331.752 to a change in status resolution adopted after the general election but before the county attorney-elect assumes office. (Weeg to Short, Lee County Attorney, 5-28-86) #86-5-6(L)

May 28, 1986

Mr. Michael P. Short
Lee County Attorney
609 Blondeau Street
Keokuk, Iowa 52632

Dear Mr. Short:

You have requested an opinion of the Attorney General on the question of whether the outgoing county attorney, the county attorney-elect, or both, may object to a resolution of the board of supervisors changing the status of the county attorney.

Iowa Code section 331.752 (1985) sets forth the procedure by which a county board of supervisors may change the status of the office of county attorney. Subsection (2) governs a change from part-time to full-time status and provides as follows:

> The board may provide, by resolution, that the county attorney shall be a full-time county officer. The resolution shall include an effective date which shall not be less than sixty days from the date of adoption. However, if the county attorney or county attorney-elect objects to the full-time status, the effective date of the change to a full-time status shall be delayed until January 1 of the year following the next general election at which a county attorney is elected. The board shall not adopt a resolution changing the status of the county attorney between March 1 and the date of the general election of the year in which the county attorney is regularly elected as provided in section 39.17.

Subsection (3) governs a change from full-time to part-time status in the following manner:

> The board may change the status of a full-time county attorney to a part-time county attorney by following the same procedures as provided in subsection 2. If the incumbent county attorney objects to the change in status, the change shall be delayed until January 1 following the next election of a county attorney.

A change in status is significant in part because section 331.752(1) bars a full-time county attorney from the private practice of law. Because subsections (2) and (3) distinguish between the procedure for changing from part-time to full-time (subsection 2) and full-time to part-time, we shall discuss each subsection separately.

1.

First, as set forth above, section 331.752(2) states "the county attorney or county attorney-elect" may object to a resolution changing that position to full-time status, thereby delaying the effective date of the resolution. Prior to March 1st of a general election year for the office of county attorney, the supervisors may pass, and the incumbent county attorney may object to, such a change in status resolution. Clearly the statutory language regarding an objection by a county attorney-elect is inapplicable at this point because no such position exists at this time. From March 1st to the date of the election, the supervisors are barred from passing a resolution, a provision which is clearly designed to prevent uncertainty as to the full or part-time status of the position which the candidates are seeking. A candidate's decision to run for the office of county attorney is likely to be based in part on whether the position is part-time or full-time. A change in status resolution passed after a candidate had made a commitment to an election campaign would unfairly alter the circumstances existing at the time the candidate decided to run for office. However, once the election is over, nothing in the statute would prohibit the supervisors from passing a change in status resolution before the next term of office begins. The question then is whether the outgoing county attorney or just the county attorney-elect may object to the resolution changing the status of a part-time county attorney to full-time.

It is our opinion that only the county attorney-elect may object to this change in status resolution passed in the interim period following the general election but before that person assumes office. The statutory language in question states "the county attorney or county attorney-elect" may object to the change in status resolution. (emphasis added) When the

legislature uses the word "or" in a statute, it is presumed to be used in the disjunctive unless the legislative intent appears contrary. Kearney v. Ahmann, 264 N.W.2d 768, 769 (Iowa 1978) (and authorities cited therein). We believe it is appropriate to accord this presumption in the present case, as the disjunctive use of the term "or" results in the most reasonable construction of this statute. We may presume that when the legislature enacted section 331.752 it intended a just and reasonable result. See Iowa Code § 4.4(3) (1985); State v. Peterson, 347 N.W.2d 398 (Iowa 1984). Under this construction, section 331.752(2) would allow either one or the other persons specified to object to the resolution to the exclusion of the other; both persons could not object. Use of the disjunctive in this section evidences the legislature's intent to authorize the present county attorney to object to a change in status resolution at certain times, and to authorize the county-attorney elect to object at other times.

The county attorney-elect rather than the outgoing county attorney is the only person who will be affected by a change in status resolution passed after the general election. Given the fact that section 331.752(2) provides such a resolution cannot be effective for at least sixty days, by the time such a resolution is effective, the county attorney-elect will have assumed office and is therefore the only person whose status would be affected by the resolution. We do not believe any public interest would be served by construing this statute to allow the outgoing county attorney to object to a change in status resolution after a general election when that person has no professional interest in the status of the position of county attorney after leaving office. We believe a contrary result would simply be unreasonable and contrary to the legislature's intent.

Accordingly, it is our opinion that under section 331.752(2), a county attorney may object to a change in status resolution passed prior to March 1 of a general election year in which the county attorney will be elected. If that county attorney is defeated and the supervisors adopt a change in status resolution after the election but prior to the January 1st on which the newly elected county attorney assumes office, the outgoing county attorney may not object to that resolution. Instead, it is the county attorney-elect who may object to such a resolution at that point in time.

2.

As set forth above, section 331.752(3) sets forth the procedure for a change in the status of the county attorney from full-time to part-time. That section states the procedures of subsection 2 governing a change in status from part-time to

full-time be followed. However, the section goes on to provide that:

> If the incumbent county attorney objects to the change in status, the change shall be delayed until January 1 following the next election of a county attorney.

(emphasis added).

It is a well-established principle of statutory construction that a statute is to be construed so that no provisions are rendered superfluous unless no other construction is reasonably possible. See Iowa Automobile Dealers Association v. Iowa Department of Revenue, 301 N.W.2d 760, 765 (Iowa 1981). Thus, though subsection 3 states it incorporates the procedures of subsection 2, the fact the legislature affirmatively stated in subsection 3 that "the incumbent"[1] may object suggests that the language of subsection 2 authorizing "the county attorney or county attorney-elect" to object is not incorporated as a part of subsection 3. In sum, it appears at first blush that the legislature intended to allow either the county attorney or the county attorney-elect to object to a change in status from part-time to full-time (subject to the limitation expressed in part 1, above), but to allow only the incumbent county attorney to object to a change in status from full-time to part-time.

However, section 4.4(3) provides that in construing a statute, it must be presumed that the legislature intended a just and reasonable result. See also State v. Peterson, supra. Further, when a statute is ambiguous, as we believe sections 331.752(2) and (3) are, it is appropriate to consider the object sought to be attained by the statute and the consequences of a particular construction. We do not believe the legislature intended section 331.752(3) to be construed so as to allow a county attorney who is defeated in the general election to object to a change in status resolution passed after that election. As set forth above in part 1, there is no articulable public benefit to be served by allowing an outgoing county attorney to object to

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[1] There is little question that the term "incumbent" refers to a person who is in present possession of the public office in question, not a person who is elected to office but is not yet qualified. See, e.g., Chapman v. Rapsey, 16 Cal. 2d 636, 107 P.2d 388, 390 (1940); Vanderveer v. Gormley, 53 Wash. 543, 102 P.2d 435, 436 (1938). The county attorney-elect would be an incumbent, however, before the first possible effective date of a change-in-status resolution adopted after the general election. See Iowa Code §§ 39.1, 39.8, and 331.752.

a change in status resolution which will not affect that person in any manner. Instead, we believe the legislature intended in sections 331.752(2) and (3) to allow the person whose position will be affected by a change in status resolution to object to the resolution and thereby postpone the effective date of the resolution until that person's term of office is expired.

It is therefore our opinion that the county attorney-elect is the only person who may appropriately object to any change in status resolution passed after a general election at which a county attorney is elected but before the county attorney-elect assumes office. We believe this conclusion is reasonable and consistent with the legislature's intent.

Sincerely,

Theresa O'Connell Weeg by EMO

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

COURTS: Small claims; cost of court reporters in small claims actions. Iowa Code §§ 625.8(2); 631.1; 631.11(3); 631.13(3), (4) (1985); Iowa R. Civ. P. 178.1. A party in small claims litigation is not entitled to the services of a court reporter simply by paying the $15.00 taxable fee under Iowa R. Civ. P. 178.1 and Iowa Code § 625.8(2) but must instead bear the full expense to obtain the services of a certified court reporter under Iowa Code § 631.11(3). (Osenbaugh to Davis, Scott County Attorney, 5-12-86) #86-5-3(L)

May 12, 1986

Mr. William E. Davis
Scott County Attorney
416 West Fourth Street
Davenport, Iowa 52801

Dear Mr. Davis:

You have requested the opinion of this office concerning whether Iowa Rule of Civil Procedure 178.1 or Iowa Code section 631.11(3) (1985) governs the provisions for court reporters in small claims actions.

Your letter states that an individual involved in small claims litigation has requested that the clerk of court provide the services of a court reporter.[1] Rather than providing a reporter at the party's own expense as provided in small claims actions under Iowa Code section 631.11(3), the individual seeks to obtain the services of a court reporter by paying in advance the $15.00 per day taxable fee provided by Iowa Code section 625.8. The litigant argues that Rule 178.1 of the Iowa Rules of Civil Procedure and Iowa Code section 625.8 establish that a court reporter will be provided upon payment in advance of the taxable fee. You have asked whether the litigant is entitled to have the proceedings recorded by a court reporter upon payment of the $15.00 fee or whether the litigant is, by virtue of Iowa Code section 631.11(3), required to provide a court reporter at his own expense.

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[1] The usual policy of this office is not to render opinions on matters arising in litigation because to do so could interfere with the jurisdiction of the court. See 120 Iowa Admin. Code 1.5(3)(a). However, as this question involves a generally applicable issue of concern to the clerks of court and we are advised that the chief judge of the judicial district has approved the request for an Attorney General's opinion, we will proceed to issue an opinion.

Iowa Code chapter 631 governs small claims actions. Section 631.11(3) states:

> Upon the trial, the judicial magistrate shall make detailed minutes of the testimony of each witness and append the exhibits or copies thereof to the record. The proceedings upon trial shall not be reported by a certified court reporter, unless the party provides the reporter at such party's expense. The magistrate, in the magistrate's discretion, may cause the proceedings upon trial to be reported electronically. If the proceedings are being electronically recorded both parties shall be notified in advance of that recording. If the proceedings have been reported electronically the recording shall be retained under the jurisdiction of the magistrate unless appealed, and upon appeal shall be transcribed only by a person designated by the court under the supervision of the magistrate.

(emphasis added). See also Iowa Code section 631.13(3), (4). The statute also provides specifically that the hearing of any additional evidence on appeal "shall not be reported by a certified court reporter." § 631.13(4)(a).

The alternative authority cited by the litigant in demanding a court reporter upon payment of a $15.00 fee to the clerk is Iowa Rule of Civil Procedure 178.1 and Iowa Code section 625.8(2). Rule 178.1 states:

> No court reporter shall be provided in the trial of actions when the amount in controversy as shown by the pleadings is less than two thousand dollars, unless the party demanding one shall pay the clerk in advance the taxable fee of the reporter for one day, at the beginning of each day. Amounts so paid shall be taxed as costs in the case, unless otherwise ordered by the court.

Iowa Code section 625.8(2) further provides, "The clerk of the district court shall tax as a court cost a fee of fifteen dollars per day for the services of a court reporter."

In construing these statutes and rules, we invoke the principle that statutes relating to the same subject should be harmonized if possible. Doe v. Ray, 251 N.W.2d 496, 501 (Iowa

1977). Further, 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 Company, et al., 288 N.W.2d 181, 188 (Iowa 1980).

At first glance, it appears that Rule 178.1 and Code section 631.11(3) apply to the same actions. A small claim is statutorily defined in section 631.1 as "a civil action for a money judgment where the amount in controversy is two thousand dollars or less, exclusive of interest and costs." Rule 178.1, in turn, governs the reporter's fees in "actions when the amount in controversy as shown by the pleadings is less than two thousand dollars." Both Rule 178.1 and section 631.11(3), therefore, apply to essentially congruent amounts in controversy. Actions subject to Rule 178.1, however, may be more broad in scope. A small claim is defined as an action for a "money judgment." Actions subject to Rule 178.1, by contrast, are defined as "actions when the amount in controversy as shown by the pleadings is less than two thousand dollars." While this would, on its face, include actions for a money judgment contained within the definition of small claims, it would encompass other actions which are not limited to money judgment. Examples could include actions involving title to property worth less than two thousand dollars, garnishment proceedings, and judicial review of agency action.

Iowa Code section 631.11(3) is a specific statute governing procedures in small claims. We observe the principle that a specific statute prevails in a conflict between a specific statute and a general statute.[2] Peters v. Iowa Employment Security Commission, 248 N.W.2d 92, 96 (Iowa 1976). We believe that the intent is clear in Iowa Code section 625.11(3) that court reporters will not be provided in small claims actions unless the party pays the expense. The legislature has deliberately set up a simple and inexpensive mechanism to resolve these claims and provided for the record generally to be obtained by means of electronic recording or detailed minutes. See also

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[2] We would also note that Iowa R. Civ. P. 178.1 was first adopted in 1961. (Iowa Code section 602.48 (1958) then provided that actions involving less than $100.00 tried in municipal court would not be reported unless the taxable fee was paid in advance and thus was very similar to Rule 178.1). The present small claims act dates to 1972 Iowa Acts, ch. 124, section 60, et seq., effective July 1, 1973. Although Rule 178.1 was amended in 1984, that amendment merely changed the dollar limit on the amount in controversy. We would also regard chapter 631 as a subsequently enacted statute intended to supersede prior inconsistent provisions.

section 631.13(3), (4). "For these small claims suits, the legislature thought it was in the public interest to provide a simpler, easier, and less expensive procedure than was afforded in district court under the Rules of Civil Procedure." Severson v. Peterson, 364 N.W.2d 212, 213 (Iowa 1985), quoting Barnes Beauty College v. McCoy, 279 N.W.2d 258, 259 (Iowa 1979). By construing Iowa Code section 631.11(3) as applicable to small claim actions and Iowa R. Civ. P. 178.1 as applicable to other actions where the amount in controversy is less than $2,000, the statutes and rules are construed so that none of their provisions are rendered superfluous. See Iowa Auto Dealers Association v. Iowa Department of Revenue, 301 N.W.2d 760, 765 (Iowa 1981).

This conclusion is further supported by the provisions in chapter 631, which indicate that that chapter governs over inconsistent rules of civil procedure. For example, Iowa Code section 631.2(1) states that, "the district court sitting in small claims . . . shall determine small claims according to the statutes and the rules prescribed by this chapter." The chapter in specific places incorporates various rules of civil procedure. Section 631.4, governing service of small claims, specifically refers to Rules of Civil Procedure 52, 56, 56.1, and 56.2. The provisions for return of service in small claims incorporates Rule 59 of the Rules of Civil Procedure. § 631.5(4). The Iowa Supreme Court has held that certain rules of civil procedure are inconsistent with the legislative mandate in chapter 631 and are therefore not applicable to small claims. See Severson v. Peterson, 364 N.W.2d 212 (Iowa 1985) (petition to vacate judgment under rules 252 and 253 not available); Barnes Beauty College v. McCoy, 279 N.W.2d 258 (Iowa 1979) (provisions for granting a new trial under rule 244 not applicable).

In conclusion, it is the opinion of this office that court reporters in small claims actions are to be provided only at the party's expense under Iowa Code section 631.11(3) and that a party is not entitled to the services of a certified court reporter merely upon the payment of the taxable fee under Iowa R. Civ. P. 178.1.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:rcp

TAXATION: Real Estate Transfer Tax Concerning Conveyance From Partner To Partnership. Iowa Code § 428A.1 (1985). The real estate transfer tax imposed on a real estate conveyance from a partner to the partnership is based on the partnership's entire consideration for the real estate conveyance and not on a portion of it. The partnership's entire consideration for the real estate conveyance must be reported on the declaration of value form. (Kuehn to Richards, Story County Attorney, 5-12-86) #86-5-2(L)

May 12, 1986

Mary Richards
Story County Attorney
Story County Courthouse
Nevada, Iowa 50201

Dear Ms. Richards:

You have requested an opinion of the Attorney General concerning Iowa Code ch. 428A (1985). Your question involves the transfer of real estate from an individual to a partnership where the transferor is one of the partners in the partnership.

The facts are as follows: A, B and C are the partners in the partnership. A has a 50% interest in the partnership and B and C each have a 25% interest. A owned a parcel of real estate jointly with D. D transferred his half interest to A which made A the sole owner of the real estate. Then, A transferred his entire interest in the real estate to the partnership.

Your questions concern the appropriate amount of real estate transfer tax and whether the partnership's entire consideration for the real estate conveyance must be reported on the declaration of value form with respect to the transfer from A to the partnership under Iowa Code § 428A.1 (1985). There is no question but that the conveyance of the real estate from A to the partnership results in the imposition of a transfer tax under Iowa Code § 428A.1 (1985). The real tax question is whether all or only half of the consideration for the real estate conveyance is taxed on the transfer from A to the partnership. The declaration of value question is also whether all or only

half of the consideration for the real estate conveyance is to be reported on the declaration of value form.

Iowa Code § 428A.1 imposes the transfer tax upon the "consideration" paid for the conveyance. Since the entire real estate was transferred to the partnership, and not merely a portion of it, the consideration in this instance is the partnership's entire consideration for the real estate conveyance.[1] It is the entire consideration which is subject to the tax.[2]

Section 428A.1 requires in relevant part:

> At the time each deed, instrument, or writing by which any real property in this state is granted, assigned, transferred, or otherwise conveyed is presented for recording to the county recorder, a declaration of value signed by at least one of the sellers

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[1]The information provided with the request for an opinion indicates that $658,000 was half of the partnership's total consideration for the real estate conveyance. Therefore, the total consideration of the real estate conveyed is $1,316,000; i.e., the partnership's entire consideration for the real estate conveyance is $1,316,000.

[2]The taxation of real estate transfers under Iowa Code ch.428A is patterned after a repealed federal tax on such transfers. 1976 Op.Att'yGen. 776. Under the federal tax, Treas. Reg. 47.4361-2(a)(12), T.D. 6589, 27 FR 1088, Feb. 7, 1962, took the position that a transfer of real estate by a partner to the partnership which contributed to partnership assets was a taxable conveyance. Iowa Department of Revenue rule 730 Iowa Admin. Code § 79.2 follows the federal regulation and applies the tax to the transfer of real estate by a partner to the partnership except certain situations involving family partnerships. See Iowa Code § 428A.2(15) (1985) and 730 Iowa Admin. Code § 79.2(2). Obviously, the legislature intended to tax real estate transfers involving a transfer by a partner to the partnership because otherwise the exception provided for family partnerships in § 428A.2(15) would have been unnecessary, meaningless and superfluous. The legislature does not do unnecessary, meaningless and superfluous acts. See Goergen v. State Tax Commission, 165 N.W.2d 782, 785-786 (Iowa 1969).

> or one of the buyers or their agents shall be submitted to the county recorder. . . . The declaration of value shall state the full consideration paid for the real property transferred. . . . (emphasis supplied)

As noted in § 428A.1, the "declaration of value shall state the full consideration paid for the real property transferred." Therefore, the declaration of value form should contain, as consideration, the entire consideration given by the partnership for the real estate. This "consideration" is the same as that which formed the tax base for the transfer tax.

The contention seems to be that since A owned half the real estate while he owned it jointly with D, when A transferred the real estate to the partnership in which he owned a half interest, half of A's interest in the real estate never transferred to the partnership and, therefore, half of the partnership's consideration for the real estate conveyance should not be considered when determining the transfer tax imposed under Iowa Code § 428A.1. This contention is inconsistent with Iowa case and statutory law. According to Iowa case law, a partnership is a legal entity separate and distinct from the partners. Partnership property does not belong separately to the individual partners but, rather, it belongs to the partnership. Smith v. Smith, 179 Iowa 1365, 160 N.W. 756 (1916); Jensen v. Wiersma, 4 A.L.R. 298, 185 Iowa 551, 170 N.W. 780 (1919); State v. Pierson, 204 Iowa 837, 216 N.W. 43 (1927); State v. Haesemeyer, 248 Iowa 154, 79 N.W.2d 755 (1956); Cody v. J. A. Dodds & Sons, 252 Iowa 1394, 110 N.W.2d 255 (1961). Thus, Iowa case law makes clear that when A conveyed the real estate to the partnership, A's entire interest in the real estate was transferred to the partnership because A is a separate and distinct entity and the partnership is a separate and distinct entity.

Iowa statutory law also makes clear that when A conveyed the real estate to the partnership, A's entire interest in the real estate was transferred and not merely half of A's interest. Iowa Code § 544.8 (1985) states:

> 544.8 Partnership property.
> 1. All property originally brought into the partnership stock or subsequently acquired by purchases or otherwise, on account of the partnership, is partnership property.

> 2. Unless the contrary intention appears, property acquired with partnership funds is partnership property.
>
> 3. Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.
>
> 4. A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor. . . . (emphasis added)

Based upon the foregoing, under the circumstances presented, it is the opinion of the Attorney General that the real estate transfer tax imposed on a real estate conveyance from a partner to the partnership is based on the partnership's entire consideration for the real estate conveyance and not on a portion of it. Furthermore, the partnership's entire consideration for the real estate conveyance must be reported on the declaration of value form.

Very truly,

Gerald A. Kuehn
Assistant Attorney General

GAK:cmh

STATE OFFICERS AND DEPARTMENTS; Administrative Rules; Board of Nursing; Authority of Nursing Board to increase statutory educational requirements. Iowa Code §§ 152.1(1)-152.1(3); 152.5-152.7 (1985). The Board of Nursing may not by rule change the statutory provisions governing titles of, or minimum educational requirements for, licensure of registered nurses and licensed practical nurses in Iowa. (Weeg to Connolly, State Representative, 5-6-86) #86-5-1(L)

May 6, 1986

The Honorable Michael W. Connolly
State Representative
State Capitol
L O C A L

Dear Representative Connolly:

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

> 1. Can the titles Registered Nurse and Licensed Practical Nurse be changed by the Iowa Board of Nursing without statutory change by the legislature?
>
> 2. Because the statutory educational requirement for licensure as a Registered Nurse is ". . . completion of at least a two academic year course of study or its equivalent in theory and practice as prescribed by the Board" (Iowa Code § 152.5(c)), could the Board of Nursing, without statutory change by the Iowa legislature, determine that the two-year Associate Degree would no longer be eligible for licensure as an R.N. in the State of Iowa?
>
> 3. Because the statutory educational requirement for licensure as a Licensed Practical Nurse is ". . . completion of at least an academic year course of study or its equivalent in theory and practice as prescribed by the Board" (Iowa Code § 152.5(d)), could the Iowa Board of Nursing without statutory change by the legislature, determine that a graduate of a one-year program would no longer be eligible for licensure as an L.P.N. in the State of Iowa?

It is a well-established principle of administrative law that, to be valid, a rule adopted by an administrative agency must be within the scope of powers delegated to that agency by statute. Iowa Illinois Gas and Electric Co. v. Iowa State Commerce Commission, 334 N.W.2d 748, 752 (Iowa 1983); Haesemeyer v. Mosher, 308 N.W.2d 35, 37 (Iowa 1981); Hiserote Homes, Inc. v. Riedemann, 277 N.W.2d 911, 913 (Iowa 1979). Correspondingly, the plain provisions of a statute cannot be altered by an administrative rule. Iowa Department of Revenue v. Iowa Merit Employment Commission, 243 N.W.2d 610, 615 (Iowa 1976). In sum, rules cannot be adopted that are at variance with statutory provisions or that amend or nullify the legislature's intent. Id. at 616.

Iowa Code chapter 152 (1985) governs the practice of nursing in Iowa. In particular, section 152.1(1) defines the practice of nursing as "the practice of a registered nurse or a licensed practical nurse." Section 152.1(2) further defines the scope of the practice of a registered nurse, while section 152.1(3) defines the scope of the practice of a licensed practical nurse. Section 152.6 governs the use of professional abbreviations:

> The board may license a natural person to practice as a registered nurse or as a licensed practical nurse. However, only a person currently licensed as a registered nurse in this state may use that title and the abbreviation "RN" after the person's name and only a person currently licensed as a licensed practical nurse in this state may use that title and the abbreviation "LPN" after the person's name.

These sections make clear that the only titles for Iowa nurses recognized by this state's legislature are those of registered nurse and licensed practical nurse. Based on the principles and authorities cited above, it is clear that the Iowa Board of Nursing has no authority to alter this legislative scheme by rule. Any changes in the titles of nurses licensed to practice in Iowa must be made by the legislature.

Pursuant to section 152.7, an applicant for a nursing license must meet a number of requirements, including the following:

> In addition to the provisions of section 147.3, an applicant to be licensed for the practice of nursing shall have the following qualifications:
>
> * * *

> 3. If to practice as a registered nurse, holds a diploma or degree resulting from the completion of a course of study in a program approved pursuant to section 152.5, subsection 1, paragraph "c".
>
> 4. If to practice as a licensed practical nurse, holds a diploma resulting from the completion of a course of study in a program approved pursuant to section 152.5, subsection 1, paragraph "d" or has successfully completed at least one academic year of a course of study in a program approved pursuant to section 152.5, subsection 1, paragraph "c" and has successfully completed all theoretical and clinical training as is required for a licensed practical nurse.

(emphasis added). Section 152.5 provides:

> 1. All programs preparing a person to be a registered nurse or a licensed practical nurse shall be approved by the board. The board shall not recognize a program unless it:
>
> a. Is of recognized standing.
>
> b. Has provisions for adequate physical and clinical facilities and other resources with which to conduct a sound education program.
>
> c. Requires, for graduation of a registered nurse applicant, the completion of at least a two academic year course of study or its equivalent which is integrated in theory and practice as prescribed by the board.
>
> d. Requires, for graduation of a licensed practical nurse applicant, the completion of at least an academic year course of study or its equivalent in theory and practice as prescribed by the board.
>
> 2. All advanced formal academic nursing education programs shall also be approved by the board.

(emphasis added). The emphasized portions of these provisions make clear that an applicant for an L.P.N. license must graduate from a board-approved program or its equivalent requiring at least one academic year of study, while applicants for R.N. licensure must graduate from an approved program requiring at least two academic years of study or its equivalent. The legislature has mandated these minimum requirements. Based on the principles discussed above, we believe the Board of Nursing has no authority to adopt rules setting stricter minimum requirements for the number of years of study required for licensure. Such rules would be invalid as outside the scope of the authority delegated to the Board by the General Assembly and contrary to the legislature's intent to allow persons meeting these minimum requirements to qualify for licensure.

A question does exist regarding the language requiring a minimum period of study "or its equivalent." (emphasis added). The Board has not provided further clarification of this equivalency language in its rules. See 590 Iowa Admin. Code section 3.3(1)(b). This statutory language clearly gives the Board some discretion to accept an equivalent to the number of academic years of study required. There is an argument that this discretion may extend so far as to allow the Board to prescribe alternative requirements increasing the number of years of study required. This argument is not persuasive, as mandatory additional years of study would not be "equivalent" to the minimum number of years now required.

The issue of requirements for entry into practice is a significant issue for the nursing profession today. However, as discussed above, any changes to the licensure scheme for nurses in Iowa must begin with legislative action rather than with Board of Nursing rulemaking.

In conclusion, it is our opinion the Board of Nursing may not by rule change the statutory provisions governing titles of, or minimum educational requirements for, licensure of registered nurses and licensed practical nurses in Iowa.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

MUNICIPALITIES: Chapter 411 Retirement Systems. Iowa Code Ch. 411 (1985); Iowa Code §§ 411.1(11), 411.1(12), 411.5(1), 411.6, 411.6(12) (1985); 1984 Iowa Acts, ch. 1285, § 22. In computing a member's earnable compensation pursuant to Iowa Code § 411.1(1)(11) (1985), compensation for holidays means pay or wages in addition to the regular compensation received for work performed on those duty shifts designated as holidays under the applicable pay plan. The annual readjustment of pensions pursuant to Iowa Code § 411.6(12) (1985) includes an increase for compensation for holidays as part of the earnable compensation of active members of the same rank and position on the salary scale as was held by the retired member at the time of retirement even if holiday pay was not explicitly included in the statutory definition of earnable compensation at the time of the member's retirement. In computing the annual readjustment of pensions for those retirees who retired prior to the date that compensation for holidays was included in the pay plan, a reasonable method to determine the amount of increase to be received by those retirees could be based on an average of the compensation for holidays received by active members of the department of the same rank and position on the salary scale as was held by the retired member of the time of the member's retirement. However, this determination is left to the sound discretion of the board of fire trustees. (DiDonato to Connors, State Representative, 6-27-86) #86-6-9(L)

June 27, 1986

The Honorable John H. Connors
State Representative
1316 E. 22nd Street
Des Moines, Iowa 50317

Dear Representative Connors:

You have requested an opinion of the Attorney General regarding what amount is to be included as compensation for holidays in earnable compensation pursuant to Iowa Code chapter 411 (1985). Specifically, you have asked what may a member of a chapter 411 retirement system receive as compensation for holidays in determining that member's earnable compensation pursuant to section 411.1(11). You also ask what method should be used to compute the annual readjustment of pensions for chapter 411 retirement system members who retired prior to the date that compensation for holidays was statutorily included in earnable compensation and before those retirees received compensation for holidays under the current collective bargaining agreement whereby the amount of compensation received for holidays is not a fixed amount. This question involves a determination as to whether an annual readjustment of pensions pursuant to chapter 411 includes an increase for compensation for holidays as

part of the earnable compensation when holiday pay was not statutorily included in earnable compensation at the time that the member retired.

It is my understanding that under the terms of the involved collective bargaining agreement between the City of Marion and the Marion fire fighters, the fire fighters have the option of receiving either time off from a scheduled duty shift or an additional twenty-four hours of straight time pay in lieu of time off for ten days per year, although fire fighters must accept pay for at least one holiday and may receive pay for a maximum of seven holidays. In addition, during the month of May, each fire fighter receives an extra twenty-four hours pay at straight time rates in lieu of holiday time off.

I.

At the outset, we feel compelled to state the appropriate purposes of an Attorney General's opinion. The only questions an Attorney General's opinion could address must be ascertainable by legal research and statutory construction, or in other words, they must be questions of law. 1972 Op.Att'yGen. 686. It is improper for us to engage in judicial fact-finding in the context of an opinion. 1982 Op.Att'yGen. 353. Accordingly, our review will not determine whether compensation for all of the days designated under the Marion fire fighter holiday plan is, in fact, remuneration for holidays within the meaning of section 411.1(11). See Op.Att'yGen. #86-1-5(L).

II.

Iowa Code § 411.1(11) (1985) defines earnable compensation as:

> "Earnable compensation" or "compensation earnable" shall mean the regular compensation which a member would earn during one year on the basis of the stated compensation for the member's rank or position including compensation for longevity and holidays and excluding any amount received for overtime compensation or other special additional compensation, meal and travel expenses, and uniform allowances and excluding any amount received upon termination or retirement in payment for accumulated sick leave or vacation.

Earnable compensation was amended effective July 1, 1984, to include compensation for holidays. 1984 Iowa Acts, chapter 1285, section 22. The amount of earnable compensation is used to

determine the average final compensation, which is used to compute a member's retirement benefits. Iowa Code § 411.1(12), 411.6 (1985). Compensation for holidays is not defined in chapter 411. However, the term "compensation" as used in a chapter 411 member's earnable compensation was discussed in 1978 Op.Att'yGen. 55. In that opinion, the definition of compensation which was discussed included, ". . . remuneration or wages given to an employee; salary, pay or emolument;" 1978 Op.Att'yGen. at 57. It was pointed out that compensation is not always synonymous with salary. Id. The opinion concluded that "stated compensation" refers solely to wages. Id.

It is the opinion of this office that this definition of compensation would also apply in determining the meaning of compensation for holidays under section 411.1(11). For that reason, a member of a chapter 411 retirement system is entitled to receive as includable within the determination of his earnable compensation the amount of pay or wages an employee would earn in addition to the regular compensation received by that member for work performed on those duty shifts designated as holidays under the applicable pay plan.

III.

Before this office can address the second question presented, it must be determined whether a member of a chapter 411 retirement system who retired prior to July 1, 1984, may receive an annual adjustment of pension including compensation for holidays pursuant to section 411.6(12). The annual adjustment of pensions is based upon an increase in the earnable compensation of an active member of the same rank and position on the salary scale as was held by the retired member at the time of retirement. § 411.6(12).

Section 411.6(12)(a) provides in relevant part that:

> Annual readjustment of pensions. Pensions payable under this section shall be adjusted as follows:
>
> a. On each July 1 and January 1, the monthly pensions authorized in this section payable to retired members and to beneficiaries, except children of a deceased member, shall be adjusted as provided in this paragraph. An amount equal to the following percentages of the difference between the monthly earnable compensation payable to an active member of the department, of the same rank and position on the salary scale as was

> held by the retired or deceased member at the time of the member's retirement or death, for the month in which the last preceding adjustment was made and the monthly earnable compensation payable to an active member of the department of the same rank and position on the salary scale for the month in which the adjustment is made shall be added to the monthly pension of each retired member and each beneficiary as follows:
>
> * * *

It is the opinion of this office that the earnable compensation used to determine annual readjustment of pensions of retired members of a chapter 411 retirement system who retired prior to the statutory inclusion of compensation for holidays in earnable compensation should include compensation for holidays received by active members of the same rank and position on the salary scale as was held by the retired member at the time of retirement.

Although compensation for holidays was first specifically included within the statutory definition of earnable compensation under chapter 411 by an amendment effective July 1, 1984, we would point out that prior to this amendment, it was the opinion of this office that earnable compensation included holiday pay. 1982 Op.Att'yGen. 387; 1978 Op.Att'yGen. at 57; 1966 Op.Att'yGen. 52. However, even if earnable compensation did not include compensation for holidays prior to the 1984 amendment, pensioners who retired prior to this time are still entitled to the inclusion of compensation for holidays in the earnable compensation used to compute their annual readjustment of pensions.

As a general rule, all statutes are to be construed as prospective in operation unless the contrary is expressed or clearly implied. Flake v. Bennett, 261 Iowa 1005, 1011, 156 N.W.2d 849, 853 (1968). Whether a statute operates retrospectively or prospectively is a matter of legislative intent. Within constitutional limits, the legislature may by clear and express language state its intention that a statute apply retroactively. Id. The language of § 411.6(12) requires that the adjustment in pensions is based on a percentage of the difference between the monthly earnable compensation for the month in which the last preceding adjustment was made and for the month in which the adjustment is made. By these words the legislature expressed its clear intention that pensioners receive the benefit of a portion of an increase in the current earnable compensation.

A finding of the inclusion of a component of earnable compensation to be used in computing the annual readjustment of

pensions which was not included in earnable compensation at the time of a chapter 411 member's retirement is also consistent with the liberal construction to be given to section 411.6(12). The Iowa Supreme Court has stated that "[I]t is elementary that laws creating pension rights are to be liberally construed with the view of promoting the objects of the legislature." Flake v. Bennett, 261 Iowa at 1013, 156 N.W.2d at 854. Iowa Code section 4.2 (1985) provides that the provisions of the Iowa Code are to be "liberally construed with a view to promote its objects and assist the parties in obtaining justice." Because the stated legislative objective of section 411.6(12) is to adjust the pensions of retired members to the rising cost of living, section 411.6(12) should be construed to allow a percentage increase in the pension amount based upon what is deemed to be earnable compensation at the time of the adjustment period. See Flake v. Bennett, 261 Iowa at 1008, 156 N.W.2d at 851-852. To find otherwise would be contrary to the Iowa Supreme Court's stated concern of the possibility that current chapter 411 members and city negotiators could sacrifice the unrepresented interests of the retirees in order to allocate more of the available funds to the salaries of the active members. Asmann v. Board of Trustees of Police Retirement System of City of Sioux City, 345 N.W.2d 136, 138 (Iowa 1984). We therefore conclude that the earnable compensation used to compute the annual readjustment of pensions includes compensation for holidays for those members who retired prior to the specific statutory inclusion of compensation for holidays.

It is therefore necessary to determine the amount of compensation for holidays to be included in earnable compensation used to compute the annual readjustment of pensions for those pensioners who have not received compensation for holidays under this flexible holiday plan. This question presents a difficult problem and we have not found any authoritative statutory or case law guidance. However, a similar question was addressed in 1982 Op.Att'yGen. 102. In that opinion, the issue was what percentage of a cost of living increase given to all non-bargaining police officers (who were in the rank of lieutenant through chief) should be used to recompute the non-bargaining retired members' pensions where officers of the same rank and position on the salary scale received different percentage increases. This office opined that the only practical approach would be to use the average percentage increase given to all of the officers receiving this increase. It is the opinion of this office that a similar method could be used in this situation. In accordance with our prior opinion, we would advise that a practical approach would be to use the average amount of compensation for holidays received by the members of the Marion Fire Department in computing the annual readjustment of pensions. However, this decision is within the responsibility of the board of fire trustees. Iowa

Code § 411.5(1) (1985). The board's decisions will be upheld if they are supported by substantial evidence and are not unreasonable, arbitrary or capricious. Asmann, 345 N.W.2d at 138.

In summary, in computing a member's earnable compensation pursuant to Iowa Code § 411.1(1)(11) (1985), compensation for holidays means pay or wages in addition to the regular compensation received for work performed on those duty shifts designated as holidays under the applicable pay plan. The annual readjustment of pensions pursuant to Iowa Code § 411.6(12) (1985) includes an increase for compensation for holidays as part of the earnable compensation of active members of the same rank and position on the salary scale as was held by the retired member at the time of retirement even if holiday pay was not explicitly included in the statutory definition of earnable compensation at the time of the member's retirement. In computing the annual readjustment of pensions for those retirees who retired prior to the date that compensation for holidays was included in the pay plan, a reasonable method to determine the amount of increase to be received by those retirees could be based on an average of the compensation for holidays received by active members of the department of the same rank and position on the salary scale as was held by the retired member of the time of the member's retirement. However, this determination is left to the sound discretion of the board of fire trustees.

Sincerely,

Ann DiDonato

ANN DiDONATO
Assistant Attorney General

AD:rcp

TAXATION: Tax Amnesty; Eligibility of 1986 Assessments for Amnesty. House File 764, 71st G.A., 2d Sess. §§ 1-4. A timely application for tax amnesty for pre-1986 delinquent taxes should not be denied merely because the Department of Revenue made an assessment in 1986. Griger to Bair, Director, 6-27-86) #86-6-8(L)

June 27, 1986

Gerald D. Bair
Director
Iowa Department of Revenue
L O C A L

Dear Mr. Bair:

You have requested an opinion of the Attorney General with respect to the Iowa Tax Amnesty Act in House File 764, 71st G.A., 2d Sess. §§ 1-4. Specifically, you inquire whether a taxpayer applicant is ineligible to receive amnesty solely on the basis that the Department of Revenue (Department) issued an assessment notice to the taxpayer in 1986. In all other respects, your opinion request assumes that the taxpayer's amnesty application satisfies the criteria in the amnesty statute.

Section 3 of H.F. 764 provides:

> Sec. 3. AMNESTY PROGRAM.
>
> 1. The director shall establish a tax amnesty program. The amnesty program shall apply to tax liabilities delinquent as of December 31, 1985, including tax on returns not filed, tax liabilities on the books of the department as of December 31, 1985, or tax liabilities not reported nor established but delinquent as of December 31, 1985. For a taxpayer who has a tax liability, the director shall accept cash, certified check, cashier's check or money order for the full amount of the tax liability.
>
> 2. The amnesty program shall be for a period from September 2, 1986 through October 31, 1986 for any tax liabilities which are delinquent as of December 31, 1985.

> 3. The amnesty program shall provide that upon written application by a taxpayer and payment by the taxpayer of amounts due from the taxpayer to this state for a tax covered by the amnesty program plus interest equal to fifty percent of the interest that would have been owed through December 31, 1985, the department shall not seek to collect any other interest or penalties which may be applicable and the department shall not seek civil or criminal prosecution for a taxpayer for the period of time for which amnesty has been granted to the taxpayer. Failure to pay all taxes delinquent as of December 31, 1985 and due to this state except those adjustments made pursuant to a federal audit completed after the effective date of this Act shall invalidate any amnesty granted pursuant to this Act. Amnesty shall be granted for only the taxable periods specified in the application and only if all amnesty conditions are satisfied by the taxpayer.
>
> 4. Amnesty shall not be granted to a taxpayer who is a party to an active criminal investigation or to a criminal litigation which is pending in a district court, the court of appeals, or the supreme court of this state for nonpayment or fraud in relation to any state tax imposed by a law of this state.
>
> 5. The director shall prepare and make available amnesty application forms which contain requirements for approval of an application. The director may deny any application inconsistent with sections 1 through 4 of this Act.

