CITIES; COUNTIES; REAL PROPERTY: Subdivision platting. Iowa Code §§ 354.8, 354.9 (1997). A city can require subdivision platting within two miles of its corporate boundaries when neither state law nor county ordinance requires such platting. (Kempkes to Kibbie, State Senator, 1-6-98) #98-1-1(L)

January 6, 1998

The Honorable John P. Kibbie
State Senator
4285 440th Ave.
Emmetsburg, IA 50536

Dear Senator Kibbie:

You have requested an opinion about the public regulation of land use. You ask whether a city can require subdivision platting within two miles of its corporate boundaries when neither state law nor county ordinance requires such platting. We conclude that Iowa Code chapter 354 (1997) permits a city to do so.

I.

Public regulation of land subdivision in the United States dates from before 1900. Cunningham, "Land-Use Controls -- the State and Local Programs," 50 Iowa L. Rev. 367, 415-16 (1965). Only after World War I, however, did such regulation receive much emphasis as a means to implement plans for orderly and efficient community development. Id.; Tomain, Land Use Controls In Iowa," 27 Drake L. Rev. 254, 255 (1977-78); Mann, "Trends in the Use of Public Controls Affecting Agricultural Landownership in Europe and Great Britain," 50 Iowa L. Rev. 458, 458 (1965).

The General Assembly has provided for the public regulation of land subdivision in chapter 354, which is entitled "Platting -- Division and Subdivision of Land." According to the General Assembly, the public has an interest in the design of subdivisions and in the provision of uniform procedures and standards governing the platting of land while allowing "the widest possible latitude"

for cities and counties to establish and enforce ordinances regulating the division of land. See Iowa Code § 354.1.

Your question primarily implicates two provisions in chapter 354: sections 354.8 and 354.9. Section 354.8 provides:

> 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. . . .

(emphasis added). See generally Iowa Code § 4.1(38) (defining "shall" and "may"), § 354.2(7), (17) (defining "governing body" and "subdivision plat"). 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 the 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 or waive the requirements of any of its standards or conditions for approval of subdivisions, and certify the resolution . . . .

(emphasis added). See generally Iowa Code § 354.2(5), (16) (defining "division" and "subdivision").

II.

You have asked whether a city can require subdivision platting within two miles of its corporate boundaries when neither state law nor county ordinance requires such platting.

Section 354.8 provides that a city may review and approve a proposed subdivision plat and establish jurisdiction, pursuant to

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January 6, 1998

The Honorable John P. Kibbie
State Senator
4285 440th Ave.
Emmetsburg, IA 50536

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I.

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section 354.9, to review subdivisions outside its boundaries. Section 354.9(1) provides that if a city desires to review subdivisions outside its boundaries, it "shall establish by ordinance the area subject to the city's review and approval." Section 354.9(2) provides that if a proposed subdivision lies within a county having ordinances that regulate land division and also within the city's area of review, then the subdivision "shall be submitted to both the city and county for approval." Section 354.9(2) also provides that the city or county "may waive its right to review the subdivision or waive the requirements of any of its standards or conditions for approval of subdivisions."

We examined section 354.9 in a recent opinion that addressed the issue whether a city may impose standards or conditions upon proposed subdivisions located outside its corporate boundaries. See 1994 Op. Att'y Gen. 142 (#94-9-9(L)). Section 354.9(2), we there emphasized, provides that a proposed subdivision within a city's extraterritorial jurisdiction "shall be submitted to both the city and county for approval." Id. We thus concluded section 354.9(2) "establishes that both a county and city may disapprove a proposed subdivision located outside a 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." Id. (citations omitted).

Other opinions from this office have reached similar conclusions. See 1980 Op. Att'y Gen. 203, 203 (under Iowa Code section 409.14 (1979), plats of subdivisions located within two miles of a city "may have to conform to that city's requirements"); 1980 Op. Att'y Gen. 96 (#79-4-21(L)) (Iowa Code chapters 306 and 409 (1979) provide a city with authority to impose requirements for roads in rural subdivisions located within one mile of its boundaries); see also 1995 Ark. Op. Att'y Gen. 172 (interpreting Arkansas law); 1977 Kan. Op. Att'y Gen. 140 (interpreting Kansas law); 43 Mont. Op. Att'y Gen. 77 (interpreting Montana law); 1994 Ohio Op. Att'y Gen. 2-181 (interpreting Ohio law); 1983 Tex. Op. Att'y Gen. (# JM-20) (interpreting Texas law).

From these opinions, we believe that the import of section 354.9 is that a city has the power to require subdivision platting within two miles of its corporate limits when neither state law nor county ordinance requires such platting. See generally Iowa Code § 354.1 (cities and counties have "the widest possible latitude" to establish and enforce ordinances regulating division of land); Oakes Const. Co. v. Iowa City, 304 N.W.2d 797, 806 (Iowa 1981) ("we incline toward a reasonably liberal reading of subdivision legislation"); Note, "Subdivision Regulation in Iowa," 54 Iowa L. Rev. 1121, 1131 (1969) ("Iowa law provides . . . municipalities with an effective aid to subdivision control by extending the jurisdiction of cities one mile beyond the corporate limits"). Moreover, chapter 354 in its entirety does not suggest that a

county's decision against requiring the platting of subdivisions has any effect upon a city's power to require such platting within two miles of its corporate boundaries. Cf. 1980 Op. Att'y Gen. 96 (#79-4-21(L)) (county zoning and subdivision requirements generally "play no part" in a city's authority to impose requirements for roads in rural subdivisions located within one mile of its boundaries).

The power of a city to require subdivision platting within two miles of its corporate limits, when neither state law nor county ordinance requires such platting, does not appear unusual. See Advisory Comm. on Planning and Zoning, U.S. Dep't of Commerce, "Standard City Planning Enabling Act," § 12 (1928); 8 E. McQuillin, The Law of Municipal Corporations § 25.13, at 46 (1991); Cribbet, "Changing Concepts in Land Use," 50 Iowa L. Rev. 245, 267 (1965); Note, "Subdivision Regulation in Iowa," 54 Iowa L. Rev. 1121, 1131 (1969) ("new subdivisions will most likely be contiguous to an existing municipality and probably will eventually be incorporated by it, making subdivision control by the city seem particularly appropriate").

Last, sound public policy reinforces the conclusion that a city has such power. See generally Iowa Code § 4.6(5) (statutory interpretation may involve a consideration of the consequences of a particular interpretation); State v. Buchanan, 549 N.W.2d 291, 294 (Iowa 1996). As one commentator has observed, "[There are] compelling practical reasons why the extension of municipal control is essential for sound metropolitan development." Note, "Subdivision Regulation in Iowa," 54 Iowa L. Rev. 1121, 1121, 1122-23 (1969).

> Since subdividers must realize a profit in order to remain in business, their tendency will be to minimize public improvements, provide streets and utility facilities at the lowest possible cost, and design and lay out the subdivision in the least expensive manner. If subdividers are allowed unfettered license in developing the new suburbs the result may often be poorly designed street and lot layout, inadequately operating utility services and overcrowded or spotty development. . . .
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We examined section 354.9 in a recent opinion that addressed the issue whether a city may impose standards or conditions upon proposed subdivisions located outside its corporate boundaries. See 1994 Op. Att'y Gen. 142 (#94-9-9(L)). Section 354.9(2), we there emphasized, provides that a proposed subdivision within a city's extraterritorial jurisdiction "shall be submitted to both the city and county for approval." Id. We thus concluded section 354.9(2) "establishes that both a county and city may disapprove a proposed subdivision located outside a 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." Id. (citations omitted).

Other opinions from this office have reached similar conclusions. See 1980 Op. Att'y Gen. 203, 203 (under Iowa Code section 409.14 (1979), plats of subdivisions located within two miles of a city "may have to conform to that city's requirements"); 1980 Op. Att'y Gen. 96 (#79-4-21(L)) (Iowa Code chapters 306 and 409 (1979) provide a city with authority to impose requirements for roads in rural subdivisions located within one mile of its boundaries); see also 1995 Ark. Op. Att'y Gen. 172 (interpreting Arkansas law); 1977 Kan. Op. Att'y Gen. 140 (interpreting Kansas law); 43 Mont. Op. Att'y Gen. 77 (interpreting Montana law); 1994 Ohio Op. Att'y Gen. 2-181 (interpreting Ohio law); 1983 Tex. Op. Att'y Gen. (# JM-20) (interpreting Texas law).

From these opinions, we believe that the import of section 354.9 is that a city has the power to require subdivision platting within two miles of its corporate limits when neither state law nor county ordinance requires such platting. See generally Iowa Code § 354.1 (cities and counties have "the widest possible latitude" to establish and enforce ordinances regulating division of land); Oakes Const. Co. v. Iowa City, 304 N.W.2d 797, 806 (Iowa 1981) ("we incline toward a reasonably liberal reading of subdivision legislation"); Note, "Subdivision Regulation in Iowa," 54 Iowa L. Rev. 1121, 1131 (1969) ("Iowa law provides . . . municipalities with an effective aid to subdivision control by extending the jurisdiction of cities one mile beyond the corporate limits"). Moreover, chapter 354 in its entirety does not suggest that a

> now the most important development area, it is here that the most significant public influence should be exerted. Although the individual subdivider may see his particular subdivision as a complete unit, the planning agency or commission must necessarily view it as a segment of an entire community.

Note, "Subdivision Regulation in Iowa," 54 Iowa L. Rev. 1121, 1121, 1122-23 (1969) (footnote omitted). Accord Cribbet, "Changing Concepts in Land Use," 50 Iowa L. Rev. 245, 266-67 (1965); Huber, "Allocation of Rights in Land," 50 Iowa L. Rev. 279, 281 (1965); Cunningham, "Land-Use Controls -- the State and Local Programs," 50 Iowa L. Rev. 367, 415-16 (1965); Tomain, Land Use Controls In Iowa," 27 Drake L. Rev. 254, 300-03, 309 (1977-78). See K-Line Farms, Inc. v. Waterloo Bd. of Review, 275 N.W.2d 424, 424 (Iowa 1979); 1994 Op. Att'y Gen. 84, 85. This reasoning, we note, has been cited with approval by the Supreme Court of Iowa in Oakes Construction Company v. Iowa City, 304 N.W.2d 797, 805 (Iowa 1981).

III.

In conclusion, a city can require subdivision platting within two miles of its corporate boundaries when neither state law nor county ordinance requires such platting.

Sincerely,

Bruce Kempkes
Assistant Attorney General

CITIES; TAXATION; CONSTITUTIONAL LAW: Tax increment financing; public purpose. Iowa Const. art. III, § 31 (1857); Iowa Code §§ 403.2, 403.5, 403.17 (1997). Assuming a city's urban renewal plan properly provides for the demolition of a privately owned building and assures that the use of public funds will achieve a public purpose, the state constitutional prohibition against using public funds for private purposes does not necessarily preclude the city from expending funds from tax increment financing to demolish the building. (Kempkes to Moreland, State Representative, **#98-1-2(L))**
1-6-98

January 6, 1998

The Honorable Michael J. Moreland
State Representative
2716 Clearview
Ottumwa, IA 52501

Dear Representative Moreland:

You have requested an opinion on public finance and urban renewal projects. You ask whether a city may expend funds from tax increment financing to demolish a privately owned building apparently located within an urban renewal area and unsuited for rehabilitation. Assuming the city's urban renewal plan properly provides for such demolition and assures that the use of public funds will achieve a public purpose, we conclude the city may do so.

I.

Iowa Code chapter 403 (1997) is entitled Urban Renewal. See generally Iowa Code ch. 403A (Municipal Housing Projects), ch. 404 (Urban Revitalization Tax Exemptions); Cribbett, "Changing Concepts in Land Use," 50 Iowa L. Rev. 245, 270-72 (1965); Cunningham, "Land-Use Control," 50 Iowa L. Rev. 367, 437-38, 443-45 (1965); Tomain, "Land Use Controls in Iowa," 27 Drake L. Rev. 254, 257-59 (1977-78). Enacted in 1957, chapter 403 "empowers Iowa cities to take specified steps 'to eliminate slums and prevent the development or spread of slums and urban blight and to encourage needed urban rehabilitation.'" Richards v. City of Muscatine, 237 N.W.2d 48, 53 (Iowa 1975) (citation omitted). See Iowa Code § 403.2. See generally 1957 Iowa Acts, 57th G.A., ch. 197, § 1.

These steps included the power to issue bonds to pay for urban renewal projects. See Iowa Code § 403.9.

In 1969, the General Assembly amended chapter 403 to provide tax increment financing (TIF) as a new method to pay for urban renewal projects: a city may thus "allocate to a special fund the increment in state, city, county, school, and other taxing district taxes resulting from the increase in valuation of an urban renewal area brought about by an urban renewal project." Richards v. City of Muscatine, 237 N.W.2d at 53. See 1969 Iowa Acts, 63rd G.A., ch. 237, § 2. Another amendment permitted a city to pay urban renewal bonds with TIF funds. Richards v. City of Muscatine, 237 N.W.2d at 53. See 1969 Iowa Acts, 63rd G.A., ch. 237, § 1.

"[A] tax increment plan appears to be a feasible method of financing [urban renewal] projects. It is more advantageous to [a] city than ordinary general obligation bonds, since the plan places the direct burden on the urban renewal property." Richards v. City of Muscatine, 237 N.W.2d at 58.

Chapter 403 defines an "urban renewal area" as a "slum area, blighted area, economic development area, or combination of the areas, which the local governing body designates as appropriate for an urban renewal project." Iowa Code § 403.17(22). These descriptive phrases, in turn, also have legislative definitions. See Iowa Code § 403.17(4), (9), (21). For example, "blighted area" includes an area with "a substantial number of slum, deteriorated, or deteriorating structures . . . ." Iowa Code § 403.17(4).

Chapter 403 defines an "urban renewal project" to include the "undertakings and activities of a municipality in an urban renewal area for the elimination and for the prevention of the development or spread of slums and blight," and such undertakings and activities may include the "[d]emolition and removal of buildings . . . ." Iowa Code § 403.17(24)(b).

Urban renewal projects stem from an urban renewal plan. Chapter 403 defines "urban renewal plan" as "a plan for the development, redevelopment, improvement, or rehabilitation of a designated urban renewal area . . . ." Iowa Code § 403.17(23). Under section 403.5, a municipality must have an urban renewal plan in order to implement urban renewal projects:

> (1). A municipality shall not approve an urban renewal project for an urban renewal area unless the governing body has, by resolution, determined the area to be a slum area, blighted area, economic development area or a combination of those areas, and

> designated the area as appropriate for an urban renewal project. . . .
>
> . . . .
>
> (6). Upon the approval of an urban renewal plan or of any modification thereof, such plan or modification shall be deemed to be in full force and effect for the respective urban renewal area . . . .

See generally Iowa Code § 403.17(12) (defining "local governing body").

II.

You have asked whether a city may expend TIF funds to demolish a privately owned building apparently located within an urban renewal area. We assume that the city's urban renewal plan properly provides for the demolition of the building, see Iowa Code §§ 403.5, 403.17(24)(b), and that the legal basis for your question rests upon a state constitutional prohibition against expending public money for private purposes.

The state constitution provides that "no public money or property shall be appropriated for local or private purposes." Iowa Const. art. III, § 31 (1857). Embodying "one of the fundamentals of popular government" by seeking to protect the integrity of public assets, the commonly known "public purpose doctrine" appears to apply to city councils. Love v. City of Des Moines, 210 Iowa 90, 230 N.W. 373, 378 (1930); 1996 Op. Att'y Gen. ___ (#95-5-1); see 1986 Op. Att'y Gen. 113, 113; see also 16 E. McQuillin, The Law of Municipal Corporations § 44.35, at 141 (1994) (fundamental to the taxing power is that taxes cannot be imposed except for public purposes). In 1986, we explained that

> [t]he expenditure of public funds strictly for private gratification clearly violates the public purpose [doctrine]. 'However, a statutory scheme which advances a public purpose will not be invalidated because it benefits certain individuals or classes more than others. Necessary incidental benefits which may accrue to [private individuals or entities] will not void [the] legislation.'

1986 Op. Att'y Gen. 113, 113 (citations omitted).

It appears that a challenge to an expenditure of public funds requires a showing of its unconstitutionality beyond a reasonable

doubt and a negation of every conceivable basis in its support. 1996 Op. Att'y Gen. ___ (#95-5-1). It is clear that a violation of the state constitutional prohibition only occurs in the absence of any public purpose underlying the expenditure of public funds. 1996 Op. Att'y Gen. ___ (#95-5-1). It is equally clear, however, that the phrase "public purpose" requires broad construction: a public entity "must have sufficient flexibility 'to meet the challenges of increasingly complex, social, economic, and technological conditions.'" 1996 Op. Att'y Gen. ___ (#95-5-1) (citation omitted); accord John R. Grubb, Inc. v. Iowa Hous. Fin. Auth., 255 N.W.2d 79, 93 (Iowa 1977); see Finlayson, "State Constitutional Prohibitions Against Use of Public Financial Resources in Aid of Private Enterprises," 1 Emerging Issues in State Constitutional Law 177, 190 (1988).

We cannot conclude the state constitutional prohibition necessarily precludes a city from expending TIF funds to demolish a privately owned building as part of a properly created urban renewal plan. Supported by four reasons, this conclusion assumes that the city has made reasonable and appropriate findings of public purpose and imposed conditions necessary to achieve it. Whether the city has done so, however, remains a question of fact not subject to resolution in an opinion. See generally 61 IAC 1.5(3).

First: An inquiry involving the state constitutional prohibition does not narrowly focus upon a public expenditure resulting in some benefit to a private entity. That a particular piece of private property may benefit in some way from a public expenditure does not, by itself, establish a state constitutional violation. See In re Advisory Opinion, 422 N.W.2d 186, 202 (Mich. 1988) (constitutionality of legislation "generally unaffected" by fact that private interests benefit from it). As long as the expenditure serves a public purpose, "the recipient may be a nonpublic entity . . . ." 42 Mont. Op. Att'y Gen. 351 (1988). "A law may serve the public interest although it benefits certain individuals or classes more than others." Dickinson v. Porter, 240 Iowa 393, 35 N.W.2d 66, 80 (1948), appeal dismissed, 338 U.S. 843. "Urban renewal itself serves a valid public purpose and relates to the general welfare." Richards v. City of Muscatine, 237 N.W.2d at 58. "The legislature must have thought . . . that urban renewal benefits a city, not just a developer." Id. at 60.

Second: The Supreme Court of Iowa has emphasized it will defer to findings by public entities on what constitutes a public purpose. See, e.g., John R. Grubb, Inc. v. Iowa Hous. Fin. Auth., 255 N.W.2d at 93; Dickinson v. Porter, 35 N.W.2d at 79, 80 (legislative declaration of public purpose underlying statute controls court if "zone of doubt" exists about a public purpose); see also 1996 Op. Att'y Gen. ___ (#95-5-1). Cf. Iowa Code § 15A.1(2) (governing body expending economic development funds to

assist private persons must first determine that expenditure will reasonably accomplish a public purpose). As the Court stated in Leonard v. State Board of Education, 471 N.W.2d 815, 817 (Iowa 1991), public entities face an "extraordinarily delicate" task in balancing the practical and real benefits to the public against the incidental benefits to private entities. The Court thus "indicated its reluctance to second-guess decisions by public entities regarding the private use of their public properties . . . ." 1996 Op. Att'y Gen. ___ (#95-5-1). Indeed, the "consensus of modern legislative and judicial thinking is to broaden the scope of activities which may be classified as involving a public purpose, especially in the area of economic welfare." Marshall Field & Co. v. Village of S. Barrington, 415 N.E.2d 1277, 1282 (Ill. App. 1981). Accord In re Advisory Opinion, 422 N.W.2d 186, 201-02 (Mich. 1988). Although chapter 403 sets forth general findings of public purpose in the urban renewal context, a city should make specific findings to support its public purpose determination for a particular project.

Third: Opinions from other states involving the use of TIF funds for similar projects tend to support our conclusion. See, e.g., 42 Mont. Op. Att'y Gen. 351 (1988) (city may expend TIF funds to demolish structure located within urban renewal area and owned by private, nonprofit corporation; such expenditures "are for a public purpose, and the nature and capacity of the recipient are not determinative of the validity of the expenditures"; as long as the expenditure serves a public purpose, the recipient may be a private nonprofit corporation); 1990 Miss. Op. Att'y Gen. (October 24, 1990) (city may expend TIF funds for grading private property in order to direct rainwater away from public street to storm drainage system); 1989 Ohio Op. Att'y Gen. 2-366 (township may expend TIF funds for improving road it does not own if improvement serves a public purpose); see also In re Advisory Opinion, 422 N.W.2d 186, 201-03 (Mich. 1988) (consistent with public purpose doctrine, city may use TIF funds for urban renewal even if they benefit private interests). Cf. 1996 Op. Att'y Gen. ___ (#96-10-5(L)) (county sheriffs may require prisoners to perform hard labor on property owned by private, nonprofit entity as long as labor serves a county function).

Fourth: We have already concluded in an opinion that the public purpose doctrine does not necessarily prohibit counties from appropriating money for low-interest or no-interest loans to private businesses for economic development with appropriate conditions to assure achievement of a public purpose. See 1986 Op. Att'y Gen. 113, 113. In that opinion, we observed in passing that

> [chapter 403] authorizes cities to designate areas for economic development. To exercise the powers conferred in that chapter, a municipality is required to adopt a resolution

> making specific findings regarding public purpose. . . . [In addition, chapter 364] specifically authorizes cities to accept grants from state and federal government and provides that, "Upon a finding of public purpose, the city may disburse the assistance to any person to be used for economic development projects."

Id. at 116 (citations omitted). We then referred to a court decision observing that a public entity is advised to make "detailed and comprehensive" findings on public purpose and that such findings "are critical to resolution of the public purpose issue." Id. at 117.

III.

Assuming a city's urban renewal plan properly provides for the demolition of a privately owned building and assures that the use of public funds will achieve a public purpose, the state constitutional prohibition against using public funds for private purposes does not necessarily preclude the city from expending funds from tax increment financing to demolish it.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

TAXATION: Cancellation of Tax Sale Certificates Issued to a County and Subsequently Assigned. Iowa Code §§ 446.31, 446.37 and 448.1 (1997). Tax sale certificates associated with a tax sale occurring prior to April 1, 1992 which are issued to a county and subsequently assigned pursuant to section 446.31 are not subject to cancellation under section 446.37, as those provisions were amended in 1991 Iowa Acts, ch. 191, sections 82 and 86. Tax sale certificates issued to a county in relation to a tax sale which occurred prior to April 1, 1992 are not subject to cancellation under section 446.37, as it read prior to 1991, when subsequently assigned by the county. A tax sale certificate issued to a county in relation to a tax sale occurring prior to April 1, 1992, which is subsequently assigned by the county under section 446.31, would not be subject to the cancellation provisions of section 448.1, as amended by 1997 Iowa Acts, chapter 121, section 24. (Hardy to Sarcone, Polk County Attorney, **1-27-98) #98-1-4(L)**

John P. Sarcone
Polk County Attorney
Room 340, Polk County Office Building
111 Court Avenue
Des Moines, Iowa 50309-2218

Dear Mr. Sarcone:

By letter dated October 20, 1997, you requested an opinion of the Attorney General concerning cancellation of tax sale certificates assigned by counties. Your specific questions and concerns in this regard can be paraphrased as follows:

1. Is a tax sale certificate associated with a tax sale occurring prior to April 1, 1992 subject to cancellation under Iowa Code section 446.37, as amended by 1991 Iowa Acts, ch. 191, section 86, when the certificate is assigned by a county as the certificate holder pursuant to section 446.31, as amended by 1991 Iowa Acts, ch. 191, section 82?

2. In the event that our response to your first question is in the negative, you have asked that we reconsider the conclusion reached in 1977 Op. Att'y Gen. 233, wherein we opined that a tax sale certificate issued to a county and subsequently assigned pursuant to section 446.31 (1977) would not be subject to cancellation under section 446.37 (1977).

3. Is a tax sale certificate associated with a tax sale occurring prior to April 1, 1992 subject to cancellation under section 448.1, as amended in 1997 Iowa Acts, ch. 121, section 24, when the certificate is issued to a county but subsequently assigned by a county as the certificate holder?

By way of background, we note that it has been the law for over half a century that the county treasurer is required to cancel a tax sale certificate, pursuant to section 446.37, if the tax sale certificate holder does not complete the statutory actions required to obtain a tax deed within the required number of years. 1943 Iowa Acts, ch. 222, § 1. It has also been the opinion of this office, since at least 1946, that this cancellation provision does not apply to certificates held by counties. 1946 Op. Att'y Gen. 114. This conclusion has recently been recognized and affirmed by the Iowa Supreme Court. Hemphill v. Montgomery, 548 N.W.2d 579, 581 (Iowa 1996). Finally, an opinion was issued by this office in 1977 in which it was concluded that the cancellation provision of section 446.37 of the 1977 Code would not be applicable to a certificate originally issued to a county and assigned by the county pursuant to section 446.31, even after such certificate had been assigned. 1977 Op. Att'y Gen. 233.

However, as you noted in your request, the legislature passed an extensive rewrite of the property tax sale law in 1991. 1991 Iowa Acts, ch. 191 (H.F. 687). Specifically relevant to your concerns, in section 86 of H.F. 687 the legislature amended section 446.37 of the Code to change the five year expiration period for tax sale certificates to three years and to expressly exclude the county from its cancellation requirement. Further, as part of the 1991 rewrite, the legislature also specifically provided that a tax sale certificate issued to a county and later assigned will be subject to section 446.37 cancellation in the hands of the assignee. 1991 Iowa Acts, ch. 191, § 82. In such case, the time period for completion of the statutory requirements to obtain a deed for the parcel involved begins to run from the date of assignment. Id.

As to the applicability of these changes, the legislature specifically provided in 1992 Iowa Acts, ch. 1016, section 31, that:

> Sections 446.21, 446.31, 446.32, and 446.37, as amended by 1991 Iowa Acts, chapter 191, sections 73, 82, 83 and 86, only apply if associated with a tax sale that occurred on or after April 1, 1992. For tax sales occurring prior to April 1, 1992, the provisions of section 446.21, 446.31, 446.32, and 446.37 in effect on the date of the tax sale apply.

(Emphasis added.) Thus, in response to your first question, it appears clear that a tax sale certificate associated with a tax sale occurring prior to April 1, 1992 which is issued to a county and later assigned by the county is not subject to cancellation pursuant to sections 446.31 and 446.37 as amended in 1991. Rather, the provisions of sections 446.31 and 446.37 which were in effect on the date of the tax sale for which each such certificate was issued would control the issue of cancellation. Consequently, our answer to your first question is in the negative, which brings us to your second question.

In your request you noted that this office previously concluded, in an opinion issued twenty years ago, that section 446.37 of the 1977 Code would not be applicable to cancel a certificate originally issued to a county and assigned by the county pursuant to section 446.31 of the 1977 Code even after such certificate had been assigned. 1977 Op. Att'y Gen. 233. You have asked that we revisit that conclusion in light of the 1991 amendments to sections 446.31 and 446.37.

"It is a longstanding 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." 1994 Op. Att'y Gen. 83. As explained above, the controlling law as to tax sale certificates associated with tax sales occurring prior to April 1, 1992 has clearly not changed. Therefore, we will only overrule the 1977 opinion if we conclude that it was clearly erroneous.

In this regard, we note that the opinion in question was based upon the fact that the assignment provisions of section 446.31 then in effect specifically provided that an assignment of a tax sale certificate by a county under section 446.31 vested in the assignee all right and title of the assignor. Id. We reasoned in the opinion that, since one of the "rights" of the county as tax sale certificate holder was the non-applicability of cancellation under section 446.37, an assignee of a tax sale certificate originally issued to a county succeeded to such non-cancellation right upon assignment under section 446.31. This construction of sections 446.37 and 446.31 before the 1991 amendments clearly gives meaning to and harmonizes all of the mandates found in those statutory provisions as required by generally applicable rules of statutory construction. Cedar Memorial Park Cemetery Assoc. v. Personnel Associates, Inc., 178 N.W.2d 343, 350 (Iowa 1970); Webster Realty Co. v. City of Fort Dodge, 174 N.W.2d 413, 418 (Iowa 1970).

Furthermore, we now note that, prior to the 1991 amendments, there were no provisions in the Code which granted an assignee any additional time from the date of assignment under section 446.31 to the date of cancellation under section 446.37 in which to complete all of the requirements to have a tax deed issued to such assignee. Since the time period to complete these requirements begins to run upon issuance of the tax sale certificate, if section 446.37, as it read prior to the 1991 amendments, were interpreted to require cancellation of a tax sale certificate once such certificate was assigned by the county, the assignee would have no additional time to complete the requirements to have a tax deed issued once assignment occurred. Consequently, no reasonable assignee would take an assignment of a tax sale certificate from a county unless there remained sufficient time in which to complete the deed process. Obviously, such interpretation would significantly curtail the ability of a county to assign a tax sale certificate. Such negative consequences must be considered in determining the appropriate statutory construction of sections 446.31 and 446.37 within the overall

statutory property tax collection scheme. Hemphill v. Montgomery, 548 N.W.2d 579, 581 (Iowa 1996).

Moreover, individual statutes should not be interpreted inconsistently with the purpose of the overall statutory scheme. State v. Vietor, 208 N.W.2d 894, 897 (Iowa 1973); Krueger v. Fulton, 169 N.W.2d 875, 877 (Iowa 1969). Rather, all statutes should be construed in light of "the object to be accomplished and the evils and mischiefs sought to be remedied." American Home Products v. Iowa State Bd. of Tax Review, 302 N.W.2d 140, 143 (Iowa 1981).

We note, in this regard, that assignment of a tax sale certificate by a county is simply another way for the county to collect the taxes due on a parcel. Thus, an interpretation which places such serious limitations on a county's ability to assign a tax sale certificate would be completely inconsistent with the purpose of all of the property tax sale provisions, which is to assist the county in its responsibility to collect as much of the total property tax liability as possible.

Finally, it appears significant to us that the legislature presumedly was aware of our 1977 opinion but, nonetheless, specifically limited the application of the 1991 amendments of sections 446.31 and 446.37 to certificates associated with tax sales occurring after April 1, 1992. Obviously, if the legislature had intended for the 1991 amendments to apply to earlier certificates, it could easily have directly disavowed our 1977 opinion and specifically so provided. This strongly suggests that the legislature agreed with our prior interpretation of sections 446.31 and 446.37. Hemphill v. Montgomery, 548 N.W.2d 579, 581 (Iowa 1996). Under such circumstances, it would clearly be improper for us to now reverse that opinion and, under the guise of statutory construction, read such consequences into the plain language of the statutory provisions in question. Kelly v. Brewer, 239 N.W.2d 109, 114 (1976); State v. Prybil, 211 N.W.2d 308, 311 (Iowa 1973).

Based upon these considerations, we cannot conclude that the 1977 opinion is clearly erroneous. Rather, these considerations lead us to conclude that our 1977 opinion was correct and we now reaffirm that opinion.

In relation to your final question regarding section 448.1, you correctly noted in your request that the legislature added an entirely new cancellation provision to section 448.1 in 1997, which states:

> The tax sale certificate holder shall return the certificate of purchase and remit the appropriate deed issuance fee to the county treasurer within ninety calendar days after the redemption period expires. The treasurer shall cancel the

> certificate for any tax sale certificate holder who fails to comply with this paragraph. This paragraph does not apply to certificates held by a county. This paragraph is applicable to all certificates of purchase issued before, on, or after July 1, 1997. Holders of certificates of purchase that are outstanding on July 1, 1997, shall return the certificate of purchase and remit the appropriate deed issuance fee to the county treasurer within ninety calendar days from that date.

(Emphasis added.) 1997 Iowa Acts, ch. 121, § 24. The purpose of this cancellation provision is obvious. Prior to its enactment, individual tax sale certificate holders could prevent cancellation of a tax sale certificate under section 446.37 by taking all of the actions necessary to qualify the certificate holder to obtain a deed but then, for whatever reason, failing to return the certificate to the county treasurer and taking delivery of a deed to the parcel. This left a gap in the procedures which the legislature addressed. Your question in this regard is whether a tax sale certificate associated with a tax sale occurring prior to April 1, 1992, which was issued to a county and subsequently assigned, would be subject to cancellation under section 448.1, as amended in 1997.

As noted above, the plain language of section 448.1, as amended, provides that "[t]his paragraph is applicable to all certificates of purchase issued before, on, or after July 1, 1997." Thus, by its plain language, the cited provision applies to all tax sale certificates, no matter when issued. The issuance date is simply not relevant to the question of cancellation.

However, this new cancellation provision also provides that it "does not apply to certificates held by a county." Moreover, section 446.31 still provides, as it did in 1977, that the assignment of a tax sale certificate by a county under section 446.31 vests in the assignee all right and title of the assignor. Finally, the legislature failed to enact any specific provisions in section 448.1, as amended, which would give an assignee any additional time subsequent to assignment to obtain a deed. Thus, for basically the same reasons we now reaffirm our 1977 opinion regarding cancellation of an assigned certificate under section 446.37, we must also conclude that the new cancellation provision found in section 448.1, as amended in 1997, was not intended to apply to tax sale certificates assigned by a county which are associated with tax sales occurring prior to April 1, 1992.

In conclusion, it is our opinion that tax sale certificates associated with a tax sale occurring prior to April 1, 1992 which are issued to a county and subsequently assigned pursuant to section 446.31 are not subject to cancellation under section 446.37, as those provisions were amended in 1991 Iowa Acts, chapter 191, sections 82 and 86. We also conclude that our 1977 opinion was not clearly erroneous and we are still of the opinion

that certificates issued to a county in relation to a tax sale which occurred prior to April 1, 1992 are not subject to cancellation under section 446.37, as it read prior to 1991, when subsequently assigned by the county. Finally, a tax sale certificate issued to a county in relation to a tax sale occurring prior to April 1, 1992, which is subsequently assigned by the county under section 446.31, would not be subject to the cancellation provisions of section 448.1, as amended by 1997 Iowa Acts, chapter 121, section 24.

Sincerely,

Lucille M. Hardy

LUCILLE M. HARDY
Assistant Attorney General

LMH:cml

REAL PROPERTY: COUNTIES; COUNTY OFFICERS: County's financial responsibility for installing tile line across county road. Iowa Code § 468.622 (1997). County supervisors must hold a hearing on an application for a drainage project and, in deciding whether to approve it, may make findings on the course, size, depth, manner of construction, and adequacy of existing drains or ditches. If they find that such drains or ditches are adequate, the county has no responsibility for the cost of projecting a tile line across the right-of-way; however, if they find that the drains or ditches are inadequate, the county has such responsibility. Thus, whether a county must pay the expense of installing a tile line from a private owner's land across one of its roads to a suitable outlet on the other side will likely involve resolution of conflicting facts and consideration of surrounding circumstances. (Kempkes to Bonnett, Taylor County Attorney, **2-9-98) #98-2-1(L)**

February 9, 1998

Mr. Ronald D. Bonnett
Taylor County Attorney
402 Main St.
Bedford, IA 50833

Dear Mr. Bonnett:

You have requested an opinion on Iowa Code chapter 468 (1997), which is entitled "Levee and Drainage Districts and Improvements." You ask whether section 468.622 requires a county to pay the expense of installing a tile line from a private owner's land across one of its roads to a suitable outlet on the other side. This question likely involves resolution of conflicting facts and consideration of surrounding circumstances. We thus cannot provide you with a specific answer; we can, however, identify the applicable legal principles for your consideration.

I.

Subchapter V of chapter 468 governs "Individual Drainage Rights." See generally Iowa Code § 468.600 et seq.

Section 468.600 provides in part that when landowners propose to construct certain ditches, tiles, or other underground drains across highway rights-of-way, they may file applications with the county auditor. Section 468.601 provides such landowners with the opportunity for a hearing before county supervisors regarding their applications and prescribes a method of notice to other affected landowners. Section 468.606 provides that if county supervisors approve a proposed drain or ditch

> they shall locate the same and fix the points of entrance and exit on such land or property, the course of the same through each tract of land, the size, character, and depth thereof, when and in what manner the same shall be constructed, how kept in repair, what connections may be made therewith, what compensation, if any, shall be made to the owners of such land or property for damages by reason of the construction of any such improvements, and any other question arising in connection therewith.

See generally Iowa Code § 4.1(30)(a) (defining word "shall" in statutes as imposing a duty unless defined otherwise).

Section 468.621 provides:

> Owners of land may drain the land in the general course of natural drainage by constructing or reconstructing open or covered drains, discharging the drains in any natural watercourse or depression so the water will be carried into some other natural watercourse . . . .

