COUNTIES; MENTAL HEALTH: Patient Payments. Iowa Code §§ 230.1, 230.15, 230.20(6), and 230.25 (1993). 42 U.S.C. §§ 1395cc(1)(O), (2)(A). A county of legal settlement may seek reimbursement from a Medicare recipient for payments made by the county pursuant to chapter 230 which represent the deductible or coinsurance payments to the Medicare Program. (Ramsay to Olesen, Adair County Attorney, 1-6-94) #94-1-1(L)

January 6, 1994

Willard W. Olesen
Adair County Attorney
230 Public Square
P.O. Box 86
Greenfield, Iowa 50849

Dear Mr. Olesen:

Your request for an opinion of the Attorney General of Iowa has been assigned to me for response. You inquire whether a county of legal settlement may hold a person who is Medicare eligible and at a state mental health hospital liable for charges which represent the deductible pursuant to the Medicare program.

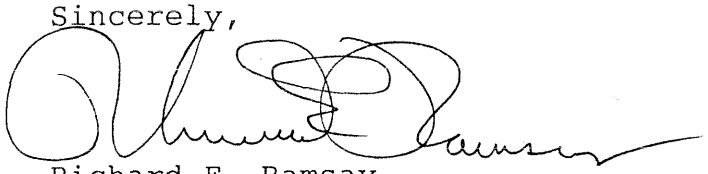
On May 11, 1990, this office opined regarding the inability of a county of legal settlement to seek reimbursement from Medicare and Medicaid patients at the state mental health hospitals. 90 Op.Att'yGen. 74. However, as you correctly note in your request, the May 11, 1990 opinion does not directly address the issues surrounding the recoupment of that portion of the costs of a Medicare recipient which represent the deductible under the Medicare program. This office is of the opinion that a county of legal settlement may seek reimbursement pursuant to chapter 230 of the Iowa Code for the deductible or coinsurance charged to a Medicare patient at a state mental health hospital which is subsequently paid by the county of legal settlement to the State of Iowa.

Medicare is a program established by Title XVIII of the federal Social Security Act. See 42 U.S.C. § 1395 (West Supp. 1992). Medicare payments to providers are reduced by deductible and coinsurance amounts, for which the Medicare recipient or another responsible person or entity is liable. 42 U.S.C. § 1395e. Participating hospitals are required to accept Medicare rates as payment in full for services rendered to Medicare recipients. 42 U.S.C. § 1395cc(1)(O). However, a provider may seek reimbursement from Medicare recipients or "other persons" for the amount of any deduction or coinsurance imposed by Title XVIII provisions. 42 U.S.C. § 1395cc(2)(A).

"Other persons" within Title XVIII is not a defined term. Applying state law to the corresponding liability for treatment at a state mental health hospital, the term "other persons" may equate to a county of legal settlement. See Iowa Code chapter 230. A county of legal settlement is liable for the costs of the care and treatment of patients at a state mental health hospital. Iowa Code § 230.1 (1993). The amount due from the patient or those legally responsible for the patient's care at the mental health hospital must be reduced by reimbursements pursuant to Titles XVIII and XIX of the federal Social Security Act. Iowa Code § 230.20(6). While the amount due may be reduced, liability is still imposed for certain costs of care and treatment pursuant to chapter 230 of the Iowa Code. A county of legal settlement may still be responsible for that portion which represents the deductible or coinsurance. Iowa Code § 230.1. The county of legal settlement may seek reimbursement from the recipient for costs at the mental health hospital which corresponds to those charges which represent the deduction or coinsurance. Iowa Code §§ 230.15 and 230.25.

In conclusion, a county of legal settlement may seek reimbursement from a Medicare recipient for payments made by the county pursuant to chapter 230 which represent the deductible or coinsurance payments pursuant to the Medicare program.

Sincerely,



Richard E. Ramsay
Assistant Attorney General

INSURANCE; SCHOOLS; TAXATION: Use of management levy for employee benefits and early retirement. Iowa Code §§ 279.46, 296.7, 298.4 (1993); Iowa Code § 296.7 (1987); 1990 Acts, ch. 1234, § 74. All indebtedness contracted for, general obligation bonds issued, and insurance agreements entered into or renewed on or after May 2, 1990, are subject to the current version of section 296.7, and therefore may not be used for employee benefit plans. The management levy may be used to fund early retirement benefits. (Condo to Stilwill, Acting Director, Department of Education, 1-13-94) #94-1-3(L)

January 13, 1994

Mr. Ted Stilwill
Acting Director
Department of Education
Grimes State Office Building
LOCAL

Dear Mr. Stilwill:

You have requested an opinion of the Attorney General addressing the effect of Iowa Code section 296.7 (1993) on employee benefit plans. In 1990, the Legislature rewrote section 296.7, and at the same time passed a law (the "grandfather clause") exempting from section 296.7 certain acts that had been permitted under the pre-1990 version of the section. Specifically, you inquire:

> 1) Are the school districts that made arrangements prior to January 1, 1990, to use the insurance levy in Iowa Code section 296.7 (1987) to pay for employee health benefit plans as authorized by the insurance levy prior to the passage of the grandfather clause allowed to continue to use the insurance levy, now management levy, for employee benefit plans?
>
> 2) Because early retirement incentives are often treated differently under the income tax provisions of the law and because payment of health and medical insurance coverage is often offered as an incentive and paid on behalf of an individual who is no longer employed by the school district, may school districts continue to utilize the management levy to pay early retirement incentives as authorized in Iowa Code sections 279.46 and 298.4(5)?

We conclude that all indebtedness contracted for, general obligation bonds issued, and insurance agreements entered into or renewed on or after May 2, 1990 are subject to the current version of section 296.7, and therefore may not be used for employee benefit plans. We further conclude that the management levy may be used to fund early retirement benefits.

At the outset, an examination of the history of the relevant statutes is helpful. In 1986, section 296.7 (the "insurance levy") was passed. 1986 Iowa Acts, ch. 1211, § 18. At that time, the section authorized a school district to levy taxes to pay for the costs of various types of insurance listed in the statute. In 1989, the legislature first passed section 298.4, the district management levy, which, then as now, allowed school districts a tax for five specific purposes only. 1989 Iowa Acts, ch. 135, § 109. At the same time, section 296.7 was amended to state that the insurance levy, originally passed in 1986, was to be included in the district management levy. 1989 Iowa Acts, ch. 135, § 103. In 1990, section 296.7 was stricken and rewritten to its present form, which includes restrictions on the use of funds raised through the insurance levy, and requires that the insurance levy is to be included in the district management levy. 1990 Iowa Acts, ch. 1234, § 1.

We construe section 296.7 in light of this legislative history. Section 296.7 currently states in relevant part as follows:

> 1. A school district or community college corporation may contract indebtedness and issue general obligation bonds or enter into insurance agreements obligating the school district or corporation to make payments beyond its current budget year for one or more of the following mechanisms to protect the school district or corporation from tort liability, loss of property, environmental hazards, or any other risk associated with the operation of the school district or corporation:
>
> a. To procure or provide for a policy of insurance.
>
> b. To provide a self-insurance program.
>
> c. To establish and maintain a local government risk pool.
>
> However, this subsection does not apply to an insurance program described in subsection 3.
>
> 2. For purposes of subsection 1, an employee benefit plan which includes a

> specific or aggregate excess loss coverage or a program that self-insures only a per-employee or per-family deductible for each year and which transfers the risk remaining beyond this deductible is not a self-insurance program, but is instead an insurance program. As used in this section, "employee benefit plan" includes, but is not limited to benefits for hospital and surgical, medical expense, major medical, dental, prescription drug, disability, or life insurance costs or benefits. . . .
>
> * * *
>
> 4. Taxes may be levied in excess of any limitation imposed by statute for payment of one or more of the following authorized by subsection 1:
>
> a. Principal, premium, or interest on bonds.
>
> b. Premium on an insurance policy, including a stop loss or reinsurance policy, except as limited by subsection 3.
>
> c. Costs of a self-insurance program.
>
> d. Costs of a local government risk pool.
>
> e. Amounts payable under an insurance agreement.
>
> However, for a school district, a tax levied under this section shall be included in the district management levy under section 298.4.
>
> * * *
>
> 6. Notwithstanding the other provisions of this section or any other statute, the tax levy authorized by this section shall not be used to pay the costs of employee benefits, including, but not limited to costs for hospital and surgical, medical expense, major medical, dental, prescription drug, disability, or life insurance benefits.

This office has relied on section 296.7(6) in a recent opinion holding that the tax levy authorized by section 296.7 may not be used to pay for employee health benefit plans. Op.Att'yGen. 92-10-5(L).

In your request, you point out a "grandfather clause," exempting acts permitted by the pre-1990 version of section 296.7 from the current section 296.7 (referred to as "section 1" in the grandfather clause). This clause states as follows:

> Section 1 of this act applies to all indebtedness contracted for, general obligation bonds issued, or insurance agreements entered into or renewed pursuant to section 296.7 on or after the effective date of section 1, but shall not apply to an act permitted by section 296.7 at any time prior to January 1, 1990.

1990 Iowa Acts, ch. 1234, § 74. Prior to the 1990 amendments, section 296.7 authorized a school district to use the insurance levy for employee health benefit plans that were of a "self-insurance" nature, provided the district had contracted for indebtedness, issued general obligation bonds, or entered into or renewed insurance agreements. Op.Att'yGen. 92-10-5(L). As a result, such programs are included under the grandfather clause. Section 296.7(2) currently places limits on the types of employee benefit plans that are considered "self-insurance."

Section 296.7(6) states that taxes raised pursuant to that section may not be used for employee benefits, notwithstanding the other provisions of this section or any other statute. A literal reading of section 296.7(6) would seem to render the grandfather clause (passed as part of the same bill as section 296.7) meaningless. A statutory construction that renders part of a statute superfluous is to be avoided. State v. Graves, 491 N.W.2d 780, 782 (Iowa 1992). Additionally, the rule that statutes relating to the same subject matter are to be construed together has particular force when the two statutes were passed in the same legislative session. State v. Dowell, 297 N.W.2d 93, 96 (Iowa 1980).

Within the grandfather clause itself, there is a question of interpretation regarding renewals of insurance agreements. The clause provides that an insurance agreement "renewed" on or after May 2, 1990 (the effective date of the current section 296.7) is subject to the prohibition on employee benefits in section 296.7(6). The clause also holds that the section 296.7(6) benefit restrictions do not apply to an act permitted by section 296.7 prior to 1990. A problem arises upon the renewal of an insurance agreement of the type permitted by section 296.7 prior to 1990, that was first entered into prior to 1990, and then renewed after May 2, 1990. Such a renewal could be said to be immune from the current section 296.7, because the agreement was permitted by section 296.7 prior to 1990. However, the renewal could also be said to be subject to the current version of

section 296.7, since it is a renewal of an insurance agreement taking place after May 2, 1990.

The language of the grandfather clause does not make clear how it is to be interpreted. The goal in construing statutes is to ascertain legislative intent. The spirit of the statute must be considered as well as the words so that a sensible, practical and logical construction should be given and inconvenience or absurdity avoided. Emmetsburg Ready Mix Co. v. Norris, 362 N.W.2d 498, 499 (Iowa 1985). The grandfather clause states that the current version of section 296.7 does not apply to acts permitted by section 296.7 prior to 1990, but that it does apply to renewals. The intent and spirit of the grandfather clause mandate that a renewal of an agreement is subject to the benefit restrictions, despite the fact that the agreement itself is an agreement permitted by the pre-1990 version of section 296.7.

Under section 296.7(4), the insurance levy is included in the district management levy. The district management levy may be used for five specific purposes: to pay the costs of unemployment benefits; liability insurance; insurance agreements; judgements; and early retirement benefits. Iowa Code § 298.4 (1993).

Of the five uses that the funds collected from the management levy may be put to, one is "[t]o pay the cost of early retirement benefits to employees under section 279.46." Iowa Code § 298.4(5) (1993). However, section 296.7(6) is clear in its prohibition of funds collected through the insurance levy from being used for any employee benefits.

Read literally, a conflict between sections 298.4(5) and 296.7(6) exists. When statutes conflict, an attempt must be made to harmonize the statutes in an effort to carry out the meaning and purpose of both statutes as the legislature intended. Dillon v. City of Davenport, 366 N.W.2d 918, 922 (Iowa 1985); Messina v. Iowa Department of Job Service, 341 N.W.2d 52, 56 (Iowa 1983). To carry out both provisions, the early retirement benefits given to retired employees cannot be viewed as a prohibited "employee benefit" under section 296.7(6). This construction is supported by the fact that a recipient of early retirement benefits is not an employee of the school district at the time the benefits are received. Therefore, it is our opinion that the management levy may fund early retirement benefits, as specifically set out in section 298.4(5).

In summary, we conclude that any indebtedness contracted for, general obligation bonds issued, or insurance agreements entered into or renewed on or after May 2, 1990 are subject to the current version of section 296.7, and therefore may not be

used for employee benefit plans. We further conclude that the management levy may be used to fund early retirement benefits.

Sincerely,

JOSEPH CONDO
Assistant Attorney General

COUNTIES: Group insurance for officers and employees. Iowa Code §§ 509A.1, 509A.3, 509A.8 (1993). The county board of supervisors is authorized to provide group insurance plans to county officers and employees under Iowa Code chapter 509A. The supervisors have discretion to formulate rules for the operation of group insurance plans provided to county officers and employees and may limit the contribution which will be made with county funds. (Scase to Dickinson, State Representative, 1-13-94) #94-1-4(L)

January 13, 1994

The Honorable Rick Dickinson
State Representative
State Capitol
L-O-C-A-L

Dear Representative Dickinson:

You have requested an opinion of the Attorney General concerning the provision of group insurance benefits to county officers and employees. Specifically, you ask whether a county board of supervisors has the authority to establish a dollar limit for county funding of insurance coverage applicable to all elected county officials, deputies, and other county employees.

It is our view that a county board of supervisors, as the governing body of the county, is authorized to determine whether group insurance will be provided to county officers and employees and to fix the amount of the cost which will be paid by the county. This conclusion is based upon a review of Iowa Code chapter 509A and prior opinions of this office.[1]

Iowa Code section 509A.1(1993) provides as follows:

> The governing body of the state, school district or any institution supported in whole or in part by public funds may establish plans for and procure group insurance, or health or medical service for

---

[1] We note that the provision of insurance coverage for public employees and their dependents is a mandatory subject of collective bargaining under Iowa Code section 20.9. 1980 Op.Att'yGen. 304, 304-06; see also Charles City Comm. School Dist. v. PERB, 275 N.W.2d 766 (Iowa 1979). Iowa Code chapter 509A governs the provision of group insurance to non-unionized county employees and those employees and officers who are exempt from collective bargaining. Id.

> the employees of the state, school district or tax-supported institution.

Chapter 509A allows counties, cities, and other publically funded entities to provide group insurance either by contracting with an insurance carrier (section 509A.6) or by adopting a self-insurance plan (section 509A.15). The insurance plans authorized by section 509A.1 are to be funded "solely from the contributions of employees, or from contributions wholly or in part by the governing body." Iowa Code § 509A.2 (1993). Employee participation in group insurance plans offered by public employers is optional. Iowa Code § 509A.4 (1993). The governing body of each tax-supported public institution is responsible for establishing, administering, and formulating rules for the operation of group insurance plans provided under chapter 509A. Iowa Code § 509A.8 (1993).

In applying Code chapter 509A to counties, this office has consistently recognized that the board of supervisors, as the governing body, may establish group insurance plans for elected officials, deputies, and other county employees. See 1982 Op.Att'yGen. 146, 148 (boards of supervisors vested with discretion to provide fringe benefits, including contribution to group insurance, to elected county officials); 1970 Op.Att'yGen. 576 (group insurance benefits offered to county employees, to be uniformly made available to deputy officers as well as other county employees). Group insurance provided under chapter 509A may include coverage for dependents of public officials and employees. See 1980 Op.Att'yGen. 304, 307.

As this office has previously noted, "major ambiguities" appear in Code section 509A.3, which governs the allocation of group insurance costs to employees. See 1980 Op.Att'yGen. 304, 306-08. Section 509A.3 provides:

> All employees participating in any such plan the fund of which is created under the provisions of section 509A.2 shall be assessed and required to pay an amount to be fixed by the governing body not to exceed the two percent which shall be contributed by the public body according to the plan adopted, and the amount so assessed shall be deducted and retained out of the wages or salaries of such employees.
>
> Any employee may authorize deductions from the employee's wages or salary in payment for plans authorized in this chapter in the manner provided in section 514.16.

Section 509A.3 does not indicate the figure upon which the two percent is based. We have, however, repeatedly determined that the two percent reference means two percent of the individual employee's earnings. See 1980 Op.Att'yGen. 304, 307; citing 1966 Op.Att'yGen. 22, 26; see also 1958 Op.Att'yGen. 32, 34 (interpreting identical language in Code § 365A.3 (1954) as placing a maximum contribution of two percent of earnings on both the city and the employee).

It is also unclear whether section 509A.3 applies to all or only a portion of the plans which may be adopted under section 509A.1. Following a detailed review of the legislative history of sections 509A.1, 509A.2 and 509A.3, we previously determined that section 509A.3 "is meant to apply only when the cost of a plan is shared between employer and employee." 1980 Op.Att'yGen. 304, 308. We also determined that the two percent limit set forth in section 509A.3 should be applied to each individual insurance "plan" offered by a public employer, reasoning as follows:

> [T]he overall scheme of Chapter 509A, Code of Iowa, 1979, presumes the possibility of a number of "plans," each of which would be subject to the two percent limitation on the contribution by the employer and the employee. Thus, in implementation of insurance programs, the effect of the limitation of § 509A.3, Code of Iowa, 1979, would depend upon how many separate insurance "plans" were procured by the governing body. For example, there could be a surgical plan, an accident plan, a permanent disability income plan, and so on. Because § 509A.8, Code of Iowa, 1979, permits governing bodies to promulgate rules in connection with insurance plans, we believe what constitutes a "plan" could be defined by rule because it is not defined in the statute. The County Home Rule Amendment provided further support for the express power to make rules.

1980 Op.Att'yGen. 304, 308-09.

It is the long-standing policy of this office not to overrule a prior opinion unless we find that the controlling law has changed or that the previous ruling was clearly erroneous. See 1992 Op.Att'yGen. 179, 192, citing 1990 Op.Att'yGen. 51, 52. Code section 509A.3 has not been amended since the issuance of 1980 Op.Att'yGen. 304. As we indicated in that opinion, we find Code section 509A ambiguous in several respects and "believe that the Legislature could provide more guidance than presently exists

in Chapter 509A . . . as to its intentions concerning limitations on expenditure by governmental bodies for insurance programs for employees." 1980 Op.Att'yGen. 304, 309. We do not, however, find the interpretation of section 509A contained in our 1980 opinion to be clearly erroneous. Therefore, our 1980 opinion stands.

In summary, we conclude that the county board of supervisors is authorized to provide group insurance plans to county officers and employees under Iowa Code chapter 509A. The supervisors have discretion to formulate rules for the operation of group insurance plans provided to county officers and employees and may limit the contribution which will be made with county funds.

Sincerely,

CHRISTIE J. SCASE
Assistant Attorney General

CJS/cs

CONSTITUTIONAL LAW; CONFLICT OF INTEREST; GIFTS: Solicitation of charitable contributions by uniformed firefighters. Iowa Const. art. III § 31; Iowa Code §§ 68B.2A, 68B.22, 721.2 (1993). Uniformed public employees may not solicit funds for charitable organizations unless their employer has determined that the activity serves a public rather than a private purpose. Before authorizing employees to use city time, uniforms, and equipment to raise funds for charity, the city council must make findings that the fundraising activity serves a public purpose, and that the donations are used to further a public purpose. Public employees are prohibited from soliciting funds for charity if either they or their families receive a personal gain or advantage. (Olson to Hahn, State Representative, 1-27-94) #94-1-6(L)

January 27, 1994

The Honorable Jim Hahn
State Representative
Statehouse
Des Moines, IA 50319

Dear Representative Hahn:

You have requested an opinion of our office concerning charitable contributions solicited by city employees. Specifically, you inquire whether on-duty city firefighters may, while wearing official uniforms and displaying city fire trucks and equipment, solicit contributions for a national charity from motorists stopped at street intersections. Your question is whether this activity would violate Iowa Code sections 68B.2A (conflict of interest), 68B.22 (gifts), 721.2 (nonfelonious misconduct in office), or any other Code section. We believe that Iowa Const. art. III, § 31, should be considered as well.

We must clarify from the outset that the opinion process may not determine specific violations of statutes or constitutional provisions. 1982 Op.Att'yGen. 162. Determination of whether a law has been violated should be made in an adjudicative setting where factual issues can be resolved with the participation of the affected parties. Our opinion on this issue, therefore, is limited to principles of law concerning how the terms of statutes and constitutional provisions should be construed.

I.

Because public property, e.g. city time, uniforms, vehicles, and equipment is being used in the fund raising activity, we begin with an analysis of Iowa Const. art. III, § 31, which states:

> [N]o public money or property shall be appropriated for local, or private purposes, unless such appropriation, compensation, or

> claim, be allowed by two thirds of the members elected to each branch of the general assembly. (Emphasis added.)

This constitutional provision is applicable to appropriations by city councils. Love v. City of Des Moines, 210 Iowa 90, 230 N.W. 373 (1930); Willis v. City of Des Moines, 357 N.W.2d 567, 570 (Iowa 1984). It generally prohibits a city from authorizing the use of city-owned property by city employees for their own purposes. 1980 Op.Att'yGen. 720, 721. To be constitutional under art. III, § 31, an appropriation of public money or property must not be for private purposes. Dickinson v. Porter, 240 Iowa 393, 35 N.W.2d 66 (Iowa 1948); 1980 Op.Att'yGen. 102, 103; 1984 Op.Att'yGen. 47, 49. It must therefore be determined whether a public purpose is served by the described solicitation of funds for charity and whether any public benefit is merely incidental to a private benefit. 1990 Op.Att'yGen. 79 (#90-7-3(L)).

The use to which the property is put largely determines its private or public nature. 1980 Op.Att'yGen. at 721. To be valid, the property must be utilized by the governing body in the exercise of its governmental functions. Id. at 722. Moreover, the benefits to the public from the use of the property must be more than merely indirect and remote. Id.

The determination of a private purpose should be made in accordance with a test formulated by the Supreme Court. That test is whether there is an "absence of public purpose" which is "so clear as to be perceptible by every mind at first blush." John R. Grubb, Inc. v. Iowa Housing Finance Authority, 255 N.W.2d 89, 93 (Iowa 1977). The term "public purpose" is to be a flexible and broad concept in order "to meet the challenge of increasingly complex, social, economic, and technological conditions." Id.

In the context of government financing of private business for economic development this office concluded that the governing body should determine whether a loan program by a municipality is for a public rather than a private purpose. 1986 Op.Att'yGen. 113. In making that determination the governing body of the municipality should make findings which establish the proposed program would further public purposes, should establish criteria which prevent favoritism, and should assure that the public funds are used to further public purposes. Id. at 119. In the instant case the city council should apply similar procedures in deciding whether the use of its property to raise funds for charity serves a public rather than a private purpose.

The Attorney General has on several occasions considered the legality of governmental appropriations to entities whose work could be considered charitable or educational. See 1972 Op.Att'yGen. 395 (city donation to recreation center operated and funded by private citizens); 1976 Op.Att'yGen. 31 (city donation to private hospital and clinic); 1980 Op.Att'yGen. 701 (#80-5-7(L)) (county appropriation for construction of building to be owned by nonprofit historical society). Those opinions concluded that appropriations of money for such purposes were not allowed under art. III, § 31 because the entities were subject to private control and would owe no duty to the state beyond that already imposed by law.

In summary, the city council, with advice from the city attorney, should make findings which adequately demonstrate that soliciting charitable contributions under the facts you describe furthers the public interest. The Supreme Court has stated that it is an "extraordinarily delicate matter" for a governing body to make policy decisions involving use of public property for potentially private purposes. Leonard v. Iowa State Board of Education, 471 N.W.2d 815, 817 (Iowa 1991). Some suggested factors the city should consider are the purpose of the charitable organization and whether it is subject to private control, how the contributions will be spent, any personal benefit or gain to the participating employees, and the specific benefit to the city.

We have also considered Iowa Code section 721.2 in conjunction with art. III, § 31. Section 721.2(5) provides that a public officer or employee commits a serious misdemeanor when the person:

> Uses or permits any other person to use the property owned by the state or any subdivision of the state for any private purpose and for personal gain, to the detriment of the state or any subdivision thereof.

This office cannot draw the line between the uses of public property which may be said to violate criminal statutes and those which truly benefit the public. 1980 Op.Att'yGen. at 105. We therefore must decline to offer an opinion on whether a court might find that the city or its employees have violated section 721.2(5).

II.

The second consideration is whether solicitations for charitable contributions by uniformed public employees constitute an unacceptable conflict of interest. Iowa Code Supp. section 68B.2A(1) (1993) provides that an employee of the state or a political subdivision "shall not engage in any outside employment or activity which is in conflict with the person's official duties and responsibilities." Under section 68B.2A(1)(a) an unacceptable conflict of interest is deemed to exist if:

> The outside employment or activity involves the use of the state's or political subdivision's time, facilities, equipment, and supplies or the use of the state or political subdivision badge, uniform, business card, or other evidences of office or employment to give the person or member of the person's immediate family an advantage or pecuniary benefit that is not available to other similarly situated members or classes of members of the general public. . . .

Where public officials are concerned, this office has opined that generally a conflict of interest exists "whenever a person serving in public office may gain any private advantage, financial or otherwise, from such service." 1982 Op.Att'yGen. 220, 221. We believe that the same rationale applies to public employees under section 68B.2A.

Section 68B.2A clearly prohibits public employees from using the employer's time, equipment, and uniform for an outside activity from which the employees benefit personally. We conclude the statute prohibits any personal gain or advantage to employees who use their uniform, public time or property to solicit funds for charity. If any gain or advantage exist, the activity is illegal.

III.

The final consideration is the gift law which, like the conflicts of interest provision, is found in Iowa Code chapter 68B. The stated purpose of the gift law is to discourage state public officials and public employees from accepting gratuities or favors from those who could gain advantage by influencing official actions. Iowa Code § 68B.21 (1993). Gifts that create unacceptable conflicts of interest or appearances of impropriety are prohibited. Id.

As amended by 1993 Iowa Acts, chapter 163, section 1, a "gift" is defined in section 68B.2(9) as "a rendering of anything of value in return for which legal consideration of equal or greater value is not given and received." Cash donations fall within the statutory definition. Op.Att'yGen. #93-7-7(L).

Ordinarily, we would next determine whether the gift was from a "restricted donor" as that term is defined in section 68B.2(24), because under section 68B.22 a public employee may not solicit or receive a gift from a restricted donor. Because the gift law is intended to apply only to gifts given to public employees and officials, however, the threshold question is whether the public employees are in fact the donees.

Our understanding is that the contributions were solicited and received by public employees for the benefit of a national charity. Charitable organizations which solicit public donations are governed by Iowa Code chapter 13C. A "charitable organization" means "a person who solicits or purports to solicit contributions for a charitable purpose and which receives contributions," but does not include a political or religious organization or an accredited college or university. Iowa Code § 13C.1(1). When public employees solicit and receive such contributions, presumably they function as agents of the charitable organization, merely the conduits through which the donations are channeled to the intended recipient. Unless the public employees benefit from the donations, in our opinion they have not received or accepted a gift prohibited under section 68B.22.

CONCLUSION

Uniformed public employees may not solicit funds for charitable organizations unless their employer has determined that the activity serves a public rather than a private purpose. Before authorizing employees to use city time, uniforms, and equipment to raise funds for charity, the city council must make findings that the fundraising activity serves a public purpose, and that the donations are used to further a public purpose. Public employees are prohibited from soliciting funds for charity if either they or their families receive a personal gain or advantage, regardless of whether the charity serves a public purpose.

Sincerely,

Carolyn J. Olson

CAROLYN J. OLSON
Assistant Attorney General

CJO:krd

COUNTY AND COUNTY OFFICERS: Board of Supervisors; Appointment of General Assistance Director. Iowa Code §§ 68B.2A, 252.26, 252.33 (1993). The language of Iowa Code section 252.26 requires the county board of supervisors to appoint a natural person to the position of general assistance director rather than an agency. (Robinson to Haskovec, Howard County Attorney, 2-11-94) #94-2-1(L)

February 11, 1994

Mr. Joseph M. Haskovec
Howard County Attorney
Howard County Court House
Cresco, IA 52136

Dear Mr. Haskovec:

You recently asked for an opinion of this office regarding the appointment of the county general assistance director:

> [D]oes the language contained in Iowa Code section 252.26 which states that 'the Board of Supervisors in each county shall appoint or designate a General Assistance Director for the county' require the Supervisors to appoint a . . . [natural] person to fill that position or may the Board of Supervisors instead appoint a local agency . . .?

In our opinion the board of supervisors may not appoint an agency and is required to appoint a natural person to the position of general assistance director.