The Iowa Tax Amnesty Act provides that an eligible taxpayer can make application to the Department for amnesty pertaining to tax liabilities "delinquent as of December 31, 1985." Such application, pursuant to § 3(2), cannot be made later than October 31, 1986. If the taxpayer is eligible for amnesty, the taxpayer will receive a partial abatement of interest that has accrued upon the delinquent tax liabilities and full abatement of any penalties pursuant to § 3(3).

Section 3(1) expressly makes eligible for amnesty those "tax liabilities not reported nor established but delinquent as of December 31, 1985." If the Department does not issue an assessment to the taxpayer until 1986 for pre-1986 delinquent tax liabilities, such delinquent tax liabilities would be unreported or unestablished on December 31, 1985, but such condition is expressly made eligible for amnesty by the above language in § 3(1). Therefore, § 3(1) clearly would include within its scope those pre-1986 delinquent tax liabilities that were not assessed by the Department until 1986, but for which an application for amnesty was timely made by October 31, 1986, the last date of the amnesty period in § 3(2).

There is no language in the statute that expressly makes a timely amnesty application ineligible for amnesty if the pre-1986 tax delinquency is assessed to the taxpayer in 1986. The language in § 3(1) clearly would authorize amnesty under such conditions. Where statutory language is clear and plain, there is no room for construction. American Home Products Corporation v. Iowa State Board of Tax Review, 302 N.W.2d 140, 143 (Iowa 1981).

Accordingly, it is our opinion that a timely application for amnesty should not be denied merely because the Department made an assessment for a pre-1986 tax delinquency in 1986.

Very truly yours,

Harry M Griger

Harry M. Griger
Special Assistant Attorney General

HMG:cmh

MUNICIPALITIES: Authority of city to impose ordinance requiring utility board to pay a fee and to provide free service to city. Iowa Code Ch. 388 (1985); Iowa Code §§ 364.1, 364.2(2), 364.3(4), 384.80, 384.80(4), 384.81(1), 384.84, 384.91, 388.1, 388.2, 388.3, 388.4, 388.5, 388.6 (1985); Iowa Const. art. III, § 38A (amend. 25). A municipality has the authority to impose a fee upon a city utility operated by a utility board based upon the costs to the city occasioned by the utility system's use of the streets and other city property. Although a utility board has the power to provide free service to the city, the sole rate setting authority resides with the utility board so that a municipality has no power to require by ordinance that free service be provided to the city by the utility board. (DiDonato to Tabor, State Representative, 6-27-86) #86-6-7(L)

June 27, 1986

The Honorable David Tabor
State Representative
R.R. #2
Baldwin, Iowa 52207

Dear Representative Tabor:

You have requested an opinion of the Attorney General regarding the authority of the council of the City of Maquoketa to impose a fee on a city utility operated by a utility board and to require that the city be provided free service by such utility. The questions that you have presented are:

> 1. Whether the city has the power to charge a municipal electric utility operated by a utility board pursuant to Iowa Code Chapter 388 (1985) to pay a fee equal to two percent of the total gross utility revenues?
>
> 2. Whether the city has the power to require by ordinance that the utility board provide free service to the city?

I.

The conduct of a city utility operated by a utility board is governed by Iowa Code chapter 388 (1985). See Iowa Code § 384.81(1) (1985). Because chapter 388 does not specifically provide that a city may charge a fee to a city utility operated by a utility board, your first question involves a determination as to whether the city has authority under its home rule powers to impose such a fee.

Amendment 25 (1968) to the Iowa Constitution, art. III, § 38A, provides that cities are granted home rule power and authority, not inconsistent with the laws of the general assembly. A city may exercise its home rule authority as it deems appropriate to protect and preserve the rights, privileges and property of the city or of its residents. Iowa Code § 364.1 (1985). Any limitation on a city's home rule powers by state law must be expressly imposed. Bryan v. City of Des Moines, 261 N.W.2d 685, 687 (Iowa 1978); Iowa Code §§ 364.1, 364.2(2) (1985). We have found no prohibition on the power of a city to impose a fee upon a municipal utility operated by a utility board. See Op.Att'yGen. #85-7-7(L). Therefore, pursuant to its home rule powers, it is our opinion that a city has the authority to assess a fee to a city utility operated by a utility board.

We would point out that the assessment of a fee by a city should be reasonably related to compensating the city for the increased costs to the city associated with regulation, inspection or the use of the streets and public ways in the operation of the utility. 9 McQuillin, Municipal Corporations §§ 26.36, 26.131 (1978). The nature of the activity to be controlled and the necessity and character of the burdens imposed by the activity upon the city are the main factors in determining the reasonableness of a fee. 9 McQuillin, Municipal Corporations § 26.36 (1978). We find no prohibition against a city imposing such a fee on the basis of a percentage of utility revenues, as long as the fee meets the standards discussed above. See 9 McQuillin, Municipal Corporations § 26.131 (1978).

Furthermore, a city may not impose a fee which is in fact a tax. A city's home rule power is limited in the imposition of taxes. Iowa Code section 364.3(4) (1985) restricts the power of a city to levy a tax by providing that: "A city may not levy a tax unless specifically authorized by a state law." We have found no statutory authorization for a city to levy a tax upon a city utility operated by a utility board. Therefore, the city could not impose what is in fact a tax and not a fee upon a municipal utility operated by a utility board. A tax has been defined as "a charge levied to pay the cost of government." Internorth, Inc. v. Iowa State Board of Tax Review, 333 N.W.2d 471, 476 (Iowa 1983). We do not decide in this opinion whether the fee imposed in the situation involving the City of Maquoketa is actually a fee or a tax, as that is a factual determination. While it is appropriate for this office to express an opinion on legal issues, it is improper for us to engage in judicial fact-finding in the context of an opinion. 1982 Op.Att'yGen. 353. We defer to the judgment of local officials who are privy to all the facts and circumstances involved in assessing this fee as to whether it is, in fact, a fee and not a tax.

II.

It is clear that a utility board has the authority to provide free service to the municipality.

Iowa Code section 384.91 (1985) provides that:

> The city shall pay for the use of or the services provided by the city utility, combined utility system, city enterprise, or combined city enterprise as any other customer, except that the city may pay for use or service at a reduced rate or receive free use or service so long as the city complies with the provisions, terms, conditions and covenants of any and all resolutions pursuant to which revenue bonds or pledge orders are issued and outstanding.

Iowa Code section 388.6 (1985) states:

> A city utility or a combined utility system may not provide use or service at a discriminatory rate, except to the city or its agencies, as provided in section 384.91.

See 1976 Op.Att'yGen. 554.

The narrower issue that you present is whether the city council or only the utility board has the authority to establish the rate at which service will be provided by the utility. It is the opinion of this office that only the utility board has the power to establish rates for service.

A utility board is the board of trustees established to "operate" a city utility. Iowa Code § 388.1(2) (1985). The establishment of a utility board must be approved by the voters of the city at an election. Iowa Code § 388.2 (1985). Upon approval by the voters, board members are appointed by the mayor subject to the city council's approval. Iowa Code § 338.3 (1985). The powers of a utility board include:

> The title of a utility board must be appropriate to the city utility, city utilities, or combined utility system administered by the board. A utility board may be a party to legal action. A utility board may exercise all powers of a city in relation to the city utility, city utilities, or combined

> utility system it administers, with the following exceptions:
>
> 1. A board may not certify taxes to be levied, pass ordinances or amendments, or issue general obligation or special assessment bonds.
>
> 2. The title to all property of a city utility or combined utility system must be held in the name of the city, but the utility board has all the powers and authorities of the city with respect to the acquisition by purchase, condemnation, or otherwise, lease, sale, or other disposition of such property, and the management, control, and operation of the same, subject to the requirements, terms, covenants, conditions, and provisions of any resolutions authorizing the issuance of revenue bonds, pledge orders, or other obligations which are payable from the revenues of the city utility or combined utility system, and which are then outstanding.
>
> 3. A board shall make to the council a detailed annual report, including a complete financial statement.
>
> 4. Immediately following a regular or special meeting of a utility board, the secretary shall prepare a condensed statement of the proceedings of the board and cause the statement to be published in a newspaper of general circulation in the city. . . .
>
> * * *

Iowa Code § 388.4 (1985).

> A utility board shall control tax revenues allocated to the city utility, city utilities, or combined utility system it administers and all moneys derived from the operation of the city utility, city utilities, or combined utility system, the sale of utility property, interest on investments, or from any other source related to the city utility, city utilities, or combined utility system.

> All city utility moneys received must be held in a separate utility fund, with a separate account or accounts for each city utility or combined utility system. If a board administers a municipal utility or combined utility system, moneys may be paid out of that utility account only at the direction of the board.

Iowa Code § 388.5 (1985).

Under Iowa Code section 384.89 (1985), a utility board "may" transfer surplus funds in its control to any other fund of the city, subject to the limitations expressed in that section.

Iowa Code section 384.84 (1985) governs the establishment of rates set by a utility board by providing that:

> 1. The governing body of a city utility, combined utility system, city enterprise, or combined city enterprise may establish, impose, adjust, and provide for the collection of rates to produce gross revenues at least sufficient to pay the expenses of operation and maintenance of the city utility, combined utility system, city enterprise, or combined city enterprise and, when revenue bonds or pledge orders are issued and outstanding pursuant to this division, shall establish, impose, adjust, and provide for the collection of rates to produce gross revenues at least sufficient to pay the expenses of operation and maintenance of the city utility, combined utility system, city enterprise, or combined city enterprise, and to leave a balance of net revenues sufficient at all times to pay the principal of and interest on the revenue bonds and pledge orders as they become due and to maintain a reasonable reserve for the payment of principal and interest, and a sufficient portion of net revenues must be pledged for that purpose. Rates must be established by ordinance of the council or by resolution of the trustees, published in the same manner as an ordinance. . . .
>
> 2. The governing body of a city utility, combined utility system, city enterprise or combined city enterprise may:

> a. By ordinance of the council or by resolution of the trustees published in the same manner as an ordinance, establish, impose, adjust, and provide for the collection of charges for connection to a city utility or combined utility system.
>
> * * *

"Governing body" is defined in Iowa Code section 384.80(4) (1985) as: "the public body which by law is charged with the management and control of a city utility, ... The council is the governing body of each city utility, . . . except that a utility board, as provided in chapter 388, is the governing body of the city utility, ..."

In addition to the limitations discussed above regarding a city's home rule authority, Iowa Code section 384.93 (1985) provides that, in the event of any conflict with the provisions of chapter 384 with the power of the city, chapter 384 controls.

> The enumeration in this division of specified powers and functions is not a limitation of the powers of cities, but the provisions of this division and the procedures prescribed for exercising the powers and functions enumerated in this division control and govern in the event of any conflict with the provisions of any other section, division, or chapter of the city code or with the provisions of any other law.

Iowa Code § 384.93 (1985).

From the above broad powers given to the utility board, including the authority to "operate" the city utility, it appears that it is the legislative intention that the utility board has the sole power to establish rates for service and the city is precluded from exercising any power in this area. No power to establish rates is specifically reserved to the city. To find otherwise would frustrate the legislative intention and would be inconsistent with chapter 388.

In conclusion, a municipality has the authority to impose a fee upon a city utility operated by a utility board based upon the costs to the city occasioned by the utility system's use of the streets and other city property. Although a utility board has the power to provide free service to the city, the sole rate setting authority resides with the utility board so that a

municipality has no power to require by ordinance that free service be provided to the city by the utility board.

Sincerely,

Ann DiDonato

ANN DiDONATO
Assistant Attorney General

AD:rcp

MUNICIPALITIES: Administrative Agencies; Airports. Iowa Code Ch. 330 (1985); Iowa Code Ch. 392 (1985); Iowa Code §§ 330.17, 330.18, 330.19, 330.20, 330.21, 330.22, 330.23, 330.24, 362.2(23), 364.1, 364.2(3), 392.1, 392.2, 392.3, 392.4; Iowa Const. art. III, § 38A. An airport commission is "an agency which is controlled by state law" so that the definition of an "administrative agency" in section 362.2(23) precludes the authority of a municipality to establish an airport board other than pursuant to Chapter 330. However, a board which does not have the power to manage and control the municipal airport, such as an advisory board, may be established pursuant to Chapter 392. (DiDonato to O'Kane, State Representative, 6-27-86) #86-6-6(L)

June 27, 1986

The Honorable Jim O'Kane
State Representative
1815 Rebecca Street
Sioux City, Iowa 51103

Dear Representative O'Kane:

You have requested an opinion of the Attorney General regarding the establishment by a city of an administrative agency to operate a municipal airport. Specifically, you have asked whether a city council may establish a board of trustees to operate a municipal airport pursuant to Iowa Code Chapter 392 (1985) or whether Iowa Code Chapter 330 (1985) precludes the applicability of Chapter 392 and provides the sole basis on which an administrative entity may be established and operate a municipal airport. You indicate that the board of trustees would have the power to employ necessary employees, enter into contracts with airlines and other users of the airport, lease airport property, make rules and regulations governing the public's use of the airport, set rates and fees for use of the airport, apply for grants, accept gifts and have exclusive control of the expenditures of the airport revenues and municipal funds allotted to the airport consistent with the budget as approved by the city council. The board of trustees would not be granted the power to tax or to pledge the credit of the city.

Iowa Code section 330.17 (1985) provides for the establishment of an airport commission as follows:

> **330.17 Airport commission -- election.**
> The council of any city or county which owns or acquires an airport may, and upon the council's receipt of a valid petition as provided in section 362.4, or receipt of a

> petition by the board of supervisors as provided in section 331.306 shall, at a regular city election or a general election if one is to be held within sixty days from the filing of the petition, or otherwise at a special election called for that purpose, submit to the voters the question as to whether the management and control of the airport shall be placed in an airport commission. If a majority of the voters favors placing the management and control of the airport in an airport commission, the commission shall be established as provided in this chapter.
>
> The management and control of an airport by an airport commission may be ended in the same manner. If a majority of the voters does not favor continuing the management and control of the airport in an airport commission, the commission shall stand abolished sixty days from and after the date of the election, and the power to maintain and operate the airport shall revert to the city or county. (Emphasis added).

Under section 330.17, it is clear that the management and control of the airport is the purpose for which the airport commission is established. 1968 Op.Att'yGen. 816, 822. It should be noted that the terms 'manage," and "administrate" mean essentially the same thing. See Andrew v. Sac County State Bank, 205 Iowa 1248, 1255-1256, 218 N.W. 24, 27 (1928); Webster's Third New International Dictionary 28, 1372 (1967). An airport commission established pursuant to section 330.17 is given plenary power to manage and control the municipal airport, with the exception of selling the airport, pursuant to Iowa Code section 330.21 (1985):

> **330.21 Powers -- funds.**
>
> The commission has all of the powers in relation to airports granted to cities and counties under state law, except powers to sell the airport. The commission shall annually certify the amount of tax within the limitations of state law to be levied for airport purposes, and upon certification the government body may include all or a portion of the amount in its budget.
>
> 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, and shall be deposited with the county treasurer or city clerk to the credit of the airport commission, and shall be disbursed only on the written warrants or orders of the airport commission, including the payment of all indebtedness arising from the acquisition and construction of airports and their maintenance, operation, and extension.

An airport commission is deemed to have the same powers that a city would have in the management and control of the airport if the city had retained the management and control. Airport Commission for City of Cedar Rapids v. Schade, 257 N.W.2d 500, 505 (Iowa 1977). It is clear that a municipality derives its powers to acquire, operate, and control an airport from its home rule authority pursuant to Iowa Const. art. III, § 38A and Iowa Code section 364.1 (1985). 1980 Op.Att'yGen. 487, 489.

Iowa Code Chapter 392 (1985) provides the procedure by which an administrative agency, in which the city retains more powers than with a municipal commission established pursuant to Chater 330, may be established. Section 392.1 provides that:

> **392.1 Establishment by ordinance.**
> If the council wishes to establish an administrative agency, it shall do so by an ordinance which indicates the title, powers, and duties of the agency, the method of appointment or election, qualifications, compensation, and term of members, and other appropriate matters relating to the agency. The title of an administrative agency must be appropriate to its function. The council may not delegate to an administrative agency any of the powers, authorities, and duties prescribed in division V of chapter 384 or in chapter 388, except that the council may delegate to an administrative agency power to establish and collect charges, and disburse the moneys received for the use of a city facility, including a city enterprise, as defined in section 384.24, so long as there are no revenue bonds or pledge orders outstanding which are payable from the revenues of the city enterprise. Except as otherwise provided in this chapter, the council may delegate rule-making authority to

> the agency for matters within the scope of the agency's powers and duties, and may prescribe penalties for violation of agency rules which have been adopted by ordinance. Rules governing the use by the public of any city facility must be made readily available to the public.

An administrative agency is defined in Iowa Code section 362.2(23) as:

> . . . an agency established by a city for any city purpose or for the administration of any city facility, as provided in chapter 392, except a board established to administer a municipal utility, a zoning commission and zoning board of adjustment, or any other agency which is controlled by state law. An administrative agency may be designated as a board, board of trustees, commission, or by another title. If an agency is advisory only, such a designation must be included in its title. (Emphasis added).

When a city establishes an administrative agency, it retains many of the powers that are given to a Chapter 330 airport commission. Chapter 392 limits the powers of an administrative agency established pursuant to section 392.1 in several ways. Section 392.2 prohibits an administrative agency from pledging the credit or taxing power of the city. Section 392.3 limits the power of an administrative agency to enter into contracts and agreements, requiring council review and approval unless otherwise stated in the ordinance. The administrative agency may take joint action with other public or private agencies pursuant to Iowa Code Chapter 28E subject to council approval. Iowa Code § 392.4 (1985).

This office has previously opined that once a city decides to create an airport commission pursuant to section 330.17, the state has preempted the control by the city of a Chapter 392 administrative agency for this purpose. 1980 Op.Att'yGen. 487, 489. That opinion determined that the control of a city airport commission by state law excepted it from the definition of a city "administrative agency" in section 362.2(23). Id. The more narrow question presented here is whether the definition of an "administrative agency" in section 362.2(23) precludes the authority of a municipality to establish an airport board other than pursuant to Chapter 330. This question involves a determination as to whether the state has preempted the city's

authority to establish a Chapter 392 administrative agency to manage and control a municipal airport.

In order to determine whether the state has preempted a city's authority to legislate in a certain area, the Iowa Supreme Court has looked to whether there is an express statutory intention to do so or whether comprehensive legislation in the area or the legislative history indicate an intention to preempt the city's authority.

It is a well established principle that municipal governments may not legislate those matters which the legislature has preserved to itself. City of Council Bluffs v. Cain, 342 N.W.2d 810, 812 (Iowa 1983). Under municipal home rule, a municipal corporation may not exercise any power which is "inconsistent with the laws of the General Assembly." Iowa Const. art. III, § 38A; Iowa Code § 364.1 (1985). This limitation on a city's authority can be termed to be preemption by the state. 1980 Op.Att'yGen. 54, 59. "An exercise of a city power is not inconsistent with a state law unless it is irreconcilable with the state law." Iowa Code § 364.2(3) (1985). The Iowa Supreme Court has further defined inconsistent to mean "incongruous, incompatible, irreconcilable." Green v. City of Cascade, 231 N.W.2d 882, 890 (Iowa 1975). Irreconcilable means "impossible to make consistent or harmonious." Id.

Preemption by the state of a city's authority to legislate in an area was discussed in City of Council Bluffs v. Cain, 342 N.W.2d 810 (Iowa 1983). In Cain, the Court stated that preemption by the legislature is accomplished by a specific expression in the statute or by covering the subject by statutes in such a manner as to demonstrate a legislative intention to preempt the field. 342 N.W.2d at 812. The legislative intention to preempt a certain area may also be determined by looking to the legislative history of a statute. Chelsea Theater Corp. v. City of Burlington, 258 N.W.2d 372, 373 (Iowa 1977). The Court in Cain explained that cities are not necessarily precluded from enacting ordinances on matters which have been the subject matter of state statutes. The traditional test is whether an ordinance prohibits an act permitted by a statute or permits an act prohibited by a statute. 342 N.W.2d at 812. The Iowa Supreme Court has stressed that State laws are to be interpreted in a way to render them harmonious with a city ordinance unless the two measures cannot be reconciled. Green v. City of Cascade, 231 N.W.2d at 890. An ordinance and state law may be irreconcilable when the ordinance defeats the intent and underlying purpose of the state legislation. City of Iowa City v. Westinghouse Learning Corp., 264 N.W.2d 771, 773 (Iowa 1978).

It is the opinion of this office that when a city chooses to place the management and control of a municipal airport in a commission or other type of administrative agency, the provisions of Chapter 330 apply and the City is precluded from establishing a Chapter 392 administrative agency to manage and control the airport.[1] This conclusion that the State has preempted the power of a city to act otherwise in establishing a city airport commission or board is based on both the legislative history of Chapter 330 and the comprehensiveness of the legislation. The legislative history of Chapter 330 has been previously discussed in 1980 Op.Att'yGen. 487. In that opinion, it was pointed out that prior to enactment of the Home Rule Act, Chapter 330 authorized cities, as well as townships and counties, to acquire and operate airports, establish rules for control thereof, and to fund the maintenance of the airport by collecting charges and issuing bonds. 1980 Op.Att'yGen. at 488. Although Chapter 330 was amended in 1972 to remove most of the references to cities, as home rule obviated the necessity for express statutory authority, the legislature chose to retain comprehensive statutory guidelines governing a municipal airport commission operating under the provisions of sections 330.17-330.24. 1980 Op.Att'yGen. at 489. It is the opinion of this office that the retention by the legislature of these provisions evidenced an intention to require that the question of the placing of the management and control of a municipal airport must be submitted to the voters of the city at an election and the establishment of the commission and the powers and duties to manage and control a municipal airport be as set forth in sections 330.17-330.24. This conclusion is bolstered by reviewing sections 330.17-330.24 which establish a broad and comprehensive procedure for establishing an airport commission and outlining its powers and duties. An ordinance establishing an airport board without the plenary powers placed in such commission under Chapter 330 and without following the provisions of Chapter 330 would be inconsistent with that statute.

In summary, because of the legislature's apparent intention to preempt a city's authority to establish any other type of agency to manage and control a municipal airport, it is the opinion of this office that a Chapter 330 airport commission is "an agency which is controlled by state law" so that the definition of an "administrative agency" in section 362.2(23) precludes the authority of a municipality to establish an airport

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[1]Section 330.17 also provides that a city "shall" submit the question of whether the management and control of a municipal airport shall be placed in an airport commission at an election upon the city council's receipt of a valid petition.

board other than pursuant to Chapter 330. However, a board which does not have the power to manage and control the municipal airport, such as an advisory board, may be established pursuant to Chapter 392.

Sincerely,

Ann DiDonato

ANN DiDONATO
Assistant Attorney General

AD/cal

MUNICIPALITIES: Library Board of Trustees and Civil Service. Iowa Code ch. 358B, 392 (1985); Iowa Code §§ 392.1, 392.5, 400.6 (1985); Iowa Code § 378.10 (1973); 1964 Iowa Acts, ch. 1088, § 196. Pursuant to House File 2403, which amends the civil service statute, whenever an Iowa Code chapter 392 library board of trustees is given the power to employ library employees, those employees are exempt from application of the civil service statute. (DiDonato to Drake, State Senator, 6-25-86) #86-6-5(L)

June 25, 1986

The Honorable Richard Drake
State Senator
420 Parkington Dr.
Muscatine, Iowa 52761

Dear Senator Drake:

You have requested an opinion of the Attorney General regarding whether employees of a municipal library are exempt from Iowa Code chapter 400 (1985) civil service coverage. You also question the continued applicability of 1938 Op.Att'yGen. 264 to the current Iowa Code provisions regarding civil service and a library board of trustees.

We would note at the outset that this opinion concerns only municipal libraries and does not include Iowa Code chapter 358B (1985) libraries which are part of a library district.

A city establishing or operating a municipal library may establish an administrative agency pursuant to Iowa Code chapter 392 (1985) to administer that library. Section 392.1 provides that:

> If the council wishes to establish an administrative agency, it shall do so by an ordinance which indicates the title, powers, and duties of the agency, the method of appointment or election, qualifications, compensation, and term of members, and other appropriate matters relating to the agency. The title of an administrative agency must be appropriate to its function. The council may not delegate to an administrative agency any of the powers, authorities, and duties prescribed in division V of chapter 384 or in chapter 388, except that the council may delegate to an administrative agency power to establish and collect charges, and disburse the moneys received for the use of a city facility, including a city enterprise, as

> defined in section 384.24, so long as there are no revenue bonds or pledge orders outstanding which are payable from the revenues of the city enterprise. Except as otherwise provided in this chapter, the council may delegate rule-making authority to the agency for matters within the scope of the agency's powers and duties, and may prescribe penalties for violation of agency rules which have been adopted by ordinance. Rules governing the use by the public of any city facility must be made readily available to the public.

Section 392.5 specifically provides for the establishment of a library board of trustees:

> A city library board of trustees functioning on the effective date of the city code shall continue to function in the same manner until altered or discontinued as provided in this section.
>
> In order for the board to function in the same manner, the council shall retain all applicable ordinances, and shall adopt as ordinances all applicable state statutes repealed by 64 GA, chapter 1088.
>
> A library board may accept and control the expenditure of all gifts, devises, and bequests to the library.
>
> A proposal to alter the composition, manner of selection, or charge of a library board, or to replace it with an alternate form of administrative agency, is subject to the approval of the voters of the city.
>
> The proposal may be submitted to the voters at any city election by the council on its own motion. Upon receipt of a valid petition as defined in section 362.4, requesting that a proposal be submitted to the voters, the council shall submit the proposal at the next regular city election. A proposal submitted to the voters must describe with reasonable detail the action proposed.
>
> If a majority of those voting approves the proposal, the city may proceed as proposed.

> If a majority of those voting does not approve the proposal, the same or a similar proposal may not be submitted to the voters of the city for at least four years from the date of the election at which the proposal was defeated.

Prior to enactment of section 392.5, a municipal library board of trustees was specifically given the power to "employ a librarian, such assistants and employees as may be necessary for the proper management of said library, and fix their compensation; . . ." and to "remove such librarian, assistants, or employees . . ." Iowa Code § 378.10 (1973); 1964 Iowa Acts, ch. 1088, § 196.

This office opined in 1938 Op.Att'yGen. 264 that, due to the language of the statute enumerating the power of a library board of trustees to employ librarians, assistants and employees, which was the same as the above quoted language, librarians, assistants and employees of municipal libraries operated by a library board of trustees do not come within the provisions of the civil service statute.

It appears that an amendment to Iowa Code section 400.6 (1985) by the seventy-first General Assembly resolves the answer to your questions. Section three of House File 2403 amends the exceptions section of the civil service statute by providing that:

> 400.6 APPLICABILITY -- EXCEPTIONS.
>
> This chapter applies to permanent full-time police officers and fire fighters in cities having a population of more than eight thousand, and to all appointive permanent full-time employees in cities having a population of more than fifteen thousand except:
>
> * * *
>
> 6. Employees of boards of trustees or commissions established pursuant to state law or city ordinances.
>
> * * *

It is the opinion of this office that the passage of this amendment to the civil service statute makes it clear that whenever a library board of trustees is given the power to employ

library employees, those employees are exempt from application of the civil service statute. To find otherwise would be to frustrate the intent of the legislature. The goal in construing a statute is to ascertain the legislative intent. The statute will be given a reasonable construction which will best effect its purpose rather than one which will defeat it. A sensible, workable, practical and logical construction should be given. Hansen v. State, 298 N.W.2d 263, 265 (Iowa 1980). Under section 392.5, a library board of trustees may be given the power to employ a librarian, librarian assistants and employees. This power of the board is clear because section 392.5 specifies that a city may provide for a library board of trustees to operate in the same manner as under the repealed statutes by adopting the applicable state statutes as ordinances. See 1976 Op.Att'yGen. 513. Whether a library employee is an employee of the board of trustees is determined by what powers the board is given in the ordinance establishing the board. See § 392.1.[1]

Therefore, due to the passage of this recent amendment to the civil service statute, we concur in the conclusion reached in 1938 Op.Att'yGen. 264, that employees of a library board of trustees are exempt from application of the civil service statute, although our agreement with that prior opinion's conclusion relies on a somewhat different statutory basis than the 1938 opinion.

In conclusion, pursuant to House File 2403, which amends the civil service statute, whenever a chapter 392 library board of trustees is given the power to employ library employees, those employees are exempt from application of the civil service statute.

Sincerely,

Ann DiDonato

ANN DiDONATO
Assistant Attorney General

AD:rcp

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[1] Although this office opined in 1976 Op.Att'yGen. 513 that library employees of a city library where the library board of trustees was given the power to hire and fire the librarian and other library employees were employees of the city and not of the board, it is our decision that this prior opinion does not remove those library employees who are employed by a board of trustees from the exception contained in section 3 of House File 2403. That prior opinion did not address the question of whether library employees who are employed by a library board of trustees are exempt from application of the civil service statute.

MUNICIPAL HOME RULE AMENDMENT/Collection of delinquent water charges: Iowa Const. art. III, § 38A; Iowa Code §§ 364.1, 384.84 (1985). Municipal home rule amendment does not authorize city ordinance creating a lien for delinquent water service bills. Municipal home rule amendment enables city ordinance terminating water service to premises until delinquent water bills are paid. Municipal ordinance requiring a maximum deposit equivalent to charge for two and a half months' service is not unreasonable. (Smith to Nystrom, State Senator, 6-25-86) #86-6-4(L)

June 25, 1986

The Honorable Jack Nystrom
State Senator
P.O. Box 177
Boone, Iowa 50036

Dear Senator Nystrom:

You have requested an opinion of the Attorney General concerning the power of a city to collect delinquent customer charges for water service. We paraphrase the first three questions accompanying your opinion request as follows:

> Under the Municipal Home Rule Amendment to the Iowa Constitution, to what extent may a city ordinance make a landlord liable for a tenant's water bills?

Before adoption of the Municipal Home Rule Amendment in 1968, Iowa had followed the general rule that liability for the debt of another cannot be imposed by ordinance in the absence of special agreement or statutory authorization for a lien on the property. Onawa v. Mona Motor Oil Co., 217 Iowa 1042, 252 N.W. 544 (1934).[1]

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[1] The Onawa case and decisions from other jurisdictions following the general rule are collected in the annotation: "Liability of Premises, or their owner or occupant, for Electricity, Gas, or Water Charges, Irrespective of Who is the User," 19 A.L.R. 3rd 1227, 1232-35. This annotation also collects cases from the few jurisdictions whose courts have sustained the validity of municipal ordinances making property owners responsible for water supplied to tenants in the absence of specific statutory authorization. The annotation does not consider the effect of constitutional or statutory provisions for municipal home rule.

The municipal home rule amendment to the Iowa Constitution states as follows:

> Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, 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.

Iowa Const. art. III, § 38A, effective November 5, 1968.

Several provisions of the Code of Iowa must be examined to determine whether laws of the General Assembly are inconsistent with a municipal ordinance that makes a landlord responsible for a tenant's water bills. In examining relevant statutory provisions, the test for inconsistency is whether the state, by broad and comprehensive legislation, has intended to exclusively regulate the subject matter and thereby preempt the right of the city to regulate.[2] We first examine Iowa Code § 384.84, subsection 1 (1985), which states as follows:

> The governing body of a city utility, . . . may provide for the collection of rates to produce gross revenues at least sufficient to pay the expenses of operation and maintenance of the city utility, ... Rates must be established by ordinance of the council or by resolution of the trustees, published in the same manner as an ordinance. All rates or charges for the services of sewer systems, sewage treatment, solid waste collection, solid waste disposal, or any of these, if not paid as provided by ordinance of council, or resolution of trustees, are a lien upon the premises served by any of these services upon certification to the county treasurer that the rates or charges are due. The lien shall not be less than five dollars.

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[2] The preemption test applicable to both the municipal and county home rule amendments is discussed in 1980 Op.Att'yGen. 54, 59-64.

> The county treasurer may charge two dollars for each lien certified as an administrative expense, which amount shall be added to the amount of the lien to be collected at the time of payment of the assessment from the payor and credited to the county general fund. The lien has equal precedence with ordinary taxes, may be certified to the county treasurer and collected in the same manner as taxes, and is not divested by a judicial sale.

Although § 384.84 authorizes ordinances providing for the collection of water rates, it creates liens only for delinquent rates or charges for the services of sewer systems, sewage treatment, solid waste collection, solid waste disposal, "or any of these." The general rule is that water rates or rents are not a lien on the property served unless it is so provided by statute or otherwise, in express, unambiguous terms. 12 McQuillin, Municipal Corporations § 35.38 (rev. ed. 1970), and authorities cited therein. The General Assembly has undoubted authority to specify the circumstances under which a lien will come into existence because liens affect land titles. See Op.Att'yGen. #79-9-10(L). There is an obvious state interest in assuring statewide uniformity in the processes by which real property is encumbered and liens of encumbrances are perfected and satisfied. It is our opinion that the numerous statutes providing for the creation and perfection of liens demonstrate the intent of the General Assembly to exclusively regulate the subject matter of lien creation, perfection and satisfaction.[3]

Accordingly, we conclude that the municipal home rule amendment does not authorize a municipal ordinance making delinquent water charges a lien on the premises served. The prior opinion of this office at 1976 Op.Att'yGen. 196 (#75-7-21)* is hereby overruled to the extent that it concludes unpaid water bills may be made a lien by municipal ordinance. The 1975 opinion observed that ordinance provisions for collection of rates "may include an assessment to be collected in the same manner as taxes." However, statutory authorization for levying and collecting special assessments is related to public improvements enumerated in Iowa Code § 384.37 (1985). The list of public improvements includes waterworks, water mains and extensions, but not water service. Thus, legislative authorization of special assessments for municipal water system improvements does

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[3] Iowa Code chs. 570-584 govern various "special" liens. Additionally, many other Code provisions create and regulate the existence of liens.

*NOTE: After issuance of this opinion, we discovered an inaccurate citation and failure to mention an additional relevant opinion. The opinion at 1976 Op.Att'yGen. 194 (#75-7-20) concluding that water bills may be made a lien by municipal ordinance was overruled by 1976 Op.Att'yGen. 884 (#76-12-12).

not include implied authorization to collect delinquent water service charges in the same manner as special assessments and taxes.

We must presume the existence of a rational legislative purpose for the exclusion of delinquent water charges from the list of delinquent municipal utility charges that are made liens by § 384.84, subsection 1.[4] The General Assembly could rationally have concluded that creation of liens for delinquent water bills would be unnecessary because of the ability of municipal water companies to physically shut off water service to premises in response to delinquent bills. Unlike water service, sewers cannot be shut off. Likewise, solid waste collection cannot be terminated without risking potential public sanitation problems. Thus, a rational legislature could have concluded that liens were needed to facilitate collection of delinquent bills for only those services that cannot practically be terminated.

It follows that in instances where a municipal service can be terminated in response to unpaid bills without creating a threat to public health or safety, the municipality has the power to terminate service and condition its resumption on the payment of all delinquent charges. In the case of rental property or change of ownership of premises, an ordinance conditioning restoration of service to the premises on payment of delinquent bills could affect contract relationships between landlord and tenant or buyer and seller. Iowa Code § 364.1 (1985) states, in pertinent part, that the "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." Although terminating water service until payment of delinquent water bills could have the effect of requiring that a landlord pay a tenant's bill or a buyer pay a seller's bill, such effect would be incidental to the municipal power to provide for collection of rates and thus not inconsistent with § 364.1.

The last question accompanying your request is whether a municipal water company can require a customer deposit equal to two and a half times the average monthly bill over the last twelve months. The General Assembly has enacted a relatively detailed statutory provision requiring the Iowa Commerce Commission to make rules regulating customer deposits required by gas and electric utilities.[5] There is no express mandate for the

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[4] Iowa Code § 4.1 (1985) requires a presumption that the General Assembly acted rationally and not by inadvertence.

[5] Iowa Code § 476.20, subsection 5 (1985).

Commerce Commission to control customer deposits charged by regulated water companies. However, the Commerce Commission has exercised implied authority to establish by rule a maximum customer deposit for regulated water companies equal to the maximum estimated charge for ninety days of service.[6] The Commerce Commission rule is relevant only by analogy since municipally-owned water companies are expressly exempted from Commerce Commission jurisdiction by Iowa Code § 476.1 (1985). Considering the relatively low cost of municipal water service in relation to the cost of other utilities, we think the maximum deposit allowed regulated water utilities by the Commerce Commission's rule is reasonable. A less stringent deposit equivalent to two and a half months' service charge would also be reasonable. Such a deposit requirement could complement the power to terminate service by reducing the frequency of need to resort to that more drastic collection method.

In conclusion, it is our opinion that the municipal home rule amendment to the Iowa Constitution does not enable a city ordinance making delinquent water service bills a lien on premises served because creation of a lien by ordinance would be inconsistent with laws of the General Assembly preempting the subject matter of lien creation. The municipal home rule amendment does enable a city ordinance terminating water service to premises until delinquent bills are paid because such an ordinance would provide for collection of water rates and its effect on private civil relationships would be incidental to the exercise of municipal power to collect water rates. An ordinance authorizing a maximum customer deposit equal to the charge for two and a half months of water service does not appear to be unreasonable.

Sincerely,

Michael H Smith

MICHAEL H. SMITH
Assistant Attorney General

MHS:rcp

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[6] 250 Iowa Admin. Code 21.4.

COUNTIES AND COUNTY OFFICERS; County Attorney; Board of Supervisors; County Budget. Authority of supervisors to regulate salary increases for assistant county attorneys. Iowa Code § 331.904(3) (1985). The county attorney is not required to adhere to uniform salary guidelines established by the board of supervisors for all county employees when determining salary increases for assistant county attorneys and the county board of supervisors may not require the county attorney to disclose the line item category from which salary increases are taken if the salaries are within the budget for the county attorney's office. (Brick to Shoning, State Representative, 6-25-86) #86-6-3(L)

June 25, 1986

The Honorable Don Shoning
State Representative
4221 Garretson Avenue
Sioux City, Iowa 51106

Dear Representative Shoning:

You have requested an opinion of this office concerning the propriety of a county attorney's action awarding salary increases to assistant county attorneys in apparent contravention of policies and procedures established by the county board of supervisors. More specifically, you question whether the county attorney can award salary increases to an assistant county attorney when:

> a) the increase to the assistant is higher than allowed by the uniform salary guidelines established by the board of supervisors for all county employees; and
>
> b) the board of supervisors is not advised from which line items in the county attorney's budget the salary increase is taken and why the funds are available.

We are advised that the factual background is as follows:

1. The County fiscal year runs from July 1 through June 30th. At the beginning of fiscal year 1985-86 there were eight full-time assistant county attorneys for Woodbury County. On August 15, 1985, one full-time assistant resigned. The position remained open until March of 1986 when the board of supervisors instituted a hiring freeze on all county employees.

2. When the hiring freeze went into effect in March of 1986, the county attorney had an extra $20,300.00 that had been

budgeted for the assistant county attorney position which was unfilled during most of the fiscal year.

3. On March 24, 1986, the county attorney completed "Personnel Action Forms" giving salary increases to six assistant county attorneys. The increases were awarded proportionately from the surplus funds with the salary increase spread over the remaining six bi-weekly pay periods of the fiscal year.