Section 468.622 provides:

> When the course of natural drainage of any land runs to a public highway, the owner of such land shall have the right to enter upon such highway for the purpose of connecting the owner's drain or ditch with any drain or ditch constructed along or across the said highway, but in making such connections, the owner shall do so in accordance with specifications furnished by the highway authorities having jurisdiction thereof, which specifications shall be furnished to the owner on application. The owner shall leave the highway in as good condition in every way as it was before the said work was done.
>
> If a tile line or drainage ditch must be projected across the right of way to a suitable outlet, the expense of both material and labor used in installing the tile line or drainage ditch across the highway and any subsequent repair thereof shall be paid from funds available for the highways affected.

(emphasis added). See generally Richardson County v. Drainage Dist. No. 1, 139 N.W. 648, 649 (Neb. 1913) (county normally had duty to erect and repair bridges under the common law, but if a county road "was crossed or cut for any purpose by other than highway authorities, it was the duty of those interfering with the road to restore the same").

II.

You have asked whether section 468.622 requires a county to pay the expense of installing a tile line from a private owner's land across one of its roads to a suitable outlet on the other side. You provide us with a letter from a county engineer who, focusing upon the word "must" in section 468.622, cannot "envision a situation where a landowner 'must' cross a county road with a tile line." See generally Iowa Code § 4.1(30)(b) (word "must" in statutes normally states a requirement).

Neither section 468.622 nor its immediate precursor -- Iowa Code section 465.23 (1989) -- has been the subject of many court decisions. See Drainage District No. 119 v. City of Spencer, 268 N.W.2d 493, 502 (Iowa 1978) (statute applies when tile line or drainage ditch on an individual's land must be projected across the right of way to a suitable outlet and does not apply to situation involving a drainage district); Droegmiller v. Olson, 241 Iowa 456, 40 N.W.2d 292, 295-96 (1949) (statute does not compel county to pay for installing tile line across highway when landowner, by artificial means, diverts course of natural drainage to run to highway); see also Franklin v. Sedore, 450 N.W.2d 849, 853 n. 5 (Iowa 1990); 1974 Op. Att'y Gen. 364; 1962 Op. Att'y Gen. 119; 1960 Op. Att'y Gen. 99; Note, "Surface Water Drainage in Iowa," 50 Iowa L. Rev. 818 (1965).

Section 468.622 grants landowners the right to connect a drain or ditch with one on the other side of a highway when the course of their land's natural drainage runs to the highway. Section 468.622, however, requires landowners to make such a connection in accordance with specifications furnished by the authorities having jurisdiction of the highway and requires those authorities to pay installation costs only when a tile line or drainage ditch "must" be projected across the right of way to a "suitable" outlet.

We believe that the word "must" should not be read in isolation, but should be read in conjunction with the word "suitable" in section 468.622. See generally Iowa Code § 4.4(2) (legislature presumably intended for entire statute to be effective). "Suitable" commonly means proper or appropriate for the end in view. Black's Law Dictionary 1286 (1979); Webster's Ninth New Collegiate Dictionary 1156 (1979). See generally Iowa Code § 4.1(38) (words and phrases shall be construed according to approved English usage). Were we to focus on "must" alone,

authorities having jurisdiction of a highway arguably would never have responsibility to pay installation costs for any tile line across the highway: in no instance, as the county engineer points out, could a person "envision a situation where a landowner 'must' cross a county road with a tile line." See generally Iowa Code § 4.4(3) (legislature presumably intended for statute to have just and reasonable result).

A 1973 opinion involved a county 's alleged responsibility, under the precursor to section 468.622, to pay for installing a ditch across one of its highways. We explained that this responsibility depended upon an underlying factual determination by the county supervisors:

> [When] private landowners construct an artificial drainage ditch, the county is not required to construct a new drain across the secondary road at the point of the ditch where the present drain accommodating a natural waterway is a suitable outlet in the natural course of drainage. [1960 Op. Att'y Gen. 99, 99]. However, [when] the owners of land desire to construct a tile line and as a result [of their application county supervisors determine] that the tile line must be projected across the right-of-way to a suitable outlet, then the [county] as to secondary roads is responsible for materials and labor [associated with installing the tile line. 1960 Op. Att'y Gen. 100, 100].
>
> The [supervisors must] hold a hearing on the application for such a drainage project and [have authority to approve it]. The supervisors further have the authority to make a finding concerning the course, size, depth and manner of construction of such drain. Accordingly, the [supervisors have] the power to determine whether or not the existing culverts are adequate or obsolete. [1960 Op. Att'y Gen. 100, 100.] In the event they are found to be adequate, the county would not be responsible for the cost of projecting a tile line across the right-of-way at a different location or depth. On the other hand, the supervisors may determine that the culverts are obsolete and in this event the cost of projecting the tile line across the right-of-way could properly be borne by the county.

1974 Op. Att'y Gen. 364, 364-65 (citations omitted).

We see no reason to withdraw or modify our 1973 opinion. See generally 1986 Op. Att'y Gen. 125 (#86-11-1(L)). Therefore, we reiterate that county supervisors must hold a hearing on an application for a project; that they have authority to approve it; and that, in doing so, they have authority to make findings on the course, size, depth, manner of construction, and adequacy of existing drains or ditches. If the county supervisors find that such drains or ditches are adequate, the county has no responsibility for the cost of projecting a tile line across the right-of-way; however, if they find that the drains or ditches are inadequate, the county has such responsibility. Section 468.622, we add, presumes a good faith determination on the adequacy or inadequacy of existing drains or ditches. See generally 1988 Op. Att'y Gen. 37 (#87-4-4(L); 1986 Op. Att'y Gen. 29, 33; 1978 Op. Att'y Gen. 106, 107.

III.

In summary: County supervisors must hold a hearing on an application for a drainage project and, in deciding whether to approve it, may make findings on the course, size, depth, manner of construction, and adequacy of existing drains or ditches. If they find that such drains or ditches are adequate, the county has no responsibility for the cost of projecting a tile line across the right-of-way; however, if they find that the drains or ditches are inadequate, the county has such responsibility. Thus, whether a county must pay the expense of installing a tile line from a private owner's land across one of its roads to a suitable outlet on the other side will likely involve resolution of conflicting facts and consideration of surrounding circumstances.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

PUBLIC RECORDS; STATE OFFICERS AND DEPARTMENTS: Water and ice vessel accident reports. Iowa Code §§ 22.7, 462A.7, 622.11 (Supp. 1997). An opinion cannot determine whether section 462A.7(4) requires the Iowa Department of Natural Resources to release to the media information from law enforcement officers' vessel accident reports filed pursuant to section 462A.7(3), because that issue normally involves resolution of conflicting facts and consideration of surrounding circumstances. Section 462A.7(4) does not require the Department to disclose to the media all information from a report or a copy of the report itself. Section 462A.7(4) also does not require the Department to disclose to the media communications made to public officers in official confidence, reduced to writing, if the Department determines that the public's interest would suffer from the disclosure. Section 462A.7(4) does require the Department to disclose to the media the date, time, specific location, and immediate facts and circumstances of a crime or incident from a report, unless the Department determines that the unusual circumstances described in section 22.7(5) exist. (Kempkes to Cohoon, State Representative, **2-9-98) #98-2-2(L)**

February 9, 1998

The Honorable Dennis Cohoon
State Representative
P.O. Box 157
Burlington, IA 52601

Dear Representative Cohoon:

You have requested an opinion about a recent amendment to Iowa Code chapter 462A (Supp. 1997), entitled "Water Navigation Regulations." See generally 1997 Iowa Acts, 77th G.A., ch. 55. Codified in section 462A.7(4), the amendment relates in part to the filing of reports by law enforcement officers with the Department of Natural Resources (DNR) about certain water and ice vessel collisions, accidents, and casualties. You ask, "What information [from such vessel accident reports] can be made available to the media?"

Your question also implicates provisions in chapter 22, entitled "Public Records," and chapter 622, entitled "Evidence." Although we cannot provide a specific answer to your question, we can offer general guidance on the DNR's disclosure to the media of information from law enforcement officers' vessel accident reports. In doing so, we note that an opinion only addresses matters of law and does not determine the propriety of any past action or inaction. See generally 1994 Op. Att'y Gen. 146, 148.

I.

Chapter 462A is designed, among other things, to govern the use, operation, and equipment of vessels. See Iowa Code §§ 462A.1, 462A.2(29). See generally 1982 Op. Att'y Gen. 340. Section 462A.7(2) requires vessel operators to file written reports about certain collisions, accidents, and casualties. Section 462A.7(3) similarly requires law enforcement officers to file written reports about their investigation into such mishaps. See generally Iowa Code § 456A.13 (providing that full-time officers of the DNR "have the same powers that are conferred by law on peace officers in the enforcement of all laws of the state . . . and the apprehension of violators").

As amended, section 462A.7(4) now provides:

> (a). All reports shall be in writing. A vessel operator's report shall be without prejudice to the person making the report and shall be for the confidential use of the [DNR]. However, upon request the [DNR] shall disclose the identities of the persons on board the vessels involved in the occurrence and their addresses. Upon request of a person who made and filed a vessel operator's report, the [DNR] shall provide a copy of the vessel operator's report to the requestor. . . .
>
> (b). All written reports filed by law enforcement officers as required under [section 462A.7(3)] are confidential to the extent provided in [sections 22.7(5) and 622.11]. However, a completed law enforcement officer's report shall be made available by the [DNR] or the investigating law enforcement agency to any party to a boating accident, collision, or other casualty, the party's insurance company or its agent, or the party's attorney on written request and payment of a fee.

(emphasis added). See 571 IAC 42.2, 42.3.

Section 462A.7(4) refers to sections 22.7(5) and 622.11. As part of the open meetings law, section 22.7(5) excepts from public disclosure

> [p]eace officers' investigative reports, except where disclosure is authorized elsewhere in this Code. However, the date, time, specific location, and immediate facts

> and circumstances surrounding a crime or incident shall not be kept confidential under this section, except in those unusual circumstances where disclosure would plainly and seriously jeopardize an investigation or pose a clear and present danger to the safety of an individual.

See generally Iowa Code § 4.1(30)(a) (use of "shall" in statutes normally imposes a duty). As part of the law of evidence, section 622.11 prohibits examining public officers about communications made to them in official confidence "when the public interests would suffer by the disclosure."

II.

Section 462A.7(4) speaks to two types of vessel accident reports: those filed by vessel operators pursuant to section 462A.7(2), and those filed by law enforcement officers pursuant to section 462A.7(3). Your question only involves the latter type of report and the media's access to information within it. See generally Iowa Code § 462A.7(4) (providing that upon request the DNR "shall disclose the identities of the persons on board the vessels involved in the occurrence and their addresses," that upon request of a person who made and filed a vessel operator's report, the DNR "shall provide a copy of the vessel operator's report to the requestor," and that a completed law enforcement officer's report "shall be made available to any party to a boating accident, collision, or other casualty, the party's insurance company or its agent, or the party's attorney").

Section 462A.7(4) expressly clothes law enforcement officers' vessel accident reports with confidentiality "to the extent provided in" sections 22.7(5) and 622.11. Section 22.7(5) only permits disclosure of the date, time, specific location, and "immediate facts and circumstances" surrounding a crime or incident from "investigative reports" and does not even permit disclosure of that information "when it would plainly and seriously jeopardize an investigation or pose a clear and present danger to the safety of an individual." See generally 1992 Op. Att'y Gen. 41 (#91-9-1(L)) (discussing "immediate facts and circumstances"); 1990 Op. Att'y Gen. 85, 86-88 (discussing "investigative reports"). Section 622.11 -- in "creating a public officer privilege for communications," including those reduced to writing, Shannon v. Hansen, 469 N.W.2d 412, 414, 415 (Iowa 1991) -- only permits disclosure by public officers about communications made to them in official confidence "when the public's interest would [not] suffer by the disclosure."

Given the specific language in sections 22.7(5) and 622.11, we cannot provide a specific answer to your question about the media's

access to information from law enforcement officers' vessel accident reports filed pursuant to section 462A.7(3). Determining whether the disclosure of a particular piece of information from such a report would plainly and seriously jeopardize an investigation, pose a clear and present danger to someone's safety, or cause the public's interest to suffer normally requires resolution of conflicting facts and consideration of surrounding circumstances. See 1982 Op. Att'y Gen. 538, 542-44; see also The Hawkeye v. Jackson, 521 N.W.2d 750, 752-53 (Iowa 1994); 1998 Op. Att'y Gen. __ (#97-10-1(L)); 1994 Op. Att'y Gen. 46, 47.

We cannot undertake such matters in an opinion. See 61 IAC 1.5(3)(c). They lie in the initial instance with the DNR, the public entity possessing the requested information, and ultimately with the courts. See 1998 Op. Att'y Gen. __ (#97-10-1(L)); 1994 Op. Att'y Gen. 46, 47; 1982 Op. Att'y Gen. 538, 542-44. Nevertheless, we can offer some guidance about the DNR's responsibilities under section 462A.7(4).

By referring to sections 22.7(5) and 622.11, section 462A.7(4) generally accords confidentiality to law enforcement officers' vessel accident reports. Such confidentiality presumably assists the DNR to obtain accurate information for use in solving water traffic and safety problems. See Sprague v. Brodus, 245 Iowa 90, 60 N.W.2d 850, 853-54 (1953) (confidentiality of law enforcement officers' motor vehicle accident reports enables the transportation department "to obtain information to the end that necessary safety regulations can be made or recommended to the legislature"; a driver questioned by an investigating officer "should always realize that he could speak freely; that he would always know he was talking in confidence and there would be no incentive to slant his statements or reshape his answers"); see also Note, 53 Iowa L. Rev. 421, 427-28 (1967); Comment, 40 Iowa L. Rev. 516, 517-21 (1955); Annot., 165 A.L.R. 1302, 1315-18 (1946).

Sections 22.7(5) and 622.11 "serve to assure all those persons upon whom law enforcement officers rely for information, as well as the officers themselves, that official confidentiality attends their conversations and may protect from public access the officers' reports of what they have said." State ex rel. Shanahan v. Iowa Dist. Court, 356 N.W.2d 523, 528 (Iowa 1984) (also observing that section 622.11, in general, "is designed to protect 'matters affecting the affairs of the state, as state secrets, and communications by informers'" and that the "interest of the public -- public safety -- is at stake, not the interest of the officer or the person communicating in confidence"). The General Assembly "clearly intended [in sections 22.7(5) and 622.11 that law enforcement officers] should ordinarily be allowed to perform much of their investigatory work in secret and have their sensitive files concerning their investigation protected from public

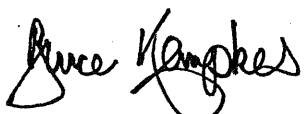
disclosure." Id. at 529. See Shannon v. Hansen, 469 N.W.2d at 415.

With these policies in mind, we can make three general observations about section 462A.7(4) as it relates to the disclosure of information to the media from a law enforcement officer's vessel accident report filed pursuant to section 462A.7(3). First, section 462A.7(4) does not require the DNR to disclose all information from a report, or a copy of the report itself, to the media. Second, section 462A.7(4) requires the DNR to disclose to the media the date, time, specific location, and immediate facts and circumstances of a crime or incident from a report, unless the DNR determines that the unusual circumstances described in section 22.7(5) exist. Third, section 462A.7(4) does not require the DNR to disclose to the media communications made to public officers in official confidence, reduced to writing, if the DNR determines that the public's interest would suffer from the disclosure.

III.

In conclusion: An opinion cannot determine whether section 462A.7(4) requires the DNR to release to the media information from law enforcement officers' vessel accident reports filed pursuant to section 462A.7(3), because that issue normally involves resolution of conflicting facts and consideration of surrounding circumstances. Section 462A.7(4) does not require the DNR to disclose to the media all information from a report or a copy of the report itself. Section 462A.7(4) also does not require the DNR to disclose to the media communications made to public officers in official confidence, reduced to writing, if the DNR determines that the public's interest would suffer from the disclosure. Section 462A.7(4) does require the DNR to disclose to the media the date, time, specific location, and immediate facts and circumstances of a crime or incident from a report, unless the DNR determines that the unusual circumstances described in section 22.7(5) exist.

Sincerely,



Bruce Kempkes
Assistant Attorney General

GAMBLING: Distribution of gambling receipts to out-of-state charities. Iowa Code §§ 99B.7(3)(b), 99F.6(4)(a) (1997). A "qualifying organization" or "qualified sponsoring organization" licensed to conduct gambling games pursuant to Iowa Code chapter 99F may distribute receipts for educational, civic, public, charitable, patriotic, or religious uses outside the State of Iowa. (Farrell to White, Iowa Racing & Gaming Commissioner, 2-17-98 #98-2-3(L)

February 17, 1998

Mr. Harold W. White
Fitzgibbons Law Firm
108 North Seventh Street
P.O. Box 496
Estherville, IA 51334

Dear Mr. White:

You requested an opinion of the Attorney General whether a "qualified sponsoring organization" licensed to operate gambling games under Iowa Code chapter 99F is required to limit distributions of gambling receipts to "educational, civic, public, charitable, patriotic, or religious uses" in Iowa. You also ask a second question, in the event a "qualified sponsoring organization" must limit distributions for uses in Iowa, whether a separate tax exempt Iowa nonprofit corporation organized by the "qualified sponsoring organization" may receive distributions from the "qualified sponsoring organization" for distribution out of state. We decline to answer the second question because we find that distributions may be made for "educational, civic, public, charitable, patriotic, or religious uses" outside the state.

All licenses to operate pari-mutuel racetracks and gambling games on excursion gambling boats must be held by nonprofit companies. A pari-mutuel racetrack licensee must be a "qualifying organization," which is defined to include certain entities exempt from federal taxation pursuant to 26 U.S.C. section 501(c) and certain Iowa nonprofit organizations. Iowa Code § 99D.8. A license to operate gambling games on an excursion gambling boat must be held by a "qualified sponsoring organization." Iowa Code §§ 99F.5(1). A "qualified sponsoring organization" is defined to include certain entities exempt from federal taxation pursuant to section 501(c) and certain Iowa nonprofit organizations. Iowa Code § 99F.1(14). A "qualifying organization" licensed to operate a

pari-mutuel racetrack may also obtain a license to operate gambling games at its racetrack enclosure.[1] Iowa Code § 99F.4A.

The legislature has set forth particular standards governing the use of receipts from gambling games. See Iowa Code § 99F.6(4)(a). One of those standards has direct applicability here:

> . . . A qualified sponsoring organization[2] licensed to operate gambling games under this chapter shall distribute the receipts of all gambling games, less reasonable expenses, charges, taxes, fees, and deductions allowed under this chapter, as winnings to players or participants or shall distribute the receipts for educational, civic, public, charitable, patriotic, or religious uses as defined in section 99B.7, subsection 3, paragraph "b".
> . . .

Id. (emphasis added). Section 99B.7(3)(b) defines "educational, civic, public, charitable, patriotic, or religious uses" as:

> . . . uses benefiting a society for the prevention of cruelty to animals or animal rescue league, or uses benefiting an indefinite number of persons either by bringing them under the influence of education or religion or relieving them from disease, suffering, or constraint, or by erecting or maintaining public buildings or works, or otherwise lessening the burden of government, or uses benefiting any bona fide nationally chartered fraternal or military veterans' corporation or organization which operates in Iowa a clubroom, post, dining room, or dance

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[1] However, a pari-mutuel racetrack cannot offer table games of chance or video machines. Iowa Code § 99F.1(9).

[2] We note that while the legislature used two technically different terms, "qualifying organization" and "qualified sponsoring organization," to refer to parimutuel racetrack and excursion gambling boat licensees, the two terms are synonymous for purposes of section 99F.6(4)(a). Section 99F.6(4)(a) makes specific reference to parimutuel racetrack licensees when setting forth the standards governing the use of receipts, so it is clear that the statutes apply to all licensees operating gambling games at their facilities.

> hall, but does not include the erection, acquisition, improvement, maintenance, or repair of real, personal or mixed property unless it is used for one or more of the uses stated. "*Public uses*" specifically includes dedication of net receipts to political parties as defined in section 43.2.
> "*Charitable uses*" includes uses benefiting a definite number of persons who are the victims of loss of home or household possessions through explosion, fire, flood, or storm when the loss is uncompensated by insurance, and uses benefiting a definite number of persons suffering from a seriously disabling disease or injury, causing severe loss of income or incurring extraordinary medical expense when the loss is uncompensated by insurance. (emphasis in text).

Chapter 99F does not, by its terms, limit distributions for "educational, civic, public, charitable, patriotic, or religious uses" to uses in the State of Iowa. The omission of any such limitation stands in contrast to a number of other provisions in chapter 99F requiring the use of Iowa goods and services. See Iowa Code sections 99F.7(4) (requiring that a licensee "utilize Iowa resources, goods and services in the operation of an excursion gambling boat"); 99F.7(5)(a) (requiring that a "substantial number of the staff and entertainers employed are residents of Iowa"); 99F.7(5)(c) (requiring a section of an excursion gambling boat be reserved for the "promotion and sale of arts, crafts, and gifts native to and made in Iowa"). Legislative intent is expressed not only by what is included, but also by what is excluded. Barnes v. Iowa Dep't of Trans., 385 N.W.2d 260, 262-63 (Iowa 1986). The express mention of certain conditions implies the exclusion of others. Id. at 263. The absence of any express limitation on the distribution of receipts for "educational, civic, public, charitable, patriotic, or religious uses," indicates the legislative intent that there be no such limitation.

As you point out in your letter, the distribution scheme set forth in Iowa Code section 99B.7(3)(b) for "qualified organizations" licensed to conduct games of chance under chapter 99B limits distributions for "educational, civic, public, charitable, patriotic, or religious uses" to uses in the State of Iowa. For example, a Catholic church from Carroll County licensed to conduct bingo could not distribute receipts from its bingo game for "educational, civic, public, charitable, patriotic, or religious uses" outside the state of Iowa. However, section 99F.6(4)(a) does not reference the entire distribution scheme set forth in section 99B.7(3)(b). The reference to section 99B.7(3)(b) is limited to its definition of "educational, civic, public,

charitable, patriotic, or religious uses." In construing a statute, we search for legislative intent based on what the legislature said, rather than what it should or might have said. State v. Peterson, 347 N.W.2d 398, 402 (Iowa 1984). Because section 99F.6(4)(a) does not reference the "uses in this state" requirement of section 99B.7(3)(b), we find that the legislature did not intend to impose that restriction.

In summary, we find that a "qualifying organization" or "qualified sponsoring organization" licensed to conduct gambling games pursuant to Iowa Code chapter 99F may distribute receipts for "educational, civic, public, charitable, patriotic, or religious uses" outside the state of Iowa. Our opinion with regard to this question renders moots the second question posed in your request.

Sincerely,

Jeffrey D. Farrell
Assistant Attorney General

COURTS; CLERKS OF COURT: Collection, use, and disclosure of social security numbers. Iowa Code §§ 22.7(33), 321.497, 421.17(25), (29), 422.72, 602.6111, 904.602(2) (1997); Iowa Code Supp. §§ 252K.311(1), 252K.602(1)(d)(1), 321.40, 595.4, 598.22B(1), (3)(a) (1997); Privacy Act of 1974, § 7, Pub.L. 93-579, 5 U.S.C. § 552a, note; 5 U.S.C. §§ 551(1), 552a(a)(1), 552(f); 42 U.S.C. §§ 405(c)(2)(C)(i), (vi), (viii)(I), (II), (III), 666(a)(13)(B). Because state courts are not "agencies" subject to the Privacy Act of 1974, federal law does not prohibit Iowa courts from collecting and using the social security numbers of parties for identification purposes. We revise our prior opinion, 1994 Op. Att'y Gen. 95 (#94-5-1(L)), to the extent it applied the Privacy Act to Iowa courts. Social security numbers collected in sole reliance upon Iowa Code section 602.6111, or other provision of law enacted on or after October 1, 1990, should be treated as confidential and not disclosed to the public. (Griebel to O'Brien, State Court Administrator, 3-2-98) #98-3-1(L)

March 2, 1998

William J. O'Brien
State Court Administrator
State Capitol
LOCAL

Dear Mr. O'Brien:

You have requested an opinion of the Attorney General concerning federal restrictions on the collection and use of social security numbers by Iowa courts. You note that in 1994 our office issued an opinion concluding, in part, that federal restrictions precluded clerks of court from refusing pleadings or other documents which failed to disclose a party's social security number. 1994 Op. Att'y Gen. 95 (#94-5-1(L)). In light of recent federal and state legislation mandating disclosure of a party's social security number in certain contexts, you ask that we update and revisit our 1994 opinion.

We now conclude federal law does not prohibit the collection and use of social security numbers by state courts and revise our 1994 opinion to the extent it applied the federal Privacy Act of 1974 to Iowa courts. We also conclude that social security numbers collected by Iowa courts solely in reliance upon Iowa Code section 602.6111 (1997), or other provision of law enacted on or after October 1, 1990, should be treated as confidential and not disclosed to the public.

Use of personal identification numbers in Iowa courts

In 1991, when clerks' offices started implementing electronic docketing, the Supreme Court of Iowa issued a supervisory order requiring a personal identification number for all parties and attorneys in civil or criminal cases in those counties with operational electronic case management systems. Supreme Court Administrative Directive, Iowa Court Information System, June 14, 1991. To facilitate electronic identification and tracking, the supervisory order required that each petition, complaint, answer, appearance, first motion, or document adding a new party or attorney filed with the clerk on or after September 3, 1991, contain a personal identification number for each separate party or attorney. Id. Parties and attorneys were required to use their social security numbers or employer identification numbers, although clerks could assign a nine-digit number if a party or attorney requested one. Clerks were directed to affix personal identification numbers to all documents finally disposing of cases, including judgments, sentencing orders, and dismissals. The supervisory order was amended January 4, 1994, to update the list of counties with operational electronic case management systems as of July 1, 1994. Id. We have been informed all Iowa counties are now using the Iowa Court Information System, the backbone for electronic docketing.

The Supreme Court's supervisory order was substantially codified in 1993 with the enactment of Iowa Code section 602.6111. This section has not been amended since enactment and 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 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.

Iowa Code § 602.6111 (1997). As codified, parties are not given the option of substituting a nine-digit number assigned by the clerk for a social security number or employer identification number. Parties are required to provide their driver's license numbers, if different from their social security numbers. Iowa Code section 602.6111 does not address personal identification numbers for attorneys, but does codify the requirement that clerks affix personal identification numbers to all documents finally disposing of cases.

In practice, the Judicial Department has used personal identification numbers to identify parties, both internally and when electronically communicating with specific state agencies. Clerks use personal identification numbers, for example, when electronically transmitting abstracts of driving conviction records to the Iowa Department of Transportation pursuant to Iowa Code section 321.491 (1997). As a practical matter, clerks need to use social security numbers and driver's license numbers to ensure accurate matches with electronic data banks maintained by the Department of Transportation.

Clerks also electronically transmit personal identification numbers to the Iowa Department of Revenue and Finance when requesting offsets against income tax refunds or other state obligations owed to debtors who owe delinquent criminal restitution to the State, pursuant to Iowa Code section 421.17(25) and (29) (1997). Iowa Code section 421.17(25) has required from 1985 that clerks obtain and forward social security numbers to the Department of Revenue when seeking offsets against income tax refunds. 1985 Iowa Acts, ch. 197, § 8. Similarly, Iowa Code section 421.17(29) has required from 1987 that clerks obtain and forward social security numbers to the Department of Revenue when seeking other types of offsets. 1987 Iowa Acts, ch. 199, § 5. Using social security numbers in this context addresses the need for precision when offsetting liabilities to the State against liabilities of the State.

In the last legislative session, a series of additional provisions were enacted which require clerks to obtain social security numbers from parties. Pleadings to establish or modify support orders or to determine parentage under Iowa Code chapter 252K, for instance, must now include the social security numbers of the obligor, obligee, and all children, if available. Iowa Code § 252K.311(1) (Supp. 1997). Support orders entered under Iowa Code chapter 252K must also contain the social security number of the obligor. Iowa Code § 252K.602(1)(d)(1) (Supp. 1997). Indeed, all initial or modified orders for paternity or support entered pursuant to Iowa Code chapters 598, 234, 252A, 252C, 252F, 252H, 252K, 600B, or any other chapter, must contain an order requiring the parties to disclose their social security numbers to the clerk or child support recovery

unit. Iowa Code § 598.22B(1) (Supp. 1997).[1] Clerks are also required to transmit social security numbers to the Department of Transportation when forwarding names of debtors owing delinquent criminal restitution for the purpose of denying motor vehicle registration. Iowa Code § 321.40 (Supp. 1997).

Prior opinion concerning Iowa Code section 602.6111

Our 1994 opinion concluded that access to the courts could not be conditioned upon disclosure of a party's social security number, pursuant to section 7 of the Privacy Act of 1974, Pub.L. 93-579, uncodified, but appearing in the annotated code as an historical note at 5 U.S.C. § 552a. 1994 Op. Att'y Gen. 95 (#94-5-1(L)). Section 7(a)(1) of Pub.L. 93-579 deems it unlawful for a "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 number." The Act does not prohibit voluntary requests for an individual's social security number, but prescribes an informed consent process whereby individuals must be informed in advance whether the disclosure is mandatory or voluntary, by what statutory or other authority the number is solicited, and what uses will be made of it. Privacy Act of 1974, § 7(b).

We concluded Iowa Code section 602.6111 was inconsistent with the Privacy Act and accordingly advised that clerks could not require disclosure of a party's social security number.[2] We also concluded that clerks were not equipped with a means to comply with the informed consent process required when making voluntary requests for a party's social security number and generally advised clerks not to determine the legal sufficiency of documents presented for filing. See Dwyer v. Clerk of the District Court

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[1] To facilitate the collection of child support, federal law started requiring in 1996 that states create procedures for placing social security numbers in the records of any individual subject to a divorce decree, support order, or paternity determination. 42 U.S.C. § 666(a)(13)(B). See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub.L. 104-193, § 317.

[2] Note that we were not requested to analyze other Code provisions which may have required or allowed a clerk of court to request a party's social security number under particular circumstances. The Privacy Act itself authorizes state agencies to deny rights, benefits or privileges upon an individual's refusal to disclose a social security number if disclosure is required by federal statute. Privacy Act of 1974, § 7(a)(2)(A). Additionally, shortly after the passage of the Privacy Act, the Social Security Act was amended in 1976 to expressly authorize states to require disclosure of social security numbers for identification purposes in the administration of any tax, general public assistance, driver's license, or motor vehicle registration law. 42 U.S.C. § 405(c)(2)(C)(i), (vi). Arguably, this amendment authorizes states to require disclosure of social security numbers for the purpose of collecting delinquent fines in traffic offense cases. See Doyle v. Wilson, 529 F. Supp. 1343, 1349 (D.C. Del. 1982); 73 Cal. Op. Att'y Gen. 347 (1990).

for Scott County, 404 N.W.2d 167 (Iowa 1987) (not clerk's duty or function to rule on the validity or legal effect of documents submitted for filing).

Courts are not "agencies"

Our 1994 opinion assumed, without express analysis, that the Privacy Act applied to state courts. We now conclude the Privacy Act does not apply to state courts.

Section 7 of the Privacy Act applies only to a "Federal, State or local government agency." Section 3 of the codified portion of the Act defines the term "agency" to mean "agency as defined in section 552(e) of this title. . . ." 5 U.S.C. 552a(a)(1). Section 552(e), which was redesignated 552(f) in a 1986 amendment,[3] defines the term "agency" for purposes of the federal Freedom of Information Act as follows:

> [T]he term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency. . .

5 U.S.C. 552(f)(1). Section 551(1), the general definitional section of the federal Administrative Procedure Act, expressly excludes courts from the definition of "agency." 5 U.S.C. § 551(1)(B) ("'agency'. . . does not include the courts of the United States.").

Courts have relied upon the cross-referenced definitions of the term "agency" in the codified portion of the Privacy Act when determining the applicability of uncodified section 7. A Georgia bankruptcy court, for example, recently relied upon the definition of "agency" in 5 U.S.C. § 551(1)(B) to find the Act's social security number provisions inapplicable to federal courts. In re Phillip Adair, 212 B.R. 171, 173 (Bankr. N.D. Ga. 1997). Federal bankruptcy rules require debtors to disclose social security numbers on bankruptcy petitions. Federal Rule of Bankruptcy Procedure 1005; Official Bankruptcy Forms 1, 5, and 16A. The court in Adair ordered dismissal of the debtor's bankruptcy case if he failed to amend the petition to disclose his social security number. 212 B.R. at 173.

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[3] Pub. L. 99-570, §1802(b).

The Privacy Act's definitional cross-references all relate to federal agencies. Applying federal definitions of "agency" to a state or local context may create ambiguity in some circumstances. Krebs v. Rutgers, 797 F. Supp. 1246, 1253 (D. N.J. 1992). The exclusion of courts, however, is unambiguous. Like the federal Administrative Procedure Act, the Iowa Administrative Procedure Act expressly excludes courts from its definition of "agency." Iowa Code § 17A.2(1)(1997)("Agency" does not mean the . . . judicial department or any of its components"). See also Iowa Code § 602.1102 (1997)(defining components of the Judicial Department to include all courts and all clerks of all courts). Our conclusion that section 7 of the Privacy Act does not apply to state courts is supported by a 1996 Arkansas Attorney General's opinion which also concluded the Act does not apply to state courts. Ark. Op. Att'y Gen. 96-291.

Because we now conclude section 7 of the Privacy Act does not apply to state courts, we revise our 1994 opinion to the extent it found that the Act precludes clerks from refusing pleadings or other documents which fail to disclose a party's social security number. That portion of the 1994 opinion which cautioned clerks not to refuse to file documents without social security numbers or employer identification numbers remains sound advice. There are no restrictions on disclosure of an employer identification number, for instance, but we advised clerks not to attempt to determine the legal effect of a failure to do so. We advised that the legal impact of the failure of a document to reflect a personal identification number should be resolved by judges and the parties, not clerks.

Confidentiality of Social Security Numbers

We did not address the confidentiality of social security numbers in our 1994 opinion given our conclusion that mandatory disclosure was prohibited and that clerks were unequipped to provide the disclosures required by the Privacy Act prior to voluntary requests for social security numbers. A separate federal law provides that "Social security account numbers . . . that are obtained or maintained by an authorized person pursuant to any provision of law, enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such social security account number . . . ." 42 U.S.C. § 405(c)(2)(C)(viii)(I). An "authorized person" is defined in 42 U.S.C. § 405(c)(2)(C)(viii)(III) as "an officer or employee . . . of any State or agency of a State . . . who has or had access to social security account numbers . . . pursuant to any provision of law enacted on or after October 1, 1990." The term "authorized person" is considerably broader than the term "agency" in the Privacy Act.

Both the Iowa Supreme Court's supervisory order and Iowa Code section 602.6111 were enacted after October 1, 1990. Social security numbers obtained or

maintained solely in reliance on these provisions should, therefore, be treated as confidential and not disclosed to the public.[4]

Iowa law also addresses the confidentiality of social security numbers in certain contexts. Social security numbers collected by clerks or the child support recovery unit in connection with initial or modified orders for paternity or support, for example, are not public records. Iowa Code § 598.22B(3)(a) (Supp. 1997). See Iowa Code §§ 22.7(33) (1997) (social security numbers of owners of unclaimed property are confidential), 421.17(25) (1997) (social security numbers provided by clerks to Department of Revenue are held in confidence and used only for offset purposes), 422.72 (1997) (Department of Revenue must remove social security numbers from sample forms), 904.602(2) (1997) (Department of Corrections shall not disseminate social security numbers to the public), and 595.4 (Supp. 1997) (social security numbers collected by county registrars on marriage license applications are confidential).

Conclusion

Iowa courts are not precluded by the federal Privacy Act of 1974 from collecting and using the social security numbers of parties for identification purposes. Social security numbers collected in sole reliance upon Iowa Code section 602.6111, or other provision of law enacted on or after October 1, 1990, should be treated as confidential and not disclosed to the public.

Sincerely,

PAMELA D. GRIEBEL
Special Assistant Attorney General

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[4] The Oregon Attorney General has noted that 42 U.S.C. § 405(c)(2)(C)(viii)(II) only precludes disclosure of a social security number if such disclosure is "unauthorized." Or. Op. Att'y Gen. (1993 WL 602063). If an individual consents to the use of a social security number for particular purposes, re-release of the number would not be "unauthorized." Further, clerks likely receive unsolicited social security numbers from a number of sources and, as previously noted, have had statutory authority to obtain social security numbers for some purposes prior to October 1, 1990.