We arrive at the conclusion that an agency cannot be appointed by the application of the rules of statutory construction where we, like the courts, must search for the legislature's intent as shown by what it actually said, rather that what it should or might have said. State v. Hatter, 414 N.W.2d 333, 337 (Iowa 1987); State v. Peterson, 347 N.W.2d 398, 402 (Iowa 1984). We may not, under the guise of construction, enlarge or otherwise change the terms of a statute. Hatter; 414 N.W.2d at 337; State v. Vietor, 208 N.W.2d 894, 898 (Iowa 1973). The express mention of one thing

in a statute implies the exclusion of others. Hatter, 414 N.W.2d at 337; In re Estate of Wilson, 202 N.W.2d 41, 44 (Iowa 1972).

We start with the statute itself:

> 252.26 **General assistance director.**
> The board of supervisors in each county shall appoint or designate a general assistance director for the county, who shall have the powers and duties conferred by this chapter. In counties of one hundred thousand or less population, the county board may designate as general assistance director an employee of the state department of human services who is assigned to work in that county and is directed by the director of human service, pursuant to an agreement with the county board, to exercise the functions and duties of general assistance director in that county. The director shall receive as compensation an amount to be determined by the county board.

The rules of construction convince us that the legislative intent in providing for a general assistance director was to appoint a natural person. In smaller counties an employee of the department of human services is authorized. This employee is obviously a natural person. Our conclusion is further influenced when we consider the discretionary powers given to the general assistance director in Iowa Code section 252.33, which provides:

> **Application for assistance.**
> A person may make application for assistance to a member of the board of supervisors, or to the general assistance director of the county where the person is. If application is made to the general assistance director and that officer is satisfied that the applicant is in a state of want which requires assistance at the public expense, the director may afford temporary assistance, subject to the approval of the board of supervisors, ...

(Emphasis added.)

The use of the term "officer" to describe the general assistance director further suggests the appointment of a natural person to that position.

Finally, we believe the determination of eligibility for county general assistance under chapter 252 is an inherently governmental function that may not be delegated to a private agency. Marco Dev. Corp. v. City of Cedar Falls, 473 N.W.2d 41, 42 (Iowa 1991). For a further discussion of the issue of privatization of government services and the governmental/proprietary function analysis, see Op.Att'yGen. #92-4-1.

For all of the reasons stated above, we are of the opinion that the county general assistance director appointed by the board of supervisors pursuant to section 252.26 must be a natural person and may not be a local private agency. We note, however, that the position may be less than full-time and the individual holding the position could also be a part-time employee of such an agency, taking into consideration potential and real conflict of interest issues that such an arrangement may create. See Iowa Code supplement section 68B.2A (1993).

Sincerely,

STEPHEN C. ROBINSON
Assistant Attorney General

SCR

COUNTIES: Chapter 347A Hospital; Certification of Budget. Iowa Code §§ 24.2(1), 24.2(4), 24.17, 347A.1, 347A.3 (1993). The board of hospital trustees for a hospital organized under Iowa Code chapter 347A must certify its annual budget under chapter 24 of the Code. (Mason to Hahn, State Representative, **3-21-94**) **#94-3-1(L)**

March 21, 1994

The Honorable Jim Hahn
State Representative
State Capitol
L O C A L

Dear Representative Hahn:

You have requested the opinion of the Attorney General as t whether a hospital organized under Iowa Code chapter 347A must certify an annual budget under chapter 24 of the Iowa Code.

Iowa Code section 24.2(1) defines "certifying board" to mean "any public body which has the power or duty to certify any tax to be levied or sum of money to be collected by taxation." A "municipality" is defined in section 24.2(4) to mean "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." Iowa Code chapter 24 sets forth various requirements for certifying boards and municipalities. One of the requirements, as set forth in section 24.17, is that certifying boards must certify their local budgets to the county auditor who then certifies a copy of the budget to the state appeal board.

A county hospital organized pursuant to chapter 347 of the Iowa Code is a "municipality" and a "certifying board" for purposes of chapter 24, even though it is not specifically stated to be so in chapter 24. 1980 Op.Att'yGen. 388, 394; 1930 Op.Att'yGen. 320, 321. Similarly, it is our opinion that a county hospital organized pursuant to chapter 347A is also a certifying board and a municipality subject to the requirements of chapter 24 for local budgets.

The hospital trustees are elected. Iowa Code section 347A.1 (1993). The board of hospital trustees therefore satisfies the requirement of being a public body. See 1962 Op.Att'yGen. 108, 109-10; State v. The Mayor, 103 Iowa 76, 72 N.W. 639 (1897). Iowa Code section 347A.3 states, in relevant part:

> If in any year, after payment of the accruing interest on and principal due of revenue bonds issued under chapter 331, division IV, part 4, and payable from the revenues derived from the operation of the county hospital, there is a balance of such revenues insufficient to pay the expenses of operation, maintenance, and funded depreciation of the hospital, the board of hospital trustees shall certify that fact as soon as ascertained to the board of supervisors of the county, and the board of supervisors shall make the amount of the deficiency for paying the expenses of operation, maintenance, and funded depreciation of the hospital available from other county funds or shall levy a tax not to exceed one dollar and eight cents per thousand dollars of assessed value in any one year on all the taxable property in the county in an amount sufficient for that purpose. However, general county funds or the proceeds of taxes shall not be used or applied to the payment of the interest on or principal of revenue bonds issued under chapter 331, division IV, part 4, but general county funds or proceeds of taxes may only be used and applied to pay expenses of operation, maintenance, and funded depreciation of the hospital which cannot be paid from available revenue derived from its operation.

(Emphasis added.) This statute gives the board of hospital trustees the power to require the board of supervisors to levy a tax or use other public revenues when needed to pay the expenses of operation, maintenance, and funded depreciation of the hospital. It is our opinion that the board of hospital trustees for a hospital organized under Iowa Code chapter 347A is, therefore, a "certifying board" for purposes of chapter 24 of the Code and must certify an annual budget as required by section 24.17. It is a separate public body which is supported by tax

revenue and must submit its budget to public scrutiny and approval.[1]

Sincerely,

Marcia Mason

MARCIA MASON
Assistant Attorney General

MM:cml

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[1]According to the Brief submitted with your opinion request, the Muscatine General Hospital has never had a balance of revenues insufficient to pay the operating and maintenance expenses, but its expansion was financed by bonds payable from property tax revenues of the county. That use of county property taxes helps support the hospital, in that the hospital can apply its revenues to operating and maintenance expenses rather than to expansion costs. Also, the hospital's current budget could lead to a future need for property tax revenue.

CONSTITUTIONAL LAW: MOTOR VEHICLE: Differential treatment based on age. U.S. Const. amend. XIV and Iowa Const. art. I, § 6; Iowa Code Supp. § 321.196 (1993); and 761 IAC 605.26(2). While the Iowa Department of Transportation's rule allowing renewal of driver's licenses by mail for people at least seventeen years and eleven months but under sixty-five years does disparately impact upon drivers over the age of sixty-four, a rational reason exists for the classification. Therefore, the rule does not appear to unconstitutionally discriminate against those drivers over age sixty-four. (Burger to Tyrrell, State Representative, 4-5-94) #94-4-1(L)

April 5, 1994

The Honorable Phil Tyrrell
State Representative
Statehouse
Des Moines, IA 50319

Dear Representative Tyrrell:

You have requested an opinion of the Attorney General concerning the validity of the Iowa Department of Transportation's (IDOT) rule regarding renewal of driver's licenses by mail. Specifically you asked whether the IDOT rule allowing renewal of driver's licenses by mail for people at least seventeen years and eleven months but under sixty-five years of age discriminates against those drivers sixty-five to seventy based upon age.

The legislature amended Iowa Code section 321.196 to permit the IDOT to adopt rules regarding the eligibility for renewal of a motor vehicle license by mail. 1993 Iowa Acts, ch. 51 § 1. The rule adopted by the IDOT prohibits those drivers sixty-five years of age or older from applying for the renewal of a driver's license by mail. See 761 IAC 605.26(2). Because the rule places a greater burden on drivers over the age of sixty-four based solely upon their age, it must be determined whether the rule creates an unconstitutional classification.

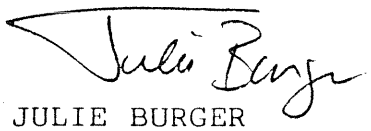
The equal protection clause is implicated when a statute treats classes of people differently. U.S. Const. amend. XIV and Iowa Const. art. I, § 6. It is not necessarily unconstitutional to legislate classifications among the public or to treat different classifications differently. It is only unconstitutional when the reason for the classification is insufficient. The test of the sufficiency of the reason differs depending on the basis of the classification. In analyzing the legislative reason for the classification, it first must be determined whether a rational basis test or more stringent standard should be applied. Veach v. Iowa Dep't of Transp., 374 N.W.2d 248, 249 (Iowa 1985). A challenged classification will not be subject to strict scrutiny unless it impinges upon a fundamental right or disadvantages an inherently suspect class.

Id. Age is not recognized as a suspect classification. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520, 525 (1976). Fundamental rights include the right to vote, the right of interstate travel, and other rights, such as those guaranteed under the First Amendment, which are considered essential to individual liberty. Bennett v. City of Redfield, 446 N.W.2d 467, 473 (Iowa 1989). Neither the privilege of driving or of re-licensure is fundamental. Because the IDOT rule neither impacts a fundamental right nor creates a suspect classification, the rational basis approach must be applied.

Under the rational basis test, a class distinction will survive if it rationally furthers a legitimate state interest. Veach, 374 N.W.2d at 249. Renewal by mail eliminates the vision examination for those drivers who take advantage of the process. Generally speaking, eyesight deteriorates with age. The aging process affects an individual's reaction time, hearing and vision. E.E.O.C. v. Missouri State Highway Patrol, 748 F.2d 447, 452 (8th Cir. 1984). This manifests itself, for example, in an individual's inability to adapt to sudden changes in lighting, such as the glare from headlights. Id. Requiring people over the age of sixty-four to apply for a driver's license in person enables the IDOT to check an applicant's eyesight; thereby, preventing visually impaired drivers from obtaining licenses to operate a motor vehicle. The IDOT acts consistently with its responsibilities when it adopts a rule which fosters protection of the driving public. Gooch v. Iowa Dep't of Transp., 398 N.W.2d 845, 847 (Iowa 1987). Certainly, there are visually impaired drivers in all age classes; however, a rule-making body may adopt regulations that only partially address a perceived evil. Id.

All persons need not be treated alike to meet constitutional standards of equal protection. It is enough if all members of the same class are treated equally. Hack v. Auger, 228 N.W.2d 42, 43 (Iowa 1975). While the IDOT rule for renewal by mail does disparately impact drivers over the age of sixty-four, a rational reason exists for the classification. Therefore, the rule does not appear to unconstitutionally discriminate against those drivers over age sixty-four.

Sincerely,



JULIE BURGER
Assistant Attorney General

JB:vr

COUNTIES: Design and construction of county hospital addition - competitive bidding. Iowa Code §§ 331.341(1), 347.13(2), 384.96, 384.97, 384.102 (1993). The plans, specifications and entire contract for a proposed building must be available to enable contractors to competitively bid on the project and allow for inspection by all interested parties and bidders. Soliciting a package bid to both design and build a county hospital addition is not authorized and would be contrary to the competitive bidding process. (Olson to Lytle, Van Buren County Attorney, 4-5-94) #94-4-2(L)

April 5, 1994

Richard H. Lytle
Van Buren County Attorney
905 Fourth Street
Keosauqua, IA 52565

Dear Mr. Lytle:

We have received your request for an opinion addressing competitive bidding procedures for construction of an addition to a county hospital. Specifically, you ask whether a single bidding process may encompass one contract for both design and construction of the improvement. Upon review of relevant legal principles, we find that the answer is no.

County hospitals organized pursuant to Iowa Code chapter 347 are creatures of the legislature, and therefore they have only such powers as the legislature grants. 1980 Op.Att'yGen. 388, 390-91. The power of a county hospital board of trustees regarding construction of buildings is set out in Iowa Code section 347.13(2) (1993) as follows:

> [Said board of hospital trustees shall] cause plans and specifications to be made and adopted for all hospital buildings, and advertise for bids, as required by law for other county buildings, before making a contract for the construction of a building.

Iowa Code section 331.341(1) provides that when the estimated cost of a public improvement, except improvements which may be paid for from the secondary road fund, exceeds twenty-five thousand dollars, the contract letting procedures in sections 384.95 to 384.103 must be followed. The definition of "public improvement" in section 384.95(1) includes a county building.

Presumably, the board of trustees in this case has determined that the building will cost more than $25,000. That being the case, before entering into a contract for the public improvement, Code section 384.102 requires the board to hold a public hearing on "the proposed plans, specifications, and form of contract, and estimated cost for the improvement." Prior to the hearing the entire contract must be filed in the county clerk's office along with the plans and specifications. Dunphy v. City Council of City of Creston, 256 N.W.2d 913, 919 (Iowa 1977). After considering objections from any interested party at the hearing, the board shall by resolution enter its decision on the plans, specifications, contract and estimated cost. Iowa Code § 384.102.

Filing the plans, specifications and contract is not only for the benefit of the general public, but for contractors who wish to competitively bid on the project as well. For projects which are estimated to cost more than $25,000, the project must be advertised soliciting sealed bids. Iowa Code § 384.96. The notice to bidders must be published in a newspaper in accordance with sections 362.3 and 384.96, and must include the information items in section 384.97. Some of those items are the time and place for filing sealed proposals, the time and place the proposals will be opened and considered, the general nature of the public improvement on which bids are requested, and any other information the governing body deems appropriate.

The general rule on competitive bidding is as follows:

> Public authorities cannot lawfully ask each bidder to make his own plans and specifications and to base his bid thereon, and then, after the bids are received, adopt one of the offered plans with its specifications and accept the accompanying bid. Such a procedure would be destructive of competitive bidding and would give public officials an opportunity to exercise favoritism in awarding contracts. A contact cannot be said to have been let to the lowest and best bidder unless all bidders have been invited to bid upon the same specification.

64 Am. Jur. 2d Public Works and Contracts § 50, at 901-02 (1972).

Competitive bidding in granting public improvement contracts is for the protection of the public. Istari Construction, Inc. v. City of Muscatine, 330 N.W.2d 798, 800 (Iowa 1983); 1983 Op.Att'yGen. 57, 61. To allow truly competitive bidding, the proposed plans and specifications on file for the project should be prepared by a disinterested competent engineer and available for inspection by interested parties and all bidders. Northwestern Light & Power Co. v. Town of Grundy Center, 220 Iowa 108, 261 N.W. 604, 609-10 (1935). The plans and specifications should be sufficiently specific in accordance with established and recognized standards to enable all bidders to bid upon the same identical proposition. Id. It is the duty of bidders to base their bids on the plans and specifications on file. Brutsche v. Incorporated Town of Coon Rapids, 220 Iowa 1295, 264 N.W. 696, 698 (1936).

There is no basis for competitive bidding where a successful bidder prepares the plans and specifications upon which that bidder submits a proposal, when those plans and specifications are not open to inspection nor available to other bidders. Town of Grundy Center, 220 Iowa at 120, 261 N.W. at 610. Such a procedure "would in effect abolish the rule entirely which requires competitive bidding" and would "open the door to fraud and favoritism, and in effect nullify the very purpose of the law requiring competitive bidding." Id.

We therefore conclude that soliciting a package bid to both design and build the hospital addition is not authorized and would be contrary to the competitive bidding process.

Sincerely,

Carolyn J. Olson

CAROLYN J. OLSON
Assistant Attorney General

CJO:krd

COUNTIES; MENTAL HEALTH: Payment to County Hospitals. Iowa Code §§ 125.82; 229.1(14); 347.16(2) & (3); 665.2, 665.3 (1993). Free care and treatment must be provided to the sick and injured resident indigents at county hospitals. A county of legal settlement may be required to pay a county hospital for the care and treatment of those who are indigent for costs including those associated with the admission or commitment for substance abuse or mental health treatment regardless of admission status. A court order requires that a county hospital admit the person for treatment regardless of the definition of acute care pursuant to Medicare, Medicaid or other third party payment systems. (Ramsay to Grundberg, State Representative, 4-29-94) #94-4-3(L)

April 29, 1994

The Honorable Betty Grundberg
State Representative
Iowa State House
LOCAL

Dear Representative Grundberg:

You have requested an opinion of the Attorney General on whether a county must pay for services rendered by a county hospital to those committed, admitted or receiving services under the substance abuse and mental health laws.

Iowa Code section 347.16 controls the rendering of treatment and the assessing of costs at county hospitals established pursuant to chapter 347 of the Iowa Code. See Iowa Code § 347.16 (1993). Specifically, regarding the poor and indigent:

> 2. Free care and treatment shall be furnished in a county hospital to any sick or injured person who fulfills the residency requirements under section 47.4, subsection 4,[1] in the county maintaining the hospital, and who is indigent.
>
> 3. Care and treatment may be furnished in a county public hospital to any sick or injured person who has legal settlement outside the county which maintains the hospital . . . .

---

[1]. Iowa Code section 47.4(4)(4) has been repealed and re-enacted into Iowa Code section 47.4(1)(d). Iowa Code section 347.16(2) has not been updated to cite the correct subsection of the Iowa Code. All references shall be to the current citation found in the 1993 volume of the Iowa Code. See 80 Iowa Acts ch. 1023 § 1.

> If care and treatment is provided under this subsection to a person who is indigent, the county in which that person has legal settlement shall pay to the board of hospital trustees the fair and reasonable cost of the care and treatment unless the cost of the indigent person's care and treatment is otherwise provided for.

Iowa Code § 347.16(2) & (3) (1993) (emphasis added).

A person who is a resident of the county and indigent shall be provided free care and treatment from the county hospital so long as that person is either sick or injured or both. Id. Care and treatment may also be provided by a count hospital to non-residents. The county of legal settlement shall be responsible for the cost of care provided to those who are indigent by a county hospital. Id. The word "shall" imposes a duty upon the county of legal settlement under this code provision. Iowa Code § 4.1(30)(a).

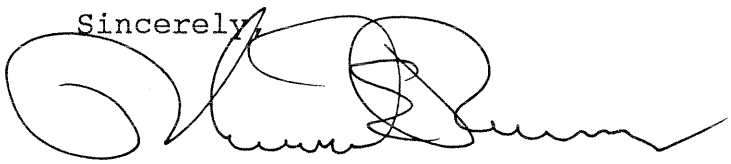
The definition of a person with a mental illness is specific and found in Iowa Code chapter 229. See Iowa Code § 229.1(14). A person must be seriously mentally ill in order to be hospitalized pursuant to the mandates of chapter 229. See Iowa Code § 229.12. Thus, a person hospitalized pursuant to the procedures of chapter 229 is ill and in need of treatment. The same is true for individuals committed pursuant to the mandates of chapter 125, the substance abuse laws. See Iowa Code § 125.82. It is the opinion of this office that the county of legal settlement may be held responsible for payment of the care and treatment of those committed pursuant to chapters 125 and 229 of the Iowa Code to a county hospital established pursuant to chapter 347 of the Iowa Code.

You also request advice regarding individuals who are not committed pursuant to chapters 125 and 229 but rather admit themselves voluntarily to county hospitals for substance abuse treatment or mental health treatment. Iowa Code section 347.16 does not distinguish between voluntary and involuntary admissions to a county hospital. Rather, those who are ill or injured and admitted to a county hospital may be charges against a county of legal settlement for the care and treatment provided. Likewise, chapter 230 does not distinguish between the voluntary and involuntary committed person to the mental health institutes. As this office has opined, the county of legal settlement is liable pursuant to chapter 230 for those admitted or committed to a state mental health institute. See Op.Att'yGen. #93-9-3; 92 Op.Att'yGen. 135.

Finally, you inquire whether a county hospital is required to admit all persons ordered for treatment under chapter 125 and 229 even when those people do not meet acute admission criteria of Medicaid, Medicare, or other third party payments. When a court orders a person, party, or entity to perform a specific task, that person, party, or entity must perform the task or risk potential contempt of court charges. Iowa Code §§ 665.2 & 665.4. A county hospital must perform the task or tasks ordered by the court or risk contempt of court proceedings.

In summary, it is the opinion of this office that Iowa Code section 347.16 requires a county hospital to provide free care and treatment of resident indigents who are ill or injured. A county of legal settlement may be required to pay a county hospital for the care and treatment of those who are indigent for costs including those associated with the admission or commitment for substance abuse or mental health treatment regardless of the admission status. Finally, a court order requires that a county hospital admit the person for treatment regardless of the definition of acute care pursuant to Medicare, Medicaid or other third party payment systems.

Sincerely,



Richard E. Ramsay
Assistant Attorney General

CLERK OF COURT: Filing of pleadings and other documents without social security number. Iowa Code §§ 602.6111, 602.8102(74), (98) (1993 Supp.). Due to federal restrictions on the use of social security numbers, federal disclosure requirements, and current Iowa law describing the duties of clerks of courts, clerks should not refuse pleadings which do not contain a federal identification number or alternative drivers' license number. The sufficiency, validity, or correction of a document filed in violation of section 602.6111 should be determined by the court. (Kelinson to Boyd, State Court Administrator's Office, 5-2-94) **#94-5-1(L)**

Mr. David Boyd
State Court Administrator's Office
State Capitol
L O C A L

Dear Mr. Boyd:

You asked whether a clerk of the district court could refuse to file a pleading or other document if a party does not volunteer his or her employer identification or social security number, and whether recent state legislation requiring these numbers be used on court documents violates federal law.

Iowa Code section 602.6111 (1993 Supp.), as enacted by the 75th General Assembly, states:

> 1. Each petition or complaint, answer, appearance, first motion, or any document filed with the clerk of the district court which brings new parties into an action shall bear a personal identification number. The personal identification number shall be the employer identification number or the social security number of each separate party. If an individual party's driver's license lists a distinguishing number other than the party's social security number, the document filed with the clerk of the district court shall also contain the distinguishing number from the party's driver's license.
>
> 2. The clerk of the district court shall fix the identification numbers pursuant to subsection 1 to any judgment, sentence,

> dismissal, or other paper finally disposing of an action.

The statute is not a request for the litigant to "volunteer" the appropriate number, but requires that the document presented for filing "shall bear a personal identification number." Whether an individual's social security number can be required on court documents must be considered in light of the Privacy Act of 1974, section 7, paragraph (a)(1), uncodified, but appearing in the annotated code as an historical note at 5 U.S.C. § 552a:

> Disclosure of Social Security Number.
>
> Section 7 of Pub.L. 93-579 provided that:
>
> (a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.
>
> (2) the provisions of paragraph (1) of this subsection shall not apply with respect to--
> (A) any disclosure which is required by Federal statute, or
> (B) the disclosure of a social security number to any Federal, State or local agency maintaining a system of records in existence and operating before January 1, 1978, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.
>
> (b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

By enacting this language, "Congress sought to curtail the expanding use of social security numbers by federal and local agencies and, by so doing, to eliminate the threat to individual privacy and confidentiality of information posed by common numerical identifiers." Doyle v. Wilson, 529 F. Supp. 1343, 1348 (D.C. Del. 1982); see also Greidinger v. Davis, 988 F.2d 1344, 1353 (4th Cir. 1993) (Virginia constitutional requirement that

social security number be provided as part of voter registration was still viable under Privacy Act because of "grandfather" clause, but violated the Equal Protection Clause of the federal Constitution).

The first question to be answered is whether participation in court proceedings is a "right, benefit or privilege provided by law" which would be denied an individual refusing to provide his social security number. Access to the courts is clearly a right guaranteed by the Constitution, and it would appear that a court clerk who denied a litigant the opportunity to file court documents would effectively be denying that person access to the court system. See Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977).

The next question is whether either of the exceptions under paragraph (2) apply. First, section 602.6111 was promulgated by the Iowa legislature, and we are unaware of any federal mandate that states adopt such a statute. Thus, the disclosure is not "required by Federal statute." Second, the disclosure was not required prior to January 1, 1978, but rather was enacted by the General Assembly in 1993 (1993 Iowa Acts, ch. 171, § 18).

Because access to the court system would be conditioned on an individual's disclosure of his social security number under Iowa Code section 602.6111, and because such disclosure is neither required by federal law nor predates January 1978, the clerk of court cannot, by virtue of the Privacy Act, refuse to file a pleading or other document if a party does not provide his or her social security number. The federal Privacy Act takes precedence over state law where the two conflict. U.S. Const. art. VI, cl. 2; United States v. One Parcel of Property Located at 1606 Butterfield Road, Dubuque, Iowa, 786 F. Supp. 1497 (N.D. Iowa 1991).

While under this analysis the state statute cannot make disclosure of the social security number mandatory, it could be considered a request to provide the number voluntarily. The Privacy Act requires that when the governmental agency asks individuals to provide their social security numbers, it must state how that information is to be used, to whom it may be disclosed, whether providing a social security number is voluntary or mandatory, and under what legal authority such a request is made. See Yeager v. Hackensack Water Co., 615 F. Supp. 1087 (D.C.N.J. 1985). Such a disclosure must be made to each person asked to provide his social security number so that person may make an informed decision whether to provide that information. See Greater Cleveland Wel. Rights Org. v. Bower, 462 F. Supp. 1313 (N.D. Ohio 1978).

Such disclosure is at best voluntary, despite the language of section 602.6111. Further, since the federally required information is not provided, section 602.6111 fails to meet even the standard for voluntary disclosure of social security numbers. The clerk could satisfy the notice requirements by providing a brochure or pamphlet with the information, but the Iowa Code imposes no duty on the clerk to provide this notice.

There appear to be no similar specific federal prohibitions on the use of employer identification numbers. As briefly discussed above, the limitations on the use of social security numbers were created because of fears that widespread use by state and federal governments would allow unauthorized access to bank accounts, payroll records, and personal information. Greidinger v. Davis, 988 F.2d 1344, 1353 (4th Cir. 1993). Although perhaps an argument can be made that the same concerns apply to employer identification numbers as well, neither Congress nor the courts have thus far addressed or adopted any protection for these numbers.

In response to your main concern as to the duty of the clerks of court, we would not advise a clerk to reject papers for lack of identifying numbers. Not only would such rejection create legal problems, particularly with regard to the social security numbers, it creates practical problems for litigants who may not have social security or federal identification numbers and for the clerks who must comply with the disclosure requirements discussed above.

Furthermore, it is unclear whether a clerk may legally refuse to file a pleading which does not provide the required identification number. The Iowa Supreme Court has ruled that "a clerk of the district court is under a duty pursuant to subsection 602.8102(98) to file and note all documents presented to the clerk for filing. It is not the clerk's duty or function to rule on the validity or legal effect of the document so received." Dwyer v. Clerk of the District Court for Scott County, 404 N.W.2d 167 (Iowa 1987).

Of all the many duties imposed upon the state's clerks of court under Iowa Code section 602.8102, only once has the legislature specifically provided that the clerk of court "shall refuse to accept filing of papers." Iowa Code § 602.8102(74) (concerning legal action under Iowa Consumer Credit Code where venue requirements not met). Further, there are other similarly technical aspects of pleading and filing litigation documents. See, e.g., I.R.C.P. 69 ("a short and plain statement of the claim"; "a pleading shall not state the specific amount of money damages sought"); I.R.C.P. 78 (". . . shall be captioned with the title of the case . . . shall bear the signature and address of

the party or attorney"); and I.R.C.P. 79 ("All averments of claim or defense shall be made in numbered paragraphs"). While it may appear to be a ministerial task to review filings for technical failures rather than determining the "validity or legal effect" of the document, the better approach, in the absence of specific direction from the legislature, is to leave the correction of such matters to the court and the parties. See Iowa I.R.C.P. 81 ("Correcting or recasting pleadings").

In conclusion, because of federal restrictions on the use of social security numbers, federal disclosure requirements, and current Iowa law describing the duties of clerks of courts, we would not advise the clerks to refuse pleadings which do not contain a federal identification number or alternative driver's license number. The sufficiency, validity, or correction of a document filed in violation of section 602.6111 should be determined by the court.

Very truly yours,

CRAIG KELINSON
Special Assistant Attorney General

CK/ls

MUNICIPALITIES; ZONING: Municipal immunity from zoning ordinance. Iowa Code § 414.1 (1993). A city may or may not be bound by its own zoning ordinance. The determination of whether it is depends on a balancing of the competing interests involved. (Hunacek to Black, State Representative, 5-2-94) #94-5-2(L)

May 2, 1994

The Honorable Dennis H. Black
State Representative
Rt. 1, Box 77
Grinnell, Iowa 50112

Dear Representative Black:

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

Is a city subject to its own zoning laws?

Your opinion request is phrased as a pure question of law and contains no specifics about the particular city, its zoning ordinance, or the nature of the alleged infraction. City zoning authority is set forth in Iowa Code section 414.1 (1993). A specific municipal zoning ordinance may, for example, validly exempt the municipality. See, e.g., 83 Am.Jur.2d Zoning and Planning § 408 at 330 (1992). We will assume that the ordinance of the city about which you inquire is silent as to this issue. For reasons that are explained in more detail below, we believe that the question of whether a particular city is bound by a particular zoning provision depends on an analysis and balancing of the individual circumstances of the case.