4. The county attorney calculated the salary increases to his assistants on a bi-weekly rather than on an annual basis. For example, one assistant's salary was $26,472.00 before the raise in pay. This assistant's bi-weekly gross salary was increased from $1,016.96 to $1,516.29 for the period beginning March 28, 1986 through June 30, 1986. This represents an actual salary increase for fiscal year 1985-86 of $2,995.98. Expressed as an annual salary, this assistant's pay increased from $26,472.00 to $29,468.00 (annual salary of $26,472.00 plus $499.33 increase for each of the six remaining pay periods).

5. At the time the salary increases were given, the county attorney notified the county personnel department, the county auditor, the board of supervisors and the affected employees that the raise was effective only for the period commencing March 28, 1986 through June 30, 1986.

6. Several years ago, the county board of supervisors developed salary range guidelines for all county employees. Historically, the county attorney has complied with these guidelines.

7. The Woodbury County Attorney's annual salary is $42,500.00.

I

The first question is whether the county attorney is permitted to increase the salary of an assistant county attorney beyond the maximum range allowed by the uniform salary guidelines established by the county board of supervisors.

The Office of the Attorney General has the statutory duty to give written opinions upon questions of law submitted by either members of the General Assembly or other state officers. Section 13.2(4) Code of Iowa (1985). However, there is no similar duty to function as an arbiter of factual disputes or disputes concerning the implementation of local personnel policy. Therefore, we will address only the legal questions concerning

the authority of the county attorney to determine the salaries of his assistants.

Implementation of county home rule is contained in Chapter 331 of the Iowa Code. Section 331.904(3) states as follows:

> 3. The annual salary of each assistant county attorney shall be determined by the county attorney within the budget set for the county attorney's office by the board. The salary of an assistant county attorney shall not exceed eighty-five percent of the maximum salary of a full-time county attorney. The county attorney shall inform the board of the full-time or part-time status of each assistant county attorney. In the case of a part-time assistant county attorney, the county attorney shall inform the board of the approximate number of hours per week the assistant county attorney shall devote to official duties.

Subsection (3) makes it clear that the county attorney is given the authority to determine the salary of each assistant as long as the salary is within the budget set by the Board for the county attorney's office. There is no statutory requirement that the county attorney seek prior board approval of the salaries awarded to his assistants, nor that he comply with the salary guidelines established for other county employees. Nevertheless, the county attorney's discretion is not unbridled. There are two limitations upon his discretion: First, the salary given to the assistant county attorney may not exceed eight-five percent of the maximum salary of a full-time county attorney; and second, the salary must be within the budget for the county attorney's office.

In this situation, we do not know what the "maximum full-time salary" for the Woodbury County Attorney may be, but we do know that the present county attorney earns $42,500 annually. Eight-five percent of that salary equals $36,125.00. Since there is no dispute about the fact that the money for the temporary increases was available in the budget, the statute does not prohibit the award of salary increases to his assistants as long as their annual salary does not exceed eighty-five percent of the county attorney's maximum full-time salary.

Although there is some dispute between the county attorney and the board of supervisors regarding the proper calculation of the assistants' annual salaries, we believe that the determina-

tion must be made according to how much money the assistant is actually paid on an annual basis. By referring to the example previously discussed, it is easy to see how problems in the eighty-five percent formula of § 331.904(3) result if the bi-weekly raise given on six pay periods is multiplied by twenty-six pay periods. The assistant county attorney in our example would have received an annual salary increased from $26,472.00 to $39,424.00. Clearly, this would be in violation of the county attorney's statutory discretion. In reality, the assistant's salary increased from $26,472.00 to an annual (albeit, one-time) gross income of $29,468.00. Applying the same rationale to the increases given to the other assistants reveals that the county attorney did not violate § 331.904(3). In fact, it appears that these increases were within the uniform guidelines set by the board of supervisors for all county employees.

II

Your second question is whether the county attorney is obliged to reveal from which line items in his budget salary increases are taken as well as the reasons for the availability of the excess funds.

In your correspondence you asked whether a county attorney's refusal to provide the above information to the supervisors constituted a violation of board policy. As stated previously in this opinion, this office cannot arbitrate disputes between county offices. Therefore, we will address the legal question of the authority of the county board of supervisors over the budgets of other elected county officers.

This office has reviewed the authority of the board of supervisors over the county budget process on numerous occasions. See Op.Att'yGen. #85-6-3; 1982 Op.Att'yGen. 389; 1982 Op.Att'yGen. 389; 1980 Op.Att'yGen. 664; 1968 Op.Att'yGen. 614. A review of these opinions reveals several relevant principles which can be summarized as follows:

1. The county board of supervisors is vested with considerable authority over the county budget process. However, once the budgets submitted by other county officers are reviewed and approved by the supervisors, there is no statutory authority for the supervisors to exercise any additional control over the budgets of elected county officials. The supervisors have the right to ensure that claims submitted by elected county officials are within that official's approved budget, but they have no right to refuse claims that are within

the budget and for a legitimate purpose. 1980 Op.Att'yGen. 664.

2. After approving a line item budget, the supervisors cannot refuse a claim submitted by an elected county officer on the ground that the claim exceeds the amount appropriated for the particular line category which that claim falls within.[1] Op.Att'yGen. #85-6-3.

3. While the supervisors control the total amount of money appropriated to an elected county office, there is no express statutory authority which would allow the supervisors to exercise further control over particular expenditures from the budgets of elected county officers. Op.Att'yGen. #85-6-3.

4. Authority over personnel matters relating to deputies and assistants resides with the elected principals unless a statute expressly gives authority to the board of supervisors. McMurray v. Board of Supervisors of Lee County, 261 N.W.2d 688, 691 (Iowa 1978).

5. Although the supervisors may exercise a significant degree of control over elected county officers' budgets prior to the budget's final adoption, once the budget is final, the supervisors' authority is significantly curtailed. Op.Att'yGen. #85-6-3.

From a review of the principles enunciated by the Iowa Supreme Court and the prior opinions of this office, we must answer your second question in the negative. There is no legal requirement for a county attorney to reveal the line items in his budget from which salary increases have been taken, nor is there any legal requirement that the county attorney explain the reasons for any surplus in his budget. We believe that elected county officials must act in good faith when submitting budget proposals in accordance with § 331.433(1) and should reasonably attempt to follow the final budget adopted by the supervisors. Nonetheless, we believe that, in order to properly fulfill their statutory duties and effectively exercise their responsibility to the people of the county, these officers must have the option of adjusting their budgets without having to supply detailed justifications to the Board of Supervisors. The discretion of

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[1]As noted in Op.Att'yGen. #85-6-3, there is no express statutory requirement in ch. 331 or any other chapter that counties use line item budgeting.

the county attorney to determine an appropriate salary for his assistant is controlled by the budgetary appropriations made by the supervisors and the requirements of Iowa Code section 331.904(3).

In conclusion, the county attorney is not required to adhere to uniform salary guidelines established by the board of supervisors for all county employees when determining salary increases for assistant county attorneys. Chapter 331 establishes autonomous county offices, each under an elected head. The only restrictions on the county attorney's discretion to determine the salary of an assistant county attorney is that the salary is within the budget for the county attorney's office and does not exceed eighty-five percent of the maximum salary of a full-time county attorney.

Finally, the county board of supervisors may not require the county attorney to disclose the line item category from which salary increases are taken if the salaries are within the budget.

Sincerely,

ANN MARIE BRICK
Assistant Attorney General

AMB:mlr

CRIMINAL LAW: Restitution plans as judgments. Iowa Code § 910.1(4), 910.3, 910.4, 909.6 (1985) and Iowa R. Cr. P. 24(d)(2). A restitution plan does not constitute a judgment and should not be treated as such; a fine receives separate treatment under the Code and is a judgment which constitutes a lien upon the offender's property. (Scase to Hines, Jones County Attorney, 6-5-86) #86-6-2(L)

June 5, 1986

Mr. John J. Hines
Jones County Attorney
123 North Maple
Monticello, Iowa 52310

Dear Sir:

You have requested an opinion of the Attorney General regarding the proper treatment of restitution repayment orders, entered pursuant to Iowa Code Chapter 910. Specifically you have asked whether a plan of restitution or a specific provision therein for the recoupment or payment of fines, court costs, or attorney's fees constitutes a judgment to be placed in the lien index.

I.

Code Section 910.1(4) defines restitution. Section 910.2, as amended by 1985 Iowa Acts, ch.195, § 66, provides in relevant part as follows:

> In all criminal cases except simple misdemeanors under chapter 321, in which there is a plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction is rendered, the sentencing court shall order that restitution be made by each offender to the victims of the offender's criminal activities and, if the court so orders and to the extent that the offender is reasonably able to do so, for court costs, court-appointed attorney's fees or the expense of a public defender when applicable.

Section 910.3 requires the sentencing court to develop a plan of restitution setting out the amount of restitution ordered and stating to whom restitution must be paid. When restitution has been ordered by the court and the offender is incarcerated, a "plan of payment" is to be prepared by the officer or individual charged with supervision of the offender. Iowa Code § 910.4 (1985).

As defined within Code sections 910.1 and 910.2, a restitution plan must include a provision for the payment of pecuniary damages suffered by the victim of the offender's criminal conduct. The sentencing court may, upon a determination that the offender has the ability to make such repayment, include in the restitution plan provisions for the recoupment of court costs and attorney's fees. See State v. Harrison, 351 N.W.2d 526 (Iowa 1984) (in which the court discusses the distinction between mandatory and discretionary restitution provisions).

It is important to note that fines are not included as part of the restitution which may be ordered under Chapter 910. Due to this omission, provisions for the payment of fines should not be included as part of the court's restitution order. Expressio unis est exclusio alterius is a principal rule of statutory construction: the express mention of one thing in a statute implies the exclusion of others. See In Re Estate of Wilson, 202 N.W.2d 41, 44 (Iowa 1972).

II

The question whether a restitution plan of payment order constitutes a judgment was discussed by the Iowa Supreme Court in State v. Haines, 360 N.W.2d 791 (Iowa 1985). The Court, in analyzing the constitutionality of Iowa's restitution statutes, noted that "the amount to be recouped is not treated as a judgment." Id. at 795. While the Court was referring to the recoupment of attorney's fees, it is our opinion that the same rule is applicable to restitution provisions relating to the payment of court costs.

Because a restitution plan of payment does not constitute a judgment, a lien should not be filed against the offender's property for amounts due under the plan. Iowa Code Section 910.4 sets out the sanctions which are available in the case of nonpayment of restitution. Proper sanctions include holding the offender in contempt of court, revoking probation, or extending the period of probation up to the maximum allowable for the offense committed. Execution upon the offender's property is not included within these sanctions and is therefore not a legal option.

III

While a restitution plan of payment does not constitute a judgment, the imposition of a fine does. Section 909.6 specifically provides that the imposition of a fine "shall have the force and effect of a judgment against the defendant for the amount of the fine." Additionally, Iowa R. Cr. P. 24(d)(2) provides that "[j]udgments for fines, in all criminal actions rendered, are liens upon the real estate of the defendant, and shall be entered upon the lien index in the same manner and with like effect as judgments in civil actions."

In conclusion, it is our opinion that a restitution plan of payment, issued pursuant to Iowa Code Chapter 910, does not constitute a judgment. Fines, however, do constitute judgments and should be entered in the lien index.

Sincerely,

Christie J. Scase

Christie J. Scase
Assistant Attorney General

TAXATION: Tax Amnesty; Eligibility For Tax Amnesty. House File 764, 71st G.A., 2d Sess. §§ 1-4. (1) Timely application for amnesty should not be denied merely because the Department of Revenue and Finance (Department) made an assessment in 1986 for pre-1986 delinquent taxes. (2) Payment of 1986 taxes with accruing interest and penalty and payment of penalty and interest accruing on and after January 1, 1986 upon pre-1986 tax delinquencies are not required as conditions for amnesty. (3) A taxpayer who submits an amnesty application and pays all delinquent tax liabilities as of December 31, 1985 plus fifty percent of the interest owed through December 31, 1985 is entitled to file a refund claim for overpayment within the applicable limitation periods in tax refund statutes as long as the overpayment is statutorily refundable. (4) The pre-1986 delinquent taxes which are "delinquent" for amnesty purposes are those for which the applicable period of limitations for the Department to assess or otherwise collect have not expired. (5) Pre-1986 delinquent taxes may be "delinquent" within the provisions of the amnesty law even if the taxpayer has timely filed a rule 730 Iowa Admin. Code § 7.8 protest. (6) If a taxpayer tenders amnesty payment subject to the condition that if the Department does not allow amnesty the payment will be returned to the taxpayer, the Department, in its discretion, can refuse to accept the tender. (Griger to Hatch, State Representative, 7-31-86) #86-7-5

July 31, 1986

Honorable Jack Hatch
State Representative
211 Fourth Street
Des Moines, Iowa 50309

Dear Representative Hatch:

You have requested an opinion of the Attorney General relating to the Iowa Tax Amnesty Act in House File 764, 71st G.A., 2d Sess. §§ 1-4. You pose the following six questions:

> 1. If a taxpayer is assessed by the Department after December 31, 1985 and prior to September 2, 1986, will the taxpayer be eligible for amnesty under the Act, if the tax delinquency relates to a period prior to December 31, 1985?
>
> 2. If a taxpayer pays all tax liabilities due from the taxpayer to the State through

December 31, 1985 plus interest equal to fifty percent of the interest that would have been owed through December 31, 1985, must the taxpayer pay all taxes due and/or penalty and/or interest accruing on or after January 1, 1986, in order to qualify for amnesty under the Act?

3. If a taxpayer submits an amnesty application and pays all delinquent tax liabilities as of December 31, 1985 plus fifty percent of the interest that would have been owed through December 31, 1985, will the taxpayer be permitted to file a claim for refund for any reason within the applicable statute of limitations?

4. Assuming a taxpayer properly filed a return and that the statute of limitations has expired pertaining to the collection of any delinquent taxes with respect to that return, are such taxes "delinquent" within the provisions of the Act which require the payment of "all taxes delinquent as of December 31, 1985 and due to this state" in order to qualify for amnesty?

5. Are taxes "delinquent" within the provisions of the Act, if a protest has been timely filed by a taxpayer and the taxpayer has a reasonable basis for the protest?

6. Will it be possible for a taxpayer to make an amnesty payment subject to the condition that if amnesty is not granted by the Department the payment will be returned to the taxpayer?

For purposes of your questions, the relevant portions of the amnesty statute are contained in § 3 of H.F. 764 which provides:

Sec. 3. AMNESTY PROGRAM.

1. The director shall establish a tax amnesty program. The amnesty program shall apply to tax liabilities delinquent as of December 31, 1985, including tax on returns not filed, tax liabilities on the books of the department as of December 31, 1985, or

tax liabilities not reported nor established but delinquent as of December 31, 1985. For a taxpayer who has a tax liability, the director shall accept cash, certified check, cashier's check or money order for the full amount of the tax liability.

2. The amnesty program shall be for a period from September 2, 1986 through October 31, 1986 for any tax liabilities which are delinquent as of December 31, 1985.

3. The amnesty program shall provide that upon written application by a taxpayer and payment by the taxpayer of amounts due from the taxpayer to this state for a tax covered by the amnesty program plus interest equal to fifty percent of the interest that would have been owed through December 31, 1985, the department shall not seek to collect any other interest or penalties which may be applicable and the department shall not seek civil or criminal prosecution for a taxpayer for the period of time for which amnesty has been granted to the taxpayer. Failure to pay all taxes delinquent as of December 31, 1985 and due to this state except those adjustments made pursuant to a federal audit completed after the effective date of this Act shall invalidate any amnesty granted pursuant to this Act. Amnesty shall be granted for only the taxable periods specified in the application and only if all amnesty conditions are satisfied by the taxpayer.

4. Amnesty shall not be granted to a taxpayer who is a party to an active criminal investigation or to a criminal litigation which is pending in a district court, the court of appeals, or the supreme court of this state for nonpayment or fraud in relation to any state tax imposed by a law of this state.

5. The director shall prepare and make available amnesty application forms which contain requirements for approval of an application. The director may deny any

> application inconsistent with sections 1 through 4 of this Act.

The Iowa Tax Amnesty Act requires the Director of Revenue and Finance to establish a tax amnesty program. Under this program, a taxpayer can make application to the Department of Revenue and Finance (Department) for amnesty with respect "to tax liabilities delinquent as of December 31, 1985." Section 3(1). These tax liabilities may be known or unknown to the Department as of December 31, 1985. Id.

The amnesty program exists from September 2, 1986 through October 31, 1986. Section 3(2). If the taxpayer's situation qualifies for amnesty, the taxpayer must pay all of the delinquent taxes covered by the program as well as a portion of the interest. Section 3(3). In exchange for such payment, interest attributable to the delinquent taxes is partially abated and any penalties are fully abated. Id.

The purpose of the amnesty program, in our judgment, is to encourage taxpayers to pay pre-1986 delinquent taxes which are collectible by the Department. The incentives for taxpayer payment of these delinquent taxes are partial abatement of interest, full abatement of penalties, and an assurance not to seek civil or criminal prosecution of the taxpayer for the amnesty period.

The amnesty statute appears to be fairly broad in terms of eligibility for amnesty. It applies to pre-1986 delinquent taxes, including those the delinquency of which were not even known to the Department. Express disqualification for amnesty for delinquent pre-1986 taxes is limited to those taxpayers who are parties to an active criminal investigation or to criminal litigation pending in an Iowa court "in relation to any state tax imposed by a law of this state." Section 3(4). With the exception of these criminal conditions, virtually all other pre-1986 delinquent tax situations appear to be eligible for the amnesty program.

The amnesty statute is, therefore, designed to encourage and motivate taxpayers to come forward and pay their pre-1986 tax delinquencies. To the extent that interpretation of the statute is necessary, the act should be reasonably or liberally construed to effectuate its purposes. See Isaacson v. Iowa State Tax Commission, 183 N.W.2d 693, 695 (Iowa 1981).

In American Home Products Corporation v. Iowa State Board of Tax Review, 302 N.W.2d 140, 142-3 (Iowa 1981), the Iowa Supreme

Court listed some general rules of statutory construction as follows:

> (1) In considering legislative enactments we should avoid strained, impractical or absurd results.
>
> (2) Ordinarily, the usual and ordinary meaning is to be given the language used but the manifest intent of the legislature will prevail over the literal import of the words used.
>
> (3) Where language is clear and plain, there is no room for construction.
>
> (4) We should look to the object to be accomplished and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.
>
> (5) All parts of the enactment should be considered together and undue importance should not be given to any single or isolated portion.
>
> (6) We give weight to the administrative interpretations of statutes, particularly when they are longstanding.
>
> (7) In construing tax statutes doubt should be resolved in favor of the taxpayer.

In Northern Natural Gas Company v. Forst, 205 N.W.2d 692, 697 (Iowa 1973), the Iowa Supreme Court stated:

> Defendant's stand also runs afoul of another rule of construction. Laws which establish taxpayer remedies are to be liberally construed. See 3 Sutherland, Statutory Construction, § 6707 (3d. 3d., Horack, 1943). More precisely, in construing taxing statutes we have held, if doubt exists, they are to be construed against the State and in favor of the taxpayer.

Mindful of the foregoing discussion of the amnesty law, which establishes a taxpayer remedy, and of the listing in the

case law of some of the rules of statutory construction, we will now respond to the six questions contained in your opinion request.

1. This office issued an opinion, Op.Att'yGen. #86-6-8(L), in which we opined that a timely application for amnesty should not be denied by the Department merely because the pre-1986 tax delinquency was assessed in 1986. The opinion states that, under these circumstances, the application for amnesty would be timely if made no later than October 31, 1986.

2. The answer to your second question is no. An examination of § 3(3) of H.F. 764 denotes that the taxpayer, to be eligible for amnesty, must pay all taxes which are covered by the amnesty program and which were delinquent as of December 31, 1985, and pay interest equivalent to half of the interest "that would have been owed through December 31, 1985." In exchange, for making such payment, "the department shall not seek to collect any other interest or penalties." If the taxpayer fails "to pay all taxes delinquent as of December 31, 1985 and due to this state" except for federal audit adjustments "completed after the effective date of this Act," amnesty is invalidated. By its terms, amnesty is invalidated if full payment of pre-1986 tax delinquencies are not made; no invalidation is provided solely because 1986 taxes are not paid.

A reading of the amnesty statute does not disclose any language which requires the taxpayer to pay any taxes accruing on or after January 1, 1986 as a condition for amnesty. The legislature has addressed and repeatedly referenced in the statute the payment of taxes "delinquent as of December 31, 1985." While we believe that the amnesty statute clearly does not require payment of 1986 taxes by the taxpayer as a condition for amnesty, even if the statute could somehow be said to be ambiguous on this point, application of the aforementioned rules of statutory construction would, in our opinion, lead to a construction that payment of 1986 taxes would not be necessary to secure amnesty. In particular, we would cite those rules involving consideration of the usual and ordinary language in the statute, the manifest intent of the legislature, the object to be accomplished and the mischief to be remedied, reading all parts of the amnesty statute together, liberal construction of taxpayer's remedies and strict construction of taxing statutes. Since taxes accruing in 1986 need not be paid as a condition for amnesty, it follows that the interest and penalties accruing on such 1986 taxes likewise need not be paid as a condition for amnesty. Of course, taxpayers should pay 1986 taxes together with any applicable interest and penalties, but their payment or nonpayment does not relate to eligibility for amnesty.

Our answer to your second question assumes that the 1986 taxes would not be covered by the situations in § 3(4) associated with criminal activity. If the conditions in § 3(4) were present, amnesty would not be available. Section 3(4) covers "any state tax imposed by a law of this state," not merely those taxes eligible for amnesty as defined in § 2(2). Section 3(4) supports our answer to your second question in that it demonstrates that when the legislature intended to deny amnesty for nonpayment of taxes, whether delinquent before or during 1986, the legislature so stated. Where a statue enumerates certain exceptions, the legislature is presumed to have intended no others. Iowa Farmers Purchasing Association, Inc. v. Huff, 260 N.W.2d 824, 827 (Iowa 1977).

With respect to interest and penalty accruing on or after January 1, 1986 for pre-1986 tax delinquencies, § 3(3) is clear and unambiguous that upon payment by the taxpayer of pre-1986 tax delinquencies covered by the amnesty program "plus interest equal to fifty percent of the interest that would have been owed through December 31, 1985, the department shall not seek to collect any other interest or penalties." There is no ambiguity in this language which fully abates the penalty and any interest accruing after December 31, 1985. We do not find any other language in the amnesty statute that would provide for payment of penalty and interest accruing in 1986 upon pre-1986 tax delinquencies as a condition for amnesty.

3. A taxpayer who submits an amnesty application and who pays all taxes delinquent as of December 31, 1985 plus fifty percent of the interest owed through December 31, 1985 should be eligible to file a tax refund claim for overpaid taxes within any applicable period of limitations associated with the tax refund statute as long as the refund claim involved a situation within the scope of the refund statute. For example, if the taxpayer has overpaid Iowa retail sales tax "as a result of mistake" in making an amnesty payment, the taxpayer would have to claim a refund "with the department within five years after the tax payment upon which a refund or credit is claimed became due, or one year after such tax payment was made, whichever time is the later." Iowa Code § 422.73(1) (1985).

The amnesty statute does not contain any language which would preclude refund claims for overpaid taxes. The amnesty statute does not expressly address refund claims. However, it is appropriate to consider the taxpayer remedy in the amnesty statute as in pari materia with other applicable tax statutes, including tax refund statutes. Northern Natural Gas Company v. Forst, 205 N.W.2d 692, 696 (Iowa 1973). Moreover, it would be absurd and unreasonable to construe the amnesty statute as precluding tax refunds in the event of mistaken overpayment where

a refund would be statutorily claimable by non-amnesty tax delinquents. Such a result would not comport with a liberal interpretation of the amnesty statute and could stand as an obstacle to thwart the objective of the amnesty law, namely, to encourage taxpayers to pay pre-1986 delinquent taxes covered by the amnesty program.

4. The answer to your fourth question is no. We are of the opinion that "all taxes delinquent as of December 31, 1985 and due to this state" for which payment must be made to secure amnesty are those taxes within the scope of collectibility by the Department. If a tax is uncollectible due to the expiration of an applicable statutory period for the Department to make an assessment or to otherwise proceed to collect the tax, the tax would not be collectible by the Department in the first instance. We fail to discern in the amnesty law an explicit purpose to make payable what would otherwise be noncollectible taxes.

We do not believe that it makes any sense to construe the amnesty law as requiring payment of taxes otherwise non-collectible by the Department under the circumstances set forth in your question. Such a construction could discourage tax delinquents from applying for amnesty, thereby defeating amnesty and producing unreasonable consequences. For example, assume that the taxpayer has filed Iowa individual income tax returns for pre-1986 tax years, but has paid insufficient amounts of tax. Assume further that the three year period in Iowa Code § 422.25(1) (1985) is applicable. Also, assume that the taxpayer made insufficient payments for a ten year period, of which seven years are, by reason of the three year limitation period in § 422.25(1), beyond the ability of the Department to assess. If the amnesty law is construed to require payment of the otherwise unassessable seven years' taxes and half of the interest thereon, the amount payable for amnesty could be greater than the amount collectible, without amnesty, for the three year period. Such an impractical consequence is worthy of consideration in the construction of the amnesty law. Northern Natural Gas at 697.

The manifest intent of the amnesty law is to encourage, not discourage, taxpayers to pay their pre-1986 tax delinquencies. This intent is effectuated if the amnesty statute is liberally construed so that the taxpayers are motivated to pay all pre-1986 taxes which are not, by limitation period, beyond the reach of collectibility by the Department in the first instance.

5. Even if a taxpayer has filed a protest pursuant to Department rule 730 Iowa Admin. Code § 7.8 to contest a Department assessment of delinquent pre-1986 taxes and, has a reasonable basis for the protest, the taxes are still "delinquent" as long as they are due and owing. Matter of

Chicago, Milwaukee, St. Paul & Pacific Railroad Company, 334 N.W.2d 290, 293 (Iowa 1983). The mere fact that the taxpayer, in good faith, challenges the Department on the question of whether a tax is due does not convert an otherwise delinquent tax into nondelinquent status. The amnesty statute does not contain any language which would make any such distinction. Of course, it follows that taxpayers who have protested a Department assessment of pre-1986 taxes are eligible for amnesty as long as they are not otherwise disqualified. Should these taxpayers elect to pay only their undisputed pre-1986 tax delinquencies and continue even to the point of litigation to resist payment of disputed pre-1986 taxes, their amnesty would be entirely invalidated in the event that the Department prevails with respect to the dispute. Section 3(3).

6. With respect to your final question, the amnesty statute does require payment by the taxpayer of the pre-1986 tax delinquencies and fifty percent of the interest accrued through December 31, 1985. Under the circumstances of your question, the taxpayer is placing a condition upon such "payment."

In Chicago, Rock Island & Pacific Railway Company v. Slate, 213 Iowa 1294, 241 N.W. 398 (1932), the taxpayer sent to the county treasurer an amount representing installment payments of general property taxes, but not a separate emergency tax. The taxpayer expressly informed the treasurer that the amount paid must be applied to the general property taxes which the taxpayer conceded were due, and should not be applied to the separate emergency tax that the taxpayer was challenging. The Iowa Supreme Court held that the treasurer was unauthorized to accept payment except as specified by the taxpayer. The Court stated:

> If the defendant was not willing to accept the voucher in accordance with its express terms, he should have returned it. He was not authorized to cash it and apply it except as definitely specified in the letter with which the draft was transmitted.

213 Iowa at 1303, 241 N.W. at 402.

Generally, a tender of payment of taxes must be unconditional. 84 C.J.S. Taxation § 618 (1954) at 1237. A taxpayer who purports to tender payment of taxes for amnesty purposes on the condition that if the Department does not grant amnesty the payment will be returned to the taxpayer has not made an unconditional tender to pay the taxes. Under such circumstances, the Department, in the exercise of discretion, may decline to accept the proffered tender payment. If the Department declines to

accept such a conditional payment tender, that tender would not constitute "payment" of taxes for amnesty purposes.

Very truly yours,

Harry M. Griger

Harry M. Griger
Special Assistant Attorney General

HMG:cmh

CITIES; TOWNSHIPS; Chapter 28E Agreements; Fire Protection Service: Iowa Code ch. 28E (1985); §§ 28E.1-28E.6; 282.12; 359.42. A township may enter into a chapter 28E agreement with either a city or a private organization to provide fire protection services in the township. Such an agreement must meet the requirements of sections 28E.5 and 28E.6; alternatively, if the agreement is between two public agencies, the requirements of section 28E.12 may be followed instead. (Weeg to O'Kane, State Representative, 7-16-86) #86-7-4(L)

July 16, 1986

The Honorable Jim O'Kane
State Representative
1815 Rebecca Street
Sioux City, Iowa 51103

Dear Representative O'Kane:

You have requested an opinion of the Attorney General on two questions relating to the provisions of fire protection services by the township. Your questions are as follows:

> Is it legal for township trustees and city councils to contract with a community fire/rescue organization to provide services; or, must the contract be made between the city and township for the formation and support of such an organization?
>
> Are all specifications listed in Chapter 28E.5 considered essential elements of such a contract to ensure legality and validity?

As you mention in your request, Iowa Code section 359.42 (1985) governs the provision of fire protection service by the township trustees and provides in relevant part as follows:

> The trustees of each township shall provide fire protection service for the township, exclusive of any part of the township within a benefited fire district and, in counties not providing ambulance services, may provide ambulance service. The trustees may purchase, own, rent or maintain fire protection service or ambulance service apparatus or equipment or both kinds of apparatus or equipment and provide housing for the equipment. . . . The trustees may contract with any public or private agency

> under chapter 28E for the purpose of providing any service or system required or authorized under this section.

(emphasis added).

Chapter 28E provides a mechanism for state and local governmental bodies to cooperate with other agencies, public or private, in providing joint services or facilities. See §§ 28E.1, 28E.3, and 28E.4. Section 28E.4 specifically provides that a public agency, which is defined in section 28E.2 as including any political subdivision of the state, may enter into a chapter 28E agreement with "one or more public or private agencies" for joint or cooperative action under this chapter. "Private agencies" are defined in section 28E.2 as any individual or form of business organization authorized by law. Under these broad definitions and the reference to "private agencies" in section 359.42, we believe a township is authorized to enter into a chapter 28E agreement with a city and/or a private organization within the township for provision of fire protection services. See Op.Att'yGen. #85-8-8(L); 1974 Op.Att'yGen. 316 (board of supervisors may enter into chapter 28E agreement with private agency to develop plan for implementing welfare services); 1972 Op.Att'yGen. 140 (county board of supervisors may enter into chapter 28E agreement with private agency for secondary road construction).

Sections 28E.4, 28E.5 and 28E.6 set forth the requirements for a ch. 28E agreement for joint or cooperative action. Section 28E.5 states:

> Any such agreement shall specify the following:
>
> 1. Its duration.
>
> 2. The precise organization, composition and nature of any separate legal or administrative entity created thereby together with the powers delegated thereto, provided such entity may be legally created.
>
> 3. Its purpose or purposes.
>
> 4. The manner of financing the joint or co-operative undertaking and of establishing and maintaining a budget therefor.
>
> 5. The permissible method or methods to be employed in accomplishing the partial or complete termination of the agreement and for

> disposing of property upon such partial or complete termination.
>
> 6. Any other necessary and proper matters.

(emphasis added) As emphasized above, the statute provides the agreement shall specify the enumerated items. The term "shall" imposes a duty. See § 4.1(36)(a). Thus, to the extent applicable,[1] a chapter 28E agreement is required to contain the items specified in section 28E.5.

However, we believe section 28E.12 provides an alternative to the requirements discussed above. That section provides:

> Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity, or undertaking which any of the public agencies entering into the contract is authorized by law to perform, provided that such contract shall be authorized by the governing body of each party to the contract. Such contract shall set forth fully the purposes, powers, rights, objectives, and responsibilities of the contracting parties.

We have generally opined on a number of occasions that section 28E.12 authorizes two public agencies to contract to perform certain authorized activities.[2] In none of these opinions have we expressly discussed the relationship between section 28E.12 and sections 28E.5 and 28E.6. However, applying the definition

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[1] For example, section 28E.5(2) authorizes, but does not require, the creation of a separate entity for the administration of a chapter 28E agreement. Section 28E.6 makes this clear by expressly providing that if the agreement does not establish a separate administrative entity, the agreement must meet other requirements, such as providing for administration of the agreement and managing any property. Thus, if such an entity is created, the requirements of section 28E.5(2) must be satisfied; if such an entity is not created, compliance with this subsection is unnecessary. Instead, compliance with section 28E.6 is required.

[2] See 1974 Op.Att'yGen. 770; 1974 Op.Att'yGen. 748; 1974 Op.Att'yGen. 678; 1974 Op.Att'yGen. 592; 1972 Op.Att'yGen. 110; 1970 Op.Att'yGen. 92; 1970 Op.Att'yGen. 349; 1968 Op.Att'yGen. 307; 1966 Op.Att'yGen. 134.

of "public agencies" set forth in section 28E.2, it is our opinion that section 28E.12 separately authorizes governmental bodies to contract with each other to perform authorized governmental services. If this section is used as authority to contract, rather than sections 28E.4 through 28E.6, then the contract must meet the requirements of this particular section in lieu of compliance with sections 28E.5 and 28E.6, i.e., it must "set forth fully the purposes, powers, rights, objectives, and responsibilities of the contracting parties."

You enclosed with your opinion request a copy of two agreements, one titled "model agreement" and the other titled "actual agreement," for the operation of fire and rescue services and ask whether such contracts are valid under either chapter 28E or section 359.42. This office cannot make this determination. We do review chapter 28E agreements which are interstate agreements pursuant to the specific requirement of section 28E.9. While our office is available to provide advice on general questions of law, we do not have the resources to provide the day-to-day legal advice needed by governmental bodies such as these. Questions of contract drafting and validity are best answered by legal counsel for the governmental bodies in question. That person is in a better position than this office to understand the needs and advocate the interests of the governmental entity in question. We can, however, note certain issues which appear on the face of the agreement.

The "actual agreement" is ambiguous in several respects. It states that it is a contract between the Lawton Community Fire and Rescue as the party of the first part and the City of Lawton, Township of Banner, and the Township of Concord as the party of the second part. Assuming that the Lawton Community Fire and Rescue is a private organization and that that entity rather than the City of Lawton is performing the service, section 28E.12 would not provide the authority for the agreement. Instead, if chapter 28E is to be relied upon as authority for the agreement, compliance with sections 28E.5 and 28E.6 would be necessary. Part II of the agreement, however, states that the City of Lawton will "operate the fire department," provide the volunteers to operate the equipment, receive and disburse the moneys, build a fire station, etc. If the Community Fire and Rescue is indeed a city department, then a contract between the city and townships under sections 28E.5, 28E.6, or 28E.12 would be appropriate.

We do note one significant difference between the two contracts submitted is that the "model agreement" establishes a separate administrative agency for the provisions of these services while the "actual agreement" does not. Chapter 28E does not require a separate agency to be established to administer a

chapter 28E agreement, but does require that, if such an agency is established, the requirements of section 28E.5(2) be followed. If section 28E.5(2) does not apply, section 28E.6 does. See footnote 1, supra. Section 28E.6(1) would require that the agreement contain a provision for an administrator or a joint board responsible for administering the joint or cooperative undertaking. Alternatively, as discussed above, section 28E.12 may apply.

We also note that the "actual agreement" does not specify the duration of the agreement as required in section 28E.5(1), nor does it include a specific statement of the purpose of the agreement as required by section 28E.5(3), though the purpose of the agreement is evident upon reading the agreement itself. We do not reach any conclusions as to the adequacy of the "actual agreement's" compliance with the remaining requirements of section 28E.5 or the requirements of section 28E.6. Again, we refer these issues to legal counsel for the parties to this agreement.

In conclusion, it is our opinion that a township may enter into a chapter 28E agreement with either a city or a private community fire and rescue organization to provide fire protection services in the township. Such an agreement must meet the requirements of sections 28E.5 or 28E.6; alternatively, if the agreement is between two public agencies, the requirements of section 28E.12 may be followed instead.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

MUNICIPALITIES: Application of Veterans Preference to City Administrator or City Manager. Iowa Code ch. 70 (1985); Iowa Code §§ 70.1, 70.8, 372.4, 372.6, 372.7, 372.8, 400.6, 400.10 (1985); House File 2403, 71st G.A., 2d Sess. § 3 (1986); 1986 Iowa Acts, ch. _____, § _____. A city manager is excepted from application of the veterans preference law under section 70.8. The position of city manager or city administrator is also exempt from application of the veterans preference law under the civil service statute. (DiDonato to Spear, State Representative, 7-16-86) #86-7-3(L)

July 16, 1986

The Honorable Clay Spear
State Representative
1914 River
Burlington, Iowa 52601

Dear Representative Spear:

We have received your request for an opinion of the Attorney General concerning whether veterans preference applies to the appointment of a city administrator. Specifically, you question whether the exception to the veterans preference law enumerated in Iowa Code section 70.8 (1985) applies to a city administrator.[1]

Iowa Code chapter 70 (1985) entitles veterans to preference in municipal employment and appointment by providing that:

> 70.1 Appointment and employment applications.
>
> 1. In every public department and upon all public works in the state, and of the counties, cities, and school corporations thereof, honorably discharged persons from the military or naval forces . . . who are citizens and residents of this state are entitled to preference in appointment and employment over other applicants of no greater qualifications. The preference in appointment and employment of cities under a

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[1] For purposes of this letter, it is presumed that the "city administrator" referred to is in fact a "city manager" whereby the city administrator has the same duties and powers as a city manager. See Iowa Code § 372.8 (1985); 1978 Op.Att'yGen. 530.

> municipal civil service is the same as provided in section 400.10.
>
> * * *

Iowa Code Supp. § 70.1 (1985).

Iowa Code section 70.8 (1985) provides for exceptions to the veterans preference law:

> Nothing in this chapter shall be construed to apply to the position of private secretary or deputy of any official or department, or to any person holding a strictly confidential relation to the appointing officer.

This same exception was construed by the Iowa Supreme Court in Tusant v. City of Des Moines, 231 Iowa 116, 300 N.W. 690 (1941). The Tusant court reasoned that if deputies are exempt, then the person appointing the deputy is also exempt, and held that this statutory exception to the veterans preference law indicated a legislative intent that it did not apply to those persons who are department heads. 231 Iowa at 126, 300 N.W. at 695. Tusant also pointed out that the veterans preference law was not meant to apply to every position of employment and that there must be some discretion exercised by the appointing officers as to certain positions requiring discretion and judgment. Id. The exception in section 70.8 has also been construed in Bianco v. Mills, 248 Iowa 365, 80 N.W.2d 753 (1957). Bianco held that the position of an attorney in a municipal legal department was strictly confidential to the appointing officer, the city council, and therefore exempt from the veterans preference law. 248 Iowa at 369, 80 N.W.2d at 755. The Court pointed out that the term "strictly confidential relation" in section 70.8 has been held to be very broad and not confined to any specific association of the parties but to apply generally to all persons associated by any relation of trust and confidence. 248 Iowa at 368, 80 N.W.2d at 754. Bianco stated the well-established rule that courts are inclined to regard an appointee whose duties are not merely clerical and which require skill, judgment, trust, and confidence as holding a strictly confidential relation to the appointing officer or board. Id.

The position of city manager clearly requires the exercise of skill and judgment and requires a strictly confidential relation to the appointing board. A city manager is appointed by the city council. Iowa Code §§ 372.4, 372.6-372.8 (1985). A city manager is the chief administrative officer of the city.

Iowa Code § 372.8(1) (1985). The broad powers and duties of a city manager, which may include the power to appoint administrative assistants and employ, reclassify or discharge all employees, are enumerated in Iowa Code section 372.8 (1985). The provisions of the veterans preference law have not changed in material part since these decisions. Under Tusant and Bianco, it is the opinion of this office that section 70.8 would clearly apply to exempt a city manager from application of the veterans preference law. See Granite Falls Hospital and Manor Board v. State, Department of Veterans Affairs, 291 N.W.2d 683, 686 (Minn. 1980).