COUNTY AND COUNTY OFFICERS: County board of supervisors; county commission on veteran affairs. Iowa Code §§ 35B.6, 35B.7, 331.907 (1997). Although county supervisors alone determine the salary for a county veteran affairs commission's executive director, they should give respectful consideration to a county commission's recommendation on a salary increase for that position. (Kempkes to Ferguson, Black Hawk County Attorney, 3-18-98) #98-3-2(L)

March 18, 1998

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

Dear Mr. Ferguson:

You have requested an opinion about the executive director of a county veteran affairs commission, known before 1978 as a "soldier's relief commission." You ask which entity -- the county board of supervisors or the county veteran affairs commission -- has the statutory authority to determine the salary for that position. Assuming that the county supervisors have this authority, you ask how much weight, if any, they must give to a county commission's recommendation on a salary increase for its executive director.

Although we conclude county supervisors alone determine the salary for a county veteran affairs commission's executive director, we suggest they give respectful consideration to a county commission's recommendation on a salary increase for the position.

I.

Iowa Code chapter 331 (1997) is entitled "County Home Rule Implementation," and, among other things, governs county supervisors. Chapter 331 grants county supervisors substantial authority over county finance and services. See Iowa Code § 331.401 et seq.; 1980 Op. Att'y Gen. ___ (#79-7-32) (1979 WL 21034); see also 1988 Op. Att'y Gen. 1 (#87-1-3(L)). Chapter 331 also grants county supervisors substantial authority over

compensation for county personnel. See Iowa Code § 331.903 et seq. For example, section 331.904(4) provides that county supervisors "shall determine the compensation of extra help and clerks appointed by the principal county officers"; and section 331.907(2) provides that, for principal county officers, county supervisors "shall review the recommended compensation schedule [of the county compensation board] and determine the final compensation schedule which shall not exceed the compensation schedule recommended . . . ."

Chapter 35B is entitled "County Commissions of Veteran Affairs." Section 35B.7 provides that a county commission -- whose members are appointed by county supervisors, Iowa Code §§ 35B.3, 35B.4, 331.321(1)(h) --

> shall meet annually to prepare an estimated budget for all expenditures to be made in the next fiscal year and certify the budget to the board of supervisors. The board may approve or reduce the budget for valid reasons shown and entered of record and the board's decision is final.

Section 35B.6(1) provides that a county commission,

> subject to the approval of the board of supervisors, shall have the power to employ an executive director and other necessary administrative or clerical assistants when needed, the compensation of such employees to be fixed by the board of supervisors . . . .

(emphasis added). We interpreted this provision in 1987 and concluded that a county commission has authority to determine whether to terminate one of its employees and that a terminated employee has a right to appeal that determination to the county supervisors. 1988 Op. Att'y Gen. 1 (#87-1-3(L)).

II.

(A)

You have asked what public entity determines the salary for a county commission's executive director.

According to section 331.301, "[a] power of a county is vested in its board [of supervisors], and a duty of a county shall be performed by or under the direction of the board except as otherwise provided by law." Your question thus rests upon the meaning of section 35B.6(1), which provides that a county

commission may, "subject to the approval of the board of supervisors," employ an executive director and other necessary administrative or clerical assistants, "the compensation of such employees to be fixed by the board of supervisors . . . ."

We see no ambiguity in section 35B.6(1) with regard to your question. See generally In re S.M.D., 569 N.W.2d 609, 611 (Iowa 1997) ("[a] statutory provision is ambiguous if reasonable minds could differ or be uncertain as to its meaning"). Section 35B.6(1) clearly places the authority to determine the salary for a county commission's executive director with the county supervisors. See generally 1996 Op. Att'y Gen. ___ (#95-8-2) ("compensation" means remuneration for services rendered, whether in salary, fees, or commissions); 1994 Op. Att'y Gen. 11 (#93-4-8(L)) (county commission's executive director is a public "employee" and not public "officer" for purposes of common law's incompatibility-of-office doctrine; Webster's Ninth New Collegiate Dictionary 430 (1979) (to "fix" means to establish, set, assign). This office arrived at the same conclusion in 1947 and again in 1987. See 1988 Op. Att'y Gen. 38 (#87-5-1(L)) (county supervisors "alone have authority to set the salaries of these appointments"); 1948 Op. Att'y Gen. 140, 142-43. See generally Iowa Code § 250.6 (1987); Iowa Code § 250.6 (1946) (county commission shall have power to employ necessary administrative or clerical assistants, "[t]he compensation of such employees to be fixed by the board of supervisors").

We take note of another provision in chapter 35B concerning a county commission's finances and lending support to our interpretation of section 35B.6(1). See generally Iowa Code § 4.6(4) (statutory interpretation may involve consideration of statutes addressing same or similar subjects). Section 35B.7 expressly provides that a county commission shall meet annually to prepare an estimated budget and certify it to the county supervisors, who "may approve or reduce the budget" and whose "decision is final."

Last, we recognize that the General Assembly presumably knew how to provide a county commission with sole or joint authority to determine the salary for its executive director. See generally Iowa Code § 35B.14 (providing that certain appropriations "shall be expended by the joint action and control of" county supervisors and county commission), § 331.904 (providing principal county officers with limited authority to fix compensation of certain employees). Its election not to do so further supports our conclusion. See State v. Iowa Dist. Court, 503 N.W.2d 411, 413 (Iowa 1993).

(B)

You have asked how much weight, if any, county supervisors must give to a county commission's recommendation on a salary increase for its executive director.

According to section 331.301, "[a] power of a county is vested in its board [of supervisors], and a duty of a county shall be performed by or under the direction of the board except as otherwise provided by law." Your question thus rests upon the existence of a law that provides a county commission with some role in determining its executive director's compensation.

We see nothing in chapters 35B and 331 that authorizes any direct role for a county commission regarding this financial matter. That lack of statutory authority does not necessarily mean that county supervisors should, as a matter of practice, refuse consideration of a salary recommendation by the county commission, which, after all, hires the executive director, Iowa Code § 35B.6(1), and certifies estimated expenditures on an annual basis, Iowa Code 35B.7. See generally 1988 Op. Att'y Gen. 38 (#87-5-1(L)) ("the commission decides the number of assistants to be employed, and which persons should be hired to fill those positions," and "has authority to discharge these employees"). We therefore suggest that county supervisors give respectful consideration to a county commission's recommendation on a salary increase for its executive director. Cf. Diehl v. Iowa Beer & Liquor Control Comm'n, 422 N.W.2d 480, 483 (Iowa 1988) (court need not follow opinions by the Attorney General, but should give respectful consideration to them).

III.

In summary: Although county supervisors alone determine the salary for a county veteran affairs commission's executive director, they should, as a matter of practice, give respectful consideration to a county commission's recommendation on a salary increase for that position.

Sincerely,

Bruce Kempkes
Assistant Attorney General

COUNTIES; COUNTY MEDICAL EXAMINERS: Fees and expenses for deaths that affect the public interest. Iowa Code § 331.802 (1997). A county must pay the fee mandated by section 331.802(2) when one of its residents dies in another county and that county's medical examiner conducts a preliminary investigation and prepares an accompanying report on the death. In such an instance, the county must pay the fee amount established by the other county for the other county's medical examiner as well as the expense of an autopsy conducted by that medical examiner pursuant to section 331.802(4). (Kempkes to Lough, Benton County Attorney, 4-3-98) **#98-4-1(L)**

April 3, 1998

Mr. Ray Lough
Benton County Attorney
Courthouse
Vinton, IA 52349

Dear Mr. Lough:

You have requested an opinion about a county's statutory responsibility to pay the fee of another county's medical examiner for performing certain services. You ask whether the county must pay this fee when one of its residents dies in another county and that county's medical examiner conducts a preliminary investigation and prepares an accompanying report on the death. Assuming the county of residence must pay the fee for these services, you then ask whether it must pay the fee amount established by its own board of supervisors for its own medical examiner or the amount established by the other county's board of supervisors for its medical examiner. You also ask whether the county of residence must pay the expense of an autopsy conducted by the other county's medical examiner.

We conclude that the county of the deceased person's residence must pay the fee for the preliminary investigation and accompanying report; that it must pay the fee amount established by the other county for the other county's medical examiner; and that it must pay the expense of an autopsy.

I.

Among other things, Iowa Code chapter 331 (1997) governs county medical examiners. Section 331.802 sets forth their various duties and powers. See generally 1994 Op. Att'y Gen. 132 (#94-8-3(L)).

In the case of a death that "affects the public interest," section 331.802(1) requires "the physician in attendance, any law enforcement officer having knowledge of the death, the embalmer, or any other person present" to make a report to the county medical examiner, who shall "take charge of the body." See generally Iowa Code § 331.802(3) (listing ten examples of deaths "affecting the public interest"). Section 331.802(2) provides that in the case of a death that affects the public interest, the county medical examiner "shall conduct a preliminary investigation of the cause and manner of death [and] prepare a written report of the findings . . . ."

In addition, section 331.802(2) provides:

> For each preliminary investigation and the preparation and submission of the required reports, the county medical examiner shall receive a fee determined by the board plus the examiner's actual expenses. The fee and expenses shall be paid by the county of the person's residence. However, if the person's death is caused by a defendant for whom a judgment of conviction and sentence is rendered under section 707.2, 707.3, 707.4, 707.5, or 707.6A, [which define various homicides,] the county of the person's residence may recover from the defendant the fee and expenses. . . .

(emphasis added).

Last, section 331.802(4) provides in part that a county medical examiner "shall determine whether the public interest requires an autopsy or other special investigation" and, in the case of a deceased person of unknown identity, "shall order an autopsy, the expense of which shall be reimbursed by" the Iowa Department of Public Health.

II.

(A)

You have asked whether a county must pay the fee mandated by section 331.802(2) when one of its residents dies in another county and that county's medical examiner conducts a preliminary investigation and prepares an accompanying report on the death.

In 1994, we addressed this question under prior law. See 1994 Op. Att'y Gen. 132 (#94-8-3(L)). See generally Iowa Code § 331.802(2) (1993). In 1996, the General Assembly amended section 331.802(2), which now provides that the fee of a county medical

examiner "shall be paid by the county of the [deceased] person's residence" and that that county may, in the case of certain homicides, recover the fee from a convicted defendant. Compare 1996 Iowa Acts, 76th G.A., ch. 1139, § 1 with H.F. 2246 (proposing to amend Iowa Code section 331.802(2) (1997) to provide that medical examiner "shall receive from the county of appointment a fee determined by the board" and that this fee "shall be reimbursed to the county of appointment by the county of the [deceased] person's residence").

We do not believe that section 331.802(2) has any ambiguity regarding which county must pay the fee for the medical examiner's services. See generally In re S.M.D., 569 N.W.2d 609, 611 (Iowa 1997) ("[a] statutory provision is ambiguous if reasonable minds could differ or be uncertain as to its meaning"). Section 331.802(2) clearly provides that the fee "shall be paid by the county of the [deceased] person's residence." See generally Iowa Code § 4.1(30)(a) (use of "shall" in statute normally imposes a duty).

You have indicated, however, the county of the deceased person's residence may not agree that the death "affects the public interest" and thereby warrants the services of the other county's medical examiner under section 331.802(3). You have indicated some concern that out-of-county hospitals may request the services of a medical examiner in inappropriate cases.

We can only make general observations regarding such possible disagreement, because the determination whether a particular death "affects the public interest" amounts to a mixed question of fact and law that does not lend itself to resolution in an opinion. See generally 61 IAC 1.5(3); 1988 Op. Att'y Gen. 18, 20-21. Moreover, as the following paragraph reveals, the public interest determines the appropriateness of a county medical examiner's services in a given case.

First: Section 331.802(2) clearly requires a county medical examiner to conduct a preliminary investigation and prepare a written report if a death affects the public interest. Second: Section 331.802(3) expressly provides that a death affecting the public interest "includes, but is not limited to," the ten examples it lists. That a particular death does not squarely fit into one of those examples thus does not necessarily preclude a finding that it may, in fact, affect the public interest. See 1987 Miss. Op. Att'y Gen. (1987 WL 121542) (interpreting similar Mississippi statute). Third: The determination whether a death affects the public interest clearly lies with the medical examiner of the county in which the death occurred. See generally Iowa Code § 331.802(1)-(5). Fourth: In its entirety, section 331.802 implicitly grants this public official a degree of discretion in making that determination. See 1996 Op. Att'y Gen. ___

(#96-5-3(L)); 1994 Op. Att'y Gen. 142 (#94-9-4(L)); 1992 Op. Att'y Gen. 26 (#91-5-2(L)). As we have observed in a related situation, the determination necessarily rests upon a resolution of factual issues and the exercise of professional judgment in light of all the facts and surrounding circumstances. 1988 Op. Att'y Gen. 18, 21. Any challenge against the determination would require a showing that a county medical examiner failed to exercise any professional judgment and, in so failing, committed an abuse of discretion. See 1978 Op. Att'y Gen. 27, 30; see also American Postal Workers Union v. U.S. Postal Serv., 891 F.2d 304, 313 (D.C. Cir. 1989).

(B)

Regarding the preliminary investigation and accompanying report that may arise when a person from one county dies in another county, you have asked whether the county of the deceased person's residence pays the fee amount established by its own board of supervisors for its own medical examiner or the presumably different amount established by the other county's board of supervisors for its medical examiner.

Section 331.802(2) provides that a county medical examiner shall receive a fee "determined by the board" for preliminary investigations and accompanying reports. Nothing in chapter 331 indicates that "the board" in section 331.802(2) means another county's board. See Iowa Code § 331.101(3) ("board" in chapter 331 means "the board of supervisors of a county"). Each county board of supervisors has authority under section 331.802(1) to appoint its own medical examiner, whose qualifications and experience presumably justify the particular fee it determines to be appropriate under section 331.802(2).

We therefore believe that a county has authority to establish the amount of the fee mandated by section 331.802(2) for its medical examiner's services, even though another county may have to pay it in certain instances. Stated conversely, a county must pay the fee amount established by another county under section 331.802(2) when one of its residents dies in that other county and that other county's medical examiner conducts a preliminary investigation and prepares an accompanying report on the death.

Had the General Assembly intended to permit the first county to pay the fee amount it had established for its own medical examiner's services -- which, in fact, were not rendered -- it presumably knew how to craft such language in section 331.802(2). Cf. Iowa Code § 28A.18(1) (bonds shall bear interest at statutory rate or at rate established by certain other states, "whichever rate is lower"); Miss. Code Ann. 41-61-59(3) (1996) ("[i]f a death affecting the public interest takes place in a county other than the one where injuries or other substantial causal factors leading

to the death occurred, jurisdiction for investigation of the death may be transferred, by mutual agreement of the respective medical examiners of the counties involved, to the county where such injuries or other substantial causal factors occurred, and the costs of autopsy or other studies necessary to the further investigation of the death shall be borne by the county assuming jurisdiction"). See generally Iowa R. App. P. 14(f)(13) (statutory interpretation focuses upon what legislature wrote, not what it should or might have written).

(C)

Regarding an autopsy that may arise when a person from one county dies in another county, you have asked whether the county of the deceased person's residence pays the expense of that autopsy.

Section 331.802(4) provides that a county medical examiner in charge of a corpse "shall determine whether the public interest requires an autopsy or other special investigation." Again, this determination clearly lies within the discretion of the medical examiner of the county in which the death occurred. In making that determination, a county medical examiner "may" -- pursuant to section 331.802(4) -- "consider the request for an autopsy from a public official or private person." See generally Iowa Code § 4.1(30)(c) ("may" in statutes normally confers a power). Nevertheless, a county medical examiner in charge of a corpse may have no choice but to conduct an autopsy: section 331.802(4) also provides that the state medical examiner or the county attorney of the county where the death occurred "may require an autopsy" and that, in the case of a deceased person of unknown identity, the county medical examiner "shall order an autopsy." See generally Iowa Code § 4.1(30)(a) ("shall" in statutes normally imposes a duty); State v. Berry, 247 N.W.2d 263, 264 (Iowa 1976) ("require" commonly means to demand, exact, or enforce).

Regarding the financial responsibility for the expense of an autopsy, section 331.802(4) is incomplete. Although it expressly provides that the Iowa Department of Public Health shall make reimbursement for the expense of an autopsy of a deceased person of unknown identity, it fails to make any provision for payment or reimbursement of the expense of an autopsy of a deceased person of known identity.

We have already concluded in this opinion that a county must pay the fee mandated by section 331.802(2) when one of its residents dies in another county and that county's medical examiner conducts a preliminary investigation and prepares an accompanying report on the death. Consistent with this conclusion, we believe that that county must also pay the expense of an autopsy for a person of known identity conducted by the medical examiner pursuant to section 331.802(4). See generally Farmers Co-op Co. v.

DeCoster, 528 N.W.2d 536, 538 (Iowa 1995); Doe v. Ray, 251 N.W.2d 496, 501 (Iowa 1977) (when possible, statute should be harmonized with other statutes relating to same subject); Lamb v. Kroeger, 233 Iowa 730, 8 N.W.2d 405, 408 (1943) (statutory interpretation should result in consistency among relevant statutory provisions); 1998 Op. Att'y Gen. ___ (#97-6-3(L)).

III.

In summary: A county must pay the fee mandated by section 331.802(2) when one of its residents dies in another county and that county's medical examiner conducts a preliminary investigation and prepares an accompanying report on the death. In such an instance, the county of residence must pay the fee amount established by the other county for the other county's medical examiner as well as the expense for an autopsy conducted by that medical examiner pursuant to section 331.802(4).

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

LABOR: Federal Professional Boxing Safety Act of 1996. 15 U.S.C. §§ 6304, 6305, 6306, 6307, 6316; Iowa Code §§ 90A.2, 90A.4 (1997). The Labor Commissioner may determine who bears the responsibility to pay for the health insurance that covers boxers' participation in matches. The Labor Commissioner may establish minimum amounts of health insurance coverage for boxers. An insurance policy must provide coverage for any injuries sustained in a match. The Labor Commissioner may seize a boxer's identification card, transmit it to the boxer's state of residence, and request its return to the boxer only after satisfactory completion of a suspension imposed by this state. The Labor Commissioner may require boxers to appeal suspensions imposed by this state either to the Association of Boxing Commissions or in accordance with the Iowa Administrative Procedure Act, the state law that would govern appeals of suspensions imposed by the Labor Commissioner. The Labor Commissioner need not allow a boxer suspended by this state to participate in matches here even if the Association of Boxing Commissions, on appeal, disagrees with that suspension. (Kempkes to Orton, Labor Commissioner, 4-14-98) #98-4-2(L)

April 14, 1998

Mr. Byron K. Orton
Labor Commissioner
Iowa Workforce Development
1000 E. Grand Ave.
Des Moines, IA 50319

Dear Commissioner Orton:

You have asked for an opinion on the federal Professional Boxing Safety Act of 1996 ("PBSA"), 15 U.S.C. ch. 89, as it may relate to the Labor Commissioner's regulation of professional boxing within this state. Among other things, the Labor Commissioner has authority under state law to issue, suspend, or revoke licenses to conduct boxing matches and to promulgate rules affecting such licensure. See Iowa Code §§ 90A.2, 90A.4 (1997); see also 347 IAC ch. 97.

You pose six questions about the PBSA: (1) who bears the responsibility to pay for mandated health insurance covering boxers' participation in matches; (2) whether the Labor Commissioner may establish minimum amounts of insurance coverage; (3) whether insurance policies may exclude certain injuries from coverage; (4) whether the Labor Commissioner may seize the identification card of a boxer suspended here, transmit it to the boxer's state of residence, and request that state to return it to the boxer only upon satisfactory completion of his suspension; (5) whether the Labor Commissioner may require boxers suspended by this state to appeal their suspensions either to the Association of Boxing Commissions (ABC) or in accordance with the Iowa Administrative Procedure Act; and (6) whether the Labor Commissioner must allow a boxer suspended by this state to participate in matches here when the ABC, on appeal, disagrees with that suspension.

The PBSA applies to a state "boxing commission," which, in this state, effectively means the Labor Commissioner. See 15 U.S.C. § 6301(2); Iowa Code §§ 90A.2, 90A.4. We thus have authority to determine the scope, import, and meaning of the PBSA as it may relate to the duties of that position. See, e.g., 1996 Op. Att'y Gen. ___ (#96-10-7); see also 1988 Op. Att'y Gen. 84 (#88-4-3(L)). That task requires ascertaining Congress's intent in passing the PBSA. See generally California Fed. Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 280, 107 S. Ct. 683, 93 L. Ed. 2d 613 (1987).

I.

The PBSA expressly purports to assist states in properly overseeing the professional boxing industry and to improve and expand the system of safety precautions protecting the health and welfare of professional boxers. See 15 U.S.C. § 6302. See generally In re Estate of Gross, ___ N.Y.S.2d ___ (App. Div. 1997) (1997 WL 790102) ("[alone among professional sports, boxing] has as its ultimate goal the physical incapacitation of a participant"). In light of these purposes, the PBSA does not prohibit states "from adopting or enforcing supplemental or more stringent laws or regulations not inconsistent with [its provisions]." 15 U.S.C. § 6313.

The PBSA sets forth a broad prohibition:

> No person may arrange, promote, organize, produce, or fight in a professional boxing match without meeting each of the following requirements or an alternative requirement in effect under regulations of a boxing commission that provides equivalent protection of the health and safety of boxers:
>
> . . . .
>
> (4). Health insurance for each boxer to provide medical coverage for any injuries sustained in the match.

15 U.S.C. § 6304.

The PBSA provides that each state boxing commission "shall issue" identification cards to registering boxers and "shall report" the results of boxing matches and any related suspension to each boxer registry within a certain time period. See 15 U.S.C. §§ 6305, 6307. The PBSA also provides that each state boxing commission "shall establish" procedures for denying authorization for boxers to fight and for ensuring that certain suspended boxers do not participate in matches. See 15 U.S.C. § 6306(a).

In addition, the PBSA provides that each state boxing commission "shall establish" procedures for reviewing suspensions on appeal and for revoking certain suspensions. See 15 U.S.C. § 6306(a). The PBSA provides that a state boxing commission "may allow a boxer under suspension in any state" to participate in a match if, on appeal to the ABC, the ABC determines that the suspension "was without sufficient grounds, for an improper purpose, or not related to the health and safety of the boxer or the purposes of [the PBSA]." 15 U.S.C. § 6306(b).[1]

II.

(A)

You have asked who bears the responsibility under the PBSA to pay for the mandated health insurance covering boxers' participation in matches. The PBSA provides that no person may "arrange, promote, organize, produce, or fight" in a match without health insurance for each boxer. See 15 U.S.C. § 6304. Such language does not directly place financial responsibility for that insurance on any particular group of persons associated with boxing.

Remarks by Congressmen who sponsored passage of the PBSA clearly indicate an intent to create a financial safety net on behalf of boxers, who risk brain damage, slurred speech, vision loss, or other serious injury and death in the ring. See generally Rice v. Rehner, 463 U.S. 713, 728, 103 S. Ct. 3291, 77 L. Ed. 2d 961 (1983) (remarks of legislative sponsors have bearing upon statutory construction). At the earliest stage, debates on boxing reform within the House Committee on Labor focused upon "protecting workers in their workplace." 142 Cong. Rec. H11155 (daily ed. September 25, 1996) (statement of Rep. Manton). Reform included provision of proper health measures for the "unknown, journeymen boxers [sustaining the sport who] may never make more than a few hundred dollars a night." 142 Cong. Rec. S12333 (daily ed. October 3, 1996) (statement of Sen. McCain). These boxers have had "[n]o pension, no medical care, no assistance from any league or association" unlike athletes in other sports who have "well-run private associations that provide benefits to [them]." Id. See

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[1] We note that significant federalism concerns arise when Congress either directly imposes administrative requirements upon state governmental entities or invests bodies such as the ABC with the power to modify or overturn a state administrative decision and impose its judgment upon that state. See generally Printz v. United States, ___ U.S. ___, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997); New York v. United States, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992). Your opinion request, however, only concerns the construction or interpretation of the PBSA.

generally 15 U.S.C. § 6311(a) (Secretary of Labor shall study feasibility and cost of national pension system for boxers).

In their remarks, the PBSA's sponsors focused upon the low wages and lack of employment-related benefits for boxers. It would seem incongruous, then, to require boxers to undergo the financial burden of paying for the health insurance covering their participation in matches. See generally California Fed. Savings & Loan Ass'n v. Guerra, 479 U.S. at 283 (courts may consider spirit of act in order to effectuate its underlying purpose); Peyton v. Rowe, 391 U.S. 54, 64-65, 88 S. Ct. 1549, 20 L. Ed. 2d 426 (1968) (remedial laws purporting to protect health and safety should receive a liberal interpretation in order to effectuate their underlying purposes); United States v. Doran, 681 F.2d 605, 607 (9th Cir. 1982); 1966 Op. Att'y Gen. 456, 458.

In any event, it appears that Congress left to the states the authority to determine which group associated with boxing must pay for the mandated health insurance. See generally Train v. Natural Resources Defense Counsel, Inc., 421 U.S. 60, 79-81, 95 S. Ct. 1470, 43 L. Ed. 2d 731 (1975); Askew v. American Waterways Operators, Inc., 411 U.S. 325, 329, 93 S. Ct. 1590, 36 L. Ed. 2d 280 (1973). Although we have not researched the law governing all fifty states, we have discovered that several states have placed this financial responsibility upon promoters. See, e.g., Haw. Rev. Stat. Annot. § 440-10(a)(3); Idaho Code § 54-407(3); Ill. Stat. ch. 225, § 105/9(2); Mass. Stat. § 39B; Mich. Stat. § 339.807; N.Y. Unconsolidated Laws § 8928-a(1); Wash. Stat. § 67.08.030(2); Wis. Stat. Annot. § 444.18; see also N.J. Stat. § 5:2A-8 (Committee Statement). Cf. 15 U.S.C. § 6310 (promoters have responsibility to assure supervising boxing commissions that all requirements of PBSA will be met for matches held in certain states); 141 Cong. Rec. S16514 (daily ed. November 1, 1995) (statement of Sen. McCain about an earlier version of the PBSA: "[p]romoters are required to provide medical insurance for each boxer").

The Labor Commissioner has authority under chapter 90A to promulgate administrative rules. See Iowa Code § 90A.4. The Labor Commissioner may promulgate an administrative rule determining who must pay for the mandated health insurance that covers boxers' participation in matches.

(B)

With regard to this health insurance, you have asked whether the PBSA permits the Labor Commissioner to establish minimum amounts of coverage. See generally 347 IAC 97.26 (all contracts between promoters and boxers shall be written on official forms furnished by Labor Commissioner). The PBSA requires "[h]ealth insurance for each boxer to provide medical coverage for any

injuries sustained in the match." See 15 U.S.C. § 6304. The PBSA does not mention any dollar amounts of coverage.

The PBSA does not displace state regulation of professional boxing. See generally Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355, 368-69, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986) (principles of federal preemption summarized). Indeed, it expressly purports to assist state boxing commissions in overseeing the professional boxing industry. See 15 U.S.C. § 6302. Accordingly, the PBSA does not prohibit states from adopting or enforcing supplemental laws or regulations "not inconsistent with" its provisions. See 15 U.S.C. § 6313.

The Labor Commissioner has authority under chapter 90A to promulgate administrative rules. See Iowa Code § 90A.4. We believe that the Labor Commissioner may promulgate an administrative rule establishing minimum amounts of health insurance coverage for boxers. Cf. Iowa Code § 64.7 (governing body may fix official bonds of township clerks "as [the] public interest may require"); 141 Cong. Rec. S16514-15 (statement of Sen. McCain about an earlier version of the PBSA: the amount of insurance "will be left up to the discretion of each State").

(C)

You have asked whether the PBSA permits a health insurance policy to exclude certain injuries from coverage. The PBSA requires health insurance for each boxer to provide medical coverage for "any injuries sustained in the match." See 15 U.S.C. § 6304. We recognize that virtually every insurance policy sets forth exclusions from coverage. You do not indicate the type of injuries that might be excluded by health insurance policies for boxers and, accordingly, we cannot determine whether their exclusion may offend the PBSA.

(D)

You have asked whether the Labor Commissioner may seize the identification card of a boxer suspended pursuant to proceedings here, transmit it to the boxer's state of residence, and request that state to return it to the boxer only upon satisfactory service of the suspension. The PBSA provides that a supervising boxing commission shall report suspensions to each boxer registry after the completion of each boxing match. See 15 U.S.C. § 6307. It also provides that each state boxing commission shall establish procedures "to ensure that . . . no boxer is permitted to box while under suspension from any boxing commission." See 15 U.S.C. § 6306(a).

Through use of identification cards, the PBSA seeks to create a "boxer passport system" among the states. 142 Cong. Rec. H11157

(daily ed. September 25, 1996) (statement of Rep. Williams). See generally 15 U.S.C. § 6305. Congress apparently established such a system, because "Commission after Commission has complained . . . that State suspensions are flouted by boxers who hop from town to town fighting under different names, ignoring failed drug tests and medical injuries . . . ." 142 Cong. Rec. H11157 (daily ed. September 25, 1996) (statement of Rep. Oxley).

The Labor Commissioner has authority under chapter 90A to promulgate administrative rules. See Iowa Code § 90A.4. We believe that the Labor Commissioner, pursuant to administrative rule, may seize an identification card, transmit it to the boxer's state of residence, and request its return to the boxer only after satisfactory completion of a suspension imposed by this state. See generally 15 U.S.C. §§ 6302, 6313.

(E)

Noting that the PBSA permits boxers to appeal state-imposed suspensions to the ABC, see 15 U.S.C. § 6306(b), you have asked whether the Labor Commissioner may require them to "select an appeal route" by appealing their suspensions either to the ABC or in accordance with the Iowa Administrative Procedure Act.

The PBSA provides that a state boxing commission shall establish procedures for reviewing suspensions upon appeal and for revoking suspensions imposed for certain reasons. See 15 U.S.C. § 6306(a)(3), (4). The PBSA also provides that it seeks to assist states in providing proper oversight for the professional boxing industry and that it does not prohibit them from adopting or enforcing supplemental regulations "not inconsistent with" its provisions. See 15 U.S.C. §§ 6302, 6313.

The Labor Commissioner has authority under chapter 90A to promulgate administrative rules. See Iowa Code § 90A.4. We believe that the Labor Commissioner may promulgate an administrative rule requiring boxers to appeal their suspensions either to the ABC or in accordance with the Iowa Administrative Procedure Act. We point out that the Iowa Administrative Procedure Act, codified in Iowa Code chapter 17A, sets forth the state law governing appeals of suspensions imposed by the Labor Commissioner and that "appeals" of these suspensions to the ABC -- discussed in Division II(F), post -- have a somewhat different function.

(F)

In connection with your previous question, you have asked whether the PBSA requires the Labor Commissioner to allow a boxer suspended by this state to participate in matches here when the ABC, on appeal, disagrees with that suspension. Although captioned

"Suspension in another State," 15 U.S.C. § 6306(b), a PBSA provision declares that a state boxing commission

> may allow a boxer who is under suspension in any State to participate in a professional boxing match . . . if the boxer appeals to the [ABC], and the [ABC] determines that the suspension of such boxer was without sufficient grounds, for an improper purpose, or not related to the health and safety of the boxer or the purposes of [the PBSA].

15 U.S.C. § 6306(b)(2) (emphasis added).

We believe that this provision is not ambiguous and not in need of construction. The word "may" in statutes usually signifies the conferral of power or discretion. Farmers & Merchants Bank v. Federal Reserve Bank, 262 U.S. 649, 662-63, 43 S. Ct. 651, 67 L.E. 1157 (1923); Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 151 (4th Cir. 1993); accord Iowa Code § 4.1(30)(c). Similarly, the word "allow" in this context usually signifies to permit, grant, or sanction. Black's Law Dictionary 70 (1979); Webster's New Collegiate Dictionary 31 (1979). The word "any" usually signifies all, every, the whole of, or without limitation. Bolman Hat Co. v. Root, 112 F.3d 113, 116 (3rd Cir. 1997), cert. denied, ___ U.S. ___ (1997 WL 592512); Kalmbach, Inc. v. State of Pennsylvania Ins. Co., 529 F.2d 552, 556 (9th Cir. 1976); State v. Bishop, 257 Iowa 336, 132 N.W.2d 455, 458 (1965); Black's, supra, at 86; Webster's, supra, at 51. In this case, the meaning of "any state" remains unaffected by the provision's caption, which uses the phrase "another state." See generally House v. Commissioner of Internal Revenue, 453 F.2d 982, 987 (5th Cir. 1972) (subheadings for statutory sections will not be read as destroying clear meaning of statutory terms); 1A Sutherland's Statutory Construction § 21.04, at 122 (1993) (section heading or caption cannot vary express statutory terms).

No reason appears to compel a construction at odds with the commonly accepted meanings (or loquendum ut vulgus) of the PBSA's terms. See Farmers & Merchants Bank v. Federal Reserve Bank, 262 U.S. at 662-63. Under the PBSA, then, a state boxing commission need not allow suspended boxers to participate in matches in its state if the ABC, on appeal, disagrees with their suspensions.

This conclusion comports with the ideas that the PBSA does not displace state regulation and that it does not prohibit states from adopting or enforcing supplemental or more stringent laws or regulations "not inconsistent with" its provisions. See 15 U.S.C. § 6313. It also avoids the significant federalism concerns that would arise if the PBSA purported to provide the ABC with the power of modifying or overturning a state-imposed suspension and imposing

its judgment upon the suspending state. (See footnote 1, ante, in Division I.) See generally Buckley v. Valeo, 424 U.S. 1, 77-78, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (when possible, courts have duty of interpreting statutes to avoid constitutional infirmities); Knight v. Iowa Dist. Court, 269 N.W.2d 430, 432 (Iowa 1978).

A suspension imposed by the Labor Commissioner will preclude the boxer from participating in matches here, despite a successful appeal to the ABC, until satisfactory completion of the suspension, modification of the suspension by the Labor Commissioner, or favorable decision under the Iowa Administrative Procedure Act. In other words, a boxer suspended by the Labor Commissioner may not insist upon participating in matches in this state merely by appealing to the ABC and obtaining a favorable decision from that body. State law, not the PBSA, ultimately governs the suspension of a boxer who participates in matches held in this state as well as any appeal of that suspension. Accordingly, we conclude the Labor Commissioner need not allow a boxer suspended by this state to participate in matches here even if the ABC, on appeal, disagrees with that suspension.

III.

With regard to the federal Professional Boxing Safety Act of 1996, we conclude: The Labor Commissioner may determine who bears the responsibility to pay for the health insurance that covers boxers' participation in matches. The Labor Commissioner may establish minimum amounts of health insurance coverage for boxers. An insurance policy must provide coverage for any injuries sustained in a match. The Labor Commissioner may seize a boxer's identification card, transmit it to the boxer's state of residence, and request its return to the boxer only after satisfactory completion of a suspension imposed by this state. The Labor Commissioner may require boxers to appeal suspensions imposed by this state either to the Association of Boxing Commissions or in accordance with the Iowa Administrative Procedure Act, the state law that would govern appeals of suspensions imposed by the Labor Commissioner. The Labor Commissioner need not allow a boxer suspended by this state to participate in matches here even if the Association of Boxing Commissions, on appeal, disagrees with that suspension.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

CITIES; STATE OFFICERS AND DEPARTMENTS; CIVIL RIGHTS: City civil rights commissions. Iowa Code § 216.19 (1997). Every city reaching a population of 29,000 on or after April 16, 1990, must establish, sustain, and adequately fund its own civil rights agency or commission. In determining the proper role of such agency or commission, a court would likely consider such factors as the services provided by similarly situated cities, any cooperative agreements between the city and the Iowa Civil Rights Commission, and the quality and extent of services actually provided by the city civil rights agency or commission. (Kempkes to Kramer, State Senator, **4-14-98) #98-4-3(L)**

April 14, 1998

The Honorable Mary Kramer
President of the Senate
State Capitol
LOCAL

Dear Senator Kramer:

The General Assembly passed Iowa's first civil rights act in 1884. Goostree, "The Iowa Civil Rights Statute," 37 Iowa L. Rev. 242, 242 (1952); Schaffter, "The Iowa 'Civil Rights Act,'" 14 Iowa L. Rev. 63, 63 (1928). You have requested an opinion on one of its descendants, Iowa Code chapter 216 (1997), which governs the Iowa Civil Rights Commission and, to a lesser extent, cities.

Section 216.19 requires certain cities to maintain their own civil rights agencies or commissions. We understand that you have three questions about section 216.19: (1) whether it applies to cities reaching populations of 29,000 on or after April 16, 1990; (2) whether it requires every city reaching a population of 29,000 on or after April 16, 1990, to establish, sustain, and adequately fund its own civil rights agency or commission; and (3) whether it permits a city reaching a population of 29,000 on or after April 16, 1990, to pass a civil rights ordinance only providing for services "adjunct to" those services rendered by the Iowa Civil Rights Commission.

I.

Popularly known as the "Iowa Civil Rights Act of 1965," chapter 216 primarily addresses the powers and duties of the Iowa

Civil Rights Commission. Chapter 216, however, also addresses the powers and duties of local government.