In City of Ames v. Story County, 392 N.W.2d 145 (Iowa 1986), the Iowa Supreme Court addressed the question of whether one municipality was immune from another municipality's zoning ordinance. The conclusion reached by the court was that "it might or might not be, the determination to be made upon balancing the conflicting interests of the two local governments." Id. at 146. In adopting this "balancing of interests" legal standard, the court considered and criticized

other legal standards which have been used in this context. We believe that a summary of these standards and the reaction of the Iowa Supreme Court to them will provide useful guidance in answering the question you pose.

First, there is the "governmental-proprietary test" under which the "immunity doctrine extends to municipalities exercising governmental functions." Id. at 147. When, however, the entity acts in a "proprietary capacity, it remains subject to the regulations." Id. The court criticized this approach as potentially leading to contradictory results in similar situations and being more suitable for tort immunity than for the resolution of zoning disputes. Id.

Next, the court considered the "superior sovereign" test, which "presumes that agencies occupying a superior position in the governmental hierarchy are immune from zoning regulations enacted by a lower echelon of government unless there is express statutory language to the contrary." Id. at 147. The court, however, noted the "practical difficulties inherent in determining a hierarchial ranking of governmental agencies", id. at 148, which has resulted in the test being applied in only a minority of jurisdictions.

The court also considered the "eminent domain" test, under which "any body with the power to condemn is immune from zoning restrictions." Id. at 148. The court noted that this rule is "impractical and oppressive" and for that reason has "been either abandoned or 'watered down' in recent years." Id.

Finally, the court considered the "statutory guidance" test, under which a statute authorizing a governmental entity to perform a certain land use planning function "will usually be held superior to a local zoning ordinance." Id. at 148. However, the court noted that some courts have taken the view that a statute must specifically exempt the governmental unit for such an exemption to be found. Id.

Noting the deficiencies in these other approaches to intergovernmental zoning conflicts, the Iowa Supreme Court adopted the "balancing of interests" test, which it described as follows:

> The legitimate public interests of both the city and the county must be recognized and weighed in the balance. The county can have no absolute veto over the construction or placement of the plant. On the other hand

> the city cannot proceed oblivious of the county's authority to zone all county lands outside corporate boundaries. To whatever extent they can be, all conflicting governmental interests must be accommodated. Where they cannot be accommodated the court is to resolve the dispute, after weighing the interests, on the basis of the greater public good.

Id. at 149.

The City of Ames case involved a dispute between two governmental entities, rather than a conflict between a city's actions and its own zoning laws. No Iowa Supreme Court decision of which we are aware precisely addresses this latter situation. The courts in other jurisdictions have split on the question. Compare Glasnock v. Baltimore County, 321 Md. 118, 581 A.2d 822 (Ct. App. Md. 1990) (county not bound by its own zoning regulations), and McGrath v. City of Manchester, 113 N.H. 355, 307 A.2d 830, 831 (1973) ("a city is not bound by its own zoning ordinance in the performance of its governmental functions absent any statutory provisions to the contrary."), with Clarke v. Town of Estes Park, 686 P.2d 777 (Colo. 1984) (unless a municipal zoning ordinance specifically exempted the municipality, it was not exempt), and Florida East Coast Properties, Inc. v. Dade County, 572 F.2d 1108, 1110 n. 1 (5th Cir. 1978) (expressly noting Florida law that "municipalities ought to comply with or properly alter their own zoning ordinances").

Although City of Ames is not directly on point, we believe that it provides some helpful guidance on the question, particularly in the absence of any definitive rule emerging from other jurisdictions. First, we think that given rejection of the idea of any absolute immunity from other entities' zoning laws, the court would be disinclined to grant a city absolute immunity from its own zoning provisions. On the other hand, City of Ames does expressly acknowledge that a city may have a legitimate reason for needing to act in contravention of a zoning scheme. This reason may arguably be lesser in the case of a city violating its own zoning laws, since the city has options available in this case, such as amending the law, that it does not have when dealing with other governmental units. However, we think that this is properly viewed as a factor to be considered in balancing the interests rather than as a factor that ends the need for balancing. Conceivably a city may find itself in a position where it needs to act quickly and without taking the time to amend or repeal a zoning provision. We read City of Ames

as suggesting that such interests should not be ignored. In addition, at least one commentator has pointed out that a "more compelling case for immunity is presented when a political subdivision attempts to circumvent its own zoning ordinance. Unlike the situation in which a governmental unit acts in derogation of the zoning ordinance of another unit, the political subdivision which approves a project violative of the ordinance it enacted is directly politically accountable to its own constituency for its decision." Note, Governmental Immunity from Local Zoning Ordinances, 84 Harv. L. Rev. 869, 873 n. 21 (1971).

In conclusion, we believe that the Iowa Supreme Court, if called upon to decide the matter, would hold that a city may or may not violate its own zoning ordinance depending on the comparative weight, in any particular case, of the competing interests involved. This balancing test is consistent with the approach used by the court for deciding intergovernmental zoning disputes, and there is no readily apparent reason why it could not be adapted for use in the case of a city violating its own ordinance. In such a case, of course, the interests of the municipality in acting in contravention of the ordinance would be balanced against the interests of landowners affected by the city's actions. Factors to consider might include, for example, the adequacy of notice to affected landowners and the opportunity for public comment, the extent to which the city has considered alternative locations or methods of accomplishing its objectives, the extent to which the city's actions would benefit the general public, the harm caused by the city's actions to affected landowners, and the character and use of adjacent land. The outcome of any particular case cannot, of course, be predicted in advance.

Sincerely yours,

Mark Hunacek

MARK HUNACEK
Assistant Attorney General

MH:mb

REAL PROPERTY; UNDERGROUND FACILITIES: Excavation in the area of underground facilities. Iowa Code § 480.4 (1993). The phrase "if known" in section 480.4(1)(b) applies to the range, township, section, and quarter section. The statewide notification center is not responsible for obtaining that information if the excavator fails to provide it. If, after receiving notice from the notification center, the facility operator requires additional information to locate and mark the underground facility, the operator should contact the excavator. (Olson to Siegrist, State Representative, 5-6-94) #94-5-4(L)

May 6, 1994

The Honorable Brent Siegrist
State Representative
714 Grace Street
Council Bluffs, IA 51503

Dear Representative Siegrist:

We have received your request for an opinion concerning the underground facilities information law, Iowa Code chapter 480. Specifically, you ask for an interpretation of section 480.4(1) which mandates that an excavator must contact the statewide notification center at least 48 hours prior to the commencement of an excavation and provide the following information:

a. The name of the person providing the notice.
b. The precise location of the proposed area of excavation, including the range, township, section, and quarter section, if known.
c. The name and address of the excavator.
d. The excavator's telephone number.
e. The type and extent of the proposed excavation.
f. Whether the discharge of explosives is anticipated.
g. The date and time when excavation is scheduled to begin.

(Emphasis added.)

Your question is whether the phrase "if known" in section 480.4(1)(b) applies only to the quarter section, or to the range, township, and section as well. Application of several well-established canons of statutory construction lead us to conclude that it refers to all four preceding terms.

Under the "doctrine of the last preceding antecedent" qualifying words and phrases refer only to the immediate preceding antecedent, unless a contrary legislative intent

appears. State ex rel. DOT v. General Electric Credit Corp. of Delaware, 448 N.W.2d 335, 345 (Iowa 1989); Op.Att'yGen. 93-7-6. When a qualifying phrase is intended to apply to all antecedents rather than only to the immediately preceding one, it is often separated from the antecedents by a comma. State v. Kluesner, 389 N.W.2d 370, 371 (Iowa 1986); State v. Lohr, 266 N.W.2d 1 (Iowa 1978). Application of this doctrine suggests a legislative intent that "range, township, section, and quarter section" are all modified by "if known."

The ultimate goal of statutory construction is, of course, to determine and effectuate the intent of the legislature. Beier Glass Co. v. Brundige, 329 N.W.2d 280, 283 (Iowa 1983). The object to be accomplished by the statute should be examined, and the statute should be given a reasonable construction which will best effect the legislature's purpose. Id.

The purpose of chapter 480 is to provide a statewide notification center to serve both excavators and those who own or operate underground facilities such as utilities. Iowa Code §§ 480.1(8), (10). 1992 Iowa Acts, ch. 1103 completely revised chapter 480 and eliminated related provisions in other Code sections. For example, prior to the establishment of the notification center, excavators were required to call separate utility operators to notify them of the proposed excavation. See e.g. Iowa Code (1991) sections 479.47 and 479A.26 (gas pipelines), and 478.36 (electric lines). Underground facility operators were required to file various information with county recorders, or in some instances city clerks. That information included the locations of the facilities within the county, townships and cities, as well as the operator's name, address, and a telephone number. Iowa Code § 480.2(1) (1991). In lieu of depositing that information with a county or city, operators could designate a one-call system to receive notices of intent to excavate. Iowa Code § 480.2(2) (1991). The one-call option allowed facility operators to deposit only the name, address, and telephone numbers of the one-call system with the county recorder or city clerk. Id. A single statewide center should simplify the notification procedure and assist underground facility operators in swiftly locating the sites of proposed excavations.

You have posed a second question regarding the obligation of the notification center and the underground facility operator if the excavator fails or is unable to provide the "required information" to the notification center. Presumably, the information you are referring to is the range, township, section and quarter section where the proposed excavation is to occur.

The responsibility of the notification center is to receive notice from excavators, transmit that information to each underground facility operator in the area of the proposed excavation, and provide the names of all operators in that area to the excavator. Iowa Code § 480.4(2). Once the center has transmitted the information to the operator and excavator, in our opinion it has fulfilled its obligation.

Section 480.4(3)(a)(1) prescribes the respective responsibilities of operators and excavators. The underground facility operator who receives notice from the notification center must mark the horizontal location of the operator's underground facility. The excavator must use due care in excavating the marked area to avoid damaging the facility. If, in the opinion of the operator, the precise location of the underground facility must be determined, the excavator is required to hand dig test holes to locate the facility, unless the operator specifies an alternate method. If the operator determines that it has no underground facility located within the proposed area of excavation, section 480.4(3)(b) requires the operator to notify the excavator prior to the indicated date the excavation is to commence.

Accurate location and marking is crucial to minimize potential damage to both the underground facility and the excavation equipment. It also helps ensure public safety during the excavation process. The statute contemplates communication between the excavator and the facility operator. If additional information is necessary to determine the exact location of the proposed excavation, the operator should contact the excavator and discuss the matter.

In conclusion, the phrase "if known" in section 480.4(1)(b) applies to the range, township, section, and quarter section. The notification center is not responsible for obtaining that information if the excavator does not provide it. If, after receiving notice from the notification center, the facility operator requires additional information to locate and mark the underground facility, the operator should contact the excavator.

Sincerely,

Carolyn J. Olson

CAROLYN J. OLSON
Assistant Attorney General

CJO:krd

JUVENILE LAW: Taking Into Custody of Truants. Iowa Code §§ 232.19, 299.10, 299.11 (1993); 42 U.S.C. 5633(a)(12). Iowa Code sections 232.19, 299.10, and 299.11 (1993) provide for the taking into custody of truant juveniles by police for the purpose of placement at school only if police have been designated as local truancy officers. (Phillips to Rafferty, State Representative, **5-11-94**) **#94-5-5(L)**

May 11, 1994

The Honorable Robert L. Rafferty
State Representative
2830 Fairhaven Rd.
Davenport, IA 52803

Dear Representative Rafferty:

You have requested an opinion of this office concerning the authority of the police regarding truants. Specifically, you inquired "under current law do police have the right to pick up a truant child and bring that child to that child's school or a school sponsored detention center?" You note in your request that truancy is not currently a delinquent act, but that Davenport police would like to coordinate with local schools to pick up truants and bring them to a central location.

It is the opinion of this office that police can pick up truants and bring them to a central location, but only if they have been appointed truant officers by the local school board pursuant to Iowa Code sections 299.10 and 299.11 (1993). The latter section gives truancy officers the authority to "take into custody without warrant any apparently truant child and place the child in the charge of the school principal, or the principal's designee, designated by the board of directors of the school district in which the child resides, or of any nonpublic school designated by the parent, guardian, or legal or actual custodian. . . ." See generally Iowa Code § 232.2(54) (defining "taking into custody"). The former section states that the local school board "may appoint a member of the police force . . . to serve as the district truancy officer."

By contrast, Iowa Code section 232.19, which sets forth the general circumstances under which a child may be taken into custody by a police officer, does not provide for picking up truants and taking them to a central location. It provides for taking children into custody by court order, or for violation of a court order, or for committing a delinquent act. Iowa Code § 232.19(1)(a),(b),(d); see also Iowa Code § 805.16 (providing for citation and arrest of juveniles charged with offenses excluded from jurisdiction of the juvenile court). Section 232.19 also provides for the taking into custody of juveniles who have run away for the purpose of reuniting them with a parent

or guardian. Iowa Code § 232.19(1)(c). Section 232.19 does not, however, confer the authority to pick up non-delinquent truants for the purpose of reuniting them with the school system. See generally Iowa Code § 232.2(12) (defining "delinquent act"). Hence, a police officer must have been designated a truancy officer by the district school board to have explicit authority to pick up truants for the purpose of taking them to a central location.

The reference in your letter to school detention centers warrants additional comment. Iowa is a participant in the federal Juvenile Justice Delinquency Prevention Act. 42 U.S.C. 5601 et seq. Under that program Iowa receives grant monies in exchange for complying with certain substantive requirements pertaining to the detention of juveniles. Amongst the requirements is one prohibiting the secure detention of status offenders. 42 U.S.C. 5633(a)(12). Status offenders are those juveniles who are charged with or have committed offenses which would not be offenses if committed by an adult. Id. Truants are status offenders by virtue of the fact that one can be truant only by being under the age of 16. Iowa Code §§ 299.1A; 299.8. Hence, federal law prohibits the secure detention of truants by a state receiving grant funds under the federal act. Secure detention includes "any public or private residential facility which includes construction fixtures designed to physically restrict the movements and activities of juveniles . . . ." 42 U.S.C. 5603(12)(a). Therefore, a school detention facility might violate federal law if it is a residential facility having locked doors or other physically restricting fixtures. Compare Iowa Code § 232.2(37) ("nonsecure facility" means a physically unrestricting facility in which children may be placed pursuant to a dispositional order of the court) with Iowa Code § 232.2(48) ("secure facility" means a physically restricting facility in which children adjudicated to have committed a delinquent act may be placed pursuant to a dispositional order of the court). See generally Iowa Code § 232.2(15) (defining "detention").

In summary, sections 232.19, 299.10, and 299.11 provide for the taking into custody of truant juveniles by police officers for the purpose of placement at school only if the police officers have been designated as local truancy officers.

Sincerely,

Charles K. Phillips

CHARLES K. PHILLIPS
Assistant Attorney General

COUNTIES: Board of Supervisors; Auditor. Iowa Code § 331.506(3)(a) (1993): Power to issue warrants. Iowa Code section 331.506(3)(a) (1993) provides county boards of supervisors with the power to delegate the initial responsibility to county auditors for issuing warrants to pay all "fixed charges." Accordingly, a county board may resolve to let a county auditor reimburse a county officer for regularly occurring outlays associated with attending a school of instruction or seminar as long as the underlying prices or rates can be fairly characterized as invariable by standards or conditions provided within the resolution or upon receipt of information sufficiently verifying their invariability. (Kempkes to Martin, Cerro Gordo County Attorney, 5-19-94) #94-5-6(L)

May 19, 1994

Mr. Paul L. Martin
Cerro Gordo County Attorney
220 North Washington
Mason City, Iowa 50401

Dear Mr. Martin:

You have requested an opinion from the Attorney General on whether a county board of supervisors may delegate to the county auditor the initial responsibility for issuing warrants to county officers "attending schools of instruction or seminars for which they have first paid the registration fees, meals, mileage, and hotel accommodations. . . ." The specific issue is whether these outlays constitute "fixed charges" within the meaning of Iowa Code section 331.506(3)(a) (1993), which governs the issuance of warrants. We conclude that a county board may, under certain circumstances, delegate the initial responsibility of issuing a warrant for such outlays to the county auditor.

In the arena of public finance, "warrants" signify drafts upon the public treasury to pay existing debts arising from duly authorized claims. See Harrison County v. Ogden, 165 Iowa 325, 145 N.W.2d 681, 686-87 (1914); see also Missouri Gravel Co. v. Federal Sur. Co., 212 Iowa 1322, 237 N.W. 635, 639 (1931); 93 C.J.S. Warrants 555 (1956).

Early in Iowa statehood the General Assembly placed virtually all responsibility for authorizing a warrant upon county boards; only one for jury fees fell outside their scope of responsibility. E.g., Iowa Code § 321 (1860); § 321 (1873). This legislative scheme remained unchanged for more than one hundred years. Then, in 1981, the General Assembly slightly expanded the responsibility for authorizing warrants. See 1981 Acts, 69th G.A., ch. 117, § 505, at 360-61.

With that change, county boards may now delegate to county auditors the initial responsibility for authorizing some warrants:

> 1. Except as provided in subsections 2 and 3, the auditor shall sign or issue a county warrant only after approval of the board by recorded vote. . . .
>
> 2. The auditor may issue warrants to pay the following claims. . . without prior approval of the board:
>
> a. Witness fees and mileage for attendance before a grand jury. . . .
>
> b. Witness fees and mileage in trials of criminal actions prosecuted under county ordinance. . . .
>
> c. Fees and costs. . . in connection with criminal and civil actions. . . .
>
> d. Expenses of the grand jury. . . .
>
> 3. The board, by resolution, may authorize the auditor to issue warrants to make the following payments without prior approval of the board:
>
> a. For fixed charges including, but not limited to, freight, express, postage, water, light, telephone service or contractual services, after a bill is filed with the auditor.
>
> b. For salaries and payrolls if the compensation has been fixed or approved by the board. . . .
>
> 4. The bills paid under subsections 2 and 3 shall be submitted to the board for review and approval at its next meeting following the payment. . . .

Iowa Code § 331.506 (emphasis added). The new law, however, only affected the time at which a county board must make an accounting of warrants. It did not shift the ultimate responsibility for their issuance, for, in all instances, a county board must review

and approve the underlying bills. See Iowa Code §§ 331.303(1)(b); 331.402(2)(d); 331.506(1),(4).

Three questions inhere in the issue presented.

The first question concerns the scope of section 331.506(3)(a), because it sets forth certain services having fixed charges: "freight, express, postage, water, light, telephone service or contractual services." Although these seven examples arguably constitute the only services for which a county auditor may authorize warrants, they do not define the scope of section 331.506(3)(a). Indeed, a clear intent to include outlays of a similar nature can be readily found in the plain language of section 331.506(3)(a) allowing county auditors to issue warrants for fixed charges "including, but not limited to," the seven examples. See generally State v. Hopkins, 465 N.W.2d 894, 896 (Iowa 1991) (generally improper to search for statutory meaning when language plain and meaning clear).

Sound policy, moreover, supports this interpretation of section 331.506(3)(a); an interpretation excluding other similar services would mean, for example, that electricity for things other than "light" would not be characterized as a fixed charge. See generally Iowa Code § 4.4(3) (statutes presumed to be reasonable); § 4.6(5) (proper to consider consequences of a particular statutory construction).

All fixed charges, then, can be the subject of a county board's resolution.

The second and more important question concerns the types of outlays that can be fairly characterized as fixed charges, a phrase having "no well-defined meaning," Standard Printing & Publishing Co. v. Bothwell, 122 A. 195, 199 (Md. 1923). See generally Iowa Code § 4.2 (Iowa Code "shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice"); § 4.1(38) (words and phrases "shall be construed according to the context and approved usage of the language"); State v. Hennenfent, 490 N.W.2d 299, 300 (Iowa 1992) (undefined words normally have their common meaning); R. Dickerson, The Interpretation and Application of Statutes 48-51 (1975). Unspecified outlays similar to the seven examples fall within the scope of section 331.506(3)(a) by virtue of the Latin phrase ejusdem generis: "of the same kind." See generally Hartman v. Merged Area VI Community College, 270 N.W.2d 822, 825 (Iowa 1978).

We have not found any decision construing section 331.506(3)(a). In Iowa-Des Moines Nat'l Bank v. Fort Dodge, D.M. & So. Ry., 249 Iowa 810, 89 N.W.2d 360, 364 (1958), however, the

Supreme Court of Iowa defined fixed charges in the context of a mortgage dispute. The court indicated that a fixed charge regularly occurs and cannot be escaped, shifted, or altered; that it does not vary with the volume of business; and that it includes such outlays as rents and taxes. Id.; see Oehler's Lawyers Account Handbook 228-29 (1952); Webster's Third New International Dictionary 861 (1967); see also N. Dopuch & J. Birnberg, Cost Accounting: Accounting Data for Management Decisions 12 (1969).

Though not necessarily definite, fixed charges suggest a degree of constancy and invariability in price, State ex rel. Bd. of R.R. Comm'rs v. Blecha & Owen Transfer, 213 Iowa 1269, 239 N.W. 125, 128 (1931); Crabb's English Synonyms 352, 354-55 (1917); 1 Britannica World Language Dictionary 479 (1966); 36A C.J.S. Fix 583-84 (1961), and include most management expenses, interest on bonded debt, depreciation, property insurance and taxes, and "other irreducible overhead," Black's Law Dictionary 637 (1990); Cochran's Law Lexicon 131 (1973); C. Niswonger & P. Fess, Accounting Principles 562 (1969).

Fixed charges, however, seem to exclude outlays for goods in the language of business: "Charge has a special reference to services, expense to minor outlays; as, the charges of a lawyer or physician; traveling expenses. . . ." Funk & Wagnalls Standard Handbook of Synonyms, Antonyms, and Prepositions 334-35 (1947). Consistent with this semantic link between charges and services, the legislature's seven examples in section 331.506(3)(a) only cover services.

Moreover, in defining fixed charges to include the seven examples of covered services, the legislature apparently distinguished between charges based upon relatively fixed rates and charges having relatively definite costs. Compare Sunshine Books, Ltd. v. Temple Univ., 697 F.2d 90, 93 n.8 (3rd Cir. 1982) (fixed cost does not vary with output) with Seabrook Island Property Owners Ass'n v. Pelzer, 356 S.E.2 411, 413 (S.C. 1987) (fixed rate means a proportional charge based on value). Outlays for telephone service illustrate this distinction: while a county may know the per-minute rate charged for a long-distance call in a given year, it cannot know the number or length of such calls in that year without a crystal ball. A fixed charge, then, may be premised upon a fixed rate. That section 331.506(3)(a) embodies this idea receives support from section 331.506(2), which expressly allows an auditor to issue warrants without prior approval for "witness fees and mileage" and for "expenses of the grand jury." See generally Coleman v. Iowa Dist. Court, 446 N.W.2d 806, 807 (Iowa 1989) (statutes should be read together, and if possible, harmonized).

The foregoing establishes the broad principle that the longer a price or rate for a regularly occurring service remains set or constant, the greater the odds it amounts to a fixed charge. Mathematical probability thus enters into the equation: the more likely that prices or rates will remain stable over a relatively long period of time, the more likely that they can be fairly characterized as fixed in nature.

Accordingly, outlays for registration fees, accommodation, meals, and mileage associated with attending a school of instruction or seminar could constitute fixed charges. A specific answer, however, depends upon the particular facts and circumstances surrounding the nature of the outlay. If, for example, county officers regularly attended seminars in the course of their duties and if the sponsor of a seminar put together a package that included the costs of registration, meals, transportation, and accommodation for a set price, such a package would fall within the definition of a fixed charge. On the other hand, if county officers irregularly attended such seminars or if the cost of a package fell as more officers committed to attend, these outlays would fall outside the definition of fixed charges.

The third and perhaps most important question concerns who decides what outlays, other than the seven examples in section 331.506(3)(a), may be fairly characterized as fixed charges when a county board delegates its responsibility to the auditor by resolution.

Nothing in the law governing the issuance of warrants specifically allocates this decision to county boards or auditors. Since the General Assembly granted county boards the power of delegation, however, this grant suggests that they also have the power in the first instance to specify in their resolutions what regularly occurring outlays constitute fixed charges. Cf. Harrison County v. Ogden, 165 Iowa 325, 145 N.W. 681, 687 (1914) (county auditor acts under the direction of the county board in issuing warrants); 1990 Op.Att'yGen. 64 (#90-2-2(L)) (county boards have exclusive power to approve claims against the county). If county boards do not specify any outlays or if they do not provide any guidance in their resolutions for the auditor, he or she may decide what constitutes a fixed charge on a case-by-case basis when presented with a bill. See generally 2 E. Oakley, Municipal Corporations § 335, at 154 (1957); Weeks, "Legislative Power Versus Delegated Legislative Power," in 1 Sutherland's Statutory Construction 252, 256, 257, 259 (1985).

Notably, a board resolution simply delegating power to pay bills for "all fixed charges," absent any standards or conditions to assure their fixed character, necessarily gives a county auditor substantial discretion in issuing warrants for the bills. See 3 Sutherland's, supra, § 64.01, at 259; § 64.02, at 261-62 (1992). Cf. Iowa Code § 421.40 (director of revenue and finance has discretion to authorize the prepayment of claims "when the best interests of the state are served"). See generally Weeks, supra, at 257. What a county auditor may do in such circumstances thus depends upon the information presented with the bill. For example, the presentation of writings verifying the regularly occurring nature of the service and its invariable price or rate normally would provide a sufficient basis for issuing the warrant.

In summary, the General Assembly in 1981 changed long-established law by providing county boards of supervisors with the power in chapter 331 to delegate the initial responsibility to county auditors for issuing warrants to pay all "fixed charges." Accordingly, a county board may resolve to let a county auditor reimburse a county officer for regularly occurring outlays associated with attending a school of instruction or seminar as long as the underlying prices or rates can be fairly characterized as invariable by standards or conditions provided within the resolution or upon receipt of information sufficiently verifying their invariability.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

BK/lm

COUNTIES: Chapter 347A Hospital; real property lease to ambulance service. Iowa Code §§ 347.24, 347.28, 347A.1 (1993), 1981 Iowa Acts (69th G.A.) ch. 117. The board of hospital trustees of a hospital organized under Iowa Code chapter 347A may lease a portion of the hospital grounds to an ambulance service. (Smith to McNertney, Kossuth County Attorney, 5-24-94) #94-5-8(L)

May 24, 1994

Mr. William J. McNertney
Kossuth County Attorney
9 East State St.
Algona, IA 50511

Dear Mr. McNertney:

You have requested an opinion of the Attorney General concerning whether the county board of supervisors rather than the board of hospital trustees has the authority to lease to an ambulance service part of the grounds of a county hospital created pursuant to Iowa Code chapter 347A. It is our opinion that such lease authority is vested in the county board of hospital trustees. Prior opinions of this office suggesting a different conclusion relied on statutes which were subsequently repealed.

Our analysis begins by sketching the evolution of the alternate county hospital enabling acts codified as Iowa Code chapters 347 and 347A. For convenience, we will refer to "chapter 347 hospitals" and "chapter 347A hospitals." The origins of chapter 347 are at least as old as 1909.[1] Chapter 347A originated four decades later.[2] Its purpose was to enable an alternative method of financing debt for establishment or improvement of county hospitals through sale of a hybrid species

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[1]1909 Iowa Acts (33rd G.A.) ch. 26.

[2]1947 Iowa Acts (52nd G.A.) ch. 192.

of revenue bond.[3] Both chapters provide for the board of supervisors to appoint an initial board of hospital trustees who stand for election after their initial terms.

Iowa Code section 347.28 expressly authorizes a county board of hospital trustees to lease or sell to any person any of its property which is not needed for hospital purposes.[4] Iowa Code section 347.24, enacted in 1962, states the following:

> Hospitals organized under chapter 37 or chapter 347A may be operated as provided for in this chapter in any way not clearly inconsistent with the specific provisions of their chapters.

Formerly, section 347A.1 authorized the "county" to acquire the lands, rights of way and other property necessary for a county hospital. It further specified that contracts for construction of the hospital be awarded by the board of supervisors. Iowa Code § 347A.1 (1979). Similar authorization to enter into agreements for acquisition of private hospital facilities was formerly conferred on the "county" by Iowa Code section 347A.8 (1979).

This office opined that sections 347A.1 and 347A.8 required title to real estate of hospitals organized under chapter 347A be held in the name of the county rather than the hospital board of trustees. 1968 Op.Att'yGen. 882. We later opined that the board of supervisors may sell real property of a hospital organized under chapter 347A. 1976 Op.Att'yGen. 489.

Our 1968 opinion relied on provisions of chapter 347A which were later repealed by the county home rule implementation act. 1981 Iowa Acts, ch. 117, §§ 1063, 1097. It could be argued that the purpose of the repeal was only to remove surplusage after adoption of the county home rule amendment to the Iowa Constitution. Iowa Const. art. III, § 39A. However, the full title of chapter 117 encompasses more than code corrections to remove mere surplusage, as follows:

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[3]The statutory framework enabling a hybrid species of revenue-bond financing with a backup tax for hospital operation and maintenance deficits was analyzed in Wickey v. Muscatine County, 242 Iowa 272, 46 N.W.2d 32 (1951).

