State of Iowa
1988

FORTY-SEVENTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

BIENNIAL PERIOD ENDING DECEMBER 31, 1988

THOMAS J. MILLER

Attorney General

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ATTORNEYS GENERAL OF IOWA

NAME	HOME COUNTY	SERVED YEARS
David C. Cloud	Muscatine	1853-1856
Samuel A. Rice	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
Isaac L. Allen	Tama	1865-1866
Frederick E. Bissell	Dubuque	1866-1867
Henry O'Connor	Muscatine	1867-1872
Marsena E. Cutts	Mahaska	1872-1877
John F. McJunkin	Washington	1877-1881
Smith McPherson	Montgomery	1881-1885
A. J. Baker	Appanoose	1885-1889
John Y. Stone	Mills	1889-1895
Milton Remley	Johnson	1895-1901
Charles W. Mullan	Black Hawk	1901-1907
Howard W. Byers	Shelby	1907-1911
George Cosson	Audubon	1911-1917
Horace M. Havner	Iowa	1917-1921
Ben J. Gibson	Adams	1921-1927
John Fletcher	Polk	1927-1933
Edward L. O'Connor	Johnson	1933-1937
John H. Mitchell	Webster	1937-1939
Fred D. Everett	Monroe	1939-1940
John M. Rankin	Lee	1940-1947
Robert L. Larson	Johnson	1947-1953
Leo A. Hoegh	Lucas	1953-1954
Dayton Countryman	Story	1954-1957
Norman A. Erbe	Boone	1957-1961
Evan Hultman	Black Hawk	1961-1965
Lawrence F. Scalise	Warren	1965-1967
Richard C. Turner	Pottawattamie	1967-1979
Thomas J. Miller	Clayton	1979-

PERSONNEL
OF THE
DEPARTMENT OF JUSTICE

PERSONNEL

MAIN OFFICE

THOMAS J. MILLER, 1/79- ..... Attorney General
J.D., Harvard University, 1969
GORDON E. ALLEN, 8/82- ..... Deputy Attorney General
J.D., University of Iowa, 1972
BRENT R. APPEL, 1/83-2/87 ..... Deputy Attorney General
J.D., University of California, 1977
ELIZABETH M. OSENBAUGH, 1/79- ..... Deputy Attorney General
J.D., University of Iowa, 1971
JOHN R. PERKINS, 12/72- ..... Deputy Attorney General
J.D., University of Iowa, 1968
EARL M. WILLITS, 7/79- ..... Deputy Attorney General
J.D., Drake, 1974
WILLIAM C. ROACH, 1/79- ..... Administrator
DEBRA E. LEONARD, 2/84- ..... Administrative Assistant
JULIE CECIL, 8/88- ..... Administrative Assistant
SHELLEY JOHNSON CHAMBERS, 11/81-7/88 ... Administrative Assistant
KAREN A. REDMOND, 10/80- ..... Accountant
EVELYN K. GALLAGHER, 1/79- ..... Administrative Assistant
CONNIE J. HOFFMAN, 8/83-10/87 ..... Legal Secretary
KATHRYN M. ZAPF, 3/83- ..... Legal Secretary
MELISSA MILLER, 1/88- ..... Secretary/Receptionist

ADMINISTRATIVE LAW

DONALD G. SENNEFF, 7/85- ..... Division Head
J.D., University of Iowa, 1967
JOAN F. BOLIN, 7/87- ..... Assistant Attorney General
J.D. Loyola (University of Chicago), 1975
ANN M. BRICK, 3/86- ..... Assistant Attorney General
M.A., J.D., Drake, 1980
MERLE W. FLEMING, 7/80- ..... Assistant Attorney General
M.A., J.D., University of Iowa, 1980
SCOTT M. GALENBECK, 1/84- ..... Assistant Attorney General
J.D., University of Iowa, 1974
KEVIN M. KIRLIN, 7/84-5/87 ..... Assistant Attorney General
J.D., University of Iowa, 1984
JULIE F. POTTORFF, 7/79- ..... Assistant Attorney General
J.D., University of Iowa, 1978
KATHY M. SKINNER, 7/87- ..... Assistant Attorney General
M.S., J.D., Drake, 1987
LYNN M. WALDING, 7/81- ..... Assistant Attorney General
M.A., J.D., University of Iowa, 1981
THERESA O. WEEG, 10/81- ..... Assistant Attorney General
J.D., University of Iowa, 1981
JAMES S. WISBY, 10/88- ..... Assistant Attorney
J.D., University of Iowa, 1968
MELANIE L. RITCHEY, 8/85- ..... Legal Secretary

AREA PROSECUTIONS

HAROLD A. YOUNG, 7/75-.....Division Head
J.D., Drake, 1967
VIRGINIA D. BARCHMAN, 10/86-.....Assistant Attorney General
J.D., University of Iowa, 1979
JAMES E. KIVI, 2/80-.....Assistant Attorney General
J.D., University of Iowa, 1975
THOMAS H. MILLER, 10/85-.....Assistant Attorney General
J.D., University of Iowa, 1975
KEVIN B. STRUVE, 7/86-.....Assistant Attorney General
J.D., University of Iowa, 1979
CHARLES N. THOMAN, 7/84-.....Assistant Attorney General
J.D., Creighton University, 1976
MICHAEL E. WALLACE, 8/84-.....Assistant Attorney General
J.D., University of Iowa, 1971
RICHARD A. WILLIAMS, 7/75-.....Assistant Attorney General
J.D., University of Iowa, 1971
SCOTT D. NEWHARD, 3/79-.....P.S.E. II
ALFRED C. GRIER, 9/72-.....Pilot
CONNIE L. ANDERSON LEE, 12/76-.....Legal Secretary
BILLIE J. RAMEY, 11/79-.....Legal Secretary

CIVIL RIGHTS

RICHARD R. AUTRY, 9/86-.....Assistant Attorney General
J.D., Drake, 1986
TERESA BAUSTIAN, 4/81-.....Assistant Attorney General
J.D., University of Iowa, 1979

CONSUMER ADVOCATE

JAMES R. MARET, 4/72-.....Consumer Advocate
L.L.B., University of Missouri, 1963
DAVID R. CONN, 9/78-.....Attorney 3
J.D., University of Iowa, 1978
DANIEL J. FAY, 4/66-.....Attorney 3
J.D., University of Iowa, 1965
WILLIAM A. HAAS, 10/84-.....Attorney 3
J.D., Drake University, 1982
ALICE J. HYDE, 1/81-.....Attorney 3
J.D., University of Iowa, 1978
RONALD C. POLLE, 8/81-.....Attorney 3
J.D., Drake University, 1979
BEN A. STEAD, 8/81-.....Attorney 3
J.D., University of Kansas, 1974
LEO J. STEFFEN, 10/72-.....Commerce Solicitor
J.D., University of Iowa, 1962
GARY D. STEWART, 7/74-.....Attorney 3
J.D., University of Iowa, 1969
ALEXIS K. WODTKE, 6/82-.....Attorney 3
J.D., Drake University, 1978
MARY L. AUGE, 3/82-.....Utility Analyst II
CHRISTINE A. COLLISTER, 5/88-.....Senior Utility Analyst

MARK E. CONDON, 11/88- ..... Utility Specialist
DAVID S. HABR, 10/87- ..... Utility Administrator I
JOYETTE D. HENRY, 4/88- ..... Utility Analyst I
SHEILA A. JONES, 6/88- ..... Utility Analyst I
CLARO N. MARTINEZ, 11/87- ..... Law Clerk
LEO J. STEFFEN, JR., 10/72- ..... Commerce Solicitor
ANN E. WALKER, 5/88- ..... Law Clerk
ARTHUR E. ZAHLLER, 12/87- ..... Utility Specialist
KAREN M. GOODRICH-FINNEGAN, 7/76- ..... Secretary
ANN M. KREAGER, 11/84- ..... Secretary

CONSUMER PROTECTION

RICHARD L. CLELAND, 4/79- ..... Division Head
J.D., University of Iowa, 1978
SUSAN BARNES, 4/84- ..... Assistant Attorney General
J.D., William and Mary, 1978
MICHAEL K. BOTTS, 4/85-1/87 ..... Assistant Attorney General
J.D., Drake, 1983
WILLIAM L. BRAUCH, 7/87- ..... Assistant Attorney General
J.D., University of Iowa, 1987
STEVEN FORITANO, 8/88- ..... Assistant Attorney General
J.D., University of Iowa, 1981
CYNTHIA A. FORSYTHE, 7/88- ..... Assistant Attorney General
J.D., University of Iowa, 1988
RAYMOND H. JOHNSON, 7/87- ..... Assistant Attorney General
J.D., University of Iowa, 1986
PETER R. KOCHENBURGER, 8/88- ..... Assistant Attorney General
J.D., Harvard, 1986
LINDA T. LOWE, 8/79-7/88 ..... Assistant Attorney General
J.D., University of Iowa, 1979
STEVEN M. ST. CLAIR, 5/87- ..... Assistant Attorney General
J.D., University of Iowa, 1978
TERRENCE M. TOBIN, 7/83-5/87 ..... Assistant Attorney General
J.D., Georgetown University, 1982
EUGENE R. BATTANI, 5/77-8/88 ..... Investigator
KATHLEEN C. BURDOCK, 10/84-1/88 ..... Investigator
DEBRA J. GILLIAM, 10/84-5/87 ..... Investigator
MARJORIE A. LEEPER, 7/82- ..... Investigator
LISE D. LUDWIG, 5/85- ..... Investigator
JACQUELINE M. MCCANN, 5/87- ..... Investigator
HOLLY G. MERZ, 10/88- ..... Investigator
DEBRA A. MOORE, 12/84- ..... Investigator
NORMAN NORLAND, 1/80- ..... Investigator
JAMES M. STROHMAN, 2/88- ..... Investigator
NANCY L. VERNON, 6/87- ..... Investigator
JANICE M. BLOES, 3/78- ..... Legal Secretary
M. SUSAN CONREY, 6/86- ..... Legal Secretary
CHERYL A. FREEMAN, 4/69-8/87 ..... Legal Secretary
MARILYN W. RAND, 10/69- ..... Legal Secretary
KATHERINE SMITH, 3/84- ..... Legal Secretary
RUTH C. WALKER, 2/79- ..... Legal Secretary
RHONDA J. CLYCE, 11/87- ..... Secretary/Receptionist

CRIMINAL APPEALS

ROXANN M. RYAN, 9/80-.....Division Head
J.D., University of Iowa, 1980
AMY M. ANDERSON, 7/88-..... Assistant Attorney General
J.D., University of Iowa, 1988
RICHARD J. BENNETT, 6/86-.....Assistant Attorney General
J.D., University of Iowa, 1978
BRADLEY V. BLACK, 7/86-2/87 .....Assistant Attorney General
J.D., University of Iowa, 1986
ANN E. BRENDEN, 3/85- .....Assistant Attorney General
J.D., Drake, 1981
PAMELA GREENMAN DAHL, 7/84-4/88 .....Assistant Attorney General
J.D., University of Iowa, 1984
JULIE A. HALLIGAN, 7/87-.....Assistant Attorney General
J.D., University of Iowa, 1987
LONA J. HANSEN, 7/77-1/88 .....Assistant Attorney General
J.D., University of Iowa, 1976
BRUCE KEMPKES, 9/86-.....Assistant Attorney General
J.D., University of Iowa, 1980
THOMAS D. McGRANE, 6/71- .....Assistant Attorney General
J.D., University of Iowa, 1971
CHRISTIE J. SCASE, 7/85- .....Assistant Attorney General
J.D., Drake, 1985
SHERYL A. SOICH, 2/88-.....Assistant Attorney General
J.D., Drake, 1987
MARK J. ZBIEROSKI, 3/87- .....Assistant Attorney General
J.D., Drake, 1986
SHONNA K. BURNS, 5/81- .....Legal Secretary
CHRISTY J. FISHER, 1/67-.....Legal Secretary
SHERILYN S. ZIMMERMAN, 2/87- .....Legal Secretary
DIANE DUNN, 10/88- .....Secretary/Receptionist

ENVIRONMENTAL LAW

JOHN P. SARCONE, 3/79-.....Division Head
J.D., Drake, 1975
DAVID L. DORFF, 4/85- .....Assistant Attorney General
J.D., Drake, 1982
ELIZABETH J. LORENTZEN, 10/83-2/87 .....Assistant Attorney General
J.D., Drake, 1983
STEVEN G. NORBY, 11/79-11/87 .....Assistant Attorney General
J.D., University of Iowa, 1979
ELIZA J. OVROM, 7/79- .....Assistant Attorney General
J.D., University of Iowa, 1979
DAVID R. SHERIDAN, 5/87- .....Assistant Attorney General
J.D., University of Iowa, 1978
MICHAEL H. SMITH, 9/84-.....Assistant Attorney General
J.D., University of Iowa, 1977
KAREN J. GOSLIN, 6/86-.....Legal Secretary
KIMBERLY K. PEACOCK, 6/86-4/87.....Legal Secretary
ROXANNE C. PETERSEN, 5/79- .....Legal Secretary

FARM

TAM B. ORMISTON, 1/79-.....Division Head
J.D., University of Iowa, 1974
TIMOTHY D. BENTON, 7/77-.....Assistant Attorney General
J.D., University of Iowa, 1977
LYNETTE A. DONNER, 10/86-.....Assistant Attorney General
J.D., Drake, 1984
STEPHEN H. MOLINE, 6/86-.....Assistant Attorney General
J.D., University of Iowa, 1986
STEVEN P. WANDRO, 11/88-.....Assistant Attorney General
J.D., University of Iowa, 1984
HARRY E. CRIST, 7/85-.....Investigator
CHARLES G. RUTENBECK, 12/74-.....Investigator
BEVERLY A. CONREY, 4/85-.....Legal Secretary

HEALTH

MAUREEN McGUIRE, 7/83-.....Assistant Attorney General
J.D., University of Iowa, 1983
ROSE A. VASQUEZ, 9/85-.....Assistant Attorney General
J.D., Drake, 1985

HUMAN SERVICES

GORDON E. ALLEN, 8/82-.....Division Head
J.D., University of Iowa, 1972
SUZIE A. BERREGAARD, 7/87-.....Assistant Attorney General
J.D., Drake, 1987
SARAH J. COATS, 2/84-.....Assistant Attorney General
J.D., University of Iowa, 1983
JEAN L. DUNKLE, 10/75-.....Assistant Attorney General
J.D., University of Iowa, 1975
KRISTIN W. ENSIGN, 10/88-.....Assistant Attorney General
J.D., Drake, 1983
ROBERT J. GLASER, 7/86-.....Assistant Attorney General
J.D., Creighton University, 1978
LUCILLE M. HARDY, 5/86-.....Assistant Attorney General
J.D., University of Iowa, 1985
DANIEL W. HART, 7/85-.....Assistant Attorney General
J.D., University of Iowa, 1983
MARK A. HAVERKAMP, 6/78-.....Assistant Attorney General
J.D., Creighton, 1976
PATRICIA M. HEMPHILL, 2/83-.....Assistant Attorney General
J.D., Drake, 1981
ROBERT R. HUIBREGTSE, 6/75-.....Assistant Attorney General
L.L.B., Drake, 1963
LAYNE M. LINDEBAK, 7/78-.....Assistant Attorney General
J.D., University of Iowa, 1979
VALENCIA V. McCOWN, 6/83-.....Assistant Attorney General
J.D., University of Iowa, 1983
E. DEAN METZ, 5/78-.....Assistant Attorney General
L.L.B., Drake, 1955
KATHRINE MILLER-TODD, 1/85-.....Assistant Attorney General
J.D., Wake Forest, 1974

CANDY S. MORGAN, 9/79- ..... Assistant Attorney General
J.D., University of Iowa, 1973
JOHN M. PARMETER, 11/84- ..... Assistant Attorney General
J.D., Drake, 1982
CHARLES K. PHILLIPS, 8/84- ..... Assistant Attorney General
J.D., Columbia University (NY), 1982
STEPHEN C. ROBINSON, 8/73- ..... Assistant Attorney General
L.L.B., Drake, 1962
ANURADHA VAITHESWARAN, 5/88- ..... Assistant Attorney General
J.D., University of Iowa, 1984
JANE A. McCOLLOM, 10/76- ..... Legal Secretary
KATHLEEN A. PITTS, 5/87- ..... Legal Secretary

INSURANCE

FRED M. HASKINS, 6/72- ..... Assistant Attorney General
J.D., University of Iowa, 1972

LOTTERY

SHERIE BARNETT, 7/83 ..... Assistant Attorney General
J.D., Drake, 1981

PROSECUTING ATTORNEYS TRAINING COUNCIL

DONALD R. MASON, 9/80- ..... Exec. Dir., Training Coordinator
J.D., University of Iowa, 1976
KAY L. CHOPARD, 3/86- ..... Assistant Attorney General
J.D., University of Iowa, 1983
ANN M. CLARY, 1/88- ..... Legal Secretary
JONI M. KLAASSEN, 9/85- ..... Legal Secretary

PUBLIC SAFETY

GARY L. HAYWARD, 6/76- ..... Assistant Attorney General
J.D., University of Iowa, 1976
JANET L. PETERSEN, 3/88- ..... Assistant Attorney General
J.D., University of Iowa, 1985
IDONA S. PATTON, 7/88- ..... Legal Secretary

REVENUE

HARRY M. GRIGER, 1/67-8/71, 12/71- ..... Division Head
J.D., University of Iowa, 1966
THOMAS M. DONAHUE, 6/78- ..... Assistant Attorney General
J.D., Drake, 1974
GERLAD A. KUEHN, 9/71- ..... Assistant Attorney General
J.D., Drake, 1967
MARCIA E. MASON, 7/82- ..... Assistant Attorney General
J.D., University of Iowa, 1982
JAMES D. MILLER, 12/79-4/82,10/86- ..... Assistant Attorney General
J.D., Drake, 1977

SPECIAL LITIGATION

DEAN A. LERNER, 2/83- ..... Assistant Attorney General
J.D., Drake, 1981
ROBERT P. BRAMMER, 11/78- ..... Investigator
DAVID H. MORSE, 3/78- ..... Investigator
LAUREN N. MARRIOTT, 8/84- ..... Legal Secretary

TORT CLAIMS

CRAIG A. KELINSON, 12/86- ..... Division Head
J.D., University of Iowa, 1976
GREG H. KNOPLOH, 5/87- ..... Assistant Attorney General
J.D., University of Iowa, 1978
CHARLES S. LAVORATO, 9/83- ..... Assistant Attorney General
J.D., Drake, 1975
ELEANOR E. LYNN, 7/83-6/85; 7/87- ..... Assistant Attorney General
J.D., University of Iowa, 1983
JOANNE L. MOELLER, 8/84- ..... Assistant Attorney General
J.D., University of Iowa, 1984
SHIRLEY ANN STEFFE, 9/79- ..... Assistant Attorney General
J.D., University of Iowa, 1979
MATTHEW W. WILLIAMS, 7/83-6/87 ..... Assistant Attorney General
J.D., University of Nebraska, 1983
ROBERT D. WILSON, 12/86- ..... Assistant Attorney General
J.D., University of Iowa, 1981
KAREN M. LIKENS, 8/77- ..... Investigator
CATHLEEN L. RIMATHE, 8/78- ..... Investigator
CYNTHIA L. BAKER, 8/84- ..... Legal Secretary
LINDA S. HURST, 3/86- ..... Legal Secretary
MARCIA A. JACOBS, 8/82- ..... Legal Secretary
LORELL SQUIERS, 9/87- ..... Legal Secretary

TRANSPORTATION

CHARLES J. KROGMEIER, 5/86- ..... Division Head
J.D., Drake, 1974
JOHN W. BATY, 9/72- ..... Assistant Attorney General
J.D., Drake, 1967
ROBERT P. EWALD, 2/81- ..... Assistant Attorney General
J.D., Washburn University, 1980
DAVID A. FERREE, 3/84- ..... Assistant Attorney General
J.D., University of Iowa, 1979
ROBIN FORMAKER, 4/84- ..... Assistant Attorney General
J.D., University of Iowa, 1979

CRAIG M. GREGERSEN, 2/79-2/87 ..... Assistant Attorney General
J.D., University of Iowa, 1978
MARK HUNACEK, 7/82- ..... Assistant Attorney General
J.D., Drake, 1981
ARDETH T. METIER, 7/86- ..... Assistant Attorney General
L.L.B., J.D., University of Iowa, 1951
RICHARD E. MULL, 7/78- ..... Assistant Attorney General
J.D., University of Iowa, 1977
CAROLYN J. OLSON, 8/87- ..... Assistant Attorney General
J.D., Drake, 1984
DANIEL W. PERKINS, 11/84- ..... Assistant Attorney General
J.D., University of Washington, 1982
MERRELL M. PETERS, 7/84- ..... Assistant Attorney General
J.D., Drake, 1984
CARMEN C. MILLS, 7/82-1/86; 1/87- ..... Paralegal
MICHAEL J. RAAB, 1/85- ..... Paralegal
CAROLYN L. SHOJAAT, 4/83- ..... Paralegal
DAVETTE D. SMITH, 8/86- ..... Paralegal

ATTORNEY GENERAL
OFFICE
ADMINISTRATIVE DIVISIONS

ADMINISTRATIVE LAW DIVISION

The Administrative Law Division provides legal services to state departments, divisions, boards, commissions and elected officials which include rendering legal advice, preparing opinions, preparing and reviewing legal documents, participating in administrative hearings, and defending or prosecuting litigated matters. The Division represents twelve state departments and three elected officials, including the Auditor, the Division of Banking, the Department of Education, Iowa Public Television, the State Board of Accountancy, the State Board of Medical Examiners, the State Board of Regents and the Treasurer.

Depending on the needs of the particular department, legal representation ranges from advice on open meetings and administrative procedures to full participation in all stages of the hearing process. Attorneys from the Administrative Law Division appeared in a considerable number of administrative hearings during the biennium. Throughout 1987-88, informal department inquiries also increased as the Division increased its representation of clients.

Inquiries to the Attorney General's office regarding county and city government operations are referred to the Division for response. Responsibility for inquiries and interpretations concerning the state election laws and campaign finance are also assumed by the Division.

Litigation has arisen in almost every area of the Division's responsibilities, although the majority of cases arise as a result of a petition for judicial review of state agency action.

The Administrative Law Division is responsible for preparing formal and informal responses to requests for many Attorney General's opinions. While the majority of requests concern questions arising in the areas of education and county government operations, and the effect of county home rule, opinions have been issued touching on such varied topics as the courts, public hospitals, banking and financial law, open meetings, state officers and departments, official publications, municipalities and elections.

During the 1987-88 biennium approximately 50 opinions were issued by the Administrative Law Division.

Approximately 250 charitable trusts and private foundations file annual reports with the Department of Justice pursuant to federal regulations, and those reports are processed and maintained by the Administrative Law Division. Pursuant to the Attorney General's supervisory powers over charitable trusts, Iowa Code § 633.303, the Division has been involved in several cases concerning trust instruments. Escheat matters and cases involving unclaimed property turned over to the State Treasurer's office are handled by the Division. In addition, inquiries from the general public regarding charitable solicitations and estate and trust law are referred to the Division.

AREA PROSECUTIONS DIVISION

The primary purpose of the Area Prosecutions Division is to assist local county attorneys in difficult, technical, or multi-jurisdiction criminal cases, and in those cases where a conflict of interest or the appearance of a conflict precludes the county attorney from handling a prosecution.

The division is staffed by six general trial attorneys, four attorneys delegated to specialty prosecution areas, one investigator and one secretary. The specialty areas each have one attorney assigned: 1) to prosecute crimes in penal institutions, 2) to conduct state tax investigations and prosecutions, 3) as a training/legal advisor for the Department of Public Safety, and 4) to manage and conduct narcotics investigations and prosecutions. The specialist positions are funded by the Iowa Departments of Corrections, Revenue and Finance, Public Safety; and by a federal grant, respectively.

In the current biennium requests for prosecution assistance from county attorneys rose by approximately 10 percent. A more dramatic growth was experienced in the most difficult and time consuming category of criminal prosecution where the number of homicide referrals increased by fifty per cent over the previous period.

The division continues its role of handling virtually all of the public official misconduct and corruption allegations raised throughout the state. Eleven new cases in this field were opened during 1987-1988.

The division also represents the Commission on Judicial Qualifications, investigating and prosecuting complaints against Iowa judges and magistrates. Twelve complaints were handled during the biannual period, a reduction from the 17 complaints received in the prior two year interval.

An additional duty delegated to the division is responsibility for the administration of the criminal asset forfeiture fund created by the legislature in 1986. All property, vehicles and contraband seized from criminal enterprises and forfeited by the courts are now managed under the direction of the Attorney General by a division attorney.

CIVIL RIGHTS DIVISION

The Civil Rights Division of the Attorney General's office is staffed with two Assistant Attorneys General. Their primary duties are to provide legal advice and assistance to the staff of the Commission, to litigate on behalf of complainants in contested case proceedings before the Commission's hearing officers, and to litigate for the Commission in judicial review proceedings in the district court and upon appeal to the Iowa Supreme Court and Court of Appeals. In addition, they provide informal and formal Attorney General's opinions, participate in training sessions held by the Commission for its staff and throughout the state, and serve as general resource personnel for citizens of Iowa who are concerned about a possible deprivation of their civil rights.

Litigation, however, remains the primary function and during the biennium the division docketed 79 cases and closed 98 cases, collecting $384,034.48 in judgments and settlements.

In 1987 and 1988, the Division was chiefly involved with handling the docket of cases scheduled for public hearing. Forty-two new hearing cases were opened and 56 cases were closed during this period. Twenty-two public hearings were held during the biennium, and of the 16 decisions rendered during this period, 10 were in the complainant's favor. Twenty-eight other cases were settled in the course of pre-trial preparation.

The activity in the district and appellate courts has also increased, as a result of appeals from commission decisions. Twenty-nine new files were opened on matters pending in the district court and 27 cases have been decided in the district courts throughout the state, with the Commission succeeding outright in 20 of these cases, and winning in part of two additional cases. The cases in the district court include original actions for injunctions pursuant to Chapter 601A and enforcement of administrative subpoenas, as well as appeals from the administrative processes of the Commission and actions to enforce the

Commission decisions. A portion of the Division's district court appeals have been taken from no-probable cause or other administrative closure findings. In virtually all of these cases, the Division was successful in defending the Commission's exercise of its discretion to close these cases.

During the biennium, the Division represented the Iowa Civil Rights Commission in eight appeals to the Iowa Supreme Court or Iowa Court of Appeals. These appeals have involved interpretation of the substantive provisions of Chapter 601A and the Commission's administrative rules in the areas of disability discrimination, public accommodations, and housing discrimination. Eight of the cases were resolved — two in the Commission's favor, two were settled and four were adverse to the Commission. Two cases remain pending before the appellate courts.

OFFICE OF CONSUMER ADVOCATE

When state government was reorganized effective July 1, 1986, the Office of Consumer Advocate was transferred to the Department of Justice. The Office of Consumer Advocate represents consumers and the public in proceedings before the Iowa Utilities Board, which implements and enforces the provisions of Iowa's public utility regulation statutes in Iowa Code chapters 476 and 476A. The Office of Consumer Advocate is also independently authorized to investigate the legality of all rates, charges, rules, regulations and practices of all persons under the jurisdiction of the Board, and may institute proceedings before the Board or court to correct any illegality. Proceedings before the Board in which the Office of Consumer Advocate participated during the 1987-88 biennium included annual reviews of electric and natural gas utilities' fuel purchasing and contracting practices, depreciation rate reviews, electric transmission line and gas pipeline certificate cases, formal complaints, investigation dockets of specific utility practices, purchased gas adjustment cases, electric utility service area disputes, rulemakings and rate cases.

Investigation of the legality of proposed rate increases filed by investor-owned utilities represents the most significant area of the Office of Consumer Advocate's litigation before the Board. To carry out its investigatory duties in a rate case, the Office of Consumer Advocate uses the technical staff of the Utilities Division of the Department of Commerce as well as outside consultants at times to analyze the information presented in the filing by the utility company, and review the utility's books and records to determine the reasonable costs of providing utility service. The Office of Consumer Advocate participates in the case by attending consumer comment hearings held at locations throughout the state, cross-examining utility witnesses at technical hearings, offering evidence through Consumer Advocate sponsored expert witnesses, and filing briefs with the Board. During 1987-1988, the Office of Consumer Advocate litigated the legality of approximately 20 rate increases proposed by electric, natural gas, telephone and water utilities. In addition, the Office of Consumer Advocate instituted rate reduction proceedings proposing to decrease the rates of two investor-owned electric utilities which had excessive earnings.