Section 216.19 -- formerly section 601A.19 -- provides:

> Nothing in this chapter shall be construed as indicating an intent on the part of the general assembly to occupy the field in which this chapter operates to the exclusion of local laws not inconsistent with the same subject matter.
>
> Nothing in this chapter shall be construed as indicating an intent to prohibit an agency or commission of local government having as its purpose the investigation and resolution of violations of this chapter from developing procedures and remedies necessary to insure the protection of rights secured by this chapter. All cities shall, to the extent possible, protect the rights of the citizens of this state secured by the Iowa civil rights act. Nothing in this chapter shall be construed as limiting a city or local government from enacting any ordinance or other law which prohibits broader or different categories of unfair discrimination or practice.
>
> An agency or commission of local government and the Iowa civil rights commission shall cooperate in the sharing of data and research, and coordinating investigations and conciliations in order to expedite needless duplication. . . .

Section 216.19 further provides:

> A city with a population of [29,000], or greater, <u>shall maintain</u> an independent local civil rights agency or commission consistent with commission rules adopted pursuant to chapter 17A. An agency or commission for which a staff is provided shall have control over such staff. A city required to maintain a local civil rights agency or commission shall structure and adequately fund the agency or commission in order to effect cooperative understanding with the Iowa civil rights commission and to aid in effectuating the purposes of this chapter.

(emphasis added). See 1990 Iowa Acts, 73rd G.A., ch. 1166, § 1. See generally Bonfield, "State Civil Rights Statutes," 49 Iowa L. Rev. 1067, 1072-73 (1964) (noting demographics that nonwhites tend to reside in Iowa's larger cities). The General Assembly drafted this particular passage in a 1990 act that amended then-section 601A.19 by "requiring certain cities to maintain a local civil rights agency or commission and provide adequate funding for the agency or commission . . . ." See 1990 Iowa Acts, 73rd G.A., ch. 1166 (explanatory paragraph).

At the same time it drafted this passage, the General Assembly provided:

> This Act applies only to an agency or commission of local government in existence on the effective date of this Act.
>
> This Act is repealed as of July 1, 1991. The Code editor shall editorially amend section 601A.19 in this Act to reflect this repeal by restoring the language in the section to the language in the section as it appears in the Code of Iowa 1989.

1990 Iowa Acts, 73rd G.A., ch. 1166, § 2.

The 1990 act took effect on April 16, 1990. See 1990 Iowa Acts, 73rd G.A., ch. 1166. In 1991, the General Assembly repealed the self-repealing provision of the 1990 act. See 1991 Iowa Acts, 74th G.A., ch. 268, § 308. This repeal took effect on June 30, 1991. See 1991 Iowa Acts, 74th G.A., ch. 268, § 309.

In addition, section 216.19 provides:

> The Iowa civil rights commission may enter into cooperative agreements with any local agency or commission to effectuate the purposes of [chapter 216]. Such agreements may include technical and clerical assistance and reimbursement of expenses incurred by the local agency or commission in the performance of the agency's or commission's duties if funds for this purpose are appropriated by the general assembly.
>
> The Iowa civil rights commission may designate an unfunded local agency or commission as a referral agency. A local agency or commission shall not be designated a referral agency unless the ordinance creating it provides the same rights and remedies as

> provided in [chapter 216]. The Iowa civil rights commission shall establish by rules the procedures for designating a referral agency.
>
> . . . .

II.

(A)

You have asked whether section 216.19 applies to cities reaching populations of 29,000 on or after April 16, 1990. Since that date section 216.19 has provided that a city "with a population of [29,000], or greater," shall maintain a civil rights agency or commission.

Nothing in chapter 216 appears to limit section 216.19 to those cities reaching populations of 29,000 before April 16, 1990. The Supreme Court of Iowa has held in similar circumstances that legislative classifications of political entities by population size create open classes that admit new members as their populations increase by the required amounts. See, e.g., Hansen v. Henderson, 244 Iowa 650, 56 N.W.2d 59, 69 (1952); Knudson v. Linstrum, 233 Iowa 709, 8 N.W.2d 495, 496 (1943); see also Midwest Popcorn Co. v. Johnson, 43 N.W.2d 174, 178 (Neb. 1950); 1974 S.C. Att'y Gen. (July 31, 1974) (1974 WL 27896); 1981 Tenn. Op. Att'y Gen. 7 (1981 WL 142701). See generally 1996 Op. Att'y Gen. ___ (#96-3-3(L)).

We therefore conclude section 216.19 applies to every city reaching a population of 29,000 on or after April 16, 1990.

(B)

You have asked whether section 216.19 requires every city reaching a population of 29,000 on or after April 16, 1990, to establish, sustain, and adequately fund its own civil rights agency or commission. Since that date section 216.19 has provided that such a larger city "shall maintain" a civil rights agency or commission.

The General Assembly has generally defined the word "shall" in statutes as imposing a duty. See Iowa Code § 4.1(30)(a). The General Assembly, however, has not defined the word "maintain" generally in chapter 4 or specifically in chapter 216. Such a circumstance normally requires reliance upon the common and ordinary meaning of the word. State v. Bush, 518 N.W.2d 778, 780 (Iowa 1994). We must ascertain its meaning according to context and approved English usage. See Iowa Code § 4.1(38); see also Iowa Code § 4.2.

On the one hand, "maintain" in this context means to prevent cessation from an existing state or condition; bear the expense of; carry on; continue; furnish means for subsistence or existence of; keep from change or from ceasing; keep in existence or continuance; keep in force; keep in good order; keep up; preserve; support; sustain; uphold. Black's Law Dictionary 859 (1979); Webster's Ninth New Collegiate Dictionary 687 (1979). This definition indicates that only those cities which had already established their own civil rights agencies or commissions by April 29, 1990, would need to sustain and adequately fund such agencies or commissions. On the other hand, "maintain" in this context may also mean something akin to the verb "establish": it may mean to commence, set up, install, or provide. See Funk & Wagnall's Standard Handbook of English Synonyms 6, 107-08 (1947); E. Ordway, Synonyms and Antonyms 195 (1913); Black's, supra, at 859; 26 Words & Phrases 79, 86 (1953). This definition indicates that all cities would need to establish, sustain, and adequately fund such agencies or commissions if city populations reached 29,000 on or after April 16, 1990.

The General Assembly has used the phrase "establish and maintain" in some statutes, see, e.g., Iowa Code §§ 6B.46, 18.8; however, it has also used the single term "maintain" in others, see, e.g., Iowa Code §§ 147A.26(1), 155A.31, and in those instances little doubt exists that "maintain" means to establish something as well as sustain it. Thus, the sole use of "maintain" in section 216.19 does not necessarily exclude the possibility that the General Assembly actually intended every city reaching a population of 29,000 on or after April 16, 1990, to establish and thereafter sustain its own civil rights agency or commission.

We believe that "maintain" in section 216.19 means to establish as well as sustain. In the 1990 act imposing the requirement upon cities to maintain such an agency or commission, the General Assembly expressly limited its application by providing that "[t]his Act applies only to an agency or commission of local government in existence on the effective date of this Act" -- April 16, 1990. See 1990 Iowa Acts, 73rd G.A., ch. 1166, § 2. Then, in the 1991 act amending then-section 601A.19, the General Assembly deleted this express limitation. See 1991 Iowa Acts, 74th G.A., ch. 268, § 308. Such a deletion indicates a legislative intent against restricting or otherwise "freezing" the applicability of section 216.19 to those cities which had already established civil rights agencies or commissions by April 16, 1990.

Population and not the prior existence of such an agency or commission thus determines the applicability of section 216.19. Any other construction of section 216.19 might lead to a bizarre result. See generally Iowa Code § 4.6(5) (statutory construction may involve consideration of the consequences of a particular construction). For example, a city reaching a population of 29,000

after April 16, 1990, would never need to establish, sustain, and adequately fund a civil rights agency or commission if it had not already established one by that date, while a city reaching a population of 29,000 after April 16, 1990, would need to continue to sustain and adequately fund a civil rights agency or commission it had established by that date. We see no reason justifying such a distinction. See generally Iowa Code § 4.4(3) (presumption that just and reasonable result intended in enactment of statute).

We therefore conclude section 216.19 requires every city reaching a population of 29,000 on or after April 16, 1990, to establish, sustain, and adequately fund its own civil rights agency or commission.

(C)

You have asked whether section 216.19 permits a city reaching a population of 29,000 on or after April 16, 1990, to pass an ordinance only requiring its civil rights commission to perform services "adjunct to" those services rendered by the Iowa Civil Rights Commission. Among other things, the city's services might relate to education, dissemination of information, and assistance in preparing and filing complaints.

Section 216.19 provides that a city with a population of 29,000 or more shall maintain an independent local civil rights agency or commission "consistent with commission rules adopted pursuant to chapter 17A." (We note, however, that the Iowa Civil Rights Commission has not yet adopted any administrative rules governing local civil rights commissions.) Section 216.19 also provides that the city "shall structure and adequately fund the agency or commission in order to effect cooperative understanding" with the Iowa Civil Rights Commission "and to aid in effectuating the purposes" of chapter 216.

In addition, section 216.19 provides that all cities "shall, to the extent possible, protect the rights" identified in chapter 216. It further provides that a city agency or commission and the state civil rights commission "shall cooperate in the sharing of data and research, and coordinating investigations and conciliations in order to expedite needless duplication," that the state civil rights commission "may enter into cooperative agreements with any local agency or commission to effectuate the purposes" of chapter 216, and that such agreements "may include technical and clerical assistance and reimbursement of expenses incurred by" a city civil rights agency or commission in the performance of its duties "if funds for this purpose are appropriated by the general assembly." See generally Iowa Code § 4.1(30)(c) ("may" in statutes normally confers a power). Finally, section 216.19 provides that the Iowa Civil Rights Commission "may designate an unfunded local agency or commission as

a referral agency" when the ordinance creating it provides the same rights and remedies that chapter 216 provides. See generally 161 IAC 1.6.

Section 216.19 does not identify substance or procedure for city civil rights ordinances and does not set forth standards or guidelines for the provision of services by city civil rights agencies or commissions. See generally Bonfield, "State Civil Rights Statutes," 49 Iowa L. Rev. 1067, 1095-115, 1123-29 (1964). Section 216.19 does, in its entirety, provide some flexibility in the proper roles served by city civil rights agencies or commissions.

Whether the services provided by a city civil rights agency or commission satisfy section 216.19 is a mixed question of fact and law. Unlike a court decision, an opinion cannot answer questions of fact. See 61 IAC 1.5(3)(c). We believe that a court determining a city's compliance with section 216.19 would likely consider such factors as the services provided by similarly situated cities, any cooperative agreements between the city and the Iowa Civil Rights Commission, and the quality and extent of services actually provided by the city through its civil rights agency or commission.

III.

To summarize: Every city reaching a population of 29,000 on or after April 16, 1990, must establish, sustain, and adequately fund its own civil rights agency or commission. In determining the proper role of such agency or commission, a court would likely consider such factors as the services provided by similarly situated cities, any cooperative agreements between the city and the Iowa Civil Rights Commission, and the quality and extent of services actually provided by the city civil rights agency or commission.

Sincerely,

Bruce Kempkes
Assistant Attorney General

PUBLIC RECORDS; CITIES: Public access to city records on general assistance. Iowa Code §§ 22.7(27), 217.30, 252.24, 252.25 (Supp. 1997). A city must permit the public to examine its records on an individual's general assistance unless it requests a court in a specific case to extend confidentiality to them. (Kempkes to Kramer, State Senator, 4-17-98) #98-4-4(L)

April 17, 1998

The Honorable Mary Kramer
President of the Senate
State Capitol
LOCAL

Dear Senator Kramer:

You have requested an opinion on public records. You ask whether a city must permit the public to examine its records on an individual's general assistance. This question primarily implicates Iowa Code chapters 22 and 252 (Supp. 1997). Our examination of these chapters leads us to conclude that a city must permit the public to examine those records unless it requests a court in a specific case to extend confidentiality to them.

I.

Chapter 22 is entitled "Examination of Public Records (Open Records)" and has been the subject of many amendments since its passage in 1967. It applies to counties, cities, and other governmental bodies and generally directs them to provide examination or copies of their "public records" to every person. Iowa Code §§ 22.1, 22.2, 22.3, 22.4. It provides a criminal penalty for a violation of its provisions and permits enforcement of those provisions by civil action. Iowa Code §§ 22.5, 22.6.

Not all "public records," however, are "open records" under chapter 22. See 1998 Op. Att'y Gen. ___ (#97-10-1(L)). "While [section 22.2] provides broadly [for] the right to examine and copy all public records, this right is qualified wherever another provision of the Code expressly limits it." Note, 57 Iowa L. Rev.

1163, 1174 (1972). Chapter 22 thus seeks to balance the public interest in access to public records with limitations upon certain disclosures of confidential information. 1996 Op. Att'y Gen. ___ (#96-2-1(L)).

Chapter 22 excepts certain public records from public examination and copying and permits injunctive relief to restrain examination and copying. Iowa Code §§ 22.7, 22.8. Specifically, section 22.7 sets forth thirty-six categories of public records that "shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information." See generally Iowa Code § 4.1(30)(a) ("shall" in statutes normally imposes a duty). Enacted in 1990, see 1990 Iowa Acts, 73rd G.A., ch. 1017, § 1, section 22.7(27) creates an exception for "[a]pplications, investigative reports, and case records of persons applying for county general assistance under section 252.25." (emphasis added).

Chapter 252 is entitled "Support of the Poor" and is commonly known as "general relief." Contemporary Studies Project, 61 Iowa L. Rev. 1155, 1160 (1976). Almost as old as the state itself -- with roots running to the Iowa Territorial Laws and ultimately to the English Poor Laws, id. at 1159, 1163, 1176 -- chapter 252 provides for financial and other forms of relief to a "poor person," Iowa Code §§ 252.1, 252.16, 252.24, 252.25, 252.27, 252.33, 252.35; see Iowa Code § 331.381(8). Although chapter 252 primarily addresses the duties, powers, and responsibilities of counties, it indicates that other governmental entities may have roles in administering or otherwise assisting in the provision of relief to the poor. See, e.g., Iowa Code § 252.4 ("[t]he word 'trustees' in this chapter shall . . . include and mean any person or officer of any county or city charged with oversight of the poor"), § 252.24 (assistance may be furnished by "any governmental agency of the county, township, or city"), § 252.42 (subject to certain conditions, county supervisors "may join and cooperate with the United States government, or a city within the city's boundaries" in sponsoring work projects); see also Iowa Code § 217.30(6) ("[t]he provisions of this section" -- which generally require the Iowa Department of Human Services to keep public assistance records confidential -- "shall apply to recipients of assistance under chapter 252").

Persons may apply for general relief to either the county board of supervisors or the county general assistance director. Iowa Code § 252.33. In general, county supervisors evaluate the applications and determine the form and amount of relief. Iowa Code § 252.27. They must record their proceedings relating to the provision of relief to individual applicants. Iowa Code § 252.27.

Enacted in 1990, see 1990 Iowa Acts, 73rd G.A., ch. 1017, § 2, section 252.25 provides in part:

> All applications, investigative reports, and case records of persons applying for county general assistance under this chapter are privileged communications and confidential, subject to use and inspection only by persons authorized by law in connection with their official duties relating to financial audits and administration of this chapter or as authorized by order of a district court. Examination of an individual's applications, reports, and records may also be authorized by a signed release from the individual.

(emphasis added).

Chapter 217 is entitled "Department of Human Services." It governs the administration of programs relating to public assistance and services.

Enacted in 1973, see 1973 Iowa Acts, 65th G.A., ch. 186, § 12, section 217.30 applies "to recipients of assistance under chapter 252." Iowa Code § 230.17(6) (emphasis added). It generally prohibits public access to names and addresses "of individuals receiving services or assistance from the department, and the types of services or amounts of assistance provided . . . ." Cf. Iowa Code § 35B.10 (similar provisions for veterans' benefits). See generally 7 U.S.C. § 2020(e)(8); 42 U.S.C. §§ 602(a)(9), 1306a; 45 C.F.R. § 205.50.

Section 217.30(4)(c) provides:

> The department shall prepare and file in its office [four times a year] a report showing the names and last known addresses of all recipients of assistance under sections 249.2 to 249.4 and chapter 239 or 249A, together with the amount paid to or for each recipient during the preceding calendar quarter. The report shall contain a separate section for each county . . . . Each report shall be securely fixed in a record book to be used only for such reports. Each record book shall be a public record, open to public inspection . . . . Each person who examines the record shall first sign a written agreement that the signer will not use any information obtained from the record for commercial or political purposes.

Similarly, section 217.30(4)(d) provides that a person shall not "solicit, disclose, receive, use, or to authorize or knowingly permit, participate in, or acquiesce in the use of any information obtained from any such report or record for commercial or political purposes."

II.

You have asked whether a city must permit the public to examine its records on an individual's general assistance. We assume that these records include information on the amount of general assistance as well as the recipient's name, address, social or economic conditions and circumstances, and agency evaluations of information. See generally Iowa Code § 217.30(1), (6); 441 IAC 9.12; 1980 Op. Att'y Gen. 723, 723-24. We therefore limit our analysis to sections 22.7(37) and 252.25. In doing so, we do not exclude the possibility that some other exception may protect the confidentiality of certain information contained within those records. See, e.g., Iowa Code § 22.7(2) (providing for confidentiality of hospital, medical, and professional counselor records of patients). We also assume that your question, limited to the records generated by such assistance, does not involve consideration of federal statutes or regulations. See generally 1983 Ohio Op. Att'y Gen. 071 (1983 WL 178741) ("[t]here are no federal restrictions on the disclosure of personal information concerning applicants for, or recipients of, poor relief"); 37A Am. Jur. 2d Freedom of Information Acts (1994).

We understand that in this case the city has an administrative agency that distributes general assistance and that it taps funds out of a separate account established for such assistance. We also understand that those funds originated solely with private donations made around the time of the Great Flood of 1993 and that no public entity contributed funds generated by taxes to the city. Last, we understand that the county has not entered into any relationship whereby the city acts as the county's agent for administering or otherwise assisting in providing relief to the poor under chapter 252. See generally Iowa Code § 252.4 (the word "trustees" in chapter 252 "shall be construed to include and mean any person or officer of any county or city charged with oversight of the poor"), § 252.24 ("[w]hen assistance is furnished by any . . . city, the assistance shall be deemed to have been furnished by the county"). In short, the county has no involvement whatsoever in funding, distributing, or otherwise administering general assistance in this case.

(A)

In 1980, this office addressed the similar question whether county supervisors could discuss in open session the "personal, social, and medical information" of a poor person when they discuss

a claim upon the county poor fund. See 1980 Op. Att'y Gen. 723, 723. Referring to section 217.30, we explained:

> In general, the county is required to keep confidential both the names and addresses of individuals receiving services or assistance and the types of services or amounts of assistance provided. Information may be disclosed for purposes of administration of programs of services or assistance to agencies who maintain the same standards of confidentiality, and information shall be disclosed to public officials for use in connection with their official duties relating to auditing and other purposes.

Id. See generally 1984 Op. Att'y Gen. 105, 106-07.

We added, however, that periodic reports prepared by overseers of the poor would reveal the names and addresses of poor persons receiving relief and the amount each poor person received during the preceding calendar quarter. We concluded that such reports

> are public records but are to be viewed only by those who sign a statement that the information will not be used for commercial or political purposes . . . . The intent of the statute is to keep confidential all information regarding recipients of assistance other than name, address, and amount of assistance paid during the preceding quarter. Only a minimal amount of information regarding assistance paid is public information. The statute expressly protects much of the information which . . . supervisors would need to evaluate claims. It would appear that . . . supervisors are authorized to meet in a closed session to discuss merits of claims and that they would be well advised not to discuss publicly the details of individual requests for assistance.

Id. (emphasis added). See generally 1988 Op. Att'y Gen. 1, 3 (Attorney General opinion "should be respected as providing the substantive interpretation" of a statute).

(B)

Our 1980 opinion only addressed the role of counties and predated enactment of sections 22.7(27) and 252.25 by more than ten years. It is those sections that we now examine in three aspects.

Before doing so, we iterate some principles of statutory construction that -- as applied to chapters 22 and 252 -- apparently conflict. Chapter 22 is a "freedom of information law" creating a "strong presumption in favor of disclosure of public records." 1990 Op. Att'y Gen. 85, 85. The exceptions enumerated in section 22.7 normally necessitate a strict construction in favor of public examination, see 1998 Op. Att'y Gen. ___ (#97-10-1(L)), but strict construction "should not be over utilized such that its use frustrates legislative intent" and should not be utilized when "the expressed exception is broadly inclusive," Gabrilson v. Flynn, 554 N.W.2d 267, 271 (Iowa 1996). Chapter 252 is a "welfare law." Section 252.25, which provides an avenue for poor persons to seek general relief, normally necessitates a liberal construction in favor of the legislative grant. See G. Endlich, The Interpretation of Statutes § 119, at 320-21 (1888). In view of this apparent conflict -- which seems inherent in balancing "openness in government [with] individual privacy and integrity," 1990 Op. Att'y Gen. 85, 86 -- we keep in mind the general legislative admonition that all statutes in Iowa "shall be liberally construed with a view to promote [their] objects and assist the parties in obtaining justice." Iowa Code § 4.2.

First: There is little question that the city is a "governmental body" and that its records on general assistance are "public records" for purposes of chapter 22. See Iowa Code § 22.1(1); 1998 Op. Att'y Gen. ___ (#97-10-1(L)) ("public record" includes all records, documents, or other information "of or belonging to" a city); see also Head v. Colloton, 331 N.W.2d 870, 873 (Iowa 1983).

Second: There is a substantial question whether the confidentiality granted by sections 22.7(27) and 252.25 extends to those records generated by persons applying to a city for general assistance.

We begin by noting the specific statutory language. See generally Iowa R. App. P. 14(f)(13) (statutory construction focuses upon what legislature actually wrote, not what it should or might have written). Section 22.7(27) only applies to applications, investigative reports, and case records of persons "applying for county general assistance under section 252.25." In similar language, section 252.25 only applies to all applications, investigative reports, and case records of persons "applying for county general assistance under [chapter 252]." We cannot presume that the General Assembly inserted meaningless language into these provisions. See generally Cherry v. Cedar Rapids Bd. of Rev., 238 Iowa 189, 26 N.W.2d 316, 320 (1947). At the same time, had the county instead of the city distributed the general assistance, sections 22.7(27) and 252.25 would clearly prohibit public access to the accompanying applications, investigative reports, and case records.

It is only the qualifying language in sections 22.7(27) and 252.25 that refers to records generated by persons applying for general assistance from a county pursuant to chapter 252 that, by negative implication, seems to sanction public access to records generated by persons applying for general assistance from a city pursuant to its own initiative. The question thus arises whether the General Assembly actually intended this distinction or whether its insertion of the qualifying language into sections 22.7(27) and 252.25 merely amounted to "over-precision" in their drafting. See generally Dickerson, "The Diseases of Legislative Language," in 1A Sutherland's Statutory Construction 679, 685 (1993) (over-precision and over-particularity "not only needlessly circumscribe the actions of those who are affected by the statute but make it harder to read, understand, and administer"; overprecision "tends especially to afflict old statutes that have been amended many times"); 1990 Op. Att'y Gen. 85, 86 ("clear purpose" of chapter 22 "is to open official conduct to the scrutiny of the public but not . . . at the expense of vital individual interests of its citizens or central governmental functions").

We have no authority, however, to investigate this question and construe or interpret sections 22.7(27) and 252.25, because they contain no ambiguity in their words or phrases. See generally Farmers Co-op Co. v. DeCoster, 528 N.W.2d 536, 537 (Iowa 1995); Sioux City v. Press Club, 421 N.W.2d 895, 897 (Iowa 1988); 1990 Op. Att'y Gen. 85, 85 (opinion request requires review of "the language chosen by the legislature, to ascertain what the legislature said, not what it could have said"). In clear language they refer only to those records generated by persons applying for county general assistance pursuant to chapter 252.

In refusing to construe another unambiguous statute, the Supreme Court of Iowa admitted that application of the statute obviously "may lead to inequitable, harsh and even bizarre results." In re Johnson's Estate, 213 N.W.2d 536, 538 (Iowa 1973). The Court, however, adhered to its longstanding practice that "where the language of a statute is plain and unambiguous, and the meaning clear and unmistakable, there is no room for construction." Id. See Book v. Datema, 256 Iowa 1330, 131 N.W.2d 470, 473 (1964) ("it is not our proper function to enlarge [a statute] by construction"). In other words, the Court has effectively held that an odd or bizarre result itself insuffices to create a statutory ambiguity. Contra Chapman v. United States, 500 U.S. 453, 475-76 & n.13, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991) (Stevens, J., dissenting) ("[w]e have specifically declined [in the following cases to approve applications of statutes leading to absurd results,] even when the statute was not ambiguous, on the ground that Congress could not have intended such an outcome"); 2A Sutherland's Statutory Construction § 45.02, at 11 n. 1 (1992) ("[i]t has been held that ambiguity is not necessarily, in all cases, 'a condition precedent to interpretation'").

Our inability to construe sections 22.7(27) and 252.25 means that they appear at odds with other exceptions contained in section 22.2 that generally prohibit public examination of information considered "personal" in nature. See, e.g., Iowa Code § 22.7(1) ("[p]ersonal information in [academic] records"), § 22.2(2) ("[h]ospital records, medical records, and professional counselor records"), § 22.7(10) ("[p]ersonal information in confidential personnel records of the military"), § 22.7(11) ("[p]ersonal information in confidential personnel records of public bodies"), § 22.7(12) ("[f]inancial statements" relating to certain agricultural programs), § 22.7(13) ("records of a library" regarding individuals), § 22.7(16) ("[i]nformation in a [public health] report" about a person's reportable disease), § 22.7(36) ("[public health records] pertaining to the gambling treatment program"). Cf. Iowa Code § 35B.12 (unlawful to publish names of veterans or their families who receive veterans' benefits).

Sections 22.7(27) and 252.25 also appear at odds with the laws of other jurisdictions. See, e.g., Banner v. Smolenski, 315 F.Supp. 1076, 1982 (D. Mass. 1970) ("it should be remembered that the case record [for a recipient of Aid to Families with Dependent Children is not intended under federal law] to be a public document"); Doe v. Greco, 405 N.Y.S.2d 801, 802-03 (Sup. Ct. 1978) (records on a welfare recipient's assistance are confidential; "the laws provide other devices for ferreting out welfare abusers"; requiring confidentiality of welfare records preserves "the dignity and self-respect of a recipient," assures "the integrity and efficiency of the administration of the program," and prevents "a recipient's exposure to exploitation or embarrassment"); McMullan v. Wohlgemuth, 308 A.2d 888, 894, 897 (Pa. 1973) (the legislature "clearly set forth its intent that maintaining the privacy of [a welfare] recipient is a crucial element in its quest to preserve 'family life' and 'encourage self-respect, self-dependency and the desire to be a good citizen and useful to society'"); 1983 Ohio Op. Att'y Gen. 071; Annot., "Confidentiality of Welfare Records," 54 A.L.R.3d 768, 770-73, 781-82 (1973); A. Schwing, Open Meetings Laws § 7.22, at 359-60 & n. 47 (1994).

In view of the foregoing, the General Assembly may wish to rewrite sections 22.7(27) and 252.25 in order to eliminate the distinction between counties and other entities which provide general assistance to the poor. If it does, it may also wish to reconcile sections 22.7(27) and 252.25 with section 217.30, which allows some access to these records if a person signs a statement that the information "will not be used for commercial or political purposes." See generally 1980 Op. Att'y Gen. 723, 723.

Third: There is a judicial procedure for limiting public access to public records on a case-by-case basis when disclosure would serve no public purpose and cause irreparable harm. 1990 Op. Att'y Gen. 85, 85. As we have explained:

> [Section 22.8] provides a procedure to restrain the examination of a specific public record ". . . if [a] court finds that such examination would clearly not be in the public interest and would substantially and irreparably injure any person or persons." This section creates a separate justification for confidentiality . . . . It should be noted that an action for an injunction under [section 22.8] may be brought only to restrain the examination of specific records and not an entire class of records . . . . In such a proceeding, the injunction would be sought by the lawful custodian of the records, who would have the burden of proving that the examination of records would serve no public purpose and would cause irreparable harm . . . . [Chapter 22] does permit the custodian of the records to deny a citizen permission to inspect public records for a reasonable time in order to obtain an injunction, but only if the custodian in good faith believes he or she is entitled to such an injunction. A bad faith refusal to permit the inspection of public records could subject the person responsible to criminal sanctions pursuant to [section 22.6].

1980 Op. Att'y Gen. 363, 364-65. See Head v. Colloton, 331 N.W.2d 870, 876 (Iowa 1983). See generally Burton v. University of Iowa Hosps., 566 N.W.2d 182, 188 (Iowa 1997) (section 22.8 "is 'an equitable remedy independent of' the section 22.7 exceptions"). We believe that this passage similarly applies to records generated by persons applying for general assistance from a city.

III.

To summarize: A city must permit the public to examine its records on an individual's general assistance unless it requests a court in a specific case to extend confidentiality to them.[1]

Sincerely,

Bruce Kempkes
Assistant Attorney General

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[1] We have addressed the second question of your opinion request in a forthcoming opinion.

COUNTIES; COUNTY OFFICERS: Redemption and preservation of warrants. Iowa Code §§ 331.506, 331.552, 331.554, 524.821, 527.1, 554.12102 (1997). Section 331.554 does not, per se, prohibit a county from redeeming its warrants through use of electronic imaging. Section 331.554 requires preservation of original county warrants for at least two years after their redemption. (Kempkes to Johnson, State Auditor, **4-17-98) #98-4-5(L)**

April 17, 1998

The Honorable Richard D. Johnson
State Auditor
State Capitol Building
LOCAL

Dear Mr. Johnson:

You have requested an opinion on various legal issues regarding the electronic redemption of county warrants. In the arena of public finance, a "warrant" signifies a draft upon a public treasury to pay an existing debt arising from a duly authorized claim. 1994 Op. Att'y Gen. 98 (#94-5-6(L)). Although in the form of commercial paper, a warrant under the common law is a mere promise to pay the amount specified and is a nonnegotiable obligation. 15 E. McQuillin, The Law of Municipal Corporations § 42.01, at 499 (1995); see Clark v. Polk County, 19 Iowa 248, 257 (1865); State v. Family Bank of Hallandale, 623 So. 2d 474, 476, 478 (Fla. 1993).

Financial institutions, which often cash warrants for their customers, have proposed that county warrants set forth magnetic ink character recognition numbers (which identify specific financial institutions and account numbers) and that county warrants undergo same-day settlement (which involves electronic exchanges of data and money). Apparently employing a technology which has been in existence for some years, see D. Baker & R. Brandel, The Law of Electronic Funds Transfers § 2.01(1) (1996); Gladstone, "Exploring the Role of Digital Currency in the Retail Payments System," 31 New Eng. L. Rev. 1193, 1193 (1997), this proposal requires the computers of financial institutions to convert county warrants into digitalized or "electronic images" and to transmit those electronic images to county computers.

Under the proposal, a county would not receive actual warrants until the day following their redemption, or perhaps not at all, and redemption would occur upon the county computer receiving their electronic images from financial institutions. See generally Baker & Brandel, supra, §§ 1.03(1), 2.01(1), 2.02. Also under the proposal, financial institutions could transmit such electronic images to county computers on a daily basis, and county personnel could thus retrieve and inspect the "electronic four corners" of county warrants by computer monitor.

You ask whether statutory provisions prohibit a county from redeeming its warrants through use of electronic imaging. Our negative answer to this question effectively renders moot your question whether state law conflicts with federal regulations if it requires physical delivery of county warrants themselves for redemption. You also ask whether county warrants may be destroyed within thirty to forty-five days of redemption. We conclude that original county warrants must be preserved for at least two years after their redemption.

I.

Your questions primarily implicate Iowa Code chapter 331 (1997), which, in part, governs county warrants. The legislatively signposted trail for redeeming such instruments begins at the office of the county auditor, continues to the office of the county treasurer, then backtracks to the office of the county auditor.

Section 331.506(1) provides that the county auditor, with certain exceptions,

> shall sign or issue a county warrant only after approval of the board by recorded vote. Each warrant shall be numbered and the date, amount, number, name of the person to whom issued, and the purpose for which the warrant is issued, shall be entered in the county system. Each warrant shall be made payable to the person performing the service or furnishing the supplies for which the warrant makes payment.

See generally Iowa Code § 331.504(2) (county auditor shall maintain books and records required by section 331.303, which, in part, requires county supervisors to keep a "warrant book" for recording each warrant drawn in the order of issue by number, date, amount, and name of drawee).

According to section 331.552(2), the county treasurer "shall [d]isburse money owed or payable by the county on warrants drawn and signed by the auditor and sealed with the official county

seal." Section 331.554(1) provides: "Upon receipt of a warrant, scrip, or other evidence of the county's indebtedness," the county treasurer "shall endorse on it the date of payment." Section 331.554(4) provides that the county treasurer "shall return the paid warrants" to the county auditor and that "[t]he original warrant shall be preserved for at least two years." Compare Iowa Code § 331.554(4) with Iowa Code § 622.30(2) (providing that electronically imaged record, whose preservation is not required by law, may be destroyed by governmental department or agency, "except if the originals are records . . . of a county officer they shall not be destroyed until they have been preserved for ten years").

In addition, your questions indirectly implicate chapters 524, 527, 533, 534, and 554. Chapter 524 governs state banks, chapter 527 governs EFT systems, chapter 533 governs credit unions, chapter 534 governs savings and loan associations, and chapter 554 -- popularly called the "Uniform Commercial Code" -- governs commercial transactions.

Enacted in 1975, section 524.821(1) provides that state banks may engage in transactions "by means of either the direct transmission of electronic impulses to or from customers and banks or the recording of electronic impulses or other indicia of a transaction for delayed transmission to a bank." See generally 1975 Iowa Acts, 66th G.A., ch. 240, § 4. Similar provisions, also of relatively recent vintage, apply to credit unions, see Iowa Code § 533.4(18), and savings and loan associations, see Iowa Code § 534.103(9).

Enacted in 1976, section 527.1 recognizes that EFTs "are essential facilities in the channels of commerce" and declares, among other things, that EFT regulation "should be fair and not unduly impede the development of new technologies which benefit the public." See generally 1976 Iowa Acts, 66th G.A., ch. 1214.

Enacted in 1992, Article 12 of chapter 554 concerns funds transfers made electronically. See Iowa Code §§ 554.12103-.12108. See generally 1992 Iowa Acts, 74th G.A., ch. 1146. Article 12 recognizes that "a funds transfer [is] a unique method of payment to be governed by unique rules" and provides a comprehensive body of law "[to define] the rights and obligations flowing from payment orders." Iowa Code § 554.12102, Official Comment.

II.

Historically, financial institutions cashing a county warrant for their customers would physically deliver it to the county treasurer for payment. County personnel would then inspect the warrant's four corners, locate its particulars on the county's list of outstanding warrants, and, if all were proper, honor and pay it. See generally Harrison County v. Ogden, 165 Iowa 325, 145 N.W. 681,

687, 688 (1914); Clark v. City of Des Moines, 19 Iowa 199, 219 (1865); 1996 Ohio Op. Att'y Gen. 003. Satisfied on the question of authenticity, a county treasurer would redeem the warrant by issuing a check or otherwise authorizing a transfer of funds from county accounts to the financial institutions.

For several years, however, technology has permitted public and private entities to exchange money by means of an "electronic funds transfer" (EFT), a generic phrase for a spectrum of computer-to-computer transfers achieved by electronic impulses. See J. Soma, Computer Technology and the Law § 8.01, at 308 (1983). "The simplest way to view EFT is that electronic blips and beeps are being substituted for paper [in moving funds between or among accounts]." Id. at 328-29. Accord Maki & Jerak, "EFTS: Living in a Legal House of Cards," 1979 Commercial L.J. 49, 50; see United States v. Daccarett, 6 F.3d 37, 43-44 (2d Cir. 1993) (describing operation of one EFT system); Note, 61 Iowa L. Rev. 1355, 1355-56 (1976). Technology has also ushered in the prospect of the "paperless" governmental entity which, like many private businesses, has the ability to create, store, retrieve, and examine bits of digital data via computer. See 1996 Op. Att'y Gen. ___ (#96-2-1); see also 14 U.L.A., "Uniform Photographic Copies of Business and Public Records as Evidence Act," Prefatory Note, at 186 (1990) (noting widespread use of microfilm by private business and public entities in 1949: microfilm saves "a tremendous amount of storage space," permits "installation of a more efficient index and record system," and promotes record-preservation, "because the microfilm may be placed in fireproof vaults for safekeeping"). Such an entity may have the authority and ability to make an EFT.