[4]See also Iowa Code section 347.14(14) authorizing hospital trustees to provide for ambulance service.

> AN ACT to implement home rule for counties by supplementing and recodifying statutes relating to the organization and functions of county government and the powers and duties of the board of supervisors and other county officers and employees, making corresponding amendments, and providing penalties.

It is more plausible that the General Assembly intended to repeal conflicting provisions from chapter 347A in order to provide for property of chapter 347 hospitals and chapter 347A hospitals to be controlled in the same manner by the boards of hospital trustees. This intent can easily be inferred from section 1063 of the 1981 Act which excised from section 347A.1 the two clauses which had prevented applicability of chapter 347 real estate disposal provisions to chapter 347A hospitals.

Inference of legislative intent to treat chapter 347A hospitals like chapter 347 hospitals is supported by other amendments which collapsed the distinction between methods of financing chapter 347 hospitals and chapter 347A hospitals. Both chapters now provide for financing by general obligation bonds as well as revenue bonds with a backup tax provision for operation and maintenance deficits.[5] We recently opined that chapter 347A county hospitals are municipalities subject to the same local budget requirements as chapter 347 hospitals. Op.Att'yGen. #94-3-1(L).

We conclude that 1981 Iowa Acts chapter 117, sections 1063 and 1097, repealed limitations on the power of the board of trustees of a chapter 347A hospital to dispose of hospital real estate pursuant to procedures set forth in chapter 347.[6] The

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[5]Iowa Code §§ 331.441(2)(b)(7), 331.441(2)(c)(8), 331.461(2)(d) & (e), 347.7, 347A.1, and 347A.3.

[6]Your question does not necessitate consideration of the effect of the 1981 amendments on the relative power of the county board of supervisors and board of hospital commissioners in relation to disposal of real property of a county memorial hospital organized under Iowa Code chapter 37. See Op.Att'yGen. #93-9-2 and 1980 Op.Att'yGen. 447 (#79-10-13(L)).

board of hospital trustees organized under Iowa Code chapter 347A, therefore, may lease a portion of the hospital grounds to an ambulance service.

Sincerely,

Michael H Smith

MICHAEL H. SMITH
Assistant Attorney General

MHS/rt

LABOR, BUREAU OF: Providing bond by out-of-state contractor. Iowa Code § 91C.7(2), (3) (1993). Iowa Code section 91C.7(2), (3) (1993) requires that out-of-state contractors provide bonds and not letters of credit for projects and that sureties give timely written notice to start the process for release of a bond. (Kempkes to Meier, Labor Commissioner, 6-8-94) #94-6-1(L)

June 8, 1994

Mr. Allen J. Meier
Labor Commissioner
1000 East Grand Avenue
Des Moines, Iowa 50319-0209

Dear Mr. Meier:

You have requested an opinion from the Attorney General concerning Iowa Code section 91C.7 (1993), which sets forth a financial requirement for construction work:

> 2. An out-of-state contractor, before commencing a contract . . . in Iowa, shall file a bond with . . . the department of employment services. The surety bond shall be executed by a surety company authorized to do business in this state, and the bond shall be continuous in nature until canceled by the surety with not less than thirty days' written notice to the contractor and to . . . the department . . . indicating the surety's desire to cancel the bond. . . .
>
> An out-of-state contractor may file a blanket bond . . . in lieu of filing an individual bond for each contract. . . .
>
> 3. Release of the bond shall be conditioned upon the payment of all taxes, . . . penalties, interest, and related fees . . . .

(Emphasis added.)

You have asked whether section 91C.7 allows a contractor to provide a letter of credit in lieu of a bond and whether it allows a surety issuing a blanket bond to give notice of cancellation through the terms of the bond itself.

Regarding the possibility of construing the word "bond" to include a letter of credit, we initially note that words and phrases in the Iowa Code shall be construed liberally according to the context and the approved usage of the language. Iowa Code §§ 4.1(38), 4.2.

A "bond" commonly means any instrument in writing that legally binds a party to do a certain thing; in the language of finance, it means a written obligation that binds a surety to pay a sum of money, usually with a seal and a clause to the effect that the obligation disappears upon the performance of a certain condition. 11 C.J.S. Bonds § 1, at 398 (1938); Webster's New World Dictionary 160 (1978). In contrast, a "letter of credit" means a written proposal, usually by a bank, to stand as a guarantor for a person for an indefinite sum of money; it requires the bank to give to a third person money or credit that the bank directly promises to repay. Johnston v. State Bank, 195 N.W.2d 126, 130-31 (Iowa 1972); 50 Am.Jur.2d Letters of Credit § 1, at 398-99 (1970); 9 C.J.S. Banks and Banking § 175, at 383-84 (1938); 38 C.J.S. Guarantee § 7, at 1142-43 (1943); Webster's, supra, at 811.

Although similar in purpose, a bond and a letter of credit amount to distinct financial guarantees. State ex rel. Missouri Highway and Transp. Comm'n v. Morganstein, 703 S.W.2d 894, 899 (Mo. 1986); see Rose Developments, Inc. v. Pearson Properties, Inc. 832 S.W.2d 286, 288-89 (Ark. 1992); Sherwood and Roberts, Inc. v. First Sec. Bank of Missoula, 682 P.2d 149, 154 (Mont. 1984); Brown v. United States Nat'l Bank of Omaha, 371 N.W.2d 692, 698 (Neb. 1985). The General Assembly has recognized this distinction throughout the Iowa Code, where it expressly sets forth in the same sentence "bond" and "letter of credit" or acknowledges other forms of financial guarantees. See, e.g., Iowa Code §§ 76.17, 175.13A, 203.1, 203.3, 203.12, 203.19, 203C.3, 203C.4, 203C.5, 203C.6, 203C.11, 203C.13, 203C.14, 203C.39, 257C.6, 326.6, 455B.301, 455B.306, 455B.474, 455D.11A, 557B.12. In at least two instances, moreover, the General Assembly has provided that in lieu of a bond a person may substitute a letter of credit. See Iowa Code §§ 207.10, 714.18. And, in at least one other instance, the General Assembly has specially defined a bond to include a letter of credit. See Iowa Code § 203C.1.

Such circumstances certainly suggest the General Assembly intended in section 91C.7(2) that a contractor file a surety's bond with the department and not any other form of financial guarantee. See James Talcott Construction, Inc. v. P. & D. Land Enterprises, 862 P.2d 395, 398 (Mont. 1993) (letter of credit not equivalent to surety bond); 1978 La.Op.Att'yGen. (#78-642)

(statute requiring contractor's bond for public works contract clearly refers to surety bond and not letter of credit). See generally J. White & R. Summers, Uniform Commercial Code § 19.1, at 4-5 (1988) (contractor may obtain bond backed by letter of credit).

Regarding a surety's responsibility for giving thirty days' written notice of cancellation to the contractor and the department, we turn to the legislative history and language of section 91C.7.

The notice requirement in section 91C.7 arose in 1989, when the General Assembly for the first time required contractors to file individual bonds. See 1989 Acts, 73rd G.A., ch. 254, § 1, at 515-16. It specifically required that such bonds shall be continuous in nature until canceled by the surety with not less than thirty days' written notice and that their release depended upon the payment of all taxes, penalties, interest, and fees. Two years later, the General Assembly again amended section 91C.7 by including the paragraph that permits a contractor to file a blanket bond in lieu of individual bonds. See 1991 Acts, 74th G.A., ch. 136, § 5, at 181-82. It made no other statutory changes.

Nothing in this history indicates that a surety may, by the terms of a blanket bond itself, avoid its responsibility of giving timely notice of cancellation in order to start the release process.

Equally important, "notice" normally requires the notifying party to take some actual and express action. See 58 Am.Jur.2d Notice § 28, at 591-92 (1989). See generally State v. Hennefent, 490 N.W.2d 299, 300 (Iowa 1992) (undefined statutory words have their common meanings). Such forewarning of an event thus permits the notified party enough time to take appropriate measures regarding it. Gray v. American Express Co., 743 F.2d 10, 17 (D.C. Cir. 1984).

Finally, nothing in the entirety of section 91C.7 indicates any leeway in the giving of timely notice for bonds. It clearly provides that contractors may substitute a blanket bond "in lieu of" individual bonds and that "the bond" filed with the department "shall be continuous in nature until canceled by the surety" with not less than thirty days' written notice to the contractor and the department. See generally Iowa Code § 4.1(30)(a) (legislature's use of "shall" in statute imposes a duty). Had the General Assembly intended for notice to be given automatically through a bond's terms, it presumably would have provided for this possibility in section 91C.7. See generally Iowa R. App. P. 14 (f)(14) (search for legislative intent focuses

upon what legislature said, not what it should or might have said).

In summary, section 91C.7 prohibits a contractor from substituting a letter of credit for a bond and requires a surety to give timely notice of cancellation for all bonds in order to start the process for their release.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

MUNICIPALITIES: Municipal Housing Agencies, Municipal Home Rule. Iowa Const. art. III, § 38A; Iowa Code §§ 364.1, 364.2(1), 364.2(2), 403A.3, 403A.5 (1993). A city council may abolish its municipal housing agency without contravening state law. (Tabor to Bisignano, State Senator, 6-20-94) #94-6-3(L)

June 20, 1994

The Honorable Tony Bisignano
State Senator
3900 S.W. 28th Street Place
Des Moines, Iowa 50321

Dear Senator Bisignano:

You have requested an opinion of the Attorney General as to whether Iowa Code section 403A.5 (1993) permits a city council to abolish a municipal housing agency created by the city and assume operation and control of all municipal housing powers of the political subdivision.

Section 403A.5 states, in part:

> Any municipality may create, in such municipality, a public body corporate and politic to be known as the "Municipal Housing Agency" of such municipality except that such agency shall not transact any business or exercise its powers hereunder until or unless the local governing body has elected to exercise its municipal housing powers through such an agency as prescribed in this section.
>
> . . .
>
> A municipality may itself exercise the powers in connection with municipal housing as defined in this chapter, or may, if the local governing body by resolution determines such action to be in the public interest, elect to have such powers exercised by the municipal housing agency, if one exists or is subsequently established in the community.

> . . . If the local governing body does not elect to make such determination, the municipality in its discretion may exercise its municipal housing project powers through a board or commission, or through such officers of the municipality as the local governing body may by resolution determine.

The statutory provision, however, does not state whether a city council's election to vest its housing powers in a municipal housing agency is reversible. We conclude that a city council may abolish its municipal housing agency without contravening state law. To reach this conclusion, it is necessary to look at both section 403A.5 and the state's grant of home rule to its cities.

First, section 403A.5 provides a city council extensive latitude in exercising its municipal housing authority. Not only does the initial decision to delegate power lie with the city council, but even after the delegation takes place the city council retains power to advise and consent to the mayor's appointment of housing commissioners, remove commissioners for cause, receive annual reports from the housing commission, and approve all agency recommendations for housing projects. Iowa Code § 403A.5; see Barnes v. Dep't. of Hous. and Urban Dev., 341 N.W.2d 766, 768 (Iowa 1983) (finding reasonable a requirement that city council make ultimate decision in approving or rejecting agency proposal).

If the legislature had wanted to restrict a city's ability to abolish its municipal housing agency once created, it would have done so expressly. The legislature, for example, has imposed such restrictions for the abolition of municipal airport commissions; pursuant to Iowa Code section 330.17 (1993), a city is required to submit that question to the voters. See 1990 Op.Att'yGen. 3. The omission of a similar restriction in Iowa Code section 403A.5 indicates a legislative intent not to so limit a city council's municipal housing decisions. See State ex. rel. Miller v. Santa Rosa Sales, 475 N.W.2d 210, 218 (Iowa 1991) (legislative intent expressed by omission as well as inclusion). Indeed, the clear legislative intent behind section 403A.5 is to give city councils final authority in municipal housing decisions. Barnes, 341 N.W.2d at 768.

Second, cities may exercise general powers subject only to limitations expressly imposed by state or federal law. Iowa Const. art III, § 38A; Iowa Code § 364.1 (1993). The power of a city is vested in its city council. Iowa Code § 364.2(1) (1993). Moreover, the enumeration of a specific power of a city does not limit or restrict the general grant of home rule. Iowa Code § 364.2(2) (1993). Thus, a city council's express authority under section 403A.5 to delegate municipal housing powers to a separate agency does not limit a city council's power to rescind that delegation. This is true because delegation does not imply a final parting with those powers, but rather a provisional conferring of authority the body has itself upon another entity. 26A C.J.S. 154 (1956) (distinguishing delegation from surrender of powers).

In sum, a city council may abolish its municipal housing agency and recapture the powers enumerated under Iowa Code section 403A.3 (1993) for exercise by any officers of the municipality which the city council chooses.

Sincerely,

MARY TABOR
Assistant Attorney General

MT/cj

COURTS: Judicial nominating commissioners, eligibility for judicial appointment. Iowa Code §§ 46.3, 46.4, 46.14 (1993). A member of a judicial nominating commission who resigns prior to the expiration of his or her term is not eligible for nomination to fill a vacancy during the remainder of the unexpired term, even if the vacancy occurred after the commissioner's resignation. (Scase to McNeal, State Representative, 6-20-94) #94-6-4(L)

June 20, 1994

The Honorable Clark E. McNeal
State Representative
P.O. Box 634
Iowa Falls, Iowa 50126

Dear Representative McNeal:

You have requested an opinion of the Attorney General regarding the eligibility of a former member of a district judicial nominating commission to be nominated for a judgeship. Specifically, you ask whether a lawyer who resigned as a member of a judicial nomination commission at a time when there was no district court vacancy is eligible for nomination by that commission during the remainder of the six years for which the lawyer was initially elected.

Iowa Code section 46.14 (1993) sets forth several factors to be considered by a judicial nomination commission in considering applicants for judicial nomination. This section includes the following limitation: "No person shall be eligible for nomination by a commission as judge during the term for which the person was elected or appointed to that commission." No exceptions to this prohibition are provided.

District judicial nomination commissioners are appointed and elected to serve "staggered terms of six years each." Iowa Code §§ 46.3, 46.4 (1993); see Iowa Constitution, art. V, § 16. As we recognized in a previous opinion interpreting Code section 46.14, a term of office is a "fixed and definite time, that is a specific period of time during which the incumbent is certain of holding the position, provided the position [is not] abolished by the creating power." 1972 Op.Att'yGen. 267, 269. We subsequently held that the phrase "[t]erm of office is not synonymous with and is to be distinguished from the phrase 'tenure in office,' which means the right to perform the duties and to receive the emoluments of the office." 1984 Op.Att'yGen. 47 [#83-5-2(L) at p. 2], citing 3 McQuillin, Municipal Corporations § 12.108 (1982).

Applying these definitions, it is clear that while a commissioner's "tenure in office" may be cut short by resignation, the six-year "term of office" is fixed by law. The term of office is not altered by resignation of the commissioner. We conclude that a member of a judicial nominating commission who resigns prior to the expiration of his or her term, is not eligible for nomination by the commission as a judge during the remainder of the unexpired term.

In our 1972 opinion we noted that the section 46.14 prohibition on nomination of a commissioner prior to the expiration of their term was likely intended to prevent "a nomination commissioner upon the occurrence of a judicial vacancy to resign his membership on the nomination commission and then offer himself for nomination by the body whose company he had just left." 1972 Op.Att'yGen. at pp. 268-69. The plain language of section 46.14 does not, however, provide an exception allowing the nomination of a former commissioner who resigned prior to the occurrence of a judicial vacancy. Therefore, we cannot read such an exception into the statute.

In summary, we conclude that a member of a judicial nominating commission who resigns prior to the expiration of his or her term is not eligible for nomination to fill a vacancy during the remainder of the unexpired term, even if the vacancy occurred after the commissioner's resignation.

Sincerely,

Christie J. Scase

CHRISTIE J. SCASE
Assistant Attorney General

CJS/cs

COUNTIES AND COUNTY OFFICERS: Salaries: Authority to provide overtime pay to assistant county attorneys and deputy officers other than those in the sheriff's office. Iowa Code § 331.904(1), (3) (1993). Iowa Code section 331.904(1), (3) (1993) prohibits a county board of supervisors from paying overtime to assistant county attorneys and deputy officers other than those in the sheriff's office if such payment boosts their salaries above the statutory maximums. (Kempkes to Blessum, Madison County Attorney, 6-20-94) #94-6-5(L)

June 20, 1994

Mr. A. Zane Blessum
Madison County Attorney
113 North John Wayne Drive
Post Office Box 309
Winterset, Iowa 50273

Dear Mr. Blessum:

You have requested an opinion from the Attorney General on the meaning of Iowa Code section 331.904 (1993), which provides:

> 1. The annual salary of the first and second deputy officer of the office of auditor, treasurer, and recorder, and the deputy in charge of the motor vehicle registration and title division shall be an amount not to exceed eighty percent of the annual salary of the deputy's principal officer. . . .
>
> 2. . . . The annual base salary of a first or second deputy sheriff shall not exceed eighty-five percent of the annual base salary of the sheriff. . . . As used in this subsection, "base salary" means the basic compensation excluding overtime pay, longevity pay, shift differential pay, or other supplemental pay and fringe benefits.
>
> 3. The annual . . . salary of an assistant county attorney shall not exceed eighty-five percent of the maximum salary of a full-time county attorney. . . .

(Emphasis added.)

In the case you have presented, a projected payment for overtime work will boost above the statutory maximums the

salaries of assistant county attorneys and deputy officers other than those in the sheriff's office. The narrow issue, then, is whether "annual salary" for these assistants and deputies includes payment for overtime work. See generally Ryce v. City of Osage, 88 Iowa 558, 55 N.W. 532, 533 (1893) (illegal to pay public officer any compensation in excess of statutory maximum). The answer is yes.

Preliminarily, we note that the word "salary" commonly suggests an amount of compensation that excludes any payment for overtime work. See, e.g., Smith v. City of Des Moines, 238 Iowa 127, 25 N.W.2d 858, 859 (1947); Vecca v. State, 616 A.2d 823, 826 (Conn.App. 1992); 1980 Nev.Op.Att'yGen. 136 (1980 WL 111113) (interpreting statutes to exclude overtime pay from a deputy sheriff's "base salary" in determining whether it exceeds statutory maximum).

Two opinions from this office, however, illustrate that context, special circumstances, or specific definitions may require different meanings for this word. 1984 Op.Att'Gen. 57 (#83-6-9)(L)); 1980 Op.Att'yGen. 187 (#79-5-30(L)). See generally Swepston v. State Personnel Bd., 240 Cal.Rptr. 470, 472 (1987); 4 E. McQuillin, The Law of Municipal Corporations § 12.193.10, at 97 (1992); 77 C.J.S. Salary 553 (1952).

In 1979, we concluded that overtime pay for services falling outside the usual scope of a deputy's required duties cannot increase the amount of his or her "salary" for purposes of determining statutory maximums. 1980 Op.Att'yGen. 187 (#79-5-30(L)) (emphasizing special circumstance that sheriff wanted to contract with federal agency to have deputy sheriffs provide law-enforcement services). In other words, such out-of-the-ordinary payments cannot affect the determination whether a deputy's salary exceeds a statutory maximum.

In 1983, we considered the issue whether the salary maximums in section 331.904 included longevity pay. 1984 Op.Att'yGen. 57 (#83-6-9)(L)). We concluded that such pay constituted part of the salaries of assistant county attorneys and deputy officers other than those in the sheriff's office and that it affected the determination whether their salaries exceeded the statutory maximums. In reaching these conclusions, we noted that the General Assembly in section 331.904 indicated its intent to treat deputy sheriffs differently from assistant county attorneys and other deputy officers when it came to determining salary maximums. Compare Iowa Code § 331.904(2) with Iowa Code § 331.904(1), (3).

Specifically, the General Assembly in section 331.904(2) expressly defined a deputy sheriff's "annual base salary" to mean "basic compensation excluding overtime pay, longevity pay, shift

differential pay, or other supplemental pay and fringe benefits." (Emphasis added.) The General Assembly, in contrast, did not similarly define in section 331.904(1), (3) the "annual salary" for assistant county attorneys and deputy officers other than those in the sheriff's office.

Such circumstances suggested to us that the General Assembly intended for the salary maximums in section 331.904(1), (3) to include longevity pay. See generally Iowa R. App. P. 14(f)(13) (statutory construction focuses upon "what the legislature said, rather than what it should or might have said"); State v. Byers, 456 N.W.2d 917, 919 (Iowa 1990) (impermissible to extend or enlarge statutory terms under guise of construction); State v. Durgin, 328 N.W.2d 507, 509 (Iowa 1983) (legislature may provide special definitions for statutory terms).

This reasoning regarding longevity pay applies with equal force to overtime pay: had the General Assembly intended in section 331.904(1), (3) to exclude overtime from the salary of assistant county attorneys and deputy officers other than those in the sheriff's office, it presumably would have excluded such pay, as it did in section 331.904(2), with an express provision. Cf. 1994 Op.Att'yGen. (#94-6-3(L)) (legislature apparently chose against restricting certain city powers by not including any express restriction within statute, as it had done in related statute). Moreover, the General Assembly presumably knew of our published opinions and could have amended section 331.904 (1), (3) if it disagreed with our conclusions. C.f. Hennessey v. Cedar Rapids Community School Dist., 375 N.W.2d 270, 273 (Iowa 1985) (administrative interpretation of statute entitled to great weight, particularly when legislature refuses to intervene over a long period of time).

The General Assembly, in fact, has recently amended section 331.904. Notably, it left intact its definition of "annual base salary" in section 331.904(2) and again chose against providing a similar definition for "annual salary" in section 331.904(1), (3). See 1994 Acts, 75th G.A., ch. __, § __ (S.F. 218).

In summary, section 331.904 prohibits a county board of supervisors from paying overtime to assistant county attorneys and deputy officers other than those in the sheriff's office if such payment boosts their salaries above the statutory maximums.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

STATE JUDICIAL NOMINATING COMMISSION: Use of former congressional districts for achieving area representation on commission. Iowa Code §§ 46.1, 46.2 (1993). The federal constitutional requirement of "one person, one vote" does not apply to the process concerning appointments to the Supreme Court of Iowa. No constitutional violation thus results if the State Judicial Nominating Commission continues to be based upon Iowa's former congressional districts and not upon its current ones. (Kempkes to Neuhauser, State Representative, 7-1-94) #94-7-2(L)

July 1, 1994

The Honorable Mary C. Neuhauser
State Representative
3485 G Richard Circle, S.W.
Iowa City, Iowa 52240

Dear Representative Neuhauser:

You have requested an opinion from the Attorney General concerning the composition of the State Judicial Nominating Commission, which, pursuant to Iowa Code sections 46.1 and 46.2 (1993), currently draws its members from each of the seven congressional districts formerly in existence. See generally Contemporary Studies Project, 57 Iowa L. Rev. 598, 748-49, 767-68 (1972); 46 Am.Jur.2d Judges § 9, at 102 (1969); 48A C.J.S. Judges § 13, at 554-55 (1981). You raise no issue of statutory construction or interpretation, but question whether this practice violates the federal constitutional requirement of "one person, one vote" now that Iowa has only five congressional districts. We find no such violation.

The 1846 and 1857 Constitutions of Iowa both vested judicial power in a supreme court, district courts, and other inferior courts established by the General Assembly. Iowa Const. art. V, § 1 (1857); Iowa Const. art. V, § 1 (1846). The first constitution provided for the election of supreme court justices by the General Assembly. Iowa Const. art. V, § 3 (1846). Eleven years later, the second constitution provided for their election by the state's qualified electors, Iowa Const. art. V, § 3 (1857), and the General Assembly accordingly set forth the

procedures governing those popular elections, see, e.g., Iowa Code ch. 46 (1962).

Thirty-six years ago, however, a district court judge proposed to change the procedure for judicial selection:

> The objective is to secure the best qualified individual for judge who is available. Hence the choice must be made intelligently.
>
> . . .
>
> No system is perfect. . . . [The best selection system yet devised] provides that when a judgeship becomes vacant, a judicial nominating commission would thoroughly examine the qualifications of all candidates . . . and certify the best candidates to the governor, who would approve one of the individuals recommended. In Iowa, there would be a statewide commission for the Supreme Court . . . .
>
> These commissions would have an important function, and they should be carefully composed. . . .

Uhlenhopp, "Judicial Reorganization in Iowa," 44 Iowa L. Rev. 6, 54, 65-66 (1958). Judge Uhlenhopp, who later served on the Supreme Court of Iowa, then elaborated on the composition of the statewide commission:

> [The commissioners] must be chosen at large rather than from a particular area, otherwise they engage in horse trading and . . . do not regard themselves as representing the entire state . . . . Thus, state [commissioners] should be selected from any place in the state. . . . The governor and the lawyers selecting commissioners in actual practice will take care of [geographical] distribution.

Id. at 67, 196.

Four years after Judge Uhlenhopp's article, in 1962, the state amended its constitution to provide:

> There shall be a State Judicial Nominating Commission. Such commission shall make nominations [to the Governor] to fill vacancies in the Supreme Court. [T]he . . . Commission shall be composed and selected as follows: There shall be not less than three nor more than eight appointive members, as provided by law, and an equal number of elective members . . . , all of whom shall be electors of the state. The appointive members shall be appointed by the Governor subject to confirmation by the Senate. The elective members shall be elected by the resident members of the bar of the state.
>
> . . .
>
> Due consideration shall be given to area representation in the appointment and election of . . . Commission members. . . .

Iowa Const. amend. 21 (1962) (emphasis added). See generally "Symposium on Judicial Election, Selection, and Accountability," 61 So. Cal. L. Rev. 1555 et seq. (1988); Am.Jur.2d Desk Book 777-78 (1992) (noting methods of judicial selection in fifty states). In short, Justice Uhlenhopp's proposal for a state commission met with approval; his proposal for at-large membership in that commission, however, did not.

Pursuant to the constitutional amendment's direction on area representation, the General Assembly in 1963 provided:

> The governor shall appoint, subject to confirmation by the senate, one eligible elector of each congressional district to the state judicial nominating commission . . . .
>
> The resident members of the bar of each congressional district shall elect one eligible elector of the district to the state judicial nominating commission . . . .

Iowa Code §§ 46.1, 46.2. See 1963 Acts, 60th G.A., ch. 80, §§ 1-2, at 119-20. Since 1963, membership in the state commission has been based upon the seven congressional districts then in existence. That practice underwent a review in 1971, when former Attorney General Richard C. Turner addressed an issue of statutory construction and concluded that

> the number and bounds of the districts [created by sections 46.1 and 46.2] . . . continue to be those of the districts existing when the law was enacted, regardless of the subsequent changes in the number and bounds of the congressional districts of the state.

1972 Op.Att'yGen. 68 (attached).

Before addressing your federal constitutional issue, we note that the state constitutional amendment did not specify a method for achieving "area representation" in the state commission. It merely provided that the General Assembly give "[d]ue consideration" to area representation in the appointment and election of commission members. Thus, while membership based upon the current number of congressional districts may be the fairest or most desirable way to ensure area representation, the state constitutional amendment does not require use of this method. Cf. Reynold v. Sims, 377 U.S. 533, 537 (1964) ("it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, citizens, or voters").

Our answer to the federal constitutional issue requires us to examine Supreme Court cases from the early 1960s and their interpretations by various lower courts. See generally 1966 Op.Att'yGen. 95.

The fourteenth amendment to the federal constitution prohibits a state from denying any person the right to equal protection of the laws. U.S. Const. amend. XIV. "Its central purpose is to prevent the States from purposely discriminating between individuals on the basis of race." Shaw v. Reno, ___ U.S. ___, 125 L.Ed.2d 511, 525 (1993). Nearly one hundred years after ratification of this amendment, the Supreme Court in legislative reapportionment cases explained that the guarantee of equal protection also encompassed the principle of one person, one vote. See, e.g., Reynolds v. Sims, 377 U.S. at 562, 568; Gray v. Sanders, 372 U.S. 368, 381 (1963); Baker v. Carr, 369 U.S. 186, 244-50 (1961) (Douglas, J., concurring); see also Mahan v. Howell, 410 U.S. 315, 319 (1973); Gomillion v. Lightfoot, 364 U.S. 339, 349 (1960) (Whittaker, J., concurring); L. Tribe, American Constitutional Law 738-41 (1978); see also Davis v. Bandemer, 478 U.S. 109, 143 (1986).

The Supreme Court set forth the general rule for challenges involving one person, one vote in Hadley v. Junior College District:

> [W]henever a state . . . government decides to elect persons by popular election to perform governmental functions, the Equal Protection Clause . . . requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as practicable, that equal numbers of voters can vote for proportionately equal numbers of officials.

397 U.S. 50, 56 (1968) (emphasis added).

Neither the Iowa electorate in ratifying the state constitutional amendment in 1962 nor the General Assembly in enacting the implementing statutes in 1963 ran afoul of this federal constitutional requirement. Nor has the State offended the requirement by continuing to use the old congressional districts in determining the composition of the state commission.