Each of Iowa's seven investor-owned retail electric distribution utilities are required to undergo an annual review of procurement and contracting practices related to the acquisition of fuel (primarily coal) for use in generating electricity, and the Office of Consumer Advocate participated in these contested cases in both 1987 and 1988. In addition, all electric utilities annually submitted generation planning filings, which address load forecasting, supply options and demand side programs, and the Office of Consumer Advocate submitted

comments and participated in the annual meetings to address the filings. The Office of Consumer Advocate also participated each year in the contested case annual reviews of the natural gas procurement and contracting practices for each of Iowa's seven investor-owned retail natural gas distribution utilities.

During the 1987-88 biennium, the Office of Consumer Advocate was involved in three accounting ruling or depreciation rate review proceedings before the Board, 15 electric transmission line certificate or renewal cases, 27 gas pipeline certificate or renewal cases, 16 formal complaints (usually initiated only after informal attempts to resolve consumer complaints against utilities are unsuccessful) and over 200 purchased gas adjustments filings by utilities. The Office of Consumer Advocate participated in 19 electric utility service area disputes, including a case of first impression involving the attempt of an Iowa municipality to establish an electric utility and buy out the existing investor-owned utility's facilities. During the biennium, the Office of Consumer Advocate was involved in 47 rulemaking proceedings and 14 Board investigation dockets, which addressed such diverse topics as energy conservation, the effects of the 1986 Tax Reform Act, whether a non-utility must obtain a Chap. 476A construction certificate before building combustion turbines, alternative forms of regulation for telephone utilities, deregulation of specific telephone services which may become competitive, and relations between utilities and their affiliated companies. In addition during 1988, the Office of Consumer Advocate has been involved with a generating plant certificate filing by a utility requesting Board approval for staggered construction of four combustion turbines (totaling 166 megawatts) near Des Moines.

The Office of Consumer Advocate is authorized to commence judicial review of Board actions, and to represent the general public interest in all other state or federal court actions challenging the validity of Board actions. During the 1987-88 biennium, the Office of Consumer Advocate was involved in 47 separate judicial review proceedings in Iowa's district and appellate courts.

At the request of the Consumer Advocate, the Consumer Advisory Panel convened regularly throughout 1987 and 1988 for consultation with the Consumer Advocate on public utility regulation issues. The panel consists of nine consumer members, with at least one appointed from each congressional district. The Attorney General appoints five of the members of the panel, and the Governor appoints the remaining four. During the 1987-88 biennium, the Consumer Advisory Panel selected energy conservation as its central topic for study and discussion. At the request of the Consumer Advisory Panel, the Attorney General's Office and the Office of Consumer Advocate sponsored a conference in September 1988 entitled *Energy Conservation: Fuel For Economic Development.*

The Office of Consumer Advocate consists of the Consumer Advocate, nine attorneys, one paralegal and two secretaries. During 1988, the Office of Consumer Advocate received legislative approval and funding for six additional personnel to serve as the office's technical staff.

CONSUMER PROTECTION

The Consumer Protection Division of the Attorney General's office enforces the Iowa Consumer Fraud Act, the Iowa Business Opportunity Sales Act, the Iowa Trade School Act, the Iowa Door-to-Door Sales Act, the Iowa Consumer Credit Code, the Iowa Campground Act, and the Iowa Physical Exercise Club Regulation Act. These, statutes, and the others enforced by the Consumer Protection Division, are designed to protect the buying public from misrepresentation, deception, and unfair trade and marketing practices.

The Consumer Protection staff consists of 22 full-time employees. The staff consists of seven attorneys, eight investigators, five secretaries, and two receptionists. the Division, through its volunteer program, usually has volunteer or intern "complaint handlers" working for the Division handling non-fraud consumer complaints.

The Division's results for 1987 and 1988 were as follows:

1. New Complaints Received 8,637
2. Complaints Closed 18,318
3. Complaints Pending at End of 1988 3,606
4. New Lawsuits Filed 86
6. Lawsuits Closed 53
7. Lawsuits Pending at End of 1988 85
8. Monies Saved and Recovered for Complainants $3,935,775.76

The Consumer Protection Division engages in many programs of preventive consumer protection designed to deter potential schemes and inform consumers. The Consumer Protection Division's involvement in mediating consumer problems, investigating complaints of deceptive advertising and sales practices, and filing lawsuits has a substantial deterrent effect on persons and companies who might be tempted to engage in fraudulent practices in Iowa. The office attempts to inform the public about both specific and common schemes of fraud through a variety of means including press releases, informational brochures, and public speaking engagements.

The number one priority of the Consumer Protection Division in 1987 and 1988 was health and nutrition fraud. Numerous lawsuits were filed against fraudulent diet pill companies and other companies making fraudulent health related claims. Automobile advertising was another area of emphasis. A comprehensive enforcement program was commenced beginning with extensive monitoring of automobile advertisements, development of enforcement guidelines, educational seminars for dealers and advertisers, warnings to dealers who engaged in deceptive advertising, and, finally, in the case of fourteen dealerships, lawsuits alleging violations of both the consumer fraud and consumer credit laws of Iowa.

The growth industry in fraud during 1987 and 1988 was travel scams. Complaints in this area increased 300% over 1985/86. The Division countered with an extensive consumer education program designed to alert Iowans to the scams and vigorous prosecutions in those cases where the schemers could be identified. By the end of 1988, complaints in this area had abated.

The priorities for the next two years are retail advertising, health and nutrition fraud, fraud against the elderly, particularly home repair fraud, and telemarketing fraud. There will be an increased emphasis on the use of criminal prosecutions to deter certain categories of hard core consumer fraud, and, in appropriate cases, use will be made of both criminal forfeiture and civil seizure laws to deny consumer fraud perpetrators of the fruits of their crimes.

During calendar years 1987 and 1988, the top 10 areas that Iowans complained about were:

1. Utilities[1] 2,682
2. Advertising 1,722

[1] 2,597 of these originated in one case closed in 1987.

In 1987, the Division was able to assist 82.73% percent of those Iowans that complained to it while in 1988, the Division was able to assist 83.68% percent of complainants.

3. Mail Order 1,682
4. Automobiles 1,404
5. Travel and Transportation 1,046
6. Magazines 991
7. Credit Code 776
8. Multilevel & Pyramids 535
9. Business Opportunity 489
10. Services (General) 443

CRIMINAL APPEALS DIVISION

The primary responsibility of the Criminal Appeals Division is to represent the State of Iowa in direct appeals of criminal cases. County attorneys prosecute the cases in district court, and the Division prosecutes criminal appeals to the Iowa Supreme Court.

The work of the Division represents a major portion of the workload of the Supreme Court and Court of Appeals. The Division typically is involved in at least one-third of all the cases decided by both Courts.

During the biennium, the Supreme Court and Court of Appeals affirmed the state's position argued by the Division in approximately 80 percent of the cases.

In 1987-88, 895 criminal appeals were taken to the Iowa Supreme Court and 548 defendant-appellant briefs were filed in those cases. The Division filed 528 briefs on behalf of the state.

Other criminal appeal and post-conviction matters handled by the Division include: certiorari proceedings related to criminal cases (usually involving attorney fee cases or allegations that a trial judge acted illegally); appeals in post-conviction relief cases under chapter 663A; applications for discretionary review by the defendant; all criminal appellate actions initiated by the state; and federal habeas corpus cases.

The Division publishes the Criminal Law Bulletin, a periodic update on developments in criminal law in the Iowa Supreme Court and U.S. Supreme Court. It also provides training for prosecutors and police officers around the state.

During the biennium, the Division also carried out a number of advisory and consultative duties with respect to the criminal law. It frequently provided advice and research to county attorneys in criminal matters. It advised the Governor's office on extradition cases. Division attorneys served on and represented the Board of Parole, the Board of Pharmacy Examiners, and the Bureau of Labor. The Division head was a member of the Prosecut,ing Attorneys Training Council and the Supreme Court Advisory Committee on the Rules of Criminal Procedure.

The Criminal Appeals Division is comprised of 11 assistant attorneys general and four support staff.

ENVIRONMENTAL LAW DIVISION

The Environmental Law Division represents the state in issues affecting the environment. The Division has a staff of five attorneys and two

secretaries and represents the Department of Natural Resources, the Department of Agriculture and Land Stewardship, Division of Soil Conservation, the State Archaeologist, and the Iowa Board of Nursing.

As of January 1, 1987, the Division had 95 cases pending. During 1987-1988, 104 cases were opened and 66 were closed, leaving 133 cases pending at the end of the biennium. During the biennium, the Division issued two formal and 11 letter opinions regarding state environmental and related issues. In addition, the Division provided advice concerning administrative law, real property and drainage law matters, and advised the Iowa Boundary Commission.

During 1987 and 1988 the Division handled 44 cases for the Natural Resources Division (Conservation) of the Department of Natural Resources. Eight cases were officially closed during the biennium leaving 36 cases pending. The Division issued 95 title opinions and 60 title vesting certificates and provided assistance in drafting administrative rules.

The Division was also involved in 99 cases on behalf of the Environmental Protection Division of the Department of Natural Resources during the biennium concerning enforcement of Chapter 455B. Sixty-three cases were opened during the biennium and 25 were closed leaving 74 cases pending as of January 1, 1989.

Twenty-five cases involving the Department of Agriculture and Land Stewardship, Division of Soil Conservation, were handled during the biennium. Seven cases were opened and 17 were closed, leaving eight cases pending as of January 1, 1989.

In February, 1988, the Division assumed responsibility for providing legal advice and handling administrative hearings for the Iowa Board of Nursing. During 1988 the division was involved in 13 administrative cases.

The Division also continued to work with attorneys general from the states of Missouri and Nebraska in a very complex administrative and water law case entitled *ETSI Pipeline Project v. Missouri, et al.*, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988), having successfully completed an appeal in the United States Supreme Court.

The Division also filed three environmental enforcement actions pursuant to the Attorney General's authority in Iowa Code Section 455B.112 (1987).

FARM DIVISION

The Attorney General's Farm Division performs legal services for the Iowa Department of Agriculture and Land Stewardship and enforces the Iowa Consumer Fraud Act in the context of agricultural transactions. The Division is staffed with four attorneys, two investigators and a secretary.

In serving as legal counsel to the Department of Agriculture, the Farm Division has represented various divisions within the department such as the Agricultural Development Authority, Grain Warehouse Bureau and the Veterinary Board. The Division also represents the Iowa Grain Indemnity Fund Board and the Iowa State Fair Authority. In addition to advising its client-agencies on a regular basis, the Division has assisted in drafting administrative rules and represented the agencies in both administrative hearings and in court. The Farm Division represented its client-agencies in 21 administrative hearings, 11 district court cases and one Iowa Supreme Court appeal through the biennium.

In enforcing the Iowa Consumer Fraud Act, the Farm Division saved or recovered $1,815,154.44 for Iowa farmers during the biennium. The Division has continued to concentrate on frauds aimed at farmers left vulnerable by the recent drought and crisis in the agricultural economy.

The Farm Division also undertook two significant cases relating to Iowa agriculture in the biennium. In *Federal Land Bank v. Arnold*, the Division intervened in a case to defend the constitutionality of Iowa Code Section 654.16 (1987), which provides for the separate redemption at fair market value of a farmer's homestead. In 1988, the Farm Division represented the Department of Insurance in an administrative action against Chubb Insurance Inc., alleging that the company had violated Iowa insurance laws in the sale of "drought insurance" to farmers. The settlement of *Iowa Insurance Division v. Chubb* resulted in a recovery of $7.6 million for Iowa farmers.

The Farm Division has continued to work with the Farmer/Creditor Mediation Service and Legal Assistance for Farmers Project. The Division successfully defended the constitutionality of Iowa's mediation statute, Iowa Code Chapter 654A (1987), in a case in which the validity of the law was challenged.

The Farm Division also monitors compliance with both the Iowa corporate farming and non-resident alien laws. The Division frequently advises parties as to whether a particular transaction will comply with these statutes. During the biennium, the Division issued eight letter of such advice. The Division also issued 10 Attorney General's opinions during this period on a variety of subjects pertaining to agriculture.

HEALTH DIVISION

The Health Division, consisting of two attorneys, represents the Iowa State Department of Health and the Division of Health Facilities in the Department of Inspections and Appeals. The attorneys provide daily advice and counsel, represent the departments in administrative hearings and litigation, and render assistance and advice in drafting administrative rules and legislation.

The division represents the Division of Health Facilities in disputes arising out of the divisions's regulatory authority over health care facilities and hospitals. The Health Division renders advice concerning these activities and represents the department at informal and formal administrative hearings which may occur as a result of the department's power to issue citations and levy civil fines and take other licensing action whenever facilities are found to be in noncompliance with statutory or regulatory provisions.

The division also represents the Office for Health Planning and Development and handles all legal problems concerning implementation and enforcement of Iowa's Certificate of Need Law. The attorneys serve as legal counsel to the Iowa Health Facilities Council, a five-member body which makes initial decisions on certificates of need.

The attorneys also advised and represented other divisions of the Health Department in administrative and court proceedings including the Iowa Women, Infants and Children program; Emergency Medical Services; Public Health Nursing; the Homemaker Health Aid Program and Central Administration.

The Health Division attorneys also served as legal counsel to the Division of Substance Abuse and twelve health licensing boards, providing general advice and representation in administrative hearings and court litigation.

The Division attorneys also prepared formal Attorney General opinions and provided frequent informal written and oral advice to the public. The attorneys participated in conferences and panel discussions on health topics at the request of Health Department agencies and other groups or organizations.

HUMAN SERVICES/ CORRECTIONS DIVISION

The Division performs legal services for the Departments of Human Services and Corrections. It is comprised of 17 fulltime assistant attorneys general and one half-time assistant attorney general (five of whom are assigned to represent the Child Support Recovery Unit of the Department of Human Services), one administrative officer, and four legal secretaries.

The legal services which are provided include: 1) defending suits in state and federal courts (1,494 lawsuits pending as of July 1988), including prisoner civil rights litigation, juvenile appeals before the Iowa Court of Appeals and Supreme Court which had been handled by the county attorneys at the district court level, matters involving mental health and correctional state institutions, and appeals to district courts from administrative hearings; 2) providing consultation and advice with regard to statutes, judicial decisions, policy, state and federal regulations, proposed legislation, and administrative rules; 3) inspecting and approving contracts and leases, and handling real estate matters; 4) researching and preparing opinions of the Attorney General; and 5) handling collections of welfare overpayments, fraud, delinquent accounts; and recovering Title XIX Medicaid payments from liable third parties.

Authority is vested in Iowa Code ch. 252B for the Attorney General to perform legal services for the Child Support Recovery Unit, Department of Human Services. Under the direction of the special assistant attorney general assigned to this Division, five assistant attorneys general are located throughout the State and assist in training the county attorneys and their assistants charged with prosecuting child support cases. This responsibility includes conducting training seminars, drafting form pleadings, overseeing all appeals, and prosecuting special cases. Child support collections principally were from absent parents of welfare recipients.

Summary of the monies recovered and collected for the State by this Division during the biennium follows:

Child Support Collections	$ 109,208,300 *
Title XIX Medical Subrogation	900,025
Welfare Overpayments	35,790
Miscellaneous Accounts	106,879
TOTAL RECOVERIES	$ 110,250,994

* Federal Fiscal Years 1987 & 1988

INSURANCE DIVISION

The Insurance Division of the Department of Justice consists of two assistant attorneys general, one full time for insurance, the other full time for securities. Legal advice is rendered to the insurance-related bureaus of the Insurance Division of the Department of Commerce, and to the Securities Bureau of the Insurance Division. The legal questions presented to the insurance assistant span a wide range but mostly involve construction

of the statutes in Title XX of the Iowa Code dealing with insurance. The insurance assistant also assists the insurance-related bureaus of the Insurance Division in preparing and drafting legislation and administrative rules and handles insurance-related litigation in which the Insurance Division is a party.

The insurance assistant also fulfills the statutorily prescribed role of reviewing documents of insurance companies such as articles of incorporation and reinsurance treaties. That assistant reviewed numerous documents of this nature in the biennium. The insurance assistant also advised the Commissioner of Insurance on legal questions relating to insurance company mergers, acquisitions, and reorganizations. Considerable attention was given by the insurance assistant in the biennium to the legal ramifications of insurance company insolvencies, in the supervision, rehabilitation, or liquidation stages.

A full time assistant attorney general was assigned to the Securities Bureau in the summer of 1988. This assistant provides legal advice to the Superintendent of Securities and the Superintendent's staff. In addition, this assistant represents the Superintendent in all court actions brought by or against the Securities Bureau. The primary responsibility of the Securities Bureau is enforcing and prosecuting violations of the Iowa Uniform Securities Act, Iowa Code chapter 502. One major accomplishment of the Bureau in this biennium was the conclusion of a receivership arising out of an action brought in 1983 pursuant to which $186,604 was distributed to persons who had lost investments in an Iowa-based grain cooperative.

In addition to the securities-related work performed by the Securities Bureau, the Bureau includes a regulated industries unit whose responsibility is to administer the following statutes: the Prearranged Funeral Contracts Act, the Loan Brokers Act, the Business Opportunity Act, the Residential Service Contracts Act, the Membership Sales Act and the Motor Vehicle Service Contracts Act. The securities assistant provides legal advice and representation to this unit.

PROSECUTING ATTORNEYS COUNCIL

The office of the Prosecuting Attorneys Training Coordinator was created by legislation in 1975 (Iowa Code chapter 13A) as an autonomous entity within the Department of Justice. A council of five members was established as the policy-making head of the agency, consisting of the Attorney General or a designated representative, the incumbent president of the Iowa County Attorneys Association, and three county attorneys elected to staggered three-year terms by and from the members of the Association. An Executive Director, a regular employee of the Department, was made the chief administrative officer and was to be appointed by and serve at the pleasure of the Council.

The structure of the office was altered under the state government reorganization legislation in 1986. Effective July 1, 1986, the Council remained in an advisory capacity only and the office was placed under the direct supervision of the Attorney General. The Executive Director (also referred to as the Prosecuting Attorneys Training Coordinator) remains the chief administrative officer responsible for the performance of the functions and duties of the office but now serves at the pleasure of the Attorney General.

The Prosecuting Attorneys Council provides continuing education and training for Iowa prosecuting attorneys and their assistants and other support services to promote the uniform and effective execution of prosecutors' duties. These services are provided to all ninety-nine county attorneys and the more than 200 assistant county attorneys as well as to many assistant attorneys general, other government attorneys and law enforcement officials.

The office has coordinated or assisted with many training events. Spring and Fall Training Conferences have been conducted annually in June and November respectively. Each year, the office has conducted workshops in late June or early July at locations around the state to acquaint prosecuting attorneys with new legislation significant to their duties. Other conferences have been conducted on specialized subjects such as child abuse, victim services, and drunk driving.

Acting as a clearinghouse of information and support services, the office: (1) provided research assistance to prosecuting attorneys; (2) published newsletters, bulletins, manuals and handbooks to keep prosecutors and others in the criminal justice system informed of developments and to provide reference material to assist them in executing their duties; (3) acted as liaison for prosecuting attorneys with the courts, executive departments and agencies, General Assembly, other divisions of the office of the Attorney General, law enforcement agencies, and other local, state or federal entities; (4) conducted annual surveys of county attorney budgets and salaries and disseminated the resulting data; (5) assisted the development and implementation of standards of conduct for prosecuting attorneys; (6) assisted prosecutors and the public in the resolution of complaints and other concerns involving questions of prosecutorial ethics and conduct; and (7) coordinated the promulgation of model forms for use in criminal cases in compliance with requirements of law.

PUBLIC SAFETY DIVISION

The Public Safety Division provides legal counsel to the Iowa Department of Public Safety, the Iowa Department of Commerce, Racing and Gaming Division and the Law Enforcement Academy. The Division is housed within the Department of Public Safety.

The Public Safety Division is involved in a wide range of activities providing Public Safety and the Racing Commission with counsel and representation in civil matters. It provided legal advice concerning the agencies' policies and practices. It reviewed and evaluated leases, contracts and real estate transactions involving the agencies. It represented the agencies and their employees in suits in federal and state court.

The Public Safety Division provided day-to-day advice on civil matters to line officers of the Department of Public Safety. It also occasionally provided advice in criminal matters in cooperation with the Area Prosecutions Division and county attorneys.

The Division also prosecuted administrative complaints before the Iowa Department of Commerce, Alcoholic Beverages Division and served as counsel to the Public Safety Peace Officers Retirement, Accident and Disability System.

REVENUE DIVISION

The Revenue Division advises and represents the Department of Revenue and Finance with respect to various taxes which are administered by the department, including income taxes, franchise tax imposed on financial institutions, state sales and use taxes, cigarette and tobacco taxes, motor vehicle fuel taxes, inheritance and estate taxes, property taxes, hotel and motel local option taxes, local option sales taxes, real estate transfer tax, and grain-handling tax. In addition, the Division drafts responses to tax opinion requests made to the Attorney General.

During the 1987-1988 biennium, the Division participated in the resolution of informal proceedings for 269 protests filed by audited taxpayers, pursuant to Department of Revenue Rule 701 Iowa Admin. Code § 7.11. The Division also handled 63 contested case proceedings before a department hearing officer or the Director of the Department of Revenue and Finance. Of these, 33 were won, four were lost, 25 were settled, and one was pending decision at the end of the biennium.

In the biennium, 29 contested cases were disposed of before the State Board of Tax Review in which eight were won, two were lost, and 19 were settled.

During the biennium, 25 Iowa District Court cases were resolved by the Division. Of these ten were won, four were lost, nine were settled, and two were pending decision. In addition, four federal district court cases were disposed of in which one was won and three were settled.

This Division was involved in five cases in the United States Supreme Court during the biennium. In two cases, this Division drafted and filed amicus curiae briefs in which other states joined. In another case, this Division had input in an amicus brief drafted and filed by Kansas. In *Shell Oil Company v. Iowa Department of Revenue*, 488 U.S. ____, 102 L.Ed.2d 186 (1988), orally argued by an attorney in this Division, the Supreme Court unanimously held that 43 U.S.C. § 1333 did not prevent Iowa from including receipts and expenditures from the federally-owned outer continental shelf in its Iowa unitary business/formula apportionment method prescribed in Iowa Code § 422.33. This Division was also successful in the case of *Department of Revenue v. Investment Finance Management Co.*, No. 86-2383 (Eight Circuit Ct. of App., filed Oct. 22, 1987) in which the Court held that we were correct in our assertion that the validity of a garnishment of funds of an Indian trader should be litigated in state court. The Supreme Court refused to review this decision.

On the appellate Iowa court level, the Division received decisions in 11 cases from the Iowa Supreme Court and one from the Iowa Court of Appeals. Of the Iowa appellate court cases decided, nine were won and three were lost. Several of these cases deserve mention.

In *Estate of Evelyn Lamoreux*, 412 N.W.2d 628 (Iowa 1987), the Iowa Supreme Court ruled that a surviving joint tenant had nine months from the date of death of the deceased joint tenant, rather than nine months from the creation of an inter vivos joint tenancy, to file a disclaimer under Iowa Code § 633.704.

In *Kelly-Springfield v. Iowa Department of Revenue*, 414 N.W.2d 113 (Iowa 1987), the Iowa Supreme Court held that the six months limitations period in Iowa Code § 422.25(1) applied only to federal audit adjustments made by the federal government on the taxpayer's federal return, and did not authorize a complete review by the Iowa Revenue Department of the Iowa return.

State of Iowa
1988

FORTY-SEVENTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

BIENNIAL PERIOD ENDING DECEMBER 31, 1988

THOMAS J. MILLER

Attorney General

Published by
THE STATE OF IOWA
Des Moines

ATTORNEYS GENERAL OF IOWA

NAME	HOME COUNTY	SERVED YEARS
David C. Cloud	Muscatine	1853-1856
Samuel A. Rice	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
Isaac L. Allen	Tama	1865-1866
Frederick E. Bissell	Dubuque	1866-1867
Henry O'Connor	Muscatine	1867-1872
Marsena E. Cutts	Mahaska	1872-1877
John F. McJunkin	Washington	1877-1881
Smith McPherson	Montgomery	1881-1885
A. J. Baker	Appanoose	1885-1889
John Y. Stone	Mills	1889-1895
Milton Remley	Johnson	1895-1901
Charles W. Mullan	Black Hawk	1901-1907
Howard W. Byers	Shelby	1907-1911
George Cosson	Audubon	1911-1917
Horace M. Havner	Iowa	1917-1921
Ben J. Gibson	Adams	1921-1927
John Fletcher	Polk	1927-1933
Edward L. O'Connor	Johnson	1933-1937
John H. Mitchell	Webster	1937-1939
Fred D. Everett	Monroe	1939-1940
John M. Rankin	Lee	1940-1947
Robert L. Larson	Johnson	1947-1953
Leo A. Hoegh	Lucas	1953-1954
Dayton Countryman	Story	1954-1957
Norman A. Erbe	Boone	1957-1961
Evan Hultman	Black Hawk	1961-1965
Lawrence F. Scalise	Warren	1965-1967
Richard C. Turner	Pottawattamie	1967-1979
Thomas J. Miller	Clayton	1979-

PERSONNEL
OF THE
DEPARTMENT OF JUSTICE

PERSONNEL

MAIN OFFICE

THOMAS J. MILLER, 1/79- ..... Attorney General
J.D., Harvard University, 1969
GORDON E. ALLEN, 8/82- ..... Deputy Attorney General
J.D., University of Iowa, 1972
BRENT R. APPEL, 1/83-2/87 ..... Deputy Attorney General
J.D., University of California, 1977
ELIZABETH M. OSENBAUGH, 1/79- ..... Deputy Attorney General
J.D., University of Iowa, 1971
JOHN R. PERKINS, 12/72- ..... Deputy Attorney General
J.D., University of Iowa, 1968
EARL M. WILLITS, 7/79- ..... Deputy Attorney General
J.D., Drake, 1974
WILLIAM C. ROACH, 1/79- ..... Administrator
DEBRA E. LEONARD, 2/84- ..... Administrative Assistant
JULIE CECIL, 8/88- ..... Administrative Assistant
SHELLEY JOHNSON CHAMBERS, 11/81-7/88 ... Administrative Assistant
KAREN A. REDMOND, 10/80- ..... Accountant
EVELYN K. GALLAGHER, 1/79- ..... Administrative Assistant
CONNIE J. HOFFMAN, 8/83-10/87 ..... Legal Secretary
KATHRYN M. ZAPF, 3/83- ..... Legal Secretary
MELISSA MILLER, 1/88- ..... Secretary/Receptionist

ADMINISTRATIVE LAW

DONALD G. SENNEFF, 7/85- ..... Division Head
J.D., University of Iowa, 1967
JOAN F. BOLIN, 7/87- ..... Assistant Attorney General
J.D. Loyola (University of Chicago), 1975
ANN M. BRICK, 3/86- ..... Assistant Attorney General
M.A., J.D., Drake, 1980
MERLE W. FLEMING, 7/80- ..... Assistant Attorney General
M.A., J.D., University of Iowa, 1980
SCOTT M. GALENBECK, 1/84- ..... Assistant Attorney General
J.D., University of Iowa, 1974
KEVIN M. KIRLIN, 7/84-5/87 ..... Assistant Attorney General
J.D., University of Iowa, 1984
JULIE F. POTTORFF, 7/79- ..... Assistant Attorney General
J.D., University of Iowa, 1978
KATHY M. SKINNER, 7/87- ..... Assistant Attorney General
M.S., J.D., Drake, 1987
LYNN M. WALDING, 7/81- ..... Assistant Attorney General
M.A., J.D., University of Iowa, 1981
THERESA O. WEEG, 10/81- ..... Assistant Attorney General
J.D., University of Iowa, 1981
JAMES S. WISBY, 10/88- ..... Assistant Attorney
J.D., University of Iowa, 1968
MELANIE L. RITCHEY, 8/85- ..... Legal Secretary

AREA PROSECUTIONS

HAROLD A. YOUNG, 7/75-.....Division Head
J.D., Drake, 1967
VIRGINIA D. BARCHMAN, 10/86-.....Assistant Attorney General
J.D., University of Iowa, 1979
JAMES E. KIVI, 2/80-.....Assistant Attorney General
J.D., University of Iowa, 1975
THOMAS H. MILLER, 10/85-.....Assistant Attorney General
J.D., University of Iowa, 1975
KEVIN B. STRUVE, 7/86-.....Assistant Attorney General
J.D., University of Iowa, 1979
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J.D., Creighton University, 1976
MICHAEL E. WALLACE, 8/84-.....Assistant Attorney General
J.D., University of Iowa, 1971
RICHARD A. WILLIAMS, 7/75-.....Assistant Attorney General
J.D., University of Iowa, 1971
SCOTT D. NEWHARD, 3/79-.....P.S.E. II
ALFRED C. GRIER, 9/72-.....Pilot
CONNIE L. ANDERSON LEE, 12/76-.....Legal Secretary
BILLIE J. RAMEY, 11/79-.....Legal Secretary