The electronic blips and beeps constituting an EFT have, increasingly, become the subject of federal law. The Federal Reserve System's reserve wire network ("FedWire"), which transfers federal securities and balances of corporations and financial institutions, became fully automated in 1973. Effros, "A Banker's Primer on the Law of Electronic Funds Transfers," 105 Banking L.J. 510, 514 (1988). In 1978, Congress enacted the federal EFT Act. See generally 15 U.S.C. § 1693 et seq.; 12 C.F.R. §§ 205.1-.15 (Regulation E). That consumer protection legislation -- inapplicable to transactions initiated by paper instruments, 15 U.S.C. § 1693a(6); 12 C.F.R. § 205.(2)(g) -- provides a basic framework for establishing the rights, liabilities, and responsibilities of participants in EFTs. Wachter v. Denver Nat'l Bk., 751 F. Supp. 906, 908 (D. Colo. 1990). In addition, various laws now require or permit federal agencies to participate in EFT systems. See, e.g., 26 U.S.C. §§ 5061, 5703; 31 U.S.C. § 3332; 48 C.F.R. § 14.202-8; 36 C.F.R. § 1222.48; 12 C.F.R. § 12.3; 7 C.F.R. § 729.407; Transactive Corp. v. United States, 91 F.3d 232, 234 (D.C. Cir. 1996); Thomas v. Bowen, 791 F.2d 730, 731 (9th Cir. 1986); see also 66 U.S.L.W. 2181 (Sept. 30, 1997) (noting proposed

Treasury Department regulation that outlines change from paper checks to EFTs for delivering federal monetary benefits).

(A)

You have asked whether a county, in redeeming its warrants, may accept electronic images of county warrants in lieu of physical delivery of the warrants themselves. Although not so described, this process appears to involve the county's participation in an EFT system. See Soma, supra, at 328-29; Maki & Jerak, supra, 1979 Commercial L.J. at 50.

Section 331.554(1) provides that the county treasurer shall "endorse [on its warrants the] date of payment." Section 331.554(4) provides that a county treasurer shall return "paid warrants" to the county auditor and that "original warrant[s]" shall be preserved for at least two years. Setting forth no affirmative language for use of copies or other substitutes, section 331.554 would appear to suggest that redemption may only occur upon a physical delivery of the warrants themselves to a county. Compare Iowa Code § 331.554(4) with Iowa Code § 527.7 (requiring that transactions via satellite terminal "be recorded in a form from which it will be possible to produce a humanly readable record of any transaction"). See generally 1994 Op. Att'y Gen. 110 (#94-6-1(L)).

The operative language of section 331.554, however, effectively dates from the Civil War era, see Iowa Code §§ 362-66, 755, 2187 (1860), when the General Assembly as well as the scientific world probably had little if no idea about future innovations such as computers and EFTs. It seems rather obvious to conclude that the General Assembly in the last century -- when documentation of official matters largely meant human hands placing ink upon paper -- never considered the question whether the precursor to section 331.554 permitted the use of electronic imaging for redeeming county warrants. See generally Soma, supra, § 8.01 (observing that development of EFT systems "is being hindered by a maze of banking laws and regulations developed at a time when our payment system was paper-based"); Field, "1996: Survey of the Year's Developments in Electronic Cash Law," 46 Am. U.L. Rev. 967, 975 (1997).

The original date of an enactment may have importance, because, as the Supreme Court of Iowa often iterates, legislative intent is the "polestar" of statutory construction. See, e.g., Farmers Co-op Co. v. DeCoster, 528 N.W.2d 536, 537 (Iowa 1995). An "ancient statute" like section 331.554(4) thus warrants close inspection of the particular circumstances attending its enactment in order to determine its present-day scope and meaning. See generally Iowa Code § 4.6(2) (providing that statutory construction may involve a consideration of the circumstances under which

statute enacted); United Fire & Cas. Co. v. Acker, 541 N.W.2d 517, 520 (Iowa 1995); Tunks, "Assigning Legislative Meaning," 37 Iowa L. Rev. 372, 378 (1952).

Thus, as one current justice has observed about a statute enacted in 1851:

> [The General Assembly] could not be presumed to have had an "intent" one way or the other on the issue [whether the survival statute protects a viable fetus as well as a child and an adult] because of the paucity of medical knowledge [about viability in 1851].
>
> The interpretation of statutes in these circumstances is discussed in K. Llewellen, The Common Law Tradition 374 (1960):
>
> > [T]he policy of a statute is of two different kinds. . . . On the one hand there are ideas consciously before the draftsmen, the committee, the legislature: a known evil to be cured, a known goal to be attained . . . . Here talk of "intent" is reasonably realistic. . . .
> >
> > But on the other hand and increasingly as any statute gains in age its language is called upon to deal with circumstances utterly uncontemplated at the time of its passage. Here the quest is not properly for the sense originally intended by the statute, for the sense originally to be put into it, but rather for the sense which can be quarried out of it in light of the new situation. Broad purposes can indeed reach far beyond details known or knowable at the time of drafting. . . . [T]he sound quest does not run primarily in terms of historical intent. It runs in terms of what the words can be made to bear, in making sense in the new light of what was originally unforeseen.

Weitl v. Moes, 311 N.W.2d 259, 275-76 (Iowa 1981) (Larson, J., dissenting in part) (citations omitted). Or, as the Court has more

recently explained, a statute should be construed "in the context of the time period during which it was enacted. 'The legislative intent that controls in the construction of a statute has reference to the legislature that enacted it. . . .'" Woodbury County v. City of Sioux City, 475 N.W.2d 203, 205 (Iowa 1991) (interpreting statute originally enacted in 1851).

In applying this reasoning to section 331.554, we begin by recognizing its underlying purpose: to provide counties with a means of safeguarding their treasuries and thus protecting the public's interest in the fiscal integrity of those treasuries. See 1996 Ohio Op. Att'y Gen. 003 (interpreting Ohio law on county warrants). Given this purpose, three arguments suggest that section 331.554 does not, per se, prohibit a county from redeeming its warrants through electronic imaging.

First: The General Assembly in its recent enactments has expressly authorized the use of electronic technology for record-keeping purposes. See, e.g., Iowa Code § 48A.13 (permitting use of electronic signatures on voter registration records), § 622.30(2) (permitting admission into evidence of electronically imaged records and records copied by any process "which accurately reproduces or forms a durable medium for accurately and legibly reproducing an unaltered image or reproduction of the original"); see also Iowa Code § 321.31(1) (permitting state transportation department to make photostatic, microfilm, or other photographic copies of its records); Iowa Code § 422.61(4) (1958) (permitting state tax commission to make photostatic, microfilm, or other photographic copies of records); Byers, "Microfilming of Business Records," 6 Drake L. Rev. 74 (1957); Note, 34 Iowa L. Rev. 83 (1948). And, like Congress, the General Assembly in its recent enactments has expressly authorized the use of EFTs for certain transactions. See, e.g., Iowa Code §§ 524.821(1), 527.1, 527.7, 533.4(18), 534.103(9), 554.12105(1). See generally Iowa Code § 4.6(4) (providing that statutory construction may involve consideration of statutes addressing same or similar subjects).

It thus appears the General Assembly has recognized that "electronic commerce" has strong value and perhaps increasing necessity in modern society. See generally "Uniform Electronic Transactions Act," Reporter's Memorandum (August 15, 1997 proposed draft); United Nations Comm'n on International Trade Law, "Report of the Working Group on Electronic Commerce" (February 28, 1997). Indeed, the General Assembly has expressly found that EFTs "are essential facilities in the channels of commerce" and directed that their regulation is not to cross the line of "unduly imped[ing] the development of new technologies which benefit the public." Iowa Code § 527.1.

Second: Other Attorneys General who have interpreted laws similar to section 331.554 conclude that governmental entities may

use electronic processes in redeeming their warrants. See 1994 Ky. Op. Att'y Gen. 2-165 (state warrants); 1994 Miss. Op. Att'y Gen. (August 1, 1994) (municipal warrants); 1996 Ohio Op. Att'y Gen. 003 (county warrants); see also 1996 Ark. Op. Att'y Gen. 065. Cf. 1994 N.Y. Op. Att'y Gen. (Inf.) 1071 (noting that county authorized to use electronic imaging system for recording documents relating to real property). It appears that sufficient safeguards currently exist to protect the authenticity of electronic images; as the Ohio Attorney General observed:

> [F]or the purposes of the banking community at large, image delivery technology has advanced to the point that it now enables a bank's customer to accurately and reliably detect and identify a forgery or alteration that appears on an instrument. Given that fact, I see no reason to prohibit the use of this same image delivery technology by a county treasurer in the redemption of county warrants that a bank presents to him for payment . . . .

1996 Ohio Op. Att'y Gen. 003.

Third: If construed to preclude use of electronic imaging, section 331.554 may well conflict with federal law, e.g., 26 C.F.R. § 6302(h) (requiring deposit of certain federal taxes by electronic means; IRS regulation); P.L. 103-182, 107 Stat. 2161, Sub. D, Pt. 2, § 523 (requiring promulgation of regulations to implement EFT system "which is required to be used for the collection of certain depository taxes"; NAFTA Implementation Act). See 1994 Ky. Op. Att'y Gen. 2-165 (concluding that although state law requires payment of claims only upon actual presentment of state warrants, IRS regulation preempts state law and thus state treasurer may authorize payment from state treasury for satisfying federal tax deposit requirements with or without physical delivery of state warrants); see also 1996 Ohio Op. Att'y Gen. 003. Cf. Iowa Code § 4.4(1) (establishing presumption in statutory construction that General Assembly intended its enactments to comply with federal constitution). See generally 15 U.S.C. §§ 1693q, 1693r; 1996 Op. Att'y Gen. (#95-6-3(L)) (explaining federal preemption analysis).

In view of these three arguments, we believe that section 331.554 does not, per se, prohibit a county from redeeming its warrants through use of electronic imaging. A county, however, must factually establish that a specific proposal for redeeming county warrants through electronic imaging satisfies the requirements of section 331.554.

We emphasize that such a proposal must contain sufficient safeguards for protecting the county's treasury. Recently, the Alabama Attorney General found that private enterprise generally

recognizes the practice of electronic imaging and concluded that a governmental auditor may inspect imaged checks instead of their originals under the following system:

> Many financial institutions do not return canceled checks to account holders. Systems in which account holders do not receive physical checks in their account statements are referred to as "check truncation systems." The financial institution generally retains the canceled check for a certain number of years. . . . The canceled check is retained sometimes as an original document, but more typically as [an] . . . electronic image of the front and back of the check. The process by which a bank makes an electronic image . . . is known as "check imaging." An image is created . . . [and] stored on magnetic or optical disk . . . . The image of the check shows endorsements, signatures and other details and is as accurate, or more accurate, than photocopying or microfilm. Check images are stored on "write once" technology. This technology prevents the check image on the disk from being altered. Financial institutions provide the same security procedure to their storage and retention of check images as they apply to retention and safekeeping of other important documents.
>
> Under check truncation systems, the account holder's record of the transaction usually is limited to a checkbook register entry and perhaps a retained carbon copy of the check. The financial institution can supply a reproduced electronic image of a canceled check, front and back, to an account holder upon request.

239 Ala. Op. Att'y Gen. 15 (1995). See 1993 Miss. Op. Att'y Gen. (August 31, 1993) (concluding that county, consistent with record-retention statute, may participate in electronic imaging system that does not return cancelled warrants, but does provide county with their reduced images and ability to obtain their full-size images). Cf. Iowa Code § 48A.13 (requiring promulgation of rules for guaranteeing the security and integrity of electronic signatures).

We also emphasize that the General Assembly should take steps for expressly meshing state law on governmental warrants with federal law on EFTs. Transmission of electronic images might, in

the future, virtually replace the physical delivery of paper instruments in collection processes. See Baker & Brandel, supra, § 2.01(1). EFT "technology is here and the development of [EFT systems] is continuing." Maki & Jerak, supra, 1979 Commercial L.J. at 53. "[S]ociety's demand for it is burgeoning." Gladstone, supra, 31 New Eng. L. Rev. at 1193.[1]

(B)

Assuming that section 331.554(4) does not prohibit a county from redeeming its warrants through electronic imaging, you have asked whether such warrants may be destroyed within thirty to forty-five days of redemption. This question hinges upon the meaning of section 331.554(4), which provides that "original warrant[s] shall be preserved for at least two years." Compare Iowa Code § 331.554(4) with U.L.A., "Uniform Electronic Transactions Act" §§ 205, 207 (August 15, 1997 proposed draft) (providing that if certain conditions met, electronic record may satisfy laws requiring retention of record in original form).

We believe that section 331.554(4) is not ambiguous and thus not in need of construction. See generally United Fire & Cas. Co. v. Acker, 541 N.W.2d at 519. The word "shall" clearly imposes a duty, Iowa Code § 4.1(38)(a), and the word "original" in this context clearly precludes a copy, reproduction, substitution, or translation, Webster's Ninth New Collegiate Dictionary 803 (1979); see Surgical Supply Serv., Inc. v. Adler, 206 F. Supp. 564, 569 (E.D Pa. 1962). Compare Iowa Code § 331.554(4) with 1993 Miss. Op. Att'y Gen. (August 31, 1993) (concluding county may retain electronic images of cancelled warrants in lieu of originals

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[1] The General Assembly might, for example, consider studying the proposed "Illinois Electronic Commerce Security Act" (November 17, 1997), which may be found on the Internet at **www.mbc.com**; the American Bar Association's "Digital Signature Guidelines: Legal Infrastructure for Certification Authorities and Secure Electronic Commerce" (August 1, 1996); the Internet Law & Policy Forum's "Survey of Electronic and Digital Signature Legislative Initiatives in the United States" (September 12, 1997), which may be found on the Internet at **www.ilpf.org**; and the "Uniform Electronic Transaction Act" (August 15, 1997 proposed draft), which may be found on the Internet at **www.law.upenn.edu/library/ulc**, written by the National Conference of Commissioners on Uniform State Laws. See generally Baker & Brandel, supra, § 1.00 et seq.; Soma, supra, ch. 8; Symposium on the Future of Electronic Cash, 46 Am. U.L. Rev. no. 4 (1997). Other Internet sources that relate to electronic imaging include the websites of three universities: University of Bradford, at **www.eimc.brad.ac.uk**; Northern Michigan University, at **www.num.edu/art-design/El**; and University of Rochester, at **www.ceis.rochester.ed**.

pursuant to record-retention statute -- which only requires retention of "records" and does not require retention of "original records" -- for specified period of time). See generally Iowa Code § 4.1(38); State v. Bush, 518 N.W.2d 778, 780 (Iowa 1994). Section 331.554(4) thus requires preservation of original county warrants for at least two years after their redemption.

We suggest that all interested parties meet and determine how to implement this statutory requirement. In addition, we suggest that the General Assembly consider the possibility of statutory amendments that permit retention of electronic images in lieu of original warrants. See generally Iowa Code § 321.31(1) (expressly permitting state transportation department to destroy original records after making photostatic, microfilm, or other photographic copies of those records); 1996 Miss. Op. Att'y Gen. (January 22, 1996) (noting that if electronic images of public records are exact, high-quality reproductions, they shall be deemed original records under Mississippi law for all purposes and admissible as evidence in all courts and administrative agencies); 1993 Miss. Op. Att'y Gen. (August 31, 1993) (concluding that Mississippi law, which only requires retention of "records," permits retention of electronic images of cancelled warrants in lieu of originals for specified period of time); Maki & Jerak, supra, 1979 Commercial L.J. at 51 (observing that goal in developing electronic processes is to eliminate paper); Mortimer & Leary, "Electronic Funds Transfers," 33 Bus. Law. 947 (1978) (explaining that "whole purpose" of EFT systems permits financial institutions to dispense with paper, which "is killing us now").

III.

In conclusion: Section 331.554 does not, per se, prohibit a county from redeeming its warrants through use of electronic imaging. Original county warrants must be preserved for at least two years after their redemption.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

COUNTIES AND COUNTY OFFICERS: Absence of supervisor due to medical emergency. Iowa Code §§ 69.2(7), 331.214 (1997). Iowa Code section 69.2(7) (1997) applies to all elected county officials and provides that sixty days absence from the county constitutes a vacancy except for medical emergency. Section 69.2(7) is the later enactment and the more specific concerning absences caused by a medical emergency. It therefore prevails over section 331.214, providing for vacancy by a county supervisor but silent on the effect of a medical emergency. (Osenbaugh to Bozwell, Appanoose County Attorney, 5-26-98) #98-5-1(L)

May 26, 1998

Robert F. Bozwell, Jr.
Appanoose County Attorney
Courthouse
Centerville, IA 52544

Dear Mr. Bozwell:

You have requested an opinion about a possible vacancy in a civil office in the following circumstances. A county supervisor suffered an aneurysm that resulted in his hospitalization and rehabilitation outside the county. Although he did not appear to lose any cognitive ability, he became paralyzed from the neck down. His medical prognosis is, however, unknown, and he plans to continue abiding at the out-of-county location for the purpose of receiving continued medical care and treatment until he can return to the county. There has been some discussion about his participation in the board's regularly scheduled meetings by electronic means until he can return to the county.

You have issued a county attorney's opinion relying on Iowa Code section 69.2(7) to conclude that absence from the county for a medical emergency would not create a vacancy. However, you have requested an opinion of this office to determine whether section 69.2(7) applies to county supervisors in light of Iowa Code section 331.214. Because we concur in your conclusion that section 69.2(7) applies also to county supervisors in case of absence from the county for a medical emergency, we find it unnecessary to address your remaining questions.

You have asked whether a person vacates the office of supervisor by abiding outside the county for sixty consecutive days in order to receive medical care and treatment for paralysis resulting from an aneurysm.

Iowa Code section 69.2(7) provides:

> Every civil office shall be vacant [at the time the] board of supervisors declares a vacancy in an elected county office upon finding that the county officer has been physically absent from the county for sixty consecutive days except in the case of medical emergency.

(emphasis added). See generally 1991 Iowa Acts, 74th G.A., ch. 12, § 3.

Although section 69.2(7) addresses absence from the county by all elected civil officers and creates an exception for medical emergency, section 331.214 provides for a vacancy by a supervisor for absence from the county for the same sixty-day period but contains no exception for medical emergencies.

> In addition to the circumstances which constitute a vacancy in office under section 69.2, the absence of a supervisor from the county for sixty consecutive days shall be treated as a resignation of the office. At its next meeting after the sixty-day absence, the board, by resolution adopted and included in its minutes, shall declare the absent supervisor's seat vacant.

§ 331.214 (emphasis added).

Section 331.214 was first adopted in 1873. In 1981, the legislature added the introductory clause referring to section 69.2. 1981 Iowa Acts, ch. 117, § 213. In 1991 the legislature amended section 69.2 to add subsection 7, providing for a vacancy in an elected county office because of physical absence over sixty days except in case of medical emergency. 1991 Iowa Acts, ch. 12, §§ 1-3. This bill, although addressing the same subject as section 331.214, contains no reference to it.

Although various principles of statutory construction produce apparently contradictory results in this case, we would construe section 69.2(7) to govern as the later enactment. Section 69.2(7) addresses vacancies in all elected county offices but provides that medical emergency is an exception to the rule that sixty days absence results in a vacancy. If statutes are irreconcilable, the latest enacted governs. Iowa Code § 4.8.

We recognize that an argument could be made that section 331.214 is the more specific statute as it relates to county

supervisors while section 69.2(7) applies to all elected county officials. However, the class of elected county officials is also a relatively specific class, and section 69.2(7) specifically addresses medical emergencies while section 331.214 is silent on the subject of medical emergencies.

It can be argued as well that the introductory phrase "in addition to the circumstances which constitute a vacancy in office under section 69.2" must mean that section 331.214 provides an additional ground constituting a vacancy. When section 69.2(7) was subsequently enacted, providing also that sixty days absence created a vacancy, this phrase no longer made sense. We are reluctant to construe statutes in a manner that renders one statute superfluous. Holiday Inn Franchising, Inc., v. Branstad, 537 N.W.2d 724, 729 (Iowa 1995). However, it is our view that the only logical construction is that the later enacted statute, section 69.2(7), applies to all elected county offices and provides a medical emergency exception.

Further, section 331.214 states that physical absence for over sixty days "shall be treated as a resignation of the office." In this case, that would raise significant issues where the medical condition precludes physical presence in the county but the supervisor is participating in meetings by electronic means pursuant to Iowa Code § 21.8. While physical absence may well be a ground for vacancy, coerced physical absence while simultaneously carrying out the duties of the office hardly suggests a "resignation" or abandonment of the office. Compare 3 E. McQuillin, The Law of Municipal Corporations § 12.65, at 331 (1980) (moving out of district will be treated as an abandonment or implied resignation of the office).

Whether the physical absence is caused by a "medical emergency" is a mixed question of law and fact. It is not therefore ascertainable by an Attorney General's opinion. Instead, this is a matter of legal advice for the county attorney in advising the Board, as you have done.

In conclusion, it is our opinion that section 69.2(7) applies to all elected county officials and provides that sixty days absence from the county constitutes a vacancy except for medical emergency. Section 69.2(7) is the later enactment and the more specific concerning absences caused by a medical emergency. It therefore prevails over section 331.214, providing for vacancy by a county supervisor but silent on the effect of a medical

emergency. The legislature may wish to resolve the ambiguity created by the existence of these two provisions.

Sincerely,

ELIZABETH M. OSENBAUGH
Solicitor General

EMO:cw

TAXATION: Income tax withholding from meal reimbursement payments to Iowa sheriffs. Iowa Code § 422.16(1) (1997); 26 U.S.C. §§ 62, 162(a). Meal reimbursements paid to Iowa sheriffs are subject to income tax withholding if they are not paid under an accountable plan which requires the meal expenses be substantiated as deductible under I.R.C. section 162(a), either as business expenses incurred while away from home overnight, or as the rare type of meal expense which qualifies as an ordinary and necessary business expense. (Mason to Stoebe, Humboldt County Attorney, 5-28-98) #98-5-2(L)

May 27, 1998

Kurt John Stoebe
Humboldt County Attorney
P. O. Box 604
429 Summer Ave.
Humboldt, Iowa 50548

Dear Mr. Stoebe:

You have requested the opinion of the Attorney General regarding whether meal reimbursements paid to Iowa sheriffs and deputies are subject to income tax withholding. As with many tax questions, the answer will depend on the particular facts. If the sheriff's meal expenses would be deductible from the sheriff's gross income if not reimbursed, then the reimbursements for those meals are not taxable income and are not subject to withholding. Generally, if the sheriff is not on a business trip and away from home overnight, the meal expenses would not be deductible from the sheriff's gross income and the reimbursements are taxable income subject to withholding.

To determine the "taxable income" for Iowa income tax purposes, certain adjustments (not applicable to the reimbursements at issue) are made to the adjusted gross income for federal income tax purposes. See Iowa Code §§ 422.4(16) and 422.7. Generally, Iowa requires employers maintaining an office or transacting business within Iowa to withhold Iowa income tax from compensation paid in Iowa whenever they are required under the Internal Revenue Code to withhold and pay federal income tax. Similarly, Iowa income tax is generally not required to be withheld on any compensation paid in Iowa of a character which is not subject to federal income tax withholding. Iowa Code § 422.16(1) (1997); 701 IAC 46.1(1)(a), 46.1(2)(e). Therefore, in order to answer your question, the requirements under the Internal Revenue Code must be examined.

Meal reimbursements paid to Iowa sheriffs and deputies would be included in their gross income and not deductible under section 119 of the Internal Revenue Code. See Commissioner v. Kowalski, 434 U.S. 77, 83, 54 L. Ed. 2d 252, 259, 98 S. Ct. 315 (1977). In Kowalski, the Court held that cash reimbursements of state police troopers' meal expenses are includable as gross income under I.R.C. section 61(a). The reimbursements are not excludable under I.R.C. section 119 as being provided "for the convenience of the employer" because section 119 applies only to meals furnished in kind and does not cover cash reimbursement for meals. Kowalski, 434 U.S. at 84, 54 L. Ed. 2d at 260.

The meal reimbursements could not be deductible under I.R.C. section 162(a)(2), which allows a deduction for travel expenses (including amounts expended for meals and lodging) "while away from home" in the pursuit of a trade or business, unless the expenses were incurred during overnight trips. United States v. Correll, 389 U.S. 299, 19 L. Ed. 2d 537, 88 S. Ct. 445 (1967). They would also not be deductible as "ordinary and necessary" business expenses under the more general provision of section 162(a) if no business purpose for the meals is demonstrated. Meals are not deductible if they serve no purpose other than the taxpayer's own subsistence. Putnam v. U.S., 32 F.3d 911, 918 (5th Cir. 1994). Daily meal expenses are classic examples of expenses which may enable a taxpayer to work but which are not incurred in the conduct of that trade or business. Id.

In Christey v. United States, 841 F.2d 809 (8th Cir. 1988), cert. denied, 489 U.S.1016, 109 S. Ct. 1131, 103 L. Ed. 2d 193 (1989), the Eighth Circuit held that Minnesota highway patrol officers were entitled to deduct from income, as ordinary and necessary business expenses, the expenses incurred for restaurant meals while on duty. The court recognized that the cost of one's meals is ordinarily a personal nondeductible expense. 841 F.2d at 811. It found, however, that under the limited circumstances of the case, the district court's conclusion was not clearly erroneous. The district court had concluded that the number of duty-related restrictions and requirements concerning the officers' meals caused the meal expenses to be deductible under the general provision of I.R.C. section 162(a). The restrictions were substantial and effectively extended the performance of the troopers' duties from patrol cars to the restaurants. 841 F.2d at 812. The troopers were not allowed to bring a meal from home or return home to eat their meal. They were restricted as to the times and places they could eat, remained on duty throughout their meals, were required to be available to the public during the meal, and were subject to being called away from the meal for an emergency. Unless these same meal restrictions exist for the sheriffs and deputies, it is unlikely that a court would find the meal expenses to be deductible as ordinary and necessary business expenses.

Meal reimbursements included in taxable income have not always been subject to income tax withholding. In Central Ill. Pub. Serv. Co. v. United States, 435 U.S. 21, 55 L. Ed. 2d 82, 98 S. Ct. 917 (1978), the employer's 1963 lunch expense reimbursements to employees who were on company travel but not away overnight did not constitute "wages" subject to withholding under I.R.C. section 3401(a), even though they were taxable income to the employees. The Court pointed out that in 1963 no regulation or administrative ruling required withholding of any travel expense reimbursement, no employer viewing the 1963 regulations could reasonably have suspected that a withholding obligation existed, and prior to the Court of Appeals' decision being reviewed, no court had ever held lunch reimbursements to be wages for withholding purposes. 435 U.S. at 32, 55 L. Ed. 2d at 91. Since the 1978 decision in Central Illinois Public Service Co., however, there have been changes to the Internal Revenue Code and to the Treasury Regulations, discussed below, such that employers are now on notice that lunch expense reimbursements are subject to withholding under certain circumstances.

The Tax Reform Act of 1986 provided for a deduction from gross income of those reimbursed business expenses paid or incurred by the taxpayer as an employee under a "reimbursement or other expense allowance arrangement" with the employer. Clark v. Modern Group Ltd., 9 F.3d 321, 333 (3rd Cir. 1993); see I.R.C. § 62(a)(2)(A). In 1988, section 62(c) was added to the Internal Revenue Code. Section 62(c) provides that for purposes of section 62(a)(2)(A), a "reimbursement or other expense allowance arrangement" must require the employee to substantiate the business expenses covered by the arrangement to the person providing the reimbursement, and must not allow the employee to retain any amount in excess of the substantiated expenses covered under the arrangement. An employee who receives a per diem or other fixed allowance from an employer will be considered to be substantiating the amount of expenses, up to amounts specified by the Internal Revenue Service (IRS). See §§ 62(c) and 274(d).

According to the legislative history of the enactment of section 62(c), Congress intended that the business purpose of the employee's travel must be substantiated to the person providing the reimbursement. House Conf. Rep. No. 100-998, 100th Cong., 2nd Sess. 204 (1988), reprinted in vol. 5 1988 U.S.C.C.A.N. 2879, 2992. The conferees intended the IRS to revise its regulations regarding the reporting of business expense reimbursements and to make similar changes in the regulations defining the amounts subject to income tax withholding. House Conf. Rep. No. 100-998, 100th Cong., 2nd Sess. 206 (1988), reprinted in vol. 5 1988 U.S.C.C.A.N. 2879, 2994. The IRS was expected to "provide that, to the extent reasonably feasible, reimbursements or allowance amounts that are not offset by an above-the-line deduction for business expenses under the rules of the provision [of section 62(c)] are subject to income tax withholding." Id.

The regulations prescribing rules relating to the requirements of section 62(c) describe accountable and nonaccountable plans. In order to be an accountable plan, the "reimbursement or other expense allowance arrangement" must provide advances, allowances, or reimbursements only for business expenses that are "allowable as deductions" under the Internal Revenue Code and are paid or incurred by the employee in connection with the performance of services as an employee. Treas. Reg. § 1.62-2(c), (d) (1992); 33 Am. Jur. 2d Federal Taxation ¶ 1108, p. 634 (1994). There are additional requirements regarding substantiation of expense amounts and returning amounts received from the payor in excess of expenses. Amounts paid under an accountable plan are excluded from the employee's gross income, are not reported as wages and are exempt from the withholding and payment of employment taxes, which include income tax. Treas. Reg. § 1.62-2(c)(4) (1992). If an arrangement does not satisfy one or more of the requirements for an accountable plan, then all amounts paid under the arrangement are treated as paid under a nonaccountable plan, are included in the employee's gross income, must be reported as wages or other compensation on the employee's Form W-2, and are subject to withholding and payment of employment taxes. Treas. Reg. § 1.62-2(c)(3), (5) (1992).

Regulation section 31.3401(a)-1(b)(2) has been amended since it was discussed in Central Ill. Pub. Serv.. It now refers to regulation section 31.3401(a)-4 (1990) regarding amounts received by an employee on or after July 1, 1990, with respect to expenses paid or incurred on or after that date. Current regulation section 31.3401(a)-4(b)(2) (1990) states that if a reimbursement or other expense allowance arrangement does not satisfy I.R.C. section 62(c), all amounts paid under the arrangement are treated as paid under a nonaccountable plan, are included in wages, and are subject to withholding and payment of employment taxes when paid.

Based on the statutory and regulatory changes since the 1978 Central Ill. Pub. Serv. decision, it is our opinion that meal reimbursements of the type at issue in that case would now be subject to income tax withholding. The meal reimbursements paid to Iowa sheriffs and deputies are subject to withholding if they are not paid under an accountable plan. In other words, if the meal expenses are not substantiated as being deductible under I.R.C. section 162(a) as business expenses incurred while away from home overnight, or as the rare type of meal expense which qualifies as an ordinary and necessary business expense,as in the Christey case, the meal reimbursements are taxable income and are subject to income tax withholding.

If substantial restrictions exist for the sheriffs' meals such that you think the expenses may be deductible under the rationale in Christey, you may wish to contact the Internal Revenue Service for its opinion based on the specific detailed facts. As

stated above, whether Iowa requires withholding of state income tax from payments to employees depends on whether federal income tax must be withheld from the payments.

Sincerely,

Marcia Mason

MARCIA MASON
Assistant Attorney General

MM:cml

COUNTIES; TAXATION: County hospital trustees' authority to certify levies to pay insurance premiums applies to health insurance premiums. Iowa Code §§ 347.7, 347.14(9) and 347.14(10) (1997). If health insurance for county hospital employees is deemed necessary for the prudent management of county hospitals, the premiums for such insurance can be paid through tax levies contained in section 347.14(10). (Miller to Folkers, Assistant Mitchell County Attorney, 6-12-98) #98-6-1(L)

June 12, 1998

Jerry H. Folkers
Assistant Mitchell County Attorney
515 State Street
Osage, Iowa 50461-1249

Dear Mr. Folkers:

The Attorney General is in receipt of your opinion request as to whether Iowa Code section 347.14(10) (1997) authorizes a levy in excess of the limitation provided in Iowa Code section 347.7 (1997) for purposes of paying health insurance premiums for county public hospital employees.

You stated in the opinion request that the Mitchell County Memorial Hospital is a county public hospital operating under the provisions of Iowa Code chapter 347 (1997). It has in the past provided health insurance coverage for its employees as part of its employee benefit package. However, the hospital has never certified a tax levy in excess of the statutory limit contained in section 347.7 for purposes of paying these health insurance premiums for its employees. It is now considering such a levy.

Section 347.7 authorizes the board of supervisors to levy taxes to support county hospitals governed by chapter 347 and sets various limitations to those levies. In addition to the levies authorized in section 347.7, section 347.14(10) specifically authorizes the board of hospital trustees to:

> Certify levies for a tax in excess of any tax levy limit to meets its obligations to pay the premium costs on tort liability insurance, property insurance, workers' compensation insurance, and any other insurance that may be necessary for the prudent management and operation of the county public hospital, the costs of a self-insurance

> program, the costs of a local government risk pool, and amounts payable under any insurance agreements to provide or procure such insurance, self-insurance program, or local government risk pool.

(emphasis added.)

Health insurance premiums are not listed in section 347.14(10) and arguably bear no relationship to the types of liability and casualty insurance enumerated in that section. The question, then, is whether health insurance falls into the category of "any other insurance necessary for the prudent management and operation of the county hospital" for which the trustees can certify a tax levy. (emphasis added). Iowa Code § 347.14(10).

In answering this question, it is necessary to review Iowa Code section 347.14(9), which authorizes the hospital trustees to:

> Procure and pay premiums on any and all insurance policies required for the prudent management of the hospital, including but not limited to public liability, professional malpractice liability, workers' compensation and vehicle liability. Said insurance may include as additional insureds the board of trustees and employees of the hospital. This subsection applies to all county hospitals whether organized under this chapter, chapter 347A, chapter 37, or otherwise established by law.

(emphasis added.) Because both statutes deal with the same subject matter, they should be read in pari materia with each other. See State v. Harrison, 325 N.W.2d 770, 772 (Iowa Ct. App. 1982) and 2A Sutherland, Statutory Construction, § 51.03 (Sands 4th Ed. 1973). Absent an express repeal or amendment, it is presumed that a new legislative provision is "in accord with the legislative policy embodied in those prior statutes." 2A Sutherland, Statutory Construction, § 51.02 at 121 (Sands 4th Ed. 1973).

In 1965, the Attorney General opined that county hospitals did have the authority to procure and pay for health insurance policies as part of the compensation package available to its employees. See 1966 Op. Att'y Gen. 146 (#65-3-7). That opinion was based, in part, upon the authorization granted to the hospital trustees under section 347.14(9) (1962), to "procure and pay premiums on any and all insurance policies required for the prudent management of the hospital."

Section 347.14(10) was added to chapter 347 in 1991. See 1991 Iowa Acts, ch. 160, § 11. It is assumed the legislature knew at the time that county hospitals had the authority to provide and pay for health insurance benefits to its employees under section 347.14(9). When the legislature authorized the hospital trustees to certify tax levies to pay for insurance "necessary for the prudent management and operation of the county public hospital," it did not exclude any particular type of insurance which was already being procured and paid for under section 347.14(9). Absent such an exclusion, the legislature clearly intended the tax levies to apply to any insurance premium deemed necessary for the prudent management of the hospital. Since health insurance falls into that category, the premiums for such insurance can be subject to the levy contained in section 347.14(10).

In conclusion, section 347.14(10) authorizes the Mitchell County Memorial Hospital trustees to certify a levy in excess of the limitation provided in section 347.7 for the purpose of paying health insurance premiums for their employees.

Sincerely,

JAMES D. MILLER
Assistant Attorney General

JDM:cml

AUDIOLOGISTS; STATE OFFICERS AND DEPARTMENTS: Titles and abbreviations. Iowa Code §§ 147.55, 147.72, 147.73, 147.74, 147.153 (1997). Only an audiologist with a doctoral degree from an accredited school, college, or university who has satisfactorily completed a regular course of academic study beyond the bachelor's and master's levels can use the prefix "Doctor" (or "Dr.") or the suffix "Ph.D." An audiologist without such a degree may not use the designation "Au.D." (Kempkes to Brunkhorst, State Representative, 6-12-98) #98-6-2(L)

June 12, 1998

The Honorable Bob Brunkhorst
State Representative
State Capitol
LOCAL

Dear Representative Brunkhorst:

Under the common law, anyone could practice health care without restriction. Today, persons may only render health-care services pursuant to statutory provisions, which underscore your request for an opinion on the use of titles and designations by audiologists. You ask whether such provisions permit an audiologist to use the title "Doctor" or the designation "Au.D."