The United States Supreme Court, we note, limited the requirement of one person, one vote to popular elections, id.; it has never applied the underlying principles to a process identical with or similar to that governing the appointment of justices to the Supreme Court of Iowa. Moreover, the requirement has only been applied by courts to elections of officials or representatives performing "governmental" or "legislative" functions. See 1966 Op.Att'yGen. 95; Annot., "Applicability of 'One Man One Vote' Rule," 18 L.Ed.2d 1537, 1543-45 (1967). When questioned whether it extends to the process of electing state justices or judges, courts have uniformly answered in the negative. See, e.g., Wymbs v. Republican State Exec. Committee, 719 F.2d 1072, 1087 n. 40 (5th Cir. 1983), cert denied, 465 U.S. 1103; Martin v. Mabus, 700 F.Supp. 327, 332 (S.D. Miss. 1988); Concerned Citizens, Inc. v. Pine Creek Conservancy Dist., 473 F.Supp. 334, 338 (S.D. Ohio 1977) (no constitutional right to "vote" on membership in courts); Wells v. Edwards, 347 F.Supp. 453, 454 (M.D. La. 1972), affirmed, 409 U.S. 1095 (judges do not exercise general governmental powers); Holshouser v. Scott, 335 F.Supp. 928, 930 (M.D.N.C. 1971), affirmed mem., 409 U.S. 807; Kail v. Rockefeller, 275 F.Supp. 939, 940-42 (E.D.N.Y. 1967); Sullivan v. Alabama State Bar Ass'n, 295 F.Supp. 1216, 1222 (M.D. Ala. 1969); New York State Ass'n of Trial Lawyers v. Rockefeller, 267 F.Supp. 148, 151-53 (S.D.N.Y. 1967) (no federally protected right to have state judges apportioned among judicial districts); Buchanan v. Rhoades, 249 F.Supp. 860, 865 (N.D. Ohio 1960),

appeal dismissed, 385 U.S. 3 and vacated, 400 F.2d 882 (6th Cir. 1968), cert. denied, 393 U.S. 839 (judges serve people and do not represent them); Stokes v. Fortson, 234 F.Supp. 575, 577 (N.D. Ga. 1964) (upholding laws allowing a majority of state's voters to oust judge elected by a district; noting that judges administer law and do not attempt to espouse causes of particular constituencies); Kentucky State Bar Ass'n v. Taylor, 482 S.W.2d 574, 576 (Ky.App. 1972); Cox v. Katz, 241 N.E.2d 747, 748 (N.Y.Ct.App. 1968), cert. denied, 394 U.S. 919 (no reason or justification for requirement that judges be distributed or allocated throughout a state on a per capita basis); see also Sailors v. Kent Bd. of Education, 387 U.S. 105, 108 (1967) (no constitutional requirement to elect non-legislative officials in states); J. Nowak, R. Rotunda & J. Young, Constitutional Law 795 (1983); 48A C.J.S., supra, at 556 (no constitutional requirement to distribute judges on per capita basis); but see Chisom v. Roemer, 501 U.S. 380, 115 L.Ed.2d 348, 363-64 (1991) (elected state judges are "representatives" for purposes of Voting Rights Act).

Two federal courts, however, have held that the guarantee of equal protection prohibits a state, in the election of its judiciary, from "diluting" the voting strength of a particular political group, Republican Party of North Carolina v. Martin, 980 F.2d 943, 953-54 (4th cir. 1992), rehearing en banc denied, 991 F.2d 1202 (1993), cert. denied, ___ U.S. ___, 126 L.Ed.2d 60, or racial group, Voter Information Project v. City of Baton Rouge, 612 F.2d 208, 211-12 (5th Cir. 1980). Such a claim stands separate and distinct from a claim involving one person, one vote. Republican Party of North Carolina v. Martin, 980 F.2d at 954; Voter Information Project v. City of Baton Rouge, 612 F.2d at 211-12. The issue whether vote-dilution can be used as a constitutional challenge against the election of a state's judiciary, however, appears far from settled. See Republican Party of North Carolina v. Martin, 991 F.2d at 1204-06 (Phillips, J., dissenting from denial of rehearing en banc).

Even if one-person-one-vote or vote-dilution principles applied to the process governing the appointment of justices to the Supreme Court of Iowa, no constitutional violation would necessarily result from a challenge to sections 46.1 and 46.2 for at least three related reasons. See generally Tribe, supra, at 743-50. First, respect for concerns of federalism dictates that a state has wide discretion with respect to establishing its judicial system. Ohio ex rel. Bryant v. Akron Metropolitan Park Dist., 281 U.S. 74, 81 (1930); see Wymbs v. Republican State Executive Comm., 719 F.2d at 1076. Second, equal protection tolerates some deviation from perfection in apportionment cases. E.g., Gaffney v. Cummings, 412 U.S. 735, 741-42 (1973); Reynolds

v. Sims, 377 U.S. at 578, 579; McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). In other words, one person, one vote involves something more than "mathematical nicety." Reynolds v. Sims, 377 U.S. at 569; see Baker v. Carr, 369 U.S. at 244-45 (Douglas, J., concurring). Cf. Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964) (congressional districts must be drawn so that "as nearly as is practicable one man's vote . . . is to be worth as much as another's"). See generally Tribe, supra, at 748. The cases before the Supreme Court requiring state legislative reapportionment, in fact, involved "gross and indisputable" malapportionment. Tribe, supra, at 744. Third, to establish an abuse of discretion under the equal protection clause requires a showing of "arbitrary and capricious or invidious" state action. Compare Republican Party of North Carolina v. Martin, 980 F.2d at 955, 957 (disproportionate results alone are insufficient in vote-dilution cases); Holshauser v. Scott, 335 F.Supp. at 932-33; with Chisom v. Roemer, 115 L.Ed.2d at 369 (discriminatory results, not discriminatory intent, need only be shown to prove a violation of Voting Rights Act).

Arbitrary, capricious, or invidious state action does not appear to underlie sections 46.1 and 46.2 or the practice of using the old congressional districts for composing the state commission. Rather, as former Attorney General Turner observed,

> The manifest purpose of the General Assembly [in sections 46.1 and 46.2] was to provide a geographical distribution of the members of the commission, and it was found convenient to indicate the congressional districts then existing as judicial commission districts. The latter districts . . . continue to exist, there being no relationship whatever between the congressional and the judicial commissions . . . .

1972 Op.Att'yGen. 68.

In summary, the federal constitutional requirement of one person, one vote does not apply to the process governing appointment of justices to the Supreme Court of Iowa. Membership in the State Judicial Nominating Commission thus may continue to be based upon Iowa's former congressional districts. See generally Exira Community School Dist. v. State, 512 N.W.2d 787,

792-93 (Iowa 1994) (federal and state equal protections usually deemed identical in scope, import, and purpose).

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

BK/lm

STATE OFFICERS AND DEPARTMENTS: Disposition of unclaimed, seized, and forfeited property. Iowa Code §§ 80.39, 809.5, 809.13 (1993). Section 80.39 allows the Department of Public safety to dispose of unclaimed property in any lawful way. Section 809.5 allows a state agency to dispose of seized property in any reasonable manner. Section 809.13 allows a state agency or local law enforcement agency to use forfeited property to enhance enforcement of the criminal laws and does not allow either agency to give it to private organizations. (Kempkes to Baker, State Representative, 7-12-94) #94-7-3(L)

July 12, 1994

The Honorable Tom Baker
State Representative
1336 Chautauqua Parkway
Des Moines, Iowa 50314

Dear Mr. Baker:

You have requested an opinion from the Attorney General whether law enforcement agencies can give forfeited property, such as cash, to private organizations engaged in preventing crime. Compare 1992 Ill.Op.Att'yGen. (#92-029) (forfeited drug profits may be used to fund community drug crime prevention efforts) with 1983 Va.Op.Att'yGen. 753 (forfeited weapons cannot be given to civilians for personal use under any circumstances). After reviewing the common law, legislative history, and specific language of the various forfeiture statutes, we conclude that law enforcement agencies cannot make such gifts. See generally Iowa Code §§ 4.1(38), 4.2, 4.4, 4.6 (1993).

The common law generally provided that title to forfeited property became vested in the sovereign. The Palmyra, 12 U.S. (Wheat.) 11, 14 (1827); 36 Am.Jur.2d Forfeiture § 1, at 611 (1968); 37 C.J.S. Forfeitures § 6, at 22-23 (1943).

Early in Iowa statehood, the General Assembly provided that a county clerk use unclaimed property "for the benefit of the poor of the county . . . ." Iowa Code § 5053 (1860). This legislative disbursement may have had a root in deodand, an

ancient doctrine of the common law providing that any personal chattel immediately causing a person's death became forfeited to the Crown, who sold it and gave the proceeds to the poor to appease God's wrath. See generally Goldsmith v. United States, 254 U.S. 505, 510-11 (1920); Fields v. Metropolitan Life Ins. Co., 36 A.L.R. 1250, 1251 (Tenn. 1923); Finkelstein, "The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty," 46 Temple L.Q. 169 (1973).

Later, the General Assembly detailed that forfeited property or the proceeds from its sale were to be credited to a county's school fund; transferred to the state criminalistics laboratory; used by any law enforcement agency, state medical or educational institution, reputable hospital, or reputable educational institution; or exchanged with other state agencies. Iowa Code §§ 749A.9, 751.29, 751.31, 751.34 (1977). Still later, the General Assembly provided that the proceeds from the sale of forfeited property were to be credited to a county's court fund, Iowa Code § 809.6 (1977 supp.), and the proceeds from the sale of obscene materials and drug-related items were to be credited to a county's general fund, Iowa Code § 809.6 (1983).

In 1984, the General Assembly enacted the current law in chapter 80 providing for the disposition of unclaimed property held by the Department of Public Safety. See 1984 Acts, 70th G.A., ch. 1154, § 1, at 216-18. One year later, the General Assembly provided generally that seized and forfeited property belonged to the Department of Justice, which could then transfer it to other state agencies or to any other law enforcement agency. Iowa Code §§ 809.6, 809.13 (1985). Drugs were to be destroyed or transferred to a public or not-for-profit hospital, Iowa Code § 204.506 (1985), and obscene materials were to be destroyed, Iowa Code § 809.6 (1985). Then, in 1986, the General Assembly enacted the current laws in chapter 809 providing for the disposition of seized and forfeited property. See 1986 Acts, 71 G.A., ch. 1140, §§ 7, 15, at 175-77.

Under current law, the State under chapters 80 and 809 may acquire three types of property. The General Assembly has classified them as "unclaimed property," "seized property," and "forfeited property."

Chapter 80 concerns the Department of Public Safety and its ability to dispose of unclaimed property. Section 80.39 provides:

> 1. Personal property, except for . . . seized or forfeitable property subject to disposition pursuant to chapter 809, . . .

> shall be disposed of pursuant to this section. . . .
>
> . . .
>
> 3. [When possessing unclaimed property, the department] may dispose of the property in any lawful way, including but not limited to the following:
>
> a. Selling the property . . . with the proceeds . . . going to the general fund of the state . . . .
>
> b. Retaining the property for the department's own use.
>
> c. Giving the property to another agency of state government.
>
> d. Giving the property to an appropriate charitable organization.
>
> e. Destroying the property.
>
> 4. [D]isposition of the [unclaimed] property shall be at the discretion of the department. . . .

(Emphasis added.)

Chapter 809 concerns property seized by any law enforcement agency or forfeited to the State. Section 809.5 governs the disposition of seized property, which section 809.1(3) essentially defines as property possessed by law enforcement agencies without consent of its owner. Section 809.5(1) provides:

> Seized property no longer required as evidence or for use in an investigation may be returned to the owner . . . . In the event that no owner can be located or no claim is filed under this section, . . . the seizing agency shall become the owner of such property and may dispose of it in any reasonable manner.

(Emphasis added.)

Section 809.1(2) defines forfeitable property as that having some connection to crime: it "is illegally possessed," or "has been or is intended to be used to facilitate the commission of a criminal offense or to avoid detection or apprehension of a person committing a criminal offense," or "is acquired as or from the proceeds of a criminal offense," or is "offered or given to another as an inducement for the commission of a criminal offense." Of significance to this opinion, section 809.13 provides:

> 1. Any person having control over forfeited property shall communicate that fact to the attorney general. . . .
>
> 2. Forfeited property . . . shall be delivered to the department of justice, or, upon written authorization of the attorney general, . . . the property may be destroyed, sold, or delivered to an appropriate agency for disposal in accordance with this section.
>
> 3. Forfeited property may be used by the department of justice in the enforcement of the criminal law. The department may give, sell, or trade property to any other state agency or to any other law enforcement agency withing the state if . . . it will enhance law enforcement . . . .
>
> 4. Forfeited property . . . not used by the department of justice . . . may be requisitioned by . . . any law enforcement agency . . . for use in enforcing the criminal laws . . . . Forfeited property not requisitioned may be delivered to . . . the department of general services [for transfer to various departments and subdivisions of the state, and such other agencies, institutions, and authorized recipients . . . as from time to time designated in federal statutes and rules. See Iowa Code § 18.15.]

(Emphasis added.) See generally Iowa Code §§ 124.506 (disposal of controlled substances), 321.89 (disposal of abandoned motor vehicles); 4 J. Yeager & R. Carlson, Iowa Practice § 911, at 197-98 (1979).

Unlike sections 80.39 and 809.5, which give broad discretion to law enforcement agencies over transfers of unclaimed or seized property, section 809.13 in its entirety directs that forfeited

property must be used to enhance enforcement of the criminal laws. See generally State v. Bessenecker, 404 N.W.2d 134, 136 (Iowa 1987). The only exception to this requirement, section 809.13(4), simply provides that the department of general services may acquire forfeited property of presumably little or no value in enforcing the criminal laws.

Enforcement of the criminal laws is peculiarly within the province of government through its various agencies, offices, or departments. See, e.g., Iowa Code §§ 80.9, 331.652, 331.756. Had the General Assembly wished to permit private organizations to acquire forfeited property, it could have -- as it did in section 80.39(2)(d) regarding charitable organizations -- specifically list them as potential beneficiaries in section 809.13. At the very least, the General Assembly could have -- as it did in section 809.5 regarding seized property -- grant considerable discretion to law enforcement agencies to dispose of forfeited property "in any reasonable manner." That the General Assembly did not similarly treat forfeited property in section 809.13 indicates an intent, in harmony with the common law, to keep it within government for governmental purposes and out of the hands of private organizations, which may not always have the public interest in mind. See generally Iowa Code § 4.6(4); Kohrt v. Yetter, 344 N.W.2d 245, 248 (Iowa 1984). Section 809.13 thus appears to prohibit the placing of forfeited property outside the governmental loop by gift to private organizations, including those engaged in preventing crime.

In summary, the Department of Public Safety may, in its discretion, dispose of unclaimed property in any lawful way; a state agency may dispose of seized property in any reasonable manner; and a state agency or local law enforcement agency, which must use forfeited property to enhance enforcement of the criminal laws, may not give it to private organizations.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

CHILD ABUSE INFORMATION: Sealing and expunging by agents; redissemination to other states. Iowa Code §§ 235A.13, 235A.15(2)(e)(4) and 235A.18 (1993). All information maintained by child protective centers as agents for the Department of Human Services is child abuse information and subject to the provisions of section 235A.18. Medical records generated by a contracting physician at the request of the centers and maintained in the physician's files are not child abuse information. All information contained in founded and undetermined child abuse files of the Department is legally accessible to child protection agencies in other states. (Miller-Todd to Palmer, Director, Iowa Department of Human Services, 8-1-94) **#94-8-1(L)**

August 1, 1994

Charles M. Palmer, Director
Iowa Department of Human Services
LOCAL

Dear Mr. Palmer:

You have asked for an opinion of the Attorney General concerning Iowa Code chapter 235A (1993), which governs the Department of Human Services in its handling of child abuse cases. You present two questions:

1. What information that child protective centers develop or produce is considered "child abuse information?"

2. What information may legally be shared with child protective agencies of other states?

Although your first question refers to information the centers "develop or produce," Iowa Code chapter 235A refers to child abuse information being maintained. Therefore, this opinion deals with what information the centers maintain is considered "child abuse information." We conclude that all information the centers maintain as agents for the department is child abuse information and subject to the provisions of section 235A.18. Medical records generated by a contracting physician at the request of the center and maintained in the physician's files are not child abuse information for the purposes of chapter 235A. With respect to the second question, we conclude that all information contained in founded and undetermined child abuse files is legally accessible to child protection agencies in other states.

Iowa Code section 235A.13 provides:

> 1. "Child abuse information" means any or all of the following data maintained by the department in a manual or automated data storage system and individually identified:

a. Report data.

b. Investigation data.

c. Disposition data.

Iowa Code section 235A.13 defines each of these data categories:

> 3. "Disposition data" means information pertaining to an opinion or decision as to the occurrence of child abuse, including:
>
> a. Any intermediate or ultimate opinion or decision reached by investigative personnel.
>
> b. Any opinion or decision reached in the course of judicial proceedings.
>
> c. The present status of any case.
>
> . . . .
>
> 6. "Investigative data" means information pertaining to the evaluation of report data, including:
>
> a. Additional information as to the nature, extent and cause of the injury, and the identity of persons responsible therefor.
>
> b. The names and conditions of other children in the home.
>
> c. The child's home environment and relationships with parents or others responsible for the child's care.
>
> . . . .
>
> 8. "Report data" means information pertaining to any occasion involving or reasonably believed to involve child abuse, including:
>
> a. The name and address of the child and the child's parents or other persons responsible for the child's care.
>
> b. The age of the child.

> c. The nature and extent of the injury, including evidence of any previous injury.
>
> d. Any other information believed to be helpful in establishing the cause of the injury and the identity of the person or persons responsible therefor.

Iowa Code § 235A.13.

The requirements of Iowa Code chapter 235A are applicable to information maintained by the department. Iowa Code § 235A.13(1). Child abuse information is defined to include report data, investigative data, and disposition data, regardless of who initiates the referral. If an allegation of child abuse is made, the department is required to initiate an appropriate investigation. Iowa Code § 232.71(1). In the course of an investigation, there will be interviews. These may be recorded on audiotape or videotape or summarized by the interviewer. Regardless of the form of recording, the interviews constitute child abuse information if taken for the purpose of obtaining information which helps establish the nature, extent, and cause of any injury and the identity of the person responsible for it.

The department itself does not have the ability or the authority to conduct medical examinations. Records of medical examinations are not generated by the department; however, the department may request information from any person believed to have knowledge of a child abuse case. Iowa Code § 232.71(5). Physicians may be asked to supply information regarding medical examinations already performed on a child or may be asked to perform a medical examination in order to assist the department in its investigation. Professionals supplying information at the request of the department are not subject to Iowa Code section 235A.18 with respect to records they maintain in their own files.

The Supreme Court of Iowa has held that "an instrumentality of government may do its ministerial work by agents or committees . . . . " Bunger v. Iowa High School Athletic Ass'n, 197 N.W.2d 555, 560 (1972). Child protection centers were developed for the purpose of assisting the department in carrying out its responsibility under chapter 232 to investigate child abuse. Under the contracts entered into between the centers and the department, the centers agree to conduct interviews of children, to obtain medical examinations of children, and to provide expert testimony regarding the findings, if necessary. The centers also by contract agree to maintain child abuse information according to the requirements of chapter 235A. The centers are carrying out functions delegated by statute to the department and are

agents of the department. They are acting on behalf of the department. Pillsbury Company v. Ward, 250 N.W.2d 35, 38 (1977).

When the centers assume the role of agents for the department, they agree to act on behalf of the department and be subject to the department's control. Brockway v. Employment Appeal Bd., 469 N.W.2d 256, 257 (Iowa App. 1991). The department, as principal, is charged with the knowledge of its agents acting within the scope of their authority. Vermeer v. Sneller, 190 N.W.2d 389, 393 (Iowa 1971). Under the Code and pursuant to the contracts, the centers must maintain or expunge all child abuse information created by them according to the Code's directives.

Both because the centers have agreed by contract and because the centers are agents acting on behalf of the department, the records of child abuse investigations must be maintained by the centers consistent with chapter 235A. Like the department, when it is necessary to obtain medical examinations, the centers must request the medical examination be performed by private physicians. The centers, like the department, do not generate medical records. The medical records generated by the private physicians may be maintained in the physician's files. However, if copies of the records are supplied to the department or the centers as the department's agents, those records in the possession of the centers become child abuse information, subject to the requirements of chapter 235A.

Regarding your second question, section 235A.15(2)(e)(4) allows the department under certain circumstances to share founded and undetermined child abuse information with legally constituted child protection agencies of other states. Based on the definitions cited above, all the information contained in the department's files or those of its agents acting on behalf of the department would be considered child abuse information and legally accessible to the child protection agencies of other states.

In summary, with respect to the first question, all information that the centers maintain as agents for the department is child abuse information and subject to the provisions of section 235A.18. Medical records generated by a contracting physician at the request of the center and maintained in the physician's files are not child abuse information for the purposes of chapter 235A. With respect to the second question,

all information contained in founded and undetermined child abuse files are legally accessible to child protection agencies in other states.

Sincerely,

Kathrine S. Miller-Todd

KATHRINE S. MILLER-TODD
Assistant Attorney General

KSMT/mo

COUNTY MEDICAL EXAMINERS: Status as county officers; insurance coverage; fees and expenses; signature on death certificates. Iowa Code §§ 97B.41(8)(b)(3), 144.28, 331.301(11), 331.801, 331.802, 331.803, 670.8 (1993). County medical examiners are not "employees" who may receive State retirement benefits, but are "officers" the county must defend in tort cases involving their official duties; counties may purchase insurance coverage for their medical examiners in lieu of defending and indemnifying them against losses from tort claims; county medical examiners may, under certain circumstances, charge a fee for certifying the cause of death even though they forgo viewing the deceased; the county in which a death occurred does not necessarily become responsible for its medical examiner's fee and expenses incurred in conducting a preliminary investigation or performing an autopsy; and physicians other than county medical examiners may sign a death certificate only if the death does not affect the public interest. (Kempkes to Welsh, State Senator, **8-23-94**) **#94-8-3(L)**

August 23, 1994

The Honorable Joe Welsh
State Senator
10626 Lake Eleanor Road
Dubuque, IA 52001

Dear Senator Welsh:

You have requested an opinion from the Attorney General about various issues involving county medical examiners. In answer to your specific questions, we conclude (1) county medical examiners are not employees who may receive State retirement benefits, but are officers a county must defend in tort cases involving their official duties; (2) counties may purchase insurance coverage for their medical examiners in lieu of defending and indemnifying them against losses from tort claims; (3) county medical examiners may, under certain circumstances, charge a fee for certifying the cause of death even though they forgo viewing the deceased; (4) the county in which a death occurred does not necessarily become responsible for its medical examiner's fee and expenses incurred in conducting a preliminary investigation or performing an autopsy; and (5) physicians who are not medical examiners may sign a death certificate only if the death does not affect the public interest.

I. Status of County Medical Examiner

Persons working for public employers may wear many hats in the sense that they may be "officers" or "employees" for one

purpose and not for another. 3 E. McQuillin, The Law of Municipal Corporations § 12.29, at 193-95 (1990); 63A Am.Jur.2d, Public Officers and Employees § 1, at 666-67 (1984). Common-law principles apply to this question unless a statute provides otherwise. See 63A Am.Jur.2d, supra, § 1, at 666-67.

Regarding state retirement benefits, the General Assembly has expressly provided that county medical examiners are not "employees" who may receive them. Iowa Code § 97B.41(8)(b)(3). Regarding the duty to defend county medical examiners, the General Assembly has generally provided that a county shall defend its officers and employees against any tort claim or demand arising out of an alleged act or omission occurring within the scope of their employment or duties. Iowa Code § 670.8; accord Iowa Code § 331.303(11). County medical examiners, who must provide bonds before accepting their positions, Iowa Code §§ 64.1, 64.2, 64.11, certainly appear to come within the protection of section 670.8 as county "officers." See 56 Am.Jur.2d Municipal Corporations § 235, at 296 (1971); see also Iowa Code § 331.801(1) (county medical examiner shall be appointed by county supervisors for a two-year term "of office"). See generally 18 Am.Jur.2d, Coroners § 1, at 688-91, § 2, at 690, § 3, at 691 (1985); 18 C.J.S. Coroners § 2, at 218 (1990). But cf. 1982 Op.Att'yGen. 245 (discussing possibility that private attorney working for city on hourly basis is not an "employee" for purposes of duty to defend). In short, a county must defend its medical examiner against any tort arising out of acts or omissions relating to official duty. See 1982 Op.Att'yGen. 245 (attached).

II. County's Election to Provide Insurance Coverage

Section 331.802(2) provides that county medical examiners shall receive a fee and actual expenses for conducting preliminary investigations and supplying written reports on them. The General Assembly has often used the phrase "actual expenses" in writing its laws. E.g., Iowa Code §§ 2.10(6), 2.12, 6B.51. At no time, however, has the General Assembly defined it or indicated that it includes premiums for malpractice insurance covering medical examiners. Absent such provisions, legislative intent regarding section 331.802(2) depends upon the common and approved usage of "actual expenses" and upon the underlying legislative objectives. See Iowa Code §§ 4.1(38), 4.2.

"Actual" means existing in fact. Nelson v. Restaurants of Iowa, 338 N.W.2d 881, 884 (Iowa 1983); Webster's New Collegiate Dictionary 812 (1979). "Expenses" include a charge incurred in the performance of duty. Webster's, supra, at 399. Thus, actual expenses of a governmental official must have been paid out in actual performance of official duties. 1985 OhioOp.Att'yGen. (# 85-066); see 1976-77 Ky.Op.Att'yGen. (# 77-656). They usually

include such outlays for meals, lodging, and mileage incurred in the course of official business. 1985 S.C.Op.Att'yGen. (9/17/85). In contrast, they do not include outlays personal in nature and unconnected with official duty. Gallarno v. Long, 214 Iowa 805, 243 N.W. 719, 721-22 (1932).

Regarding the payment of insurance premiums for malpractice involving a county medical examiner's official duties, we do not need to interpret section 331.802(2) or construe its phrase "actual expenses." That conclusion arises because, under section 331.303(11), a county shall defend, save harmless, and indemnify its officers, employees, and agents against tort claims arising out of alleged acts or omissions occurring within the scope of their employment. Accord Iowa Code § 670.8. Such protection may take the form of purchasing insurance. Iowa Code § 670.7; 1982 Op.Att'yGen. 245. A county thus must protect its medical examiner from tort claims involving official duty by way of insurance or through its own coffers.

III. Election Against Viewing Deceased

Section 331.802 provides that when deaths affect the public interest, county medical examiners shall take charge of the bodies. It also provides that in such cases, county medical examiners shall conduct preliminary investigations into the cause and manner of death and supply written reports of their findings. It further provides that for each preliminary investigation and submitted report, county medical examiners shall receive a fee.

Nothing in these provisions prohibits county medical examiners from charging a fee when they -- satisfied that the facts and circumstances have indicated a person's death does not affect the public interest -- opt against viewing the deceased. Cf. 1898 Op.Att'yGen. 67 (no statutory duty for coroners to view every body dead from other than natural causes). To examine means to inspect closely, to test the condition of, or simply to inquire into carefully. Webster's, supra, at 394; see 32 C.J.S. Examine 854 (1964). It may indicate no more than an effort to find out that which is unknown. Crabb's English Synonyms 320 (1917). To investigate especially means to conduct an official inquiry, Webster's, supra, at 603, and to conduct an inquiry simply means to ask information about or seek information by asking questions, Funk & Wagnall's Standard Handbook of Synonyms, Antonyms, and Prepositions 258 (1947). Thus, unlike the apparent implication from the phrase "personal examination" -- which the General Assembly has used in other context, e.g., Iowa Code §§ 222.28, 478.28, 508.16 -- "examination" in section 331.802(2) does not require a county medical examiner to view a deceased in every instance before charging a fee for certifying a cause of death.

IV. Injury in One County, Death in a Second County

In 1937, this office interpreted the statute directing a coroner to hold an inquiry for dead bodies "found or being in his county." We concluded this language meant that "jurisdiction" over a deceased lay with the county in which the act causing death occurred. 1938 Op.Att'yGen. 252. In reaching this conclusion, we indicated that the responsibility for the fees and expenses accompanying an inquiry lay with that county, for a different conclusion "would place [an unreasonable and illogical] burden" upon the taxpayers of the county in which the death occurred.

In 1962, we interpreted the statute governing county medical examiners. It then provided that responsibility for a county medical examiner's fee and expenses for conducting a preliminary investigation lay with the county "for which he is appointed." We concluded that "the examiner of the county wherein the death occurred is the proper person to make the investigation, and such expenses would be borne by said county." 1962 Op.Att'yGen. 134.

Several years later the General Assembly enacted the current language in section 331.802(2). 1970 Iowa Acts, 63rd G.A., ch. 1280, § 10, at 404. It now provides that the fees and expenses of county medical examiners conducting preliminary investigations shall be paid "by the county for which the service is provided."

The General Assembly certainly knew how to draft language that would fix responsibility for fees and expenses upon the county where a death occurred. See, e.g., Iowa Code § 331.802(5)(a). Under section 331.802(2), however, the place of a person's death only dictates which county medical examiner may take charge of (or have "jurisdiction" over) the body when the death affects the public interest.