CIVIL RIGHTS

RICHARD R. AUTRY, 9/86-.....Assistant Attorney General
J.D., Drake, 1986
TERESA BAUSTIAN, 4/81-.....Assistant Attorney General
J.D., University of Iowa, 1979

CONSUMER ADVOCATE

JAMES R. MARET, 4/72-.....Consumer Advocate
L.L.B., University of Missouri, 1963
DAVID R. CONN, 9/78-.....Attorney 3
J.D., University of Iowa, 1978
DANIEL J. FAY, 4/66-.....Attorney 3
J.D., University of Iowa, 1965
WILLIAM A. HAAS, 10/84-.....Attorney 3
J.D., Drake University, 1982
ALICE J. HYDE, 1/81-.....Attorney 3
J.D., University of Iowa, 1978
RONALD C. POLLE, 8/81-.....Attorney 3
J.D., Drake University, 1979
BEN A. STEAD, 8/81-.....Attorney 3
J.D., University of Kansas, 1974
LEO J. STEFFEN, 10/72-.....Commerce Solicitor
J.D., University of Iowa, 1962
GARY D. STEWART, 7/74-.....Attorney 3
J.D., University of Iowa, 1969
ALEXIS K. WODTKE, 6/82-.....Attorney 3
J.D., Drake University, 1978
MARY L. AUGE, 3/82-.....Utility Analyst II
CHRISTINE A. COLLISTER, 5/88-.....Senior Utility Analyst

MARK E. CONDON, 11/88- ..... Utility Specialist
DAVID S. HABR, 10/87- ..... Utility Administrator I
JOYETTE D. HENRY, 4/88- ..... Utility Analyst I
SHEILA A. JONES, 6/88- ..... Utility Analyst I
CLARO N. MARTINEZ, 11/87- ..... Law Clerk
LEO J. STEFFEN, JR., 10/72- ..... Commerce Solicitor
ANN E. WALKER, 5/88- ..... Law Clerk
ARTHUR E. ZAHLLER, 12/87- ..... Utility Specialist
KAREN M. GOODRICH-FINNEGAN, 7/76- ..... Secretary
ANN M. KREAGER, 11/84- ..... Secretary

CONSUMER PROTECTION

RICHARD L. CLELAND, 4/79- ..... Division Head
J.D., University of Iowa, 1978
SUSAN BARNES, 4/84- ..... Assistant Attorney General
J.D., William and Mary, 1978
MICHAEL K. BOTTS, 4/85-1/87 ..... Assistant Attorney General
J.D., Drake, 1983
WILLIAM L. BRAUCH, 7/87- ..... Assistant Attorney General
J.D., University of Iowa, 1987
STEVEN FORITANO, 8/88- ..... Assistant Attorney General
J.D., University of Iowa, 1981
CYNTHIA A. FORSYTHE, 7/88- ..... Assistant Attorney General
J.D., University of Iowa, 1988
RAYMOND H. JOHNSON, 7/87- ..... Assistant Attorney General
J.D., University of Iowa, 1986
PETER R. KOCHENBURGER, 8/88- ..... Assistant Attorney General
J.D., Harvard, 1986
LINDA T. LOWE, 8/79-7/88 ..... Assistant Attorney General
J.D., University of Iowa, 1979
STEVEN M. ST. CLAIR, 5/87- ..... Assistant Attorney General
J.D., University of Iowa, 1978
TERRENCE M. TOBIN, 7/83-5/87 ..... Assistant Attorney General
J.D., Georgetown University, 1982
EUGENE R. BATTANI, 5/77-8/88 ..... Investigator
KATHLEEN C. BURDOCK, 10/84-1/88 ..... Investigator
DEBRA J. GILLIAM, 10/84-5/87 ..... Investigator
MARJORIE A. LEEPER, 7/82- ..... Investigator
LISE D. LUDWIG, 5/85- ..... Investigator
JACQUELINE M. MCCANN, 5/87- ..... Investigator
HOLLY G. MERZ, 10/88- ..... Investigator
DEBRA A. MOORE, 12/84- ..... Investigator
NORMAN NORLAND, 1/80- ..... Investigator
JAMES M. STROHMAN, 2/88- ..... Investigator
NANCY L. VERNON, 6/87- ..... Investigator
JANICE M. BLOES, 3/78- ..... Legal Secretary
M. SUSAN CONREY, 6/86- ..... Legal Secretary
CHERYL A. FREEMAN, 4/69-8/87 ..... Legal Secretary
MARILYN W. RAND, 10/69- ..... Legal Secretary
KATHERINE SMITH, 3/84- ..... Legal Secretary
RUTH C. WALKER, 2/79- ..... Legal Secretary
RHONDA J. CLYCE, 11/87- ..... Secretary/Receptionist

CRIMINAL APPEALS

ROXANN M. RYAN, 9/80-.....Division Head
J.D., University of Iowa, 1980
AMY M. ANDERSON, 7/88-..... Assistant Attorney General
J.D., University of Iowa, 1988
RICHARD J. BENNETT, 6/86-.....Assistant Attorney General
J.D., University of Iowa, 1978
BRADLEY V. BLACK, 7/86-2/87 .....Assistant Attorney General
J.D., University of Iowa, 1986
ANN E. BRENDEN, 3/85- .....Assistant Attorney General
J.D., Drake, 1981
PAMELA GREENMAN DAHL, 7/84-4/88 .....Assistant Attorney General
J.D., University of Iowa, 1984
JULIE A. HALLIGAN, 7/87-.....Assistant Attorney General
J.D., University of Iowa, 1987
LONA J. HANSEN, 7/77-1/88 .....Assistant Attorney General
J.D., University of Iowa, 1976
BRUCE KEMPKES, 9/86-.....Assistant Attorney General
J.D., University of Iowa, 1980
THOMAS D. McGRANE, 6/71- .....Assistant Attorney General
J.D., University of Iowa, 1971
CHRISTIE J. SCASE, 7/85- .....Assistant Attorney General
J.D., Drake, 1985
SHERYL A. SOICH, 2/88-.....Assistant Attorney General
J.D., Drake, 1987
MARK J. ZBIEROSKI, 3/87- .....Assistant Attorney General
J.D., Drake, 1986
SHONNA K. BURNS, 5/81- .....Legal Secretary
CHRISTY J. FISHER, 1/67-.....Legal Secretary
SHERILYN S. ZIMMERMAN, 2/87- .....Legal Secretary
DIANE DUNN, 10/88- .....Secretary/Receptionist

ENVIRONMENTAL LAW

JOHN P. SARCONE, 3/79-.....Division Head
J.D., Drake, 1975
DAVID L. DORFF, 4/85- .....Assistant Attorney General
J.D., Drake, 1982
ELIZABETH J. LORENTZEN, 10/83-2/87 .....Assistant Attorney General
J.D., Drake, 1983
STEVEN G. NORBY, 11/79-11/87 .....Assistant Attorney General
J.D., University of Iowa, 1979
ELIZA J. OVROM, 7/79- .....Assistant Attorney General
J.D., University of Iowa, 1979
DAVID R. SHERIDAN, 5/87- .....Assistant Attorney General
J.D., University of Iowa, 1978
MICHAEL H. SMITH, 9/84-.....Assistant Attorney General
J.D., University of Iowa, 1977
KAREN J. GOSLIN, 6/86-.....Legal Secretary
KIMBERLY K. PEACOCK, 6/86-4/87.....Legal Secretary
ROXANNE C. PETERSEN, 5/79- .....Legal Secretary

FARM

TAM B. ORMISTON, 1/79-.....Division Head
J.D., University of Iowa, 1974
TIMOTHY D. BENTON, 7/77-.....Assistant Attorney General
J.D., University of Iowa, 1977
LYNETTE A. DONNER, 10/86-.....Assistant Attorney General
J.D., Drake, 1984
STEPHEN H. MOLINE, 6/86-.....Assistant Attorney General
J.D., University of Iowa, 1986
STEVEN P. WANDRO, 11/88-.....Assistant Attorney General
J.D., University of Iowa, 1984
HARRY E. CRIST, 7/85-.....Investigator
CHARLES G. RUTENBECK, 12/74-.....Investigator
BEVERLY A. CONREY, 4/85-.....Legal Secretary

HEALTH

MAUREEN McGUIRE, 7/83-.....Assistant Attorney General
J.D., University of Iowa, 1983
ROSE A. VASQUEZ, 9/85-.....Assistant Attorney General
J.D., Drake, 1985

HUMAN SERVICES

GORDON E. ALLEN, 8/82-.....Division Head
J.D., University of Iowa, 1972
SUZIE A. BERREGAARD, 7/87-.....Assistant Attorney General
J.D., Drake, 1987
SARAH J. COATS, 2/84-.....Assistant Attorney General
J.D., University of Iowa, 1983
JEAN L. DUNKLE, 10/75-.....Assistant Attorney General
J.D., University of Iowa, 1975
KRISTIN W. ENSIGN, 10/88-.....Assistant Attorney General
J.D., Drake, 1983
ROBERT J. GLASER, 7/86-.....Assistant Attorney General
J.D., Creighton University, 1978
LUCILLE M. HARDY, 5/86-.....Assistant Attorney General
J.D., University of Iowa, 1985
DANIEL W. HART, 7/85-.....Assistant Attorney General
J.D., University of Iowa, 1983
MARK A. HAVERKAMP, 6/78-.....Assistant Attorney General
J.D., Creighton, 1976
PATRICIA M. HEMPHILL, 2/83-.....Assistant Attorney General
J.D., Drake, 1981
ROBERT R. HUIBREGTSE, 6/75-.....Assistant Attorney General
L.L.B., Drake, 1963
LAYNE M. LINDEBAK, 7/78-.....Assistant Attorney General
J.D., University of Iowa, 1979
VALENCIA V. McCOWN, 6/83-.....Assistant Attorney General
J.D., University of Iowa, 1983
E. DEAN METZ, 5/78-.....Assistant Attorney General
L.L.B., Drake, 1955
KATHRINE MILLER-TODD, 1/85-.....Assistant Attorney General
J.D., Wake Forest, 1974

CANDY S. MORGAN, 9/79- ..... Assistant Attorney General
J.D., University of Iowa, 1973
JOHN M. PARMETER, 11/84- ..... Assistant Attorney General
J.D., Drake, 1982
CHARLES K. PHILLIPS, 8/84- ..... Assistant Attorney General
J.D., Columbia University (NY), 1982
STEPHEN C. ROBINSON, 8/73- ..... Assistant Attorney General
L.L.B., Drake, 1962
ANURADHA VAITHESWARAN, 5/88- ..... Assistant Attorney General
J.D., University of Iowa, 1984
JANE A. McCOLLOM, 10/76- ..... Legal Secretary
KATHLEEN A. PITTS, 5/87- ..... Legal Secretary

INSURANCE

FRED M. HASKINS, 6/72- ..... Assistant Attorney General
J.D., University of Iowa, 1972

LOTTERY

SHERIE BARNETT, 7/83 ..... Assistant Attorney General
J.D., Drake, 1981

PROSECUTING ATTORNEYS TRAINING COUNCIL

DONALD R. MASON, 9/80- ..... Exec. Dir., Training Coordinator
J.D., University of Iowa, 1976
KAY L. CHOPARD, 3/86- ..... Assistant Attorney General
J.D., University of Iowa, 1983
ANN M. CLARY, 1/88- ..... Legal Secretary
JONI M. KLAASSEN, 9/85- ..... Legal Secretary

PUBLIC SAFETY

GARY L. HAYWARD, 6/76- ..... Assistant Attorney General
J.D., University of Iowa, 1976
JANET L. PETERSEN, 3/88- ..... Assistant Attorney General
J.D., University of Iowa, 1985
IDONA S. PATTON, 7/88- ..... Legal Secretary

REVENUE

HARRY M. GRIGER, 1/67-8/71, 12/71- ..... Division Head
J.D., University of Iowa, 1966
THOMAS M. DONAHUE, 6/78- ..... Assistant Attorney General
J.D., Drake, 1974
GERLAD A. KUEHN, 9/71- ..... Assistant Attorney General
J.D., Drake, 1967
MARCIA E. MASON, 7/82- ..... Assistant Attorney General
J.D., University of Iowa, 1982
JAMES D. MILLER, 12/79-4/82,10/86- ..... Assistant Attorney General
J.D., Drake, 1977

SPECIAL LITIGATION

DEAN A. LERNER, 2/83- ..... Assistant Attorney General
J.D., Drake, 1981
ROBERT P. BRAMMER, 11/78- ..... Investigator
DAVID H. MORSE, 3/78- ..... Investigator
LAUREN N. MARRIOTT, 8/84- ..... Legal Secretary

TORT CLAIMS

CRAIG A. KELINSON, 12/86- ..... Division Head
J.D., University of Iowa, 1976
GREG H. KNOPLOH, 5/87- ..... Assistant Attorney General
J.D., University of Iowa, 1978
CHARLES S. LAVORATO, 9/83- ..... Assistant Attorney General
J.D., Drake, 1975
ELEANOR E. LYNN, 7/83-6/85; 7/87- ..... Assistant Attorney General
J.D., University of Iowa, 1983
JOANNE L. MOELLER, 8/84- ..... Assistant Attorney General
J.D., University of Iowa, 1984
SHIRLEY ANN STEFFE, 9/79- ..... Assistant Attorney General
J.D., University of Iowa, 1979
MATTHEW W. WILLIAMS, 7/83-6/87 ..... Assistant Attorney General
J.D., University of Nebraska, 1983
ROBERT D. WILSON, 12/86- ..... Assistant Attorney General
J.D., University of Iowa, 1981
KAREN M. LIKENS, 8/77- ..... Investigator
CATHLEEN L. RIMATHE, 8/78- ..... Investigator
CYNTHIA L. BAKER, 8/84- ..... Legal Secretary
LINDA S. HURST, 3/86- ..... Legal Secretary
MARCIA A. JACOBS, 8/82- ..... Legal Secretary
LORELL SQUIERS, 9/87- ..... Legal Secretary

TRANSPORTATION

CHARLES J. KROGMEIER, 5/86- ..... Division Head
J.D., Drake, 1974
JOHN W. BATY, 9/72- ..... Assistant Attorney General
J.D., Drake, 1967
ROBERT P. EWALD, 2/81- ..... Assistant Attorney General
J.D., Washburn University, 1980
DAVID A. FERREE, 3/84- ..... Assistant Attorney General
J.D., University of Iowa, 1979
ROBIN FORMAKER, 4/84- ..... Assistant Attorney General
J.D., University of Iowa, 1979

CRAIG M. GREGERSEN, 2/79-2/87 ..... Assistant Attorney General
J.D., University of Iowa, 1978
MARK HUNACEK, 7/82- ..... Assistant Attorney General
J.D., Drake, 1981
ARDETH T. METIER, 7/86- ..... Assistant Attorney General
L.L.B., J.D., University of Iowa, 1951
RICHARD E. MULL, 7/78- ..... Assistant Attorney General
J.D., University of Iowa, 1977
CAROLYN J. OLSON, 8/87- ..... Assistant Attorney General
J.D., Drake, 1984
DANIEL W. PERKINS, 11/84- ..... Assistant Attorney General
J.D., University of Washington, 1982
MERRELL M. PETERS, 7/84- ..... Assistant Attorney General
J.D., Drake, 1984
CARMEN C. MILLS, 7/82-1/86; 1/87- ..... Paralegal
MICHAEL J. RAAB, 1/85- ..... Paralegal
CAROLYN L. SHOJAAT, 4/83- ..... Paralegal
DAVETTE D. SMITH, 8/86- ..... Paralegal

ATTORNEY GENERAL OPINIONS

JANUARY 1987
TO
DECEMBER 1988

JANUARY 1987

January 6, 1987

STATE OFFICERS AND DEPARTMENTS: Commission On Aging And Area Agencies On Aging. Sale Of Insurance By Area Agencies On Aging. 42 U.S.C. § 3001 *et seq.*; Iowa Code §§ 249D.31, 249D.32 and 249D.33 (1987). An area agency on aging has no authority to conduct or own an insurance business in its capacity as a governmental agency. The area agency on aging may not take actions which cause it to appear that an insurance business is carried on under governmental authority. An insurance business may be incompatible with the area agency's role as a quasi-governmental body. (Osenbaugh to Tynes, 1-6-87) #87-1-1(L)

January 6, 1987

TAXATION: Property Acquisitions Under The Municipal Housing Law Of Iowa Code Ch. 403A (1985). Iowa Code §§ 403A.10, 427.18 and 441.46 (1985). Sections 427.18 and 441.46 impose property tax for the full fiscal year on property acquired during the fiscal year under § 403A.10 if the property was taxable on July 1 of that fiscal year. (Miller to Mertz, Marion County Attorney, 1-6-87) #87-1-2(L)

January 6, 1987

COUNTIES AND COUNTY OFFICERS: Veteran Affairs Commission; Combination Of Veteran Affairs Commission With Other County Offices. Iowa Code ch. 250 (1985); §§ 250.1; 250.3; 250.6; 250.7; 331.321(4); and 331.323(1). (1) The legislature intended that the director, rather than the commission, of veteran affairs be one of the offices which may be combined with another county office under § 331.323(1). Such a combination is not a violation of § 250.12, which prohibits duties of the commission from being placed under any other county agency if the commission retains all final decision-making authority over commission business; (2) completion of paperwork by another county office for final action by the commission is not a violation of § 250.12; (3) a petition is required to combine offices under § 331.323(1); the board of supervisors has no authority to combine offices on its own motion; and (4) the commission, and not the board of supervisors, has original jurisdiction over a decision whether to terminate one of its employees; that employee then has a right to appeal to the board of supervisors under § 331.321(4). (Weeg to Poncy, State Representative, 1-6-87) #87-1-3(L)

January 7, 1987

COUNTIES AND COUNTY OFFICERS: Clerk of District Court. Iowa Code § 633.31(2)(k) (1985). The Clerk of District Court should assess fees as allowed by § 633.31 whenever a conservatorship is settled. No probate fee is charged where the conservator has merely commenced a lawsuit — or is being sued — and the assets of the estate are indeterminate. (Galenbeck to Poppen, Wright County Attorney, 1-7-87) #87-1-4(L)

January 7, 1987

ATTORNEY GENERAL: Code Editor: Editorial Changes; Effect Of Opinion Of The Attorney General. 1982 Iowa Acts, ch. 1217; Iowa Code §§ 14.13, 282.2 (1985). Editorial changes in the Code are not to be substantive. An Attorney General's opinion establishes the substantive interpretation of a Code section until it is overruled, revised, withdrawn upon consideration or upset by court decision. An editorial change contrary to the Attorney General's opinion interpreting the gender references in section 282.2 was an inadvertent substantive change, and is therefore void and of no effect. (Donner to Peeters, Director, Legislative Service Bureau, and Brown, Acting Code Editor, Legislative Service Bureau, 1-7-87) #87-1-5

Mr. Donovan Peeters, Director, Legislative Service Bureau and Ms. JoAnn Brown, Acting Code Editor, Legislative Service Bureau: I am in receipt of your letter to this office dated December 19, 1986, concerning editorial gender reference changes made in section 282.2 as it appears in the 1985 Code of Iowa. Specifically, your question was whether a prior Attorney General's opinion interpreting the gender references in the section takes precedence over the contrary editorial change made by the Code editor under a general mandate from the General Assembly. We conclude that in this case the prior interpretation takes precedence.

The gender change in section 282.2 was made in response to 1982 Iowa Acts, chapter 1217, which mandated that "the Code editor . . . shall edit the Code in order that words which designate one gender will be changed to reflect both genders . . . *The Code editor shall not make any substantive changes to the Code while performing the editorial work.*" [Emphasis added.] Substantially identical language was enacted as a permanent mandate by 1985 Iowa Acts, chapter 197, appearing in Iowa Code Supplement section 14.13(2) (1985). One of the original duties of the Code editor was and continues to be to "correct all manifest grammatical and clerical errors including punctuation *but without changing the meaning.*" Iowa Code Supplement section 14.13(1)(b) (1985). [Emphasis added.] Therefore, a substantive change is outside the scope of the authority of the Code editor.

Iowa Code section 282.2 (1983) provided:

> The parent or guardian whose child or ward attends school in any district of which *he* is not a resident shall be allowed to deduct the amount of school tax paid by *him* in said district from the amount of tuition required to be paid. [Emphasis added.]

The same language existed at the time 1968 Op.Att'yGen. 66 was issued, interpreting the "he" and "him" in section 282.2 to refer to the parent or guardian. However, the editorial change contained in the 1985 Code interpreted "he" to be "the child or ward" and "him" to be "the parent or guardian." At issue is the effect of this prior opinion and the nature of the change upon the law.

We have previously stated that opinions of the Iowa Attorney General "constitute a body of legal precedents having authority the same in kind, if not the same in degree, with decisions of the courts of justice, and administrative officers should regard them as law until they are withdrawn or overruled by the courts." 1930 Op.Att'yGen. 344, 345, quoting 2 *Thorton on Attorneys at Law* §728, page 1140. The Iowa Supreme Court has not ruled as to the effect of Attorney General opinions on the law in the absence of judicial precedent, but has consistently held that, while the opinions are not binding on the Court and are not entitled to the weight of precedent, they are to be carefully and respectfully considered. *In re Clausen's Estate*, 139 N.W.2d 196, 200 (Iowa 1965); *Bernklau v. Bennett*, 162 N.W.2d 432, 436 (Iowa 1968); *Unification Church v. Clay Central School Dist.*, 253 N.W.2d 579, 581 (Iowa 1977); *Bishop v. Iowa State Board of Public Instruction*, No. 85-1616 slip op. at 9 (Iowa Sup. Ct. Nov. 12, 1986).

Former Iowa Chief Justice Robert L. Larson, In Larson, *The Importance and Value of Attorney General Opinions*, 41 Iowa L.Rev. 351 (1956), stated that while compliance with an opinion is not compulsory in his view, "[i]n fact, by custom, if for no other reason in this state, such opinions are followed and relied upon as the law until they are overruled, revised, withdrawn upon consideration or upset by court decision." *Id.* at 361. He concluded that the logic sustaining respect for the doctrine of *stare decisis* is equally applicable to opinions of the Attorney General, and other officers of the state "are bound to respect and should follow [the opinion] until it is judicially overruled or changed by legislative action." *Id.* at 368.

Therefore, 1968 Op.Att'yGen. 66 is to be given careful consideration and should be respected as providing the substantive interpretation of Iowa Code section 282.2 (1983). Even in the absence of the opinion, the only judicial authority to observe the question of the gender references in section 282.2 provides for the substantive interpretation that "he" and "him" were both intended to refer to the parent or guardian. In *Hume v. Ind. School Dist.*, 164 N.W. 188 (Iowa 1917), cited in 1968 Op.Att'yGen. 66, the Court noted that the appellee contended that "he" refers to the parent or guardian, and stated that "[w]ithout determining the question, I am inclined to appellee's view on this point." *Id.* at 193-194. Although this is dicta, together with the opinion of the Attorney General, a substantive interpretation of the section exists. As there has been no direct legislative act taken in opposition to this interpretation, it is presumed that the legislature is satisfied with and acquiesces in the substantive interpretation. *General Mortgage Corp. of Iowa v. Campbell*, 138 N.W.2d 416, 421 (Iowa 1965).

As 1968 Op.Att'yGen. 66, together with *Hume*, established the substantive meaning of the pronouns "he" and "his" in section 282.2, the contrary editorial change was in fact an inadvertent substantive change, which was outside the scope of the authority of the Code editor and therefore void and of no effect.

The fact that the substantive editorial change was included in the published Code does not legitimize the change. The Code itself is not adopted by legislative act, and is only a compilation of the laws of Iowa. *Jones v. Mills*, 279 N.W. 97, 102 (Iowa 1938) (concurring opinion); *State v. Gute*, 106 N.W.2d 417, 418 (Iowa 1961). Without a manifest intent by the legislature to effect a substantive change, editorial changes have long been held to not affect the meaning of a statute. *Jones v. Mills*, 279 N.W. 97 (Iowa 1938); *General Mortgage Corp. of Iowa v. Campbell*, 138 N.W.2d 416 (Iowa 1965); *Hansen Ins. Co. v. Alamo Motel*, 264 N.W.2d 774 (Iowa 1978). In regard to section 282.2, there was no direct and deliberate action taken by the legislature to effect a substantive change.

In conclusion, we opine that the meaning of section 282.2 remains as established prior to the 1985 Code by 1968 Op.Att'yGen. 66 and *Hume*. The editorial change in section 282.2 in the 1985 Code is void and of no effect because it attempted a substantive change in the law outside the scope of the authority of the Code editor.

January 12, 1987

FINANCIAL INSTITUTIONS: Iowa Industrial Loan Law. Iowa Code §§536A.2(5) and 536A.5 (1985). The exclusion of savings and loan associations from coverage under chapter 536A does not prohibit a savings and loan association or its affiliate from holding an industrial loan company license. This opinion reverses 1972 Op.Att'yGen. 487. (Galenbeck to Richard D. Johnson, Auditor of State, 1-12-87) #87-1-6

Richard D. Johnson, Auditor of State: You have requested an opinion of this office whether an industrial loan company organized pursuant to Iowa Code chapter 536A (1985) may be affiliated with or subsidiary to a savings and loan association, bank, or other entity listed in §536A.5. As your letter notes, an opinion on this subject requires review and reconsideration of an earlier opinion of this office, 1972 Op.Att'yGen. 487 (Haesemeyer to Yenter, Auditor of State, 6-21-72, #72-6-16), and a letter of clarification dated January 10, 1973, regarding that opinion. The letter of clarification is addressed to Representative Don Alt from R. E. Haesemeyer, Solicitor General.

Section 536A.2(5) provides a definition of "industrial loan company":

> "*Industrial Loan Company*" shall mean a corporation *operating* under the provisions of this chapter and engaged in the business of loaning money to be repaid in one payment or in weekly, monthly or other periodic installments and the charging, receiving or requiring of interest, discount, fees, compensation or charges of whatever nature or kind for the use

of such money and for the services to be rendered to the borrower in connection with the loan. *The term "Industrial Loan Company" shall not include those businesses specifically exempted in section 536A.5.* (emphasis added to last sentence). As noted in §536A.2(5), exemptions from the chapter are delineated in §536A.5:

> This chapter does not apply to any of the following:
>
> 1. *Businesses organized or operating as permitted under the authority of a law of this state or the United States relating to* banks, trust companies, building and loan associations, *savings and loan associations,* insurance companies, regulated loan companies organized under chapter 536, or credit unions.
>
> 2. Persons that make loans only on notes secured by first mortgages on real estate.
>
> 3. Licensed real estate brokers or salespersons.
>
> 4. A person engaged exclusively in the business of purchasing commodity financing or commercial paper.
>
> 5. A pawnbroker.
>
> 6. A person engaged in the mercantile business.
>
> 7. Loans made to a domestic or foreign corporation. (emphasis added)

The issue presented by your opinion request is what the underscored exemption provision of §536A.5(1) was intended to achieve. First, the language may simply be an attempt to distinguish industrial loan company regulation from regulation of other businesses. For example, a savings and loan association is regulated by other provisions of the Iowa Code, specifically chapter 534. Section 536A.5 may be a directive that no additional regulation of savings and loan associations is intended by the chapter.

An alternative reading of §536A.5 attributes to the section a mandate that "banks, trust companies, building and loan associations, savings and loan associations," etc. may not hold a chapter 536A industrial loan license. This second position was adopted in the Attorney General's opinion noted above, 1972 Op.Att'yGen. 487. The 1972 opinion concludes that neither the entities listed in §536A.5 nor related business entities may possess an industrial loan company license. This conclusion rests on the statutory declaration of §536A.2(5): "The term 'Industrial Loan Company' shall not include those businesses specifically exempted in section 536A.5."

Although we are reluctant to reverse earlier opinions of this office (*see* 80 Op.Att'yGen. 107), the 1972 opinion, 1972 Op.Att'yGen. 487, is appropriately overruled for the following reasons:

1. Established rules of statutory construction provide that the "usual and ordinary meaning" is to be attributed to legislation. *Sommers v. Iowa Civil Rights Com'n,* 337 N.W.2d 470, 472 (Iowa 1983). Applying this standard to Iowa Code §536A.2(5), one concludes the definition of industrial loan companies — which are to be regulated by the statute — does not include savings and loan associations for the reason savings and loan associations are regulated by chapter 534. Iowa Code chapters 534 and 536A provide complete, individual regulatory schemes for two categories of financial institutions. There is no apparent reason why a savings and loan association should conform to industrial loan company regulations. Avoidance of a statutory construction which would result in over-lapping regulation of financial institutions respects the intent and effectuates the purpose of the legislation.