Regarding that designation, you have enclosed an opinion from the Ethical Practice Board of the American Speech-Language Hearing Association (ASHA). That opinion describes the "Au.D." designation as one "obtained through earned entitlement." Specifically, it says an "Au.D." designation "is awarded through a portfolio review process with main emphasis on the review of the documentation of tasks previously performed, time in practice, additional educational courses taken, awards received, and publications written by the applicant." The opinion concludes "the use of an 'Au.D.' designation obtained by 'earned entitlement' from any organization or institution that is not regionally accredited . . . may be in violation of the ASHA's Code of Ethics," because it "creates the impression that it represents a doctoral-level degree awarded by a regionally accredited institution, usually a university."

In a letter supporting the opinion, the President of the ASHA notes that the ASHA "is the [largest] professional and scientific organization" representing audiologists and that it "is strongly opposed [to use of "Au.D."] because it is misleading to the public and is unfair to those audiologists who have earned doctoral degrees [from regionally accredited institutions]." This letter concludes that use of "Au.D." by persons lacking such doctoral degrees "is a deceptive and unfair trade practice."

We conclude that only an audiologist with a doctoral degree in audiology from an accredited school, college, or university who has satisfactorily completed a regular course of academic study beyond the bachelor's and master's levels can use the prefix "Doctor" (or "Dr.") or the suffix "Ph.D." We also conclude that an audiologist without such a degree may not use the designation "Au.D."

I.

Iowa Code chapter 147 (1997) is entitled "General Provisions, Health-Related Professions." Among other things, it creates the Board of Examiners for Speech Pathology and Audiology, see Iowa Code §§ 147.13(10), 147.14(9), and invests it with authority to "adopt all necessary and proper rules to implement and interpret this chapter," see Iowa Code § 147.76.

In one division, chapter 147 sets forth specific provisions governing audiologists and the practice of audiology. See Iowa Code §§ 147.151-.157. It defines the practice of audiology to include "the application of principles, methods, and procedures for measurement, testing, evaluation, prediction, consultation, counseling, instruction, habilitation, rehabilitation, or remeditation related to hearing and disorders of hearing and associated communication disorders . . . ." Iowa Code § 147.151(3).

Section 147.153 establishes the licensing requirements for an audiologist: in addition to passing an examination and completing two levels of clinical training, an applicant must possess a master's degree or its equivalent "from an accredited school, college or university with a major in audiology" and satisfactorily complete supervised clinical training in audiology as a student "in an accredited school, college or university." Under section 147.2, a person can only engage in the practice of audiology upon obtaining an audiologist's license, which, under section 147.7, must be publicly displayed in the primary place in which the person practices.

In another division, chapter 147 governs license revocation and discipline. Section 147.55 sets forth disciplinary sanctions for "[k]nowlingly making misleading, deceptive, untrue or fraudulent representations in the practice of a profession or

engaging in unethical conduct or practice harmful or detrimental to the public"; for "[f]raud in representations as to skill or ability"; and for "[u]se of untruthful . . . statements in advertisements." Accord 645 IAC 301.112(1)(c), (f), (g). An administrative rule defines "unethical business practices" to include "[f]alse or misleading advertising." 645 IAC 301.112(9)(a).

In yet another division, chapter 147 governs the use of titles and degrees for persons licensed in health-care professions. Section 147.72 provides that a licensee "may append to the person's name any recognized title or abbreviation, which the person is entitled to use, to designate the person's particular profession . . . ." Section 147.73 provides:

> Nothing in section 147.72 shall be construed:
>
> (1). As authorizing any person licensed to practice a profession . . . to use or assume any degree or abbreviation of the same unless such degree has been conferred upon said persons by an institution of learning accredited by the appropriate board . . . , together with the director of public health, or by some recognized state or national accredited agency.
>
> (2). As prohibiting any holder of a degree conferred by an institution of learning accredited by the appropriate board . . . , together with the director of public health, or by some recognized state or national accredited agency, from using the title which such degree authorizes the holder to use, but the holder shall not use such degree or abbreviation in any manner which might mislead the public as to the holder's qualifications to treat human ailments.

Somewhat awkwardly, sections 147.74(1) and 147.74(11) combine to provide that any person "who fails to use the following designations" shall be guilty of a simple misdemeanor: "[an] audiologist with a doctoral degree may use the suffix 'Ph.D.,' or the prefix 'Doctor' or 'Dr.' and add after the person's name . . . 'audiologist.'" (emphasis added). Section 147.74(20) provides that "[n]o other practitioner" licensed to practice a profession "shall be entitled to use the prefix 'Dr.' or 'Doctor.'"

II.

(A).

You have asked whether an audiologist may use the title of "Doctor." Sections 147.74(1) and 147.74(11) provide that an audiologist "with a doctoral degree" may use the prefix "Doctor" (or "Dr.") or the suffix "Ph.D.," and 147.74(20) provides that "[n]o other practitioner" licensed to practice audiology "shall be entitled to use the prefix 'Dr.' or 'Doctor.'" Thus, an audiologist without a doctoral degree may not use that prefix or suffix.

The phrase "doctoral degree" has, however, some ambiguity. Read in a narrow sense, "doctoral degree" indicates a doctoral degree conferred by an accredited school, college, or university upon the recipient's satisfactory completion of a regular course of academic study beyond the bachelor's and master's levels. See generally Commonwealth v. New England College of Chiropractic, Inc., 108 N.E. 895, 896 (Mass. 1915). Read in a broad sense, "doctoral degree" indicates a degree awarded to a person by any institution or organization for reasons that may not relate to a regular course of academic study.

Our construction of sections 147.74(1) and 147.74(11) primarily hinges upon the common meanings of "doctor" (for "doctoral") and "degree." See generally Iowa Code § 4.1(38) (statutory words and phrases shall be construed according to context and approved English usage). Within the context of health-care professionals' licensure, the common meaning of statutory language carries particular importance, because members of the general public often rely upon titles, degrees, and certifications in making their choices among practitioners. See generally Iowa Code § 4.4(5) (establishing legislative presumption that, in construing statute, public interest favored over any private interest). Sections 147.74(1), 147.74(11), and 147.74(20) apparently seek to prohibit the employment of descriptive language that may tend to mislead the general public, and we construe them in light of this purpose. See generally Iowa Code § 4.6(1) (statutory construction may take into account legislative object).

The word "doctor" commonly means "a person who has earned one of the highest academic degrees (as a PhD) conferred by a university." Webster's Ninth New Collegiate Dictionary 333 (1979). "In common speech, as well as in university parlance, 'Doctor' as a prefix to a person's name signifies an academic distinction founded upon having received a degree." Commonwealth v. New England College of Chiropractic, Inc., 108 N.E. at 896.

The word "degree" commonly means "a title conferred on students by a college, university or professional school on

completion of a unified program of study." Id. at 296. Accord Black's Law Dictionary 381 (1979). In common speech, it signifies "any academic rank recognized by colleges and universities" and "the idea of some collegiate, university or scholastic distinction." Commonwealth v. New England College of Chiropractic, Inc., 108 N.E. at 896. "Degree" has the primary meaning of "a grade or rank to which scholars are admitted by a college or university in recognition of their attainments: as the degree of bachelor, master, doctor, etc." In re Portugal, 129 A.2d 450, 453 (N.J. App. 1957) (citation omitted).

These common definitions suggest that the phrase "doctoral degree" in sections 147.74(1) and 147.74(11) means a doctoral degree conferred by an accredited school, college, or university upon a person who has satisfactorily completed a regular course of academic study beyond the bachelor's and master's levels. Cf. In re Dundee, 545 N.W.2d 756, 759 (Neb. 1996) (rule requiring "professional degree" for practicing attorney "contemplates only a juris doctor degree," which is subject to qualitative standards and regulation). For purposes of titles or designations, then, having such a degree and having practical experience are not necessarily the same. Cf. Commonwealth v. New England College of Chiropractic, Inc., 108 N.E. at 896 (statutory provision restricting issuance of academic degrees aims "to insure to the people of the commonwealth freedom from deception when dealing with those who put forward professions of educational achievement such as ordinarily is accompanied by a collegiate degree" and "to make certain that those who use such symbols have had the opportunity of being trained according to prevailing standards in some school of recognized standing, under teachers of reputation for learning").

Such a construction of sections 147.74(1) and 147.74(11) also comports with section 147.153, which requires each licensed audiologist to possess "a master's degree or its equivalent from an accredited school, college or university" and satisfactorily complete "supervised clinical training in audiology as a student in an accredited school, college or university." Accord 645 IAC 300.3(3). See generally Robbins v. Iowa Dep't of Inspections & App., 567 N.W.2d 653, 657 (Iowa 1997) ("statutory provisions [are] read, not in isolation, but in conformity with [an] overall statutory scheme"). It would make little sense to require a person to obtain a master's degree from an accredited school, college, or university in order to practice audiology and to use the title "Audiologist," but permit that person to use the title "Doctor of Audiology" merely upon receiving a "doctoral degree" from any institution or organization for reasons unrelated to a regular course of academic study beyond that master's degree. See generally Iowa Code § 4.4(3) (principle of statutory construction that legislature presumably intended just and reasonable result in passing statute); 1992 Op. Att'y Gen. 7 (#91-2-3(L)) (rejecting

construction of statute "as being inconsistent with the spirit of [the] statutory scheme").

At first glance, our conclusion might appear to conflict with section 147.73. Referring to section 147.72 -- which permits licensees to use recognized titles and abbreviations -- section 147.73 provides in part that "[n]othing in section 147.72 shall be construed" as either (a) authorizing a licensee to use any degree or abbreviation unless such degree has been conferred "by an institution of learning accredited by the appropriate board" or "by some recognized state or national accredited agency" or (b) prohibiting any holder of a degree conferred "by an institution of learning accredited by the appropriate board" or "by some recognized state or national accredited agency" from using the accompanying title. Section 147.73, however, expressly limits its rule of construction to section 147.72, and section 147.72 only governs the use of recognized titles or abbreviations "to designate [a] particular profession."

Sections 147.72 and 147.73 thus address the narrow question whether licensees may use a title or abbreviation to designate or otherwise identify their particular profession, such as "Audiologist" or "Au." See generally 1986 Ohio Op. Att'y Gen. 2-342 (1997 WL 237880) (in addition to "Audiologist," person may provide services to public under a variety of titles, including "Hearing Clinician," "Hearing Therapist," and "Audiometrist"). They do not address the decidedly different question whether licensees may use a title or abbreviation to signify the level of formal education that they have attained within that profession.

(B).

You have also asked whether an audiologist may use the designation "Au.D." No statute or administrative rule specifically addresses the use of "Au.D." by audiologists in this state, and we have not found this abbreviation in any dictionary.

Like "O.D." for a Doctor of Optometry, "M.D." for a Medical Doctor, and "J.D." for a Juris Doctor, the designation "Au.D." appears to indicate a "Doctor of Audiology." See Commonwealth v. New England College of Chiropractic, Inc., 108 N.E. at 896 ("Doctor" is indicated "when other initials in combination with D. are written after the name, as in D.D., LL.D., Ph.D., M.D."); see also New International Abbreviations Dictionary 109-20 (1974). In addition, we understand that at least one organization awarding the "Au.D." and audiologists in general consider it to mean "Doctor of Audiology." It thus appears undisputed that "Au.D." signifies "Doctor of Audiology" when used as a suffix with an audiologist's name.

As we have already concluded, however, sections 147.74(1), 147.74(11), and 147.74(20) authorize audiologists to use the prefix "Doctor" (or "Dr.") and the suffix "Ph.D." only if they have received a doctoral degree from an accredited school, college, or university after satisfactorily completing a regular course of academic study beyond the bachelor's and master's levels. In light of this conclusion, we see no reason to permit an audiologist without such a degree to use the designation "Au.D.," which imparts the same idea as "Doctor," "Dr.," and "Ph.D." See Bridgestone/Firestone v. Accordino, 561 N.W.2d 60, 62 (Iowa 1997) (indicating that substance, not form, prevails in statutory construction). We refuse to ascribe to the General Assembly an intent to confine the scope of sections 147.74(1) and 147.74(11) simply to "Doctor," "Dr.," and "Ph.D." and thereby exclude similar foreign terms ("Doctour" or "Doktor"), similar abbreviations ("Doc." or "D."), or misspellings ("Docter" or "Docktor") that essentially signify the same thing and impart the same meaning.

We point out that use of "Au.D." -- especially in the absence of any accompanying explanation -- may have the tendency of misleading the general public by suggesting that the audiologist has, in fact, received a doctoral degree from an accredited school, college, or university. Cf. Gandee v. Glaser, 785 F. Supp. 684, 689 (S.D. Ohio 1992) ("Certified Hearing Aid Audiologist," when used by person not licensed as audiologist, inherently misleading); Florida Hearing Aid Society, Inc. v. Florida Dep't of Health Servs., 399 So.2d 1035, 1036 (Fla. App. 1981) ("Certified Hearing Aid Audiologist," when used by person not licensed as audiologist, "tends to mislead the general public"); National Hearing Aid Society v. Commonwealth ex rel. Hancock, 551 S.W.2d 247, 248-49 (Ky. App. 1977) (private trade organization awarding title of "Certified Hearing Aid Audiologist" to hearing-aid dealers either knew or should have known that "consumers would be deceived by the use of [such title]"); 1986 Ohio Op. Att'y Gen. 2-342 (1997 WL 237880) (use of "Certified Hearing Aid Audiologist" by person not licensed to practice audiology might improperly "lead or incline [the public] to have the notion or feeling that one using the term is an audiologist"); 1995 Tex. Att'y Gen. DM-336 (1995 WL 228737) (although the question remains one of fact, "[w]e think it [possible] that an acupuncturist who uses the titles 'Oriental Medical Doctor' or 'O.M.D.' violates [the statutory prohibition against advertising that causes confusion or misunderstanding about the credentials, education, or licensure of a health care professional]"). See generally Peel v. Illinois Attorney Registration and Disciplinary Comm'n, 496 U.S. 91, 100, 110 S. Ct. 2281, 100 L. Ed. 2d 83 (1990).

III.

Only an audiologist with a doctoral degree from an accredited school, college, or university who has satisfactorily completed a

regular course of academic study beyond the bachelor's and master's levels can use the prefix "Doctor" (or "Dr.") or the suffix "Ph.D." An audiologist without such a degree may not use the designation "Au.D."

Sincerely,

Bruce Kempkes
Assistant Attorney General

PUBLIC FUNDS; Corn Promotion Board: Private organization's use of commodity check-off dollars from Corn Promotion Fund. Iowa Code §§ 185C.21, 185C.29 (1997). Section 185C.29 requires the use of commodity check-off dollars from the Corn Promotion Fund for making fair and balanced presentations of factual information to the public and prohibits their use for advocating one side of a political or legislative issue. (Kempkes to Kibbie, State Senator, 6-19-98) #98-6-3(L)

June 19, 1998

The Honorable John P. Kibbie
State Senator
4285 440th Ave.
Emmetsburg, IA 50536

Dear Senator Kibbie:

You have requested an opinion about Iowa Code chapter 185C (1997), which governs the Corn Promotion Board, as it relates to the use of public funds by a private organization. You ask whether section 185C.29 permits the Ag Value Growth Foundation -- apparently a private, nonprofit organization, see 26 U.S.C. § 501(c)(3), under contract with the Board -- to pay for certain television advertisements with "commodity check-off dollars" taken from the Corn Promotion Fund.

We understand that one advertisement portrays the regulation of agriculture by this state's ninety-nine counties as the equivalent of ninety-nine officials refereeing a single basketball game. We note that the proper role of counties vis-a-vis the state in regulating agriculture has been a topic of current controversy in the General Assembly and the Supreme Court of Iowa. See H.F. 2494 (enacted in this session and providing that "[a] county shall not adopt or enforce county legislation regulating an animal operation unless expressly authorized by state law"); Goodell v. Humboldt County, ___ N.W.2d ___ (Iowa, March 5, 1998) (striking down county regulations, promulgated pursuant to home rule authority, of large livestock operations).

Your question, however, requires this office to make findings of fact about the impact of the advertisements as well as the

source of funding for them. An opinion cannot make such findings: it can only construe or interpret laws or answer questions of law. See generally 61 IAC 1.5(3); 1998 Op. Att'y Gen. ___ (#97-6-4(L)); 1992 Op. Att'y Gen. 113, 117. Moreover, chapter 185C provides a criminal penalty for violation of its provisions. See Iowa Code § 185C.31. An opinion cannot "decide the criminality of any particular action or inaction." 1998 Op. Att'y Gen. ___ (#97-6-4(L)).

Accordingly, we can only address in a general manner the propriety of using commodity check-off dollars from the Corn Promotion Fund to pay for television advertisements. We conclude that section 185C.29 requires their use for making fair and balanced presentations of factual information to the public and prohibits their use for advocating one side of a political or legislative issue.

I.

Chapter 185C provides for the Board's creation. See Iowa Code §§ 185C.2-.8. The Board "is not a state agency," Iowa Code § 185C.34; but see 1978 Op. Att'y Gen. 332, 336 (Board "is a state agency" for purposes of state constitutional provision). Apparently an unincorporated association, the Board essentially functions "to promote the marketing of corn products," 1978 Op. Att'y Gen. 818, 818-19. "[W]hile corn producers are the direct beneficiaries of the promotion efforts [by the Board,] the entire State of Iowa can be seen as the ultimate beneficiary of a statutory scheme which promotes corn production. It hardly needs mentioning that corn production makes a not insubstantial contribution to the economy of Iowa." 1978 Op. Att'y Gen. 332, 334.

Among other things, chapter 185C charges the Board with providing the "methods and means, including, but not limited to, public relations and other promotion techniques for the maintenance of present markets"; assisting "in the development of new and larger markets"; working for the "prevention, modification, or elimination of trade barriers"; and promoting "the production and marketing of ethanol." Iowa Code § 185C.11(2)-(5). Chapter 185C provides that the Board shall "perform all acts reasonably necessary to effectuate [its] purposes," Iowa Code § 185C.12(2), and may "enter into any contracts or agreements necessary to carry out [its] purposes," Iowa Code § 185C.4(2).

In addition, chapter 185C establishes a mandatory program for payment of state assessments into a Corn Promotion Fund, which may include money from gifts or federal or state grants. Iowa Code §§ 185C.21-.26. Individuals and entities must pay assessments if they engage in the business of producing and marketing 250 bushels or more of corn in the previous marketing year. Iowa Code

§§ 185C.1(11), 185C.21-23. The Corn Promotion Board determines the amount of the assessments, which cannot surpass one-quarter of one cent per bushel of corn. Iowa Code §§ 185C.21(1). A special referendum of corn producers can authorize an increase in an assessment beyond this limit. Iowa Code § 185C.21(2).

Of importance to your question, section 185C.29 delineates permissible and impermissible uses of such "commodity check-off dollars" in the Corn Promotion Fund:

> After the costs of elections, referendum, necessary board expenses, and administrative costs have been paid, at least seventy-five percent of the remaining funds from state assessments in the corn promotion fund shall be allocated to organizations selected by the corn promotion board on the basis of their ability to carry out the purposes of [chapter 185C]. The funds can only be used for research, promotion, and education in co-operation with agencies equipped to perform these activities.
>
> The Iowa corn promotion board shall not expend any funds on political activity, and it shall be a condition of any allocation of funds that any organization receiving funds shall not expend the funds on political activity or any attempt to influence legislation.

(emphasis added). See Iowa Code § 185C.28.

II.

Your question involves the propriety of using commodity check-off dollars from the Corn Promotion Fund to pay for television advertisements. Section 185C.29, which establishes limitations for the use of those dollars, apparently seeks to ensure that the various corn producers contributing them to the Corn Promotion Fund are not compelled to support political or ideological speech.

(A)

In a case premised upon the First Amendment, the United States Supreme Court has recently upheld a federal regulatory scheme authorizing compulsory assessments on fruit producers to pay for generic fruit advertising. See Glickman v. Wileman Bros. & Elliot, ___ U.S. ___, ___ S. Ct. ___, 138 L. Ed. 2d 585 (1997). The Court emphasized, however, that this scheme did not compel the fruit producers "to endorse or to finance any political or ideological

views." 138 L. Ed. 2d at 600 & n. 14. As the Court explained, using the assessments to pay for generic fruit advertising simply did not require the fruit producers "to use their own property to convey an antagonistic ideological message, force them to respond to a hostile message when they 'would prefer to remain silent,' or require them to be publicly identified or associated with another's message." Id. at 600-01 (citations omitted). Compare id. with Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 521-22, 529, 111 S. Ct. 1950, 114 L. Ed. 2d 572 (1991) (First Amendment does not permit assessment against all members of teachers' union "for political activities outside the scope of the collective bargaining context"; however, it does permit assessment against them for "informational support services" that concern teaching and education generally, professional development, unemployment, job opportunities, and award programs).

(B)

Section 185C.29 provides that commodity check-off dollars "can only be used for research, promotion, and education," that the Corn Promotion Board "shall not expend any funds on political activity," and that any organization receiving such money "shall not expend the funds on political activity or any attempt to influence legislation."

The phrases "can only be used" and "shall not expend" in section 185C.29 clearly indicate limitations. See Iowa Code § 4.1(30)(a); Black's Law Dictionary 982 (1979). Section 185C.29 thus creates a dichotomy between the permissible use of public funds for "research, promotion, and education" and the impermissible use of funds for "political activity" or any "attempt to influence legislation." In other words, the General Assembly has effectively deemed the former activities as serving a public purpose and deemed the latter activities as not serving a public purpose. See generally Stanson v. Mott, 551 P.2d 1, 9 (Cal. 1976).

The word "political" means of or relating to government or the conduct of government; of, relating to, or concerned with making as opposed to administering governmental policy; of or pertaining to the influence by which individuals seek to determine or control public policy. State ex rel. Maley v. Civic Action Comm., 238 Iowa 851, 28 N.W.2d 467, 470 (1947); Black's, supra, at 1043; Webster's Ninth New Collegiate Dictionary 883 (1979). The word "activity" means an active force, a pursuit in which a person is active. Webster's, supra, at 12. The word "influence," a synonym of affect or modify, means to affect or alter by indirect or intangible means, sway, or have an effect on the condition or development of, especially in some gentle, subtle, and gradual way. Black's, supra, at 700; Webster's, supra, at 587.

The word "research" means studious inquiry or examination, especially investigation or experimentation aimed at the discovery and interpretation of facts, revision of accepted theories or laws in the light of new facts, or practical application of such new or revised theories or laws. Webster's, supra, at 976. The word "education" means the action or process of educating, by developing or training powers and capabilities. In re Petty, 241 Iowa 506, 41 N.W.2d 672, 675 (1950); Webster's, supra, at 358. (To "educate," a synonym of to teach, means to develop mentally or morally, especially by instruction. Black's, supra, at 461; Webster's, supra, at 358.)

The word "promotion" means the act of furthering the growth or development of something, especially the furtherance of the acceptance and sale of merchandise through advertising. Black's, supra, at 1093; Webster's, supra, at 914. Its synonyms include "propaganda" and "ballyhoo," which signify allegations deliberately spread to further one's cause (or damage an opposing cause) and exaggerations. A Dictionary of Discriminated Synonyms 657 (1st ed., 1942); Webster's, supra, at 85, 916. As used in section 185C.29, however, "promotion" does not appear to have a meaning similar to these synonyms. Under the principle of noscitur a sociis -- whereby "the meanings of statutory terms are ascertained in light of the meaning of words with which they are associated," United States Jaycees v. Iowa Civil Rights Comm'n, 427 N.W.2d 450, 454 (Iowa 1988); see 1988 Op. Att'y Gen. 116 (#88-12-5(L)) -- "promotion" should necessarily relate in some way to the presentation or examination of factual information, the common theme of associated words "research" and "education." Stated otherwise, "promotion" in section 185C.29 only appears to sanction the act of furthering growth or development through the presentation of factual information to the public. Cf. 7 U.S.C. § 7412(12) (agricultural "promotion" means "any action taken . . . to present a favorable image of an agricultural commodity to the public to improve [its] competitive position . . . in the marketplace and to stimulate [its] sales"). See generally Glickman v. Wileman Bros. & Elliot, 138 L. Ed. 2d at 600-02 (contrasting generic advertising that promotes fruit with ideological advertising).

(C)

In 1980, we issued an opinion that school districts have no authority to expend public funds to promote or oppose a ballot issue. See 1980 Op. Att'y Gen. 726 (#80-6-17(L)). Although school districts may have authority to expend public funds for disseminating information to electors about the specifics of bond proposals, we observed that expenditures of public funds to urge a particular vote on a ballot issue would not serve an informative purpose. Id.

In 1990, we issued an opinion on statutory language prohibiting "espousal" by state administrators of a candidate for political office. 1990 Op. Att'y Gen. 70 (#90-4-2(L)). We distinguished between "hard core conduct" and "lesser political involvement" and observed that "any active public solicitation of funds or support for a specific candidate is clearly 'hard core conduct'" within the scope of the statutory prohibition. Id.

In 1991, we issued an opinion that cities and counties have no authority to expend public funds to promote or oppose a ballot issue. See 1992 Op. Att'y Gen. 55 (#91-12-2(L)). Quoting a prior opinion, we explained that public funds entrusted to a public entity "belong equally to the proponents and opponents of [a] proposition, and the use of the funds to finance not only the presentation of facts merely but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint." See Mines v. Del Valle, 257 P. 530, 537 (Cal. 1927), overruled on other grounds, Stanson v. Mott, 551 P.2d 1 (Cal. 1976); Citizens to Protect Public Funds v. Parsippany-Troy Hills Bd. of Educ., 98 A.2d 673, 677 (N.J. 1953); 1992 Op. Att'y Gen. 113, 113 (political subdivisions or county charter commission may not expend public funds "for activities expressly advocating support or opposition to [a] proposed charter").

In 1992, we issued an opinion on Iowa Code section 56.12A (1991), which prohibits the expenditure of public funds "for political purposes, including supporting or opposing a ballot issue." 1992 Op. Att'y Gen. 113. We concluded this language prohibited the expenditure of public funds for "activities expressly advocating support or opposition to" an election issue. Id. at 113, 116-17. We also concluded "merely informative" speech that does not present a "clear plea for action" does not constitute "advocacy." Id. at 118. See F.E.C. v. Furgatch, 807 F.2d 857, 864 (9th Cir. 1987).

(D)

Similar to section 185C.29, the General Assembly has passed legislation prohibiting the expenditure of public money for "political activities" or "political purposes." See, e.g., Iowa Code § 56.12A (state, county, city, or other political subdivision), § 99D.12(1) (nonprofit organizations promoting horse racing), § 99D.12(2) (nonprofit organizations promoting dog racing), § 182.18 (Sheep and Wool Promotion Board); see also Iowa Code of Judicial Conduct 7(A)(1)(b) (judge shall not "[m]ake speeches for" a political organization or candidate or "publicly endorse" a candidate for political office).

Congress, too, has passed legislation similar to section 185C.29. For example, section 1913 of Title 18 prohibits federal agencies from using public money to pay for any advertisement

"intended or designed to influence in any manner a Member of Congress, to favor or oppose, any legislation or appropriation [deemed unnecessary for the efficient conduct of the public business]." 18 U.S.C. § 1913. At least two federal courts have discussed the general scope of section 1913.

In American Public Gas Association v. Federal Energy Administration, 408 F. Supp. 640, 642 (D.C. Cir. 1976), the court observed that the prohibition in section 1913 was directed against activity "likely to induce persons to contact their congressman." In Miller v. Miller, 151 Cal. Rptr. 197, 202-03 (App. 1978), the court quoted testimony given during Congressional hearings that section 1913

> was generally intended to prohibit the use of Government funds for public relations campaigns . . . intended to result in communications [to Members of Congress] and to influence them concerning specific legislation either directly, indirectly through artificially stimulated letter campaigns or through governmental support of organizations which "lobby" the Congress. Promotional campaigns aided or assisted by Federal funds which are directed towards economic goals or general public benefits, such as advertisements or publications designed to increase the utilization of goods or services of a particular industry or technology, or to conserve certain resources, might not come within the prohibition, then, when not directed at or concerned with particular Federal legislation or otherwise intended to influence a Member of Congress in the passage or defeat of Federal legislation.

(citation omitted). See generally Glickman v. Wileman Bros. & Elliot, 138 L. Ed. 2d at 600-02.

(E)

The words "research," "promotion," and "education" appear to have a common theme: they signify neutrality, fairness, hard data, facts, information. Similarly, the phrases "political activity" and "attempt to influence legislation" appear to have a common theme: they signify partisanship, advocacy, opinion, belief. A line thus exists between making a fair and balanced presentation of factual information to the public and advocating one side of a political or legislative issue. See Stanson v. Mott, 551 P.2d 1, 9 (Cal. 1976); Smith v. Dorsey, 599 So.2d 529, 543 (Miss. 1992); Carter v. City of Las Cruces, 915 P.2d 336, 339 (N.M. App. 1996);

State ex rel. Wisconsin Dev. Auth. v. Dammann, 280 N.W. 698, 719, 723 (Wis. 1938) (Fowler, J., dissenting).

"In a nutshell, [public funds may be used to] inform, but not persuade." Smith v. Dorsey, 599 So.2d at 533. "[I]t is generally accepted that a public agency pursues a proper 'informational' role when it simply gives a 'fair presentation of the facts.'" Id. "A fair and balanced presentation of the facts would include relevant information addressing [both sides of an issue]." Id. at 542-43.

As a New York court explained in a referendum case involving an expenditure of public funds, a state agency must maintain "a position of neutrality and impartiality" and thus may not use public funds for or against any issue even if the position advocated "is believed to be in the [public's] best interests." Stern v. Kramarsky, 375 N.Y.S.2d 235, 239 (S. Ct. 1975). "To educate, to inform, to advocate or to promote voting on any issue may be undertaken, provided it is not to persuade nor to convey favoritism, partisanship, partiality, approval or disapproval by a State agency of any issue, worthy as it may be." Id. Cf. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 112, 93 S. Ct. 2080, 36 L. Ed. 2d 772 (1973) (under Federal Communications Commission's "Fairness Doctrine," broadcasters have responsibility to provide public "with access to a balanced presentation of information").

As a Florida court similarly explained:

> The theme which predominates in these cases, and one which is reinforced by logic and common notions of fair play, is simply stated. While [the government may] allocate tax dollars to educate the electorate on the purpose and essential ramifications on referendum items, it must do so fairly and impartially. Expenditures for that purpose may properly be found to be in the public interest. It is never in the public interest, however, to pick up the gauntlet and enter the fray. The funds collected from taxpayers theoretically belong to proponents and opponents . . . alike. To favor one side of any such issue by expending funds obtained from those who do not favor that issue turns government on its head and is the antithesis of the democratic process.
>
> . . . . The appropriate function of government in connection with an issue placed

> before the electorate is to enlighten, NOT to proselytize.

Palm Beach County v. Hudspeth, 540 So.2d 147, 154 (Fla. App. 1989).

Last, as a Wisconsin justice explained in a case involving the use of public funds for "education" about a controversial issue, that term imparts a sense of evenhandedness:

> Education in a democratic government must necessarily be non-partisan, presenting the merits of both sides of a question. It seeks to promote and encourage clear thinking and good citizenship; but it does not seek to promote and encourage the activities or accomplish the objectives of a party. The purpose of education is to inform the people, in order that they may form their own convictions.

State ex rel. Wisconsin Dev. Auth. v. Dammann, 280 N.W. at 718 (Fairchild, J., dissenting).

(F)

In view of the foregoing, we conclude that section 185C.29 requires the use of commodity check-off funds for making fair and balanced presentations of factual information to the public and prohibits their use for advocating one side of a political or legislative issue. In determining the propriety of a television advertisement under section 185C.29, a court might consider the following facts and circumstances: (1) the advertisement's content, including any subtle messages and the use of inherently misleading or deceptive terms; (2) any "call for action" by the electorate; (3) the advertisement's creators and their level of expertise in advertising; (4) the advertisement's intended audience; (5) its part, if any, as one of a series of advertisements; (6) the medium; (7) the rate charged for its broadcast or publication; (8) the express purposes of the private organization arranging for its broadcast or publication and its past activities; (9) agency investigation, if any, into that organization's tax status after the advertisement's broadcast or publication; (10) the existence of an upcoming legislative vote or any current judicial, political, or legislative controversy that the advertisement specifically mentions or directly implicates; (11) prior review and approval of the advertisement by a neutral body; and (12) any pertinent contractual provisions between the private organization and the Corn Promotion Board.

On a quantitative level, it seems safe to say that a violation of section 185C.29 likely increases as the number of facts and

circumstances indicating a violation increase. Thus, a single hand-lettered sign hanging above the entrance to the Iowa State Fair's midway that urges everyone to eat "corndogs" obviously presents a different case under section 185C.29 than a blitzkrieg of "infomercials" on television or "advertorials" in the Des Moines Register during a legislative session that implore the electorate to call their legislators and insist they vote the following week for or against a specific bill affecting agriculture and attracting widespread attention from politicians, political activists, and the media. Cf. Dole v. Drywall Tapers Local Union, 733 F. Supp. 864, 866 (D.N.J. 1990) (tone, content, and timing of publication and its effective encouragement and endorsement of candidate determines whether union funds improperly promoted candidate in union election). See generally 26 C.F.R. § 56.4911-2 (April 1, 1997) (Internal Revenue Service rules relating to excise tax on electing public charities' excess lobbying expenditures that list examples of informative vis-a-vis partisan communications);

On a qualitative level, such facts and circumstances obviously have varying degrees of weight. Nevertheless, a close proximity in time between an advertisement and an upcoming legislative vote may, in combination with other matters, lead a court to presume the advertisement constitutes either "political activity" or an "attempt to influence legislation" under section 185C.29. For comparison, we quote an administrative rule for organizations claiming status as "public charities" under the Internal Revenue Code:

> If within two weeks before a vote by a legislative body, or a committee (but not a subcommittee) thereof, on a highly publicized piece of legislation, an organization's paid advertisement appears in the mass media, the paid advertisement will be presumed to be a grass roots lobbying communication, but only if the paid advertisement both reflects a view on the general subject of such legislation and either: refers to the highly publicized legislation; or encourages the public to communicate with legislators on the general subject of such legislation.

26 C.F.R. § 56.4911-2 (April 1, 1997).

III.

In summary: Section 185C.29 requires the use of commodity check-off dollars for making fair and balanced presentations of

factual information to the public and prohibits their use for advocating one side of a political or legislative issue.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

CITIES: Formula for determining compensation of mayor and council. Iowa Code §§ 364.6, 372.13(8) (1997). City ordinances do not substantially comply with section 372.13(8) if they link future salary adjustments for the mayor and the council with future salary adjustments the council may make for other city officers or employees. Such ordinances would, however, substantially comply with section 372.13(8) if they linked future salary adjustments of the mayor and council members with some rationally related, independent factual standard. (Kempkes to Jenkins, State Representative, 6-26-98) #98-6-4(L)

June 26, 1998

The Honorable Willard Jenkins
State Representative
State Capitol
LOCAL

Dear Representative Jenkins:

The common law did not permit a public officer to claim a remuneration for performing an official duty. Accordingly, "[u]nless the law provides a salary or compensation to the public officer none can be recovered." 4 E. McQuillin, The Law of Municipal Corporations § 12.174, at 8-9 (1992). You have asked an opinion about Iowa Code chapter 372 (1997), entitled "Organization of City Government," and its provision in section 372.13(8) for the compensation of mayors and city council members.

You ask whether section 372.13(8) permits cities to pass ordinances that establish "formulas" for determining the future compensation of their mayors and council members. One ordinance provides the mayor and each council member with an annual salary of a specific dollar amount for an upcoming year and thereafter an "annual salary adjustment equal to that provided to all appointed officers of the city." Another ordinance provides (1) the mayor with an annual salary of a specific dollar amount for an upcoming year and thereafter an "annual salary adjustment equal to that provided to all other exempt employees for each subsequent year" and (2) the council members with an annual salary equal to ten percent of the mayor's salary. Neither ordinance permits any increase to take effect during the terms of office served by the current mayor and council members.

We conclude that such ordinances do not substantially comply with section 372.13(8) to the extent they link future salary adjustments for the mayor and council members with future salary adjustments the council may make for other city officers and employees. We add, however, that city ordinances would substantially comply with section 372.13(8) if they linked future salary adjustments for the mayor and council members with some rationally related, independent factual standard.

I.

Before examining chapter 372, we take note of chapter 364, entitled "Powers and Duties of Cities." Section 364.1 codifies the state constitutional grant of municipal home rule by providing that a city may, for certain public purposes, exercise any power and perform any function "if not inconsistent with" the laws of the General Assembly. See generally Iowa Const. amend. 38A (1968). Section 364.2(1) provides that a city power "is vested in the city council except as otherwise provided by law"; section 364.2(2) provides that the enumeration of a specific power of a city "does not limit or restrict the general grant of [constitutional] home rule power"; and section 364.2(3) provides that an exercise of a city power "is not inconsistent with a state law unless it is irreconcilable with the state law." See generally Iowa Code § 364.3(1) (city council shall exercise power only by passage of a motion, a resolution, an amendment, or an ordinance). Section 364.6 provides in part that a city "shall substantially comply with a procedure established by state law for exercising a city power."