Unlike its predecessor -- which placed the responsibility for fees and expenses upon the county where death occurred, see 1962 Op.Att'yGen. 134 -- section 331.802(2) fixes responsibility for them upon "the county for which the service is provided." In other words, fees and expenses link with specific services, and thus any county receiving a benefit from services performed must pay the accompanying fee or expense. If, for example, Mr. Jones were stabbed in Dallas County, where he lived, and went by ambulance for treatment to Polk County, where he died from his wound, Dallas County would bear the responsibility for the fee and expenses incurred by the Polk County Medical Examiner in conducting an autopsy of Mr. Jones. Dallas County, the place of the injury and any future criminal proceedings, see 1938 Op.Att'yGen. 252, would have received the services of the Polk County Medical Examiner with regard to the autopsy.

V. Required Signatures on Death Certificates

Section 144.26 generally provides for the issuance of death certificates. Section 144.28 provides:

> The medical certification shall be completed and signed . . . by the physician in charge of the patient's care for the illness or condition which resulted in death except when inquiry is required by the county medical examiner. When inquiry is required by the county medical examiner, the medical examiner . . . shall complete and sign the medical certification . . . .

(Emphasis added.) Under section 331.802(2), county medical examiners must conduct inquiries for deaths affecting the public interest.

Section 144.28 thus envisions two situations. It provides, first, that when a death affects the public interest, only county medical examiners may sign the death certificate; and second, when a death does not affect the public interest, physicians other than county medical examiners may sign the death certificate.

VI. Conclusion

In summary, (1) county medical examiners are not employees who may receive State retirement benefits, but are officers the county must defend in tort cases involving their official duties; (2) counties may purchase insurance coverage for their medical examiners in lieu of defending and indemnifying them against losses from tort claims; (3) county medical examiners may, under certain circumstances, charge a fee for certifying the cause of death even though they forgo viewing the deceased; (4) the county in which a death occurred does not necessarily become responsible for its medical examiner's fee and expenses incurred in conducting a preliminary investigation or performing an autopsy; and (5) physicians other than county medical examiners may sign a death certificate only if the death does not affect the public interest.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

TAXATION: Sales of Homesteads to Collect Taxes. Iowa Code §§ 422.26 and 561.16 (1993). Section 422.26 is a "special declaration of statute to the contrary" under section 561.16 so that the Iowa Department of Revenue and Finance is authorized to seek the sale of homesteads to effect collection of any taxes collected pursuant to section 422.26. (Hardy to Bair, Director of Revenue, 8-23-94) #94-8-5(L)

August 23, 1994

G. D. Bair, Director
Department of Revenue and Finance
Hoover State Office Building
L O C A L

Dear Mr. Bair:

You have requested an opinion of the Attorney General regarding the sale of homesteads to satisfy delinquent taxes collected by the Iowa Department of Revenue and Finance pursuant to Iowa Code section 422.26 (1993). Specifically, you have asked the question: "Is Iowa Code section 422.26 a 'special declaration of statute to the contrary' under section 561.16 which allows the Department to seek the sale of homesteads to satisfy taxes collected pursuant to section 422.26?" Based upon the following analysis, it is our opinion that the provisions of section 422.26 are a "special declaration of statute to the contrary" under Iowa Code section 561.16 (1993) which authorize the Department to seek the sale of homesteads to effect collection of any taxes collected pursuant to section 422.26.

Section 561.16 currently provides in part that: "The homestead of every person is exempt from judicial sale where there is no special declaration of statute to the contrary" (emphasis added). However, as to the collection of taxes by the Iowa Department of Revenue and Finance, section 422.26 provides that the amounts of unpaid taxes, penalties, interest and costs collected thereunder:

> shall be a lien in favor of the state upon all property and rights to property, whether real or personal, belonging to said taxpayer. . . . The department shall, substantially as

> provided in this chapter and chapter 626, proceed to collect all taxes and penalties as soon as practicable after they become delinquent, except that no property of the taxpayer is exempt from payment of the tax.

(Emphasis added.) That statute further provides that the distress warrant issued pursuant to this provision "shall direct the sheriff to distrain, seize, garnish, or levy upon, and sell, as provided by law, any real or personal property belonging to the taxpayer to satisfy the amount of the delinquency plus costs" (emphasis added). In addition, Iowa Code sections 626.74 through 626.86 (1993) clearly provide the applicable procedure for the sale of real estate via execution by the sheriff. Your question requires the application of various rules of statutory construction to these related provisions of the Code in order to determine whether the underscored language from section 422.26 constitutes a "special declaration of statute to the contrary" under section 561.16.

In this regard, we begin by noting that the purpose of employing rules of statutory construction is to ascertain the intent of the legislature when the provisions at issue were enacted. American Home Products Corp. v. Iowa State Board of Tax Review, 302 N.W.2d 140, 142 (Iowa 1981). Further, in determining the intent of the legislature, all related provisions which are in pari materia must be read together and harmonized if possible. Goergen v. State Tax Commission, 165 N.W.2d 782, 785-87 (Iowa 1969). Finally, it is well settled that statutes which purport to limit the right of the state to collect taxes must be strictly construed in favor of the state. Younkers Bros., Inc. v. Zirbel, 12 N.W.2d 219, 223 (Iowa 1943); 84 C.J.S. Taxation, § 640.

In researching both sections 422.26 and 561.16 and their statutory predecessors, as well as other similar or related statutes, we found that the basic language from section 561.16 emphasized above was present as early as 1873. See Iowa Code section 1988 (1873). At that time, there were no state income taxes or sales taxes imposed or collected in Iowa. However, the Iowa legislature had imposed taxes on personal property. Further, these taxes were collected pursuant to Iowa Code section 865 (1873) which stated in relevant part that:

> taxes due from any person upon personal property, shall be a lien upon any real property owned by such person or to which he may acquire a title. The treasurer is authorized and directed to collect the delinquent taxes by the sale of any property upon which the taxes are levied, or any other personal or real property belonging to the person against whom the taxes are assessed.

(Emphasis added.)

In addition to the statutes quoted above, the 1873 Code also contained specific statutory exemption language related to separately listed property. The relevant provision in this regard was codified at Iowa Code section 876 (1873) and provided that: "In all cases where the homestead is listed separately as a homestead, it shall be liable only for the taxes thereon." Similarly, Iowa Code section 1991 (1873) related to separately platted homestead property and provided that: "The homestead is liable for taxes accruing thereon, and, if platted as hereinafter directed, is liable only for such taxes . . . and the whole or a sufficient portion thereof may be sold to pay the same." It should be noted at this time that the presence of sections 876 and 1991 in the 1873 Code strongly suggests that the limiting sentence in section 1988 was not intended to apply to tax collections. Otherwise, we would have to assume that the exemption provisions of sections 876 and 1991 concerning separately listed homestead property would have been unnecessary surplusage. Such an assumption would not be appropriate. Hanover Insurance Co. v. Alamo Hotel, 264 N.W.2d 774, 778 (Iowa 1978).

Subsequently, the legislature repealed the personal property tax exemptions regarding separately listed and platted homestead property which were previously set forth in sections 876 and 1991. The revised provisions were codified at Iowa Code sections 1423 and 2975 (1897), respectively. Further, section 865, which related to personal property tax liens, was moved to Iowa Code section 1400 (1897) and was changed to read: "Taxes upon real estate shall be a lien thereon against all persons except the state. Taxes due from any person upon personal property shall be a lien upon any and all real estate owned by such person or to which he may acquire title . . . ." Finally, to collect these taxes, the treasurer was authorized, pursuant to Iowa Code section 1414 (1897), to sell "any personal property belonging to the person to whom such taxes are assessed, and not exempt from taxation, or any real or personal property upon which they are a lien. . . ." As noted above, the "special declaration of statute to the contrary" language in the homestead exemption statute remained.

In 1913, the Iowa Supreme Court was faced for the first time with the question of whether or not, under the language of section 1400, homesteads could be sold to satisfy delinquent personal property taxes. The Court specifically held that the language of section 1400 did allow the sale of homesteads for personal property taxes. Tate v. Madison County, 143 N.W. 492 (Iowa 1913). This holding was reaffirmed in Hampe v. Philipp, 210 Iowa 1243, 232 N.W. 648 (1930). The Court noted the repeal of the limiting language of prior sections 876 and 1991 in its decisions. As to the court's legal analysis in those cases, the court merely cited the statutory language of section 1400 and, apparently, found it to be a clear and unambiguous "statute to the contrary." Thus, by 1930, it had become well settled that homesteads were subject to sale for delinquent personal property taxes.

The Code of 1935 is the first Code which provided for the imposition of and collection of income, corporation and sales taxes in Iowa. Further, in Iowa Code section 6943-f22 (1935), the forerunner of the present section 422.26 was enacted. We note that in section 6943-f22 the legislature enacted strikingly similar language to that which was interpreted in the Tate and Hampe cases. Specifically, the new legislation provided that:

> such tax . . . shall be a lien upon all property and rights to property, whether real or personal, belonging to said taxpayer. The lien aforesaid shall attach at the time the tax becomes due and payable and shall continue until the liability for such amount is satisfied. . . The board shall substantially as provided in sections 7189 and 7189-d1, proceed to collect all taxes and/or penalties as soon as practicable after the same become delinquent, except that no property of the taxpayer shall be exempt from the payment of said tax.

(Emphasis added.) In fact, the last quoted sentence provides even stronger language than that which was before the court in Tate and Hampe. As noted above, this same language has remained in the Code and is now located at section 422.26. Thus, we would conclude that the Tate and Hampe decisions are controlling and that section 422.26 provides the required "special declaration of statute to the contrary" to overcome the prohibition against judicial sale found in the homestead provision.[1] Consequently, the forced sale of real estate via execution by the sheriff for any and all taxes collected

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[1] We are aware of the most recent ruling of the Iowa Supreme Court regarding the interpretation of the "special declaration of statute to the contrary" language of section 561.16 as related to forfeitures, titled Matter of Bly, 456 N.W.d 195 (Iowa 1990). However, we have concluded that the results reached in that case do not control our conclusions regarding the statutory interpretation question presently before us since the Bly case involved forfeitures which, unlike tax collection statutes, are not favored in the law but which are to be narrowly construed against the state. Further, the statutory language interpreted in the Bly case is not substantially similar to the statutory language we have been asked to interpret concerning tax collection. Finally, there were no prior cases on point re forfeitures to control the results in Bly while there are two cases squarely on point as to the interpretation of tax collection statutes in relation to section 561.16, the Tate and Hampe cases.

pursuant to section 422.26 is clearly allowed under the present statutes.[2] We also note that a prior decision from this office reached the same result that we now reach. 1958 Op.Att'yGen. 310.

In summary, it is our opinion that, based on the language of section 422.26 and the Tate and Hampe decisions, the Department is authorized to seek the sale of homesteads by the sheriff to effect collection of any taxes collected by the Department pursuant to section 422.26.

Sincerely,

Lucille M. Hardy

LUCILLE M. HARDY
Assistant Attorney General

LMH:cml

[2] The Internal Revenue Service is authorized to and does seize and sell Iowa homesteads to satisfy delinquent federal taxes. However, the conditions under which collection by this means may be undertaken are controlled by and set forth in revenue regulations promulgated by the IRS. Presumedly, the Iowa Department of Revenue and Finance intends to implement appropriate rules to govern this method of collection as well.

ELECTIONS; GAMBLING: Special elections; Excursion Boat Gambling. Iowa Code § 99F.7(10) (Supp. 1993); 1994 Iowa Acts, ch. _____ (House File 2179), § 17. Iowa Code section 99F.7(10)(c), as amended by 1994 Iowa Acts, ch. ___ (House File 2179), § 17, requires the supervisors of a county which has approved excursion boat gambling to submit the question of approval of excursion boat gambling to the electorate of the county even if there is currently no excursion boat licensed to operate in the county. Action must be taken by the supervisors to call the election as quickly as the election process will allow. (Scase to Baxter, Secretary of State, **8-29-94) #94-8-6(L)**

The Honorable Elaine Baxter
Secretary of State
Statehouse
L-O-C-A-L

Dear Secretary of State Baxter:

You have requested an opinion of the Attorney General interpreting section 17 of 1994 Iowa Acts, House File 2179. This recent legislation allows expanded gambling games on excursion gambling boats and at pari-mutuel racetracks upon voter approval, providing, in relevant part, as follows:

> If, after January 1, 1994, section 99F.4, subsection 4, or 99F.9, subsection 2, is amended or stricken, including any amending or striking by this Act,[1] or a licensee of a pari-mutuel racetrack who held a valid license issued under chapter 99D as of January 1, 1994, requests a license to operate gambling games as provided in this chapter, the board of supervisors of a county in which excursion boat gambling has been approved or in which the licensee of a pari-mutuel racetrack requests a license to operate gambling games shall submit to the

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[1] Prior to amendment by House File 2179, Code section 99F.7(10)(c) (1993) contained a similar provision requiring the supervisors to re-submit the question of approval of excursion boat gambling to the electors of the county if Code sections 99F.4(4) or 99F.9(2), which contained the wager and loss limits applicable to excursion boat gambling, were amended after July 1, 1989. This provision allows the electors of a county which has approved excursion boat gambling to reconsider that approval when the wager and loss limits are amended changing the scope of statutorily authorized excursion boat gambling.

> county electorate a proposition to approve or disapprove the conduct of gambling games on excursion gambling boats or the operation of gambling games at pari-mutuel racetracks at a special election at the earliest practicable time. . . .

(Emphasis added) 1994 Acts, House File 2179, § 17 [amending Iowa Code § 99F.7(10)(c) (1993)].

You ask whether under this section a county that has voted to approve excursion boat gambling but does not currently have an excursion boat licensed to operate in the county, nevertheless, must submit to the electorate a proposition to approve or disapprove the conduct of gambling games on excursion gambling boats. If so, you request guidance on application of the phrase "at the earliest practicable time." We conclude that the supervisors of a county which has approved excursion boat gambling must re-submit the question of approval of excursion boat gambling to the electorate of the county as soon as the election process will allow, even if there is currently no excursion boat licensed to operate in the county.

This office recently interpreted section 17 of House File 2179 and concluded that a special election is triggered when either of two conditions is met:

> When a statute enumerates conditions governing a subject matter, the courts may not impose additional conditions. Lindstrom v. Aetna Life Ins. Co., 203 N.W.2d 623, 627 (Iowa 1973). The statute provides only two conditions precedent for submission of the proposition to the electorate: 1) if either section 99F.4(4) or 99F.9(2) is amended or stricken after January 1, 1994; or 2) if a licensee of a pari-mutuel racetrack who held a valid license issued under chapter 99D as of January 1, 1994, requests a license to operate gambling games.
>
> In the event that either of these conditions is met, the board of supervisors of a county in which excursion boat gambling has been approved or in which the licensee of a pari-mutuel racetrack requests a license to operate gambling games 'shall submit to the county electorate a proposition to approve or disapprove the conduct of gambling games on excursion gambling boats or the operation of

> gambling games at pari-mutuel racetracks at a special election at the earliest practicable time.' H.F. 2179, § 17 [emphasis added].

1994 Op.Att'yGen. ___, ___ (#94-7-1, at. p. 3).

The first of these conditions was met by passage of House File 2179 itself. That is, Iowa Code section 99F.4(4) was amended by, and Iowa Code section 99F.9(2) was stricken by, House File 2179. This necessarily occurred "after January 1, 1994," because House File 2179 was passed in the 1994 session and the General Assembly did not convene until the second Monday in January. See Iowa Const. art. III, § 2. The condition precedent for submission of a proposition to approve or disapprove the conduct of gambling games on excursion gambling boats in counties that had previously approved excursion boat gambling, therefore, has been met.

From the statutory language we must conclude that the legislature intended House File 2179 itself to trigger elections in all counties in which excursion boat gambling previously had been approved. When interpreting a statute the ultimate goal is to ascertain and give effect to the intention of the legislature. John Deere Dubuque Works v. Weyant, 442 N.W.2d 101 (Iowa 1989). The legislature passed a bill which, upon enactment, contained a condition for a special election and satisfied that condition at the same time. We must conclude, therefore, that the legislature intended no exception from a special election for a county in which there is no excursion boat licensed currently.

Consistent with that legislative intent, the statute does not limit the presentation of the question to those counties in which an excursion boat is currently licensed. Nor does it give the board of supervisors of a county that has previously approved excursion boat gambling the discretion to forego an election on the question. As we reasoned with regard to calling an election at the request of the licensee of a pari-mutuel racetrack:

> The language of House File 2179 . . . imposes a mandatory duty upon the board of supervisors to call a special election when the conditions of the statute are met. Ordinarily the use of the term "shall" is mandatory and imposes a legal duty. Iowa Code § 4.1(30)(a) (1993); Willett v. Cerro Gordo County Board of Adjustment, 490 N.W.2d 556, 559 (Iowa 1992). In other contexts scheduling an election where statutory conditions have been met is viewed as mandatory, rather than discretionary. See

> Lame et al. v. Kramer, 259 Iowa 675, 682-83, 145 N.W.2d 597, 601-02 (1966) (mandatory duty to schedule a franchise election upon filing of proper petition); 1972 Op.Att'yGen. 329, 331 (mandatory duty to schedule a special election for selecting a supervisor representation plan upon filing of a proper petition).

1994 Op.Att'yGen. ___, ___ (#94-7-1, at pp. 3-4).

Having concluded that the special election mandated by section 17 of House File 2179 must be conducted in all counties that have approved excursion boat gambling, we turn to interpretation of the phrase "at the earliest practicable time." The Colorado Court of Appeals has interpreted an analogous statutory provision in Rizer v. People, 18 Colo. App. 40, 69 P. 315 (1902). In this case the court was called upon to determine whether a city council could legally delay ordering a special election until funds were available, even though the controlling statute required them to call a special election to fill a vacancy in the office of mayor "as soon as practicable" after the vacancy occurred. Id.

The Court held that the council had no discretion to delay the election:

> It is true that the statute does not require action within a specified number of days after the vacancy occurs; but, if it furnishes a rule by which the time for action by the council may be ascertained, then, on the principle that what may be made certain is certain, the effect is the same, and the duty to move equally peremptory. The word 'practicable' means 'feasible.' An act is practicable of which conditions or circumstances permit the performance. . . . Until [the council] is legally in session, it is, of course, impracticable for it to order an election to fill the vacancy; but, at its first regular meeting after the vacancy occurs, there is no reason why it may not proceed to the ordering of an election.

18 Colo.App. at 43, 69 P. at 316. The court rejected the city council's claim that the lack of available funds rendered ordering the election during the current fiscal year impracticable, ruling that "[t]he law determines the question of practicability, and, when the making of the order for the

election became practicable, the [council was] without discretion to say, or the power of judgment to determine, that it was impracticable." Id.

The phrase "as soon as practicable" is also a common provision in insurance policies. In this context, the Iowa court has interpreted this clause to mean "within a reasonable length of time under all of the facts and circumstances." Gifford v. New Amsterdam Casualty Co., 216 Iowa 23, 24, 248 N.W. 235, 236 (1933); accord Henschel v. Hawkeye-Security Ins. Co., 178 N.W.2d 409, 415 (Iowa 1970); Leytem v. Fireman's Fund Indemnity Co., 249 Iowa 524, 525, 85 N.W.2d 921, 922 (1957).

Applying these authorities to section 17 of House File 2179, would require the supervisors to take action to submit the proposition regarding continued approval of excursion boat gambling as quickly as the election process allows.

In summary, we conclude that Iowa Code section 99F.7(10)(c), as amended, requires the supervisors of a county which has approved excursion boat gambling to submit the question of approval of excursion boat gambling to the electorate of the county even if there is currently no excursion boat licensed to operate in the county. Action must be taken by the supervisors to call the election as quickly as the election process will allow.

Sincerely,

CHRISTIE J. SCASE
Assistant Attorney General

CJS/cs

COUNTY OFFICERS AND EMPLOYEES: County sheriff conducting polygraph examinations of candidates for civil positions in county jail. Iowa Code §§ 331.651(7), 331.653(35), 331.658, 331.903(1), 356.1, 356.2, 356.3, 356.6, 356.44, 356.49, 730.4 (1993). Although section 730.4 allows county sheriffs to conduct polygraph examinations of candidates for the positions of "peace officer" or "corrections officer," these phrases generally exclude such positions in the county jail as janitor, maintenance worker, secretary, clerk, intern, or other such civil employees. (Kempkes to Ferguson, Black Hawk County Attorney, **9-15-94**) **#94-9-2(L)**

September 15, 1994

Mr. Thomas J. Ferguson
Blackhawk County Attorney
B-1 Courthouse Building
Waterloo, Iowa 50703

Dear Mr. Ferguson:

You have requested an opinion whether a county sheriff may conduct polygraph examinations of candidates for certain unknown "civil positions" in the county jail. Sheriffs have the duties to take care of county jails and the prisoners held in them. Iowa Code §§ 331.653(35), 331.658, 356.1, 356.2, 356.3, 356.6, 356.44, 356.49 (1993). Accordingly, they may appoint and remove persons filling such positions as deputy, assistant, and clerk. Iowa Code §§ 331.651(7), 331.903(1). The specific question you ask involves Iowa Code section 730.4, which provides:

> 2. An employer shall not as a condition of employment . . . knowingly do any of the following:
>
> a. Request or require that an . . . applicant for employment take or submit to a polygraph examination.
>
> b. Administer . . . a polygraph examination to an . . . applicant for employment.

> c. Request or require that an . . . applicant for employment give an express or implied waiver of a practice prohibited by this section.
>
> 3. Subsection 2 does not apply to the state or a political subdivision of the state when in the process of selecting a candidate for employment as a peace officer or a corrections officer.

(Emphasis added.) In short, we must determine what the General Assembly meant in section 730.4 by the undefined phrases "political subdivision of the state," "peace officer," and "corrections officer."

This determination requires us to focus upon the specific language of section 730.4. See generally Iowa Code §§ 4.1, 4.4, 4.6. In addition, section 730.4 must be liberally construed to achieve its underlying purpose. Iowa Code § 4.2. These considerations lead us to conclude that although county sheriffs may conduct polygraph examinations of candidates for the positions of "peace officer" or "corrections officer," these phrases generally exclude such positions in the county jail as janitor, maintenance worker, secretary, clerk, intern, or other such civil employees.

I.

Chapter 730 is entitled "Employer-Employee Offenses." Although some of its provisions date to 1897, see Iowa Code §§ 730.1, 730.2, section 730.4 dates only to 1983, see 1983 Iowa Acts, 70th G.A., ch. 86, §§ 1-3, at 105-06. At that time, the General Assembly only provided that polygraph examinations could be administered "in the process of selecting a candidate for employment as a peace officer." See id. at 106. Five years later, the General Assembly included corrections officers within this exception. See 1988 Iowa Acts, 72nd G.A., ch. 1227, § 1, at 433.

The exception created in section 730.4 for peace and corrections officers undoubtedly reflects a legislative desire to allow the State and its political subdivisions the opportunity to measure by machine the honesty and reliability of a candidate for employment in certain positions involving the public's safety, security, or trust. See generally Long Beach City Employees Ass'n v. City of Long Beach, 719 P.2d 660, 671-72 (Cal. 1986); Crabinger v. Conlisk, 320 F.Supp. 1213, 1219 (E.D. Ill. 1970), affirmed, 455 F.2d 490 (7th Cir. 1972); Annot., "Polygraph Examination for Employment," 23 A.L.R.4th 187, 188 (1983). In

view of this purpose, we conclude the General Assembly intended in section 730.4 that a county sheriff's office constitutes a "political subdivision of the state." Cf. 56 Am.Jur.2d Municipal Corporations § 5, at 75, § 17, at 82 (1971) (counties are political subdivisions of the state); 70 Am.Jur.2d Sheriff § 1, at 223 (1987) (county sheriff generally classified as public officer).

Indeed, the Supreme Court of Iowa has broadly stated that a county sheriff's office constitutes a political subdivision of the state. McSurely v. McGrew, 140 Iowa 163, 118 N.W. 415, 418 (1908). It has also noted that a sheriff is a peace officer. State v. Graham, 203 N.W.2d 600, 603 (Iowa 1973); see Iowa Code §§ 321J.1(7), 801.4(11); 70 Am.Jur.2d, supra, § 2, at 224 (sheriff traditionally considered county's chief law-enforcer). Accordingly, county sheriffs have the power to conduct a polygraph examination of a candidate for the position of "peace officer" or "corrections officer," phrases we now construe.

II.

Neither "peace officer" nor "corrections officer" has a singular, well-defined meaning. In general, however, peace officer generally describes sheriffs and deputies, constables, marshals, city police officers, and other officers "whose duties require enforcement and preservation of public peace"; similarly, corrections officer generally describes those officers working in the network of governmental institutions such as prisons, jails, and reformatories. See Black's Law Dictionary 344, 834, 1130 (1990). See generally Iowa Code §§ 4.1(31) (sheriff may mean any person performing sheriff's duties), 80B.3(2) (defining law-enforcement officer to include sheriff), 321J.1(7) (defining peace officer to include highway trooper, civil-service police, sheriff, and regular, formally trained deputies), 411.1(15) (defining police officer to include matrons and other senior officers who have passed regular civil-service examination), 801.4(11) (defining peace officer to include sheriff, and parole, probation, and conservation officers). The scope of these meanings, however, expands or contracts in view of the underlying purpose of the particular statute. See State v. Spaulding, 102 Iowa 639, 72 N.W. 288, 289-90 (1897); 3 E. McQuillin, The Law of Municipal Corporations § 12.29, at 193-94 (1990).

As earlier noted, the exception created in section 730.4 for peace and corrections officers reflects a legislative desire to allow the State and its political subdivisions the opportunity to measure by machine the honesty and reliability of a candidate for employment in certain positions involving the public's safety, security, or trust. With this purpose in mind, the General Assembly could have chosen to extend the exception in section

730.4 to candidates for all positions tinged with some aspects of the public's safety, security, or trust. For example, the General Assembly could have specifically included all personnel of all public entities concerned with the detention of persons, concluding that a broad exception would tend to prevent escapes or illegalities involving any officer or employee. See, e.g., 1990 Op.Att'yGen. 11 (noting federal administrative rule requiring contractor to establish program for drug testing of "employees in sensitive positions"). Cf. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (discussing drug testing of customs-service employees). But see Long Beach City Employees Ass'n v. City of Long Beach, 719 P.2d at 670-72 (statute allowing polygraph examinations of all public employees except public safety officers violates equal protection); Oberg v. City of Billings, 674 P.2d 494, 496-97 (Mont. 1983) (statute allowing polygraph examinations of "employees of public law enforcement agencies" -- which would include secretaries, clerks, and dispatchers in addition to police officers -- violates equal protection; such employees "do not occupy the same position of power and concomitant trust"). See generally 3 McQuillin, supra, § 12.27, at 188-89.

The General Assembly, however, chose to limit the exception in section 730.4 to "officers" considered conservators of the peace or correctional in nature. See Dixon v. McMullen, 527 F.Supp. 711, 721 (N.D. Tex. 1981) (police officers "are just simply a special category" for imposing employment qualifications; "[i]ntegrity and trust are prerequisites"); Long Beach City Employees Ass'n v. City of Long Beach, 719 P.2d at 670 ("the compulsory polygraph testing of ordinary public employees has consistently been viewed as not essential to the public interest, while the testing of police officers and related personnel . . . has been held essential"; police and corrections officers hold "peculiar and delicate" positions in society); Civil Service Ass'n v. San Francisco Civil Service Comm'n, 188 Cal.Rptr. 806, 810-11 (App. 1983) (statute allowing for polygraph examinations of all public employees not considered public safety officers indicates legislative distinction between "officers" and "employees"), overruled, Long Beach City Employees Ass'n v. City of Long Beach, 719 P.2d at 671-72 (statute violates equal protection). We must construe the phrases "peace officer" and "corrections officer" according to the approved usage of the language. See Iowa Code § 4.1(38); State v. Hennenfent, 490 N.W.2d 299, 300 (Iowa 1992) (generally, undefined statutory terms intended to have ordinary meanings).

"Officer" generally implies an authority "to exercise some portion of the sovereign power . . . , either in making,

interpreting, administering or executing laws." 3 McQuillin, supra, § 12.29, at 195. See generally 63A Am.Jur.2d Public Officers and Employees § 1, at 666-67, § 9, at 672-74 (1984); 67 C.J.S. Officers and Public Employees § 2, at 220-23, § 7, at 233-34 (1978). In other words, the word normally encompasses all persons who actually discharge one or more important functions of a public office. Id. at 194-96; accord State v. Conway, 219 Iowa 1155, 260 N.W. 88, 92 (1935); State v. Spaulding, 72 N.W. at 289-90; see Black's, supra, at 1083; Webster's New Collegiate Dictionary 370, 790 (1979). Unlike "employees," who normally render assistance to officers under their direction, "officers" suggest that greater importance, dignity, and independence attaches to the position and that these persons, who often take an oath, represent the power of the sovereign. State v. Spaulding, 72 N.W. at 290-91; 3 McQuillin, supra, § 12.30, at 201-02.