2. No "gloss" on Iowa Code §536A.2(5) (1986) is necessary; nor is it appropriate in the context of the section. The chapter regulates principally *what* an industrial loan company may or may not do rather than *who* or *which business entity* may obtain an industrial loan license. The fact a savings and loan association

is not definitionally equivalent to an industrial loan company *does not preclude* the savings and loan association from applying for a license to own and operate an industrial loan company.

3. Consistent with the 1972 opinion of this office, no Iowa or federal chartered savings and loan association has obtained an Iowa industrial loan license. However, numerous businesses licensed pursuant to Iowa Code chapter 536 ("Iowa Regulated Loan Act") possess industrial loan licenses. Dual licensing occurs despite the fact the same provision of § 536A.5 which mentions savings and loan associations also mentions "small loan companies organized under the provisions of chapter 536. . . ." Thus, while savings and loan associations have been denied ownership of industrial loan licenses, chapter 536 regulated loan companies have been permitted to own industrial loan licenses. This inconsistency in the interpretation of chapter 536A suggests, at least, that no practical objection to dual licensing exists.

In summary, after review of Iowa Code chapter 536A (1985), we conclude that savings and loan associations — and their subsidiaries — may hold an industrial loan license. Our conclusion reverses the Attorney General's opinion found at 1972 Op.Att'yGen. 487.

January 12, 1987

MUNICIPALITIES: Home Rule Authority, Payment Of Punitive Damages. Iowa Const., art. III, §§ 31, 38A, 39A; Iowa Code §§ 613A.4(5), 613A.8 (1985). A municipality is not prohibited from indemnifying an employee for an award of punitive damages. (Osenbaugh to Stream, Mahaska County Attorney, 1-12-87) #87-1-7(L)

January 12, 1987

STATE OFFICERS AND DEPARTMENTS: Iowa Sheep And Wool Promotion Board. Iowa Code sections 25A.2(1), 25A.2(3), 25A.2(5)(b), 25A.21 (1985); Iowa Code Supp. sections 182.2, 182.4(1), 182.4(2), 182.5, 182.11, 182.12, 182.13, 182.14, 182.16, 182.18, 182.20, 182.21 (1985); 1985 Iowa Acts, chapter 199, section 5; 1985 Iowa Acts chapter 207; 28 U.S.C. § 2671. The Iowa Sheep and Wool Promotion Board is not a state agency under § 25A.2(1), so that Board members are not state employees to whom the state owes a duty to defend and indemnify under § 25A.21. An employee of an organization or entity which receives funds from the Board may not serve as a Board member under § 182.13. (Benton to Cochran, 1-12-87) #87-1-8

Mr. Dale Cochran, Iowa Secretary of Agriculture: Your predecessor in office requested an opinion of the Attorney General on two questions concerning the Iowa Sheep and Wool Promotion Board. As the request notes, the Board has been elected to administer funds generated by the mandatory sheep and wool checkoff which went into effect shortly after July 1, 1986. The Board joins the various other commodity groups established to promote their particular agricultural commodity. The first question concerns the status of the Board members under Iowa Code Chapter 25A (1985), the Iowa Tort Claims Act. Your predecessor asked specifically,

> Are Board members "employees of the state" as that term is used in the State Tort Claims Act and therefore entitled to the protections and benefits of that Act?
>
> This question assumes importance because of the State's duty under § 25A.2l to defend, indemnify and hold harmless its employees against claims as defined in § 25A.2(5)(b).
>
> Section 25A.2(3) in pertinent part defines an employee of the state as:
>
> . . .any one or more officers, agents, or employees of the general assembly, and persons acting on behalf of the state or any state agency in any official capacity, temporarily or permanently in the service of the state

> of Iowa, whether with or without compensation but does not include a contractor doing business with the state.

Under §25A.2(1), a state agency includes:

> . . .all executive departments, agencies, boards, bureaus, and commissions of the state of Iowa, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the state of Iowa, whether or not authorized to sue and be sued in their own names.

Given these definitions, the determination of whether the members of the Sheep and Wool Promotion Board are "employees of the state" must turn on the nature of the Board itself, that is, whether the Board falls within the definition of a state agency under §25A.2(1). If the Board is a state agency for purposes of this statute, its officers, agents and persons acting on its behalf fall within the coverage of Chapter 25A.

The General Assembly in 1985 Iowa Acts, chapter 207 passed legislation "creating" an Iowa Sheep and Wool Promotion Board. The legislation, codified at Iowa Code Supp. ch. 182 (1985), establishes the procedure through which the Board comes into existence and delineates its function. Section 182.2 provides that the Secretary of Agriculture shall call a referendum on the question of whether the Board should be established, and whether to impose an assessment on sheep and wool products sold by producers upon receipt of a petition signed by at least fifty producers in each district. If a majority of voters favor establishing the Board and imposing the assessment, ". . .the Iowa sheep and wool promotion board shall be established." §182.4(1). The establishment of the Board and the imposition of the assessment may be terminated by an election called by the Secretary upon receipt of a petition from twenty-five producers in each district. §182.4(2). The letter indicates that a referendum has in fact been held establishing the Board and that the assessment has gone into effect.

The Board members to whom the letter refers are nine producers, one from each district. §182.5. Section 182.11 states that:

> The purposes of the board shall be to:
>
> (1) Enter into contracts or agreements with or make grants to recognized and qualified agencies, individuals, or organizations for development and carrying out of research and education programs directed toward better and more efficient production, marketing, and utilization of sheep and wool and their products.
>
> (2) Provide methods and means, including, but not limited to, public relations and other promotion techniques for the maintenance of present markets.
>
> (3) Assist in development of new or larger markets, both domestic and foreign, for sheep and wool and their products.

The Board has various powers, including the employment of assistants and professional counsel and paying their salaries, entering into contracts, adopting rules, and establishing accounts in financial institutions to hold Board moneys. §182.13.

The assessment set by the Board is imposed on the producer at the time of delivery to the first purchaser, who deducts the assessment from the price paid to the producer at the time of sale. §182.14. The purchaser remits the assessment to the Board not later than thirty days following each calendar quarter during which the assessment was collected. §182.16. The amounts collected from the assessment are deposited in an account established pursuant to §182.12(9). Section 182.18 states in part:

> Moneys collected under this chapter are subject to audit by the auditor of the state and shall be used by the Iowa sheep and wool promotion board first for the payment of collection and refund expenses, second

for payment of the costs and expenses arising in connection with conducting referendums, and third for the purposes identified in section 182.11.

The Secretary of Agriculture is given broad powers in § 182.20 to examine books, records and accounts and to conduct administrative hearings in connection with the administration of the chapter. A person who willfully violates a provision of Chapter 182 is guilty of a simple misdemeanor. § 182.21.

The General Assembly in enacting Chapter 182 did not specify whether it intended the Board to be a state agency. By contrast, the legislature provided in 1985 Iowa Acts, chapter 199, section 5 that the Iowa Pork Producers Council is a state agency, "only for the purposes of chapter 21 and 22." In the absence of clear legislative direction the answer to the first question is less than clear-cut. From our overview of Chapter 182, it seems apparent that there is a close relationship between the Board and the Secretary of Agriculture, and that the Board itself is of a part-public, part-private nature. Our first approach in determining the Board's status under Chapter 25A should be to examine the state of the law in this regard concerning Iowa's other commodity promotion groups.

The Pork Producer's Council, Turkey Marketing Council, Soybean Promotion Board and Corn Promotion Board all have provisions providing specifically that they are not state agencies. Each of these councils or boards perform functions similar to the Sheep and Wool Promotion Board in that they, after a referendum, levy an excise tax or checkoff with the funds utilized to promote the particular commodity. In addition to these statutory provisions, there is a body of previous Attorney General opinions pertaining to the nature of commodity promotion boards. We decided in 1980 Op. Att'yGen. 639 that members of the Soybean Promotion Board and Beef Cattle Producer's Association do not fall within Chapter 25A. While not in a formal opinion, we stated to your predecessor in a letter of September 6, 1984, our view that the State Dairy Association is not a state agency under § 25A.2(1) so that its employees are not state employees despite the absence of any exclusionary language in Chapter 178. In 1966 Op. Att'yGen. 373, 375, we decided that employees of the Dairy Association, Beef Cattle Association, Swine Producers Association, and Sheep Association were not state employees subject to the rules and regulations of the State Personnel Director. For purposes of the Open Meetings law, then Iowa Code Chapter 28A (1979), we decided in 1979 Op. Att'yGen. 183 that of all the commodity promotion boards, only the Soybean and Corn Promotion Boards were "governmental bodies" under that statute. We described the remainder generally to be "organized and created as entities separate from state government."

There is no specific test which emerges from these opinions which we can utilize to decide whether the Board is a Chapter 25A state agency. In deciding whether mental health advocates are state employees, we adopted in 1984 Op. Att'yGen. 137, the test utilized by the Iowa Supreme Court in *Gabrielson v. State*, 342 N.W.2d 867, 869 (Iowa 1984), for determining whether the relationship between employer and employee exists.[1] However, here the prefatory question concerns the status of the Board itself under § 25A.2(1). In construing Chapter 25A, the Iowa Court has turned to the Federal Tort Claims Act, 28 USC § 2671

[1] In Gabrielson, 342 N.W.2d at 870, the Court held that a district court shorthand reporter was a state employee under the State's disability statute by examining the following criteria: (1) the right of selection, or to employ at will; (2) responsibility for the payment of wages by the employer; (3) the right to discharge or terminate the relationship; (4) the right to control the work; and (5) is the party sought to be held as the employer the responsible authority in charge of the work or for whose benefit the work is performed.

et. seq., and given great weight to relevant federal decisions construing identical or similar federal statutory provisions. *Hyde v. Buckalew*, 393 N.W.2d 800, 802-803 (Iowa 1986). Accordingly, we can look for guidance in fashioning our analysis to the relevant provisions of the federal law.

The definitional section of the Federal Act parallels the language within §25A.2(l) by stating at 28 USC §2871 that:

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term 'Federal agency' includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.
>
> 'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

There are several Federal cases which have construed this provision in examining whether particular entities are federal agencies so that their employees are federal employees. The leading case is *United States v. Orleans*, 425 U.S. 807, 96 S.Ct. 1971, 48 L.Ed.2d 390 (1976), which determined whether community action agencies funded under the Economic Opportunity Act of 1964 were federal instrumentalities or agencies for purposes of Federal Tort Claims Act liability. The Court discounted the fact that the entities were federally funded and had to comply with federal regulations. Instead the Court focused on the extent to which the Federal Government supervised their day-to-day operations in holding that community action agencies were not federal agencies or instrumentalities. *Orleans*, 425 U.S. at 819. The Court noted that the critical element in distinguishing an agency from a contractor was the power of the Federal Government "to control the detailed physical performance of the contractor." *Orleans* 425 U.S. at 814. We followed the *Orleans* decision in 1978 Op. Att'yGen. 449, where we decided that state-funded Area Agencies on the Aging were not state agencies, so that volunteers for these organizations were not state employees under Chapter 25A.

The Federal Courts have also examined other factors in determining whether an entity is a federal agency within the meaning of the Act. For example, in *Pearl v. United States*, 230 F.2d 243, 245 (10th Cir. 1956), the Court held that the Civil Air Patrol was not a federal agency under §2671 because it was not a wholly-owned or mixed-ownership government corporation. The Court in *Goddard v. District of Columbia Redevelop. Land Agency*, 287 F.2d 343, 345 (D.C. Cir. 1961), *cert. den.* 366 U.S. 910, 81 S.Ct. 1085, 6 L.Ed.2d 235 (1961), examined the extent to which the entity involved was funded by Federal Government and whether the entity furthered the policy of the United States.

While these criteria may be helpful, the critical factor in our analysis is the existence of the State's control over the "detailed physical performance" and "day-to-day" operation of the Board. *Lewis v. United States*, 680 F.2d 1239, 1240 (9th Cir. 1982). It is clear under Chapter 182 that the Secretary has a definite role with respect to the Board. The Secretary calls the elections by which the Board comes into existence and by which it can be terminated. §182.4. In addition, the Secretary may examine books and records and conduct hearings in conjunction with the administration of the chapter. §182.20. The moneys collected through the assessment process are subject to audit by the State Auditor, and must be expended for specified purposes. §182.18. However, the fact that an entity is subject to governmental regulation alone is insufficient to render the entity a government agency. *Orleans*, 425 U.S. at 815. Of more

importance we think, is whether the performance and day-to-day operation of the Board is controlled by the State.

Even given the close relationship with the Secretary, we are convinced that the Board controls its own physical performance and day-to-day operation. It is the Board, and not the Secretary, which enters into contracts and makes grants to qualified organizations or individuals for the development of research and educational programs. Presumably the Board determines which organizations or individuals will best accomplish these purposes. It is the Board which decides on the methods of public relations techniques for both present and new markets. We note also that the Board hires its own employees, including counsel, and that the payment of Board members' expenses comes from the monies generated by the assessment and not from State funds. While the Secretary and the Auditor clearly play a role in the administration of Chapter 182, the Board makes the actual day-to-day decisions on how best to promote sheep and wool products and the other routine duties imposed under that statute. There is no suggestion in the law that the Secretary exercise any veto-like authority over any of these decisions. There is also no suggestion that the Board is subject to the Department of General Services, or that the Board members or their employees are subject to the State's Department of Personnel. The Board exercises sufficient independence over its day-to-day operations so that it does not act as an agency or instrumentality of the State.

Our conclusion is supported by a comparison with the other commodity promotion group statutes. As we noted, several of those statutes have provisions stating that the entities are not state agencies, including the legislation creating the Pork Producers Council, passed during the same session as the bill concerning the Board. 1985 Iowa Acts, chapter 199, section 5. In examining Chapter 182, we must construe its provisions so as to produce a harmonious body of legislation. *State v. Rich*, 305 N.W.2d 739, 745 (Iowa 1981). To hold that the Board is a state agency under Chapter 25A would make it the only commodity group to be so viewed. It would be incongruous to extend Chapter 25A to one Board and not the others. The better result in our view is to conclude that the Board is not within Chapter 25A and to defer to the legislature to decide to extend Chapter 25A to the various commodity groups. The Sheep and Wool Promotion Board is not a state agency under § 25A.2(1) and its Board members are accordingly not state employees whom the State must defend and indemnify.

The second question concerns § 182.13 and the eligibility of one Board member. Section 182.13 states in full:

> Members of the board may receive payment for their actual expenses and travel in performing official board functions. Payment shall be made from amounts collected from the assessment. *No member of the board shall be a salaried employee of the board or any organization or agency receiving funds from the board.* The board shall meet at least once every three months, and at other times it deems necessary. (Emphasis supplied).

The request indicates that one Board member is an employee of the diagnostic laboratory of the Veterinarian College at Iowa State University. Several years ago the Iowa Sheep Producer's Association had funded a research project at the school, although the Board member was not involved in that project. Your predecessor asked whether a similar type of project would now be allowed to receive funding from the Board.

The language within § 182.13 is straight-forward and unambiguous. The Board member may not serve on the Board if that person is an employee of any organization receiving funds from the Board. This result is clear, whether or not the board member is involved as an employee in the particular project being funded.

If the Board is not granting funds to Iowa State, there would not be a problem at present. If the Board determines in the future to grant funds to Iowa State in connection with any of its purposes, the law is clear that the Board member involved may not serve in the capacity of a Board member while an employee of the university.

January 13, 1987

CIVIL RIGHTS: State Contract Compliance Requirements. Iowa Code §§ 19B.7, 73.16, as amended by 1986 Iowa Acts, ch. 1245, §§ 226, 832. Section 19B.7 requires that the Office of Management establish a contract compliance policy mandating nondiscrimination in and encouragement of the use of minority and women businesses by programs benefiting from state aid. This policy would apply to local governments which are benefiting from state financial assistance. Local governments receiving funds under Iowa Code chapter 315 are subject to § 19B.7. It is within the discretion of the Office of Management whether to require state agencies to develop the specifics of the procedures which will conform to § 19B.7 or to require state agencies to require the programs receiving state aid to develop those specifics. Section 19B.7 does not affect federal block grants to local governments. The set-aside provisions of § 73.16 do not apply to governing bodies of counties, townships, school districts, or cities. (Autry to Groninga, State Representative, 1-13-87) #87-1-9(L)

January 15, 1987

CONSTITUTIONAL LAW: Counties; Cities; Public Hospitals. Art. III, §§ 38A, 39A; Art. VIII, § 3, § 4; Art. XI, § 3, Const. of Iowa; ch. 28E, 331, 347, 347A, 364; §§ 28E.4, 97A.7, 97B.7, 331.304, 347.13, 347.14, 347A.1, 364.5, 380.1, 384.24, 384.26, 411.7, 452.10, 453.1, 453.16, 602.9111, Code of Iowa (1985). It is constitutionally permissible for political subdivisions to purchase stock in private corporations. However, cities and counties are presently preempted by statute from purchasing corporate stock, except for pension trust funds. County hospitals cannot purchase stock absent express statutory approval, which does not exist. City hospitals have only those powers delegated them by their respective cities and, thus, are preempted from purchasing corporate stock to the same extent as cities are. County and city hospitals may form an inter-governmental entity pursuant to ch. 28E, but such an entity cannot be formed as a private corporate entity. (Kirlin to Chapman, State Representative, 1-15-87) #87-1-10

The Honorable Kay Chapman, State Representative: You have requested an opinion concerning whether a city or county hospital can purchase shares in a for-profit corporation which would sell its stock only to public and private hospitals and which would provide services only to its shareholders. Although your question is narrowly focused, it raises substantial and complex legal issues of long standing which require interpretation of constitutional and statutory provisions. In order to adequately respond to your request we find it necessary to review the history of certain of these provisions before analyzing your question directly. We ask your indulgence and hope that the reason for the structure of this opinion will become apparent as you read on.

Ownership of stock in private corporations by governmental entities has been a matter of public concern and debate since 1844, when our first state constitution was proposed by the territorial legislature. *See Shambaugh, Fragments of the Debates of the Iowa Constitutional Conventions of 1844 and 1846* (1900) at 150-51 *et seq.* In Art. VIII, § 2, of what is now known as the 1846 Constitution of Iowa, the drafters provided that "the state shall not directly or indirectly become a stockholder in any corporation." Following enactment of that constitution a number of cities and counties in Iowa issued bonds in order to raise money to purchase stock in railroad companies which promised to provide rail service to the political subdivision. During the 1857 constitutional convention, delegates debated whether to prohibit local governments from

purchasing stock in private corporations. Following extensive debate, the convention voted to continue the prohibition against the state becoming a stockholder in any corporation, Art. VIII, §3, but rejected several attempts to extend that prohibition to city and county governments. *See Debates of the Constitutional Convention of the State of Iowa*, (1857) at 290-95, 297-300, 302, 305, 312-13, 315-16, 319-20, 325, 337-38, 341-43, 415-19, 426, 773-79, 794, 1022-24.

While the constitutional convention of 1857 rejected attempts to include local governments in the stockholder prohibition clause, the convention did adopt language prohibiting any "political or municipal corporation" from becoming a stockholder in a banking corporation. Art. VIII, §4. Such a prohibition would be superfluous if local governments were prohibited from owning stock in any corporation under Art. VIII, §3.[1] It is a well established rule of construction that the legislature is not presumed to perform a useless act. *Slockett v. Iowa Valley Community School District*, 359 N.W.2d 446, 448 (Iowa 1984). Neither will we assume that the framers of our constitution intended to implicitly apply Art. VIII, §3 to political subdivisions where they declined to do so directly and then approved the more limited express prohibition contained in Art. VIII, §4.

Furthermore, the 1857 convention adopted separate provisions restricting the authority of the state, Art. VII, §2, and counties or other political or municipal corporations, Art. XI, §3, to incur debt. Thus, it appears that, when the framers of the 1857 constitution intended to prohibit certain actions by local governments, they expressly included the local governments in that prohibition. We therefore conclude that the 1857 convention did not intend, under Art. VIII, §3, to prohibit political subdivisions from becoming corporate shareholders.

In the years following enactment of the 1857 constitution, Iowa courts repeatedly confronted the question whether local governments in the state could become stockholders or otherwise financially assist private corporations, with differing results. Those differences were apparently resolved in *Stewart v. Board of Supervisors*, 30 Iowa 9 (1870), in which the Supreme Court upheld legislation authorizing local governments to levy a tax for the benefit of private railroad corporations. The court in *Stewart* construed prior decisions as holding that local governments must have expressed statutory authority to subscribe to the stock of railroad companies and to issue bonds or levy taxes to pay for the stock. Under the *Stewart* analysis the legislature could constitutionally permit local governments to subscribe to stock in private corporations; however such authorization had to be legislated in express terms. We note that this conclusion conflicts with a prior opinion issued by this office. *See* 1968 Op.Att'yGen. 843-

[1] It is generally held that, although counties have many of the characteristics of municipal corporations, counties fall into the class of bodies politic called quasi-municipal corporations organized to exercise those powers and duties of the state which have been delegated to the counties. 1 McQuillin, The Law of Municipal Corporations, 3d ed. (revised) §2.46. The distinction between political and municipal corporations found in Art. VIII, §4, appears to recognize a distinction between municipal corporations and other political bodies. Furthermore, Art. XI, §3, expressly limits the debt which may be incurred by any "county, or other political or municipal corporation." The Iowa Supreme Court has concluded that counties may, for certain purposes, be classified as municipal corporations. *Wapello Co. v. Ward*, 136 N.W.2d 249, 252 (Iowa 1965). The Court noted in *Ward* that it is the limited character of a county's powers which distinguish it from other municipal corporations, such as cities and towns, which possess "general governmental authorities." *Id.* Accordingly, we conclude that a county may be a municipal corporation and is necessarily a political corporation within the meaning of Art. VIII, §4.

44 (Opining that townships are prohibited corporation). That opinion was reached without analysis of the intend of the framers of the constitution or of any applicable case law. Accordingly, to the extent that the prior opinion is inconsistent with the conclusions contained herein, it is hereby overruled.

The *Stewart* court's requirement of express statutory approval for subdivisions to finance private development efforts was consistent with the then prevailing Dillon Rule, which provided that political subdivisions had only those powers expressly granted or necessarily implied by the terms of a statute. *City of Clinton v. Cedar Rapids and Missouri River Railroad*, 24 Iowa 455, 475 (1868). The Dillon Rule operated before cities were granted home rule status by constitutional amendment in 1968. Art. III, § 38A. Counties attained home rule status by constitutional amendment in 1978. Art. III, § 39A. The two home rule provisions are almost identical with regard to their basic grant of home rule powers and their express repudiation of the Dillon Rule.

The home rule amendments provide, in part, that cities and counties:

> . . . are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly.

Art. III, §§ 38A, 39A. In 1980 Op.Att'yGen. 54, this office discussed the "not inconsistent with state law" language, alternatively referred to as the preemption doctrine. There, we cited a number of Iowa Supreme Court decisions in concluding that following home rule, the power of municipalities in Iowa is "limited only by an express statutory limitation or legislative history which clearly implies an intent to vest exclusive subject matter jurisdiction with the state." 1980 Op.Att'yGen. at 61 (and cases cited therein). The Supreme Court discussed the preemption doctrine more recently in *City of Council Bluffs v. Cain*, 342 N.W.2d 810 (Iowa 1983). There the Court stated:

> It is a well established principle that municipal governments may not undertake to legislate those matters which the legislative branch of state government has preserved to itself. There are alternative ways for a state legislature to show such a preservation. One is of course by specific expression in statute. Another is, as defendant suggests, by covering a subject by statutes in such a manner as to demonstrate a legislative intention that the field is preempted by state law.

Cain, 342 N.W.2d at 812. We have opined that, because of the similarities in language and purpose between city and county home rule amendments, we will look to judicial decisions construing the home rule powers of cities in order to determine such powers of counties. 1980 Op.Att'yGen. at 60.

Because the home rule amendments expressly repudiate the Dillon rule, we are of the opinion that their enactment eliminates for cities and counties the need to obtain express statutory approval in order to purchase stock in private corporations, as the *Stewart* court had earlier concluded. However, we are also of the opinion that the legislature has moved to preempt cities and counties from making such purchases both by express statutory restriction and by a long-standing state scheme restricting the investment authority of all political subdivisions.

The express statutory restrictions are found in the Code chapters implementing home rule for counties and cities. Iowa Code § 331.304(1) provides that "(t)he power (of a county) to act jointly with other political subdivisions or public or private agencies shall be exercised in accordance with chapter 28E . . . or other applicable state law." Iowa Code § 364.5 similarly limits cities. Chapter 28E authorizes public agencies to enter into agreements with other public or private agencies for joint or cooperative action, including the creation of a separate entity to carry out the purposes of such agreements. § 28E.4. However, ch. 28E does not create substantive rights or confer additional powers

on public agencies; it merely provides for the joint exercise of powers which such agencies already possess. *Barnes v. Department of Housing and Urban Development*, 341 N.W.2d 766, 767 (Iowa 1983). The Iowa Supreme Court has held that a ch. 28E entity created by several municipal corporations is a "public corporation" possessing "a corporate identity analogous to but separate from the corporate identity of its incorporators." *Allis-Chalmers Corp. v. Emmett County Council of Governments*, 355 N.W.2d 586, 590 (Iowa 1984). (emphasis added). Although chapter 28E does not specify the legal status of intergovernmental entities created pursuant to its terms, such entities are inherently public in nature because the only powers they may possess are those already possessed by the public agencies for whose benefit they are formed, and those powers are granted by the constitution and laws of the State of Iowa.

Political subdivisions are also expressly prohibited form investing their idle funds in shares of corporate stock. Iowa Code §§ 452.10 and 453.1 govern the investment authority of political subdivisions in Iowa. Most subdivisions are limited to investing in a few specified types of instruments. Corporate stock is not on this list of permissible investments. § 452.10. Cities which have established fire or police retirement systems pursuant to Iowa Code ch. 411 have "prudent person" status permitting them to invest in a wider range of investment products subject to certain collateralization requirements found in § 453.10. However, even those cities with "prudent person" investment authority are expressly prohibited from investing idle city funds in common, preferred or guaranteed stock. § 452.10. In fact, the only public entities which are authorized by statute to purchase shares of corporate stock are certain public employee pension funds whose assets have historically been segregated by law from all other assets for their respective governmental employers and placed in separate trust funds. §§ 97A.7, 97B.7, 411.7, 602.9111.[2]

For the reasons set out above, we conclude that it is constitutionally permissible for political subdivisions to purchase stock in private corporations; but that the legislature has preempted cities and counties from making such purchases under present statutory law. It remains to be determined whether political subdivisions which have not obtained home rule status and local agencies of cities and counties may purchase stock in private corporations. Before outlining a response it may be helpful to briefly describe the origin and powers of city and county public hospitals.

For many decades, cities were expressly authorized to establish and regulate hospitals pursuant to Iowa Code ch. 368. The board of trustees of a city hospital was authorized under § 380.1 "to provide for the management, control and government of . . . (the) hospital and . . . (to) provide all needed rules and regulations for the economic conduct thereof . . . ." This grant of authority has been recognized and affirmed by state courts. *See Koelling v. Board of Trustees*, 146 N.W.2d 284 (Iowa 1967). The above provisions were repealed in 1975 when the current version of ch. 364 took effect, implementing home rule authority for cities in Iowa. Acts 1972, 64th G.A., ch. 1088, § 199, effective July 1, 1975. The continuing authority of cities to establish and maintain hospitals, subject only to express statutory limits of city powers, is recognized in §§ 384.24(4)(c) and 384.26, which authorize cities to issue general obligation bonds for certain general corporate purposes including the "acquisition, construction, reconstruction, enlargement, improvement, and equipping of . . . hospitals, . . . and the acquisition of real estate therefor."

County hospitals may be organized under ch. 347 or ch. 347A. Despite the implementation of county home rule under ch. 331, most provisions of chs.

[2] It should be noted that cities, city utilities and police and firefighter pension funds may now pool their idle funds for investment purposes. § 411.7 as amended by Acts 1986, 71st G.A., ch. 1203. However, such investment pools are subject to the restriction found in § 452.10, including the stock purchase prohibition.

347 and 347A remain in effect, including those provisions spelling out the powers and duties of hospital boards of trustees. Trustees of ch. 347 hospitals are vested with broad authority, including the power to:

> Do all things necessary for the management, control and government of said hospital and (to) exercise all of the rights and duties pertaining to hospital trustees generally, unless such rights of hospital trustees generally are specifically denied by this chapter, or unless such duties are expressly charged by this chapter.