In chapter 372, section 372.4 provides for the mayor-council form of government. See generally Iowa Code § 372.1(1). Section 372.14 sets forth various provisions governing mayors, and section 372.13 sets forth various provisions governing city councils. Of importance to your question, section 372.13(8) provides:

> By ordinance, the council shall prescribe the compensation of the mayor, council members, and other elected city officers, but a change in the compensation of the mayor does not become effective during the term in which the change is adopted, and the council shall not adopt an ordinance changing the compensation of the mayor, council members, or other elected officers during the months of November and December in the year of a regular city election. A change in the compensation of council members becomes effective for all council members at the beginning of the term of the council members elected at the election next following the change in compensation
> . . . .

See generally Iowa Code § 4.1(30)(a) ("shall" in statutes normally imposes a duty). This provision has long historical roots. See, e.g., Iowa Code § 368A.21 (1954); Iowa Code § 491 (1873). See generally Iowa Const. art. III, § 25 (1997) (amend. 28 (1968)) ("no General Assembly shall have the power to increase compensation . . . effective prior to the convening of the next General Assembly following the session in which any increase is adopted").

II.

You have asked whether cities may pass ordinances that link future salary adjustments for the mayor and council members with future salary adjustments the council may make for other city officers and employees. We must determine whether such ordinances substantially comply with section 372.13(8). See Iowa Code § 364.6; 4 McQuillin, supra, § 12.179, at 37, § 12.197, at 118.

Section 372.13(8) "is mandatory once the decision to compensate is made," and thus "the council is under a duty to set and pay such compensation only in accordance with [its requirements]." 1980 Op. Att'y Gen. 837, 838-39. See Glaser v. City of Burlington, 231 Iowa 670, 1 N.W.2d 709, 712 (1942). In the past, courts applying statutes such as section 372.13(8) have struck down "evasions of any nature." 4 McQuillin, supra, § 12.198, at 122-23; see 1982 Op. Att'y Gen. 254 (#81-9-10(L)). Its language "is general and absolutely prohibitive of any increase or diminution by any means whatever." Purdy v. City of Independence, 75 Iowa 356, 39 N.W. 641, 642 (1888).

The two ordinances have a common formula. After setting forth a specific salary for an upcoming year, each ordinance specifically provides for future adjustments to this salary by linking them with any future adjustments the council may make in the salaries of other city officers or employees.

We believe that this type of formula does not substantially comply with section 372.13(8). We have an obligation to construe section 372.13(8) in favor of the general public and against those persons compensated with public funds. See 4 McQuillin, supra, § 12.174.10, at 10; see also Iowa Code § 4.4(5) (statutory construction favors public interest over any private interest); 1982 Op. Att'y Gen. 254 (#81-9-10(L)). Statutes such as section 372.13(8) seek to protect the public "against the evil of permitting a public official to use his official power and prestige to augment his own salary." Castree v. Slingerland, 248 N.Y.S. 746, 748 (Sup. Ct. 1931). See Ryan v. City of Osage, 88 Iowa 558, 55 N.W. 532, 533 (1893); Purdy v. City of Independence, 75 Iowa 356, 39 N.W. 641, 642 (1888); Cox v. City of Burlington, 43 Iowa 612, 613 (1874); Geyso v. City of Cudahy, 149 N.W.2d 611, 615 (Wis. 1967); 1982 Op. Att'y Gen. 254 (#81-9-10(L)); 63C Public Officers and Employees § 294, at 734-35 (1997); 67 C.J.S. Officers § 231, at 738-39 (1978).

We believe, however, that cities may properly link future salary adjustments for their mayors and council members to some rationally related, independent factual standard, such as a recognized schedule or index. We believe that this type of mechanically applied formula, resting upon a source outside the council's direct control, would substantially comply with section 372.13(8).

In Shepoka v. Knopik, 272 N.W.2d 364, 366 (Neb. 1978), the court held that county supervisors -- who had provided other county officers with annual salary adjustments based upon changes in the cost-of-living -- did not violate a constitutional prohibition against changing compensation during terms of office. The county supervisors had specifically linked the annual adjustments to a federal agency's factual findings on the cost-of-living.

The court analogized this linkage to laws that provide for future changes in salary based upon future changes in population:

> [W]hen a statute enacted and in effect prior to the election of a public officer fixes the compensation of such officer upon the basis of population and an increase or decrease in population occurs during the officer's term because of a change in population after his election, such increase or decrease in compensation does not violate our constitutional provision that the compensation of a public officer shall not be increased or diminished during his term. It is a factual and not a legislative change.
>
> Here the [county supervisors] based the change upon an independent factual standard, an index established by a federal agency. The constitutional provision . . . was not applicable because any change made pursuant to [their action] was not a legislative change.

Id. at 366 (citation and quotation marks omitted). See 63C Am. Jur. 2d Public Officers and Employees § 293, at 734 (1997).

By linking future salary adjustments for their mayors and council members to changes, for example, in the Consumer Price Index, cities would base them upon an independent factual standard

and place them outside the council's direct control. Compare In Shepoka v. Knopik, 272 N.W.2d at 366 with Lee v. Taylor City, 234 N.W.2d 483, 484 (Mich. App. 1975) (city ordinance that linked annual salary increases for mayor and council members with changes in the Consumer Price Index violated charter prohibition against change in salary during term of office: "it is manifest that the escalator clause itself portends a continuing, i.e., yearly, increase in the salary of those officials to be elected for the following . . . term"). See generally Schultz v. Garrett, 451 N.E.2d 794, 797-98 (Ohio 1983) (statute enacted before county officials' term of office can -- consistent with constitutional prohibition against change in salary during term of office -- link change in salary to change in county population); Barton v. Derryberry, 500 P.2d 281, 283 (Okla. 1972) (statute enacted before public officials' election to office can -- consistent with constitutional prohibition against change in salary during term of office -- link change in salary to change district population, "so that an increase in population, as reflected by a subsequent official census, would indicate a salary raise"); Annot., 139 A.L.R. 737, 742 (1942) (majority of cases uphold laws providing for future changes in salary based upon future changes in population or assessed valuation).

III.

In conclusion: City ordinances do not substantially comply with section 372.13(8) if they link future salary adjustments for the mayor and the council with future salary adjustments the council may make for other city officers or employees. City ordinances would, however, substantially comply with section 372.13(8) if they linked future salary adjustments of the mayor and council members with some rationally related, independent factual standard.

Sincerely,

Bruce Kempkes
Assistant Attorney General

COUNTIES; TAXATION: County emergency management commissions. Iowa Code §§ 29C.17 (1997). A county emergency management commission needs approval from the county board of supervisors in order to levy a special tax for funding its services. (Kempkes to Gordon, Administrator, Emergency Management Division, Iowa Department of Public Defense, 7-8-98) #98-7-1(L)

July 8, 1998

Ms. Ellen M. Gordon
Administrator, Emergency Management Division
Iowa Department of Public Defense
Hoover State Office Building
Des Moines, IA 50319

Dear Ms. Gordon:

You have requested an opinion about Iowa Code chapter 29C (1997), which is entitled "Emergency Management." You ask whether a county emergency management commission needs approval from the county board of supervisors in order to levy a special tax for funding its services. We conclude that such approval is needed.

I.

Chapter 29C establishes the Emergency Management Division within the Iowa Department of Public Defense as part of this state's policy

> to insure that preparations of this state will be adequate to deal with [public] disasters, and to provide for the common defense and to protect the public peace, health and safety, and to preserve the lives and property of the people of the state.

Iowa Code § 29C.1. See Iowa Code §§ 29C.1(1), 29C.5; see also Iowa Code §§ 7E.5(1)(q), 29.1, 29.3. The Division has various responsibilities with regard to emergency management in general. See Iowa Code §§ 29C.5, 29C.8, 29C.8A(2).

Chapter 29C provides for the establishment of county emergency management agencies and commissions to help ensure the provision of emergency management services on a local level. See Iowa Code §§ 29C.1(1), 29C.2(3), 29C.9(1); see also Iowa Code § 331.321(1)(a). Each county commission has, at a minimum, a representative from the county board of supervisors, the county sheriff's office, and the cities within the county. Iowa Code § 29C.9(2). Among other things, a county commission "shall determine the mission of its agency and program and provide direction for the delivery of the emergency management services of planning, administration, coordination, training, and support for local governments . . . ." Iowa Code § 29C.9(6).

Each county must deposit the revenues it provides and collects for the provision of emergency management services within the county emergency management fund. Iowa Code § 29C.17(1). Section 29C.17(1) provides that each county commission "shall be the fiscal authority" for the county emergency management fund and that each chair or vice-chair "is the certifying official" for its budget. Section 29C.17(2) provides:

> For the purposes consistent with this chapter, the county emergency management agency's approved budget may be funded by any one or any combination of the following [four] options:
>
> (a). A countywide special levy approved by the board of supervisors.
>
> . . .

(emphasis added). Section 29C.17(5) provides:

> Subject to [Iowa Code chapter 24, which governs local budgets,] the commission shall adopt, certify, and submit a budget . . . to the county board of supervisors and the cities for the ensuing fiscal year . . . [for all] anticipated emergency management expenses
> . . . .

(emphasis added).

II.

You have asked whether a county emergency management commission needs approval from the county board of supervisors in order to levy a tax for funding its services.

Section 29C.17(5) provides that a county commission "shall adopt, certify, and submit" its proposed budget "to the county board of supervisors and the cities . . . ." Section 29C.17(2)(a) provides that a county commission's "approved budget" may be funded by a countywide special levy "approved by the board of supervisors."

Logic would suggest that a legislatively created entity such as a county commission does not acquire the power to tax by mere implication and that such an extraordinary power can exist only by virtue of an express or specific statutory grant. Cf. Iowa Const. art. III, § 39A (amend. 39A (1978)) (counties have no power to tax "unless expressly authorized" by statute); Iowa Code § 331.301(7) (counties shall not levy a tax "unless specifically authorized" by statute); 1980 Op. Att'y Gen. 244, 247 (municipalities cannot levy taxes "except as authorized by the legislature; taxing power cannot be implied"); 16 E. McQuillin, The Law of Municipal Corporations § 44.05, at 17 (1994) (municipal power to tax "must rest upon a constitutional or statutory grant of power clearly expressed"). If so, county commissions would clearly lack authority under chapter 29C to levy a special tax. Compare Iowa Code § 29C.17 with Iowa Code § 257.3(1) (school district "shall cause to be levied each year, for the school general fund, a foundation property tax"), § 357.25 (trustees of benefited water district in certain counties "shall have power to levy an annual tax").

In any event, it appears that county commissions lack the power to levy a special tax by implication. Section 29C.17 unambiguously places upon the county supervisors ultimate authority over the decision whether to levy a special tax for funding a county commission's services. See generally In re R.L.D., 456 N.W.2d 919, 920 (Iowa 1990) (clear and unambiguous statute does not require application of statutory construction principles). Although section 29C.17(1) identifies the county commission as a "fiscal authority" and section 29C.17(5) requires it to "adopt" and "certify" a proposed budget, the county commission must also "submit" that budget to the county supervisors. Such language does not imply a power to tax. See Black's Law Dictionary 45, 207, 1278 (1979). To the contrary, the verb "submit" commonly and legally means to commit to the discretion of another; yield to the will of another; propound; or present for determination. Id. at 1278; Webster's Ninth New Collegiate Dictionary 1152 (1979).

Moreover, if any doubt existed about the meaning of section 29C.17(5), section 29C.17(2)(a) extinguishes it by requiring that

a special tax be "approved" by the county supervisors. See 1980 Op. Att'y Gen. 896, 901 (express statutory procedure, requiring approval from school budget review committee or electorate in order to levy additional tax, "mitigates strongly against any implied authority" for school board itself to levy separate tax on property for crediting cash reserve balance). See generally Iowa Code § 331.381(2) (county supervisors shall "[p]rovide for emergency management planning in accordance with sections 29C.9 through 29C.13").

Neither our prior opinions nor subsequent statutory amendments conflict with our conclusion. See, e.g., 1994 Op. Att'y Gen. 59 (#93-11-4(L)); 1992 Op. Att'y Gen. 84, 85-86. Rather, we affirm our conclusion in 1993 that a county commission

> certifies its budget to the county board of supervisors which then has the responsibility to levy the taxes needed to satisfy the budget. [Section 29C.17] does not provide for the commission to be an independent taxing district with the authority to levy taxes apart from the county board of supervisors . . . .

1994 Op. Att'y Gen. 59 (#93-11-4(L)). See generally Iowa Code §§ 331.424(1)(j), 384.13(22).

Finally, we emphasize that counties and cities bear the financial responsibility for the approved budgets of county commissions. See Iowa Code § 29C.17. We see no authority on the part of either counties or cities to set aside their statutory duty to provide adequate funds for those budgets. See 1994 Op. Att'y Gen. 39, 44-45; 1994 Op. Att'y Gen. 59 (#93-11-4(L)); see also 1992 Op. Att'y Gen. 84, 85; 1980 Op. Att'y Gen. 664, 665-66.

III.

In summary: A county emergency management commission needs approval from the county board of supervisors in order to levy a special tax for funding its services.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

SCHOOLS: Supplementary weighting; Community college sharing agreements. Iowa Code § 257.11 (1997). Determination of whether a course offered by a community college using local school facilities may be considered a community college course for weighting purposes should be made on a case-by-case basis. In order to receive supplemental weighting, there must be factors which establish that a class offered outside community college facilities is nonetheless a class "in a community college," rather than a district offering. (Scase to Stilwill, 7-23-98) #98-7-2(L)

July 23, 1998

Ted Stilwill, Director
Iowa Department of Education
Grimes State Office Building
L-O-C-A-L

Dear Director Stilwill:

You have requested an opinion of this office regarding application of the supplementary weighting provisions of Iowa Code section 257.11 (1997) to classes taught in conjunction with a community college.

Code section 257.11 contains Iowa's "supplementary weighting plan" for determining enrollment. A qualifying school district may apply supplementary weighting to increase the district's enrollment count, thereby increasing the amount of state foundation aid funding available to the district. This section is intended "to provide additional funds for school districts which send their resident pupils to another district or to a community college for classes, which jointly employ and share the services of teachers under section 280.15, which use the services of a teacher employed by another school district, or which jointly employ and share the services of a school superintendent under section 280.15 or 273.7A . . .." Section 257.11(2) provides in relevant part:

> Shared classes or teachers. If the school budget review committee certifies to the department of management that the shared classes or teachers would otherwise not be implemented without the assignment of additional weighting, pupils attending classes in another school district or a community college, attending classes taught by a teacher who is employed jointly under section 280.15, or attending classes taught by a teacher who is employed by another school district, are assigned a weighting of one plus an additional portion equal to one times the percent of the pupil's school day

> during which the pupil attends classes in another district or community college, attends classes taught by a teacher who is jointly employed under section 280.15, or attends classes taught by a teacher who is employed by another school district.

From your request letter, it appears that school districts and community colleges engage in a number of innovative arrangements for delivery of classes to high school students. You describe a number of scenarios through which a high school teacher who is, or previously has been, employed by a local school district teaches a course at the high school for high school credit. In each case the teacher is compensated through the community college, either directly by contract with the community college or indirectly by a tuition payment/cost reimbursement agreement between the local district and the community college. You ask whether the described sharing arrangements would qualify the local district for supplementary weighting under section 257.11 and question whether the outcome would be different if the classes meet the academic criteria for community college credit so that the students are eligible for dual high school and community college credit.

Pursuant to subsection 257.11(2), supplementary weighting is available only if two conditions are met. First, pupils must be either: (a) attending classes in another school district, (b) attending classes in a community college, (c) attending classes taught by a teacher who is employed jointly under section 280.15[1], or (d) attending classes taught by a teacher who is employed by another school district. Second, "the school budget review committee [must certify] to the department of management that the shared classes or teachers would otherwise not be implemented without the assignment of additional weighting." A local district does not qualify for supplementary weighting unless it has students which meet one of the of the first

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[1] Code section 280.15 (1997) provides that "two or more public school districts may jointly employ and share the services of any school personnel." The section also provides guidelines for cost sharing agreements in cases of whole grade sharing and teacher terminations as a result of whole grade sharing. Joint employment of teachers under this section was examined at length in a declaratory ruling issued by the Department in 1993. See In the Matter of Manson and Northwest Webster Community School District, 10 D.o.E. App. Dec. 219. For the purpose of this opinion, it is sufficient to note that section 280.15 does not authorize a school district and a community college to jointly employ school personnel.

criteria and the district meets the second criteria. As subsection 257.11(1) provides, "pupils in a regular curriculum attending all their classes in the district in which they reside, taught by teachers employed by that district, . . . are assigned a weighting of one."

A "school district" is defined as "a school corporation organized under chapter 274." Iowa Code § 257.2(11) (1997). While community colleges are designated as school corporations, they are organized under Code chapter 260C and, therefore, are not "school districts" for purposes of interpreting chapter 257. See Iowa Code § 260C.16 (1997).

The only relationship between a community college and a local school district which entitles the local school district to section 257.11 supplementary weighting is one in which pupils of the district are "attending classes in . . . a community college." Iowa Code § 257.11(2) (1997); see also Iowa Code § 257.11(1) (1997) (statement of legislative intent to "provide additional funds for school districts which send their resident pupils to . . . a community college for classes . . ."). Therefore, determination of whether the local school district qualifies for supplementary weighting under any of the described sharing arrangements depends upon whether the students in these cases can be properly characterized as attending classes 'in a community college.'

Use of the word "in" suggests a geographic location requirement. The word "in" has been construed as more restrictive than the word "from." State v. Smith, 196 N.W.2d 439, 440-441 (Iowa 1972), held that the theft of a tire and rim from a car wheel was not larceny "in" a motor vehicle. In strictly construing that criminal statute, the Iowa Supreme Court held that the word "in" there means "within a particular place" or "on the interior or inner side: within." In a different context, an issue of construction of a will leaving a bequest to a home for the elderly in the city of Muscatine, the court stated that the word "in" is often more restrictive than the word "at," noting that "...if we speak of being in a house or in a building, we are understood to mean that we are actually within its walls. But this is not always true when applied to geographical situations." Old Ladies' Home v. Hoffman, 117 Iowa 716, 718, 89 N.W. 1066, 1067 (1902). The Court refused to assume that the testator intended the word "in" to strictly mean located within the city's corporate boundaries, noting that "...it quite clear that she did not have in mind strict geographical lines, and that her sole purpose, as to locality, was to endow an institution which should be so clearly connected with her home city as to be recognized as a part thereof..." Id.

A class offered in a building on the campus of a community college would clearly be a class "in a community college." The situations set forth in your letter all involve classes not physically located on a community college campus. In those instances it will be much more difficult for the local school district to establish that the class meets the requirement of being "in a community college." We recognize that community colleges often hold classes at satellite facilities in order to enable Iowans to more readily participate in college-level classes. This fact suggests a broad reading of the phrase "in a community college," but we cannot read the requirement totally out of the statute.

By definition, a community college is

> a publically supported school which may offer programs of adult and continuing education, lifelong learning, community education, and up to two years of liberal arts, paraprofessional, or occupational instruction partially fulfilling the requirements for a baccalaureate degree but confirms no more than an associate degree; or which offers as the whole or as part of the curriculum up to two years of vocational or technical education, training, or retraining to persons who are preparing to enter the labor market.

Iowa Code § 260C.2(1). Among the educational opportunities which community colleges are directed to provide are "[p]rograms for all students of high school age who may best serve themselves by enrolling for vocational and technical training while also enrolled in a local high school, public or private" and "programs for students of high school age to provide advanced college placement courses not taught at a student's high school while the student is also enrolled in the high school." Iowa Code § 260C.1(5), (6).

Several statutory provisions address the interaction of high school and community college programs. Code section 260C.14(2) authorizes the board of directors of a community college to establish resident and nonresident tuition rates, providing that "except for students enrolled under chapter 261C [postsecondary enrollment], if a local school district pays tuition for a resident pupil of high school age, the limitation on tuition for residents of Iowa shall not apply, the amount of tuition shall be determined by the board of directors of the community college with the consent of the local school board . . .." Iowa Code § 260C.14(2) (Supp. 1997). Correspondingly, Code section 282.6, which provides that local schools are to be tuition free to

residents of school age, includes an exception for "tuition authorized by chapter 260C." Iowa Code § 282.6 (1997).

Code chapter 261C, the "Postsecondary Enrollment Options Act," allows eleventh and twelfth grade pupils, as well as ninth and tenth grade pupils who are identified as gifted and talented, to apply for enrollment for academic or vocational-technical credit in non-sectarian courses offered at eligible postsecondary institutions, including community colleges. See Iowa Code §§ 261C.2, 261C.3, 261C.4 (1997). If the pupil's application is accepted, tuition reimbursement in the amount of the actual costs of tuition, books and fees, or $ 250, whichever is lower, is paid to the postsecondary institution by the pupil's school district of residence. Iowa Code § 261C.6 (1997). Pupils may only use this option if a comparable course is not offered by the school they attend, and they are not eligible to use the option to enroll in the postsecondary institution on a full-time basis. Iowa Code §§ 261C.4, 261C.6 (1997).

Finally, Code section 282.26 provides that "the board of any community college may, by mutual agreement with any college or university, permit any specially qualified high school student to attend advanced courses of academic instruction at the college or university." While this section allows credit earned in such a course to be applied toward high school graduation, the section specifically prohibits the expenditure of public school funds "for payment of tuition or other costs for such attendance at a college or university, unless the payment is expressly permitted or required by law." Id.

Review of these Code sections leads us to conclude that the function of a community college with respect to high school students is to supplement, rather than supplant, local high school programs. It is not the function of a community college to assume the responsibility of meeting the basic educational curriculum requirements placed upon a local school district. See Iowa Code § 280.3 (1997) ("The board of directors of each public school district . . . shall prescribe the minimum educational program . . . [which] shall be the curriculum set forth in section 256.11, except as otherwise provided by law."). Rather, community colleges are authorized to provide students enrolled in high school with supplemental vocational, technical and advanced college placement courses not available at the student's high school. See Iowa Code §§ 260C.1(5), (6); 261C.4 (1997).

With this background in mind and in light of the fact that community colleges may offer courses in locations other that the primary college campus, we turn to your final inquiry: whether a pupil must physically leave the high school attendance center in order to attend a class in a community college and qualify for

supplementary weighting. While the location of a class may not be the sole factor for consideration in determining whether the course is offered "in a community college," more than a mere cost sharing arrangement through which the community college pays a high school teacher to present a class at the high school is necessary in order for a class to be considered to be offered "in a community college." It is difficult to envision a situation in which a course offered at a high school which the local school district is required to provide as a part of its minimum educational curriculum, pursuant to Code sections 256.11 and 280.3, could be considered to be a community college course. Such core curriculum courses are, by their nature, high school classes, even if compensation for the classroom teacher is paid by a community college.

In contrast, "honors early start" class offerings, which you describe as courses of the same quality as those offered at the community college main campus which are taught at the high school by a teacher who meets the licensure requirements of a community college instructor using the syllabus of the community college, might be considered community college courses for supplementary weighting purposes if surrounding facts indicate that the course is an offering of the community college rather than the local school district. For example, if the courses are included in the community college catalog and are open to members of the public other than high school students, it would seem reasonable to conclude that the high school is serving as a satellite campus of the community college and that the courses are offered "in a community college."

As noted above, if the class is not located in a community college building, other factors must exist to establish that the class is "in a community college." The department should consider a number of factors in making this determination. These factors might include: the location of the classroom, whether the teacher and course material meet the standards for a community college course, the availability of community college credit for students taking the course, whether the course is included in the community college catalogue, and whether enrollment is limited to student of the high school. Weighting should not be allowed unless the department determines that the course in question is offered "in a community college." The department may wish to consider the adoption of administrative rules clearly identifying those factors which it determines must exist in order for a course to be found to be offered "in a community college."

You have asked us to rule on a number of specific factual situations. The function of an Attorney General's opinion is to decide a question of law or statutory construction. 1972

Op.Att'yGen. 686; 1992 Op.Atty.Gen. 199, 201. Application of those legal criteria to particular fact situations is an administrative function. That authority has been delegated to you by the legislature. See Iowa Code §§ 256.9(16) (the director shall . . . interpret the school laws); 256.9(18) (1997) ("the director shall . . . insure uniformity, accuracy, and efficiency in keeping records in both pupil and cost accounting . . . and the submission of reports"). The agency, not this office, has authority to undertake any necessary investigations and to decide issues of policy. Application of law to particular facts should be undertaken through processes, either formal or informal, that permit investigation of facts and opportunity for affected persons to comment.

In summary, we conclude that, in the absence of department rule, determination of whether a course offered by a community college using local school facilities may be considered a community college course for weighting purposes should be made on a case-by-case basis. In order to receive supplemental weighting, there must be factors which establish that a class offered outside community college facilities is nonetheless a class "in a community college," rather than a district offering.

Sincerely,

Christie J. Scase
Assistant Attorney General

CJS/cs

COUNTIES; ZONING: Authority of counties to zone livestock confinement operations. Iowa Code §§ 331.304A, (House File 2494, 77th G.A., 2d Sess., § 9, Iowa 1998), 335.2 (1997). Iowa Code section 335.2 prohibits county zoning of livestock confinement operations. (Benton to Black, State Senator, 7-27-98) #98-7-3(L)

July 27, 1998

The Honorable Dennis H. Black
State Senator
5239 E. 156 Street S
Grinnell, Iowa 50112

Dear Senator Black:

You have requested our opinion concerning the impact of House File 2494, 77th G.A., 2d Sess., § 9 (Iowa 1998). Section 9 of the bill took effect upon enactment and is now codified at Iowa Code section 331.304A. Section 331.304A(2) states in part:

> A county shall not adopt or enforce county legislation regulating a condition or activity occurring on land used for the production, care, feeding or housing of animals unless the regulation of the production, care, feeding, or housing of animals is expressly authorized by state law.

Based on this language, you pose the following questions:

> (1) Would this provision in the legislation allow either non-permitted or permitted animal operations or confinement facilities to be placed in existing rural residential areas, where the land has been zoned "Residential" (although unincorporated), and said designation has been legally adopted in the county zoning ordinance?
>
> (2) Would this provision preclude a county zoning commission from adopting an ordinance containing a "Residential" designation for an existing rural residential area, which has been in existence for some time, where there

> is no agricultural use, and where said designation prohibits the presence of any animal agriculture?

Your questions concern county zoning and the extent to which the preemptive language of section 331.304A would apply to county zoning ordinances. However, county zoning of agricultural land and structures has been preempted by another statute. Goodell v. Humboldt County, 575 N.W.2d 486, 494 (Iowa 1998).

Iowa Code chapter 335 governs county zoning. The statute exempts agricultural land and structures from a county's zoning power. Section 335.2 states in part:

> Except to the extent required to implement section 335.27 [agricultural land preservation ordinance], no ordinance adopted under this chapter applies to land, farm houses, farm barns, farm outbuildings or other buildings or structures which are primarily adapted, by reason of nature and area, for use for agricultural purposes, while so used.

Section 335.2 prohibits county zoning of land or structures used for agricultural purposes, including livestock confinement facilities. Kuehl v. Cass County, 555 N.W.2d 686, 689 (Iowa 1996).

Sincerely,

Timothy Benton

TIMOTHY D. BENTON
Assistant Attorney General

TAXATION: Sales tax; sewage services. Iowa Code § 422.43(11) (1997). The adoption by the Iowa Department of Revenue and Finance, in 701 IAC 26.72(1)"a", of a definition of "sewage services" which includes storm water drainage services was not unreasonable. Pursuant to that valid rule, charges paid to municipalities for storm water drainage services would be taxable as gross receipts from "sewage services" under section 422.43(11). (Hardy to Szymoniak, State Senator and Warnstadt, State Representative, 7-28-98) #98-7-4(L)

July 28, 1998

The Honorable Elaine Szymoniak
State Senator
2116 44th Street
Des Moines, Iowa 50310

The Honorable Steven Warnstadt
State Representative
2724 Chambers Street
Sioux City, Iowa 51104

Dear Senator Szymoniak and Representative Warnstadt:

You have requested an Attorney General's opinion as to whether charges paid to municipalities for storm water drainage services are properly taxable as gross receipts from "sewage services" pursuant to Iowa Code section 422.43(11) (1997). More specifically, you asked whether the administrative rule found at 701 IAC 26.72(1)"a", wherein taxable "sewage services" are defined to include storm water drainage services, is a valid rule. For the following reasons, we conclude that the rule in question is valid since it is not unreasonable. Therefore, charges paid to municipalities for storm water drainage services would be taxable as gross receipts from "sewage services" pursuant to section 422.43(11).

Section 422.43(11) imposes a sales tax on the gross receipts derived from a number of different services, including "sewage services for nonresidential commercial operations." This particular service was added to section 422.43(11) as a taxable service in 1992. 1992 Iowa Acts, ch. 1232, § 405. However, the legislature did not define in chapter 422 what it meant by the term "sewage services" in section 422.43(11). Rather, the Iowa Department of Revenue and Finance (Department) was charged with the responsibility of enacting rules to define that term for purposes of administering section 422.43(11). Iowa Code § 422.68(1992).

Pursuant to that charge, the Department adopted 701 IAC 26.72(1)"a", wherein "sewage service" was defined as "the service of collecting rainwater and other solid

and liquid refuse or excreta for drainage or purification by means of pipes, channels, or conduits usually placed underground." Administrative rules have the force and effect of law and should be upheld if a rational agency could have concluded that the rule is reasonable and within its delegated authority. Loftis v. Iowa Department of Agriculture and Land Stewardship, 460 N.W.2d 868, 872 (Iowa 1990); Hy-Vee Food Stores, Inc. v. Iowa Department of Revenue, 379 N.W.2d 37, 40 (Iowa 1985); Hiserote Homes, Inc. v. Riedemann, 277 N.W.2d 911, 913 (Iowa 1979). In other words, an interpretive administrative rule should be upheld unless the rule is clearly unreasonable. Loftis v. Iowa Department of Agriculture and Land Stewardship, 460 N.W.2d at 872-873. Moreover, words used in statutes are generally presumed to have been used in their ordinary and usual sense and with the meaning commonly attributable to them. Sorg v. Iowa Department of Revenue and Finance, 269 N.W.2d 129, 132 (Iowa 1978). Finally, resort to dictionary definitions is appropriate to construe statutory language according to the common and approved usage of language. S & M Finance Co. Fort Dodge v. Iowa State Tax Commission, 162 N.W.2d 505, 508 (Iowa 1968).

In this regard, we note that the definition of "sewage" found in the cited rule is consistent with the generic dictionary definitions of "sewage," "sewerage" and "sewer." For example, the term "sewer" is defined in Webster's New World Dictionary of the American Language 1305 (2nd College Ed. 1974) as "a pipe or drain, usually underground, used to carry off water and waste matter." Further, the term "sewerage" is defined to be the synonym of "sewage" in that same source and "sewerage" is defined to be the "removal of surface water and waste matter by sewers." Id. Thus, the definition of "sewage" in the rule in question is consistent with the ordinary and usual meaning of that term. Accord, Town of Freeport v. Sellers, 190 S.W.2d 813, 814 (Tex. 1945); Anselmi v. City of Little Rock Springs, 80 P.2d 419, 420-422 (Wyo. 1938).

However, if there are other clear indications of legislative intent which are inconsistent with the dictionary meaning of a term in a statute, the rule implementing the statute may still be deemed invalid. Hiserote Homes, Inc. v. Riedemann, 277 N.W.2d at 913. In your request, it was suggested that such contrary intent can be found in the definition of "sewage" found at Iowa Code section 455B.171. That provision is apparently the only place in the Code where the term "sewage" is specifically defined. In this regard, we note that, as a matter of law, the meaning of the term "sewage services" for the purpose of section 422.43(11) must be found within the provisions of chapter 422, or another statute which is in pari materia with that chapter. Ballstadt v. Iowa Department of Revenue, 368 N.W.2d 147, 149 (Iowa 1985); S & M Finance Co. Fort Dodge v. Iowa State Tax Commission, 162 N.W.2d at 508. In order to be considered in pari materia, another statute must relate to the

same person or thing, to the same class of persons or things, or have identical purposes or objects. Ballstadt v. Iowa Department of Revenue, 368 N.W.2d at 149.

Here, chapters 455B and 422 have totally different objectives. Chapter 455B controls the numerous and varied activities within the jurisdiction of the Iowa Department of Natural Resources. Chapter 455B relates to environmental protection, not taxation. Moreover, the preamble to the definitions found in section 455B.171 states that those definitions are applicable only as to Part 1 of Division III of chapter 455B.

It was also stated in your request that the term "sewage" is used separately and distinctly from storm water drainage in four separate provisions of the Code. Those provisions were sections 362.2(6), 384.84(2)(a), 384.84(3)(a) and 388.2. In addition to the problem that those provisions were not implemented for taxation purposes as was chapter 422, we note that the term "storm water drainage system" was merely listed along with the narrow term "sanitary sewage system" in defining the term "city utility" for purposes of section 362.2(6). The same is true as to section 388.2. However, the narrower limiting word "sanitary" was not used by the legislature in section 422.43(11) for "sewage services" taxation purposes. Instead, the legislature used the broader and more generic term "sewage," without any limiting language, for purposes of the taxation of services under section 422.43(11). Finally, use of the term "storm water drainage system" in sections 384.84(2)(a) and 384.84(3)(a) also relates directly to and is in pari materia with the term "city utility" as defined in section 362.2(6). Iowa Code § 362.9 (1997). It would be improper, under the guise of construction, to add words of qualification to the broader statutory language in question. Hy-Vee Food Stores, Inc. v. Iowa Department of Revenue, 370 N.W.2d at 43; Kelly v. Brewer, 239 N.W.2d 109, 114 (Iowa 1976).

Based upon all of the above, it is our conclusion that the adoption by the Department, in 701 IAC 26.72(1)"a", of a definition of "sewage services" which includes storm water drainage services was not unreasonable. Therefore, pursuant to that valid rule, charges paid to municipalities for storm water drainage services would be taxable as gross receipts from "sewage services" under section 422.43(11).

Sincerely,

Lucille M. Hardy

LUCILLE M. HARDY
Assistant Attorney General

LMH:cml

TAXATION: Accrual of mobile home taxes under Iowa Code section 435.22 on destroyed mobile homes. Iowa Code sections 435.22, 435.24(1), 435.25 (1997). The tax on mobile homes imposed by Iowa Code section 435.22 does not continue to accrue on a mobile home after it has been destroyed by a fire or other disaster. (Mason to Hardisty, Adams County Attorney, 7-28-98) #98-7-5(L)

July 28, 1998

Earl E. Hardisty
Adams County Attorney
Courthouse Box 28
Corning, Iowa 50841

Dear Mr. Hardisty:

You have requested an opinion of the Attorney General regarding taxation under Iowa Code chapter 435 of a mobile home that has not been converted to real estate. Specifically, you asked whether taxes would continue to accrue on a mobile home which no longer exists due to destruction by a disaster, such as fire, during the fiscal year.[1]

Iowa Code section 435.22 imposes an "annual tax" on owners of mobile homes.[2] The tax is based on household income and the number of square feet of floor space. Iowa Code section 435.24(1) states, in part:

> The annual tax is due and payable to the county treasurer on or after July 1 in each fiscal year and is collectible in the same manner and at the same time as ordinary taxes as provided in sections 445.36, 445.37, and

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[1]Because the 1998 amendments to chapter 435 are not relevant to this opinion, statutory provisions referred to in this opinion are those in the 1997 Code.

[2]Taxable mobile homes which were not located in a mobile home park as of January 1, 1995, are assessed and taxed as real estate. Iowa Code § 435.35 (1997).

> 445.39. . . . Both installments of taxes may be paid at one time. The September installment represents a tax period beginning July 1 and ending December 31. The March installment represents a tax period beginning January 1 and ending June 30. A mobile home . . . coming into this state from outside the state . . . or put in use at any time after July 1 or January 1, and located in a mobile home park, is subject to the taxes prorated for the remaining unexpired months of the tax period. . . . The owner of a home who sells the home between July 1 and December 31 and obtains a tax clearance statement is responsible only for the September tax payment and is not required to pay taxes for subsequent tax periods.