Furthermore, a city manager or city administrator is exempt from application of the veterans preference law in cities operating under civil service. Section 70.1 provides that veterans preference for cities under civil service is the same as provided in section 400.10. That section applies the veterans preference "[I]n all examinations and appointments under" chapter 400. Iowa Code Supp. § 400.10 (1985). Section 400.6 as recently amended specifically exempts the city manager or city administrator from application of the civil service law[2]:

> 400.6 Applicability -- exceptions.
>
> This chapter applies to permanent full-time police officers and fire fighters in cities having a population of more than eight thousand, and to all appointive permanent full-time employees in cities having a population of more than fifteen thousand except:
>
> * * *
>
> 3. The city manager or city administrator and assistant city managers or assistant city administrators.

House File 2403, 71st G.A., 2d Sess. § 3 (1986).

Therefore, the position of city manager or city administrator is not an examination or appointment under chapter 400 and the veterans preference would not apply under section 400.10.

In conclusion, a city manager is excepted from application of the veterans preference law under section 70.8. The position

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[2] Prior to this amendment, section 400.6 exempted the city manager and administrative assistants to the manager from application of civil service. Iowa Code § 400.6(1)(a) (1985).

of city manager or city administrator is also exempt from application of the veterans preference law under the civil service statute.

Sincerely,

Ann DiDonato

ANN DiDONATO
Assistant Attorney General

AD:rcp

STATE OFFICERS AND DEPARTMENTS/Code Editor: Iowa Code §§ 4.6, 110.1, Iowa Code Supp. § 14.13 (1985); 1986 Iowa Acts, H.F. 2414. Repealer clause in 1986 Iowa Acts, H.F. 2414, § 1, contains manifest clerical error which Code Editor should correct in preparing 1987 edition of Iowa Code. (Smith to Wilson, Director, State Conservation Commission, 7-8-86) #86-7-2(L)

July 8, 1986

Mr. Larry J. Wilson, Director
State Conservation Commission
Wallace State Office Building
L O C A L

Dear Mr. Wilson:

You have requested an opinion of the Attorney General concerning the authority of the Code Editor to correct an error in a 1986 amendment of Iowa Code section 110.1 (1985) when compiling the 1987 Code of Iowa.

Before addressing the authority of the Code Editor, we must consider the effect of the 1986 amendment. Iowa Code section 110.1 (1985) requires possession of licenses for various fishing, trapping and hunting activities, and sets fees for the various types of licenses. Six categories of fishing licenses are set forth in § 110.1(1), paragraphs "a" through "f" (1985), as follows:

> 1. Fishing licenses:
> a. Legal residents except as otherwise provided ..... $ 8.50
> b. Lifetime license for legal residents permanently disabled or sixty-five years of age or older ..... $ 8.50
> c. Nonresident license ..... $ 15.50
> d. Three-day license for resident ..... $ 4.50
> e. Three-day license for nonresident ..... $ 5.50
> f. Trout stamp ..... $ 8.00

Section 110.1 was amended by 1986 Iowa Acts, H.F. 2414, § 1, which states as follows:

> Section 1. Section 110.1, subsection 1, paragraphs c and d, Code 1985, are amended by

striking those paragraphs and inserting in lieu thereof the following:

c. Three-day license for residents and nonresidents ..... $ 5.50

Your letter explains that H.F. 2414 should have repealed paragraphs "d" and "e" and that the reference to paragraphs "c" and "d" was due to a drafting error. If the language of the bill were given literal effect, the Conservation Commission's authority to issue annual nonresident fishing licenses would be repealed, and § 110.1(1) would contain two redundant provisions for three-day nonresident fishing licenses. There are two reasons for questioning whether the words in the 1986 amendment should be given literal effect. First, the resulting redundant three-day fishing license provisions indicate an error in the drafting process. Second, repeal of the annual nonresident fishing license is inconsistent with retaining nonresident hunting and fur harvester licenses. Limiting non-resident fishing licenses to a three-day duration also would be an abrupt departure from long-established non-resident fishing license provisions. See, e.g., Iowa Code §§ 1725 and 1727 (1924).

It is our opinion that the redundancy resulting from literal interpretation of H.F. 2414, § 1, renders the statute ambiguous because the General Assembly obviously did not intend to enact redundant statutes. When a term in a legislative act is ambiguous, rules of statutory construction are invoked to aid in determining its meaning. Willis v. City of Des Moines, 357 N.W.2d 567, 570 (Iowa 1984). Interpretation of an ambiguous statute must include consideration of the consequences of a particular construction. Iowa Code § 4.6 (1985). It must be presumed that the legislature intended an entire statute to be effective with a just and reasonable result. Iowa Code § 4.4(2), (3) (1985); Kohrt v. Yetter, 344 N.W.2d 245, 246 (Iowa 1984). A statute should not be construed so as to make any part of it superfluous unless no other construction is reasonably possible. George H. Wentz, Inc. v. Sabasta, 337 N.W.2d 495, 500 (Iowa 1983).

The consequences of a literal construction of H.F. 2414 would be insertion of a superfluous three-day fishing license provision in Iowa Code § 110.1 and illogical repeal of the annual nonresident fishing license provision. Literal construction of the statute would require a visiting nonresident to buy several three-day licenses to fish repeatedly during an extended visit. For example, during a four-week stay at a lake resort, ten three-day licenses would be needed for a nonresident to fish daily.

We cannot presume that the General Assembly intended to discourage nonresident fishing by limiting the duration of licenses to three days. We therefore conclude that the ambiguity in H.F. 2414, § 1, must be resolved by interpreting section 1 as a repeal of Iowa Code section 110.1(1), paragraphs "d" and "e", the provisions, respectively, for resident and nonresident three-day fishing licenses. House File 2414 establishes a new three-day license provision applicable to both residents and nonresidents. This construction of the statute conforms to the manifest legislative intent, which must prevail over the literal import of the words used. Olds v. Olds, 356 N.W.2d 571 (Iowa 1984).

We have concluded that H.F. 2414, § 1, contains an error which should not be given effect. The Code Editor has authority to correct all manifest grammatical and clerical errors including punctuation but without changing the meaning, and to prepare comments deemed necessary for a proper explanation of the manner of printing the section or chapter of the Code. Iowa Code Supp. § 14.13(1), paragraphs "b" and "e" (1985). "Clerical error" has been defined as an error made in copying or writing. Webster's Third New International Dictionary (1966).

The circumstances of enactment of H.F. 2414 support the conclusion that a clerical error was made in drafting the repealer clause relating to the nonresident fishing license provisions in § 110.1(1). The bill originated as House Study Bill 731, assigned to the House Committee on Natural Resources and Outdoor Recreation.[1] The study bill did not include any provision amending § 110.1. In committee the study bill was amended by inserting the fishing license revisions as a new section one. The study bill was then reported out of committee as H.F. 2414.[2] The explanation appended to H.F. 2414, in pertinent part, stated as follows:

> Section one replaces separate three-day fishing licenses for residents and nonresidents with a single license.

The explanation contradicted section 1 of the text which provided for repeal of section 110.1(1), paragraphs "c" and "d". The

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[1] 1986 H.J. 448.

[2] House File 2414 in the form reported out by the House Committee on Natural Resources, together with subsequent amendments, is contained in "House Bills, Files 2300-2449, Volume 2, 71st General Assembly, 1986 Regular Session" (compiled and maintained by the Iowa State Law Library).

explanation would be consistent with repeal of paragraphs "d" and "e".

Explanations appended to bills are not generally reliable as guides to legislative intent because explanations are not amended to conform with amendments of bill text. House File 2414 was amended several times by the House, Senate and a conference committee before the conference committee report was adopted. However, none of the amendments affected the fishing license provisions in section one of the bill. To identify the intent of an ambiguous legislative enactment the Iowa Supreme Court has examined the explanation appended to the act in bill form, e.g., as in Good Development Co. v. Horner, 260 N.W.2d 524 (Iowa 1977), and American Home Products Corp. v. Iowa State Board of Tax Review, 302 N.W.2d 140 (Iowa 1981). The explanation appended to H.F. 2414 clearly stated a legislative intent to consolidate three-day resident and non-resident fishing licenses rather than repeal the authorization to issue annual non-resident fishing licenses. In this instance, the discrepancy between the explanation and the bill text reinforces the conclusion that the repealer clause in the text contains a manifest clerical error.

It is our opinion that the provision in H.F. 2414, § 1, for repeal of Iowa Code § 110.1(1), paragraphs "c" and "d" contains a manifest clerical error that the Code Editor should correct by deeming the repealer clause as an instruction to strike paragraphs "d" and "e". The Code Editor should also insert in the 1987 edition of the Iowa Code an editorial comment explaining the correction of the clerical error. The comment might appropriately cite this opinion as authority for the correction.

Sincerely,

Michael H Smith
MICHAEL H. SMITH
Assistant Attorney General

MHS:rcp

CORPORATIONS; Professional Corporations: Iowa Code §§ 496C.10 to 496C.11 (1985). Shares of stock in a professional corporation may be issued only to individuals who are licensed to practice the same profession. Sections 496C.10 and 496C.11 prohibit the issuance of shares in a professional corporation to another professional corporation even though that corporation is authorized to practice the same profession. (Brick to Odell, Secretary of State, 7-8-86) #86-7-1(L)

July 8, 1986

The Honorable Mary Jane Odell
Secretary of State
State Capitol
LOCAL

Dear Secretary Odell:

You have requested an opinion concerning the intent and interpretation of §§ 496C.10 and 496C.11, Code of Iowa, regarding the issuance and transfer of shares in a professional corporation, wherein you raised the following question:

> Whether Iowa Code §§ 496C.10 and 496C.11 permits stock in a professional corporation to be issued to another professional corporation that is authorized to practice the same profession?

Section 496C.10 provides in part as follows:

> Shares of a professional corporation may be issued, and treasury shares may be disposed of, only to individuals who are licensed to practice in this state, or in any other state or territory of the United States or in the District of Columbia, a profession which the corporation is authorized to practice.

(Emphasis added).

In contrast, § 496C.11 states in part that:

> No shareholder or other person shall make any voluntary transfer of any shares in a professional corporation to any person, except to the professional corporation or to an individual who is licensed to practice in this state a profession which the corporation is authorized to practice.

(Emphasis added).

The purpose of these sections is to prohibit the issuance or transfer of shares of a professional corporation to anyone not licensed to practice the profession which the professional corporation is license to practice. The absence of such prohibitions could jeopardize the public interest since ownership or control of professional corporations could be acquired by individuals not qualified to practice the profession. 1974 Op.Att'yGen. 270.[1] This is a uniform feature of all professional corporation acts. Resignation: Issues Pertaining to Ownership of Professional Corporation as Affected by Resignation from Corporate Practice by Active Shareholder, 32 ALR 4th 921 (1984).

Professional service corporation statutes are of recent origin. Such statutes have been enacted in most jurisdictions in response to the desire of professionals to incorporate. As a result, professionals not previously privileged to incorporate can now enjoy the tax benefits open to employees under the qualified pension, profit-sharing and annuity plan provisions of the Internal Revenue Code. Statutes: Practice by Attorneys and Physicians as Corporate Entities or Associates under Professional Service Corporation Statutes, 4 ALR 3rd 383 (1965). [Hereinafter referred to as "Practice by Attorneys]

A key issue raised by such incorporation, however, is how liability should be allocated for the malpractice or other tort

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[1]In 1974 Op.Att'yGen. 270 we concluded that shares of stock in a professional corporation may be issued to and held by a trustee who is also licensed to practice the same profession. Section 496C.3 clearly states that the provisions of the Iowa Business Corporation Act, Chapter 496A, shall apply to the professional corporation. Chapter 496A gives the professional corporation the same rights and powers enjoyed by the ordinary business corporation including the right to hold shares in trust. The factor distinguishing that situation from the present one is the fact that the trustee would still be an individual licensed to practice the same profession.

of one of the professional corporation's members. The former prohibition against the practice of law or medicine by a corporate entity has been based on the essential personal relationship existing between the lawyer or physician on the one hand and the client or patient on the other. It was believed that the noncorporate status of the lawyer or physician was necessary to preserve the benefits of a highly confidential relationship with the client or patient. Practice by Attorneys, supra at 385.

All states now have professional corporation statutes and a uniform feature of these statutes is a provision restricting the ownership of stock in the professional corporation to duly licensed members of that particular profession. Some states permit the issuance or transfer of shares of stock in a professional corporation to another professional corporation that is licensed to practice the same profession. 6 Hayes, Iowa Practice § 1141 (1985); 1 Prof. Corp. Handbook (CCH) ¶ 4001 et seq. Iowa's professional corporation statute, however, appears to be more narrowly drawn than those allowing the issuance and transfer of stock between two similarly licensed professional corporations. This is indicated by the use of the word "individual" in § 496.10 as opposed to the word "person."

The Iowa Supreme Court has enunciated the guidelines for use in determining legislative intent. Pearson v. Robinson, 318 N.W.2d 188 (Iowa 1982). Consideration must be given to "the language used, the object to be accomplished, [and] the evils and mischief sought to be remedied . . . ." Id. at 190.

There is very little ambiguity contained in the first sentence of § 496C.10 which states that: "[s]hares of a professional corporation may be issued . . . only to individuals . . . ." (emphasis added). The word "individual" in its plain, ordinary and generally accepted meaning does not include a corporation. A corporation may be a person for some purposes, but it is not an "individual." Sentry Security Systems, Inc. v. Detroit Auto. Interinsurance Exchange, 394 Mich. 96 (1982); 228 N.W.2d 779, 780; see Ballentine's Law Dictionary 613 (3rd ed. 1969).

The general rule is that statutes granting corporate powers, rights and privileges, are strictly interpreted. 2A Sutherland, Statutory Construction § 64.05 (Sands 4th ed. 1985). Further support for a narrow construction of this statute can be found in the comments of James W. Griffin, Sr. Chairman of the Commerce Committee at the time the statute (then S.F. 554) was recommended for passage:

> This Act constitutes a limited and special exception to the salutary common law princi-

> ple which prohibits a corporation from rendering professional services, and it shall not be construed as an indication of legislative intent that the principle is unsound or that further exceptions should be made with respect to it.

Journal of the Senate (January 27, 1970) (page 255).

Iowa was one of the last states in the nation to adopt a professional corporation act. 6 Hayes, Iowa Practice § 1141 (1985). Had the legislature intended to allow shares of stock in a professional corporation to be issued to and owned by another professional corporation licensed to practice the same profession, they could have adopted language similar to that contained in the Massachusetts Act which states:

> A professional corporation may issue the shares of its capital stock only to persons who are duly registered to render the same professional services as those for which the corporation was organized . . . .

(Emphasis added). 1 Prof. Corp. Handbook (CCH) ¶ 5056. In the absence of such a broad provision, and in light of the plain language of § 496C.10, the practice of allowing shares of stock in a professional corporation to be issued to and owned by another professional corporation that is authorized to practice the same profession, would violate legislative intent. Therefore, we must answer the question posed by you in the negative.

Sincerely,

ANN MARIE BRICK
Assistant Attorney General

AMB:mlr

MUNICIPALITIES: Consolidation of and appointments in police and fire departments under department of public safety. Iowa Code Supp. § 372.13(4) (1985); Iowa Code §§ 4.1(36)(a); 364.1, 364.2(3); 372.4; 372.5; 400.6(4); 400.13 (1985); House File 2035, 71st. G.A., 2d Sess. §§ 1, 2 (Iowa 1986); 1986 Iowa Acts, ch. _____, §§ _____; House File 2403, 71st. G.A., 2d Sess. § 3 (Iowa 1986); 1986 Iowa Acts, ch. _____, § _____; Iowa Const. art. III, § 38A. A city under the mayor-council form of government may create a department of public safety including the police and fire departments. A city under civil service is required to appoint a chief of the police department and a chief of the fire department pursuant to Iowa Code section 400.13 (1985). A director of public safety should not simultaneously occupy both the police chief and the fire chief positions. Pursuant to H.F. 2035, the city council has the authority to adopt an ordinance providing the public safety director with the authority to appoint the police and fire chiefs. A director of public safety may exert supervisory and management control over the police chief and the fire chief and their respective divisions, although they should be given considerable latitude to perform their statutory duties. The director of the department of public safety is exempt from civil service requirements pursuant to H.F. 2403. A director of the public safety department does not have to meet the requirements of section 400.13. (DiDonato to Diemer, State Representative, 8-29-86) #86-8-9(L)

August 29, 1986

The Honorable Marvin E. Diemer
State Representative
P.O. Box 646
Cedar Falls, Iowa 50613

Dear Representative Diemer:

You have requested an opinion of the Attorney General presenting several questions regarding the consolidation of police and fire services under a department of public safety and the necessity to appoint a chief of the police department and a chief of the fire department under such a plan. According to the proposed plan, a director of public safety would be appointed to administrate a department of public safety with the police and fire departments retaining their separate identities but being divisions of the public safety department. I am also advised that the City of Cedar Falls, which has raised these questions, would seek this consolidation under its current mayor-council form of government.

I.

The question you present which needs to be initially addressed is:

> Can a city under a mayor-council form of government create a department of public safety which encompasses both the police and fire functions?

It is the opinion of this office that a city operating under the mayor-council form of government is not precluded from consolidating its police and fire functions under a department of public safety.

We would note at the outset that a department of public safety is specifically provided for in Iowa Code section 372.5 (1985) under the commission form of city government. Such a department is not specifically provided for in Iowa Code section 372.4 (1985):

> A city governed by the mayor-council form has a mayor and five council members elected at large, unless by ordinance a city so governed chooses to have a mayor elected at large and an odd number of council members but not less than five, including at least two council members elected at large and one council member elected by and from each ward. The council may, by ordinance, provide for a city manager and prescribe the manager's powers and duties, and as long as the council contains an odd number of council members, may change the number of wards, abolish wards, or increase the number of council members at large without changing the form.
>
> * * *

The last paragraph of section 372.4 was recently amended to provide that:

> The mayor shall appoint a council member as mayor pro tem, and shall appoint the marshal or chief of police except where an intergovernmental agreement makes other provisions for police protection or as otherwise provided in section 400.13. Other offices must be selected as directed by the council. The mayor is not a member of the

> council and may not vote as a member of the council.

House File 2035, 71st. G.A., 2d Sess. § 2 (Iowa 1986).

Iowa Code Supp. section 372.13(4) (1985) provides that:

> Except as otherwise provided by state or city law, the council may appoint city officers and employees, and prescribe their powers, duties, compensation, and terms . . . .

These two sections of the Iowa Code appear to recognize that a city operating under a mayor-council form of government has the authority to establish the offices deemed necessary to carry out its functions. Furthermore, the establishment by a municipality operating under a mayor-council form of government of a department of public safety would be permitted under its home rule powers. Under municipal home rule, a municipal corporation may not exercise any power which is "inconsistent with the laws of the General Assembly." Iowa Const. art. III, § 38A; Iowa Code § 364.1 (1985). "An exercise of a city power is not inconsistent with a state law unless it is irreconcilable with the state law." Iowa Code § 364.2(3) (1985). The Iowa Supreme Court has further defined inconsistent to mean "incongruous, incompatible, irreconcilable." Green v. City of Cascade, 231 N.W.2d 882, 890 (Iowa 1975). Irreconcilable means "impossible to make consistent or harmonious." Id. Applying these principles to the question of the establishment of a department of public safety under a mayor-council form of government, it appears that the establishment of such a department is not inconsistent with section 372.4 and would therefore not be prohibited by a city.

II.

Having determined that a city under the mayor-council form of government may create a department of public safety including the police and fire departments, we now address your questions regarding the establishment of such a department.

You next ask if a city consolidates police and fire services under a director of public safety, must a police and fire chief be appointed? You also present several options which are being considered and question the authority of a city to establish each:

> 1. Whether a deputy director in charge of police and a deputy director in charge of

> fire subject to civil requirements could be appointed below a director of public safety?
>
> 2. Whether a police chief and fire chief below the director of public safety could be appointed pursuant to sections 372.4 and 400.13?
>
> 3. Whether a director of public safety could be appointed as both the police chief and fire chief and would be required to meet the qualifications for both the police and fire chief?

It is the opinion of this office that under the civil service statute, a police chief and fire chief must be appointed even if the police and fire departments are consolidated and a director of public safety is appointed to be in charge of the department of public safety.

Iowa Code section 400.13, as recently amended, provides that:

> In cities under the commission plan of government the superintendent of public safety, with the approval of the city council, shall appoint the chief of the fire department and the chief of the police department. In cities under a council-manager form of government the city manager shall make the appointments with the approval of the city council, and in all other cities the appointments shall be made as provided by city ordinance or city charter.

(emphasis added). House File 2035, 71st G.A., 2d Sess. § 1 (Iowa 1986). By the use of the word "shall" the legislature has made clear its intent that cities have a duty under civil service to appoint chiefs of the police and fire departments. See Iowa Code § 4.1(36)(a) (1985); State v. Lohr, 266 N.W.2d 1, 5 (Iowa 1978).

In addition, it is clear that under the mayor-council form of city government, there is a duty to appoint a chief of police as the recent amendment to section 372.4 requires that the mayor "shall appoint a chief of police."

While the question you present has not been specifically addressed by prior case law, the Iowa Supreme Court has recognized that in those cities under civil service, police and fire chiefs must be selected by civil service procedures. LaPeters v.

City of Cedar Rapids, 263 N.W.2d 734, 735 (Iowa 1978); Dennis v. Bennett, 258 Iowa 664, 668-669, 140 N.W.2d 123, 125-126 (Iowa 1966). See also 1976 Op.Att'yGen. 382. Furthermore, statutory duties are specifically assigned to both the chief of the police department and chief of the fire department. See Iowa Code §§ 100.2, 100.3 (as amended by House File 660, 71st G.A., 2d Sess. § 1 (Iowa 1986)), 100.12, 400.19 (fire chief duties), 80D.3, 80D.4, 80D.6, 80D.7, 80D.9, 101A.3, 400.19, 690.1, 690.2, and 817.1 (police chief duties) (1985). It is the opinion of this office that the statutory duties to be specifically performed by a police chief or fire chief further evidence a legislative intention that a chief of the police department and a chief of the fire department must be appointed under civil service. A statute will be given a reasonable construction which will best effect its purpose rather than one which will defeat it. A sensible, workable, practical, and logical construction should be given. Hansen v. State, 298 N.W.2d 263, 265 (Iowa 1980). Therefore, the answer to your first two questions presented is that a chief of the police department and chief of the fire department, each meeting those respective civil service requirements, must be appointed even where a director of public safety is appointed to oversee those departments consolidated in a department of public safety. A director of public safety should not be appointed to simultaneously occupy the positions of police chief and fire chief. Because the public safety director oversees both departments and makes recommendations and reports to the city regarding the departments, a potential for a conflict of interest exists. The very real potential for a conflict of interest between these positions would make it inappropriate for the same person to occupy each position. See 1982 Op.Att'yGen. 220, 226.[1]

III.

The next question which you present is:

> In accordance with recently amended section 400.13, can a city council by ordinance provide the public safety director with the authority to appoint the police and fire

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[1] The doctrine of incompatibility applies only where both positions are considered offices. 1982 Op.Att'yGen. 220. However, if these positions were found to be offices, the doctrine of incompatibility would prohibit the simultaneous holding of these positions. 1978 Op.Att'yGen. 110 (public safety director in charge of police department cannot simultaneously occupy position of police chief).

> chiefs in accordance with provisions of section 400.13 and exert supervisory and management control over the chiefs and their respective divisions?

Newly amended section 400.13 provides that cities which are not under a commission plan or a council-manager form of government shall appoint the chief of the police department and chief of the fire department "as provided by city ordinance or city charter." H.F. 2035. Recently amended section 372.4 provides that a chief of police shall be appointed by the mayor "or as otherwise provided in section 400.13." H.F. 2035. Therefore, the city council has the authority to adopt an ordinance providing the public safety director with the authority to appoint the police and fire chiefs.

Although chapter 400 does not prohibit a director of public safety from exerting supervisory and management control over the police chief and fire chief and their respective divisions, we would note that such a director is not statutorily charged with the performance of the duties of a police chief or fire chief, therefore, these duties are not delegated by such a director to the positions of chief. See Dennis v. Bennett, 258 Iowa at 671, 140 N.W.2d at 128. The police chief and fire chief are solely responsible for the statutory duties of their respective offices and should be given considerable latitude in effecting these duties. See 16A McQuillin, The Law of Municipal Corporations § 45.08, p. 53 (3rd rev. ed. 1984).

IV.

You further ask whether the appointment of a public safety director may be made as an exception to the civil service requirement, as a department head pursuant to section 400.6. In a somewhat related question you ask whether a public safety director must meet the civil service requirements for both a police chief and fire chief.

It is the opinion of this office that a director of the department of public safety would be exempt from the civil service requirements pursuant to section 400.6.

Section 400.6 as recently amended states the exceptions to the civil service statute in relevant part as:

> This chapter applies to permanent full-time police officers and fire fighters in cities having a population of more than eight thousand, and to all appointive permanent full-time employees in cities having a

> population of more than fifteen thousand except:
>
> * * *
>
> 4. The head and principal assistant of each department and the head of each division. This exclusion does not apply to assistant fire chiefs and to assistant police chiefs in cities with police departments of two hundred fifty or fewer members. However, sections 400.13 and 400.14 apply to police and fire chiefs.

House File 2403, 71st G.A., 2d Sess. § 3 (1986). As the director of the public safety department would be the designated head of that department, such a position would therefore be exempt under section 400.6(4).

Furthermore, it is the opinion of this office that a director of the public safety department does not have to meet the requirements of section 400.13.

Iowa Code section 400.13 (1985) provides that:

> The chief of the fire department and the chief of the police department shall be appointed from the chiefs' civil service eligible lists. Such lists shall be determined by original examination open to all persons applying, whether or not members of the employing city. The chief of a fire department shall have had a minimum of five years' experience in a fire department, or three years experience in a fire department and two years of comparable experience or educational training. The chief of a police department shall have had a minimum of five years experience in a public law enforcement agency, or three years experience in a public law enforcement agency and two years of comparable experience or educational training. A chief of a police department or fire department shall maintain civil service rights as determined by section 400.12.
>
> * * *

Under the language of section 400.13, these requirements apply only to the respective positions of chief. Express mention of

one thing in a statute implies the exclusion of others. Stated otherwise, legislative intent is expressed by omission as well as by inclusion. See In re Estate of Wilson, 202 N.W.2d 41, 44 (Iowa 1972). Expressio unius est exclusio alterius is the legal maxim. Also, only the position of chief is charged with the duties of that office. See Dennis v. Bennett, id. Therefore, a public safety director would not have to meet the requirements of section 400.13 to occupy that position.

In conclusion, a city under the mayor-council form of government may create a department of public safety including the police and fire departments. A city under civil service is required to appoint a chief of the police department and a chief of the fire department pursuant to Iowa Code section 400.13 (1985). A director of public safety should not simultaneously occupy both the police chief and the fire chief positions. Pursuant to H.F. 2035, the city council has the authority to adopt an ordinance providing the public safety director with the authority to appoint the police and fire chiefs. A director of public safety may exert supervisory and management control over the police chief and the fire chief and their respective divisions, although they should be given considerable latitude to perform their statutory duties. The director of the department of public safety is exempt from civil service requirements pursuant to H.F. 2403. A director of the public safety department does not have to meet the requirements of section 400.13.

Sincerely,

Ann DiDonato

ANN DiDONATO
Assistant Attorney General

AD:rcp

COUNTIES AND COUNTY OFFICERS; Board of Supervisors; Reimbursement of expenses of county officers and employees: Iowa Code §§ 79.9 to 79.13; 331.215(2); 331.324(1)(b) (1985). A county board of supervisors may set a ceiling on the amount the county will reimburse its officers and employees for meal expenses incurred while attending meetings pertaining to county government. (Weeg to Noonan, Benton County Attorney, 8-26-86) #86-8-6(L)

August 26, 1986

Mr. Thomas E. Noonan
Benton County Attorney
Third Floor, Courthouse
Vinton, Iowa 52349

Dear Mr. Noonan:

You have requested an opinion of the Attorney General on the question whether the board of supervisors may adopt a policy restricting county reimbursement for meal expenses incurred by county officers and employees while attending meetings pertaining to county government. You state your county board of supervisors has by written policy limited reimbursement for meals to sixteen dollars a day. However, the policy does provide that the limit may be waived in special situations approved by the board.

Several statutory provisions relate to your question. First, Iowa Code section 331.324(1)(b) (1985) provides the board of supervisors shall "grant claims for mileage and expenses of officers and employees in accordance with sections 79.9 to 79.13 and section 331.215, subsection 2 . . ." Sections 79.9 to 79.13, as recently amended by 1986 Session, H.F. 2484, section 773, only govern reimbursement for mileage or transportation expenses for local governmental officers or employees with the exception of section 79.13, which governs all travel expenses of peace officers.[1] Section 331.215(2) which is applicable to other county officers and employees by this reference, provides as follows:

> A supervisor is entitled to reimbursement for mileage expenses incurred while engaged in the performance of official duties

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[1] Section 79.13 provides that travel expenses of peace officers may not be approved by the supervisors unless a claim includes the destination of the trip and the number of miles covered. Further, receipts are required for all expenses but meals.

> at the rate specified in section 79.9. The total mileage expense for all supervisors in a county shall not exceed the product of the rate of mileage specified in section 79.9 multiplied by the total number of supervisors in the county times ten thousand. The board may also authorize reimbursement for mileage and other actual expenses incurred by its members when attending an educational course seminar, or school which is related to the performance of their official duties.

In 1980 Op.Att'yGen. 444 (#79-10-10(L)) we held that the county board of supervisors determines the appropriate amount of reimbursement by the county for expenses incurred by county officers and employees who attend schools of instruction. We further held that the amount of reimbursement is to be determined in accordance with a training reimbursement policy adopted by the supervisors after consultation with other elected county officials. That opinion relied on Iowa Code section 343.12 (1979), which provided:

> County officers, deputies and employees may attend educational seminars, short courses, schools of instruction or other educational activities related to the performance of their duties, and be reimbursed for mileage and actual expenses incurred where approved by the department head and the board of supervisors as provided in section 331.21. For the purpose of this section mileage expenses received by supervisors shall be in addition to[2] that provided by section 331.22 . . . The board of supervisors after consulting with the other elected county officers, shall adopt a training reimbursement policy. The policy shall give priority to attendance at training functions conducted at the local level. (emphasis added).

We concluded that, based on this permissive and discretionary language, the legislature intended for the supervisors to exercise its discretion in approving claims for reimbursement, and

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[2] Section 331.21 governed compensation for, and reimbursement for expenses incurred by, members of the board of supervisors. This section was repealed by 1981 Iowa Acts, chapter 1117, section 1244; similar provisions are now found in section 331.215(2), referred to above.

that implicit in the power of approval "is the power to deny or allow to any extent the claims submitted for reimbursement . . ."

Section 343.12 was repealed by 1981 Iowa Acts, chapter 117, section 1244, and replaced by section 331.324(1)(b), which, as set forth above, authorizes the supervisors to approve expense claims. However, the new statute does not include a provision for establishing a training reimbursement policy in conjunction with elected county officers. Accordingly, that portion of the holding of our prior opinion is no longer applicable. However, because section 331.324(1)(b) does not otherwise vary greatly from former section 343.12, our previous opinion is controlling on the question of whether the board may determine the amount of reimbursement to be paid county officers and employees for expenses incurred while attending training conferences.

In conclusion, it is our opinion a county board of supervisors may set a ceiling on the amount the county will reimburse its officers and employees for meal expenses incurred while attending meetings pertaining to county government. Accordingly, the sixteen dollar per day limit on meal expenses set by your board of supervisors is a valid exercise of the supervisors' discretion.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

SCHOOLS: Taxes. Iowa Code § 297.5 (1985); 1980 Iowa Acts, ch. 1089. Iowa Code § 297.5 requires a vote of the people to authorize an addition to a schoolhouse which is financed by the § 297.5 levy. (Fleming to Benton, Commissioner, Department of Education, 8-26-86) #86-8-5(L)

August 26, 1986

Dr. Robert D. Benton
Commissioner
Department of Education
L O C A L

Dear Dr. Benton:

You have asked for our opinion which requires an interpretation of Iowa Code § 297.5, as amended by 1980 Iowa Acts, ch. 1089. The specific question you present is:

> Must a proposed addition to an existing school be approved by the voters of the district where the addition is to be financed by an Iowa Code § 297.5 levy?

The relevant Code section is as follows:

> The directors in a high school district maintaining a program kindergarten through grade twelve may, by March 15 of each year certify an amount not exceeding twenty-seven cents per thousand dollars of assessed value to the board of supervisors, who shall levy the amount so certified, and the tax so levied shall be placed in the schoolhouse fund to be used for the purchase

> and improvement of sites or for major building repairs. Any funds expended by a school district for new construction of school buildings or school administration buildings must first be approved by the voters of the district.
>
> . . . .
>
> For purposes of this section, "major building repairs" includes reconstruction, repair, improvement or remodeling of an existing schoolhouse and additions to an existing schoolhouse and expenditures for energy conservation.

Iowa Code § 297.5 (emphasis added).

The question arises because of the ambiguity of the code section, particularly the relationship of the two sentences underscored above that were added to § 297.5 by the 1980 Act. It is well settled that principles of statutory construction are not applied if a statute is clear. State v. Rich, 305 N.W.2d 739, 745 (Iowa 1981). Instead, the principles come into play where ambiguity exists. LeMars Mutual Ins. Co. of Iowa v. Bonnecroy, 304 N.W.2d 422, 424 (Iowa 1981). Your question and this particular statute require the use of statutory construction rules. The issue is difficult because some of the most common principles do not apply. For example, neither the principle that a special statute prevails as an exception to a general provision, Iowa Code § 4.7 (1985), nor the rule that the latest provision in date of enactment prevails, Iowa Code § 4.11 (1985), is helpful here because the ambiguity arises from aspects of language adopted at the same time in the same act. Moreover, there are no court decisions which interpret the statute to assist us.

Thus, we must begin with the principle that the polestar of statutory construction is legislative intent. Beier Glass Co. v. Brundige, 329 N.W.2d 280, 283 (Iowa 1983); Doe v. Ray, 251 N.W.2d 496, 500 (Iowa 1977). To ascertain legislative intent, we

> . . . may consider among other matters:
> 1. The object sought to be attained.
> 2. The circumstances under which the statute was enacted.
> 3. The legislative history.
> 4. The common law or former statutory provisions, including laws upon the same or similar subjects.
> 5. The consequences of a particular construction.

6. The administrative construction of the statute.
7. The preamble or statement of policy.

Iowa Code § 4.6 (1985). In addition, the issue presented must be addressed under the rule that the legislature may define words and phrases and we are bound by such definitions. State v. Durgin, 328 N.W.2d 507, 509 (1983). With those principles in mind we turn to the issue presented, whether the voters must approve an addition to a schoolhouse which is financed by a § 297.5 levy.

The legislative history of 1980 Iowa Acts, ch. 1089, is lengthy and complex. See Index for Senate and House Journals, 68th General Assembly, 1979-1980 Regular Session, pp. 407-408. The statute was enacted after a series of actions in both the House and Senate; the enacted version was the product of a conference committee after the two houses adopted different versions. Thus, we are aided in determining the intent of the General Assembly by examining the difference between the version that was rejected and the version that became law as well as the language of the statute before it was amended.

Prior to the 1980 amendment, the last clause of the first sentence in § 297.5 was as follows:

> and the tax so levied shall be placed in the schoolhouse fund and used only for the purchase and improvement of sites in and for said school district as specified by the directors.

Iowa Code § 297.5 (1979) (emphasis added). The language referring to the directors was deleted by the 1980 legislature. The 1980 Act extended the uses for which the § 297.5 levy could be expended as well as granting completely new authority to utilize a school district's "unexpended cash balance" for schoolhouse purposes, that is for site acquisition and major repairs of schoolhouses. We believe that the caveat that "new construction . . . must first be approved by the voters of the district" and the deletion of the reference to action by the school board demonstrate a clear intent that voters, not the board, should decide whether to undertake "new construction." The conflict between a policy which gives more power to the board and a policy that limits the power of the board is reflected in the legislative history of the 1980 amendment.

In the House version of the Act, 1980 J.H. p. 1359, a school district board was authorized on its own motion to use the "unexpended cash balance" for listed schoolhouse purposes. In

contrast, section 2 of 1980 Iowa Acts, ch. 1089, required a school district to obtain authorization from the state's school budget review committee to spend the unexpended cash balance for site acquisition and major building repairs. Thus, limits on a school board's power was the policy that prevailed in the final version of the 1980 Act.

In our view, the sentence in § 297.5 -- "Any funds expended by a school district for new construction of school buildings or school administration buildings must first be approved by the voters of the district." -- was a restatement of the long Iowa tradition that voters make the decision to undertake new construction of school buildings. Cf. Adams v. Fort Madison Community School District, 182 N.W.2d 132, 1138-140 (1970) (Sixty percent vote on bond issues upheld). Prior to 1980, the only exception to voter control of the schoolhouse fund was the site levy authorized by § 297.5. The amendment in 1980 authorized a district board "each year," § 297.5 (first sentence), to certify a levy to finance "major building repairs" as defined by the statute. Your question arises because the legislature included "additions to existing schoolhouses" in the definition of "major building repairs."

An "addition to existing schoolhouses" is the only item of "new construction" in the definition of "major building repairs." If there had been no "new construction" included in the definition of major building repairs, the sentence requiring that "new construction . . . must first be approved by the voters . . ." would be unnecessary in the 1980 amendment because all other statutes which authorize a tax levy for schoolhouse purposes require voter approval. See Iowa Code § 278.1(7) (1979) (Voters approve sixty-seven and one-half cent levy per thousand dollars of assessed value) and Iowa Code ch. 296 (1979) (Voters must approve school bond issues by 60%). We must presume that the legislature included every part of the statute for a purpose and intended each part to be given effect. George H. Wentz, Inc. v. Sabasta, 337 N.W.2d 495, 500 (Iowa 1983); State v. Berry, 247 N.W.2d 263, 264 (Iowa 1976); Goergen v. State Tax Com'n., 165 N.W.2d 782, 785 (Iowa 1969). The voter approval sentence in § 297.5 would have no effect if it did not apply to "additions to existing schoolhouses."

We recognize that the amendment to Iowa Code § 297.5 filled the gap between routine maintenance which is financed from a school district's general fund and major capital expenditures which usually require long-term indebtedness and bond issue elections. The availability of the § 297.5 levy for "major building repairs" permits a school district to engage in planning for many "major building repairs" which can be anticipated, but

which may not be financed as routine maintenance from the general fund. We do not believe that § 297.5 permits school boards to embark on "new construction" projects, that is "additions to schoolhouses," without voter approval.

In summary, it is our opinion that Iowa Code § 297.5 requires a vote of the people to authorize an addition to a schoolhouse which is financed by a § 297.5 levy.

Sincerely,

MERLE WILNA FLEMING
Assistant Attorney General

MWF/cjc

COUNTIES: Ownership and Management of Cemeteries. Iowa Code §§ 331.301, 359.28, 359.30, 384.24(3)(k), 384.25(1), 566.14-566.18, 566A.1 (1985). Counties, under home rule, have the authority to acquire and maintain a cemetery. (Lorentzen to Wibe, Cherokee County Attorney, 8-13-86) #86-8-3(L)

August 13, 1986

Mr. John A. Wibe
Cherokee County Attorney
P.O. Box 100
Cherokee, Iowa 51012

Dear Mr. Wibe:

You have requested an opinion of the Attorney General on the question of whether a county has authority to acquire title and operate and maintain a cemetery.