Section 347.14(10). Trustees of county hospitals organized under ch. 347A have more limited powers, including the following:

> The board of hospital trustees may employ, fix the compensation of, and remove at pleasure professional, technical, and other employees as it deems necessary for the operation and maintenance of the hospital, and disbursement of funds for operation and maintenance shall be made upon order and approval of the board of hospital trustees. . . . The board of trustees shall make all rules and regulations governing its meetings and the operation of the county hospital and shall fix charges for the services rendered. . . .

Section 347A.1.

This office has had occasion to consider the effect of home rule amendments on public agencies created by state law and affiliated with counties and cities. We have opined that home rule status does not extend to county hospitals organized under ch. 347. 1980 Op.Att'yGen. 388, 390. More recently we have stated that city utility boards do not have authority under home rule to undertake activities outside of their statutory mandate to operate utilities. Op.Att'yGen. #86-11-1(L). In both instances we recognized that the affiliated entity was given independent and broad powers within its statutory field of operations. However, we took the position that the powers granted cities and counties under the home rule amendments may be exercised only by a city council or a county board of supervisors or by others acting under a proper delegation of authority from one of the above bodies.[3]

Regarding the hospitals in question here, we reaffirm our earlier conclusion that ch. 347 hospitals do not exercise home rule powers. We also conclude that ch. 347A hospitals lack home rule powers and instead exercise only those powers granted them by statute. As noted earlier, those statutory powers, at least with respect to ch. 347 hospitals, may be so broad as to be comparable to the home rule power of the county itself, but ch. 347 is not a limitless charter. A county hospital's powers, broad as they may be, are limited to the subject matter of the statute. *See* Op.Att'yGen. #86-11-1(L) at 6. The subject matter of chs. 347 and 347A is "the management, control and government of (a county public) hospital. . . ." *See* §347.14(10). While the formation of a related entity as a captive vendor may serve a useful purpose to county hospitals, we must conclude that it is beyond the scope of a county hospital's authority under ch. 347 or 347A.

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[3] We recognized that *Kasparek v. Johnson County Board of Health*, 288 N.W.2d 511, 514 (Iowa 1980), suggests that the home rule amendments affect the authority of local agencies of counties and cities. In *Kasparek*, the Supreme Court held that a county board of health had authority to appear in court to defend its rules. However, the Court noted that the health board was expressly authorized by statute to enforce a number of state-imposed health measures. The Court concluded that the statutory grant of enforcement powers "carries with it a concomitant power to defend them and resist their nullification in court." The Court's conclusion is couched in terms of necessarily-implied powers, notwithstanding its earlier reference to home rule. Such powers were recognized even under the earlier Dillon Rule. Thus, the precedential value of *Kasparek* is open to question.

Our conclusion is buttressed, in our opinion, by the same factors which led us to conclude that cities and counties are themselves preempted from purchasing corporate stock. County hospitals are authorized under ch. 28E to establish intergovernmental entities. *See* 1976 Op.Att'yGen. 565-66 (Broadlawns Polk County Hospital authorized to join consortium of hospitals provided ch. 28E requirements were observed). However, as already noted, ch. 28E does not authorize investment in or formation of private corporations. County hospitals are also subject to the stock prohibition found in §§ 452.10 and 453.1.

In summary, we find no compelling reason why county hospitals should enjoy powers greater than counties themselves now possess by virtue of home rule status as limited by state statutes.

Regarding city hospitals, we conclude that they are purely local agencies of their respective city governments and possess no home-rule authority in their own right. In the absence of any statutory charter, they exercise only such powers as the city delegates to them pursuant to its home rule authority. We have already concluded that cities are preempted by statute from purchasing stock except with certain pension trust funds. A city hospital is likewise preempted. In our opinion, city hospitals may join in ch. 28E agreements, subject to the limitations already discussed.

SUMMARY

For the reasons stated above, we conclude that it is constitutionally permissible for political subdivisions to purchase stock in private corporations. However, cities and counties are presently preempted by statute from purchasing corporate stock, except for pension trust funds. County hospitals cannot purchase stock absent express statutory approval, which does not exist. City hospitals have only those powers delegated them by their respective cities and, thus, are preempted from purchasing corporate stock to the same extent as cities are. County and city hospitals may form an inter-governmental entity pursuant to ch. 28E, but such an entity cannot be formed as a private corporate entity.

January 20, 1987

TAXATION: Requirement Of Tax Clearance Statement; County Liability For Rent On Abandoned Mobile Home. Iowa Code §§ 135D.24(4), 135D.24(6), and 562B.27(1) (1985). A mobile home park owner is not required to obtain a tax clearance statement prior to removing an abandoned mobile home from the park. A county is not liable for rent and utilities due on an abandoned mobile home merely because it has a tax lien on the mobile home. If the county acquires a tax deed to the mobile home, it is liable for rent and utilities accruing after that date. (Mason to Richards, Story County Attorney, 1-20-87) #87-1-11(L)

January 20, 1987

PUBLIC RECORDS: Criminal Law: Confidentiality Of Victim Impact Statements. 1986 Iowa Acts, ch. 1178; Iowa Code ch. 910A; Iowa Code §§ 4.6, 4.7, 22.1, 22.2, 22.7, 602.1601, 901.2, 901.3, 901.4, 901.5, 910A.4, 910A.5, 910A.6, 910A.7, 910A.8, 910A.9, 910A.17 (1985). A victim impact statement is part of the presentence investigation report and is therefore confidential under Iowa Code § 901.4. (Hansen to O'Brien, State Court Administrator, 1-20-87) #87-1-12(L)

January 21, 1987

CAMPAIGN FINANCE DISCLOSURE COMMITTEE: Gifts; Contributions. Iowa Code ch. 56; §§ 56.2, 56.6, 56.10, 56.11; Iowa Code ch. 68B; § 68B.2. All contributions, including gifts, which are made to a candidate's committee of a state officeholder from a political committee or a registered lobbyist while the general assembly is in session must be reported in accordance with chapter 56. A gift is merely something transferred by one person to another without compensation regardless of the form and would include

food and drink. Ultimately, the Campaign Finance Disclosure Commission would have authority to decide whether any particular gift constitutes a contribution to a candidate's committee of a state officeholder or a gift to the state officeholder in his or her personal or professional capacity unrelated to the candidate's committee. (Pottorff to Holden, State Senator, 1-21-87) #87-1-13

Honorable Edgar Holden, State Senator: You have requested an opinion of the Attorney General concerning the definition of a "gift" which must be reported under chapter 56 of the Code to the Campaign Finance Disclosure Commission. You point out chapter 56 requires reporting of contributions on dates specified in §56.6. Under an amendment added in 1986, a candidate's committee of a state officeholder must also file a letter report within fourteen days of the receipt of any contribution from a political committee or a lobbyist registered under the rules of either house of the general assembly while the general assembly is in session. The term contribution, in turn, is defined in §56.2(4) to include a "gift." You further point out that chapter 68B requires reporting of gifts. The term "gift" under chapter 68B, however, is defined to exclude campaign contributions. Accordingly, chapter 68B draws a distinction between contributions and gifts which chapter 56 does not draw.

In light of these provisions you inquire whether any "gift" made to a state officeholder during the legislative session, including a cup of coffee, must be reported as a contribution to the Campaign Finance Disclosure Commission under the 1986 amendment. It is our opinion that all contributions, including gifts, which are made to a candidate's committee of a state officeholder from a political committee or a registered lobbyist while the general assembly is in session must be reported in accordance with chapter 56. A gift is merely something transferred by one person to another without compensation regardless of the form and would include food and drink. Ultimately, the Commission has authority to decide whether any particular gift constitutes a contribution to a candidate's committee of a state officeholder or a gift to the state officeholder in his or her personal or professional capacity unrelated to the candidate's committee.

Chapter 56 requires the filing of periodic disclosure reports by various committees. Political committees, certain statutory committees, ballot issue committees and candidate's committees must all file disclosure reports on dates specified in chapter 56. *See* Iowa Code §56.6 (1985). In addition, candidate's committees of state officeholders may incur a special filing obligation under a 1986 amendment to §56.6 which provides:

> NEW LETTERED PARAGRAPH. A candidate's committee of a state officeholder shall file a letter report to be received within fourteen days of the receipt of any contribution from a political committee or from a lobbyist registered under the rules adopted by either house of the general assembly while the general assembly is in session. The letter report shall notify the commission of the following:
>
> (1) The name of the candidate's committee.
>
> (2) The name and complete address of the political committee or registered lobbyist making the contribution.
>
> (3) The amount of the contribution.
>
> (4) The date the contribution was received.
>
> (5) In the event the contribution was caused by a fundraiser, an explanation of the sponsor and type of event held.

1986 Iowa Acts, ch. 1023, §6. Under this language a candidate's committee of a state officeholder must file a letter report within fourteen days of the receipt of any "contribution" from a political committee or a registered lobbyist while the general assembly is in session.

In order to determine the scope of the reporting obligation under this section, it is necessary to construe the term "contribution." Contribution is defined under chapter 56 in relevant part to include "[a] *gift*, loan, advance, deposit, rebate, refund, or transfer of money or a gift in kind." Iowa Code §56.2(4)(a) (1985) (emphasis added). "Gifts," therefore, are specifically included as contributions.

The term "gift" is not further defined in chapter 56. The gift law, chapter 68B, however, defines gift to mean "a rendering of money, property, services, discount, loan forgiveness, payment of indebtedness or anything else of value in return for which legal consideration of equal or greater value is not given and received." Iowa Code §68B.2(9).[1]

Ordinarily, we would consider this statutory definition of "gift" in construing the term under chapter 56. Generally, the meaning of a statute may be ascertained by reference to similar statutes. *State v. Williams*, 315 N.W.2d 45, 49-50 (Iowa 1982). Recent court decisions, however, have cast doubt on the continued validity of this statute. In *Western International et al. v. Kirkpatrick*, No. 86-1061 (filed 11/12/86), the Iowa Supreme Court struck down substantive provisions of House File 2066, a Code corrections bill, on ground that inclusion of the substantive provisions violated the subject and title requirements of the Iowa Constitution. *See* Iowa Const. art. III, §29. Since the *Kirkpatrick* decision, portions of the gift law enacted in 1980, including the definition of "gift," have been found to be unconstitutional by the Jasper County District Court on a similar ground. *See* 1980 Iowa Acts, ch. 1015, §§6-8.

In view of these recent developments, we look to other authority to construe the term "gift" in chapter 56. Words are to be given their ordinary meaning unless defined by the legislature or possessed of a particular and appropriate meaning in law. *Good v. Iowa Civil Rights Commission*, 368 N.W.2d 151, 155 (Iowa 1985). The word "gift" in ordinary meaning is "something that is voluntarily transferred by one person to another without compensation." *Webster's Third New International Dictionary* (unabridged ed. 1967). This definition does not distinguish among gifts of money, gifts of material goods and services and gifts of food and drink. Opinions of this office, in fact, have recognized that a gift may come in various forms. *See e.g.* 1980 Op.Att'yGen. 705 (travel expenses); 1978 Op.Att'yGen. 373 (brunches and teas). Accordingly, we conclude that a gift, i.e., contribution, is, in essence, merely something transferred by one person to another without compensation regardless of the form. Food and drink, therefore, may be a contribution within the meaning of §56.6(2).

Determination of the definition of "gift" only partially resolves the issue which you raise. Applying the ordinary meaning of "gift," a gift, i.e., contribution, is received when something is voluntarily transferred by one person to another without compensation. Under the terms of the 1986 amendment in issue, however, the "gift," i.e., contribution, must be received *by* a candidate's committee of a state officeholder *from* a political committee or registered lobbyist *while* the general assembly is in session in order to trigger additional reporting obligations.

Generally, determination whether a gift is received from a political action committee or lobbyist while the legislature is in session will be fairly ascertainable in fact. More troublesome is the determination whether a gift is received by a candidate's committee of a state officeholder or by the state officeholder in his or her personal or professional capacity unrelated to the candidate's committee.

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[1] This definition of gift expressly excludes "campaign contributions." Iowa Code §68B.2(9)(b) (1985). The gift law and the campaign finance disclosure law, therefore, function in tandem so that gifts reportable under chapter 68B do not include campaign contributions reportable under chapter 56 and vice versa.

In previous opinions we have pointed out that the capacity in which a gift is received is a factual issue resolution of which may not always be free from doubt. In 1982, for example, we stressed that chapter 68B applies to gifts received in an official, not personal, capacity but urged officials to err in favor of over inclusion. Op.Att'yGen. #82-8-9(L). We view the determination whether a gift is received by the candidate's committee or by the state officeholder in a personal or professional capacity unrelated to the candidate's committee in an analogous light.

Ultimately, the determination whether any gift, i.e., contribution, is received by the candidate's committee of a state officeholder and, therefore, must be reported under chapter 56, lies with the Campaign Finance Disclosure Commission which enforces chapter 56. Although we cannot resolve this aspect of the issue through the opinion process, *see* 1972 Op.Att'yGen. 686, we point out that the determination may be made on a case-by-case basis through adjudication of complaints filed by or with the Commission under §56.11 or through interpretative rules promulgated by the Commission under §56.10(4). Factors which may be significant in addressing this issue in either agency procedure may include: (1) the proximity of an election, at which the state officeholder has been or will be a candidate, to the receipt of the gift; and (2) the relationship between the gift and other campaign events.

January 21, 1987

ATTORNEY GENERAL: State Officers And Departments; Legal Representation. Iowa Code §§13.2(2)-(3); 25A.21-25A.22 (1985). In addition to the defense of tort claims brought against state employees under Code §§25A.21 and 25A.22, the Attorney General defends all actions brought against a state officer in the officer's official capacity under §13.2(3). Under Code §13.2(2) the Attorney General has discretion to determine when the interests of the State are served by providing legal representation to state officers and employees in suits or administrative proceedings brought against them in their personal capacity. (Osenbaugh to Richey, Board of Regents, 1-21-87) #87-1-14

R. Wayne Richey, Executive Secretary, State Board of Regents: We have received your request for an Attorney General's opinion asking this office to define the circumstances in which Regents employees are entitled to legal representation at state expense in administrative proceedings or trials.

Section 25A.21 of the State Tort Claims Act provides that the state will defend employees against any claim as defined in §25A.2(5)(b). Section 25A.21 states:

> Employees defended and indemnified.
>
> The state shall defend any employee, and shall indemnify and hold harmless an employee against any claim as defined in section 25A.2, subsection 5, paragraph "b", including claims arising under the Constitution, statutes or rules of the United States or of any state. The duty to indemnify and hold harmless shall not apply and the state shall be entitled to restitution from an employee if, in an action commenced by the state against the employee, it is determined that the conduct of the employee upon which a tort claim or demand was based constituted a willful and wanton act or omission or malfeasance in office.

"Claim" is defined in §25A.2(5) as follows:

> a. Any claim against the state of Iowa for money only, on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state while acting within the scope of the employee's office or employment, under circumstances where the state, if a private person, would be liable to the claimant for such damage, loss, injury, or death.

> b. Any claim against an employee of the state for money only, on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state while acting within the scope of the employee's office or employment.

Under §§ 25A.21 and 25A.2(5) the State provides legal representation to defend tort actions arising from acts of employees "within the scope of the employee's office or employment." The basic rule is that an employee is acting within the scope of employment where he is acting to further the interests of his employer. *Home Indemnity Company v. State Bank of Fort Dodge*, 233 Iowa 107, 8 N.W.2d 757, 772 (1943). Where the employee commits an independent act for his own benefit which is designedly against the interests of the principal, the courts have found the employee to be acting outside the scope of employment. Id.

State employees are also entitled to defense and indemnification in actions in federal court under Iowa Code § 25A.22. That section states:

> Actions in federal court. The state shall defend any employee, and shall indemnify and hold harmless an employee of the state in any action commenced in federal court under section 1983, Title 42, United States Code, against the employee for acts of the employee while acting in the scope of employment. The duty to indemnify and hold harmless shall not apply and the state shall be entitled to restitution from an employee if, in an action commenced by the state against the employee, it is determined that the conduct of the employee upon which the claim or demand was based constituted a willful and wanton act or omission or malfeasance in office.

For litigation other than tort claims, this office provides representation as set forth in Iowa Code chapter 13. Section 13.2 provides in relevant part:

> It shall be the duty of the attorney general, except as otherwise provided by law to:
>
> . . .
>
> 2. Prosecute and defend in any other court or tribunal, all actions and proceedings, civil or criminal, in which the state may be a party or interested, when, in the attorney general's judgment, the interest of the state requires such action, or when requested to do so by the governor, executive council, or general assembly.
>
> 3. Prosecute and defend all actions and proceedings brought by or against any state officer in the officer's official capacity.

Under these sections, this office defends all actions brought against a state officer in the officer's official capacity under § 13.2(3). This office may also represent state employees and officers sued personally if the attorney general concludes that the interest of the state requires such action.

This office also has authority to appear in administrative proceedings under Iowa Code § 13.2(2) and (3). This office regularly represents the state and its officers in federal administrative proceedings where the state may be interested. In state administrative proceedings, this office most often appears to prosecute when we conclude that representation by this office is necessary. However, in most uncomplicated state agency proceedings, agency staff presents the agency's position as part of the administrative functions of the agency.[1]

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[1] In many administrative proceedings it is not necessary to have an assistant attorney general present the case as agency staff has the necessary expertise on the regulatory and statutory requirements of that agency and legal skills are not required.

The State provides representation, where necessary, to employees in non-tort suits or proceedings brought against the officer in the officer's official capacity. § 13.2(2). Assume that the president of a university is ordered to appear before a state agency in a hearing to determine — university property must conform to certain land-use requirements. This action would be brought against that officer in the officer's "official capacity" because it is in reality a suit against the entity the officer represents. *See e.g. Kentucky v. Graham*, 473 U.S. 159, 87 L.Ed.2d 114, 121, 105 S.Ct. 3099 (1985). The university rather than the individual is the real party in interest and the university rather than the individual would be responsible for compli ance with any resulting order. *Id.* A suit or proceeding against an officer which seeks to bind the agency or the State to pay damages or to act or refrain from acting in a particular matter is an action brought against the officer in the officer's official capacity.

Assume on the other hand that a university employee is charged with driving while intoxicated while driving a university car on university business. The criminal prosecution and any license revocation proceedings would be brought against that employee in the employee's personal capacity. The employee's personal rights would be determined in those proceedings. The Attorney General would not defend under section 13.2(2). Given the State's interest in enforcement of drunk driving laws and this office's role in criminal prosecution, it would also be very unlikely that the Attorney General would conclude that the interests of the State required representation of the employee by this office. The Attorney General would not therefore represent the employee under section 13.2(3). *See* 1930 Op.Att'yGen. 326 (park custodian charged with assault must provide own legal defense).

It is not possible to precisely define in advance those situations where the State's interests are best served by defense of proceedings seeking personal relief against state employees. The legislature has determined that the State should defend state employees for tort claims resulting from actions within the scope of their employment in Code sections 25A.21 and 25A.22. For other actions, the legislature has conferred discretion on the Attorney General to determine when "the interest of the State requires such action . . ." § 13.2(2). *Buechele v. Ray*, 219 N.W.2d 679, 682 (Iowa 1974). This determination must necessarily be made in individual cases. We cannot therefore define in advance the range of cases in which representation by this office is appropriate. We can outline some factors which may be relevant.

This office might well decide to represent an employee in proceedings where an adverse decision would interfere with the future conduct of state business. For example, a municipality or a federal agency might seek to impose civil penalties on an employee for carrying out official state policy. The threat of penalties could jeopardize the performance of that and other employees.

There may be situations in which the State has an interest in protecting its employees from financial loss resulting from the defense of unfounded claims but it would not be in the State's interest to defend the employee if the allegations in question are true. In those instances there is precedent for the discretionary reimbursement of attorney's fees to state employees when the proceeding results in a decision that the employee has not violated state law. For example, in 1978 Op.Att'yGen. 27, this office held that a state senator was not entitled to representation in a suit challenging his right to office. When it was judicially established that the defendant was entitled to the office, the legislature determined it appropriate to reimburse the individual for the cost of representation. This approach recognizes that contested issues may not be resolved in advance of hearing but still makes the blameless employee whole after the fact.

On occasion, a state officer or employee is named as a respondent in administrative proceedings. In those cases, this office would defend only if it concluded that the proceedings were brought against the officer in the officer's official capacity or that, for some other reason, the interest of the state required that this office represent the officer.[2]

The determination whether the State will provide legal representation in a specific case requires determination of issues of fact and the exercise of professional judgment. All of the circumstances which meet the statutory criteria could not appropriately be fully defined in advance. It is the view of this office that this determination should be made on a case-by case basis rather than by attempting to develop detailed criteria for classification of cases in advance. The decision to proceed on a case-by-case basis is within the informed discretion of the Attorney General. *See Young Plumbing and Heating Co. v. Iowa Natural Resources Council*, 276 N.W.2d 377, 382 (Iowa 1979).

We believe this approach appropriately balances the interests of the State as well as of the employees.

January 22, 1987

INCOMPATIBILITY OF OFFICES: Conflict Of Interest. Iowa Code ch. 273; Iowa Code §281.4 (1985). The doctrine of incompatibility does not apply where an employee of an Area Education Agency, AEA, is also a member of the board of directors of a school district within the AEA. Conflict of interest problems are decided on the basis of the particular facts and circumstances in each case. We do not decide evidentiary questions. (Fleming to Murphy, State Senator, 1-22-87) #87-1-15(L)

FEBRUARY 1987

February 25, 1987

ELECTIONS: School Districts. Iowa Code ch. 275: §§275.12, 275.18, 275.23A; Iowa Code ch. 278: §278.1. Section 275.23A does not authorize additional boundary adjustments of school director districts after adjustment following the federal decennial census. Additional boundary changes must be made through submission to the voters pursuant to the appropriate statutory process. (Pottorff to Ritsema, State Senator, 2-25-87) #87-2-1(L)

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[2] We note that the Iowa Supreme Court recently held that, under a different statute, a school district *could* pay attorneys fees owed by a superintendent for the defense of a license disciplinary proceedings where the complaint arose out of a challenge to his official actions. (The disciplinary proceedings resulted in a reprimand). The Court did remand the case to the State Board of Public Instruction for evidence, findings and conclusions as to the validity of the school board's exercise of discretion to pay the superintendent's attorney fees. *Bishop v. Iowa State Board of Public Instruction*, No. 85-1616 (Iowa Sup. Ct. Nov. 12, 1986). Justice Wolle dissented, arguing that the statute should not be construed to permit taxpayers to be charged the cost of paying attorney fees incurred solely to protect an employee from disciplinary action based on unprofessional conduct. That case construed Iowa Code §279.37 (1983), which provides:

> A school corporation may employ an attorney to represent the school corporation as necessary for the proper conduct of the legal affairs of the school corporation.

MARCH 1987

March 12, 1987

TAXATION: School Districts: Schoolhouse Tax Fund. Iowa Code §§ 76.3, 278.1, 297.36, 444.2 (1985). A school district which has issued obligations in anticipation of schoolhouse tax receipts may, at the time of issuance, certify the annual levy of an amount which is within the tax limit approved by the voters when computed on the adjusted taxable valuation of the school district for the fiscal year preceding the year in which obligations are issued, and the county auditor must annually levy that amount until the obligations are satisfied, regardless of changes in school district property values in future years. (Kirlin to Cavanaugh, Director, Department of Management, 3-12-87) #87-3-1

Patrick Cavanaugh, Director, Department of Management: Your predecessor, Mr. William Krahl, has asked this office for an opinion concerning whether a school district which has issued obligations in anticipation of schoolhouse tax receipts is prohibited from certifying a schoolhouse tax levy which would exceed 67-cents per thousand dollars of assessed valuation during any fiscal year while the obligations remain outstanding.

Specifically, Mr. Krahl states that voters in the Creston Community School District on September 9, 1984, approved the levy of a schoolhouse tax starting in fiscal year 1986. Based upon a letter from the school district's legal counsel, attached to Mr. Krahl's letter, and other documents provided by the same counsel, we assume the following facts: School district voters approved a schoolhouse tax for a period of ten years, not to exceed 67-cents per thousand dollars of assessed value in any year. The school district then issued obligations in anticipation of the tax approved by the voters and the school district's board of directors adopted a resolution to provide for an amount to be levied annually until such time as the obligations were fully satisfied as to principal and interest. The amount to be levied under the resolution was equal to or less than the product of 67-cents per thousand dollars multiplied by the latest equalized actual property valuations available to the school district at the time the obligations were issued. The assessed value of taxable property in the school district has since declined to the point that the amount to be levied under the resolution is greater than the product of 67-cents per thousand dollars multiplied by the latest equalized actual property valuations available to the school district.

For the reasons stated below, we conclude that the amount certified for levy by the school district must be levied while the obligations remain outstanding regardless of the decline in school district property values.

Iowa Code § 278.1(7) (1985) authorizes residents of a school district to "[v]ote a schoolhouse tax, not exceeding sixty-seven and one-half cents per thousand dollars of assessed value in any one years . . ." for certain enumerated purposes. We do not understand the purpose to be at issue here. If there were no other statute relating to the levy of a school tax, we would conclude that a tax in excess of 67-cents per thousand dollars of assessed value in any given year could not lawfully be levied. *See Richards v. County of Lyon*, 29 N.W. 630, 631 (Iowa 1886). However, as was the case in *Richards*, other statutory provisions relating to the levy of a schoolhouse tax exist and must be considered. We are obliged to construe these related provisions so as to give effect to each, unless the language used and the subject matter prohibit such a construction. *Id.; see also Chappell v. Board of Directors*, 39 N.W.2d 628, 629 (Iowa 1950).[1]

[1] It has been suggested that Iowa Code § 76.3 (1985) negates the schoolhouse tax limitation found in § 278.1(7) to the extent that school districts are authorized under § 297.36 to issue obligations in anticipation of such tax receipts. Section 76.3 provides that:

Iowa Code §297.36 provides that, upon electoral approval of a schoolhouse tax under §278.1(7), a school district's board of directors may borrow money in anticipation of collection of the tax. If the board decides to borrow, the second unnumbered paragraph of §297.36 provides that:

> By resolution, the board shall provide for an annual levy which is within the limits of the tax approved by the voters to pay for the amount of the principal and interest due each year until maturity. The board shall file a certified copy of the resolution with the auditor of each county in which the district is located. The filing of the resolution with the auditor shall make it the duty of the auditor to annually levy the amount certified for collection until funds are realized to repay the loan and interest on the loan in full.

We interpret the above language to require that the school district must compute the annual levy at the time it issues its obligations and to require that the levy must at that time be within the tax limit approved by school district voters pursuant to §278.1(7). Once the school district makes the above computation, it must adopt a resolution providing for an annual levy and must notify all affected county auditors of the levy. Those auditors are then required to annually levy the amount certified until the school district's obligations are satisfied.

Although the schoolhouse tax limit contained in §278.1(7) is stated as a rate per thousand dollars of assessed value, it should be noted that the auditor is directed under §279.36 to "annually levy the amount certified for collection" in the resolution adopted by the school district's board of directors until outstanding obligations are satisfied. We understand that the Creston Community School District certified the amount to be levied in dollars and not by rate. This is consistent with Iowa Code §444.2, which provides that:

> When an authorized tax rate within a taxing district, including . . . school districts, . . . has thus been determined as provided by law, the . . . officers charged with the duty of certifying the authorized rate to the county auditor or board of supervisors shall, before certifying the rate, compute upon the adjusted taxable valuation of the taxing district for the preceding fiscal year, the amount of tax the rate will raise, stated in dollars, *and shall certify the computed amount in dollars and not by rate, to the county auditor and board of supervisors.*

(emphasis added). We therefore conclude that the school district properly certified the amount to be levied. Furthermore, we find no provision in §279.36 which authorizes school districts or county auditors to annually recompute the schoolhouse tax levy once the school district has determined that the levy is within the tax limit approved by the voters when computed on the adjusted

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n.[1] continued

> Tax limitations in *any law or proposition for the issuance of bonds or obligations,* including any law or proposition for the issuance of bonds or obligations in anticipation of levies or collections of taxes or both, shall be based on the latest equalized actual valuation then existing and shall only restrict the amount of bonds or obligations which may be issued.

(emphasis added). We have reviewed the cases construing this provision. *See Olson v. Waterloo,* 54 N.W.2d 458 (1952); *Walker v. Sears,* 61 N.W.2d 729 (1953). Those cases involved the application of §76.3 to statutory provisions authorizing the issuance of public debt. In contrast, §278.1(7) contains no provision for the issuance of public debt. By its terms, §76.3 modifies only those tax limitations found in a "law or proposition for the issuance of bonds or obligations." The effect of §76.3 on §297.36 is also uncertain, because the latter statute provides that it supplements existing statutory authority to finance the purposes specified in §278.1(7) and, by its terms, is not subject to any other law. We therefore decline the suggestion to rely on §76.3 and choose to rest the conclusions stated in this opinion on other grounds.

taxable valuation of the school district for the fiscal year preceding the year in which the obligations are issued. In our opinion, the language of §297.36 negates any such inference.