Although "officer" may mean all persons in any public station or employment conferred by the government, State v. Spaulding, 72 N.W. at 289, the General Assembly in recent years has generally considered officers and employees to amount to distinct classes of public servants in its enactments. See, e.g., Iowa Code §§ 2.10(5)(c), 2C.15, 7.12, 12C.24, 15D.4, 16.6(1), 16A.5(1), 18.114 (all setting forth "officer" and "employee" in same sentence). When the General Assembly has departed from this practice, it has done so by providing special definitions. See, e.g., Iowa Code § 490.140(8) (broadly defining employee to include officer); 722.10(1) (broadly defining employee to include officer); see also Iowa Code § 670.1(3) (broadly defining officer to include any member of governing body).

The foregoing authorities thus suggest that, as a general rule, sheriffs may not conduct a polygraph examination of a candidate for such positions in their offices as janitor, maintenance worker, secretary, clerk, intern, or other such civil employees. Cf. 1930 Op.Att'yGen. 165 (school janitor a mere employee and not public official for purposes of official-misconduct statute); 16A E. McQuillin, The Law of Municipal Corporations § 45.06, at 30 (1992) (police department's civilian employees, such as mechanics, clerical workers, switchboard operators, and janitors, not normally considered officers).

III.

In summary, although section 730.4 allows county sheriffs to conduct polygraph examinations of candidates for the positions of "peace officer" or "corrections officer," these phrases generally

exclude such positions in the county jail as janitor, maintenance worker, secretary, clerk, intern, or other such civil employees.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

STATE OFFICERS AND DEPARTMENTS; MUNICIPALITIES; SCHOOLS: Energy bank program: competitive bidding on energy conservation measures; tort liability in design and construction of energy conservation measures. Iowa Code §§ 73A.2, 297.7, 331.241(1), 384.95(1), 384.99, 473.2, 473.3, 473.19, 473.20, 669.14(9), 670.4(8) (1993). Various statutes require counties, cities, and school corporations participating in the energy bank program, Iowa Code ch. 473 (1993), to administer and use competitive-bidding procedures for capital improvements, which would include the implementation of energy conservation measures when the estimated cost exceed statutory limitations; in any event, public policy suggests all public entities administer and use competitive-bidding procedures in such circumstances. Public entities may consult with the private sector, such as an energy savings company, in preparing their proposals for energy conservation measures. Public entities may be protected by the tort claims acts from certain claims of negligence relating to the design or construction of energy conservation measures. (Kempkes to Wilson, Director, Department of Natural Resources and Ramirez, Director, Department of Education, 9-16-94) #94-9-3(L)

September 16, 1994

Mr. Larry J. Wilson
Director
Department of Natural Resources
L O C A L

Mr. Al Ramirez
Director
Department of Education
L O C A L

Dear Mr. Wilson and Mr. Ramirez:

You have requested an opinion concerning Iowa Code chapter 473 (1993), which governs energy development and conservation and establishes the "energy bank program" for implementing "energy conservation measures." In answering your specific questions about public entities participating in the energy bank program, we conclude (1) that various statutes generally require counties, cities, and school corporations to administer and use competitive-bidding procedures for capital improvements, which would include the implementation of energy conservation measures with costs in excess of statutory limitations; (2) that, in any event, public policy suggests all public entities administer and use competitive-bidding procedures in such circumstances; (3) that public entities may consult with the private sector, such as an energy savings company, in preparing their proposals for

energy conservation measures; and (4) that public entities may be protected by the tort claims acts from certain claims of negligence arising out of the design or construction of energy conservation measures.

I.

Chapter 473 is entitled "Energy Development and Conservation." Section 473.2 sets forth specific legislative findings regarding energy development and conservation. They emphasize generally that the State should seek to provide its citizens with reliable and safe energy at the least possible cost. The cost of energy, in fact, is a concern mentioned repeatedly throughout section 473.2:

> The General Assembly finds that the health, welfare, and prosperity of all Iowans require the provision of adequate, efficient, reliable, environmentally safe, and least-cost energy at prices which accurately reflect the long-term cost of using such energy resources . . . . The goals . . . of this policy are to ensure the following:
>
> 1. Efficiency. The provision of reliable energy at the least possible cost to Iowans in such a manner that:
>
> a. Physical, human, and financial resources are allocated efficiently.
>
> b. All supply and demand options are considered and evaluated . . . to determine how best to meet consumers' demands for energy at the least cost.
>
> 2. Environmental quality. The protection of the environment from the adverse external costs of an energy resource utilization so that:
>
> . . .
>
> b. The prudently and reasonably incurred costs of environmental controls are recovered.

See Iowa Code § 473.3 (declaring goal of more efficient use of energy resources by implementing programs designed to promote efficiency).

The Department of Natural Resources administers energy development and conservation, which includes the energy bank program. Iowa Code §§ 473.7, 473.19. Section 473.19 defines that program as consisting

> of the following forms of assistance for the state, state agencies, political subdivisions of the state, school districts, area education agencies, community colleges, and nonprofit organizations:
> . . .
> 2. Providing loans, leases, and other methods of alternative financing from the energy loan fund . . . to implement energy conservation measures.

Section 473.19 further provides that "energy conservation measures" mean any

> construction, rehabilitation, acquisition, or modification of an installation in a facility or a vehicle which is intended to reduce energy consumption, or energy costs, or both, or allow the use of alternative energy source, which may contain integral control and measurement devices.

Section 473.20 generally establishes the "energy loan fund," and section 473.20(5) specifically provides:

> The state, state agencies, political subdivision of the state, school districts, area education agencies, and community colleges shall design and construct the most energy cost-effective facilities feasible and shall use the financing made available by the department to cover the incremental costs above minimum building code energy efficiency standards of purchasing energy efficient devices and materials unless other lower cost financing is available. . . .

(Emphasis added.) See generally Iowa Code § 473.20(A)(1) (providing for self-liquidated financing).

II.

Guided by the language of these statutes and by the appropriate principles of construction and interpretation, see Iowa Code §§ 4.1, 4.2, 4.4, 4.6, we now address the question whether the implementation of energy conservation measures must result from publicly administered, competitive bidding.

Preliminarily, we have found no case or opinion addressing this question. Although an opinion from this office sets forth language suggesting that "shared energy savings contracts" need not result from competitive bidding, see generally Iowa Code §§ 278.1, 279.12 (1983), that language, when read in its proper context, merely pointed out that the General Assembly had not expressly required competitive bidding for such contracts, 1984 Op.Att'yGen. (#84-1-12(L)) (attached). Indeed, the opinion emphasizes that such contracts "should be carefully scrutinized to ensure that [they do not avoid a requirement of] . . . competitive bidding . . . ." Id.

Additionally, we note that competitive-bidding procedures may not apply to certain contracts for "professional services." See 1992 Op.Att'yGen. 192 (sale of professional services, such as those provided by architects, normally not subject to competitive bidding as they involve subjective elements); 64 Am.Jur.2d Public Works and Contracts § 43, at 896 (1972); Annot., 15 A.L.R.3d 733 (1967). Such services typically involve the exercise of special skills, training, taste, or discretion. 64 Am.Jur.2d, supra, at 898. It seems, however, that the implementation of energy conservation measures -- such as, for example, installing new windows or boilers -- generally do not involve these types of services.

Use of competitive bidding for public contracts depends upon the existence of an applicable statute. Weiss v. Town of Woodbine, 229 Iowa 978, 295 N.W. 873, 876 (1941); 1978 Op.Att'yGen. 106; Note, 10 Drake L. Rev. 53, 55 (1973). Chapter 473 does not expressly include any requirement of competitive bidding for the implementation of energy conservation measures by the State, its agencies and political subdivisions, school districts, area education agencies, community colleges, and nonprofit organizations.

These public entities may nevertheless be required by other chapters to administer and use competitive-bidding procedures for purchasing goods or services with costs in excess of statutory limitations. For example, under sections 331.341(1), 384.95(1), and 384.99, counties and cities must administer procedures underlying a contractual award to the lowest responsible bidder for certain "public improvements" (which means any building or construction work paid with city funds and includes projects constructed by or operated jointly with public or private agencies); and likewise, under sections 73A.2 and 297.7, a school corporation must administer and use competitive-bidding procedures underlying a contractual award to the lowest responsible bidder for certain "public improvements" (such as the construction or repair of school buildings).

Little doubt exists that the implementation of energy conservation measures -- which by definition involve the construction, rehabilitation, acquisition, or modification of an installation in a facility or vehicle, see Iowa Code § 473.19 -- falls within these definitions of "public improvements." Accordingly, school corporations, counties, and cities participating in the energy bank program must administer and use competitive-bidding procedures for installing new boilers, windows, wiring, control systems, and similar energy conservation measures when the estimated cost exceeds statutory limitations.

In any event, all public entities participating in the energy bank program would be wise to administer and use competitive-bidding procedures for implementing such energy conservation measures. See generally 1988 Op.Att'yGen. 116 (#88-12-4(L)). That recommendation arises because sections 473.2, 473.3, and 473.20(5) effectively require the department to administer the energy bank program in such a manner as to maximize energy savings for the public and thereby serve its best interests. See generally Poor v. Town of Duncombe, 231 Iowa 907, 2 N.W.2d 294, 304 (1942); 10 McQuillin, supra, § 29.31, at 384. The department must therefore have some reasonable assurance that the provider of a particular energy conservation measure will serve the public's interests better, by achieving greater savings in cost, than another equally responsible provider. In other words, public entities may have little choice but to administer and use competitive bidding for implementing energy conservation measures when the estimated cost exceeds statutory limitations, because the department impliedly has discretion in disbursing monies from the energy loan fund in order to achieve maximum energy savings for the public. See generally Mills Publishing Co. v. Larrabee, 98 Iowa 97, 42 N.W. 593, 594 (1889); 64 Am.Jur.2d, supra, § 68, at 925.

Although publicly administered competitive-bidding procedures may not constitute the only means of ensuring maximum energy savings for the public in implementing energy conservation measures, they do provide the department with a sufficient basis upon which to disburse monies from the energy loan fund. See generally Weiss v. Town of Woodbine, 289 N.W. at 474; Iowa Elec. Co. v. Town of Cascade, 227 Iowa 480, 288 N.W. 633, 635 (1939); 1988 Op.Att'yGen. 116 (#88-12-4(L)); 1982 Op.Att'yGen. 484; 1974 Op.Att'yGen. 171; 10 E. McQuillin, The Law of Municipal Corporations § 29.29, at 375 (1990); Note, 10 Drake L. Rev. at 73; Comment, 25 Iowa L. Rev. 828, 828 (1940); 64 Am.Jur.2d Public Works and Contracts § 30, at 882 (1972). As the court recognized in Miller v. City of Des Moines, 143 Iowa 409, 122 N.W. 226, 230 (1909), "Experience has shown that the interests of the tax payers are best conserved by offering contracts for public work

to the competition of all persons able and willing to perform it."

Regarding the administration of competitive bidding, no statute appears to permit a private person or entity to establish a proposal's plans and specifications or conduct the underlying procedures on behalf of the public entity. Ordinarily, the public entity itself bears the responsibility for preparing the underlying proposal, giving notice, and reviewing the bids. Cf. 64 Am.Jur.2d, supra, § 63, at 916-17 (valid public works contract requires meeting of minds between supplier and public entity). See generally Iowa Code §§ 384.96, 384.97, 384.100, 384.101 (bidding procedures to be followed by counties and cities); 1992 Op.Att'yGen. 192 (competitive bidding typically includes specific procedures for issuance of proposals, submissions of bids, and review of bids after closing date); 401 IAC 9.1 et seq. (bidding procedures for Department of General Services).

No statute, however, appears to prevent public entities from consulting with and drawing upon the expertise of the private sector, such as an energy service company, in preparing their proposals. Cf. 1982 Op.Att'yGen. 484 ("contracting officials [generally] exercise broad discretion in the awarding of contracts"); 64 Am.Jur.2d, supra, § 50, at 902. Moreover, no statute appears to prevent public entities, in preparing their proposals, from setting forth plans or specifications for different materials or articles of the same general purpose and then choosing among the alternative materials or articles after receiving all bids. See generally 64 Am.Jur.2d, supra, § 52, at 904-05.

Public entities must act fairly, however, if they choose to consult with an energy service company in preparing their proposals for energy conservation measures; that is, they must take pains to ensure that a particular plan or set of specifications do not favor the good or service of any energy service company offering advice. See 1982 Op.Att'yGen. 484 ("fairness to bidders is a requirement in the competitive process"). Any other action in preparing a proposal, such as merely copying the specifications of a particular energy service company's good or service, would effectively eviscerate competitive bidding. See 64 Am.Jur.2d, supra, § 30, at 882, § 50, at 901-02, § 51, at 902-03, § 64, at 918. We therefore agree that

> [s]o long as the public authorities act freely and independently and for the best interests of the public body . . . , the mere fact that they incorporate into the plans and

> specifications suggestions advanced by representatives of possible bidders, appearing at open, public meetings, is not ground to set the contract aside when it also appears that competition was not unreasonably limited.

Id. § 33, at 885. Cf. Iowa Code §§ 331.342 (prohibiting county officers or employees from having direct or indirect interest in contract with county), 362.5 (prohibiting city officer or employee from having direct or indirect interest in contract with city).

We make one final comment regarding competitive bidding: state agencies participating in the energy bank program should comply with Executive Order Number 50 (attached), signed by the Governor in January, 1983. The order notes that state agencies must make every reasonable effort to ensure that commitments of public funds for contracts and services be done professionally in order to receive the most value for money spent; to aid state agencies in their efforts, the order then effectively provides for the adoption of rules for the solicitation and selection of professional service providers.

III.

Section 473.13A generally requires that public entities identify and implement energy conservation measures through energy audits and engineering analyses. According to administrative rule, such analyses shall be certified by "an analyst, employed by a firm on the list of qualified engineering/architectural firms" maintained by the department. 565 IAC 6.1(2). Nothing in chapter 473, however, requires architects or engineers employed by public entities to participate in designing or inspecting energy conservation measures.

Tort liability of a public entity that does not have its own architect or engineer design or inspect a proposed energy conservation measure depends, at the outset, on whether these duties exist under a statute or the common law. See 63A Am.Jur.2d Public Officers and Employees § 361, at 927-29 (1984). Apparently no statute requires any input, from architects or engineers employed by public entities, regarding energy conservations measures. Whether a duty exists under the common law requires an examination of all the facts and circumstances attending a specific case, and thus we cannot issue an opinion on its existence.

Yet even if a duty exists, tort liability does not necessarily result from its breach. Chapters 669 and 670 govern tort liability of the State, governmental subdivisions, and their officers and employees. Both chapters exempt from liability any claim

> based upon or arising out of a claim of negligent design or specification, negligent adoption of design or specification, or negligent construction or reconstruction of a public improvement as defined in section 384.37, subsection 19 [which includes changes in sewers, streets, levees, lighting, waterworks, sewage, and gas, heating, and electrical connections], or other public facility that was constructed or reconstructed in accordance with generally recognized engineering or safety standard, criteria, or design theory in existence at the time of the construction or reconstruction. . . . This section shall not apply to claims of gross negligence.

Iowa Code § 669.14(9); accord Iowa Code § 670.4(8). See generally 1988 Op.Att'yGen. 116 (#88-12-4(L)) (defining constructiion work). Accordingly, public entities may have protection under sections 669.14(9) and 670.4(8) from any tort liability arising out of the negligent design or construction of energy conservation measures.[1]

IV.

In summary, (1) various statutes generally require counties, cities, and school corporations to administer and use competitive-bidding procedures for capital improvements, which would include the implementation of energy conservation measures when the estimated cost exceeds statutory limitations; (2) in any event, public policy suggests that all public entities administer and use competitive-bidding procedures in such circumstances; (3) public entities may consult with the private sector, such as an energy savings company, in preparing their proposals for energy conservation measures; and (4) public entities may be protected

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[1] This opinion has no impact upon whether architects or engineers employed by public entities must or may design or inspect energy conservation measures. We simply note that chapters 542B and 544A set forth the general qualifications and duties of persons in those professions.

by the tort claims acts from certain claims of negligence arising out of the design or construction of energy conservation measures.

Sincerely,

Bruce Kempkes
Assistant Attorney General

COUNTIES AND CITIES: County's power to disapprove proposed plat for subdivision located within extraterritorial jurisdiction of city. Iowa Code §§ 306.4(2),(3), 331.362, 354.8, 354.9, 354.11(1) (1993). A county board of supervisors acting pursuant to ordinance may disapprove a proposed subdivision plat showing a dedication of land to the county for public thoroughfares, and both a county and city may provide reasonable standards or conditions affecting proposed subdivisions located outside the city's boundaries but within the city's extraterritorial jurisdiction. (Kempkes to Mullin, Woodbury County Attorney, 9-16-94) #94-9-4(L)

September 16, 1994

Mr. Thomas S. Mullin
Woodbury County Attorney
300 Courthouse
Sioux City, Iowa 51101

Dear Mr. Mullin:

Iowa Code chapter 354 (1993) generally permits a city to impose standards or conditions upon proposed subdivisions located within its boundaries. By imposing restrictions, a city may ensure the existence of adequate streets and other public facilities or conveniences. See Bartelt, "Extraterritorial Zoning," 32 Notre Dame Law. 367, 394 n. 89 (1957). You have requested an opinion, however, concerning a city's power to impose standards or conditions upon proposed subdivisions located outside a city's boundaries. Your question initially involves section 354.8, which provides a city with extraterritorial powers:

> A proposed subdivision plat lying within the jurisdiction of a governing body shall be submitted to that governing body for review and approval prior to recording. A city may establish jurisdiction to review subdivisions outside its boundaries pursuant to the provisions of section 354.9. Governing bodies shall apply reasonable standards and conditions in accordance with the applicable statutes and ordinances for the review and approval of subdivisions. . . .

> If the subdivision plat and all matters related to final approval of the subdivision plat conform to the standards and conditions established by the governing body, and conform to this chapter, . . . the governing body, by resolution, shall approve the plat and certify the resolution which shall be recorded with the plat. . . .

See generally A. Vestal, Iowa Land Use and Zoning Law 219 n. 31 (1979). The establishment of extraterritorial jurisdiction commonly means that a city has plans to annex adjacent or nearby subdivisions. 5 N. Williams & J. Taylor, American Planning Law § 156.03, at 349 (1985).

Proposed thoroughfares constitute one of the most important elements of a subdivision plan. Id., § 156.07, at 353. They "are normally conveyed (`dedicated') by the developer to the municipality or county," which should ensure that they "are sufficiently wide, properly paved, and aligned to avoid future maintenance or public safety problems." R. Platt, Land Use Controls 222 (1991).

You mention that a developer has proposed a subdivision located outside the boundaries of a city with established extraterritorial jurisdiction; that the city's ordinances require each lot in subdivisions to have frontage on a public thoroughfare lying within a dedicated public right of way; and that the county, presumably pursuant to its ordinances requiring such thoroughfares to remain private, has disapproved the proposed subdivision. See generally Williams & Taylor, supra, § 156.07, at 353 (requirement that developer of subdivision dedicate land for streets not a serious legal issue). To answer your questions about this conflict, we must ascertain the underlying intent of the General Assembly in enacting chapter 354. See Iowa Code §§ 4.1, 4.2, 4.4, 4.6. We conclude that under such circumstances a county board of supervisors, acting pursuant to ordinance, may disapprove a proposed subdivision plat showing a dedication of land to the county and that both a county and city may provide reasonable standards or conditions affecting proposed subdivisions located outside the city's boundaries but within the city's extraterritorial jurisdiction.

I.

A county generally has jurisdiction over its secondary roads, Iowa Code §§ 306.4(2), 331.362, and has discretion of a legislative nature to determine whether such roads should be established, Oakes Constr. Co. v. Iowa City, 304 N.W.2d 797, 808 (Iowa 1981). In other words, it alone may establish its

secondary roads. 1970 Op.Att'yGen. 126. Like a county and its roads, a city generally has jurisdiction over its streets. Iowa Code §§ 306.4(3), 364.12, 1970 Op.Att'yGen. 476. It too has discretion of a legislative nature for determining whether a street should be established. Oakes Constr. Co. v. Iowa City, 304 N.W.2d at 808.

Public thoroughfares such as roads or streets may become established by prescription, estoppel, or dedication. Iowa Loan & Trust Co. v. Polk County Bd. of Supervisors, 187 Iowa 160, 174 N.W. 97, 97 (1919). Under the common law, offers of dedication need to be accepted formally (by the governing public body) or informally (by the general public). See Kelroy v. City of Clear Lake, 232 Iowa 161, 5 N.W.2d 12, 16 (1942); 23 Am.Jur.2d Dedication § 43, at 39 (1983). Despite statutes expressly providing for formal acceptance, the general public may informally accept a person's offer to dedicate private land to the public and thereby create an easement in its favor. Iowa Loan & Trust Co. v. Polk County Bd. of Supervisors, 174 N.W. at 97; Town of Kenwood Park v. Leonard, 177 Iowa 337, 158 N.W. 655, 658 (1916); Manderschild v. City of Dubuque, 29 Iowa 73, 81 (1870); Note, "Acquisition of Public Ways in Iowa," 32 Iowa L. Rev. 746 (1947); 1966 Op.Att'yGen. (#66-1-6(L)); 1955 Op.Att'yGen. 28.

The enforcement provision in chapter 354, however, mentions prior approval of dedicated lands within proposed subdivisions and not subsequent acceptance. See generally 1962 Op.Att'yGen. 146; Annot., 11 A.L.R.2d 524, 567-69 (1950). Specifically, section 354.11(1) provides that a county recorder may file a proposed subdivision plat, which includes a dedication of land to the public, only if the dedication "is approved by the governing body." See generally Iowa Code § 354.19 (approved dedication of lands to public is equivalent to deed in fee simple to them); Vestal, supra, at 214.

Certainly a county board of supervisors, acting pursuant to ordinances regulating proposed subdivision plats, need not approve every dedication of land for use as a public thoroughfare. In other words, a county ordinance requiring that the thoroughfares in proposed subdivisions remain private appears to be a reasonable condition. Cf. 1970 Op.Att'yGen. 311 (county may approve plat and at same time disapprove roads in plat; in such instances, roads must be maintained as private roads). As explained in Oakes Constr. Co. v. Iowa City, 304 N.W.2d at 808,

> The duties resting upon . . . governmental authorities with respect to the establishment of streets or other highways are, unless imposed by law, of a political

> rather than a legal nature, the performance of which cannot be compelled by the courts, and for the nonperformance of which they cannot be held responsible. To warrant the establishment of a highway which is to be opened, constructed, or maintained at public expense . . . , such highway must be required by public convenience and necessity. Whether such necessity exists, however, is generally regarded as a legislative question which must be left to the discretion of the proper governmental authorities.

(Quoting 39 Am.Jur.2d, Highways § 38, at 430-31 (1968).) See generally 1964 Op.Att'yGen. 74 (county may not arbitrarily or capriciously disapprove road system within plat).

Nothing in chapter 354 appears to weaken this discretion of counties or grant a city the extraordinary power to compel counties to assume the duties, expenses, and liabilities associated with maintaining thoroughfares in subdivisions located outside the city but within its extraterritorial jurisdiction. The General Assembly presumably knew how to provide for such power. See, e.g., Iowa Code §§ 306.4(3) (transportation department and municipality shall exercise concurrent jurisdiction over municipal extensions of primary roads), 314.5 (providing counties with power to maintain secondary roads extending into cities) (1966). Such circumstances suggest that a county board of supervisors may refuse to accept an offer of dedicated land for public thoroughfares within a proposed subdivision and thereby disapprove the accompanying plat: a county "cannot have undesirable burdens thrust on it [through dedication] and be burdened with the various duties, expenses, and liabilities incident to ownership," 23 Am.Jur.2d, supra, § 43, at 29. Cf. Burroughs v. City of Cherokee, 134 Iowa 429, 109 N.W. 876, 878 (1906) (no law compels a city to open and improve a public street platted and dedicated to public use).

Cities and counties, moreover, do not operate in a vacuum in reviewing proposed subdivisions located within the no-man's-land effectively created by section 354.8. Section 354.9 provides:

> 1. If a city, which has adopted ordinances regulating the division of land, desires to review subdivisions outside the city's boundaries, then the city shall establish by ordinance specifically referring to the authority of this section, the area subject to the city's review and approval. . . .

> 2. If a subdivision lies in a county, which has adopted ordinances regulating the division of land, and also lies within the area of review established by a city pursuant to this section, then this subdivision shall be submitted to both the city and county for approval. . . . Either the city or county may, by resolution, waive its right to review the subdivision. . . .

(Emphasis added.) Section 354.9(2) thus establishes that both a county and city may disapprove a proposed subdivision located outside the city, but within the city's extraterritorial jurisdiction, on the ground that it does not comply with a reasonable standard or condition embodied in their respective ordinances. Compare Brookhill Dev. Co. v. City of Waukesha, 307 N.W.2d 242, 246 (Wis. 1981) (legislature intended for both county and city to approve proposed subdivisions located outside city's boundaries but within city's extraterritorial jurisdiction); 1977 Ill. Op.Att'yGen. 90 (neither county nor city has exclusive jurisdiction to approve proposed development within city's extraterritorial power); 1985 Tex. Op.Att'yGen. (# JM-365) (county and city may independently regulate subdivisions within extraterritorial jurisdiction of city, except that the more stringent regulations prevail over any lesser ones) with Petterson v. City of Naperville, 137 N.E.2d 371, 377-78 (Ill. 1956) (statutory scheme indicated cities alone may regulate subdivisions located outside their boundaries but within their extraterritorial jurisdiction). Cf. City of Cedar Rapids v. State, 478 N.W.2d 602, 605 (Iowa 1991) (city's power to regulate streets does not equate with exclusive jurisdiction to enforce motor-vehicle laws); City of Bloomfield v. Davis County Community School Dist., 254 Iowa 900, 119 N.W.2d 909, 911 (1963) (city zoning regulations inapplicable to state or county unless legislature clearly manifests contrary intent). See generally Cunningham, "Land-Use Controls -- the State and Local Programs," 50 Iowa L. Rev. 367, 419 (1965) ("subdivisions are sometimes required to meet the requirements of both municipal and county authorities").

II.

You have also asked whether a city, having established extraterritorial jurisdiction over proposed subdivisions, may require each lot to have frontage on a public thoroughfare lying within a dedicated public right of way. Whether this requirement is reasonable involves resolution of fact and policy issues. See Ayres v. City of Los Angeles, 207 P.2d 1, 7 (Cal. 1949); see also Oakes Constr. Co. v. City of Iowa City, 304 N.W.2d at 799-807. Cf. Dolan v. City of Tigard, ____ U.S. ____, 62 U.S.L.W. 456

(6/21/94) (zoning regulation exacting dedication of land); Village of Euclid v. Amber Realty Co., 272 U.S. 365, 395 (1926) (zoning in general). See generally C. Haar, Land-Use Planning ch. 4 (1971); D. Hagman, Urban and Land Development ch. 14 (1973); D. Mandelker, Land Use Law ch. 9 (1993); Tomain, "Land Use Controls in Iowa," 27 Drake L. Rev. 254, 303 (1977-78); Landau, "Urban Concentration and Land Exactions for Recreational Use," 22 Drake L. Rev. 71 (1972); Note, "Subdivision Regulation in Iowa," 54 Iowa L. Rev. 1121, 1126-43 (1969); Annot., 11 A.L.R.2d 524 (1950).

The question thus appears ill-suited for this office to address. See, e.g., 1972 Op.Att'yGen. 686. We note, however, that absent county-city cooperation, see Frey, "Subdivision Control and Planning," 1961 U. Ill. L.F. 411, 425; see also Iowa Code ch. 28E; cf. Iowa Code §§ 335.24, 414.21 (addressing zoning conflicts), a city having concerns about the placement of or standards for thoroughfares within proposed subdivisions located outside its boundaries, but within its extraterritorial jurisdiction, need not ignore such concerns. See generally Taylor & Williams, supra, § 156.07, at 353 (widespread practice to require developer to pave proposed thoroughfares in subdivision). To ensure the city's orderly development, see Iowa Code § 354.1(4), it can specifically address the quality and placement of subdivision thoroughfares by ordinance, see generally Oakes Constr. Co. v. City of Iowa City, 304 N.W.2d at 799-807.

III.

In summary, a county board of supervisors acting pursuant to ordinance may disapprove a proposed subdivision plat showing a dedication of land to the county for public thoroughfares, and both a county and city may provide reasonable standards or conditions affecting proposed subdivisions located outside the city's boundaries but within the city's extraterritorial jurisdiction.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

MOTOR VEHICLES: Juvenile Adjudications and Proof of Financial Responsibility. Iowa Code §§ 232.55, 321.213, 321.213A (Supp. 1993), 321A.17 (1993). Pursuant to new Iowa Code section 321.213A as enacted by 1994 Iowa Acts, ch. ____ (Senate File 2319), the Department of Transportation is required to suspend the driver's license of a juvenile who has been adjudicated to have committed certain delinquent acts. Because an adjudication is not a conviction, the Department of Transportation cannot require proof of financial responsibility for suspension of licenses under section 321.213A. (Burger to Rensink, Director, Department of Transportation, 10-7-94) #94-10-1(L)

October 7, 1994

Darrel Rensink, Director
Department of Transportation
800 Lincoln Way
Ames, Iowa 50010

Dear Mr. Rensink:

You have requested an opinion of the Attorney General concerning the financial responsibility requirements of Iowa Code section 321A.17 as it relates to driver's license suspensions under Iowa Code section 321.213A (1994). Specifically you asked:

> Is proof of financial responsibility required by section 321A.17 when the Department suspends a license under new section 321.213A as enacted by Senate File 2319, section 34, 1994 Iowa Acts?