No express statutory authority exists governing county acquisition of land for the use of cemeteries or management thereof.[1] However, Iowa Constitution, article III, section 39A, granted counties home rule authority to determine local affairs so long as that authority is "not inconsistent with the laws of the general assembly." In 1980 Op.Att'yGen. 54, we termed this limitation as one of "preemption" and stated that preemption is applicable when a county regulation is inconsistent with pervasive state legislation which exclusively regulates the subject matter in question. We concluded in that opinion as follows:

> After the enactment of Home Rule, municipalities in Iowa appear to be clearly limited only by an express statutory limitation or legislative history which clearly implies an

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[1] Iowa Code § 566.14-566.18 empowers counties, among other political subdivisions, to manage perpetual care funds for cemeteries. Counties are designated as "trustees in perpetuity" and are required, among other duties to "accept, receive, and expend all moneys and property donated or left to . . . [the county] by bequest . . . ." Iowa Code § 566.14.

> intent to vest exclusive subject matter jurisdiction with the state.

1980 Op.Att'yGen. at 61. Iowa Code section 331.301 (1985) further explicates the counties' home rule powers. See § 331.301(3) (". . . A county may exercise its general powers subject only to limitations expressly imposed by a state law."). We believe the exercise of a county power is inconsistent with state law only when the two authorities are irreconcilable. See section 331.301(4); 1980 Op.Att'yGen. 54. See also City of Council Bluffs v. Cain, 342 N.W.2d 810 (Iowa 1983), and Green v. City of Cascade, 231 N.W.2d 882 (Iowa 1975). Based on these authorities, county powers should be interpreted so as to harmonize with state law unless the two cannot be reconciled, in which case state law prevails.

Thus, although the county has no express statutory authority to acquire a cemetery, the county would have home rule authority to do so if there was not inconsistent state legislation. We therefore next review the statutory authority which concerns authority to acquire cemeteries.

Cities may issue general obligation bonds to finance the acquisition of property to be used as a cemetery and to maintain such cemetery facilities. Iowa Code §§ 384.25(1) and 384.24(3)(k). See 1984 Op.Att'yGen. 101 and 1978 Op.Att'yGen. 804. Also, townships have the power to condemn or purchase land within township limits, and to levy tax to finance the purchase or condemnation of land to be used as a cemetery, as well as finance the maintenance thereof. Iowa Code §§ 359.28 and 359.30. See 1982 Op.Att'yGen. 212. Chapter 566A sets forth cemetery regulations regarding perpetual care of cemetery lots which expressly do not apply to "organizations which are churches or religious or established fraternal societies, or incorporated cities or other political subdivisions of the state of Iowa owning, maintaining or operating cemeteries . . ." (emphasis added). Iowa Code § 566A.1.

Therefore, there exists no limitation in state law regarding county acquisition of land for the use of cemeteries. A county has general authority to "exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the county or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents." Iowa Code § 331.301(1). It is conceivable that acquiring land for the use of cemeteries would be a legitimate exercise of the county's general powers and duties. Other political subdivisions have been granted the power to acquire land for the use of cemeteries, as well as the power to manage such local service. Further,

counties have been granted some authority with regard to cemeteries. Finally, we can discern no express or implied legislative intent from the overall statutory scheme governing cemeteries that counties not own and operate cemeteries. Because the exercise of this county power may be harmonized with state law, it is our opinion that counties may own and operate cemeteries.

Sincerely,

ELIZABETH LORENTZEN
Assistant Attorney General

EL:rcp

MUNICIPALITIES: Source of funds for payments pursuant to Iowa Code section 411.15 (1985). Iowa Code §§ 411.1(14), 411.8(1), 411.11, 411.15 (1985). Pursuant to Iowa Code section 411.15 (1985), payments for hospital, nursing and medical attention for treatment for injuries or diseases for the members of the police and fire departments of cities shall be paid out of the appropriation for the department to which the injured person belongs or belonged, and are not to be paid from the pension accumulation fund. (DiDonato to Gronstal, State Senator, 8-13-86) #86-8-2(L)

August 13, 1986

The Honorable Mike Gronstal
State Senator
220 Bennett Ave.
Council Bluffs, Iowa 51501

Dear Senator Gronstal:

You have requested an opinion of the Attorney General whether the costs for hospital, nursing, and medical attention for members of the police and fire departments which are to be paid by cities pursuant to Iowa Code section 411.15 (1985) are to be paid from the Iowa Code section 411.8(1) (1985) pension accumulation fund. It is the opinion of this office that the source of funding for these payments is the departmental appropriation and not the pension accumulation fund.

Iowa Code section 411.15 (1985) provides that:

> Cities shall provide hospital, nursing, and medical attention for the members of the police and fire departments of the cities, when injured while in the performance of their duties as members of such department, and shall continue to provide hospital, nursing, and medical attention for injuries or diseases incurred while in the performance of their duties for members receiving a retirement allowance under section 411.6, subsection 6, and the cost of the hospital, nursing, and medical attention shall be paid out of the appropriation for the department to which the injured person belongs or belonged; provided that any amounts received by the injured person under the workers' compensation law of the state, or from any other source for such specific purposes, shall be deducted from the amount paid by the city under the provisions of this section.

(emphasis added).

Because this section specifies that the costs are to be paid from the involved departmental appropriation, it appears that the legislative intent is that the source of these payments be solely from the city. This office has opined in prior opinions that the "obvious purpose" of section 411.15 is to insure that firefighters and police officers have their medical expenses paid for, other than by themselves, when they are injured while in the performance of their duties. 1974 Op.Att'yGen. 230. Prior opinions have also stated that section 411.15 mandates that the municipality provide and pay for the required hospital, nursing and medical attention. 1978 Op.Att'yGen. 194; 1974 Op.Att'yGen. 230.

It is the opinion of this office that the pension accumulation fund may not be used as the source of payments made pursuant to section 411.15 because it is not funded solely by the city but contains contributions by both the municipality and the members of the retirement system. See Iowa Code §§ 411.1(14); 411.8(1)(f) and 411.11 (1985). The pension accumulation fund is to be used "for the payment of all pensions and other benefits payable from contributions made by the said cities and the members." Iowa Code § 411.8(1) (1985). Therefore, payments for treatment under section 411.15 may not be made from the pension accumulation fund. See Niffenegger v. City of Des Moines, 289 N.W.2d 606, 608 (Iowa 1980) (section 411.8(3) expense fund is to be used solely for expenses related to the retirement system).

In conclusion, pursuant to Iowa Code section 411.15 (1985), payments for hospital, nursing and medical attention for treatment for injuries or diseases for the members of the police and fire departments of cities shall be paid out of the appropriation for the department to which the injured person belongs or belonged, and are not to be paid from the pension accumulation fund.

Sincerely,

Ann DiDonato

ANN DiDONATO
Assistant Attorney General

AD:rcp

COUNTIES AND COUNTY OFFICERS; Board of Supervisors; Auditor; Chapter 28E agreements; County public safety commission; Authority of supervisors to compel auditor to serve as treasurer for an entity created by a Chapter 28E agreement: Iowa Code Chapter 28E (1985); §§ 28E.21 to 28E.27; 28E.28; 331.431; 331.502(37); 331.504(2); 331.504(3); 331.506(1); 331.507(1). A county board of supervisors may not compel the auditor to serve as treasurer for a county public safety commission created by a Chapter 28E agreement. However, even if the auditor elects not to serve as treasurer, the auditor may be required to perform services for that commission that fall within the scope of that office's statutory duties. (Weeg to Swaim, Davis County Attorney, 9-17-86) #86-9-3(L)

September 17, 1986

Mr. R. Kurt Swaim
Davis County Attorney
Davis County Courthouse
Bloomfield, Iowa 52537

Dear Mr. Swaim:

You have requested an opinion of the Attorney General on the question whether your county board of supervisors may compel the county auditor to serve as treasurer to a county public safety commission, which is an entity created by a Chapter 28E agreement between Davis County and the City of Bloomfield.

Public safety commissions[1] are governed by Iowa Code sections 28E.21 to 28E.28 (1985). Nowhere in these sections is there a reference to a county auditor's relationship to such a commission. The only relevant provision is section 28E.28, which provides in part that:

> . . . The public safety commission shall be composed of elected officials from the public agencies party to the agreement. The composition of the commission shall be determined by the terms of the agreement. . . .

While this section authorizes elected county officers to serve on

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[1] We assume for the purposes of this opinion that the commission in question was created pursuant to sections 28E.21-28E.28. There may be separate authority to establish a public safety commission pursuant to the general authority of chapter 28E, but we do not decide this question in this opinion. In any event, our conclusion is not affected by this factor.

the commission, it does not state what particular officers shall serve or who decides how the selection is to be made.

The duties of the county auditor are set forth in sections 331.501 to 331.512. Nowhere in these statutes is the auditor required to serve as treasurer to a public safety commission created by a Chapter 28E agreement.

In Bevington v. Woodbury County, 107 Iowa 424, 78 N.W. 222, 223 (1899), the Iowa Supreme Court stated:

> We take it as beyond controversy that the county attorney cannot be called upon to perform any duty in his official capacity save such as may be enjoined upon him by law.

This office has issued a number of opinions affirming the principle that county officers are not required to perform duties that are not within the scope of their statutory duties. In 1982 Op.Att'yGen. 384 (#82-3-17(L)), a copy of which is enclosed for your review, we held that a county attorney is not required to represent a chapter 28E entity as a part of the official duties of that office. In that opinion we concluded that, because the county attorney's statutory duties did not expressly include the duty to represent chapter 28E organizations to which the county was a party, the county attorney had no legal duty to represent such organizations. Further, we stated that:

> In the event the parties to the agreement elect to create a separate entity, that entity necessarily assumes an existence distinct from that of the individual agencies which created it . . . . At this point, the duties of the organization, such as securing legal counsel, devolve upon the organization itself, not upon its member agencies.

Finally, we noted that the language of section 28E.11 authorizing public agencies to provide personnel or services to a separate chapter 28E entity is permissive, not mandatory. Thus, we concluded that a county attorney may, but is not required to, represent a chapter 28E entity in his or her official capacity. See also 1962 Op.Att'yGen. 131 (county attorney not required to draft leases or pay travel expenses or phone tolls for work performed for conservation board); 1980 Op.Att'yGen. 523 (#79-12-3(L)); 1982 Op.Att'yGen. 427 (#82-5-17(L)) (county attorney may, but not required to, assist supervisors in compiling code of ordinances); 1982 Op.Att'yGen. 496 (#82-8-6(L)).

Furthermore, the Iowa Supreme Court has recently emphasized that our system of county government is not one of central management by the board of supervisors with subsidiary departments: "With few exceptions, however, our statutes establish autonomous county offices, each under an elected head." McMurry v. Board of Supervisors of Lee County, 261 N.W.2d 688 (Iowa 1978). See also Smith v. Newell, 254 Iowa 496, 117 N.W.2d 883 (1962). This principle of autonomy of elected county officers has been reiterated by this office on numerous occasions.[2]

Accordingly, based on these authorities, we conclude that the supervisors may not compel the county auditor to serve as treasurer for a separate legal entity created by a Chapter 28E agreement. This duty is not included among the auditor's statutory duties, and the supervisors have no authority to unilaterally expand the auditor's duties. However, the auditor would certainly be authorized to voluntarily serve on this commission in light of the provisions of section 28E.28. Further, the auditor may conclude that service on this commission is reasonably related to the scope of that office's duty and that such service is in the best interest of the county. However, this is a decision that the auditor is entitled to make as an independently elected county officer, and is not a decision that is for the board of supervisors to make.

If the auditor refuses to serve as treasurer to this public safety commission in question, however, a question remains as to whether the auditor may be required to provide to the commission services that are within the scope of that office's official duties. Section 331.431 authorizes the county to establish funds in addition to those expressly authorized in sections 331.427-331.430. Accordingly, in the event the supervisors authorize a separate fund to be established for a county public safety commission, we believe the auditor is required to perform those services with regard to this fund that that office is required to perform for any other county fund. See, e.g., sections 331.502(37) (auditor responsible for all public money collected or received by the auditor's office); 331.504(2) (auditor to maintain books and records relating to, inter alia, claims and warrants); 331.504(3) (auditor to sign all orders issued by the board for payment of money); 331.504(5) (auditor to maintain file of all accounts acted upon by the board); 331.506(1) (auditor to issue warrants upon board approval; and

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[2] See, e.g., Op.Att'yGen. #86-6-3(L); Op.Att'yGen. #86-2-9(L); Op.Att'yGen. #85-6-3; 1984 Op.Att'yGen. 167 (supervisors cannot enter into Chapter 28E agreement for performance of certain law enforcement functions without approval of sheriff); 1984 Op.Att'yGen. 94 (#83-11-4(L)).

331.507(1) (auditor to collect and receive all money due the county except when otherwise provided by law).

In conclusion, it is our opinion that a county board of supervisors may not compel the auditor to serve as treasurer for a county public safety commission created by a Chapter 28E agreement. However, even if the auditor elects not to serve as treasurer, the supervisors could authorize the creation of a county fund for the public safety commission and the auditor would then be required to perform services with regard to that fund that fall within the scope of that office's statutory duties.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

Enclosure

CORPORATIONS: Environmental Law. 40 C.F.R. §§264.147, 265.147; Iowa Code §496A.4(8)(1985). A parent corporate guarantee given as additional financial responsibility for owners and operators of hazardous waste facilities to satisfy the liability requirements under federal law is fully valid and enforceable in Iowa by third parties injured as a result of the operation of the facilities. (Haskins to Wilson, Director, Department of Natural Resources, 9-2-86) #86-9-2(L)

September 2, 1986

Mr. Larry J. Wilson
Director
Department of Natural Resources
Wallace Building
Des Moines, IA 50319

Dear Mr. Wilson:

You have asked our office whether a parent corporate guarantee given as additional financial responsibility for owners and operators of hazardous waste facilities to satisfy the liability requirements of 40 C.F.R. §§264.147 and 265.147 is fully valid and enforceable in Iowa by third parties injured as a result of the operation of the facilities. Our opinion is that it is valid and enforceable. Iowa Code §496A.4(8) states that business corporations organized thereunder, unless otherwise stated in their articles of incorporation, have power to "make contracts and guarantees . . . and to guarantee the obligations of other persons."

In examining the format specified in 40 C.F.R. §263.151(h)(2) for the corporate guarantee, we note that the future, injured, third parties are not, of course, parties to the guarantee. Nevertheless, it is our opinion that the guarantee would be fully enforceable by them as direct third-party beneficiaries. The corporate guarantee evinces an intent to benefit this class of persons and is given to discharge an obligation of the promisee-subsidiary. As such, an enforceable third-party beneficiary relationship is created under Iowa law. See Khabbaz v. Swartz, 319 N.W.2d 279, 284-285 (Iowa 1982); Bain v. Gillispie, 357 N.W.2d 47, 50 (Iowa Ct. App. 1984). The guarantee is explicit: it "guarantees any and all third parties who have sustained . . . injury . . . caused by . . . operations of the facility(ies) . . . that in the event that (owner or operator) fails to satisfy a judgment or awards . . .

the guarantor will satisfy such judgment(s), award(s) . . .". It is therefore our opinion that this guarantee would be enforceable by insured third parties in this state.

Very truly yours,

Fred M. Haskins
Assistant Attorney General

FMH/860-5

MENTAL HEALTH: Iowa Code §§ 229.11, 229.12, 229.19. Rule 16 of The Supreme Court Involuntary Hospitalization Rules. When Involuntary Hospitalization proceedings are transferred pursuant to Rule 16, the receiving court acquires jurisdiction in the cause and conducts the hospitalization proceedings. Those advocates appointed by the receiving court are obligated to represent the interests of those persons hospitalized by that court. (McCown to Sandy, Dickinson County Attorney, 9-2-86) #86-9-1(L)

September 2, 1986

Mr. John Sandy
Dickinson County Attorney
1710 Hill Avenue
Box 445
Spirit Lake, Iowa 51360

Dear Mr. Sandy:

You have requested advice on the following question:

> What duties is the County Mental Health Advocate obligated to perform in accordance with 229.19 when there has been a Rule 16 transfer of involuntary hospitalization proceedings under Chapter 229.

According to the information you have provided, the district court in Dickinson County has on several occasions transferred involuntary hospitalization proceedings to the court in Cherokee County, where respondents have been taken into immediate custody pursuant to Section 229.11. It is your impression that in this situation the Cherokee county Mental Health Advocate is obligated to serve as advocate to the respondent in accordance with Section 229.19, as opposed to the Dickinson County Mental Health Advocate. We agree.

Rule 16 of the Supreme Court Rules for Hospitalization of Mentally Ill provides:

> The hearing provided in section 229.12, The Code, shall be held in the county where the application was filed unless the judge or referee finds that the best interests of the respondent would be served by transferring the proceedings to a different location.

This provision refers to a hearing transfer. Rule 16 has been construed to allow only prehearing transfers. Op.Att'yGen. # 79-8-19(L). We have also opined that the legal term "transfer" connotes a change of jurisdiction, thus a change of the court and judge handling the matter. 1980 Op.Att'yGen. # 79-9-12 400.

The appointment and duties of advocates are set out in Section 229.19. Section 229.19 provides in pertinent part:

> The district court in each county shall appoint an individual who has demonstrated by prior activities an informed concern for the welfare and rehabilitation of the mentally ill, ... to act as advocate representing the interest of all patients involuntarily hospitalized by that court, in any matter relating to the patients' hospitalization or treatment under section 229.14 or 229.15. ...

Pursuant to section 229.19, an advocate is responsible for representing the interests of patients hospitalized by the district court which appointed them.

The answer to your question then is that when involuntary hospitalization proceedings are transferred from Dickinson County to Cherokee County pursuant to Rule 16, the advocate appointed by the district court in Cherokee County is responsible for representing patients hospitalized by the district court in Cherokee County.

We have previously expressed the opinion that a county attorney is responsible only for those actions initiated in the district court of that county. Op.Att'yGen. # 85-3-1. Similarly, advocates are responsible only for those actions initiated in the district court that appointed them.

In summary, when hospitalization proceedings are transferred pursuant to Rule 16, the receiving court acquires jurisdiction in the cause and conducts the hospitalization proceedings. Those advocates appointed by the receiving court are obligated to represent the interests of those persons hospitalized by that court.

Sincerely

Valencia Vayd McCown

Valencia Vayd McCown
Assistant Attorney General

VVM/jaa

MENTAL HEALTH: Iowa Code §§ 222.1(2), 222.13, 222.31, 222.59, 222.59(1), 222.59(5), 222.59(6), 222.60, 222.73; Iowa Code Chapter 222 (1985). The county board of supervisors has little discretion to determine what are necessary costs of admission, commitment, or treatment, training, instruction, care, habilitation, support and transportation of mentally retarded persons committed or admitted as patients in a hospital-school or special unit. The board of supervisors has some discretion to determine those costs for mentally retarded persons committed to public or private institutions. However, courts will defer to the judgment of professionals when confronted with challenges to the adequacy of treatment received by persons whose liberty interests are infringed. (McCown to O'Kane, State Representative, 10-30-86) #86-10-5(L)

October 30, 1986

The Honorable James O'Kane
State Representative
1815 Rebecca Street
Sioux City, Iowa 51103

Dear Representative O'Kane:

You have requested advice on the following questions:

1. Does the County Board of Supervisors have discretion to determine what costs of admission, commitment, or treatment, training, instruction, care, habitation, support and transportation of mentally retarded persons are necessary and by that determination to control the amount of payment the county will make under Code Section 222.60?

2. If your answer to the question is yes, what criteria must the County Board use to determine what is necessary in a given case, and what effect does the treating professional's opinion have on this determination? This question assumes that the expenses are legal and that all the other criteria set out in 222.60 have been met.

I

Iowa Code § 222.60 (1985) provides in part:

> All necessary and legal expenses for the cost of admission or commitment or for the treatment, training, instruction, care, rehabilitation, support and transportation of patients in a state hospital-school for the mentally retarded, or in a special unit, or any public or private facility within or

> without the state, approved by the commissioner of the department of human services shall be paid by either:
>
> 1. The county in which such person has legal settlement as defined in section 252.16.
>
> 2. The state when such person has no legal settlement or when such settlement is unknown.

A prior Attorney General's Opinion which addresses the county board of supervisors' discretion in determining the funding for the care and treatment of mentally retarded or developmentally disabled persons under 222.60 is helpful to this subject. 1984 Op.Att'yGen. 118 [#84-2-4(L)]. In that opinion we stated:

> [Section 222.60] establishes the obligation to pay and sets out the conditions under which the county must pay. Four criteria are set out which must be met before the responsibility of bearing the expense is imposed on the county:
>
> (a) the expense must be necessary and legal
>
> (b) the expense must be related to admission, commitment or treatment;
>
> (c) the costs must be for a patient at an authorized facility;
>
> (d) the patient must have legal settlement in that county
>
> . . .
>
> Assuming that all of the conditions of § 222.60 have been met in a given case, the board of the county of the patient's legal settlement has no discretion as to the amount it will pay if the patient has been committed to a ch. 222 facility. Expenses "shall be paid" by the county in which the person has legal settlement. § 222.60, Iowa Code. "The word 'shall' imposes a duty". § 4.1(36), Iowa Code. The county is obligated to pay

> "all necessary and legal expenses", which should not be read narrowly in view of the fairly exhaustive list in the statute of types of services covered.

Clearly, if expenses are necessary and legal, the county has a statutory obligation to pay them. Your question is whether the county has the discretion to determine whether certain expenses are necessary. The answer to this question is dependent on the patient's placement.

Section 222.60 makes counties liable for necessary costs at authorized facilities. Those facilities include a state hospital-school for the mentally retarded, or a special unit,[1] or any public or private facility within or without the state, approved by the commissioner of the department of human services. Iowa Code § 222.60.

For those patients committed or admitted to a hospital-school or a special unit, the county has little or no discretion in determining what costs are necessary.[2] Generally, the expenses of patients in a hospital-school or special unit are certified by the superintendent of the hospital-school to the state comptroller. The comptroller then charges each county for the amount it is liable under § 222.73. The amount charged for the treatment of outpatients is established by the state director. Iowa Code § 222.73. Thus, under § 222.73, the counties have no discretion in determining what costs are necessary when patients are committed to a hospital-school or special unit.

It also appears that the county has limited discretion concerning costs when Chapter 222 patients are placed outside a hospital school or special unit. Iowa Code Section 222.59 permits the superintendent of a hospital-school or special unit to arrange for patients to be out placed at other facilities. Such placement may be made when it is determined that the patient is unlikely to benefit from further treatment, training, instruction, or care at the institution or is likely to improve

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[1]"Special unit" means a special mental retardation unit established at a state mental health institute. Iowa Code § 222.1(2) (1985).

[2]Voluntary admissions. Iowa Code § 222.13 (1985). Involuntary commitments. Iowa Code § 222.31 (1985).

the patient's life status in an alternative facility. Iowa Code § 222.59(1) (1985). If state funds are being made available to the county (which the county may by law use to pay a portion of the cost of the patient so placed), the county board of supervisors may not change a placement or program arranged and approved under § 222.59. However, the county board may at any time propose an alternative placement or program to the state director. Iowa Code § 222.59(6) (1985). The clear intent of the legislature as evidenced by § 222.59(6) is to grant the board more discretion regarding the care of mentally retarded persons placed outside a hospital-school or special unit.

However, based on the above cited statutes, the county board has little discretion with regard to determining what expenses are necessary when the patient has been committed or admitted to a hospital-school or special unit. As long as the patient remains under the auspices of the state by virtue of the patient's commitment to a hospital-school or special unit, the board of supervisors must yield to the discretion of the superintendent and professional staff of the hospital-school or special unit.[3]

Chapter 222 does not specifically speak to the board's discretion for costs incurred by patients admitted to public or private institutions. The expenses of patients in public or private institutions are not certified as they are for patients in hospital-schools or special units. Therefore, the county

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[3]Iowa Code § 229.59(5):

> Placement of a patient outside of a hospital-school or special unit under this section shall not relieve the Iowa department of human services of continuing responsibility for the welfare of the patient, except in cases of discharge under section 222.15 or 222.43. Unless such a discharge has occurred, the department shall provide for review of each placement arrangement made under this section at least once each year, or not more often than once each six months upon the written request of the patient's parent, guardian or advocate, with a view to ascertaining whether such arrangements continue to satisfactorily meet the patient's current needs.

board of supervisors may have some discretion in determining what services are necessary. As previously indicated, it is clear that the legislature intended to grant the board more discretion regarding the care of mentally retarded persons placed outside of a hospital-school or special unit.

II

The county board's discretion in determining what are "necessary" costs is not without its limits. Constitutional and statutory considerations indicate that the board's determination must be a product of medical authorities' professional judgment. Prior to the admission of a person to a public or private institution, that person must be determined to be mentally retarded within the meaning of Chapter 222. Based on that determination, that person must be committed or admitted to an institution which offers appropriate services.

Additional guidance can be found in a United States Supreme Court case which holds that the liberty interests of a mentally retarded person who is involuntarily committed required the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint. Youngberg v. Romeo, 457 U.S. 307, 319, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). In determining what was reasonable in a case presenting a claim for training by a state, a treatment decision by a qualified professional is presumptively valid. Id. at 322. Also, in a recent federal court case, the court affirmed a district court decision that held that the state should implement a training or treatment plan prescribed by its own professionals for a mentally retarded ward of the state. Thomas v. Morrow, 781 F.2d 367, 369 (4th Cir. 1986). Following these cases, a decision regarding treatment and training of persons whose liberty interests are impaired should be consistent with professional judgment.

In determining what are necessary costs where a mentally retarded person is not involuntarily committed, we think the court would find a treatment decision supported by professional judgment to be presumptively accurate. If in a particular instance, the county board of supervisors were to deny a prescribed treatment or service, we think the board should have a reasonable basis for rejecting the views of the professional concerning what treatment is necessary.

An additional concern you have raised is the situation of professionally recommended services which are terminated because of a reduction in federal and state funding. You have indicated that the position of many institutions which serve mentally retarded persons is that, even if federal and state funds are not available, the county has an obligation to pay for these services

under § 222.60. This is not necessarily the case. Youngberg points out that qualified professionals may consider the burden on the state when they prescribe treatment. Given fiscal and administrative limitations, treatment decisions of professionals affecting institutional residents must bear a presumption of correctness. Youngberg v. Romeo, 457 U.S. at 322, 324.

To summarize, the county board of supervisors has little discretion to determine what are necessary costs of admission, commitment, or treatment, training, instruction, care, habilitation, support and transportation of mentally retarded persons committed or admitted as patients in a hospital-school or special unit. The board of supervisors has some discretion to determine those costs for mentally retarded persons committed to public or private institutions. However, courts will defer to the judgment of professionals when confronted with challenges to the adequacy of treatment received by persons whose liberty interests are infringed.

Sincerely,

Valencia Voyd McCown

Valencia Voyd McCown
Assistant Attorney General

VVM/jam

AUDITOR: Cities. Iowa Code § 11.18 (1985). Auditor has discretion to audit cities when the Auditor deems such action to be in the public interest. (Galenbeck to Renaud, State Representative, 10-30-86) #86-10-4(L)

October 30, 1986

Dennis Renaud
State Representative
912 - 4th Street, S.W.
Altoona, Iowa 50604

Dear Mr. Renaud:

You have requested an opinion of the Attorney General regarding two questions:

1. Is the State Auditor's office entitled to conduct an audit of Altoona if the city council has, prior to July 1, 1986, made arrangements to hire a certified public accountant to audit the city for the 1985-86 fiscal year?

2. Does Iowa Code § 11.18 (1985) apply to the city of Altoona?

I will respond in the order your questions are stated above.

1. Answers to both inquiries are found in Iowa Code § 11.18 (1985) which provides in part:

> The financial condition and transactions of all cities and city offices . . . shall be examined at least once each year. . . . Examinations may be made by the auditor of state, or in lieu of the examination by state accountants the local governing body whose accounts are to be examined, in case it elects so to do, may contract with, or employ, certified or registered public accountants. . . . If a city . . . elect[s] to have the audit made by certified or registered public accountants, it must so notify the auditor of state within sixty days after the close of the fiscal year to be examined. A city must so notify the state auditor by filing a resolution of the council. Such notification and designation shall remain in effect until rescinded or modified by a subsequent resolution of the council filed with the state auditor. If any city . . . does not file such notification with the auditor of state within the required period, the auditor of state is authorized to make the examination and cover any period which has not been previously examined.
>
> * * *
>
> In addition to the powers and duties under other provisions of the Code, the auditor of state may at any time, if the auditor of state deems such action to be in the public interest, cause to be made a complete or partial audit of the financial condition and transactions of any city, county, school corporation, governmental subdivision, or any office thereof, even though an audit for the same period has been made by certified or registered public accountants. Such state audit shall be made and paid for as provided in this chapter, except that in the event an audit covering the same period has previously been made and paid for, the costs of such additional state audit shall be paid from any funds available in the office of the auditor of state. This paragraph shall not be construed to grant any new authority to have audits made by certified or registered public accountants. (emphasis added)
>
> * * *

The auditor may audit the financial condition and transactions of Altoona in two circumstances. The first circumstance might be characterized as a regular or annual audit. This audit must be performed by the auditor unless, in lieu thereof, the city elects to hire a registered or certified public accountant (CPA) to perform the same function. In the second circumstance, the auditor may perform an optional or discretionary audit whenever such an audit is in the public interest. 1974 Op.Att'yGen. 768-769.

This second circumstance is described at length in the third paragraph of § 11.18. The determination to perform or not perform an audit is within the auditor's discretion. The standard by which the auditor acts is his determination whether the public interest requires an audit. The audit may cover any office of a city, or all of a city government. The audit may be full or partial, covering an identical time period or government entity for which an audit has previously been performed by a CPA. If a prior CPA audit has been "made and paid for," the cost of the audit is "paid from any funds available in the office of the auditor of state." Otherwise, costs are borne as provided by Iowa Code §§ 11.20 and 11.21.

Thus, in answer to your first question, the auditor may audit the city of Altoona for the fiscal year 1985-86. If no audit by a CPA has been "made and paid for," the cost of the audit must be borne by Altoona as provided in Iowa Code §§ 11.20 and 11.21.

2. Implicit in the answer supplied above is the response to your second question. Iowa Code § 11.18 does apply to the city of Altoona. As noted above, the statute begins with a broad-sweeping statement:

> The financial conditions and transactions of all cities and city offices . . . shall be examined once each year, except that cities having a population of seven hundred or more but less than two thousand shall be examined at least once every four years, and cities having a population of less than seven hundred may be examined as otherwise provided in this section. (emphasis added)

Although the statute provides different treatment in some respects for cities having a population of less than seven hundred and for cities with a population of seven hundred to two thousand, Iowa Code § 11.18 clearly applies to the city of

Altoona. The 1985-86 Iowa Official Register lists the 1980 population of Altoona as 5,764. See Secretary of State, Iowa Official Register (Volume 61, 1985-86) p. 137.

The auditor has discretionary authority to audit the city of Altoona when the Auditor "deems such action to be in the public interest."

Sincerely,

Scott M. Galenbeck

SCOTT M. GALENBECK
Assistant Attorney General

SMG/cjc

CONSTITUTION: Health. House File 2484, § 204(10)(b), 71st G.A., 2d Sess. (Iowa 1986). A reasonable basis exists for the legislative classification created by H.F. 2484 and if challenged, it is unlikely a court would find it violates equal protection under either the federal or Iowa constitutions. (McGuire to Welsh, State Senator, 10-22-86) #86-10-3(L)

October 22, 1986

The Honorable Joseph J. Welsh
State Senator
R.R. #2, Box 37
Dubuque, Iowa 52001

Dear Senator Welsh:

You requested an Attorney General's opinion on the constitutionality of House File 2484, § 204(10)(b), 71st G.A. 2d Sess. (Iowa 1986). Specifically you ask whether H.F. 2484, § 204(10)(b) violates (1) the Fourteenth Amendment of the United States Constitution; (2) Article I, § 6 of the Constitution of the State of Iowa. You have also asked whether this provision violates any other provision of Iowa law. We cannot in an opinion speculate concerning the broad range of potential challenges to this act but will instead respond to the specific questions asked.

House File 2484, § 204(10)(b) states:

> Funds appropriated under this paragraph shall be used to maintain and expand the existing public nursing program for elderly and low-income persons with the objective of preventing or reducing inappropriate institutionalization. The funds shall not be used for any other purpose . . . In order to receive allocations under this paragraph, the local board of health having jurisdiction shall prepare a proposal for the use of the allocated funds available for that jurisdiction that will provide the maximum benefits of expanded public health nursing care to elderly and low-income persons in its jurisdiction. After approval of the proposal by the department, the department shall enter into a contract with the local board of health. The local board of health shall subcontract with the Nonprofit Nurses' Association, an independent nonprofit agency, or a

> suitable local governmental body to use the allocated funds to provide public health nursing care. Local boards of health shall make an effort to subcontract with agencies that are currently providing services to prevent duplication of services.

Your concern centers around the fact that this legislation allows the local boards of health to qualify for state money only if they subcontract with a non-profit entity or local governmental body to provide the public health nursing services. This legislation precludes the local boards who want the public monies from contracting with proprietary, for-profit, entities. Thus, the legislature has made a classification for the purpose of contracting with local boards between the non-profit or local governmental body and the for-profit entities. This classification is what is in question.

I. United States Constitution, Amendment XIV

The Fourteenth Amendment provides that no state shall deny any person the equal protection of law. The focus of an equal protection challenge, then, is any classification which results in unequal treatment.

It must be stated initially that the Fourteenth Amendment does not preclude states from making any classification of persons for purposes of legislation. Western and Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. 648, 657, 68 L.Ed.2d 514, 523 (1981). In reviewing the classification made by the legislature, the reviewing court first looks to whether a suspect classification or fundamental right is involved. Frontiero v. Richardson, 411 U.S. 677, 682, 36 L.Ed.2d 583, 589 (1976).

A suspect classification is one based upon such inherent distinctions as race, alienage or religion. See Califano v. Goldfarb, 430 U.S. 199, 51 L.Ed.2d 270 (1977); New Orleans v. Dukes, 427 U.S. 297, 49 L.Ed.2d 511 (1976). Fundamental rights are constitutional rights and include the right to vote, the right of privacy, and the right to travel. See Kramer v. Union Free School District, 395 U.S. 621, 23 L.Ed.2d 583 (1969); Shapiro v. Thompson, 394 U.S. 618, 22 L.Ed.2d 600 (1968); Griswold v. Connecticut, 381 U.S. 479, 14 L.Ed.2d 510 (1965).

If a suspect class or fundamental right is involved, a very strict standard of review will be utilized and the state bears a heavy burden of justifying the classification. Trimble v. Gordon, 430 U.S. 762, 52 L.Ed.2d 31 (1977). If not, the review

of the legislation is to ascertain simply whether the classification bears a rational relation to a governmental interest. Schweiker v. Wilson, 450 U.S. 221, 67 L.Ed.2d 186 (1981).

As there is no suspect classification nor a fundamental right involved in the present case, the rational basis test is applicable. With the rational basis test, the role of review is limited. The legislation is reviewed solely to determine whether the classification bears a rational relationship to the governmental purpose of the legislation. See City of Charlotte v. Local 660, Internat'l Association of Firefighters, 426 U.S. 283 (1976). Such a review is undertaken with the understanding that a state's power to classify is broad and its discretion is limited only in that it may not be palpably arbitrary. Phillips Chemical Co. v. Dumas Independent School District, 4 L.Ed.2d 384 (1960). Additionally, statutes are afforded the presumption of constitutionality. Hodel v. Indiana, 452 U.S. 314, 69 L.Ed.2d 40 (1981).

In ascertaining whether the classification is rationally related to a governmental purpose, the court looks at: 1) whether the questioned legislation has a legitimate purpose and 2) whether the legislature reasonably believed use of the classification would promote that purpose. Western and Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. 648, 688, 68 L.Ed.2d 514, 531 (1981).

In the case at hand, the legislature appropriated funds to "maintain and expand the existing public health nursing program for elderly and low-income persons with the objective of preventing or reducing inappropriate institutionalization." H.F. 2484, § 204(10)(b). Certainly this legislation has a legitimate governmental purpose of promoting the health and welfare of its citizens.

In order to implement the purpose, the legislature allocated funds to be available to local boards of health who "shall subcontract with a nonprofit nurses association, an independent nonprofit agency, or a suitable local governmental body to use the allocated funds to provide public health nursing care." H.F. 2484, § 204(10)(b).[1]

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[1] See H.F. 2484, § 204(10)(c)(5) which utilizes the same language for grants to county boards of supervisors for the homemaker-home health aide program. See also Iowa Code § 143.1 which states that particular governmental entities "may contract with any non-profit nurses' association for public health nursing service."

A legislature could reasonably believe that the public money used to provide public health nursing services would be more effectively utilized in reaching the target population by non-profit entities. Without the additional need of the proprietary entities to make a profit, the legislature could reasonably conclude that the non-profit entities would allocate more of the money to provide direct care services.

Since the legislation has a legitimate purpose and the legislature could reasonably believe contracting with non-profit entities would result in more money spent on direct service, we consider it unlikely that a court would strike down S.F. 2484 as violating the Fourteenth Amendment.

II. Iowa Constitution, Article I, § 6

Your second question, whether this legislation violates Iowa Const. art. I, § 6, is resolved by the answer to your first question. This provision of the Iowa Constitution is a counterpart of the federal equal protection clause. See City of Waterloo v. Selden, 251 N.W.2d 506, 509 (Iowa 1977). Therefore, the analysis is essentially the same. Id. And the burden is on the one challenging the legislation to negate every conceivable basis which may support the legislation. Grubbs v. Iowa Housing Finance Authority, 255 N.W.2d 89, 95 (Iowa 1977).

Additionally, when a statute's classification survives an equal protection challenge, it will also survive a privileges and immunities challenge. Matter of Chicago, Milwaukee, St. Paul & Pacific R. Co., 334 N.W.2d 290, 294 (Iowa 1983). Thus there appears to be no violation of Iowa Const. art. I, § 6.

Conclusion

It is the opinion of this office that a reasonable basis exists for the legislative classification created by H.F. 2484. Should this statute be challenged in a court of law, we consider it unlikely the court would find it violates equal protection under either the federal or Iowa constitutions.

Sincerely,

Maureen McGuire

MAUREEN McGUIRE
Assistant Attorney General

MM:rcp

CONSTITUTIONAL LAW: Appropriations. Iowa Const. Art. III, § 24; Iowa Code §§ 8.33 and 93.15 (1985); Senate File 2305, 71st G.A., 2d Sess., § 8 (Iowa 1986), 1986 Iowa Acts, ch. _____. Monies appropriated from the Petroleum Overcharge Fund are subject to reversion, and may not be obligated beyond the fiscal year of appropriation or other expressly established deadline, unless appropriated by the General Assembly. (Norby to Bean, Administrator, Energy and Geological Resources Division, Department of Natural Resources, 10-22-86) #86-10-2(L)

October 22, 1986

Mr. Larry L. Bean, Administrator
Energy and Geological Resources
Department of Natural Resources
Wallace State Office Building
L O C A L

Dear Mr. Bean:

We are in receipt of your request for an Attorney General's opinion concerning the availability of certain monies in the Petroleum Overcharge Fund [hereinafter P.O.F.], established by Iowa Code section 93.15 (1985). See 1984 Iowa Acts, ch. 1313.[1] The P.O.F. contains monies received by the State of Iowa through consent decrees in certain litigation as well as general fund appropriations. Your specific concern involves funds appropriated in 1985, by 1985 Iowa Acts, ch. 265, § 1, but not obligated prior to June 30, 1986.[2] The 1985 appropriation considered herein consists solely of funds received as a consequence of four specific consent decrees. 1985 Iowa Acts, ch. 265, § 1(1). In addition to the purposes stated in the appropriation act, these funds must be expended in accordance with a plan approved by the United States Department of Energy, id., § 1(5), for uses specified by federal statute.[3]

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[1] The origins of the P.O.F. are contained in 1983 Iowa Acts, ch. 202, § 27 and ch. 207, §§ 3, 4, and 5.