We recognize that the effect of §297.36, as we interpret it, may be to impose schoolhouse tax levies in excess of the amount permitted in §278.1(7), when stated by rate. However, we must conclude that the legislature, having authorized the lawful creation of debt under §297.36, also conferred the means to satisfy that debt. *See Richards*, 29 N.W. at 631.

In summary, we conclude that a school district which has issued obligations in anticipation of schoolhouse tax receipts may, at the time of issuance, certify the annual levy of an amount which is within the tax rate approved by the voters when computed on the adjusted taxable valuation of the school district for the fiscal year preceding the year in which obligations are issued, and the county auditor must annually levy that amount until the obligations are satisfied, regardless of changes in school district property values in future years.

March 16, 1987

COUNTIES AND COUNTY OFFICERS: Board Of Supervisors; Reimbursement For Mileage Expenses. Iowa Code §§79.9, 331.215(2), 331.324(1)(b) (1985). County supervisors may be reimbursed for mileage expenses incurred in traveling between home and the courthouse if those trips are made to conduct official county business. (Weeg to Scieszinski, Monroe County Attorney, and Schroeder, Keokuk County Attorney, 3-16-87) #87-3-2

Annette J. Scieszinski, Monroe County Attorney, and John E. Schroeder, Keokuk County Attorney: You have requested an opinion of the Attorney General on several questions regarding reimbursement of mileage expenses incurred by the board of supervisors in executing their official duties. We have combined your questions, which we have rephrased as follows:

1. Whether members of a county board of supervisors are entitled to mileage reimbursement for commuting between home and the courthouse for scheduled board meetings.

2. Whether a supervisor may be paid mileage for commuting from home to the courthouse to staff the supervisors' office when scheduled meetings of the board are not being held.

3. Whether a supervisor should be paid mileage for traveling from home to meetings which have been placed upon the board's agenda (i.e., conference board meetings, meetings with sales representatives outside the courthouse, etc.).

4. Whether a supervisor may be paid mileage for traveling to various destinations on official business, when the trip begins at the courthouse and ends at the supervisor's home.

5. Whether the payment of mileage to a supervisor under any of the situations allowable under section 331.215(2) provides that a supervisor as a public official may be compensated for expenses for which another public official (i.e., auditor, treasurer, etc.) would not be compensated.

6. Whether any of the above answers are affected by the number of miles traveled.

The law governing compensation and mileage for members of county boards of supervisors has been amended on almost an annual basis the past several decades. Without reviewing these statutory changes in detail, we will attempt to summarize the most significant changes in recent years.

Up until 1969, the law provided that supervisors were entitled to be compensated on a per diem basis except in larger counties, in which case a salary schedule was established. Iowa Code §331.22 (1966). In the first unnumbered paragraph of this section, which set the per diem rate, the

legislature provided the supervisors were also entitled to mileage "for every mile traveled in going to and from the regular, special, and adjourned sessions thereof, and in going to and from the place of performing committee service." In the second unnumbered paragraph, mileage for one trip was allowed when the board was in continuous session. In the third unnumbered paragraph, salaries were established for supervisors in counties where the population was larger; salaries were based on the size of the county and the numbers of supervisors on the board. That paragraph concluded with language stating:

> These salaries shall be in full payment of all services rendered to the county by said supervisors except statutory mileage while actually engaged in the performance of official duties.

There is an argument that this language created a two-tier system for reimbursing supervisors: some were paid a per diem, with mileage reimbursement for travel to and from the courthouse expressly authorized, while others in larger counties were paid salaries and entitled to mileage incurred "while engaged in the performance of official duties." However, in 1968 Op.Att'yGen. 446 we reached a contrary conclusion in deciding that even supervisors being paid on a salary basis were entitled to reimbursement for mileage expenses incurred in traveling to and from the courthouse. In that opinion we construed the statutory language authorizing reimbursement for mileage incurred "while actually engaged in the performance of official duties" as authorizing reimbursement for mileage incurred by supervisors while attending adjourned sessions of the board. We also stated attendance at an adjourned session is as much an official duty of a supervisor as is attendance at a regular or special meeting.

In 1969, the legislature established a new salary schedule for supervisors, and stated these salaries were to be in full payment of all services rendered by the supervisors "except statutory mileage while actually engaged in the performance of official duties." 1969 Iowa Acts, ch. 217, § 1. In the new second unnumbered paragraph of that statute, the legislature stated that in counties under 40,000 population the supervisors could elect to be paid on a per diem basis, and in addition, were to be paid mileage for "going to and from sessions and in going to and from the place of performing committee service." *Id.* These changes restructured the statute but did not materially affect the manner in which supervisors were compensated or reimbursed for mileage expenses.

In 1973, the legislature set an annual cap of $1000 on the amount of mileage reimbursement that supervisors who were paid on a per diem basis could receive. 1973 Iowa Acts, ch. 1081, § 1.

In 1975, the manner in which supervisors were to be paid was dramatically revised. County compensation boards were established to set the compensation of all elected county officers, and numerous related provisions were amended in light of this change. 1975 Iowa Acts, ch. 191. Section 331.22 itself was amended to simply provide:

> The board of supervisors shall receive an annual salary or per diem compensation as provided [by the county compensation board]. The annual salary or per diem shall be in full payment for all services rendered to the county except that each member of the board is entitled to reimbursement for mileage expense incurred while engaged in the performance of official duties . . . . The total mileage for a member of the board of supervisors shall not exceed one thousand five hundred dollars per year.

1975 Iowa Acts, ch. 191, § 8. The new statutes drastically revised the manner in which supervisors would be compensated: instead of per diems or salaries being set by the legislature, county compensation boards now recommend the amount of compensation to be paid elected county officials.

No significant changes occurred again until 1981, when the legislature enacted what is now Iowa Code sections 331.215(1) and (2) (1985). 1981 Iowa Acts, ch. 117, §214. This change divided the statute into subsections. Subsection 1 states that supervisors may be paid on a salary or per diem basis, payment of which is to constitute "full payment for all services rendered to the county except for reimbursement for mileage and other expenses authorized in subsection 2." Subsection 2 separately addresses the question of mileage and expenses and states:

> *A supervisor is entitled to reimbursement for mileage expenses incurred while engaged in the performance of official duties at the rate specified in section 79.9.* The total mileage expense for all supervisors in a county shall not exceed the product of the rate of mileage specified in section 79.9 multiplied by the total number of supervisors in the county times ten thousand. The board may also authorize reimbursement for mileage and other actual expenses incurred by its members when attending an educational course, seminar, or school which is related to the performance of their official duties.

(emphasis added). Section 79.9 simply sets the rate of reimbursement allowed for actual and necessary mileage.

A number of prior opinions of this office addressed the question of proper mileage reimbursement under the statutes prior to the 1975 amendments. *See* 1970 Op.Att'yGen. 406; 1968 Op.Att'yGen. 446; 1968 Op.Att'yGen. 102; 1932 Op.Att'yGen. 197; 1924 Op.Att'yGen. 148; 1918 Op.Att'yGen. 317; 1916 Op.Att'yGen. 317. *See also State v. Naumann*, 213 Iowa 418, 239 N.W. 93 (1931). Under the law prior to 1975, as interpreted by our office, supervisors were under most circumstances entitled to reimbursement for mileage incurred on round trips from home to the courthouse.

This conclusion contrasts with other opinions of this office during that time period which held that the supervisors could not authorize travel expenses incurred by the county attorney for travel from the county attorney's home to the courthouse and back.[1] 1940 Op.Att'yGen. 179; 1938 Op.Att'yGen. 55. *See also* 1922 Op.Att'yGen. 296. However, we did hold that the county attorney could be reimbursed for reasonable expenses incurred in attending a hearing in a town other than the county seat. 1926 Op.Att'yGen. 176. *See also* 1940 Op.Att'yGen. 463.

Thus, the question is whether the 1975 amendments indicate a clear legislative intent to change the manner in which supervisors had previously been reimbursed for mileage. We believe it did not. The law prior to 1975, as construed by our office on numerous occasions, authorized supervisors to collect mileage reimbursement for commuting expenses. As set forth above, in 1968 Op.Att'yGen. 446 we concluded the language, "while actually engaged in the performance of official duties," included commuting expenses. We affirmed that conclusion most recently in 1970 Op.Att'yGen. 406. That statutory language remains unchanged. Because the 1975 statutory revisions did not alter the standard by which mileage is to be paid, and because we are unwilling to say that our prior opinions construing this standard are clearly erroneous, we conclude today that supervisors are authorized to be reimbursed for mileage incurred in traveling between home and the courthouse on county business.

We have one reservation regarding this conclusion. In section 331.324(1)(b), the legislature has provided that a board of supervisors shall among other things:

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[1] At the time of these opinions, the relevant statute did expressly provide that the county attorney was entitled to reimbursement for expenses incurred "at a place other than his residence and the county seat." *See* Iowa Code §5228 (1935).

> Grant claims for mileage and expenses of officers and employees in accordance with sections 79.9 to 79.13 and section 331.215, subsection 2....

We recently held that section 331.215(2) is applicable to other county officers and employees because of this reference. *See* Op.Att'yGen. #86-8-6(L). In that opinion, we concluded that the supervisors were to reimburse claims for expenses incurred by county officers and employees in attending meetings pertaining to county government in accordance with the last sentence of section 331.215(2). This conclusion would appear to similarly require application of the first sentence of section 331.215(2) to claims for mileage reimbursement submitted by other county officers and employees. In this case, if supervisors are entitled to reimbursement for commuting expenses because incurred in the performance of official duties, other county officers and employees would presumably be entitled to reimbursement for these same expenses. However, we are unwilling to say that is so. As previously discussed, there is no clear indication that the legislature intended in 1975 and again in 1981, when it significantly revised the statutes governing compensation and reimbursement of expenses of supervisors, to change the method for reimbursement of mileage expenses, which had historically allowed supervisors, but not other county officers and employees, to collect commuting mileage. We would urge those persons who believe this situation to be unclear or unjust to seek legislative clarification on this subject.

Thus, we conclude that the answers to your specific questions are all in the affirmative, except for your last question. In that regard, we conclude that because the statute makes no reference to number of miles traveled, that fact is of no consequence in determining proper reimbursement for travel expenses.

In conclusion, it is our opinion that county supervisors may be reimbursed for mileage expenses incurred in traveling between home and the courthouse if those trips are made to conduct official county business.

March 19, 1987

CONSTITUTIONAL LAW: Cities: Pension Funds. Art. VIII, §3, Const. of Iowa; Iowa Code ch. 411; §§97B.7, 411.2, 411.7, 452.10, 453.16 (1987). It is constitutionally permissible for police and fire fighter retirement systems created under Iowa Code ch. 411 to invest in stock issued by private corporations. Such retirement systems are authorized by statute to invest in corporate stock, including mutual fund stock, where such an investment would be considered prudent under the criteria established in §97B.7. However, where ch. 411 retirement system funds are pooled with other funds with more restricted investment authority, investment of the pooled funds is limited to the more restrictive standard. (Kirlin to Goodwin, State Senator, 3-19-87) #87-3-3

The Honorable Norman J. Goodwin, State Senator: You have requested an opinion concerning funds held by retirement systems for police officers and fire fighters established under Iowa Code ch. 411 (1987). I have taken the liberty of rearranging your questions in the order in which they will be addressed below:

(1) Whether it is constitutionally permissible for ch. 411 pension funds to be invested in stock issued by private corporations?

(2) Whether Iowa Code §452.10 prohibits the investment of ch. 411 pension funds in corporate stock?

(3) Whether there is any statutory prohibition against the investment of ch. 411 pension funds in mutual funds?

(4) Whether ch. 411 pension funds are public funds under the Iowa Code?

I.

Article VIII, §3 of the Iowa Constitution provides that "the state shall not directly or indirectly become a stockholder in any corporation." This office recently opined that Art. VIII, §3, does not prohibit political subdivisions from purchasing stock in private corporations. Op.Att'yGen. #87-1-10 (Kirlin to Chapman). Chapter 411 retirement systems are distinct legal entities created by political subdivisions of the state for the purpose of meeting the retirement needs of certain city employees. Accordingly, we conclude that Art. VIII, §3, does not prohibit the investment of ch. 411 retirement funds in corporate stock. We are not aware of any other constitutional provision which would prohibit the investment of ch. 411 retirement systems in corporate stock.

II.

In the Chapman opinion, we recognized that, although subdivisions were not constitutionally prohibited from investing in corporate stock, they may be expressly prohibited by statute from doing so. *Id.* For the reasons discussed below, we now conclude that ch. 411 retirement systems are authorized by statute to invest in corporate stock.

Chapter 411 retirement systems are created for police officers and fire fighters in each city which establishes a civil service system pursuant to Iowa Code ch. 400. §411.2. Each retirement system holds and invests all cash, securities and other property in its own name. *Id.* Each is managed by a board of trustees which is authorized to invest monies collected by the retirement system until such monies are needed to make benefit payments. §411.7(2). The board is permitted by statute to invest in any investment authorized under §97B.7(2)(b) for the Iowa Public Employees' Retirement System (IPERS). *Id.*[1]

IPERS monies may be invested in any kind of property, except as provided in ch. 12A, which persons of prudence, discretion and intelligence would acquire for their own account, provided that they invest not for the purpose of speculation, but with regard to the permanent disposition of the account, considering the probable income, as well as the probable safety of their account capital. §97B.7(2)(b). This is frequently referred to as the "prudent person" rule. IPERS was given prudent person investment authority as of July 1, 1985. 1985 Iowa Acts, ch. 190, §1. Prior to that date, IPERS was restricted to investing in certain specified investments. However, for the past two decades, IPERS' permissible investments included corporate stock, subject to certain restrictions. 1967 Iowa Acts, ch. 120, §1, effective August 15, 1967. The 1985 amendment evidences a clear and unmistakable legislative intent to remove the prior restrictions to IPERS investment in corporate stock and to permit IPERS investment managers to exercise greater discretion to invest in corporate stock where it is otherwise appropriate to do so under the criteria established in §97B.7(2)(b). Under §411.7(2), ch. 411 retirement systems may invest in any investment authorized for IPERS. Accordingly, we conclude that ch. 411 retirement systems may purchase corporate stock if such an investment would be prudent under the criteria established in §97B.7(2)(b).

[1] The General Assembly in 1986 authorized ch. 411 retirement systems to form investment pools with other ch. 411 retirement systems, utility boards and cities. 1986 Iowa Acts, ch. 1203, §4. The legislature further provided that such pools are subject to §452.10. For the reasons set out in this opinion, we conclude that the legislature recognized that the various participants in such a pool may have differing ranges of investment authority. We interpret the above amendment to require that, when a ch. 411 retirement system pools assets with an entity with more limited investment authority under §452.10, the more limited authority found in §452.10 governs all of the assets placed in the pool. In addition, the pooled assets may be subject to the collateralization requirements that control most investments authorized under §452.10. *See* §453.16.

We do not believe that §452.10 compels a contrary conclusion. The second unnumbered paragraph of §452.10 authorizes a treasurer of a city which has established a civil service system pursuant to ch. 400 to invest "any public funds of the city not currently needed for operating expenses in investments authorized (for ch. 411 retirement systems, for IPERS or for life insurance companies) except common, preferred, or guaranteed stock. . . ." We are aware that city treasurers serve as custodians of ch. 411 retirement systems contributed by their respective cities and employees. §411.7(3). However, we do not believe that such retirement systems are "public funds of the city" within the meaning of §452.10, in light of the fact that each ch. 411 retirement system is an entity distinct from the city and is expressly authorized to hold and invest property in its own name. §411.2. Indeed, §452.10 supports our conclusion that ch. 411 retirement systems may invest in corporate stock by its express prohibition against investing idle city funds in corporate stock. If ch. 411 retirement systems were prohibited from investing in stock, the prohibition contained in §452.10 would be superfluous. We will not assume that the legislature intended to perform a useless act. *Slockett v. Iowa Valley Community School District*, 359 N.W.2d 446, 448 (Iowa 1984).

III.

A mutual fund is an open-end investment company, as defined under the Investment Company Act of 1940. *Investment Company Institute v. Camp*, 401 U.S. 617, 625, n.11 (1971). A mutual fund may be organized as a unit investment trust or may issue shares of stock. 15 U.S.C. §§80a-4, 80a-5. For the purposes of this opinion, the distinction between stock funds and those organized as trusts is immaterial. Because we are of the opinion that it is permissible for ch. 411 retirement systems to invest in corporate stock, we also conclude that they are authorized to invest in mutual funds which would otherwise be considered prudent investments under the criteria set out in §97B.7.

IV.

Several statutes impose duties or powers with regard to public funds. It is a familiar principle of statutory construction that the meaning of the same word or phrase may vary as between different statutes and that the proper interpretation of a word or phrase depends, in part, upon the context of the statute in which it is used. *State v. Osborne*, 368 N.W.2d 68, 70 (Iowa 1985). Your question does not refer to any specific statute. We find it unnecessary to construe the phrase "public funds" in order to respond to the prior questions you pose. We note that retirement systems have been considered public funds for certain purposes. *Tesch v. Board of Deposits*, 297 N.W. 379 (Wisc. 1941) (Pension fund subject to state deposit guarantee fund); Op.Att'yGen. #078-148 (Florida, December 22, 1978) (Pension fund subject to state public depository law); Op.Att'yGen. No. S-1300 (Illinois, October 24, 1977) (Pension fund eligible to join state treasurer's investment pool). However, we respectfully decline to answer your last question at this time in the absence of a specific statutory reference.

SUMMARY

It is constitutionally permissible for ch. 411 retirement systems to invest in stock issued by private corporations. The legislature has authorized ch. 411 retirement systems to invest in corporate stock, including mutual fund stock if such an investment would be considered prudent under the criteria established in §97B.7. However, where such funds are pooled with other funds with more restricted investment authority, investment of the pooled funds will be limited to the more restrictive standard.

March 19, 1987

SUBSTANCE ABUSE: Costs. Iowa Code §§ 125.43; 125.44; 230.15 (1987). Costs of substance abuse commitments are not included in costs of care, maintenance and treatment. (McGuire to Ritchie, Buena Vista County Attorney, 3-19-87) #87-3-4(L)

March 24, 1987

MENTAL HEALTH: Community Supervised Apartment Living Arrangements. Iowa Code §§ 135C.6(1), 225C.19, 225C.19(1), 252.16(3) (1987); 441 Iowa Admin. Code ch. 36, §§ 36.2, 36.3(1), 36.7(1), 36.7(2). Approved community supervised apartment living arrangement (CSALA) providers are institutions within the meaning of § 252.16(3). Persons living in residences provided by the CSALA providers are residents of an institution and precluded from acquiring or changing legal settlement. To the extent that the services provided by CSALA providers are essential for persons to operate in a residential setting, the services constitute support by an institution. Such persons are precluded from acquiring or changing legal settlement. (McCown to Norman, Commissioner, Department of Human Services, 3-24-87) #87-3-5(L)

March 25, 1987

INSURANCE: School Districts; Power To Contract Indebtedness To Fund School District Self-Insured Health Plan. Iowa Code sections 296.7, 509A.14 (1987). A school district is authorized to contract indebtedness or issue bonds to fund a self-insured health plan for its employees. (Haskins to Walters, Director, Department of General Services, 3-25-87) #87-3-6

Jack B. Walters, Director of General Services: You have requested the opinion of this office as to whether Iowa code § 296.7 (1987) authorizes a school district to contract indebtedness or issue general obligation bonds for the purpose of self-insuring the health insurance program of a school district.

First of all, it is clear that a school district may self-insure a health plan for its employees under Iowa Code § 509A.14 (1987) which provides:

> The commissioner of insurance shall adopt rules for self-insurance plans for life insurance and *accident and health insurance* for the state, a political sub-division of the state, a school corporation, or any other public body in the state. The rules adopted shall include, but are not limited to, the following:
>
> 1. A requirement that the plan shall include all coverages and provisions that are required by law in insurance policies for the type of risk that the self-insurance plan is intended to cover.
>
> 2. A requirement that at least once each twelve months, the governing body of the public body shall obtain from an outside consulting actuary a certification that the plan is able to cover all reasonably anticipated expenses.
>
> 3. A requirement that if the resources of the plan are inadequate to fully cover a claim under the plan, then the public body is liable for any portion of the claim that is left unpaid.

[Emphasis added]. *See also* 1980 O.A.G. 841(l). The ability to engage in, and the terms and conditions for, school indebtedness is, of course, purely statutory. *See Brutsche v. Coon Rapids Community School Dist.*, 255 N.W.2d 337 (Iowa 1977); *Honohan v. United Community School Dist.*, 258 Iowa 57, 137 N.W.2d 601 (1965); 1964 O.A.G. 340; *see also Bishop v. Iowa State Bd. of Public Instruction*, 395 N.W.2d 888, 891 (Iowa 1986) ("the only powers of a school district are those expressly granted or necessarily implied in the district's governing statutes").

The question is whether a school district may contract long-term indebtedness or issue bonds to finance the obligations created by the plan. Iowa Code § 296.7, which provides as follows:

> A school district or merged area school corporation is authorized to contract indebtedness and to issue general obligation bonds or enter into insurance agreements obligating the school district or corporation to make payments beyond its current budget year to procure or provide for a

policy of insurance, a self-insurance program, or a local government risk pool to protect the school district or corporation from *tort liability, loss of property, or any other risk associated with the operation of the school district or corporation.* Taxes for the payment of the principal, premium, or interest on such a bond, the payment of such an insurance policy, the payment of the costs of such a self-insurance program, the payment of the costs of such a local government risk pool, and the payment of any amounts payable under any such insurance agreement may be levied in excess of any tax limitation imposed by statute. Such a self-insurance program or local government risk pool is not insurance and is not subject to regulation under chapters 505 through 523C. However, those selfinsurance plans regulated pursuant to § 509A.14 shall remain subject to the requirements of § 509A.14 and rules adopted pursuant to that section. [Emphasis added].

The issue is whether the phrase "any other risk associated with the operation of the school district or corporation" is limited to the general subject matter of its immediate textual antecedents - "tort liability" and "loss of property", e.g. property and casualty-type risks or is broader than them so as to encompass the risks which a school district assumes by reason of having a self-insured health plan for its employees. Ordinarily, where general words follow specific words in an enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. *See De More v. Dieters,* 334 N.W.2d 734, 738 (Iowa 1983) (rule of "ejusdem generis"). However, legislative intent is to be gleaned from the enactment as a whole. *Id.* The apparent legislative intent to permit indebtedness or bonding for health plans is evidenced by the reference in the last sentence of § 18 to § 509A.14, which, as seen, authorizes self-insured health plans by governmental entities pursuant to rules of the Commissioner of Insurance. The Commissioner has, in fact, adopted rules pursuant to § 509A.14 governing these plans. *See* 191 Iowa Admin. Code § 35.20. Nothing in § 509A.14 or these rules is inconsistent with school districts contracting indebtedness or issuing bonds to fund a plan authorized there.

Accordingly, we conclude that a school district is authorized to contract indebtedness or issue bonds to fund a self-insured health plan for its employees.

March 27, 1987

OPEN MEETINGS: Public Records; Advisory Committees. Iowa Code § 21.2(1)(a); § 22.1. For a committee appointed by the Governor to be a governing body expressly created by executive order and thus subject to the open meetings law, the body would have to possess more than advisory authority. A committee appointed by the Governor in his official capacity to make recommendations on an issue concerning state government would be a "committee of the state" and subject to the public records law. Committee materials would be public records if they meet the standards set forth in 1982 Op.Att'yGen. 215 — i.e., they are comprehensible writings developed or maintained by a public body or official as a convenient, appropriate, or customary method by which the body or official discharges a public duty. (Osenbaugh to Hammond, State Representative, 3-27-87) #87-3-7(L)

APRIL 1987

April 13, 1987

CONSERVATION: Fishing Laws. Iowa Code §§ 109.38, 109.39, 109.64, 109.67, 109.78, 110.1, 110.24 (1987). An Iowa fishing license is required to fish in all waters in the State. The license exemption for tenants who fish on their own lands is applicable to the lessee of camping space at a commercial campground who fishes in a private lake at the campground if the lease

confers an exclusive right to fish in common with rights of the owner and other tenants. Neither the owner nor any tenant is exempt from the duty to abide by catch limits, possession limits, size restrictions and closed seasons. The Natural Resource Commission could establish appropriate exemptions by administrative rule. (Smith to Angrick, Citizens' Aide/Ombudsman, 4-13-87) #87-4-1

William P. Angrick II, Citizens' Aide Office: You have requested an opinion of the Attorney General concerning whether a lessee of a camping space at a private recreational campground must have an Iowa fishing license to legally take fish from a private lake at the campground. Our response assumes that the private lake is physically isolated so that fish cannot migrate into it from other waters at any time. It is our opinion that an Iowa fishing license is required to fish in all waters in the State, and that the license exemption for tenants who fish on their own land applies to a lessee of camping space at a commercial campground if the lease confers an exclusive right to fish a private lake or pond in common with the owner and other tenants. We analyze the relevant law in two steps: First we consider the territorial scope of Iowa angling laws; second, we examine an exception that authorizes owners or tenants to fish on their lands.

I.

Various laws for the conservation of fish and wildlife are codified in Iowa Code ch. 109 (1987). Fishing and hunting license requirements and certain exceptions are set forth in Iowa Code ch. 110 (1987). Section 110.1 prohibits taking of fish or wildlife without a license and specifies fees for various licenses. The fee provisions have been amended frequently, most recently by 1986 Iowa Acts, ch. 1240. However, the portion of § 110.1 requiring a license to fish has not been amended since it was enacted as 1933 Iowa Acts, ch. 30, § 10 (45th G.A.). This portion of § 110.1 has been quoted by the Iowa Supreme Court as follows:

> Except as otherwise provided in this chapter, no person shall fish... without first procuring a license or certificate so to do....

State v. Dawson, 245 Iowa 747, 63 N.W.2d 917 (1954). In that case the defendant contended that the Iowa fishing license requirement did not apply to a city-owned lake alleged not to be under the "jurisdiction" of the State Conservation Commission. In affirming the defendant's conviction for fishing without a license, the court stated the following:

> Defendant's argument confuses the jurisdiction which the state has taken, through its Conservation Commission, over certain waters in this state and the ownership of fish which have not been caught and reduced to possession. Without question all of the fish in this state, in a state of freedom, belong to the state of Iowa for the benefit of the people of Iowa and the state has exclusive jurisdiction to regulate or prohibit the appropriation of all of the fish in the waters of this state.

State v. Dawson, 63 N.W.2d at 917-918. This case established that fish in a municipal reservoir are "in a state of freedom" and in "waters of this state." It did not intimate which bodies of water, if any, would be exempt from the state fishing license requirement.

The fishing license requirement in § 110.1 is not expressly limited to certain waters. Likewise, various angling regulations in Iowa Code ch. 109 are not expressly limited to certain waters. Sections 109.38 and 109.67 authorize the Iowa Natural Resource Commission to establish seasons, daily catch limits, possession limits, and size restrictions for the taking of fish, and these sections prohibit taking of fish in violation of such regulations. The purpose of the authorized regulations is to maintain various species in proper biological balance which includes maintenance of an adequate supply of each species of fish and wildlife as required by § 109.39.

The terms "waters of the state," "state waters," "public waters," and "private waters" appear in various sections in chapter 109[1] but are not defined in chapter 109 or 110.[2] It is clear that § 109.2 disclaims public ownership of fish privately (and lawfully) stocked in an isolated pond or lake on private land. If the public does not own fish in isolated private lakes and ponds, one may ask what state interest justifies exercise of governmental police power to regulate the taking of such privately-owned fish. This question has been addressed by appellate courts in several other states. Cases are collected in 15 A.L.R.2d 754. The majority rule in the past has been that statutory fishing regulations do not apply to lakes or ponds privately owned and not connected with any stream or other public waters, e.g., *People v. Conrad*, 125 Mich. 1, 83 N.W. 1012 (1900). This rule is based on the view that the state's interest in protection of wild fish does not extend to fish lawfully stocked and isolated in private ponds and lakes.