Iowa Code section 435.25 states, in part:

> . . . .
>
> Chapters 446, 447, and 448 apply to the sale of a home for the collection of delinquent taxes and interest, the redemption of a home sold for the collection of delinquent taxes and interest, and the execution of a tax sale certificate of title for the purchase of a home sold for the collection of delinquent taxes and interest in the same manner as though a home were real property within the meaning of these chapters to the extent consistent with this chapter. . . .
>
> When a home is removed from the county where delinquent taxes, regular or special, are owing, or <u>when it is administratively impractical to pursue tax collection through the remedies of **this section**, all taxes</u>, regular and special, interest, and costs <u>shall be abated</u> by resolution of the county board of supervisors. The resolution shall direct the treasurer to strike from the tax books the reference to that home.

(emphases added). The "remedies" to which section 435.25 refers are those associated with selling the home at a tax sale. If the mobile home is destroyed by fire or other disaster, the county treasurer will be unable to sell the home at a tax sale. It will, therefore, be "administratively impractical to pursue tax collection" through the remedies of section 435.25, and delinquent mobile home taxes shall be

abated by the county board of supervisors and the home removed from the tax books. "Abate" is not defined in chapter 435. It is, however, defined in chapter 445 regarding the collection of various taxes, including specifically taxes on mobile homes pursuant to chapter 435. "Abate" means to cancel applicable amounts in their entirety. Iowa Code § 445.1(1). Therefore, unpaid mobile home taxes are cancelled after the home is destroyed.

In your first example, the owner paid the first installment of taxes in September, 1997 but did not pay the second installment of taxes. The mobile home was destroyed by fire on December 30, 1997. The title for the mobile home was turned in to the county treasurer and a junking certificate was filed. You asked whether taxes continued to accrue until June 30, 1998. If the owner had sold the home in December and obtained a tax clearance statement, then he would not have had to pay the March installment or taxes for subsequent tax periods. Iowa Code § 435.24. Turning the title over to the treasurer due to the home's destruction seems analogous to selling the home. The former owner no longer has the taxable mobile home. Further, although the mobile home tax is an "annual tax", section 435.24(1) refers to two different tax periods. It is not clear from the statutory language that a mobile home would be taxable for a "tax period" in which it does not exist. Taxing statutes are strictly construed against the taxing body, and it must appear from the statutory language that an assessed tax was clearly intended. Sorg v. Iowa Dept. of Revenue, 269 N.W.2d 129, 132 (Iowa 1978); Scott County Conservation Bd. v. Briggs, 229 N.W.2d 126, 127 (Iowa 1975). It is our opinion that the tax would not continue to accrue after the tax period during which the home was destroyed. Also, because the home does not exist, it would be administratively impractical to pursue tax collection through a tax sale. Therefore, as discussed above, even if taxes continued to "accrue", they would have to be cancelled by the board of supervisors after they became delinquent. Iowa Code § 435.25.

In your second example, the owner paid the first installment of taxes in September, 1997 but did not pay the second installment of taxes. The mobile home was destroyed by fire on February 4, 1998. The title for the home was turned in to the county treasurer on March 22, 1998 and a junking certificate was filed. You asked whether taxes are due on a prorated basis for January 1, 1998 until February 4, 1998, prorated until March 22, 1998, or accrued until June 30, 1998. Although the home was not destroyed until after the January 1 beginning of a tax period, the March installment of tax for the tax period of January through June had not been made. When the home was destroyed, it became "administratively impractical to pursue tax collection" through the tax sale remedies of section 435.25. Therefore, after the tax became delinquent in April, 1998, the county board of supervisors would have been required to abate the tax, and the home would be removed from the tax books. Iowa Code § 435.25 (1997). As long as the March

1998 tax payment was not made, the amount accrued, regardless of whether it was accrued for the entire tax period or only until February 4 when the home was destroyed, would be cancelled.

If taxes have already been paid on a mobile home for a tax period during which the home is destroyed and the loss is not covered by insurance, the owner can ask the board of supervisors to exercise its discretionary authority under Iowa Code section 445.62 to refund in whole or in part the taxes paid which are attributable to the uninsured loss. Section 445.62 deals with the discretionary power of the board of supervisors to remit taxes rightfully due and collectible. Grundon Holding v. Bd. of Review of Polk Cty., 237 N.W.2d 755, 759 (Iowa 1976). A September 19, 1973 Iowa Attorney General Opinion concluded that supervisors could remit, in whole or in part, taxes paid by mobile home owners which were directly attributable to the uninsured loss of the home, upon the owners' application for such relief. 1973 Op. Att'y Gen. 246, 247.

Sincerely,

Marcia Mason

MARCIA MASON
Assistant Attorney General

MM:cml

PUBLIC RECORDS; COUNTY OFFICERS: Certified copies of vital statistics records. Iowa Code §§ 22.2, 144.45, 622.46 (1997). Section 144.45, not sections 22.2(1) and 622.46, governs the issuance of certified copies of vital statistics records and only requires county recorders to issue such copies to an applicant "entitled to a record." The Health Department's administrative rule, 641 IAC 96.7 -- which requires an applicant to demonstrate a verifiable "direct and tangible interest" in order to receive certified copies -- does not offend section 144.45. County recorders have some discretion in issuing certified copies, but may not abuse that discretion and must act in good faith in refusing to issue such copies to an applicant. (Kempkes to Hardisty, Adams County Attorney, 8-12-98) #98-8-1(L)

August 12, 1998

Mr. Earl E. Hardisty
Adams County Attorney
Courthouse
Box 28
Corning, IA 50841

Dear Mr. Hardisty:

You have requested an opinion about public records on "vital statistics," which encompass "births, deaths, fetal deaths, adoptions, marriages, divorces, annulments, and data related thereto." Iowa Code § 144.1(13). Pointing to Iowa Code chapters 22, 144, and 622 (1997), you ask (1) whether section 622.46 confers a right upon members of the general public to receive certified copies of vital statistics records; (2) whether an administrative rule offends section 144.45 by requiring applicants to demonstrate a direct and tangible interest in order to receive such copies; and (3) whether county recorders have discretion in issuing such copies to applicants.

I.

Entitled Vital Statistics, chapter 144 has rather long roots. See 1921 Iowa Acts, 39th G.A., ch. 222. It refers to one provision in chapter 22, entitled Examination of Public Records (Open Records), which, in turn, refers to one provision in chapter 622, entitled Evidence. See generally Iowa Code §§ 22.2(1), 622.46.

Section 144.3 provides the Iowa Department of Public Health with rule-making authority for the purpose of carrying out the

provisions of chapter 144. Section 144.4 creates the position of state registrar of vital statistics. Section 144.9(1) provides that county recorders shall serve as county registrars who -- under the supervision of the state registrar, Iowa Code § 144.5 (Supp. 1997) -- administer and enforce chapter 144 and the Health Department's administrative rules. See generally 1952 Op. Att'y Gen. 9, 9-10.

Section 144.43 (Supp. 1997) provides in part:

> [T]he following vital statistics records may be inspected and copied as of right under chapter 22 when they are in the custody of a county registrar or when they are in the custody of the state archivist and are at least seventy-five years old:
>
> 1. A record of birth.
>
> 2. A record of marriage.
>
> 3. A record of divorce, dissolution of marriage, or annulment of marriage.
>
> 4. A record of death if that death was not a fetal death.

See generally 641 IAC 96.6; 1980 Op. Att'y Gen. 635.

Section 22.2(1) provides that members of the general public shall, subject to specified exceptions, have the rights to examine and copy "public records" and that "[a]ll rights under this section are in addition to the right to obtain certified copies under section 622.46." Section 622.46 provides that "[e]very officer having the custody of a public record or writing shall furnish any person, upon demand and payment of the legal fees therefor, a certified copy thereof."

Of importance to your questions, section 144.45 provides:

> The state registrar and the county registrar shall, upon written request from <u>any applicant entitled to a record</u>, issue a certified copy of any certificate or record in the registrar's custody or of a part of a certificate or record. . . .

(emphasis added). See generally Iowa Code § 4.1(30)(a) ("shall" in statutes normally imposes a duty). Pursuant to its rule-making authority, the Health Department promulgated a rule in 1979 that interprets section 144.45:

> Certified copies of vital records may be issued or made at the county level, upon the payment of the required fee for certification and demonstration of a verifiable direct and tangible interest. . . .
>
> The following persons shall be considered to have a direct and tangible interest in requested records:
>
> 1. The registrant, a member of the registrant's immediate family, legal representative or agent. Other persons may demonstrate a direct and tangible interest when it is shown the information needed is for the determination or protection of a personal or property interest.
>
> . . .

(emphasis added). See 641 IAC 96.6(3).

II.

(A)

You have asked whether sections 22.2(1) and 622.46 confer a right upon members of the general public to obtain certified copies of vital statistics records. Section 22.2(1) generally confers upon members of the general public the rights to "examine and copy" public records and refers to section 622.46, which, in broad language, requires an officer having custody of a public record to furnish a certified copy thereof to "any person." In narrower language, however, section 144.45 requires a registrar having custody of any certificate or record to issue a certified copy thereof to "any applicant entitled to a record."

We note that section 622.46, lying within the chapter governing evidence, generally relates to certified copies of "a public record" and that section 144.45 specifically relates to certified copies of "a certificate or record [on vital statistics]." Such circumstances suggest that section 144.45 takes precedence over section 622.46 to the extent any conflict exists between them. See generally Iowa Code § 4.7 (specific statute shall be harmonized with general statute and shall govern general statute if they irreconcilably conflict). Accordingly, we conclude that section 144.45, not sections 22.2(1) and 622.46, governs the issuance of certified copies of vital statistics records and that an applicant must be "entitled to a record" in order to obtain a certified copy thereof.

(B)

You have asked whether the Health Department's rule offends section 144.45, which requires registrars to issue certified copies of vital statistics records to "any applicant entitled to a record." Neither chapter 144 nor section 144.45 itemizes or otherwise identifies those persons "entitled" to a record.

(1). It is clear that a state administrative agency such as the Health Department may not modify or otherwise rewrite statutes. That power belongs solely to the General Assembly. It is equally clear, however, that an agency may construe or interpret the language of the General Assembly so long as it does not purport "to make law or change the meaning of the law." Rosen v. Iowa Bd. of Medical Examiners, 539 N.W.2d 345, 349 (Iowa 1995) (quotation marks omitted). See 1982 Op. Att'y Gen. 93, 95. "Phrased differently, administrative rules must be reasonable and consistent with legislative enactments." Iowa Dep't of Revenue v. Iowa Merit Employment Comm'n, 243 N.W.2d 610, 614 (Iowa 1976). Accord 1982 Op. Att'y Gen. 93, 95-96.

Like a court, this office has a limited role in reviewing the administrative rules under a "rational agency" standard. See Hiserote Homes, Inc. v. Riedemann, 277 N.W.2d 911, 913 (Iowa 1979). We accord weight to the Health Department's construction of statutory language. See Iowa Code § 4.6(6); Rosen v. Iowa Bd. of Medical Examiners, 539 N.W.2d at 349. In fact, we presume the validity of its rules. See Rosen v. Iowa Bd. of Medical Examiners, 539 N.W.2d at 349; Willet v. Iowa Dep't of Transp., 572 N.W.2d 172, 174 (Iowa App. 1997). Particularly with regard to substantive rules, we defer to the Health Department's specialized area of expertise. See Barker v. Iowa Dep't of Transp., 431 N.W.2d 348, 349 (Iowa 1988); Hiserote Homes, Inc. v. Riedemann, 277 N.W.2d at 913. Only a clear and convincing showing can result in the abrogation of administrative rules. See Dunlap Care Ctr. v. Iowa Dep't of Social Servs., 353 N.W.2d 389, 393 (Iowa 1984); State ex rel. City of Cedar Rapids v. Holcomb, 68 Iowa 107, 26 N.W. 33, 34 (1885).

We recognize that delegations of policy-making authority extend along a broad continuum and that the breadth of flexibility the Health Department possesses in administering chapter 144 ultimately depends upon legislative intent. See 1982 Op. Att'y Gen. 93, 96. Factors that bear on the extent of flexibility in a given situation include the general nature of the agency's tasks, its rule-making authority, and the particular statute's words and phrases.

(2). The Health Department has identified those persons "entitled" to a record in its rule interpreting section 144.45. It requires applicants for certified copies to have a "direct and

tangible interest" in the underlying records. It then proceeds to define those persons as "the registrant, a member of the registrant's immediate family, legal representative or agent" and to acknowledge that "[o]ther persons" may have a direct and tangible interest if they can show that "the information needed is for the determination or protection of a personal or property interest." 641 IAC 96.7. In view of our limited review, we cannot say as a matter of law that this rule offends section 144.45. Five arguments point to this conclusion.

First: Chapter 144 does not provide every person with a right to obtain certified copies of vital statistics records. Compare Iowa Code § 144.45 (1997) with Iowa Code § 144.41 (1950) (registrars shall supply "to any person for any proper purpose" certified copy of any birth, death, or marriage record); Fla. Stat. § 382.35(4) (1982) (state registrar shall furnish certified copy of vital statistics record "to any person requesting it"). Indeed, section 144.45 -- in the phrase "any applicant entitled to a record" -- clearly limits the group of persons having the right to obtain certified copies of vital statistics records. See 1983 Colo. Op. Att'y Gen. OHR8303092/LW (examining similar Colorado law).

Second: The Health Department's rule closely resembles, if not tracks, other states' laws on issuing certified copies of vital statistics records. See, e.g., 1980 Alas. Op. Att'y Gen. J-66-163-80 (rule); 1990 Haw. Op. Att'y Gen. 23 (statute); 1988 N.H. Op. Att'y Gen. 039 (statute); Miss. Op. Att'y Gen. (February 19, 1992) (rule); 1988 S.C. Op. Att'y Gen. 131 (statute); 1991 Tex. Op. Att'y Gen. DM-61 (rule); 1991 Wis. Op. Att'y Gen. 35 (statute); U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, Nat'l Center for Health Statistics, Model State Vital Statistics Act § 24 (1992) ("[t]he registrant, his or her spouse, children, parents, or guardian, or their respective legal representative" or any other person needing the information "for the determination or protection of his or her personal or property right" may obtain certified copy).

The Health Department has company in its interpretation of the phrase "any applicant entitled to a record." By administrative rule, its counterpart in Texas has interpreted any "properly qualified applicant" in that state's law to mean "[a] legal representative, personal representative or agent, an immediate family member, or the registrant, who has a direct and tangible interest in [a vital statistics] record and who shall have a significant legal relationship to the person whose record is requested." See 15 Tex. Reg. 5603 (1990). The Texas Attorney General has applied this rule without question in determining the propriety of releasing certain vital statistics records. See 1991 Tex. Op. Att'y Gen. DM-61.

Third: By investing the Health Department with rule-making authority, see Iowa Code § 144.3, the General Assembly "contemplated the adoption of regulations which would '[ensure] the proper use' of vital statistics records." 1980 Alas. Op. Att'y Gen. J-66-163-80. Cf. Iowa Code § 144.43 (restrictions on access to vital statistics records kept by state registrar helps "to ensure their proper use"). See generally Iowa Code § 144.45 (certified copy of vital statistics record "shall be considered for all purposes the same as the original and shall be prima facie evidence of the facts therein stated").

Requiring a verifiable "direct and tangible interest" on the part of an applicant seeking certified copies of vital statistics records would tend to ensure their proper use and prevent, for example, their use to obtain false identification cards. Cf. 1988 N.H. Op. Att'y Gen. 039 (noting that statutory requirement of tangible and direct interest purports to protect against fraudulent use of vital statistics records); 1990 Nev. Op. Att'y Gen. 55; 1991 Wis. Op. Att'y Gen. 35. See generally Iowa Code § 4.2 (statutes shall be liberally construed with a view to promote their objects), § 4.6(1) (statutory construction may take into account the legislative object); Walker v. Sears, 245 Iowa 262, 61 N.W.2d 729, 731 (1953) (liberal construction afforded to statutes that delegate power to enact and enforce health regulations).

Fourth: We issued an opinion in 1979 that addressed the compatibility of the Health Department's rule with section 144.43, which governs access to vital statistics records. See 1980 Op. Att'y Gen. 635, 638-39. We concluded that the Health Department -- whose newly promulgated rule "defined who is eligible to inspect recent records [on vital statistics] and for what purposes those records may be inspected" -- had "correctly describe[d] the law." 1980 Op. Att'y Gen. 635, 638.

Fifth: The Health Department promulgated its rule nearly twenty years ago. See 1980 Op. Att'y Gen. 635, 638-39. "When an agency or state officer is charged with the responsibility of implementing a statute and has interpreted a statute in a particular way, that interpretation is entitled to considerable weight, especially if it is of long standing, without legislative intervention. See Iowa Code § 4.6(6) [(statutory construction may take into account administrative construction)] . . . ." Hennessey v. Cedar Rapids Community School Dist., 375 N.W.2d 270, 273 (Iowa 1985). Accord Patterson v. Iowa Bonus Bd., 246 Iowa 1087, 71 N.W.2d 1, 7 (1955); 1994 Op. Att'y Gen. 99, 102.

(C)

You have asked whether county recorders have discretion in issuing certified copies of vital statistics records to applicants.

The Health Department's rule requires county recorders to determine whether an applicant has demonstrated a verifiable direct and tangible interest in the underlying records, which, in turn, requires them to ascertain either the identity of the applicant (as the registrant, or a member of the registrant's immediate family, legal representative, or agent) or the applicant's need for the information in order to determine or protect a personal or property interest. See 641 IAC 96.7.

These duties obviously impart some level of discretion on the part of county recorders. See 1980 Alas. Op. Att'y Gen. J-66-163-80 (custodian of records, and ultimately the state registrar, must determine whether each applicant's interest is "direct and tangible" and whether such interest is "necessary for the determination of personal or property rights"); 1990 Haw. Op. Att'y Gen. 23 (registrar has authority to determine whether person has statutory right to obtain certified copies of records on vital statistics); 63 Md. Op. Att'y Gen. 670 (1978) (custodian has duty to make inquiry into applicant's relationship to subject of vital statistic record and purpose for request). See generally 1983 Colo. Op. Att'y Gen. OHR8303092/LW (state bureau of criminal investigation, which must update its arrest and fugitives records, has "direct and tangible interest" in vital statistic records); 1990 Haw. Op. Att'y Gen. 23 (for the purpose of determining their property rights, beneficiary of life insurance policy unrelated to insured may obtain copy of insured's death certificate in order to receive benefits, and divorced person may obtain a copy of former spouse's subsequent marriage certificate in order to show reason for terminating spousal support); 1988 N.H. Op. Att'y Gen. 039 (different considerations may apply in deciding whether to disclose information from one type of vital statistics record (e.g., marriage certificates) than in deciding whether to disclose information from another type (e.g., death certificates)).

Nevertheless, county recorders may not abuse that discretion and must act in good faith in determining whether to provide certified copies to a particular applicant. See Polk County Conference Bd. v. Sarcone, 516 N.W.2d 817, 821 (Iowa 1994); see also Hubbell v. Higgins, 148 Iowa 36, 126 N.W. 914, 917 (1910). An "abuse of discretion" has been defined as deciding a matter "on grounds or for reasons clearly untenable or to an extent clearly erroneous." City of Windsor Heights v. Spanos, 572 N.W.2d 591, 592 (Iowa 1998).

III.

In summary: Section 144.45, not sections 22.2(1) and 622.46, governs the issuance of certified copies of public records on vital statistics and only requires their issuance to applicants "entitled to a record." The Health Department's administrative rule, 641 IAC 96.7 -- which requires applicants to demonstrate a verifiable

"direct and tangible interest" in order to receive such copies -- does not offend section 144.45. County recorders have some discretion in issuing such copies to applicants, but may not abuse that discretion and must act in good faith in refusing to issue them to a particular applicant.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

CITIES; POLICE OFFICERS AND FIREFIGHTERS PENSION FUND: Calculation of benefits. Iowa Code §§ 411.1, 411.6 (1997); 29 U.S.C. § 207. The federal Fair Labor Standards Act, which addresses issues of overtime compensation, does not preempt or otherwise affect Iowa Code chapter 411, which addresses the significantly different issue of pension benefits. If police officers and firefighters receive compensation from their city for any overtime work, Iowa Code section 411.1(8) requires the exclusion of that compensation from the base amount used to calculate their pension benefits; determining whether a particular compensation constitutes "overtime" compensation depends on whether city employees receive it as compensation beyond the compensation regularly fixed and paid under contract for customary and normal work. The governing collective bargaining agreement determines the scope of "full pay and allowances" due temporarily disabled police officers and firefighters under Iowa Code section 411.6(5)(b). (Kempkes to Warnstadt, State Representative, 9-25-98) #98-9-2(L)

September 25, 1998

The Honorable Steven Warnstadt
State Representative
2724 Chambers St.
Sioux City, IA 51104

Dear Representative Warnstadt:

You have requested an opinion on Iowa Code chapter 411 (1997), entitled "Retirement System for Police Officers and Fire Fighters," as it governs the calculation of pension and temporary disability benefits of a city's employees. See generally 61 IAC 1.5(5). You ask whether "earnable compensation" for purposes of calculating pension benefits excludes "any amount worked as overtime when the overtime worked has been required by the employer." You also ask whether "full pay and allowances" for purposes of calculating temporary disability benefits includes "shift differential and pay due under the federal Fair Labor Standards Act (FLSA), or if it [only encompasses] base pay and longevity pay."

I.

Chapter 411 establishes a statewide retirement system for police officers and fire fighters of certain cities. See generally Iowa Code §§ 411.2, 411.3. A board of trustees operates this system, which, among other things, provides for retirement and disability benefits. Iowa Code § 411.5. Chapter 411 expressly purports

> to promote economy and efficiency in the municipal public safety service by providing an orderly means for police officers and fire fighters to have a retirement system which will provide for the payment of pensions to retired members and members incurring disabilities, and to the surviving spouses and dependents of deceased members.

Iowa Code § 411.1A.

Chapter 411 provides a pension, or "service retirement benefit," to police officers and firefighters. The amount of that benefit shall be premised upon the average final compensation of a member at the time of termination. Iowa Code § 411.6(1)(b). "Average final compensation" means, in part, the average earnable compensation. Iowa Code § 411.1(3). Section 411.1(8) defines "earnable compensation" as

> the annual compensation which a member receives for services rendered as a police officer or fire fighter in the course of employment . . . . However, the term "earnable compensation" or "compensation earnable" shall not include amounts received for overtime compensation, meal or travel expenses, uniform allowances, fringe benefits, severance pay, or any amount received upon termination or retirement in payment for accumulated sick leave or vacation. . . .

(emphasis added). See generally 1978 Op. Att'y Gen. 260, 260-61 ("overtime compensation is a proper subject of a collective bargaining agreement between the public employer and the employee organization").

Chapter 411 also provides an "accidental disability benefit" to members. Under section 411.6(5)(b), if a member in service

> becomes incapacitated for duty as a natural or proximate result of an injury or disease incurred in or aggravated by the actual performance of duty . . . , the member, upon being found temporarily incapacitated . . . , is entitled to receive the member's full pay and allowances . . . [until found to be recovered fully or disabled permanently].

(emphasis added).

II.

We have reviewed a copy of a letter authored by the city attorney explaining the city's position as well as information from city employees on your questions. We have also reviewed a copy of a letter, authored by the board of trustees for the statewide system and sent to one employee, which discusses whether "FLSA overtime [should] be included as 'earnable compensation' under chapter 411." We have examined your questions in light of this additional information.

Accordingly, we need to determine (a) whether FLSA provisions addressing payment of overtime govern or otherwise affect the meaning of "overtime compensation" in section 411.1(8); (b) whether "earnable compensation" for purposes of section 411.1(8) excludes all overtime compensation; and (c) whether "full pay and allowances" for purposes of section 411.6(5)(b) includes pay for "overtime," as the FLSA defines that term, and pay for shift differential. See generally 3 E. McQuillin, The Law of Municipal Corporations §§ 12.145, 12.149, 12.157 (1990).

(A)

Do FLSA provisions addressing payment of overtime govern or otherwise affect the meaning of "overtime compensation" in section 411.1(8)?

Congress enacted the FLSA to provide hour-and-wage protections to individual employees and to ensure that each employee covered by the FLSA would receive "[a] fair day's pay for a full day's work." Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 729, 101 S. Ct. 1437, 67 L. Ed. 2d 643 (1980) (citation omitted). Accord 1994 Op. Att'y Gen. 70 (#93-11-9(L)). Applicable to public employers, the FLSA generally requires them to pay time-and-a-half of hourly wages for time worked by their employees in excess of forty hours in one week. See 29 U.S.C. § 207(a)(1). The FLSA makes special and detailed provisions for law enforcement officers and firefighters regarding their minimum hours and wages. See 29 U.S.C. § 207k; see also 29 C.F.R. § 553.200 et seq.

Chapter 411 does not expressly refer to the FLSA or indicate the FLSA has any applicability to its provisions on pension benefits. The General Assembly has, however, expressly referred to the FLSA in other statutory provisions. See, e.g., Iowa Code §§ 70A.1, 91D.1(1)(b), 331.904(2)(c). Neither this office nor the Iowa appellate courts has ever referred to the FLSA in examining the scope of chapter 411.

For purposes of your question about this federal act, the FLSA and chapter 411 are simply different acts passed by different legislative bodies for different purposes that happen to use common

language in their various provisions. The FLSA, which addresses issues of overtime compensation, thus does not preempt or otherwise affect chapter 411, which addresses the significantly different issue of pension benefits. See generally Goodell v. Humboldt County, 575 N.W.2d 486, 491-93 (Iowa 1998); 1994 Op. Att'y Gen. 70 (#93-11-9(L)) (statutory limitations upon salaries paid to deputy sheriffs do not conflict with the FLSA).

(B)

Does "earnable compensation" for purposes of section 411.1(8) exclude all "overtime compensation"?

Section 411.1(8) specifically excludes "overtime compensation" from the base amount used to calculate pension benefits. We believe that the test for determining whether the base amount excludes a particular compensation ostensibly paid as "overtime" to city employees rests upon whether they received it for performing services beyond or in addition to their customary and normal work. See, e.g., Espinosa v. Bd. of Trustees, 466 N.W.2d 914, 915 (Iowa 1991) ("earnable compensation" is to be determined generally, according to the salary for a particular rank, not according to the specific retiree's actual income for any given year; lump-sum payment for back wages is not part of "regular compensation" received by retiree and thus not part of "earnable compensation"); Golinvaux v. City of Dubuque, 439 N.W.2d 196, 198 (Iowa 1989) ("educational pay" that amounts to a fixed percentage increase in wage base, as opposed to a scheme of tuition reimbursement, is part of "earnable compensation"; 1982 Op. Att'y Gen. 387 (#82-3-26(L)) (calculation of pension benefits includes permanent monthly payment, automatically paid on same basis as base wage, for educational courses); 1966 Op. Att'y Gen. 52 (#65-12-16(L)) (noting that calculation of pension benefits normally rests upon compensation regularly paid); see also Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 490, 68 S. Ct. 1186, 68 S. Ct. 1186, 92 L. Ed. 1502 (1947) (Frankfurter, J., dissenting); Ferguson v. Port Huron and Sarnia Ferry Co., 13 F.2d 489, 492 (E.D. Mich. 1926); Black's Law Dictionary 996 (1979); Webster's Ninth New Collegiate Dictionary 812 (1979). Cf. Weishaar v. Snap-On Tools Corp., 582 N.W.2d 177, 181-82 (Iowa 1998) (workers compensation benefits premised upon "customary work week"); 1978 Op. Att'y Gen. 102, 102-03 ("[e]xtra pay for duty on holidays and for temporarily filling in for a superior are in the same category as overtime compensation" and thus "shall not be included in the computation of 'earnable compensation' [under chapter 411]").

Thus, if city firefighters pursuant to contract worked a 27-day cycle, going to work for twenty-four hours and going off-duty for the next forty-eight hours, they would regularly work and receive regular compensation for a total of 216 hours per month. The city would only have an obligation under chapter 411 to report

those 216 hours of regularly scheduled work and that regularly paid compensation to the statewide system, even if the firefighters worked more than the scheduled 216 hours per month to handle emergencies.

(C)

Does "full pay and allowances" for purposes of section 411.6(5)(b) include pay for "overtime," as the FLSA defines that term, as well as pay for shift differential?

Section 411.6(5)(b) does not define the phrase "full pay and allowances" for purposes of calculating temporary disability benefits. In Dubuque Policemen's Protective Association v. City of Dubuque, 553 N.W.2d 603, 606-07 (Iowa 1996), however, the Supreme Court of Iowa held that collective bargaining agreements determine the scope of "full pay and allowances" due temporarily disabled police officers and firefighters under section 411.6(5)(b). Accord Dubuque Policemen's Protective Ass'n v. City of Dubuque, 581 N.W.2d 627, 631 (Iowa 1998). Accordingly, the collective bargaining agreement provides the answer to your question.

III.

In summary: The federal Fair Labor Standards Act, which addresses issues of overtime compensation, does not preempt or otherwise affect Iowa Code chapter 411, which addresses the significantly different issue of pension benefits. If police officers and firefighters receive compensation from their city for any overtime work, Iowa Code section 411.1(8) requires the exclusion of that compensation from the base amount used to calculate their pension benefits; determining whether a particular compensation constitutes "overtime" compensation depends on whether city employees receive it as compensation beyond the compensation regularly fixed and paid under contract for customary and normal work. The governing collective bargaining agreement determines the scope of "full pay and allowances" due temporarily disabled police officers and firefighters under Iowa Code section 411.6(5)(b).

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

TAXATION: Tax Sales; Redemption Procedures. Iowa Code §§ 447.9, 447.12 and 447.14 (1997); 1998 Iowa Acts, ch. ___, S.F. 2400, 77th G.A., 2d Sess. (1998). It is likely that service of notice of the expiration of right of redemption by both regular and certified mail pursuant to Iowa Code section 447.9 (1997), as amended by Senate File 2400 (1998), would be sustained as consistent with fourteenth amendment procedural due process guarantees. The ninety-day redemption period allowed under section 447.9 begins on the date an affidavit of service is filed with the county treasurer under section 447.12. Section 447.9, as amended by S.F. 2400, applies only in those instances where the tax sale from which redemption is authorized occurred after July 1, 1998. (Hardy to Ferguson, Black Hawk County Attorney, 10-6-98) #98-10-1(L)

October 6, 1998

Thomas J. Ferguson
Black Hawk County Attorney
B-1 Courthouse Bldg.
Waterloo, Iowa 50703

Dear Mr. Ferguson:

You have requested an opinion of the Attorney General concerning recent legislation relating to redemption from a tax sale conducted for the purpose of collection of delinquent ad valorem property taxes. Your three specific questions in this regard and our responses thereto are set forth separately below.

1. Your first question is whether service of the notice of expiration of right of redemption by mail, pursuant to Iowa Code section 447.9 (1997), as amended by Senate File 2400, 77th G.A., 2d Sess. (1998), facially violates fourteenth amendment procedural due process guarantees. We first note that section 447.9, as amended by S.F. 2400, requires service of the notice of expiration of right of redemption "by both regular mail and certified mail to the person's last known address."

The controlling test on this issue is found in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), wherein the Court stated as follows:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the

> required information, and it must afford a reasonable time for those interested to make their appearance.

Employing this test in Mullane, the Court disapproved notice by publication of the settlement of a trust account to trust fund beneficiaries whose interests or whereabouts could be ascertained with due diligence. However, the Court also indicated in its decision that notice by mail to those same beneficiaries would satisfy procedural due process requirements. Id.

Moreover, in Mennonite Board of Missions v. Adams, 462 U.S. 791, 799 (1983), the Court employed the same test and disapproved notice by public posting of a tax sale to mortgagees of the property subject to sale whose names and addresses were reasonably ascertainable. However, again, the Court indicated that notice by mail to those same mortgagees would be sufficient. Id. Finally, in Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 489-90 (1988), the Court specifically cited to Mullane and Mennonite and stated that "Actual notice need not be inefficient or burdensome. We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice." See also, Matter of Estate of Daily, 555 N.W.2d 254, 257 (Iowa App. 1996); Norgard v. Iowa Dep't. of Transp., 555 N.W.2d 226, 228 (Iowa 1996) (Notice by mail of condemnation appraisement sufficient under Mullane). Based upon the language found and conclusions reached by the courts in the cited decisions, it is likely that allowing service by both regular mail and certified mail of the section 447.9 notice of expiration of right of redemption to a person's last known or reasonably ascertainable address would be sustained as consistent with procedural due process guarantees.

2. Your second question is whether the ninety-day redemption period allowed under section 447.9, as amended by S.F. 2400, begins on the date service of the notice of expiration of right of redemption is completed by mailing under section 447.9 or on the date on which an affidavit of service has been filed with the county treasurer under section 447.12. In this regard, section 447.9, as amended by S.F. 2400, now states:

> After one year and nine months from the date of sale, or after nine months from the date of a sale made under section 446.18 or 446.39, the holder of the certificate of purchase may cause to be served upon the person in possession of the parcel, and also upon the person in whose name the parcel is taxed, a notice signed by the certificate holder or the certificate holder's agent or attorney, stating the date of sale, the description of the parcel sold, the name of the

> purchaser, and that the right of redemption will expire and a deed for the parcel be made unless redemption is made within ninety days from the completed service of the notice. The notice shall be served by both regular mail and certified mail to the person's last known address and such notice is deemed completed when the notice by certified mail is deposited in the mail and postmarked for delivery. The ninety-day redemption period begins as provided in section 447.12.

(Emphasis added). Further, section 447.12 provides in relevant part that:

> Service is complete only after an affidavit has been filed with the county treasurer, showing the making of the service, the manner of service, the time when and place where made, under whose direction the service was made, and costs incurred as provided in section 447.13. . . . The affidavit shall be filed by the treasurer and entered in the county system and is presumptive evidence of the completed service of the notice. The right of redemption shall not expire until ninety days after service is complete. . . .

(Emphasis added). You suggested in your request that the language regarding when completion of service of the required notice occurs appears to be inconsistent in the cited provisions. Assuming, arguendo, that such is the case, certain rules of statutory construction would be employed to determine the intent of the legislature when it amended section 447.9.

The first applicable rule requires the presumption that a reasonable result was intended by the legislature when the cited language was enacted. Brinegar v. Iowa Dept. of Rev. and State Board, 437 N.W.2d 585, 586 (Iowa 1989). In other words, any interpretation of the statutory language should "make sense." Id. Further, all parts of an enactment should be considered together, all should be given effect if possible, and undue importance should not be given to any single or isolated portion. Cedar Memorial Park Cemetery Assoc. v. Personnel Associates, Inc., 178 N.W.2d 343, 350 (Iowa 1970); Webster Realty Co. v. City of Fort Dodge, 174 N.W.2d 413, 418 (Iowa 1970). Finally, since the provision involved is in the nature of a statute of limitations, it should be construed to favor the longest redemption period. Conoco, Inc. v. Iowa Dept. of Revenue and Finance, 477 N.W.2d 377, 379 (1991).

Employing the referenced statutory construction rules to the language in question, it appears clear to us that the legislature intended for the ninety-day redemption period to begin on the date the filing of the affidavit of service with the treasurer is completed under section 447.12 and not on the date that service by certified mail has been completed under section 447.9. Otherwise, the sentence in section 447.9 which states that the ninety-day redemption period begins as provided in section 447.12 would have no meaning. Moreover, this interpretation not only gives meaning to all of the cited language, it makes sense and allows the redeemer the longest period in which to redeem. Thus, we conclude that the ninety-day redemption period begins on the date the filing of the affidavit of service with the treasurer is completed under section 447.12.

3. Your last question is whether section 447.9, as amended by S.F. 2400, applies only where the tax sale from which redemption is authorized occurred after July 1, 1998. It is our opinion that the answer to your question is in the affirmative because section 447.14 specifically states that "The law in effect at the time of tax sale governs redemption." When a statutory provision is clear as to a specific point, there is no need to employ rules of statutory construction to ascertain the intent of the enacting legislature. Iowa Dept. of Revenue and Finance v. Peterson, 532 N.W.2d 805, 806 (1995). We also note that the cited language from section 447.14 is in fact merely a codification of the common law principles controlling prospective application of redemption statutes. Lockie v. Hammerstrom, 222 Iowa 451, 269 N.W. 507 (1936).

In conclusion, in our opinion, it is likely that service of the notice of the expiration of right of redemption by both regular mail and certified mail pursuant to section 447.9, as amended by S.F. 2400, would be sustained as consistent with fourteenth amendment procedural due process guarantees. Moreover, the ninety-day redemption period allowed under section 447.9 begins on the date on which an affidavit of completion of service has been filed with the county treasurer under section 447.12. Finally, section 447.9, as amended by S.F. 2400, applies only in those instances where the tax sale from which redemption is authorized occurred after July 1, 1998.

Sincerely,

Lucille M. Hardy

LUCILLE M. HARDY
Assistant Attorney General

LMH:cml