[2] 1985 Iowa Acts, ch. 265, § 2 provides that funds appropriated in § 1 are for the fiscal year ending June 30, 1986, with the exception of § 1(1)(b) funds. Section 1(1)(b) funds are therefore not subject to this opinion.

[3] Part A of the Energy Conservation and Existing Buildings Act of 1976, 42 U.S.C. 6861; 2) Part D of title III of the Energy Policy and Conservation Act relating to primary and supplemental state energy conservation programs, 42 U.S.C. 6321 et. seq.;

In appropriating new and remaining funds to the P.O.F., the 1986 legislature failed to specifically include the 1985 appropriation. Senate File 2305, 71st G.A. 2d Sess., § 8 (Iowa 1986) provides as follows:

> Sec. 8. FUND CARRYOVERS. Notwithstanding section 8.33, all unencumbered or unobligated moneys remaining from the funds which were apportioned to this state under Pub. L. No. 97-377 and which were appropriated under 1983 Iowa Acts, chapter 207, section 5, and under 1983 Iowa Acts, chapter 202, section 21, as well as any interest accrued in the petroleum overcharge fund through June 30, 1986 are appropriated to the energy policy council or its successor agency to continue the programs established under 1983 Iowa Acts, chapter 207, section 5, as amended by 1985 Iowa Acts, chapter 265, sections 3 and 4, and under 1983 Iowa Acts, chapter 202, section 21, during the fiscal year beginning July 1, 1986.

Curiously, the 1985 appropriation was made for the same purposes as the 1983 appropriation, which is reappropriated. Equivalent legislation of prior years has specifically appropriated all remaining funds. 1984 Iowa Acts, ch. 1313, § 2(1) and (2); 1985 Iowa Acts, ch. 265, § 2.

Iowa Code § 8.33 provides, with exceptions not relevant to the instant question, that at the close of each fiscal year all unencumbered or unobligated balances of appropriations shall revert to the state treasury to the credit of the fund from which the appropriation was made. A requirement of a legislative appropriation of all treasury funds is provided by Iowa Const. art. III, § 24 (no money shall be drawn from the treasury but in consequence of appropriations made by law). In addition, § 93.15 itself in relevant part states as follows:

> . . . The state of Iowa acting on behalf of itself, its citizens and its political subdivisions accepts any funds awarded or allocated to it, its citizens and political

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[3] (cont'd) 3) Part G of the Energy Policy and Conservation Act relating to energy conservation for schools and hospitals, 42 U.S.C. 6371 et. seq.; 4) the National Energy Extension Service Act, 42 U.S.C. 7001 et. seq.; and 5) the Low Income Home Energy Assistance Act of 1981, 42 U.S.C. 8621 et. seq.

> subdivisions as a result of petroleum overcharge cases. The funds shall be deposited in the petroleum overcharge fund and shall be expended only upon appropriation of the general assembly for programs which will benefit citizens who may have suffered economic penalties resulting from the alleged petroleum overcharges . . . .

Notwithstanding the requirements of art. III, § 24, and Iowa Code §§ 8.33 and 93.15, the source and specified use of the funds considered herein suggests a plausible rationale for expenditure without a specific appropriation. As the funds are made available to the State through a federal court decree and are directed to specific purposes by a federal statute, it is arguable that the funds are outside of the normal State budget systems.

We cannot, however, conclude that these funds escape the reach of art. III, § 24, and Iowa Code § 8.33. The principles discussed at 1968 Op.Att'yGen. 132, 149-153 apply herein. Despite their source, these funds are "state funds," as defined in Iowa Code § 8.2(2) (1985), although segregated from the general fund. Iowa Code § 444.21 (1985). 1968 Op.Att'yGen. at 149. In addition, even if these funds are considered within the ambit of Iowa Code § 7.9 (1985), we do not believe the federal guidelines are specific enough to allow administration by the Governor. The legislature still must exercise discretion in directing the expenditure of these funds. 1968 Op.Att'yGen. at 151. Cf. Webster County Board of Supervisors v. Flattery, 268 N.W.2d 869 (Iowa 1978) (no inherent judicial power to order expenditure by county from federal funds administered by Iowa Crime Commission).

In conclusion, it is our opinion that the funds appropriated by 1985 Iowa Acts, ch. 265, with the exception of those appropriated by section 1(1)(b), remain in the Petroleum Overcharge Fund but may not be obligated for any purposes until appropriated by an act of the legislature.

Sincerely,

STEVEN G. NORBY
Assistant Attorney General

SGN:rcp

INSURANCE: Mandatory chiropractic coverage in group insurance policies or plans. 1986 Iowa Acts, H.F. 2219, §§2, 5, 7, amending Iowa Code §§509.3, 514.7, 514B.1(2) (1985). (1) Existing group plans offered by a nonprofit service corporation which renew on the very date - July 1, 1986 - which is the effective date of 1986 Iowa Acts, H.F. 2219, mandating chiropractic coverage in certain group policies or insurance-like plans, are subject to the requirements of H.F. 2219 at that time and not later. (2) H.F. 2219 is inapplicable to a self-insured plan. The point at which a plan with a stop-loss loses its self insured status and becomes subject to H.F. 2219 as "group" coverage is when there is an actuarial certainty of payment upon the stop-loss. (3) H.F. 2219 does not, by its own terms, exclude plans of the state or federal government providing benefits for their employees. (4) It cannot be stated that a health maintenance organization must contract with a chiropractor in its service area in order to comply with H.F. 2219. (5) The "Farm Bureau" plan is a "group subscriber contract or plan" under H.F. 2219. (6) The date of renewal of the master policy of the Iowa State Bar Association plan, rather than the anniversary date of any law firm in the plan, determines the timing of the application of H.F. 2219. (Haskins to Hager, Commissioner of Insurance, 10-2-86) #86-10-1(L)

October 2, 1986

William D. Hager
Commissioner of Insurance
Insurance Division
LOCAL

Dear Commissioner Hager:

You have asked the opinion of our office on a number of questions regarding 1986 Iowa Acts, H.F. 2219, (hereafter, the "Act") which pertains to chiropractic coverage for certain group insurance policies or insurance-like plans.

The Act applies to "group policies" under Iowa Code ch. 509 (1985), "group subscriber contracts or plans" offered by nonprofit health service corporations under Iowa Code ch. 514 (1985), and "prepaid group plans" offered by health maintenance organizations under Iowa Code ch. 514B (1985). Basically, the Act mandates payment of diagnosis or treatment by a licensed chiropractor where payment would be made to a licensed M.D. or D.O. for the same human ailment, regardless of the terminology employed by the different professions for the ailment, if the diagnosis or treatment is within the scope of the chiropractor's license. See 1986 Iowa Acts, H.F. 2219 §§2, 5, 7, amending Iowa Code §§509.3, 514.7, 514B.1(2) (1985).

Your first question is:

> At what point in time, i.e. July 1, 1986 or July 1, 1987, would a group contract renewed on July 1, 1986 by a corporation operating pursuant to Iowa Code chapter 514 become subject to the requirements of this Act?

The Act was approved by the governor on May 5, 1986 and was not made effective by publication. Hence, it is effective on July 1, 1986. See Iowa Code §3.7 (1985). By its terms, the Act's requirements governing a group plan offered by a nonprofit health service corporation apply to "[new] group subscriber contracts delivered after July 1, 1986, and to [existing] group subscriber contracts on their anniversary or renewal date, ..." 1986 Iowa Acts H.F. 2219, §5, amending Iowa Code § 514.7(1985). The first renewal or anniversary date of an existing group policy issued under ch. 514 to which this language can refer is July 1, 1986 - the very day which is the effective date of the Act. Therefore, it is clear that the Act applies to such a policy actually renewing on this date. There would be no delay in application of the Act until the next renewal date - July 1, 1987, for example. Compare 1986 Iowa Acts, H.F. 2219, §2, amending Iowa Code §509.3 (1985) (Act applies to group insurance policies under ch. 509 "delivered or issued for delivery after July 1, 1986, and to existing group policies on their next anniversary or renewal date . . . .." (Emphasis added)). This is the case even though a new, as opposed to an existing, policy issued precisely on July 1, 1986 would not be subject to the Act. A new policy under ch. 514 is covered only if it is "delivered after July 1, 1986." The general rule is that a reference to events "after" a certain date does not include events occurring on that date. See 86 C.J.S. Time §13(3), at 851-852 (1954).

Your second question is:

> Is this Act inapplicable with respect to a self-funded plan? Several employers provide their employees with insured health plans which include deductibles of approximately $500 or $1,000. The employer then agrees to assume responsibility for the deductible amount, in effect operating a self-funded plan for this amount. Would the requirements of this Act apply to such a "combination" plan? If yes, at what point would such a plan be considered self-funded if indeed

self-funded plans are outside the scope of the bill?

We believe the Act is inapplicable to a self-insured benefit plan. The basis for this conclusion is that self-insurance, because it does not involve a transfer or shifting of risk, is not subject to the laws regulating insurance generally, see 1 Couch, Cyclopedia of Insurance Law §1:2, at 6 (1984), and specifically to those which were amended by H.F. 2219 - Iowa Code ch. 509 (group insurance), ch. 514 (nonprofit health service corporations), and ch. 514B (health maintenance organizations).

It is true that Iowa Code §514B.34 (1985), added by 1986 Iowa Acts, H.F. 2219, §10, expressly authorizes insurers, nonprofit service corporations, health maintenance organizations, and self-insurers, to institute cost utilization control systems as long as those systems do not limit payment for health care services solely on the basis of licensure under Iowa Code ch. 151 (chiropractic). But new section 514B.34 cannot confer coverage under the Act where none would otherwise exist by virtue of initial non-inclusion under the triggering statutes, Iowa Code chs. 509, 514, and 514B.

Does the fact that the plan purchases a stop-loss with a deductible change this result? We believe that it can do so in the proper circumstances. Stop-loss coverage purchased by a group policyholder to cover catastrophic losses is typically not marketed as group coverage and is for the benefit of the individual group policyholder and not the members of its group (ordinarily, its employees) even though it is ultimately used to reimburse the policyholder for expenses to its group members. This kind of stop-loss is not triggered until a very high threshold level has been reached. On the other hand, a stop-loss (taking the form of a deductible for the group policyholder) triggered at a low level such as $500 or $1,000 could easily be the equivalent of a "group" policy for the benefit of the members of the group. Certainly, an employer cannot evade the Act by purchasing a virtually first-dollar "individual" stop loss policy but self-insuring a small portion of its risk under the plan. In essence, in that event, the plan has lost its status as a truly self-insured plan. But at what point does this occur?

One authority, in dealing with an analogous issue under the federal Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§1001-1381, has adopted an "actuarial certainty of payment" standard. See Op. Att'y Gen. (Tenn.) #86.103. The need for such a test arises because ERISA preempts state laws mandating benefits for employee welfare benefit plans which are

"uninsured" but not those which are "insured." See Metropolitan Life Ins. Co. v. Massachusetts, 105 S.Ct. 2380, 2393, 85 L.Ed.2d 728, 745 (1985). In the case of a plan with both a stop-loss and a self-insured retention by the employer, neither feature is determinative of whether the plan is "uninsured" or "insured." See Michigan United Food and Commercial Workers Union v. Baerwaldt, 767 F.2d 308, 312-313 (6th Cir. (1985). However, when there is an "actuarial certainty of payment" under the stop-loss, an "insured" plan is present and ERISA does not preclude application of state mandated benefit laws to the plan. See Op. Att'y Gen. (Tenn.) #86.103.

We think that this standard is applicable here also: the point at which a self-insured plan with a stop-loss becomes "group" coverage and ceases to be self-insurance is when there is an actuarial certainty of payment upon the stop-loss.[1] While this standard may be difficult to apply, we see no other way to distinguish between truly self-insured plans and plans which are in reality covered by group insurance, to which the Act would apply.

Your third question is:

> Does a plan provided to state and federal government employees by reason of their employment constitute "other similar coverage under a state or federal government plan" thereby exempting the plan from the bill's provisions?

This issue concerns the exemption from the Act for "blanket, short-term travel, accident-only, limited or specified disease, or individual or group conversion policies, or policies under Title XVIII of the Social Security Act, or any other similar coverage under a state or federal government plan." 1986 Iowa Acts, H.F. 2219, §2, amending Iowa Code §509.3 (1985). Does the reference to coverage under a state or federal government plan mean that a plan operated by the state or federal government for its own employees is exempt from the requirements of H.F. 2219?

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[1] Indeed, for a non-governmental employer group, which would be an "employee welfare benefit plan" under ERISA, this standard sets the limit on application of the Act, no matter how it is worded. In other words, it is clear that the truly self-insured employer group could not be subjected to the Act whatever the desire of the legislature.

Or does this exemption cover only state or federal programs "similar" to such programs as Title XVIII of the Social Security Act (Medicare)[2] - viz., Title XIX of the Social Security Act (Medicaid)[3]? We believe the latter is the case. The reference to a state or federal government plan is not to all plans of whatever nature but only to those plans "similar" in nature to the type mentioned in the antecedent reference, viz., social welfare type plans such as Medicaid. Plans offered by the state or federal government for their own employees are therefore not exempted from the Act by its terms.

The fourth question is:

> A health maintenance organization (HMO) provides benefits to its enrollees through a limited panel of medical providers whom the HMO has under contract. Does the bill effectively require that an HMO contract with at least one chiropractor in each service area?

A health maintenance organization provides benefits to its enrollees within a given "service area" or areas. However, it is unclear whether it is indeed precluded from providing services through providers which have not contracted with the health maintenance organization and which thereby are not members of its "panel" of providers. The Act merely requires that an HMO plan contain a "provision for payment of necessary diagnosis or treatment provided by a chiropractor licensed under chapter 151 . . . if the plan would pay or reimburse for the diagnosis or treatment of [a] human ailment . . . if it were provided by a person licensed under chapter 148, 150, or 150A [an M.D. or D.O.]." 1986 Iowa Acts, H.F. 2219, §7, amending Iowa Code §514B.1(2) (1985). Certainly, one way to comply with this requirement would be for the HMO to contract with a chiropractor. Nevertheless, there might be other conceivable arrangements - too varied to speculate upon or set out herein - which could meet the Act's requirement short of actual panel membership by a chiropractor. For example, a chiropractor could be made available on a referral basis to enrollees of the HMO. In essence, we cannot categorically state that an HMO must contract with a chiropractor in its service area in order to comply with the Act.

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2 42 U.S.C. §1395 et seq.
3 42 U.S.C. §1396 et seq.

Your fifth question is:

> As a benefit of belonging to a variety of organizations, members are eligible to apply for a health insurance program provided by Blue Cross and Blue Shield of Iowa (the Plans). Membership in the appropriate organization is a prerequisite to application. No master policy is issued to the organization, rather certificates are issued to each member to whom coverage is issued. Individuals are responsible for the entire premium and make payments directly to the Plans. The Plans may refuse to provide coverage to any applicant for failure to provide evidence of individual insurability. Does such an arrangement constitute a "group subscriber contract" subject to the provisions of this Act?

The Act does not define the phrase "group subscriber contract or plan" but the plan, known as the "Farm Bureau" plan, has characteristics of both an individual and group plan. Unlike group plans, it lacks a conversion privilege (which is statutorily required for plans under ch. 509). See Iowa Code §509.3(4) (1985), amended by 1986 Iowa Acts, H.F. 2465, §8. However, like many group plans, the plan has a "coordination of benefits" provision to avoid duplication of payment by other insurers. A written agreement between the Plans and the Iowa Farm Bureau Federation ("Farm Bureau") exists which could constitute a master policy. This document sets forth the requirement that a subscriber be a member of the Farm Bureau. It provides that the Farm Bureau is to promote the plan to its members and compensates the Farm Bureau on the basis of the number of subscribers in the plan. An exhibit to the agreement incorporates by reference, as the terms of coverage for participants in the plan, the "certificate" given to a subscriber and sets forth the rates for coverage. It provides, like many group plans, that individual insurability is suspended during "open enrollment" periods. For initial applicants, the agreement supersedes the requirement of a waiting period contained in the certificates. On occasion, the Farm Bureau has itself publically referred to its plan as a "group" or "group coverage."

We believe that, especially in the context of the Act, the distinguishing feature of a "group" plan is the requirement that all members belong to a definable group. See generally 19 Couch, Cyclopedia of Insurance Law §82:1, at 706 (1983). The concept of

a "group" for insurance purposes is a broadening one at present. See Gregg and Lucas, Life and Health Insurance Handbook 352 (1973). Indeed, it is increasingly difficult to even distinguish group and individual plans. The statute uses the term "group subscriber plan or contract." Therefore, it must be presumed that a plan offered by a corporation under ch. 514 was intended by the legislature to be covered in the absence of a clear manifestation otherwise. In construing statutes, a court ascribes to statutory terms their ordinary meaning unless the legislature otherwise defines them. See State v. White, 319 N.W.2d 213, 215 (Iowa 1982).

For there to be group, as opposed to individual, coverage, there must be a master policy. See 44 Am. Jur.2d Insurance §1842, at 833 (1982); Gregg and Lucas, Life and Health Insurance Handbook 852 (1973). However, the agreement between the Plans and the Farm Bureau in substance constitutes the master policy; the document given an individual subscriber is the equivalent of a group certificate and indeed is referred to as such. See Iowa Code §509.3(2) (1985) (A group accident or health policy shall contain a "provision that the company will issue to the policyholder for delivery to each person insured under the policy an individual certificate setting forth a statement as to the insurance protection to which the person is entitled. . . .")[4]; Keeton, Insurance Law §2.8, at 62 (1971) (a group certificate sets out the principal conditions of coverage). "Certificate" itself is group insurance terminology. See Vance, Law of Insurance §203, at 1042 (1951). In the past, individual insurability was a factor militating against group coverage. See Gregg and Lucas, supra. So too was direct payment by the group policyholder. But, now, by statute, features such as direct payment by the members of the group and individual insurability no longer appear to be inconsistent with group insurance. See e.g. Iowa Code §509.1(1)(b) (1985) (Accident and health group policy may be paid for entirely by employees; group need not cover employees as to whom evidence of individual insurability is not satisfactory to the insurer). Therefore, under all the circumstances, we conclude that the "Farm Bureau" plan is a "group subscriber contract or plan" within the meaning of the Act.

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[4] Ch. 509, governing plans sold by commercial insurers, is, of course, strictly speaking, inapplicable to nonprofit service corporations under ch. 514. See Iowa Code §514.1 (1985). However, it does provide useful indicators of what "group" coverage is like.

Finally, we turn to your last question:

> Master group contracts are often issued to associations comprised of a multitude of smaller units. For example, a master policy is issued to the Iowa Bar Association and certificates are then issued to individual law firms. The master policy renews and is re-rated annually. Each smaller unit has its own anniversary date when enrollment is open. Does this Act become applicable upon renewal of the master policy or on the smaller unit's open date?

As indicated, the Act applies to an existing "group subscriber contract or plan" renewing on or after July 1, 1986. The real issue is whether the subunits can be said to each be "group" plans, so that the anniversary date of the subgroups, as opposed to the renewal date of the master policy, determines when coverage by the Act is required.

After examining the documents constituting the particular arrangement referred to, it appears that there is only one group plan involved - that between the Plans and the bar association. The subunits -law firms - are little more than group certificate holders and are not themselves individual groups. Indeed, the "employees" referred to in the master policy between the Plans and the bar association are individual attorneys and not law firms. No written agreements exist between the Plans and any law firm. In other words, this is not an instance where the group plan is, in reality, a collection of group plans between the Plans and individual law firms, with the master policy being a mere facilitating arrangement. Hence, we believe that, under these circumstances, it is the date of renewal of the master policy, as opposed to the anniversary date of the subunits, which governs the timing of the application of the Act.

In sum, existing group plans offered by a nonprofit service corporation which renew on the very date - July 1, 1986 - which is the effective date of the Act are subject to the requirements of that Act at that time and not later. The Act is inapplicable to self-insured plans. The point at which a plan with a stop-loss loses its self-insured status and becomes subject to the Act as "group" coverage is when there is an actuarial certainty of payment upon the stop-loss. The Act, by its own terms, does not exclude plans of the state or federal government providing benefits for their employees. It cannot be stated that a health maintenance organization must contract with a chiropractor in its

service area in order to comply with the Act. The "Farm Bureau" plan is a "group subscriber contract or plan" within the meaning of the Act. The date of renewal of the master policy of the Iowa State Bar Association plan, rather than the anniversary date of any law firm in the plan, determines the timing of the application of the Act. We note that it is the legislature, and not this office, which has made the policy choices behind the mandating of chiropractic coverage in the Act.

Very truly yours,

Fred M. Haskins
Assistant Attorney General

FMH/860-F3

TAXATION: Local Option Sales and Services Tax; Conditions for Calling Election to Consider Tax Repeal. Iowa Code § 422B.1(5) (Supp. 1985); Iowa Code § 422B.1(7) (Supp. 1985), as amended by 1986 Iowa Acts, Senate File 2302. As a condition for calling any election to consider the repeal of a local option sales and services tax imposed in only certain areas in the county, a petition signed by the eligible voters of the county equal in number to five percent of the persons in the county who voted at the last preceding state general election must be received or, alternatively, a motion or motions for repeal must be adopted by the governing body or bodies of incorporated or unincorporated areas, representing at least one half of the population of the county. (Griger to Herrig, Dubuque County Attorney, 11-19-86) #86-11-4(L)

November 19, 1986

James W. Herrig
Dubuque County Attorney
Dubuque County Courthouse
Dubuque, Iowa 52001

Dear Mr. Herrig:

You have requested an opinion of the Attorney General with respect to the repeal of a local option sales and services tax imposed in certain incorporated areas in Dubuque County. You state that on November 4, 1986, a majority of those voting in each of four cities in Dubuque County approved the imposition of the tax, but majorities of those voting in the remaining incorporated areas, including the City of Dubuque, and in the unincorporated area did not approve imposing the tax. The result is that the tax will be imposed in these four cities which are now considering whether to attempt to have the tax repealed. You inquire whether the alternative methods for calling an election to vote on tax imposition, in Iowa Code § 422B.1(5) (Supp. 1985), also apply for purposes of calling an election to vote on the question of repeal of the tax.

Iowa Code chapter 422B (Supp. 1985), as amended by 1986 Iowa Acts, Senate File 2302 (S.F. 2302), authorizes a county to impose, if approved by the voters, a local sales and services tax. The tax "shall only apply to those incorporated areas and the unincorporated area of that county in which a majority of those voting in the area on the tax favor its imposition." Iowa Code § 422B.1(2) (Supp. 1985), as amended by S.F. 2302, § 2.

There are two alternative methods, in § 422B.1(5), by which an election to consider the question of tax imposition can be called. First, § 422B.1(5)(a) provides that the tax imposition question shall be submitted to the voters "upon receipt of a petition requesting impostion . . . signed by eligible electors of the whole county equal in number to five percent of the persons in the whole county who voted at the last preceding state general election."

Second, and alternatively, § 422B.1(5)(b) provides that the question of tax imposition shall be submitted to the voters "upon receipt by the county commissioner of elections of the motion or motions, requesting such submission, adopted by the governing body or bodies of the cities located within the county or of the county, for the unincorporated areas of the county, representing at least one half of the population of the county."

Once approved by the voters, the local sales and services tax can be repealed "only after an election at which a majority of those voting on the question of repeal . . . favor the repeal."[1] Iowa Code § 422B.1(7) (Supp. 1985), as amended by S.F. 2302, § 5. Section 422B.1(7) further provides in part:

> The election at which the question of repeal or rate change is offered shall be called and held in the same manner and under the same conditions as provided in subsections 5 and 6 for the election on the imposition of the local option tax. However, in the case of a local sales and services tax where the tax has not been imposed countywide, the question of repeal or imposition shall be voted on only by the qualified electors of the areas of the county where the tax has been imposed or has not been imposed, as appropriate.

While it would be logical to allow only the eligible electors or the governing bodies in the tax imposing cities to decide whether an election should be called to consider the question of repeal of the tax, § 422B.1(7) clearly does not provide for such result. Instead, the statute states that an election to consider the repeal of the tax must be called under the same conditions as an election would be called, under § 422B.1(5), to consider the question of tax imposition. Construction of statutes is only proper when legislative enactments are so ambiguous or obscure that reasonable minds could disagree or be uncertain as to their meaning. American Home Products Corporation v. Iowa State Board of Tax Review, 302 N.W.2d 140, 143 (Iowa 1981); Palmer v. State Board of Assessment and Review, 226 Iowa 92, 95, 283 N.W. 415, 416 (1939). We are of the view that § 422B.1(7) is clear and unambiguous.

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[1]Senate File 2302, § 10 authorized repeal of a local option sales and services tax without an election. However, § 10 was repealed on July 1, 1986, and, as a consequence, has no application to the instant opinion request.

Accordingly, it is our opinion that § 422B.1(7) requires, as a condition for the call of any election to consider the repeal of a local sales and services tax, that one of the alternative methods in § 422B.1(5) be utilized.[2] As a condition for calling an election to consider the repeal of the tax, a petition signed by the eligible voters of the county equal in number to five percent of the persons in the county who voted at the last preceding state general election must be received or, alternatively, a motion or motions for repeal must be adopted by the governing body or bodies of incorporated or unincorporated areas, representing at least one half of the population of the county.

Very truly yours,

Harry M Griger

Harry M. Griger
Special Assistant Attorney General

HMG:cmh

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[2]The Secretary of State has promulgated a rule, 750 Iowa Admin. Code § 11.5(1)(a), concerning the method for calling an election to consider repeal of local sales and services tax. The rule is not consistent with our opinion and, accordingly, we believe to that extent the rule is ultra vires as incompatible with § 422B.1(7).

TAXES: Mandatory Mediation. 1986 Iowa Acts, _____ (H.F. 2473); new Iowa Code Ch. 654A; §§ 654A.1, 654A.4. Counties in their tax collecting capacity are not subject to the requirements of mandatory mediation (Ormiston to Pillers, Assistant Clinton County Attorney, 11-19-86) #86-11-5(L)

November 19, 1986

Mr. G. Wylie Pillers III
Clinton County Attorney
Clinton County Courthouse
Clinton, Iowa 52732-0157

Dear Mr. Pillers:

You have asked this office for an opinion on whether the mandatory mediation which is established in H.F. 2473, new Code Chapter 654A, applies to counties as they attempt to collect on delinquent real estate taxes. We believe that the legislature did not contemplate the application of mandatory mediation to counties as it relates to the collection of delinquent real estate taxes.

The language of H.F. 2473 speaks in terms of creditor and debtor. Creditor is defined at section 14 of H.F. 2473, new Iowa Code § 654A.1(3), as "the holder of a mortgage on agricultural property, a vendor of a real estate contract for agricultural property, a person with a lien or security interest in agricultural property, or a judgment creditor with a judgment against a debtor with agricultural property. Further, it only applies to a creditor "with a secured debt against the borrower of twenty thousand dollars or more." H.F. 2473, § 17; new Code § 654A.4.

Although the scope of H.F. 2473 as it relates to mandatory mediation is broad, it does not appear that it extends to a county or any other governmental entity in its capacity of collecting delinquent taxes since a taxpayer is usually not regarded as a borrower and taxes are not contractual debts.

Iowa courts have generally held that taxes are not debts. Eide v. Hottman, 257 Iowa 264, 132 N.W.2d 755 (1965). In Bailes v. City Council of City of Des Moines, 127 Iowa 124, 102 N.W. 813-814 (1905), the court observed:

> The general tenor of authorities is to the effect that a tax in its essential characteristics is not a debt, but an impost levied by authority of government upon its citizens or subjects for the support of

> the state. Whereas a debt is a sum of money due by certain and express agreement, and originates or is founded upon contracts express or implied.

The court in In re Estate of McMahon, 237 Iowa 236, 21 N.W.2d 581 (1946) also asserts that taxes are not be regarded as debt. The Court in McMahon, also relied on Section 8 of 51 AM. JUR. Taxation (1944) which states:

> [i]t is generally considered that taxes are not debts in the ordinary meaning of that word. A tax duly assessed and levied is not a debt within the meaning of the Federal Constitution; nor are taxes debts within the constitutional provision against imprisonment for debt. A tax is not a debt within the meaning of allowing deductions in the determination of the amount of tax.
>
> A tax does not establish the relation of the debtor and creditor between the taxpayer and the state or municipality; it does not bear interest when past due, unless the statute so provides; it is not liable to set off; and it is not enforceable by a personal action against the taxpayer absent statutory authority. A tax differs materially and essentially from a debt. The one is founded on contract; the other is not.... McMahon at 582.

The rule is well established that a tax is not a debt within the ordinary meaning of the word.

It appears that on the basis of Iowa law that a tax is not to be regarded as a debt. Therefore, the counties of Iowa, in their tax collecting capacity, are not subject to the mandatory mediation requirements of H.F. 2473.

Sincerely,

Tam B. Ormiston

TAM B. ORMISTON
Assistant Attorney General

TBO:bac

COUNTIES; Cemeteries; Applicability of law for protection and preservation of marked and unmarked burial sites: Iowa Code sections 566.20-566.27 (1985); Iowa Code sections 566.31-566.34 (198__) (1986 Iowa Acts, ch. _____, S.F. 120): Sections 566.31 and 566.32 (S.F. 120, §§ 1 and 2) which impose criminal sanctions for disturbing known burial sites, apply only to marked burial sites, while section 566.33 (S.F. 120, § 3), which requires local governments to preserve burial sites, applies to any burial site, marked or unmarked. (Weeg to Metcalf, Black Hawk County Attorney, 11-17-86) #86-11-2(L)

November 17, 1986

Mr. James M. Metcalf
Black Hawk County Attorney
P.O. Box 2215
Waterloo, Iowa 50704

Dear Mr. Metcalf:

You have requested an opinion of the Attorney General on the question whether 1986 Iowa Acts, chapter _____, S.F. 120 (new Iowa Code sections 566.31-566.34) applies to an abandoned and unmarked cemetery. You also ask whether the fact that a gravesite is marked affects the applicability of this new law.

As background, prior to enactment of S.F. 120, the question of responsibility for maintaining cemeteries which had fallen into disuse and disrepair was discussed by the Iowa Court of Appeals in Dearinger v. Peery, 387 N.W.2d 367 (Iowa App. 1986). In that case a township cemetery had been abandoned by the township and conveyed to an adjacent landowner. The cemetery deteriorated, and eventually the landowner sought to remove the only two original graves that remained. The court quieted title in the landowner and then held that the township did not have a duty to maintain the cemetery under existing law. However, the court cited a number of authorities in strongly stating that Iowa law "jealously protects" the special interest in the right of a person to a burial place that forever remains undisturbed, and held that the landowner had the duty to restore the existing gravesites. 387 N.W.2d at 372-373.

The Dearinger decision was issued on March 31, 1986. Senate File 120 was introduced on January 29, 1985, approved on March 20, 1986, and became effective July 1, 1986.

As an initial matter, Iowa Code sections 566.20 through 566.27 (1985) govern abandoned cemetery lots.[1] However, the

[1] Separate provisions for disposing of township cemetery land which has not ever been used for burial purposes are found in section 359.37.

procedure set forth in these sections for declaring a cemetery lot abandoned apply only to unoccupied cemetery lots. See § 566.20. Accordingly, a cemetery lot in which a person is buried cannot be legally abandoned under these sections. See 1966 Op.Att'yGen. 151 (#66-9-3) (unoccupied portion of a cemetery lot in which a veteran is buried falls within the abandonment provision of ch. 566). Accordingly, when you refer to abandoned cemeteries in your opinion request, we assume you mean unoccupied burial lots, in which case sections 566.20 to 566.27 apply, and not the new provisions of S.F. 120, which apply to burial sites, marked or unmarked, in which persons have actually been buried.

In the event a burial site is occupied, the question becomes whether S.F. 120 applies. Senate File 120, section 1, provides:

> If a governmental subdivision or agency is notified of the existence of a marked burial site within its jurisdiction, and the burial site is not otherwise provided for under this chapter or chapter 305A or 566A, it shall as soon as practicable notify the owner of the land upon which the burial site is located of the site's existence and location. The notification shall include an explanation of the provisions contained within section 566.32.

(emphasis added). Section 2 provides it is a simple misdemeanor for a person to knowingly and without authorization remove, destroy, or otherwise disturb a burial site for which the person received notification under section 1. Section 3 provides:

> A governmental subdivision or agency having a burial site within its jurisdiction, for which protection or preservation is not otherwise provided, shall preserve and protect the burial site as necessary to restore or maintain its physical integrity as a burial site. The governmental subdivision or agency may enter into an agreement with a public or private organization interested in historical preservation to delegate to the organization the responsibility for the protection and preservation of the burial site.

(emphasis added). Finally, section 4 authorizes law enforcement officers to confiscate and return a grave or burial memorial in the possession of an unauthorized person.

The polestar of statutory construction is legislative intent. See, e.g., Beier Glass Co. v. Brundige, 329 N.W.2d 280, 283 (Iowa 1983). In construing a statute, the language used by the legislature should be interpreted fairly and sensibly in accordance with the plain meaning of the words used. See In re Klug's Estate, 251 Iowa 1128, 104 N.W.2d 600, 603 (1968). Based on these basic principles of statutory construction, we believe that by using the phrase "marked burial site" in section 1, and by referring to section 1 in section 2, the legislature intended that these two sections apply to marked burial sites. Section 3 refers only to "burial sites," not marked burial sites. The Iowa Supreme Court has held that when identical language is used several places in a statute, it is generally given the same meaning. See Beier Glass v. Brundige, 329 N.W.2d at 286. Conversely, we believe when identical language is not used, a different meaning was intended. We can only conclude that the omission of the word "marked" in section 3 was deliberate in order that section 3 have broader application than sections 1 and 2, or the legislature would have specified otherwise.

This conclusion is consistent with the apparent purposes of these sections. Sections 1 and 2 provide protection for marked burial sites which are otherwise not protected by statute and impose criminal sanctions for disturbing such known burial sites. It is well-established that criminal sanctions generally cannot be imposed without proof of the element of knowledge on the part of the perpetrator. See, e.g., Dunahoo, The New Iowa Criminal Code, 29 Drake L. Rev. 294-301 (1979-1980). It therefore makes sense that such sanctions may be imposed only when burial sites can be identified by a marking of some type. On the other hand, we believe the intent of section 3 is to protect any burial site, marked or unmarked, that is not cared for by requiring governmental bodies to maintain such sites once brought to their attention.

In conclusion, it is our opinion that Senate File 120, sections 1 and 2, apply only to marked burial sites, while section 3 applies to any burial site, marked or unmarked.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

MUNICIPAL CORPORATIONS: Home rule; utility boards. Iowa Const., Art. III, § 31; Art. III, § 38A. Iowa Code §§ 384.84; 384.89; 388.4; 388.5. A municipal utility board may spend utility revenues to coordinate economic development promotional efforts if it properly determines that this is a utility operating expense. The determination whether an expenditure is a proper utility operating expense is to be made by the utility board. Our prior opinion #84-12-11(L) is overruled to the extent inconsistent with this opinion. A utility board may not spend utility revenues for city purposes not related to operation of the utility but may transfer surplus revenues to other city funds as provided in Iowa Code § 384.89. City boards, other than the city council, do not have home rule authority to act outside their statutory field of operation. (Osenbaugh to Priebe, State Senator, 11-10-86) #86-11-1(L)

November 10, 1986

The Honorable Berl Priebe
State Senator
R.R. 2, Box 145A
Algona, Iowa 50511

Dear Senator Priebe:

You have requested the opinion of this office concerning whether municipal utilities can provide financial assistance to the Iowa Area Development Group, an economic development arm of Central Iowa Power Cooperative (CIPCO). You specifically ask the following questions:

1. Under Home Rule is it legal for a City Council acting as the governing body of a municipal utility to contribute public funds to an economic development program such as the Iowa Area Development Group?

2. Under Home Rule is it legal for a Board of Trustees acting as a governing body of a municipal utility to contribute public funds to economic development program such as the Iowa Area Development Group?

3. Is it legal for organizations such as the North Iowa Municipal Electric Cooperative Association, the Western Iowa Municipal Electric Cooperative, and the Southern Iowa Municipal Electric Cooperative, formed pursuant to Chapters 28E and 499 of the Iowa

Code, to contribute public funds to an economic development program such as the Iowa Area Development Group?

Submitted with your request is a document entitled Iowa Area Development Group Economic Development Proposal. The potential participants include rural electric cooperatives, municipal utilities served directly by the rural electric cooperatives, municipal electric cooperatives established pursuant to chapter 28E, their participating municipal electric utilities, and other independent municipal electric utilities. The proposal contemplates that the member utilities would financially support an organization known as the Iowa Area Development Group. This would be established as a department within CIPCO. The employees would be on the CIPCO payroll and be subject to CIPCO administrative policies and procedures. The development group would be staffed with three employees. The group would develop and maintain plant site inventories, building inventories, prospect inventories, and other economic development data bases. Staff would also provide assistance to participating utilities in developing individual economic development programs and serve as liaison with local development organizations. The group would also provide economic development training and education.

The stated goals and objectives of the plan are to retain and increase job opportunities within the service areas, to promote the more efficient utilization of existing generation and transmission facilities, to stabilize power costs by increasing the sales base, to increase the utilities' involvement in local economic development activities, and to contribute to improvement of local economies.

The proposal includes statements that commercial industrial customers are important to each utility. It also indicates that investor owned utilities throughout the country and rural electric cooperatives in other states have economic development departments to promote the addition of new loads to the service area.

I. Public Purpose

Article III, § 31, of the Iowa Constitution generally prohibits the appropriation of public money or property for private purposes. This office recently opined that the goal of economic development is a public purpose. Whether a specific expenditure of public moneys for economic development serves a public purpose must be determined in light of the specific circumstances. Op.Att'yGen. #86-8-8 (copy attached).

We would note that the legislature has provided for similar research and marketing activities by the Iowa Development Commission. See Iowa Code Supp. § 28.101 (1985). This legislative determination that similar economic development research and marketing serves a public purpose is a relevant factor. Thus we believe that a governing body could conclude that hiring personnel to carry out economic development research and marketing would serve a public purpose.

II. Use of Utility Revenues

In Op.Att'yGen. #84-12-11(L), this office concluded that a board of trustees of a municipal utility may participate in activities of a local non-profit development corporation but cannot provide financial contributions to the local development corporation. That opinion concerned only the authority of a utility board and not the authority of a city council as such. The opinion concluded that it was doubtful that expenditures to a local development corporation could be shown to be a cost of operation and maintenance of the utility system such that consumers could be required to pay for such expenditures as a charge for utility service. Having so concluded, the opinion noted that the legislature has specifically provided for the transfer to the city of surplus funds beyond those needed to meet the municipal utility's obligations. See Iowa Code § 384.89 (1985). This express provision for the use of utility funds precluded implying authority for contribution of utility funds to other entities.

Your letter, in effect, requests that we review this prior opinion. This office does not overrule prior opinions unless they are clearly erroneous, 1980 Op.Att'yGen. 107, 108. An opinion may also be distinguished because of a change in the law or other changed circumstances.

A utility board can use utility revenues to pay those expenses which it properly determines are utility operating expenses. City of Spencer v. Hawkeye Security Insurance Co., 216 N.W.2d 406, 411 (Iowa 1974) (utility board could purchase liability insurance to indemnify its employees). The utility board has control of utility revenues. § 388.5; City of Spencer, 216 N.W.2d at 411. The utility board therefore has primary jurisdiction to determine what are expenses of operation and maintenance properly payable out of utility revenues. See §§ 384.84(1), 384.89.

Our prior opinion stated that it was doubtful whether contributions to a local development corporation could be shown to be a cost of operation and maintenance of the utility system.