However, in relatively recent cases, courts have recognized a valid state police power interest in regulating angling in private, isolated waters. The rationale for such extension of the police power relates to the practical difficulties of enforcing angling laws if the existence of a violation depends on proof of which body of water a fish was taken from. The Court of Appeals of Kentucky upheld the constitutionality of a Kentucky statute regulating the size and number of fish which may be caught from public and private waters and requiring anglers to have licenses. The statute excepted only owners of land on which private ponds are located, their resident children, and lessees. In *Draffen v. Black*, 302 Ky. 775, 196 S.W.2d 362 (1946), the court held statutory regulations were applicable to members of the public who paid to fish in a private pond, commenting on enforcement implications as follows:

> At once it is apparent that the Fish and Game Commission would be helpless in its endeavor to prohibit the taking of excessive numbers or undersized fish from public streams, if one could retain in his possession all fish taken from private ponds, irrespective of their size and number; because, in penal actions to enforce the game laws, the Commonwealth would be required to prove the contraband in possession of an angler was taken from a public stream, and not from private waters. The Legislature made no exception, and the courts may not, especially when to do so virtually would destroy the force of the Act. The Legislature has not attempted to interfere with appellee in the exercise of his individual rights in respect to the fish in his pond. It has attempted to regulate only the public invited to fish in the pond.

Appellate courts in South Carolina and Mississippi have adopted the same rationale for upholding statutory fishing regulations as applied to private ponds. *Dargan v. Richardson*, 92 S.E.2d 167 (S.C. 1956); *State v. Heard*, 151 So. 2d 417 (Miss. 1963). Other courts have construed angling license statutes more narrowly based on statutory words of limitation, e.g., as in *Ohio Water Service*

[1] The term "public waters" appears in §§ 109.2, 109.16, and 109.64 (1987). The term "private waters" appears in §§ 109.64 and 109.78 (1987). The term "state waters" appears in § 109.9 (1987). The term "waters of the state" appears in §§ 109.10, 109.14, 109.17, 109.72, 109.73, 109.74, 109.80, 109.82, and 110.24 (1987).

[2] A new Iowa Code ch. 109B (1987) entitled "Commercial Fishing" was created by 1986 Iowa Acts, ch. 1141. This act includes a definition stating that "waters of the state" means all of the waters under the jurisdiction of the state. This definition does not go very far towards clarifying the ambiguity inherent in the term, although it clarifies that "waters of the state" include more than "public waters." Further exploration of these murky waters would be outside the scope of this opinion request.

Co. v. Ressler, 173 Ohio St. 33, 180 N.E.2d 2 (1962), where a divided court held that a statutory prohibition on taking any fish by angling in any of "the waters of the state" meant only public-owned lakes and streams.

The Iowa and Kentucky statutes contrast in two significant respects with the Ohio statute construed in *Ohio Water Service Co.* First, the license requirement in Iowa Code section 110.1 is not limited to certain waters. It prohibits any fishing without a license. Likewise, the authorization in §§ 109.38, 109.39 and 109.67 to establish angling restrictions is not limited to certain waters. Second, like the Kentucky statute, Iowa Code § 110.24 expressly exempts from the license requirement owners or tenants of land and certain family members when fishing on such lands. Such exemption minimizes the impact of the police power on those who maintain private ponds and lakes for use by themselves or their tenants and families.

The history of amendments to Iowa's statutory fishing license requirements evidences legislative intent to broaden the scope of the license requirement. The first statute requiring an angling license appeared as § 1719 in the Iowa Code of 1924. It required a license only to fish in the "stocked meandered lakes of the state." Additionally, § 1707 of the 1924 Code stated, in pertinent part, that:

> Persons who raise or propagate fish upon their own premises, or who own premises on which there are waters having no natural inlet or outlet through which such waters may become stocked or replenished with fish, are the owners of the fish therein and may take them therefrom or permit the same to be done.

The limitations of the license requirement to fishing in "stocked meandered lakes" was repealed by 1929 Iowa Acts, ch. 57, § 5 (43rd G.A.), which enacted a new statute providing:

> No male person over the age of eighteen shall fish in any state waters without first procuring a fishing license.

In 1930 Op.Att'yGen. 164 this office opined that "state waters" was limited to state-owned waters. In 1933 the General Assembly rewrote the fish and game laws with legislation entitled in part as an act ". . . to prohibit the fishing, trapping, hunting and other pursuits affecting wildlife, except under license . . . ." That act, 1933 Iowa Acts, ch. 30, repealed the language that had made a fishing license required to take fish from "state waters." It substituted the broad license requirement currently contained in § 110.1. The 1933 amendment also repealed the provision (§ 1707 of the 1931 Code) which had authorized owners of waters without inlet or outlet to take fish or permit others to take them. The act also expanded a hunting license exemption that had allowed owners or tenants occupying farm land to hunt on such land without licenses. The exemption was expanded to include fishing without license and it was made applicable to all private lands rather than just farm land.

When these portions of the 1933 act are examined together, they evidence a legislative intent to broaden the applicability of the fishing license requirement and narrow the exemptions.[3] Although *State v. Dawson* involved fishing in

[3] We note that the Iowa Department of Natural Resources currently spends approximately $50,000.00 annually to provide breeding stock for farm ponds pursuant to Iowa Code § 109.78. Although allowing public access is not a requirement of eligibility for free breeding stock, many pond owners who receive breeding stock from the State do allow the public to fish in their private ponds. Information from DNR surveys of licensees indicates that about fifteen percent of fishing trips by licensees are to farm ponds. Thus, there is some factual connection between fishing license revenues and fishing opportunities in private ponds.

a municipal reservoir, we think the Supreme Court would reach the same result in a case involving a private pond unless the defendant could come within an exception provided in § 110.24.[4]

II.

We next address the exemption that allows owners or tenants to fish on their lands without a license. The exemption was enacted as 1933 Iowa Acts, ch. 30, § 23 (part of the legislation discussed in Part I of this opinion which broadened the fishing license requirement to cover all fishing in the state). The exemption is codified in § 110.24 (1987) which also contains several other exemptions from hunting and fishing license requirements. Section 110.24 was most recently amended by 1986 Iowa Acts, ch. 1240, which inserted the word "juvenile," limiting which children of owners or tenants of land can hunt, trap or fish on such lands without license. The relevant portion of "110.24, first unnumbered paragraph, reads as follows:

> Owners or tenants of land, and their juvenile children, may . . . fish . . . upon such lands . . . without securing a license so to do . . . .

We give particular attention to the meaning of the words "or" and "tenants" in the above-quoted language. Statutory words and phrases are ordinarily to be construed according to the context and approved use of the language. Iowa Code § 4.1(2) (1987). When the word "or" is used it is presumed to be disjunctive unless a contrary legislative intent appears. *Kearney v. Ahmann*, 264 N.W.2d 768 (Iowa 1978). However, the word "or" is sometimes construed as conjunctive to prevent an unreasonable result. *Lahn v. Incorporated Town of Primghar*, 225 Iowa 686, 281 N.W. 214 (1938). If the fishing license exemption is for either owners or tenants but not both, the statute fails to indicate the circumstances in which one class is exempted but not the other.

Another portion of § 110.24 does use "owner" and "tenant" of land in a disjunctive relationship to explain who is eligible for a free license to hunt deer or turkey. Essentially, one free license may be issued for each "farm unit" (a defined term) on which the owner, a member of the owner's family, or a farm tenant resides. A person does not qualify as a tenant unless he or she resides on the farm unit and is actively engaged in operation of the farm unit. Definitions of "farm unit" and "tenant" are included together in the sixth unnumbered paragraph of § 110.24, added by 1986 Iowa Acts, ch. 1240, § 7. Literally, the new paragraph says the definitions are of these words "as used in this section." But nothing in § 110.24 or in the 1986 amending legislation suggests that the related definitions of "farm unit" and "tenant" have any purpose other than to clarify who is eligible for a free license to hunt deer or turkey. The addition of an express limitation of the meaning of a word for one purpose is inconsistent with the existence of a similar implied limitation when the word is used for a different purpose in the same statute. *See* 2A Sutherland, *Statutory Construction* (Sands Fourth ed. 1984) §§ 47.23-47.25.

Thus, the fishing license exemption for owners and tenants of land should be interpreted as a conjunctive exemption for both owners and tenants. And permanent residency on the land where fishing occurs is not a required element of eligibility for the exemption. Since we find no special limitation of the word "tenant" was intended, we consider its approved usage. Several helpful definitions are contained in *Black's Law Dictionary* (Fifth ed. 1979) as follows:

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[4] At 1934 Op.Att'yGen. 308 an opinion dated August 7, 1933, concludes that the applicability of the fishing license requirement to a privately owned lake depends on whether it is stocked by overflow from state-owned waters. The 1933 opinion did not consider the effect of the newly effective fish and game amendments in 1933 Iowa Acts, ch. 30. These amendments dictated a different conclusion.

> *Tenant.* In the broadest sense, one who holds or possesses lands or tenements by any kind of right or title, whether in fee, for life, for years, at will, or otherwise. In a more restricted sense, one who holds lands of another; one who has the temporary use and occupation of real property owned by another person (called the "landlord"), the duration and terms of his tenancy being usually fixed by an instrument called a "lease." One who occupies another's land or premises in subordination to such other's title and with his assent, express or implied. One renting land and paying for it either in money or part of crop or equivalent.

In light of these dictionary definitions, a "tenant" for the purpose of the fishing license exemption appears to be one who has leased the right to hold, occupy or possess land, and thereby acquired the right to fish on the premises. The nature of fishing is such that it can be exercised in common with others on the same land. However, the words "hold," "occupy" and "possess" include an element of exclusivity, i.e., the right to cause exclusion of others not similarly situated.

Applying the foregoing analysis to a private lake or pond at a campground, we conclude that the lessee of a camping space may fish a private pond or lake on the premises without an Iowa fishing license if the lease confers an exclusive right to fish in common with other lessees and the owner. An exclusive right does not exist if the pond or lake is open to fishing other than as an incident of leases for occupancy of land on the campground premises. Thus, tenancy cannot be established at a pond or lake that is open to the public to fish for free or for a fee.[5] The Iowa Natural Resource Commission could adopt an interpretive rule specifying the minimum duration of occupancy required to establish a camping tenancy for the purpose of the fishing license exemption. Although not conclusive, such rule would be relevant if the exemption were asserted as a defense in a prosecution for fishing without a license. In the absence of any such rule, we think the lease of camping space for one night should be sufficient to establish a tenancy if it confers an exclusive right to fish in common with other lessees.

This liberal interpretation of the word "tenant" is consistent with 1934 Op.Att'yGen. 572, which opined that the license exemption for tenants included transients temporarily occupying a transient camp operated by the Iowa Service Bureau. The Bureau leased a strip along a non-meandered portion of the Raccoon River for the specific purpose of providing fishing access for the transients.[6]

Although owners, tenants, and their juvenile children do not need a license to fish in a private lake or pond on their land, they are not exempt from the duty to abide by closed seasons, daily catch limits, possession limits, and size restrictions established pursuant to §§ 109.38 and 109.67. The Iowa Natural Resource Commission could establish appropriate exceptions by administrative rule. However, even private fish hatcheries licensed by the Iowa Department of Natural Resources are prohibited by Iowa Code § 109.64 from selling undersized fish for food purposes. This prohibition indicates legislative intent to maximize uniformity of certain regulations concerning taking and possession of fish throughout the state.

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[5] Tenants' right of exclusive use would not be destroyed by allowing non-tenants to fish for free as guests, but guests would not be exempt from the license requirement.

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[6] We question whether the license exemption for tenants of land could now be applied to a stream in light of the right of the public to navigate non-meandered streams as declared in Iowa Code § 106.69 (1987).

In conclusion, it is our opinion that Iowa Code § 110.1 (1987) requires an Iowa fishing license to be obtained to fish in any water in the State including private lakes and ponds, subject to exceptions in § 110.24 (1987). The exception for owners and tenants of land, and their juvenile children, authorizes a lessee of camping space at a campground to fish in a private lake or pond on the premises without a license if the lease confers an exclusive right to fish in common with the rights of the owner and other lessees. Neither the owner nor any lessee is exempt from the duty to abide by catch limits, possession limits, size restrictions and closed seasons established pursuant to Iowa Code §§ 109.38, 109.39 and 109.67.

April 13, 1987

COUNTIES AND COUNTY OFFICERS: Recorder And Auditor: Name Changes. Iowa Code Supp. §§ 674.14, 331.507(2)(b) and 331.602(42) (1985); Iowa Code § 331.604 (1985). A name-change decree transmitted to the county recorder by a district court clerk should be indexed and recorded in the same manner as a deed except that indexing notations should identify the instrument as a change of name. (Smith to Murphy, Kossuth County Attorney, 4-13-87) #87-4-2(L)

April 23, 1987

GENERAL SERVICES, DEPARTMENT OF: Racing Commission: Location Of Racing Commission Offices. Iowa Code § 99D.6 (1987). The Department of General Services must provide the Gaming Division of the Iowa Department of Commerce office space for its headquarters within the corporate limits of the City of Des Moines. (Hayward to Ketterer, 4-23-87) #87-4-3(L)

April 23, 1987

MUNICIPALITIES: Utility Boards; Elections; Appointment Of Officers. Iowa Code §§ 63.1, 63.7, 69.1, 388.3 (1987). A city utility board member may hold over following the expiration of a statutory term until the confirmed appointment of a successor and is entitled to fully participate in those affairs of the board. (Dorff to Poncy, State Representative, 4-23-87) #87-4-4(L)

April 29, 1987

CITIES: Counties; Criminal Law: Parking Ticket Enforcement. Iowa Const. art. I, § 11; 1986 Iowa Acts, ch. 1238, §§ 14 and 31; Iowa Code §§ 321.236(1), 331.655(1)(b), 602.8105(1), 602.8106(5), 602.8109(6), 805.6(1), 805.12, and 815.13 (1987). Responsibility for a municipal parking meter or overtime parking violation alleged by simple notice of fine is "denied" when the specified fine remains unpaid after the due date on the parking ticket. Regardless of whether responsibility for the ticket is actively challenged or the ticket is merely ignored, prosecution can be commenced only by filing of a sworn charging instrument. In overtime parking prosecutions the clerk cannot tax against the defendant the costs of service of process on the defendant; in other cases the clerk must tax against the defendant the costs of serving process on the defendant when they are shown in the clerk's file. The prosecuting governmental body is not entitled to reimbursement of costs until they have been paid by the defendant to the clerk. (Smith to Metcalf, Black Hawk County Attorney, 4-29-87) #87-4-5(L)

April 30, 1987

HOSPITALS: County. Iowa Code §§ 347A.1, 347A.3 (1987). A depreciation fund to cover expenses which need not be paid the same year cannot be established through a tax levy for chapter 347A county hospitals. (McGuire to Murphy, Kossuth County Attorney, 4-30-87) #87-4-6(L)

MAY 1987

May 11, 1987

COUNTIES AND COUNTY OFFICERS: Board Of Supervisors; Veteran Affairs Commission; Authority To Hire Employees, Set Salaries, And Award Benefits. Iowa Code chapter 250 (1987); §§250.6, 250.7, 250.9, 250.10. The veteran affairs commission hires and fires employees in its office; the board of supervisors must approve those appointments, and also sets the salaries for those employees. The commission also decides the amount of benefits to be awarded to what persons within the budget set by the supervisors: the supervisors must then review each claim. The supervisors' approval and review authority is subject to a reasonableness standard. (Weeg to Baker, Veteran Affairs Division, Department of Public Defense, 5-11-87) #87-5-1(L)

May 18, 1987

ADMINISTRATIVE AGENCIES: Schools; Board of Nursing; Educational Requirements For Nursing Instructors In Community College Nursing Programs. Iowa Code §§152.5(1); 294.2 (1987). 1) Section 294.2 does not prohibit the application of Board of Nursing rules imposing additional educational requirements to area community college nursing education programs; and 2) the Board of Nursing may adopt rules requiring the faculty of an approved nursing program to meet new and more rigorous educational requirements in order for that program to be approved by the Board. (Weeg to Royce, Administrative Rules Review Committee, 5-18-87) #87-5-2(L)

May 20, 1987

REAL PROPERTY: Highways; Conservation: Roadside Trapping. Iowa Code §§109.92, 306.4 and 320.4 (1987). The owner, contract purchaser, or lessee who controls land that is subject to a public road easement may prohibit trapping of animals within the road right of way. (Smith to Pellett, State Representative, 5-20-87) #87-5-3(L)

May 20, 1987

JUVENILE LAW: Processing Of Complaints Alleging Delinquency. Iowa Code §§232.2(24), 232.2(25), 232.28(1)-(8), 232.35, 232.35(2), 232.35(3), 331.756 (1987). The juvenile code contemplates that the receipt and initial processing of delinquency complaints is a function of juvenile court officers. Nothing in this statutory scheme precludes a law enforcement officer from conferring with the county attorney at any time. (Phillips to O'Brien, State Court Administrator, 5-20-87) #87-5-4(L)

JUNE 1987

June 16, 1987

COUNTIES AND COUNTY OFFICERS: Taxation: Referendum For Unified Law Enforcement (ULE) District And Levy. Iowa Code §§28E.22, 28E.28 (1987). The authorization of a ULE District and levy by a referendum held pursuant to a statute limiting the effective period of the authorization to five years remains subject to the five year limitation unless or until a post-amendment referendum is held, as the amendment removing the limitation is only prospective in application. (Donner to Huddle, Louisa County Attorney, 6-16-87) #87-6-1(L)

June 18, 1987

SCHOOLS: Insurance: Ability Of School Districts To Purchase An Annuity For Its Employees Invested In Mutual Funds. Iowa Code sections 294.16, 422.3(5) (1987). A school district may purchase an annuity for its employees which is invested in mutual funds so long as the annuity is purchased from

an authorized insurance company and an Iowa-licensed agent. (Haskins to Shoultz, State Representative, 6-18-87) #87-6-2(L)

June 24, 1987

TAXATION: Real Estate Transfer Taxes Regarding Conveyances In Partition Actions. Iowa Code §§428A.1 and 428A.3 (1987). Partition referees are not exempt from paying real estate transfer taxes as they are not public officials as defined in §428A.3. There are no real estate transfer taxes owing if the partitioned realty is subsequently transferred to a third party for consideration of $500.00 or less. (Miller to Richards, Story County Attorney, 6-24-87) #87-6-3(L)

June 26, 1987

CONSTITUTIONAL LAW: Item Veto. Iowa Const. art. III, §16; House File 671, 72nd G.A., First Session §203(1). Item veto of §203(1)(a) of House File 671, which establishes the rate by which persons with dependent children shall be paid based on the total number of persons who receive benefits, constitutes an item veto of a condition or qualification on an appropriation and would be held unconstitutional if challenged in a court of law. (Miller and Pottorff to Avenson, State Representative, Arnould, State Representative, and Hutchins, State Senator, 6-26-87) #87-6-4

The Honorable Donald Avenson, State Representative; The Honorable Bill Hutchins, State Senator; and The Honorable Bob Arnould, State Representative: You have jointly requested an opinion of the Attorney General concerning an item veto by Governor Terry Branstad of §203(1)(a) of House File 671. You point out that §203(1) of House File 671 appropriates 62 million dollars to the Department of Human Services for aid to families with dependent children in the following language:

> Sec. 203 SPECIAL PROGRAMS. There is appropriated from the general fund of the state to the department of human services for the fiscal year beginning July 1, 1987, and ending June 30, 1987, the following amounts, or so much thereof as is necessary, to be used for the purposes designated:
>
> | | 1987-1988 Fiscal Year |
> |---|---|
> | 1. For aid to families with dependent children..... | $62,000,000 |

House File 671, 72nd G.A., First Session §203(1). Immediately following this appropriation, subparagraphs (a) through (i) delineate purposes for which this money shall be spent. Subparagraph (a), item vetoed by Governor Branstad, specifically provides:

> As a condition of this appropriation, effective July 1, 1987, the department shall establish the schedule of basic needs for one person at one hundred seventy-four dollars, for two persons at three hundred forty-three dollars, for three persons at four hundred six dollars, for four persons at four hundred seventy-two dollars, for five persons at five hundred twenty-two dollars, for six persons at five hundred eighty-one dollars, for seven persons at six hundred thirty-eight dollars, for eight persons at six hundred ninety-six dollars, for nine persons at seven hundred fifty-three dollars, for ten persons at eight hundred twenty-three dollars, and for each additional person eighty-two dollars.

H.F. 671 §203(1)(a).

The terms of this subparagraph set out the "schedule of basic needs" which establishes the rate by which families with dependent children shall be paid from the 62 million dollar appropriation. You note that this schedule includes a 6.5 percent increase in benefits over the amount recipients received in the previous fiscal year and is expressly stated to be a condition of the appropriation of the 62 million dollars.

In light of these provisions, you inquire whether item veto of subparagraph (a) is within the scope of the item veto power granted to the Governor by Article III, Section 16 of the Iowa Constitution. It is our opinion that, if item veto of §203(1)(a) were challenged in a court of law, the item veto would be held unconstitutional.

The gubernatorial power to exercise an item veto in an appropriation bill is specifically provided in the Iowa Constitution:

> Item veto by Governor. The Governor may approve appropriation bills in whole or in part, and may disapprove any item of an appropriation bill; and the part approved shall become a law. Any item of any appropriation bill disapproved by the Governor shall be returned, with his objections, to the house in which it originated, or shall be deposited by him in the office of the Secretary of State in the case of an appropriation bill submitted to the Governor for his approval during the last three days of a session of the General Assembly and the procedure in each case shall be the same as provided for other bills. Any such item of an appropriation bill may be enacted into law notwithstanding the Governor's objections, in the same manner as provided for other bills. [Iowa Const. art. III, § 16 amend. 27.]

Under this provision the governor may disapprove "any item of an appropriation bill."

In evaluating the constitutionality of an item veto, several principles are applicable. Exercise of the item veto power is limited to appropriation bills. 1980 Op.Att'yGen. 864, 865-66. *See Turner v. Iowa State Highway Commission*, 186 N.W.2d 141 (Iowa 1971). An "item" of an appropriation bill is not limited to an appropriation of money but is broadly defined to include any "part" of an appropriation bill. *Colton v. Branstad*, 372 N.W.2d 184, 188-89 (Iowa 1985); *Turner v. Iowa State Highway Commission*, 186 N.W.2d at 149. Exercise of the item veto power, however, cannot be used to veto a legislatively imposed qualification on an appropriation without veto of the underlying appropriation as well. *Welden v. Ray*, 229 N.W.2d 706, 713 (Iowa 1975). The question which you pose involves application of the latter principle.

Recent Iowa Supreme Court decisions have focused on the criteria for determining whether particular language in an appropriation bill constitutes a legislatively imposed qualification, or condition, upon an appropriation. Specific draftsmanship is not determinative. *Colton v. Branstad*, 372 N.W.2d at 192. Labeling a subparagraph as a "condition" of an appropriation, therefore, will not necessarily insulate the language from item veto. *Id.* at 192. Rather, the appropriate inquiry is whether the language in issue qualifies, restricts or otherwise conditions how the money appropriated shall be spent. *Welden v. Ray*, 229 N.W.2d at 710-13. *See Colton v. Branstad*, 372 N.W.2d at 190.

In *Welden v. Ray*, the Iowa Supreme Court explained the prohibition on item veto of a condition of an appropriation in terms of the inherent powers of the separate branches of government. Appropriation of money is essentially a legislative function. *Id.* at 709. Inherent in the power to appropriate is the power to specify how the money shall be spent. *Id.* at 710. The Welden court further explained:

> All legislative appropriations are qualified to a degree; the legislature does not appropriate money without stating how the funds shall be used. Sometimes the qualification is general: 'For salaries, support, maintenance and miscellaneous purposes.' Sometimes the qualification is more specific: 'to be used for aid to school districts for development and the conduct of programs, services and activities of vocational education through secondary schools.' In either event, the qualification states how and for what purpose the money may be expended.

> The qualification may be affirmative in form: 'Salaries of nine legal assistants.' Or it may be couched in the negative: 'not more than one thousand five hundred sixty [positions] are to be filled at any one time.' No difference in substance exists between affirmative and negative qualifications; both are restrictions upon the appropriations.

Id. at 710 (citations omitted).

Applying these principles to House File 671, we have little doubt that subparagraph (a) is a legislatively imposed qualification or condition on the 62 million dollar appropriation. The legislature has specifically delineated in subparagraph (a) the rate by which persons with dependent children shall be paid based on the total number of persons who receive benefits. Clearly this rate schedule constitutes a qualification on how the money shall be spent.

We are aware that House File 671 does not separately appropriate a fixed portion of the 62 million dollars for the 6.5 percent increase in benefits reflected in the rate schedule set out in §203(1)(a).[1] Accordingly, there is no separate and congruent appropriation of money less than the full 62 million dollars available for item veto. In our view, however, this factor would not excuse application of the Welden principle.

The Iowa constitution does not require specific subitemization of an appropriation. *See* Iowa Const. art. III, §24. ("No money shall be drawn from the treasury but in consequence of an appropriation."). Other state constitutions have imposed this requirement. *See e.g., State Board of Agriculture v. Brady*, 277 Ill. 124, 115 N.E. 204 (1917) ("Bills making appropriations of money out of the treasury shall specify the objects and purposes for which the same are made, and appropriate to them respectively their several amounts in distinct items and sections."). Where the state constitution requires subitemization of an agency budget, courts have held that both the subitemized appropriation of money and the purpose or object for which it is appropriated may be item vetoed without veto of a lump sum figure reflecting the total appropriation to the agency. *Id.* at 205. The Iowa Supreme Court has expressed approval of this result. *Welden v. Ray*, 229 N.W.2d at 711.

In *Welden*, the Iowa Supreme Court discussed with approval development of the so-called "Brady Rule" on inclusion of lump sum amounts in appropriation bills for state agencies. The "Brady Rule" is drawn from *State Board of Agriculture v. Brady*, 277 Ill. 124, 115 N.E. 204 (1917), in which the Illinois Supreme Court reviewed the claim that drafting of an appropriation bill to set out a lump sum appropriation followed by subdivisions appropriating the lump sum in specified amounts for specified purposes precluded the governor from item vetoing a subdivision without also item vetoing the lump sum. The Illinois Supreme Court rejected this contention noting that the Illinois state constitution required that bills appropriating money from the treasury specify the objects and purposes of the appropriation and appropriate to the objects and purposes "their several amounts indistinct items and sections." *Id.* at 205. The lump sum appropriation, therefore, could not be deemed a distinct item in satisfaction of the constitutional mandate. Items subject to item veto were the subdivisions which set out specified amounts of the lump sum for specified purposes. *Id.* at 206-07.

After review of these authorities, two significant factors persuade us that the *Welden* court's approval of the "Brady Rule" is insufficient to extend the item veto power to §203(1)(a). First, the Iowa constitution does not require subitemization, and the Iowa Supreme Court has not imposed subitemization by judicial construction. In *Welden v. Ray*, in fact, the Court struck down item

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[1] In his item veto message Governor Branstad estimates the 6.5 percent increase at "approximately 5.7 million" dollars. (letter to Secretary of State Elaine Baxter, June 9, 1987).

vetoes of conditions on appropriations for which no separate and congruent appropriation of money was subitemized and available for item veto. *See e.g., Welden v. Ray*, 279 N.W.2d at 708 (item veto of ceiling of 72 permanent full-time positions held to be an inseverable condition of approximately one-half million dollar appropriation to the office of planning and programming for salaries, support, maintenance, and miscellaneous purposes). Second, the drafting of § 203(1)(a) does not suggest the legislature failed to subitemize solely to evade the governor's item veto power. Establishment of the rate schedule for benefits is a legislatively imposed qualification on the appropriation which goes to the very heart of administration of the program for aid to dependent children. *Cf. Colton v. Branstad*, 372 N.W.2d at 189-90 (unrelated contingency on appropriated funds susceptible to item veto despite legislative labeling as a "condition" on the appropriation). A failure to appropriate separate amounts for the previous rate schedule and for the 6.5 percent increase is not a departure from past legislative practice. Determination of the total amount of benefits, in fact, is not susceptible of definitive calculation. The amount paid out will necessarily vary according to the number of applications for benefits. Although the item veto message approximates the cost of the 6.5 percent increase at 5.7 million, the ultimate figure may be higher or lower.

In our view, the Iowa Supreme Court would embrace the "Brady Rule" under the appropriate circumstances. The appropriate circumstances for application of the "Brady Rule" would be presented when a lump sum appropriation to a state agency, or for a program within a state agency, is subitemized by the legislature to specify a portion of that amount for a specific purpose. Under these circumstances, we believe the Iowa Supreme Court would apply the "Brady Rule" to endorse the governor's power to excise the specific amount and the specific purpose without veto of the entire lump sum. Other subsections of § 203, in fact, are drafted in this manner. *See e.g.*, H.F. § 203(1)(b) ("From the funds appropriated in subsection 1, four hundred thousand (400,000) dollars, or so much thereof as is necessary, shall be allocated for this program."). Subsection 203(1)(a), however, constitutes the full rate schedule for payment of benefits from the 62 million dollar appropriation which happens to reflect a 6.5 percent increase. The governor's item veto does not seek to excise a specific amount and the specific purpose for which it was appropriated. Rather, the item veto seeks to slice the rate schedule by approximating and severing the portion which would reflect an increase over the 1985 rate schedule. This intrudes into the legislative function, materially alters the purpose for which the 62 million dollars was appropriated and is inconsistent with the law.