Iowa Code section 321.213A, as amended by the 1994 session of the General Assembly, requires the Iowa Department of Transportation to suspend the driver's license of a juvenile who has been adjudicated to have committed certain delinquent acts. Section 321.213A only governs the suspension of a juvenile's driver's license. A separate provision, Iowa Code section 321A.17, establishes the criteria to determine whether proof of financial responsibility is required and generally requires proof of financial responsibility in order to maintain motor vehicle registration whenever the department suspends or revokes a license, upon receiving record of a conviction. The question, then, is whether proof of financial responsibility is required when the department suspends a juvenile's driver's license under section 321.213A.

New Code section 321.213A, passed by the 1994 session of the General Assembly, provides as follows:

> Upon the entering of an order at the conclusion of a dispositional hearing under section 232.50, where the child has been adjudicated to have committed a delinquent act, which would be a first or subsequent violation of section 123.46, section 123.47 involving the purchase or attempt to purchase alcoholic beverages, or chapter 124, or a second or subsequent violation of section 123.47 regarding the possession of alcoholic beverages, the clerk of the juvenile court in the dispositional hearing shall forward a copy of the adjudication and dispositional order to the department. The department shall suspend the license or operating privilege of the child for one year. The child may receive a temporary restricted license as provided in section 321.215.

This new section requires the suspension of the driver license of a juvenile who has committed certain acts in violation of the juvenile code, chapter 232. Adjudications of delinquency under chapter 232 are generally not considered to be criminal convictions. Iowa Code § 232.55(1). The financial responsibility provisions in section 321A.17 are tied to convictions, not juvenile court adjudications. Therefore, because an adjudication or disposition under chapter 232 is not a conviction, the financial responsibility requirements of section 321A.17 do not apply, absent a special statutory directive.

In a related statute the legislature has provided just such a special directive with regard to certain code violations that are not generally considered to be convictions. Section 321.213 treats certain adjudications the same as a conviction, as follows:

> Upon the entering of an order at the conclusion of an adjudicatory hearing under section 232.47 that the child violated a provision of this chapter or chapter 124, 126, 321A, 321J, or 453B for which the penalty is greater than a simple misdemeanor, the clerk of the juvenile court in the adjudicatory hearing shall forward a copy of the adjudication to the department. Notwithstanding section 232.55, a final adjudication in a juvenile court that the

> child violated a provision of this chapter or section 124.401, 124.402, 124.403, a drug offense under section 126.3, or chapter 321A, 321J, or 453B constitutes a final conviction of a violation of a provision of this chapter or section 124.401, 124.402, 124.403, a drug offense under section 126.3, or chapter 321A, 321J, or 453B for purposes of section 321.189, subsection 8, paragraph "b", and sections 321.193, 321.194, 321.200, 321.209, 321.210, 321.215, 321.555, 321A.17, 321J.2, 321J.3, and 321J.4.

Thus, by virtue of the above section, certain juvenile court adjudications are treated the same as convictions for the purposes listed in the section, one of which is section 321A.17. However, new section 321.213A, lacks similar language. Had the legislature intended to treat these adjudications as convictions it knew how to do so. First National Bank v. Matt Bauer Farms Corp., 408 N.W.2d 51, 55 (Iowa 1987) ("Had the legislature intended to alleviate any supposed unfairness to the statute by providing exceptions . . . it certainly knew how to do so.") The failure of the legislature to insert language which treats adjudications as convictions strongly suggests that the legislature intended to exempt juveniles whose licenses are suspended under section 321.213A from the financial responsibility requirements of section 321A.17. For these reasons, it is the conclusion of this office that proof of financial responsibility is not required when the Iowa Department of Transportation suspends a license under section 321.213A.

Sincerely,

Julie Burger

JULIE BURGER
Assistant Attorney General

JUVENILE LAW; CONFIDENTIALITY: Release of mental health information. Iowa Code §§ 228.6, 228.9, 232.97, 232.101, 232.102, 232.147(3)(6), 235A.2(a)(1) (1993); 441 IAC 182.5(5)(a)(3), (c)(5), (f)(7), 182.9(2)(d) and 1285.10(4), (5), (6)(h) and 8(d). With the exception of "psychological test materials" which are subject to the requirements of Iowa Code section 228.9, Department of Human Services rules found at 441 IAC 182.5(5)(a)(3), (c)(5), (f)(7), 182.9(2)(d) and 185.10(4), (5), (6)(h) and 8(d) which require the release of treatment information by a service provider to a child's attorney, do not conflict with other statutes and administrative rules on confidentiality but merely facilitate the exchange of information otherwise available to the child's attorney or guardian ad litem. (Wickman to Halvorson, State Representative, **11-29-94**) **#94-11-2(L)**

November 29, 1994

The Honorable Roger A. Halvorson
State Representative
P.O. Box 627
Monona, IA 52159

Dear Representative Halvorson:

You have requested an opinion of this office concerning whether the amendments to the new rehabilitative services rules of the Department of Human Services requiring the release of certain information by a service provider to a child's attorney in juvenile proceedings are in conflict with other administrative rules regarding confidentiality of the same information. The amended rules to which you refer are found in Iowa Administrative Code section 441--182.5(5)(a)(3), (c)(5), (f)(7), 182.9(2)(d), and 185.10(4), (5), (6)(h), (8)(d). You have asked whether these rules conflict with other state administrative rules and statutes governing the release of confidential client information or child abuse and neglect information to third parties.

Because we do not have the actual documents before us, in order to answer your question, two assumptions need to be made. First, it is assumed the client information at issue is "mental health information" as defined in Iowa Code section 228.1(5)(1993). Second, it is assumed that the information is generated and kept as a result of an order of the juvenile court in a pending child in need of assistance action. In most cases, a child would not have an attorney or guardian ad litem in the absence of such an action, which fact you have suggested in your question.

Iowa Code section 235A.2(a)(1) gives a child's attorney or guardian ad litem direct access to child abuse information regarding the child. Iowa Code section 235A.17(1) also allows a person, agency or other recipient of child abuse information authorized to receive such information or redisseminate it if all of the following conditions apply:

a. The redissemination is for official purposes in connection with prescribed duties, or in the case of a health practitioner, pursuant to professional responsibilities.

b. The person to whom such information would be redisseminated would have independent access to the same information under section 235A.15.

c. A written record is made of the redissemination, including the name of the recipient and the date and purpose of the redissemination.

d. The written record is forwarded to the registry within thirty days of the dissemination.

In most circumstances child abuse reports will be, or will have been, entered into evidence in juvenile court. The child's attorney is entitled to view and receive copies of any documents entered into evidence in the child-in-need-of-assistance proceedings. See Iowa Code §§ 232.147(3) and (6).

The Department of Human Services rules which you question facilitate the transfer of information between persons who by law already have access to said information. The rules allowing and requiring redissemination of child abuse information to a child's attorney or guardian ad litem appear to be consistent with the laws governing the confidentiality of such information.

During the course of a typical child-in-need-of-assistance proceeding, the juvenile court orders the Department of Human Services to gather and submit a number of reports regarding the child and his or her family other than child abuse reports. See Iowa Code §§ 232.97, 232.101, and 232.102. These reports include confidential client information generated and kept by private agencies and other service providers as a result of purchase of service agreements with the Department of Human Services. The child's attorney or guardian ad litem would also have access to any of these documents submitted to the court.

The child's attorney or guardian ad litem will also have access to mental health information pursuant to Iowa Code section 228.6 (1993). This section provides in part:

> 1. A mental health professional or an employee of or agent for a mental health facility may disclose mental health information if and to the extent necessary, to meet the requirements of section . . . 232.147, or to meet the compulsory reporting or disclosure requirements of other state or federal law relating to the protection of human health and safety.
>
> 2. Mental health information acquired by a mental health professional pursuant to a court-ordered examination may be disclosed pursuant to court rules (emphasis added).

Iowa Code section 232.147, referenced above, addresses the confidentiality of juvenile court records, and provides the child, and the child's counsel or guardian ad litem with access to official juvenile court records. No court order is required for such access. See Iowa Code §§ 232.147(3)(b) and (c). Read together these two provisions indicate that the child's attorney and guardian ad litem are to have access to mental health information involved in the juvenile court proceeding.

With respect to the information and documents discussed thus far, it is our opinion that the Department's rules do not conflict with other state or administrative rules governing the release of confidential information. In all respects, the statutory requirements and administrative rules appear to be in harmony with each other and with the goal to facilitate disclosure to the child's attorney and guardian ad litem.

One note discordant with this harmony was recently passed by the Iowa Legislature in chapter 1159 of the Laws of the 75th General Assembly, 1994 Session, as a new section to Iowa Code chapter 228. In that new section 228.9, a prohibition on the disclosure of "psychological test material" was created. Those "materials" are not to be disclosed to any person, including the subject of the test, nor are the "materials" to be disclosed in any "administrative, judicial or legislative proceeding." The term "psychological test materials" is not defined in the statutory amendment. Without knowing more about the information and documents to which your question is addressed, we cannot in this opinion resolve questions concerning the applicability of

this limited exception. The determination of what information is considered to be "psychological test materials" will need to be resolved on case-by-case basis, consistently with section 228.9. In all other situations discussed, that is, if "psychological test materials" are not involved, the administrative rules of the Department facilitate the transfer of information otherwise confidential between and among persons who already have legal access to the documents and information.

In summary, it is our opinion that with the exception of "psychological test materials" which are subject to the non-disclosure requirements of Iowa Code section 228.9, the Department of Human Services rules found at 441 IAC 182.5(5)(a)(3), (c)(5), (f)(7), 182.9(2)(d) and 185.10(4), (5), (6)(h) and 8(d) which require the release of treatment information by a service provider to a child's attorney, do not conflict with other statutes and administrative rules on confidentiality but merely facilitate the exchange of information otherwise available to the child's attorney or guardian ad litem.

Sincerely,

Mary K. Wickman

MARY K. WICKMAN
Assistant Attorney General

MKW/mo

TAXATION: Real Estate Transfer Tax Where Mortgage Debt Is Not Assumed. Iowa Code § 428A.1 (1993). An existing mortgage upon real estate purportedly transferred as a gift is "consideration," as that term is used in section 428A.1, even if the mortgage is not assumed by the transferee. Accordingly, the transfer tax is imposed on transfers involving such consideration. (McCown to Richards, Story County Attorney, 12-15-94) #94-12-2(L)

December 15, 1994

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

Dear Ms. Richards:

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

> How much transfer tax should be collected when a parcel of property held in the name of a partnership and containing a $1 million mortgage is transferred to an individual member of the partnership and the Warranty deed states that the "transaction is without consideration and should therefore be treated as a gift for purposes of chapter 428A?

In relevant part, section 428A.1, first unnumbered paragraph, imposes a real estate transfer tax as follows:

> There is imposed on each deed, instrument, or writing by which any lands, tenements, or other realty in this state shall be granted, assigned, transferred, or otherwise conveyed, a tax determined in the following manner: When there is no consideration . . . there shall be no tax. When there is consideration and the actual market value of the real property transferred is in excess of five hundred

> dollars, the tax shall be fifty-five cents for each five hundred dollars or fractional part of five hundred dollars in excess of five hundred dollars. The term "consideration" as used in this chapter, means the full amount of the actual sale price of the real property involved, paid or to be paid, including the amount of an encumbrance or lien on the property, whether assumed or not by the grantee. . . .

Iowa Code § 428A.1 (1993) (emphasis added).

Iowa Code section 428A.1 imposes the tax on the "actual sale price" paid for the property to be transferred. A valid consideration constitutes the "actual price paid." 1972 Op. Att'y Gen. 654, 655. Consideration is what is received by the grantor in exchange for the transferred property. Id. at 655. Section 428A.1 specifically states that "[t]he term 'consideration' means the full amount of the actual sale price of the real property involved, paid or to be paid, including the amount of the encumbrance or lien on the property, whether assumed or not by the grantee." Where an interest in realty is conveyed for a consideration, a tax will be imposed on the amount of that consideration in accordance with section 428A.1. An outright gift of a deed is exempt from this transfer tax; however, "A deed which is part gift and part sale in reality amounts to a deed given for a consideration. . . ." It is a type of transfer which is taxable to the extent of the consideration paid." 1972 Op. Atty Gen. at 657.

More specifically, you ask: when the transferee does not assume the mortgage debt, how should the recorder interpret and apply the language from section 428A.1, which states that consideration includes the amount of an encumbrance or lien whether assumed or not by the grantee?

This office addressed a similar issue in an earlier opinion. It was opined that "where real estate is transferred, purportedly as a gift, and the transferee receives the property which is encumbered with a mortgage or other lien and assumes payment of the underlying debt, the deed, instrument, or writing is taxable under the provisions of section 428A.1 to the extent of the assumed debt." 1982 Op. Att'y Gen. 44, 46. Your question concerns real estate transferred as a gift where the transferee does not assume the underlying debt. It is our opinion from the language of the statute, the Iowa legislature clearly intended that a mortgage upon real estate, whether assumed by the transferee, was "consideration" as that term is used in section 428A.1 and thus is taxable.

When the language employed in a statute is plain, clear and unambiguous, no construction is necessary or allowed. Ladd v. Iowa West Racing Ass'n, 438 N.W.2d 600, 602 (Iowa 1989). When the language is plain, clear and unambiguous, courts are simply to apply the statutory language to the facts in question unless its application to a given set of facts would produce an absurd, ridiculous or anomalous result. Id.; John Deere Dubuque Works of Deere & Co. v. Weyant, 442 N.W.2d 101, 104 (Iowa 1989). In our opinion, the language of section 428A.1 is clear and plain, and its application does not create absurd results.

Iowa Code section 428A.1 expressly includes encumbrances such as mortgages and other liens upon real estate as consideration whether or not assumed by the transferee. In the situation presented, a transfer tax is imposed on transfers involving such consideration.

Sincerely,

Valencia Voyd McCown

VALENCIA VOYD McCOWN
Assistant Attorney General

VVM:cml

STATE OFFICERS AND DEPARTMENTS; SCHOOLS AND SCHOOL DISTRICTS: Powers of area education agencies. Iowa Code §§ 273.2, 273.3, 274.1, 297.2, 297.6, 297.22 (1993). Area education agencies may not buy property from sources other than school districts. (Kempkes to Ramirez, Director, Department of Education, **12-21-94) #94-12-3(L)**

December 21, 1994

Mr. Al Ramirez, Director
Department of Education
Grimes State Office Building
Des Moines, IA 50319

Dear Director Ramirez:

Twenty years ago the General Assembly replaced county school systems with "area education agencies." See 1974 Iowa Acts, 65th G.A., ch. 1172, at 550-603; Bishop v. Keystone Area Educ. Agency, 275 N.W.2d 744, 746 (Iowa 1979). You have requested an opinion primarily involving Iowa Code chapter 273 (1993), which governs area education agencies. After noting a recent legislative amendment to chapter 273 and a legal opinion about its impact from a private attorney, you ask whether the General Assembly intended to allow area education agencies (1) to buy property from sources other than school districts and (2) if so, to buy it without approval from the Department of Education. Our review of the Iowa Code and applicable principles of statutory construction and interpretation leads us to conclude that the General Assembly did not intend for area education agencies to buy property from sources other than school districts.

I.

Area education agencies have been classified as school corporations for the purpose of exercising their powers under chapter 273. See Iowa Code § 273.2. They thus possess only those powers expressly set forth, or necessarily implied, by statute. Sioux City Community School Dist. v. Bd. of Pub. Instruction, 402 N.W.2d 739, 741 (Iowa 1985); Bellmeyer v. Indep.

Dist. of Marshalltown, 44 Iowa 564, 565 (1876); 1992 Op. Att'y Gen. 179; 68 Am. Jur. 2d Schools § 16, at 366 (1993); 78 C.J.S. Schools and School Districts § 119, at 902 (1952). See generally 1980 Op. Att'y Gen. 54. As a result, a doubtful claim of power must be resolved against its existence. Bishop v. State Bd. of Pub. Instruction, 395 N.W.2d 888, 894 (Iowa 1986) (Wolle, J., dissenting); Andrew v. Stuart Sav. Bk., 204 Iowa 570, 215 N.W. 807, 808-809 (1927); 78 C.J.S., supra, § 119, at 904-05; see Elroy-Kendall-Wilton Schools v. Coop. Educ. Serv. Agency, 306 N.W.2d 89, 91 (Wis. App. 1981) (any reasonable doubt of implied power should be resolved against its existence).

Section 273.2 (Supp. 1993) provides that area education agencies may "hold" property and, pursuant to section 273.3(7), execute lease-purchase agreements. It also provides that area education agencies executing such agreements must receive approval from the Department of Education if the lease exceeds ten years or the purchase price exceeds $25,000.

Section 273.3 sets forth the duties and powers of the boards of directors for area education agencies. Among other things, it specifically authorizes them to determine policies, receive and expend money for programs and services, provide directly or contractually for special education programs and media services, employ personnel, and prepare annual budgets. See Iowa Code § 273.3(1)-(2), (4)-(6), (10)-(19).

Section 273.3 sets forth two instances in which the boards of area education agencies act subject to the State Board of Education: the State Board enacts rules governing the special-education programs or media services provided by area education agencies, and it approves the budgets submitted by the boards of area education agencies. See Iowa Code § 273.3(5), (12). Section 273.3 also sets forth two instances in which the boards of area education agencies may act subject to the direct approval of the Department of Education: it provides that they shall

> (7). Be authorized to lease, subject to the approval of the director of the department of education[,] and to receive by gift and operate and maintain facilities and buildings necessary to provide authorized programs and services. However, a lease for less than ten years and with an annual cost of less than [$25,000] does not require approval . . . .
>
> (8). Be authorized, subject to the approval of the director of the department of education, to enter into agreements for the joint use of personnel, buildings, .

> facilities, supplies, and equipment with school corporations . . . .

See Iowa Code § 273.3(3), (9) (also mentioning direction or approval from Department of Education).

In Senate File 2231, effective April 19, 1994, the General Assembly passed an act relating to the sale, lease, or disposal of property by area education agencies. 1994 Iowa Acts, 75th G.A., ch. 1089, at 175. The first provision of Senate File 2231 created a new power in section 273.3 for the boards of area education agencies that, like subsections (7) and (8), may require direct approval from the Department of Education. See 1994 Iowa Acts, 75th G.A., ch. 1089, § 1, at 175. Now boards of area education agencies shall

> (20). Be authorized to sell, lease, or dispose of . . . property belonging to the area education agency. . . . Before the board . . . may lease property . . . , the board shall obtain the approval of the director of the department of education.

At the same time, the General Assembly in Senate File 2231 amended chapter 297, which governs school district property. Section 297.22(1) permits a school district to sell, lease, or dispose of a schoolhouse, site, or other property. Section 297.22(1) also provides that under certain circumstances a school district "may sell, lease, exchange, give, or grant" any interest in real property to various public entities. The second provision of Senate File 2231 changed section 297.22(1) by specifically adding area education agencies to those public entities. See 1994 Iowa Acts, 75th G.A., ch. 1089, § 2, at 175.

II.

The answer to your question about the power of area education agencies to buy property from sources other than school districts depends upon the legislative intent underlying these statutes. See Iowa Code §§ 4.1, 4.2. Critical to determining legislative intent is the specific language the General Assembly chose to employ in drafting the statutes. See Iowa R. App. P. 14(f)(13) (statutory construction focuses upon what legislature said, not what it should or might have said). Unambiguous words or phrases do not require any construction or interpretation unless the approved usage of the language appears inconsistent with the manifest legislative intent or repugnant to the statutory context. See Iowa Code §§ 4.1, 4.1(38); State v. Hopkins, 465 N.W.2d 894, 896 (Iowa 1991) (generally improper to search for statutory meaning when language plain and meaning clear); State v. Byers, 456 N.W.2d 917, 919 (Iowa 1990)

(impermissible to extend or enlarge statutory terms under guise of statutory construction); see also Good v. Iowa Civil Rights Comm'n, 368 N.W.2d 151, 155 (Iowa 1985) (statutory words must be given ordinary meaning unless legislature, or law in general, provides special meaning); 1992 Op. Att'y Gen. 199; 1992 Op. Att'y Gen. 192. In other words, if the General Assembly provided explicit and fairly certain statutory terms in its enactments, then principles of statutory construction and interpretation become inapplicable unless a strict application of those terms would lead to injustice, absurdity, or contradiction. State v. Perry, 440 N.W.2d 389, 391 (Iowa 1989).

We find nothing in chapters 273 and 297 indicating a legislative intent to allow area education agencies to buy property from sources other than school districts. The statutory language -- which is plain, simple, clear, and explicit -- neither stretches that far nor implies that much.

First, no statute expressly provides for such purchasing authority. Section 273.2 merely indicates that area education agencies may "hold" property; it does not mention they may "buy" or "purchase" it. This choice of language carries significance, because the General Assembly throughout the Iowa Code has used "buy" or "purchase" and "hold" within the same sentence to describe the powers of various entities. E.g., Iowa Code §§ 15E.136, 15E.137(3), 321.104(2), 330A.8(4), 490.302(4), 490A.202(5), 496B.8(1), (4), 502.407, 504A.4(4), 524.801(4), 534.103(1). For example, an aviation authority may "purchase, hold, . . . and lease" property; and a corporation may "[p]urchase, . . . hold, . . . and otherwise deal with" property. Iowa Code §§ 330A.8(3), 490.302(4). We also note that the General Assembly's most recent enactment concerning such powers authorizes school districts to "purchase . . . or otherwise acquire" a building for use as a school-lunch facility. 1994 Iowa Acts, 75th G.A., ch. 1029, § 20, at 62 (amending Iowa Code § 283.9 (1993)).

Such a practice certainly suggests a legislative intent to distinguish, and thus exclude, buying property from the mere holding of it. See generally Kohrt v. Yetter, 344 N.W.2d 245, 248 (Iowa 1984). This intent comports with normal definitions: the power to hold does not signify the power to buy. Black's Law Dictionary 730-31 (1990); Crabb's English Synonyms 416-18 (1917); E. Ordway, Synonyms and Antonyms 150-51 (1913); Scholastic Dictionary of Synonyms, Antonyms, Homonyms 93 (1965); Webster's Ninth New Collegiate Dictionary 540 (1978). Regarding property, then, the General Assembly has expressly given less power to area education agencies than to school districts. Although section 274.1 provides that school districts may -- like area education agencies under section 273.2 -- "hold" property, section 297.2 further provides that school districts may "take and hold"

certain property for use as a schoolhouse site, and section 297.6 similarly provides that they may "take and hold" property through the process of condemnation. See generally Webster's, supra, at 1178 ("take" includes "buy").

Second, nothing in the recent legislative amendments to chapters 273 and 297 necessarily implies a power on the part of area education agencies to buy property from sources other than school districts. Senate File 2231 merely classified area education agencies as an entity that could, in one of many ways, acquire property from a school district and authorized them to sell, lease, or dispose of property. That a school district may sell, lease, exchange, give, or grant property to area education agencies, which may only dispose of property in some way, does not necessarily imply a power on their part to buy property from sources other than school districts. See Lacina v. Maxwell, 501 N.W.2d 531, 533 (Iowa 1993) (express mention of one thing in statute implies exclusion of another); Dist. Township v. City of Dubuque, 7 Iowa (C. Cole) 262, 275-76 (1858) (affirmative words may imply a negative of what is not affirmed, as strongly as if expressed); 1992 Op. Att'y Gen. 86. Cf. In re Estate of Mills, 374 N.W.2d 675, 677 (Iowa 1985) (when statute enumerates certain exceptions, legislature presumably intended no others). This conclusion receives support from the limitation set forth in section 273.3(7), which only authorizes area education agencies to "receive by gift" facilities and buildings necessary for providing programs and services.

III.

In conclusion, section 273.3 does not authorize area education agencies to buy property from sources other than school districts. We note that this lack of statutory authorization does not appear unusual. See, e.g., Elroy-Kendall-Wilton Schools v. Coop. Educ. Serv. Agency, 306 N.W.2d at 91-92; Ofenloch v. Gaynor, 320 N.Y.S.2d 362 (Sup. Ct. 1970), affirmed, 317 N.Y.S.2d 267 (App. Div.), appeal dismissed, 270 N.E.2d 727, 270 N.E.2d 902 (1971).

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

FIRE DISTRICTS; CITIES: Power of benefited fire district to levy tax independent of contract with city. Iowa Code § 357B.3 (1993). If a fire district has elected to impose the maximum tax levy under section 357B.3(1), it may levy an additional tax under section 357B.3(2) only if the first levy proves insufficient for funding fire protection. If, however, a district has elected to contract with a city to provide fire protection, it may not supplement the funds received under that contract by independently levying a tax pursuant to section 357B.3(2). (Kempkes to Connors, State Representative, 12-21-94) #94-12-4(L)

December 21, 1994

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

Dear Representative Connors:

You have requested an opinion regarding Iowa Code chapter 357B (1993). This chapter governs the duties and powers of trustees in charge of "benefited fire districts." You mention that several unincorporated areas, which formerly paid for their fire protection by taxes levied by certain districts, have been incorporated into various cities. These areas now receive fire protection from the districts through their existing contracts with the cities. Some trustees believe that the cities, which have made their payments based upon a tax of 40 1/2 cents per $1,000 of valuation of their general-fund-tax receipts, have made inadequate contributions for fire protection. They wish to levy independently an "additional" tax of 20 1/4 cents per $1,000 of valuation to increase the cities' contributions.

You ask whether section 357B.3(2) permits a district to levy such a tax upon cities contracting for fire protection. We conclude that under such circumstances a district may not do so. This conclusion results from application of the principle that clear statutory language normally does not leave any room for employing rules of statutory construction. See General Elec. Co. v. Iowa Bd. of Tax Review, 492 N.W.2d at 420; 3A Sutherland's Statutory Construction § 66.01, at 2 (1992). Moreover, application of another principle -- that the power of inferior tribunals (such as fire districts) to levy taxes will be strictly construed against its existence -- would result in the same

conclusion if the language in section 357B.3(2) were unclear. See Great Northern Ry. v. Plymouth County, 197 Iowa 903, 196 N.W. 284, 284 (1923); Sutherland's, supra, § 66.01, at 1, § 66.05, at 30; see also General Elec. Co. v. Iowa Bd. of Tax Review, 492 N.W.2d 417, 420 (Iowa 1992).

Section 357B.3 allows benefited fire districts to provide their services to cities by contract. See 1990 Op. Att'y Gen. 104. Section 357B.3(1) also allows them to levy an annual tax not exceeding 40 1/2 cents per $1,000 of assessed property values. Section 357B.3(2) provides that "[if this levy] is insufficient to provide the services authorized or required under this section, [a district] may levy an additional annual tax not exceeding [20 1/4 cents per $1,000] of assessed value of the taxable property in the . . . district to provide the services" (emphasis added). See generally Iowa Code § 4.1(30)(c) (legislature's use of "may" confers a power). Section 357B.8(1) provides that a city formerly within a district before its incorporation may continue to receive fire protection from the district under a contract or direct levy; and section 357B.8(2) provides that in such instances a district may, with the approval of the city council, instead certify an annual tax levy not exceeding 40 1/2 cents per $1,000 of assessed property values within the city.

The trustees concerned about the adequacy of the cities' contributions apparently look to section 357B.3(2) as the source of their power to levy an "additional" tax independent of their contracts with the cities. Such an independent taxing power, however, clearly does not exist under section 357B.3, which sets forth two methods of funding for fire protection provided by benefited fire districts. First, districts may let out contracts for their services. See Iowa Code § 357B.3(1). Second, districts may levy an annual tax not exceeding 40 1/2 cents per $1,000 of assessed property values, and, if this tax proves insufficient, they may then levy an additional tax not exceeding 20 1/4 cents per $1,000 of assessed property values. See Iowa Code § 357B.3(1), (2). The conditional language providing for the levying of this additional tax is clear and thus requires no construction. Cf. Hartz v. Truckenmiller, 228 Iowa 819, 293 N.W. 568, 572 (1940) (statute was clear when it conditionally provided that "[i]f any levy of assessment is not sufficient to meet the interest and principal of outstanding bonds, additional assessments may be made" by county). See generally General Elec. Co. v. Iowa Bd. of Tax Review, 492 N.W.2d at 420; Great Northern Ry. v. Plymouth County, 196 N.W. at 284.

In other words, if a district has elected to impose the maximum tax levy under section 357B.3(1), it may levy an additional tax under section 357B.3(2) only if the first levy proves insufficient for funding fire protection. If, however, a

district has elected to contract with a city to provide fire protection, it may not supplement the funds received under that contract by independently levying a tax pursuant to section 357B.3(2).

Sincerely,

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