In so concluding, we considered rules of the Commerce Commission concerning what expenses privately owned utilities may charge to ratepayers. Op.Att'yGen. #84-12-11(L). These rules are not directly applicable as municipal utility rates are not subject to Commerce Commission review. Further, municipal utilities may charge a rate which will generate a profit. City of Corning v. Iowa-Nebraska Light & Power Co., 225 Iowa 1390, 1396-97, 282 N.W. 791, 800 (Iowa 1938). See Iowa Code § 384.84 (rates must be "at least sufficient" to pay obligations of utility). The rate-making power of the utility board is exclusive although subject to judicial review for reasonableness. State v. City of Altoona, 274 N.W.2d 366 (Iowa 1979).

The utility board or its designees on a joint board must therefore determine whether the proposed hiring of staff to coordinate the utilities' economic development efforts is properly a utility operating expense. That is a factual determination which an Attorney General's opinion cannot resolve. See 120 Iowa Admin. Code 1.5(3)(c). We would therefore overrule our prior opinion, #84-12-11(L), to the extent that it made the factual determination that an expenditure was not an expense of operation and maintenance. If, in fact, the costs are a reasonable expense of operation and maintenance, a municipal utility board can authorize the expenditure.

III. Surplus Funds

If the proposed expenditures are not properly utility expenses of operation and maintenance, then the question arises whether a municipal utility board has home rule authority to expend surplus funds for this purpose.

Our prior opinion, #84-12-11(L), determined that it did not. The opinion noted that the legislature has specifically provided for the transfer of surplus funds not needed to meet the municipal utility's obligations. Iowa Code § 384.89 provides that surplus funds may be transferred to any other fund of the city. The opinion concluded that this express provision for the use of utility funds precludes implying authority for contributions of utility funds to other entities.

That opinion did not consider whether the governing board of a municipal utility has home rule authority to spend funds for non-utility purposes. In our view the municipal home rule amendment, Iowa Const. art. III, § 38A, cannot be cited by a utility board to extend its jurisdiction to non-utility matters.

The municipal home rule amendment has two paragraphs. The first grants municipal corporations "home rule power and author-

ity . . . to determine their local affairs and government . . ." The second abolishes the Dillon rule, which held that a municipal corporation has only those powers expressly granted by statute. While the second paragraph may affect municipal agencies,[1] it is our view that the first paragraph does not confer home rule authority on municipal agencies.

This Office has previously held that county home rule does not apply to county public hospitals. 1980 Op.Att'yGen. 388. Our rationale for that conclusion is as follows:

> The counties of Iowa were laid out when Iowa was a territory. The 1846 Constitution provided in Article XI, section 2, that "no new county shall be laid off hereafter, nor old county reduced to less content than four hundred and thirty-two square miles." That Constitution was replaced by the 1857 Constitution of Iowa, still in effect, which provides in Article XI, section 2, that "no new county shall be hereafter created containing less than four hundred and thirty-two square miles . . .". See Garfield v. Brayton, 33 Iowa 16 (1871). It is our opinion that the County Home Rule Amendment applies only to the governmental units of the

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[1]We recognize that Kasparek v. Johnson County Board of Health, 288 N.W.2d 511, 514 (Iowa 1980), suggests that the home rule amendments affect the authority of local agencies of counties and municipalities. In Kasparek, the Court held that a county board of health had authority to appear in court to defend its rules. In rejecting opposing counsel's arguments, the Court stated:

> The authorities plaintiffs rely on are noted in the prior doctrine that counties, municipalities and their local agencies have only such powers as are expressly granted by the legislature. This principle is no longer valid following adoption of the home rule amendments. (citations omitted) (emphasis added).

Thus the Court has indicated that the Dillon rule would not apply to city agencies.

> ninety-nine geographic counties. A county hospital is not a "county" as that term is used in the 1978 Home Rule Amendment even though the geographical boundaries of the county hospital "municipality" are congruent with those of the county. A board of supervisors is the legislative or policy-making body for a county. Mandicino v. Kelly, 158 N.W.2d 754, 760 (Iowa 1968). A county hospital board of trustees holds the control and management of a county hospital. Phinney v. Montgomery, 218 Iowa 1240, 1243, 257 N.W. 208, 210 (1934).

Id. at 390. Notwithstanding this conclusion, we went on to hold that the statutory powers and duties of county hospitals are so broad within their scope of authority as to be similar to a county's home rule authority.

Later, in Op.Att'yGen. #85-8-8(L), we stated that while counties and cities have been granted home rule authority, this authority does not extend to townships.

The legislature has delegated to the utility board, with certain exceptions, "all powers of a city in relation to the city utility . . . " § 388.4. A utility board, like a county public hospital board, is given independent and broad powers within its statutory field of authority. City of Spencer v. Hawkeye Security Insurance Company, 216 N.W.2d 406 (Iowa 1974) (utility board has power to insure the liability of its employees). By statute, however, that board has a distinct field of operation. City of Spencer, 216 N.W.2d at 411. While it may geographically be coterminous with the city, its authority is limited to the subject matter of city utilities.

It is our conclusion that a city utility board has power to determine what expenses are properly regarded as utility operating expenses. It does not have power under home rule to spend utility revenues for purposes not related to operation of the utility. The mechanism for using surplus utility revenues for other city purposes is by transfer to other city funds as set forth in Iowa Code § 384.89.

IV. UTILITY ASSOCIATIONS

Under Iowa Code § 28E.3 municipal utilities can jointly exercise powers each possesses. We know of no reason why a 28E entity formed of municipal utilities could not spend funds derived from utility revenues for economic development to the

same extent that its member utilities could do so if consistent with the 28E agreement establishing the entity. You have not pointed to any specific provision in chapter 499 which would impose special limitations. In the absence of any such provision, our analysis would be similar.

CONCLUSION

A municipal utility board may spend utility revenues to coordinate economic development promotional efforts if it properly determines that this is a utility operating expense. The determination whether an expenditure is a proper utility operating expense is to be made by the utility board. Our prior opinion #84-12-11(L) is overruled to the extent inconsistent with this opinion. A utility board may not spend utility revenues for city purposes not related to operation of the utility but may transfer surplus revenues to other city funds as provided in Iowa Code § 384.89. City boards, other than the city council, do not have home rule authority to act outside their statutory field of operation.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

by mlr

EMO:mlr

SCHOOL BOARDS: Publication of expenditures: Iowa Code §§ 279.34, 279.35, 279.36 (1985). In school districts under one hundred twenty-five thousand population the school board is required to publish a list of warrants issued to employees, the names of payees, amounts after the warrants, and the reason paid. The board is not required to publish amounts withheld from the warrants. (Ovrom to Royer, State Representative, 12-5-86) #86-12-1(L)

December 5, 1986

Honorable Bill Royer
State Representative
608 Illinois
Essex, Iowa 51638

Dear Representative Royer:

You have asked for an attorney general's opinion concerning the amount of information a school board is required to publish about expenditures under Iowa Code Sections 279.34-279.36. You attached a letter from the Clarinda Herald-Journal asking if it is sufficient to publish "only the total amount of warrants issued for all employees . . . less all withholding, tax sheltered annuities and etc." In our opinion this is sufficient in school districts under one hundred twenty-five thousand population.

Section 279.36 states that in school districts under one hundred twenty-five thousand population, the board must publish quarterly:

> a summary of the proceedings of the board pertaining to financial matters or expenses to the district for the previous quarter, including the list of all warrants issued by the board, the names of the persons, firms or corporations receiving same, the amount thereof and the reason therefor; except that warrants issued to persons regularly employed by the school district for services regularly performed by them need be listed not oftener than annually . . .

Iowa Code Section 279.36 (1985).

This section requires only that the board publish the warrant, the name of the person receiving it, its amount and the reason it was issued. For regular employees, such as teachers,

this information need be published only annually. The amount of the warrant issued to the employee would not include any deducted amounts for annuities or pension plans, nor would it show benefits paid for by the board, such as health insurance or employer contributions to pension plans. Of course the amount spent by the district on such items should show up in other parts of the financial summary.

Just because they are not published by a school board under Section 279.36 does not mean amounts withheld or deducted cannot be printed by the newspaper. Such information is public record and can be reported by a newspaper staff.

For districts over one hundred twenty-five thousand people "the statement of disbursements is to show the names of the persons, firms, or corporations, and the total amount paid to each during the school year." Iowa Code Section 279.34 (1985). We note that the language under this section is different than that in Section 279.36 relating to smaller districts. We do not in this opinion determine the amount of information necessary to publish under Section 279.34.

Sincerely,

ELIZA OVROM
Assistant Attorney General

EO:rcp

MUNICIPALITIES: 28E Entities; Tort Liability. Iowa Code ch. 28E; § 613A.1, 613A.7. The South Area Crime Commission Service Agency is a municipality as defined in Iowa Code § 613A.1. The Agency has the statutory responsibility to defend and indemnify its officers and employees as delineated by section 613A.8. (Williams to Schwengels, State Representative, 12-5-86) #86-12-2(L)

December 5, 1986

The Honorable Forrest V. Schwengels
State Senator
State Capitol
Des Moines, Iowa 50319

Dear Senator Schwengels:

You have asked whether the South Iowa Area Crime Commission Service Agency qualifies as a municipality within the meaning of Iowa Code section 613A.1.

It is our understanding that the Service Agency is an association of the "units of government" of designated Iowa Counties, Agreement, Art. VIII, section 2. It is also our understanding that the Service Agency is not specifically required or authorized by statute. Rather, the Agency was created as a joint exercise of power pursuant to Iowa Code Chapter 28E.

The Service Agency is financed by voluntary contributions of each of its members. The only sanction for a failure to contribute is removal from the rolls of the association.

> Any special or budgetary appropriation adopted by the agency shall be a membership requirement of each and every member. The failure of a member to pay over to the agency its allocated share of the agency's budget may be considered a withdrawal of that member and a default of this agreement.

Agreement, Art. VII, Section 3 (c).

The Service Agency is also authorized to "accept and expend funds from federal, state or local agencies, public or semi-public, or private individuals or corporations...." Agreement, Art. VII, Section 1. The Service Agency does not appear to have the ability to levy taxes or appropriations. The Agency appears to be primarily advisory in function.

> [The Service Agency was created] for the purpose of assisting governmental bodies within the area in developing plans, reviewing grant requests, making recommendations to the appropriate state agencies, providing fiscal accountability, and to provide centralized administration and coordinated planning efforts under the direction of the member counties.

Agreement, Article V, Section 1 (Amendment, filed November 15, 1983).

Chapter 613A subjects each Iowa municipality to liability for its torts and those of its officers and employees. For purposes of Chapter 613A, a municipality is any "city, county, township, school district, and any other unit of local government ...." 613A.1(1). In 1975 we opined that the Woodbury Solid Waste Agency (WSWA) constituted a "...unit of local government..." as that phrase is used within Section 613A.1(1). 1976 Op. Atty. Gen. 345, 346.

The WSWA was a cooperative entity specifically authorized and financed pursuant to Iowa Code Chapter 28F. We based our conclusion that the WSWA was a chapter 613A municipality on the premise that:

> The Agency is serving the general public in these participating towns and Woodbury County by controlling the disposal of solid waste and could thusly qualify as a unit of local government. Coverage may also be afforded simply under the principle the Agency employees and board members are providing direct services to the participating towns individually and Woodbury County; making the Agency a quasi-city or quasi-county entity.

Id.

Our 1975 WSWA opinion was further explained in 1980 when we opined that a Creston County Law Enforcement Commission made up of members of the City of Creston and Union County, and specifically authorized and financed pursuant to Iowa Code Section 28E.28, constituted a municipality for purposes of Chapter 613A. 1980 Op. Atty. Gen. (#80-3-9 (L)). In this opinion, we interpreted our 1975 opinion to mean "that members of a board or agency, established pursuant to Chapter 28E, are subject to the coverage and protection of Chapter 613A."

Like WSWA, this Law Enforcement Commission was established pursuant to specific statutory authorization, Iowa Code § 28E.21 et seq. Like WSWA, the Creston County Law Enforcement Commission has the ability to raise revenue through mandatory contributions and a tax levy. Iowa Code § 28E.24. Like the Service Agency involved here, the operations of the Commission do not appear to have involved the direct provision of services to the general public of Union County. To this extent, our 1975 and

1980 opinions imply that an entity, created pursuant to Chapter 28E and involving the joint exercise of governmental powers (whether or not those powers involve the direct provision of services to the public), constitutes a municipality for purposes of Chapter 613A.

Also of assistance in resolving this question is the decision in Allis-Chalmers Corp. v. Emmett County Council of Governments, 355 N.W.2d 586 (Iowa 1984). In that case, the Iowa Supreme Court held that the members of an intra-county association of governments, created pursuant to Chapter 28E, were not liable for the contract obligations of the association. In reaching this conclusion, the Court focused on the provisions of the agreement which created the association.

> The agreement entered by the governmental bodies in this case recited that the organization was to be permanent. It also recited that [the association] "shall be a public body corporate and politic and separate legal entity exercising public and essential governmental functions to provide for the public health, safety and welfare" with numerous specified powers.
>
> Among the powers was the right to sue and be sued, the right to acquire and dispose of property, the right to enter contracts, the right to operate a solid waste disposal and collection service within each member unit, the right to fix and charge fees for its services, the right to establish a budgeting system for [association] funds, the right to borrow money and issue bonds, the right to provide for remedies in the event of default, and the right to receive funds from each member governmental unity.
>
> The agreement stated a number of general purposes involving cooperative governmental action including the providing of joint services and facilities. [The association] was required to prepare in advance a budget for each calendar year. Each member was to provide in its own budget for its share of [the association]'s budget. Allocation of each member's share was to based on a stated formula. Dues were to be assessed, and special appropriations could be required. Non-payment by a member was to be considered a monetary withdrawal by a member and default of the agreement.

Id. at 588-89.

While the holding in this case does not directly answer the question whether the Service Agency is a municipality, we believe the Court's expansive discussion of the terms of the actual agreement is helpful in emphasizing the important role the language of such an agreement plays in making any judgments as to the legal status of any entity created by the agreement.

It is our view that the terms of the Chapter 28E agreement creating the Service Agency in the present case indicate it is an entity subject to the provisions of Chapter 613A.

The governing body of each Chapter 613A "municipality" is specifically required to provide for the defense and indemnification of its employees. Iowa Code § 613A.8. The governing body of a Chapter 613A municipality is defined as "the council of a city, county board of supervisors, board of township trustees, local school board, and other boards and commissions exercising quasi-legislative, quasi-executive, and quasi-judicial power over territory comprising a municipality." § 613A.1(2).

While it is clear that the Service Agency is intended to serve a fixed territory, Agreement, Art VIII, Section 2, the Service Agency has no apparent financial mechanism to fulfill any defense or indemnification obligations. Unlike WSWA, the Service Agency does not have statutory authority to issue revenue bonds. See § 28F.3. This is significant in that the Chapter 613A liability of most governmental subdivisions is supported by the ability of the subdivision to raise revenue through taxation or bond issuance. However, a governmental unit may be a municipality under chapter 613A even though it has no means to pay a resulting judgment. See 1980 Op. Atty. Gen. 244 (soil conservation districts). The Service Agency would, however, be authorized to purchase liability insurance. § 613A.7.

We would also note that a question could arise concerning whether the member municipalities could be found liable for any torts committed by the Service Agency.

In City of Spencer v. Hawkeye Security Co., 216 N.W.2d 406,411-12 (Iowa 1974), the Iowa Supreme Court held that an independent and autonomous utility board which served the residents of the City of Spencer was a Chapter 613A governing body. The Court then held that the utility board was required to defend and indemnify its employees pursuant to section 613A.8. The Court reserved the question whether the city which had created the board could also be held liable for torts committed by utility board employees.

Subsequently, the Court in Allis-Chalmers v. Emmet County, supra, concluded that the governmental bodies which created a separate Chapter 28E entity were not liable under the contracts of that entity. As set forth above, the Court relied on the express terms of the Chapter 28E agreement which created the separate entity and concluded that the language of this agreement evinced an intent to create a separate public body whose contractual obligations could not be enforced against its creating member-entities.

The Supreme Court has not defined when member municipalities may be found liable for the torts of a separate Chapter 28E entity. We would not attempt to predict potential tort liability in an opinion. The attorneys who regularly advise those bodies and who would defend any suits should provide advice on this question.

In conclusion, the South Area Crime Commission Service Agency is a municipality as defined in section 613A.1. The Agency has the statutory responsibility to defend and indemnify its officers and employees as delineated by section 613A.8.

Cordially,

Matthew W. Williams
Assistant Attorney General

MWW:mww

MUNICIPALITIES: Zoning: temporary use permits. Iowa Code Chapter 414 (1985); House File 2220, 71st G.A., 2d Sess. § 1 (Iowa 1986). A city council may provide for its review of temporary use permits granted by a board of adjustment and remand decisions granting temporary use permits to a board of adjustment only if the temporary use permit constitutes a variance under Iowa law. (Dorff to O'Kane, State Representative, 12-5-86) #86-12-3(L)

December 5, 1986

The Honorable James D. O'Kane
State Representative
1815 Rebecca Street
Sioux City, Iowa 51103

Dear Representative O'Kane:

You have requested an opinion of the Attorney General concerning the effect of House File 2220, 71st G.A., 2d Sess. § 1, on Iowa Code section 414.7 (1985). The question you pose is whether a temporary use permit granted by a board of adjustment is a variance for purposes of H.F. 2220.

Section 414.7, with the recent amendment underlined, provides as follows:

> The council shall provide for the appointment of a board of adjustment and in the regulations and restrictions adopted pursuant to the authority of this chapter shall provide that the said board of adjustment may in appropriate cases and subject to appropriate conditions and safeguards make special exceptions to the terms of the ordinances in harmony with its general purpose and intent and in accordance with general or specific rules therein contained and provide that any property owner aggrieved by the action of the council in the adoption of such regulations and restrictions may petition the said board of adjustment direct to modify regulations and restrictions as applied to such property owners. <u>The council may provide for its review of variances granted by the board of adjustment before their effective date. The council may remand a decision to grant a variance to the board</u>

> of adjustment for further study. The effective date of the variance is delayed for thirty days from the date of the remand.

(emphasis added).

Prior to enactment of H.F. 2220, a city council was unable to review the actions of its board of adjustment. Depue v. City of Clinton, 160 N.W.2d 860, 862 (Iowa 1968). Review of a board's action in granting a variance was available only through the process of filing a petition for writ of certiorari with a "court of record." Id.; see also Iowa Code § 414.15 (1985).

Under section 414.7 as amended however, a city council is now empowered to:

> 1) provide for their review of variances granted by the city's board of adjustment prior to the effective date of the variance; and,
>
> 2) remand decisions granting variances to the city's board of adjustment where further study is deemed warranted.

Your question therefore appears directed toward determining whether H.F. 2220 empowers a city council to exercise such powers with respect to temporary use permits. We believe the answer to your question depends upon the nature of the particular temporary use permit.

Much of the confusion surrounding the field of zoning law is attributable to the nomenclature of the field itself. Different jurisdictions often use the same terms to describe different things. Different terms are also used to describe the same thing. Terms frequently used in one jurisdiction may be used seldom, if ever, in another. The starting point in answering your question is therefore the meaning of the relevant terms under Iowa law. We note in this connection that Iowa Code section 414.12 refers to the board's authority to decide "special exceptions" and to grant "variances."

The term "variance," as construed by the Iowa Supreme Court, means "an authorization for the construction or maintenance of a use of land which is prohibited by a zoning ordinance." Greenawalt v. Zoning Board of Adjustment of Davenport, 345 N.W.2d 537, 541 (Iowa 1984) (quoting 3 Anderson, American Law of Zoning, § 18.02, at 136 (1968)) (emphasis added). A party seeking a variance is required to show that literal enforcement of the zoning ordinance would cause him undue hardship. Buchholz v.

Board of Adjustment of Bremer County, 199 N.W.2d 73, 75 (Iowa 1972); Board of Adjustment of City of Des Moines v. Ruble, 193 N.W.2d 497, 503 (Iowa 1972); Vogelaar v. Polk County Zoning Board of Adjustment, 188 N.W.2d 860, 862 (Iowa 1971). A variance is "designed as an escape hatch from the literal terms of the ordinance which, if strictly applied, would deny a property owner all beneficial use of his land and thus amount to a confiscation." Greenawalt, 345 N.W.2d at 541 (quoting Lincourt v. Zoning Board of Review, 98 R.I. 305, 310, 201 A.2d 482, 485 (1964)).

A "special exception," on the other hand, permits a use not otherwise permitted in a particular district when certain conditions specifically set out in the ordinance are satisfied. Vogelaar, 188 N.W.2d at 862; Depue, 160 N.W.2d at 863-64; see also Cunningham, Land-Use Controls -- The State and Local Programs, 50 Iowa L.Rev. 367, 399-400 (1965). It differs from a variance in that it allows property to be put to a use which the zoning ordinance expressly permits. Vogelaar, 188 N.W.2d at 862; Depue, 160 N.W.2d at 863.

In addition to conferring meaning upon the aforementioned zoning terms employed in chapter 414, the Iowa Supreme Court has also accorded meaning to several other zoning terms not expressly used in chapter 414. In two cases involving applications for "special use permits," for example, the court has recognized that a "special use" means the same thing as a "special exception," and that the authority to grant either lies within the jurisdiction of the board of adjustment. Buchholz, 199 N.W.2d at 75; Depue, 160 N.W.2d at 864. And in Schultz v. Board of Adjustment of Pottawattamie County, 258 Iowa 804, 807, 139 N.W.2d 448, 450 (1966), the court defined the term "conditional use" as "a provisional use for a purpose designated by the ordinance itself; a grant of right for any use specified by the ordinance subject to finding by an administrative officer or board that the use is proper, essential, advantageous or desirable to public good, convenience, health or welfare."

The term "temporary use permit," however, is not used in chapter 414. Nor has the term been defined by Iowa case law. In at least one jurisdiction a temporary use permit authorizes "a use which would otherwise be proscribed by an existing zoning ordinance and is frequently referred to as a conditional or special use permit and may impose a requirement that the nonconforming use shall expire upon termination of a given period." Suburban Club of Larkfield, Inc. v. Town of Huntington, 289 N.Y.S.2d 813, 818, 56 Misc. 2d 715 (1968).

Under the Suburban Club definition, a temporary use permit takes on a "split personality" under Iowa law. Since it authorizes a use otherwise proscribed by an existing zoning ordinance,

it appears to be a variance. See Greenawalt, 345 N.W.2d at 541; Buchholz, 199 N.W.2d at 75; Ruble, 193 N.W.2d at 503; Vogelaar, 188 N.W.2d at 862. On the other hand, since it is "frequently referred to as a conditional or special use permit," it would also appear to be a special exception under Iowa law. See Buchholz, 199 N.W.2d at 75; Vogelaar, 188 N.W.2d at 862; Depue, 160 N.W.2d at 863-64.

It is therefore our opinion that the true nature of a temporary use permit for purposes of H.F. 2220 can only be ascertained by reference to the particular temporary use permit in question. If the permit authorizes a use prohibited by a zoning ordinance, it constitutes a variance which pursuant to H.F. 2220 can: 1) be made reviewable by the city council; and, 2) be remanded to the city's board of adjustment for further study. Conversely, if it allows a use expressly permitted by the zoning ordinance when certain conditions are satisfied, it constitutes a special exception under Iowa law.

This brings us to the question of whether special exceptions are reviewable by a city council in light of H.F. 2220's amendment to section 414.7. We believe the answer to this question is governed by principles of statutory construction.

In construing a statute, no one doctrine or principle of construction is necessarily determinative. Metier v. Cooper Transport Co., 378 N.W.2d 907, 912 (Iowa 1985). The polestar of all statutory construction is the intent of the legislature. Office of Consumer Advocate v. Iowa State Commerce Com'n, 376 N.W.2d 878, 880 (Iowa 1985). A statute should be accorded a sensible, practical, workable and logical construction. Id. at 882.

It is generally presumed that statutory words are used in their ordinary and usual sense with the meaning commonly attributed to them. American Home Products Corp. v. Iowa State Board of Tax Review, 302 N.W.2d 140, 143 (Iowa 1981). If, in doing so, the language of the statute is precise and free from ambiguity, no more is necessary than to apply to words used their ordinary sense in connection with the subject considered. State v. McNeal, 167 N.W.2d 674, 677 (Iowa 1969). In other words, where the language of a statute is clear and plain, there is no room for construction. Hinders v. City of Ames, 329 N.W.2d 654, 655 (Iowa 1983).

Furthermore, in the field of statutory construction, legislative intent is expressed by omission as well as by inclusion. In re Estate of Wilson, 202 N.W.2d 41, 44 (Iowa 1972). Under the doctrine of expressio unius est exclusio alterius, the express mention of one thing implies the exclusion of others. Id.; see

also State v. Flack, 251 Iowa 529, 533, 101 N.W.2d 535, 538 (1968).

As discussed above, the terms "variance" and "special exception" have separate and distinct meanings under Iowa law. Since H.F. 2220 does not empower a city council to provide for its review of special exceptions granted by a board of adjustment, we conclude that temporary use permits which allow a use expressly permitted by a municipal zoning ordinance when certain conditions are satisfied are not subject to review by a city council under Iowa Code § 414.7 as amended by H.F. 2220.

Sincerely,

DAVID L. DORFF
Assistant Attorney General

DLD:rcp

BEER AND LIQUOR CONTROL: Persons Age Nineteen and Twenty. Iowa Code ch. 123 (1985); Iowa Code Supp. §§ 123.3(21), 123.3(33), 123.47; Iowa Code §§ 4.4(2), 4.4(3), 123.47A and 123.90 (1985); 1986 Iowa Acts, ch. 1221, §§ 1 and 2. A college dormitory room could constitute a "private home," as used in § 123.47A. Thus, if the room is a private residence as a factual matter, state law would not prohibit a person age nineteen or twenty from possessing alcoholic beverages within a dormitory room with the knowledge and consent of the person's parent or guardian. (Walding to Hermann, State Representative, 12-11-86) #86-12-5(L)

December 11, 1986

The Honorable Donald F. Hermann
State Representative
1610 Elmwood Avenue
Bettendorf, Iowa 52722

Dear Representative Hermann:

We are in receipt of your request for an opinion of the Attorney General regarding the Alcoholic Beverages Control Act, Iowa Code ch. 123 (1985). Specifically, you have inquired as to the circumstances in which alcoholic beverages[1] may be served to persons age nineteen or twenty under Iowa Code § 123.47A, 1986 Iowa Acts, ch. 1221, § 1 (raising the drinking age to twenty-one). That section permits persons age nineteen or twenty[2] to possess alcoholic beverages within a private home with proper parental or guardian approval.

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[1] The term "alcoholic beverages" is defined in Iowa Code Supp. § 123.3(21) (1985) to mean "any beverage containing more than one-half of one percent of alcohol by volume including alcoholic liquor, wine, and beer.

[2] The prohibition against persons age nineteen or twenty purchasing or possessing alcoholic beverages does not apply to persons born on or before September 1, 1967. 1986 Iowa Acts, ch. 1221, § 2.

In your letter you state that it is your belief that "all college students [age nineteen or twenty] are allowed to drink alcoholic beverages in their college dormitory rooms if they claim parental approval has been granted and the school rules do not prohibit it." (Emphasis added) You further observe that it is your belief that "under current Iowa law, any person in Iowa can put on a party in a private home to include persons 19 and 20 and these persons can legally consume alcohol by merely saying they have parental approval." (Emphasis added)

The focus of your inquiry, therefore, is whether a college dormitory room constitutes a "private home," as the term is used in § 123.47A, or stated alternatively, whether a person age nineteen or twenty may possess alcoholic beverages within a college dormitory room with proper parental or guardian approval. Also at issue is what constitutes proper parental or guardian approval under § 123.47A. An analysis of those issues commences with an examination of § 123.47A.

Section 123.47A provides in pertinent part:

> A person shall not sell, give, or otherwise supply alcoholic liquor, wine, or beer to any person knowing or having reasonable cause to believe that the person is age nineteen or twenty. A person age nineteen or twenty shall not purchase or possess alcoholic liquor, wine, or beer. However, a person age nineteen or twenty may possess alcoholic liquor, wine, or beer given to the person within a private home with the knowledge and consent of the person's parent or guardian. (Emphasis added)

The legislative intent in enacting § 123.47A was to prevent persons age nineteen or twenty from having alcoholic beverages in their possession except in certain expressly limited circumstances. See DeMore By DeMore v. Dieters, 344 N.W.2d 734, 737 (Iowa 1983) (discussing the legislative intent of Iowa Code Supp. § 123.47 (1985)).

Section 123.47A was modeled after Iowa Code Supp. § 123.47 (1985). In material part, § 123.47 provides:

> A person shall not sell, give, or otherwise supply alcoholic liquor, wine, or beer to any person knowing or having reasonable cause to believe that person to be under legal age, and a person or persons under legal age shall not individually or jointly have alcoholic liquor, wine, or beer in their possession or control; except in the case of liquor, wine, 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. . . . (Emphasis added)

Comparing the two sections, we note that both provisions make it a crime for a person to provide persons of a restricted age with, as well as prohibiting such person from possessing, an alcoholic beverage. Important to this opinion, both sections contain the phrase "within a private home with the knowledge and consent of the parent or guardian."[3]

The sections differ in that the class of individuals intended to be restricted from possessing alcoholic beverages is persons under the legal age of nineteen in § 123.47,[4] and persons age nineteen or twenty in § 123.47A. Further, § 123.47 prohibits an under-age person from having alcoholic beverages in their "possession or control," while § 123.47A forbids persons age nineteen or twenty to "purchase or possess" alcoholic beverages. For purposes of this opinion, suffice-it-to-say, consumption by a person under the age of twenty-one is not a necessary element for a conviction under either section.[5] Finally, we note that the penalty for a violation of § 123.47 is a serious misdemeanor if the defendant is of legal age, 1980 Op.Att'yGen. 825; and a simple misdemeanor for persons under legal age, Iowa Code § 123.90 (1985); while a violation of § 123.47A is a simple misdemeanor punishable by a scheduled fine of fifteen dollars or, for a licensee or permittee, a fine of not more than fifty dollars.

Turning to the first issue, our office previously examined the phrase "within a private home with the knowledge and consent of the parent or guardian" as used in § 123.47. In 1982 Op.Att'yGen. 79, we concluded that a "private home" includes "a residential dwelling and the adjacent land which is under the

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[3] In the phrase, the word "person's," which appears before "parent or guardian" in § 123.47A, has been deleted from the phrase. The word neither detracts from nor adds to the meaning of the phrase as examined in the context of this opinion.

[4] "Legal age" is defined in Iowa Code Supp. § 123.3(33) (1985) to include persons "nineteen years of age or more."

[5] In 1982 Op.Att'yGen. 443, we opined that "possession," as used in § 123.47, requires a conscious possession of an alcoholic beverage, and a defendant must have either exercised "dominion and control" or have had "actual care and management" of the substance.

control of the owner or lessor of the dwelling. 1982 Op.Att'yGen. at 81.

Applying that definition to a college dormitory room, we believe that a dormitory room could be found to be a "private home" if the school so treats it. We have previously opined that "[t]he requirement that the home be 'private' appears to present a factual question, and in an appropriate case it might be found by the trier of fact that the premises were in fact open to the public generally." 1982 Op.Att'yGen. at 81.

We believe it likely that a court would find that a college dormitory room is a "private home" if, by the terms of the agreement and rules between the student and the college, the student exercises dominion and control over that room with an expectation of privacy.

The issue then arises as to what constitutes proper parental or guardian approval under § 123.47A to permit persons age nineteen or twenty to possess alcoholic beverages within a private dormitory room. Section 123.47A requires that such possession be "with the knowledge and consent of the person's parent or guardian."

Again knowledge and consent of a parent or guardian would be a factual question. The clearest case of parental or guardian knowledge and consent is possession of an alcoholic beverage by a person age nineteen or twenty in the presence of the parent or guardian. In the parent's or guardian's absence, written documentation, while not essential to demonstrating parental or guardian knowledge and consent, would clarify the issue. 1982 Op.Att'yGen. 82.

Accordingly, it is our opinion that a college dormitory room could constitute a "private home," as used in § 123.47A. Thus, if the room is a private residence as a factual matter, state law would not prohibit a person age nineteen or twenty from possessing alcoholic beverages within a dormitory room with the knowledge and consent of the person's parent or guardian.

Your letter also asks our views concerning the wisdom of this legislation. Attorney General's opinions resolve questions of law and not questions of fact or policy. See 120 Iowa Admin. Code § 1.5(3)(c). We have therefore limited this opinion to the questions of law presented in your letter.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW/cjc

PLATS: Iowa Code Chapter 409; §§ 409.1, 409.8, 409.9, 409.11 (1985); 1984 Iowa Acts, ch. 1271, § 1. Rural subdivisions which do not convey a street, road, alley, or other public interest, are exempt from the acknowledgment requirement in Iowa Code § 409.8 (1985). Buyers of platted lots in this narrow category of subdivisions should be on notice that under a 1984 amendment to Section 409.1, they are not covered by several of the usual protections of Chapter 409. (Ovrom to Putnam, Winneshiek County Attorney, 12-17-86) #86-12-6(L)

December 17, 1986

Mr. Dale L. Putnam
Winneshiek County Attorney
112 West Main St.
P.O. Box 450
Decorah, Iowa 52101

Dear Mr. Putnam:

You have asked for an attorney general's opinion whether Iowa Code Chapter 409 requires that a survey plat of a rural subdivision be acknowledged by all holders of record legal and equitable title to be eligible to record.

You describe a situation where a rural parcel of 160 acres is being sold by A to B on real estate contract. B is making installment payments and A will deliver a warranty deed upon full payment. B subdivides the parcel and sells two tracts to C on contract. B signs the plat, but A does not. You ask who must sign the plat under Chapter 409.

Section 409.8 requires that subdivision plats be acknowledged by the "proprietor and the proprietor's spouse, if any . . ." This raises a question as to who is the proprietor in the contract sale situation you describe. This office considered a similar question in 1978, and opined that both A and B were proprietors who must acknowledge the plat. 1978 Op.Att'yGen. 571.

However, a 1984 amendment exempted certain plats from this requirement. 1984 Iowa Acts, Ch. 1271, § 1. Section 409.1 exempts a plat from the requirements of Section 409.8 where either of the following conditions exist:

1. No street, road, alley, or other public interest is being conveyed.

2. The plat is for assessment and taxation purposes under section 441.65.

You describe a rural subdivision which does not appear to convey any streets, roads, alleys or other public interest. Therefore the requirement in 409.8 that the plat be acknowledged by the proprietor and the proprietor's spouse is inapplicable, and an acknowledgment by B, the contract buyer, would be sufficient.

We note that the 1984 amendment to Section 409.1 also exempts such plats from the requirement to obtain an abstract and attorney's opinion, a treasurer's certificate that the land is free from taxes, a clerk's statement that it is free from judgments and liens, as well as other provisions of the statute designed to protect the buyer of subdivided lots. See, e.g., Sections 409.9, 409.11 (proprietor's bond), 409.2 (1985) (covenant of warranty). Therefore the buyer of lots in a subdivision where no street, road, alley or other public interest is being conveyed should take note that he or she is not covered by several of the usual protections of Chapter 409.

The 1978 attorney general's opinion mentioned above was written prior to the 1984 amendment to Section 409.1 exempting the two narrow classes of plats from the acknowledgment requirement. The conclusion in that opinion is still valid for the majority of plats, which would contain streets, roads and alleys.

Sincerely,

ELIZA OVROM
Assistant Attorney General

EO:rcp

TAXATION: Iowa Sales Tax; Fees Associated With Public Records. Iowa Code §§ 22.3, 144.46, 321.10, and 422.43 (1985). Fees paid by the public for the right of access to public records are not subject to Iowa sales tax. When the record custodian is paid a fee for a copying service, the transfer of the record copy is merely incidental to the access service performed and is not subject to sales tax. (Osenbaugh to Angrick, Citizens' Aide/Ombudsman, 12-17-86) #86-12-7(L)

December 17, 1986

William P. Angrick II
Citizens Aide/Ombudsman
Capitol Complex
L O C A L

Dear Mr. Angrick:

This will acknowledge receipt of your letter in which you requested an opinion of the Attorney General in regard to possible sales tax liability of state and local custodians of public records when they are charging copying costs under Iowa Code § 22.3 (1985) for making copies of existing records. You pose the following seven questions:

1. Are state custodians of public records required to collect Iowa retail sales tax when charging the copying service costs under Iowa Code § 22.3 (1985)?

2. Does Iowa Code § 422.45(20) (1985) exempt county and city custodians of public records from collecting Iowa retail sales tax when charging the copying service costs under Iowa Code § 22.3 (1985)?

3. Is a public entity required to have a retail sales tax collection permit when the entity is required to collect retail sales tax?

4. What is the tax penalty, if any, to the custodian of the public record who fails to collect and remit sales tax due and owing on the copying costs of public documents?

5. Does retail sales tax apply when birth and death certificates are issued pursuant to Iowa Code § 144.46 (1985) by the Vital Records Division of the Iowa Department of Health and the clerks of Iowa District Court?

6. Does retail sales tax apply when the Iowa Department of Transportation provides accident and drivers license records pursuant to Iowa Code §§ 321.10, 321.200, 321.201-.208, 321.271, 321A.3, 321A.7, 321B.13 (1985)?

7. Does retail sales tax apply when the clerks of Iowa District Court provide child support payment records pursuant to Iowa Code chs. 252B, 252C, 252D, and §§ 602.8102(47) and 602.8105 (1985)?

We are of the view that all of your questions are resolved by our answer to a fundamental question raised in your opinion request, namely, whether the custodians of the records are engaged in transactions which are subject to Iowa sales tax imposed by Iowa Code § 422.43 (Supp. 1985). We conclude that the custodians are not engaged in taxable transactions.

Section 422.43 imposes the Iowa sales tax upon the retail sale of tangible personal property and upon the rendition of certain enumerated services. An examination of § 422.43 does not disclose any taxable service performed by a custodian in making available for examination and copying the custodian's records. The issue, therefore, becomes whether the custodian is making retail sales of tangible personal property.[1]

[1]Under appropriate circumstances, government can and does engage in sales of tangible goods subject to Iowa retail sales tax. 1934 Op.Att'yGen. 577; 1936 Op.Att'yGen. 280; 1938 Op.Att'yGen. 592; 1978 Op.Att'yGen. 686.

Section 422.43 provides in relevant part:

> There is imposed a tax of four 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 . . . .

This office issued an opinion, 1978 Op.Att'yGen. 686, in which we opined that the making of photocopies of documents by the clerk of court for third persons, but not for participants, would be subject to Iowa sales tax. We have reconsidered the soundness of that opinion and, for reasons set forth in this opinion, we withdraw it as being erroneous.

The custodian is considered by the legislature as rendering a service to those who desire to examine or copy the records. 1981 Op.Att'yGen. 76; 1981 Op.Att'yGen. 207; Iowa Code § 22.3. In 1981 Op.Att'yGen. at 77, we stated:

> Section 68A.3 expressly allows the custodian to impose a reasonable fee for the expense of copying public records. We have opined that the section is calculated to insure that the lawful custodian of public records is, in making such records available for examination and copying, not to be obliged to incur unnecessary expense or to have the work of his office disrupted without being reimbursed for such expense or compensated for such disruption. 1968 Op.Att'yGen. 656, 657. However, while reasonable fees may be assessed for these services, we have stated that all citizens requesting to examine and copy public records are to be treated alike. Certain individuals or classes of individuals are not to receive preferential treatment or reduced rates.

Basically, Iowa Code chapter 22 (formerly Iowa Code chapter 68A) establishes the right of access to public records. 1981 Op.Att'yGen. at 210. In providing this right of access, a service not made taxable in § 422.43, the custodian is entitled to charge two fees in § 22.3. First, the custodian "may charge a reasonable fee for the services of the lawful custodian or the custodian's authorized deputy in supervising the records during such work." Second, if copy equipment is available, the custodian "shall provide any person a reasonable number of copies of any public record in the custody of the office upon the payment of a fee" which shall not "exceed the cost of providing the [copying] service."

It is clear that the fee charged by the custodian for supervising public records is not subject to sales tax under § 422.43. It is less clear whether the copying service fee is subject to tax as constituting, in substance, a sale of tangible personal property (the public record in written format).

Generally, statutes imposing taxes are strictly construed with all doubts resolved against tax imposition. It should appear from the statute that the legislature clearly intended to impose the tax. Sorg v. Iowa Department of Revenue, 269 N.W.2d 129 (Iowa 1978); Associated General Contractors of Iowa v. Iowa State Tax Commission, 255 Iowa 673, 123 N.W.2d 922 (1963).

Not every transfer of tangible personalty is subject to a state sales tax generally imposed upon retail sales of such property. Where the transfer of tangible personal property is only incidental to a service performed for the consumer, the transfer is not considered to constitute a sale for sales tax purposes. White Oak Corporation v. Department of Revenue Services, 503 A.2d 582, 587 (Conn. 1986); Bullock v. Statistical Tabulating Corporation, 549 S.W.2d 166 (Tex. 1977).

As previously noted, Iowa Code chapter 22 establishes a right of access to public records. It is this access service which the custodian performs and for which the public pays. This situation is, therefore, unlike that in which government or non-governmental entities or persons sell printed materials which is the essence of the transaction. When the custodian of a public record charges a fee for a copy of the record, the transfer of the record copy is merely incidental to the access service performed. Accordingly, § 422.43 does not clearly impose the Iowa retail sales tax for copying service fees charged by custodians of public records.

We also believe that the reasoning and results reached in this opinion with respect to public records in general also apply to the specific records which you detail in your fifth, sixth, and seventh questions. The public is paying for access to those records. Thus, Iowa retail sales tax does not apply to fees paid and associated with copies of those records.

Very truly yours,

Elizabeth M. Osenbaugh

Elizabeth M. Osenbaugh
Deputy Attorney General

WP1

COUNTIES: General Relief; Durational Residency Requirement. U.S. Constitution Amendments IV, XIV; Iowa Code Chapter 252; Iowa Code §§ 125.44, 204.409, 222.60, 230.1, 252.16, 252.24, 252.25, 252.27, 321.281, 321.283(3). A county cannot use the concept of legal settlement to deny county residents eligibility for medical services. (McCown to Metcalf, 12-30-86) #86-12-8(L)

December 30, 1986

Mr. James M. Metcalf
Black Hawk County Attorney
B-1 Courthouse
Waterloo, Iowa 50703

Dear Mr. Metcalf:

You ask whether it is constitutionally permissible for Black Hawk County to impose an eligibility requirement for advanced medical services that a resident have legal settlement as defined in Iowa Code § 252.16. Your letter assumes that the applicant has established residency but has not established legal settlement in the county. Thus, this opinion assumes that the person is a resident of Black Hawk County and does not decide that question. Nor do we decide whether factors which are relevant to legal settlement might not also be relevant to the factual issue of residence.

At common law, the public authorities of each county have no duty to support paupers or other needy persons. Such duty, where it exists, rests entirely on statute. Michel v. State Board of Welfare, 245 Iowa 961, 65 N.W.2d 98 (1954). Where the state or one of its subdivisions has assumed the duty of support, it may be limited by statute. The duty goes no further than the statute prescribes, and the claimant must show that s(he) comes within its terms. Michel.

Iowa has such a statutory scheme. Iowa Code Chapter 252 dictates that each county provide assistance to persons unable to earn a living by labor due to either a physical or mental disability. 1978 Op.Att'yGen.766; Op.Att'yGen. #84-8-4(L). Iowa Code § 252.25 provides that "(t)he board of supervisors of each county shall provide for the relief of poor persons in its county who are ineligible for," or awaiting approval for state or

federal assistance. Id. Thus, each county has a duty to provide some relief to poor persons within the county, the form and amount of which assistance is within the discretion of the Board. Iowa Code § 252.27. Op.Att'yGen. #84-2-5(L). There is no requirement that the county provide particular advanced medical services to any poor person.

Under the Iowa scheme for providing general assistance to the poor and needy, the county where a person has legal settlement is generally responsible for providing support of the poor. Iowa Code § 252.24. However, in limited situations, where the person applying for or receiving services has not established a county of legal settlement or whose legal settlement is unknown, the state has statutorily assumed liability for their care. Iowa Code § 222.60 (mentally retarded); Iowa Code § 230.1 (mentally ill); Iowa Code §§ 125.44, 204.409, 321.281, 321.283(3) (substance abuser). These service recipients are identified as "state cases". Accordingly, the "state cases" concept is a funding mechanism which places financial liability upon the state for services provided to persons who have not established legal settlement in a county in Iowa, or whose legal settlement is unknown.

The question, then, is whether a county may refuse to pay for certain medical services for an applicant, who is otherwise eligible, unless that person has established legal settlement in that county. You have indicated that Black Hawk County's position has always been that it will not fund a person in the advanced medical services program unless that person has established legal settlement.

Legal settlement is defined at Iowa Code § 252.16. In pertinent part, that section reads as follows:

> A legal settlement in this state may be acquired as follows:
>
> 1. A person continuously residing in a county in this state for a period of one year acquires a settlement in that county except as provided in subsection 7.
>
> 2. A person having acquired a settlement in a county of this state shall not acquire a settlement in any other county until the person has continuously resided in the other county for a period of one year ...

Requirements that persons seeking relief must have resided in the county for a particular period of time violates fundamental rights and must be justified by compelling state interests to be upheld. Memorial Hospital v. Maricopa County, 415 U.S. 250, 39 L.Ed.2d 306, 94 S.Ct. 1076 (1974); Hawk v. Fenner, 396 F.Supp. 1 (S.D. 1975). See also, Shapiro v. Thompson, 394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322 (1969).

In Shapiro, the United States Supreme Court found that durational residency requirements impinged upon the right of indigent persons to travel between states and that such requirements were violative of the Fifth and Fourteenth Amendments absent a compelling state interest. While Shapiro involved state statutes funded by Federal participation, the Maricopa County and Hawk decisions cited above involved programs which were funded from state and county sources.

Where Shapiro dealt with the denial of welfare benefits, Maricopa involved the denial of non-emergency medical care. The challenged statute mandated a one-year waiting period to receive non-emergency medical care. Medical assistance was found to be as much of a basic necessity of life to an indigent as welfare assistance.

Once a county provides general assistance to its residents it may not lawfully distinguish between residents without a compelling reason. Legal settlement (durational residency) is primarily a system of determining financial responsibility between counties rather than a method of denying assistance to needy persons. 1972 Op.Att'yGen. 328. A person cannot be barred from receiving general relief in a county on a ground that s(he) has not established legal settlement as defined in § 252.16.

As indicated above, it is constitutionally impermissible for a county to employ a durational residency requirement for general assistance. A durational residency requirement in this particular instance will not withstand constitutional attack under the equal protection clause of the Fourteenth Amendment. In the absence of a compelling state interest, any rights, benefits and services granted according to the length of residency is clearly impermissible. See Zobel v. Williams, 457 U.S. 55, 72 L.Ed.2d 672, 102 S.Ct. 2309 (1982). (A state statute which allowed state distributed income derived from its natural resources to citizens based on the length of each citizen's residence was found to have violated the equal protection clause.)

To summarize, it is constitutionally impermissible for a county to employ a durational residency requirement for general assistance. Iowa settlement laws operate to allocate financial responsibility rather than to determine entitlement.

Sincerely,

Valencia Voyd McCown

Valencia Voyd McCown
Assistant Attorney General

VVM/jam

PUBLIC RECORDS; OPEN MEETINGS: Economic Development satellite centers. Iowa Code Supp. § 28.101 (1985); Iowa Code §§ 21.2(1)(1); 22.1 (1985); Open meetings and public records provisions of the Iowa Code apply to research and marketing centers and satellite centers established by the Iowa Department of Economic Development. The same provisions apply to regional coordinating councils established to seek a satellite center. (Osenbaugh to Chapman, State Representative, 12-30-86) #86-12-9(L)

December 30, 1986

The Honorable Kay Chapman
State Representative
900 - The Center
Cedar Rapids, Iowa 52401

Dear Representative Chapman:

You have requested an Attorney General's opinion regarding Iowa Code Supp. § 28.101 (1985). 1985 Iowa Acts Ch. 33, §§ 601 and 602. This section specifies responsibilities for the Iowa Development Commission, now the Department of Economic Development. Among those is supervision of a "centrally located marketing center" to be known as "The Primary Research and Marketing Center for Business and International Trade." The implementation options of § 28.101 include satellite marketing centers, which may be created if a regional coordinating council develops a plan to coordinate all federal, state, and local economic development services within its region.

Your inquiry asks whether Iowa Code chapter 21 ("Official Meetings Open to the Public") and 22 ("Examination of Public Records") are applicable to the activities of coordinating councils and satellite centers created under § 28.101.[1] The open meetings and public records aspects of your inquiry are dealt with separately below.

Provisions of the open meetings law apply to "governmental" bodies. Chapter 21 defines a "governmental body" at § 21.2(1)(a) to include:

---

[1]The Department of Economic Development has adopted rules requiring each regional coordinating council's by-laws to include provisions specifying "[h]ow the public may access the council to present views on and proposals for economic development of the area . . . ." 261 Iowa Admin. Code 11.3(1)(d).

> A board, council, commission or other governing body expressly created by the statutes of this state . . . .

Application of this definition requires satisfaction of two elements: First, the entity must be a governing body; and the entity must be expressly created by statute.

Previous opinions of this office have noted that a "governing body" must possess "decision-making" or "policy-making" authority, though "final authority" is not required. 1979 Op.Att'yGen. 148. This stance is consistent with Green v. Athletic Council of Iowa State University, 251 N.W.2d 559 (Iowa 1977).

A review of the statutory language shows that a regional coordinating council is a council "of the State" which is vested with decision-making authority.

> 2. To aid in fulfilling the purpose of the primary research and marketing center for business and international trade, the commission may provide grants to establish satellite centers throughout the state. To facilitate establishment of satellite centers, the state is divided up into fifteen regional economic delivery area which have the same area boundaries as merged areas, as defined in section 280A.2, in existence on May 3, 1985. Each regional delivery area wishing to receive a grant from the commission to establish a satellite center in its area shall create a regional coordinating council which shall develop a plan for the area to coordinate all federal, state, and local economic development services within the area. After developing this plan, the council may seek a grant for a satellite center by submitting the coordinating plan and an application for a grant for a satellite center by submitting the coordinating plan and an application for a grant to

> the Iowa development commission. A grant shall not be awarded within the regional economic delivery area without the approval of the regional coordinating plan by the Iowa development commission. (Emphasis added).

Iowa Code § 28.101(2).

The duty of the regional coordinating council, once constituted, is to develop a plan "to coordinate all federal, state, and local economic development services within the area." If such a plan is approved by the Department of Economic Development, the council may become the recipient of a grant to establish a satellite marketing center. The council must then hire a director for the center; the director's duties are carefully delineated in § 28.101(2).

Although the Department of Economic Development must ultimately approve each regional economic development plan, only the regional council can develop the plan. Disapproval of the plan by the department results in remand to the council, which may then submit a revised plan. 261 Iowa Admin. Code § 11.5. After July 1, 1987, Iowa plan funds for community betterment will be awarded to political subdivisions only if a regional plan has been approved. The statute also contemplates that satellite center grants will be awarded only to regional councils. § 28.101(2). The councils will supervise the satellite centers which serve a number of functions in the coordination of local marketing and economic development activities. Id. The councils' roles are not solely advisory. Instead, we conclude that they have policy-making and decision-making functions.

Opinions of the Attorney General have indicated the importance attached to the "expressly created" language of § 21.2(1)(a). 1984 Op.Att'yGen. 152. In brief, to be expressly created, the body must be directed rather than authorized or permitted to form. This office has held that the boards of non-profit corporations are not "expressly created" by statute because the board for each non-profit corporation is not created by statute. 1980 Op.Att'yGen. 167 (#79-5-15(L)).

If a regional delivery area wishes to seek grant assistance from the state department to establish a satellite marketing center, it must establish a regional coordinating council. Section 28.101(2) provides no alternative process. The development of a regional plan by the council is a condition precedent to the future grant of Iowa plan for community betterment funds

to local governments in the area. Furthermore, requirements regarding the size of the council (6 members), its representation ("of the region") and its membership ("from state and local government, business, and education") are set forth in the statute. The creation of the regional council is a condition precedent to the funnelling of lottery money to any political subdivision in the area. These unique circumstances cause us to conclude that the councils are not just permitted but are "expressly created" by statute.

We conclude that regional coordinating councils are subject to the open meetings law, Iowa Code ch. 21. The councils are governing bodies expressly created pursuant to Iowa Code Supp. § 28.101(2) (1985).

You also ask whether the public records law applies to these entities. The public records law, Code chapter 22, applies to any council or committee of the State, its departments, or entities. Iowa Code § 22.1 (1985) specifies:

> 22.1. Definitions. Wherever used in this chapter, "public records" includes all records, documents, tape, or other information, stored or preserved in any medium, 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. (emphasis added).

The question thus arises whether a council or a satellite center is an entity of the State or a branch, council, or committee of the State. As noted above, the council's functions are governmental in nature.

Initially, the council must develop a plan to coordinate federal, state and local economic development services within its regional delivery area. If the plan is approved by the Iowa Development Commission, and a grant is awarded to the council by the commission, the council must then hire a director for the satellite marketing center within its region. Although the statute does not so specify, the council would presumably supervise the director's activities to assure compliance with the terms of the council's grant and the objectives of the plan.

We believe the regional coordinating councils have sufficient public attributes to be councils "of the State." The legislation specifically states that a council is a "public

agency" for purposes of entering into agreements under chapter 28E. § 28.101(2). Further indication that the councils and satellite centers are public entities is found in S.F. 2175, § 808(3)(a)(2), new Iowa Code § 15.108(3)(a)(2), which provides as follows:

> 3. LOCAL GOVERNMENT AND SERVICE COORDINATION. To coordinate the development of state and local government economic development-related programs in order to promote efficient and economic use of federal, state, local, and private resources.
>
> (2) Establish, manage, and administer the activities of the primary research and marketing center and the satellite centers as provided in section 28.101.

Additionally, S.F. 2175, §§ 816-821, new Iowa Code §§ 15.231-15.256, establish a statewide network to coordinate economic development, and job training programs. This network is to be coordinated through three state departments, and each regional office of the network is a part of the satellite centers established under § 28.101. S. F. 2175, § 819. These legislative actions indicate that the councils and satellite centers are public in nature and are councils or branches of a department "of the State" subject to the public records law. See 1984 Op.Att'yGen. 152.

In light of the nature of the activities of the council and the policies underlying chapter 22 (see § 22.8(3); 1984 Op.Att'yGen. 152), we consider regional coordinating councils and satellite centers to fit within the definition of government body contained in Iowa Code § 22.1 (1985).

Regional coordinating councils and satellite centers are subject to Iowa Code ch. 22 (1985) regarding examination of public records. Regional coordinating councils are also covered by Chapter 21 which requires open meetings.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:mlr

TRANSPORTATION-PUBLIC TRANSIT. Iowa Code § 601J.4. An entity which uses public funds for transportation, even if those funds are not initially designated for such use, is required to coordinate with the regional transit system pursuant to Iowa Code § 601J.4. (Peters to Welu, 12-30-86) #86-12-10(L)

December 30, 1986

Mr. David J. Welu
Dallas County Attorney
P.O. Box 6
Redfield, Iowa 50233

Dear Mr. Welu:

You have requested an opinion of this office concerning the circumstances under which Iowa Code § 601J.4 requires coordination with regional transit systems. Specifically, you ask:

> Does the language of Iowa Code § 601J.4 refer to the receipt of public funds earmarked for transportation as the condition of coordinating with the regional transit system or does the receipt of any kind of public funds require an entity that uses funds for transportation to coordinate with the regional transit system?

This question arises out of a disagreement between the Dallas County Hospital and the Iowa Department of Transportation (DOT). Your letter states that the hospital receives public funds, some of which are used to provide public transportation as that term is defined in Iowa Code § 601J.1(8). You further state that because of this public funding, the hospital is one of the entities named in § 601J.5 ("all agencies or organizations purchasing or providing transportation services, except public school transportation, with federal, state or local funds shall comply with section 601J.4.") and is therefore subject to the provisions of § 601J.4 if that statute is otherwise applicable.

The disagreement arises over the following language in § 601J.4:

> Any organization, state agency, political subdivision, and public transit system, except public school transportation, receiving federal, state or local aid to provide or contract for public transit services or transportation to the general public and

> specific client groups, must coordinate and consolidate funding and resulting service, to the maximum extent possible, with the urban or regional transit system.

The question is whether the statutory phrase "federal, state or local aid to provide or contract for public transit services" refers only to funds that are specifically earmarked for transportation, rather than funds that are given for a general purpose and used for transportation.

We believe that § 601J.4 is not limited to designated public funds. This issue is, of course, one of statutory construction. We attempt to ascertain and give effect to legislative intent. Emmetsburg Ready Mix Co. v. Norris, 362 N.W.2d 498, 499 (Iowa 1985). To do this, we look to the object which the legislature sought to accomplish in order to reach a result which will best effectuate the statute's purpose. State v. Peterson, 347 N.W.2d 398, 402 (Iowa 1984). Impractical results should be avoided. Id.

The starting point in any case involving interpretation of a statute is the statute itself. United States v. Hepp, 497 F.Supp. 348, 349 (N.D. Iowa 1980), aff'd 656 F.2d 350 (8th Cir. 1981). Here, the statute itself, though arguably ambiguous, does not specifically refer to "earmarked" funds but, rather, funds that are used "to provide or contract for public transit services or transportation to the general public." The statute is not specifically limited by its language to designated funds and the courts are generally reluctant to imply a limitation when none is stated. See State v. Pettit, 360 N.W.2d 833, 835 (Iowa 1985).

The objectives of § 601J.4 are enunciated in paragraph 2, subparagraphs a-h which set out the criteria by which the program is reviewed. These criteria can be summarized as requiring coordinated public transportation services in a region and the elimination of duplicative services (subparagraph b) and duplicative costs (subparagraph a). Whether public funds are designated for a specific purpose or are simply part of a general grant, the money remains public funds. The object of § 601J.4 is to maximize the efficiency in the expenditure of public funds for public transportation. It would be contrary to this objective to limit § 601J.4 to only earmarked public funds.

This reasoning would also apply if public funds were co-mingled with private funds and then used to provide public transportation. As long as any part of the funds used are public

funds, then 601J.4 applies.

An unduly restrictive definition of the quoted statutory phrase would result in non-designated public funds being used for public transportation without coordination on a regional level. These funds could be spent for services that are already available in the community. This would be contrary to the statute's objectives. To implement the hospital's reasoning would lead to the potential waste of public funds through duplicative services.

This discussion indicates that the legislature intended section § 601J.4 to create a coordinated public transportation system in order to avoid public funds being expended for duplicate costs and services. This intent would be frustrated in part if non-designated public funds were used for duplicative public transportation outside the coordinated system. Section 601J.4 is not limited by its terms to designated public funding and to read such a limitation into the statute would frustrate the intent of the legislature.

Therefore, the answer to your question is that an entity which uses public funds for transportation, even if these funds are not initially designated for such use, is required to coordinate with the regional transit system.

Yours truly,

Merrell M Peters

MERRELL M. PETERS
Assistant Attorney General

MMP:jg

FORCIBLE ENTRY AND DETAINER: Sheriff's Disposition of Personal Property. Iowa Code ch. 556B (1985) and Iowa Code ch. 648 (1985) as amended by Senate File 508, 71st G.A., 2d Sess., 1986 Iowa Acts, ch._____ (S.F. 508); Iowa Code §§ 331.651-331.660 (1985); Iowa Code §§ 364.12, 364.14, Iowa Code § 319.13 (1985) and Iowa Code § 723.4(7) (1985). In executing a forcible entry and detainer action, the county sheriff may leave the personal property of the defendant at the curbside if the writ of removal so directs. If the property is placed temporarily on the public way and it does not obstruct the travelled portion of the street, it is unlikely that the sheriff would be found to be in violation of statutes prohibiting obstructions of public ways. (Lowe to Richards, Story County Attorney, 12-30-86) #86-12-11(L)

December 30, 1986

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

Dear Ms. Richards:

We have received your request for an opinion on whether a county sheriff, in the course of executing a writ of forcible entry and detainer, may remove from the real property any personal property of the defendant and place it by the curbside. Your request concerns only whether this action by the sheriff would be contrary to the city's right to keep the parking free of obstruction. This opinion does not address the rights of any other parties as against the sheriff. We also do not address whether the real property owner, who is a plaintiff in the entry and detainer action, could be found to be in violation of the statutes discussed herein.

Forcible entry and detainer actions involving real property are governed by Iowa Code ch. 648 (1985). When a plaintiff prevails in a forcible entry and detainer action under Chapter 648 as amended by Senate File 508, 71st G.A., 2d Sess. § 648.22, they are entitled to have ". . .the defendant removed from the premises, and the plaintiff put in possession of the premises, and an execution for the defendant's removal within ten days of the judgment. . ." issued accordingly.

The duties of a county sheriff are governed by Iowa Code sections 331.651 to 331.660 which provide that the sheriff must "carry out duties relating to the execution of judgments and orders of the court as provided in chapter 626." Accordingly, the sheriff must carry out the necessary execution in a forcible entry and detainer action. The execution requires the removal of the defendant from the real estate.

There is no question that removal of the defendant's personal property which is located on or in the real estate is included in this removal (Restatement [Second] of Property, § 12.3[1], p. 473, [1977]), otherwise the plaintiff would not be able to

enjoy possession of the real estate. See Usailis v. Jasper, 222 Iowa 1360, 1367 (1937), 271 N.W. 524:

> . . .where the defendant has his personal property in the building. . .the great weight of authority is to the effect that a proper execution of the writ under such circumstances would require removal of the personal property or at least sufficient amount thereof to enable the plaintiff to move in and occupy the premises with property of his own.

The Iowa Code does not specifically address how the sheriff is to dispose of the personal property of the defendant.

When the personal property is left at the curbside, the rights and duties of the real estate owner may come into question in connection with Iowa Code § 364.12(2) (1985) which provides that an: "...abutting property owner may be required by ordinance to maintain all property outside the lot and property lines and inside the curb lines upon the public streets...." Furthermore if the city determines that obstructions placed on the street and the parking by the real property owner are a nuisance, the owner may be ordered to abate the nuisance or if he fails to do so after notice, the city may perform the necessary action and assess the cost against the real property owner (Iowa Code § 364.12 [1985]). However, it is recognized that property owners may have a right to temporarily obstruct the street. "The streets of a town are fairly subject to many purposes to which a highway in the country would not be, and may be used for temporary deposit of goods in their transit to the storehouse." Haight v. City of Keokuk, 4 Iowa 199, 4 Clarke 199 (1857). "Abutting property owners have a right to a reasonable temporary obstruction of the street for appropriate purposes." Jones v. City of Fort Dodge, 185 Iowa 600, 171 N.W. 16 (1919).

We would note that if the placement of the tenant's property is on a public highway governed by Iowa Code ch. 319 (1985), section 319.12 prohibits the placement of any obstruction upon the right of way with few exceptions. We will assume that the streets in question here are not highways within the scope of Chapter 319.

Obstructions of public ways may also constitute a misdemeanor under Iowa Code § 723.4(7) (1985) if a person "without authority or justification, . . .obstructs any street, sidewalk, highway, or other public way, with the intent to prevent or hinder its lawful use by others." Assuming the sheriff's placement of the tenant's property on the street is conducted pursuant to a valid writ of execution in a Chapter 648 proceeding of which the tenant had notice, then the question arises whether the sheriff could be found to be "without authority" or that he acted with the "intent to hinder" the use of the street.

While the sheriff may have authority to place the personal property on the street, some jurisdictions have held that an obstruction cannot be justified on the ground that the obstructor is an officer removing goods from a house in obedience to an execution, 64 C.J.S., Municipal Corporations § 1745, Comm. v. Lennox, 172 Mass. 434, 52 N.E. 521 (1899). "The officer executing a writ of possession, being under legal compulsion of removing the tenant's personal property from the premises must of necessity make some disposition thereof. Obviously, he is not authorized to burn or otherwise destroy it, and it is equally unreasonable to suppose that he may place and leave it unattended in a public street which would obstruct the free use thereof and constitute a public nuisance." Shemanski v. Sair, 268 P.2d 576, 124 C.A.2d 885 (Cal. 1954). However, other jurisdictions have said that in such situations, the nuisance created by the placing of the property on the streets "is the offense of the owner of the goods, and the officer is not guilty of a violation of an ordinance prohibiting the placing or leaving of any object on the street." 64 C.J.S. Municipal Corporations § 1756(a), Williams v. District of Columbia, 22 App. D.C. 471 (1903). The Lennox case and the Williams case represent a split of authority on whether the sheriff may be found in violation of statutes prohibiting the obstructions of public ways. There are no Iowa cases on this precise issue, however, in light of the continued validity of holding of Usailis v. Jasper, supra, it would appear that the sheriff may place the property on the street at least temporarily where it does not obstruct the public way in a hazardous manner.

In summary, it is our conclusion that based on the language of Iowa Code § 648.22 and §§ 331.651 to 331.660 and the authorities cited herein, a county sheriff who is executing a valid writ of forcible entry and detainer pursuant to Iowa Code ch. 648 may leave the personal property of the defendant at the curbside when the writ or warrant of removal specifically directs the sheriff to remove both the defendant and his personal property from the premises. The act of the sheriff placing the property temporarily at the curbside would not per se constitute a nuisance under municipal ordinances or a violation of Iowa Code §§ 319.13 or 723.4(7) (1985).

Sincerely,

Linda Thomas Lowe

LINDA THOMAS LOWE
Assistant Attorney General

cf

COUNTIES: Official Publications; Bona Fide Yearly Subscribers; Publication of Claims. Iowa Code §§ 349.7 (1985) and 349.18 (1985) as amended. A person obtaining a newspaper at a street sale location, vendor location, or newspaper office is not a "subscriber" unless an implied or actual contract to pay for the paper exists beyond the immediate sale. If a contract does exist, the remaining criteria of § 349.7 must be satisfied for the subscriber to be counted as a "bona fide yearly subscriber". The list of claims allowed by a board of supervisors and published in official county newspapers under § 349.18 shall include an identification of the purpose of the payment. (Donner to Miller, State Representative, 12-31-86) #86-12-12(L)

December 31, 1986

The Honorable Thomas H. Miller
State Representative
1501 Susan Avenue
Cherokee, Iowa 51012

Dear Representative Miller:

You have asked for an Attorney General's opinion concerning official publications. First, you have inquired whether an identification of purpose is included in a "claim" allowed by a county board of supervisors subject to the publication requirement of Iowa Code Section 349.18 (1985). Second, in regard to the determination of the number of bona fide yearly subscribers under Iowa Code Section 349.7 (1985, as amended) for the selection of an official county newspaper, you have asked, "What are the circumstances, if any, whereby readers who obtain their newspapers at street sale location, from vendor locations or from newspaper offices could be considered bona fide yearly subscribers . . . [and] [w]hen is a person who make arrangements with a newspaper to receive that paper by subscription with delivery to be at a newspaper office, vendor location or other place other than the subscriber's place of business or residence considered a subscriber. . . ?" We conclude first that an identification of purpose is a necessary element of a "claim" allowed by a county board of supervisors for the purpose of the required publication under Iowa Code Section 349.18. Second, before a person may be counted as a "bona fide yearly subscriber," the person must be a "subscriber," which, in the case of newspapers obtained from street sale locations, vendor locations, or from newspaper offices, requires that the person have done something to enter into an implied or actual contract to pay for the paper beyond the immediate sale.

I. IDENTIFICATION OF PURPOSE OF PAYMENT

Iowa Code Section 349.18 (1985) provides:

> All proceedings of each regular, adjourned or special meeting of a board of supervisors, including the schedule of bills allowed,

> shall be published immediately after the adjournment of the meeting, and the publication of the schedule of the bills allowed shall include a list of all claims allowed, including salary claims for services performed, showing the name of the person or firm making the claim and the amount of the claim, except that names of persons receiving relief shall not be published and salaries paid to persons regularly employed by the county shall only be published annually showing the total amount of the annual salary. The county auditor shall furnish a copy of the proceedings to be published, within one week following the adjournment of the board. [Emphasis added.]

As you have observed, this section was amended in 1984 Iowa Acts, chapter 1069 (Senate File 2243), resulting in the current language set forth above. A study of the legislative history of this section reveals that prior to 1933, the section did not specify what was to be included in the published "schedule of bills allowed". Iowa Code § 5412-a1 (1931). In 1933, language was added to provide that "the publication of the schedule of bills allowed shall show the name of each individual to whom the allowance is made and for what such bill is filed and the amount allowed thereon." 1933 Iowa Acts, ch. 105, § 2. In 1968 Op.Att'yGen. 742, we concluded that in the absence of any statutory exception, the names of poor support payees were not confidential and were therefore required to be published, as the intent of the section as amended in 1933 was the "complete disclosure of expenditures of public funds", and "a much more specific and comprehensive disclosure was required "than prior to the [1933] amendment." 1968 Op.Att'yGen. 742, 744, quoting 1963 Op.Att'yGen. 92. The section was then amended by 1973 Iowa Acts, chapter 186, section 28, to include the exception that the names of persons receiving county poor fund relief were not to be published.

In Op.Att'yGen. #82-4-10(L) and in unpublished letter of informal advice dated 2-19-80, Hyde to Johnson, Auditor of State, we again concluded that the intent of the section was to require a county board of supervisors to fully disclose all expenditures of public funds. The section was again amended in 1983 Iowa Acts, chapter 123, section 123. This amendment was primarily editorial, with the most relevant change being the rephrasing of the requirement that the schedule of the bills allowed show "for what purpose the bill is filed" rather than "for what such bill is filed," emphasizing the statement of purpose.

The 1984 amendment struck the requirement that the publication of the schedule of the bills allowed "show the name of each individual to whom the allowance is made and for what purpose the bill is filed and the amount allowed" and replaced it with the requirement that the schedule "include a list of all claims allowed, including salary claims for services performed, showing the name of the person or firm making the claim and the amount of the claim . . . ." Since the language specifying a showing of the "purpose" of an allowed bill was stricken, such a requirement would be eliminated and the intent of the section altered unless the amendment was nonsubstantive. The change would be nonsubstantive if the legislature intended that "purpose" is an element of a "claim" in the requirement that the schedule of bills allowed "include a list of all claims allowed." [Emphasis added.]

The general objective of the publication requirement of county business in an official newspaper is to furnish the public a convenient method of ascertaining what business is being transacted by the board of supervisors and how it is being transacted, as well as to furnish a check upon extravagance and to prevent the presentation and allowance of trumped up or padded claims against the county. See 1910 Op.Att'yGen. 223; Letter of Informal Advice dated 2-19-80, Hyde to Johnson, Auditor of State. Without a general description of the purpose of an allowed bill, the objective of requirement of publication would not be served.

The use of the term "claim" does imply a reference beyond the demand for money by a specified party to the general grounds for recovery. As an analogy, Iowa Rules of Civil Procedure 69(a) specifies that a pleading setting forth a claim consists of two components: 1) "a short and plain statement of the claim showing that the pleader is entitled to relief" and 2) a demand for judgment. This "statement of the claim" has been held to require an appraisal of the incident of which the claim arose. See e.g., Haugland v. Schmidt, 349 N.W.2d 121, 123 (Iowa 1984).

Interpreting "claim" to require a reference to the purpose for payment is consistent in the context of section 349.18 as amended. The "list of all claims allowed" is to include "salary claims for services performed." The "name of the person or firm making the claim and the amount of the claim" is to be shown. However, the exception that the names of persons receiving relief are not to be published is retained. It would not be necessary to retain this exception if the legislature had contemplated the removal of a published reference to the purpose. Without a statement of purpose, it would be virtually impossible for the public to discern whether allowed amounts to unnamed persons were indeed paid for the purpose of relief under this exception.

Finally, the stated objective of the 1984 amendment did not imply an intent to eliminate an identification of purpose. The title to Senate File 2243 read, "An Act specifying which claims paid to county employees must be published in official newspapers." [Emphasis added.] The bill added the language specifying that "salary claims for services performed" were to be included in the list of bills allowed, and providing the exception that salaries of county employees need only be published annually. The typification of a "salary claim" supports the interpretation that the legislature did intend for "claims" to be identified by purpose. Without a statement identifying a claim as a salary claim by a county employee, it would not be clear to the public why the claim was only published annually. There is no evidence of an intent to depart from the previously ascribed intent--the full disclosure of all expenditures of public funds.

We conclude that an identification of purpose is a necessary element of a "claim" in the context of the publication required under section 349.18 of the "list of all claims allowed" by a county board of supervisors.

II. BONA FIDE YEARLY SUBSCRIBERS

Iowa Code Section 349.7 (1985), as amended by 1986 Iowa Acts, Chapter 1183, provides:

> **349.7 Subscribers - how determined**
>
> 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 who have been subscribers at least six consecutive months before the date of application, whose papers are regularly delivered by carrier upon an order or subscription, or whose papers are purchased from the publisher for resale and delivery by independent carriers who have filed with the publisher a list of their subscribers. [Emphasis added.]

This section requires that a person be a "subscriber" before the person may be a "bona fide yearly subscriber." In 1962 Op.Att'yGen. 140, citing 1898 Op.Att'yGen. 45, we opined that the term "subscriber" in this context requires a showing that the person has done something for which an implied contract to pay for the paper would arise. Specifically "[i]n over-the-counter sales, there is no contract between the publisher and the buyer beyond the immediate sale, and such sales therefore may not be considered in the counting of 'yearly subscribers'." 1962 Op.Att'yGen. 140, 141. See also, Times-Guthrian Pub. Co. v. Guthrie County Vedette, 125 N.W.2d 829, 831-832 (Iowa 1964); Van der burg v. Bailey, 229 N.W. 253, 254 (Iowa 1930). In order for readers who obtain their newspapers at street sale locations, from vendor locations or from newspaper offices to be considered as subscribers, they first would have to enter into some form of implied or actual contract to remove the transaction from the over-the-counter sale context. To become a "bona fide yearly subscriber," the reader would then have to satisfy the remaining criteria in § 349.7 by maintaining that subscriber relationship for at least six consecutive months prior to the newspaper's application for designation as an official county newspaper. If the contract is not directly with the publisher, the independent carrier must have included the reader on the list filed with the publisher. In the example you cited, whether the person who makes arrangements with a newspaper to receive that paper by subscription with delivery to be at a newspaper office, vendor location, or other place other than the subscriber's place of business or residence is considered a bona fide yearly subscriber depends on the terms of the "arrangement." Specifically, there must be a binding contract to pay which removes the transaction from the over-the-counter sale context, and your use of the term "by subscription" would seem to satisfy that requirement by implying the existence of a contract. See, Times-Guthrian. The remaining criteria identified above would then have to be satisfied before the person could be counted as a bona fide yearly subscriber.

Sincerely,

Lynette A. F. Donner

LYNETTE A. F. DONNER
Assistant Attorney General

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COURTS; STATE OFFICERS AND EMPLOYEES; Taxation of fees as costs: Iowa Code §§ 331.604; 602.8102(113); 625.14; 655.4; 655.5 (1985). The clerk of court on his or her own motion may not routinely tax as costs any fees assessed by the recorder pursuant to section 655.4. However, such fees may be taxed as costs in the event the court so orders under section 625.14. (Weeg to O'Brien, State Court Administrator, 12-31-86) #86-12-14(L)

December 31, 1986

Mr. William J. O'Brien
State Court Administrator
State Capitol
L O C A L

Dear Mr. O'Brien:

You have requested an opinion of the Attorney General regarding the interpretation of Iowa Code sections 655.4 and 655.5 (1985). Section 655.4 provides as follows:

> When a judgment of foreclosure is entered in any court, the clerk shall file with the recorder an instrument in writing referring to the mortgage and duty acknowledging that the same was foreclosed and giving the date of the decree.

Section 655.5 subsequently provided:

> When the judgment is fully paid and satisfied upon the judgment docket of such court, the clerk shall file with the recorder an instrument in writing, referring to the mortgage and duly acknowledging a satisfaction of such mortgage, and for such service the sum of twenty-five cents will be allowed to be taxed as part of the costs of the case.

However, section 655.5 was amended in 1985 to eliminate the filing fee. See 1985 Iowa Acts, ch. 159, § 11. Iowa Code section 655.5 (1985 Supp.) now provides:

> When the judgment is fully paid and satisfied upon the judgment docket of the court, the clerk shall file with the recorder an instrument in writing, referring to the mortgage and duly acknowledging a

> satisfaction of the mortgage. The instrument shall be filed without fee.

Section 602.8102(113) further provides that one of the duties of the clerk of court is to:

> When a judgment of foreclosure is entered, file with the recorder an instrument acknowledging the foreclosure and the date of decree and upon payment of the judgment, file an instrument with the recorder acknowledging the satisfaction as provided in sections 655.4 and 655.5.

In your opinion request you note that section 655.4 makes no provision regarding the filing fee. You further state that prior to July 1, 1986, county recorders did not charge the fee under either section to the clerks of court. However, now that clerks of court are state rather than county employees, some recorders have begun charging the $5.00 per page fee pursuant to section 331.604 for services performed under section 655.4. Your question then is whether the clerk of court has the authority to tax this recording fee as an additional court cost back to the holder of the foreclosure judgment.

It is our opinion that this fee may not be routinely taxed as costs. In support of this conclusion, we first note that section 655.5 formerly provided for a specific filing fee to be taxed as costs when the clerk filed a satisfaction of mortgage with the recorder. Now that statute expressly states this instrument shall be filed without fee. Section 655.4 does not provide for a specific filing fee, it does not provide that a fee be taxed as costs, nor does it provide that the instrument shall be filed without fee. This is so even though under both sections the clerk files a document, be it a judgment of foreclosure or a satisfaction of mortgage, with the recorder's office.

The primary rule in construing a statute is to ascertain and give effect to the intent of the legislature. See Beier Glass Co. v. Brundige, 329 N.W.2d 280, 283 (Iowa 1983). We believe, given the similarity between services performed under sections 655.4 and 655.5, the close proximity of these statutes, and their interrelationship, that had the legislature intended that a fee be taxed as costs under section 655.4, or that the instrument be filed without a fee, that it would have so expressly provided as it did in section 655.5. We therefore conclude that the clerk has no independent authority to tax as costs a fee under section 655.4.

This conclusion is consistent with the general rule that costs are taxable only to the extent provided by statute. See City of Ottumwa v. Taylor, 251 Iowa 618, 102 N.W.2d 376, 378 (1960). Such statutes are generally strictly construed as in derogation of the common law rule that costs were generally not allowed. Id. The only statute that we have found that is a basis for taxing costs under section 655.4 is section 625.14, which provides:

> The clerk shall tax in favor of the party recovering costs the allowances of his witnesses, the fees of officers, the compensation of referees, the necessary expenses of taking depositions by commission or otherwise, and any further sum for any other matter which the court may have awarded as costs in the progress of the action, or may allow.

Thus, though the clerk may not on his or her motion tax as costs the fee charged by the recorder under section 655.4, section 625.14 would authorize these fees to be taxed as costs if the court so ordered.

We would suggest that legislative action be sought to avoid any confusion regarding taxation of fees as costs under sections 655.4 and 655.5.

In conclusion, it is our opinion that the clerk of court on his or her own motion may not routinely tax as costs any fees assessed by the recorder pursuant to section 655.4. However, such fees may be taxed as costs in the event the court so orders under section 625.14.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

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