In summary, it is our opinion that item veto of § 203(1)(a) of House File 671, which establishes the rate by which persons with dependent children shall be paid based on the total number of persons who receive benefits, constitutes an item veto of a condition or qualification on an appropriation and would be held unconstitutional if challenged in a court of law.

JULY 1987

July 22, 1987

COURTS: Governor: Budget. Iowa Code § 602.1301(2)(b) (1987). Iowa Code § 602.1301(2)(b) requires the governor to submit to the legislature the Supreme Court's estimate of total expenditure requirements of the Judicial Department in the proposed budget without change. (Osenbaugh to O'Brien, State Court Administrator, 7-22-87) #87-7-1(L)

July 28, 1987

COUNTIES AND COUNTY OFFICERS: Conflict Of Interest; County Assessor; Board Of Review. Iowa Code §§ 441.31, 441.33; 441.37 (1987). The spouse of the assessor should not serve on the board of review because of the potential for a conflict of interest. (Weeg to Wibe, Cherokee County Attorney, 7-28-87) #87-7-2(L)

July 24, 1987

EMPLOYEES, STATE: Professional Licensing Boards. Iowa Code ch. 7E; §§ 7E.1(2)(d), 7E.2(2), 7E.2(5); Iowa Code ch. 135; §§ 135.11A, 135.31; Iowa Code ch. 147; § 147.103; Iowa Code ch. 258A; § 258A.6(4). Individuals who were employees of the Board of Medical Examiners, Board of Pharmacy Examiners, Board of Nursing and Board of Dental Examiners before reorganization are still employees of these boards for purposes of hiring, firing, promotion, transfer and discipline. (Pottorff to Vanderpool, Executive Director, Iowa Board of Medical Examiners; Johnson, Executive Secretary, Iowa Board of Pharmacy Examiners; Mowery, Executive Director, Iowa Board of Nursing; Price, Executive Director, Iowa Board of Dental Examiners, 7-24-87) #87-7-3(L)

AUGUST 1987

August 13, 1987

ENVIRONMENTAL QUALITY: Household Hazardous Waste Sales Permit Fees. U.S. Const. amend. XIV, § 1; House File 631, 72nd G.A., First Session, § 507, Iowa Code Supp. § 455F.7 (1987). The term "gross retail sales" as used in § 507 of H.F. 631 means gross retail sales of household hazardous materials only and not gross retail sales of an applicant's entire business. (Sarcone to Harbor, State Representative, 8-13-87) #87-8-1(L)

August 20, 1987

REVENUE, DEPARTMENT OF: Delinquent Property Tax; Counties and County Officers; Treasurer; Assessor: Costs Of Tax Sale Publications. Iowa Code §§ 446.9(2); 446.15; 446.29 (1987). A ten dollar fee for tax sale publication costs should be charged per assessment roll, regardless of the amount of property included in that assessment roll. (Weeg to Van Maanen, State Representative, 8-20-87) #87-8-2

The Honorable Harold Van Maanen, State Representative: You have requested an opinion of the Attorney General on questions regarding the cost of tax sale publications. In a letter dated July 1, 1987, we declined to issue an opinion in response to your request because we had previously resolved those questions in a letter of informal advice to Senator Berl Priebe and Representative David Osterberg, dated April 13, 1987. Since our July 1st letter, it has come to our attention that questions still remain as to how, as a practical matter, our informal advice should be implemented. For this reason, we will withdraw our previous denial of your request and issue this opinion.

Your specific question involves interpretation of Iowa Code § 446.9(2) (1987), and how the ten dollar fee imposed by that section should be assessed. Chapter 446 governs tax sales in general § 446.9(2) specifically provides:

> Publication of the time and place of the annual tax sale shall be made once by the treasurer in an official newspaper in the county at least one week, but not more than three weeks, before the day of sale. The publication shall contain the description of the real estate to be sold that is clear, concise, and sufficient to distinguish the real estate to be sold from all other parcels. All items offered for sale pursuant to section 446.18 may be indicated by an "s" or by an asterisk. The publication shall also contain the name of the person in whose name the real estate to be sold

> is taxed, the amount of delinquent taxes, both regular and special, for which the real estate is liable for each year, the amount of the penalty, interest, *and ten dollars representing costs*, all to be incorporated as a single sum. The publication shall contain a statement that, after the sale, if the real estate is not redeemed within the period provided in chapter 447, the right to redeem expires and a deed may be issued.

(emphasis added). This ten dollar fee "representing costs" appears to cover the costs incurred by the treasurer, regardless of the amount of property described therein. (Section 446.10 separately provides for the costs of publication.) Section 446.9(2) does not specify the amount of land that may be included in the publication, but does require the publication to specify the name of the person in whose name the real estate to be sold is taxed, as well as a description of the real estate to be sold. The publication is also to include the amount of taxes owed, the penalty, interest, and ten dollars representing costs. Because the ten dollar fee is included in the publication along with the total of other amounts owed, it appears this fee is intended to be assessed for each publication regardless of the amount of property described in that publication. This conclusion is further supported by the fact there is no language in the statute that expressly or impliedly provides for assessing a fee based on a certain amount of property. *Compare* § 331.507(2).[1]

A question then arises as to how to determine the amount of property that may be included within one publication. Section 446.9(2) is silent on this question. We have previously provided informal advice to county treasurers that the publication of sale should be consistent with what tracts or parcels of land will be sold. Section 446.15 requires the treasurer to "offer for sale, *separately*, each tract or parcel of real estate advertised for sale . . ." (emphasis added). Section 446.29 later provides that, following the sale: "not more than one parcel or description shall be entered upon each certificate of purchase." Thus, if the parcels are assessed separately, the tax sale must be consistent with the assessment and only one such parcel should appear on the tax sale certificate. *See* 1940 Op.Att'yGen. 209; 1920 Op.Att'yGen. 367. However, where the property is assessed as one unit, that entire unit may be offered at the tax sale. *See Blondel v. Verlinden*, 238 Iowa 429, 26 N.W.2d 342 (1947) (valid tax sale when three contiguous city lots with four homes on them were listed, assessed, advertised, and sold at the tax sale as one tract). Accordingly, the amount of property to be included in a section 446.9(2) publication depends entirely on how the assessor has assessed the property.

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[1] Section 331.507(2) provides:

> a. For a transfer of property made in the transfer records, *five dollars for each separate parcel of real estate described*, in a deed, or transfer of title certified by the clerk of the district court. However, the fee shall not exceed fifty dollars of a transfer of property which is described in one instrument of transfer.
>
> (1) *For the purposes of this paragraph, a parcel of real estate includes*:
>
> (a) For real estate located outside of the corporate limits of a city, all contiguous land lying within a numbered section.
>
> (b) For real estate located within the corporate limits of a city, all contiguous land lying within a platted block or subdivision.
>
> (2) Within a numbered section, platted block, or subdivision, land separated only by a public street, alley, or highway remains contiguous.

(emphasis added). *See* Op.Att'yGen. #84-10-7(L).

It is our understanding that all property assessed as one unit is included on one assessment roll.* The auditor then uses the information on that assessment roll to compute the amount of tax due and certifies that amount to the treasurer for collection. It is also our understanding that all property included on a single assessment roll is taxed as one unit. Thus, the ten dollar fee under §446.9(2) should be assessed per assessment roll, i.e., for all property included within one assessment roll. If the property is assessed and taxed as one unit, we believe only one ten dollar fee should be charged, regardless of how much or how little property is included on a single assessment roll.

By way of example, the assessor may assess a 160-acre farm, and in order to better valuate the property, breaks that farm down into four 40-acre segments. The assessment roll thus contains a separate description and assessment for each 40-acre segment. However, the total amount of property on that assessment roll is 160 acres, and the total amount of the assessed value is based on that 160 acres. That assessment roll is then transferred to the auditor's office. The auditor then determines a single tax for the entire property and certifies that amount to the treasurer. The taxpayer must then pay the entire amount of tax due or the taxes will be delinquent. The taxpayer cannot split the tax payment by paying, for example, 50% of the tax due for 80 acres of the property to avoid delinquency. In this case, because there is only one assessment roll, only one ten dollar fee would be charged under §446.9(2) if the taxes were delinquent.

As a further example, the assessor may separately assess two separate but adjoining lots owned by a municipal homeowner, even though the homeowner may consider that property to be a single unit. In this case, a separate assessment roll would exist for each lot, and two separate taxes would be assessed: The homeowner could pay one without paying the other, and the tax on one lot could be delinquent without the other being affected. Here, if taxes on both lots were delinquent, two separate ten dollar fees would be charged under §446.9(2) because there are two separate assessment rolls.*

In conclusion, it is our opinion that a ten dollar fee for tax sale publication costs should be charged per assessment roll, regardless of the amount of property included in that assessment roll.

* The following clarification was added on January 19, 1988: We note that our use of the term "assessment roll" is not intended to refer to a single page of a document, but is intended instead to refer to a single assessment. Several separately assessed units of property may be included on one page, or an assessment of a single unit of property may stand alone on a single page. We do not opine on these varying practices, but simply note that they exist.

* The following clarification was added on January 19, 1988: We are aware that the manner in which documents containing assessments are kept vary in format from county to county, and that treasurers' practices with regard to property tax collection also are not uniform. Keeping this in mind, we set forth the following statements of general applicability. If the property in question is assessed as a single unit, is taxed as a single unit, and may only be sold at a tax sale as a single unit, then only one ten dollar fee may be charged against that property under §446.9(2). This is the case even though, for assessment purposes, the property may be broken down into several segments before the final assessment is totalled. However, if the segments of property are separately assessed, and the taxpayer has the choice of paying taxes on some segments but not others, and those segments would be sold separately at a tax sale, then a separate ten dollar fee would be charged against each segment of property.

August 20, 1987

STATE OFFICERS AND DEPARTMENTS: Iowa Department Of Economic Development. Iowa Code sections 4.1(36), 4.8, 15.108(4)(a), 28.107, 28.108 (1987); 1985 Iowa Acts, chapter 252, § 48 [Iowa Code Section 28.101]; 1986 Iowa Acts, chapter 1245, § 808 [Iowa Code Section 15.108]. The discretionary provisions of § 28.107 and the mandatory provisions of § 15.108(4)(a), concerning the creation of an Iowa export trading company, are irreconcilable. Under § 4.8, the mandatory provisions of § 15.108(4)(a) control as the statute latest in date of enactment, and therefore the creation by the Department of Economic Development of the Iowa export trading company is mandatory. (Benton to Thoms, 8-20-87) #87-8-3(L)

August 20, 1987

COUNTIES AND COUNTY OFFICERS: County Recorders: Claimant's Book; Affidavit Of Possession. Iowa Code §§ 331.603(4), 331.607(10), 614.17, 614.18, 614.34, and 614.35 (1987). Section 331.603(4) allows the "claimant's book" to be combined with other indices maintained by the county recorder; however as a practical matter it may be necessary to maintain a separate claimant's book since it is indexed by real estate description rather than by name of the claimant. Affidavits of possession are not "claims" required to be indexed in the claimant's book under section 614.18 or 614.35. (Ovrom to Priebe, State Senator, 8-20-87) #87-8-4(L)

August 24, 1987

ENVIRONMENTAL QUALITY: Real Property/County Recorder: Groundwater Hazard Statement. 1987 Iowa Acts, ch. 225, § 307; Iowa Code Supp. § 558.69 (1987); Iowa Code §§ 428A.1, 428A.2, 428A.4, 558.1 (1987). The Groundwater Protection Act impliedly delegates to the Iowa Department of Natural Resources the power and duty to adopt rules identifying which classes of real estate transfer documents must be accompanied by a groundwater hazard statement notwithstanding their statutory exemption from the declaration of value requirements. (Smith to Wilson, Director, Department of Natural Resources, 8-24-87) #87-8-5

Larry J. Wilson, Director: You have requested an opinion of the Attorney General concerning the authority of the Iowa Department of Natural Resources (DNR) to adopt rules interpreting the new groundwater protection act to define the classes of documents relating to transfers of real estate which must be accompanied by a groundwater hazard statement to be eligible for filing with the county recorder.

Your opinion request explains that the groundwater protection act, H.F. 631, 72nd G.A., First Session, § 307, first unnumbered paragraph, prohibits county recorders from recording a real estate transfer document which Iowa Code ch. 428A (1987) requires to be accompanied by a declaration of value, unless the document is also accompanied by a groundwater hazard statement signed by the grantors or transferors of the property. Your request questions the meaning of the first sentence of the second unnumbered paragraph of § 307 which requires a groundwater hazard statement to be submitted on a separate form if a declaration of value is not required. Your request notes that it seems unreasonable to require a groundwater hazard statement with certain types of real estate transfer documents that are exempt from the declaration of value, e.g., sheriff's deeds and tax deeds.[1]

[1] We have also received requests from county attorneys for an opinion concerning the applicability of the groundwater hazard disclosure requirement to transfer documents exempt from declaration of value, particularly sheriff's deeds. A 1987 amendment of Iowa Code § 428A.2 clarifies that sheriff's deeds need not be accompanied by a declaration of value to be recorded. *See* 1987 Iowa Acts, H.F. 374, §§ 4 and 5, amending §§ 428A.1 and 428A.2.

Our analysis of the rulemaking authority of the DNR begins by setting forth the text of 1987 Iowa Acts, H.F. 631, §307, which creates a new Iowa Code §558.69, as follows:

> Sec. 307. *NEW SECTION.* 558.69 EXISTENCE AND LOCATION OF WELLS, DISPOSAL SITES, UNDERGROUND STORAGE TANKS, AND HAZARDOUS WASTE.
>
> With each declaration of value submitted to the county recorder under chapter 428A, there shall also be submitted a statement that no known wells are situated on the property, or if known wells are situated on the property, the statement must state the approximate location of each known well and its status with respect to section 159.20 or 455B.190. The statement shall also state that no disposal site for solid waste, as defined in section 455B.301, which has been deemed to be potentially hazardous by the department of natural resources, exists on the property, or if such a disposal site does exist, the location of the site on the property. The statement shall additionally state that no underground storage tank, as defined in section 455B.471, subsection 6, exists on the property, or if an underground storage tank does exist, the type and size of the tank, and the substance in the tank. The statement shall also state that no hazardous waste as defined in section 455B.411, subsection 4, or listed by the department pursuant to section 455B.412, subsection 2, or section 455B.464, exists on the property, or if hazardous waste does exist, that the waste is being managed in accordance with rules adopted by the department of natural resources. The statement shall be signed by the grantors or the transferors of the property. The county recorder shall refuse to record any deed, instrument, or writing for which a declaration of value is required under chapter 428A unless the statement required by this section has been submitted to the county recorder.
>
> If a declaration of value is not required, the above information shall be submitted on a separate form. The director of the department of natural resources shall prescribe the form of the statement and the separate form to be supplied by each county recorder in the state. The county recorder shall transmit the statements to the department of natural resources at times directed by the director of the department.

Preliminarily, we observe that the new statute includes a facially absolute requirement that each declaration of value submitted to the county recorder be accompanied by a groundwater hazard statement on a form prescribed by the DNR. The DNR cannot modify an unambiguous statutory requirement by rule. *See* 1980 Op.Att'yGen. 92, 96 (#79-4-20), in which this office opined that the Iowa Department of Revenue lacked authority to adopt a rule or order exempting eminent domain land acquisition contracts from an unambiguous statutory requirement that they be accompanied by a declaration of value when presented for recording.

Although §307 plainly requires that each declaration of value be accompanied by a groundwater hazard statement on a form prescribed by the DNR, the statute fails to expressly identify the other circumstances in which a groundwater hazard statement must be submitted to the county recorder. The first sentence of the second paragraph of §307 requires a groundwater hazard statement to be submitted on a separate form if "a declaration of value is not required...." That sentence fails to identify a critical referent. The unidentified referent is the class of documents that must be accompanied by a groundwater hazard statement to be eligible for recording notwithstanding inapplicability of the declaration of value requirement.

Arguably, the affected class of documents includes each "deed, instrument, or writing by which any lands, tenements, or other realty in this state shall be granted, assigned, transferred, or otherwise conveyed. . . ." That class of documents is identified in Iowa Code §428A.1 for purposes of relating to the

real estate transfer tax and the declaration of value form used to gather data for the sales/assessment ratio study. One could argue that the clause "(i)f a declaration of value is not required" refers to the statutory exemptions from the declaration of value requirement set forth in § 428A.1 (which crossreferences most of the transfer tax exemptions in § 428A.2) and § 428A.4. However, another alternative is only slightly less plausible. Since H.F. 631, § 307 creates a new Iowa Code § 558.69, it could be argued that the implied referent of the new Code section is the class of documents defined elsewhere in the same chapter, i.e., in Iowa Code § 558.1, which defines "instruments affecting real estate."

In interpreting a statute, Iowa Code § 4.6 requires a presumption that a just and reasonable result, and a result feasible of execution was intended by the General Assembly. The Iowa Supreme Court has repeatedly stated that statutes should be interpreted to avoid strained, impractical, or absurd results in favor of a sensible, logical construction, e.g., *Beier Glass Co. v. Brundige*, 329 N.W.2d 280, 283 (Iowa 1983). If the second paragraph of § 307 of H.F. 631 were interpreted to require a groundwater hazard statement for recording of all real estate transfer documents exempted from the declaration of value requirement, statements would be required for recording of all correction deeds, deeds for the release of a security interest, sheriff's deeds, deeds in fulfillment of real estate contracts, assignments of vendor's interest in real estate contracts, tax deeds, and other similar documents. Requiring a groundwater hazard statement with those types of transfer documents generally would impose a duty of disclosure on grantors who could not be expected to have any relevant information that had not been submitted with a document recorded earlier. Such an interpretation of § 307 would require an assumption that the General Assembly failed to understand the purpose of the statutory exemptions from the requirement of submitting a declaration of value.

A more plausible interpretation of the intended scope of real estate transactions affected by the new groundwater hazard statement can be inferred from the relationship between the real estate transfer tax, declaration of value form, and groundwater hazard statement. The real estate transfer tax was created by 1965 Iowa Acts, ch. 358, codified as a new Iowa Code ch. 428A. The 1965 enactment generally required transferors of interests in real estate to purchase documentary tax stamps based on the land sales price; the stamps to be affixed to the instrument evidencing the transfer when presented for recording. Certain instruments were exempted from the requirement, e.g., mortgages, wills, plats, leases, and instruments evidencing transfers by most types of governmental bodies.

Thirteen years after creation of the real estate transfer tax, the General Assembly enacted 1978 Iowa Acts, ch. 1148, which amended Iowa Code ch. 428A by adding provisions requiring that a declaration of value be submitted to the county recorder as a condition of recording certain types of real estate transfer documents. The primary function of the declaration of value is to assist the Iowa Department of Revenue in collecting data for the sales/assessment ratio study mandated by Iowa Code § 421.17(6). The sales/assessment ratio study is used to prepare biennial orders equalizing levels of assessment of various classes of realty. *See* Iowa Code § 441.47, et seq. Hence, the primary function of the declaration of value is unrelated to the real estate transfer tax, although it would appear to have a useful secondary function of assisting the recorder in fixing the amount of transfer tax because it requires identification of the sales price used to calculate the amount of transfer tax.

In contrast, the groundwater hazard statement has nothing to do with real estate assessment and taxation or the real estate transfer tax. Its manifest purpose is to require transferors of interests in real estate to disclose their knowledge of subsurface conditions relevant to potential groundwater

contamination at the time of transfer.[2] Equally manifest is that the General Assembly engrafted the groundwater hazard statement on the declaration of value in an attempt to minimize the burden of the additional step erected in the county recorder's doorway. In so doing, the General Assembly is presumed to have considered the purposes of the statutory exemptions from the requirement of submitting a declaration of value. *See* 2A *Sutherland Statutory Construction* (Sands 4th ed.) § 45.12. A reasonable General Assembly would have recognized that some, but not all, exemptions to the declaration of value requirement should also apply to the groundwater hazard disclosure requirement. In light of the different purposes of the declaration of value and the groundwater hazard statement, we conclude that the General Assembly impliedly delegated to the Department of Natural Resources the power and duty to determine by rule which classes of real estate transfer documents must be accompanied by a groundwater hazard statement notwithstanding their statutory exemption from the declaration of value requirement. Stated otherwise, we conclude the new statute left a gap for the agency to fill in by administrative rules identifying those classes of real estate transfer documents that are relevant to groundwater hazard disclosure, notwithstanding their irrelevance to declaration of value.[3]

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[2] Less manifest is the identity of the intended beneficiaries of the new groundwater hazard disclosure requirement. The statute requires the completed groundwater hazard statements to be transmitted by county recorders to the DNR in accordance with DNR instructions. It does not require direct disclosure by transferors to transferees. However, requiring the statement to be submitted to the recorder with the transfer document tends to increase transferor and transferee awareness of the importance of potential groundwater hazards. Encouraging heightened transferor/transferee awareness of potential groundwater hazards is related to the legislative findings and policies expressed in H.F. 631, §§ 103 and 105 (which create new Iowa Code Supp. §§ 455E.3 and 455E.5). Additionally, the General Assembly could reasonably have intended that groundwater hazard statements be available to the DNR for use in collecting data relevant to various investigatory and planning duties imposed on the DNR by H.F. 631, § 108 (creating new Iowa Code Supp. § 455E.8).

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[3] We also reject another alternative interpretation of H.F. 631, § 307, suggested in a recent opinion request. The question raised was whether the General Assembly intended to prohibit recording of a document exempt from declaration of value but not Administrative rules defining "transferor" and exempting certain classes of documents, e.g., sheriff's deeds, from being accompanied by a groundwater hazard statement would carry out the statutory mandate to prescribe a form that encourages disclosure of relevant information in the types of real estate transfers where the transferors can generally be expected to have some knowledge of subsurface conditions. The rules should require groundwater hazard statements for all transfer documents executed by grantors who could reasonably be expected to have or acquire relevant information not previously submitted concerning potential groundwater hazards at the affected real estate exempt from the requirement of being accompanied by a groundwater hazard statement. If it were assumed that the General Assembly intended the prohibition on recording only to apply to documents that must be accompanied by a declaration of value, it would follow that the General Assembly also created a duty to submit groundwater hazard statements with real estate transfer documents exempt from declaration of value, but failed to provide any mechanism to enforce performance of the duty. Such assumption ignores the rules of statutory construction that require a presumption that the legislature intended a just and reasonable result, and a result feasible of execution.

Administrative rules defining "transferor" and exempting certain classes of documents, e.g., sheriff's deeds, from being accompanied by a groundwater hazard statement would carry out the statutory mandate to prescribe a form that encourages disclosure of relevant information in the types of real estate transfers where the transferors can generally be expected to have some knowledge of subsurface conditions. The rules should require groundwater hazard statements for all transfer documents executed by grantors who could reasonably be expected to have or acquire relevant information not previously submitted concerning potential groundwater hazards at the affected real estate.

SEPTEMBER 1987

September 8, 1987

CITIES; COUNTIES; CRIMINAL LAW: Criminal prosecution service fees. Iowa Code §§ 331.655 and 602.8105(1)(j) (1987). Peace officer can be required to serve a criminal prosecution document without advance payment. Peace officer does not have to wait until the completion of a prosecution to collect fees for such service. (Halligan to Metcalf, Black Hawk County Attorney, 9-8-87) #87-9-1(L)

OCTOBER 1987

October 12, 1987

COUNTIES AND COUNTY OFFICERS: Secondary Road Assessment Districts. Iowa Code §§ 311.6, 311.7 and 311.11. The Board of Supervisors and the developer of a subdivision cannot, by agreement, waive the procedural rights of future property owners concerning the establishment of a secondary road assessment district or the assessment of the costs of road improvements pursuant to § 311.6 of The Code. The Board of Supervisors cannot agree to approve a proposal for the creation of a secondary road assessment district prior to the filing of a petition and the holding of the hearing required by § 311.11 of The Code. (Krogmeier to Brown, Buena Vista County Attorney, 10-12-87) #87-10-1(L)

October 12, 1987

CRIMINAL LAW, ADMINISTRATIVE LAW: Administrative rules incorporating federal standards by reference. Iowa Code Chapter 17A. An administrative rule, violation of which is a crime, may incorporate federal standards by reference, provided these standards are explicit and readily ascertainable. (Hunacek to Royce, 10-12-87) #87-10-2

Mr. Joe Royce, Administrative Rules Review Committee: You have requested an opinion of the Attorney General concerning the specificity required in an administrative rule, violation of which is, by statute, made a crime. As you point out in your request, Iowa Code §§ 325.34, 327.22, and 327A.18 make it a simple misdemeanor for specifically defined people to violate an administrative rule promulgated by the Iowa Department of Transportation (DOT). You also note that several DOT rules incorporate by reference a federal regulation, rather than set out this federal regulation in full. You then raise the following question:

> Must the entire text of a rule be set out in the Iowa Administrative Code if violation of that rule carries a criminal penalty?

We interpret your question as being concerned with the propriety of incorporation by reference. Because you raise no issue concerning the question of whether the legislature may, consistent with constitutional requirements of separation of powers, delegate to an administrative agency the authority to define crimes, we do not address that issue in detail here. We do note, however, that the United States Supreme Court approved such a practice in *United States v. Grimaud*, 220 U.S. 506, 55 L.Ed. 563, 31 S.Ct. 480 (1911), and one commentator has observed that "The Supreme Court's view has not waivered a millimeter during the six decades since Grimaud's case came before it." W. Gellhorn, Administrative Prescription and Imposition of Penalties, 1970 Wash. Univ. L.Q. 265, 266.

Our principal concern with a state agency incorporating by reference some other standard or rule in an administrative rule, the violation of which carries a criminal penalty, is whether the resulting administratively-defined crime would provide inadequate notice, so that enforcement of that rule would offend the due process clause. A criminal statute is unconstitutionally vague if it "does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so he may act accordingly. A statute must give fair warning of proscribed conduct in order to avoid arbitrary and discriminatory enforcement." *State v. Jaeger*, 249 N.W.2d 688, 691 (Iowa 1977). To survive a due process attack, a penal statute must give a person of ordinary intelligence fair notice of what is prohibited, and must provide an explicit standard for those who apply it. *State v. Pierce*, 287 N.W.2d 570, 573 (Iowa 1980).

These concerns are implicated here because if an administrative rule incorporates by reference some standard or rule which is itself not specifically defined or not readily available, the administrative rule may not provide the constitutionally necessary "explicit standard" or may not provide a person with the required "reasonable opportunity to know what is prohibited." Enforcement of the statute would then violate the due process clause. Whether any particular administrative rule, or criminal statute, is unconstitutional must of course be determined on a case-by-case basis. We think, however, that incorporation by reference of an existing federal administrative rule, codified in the Code of Federal Regulations, does not, by itself, deprive a person of fair notice provided that the incorporated federal rule itself is sufficiently explicit as to its requirements. The text of a federal administrative rule is as readily available as is the text of an Iowa administrative rule and so should provide the necessary "reasonable opportunity to know" to any person who is covered by the rule.

We believe, however, that the preferred practice for state agencies to follow would be, whenever practicable, to specify in detail the standards involved, rather than incorporate by reference some other standards. When incorporation by reference is employed, the state agency should specify in as much detail as practicable where the incorporated standard can be found (for example, a specific citation to an existing federal rule). Such a practice would make it easier for people to be aware of what conduct is prohibited by the administrative rule, thus making any resulting criminal prosecution fairer.

October 21, 1987

TAXATION: Sales Tax On Fuel Used To Heat Greenhouses. Iowa Code § 422.42(3) (1987) as amended by House File 626, 72nd G.A., First Session, § 7 (Iowa 1987). Greenhouse operators do not qualify for the sales tax processing exemption under Iowa Code § 422.42(3) as amended by H.F. 626, § 7 upon fuel used to heat greenhouses. (Kuehn to Poncy, State Representative, 10-21-87) #87-10-3(L)

October 21, 1987

CITIES; COUNTIES; LAW ENFORCEMENT: Cities' duty to provide law enforcement. Iowa Code §§372.4, 372.5(4), 372.8(2)(d), and 372.14(2) (1987): Iowa Code ch. 372 imposes a responsibility upon all cities to provide police protection either by, at a minimum, appointing a police chief or town marshal, or by contracting with the county or another city for such protection. The chief or marshal must meet the requirements of the Iowa Law Enforcement Academy for certification as a law enforcement officer, and be so certified as provided by the rules of the academy. (Hayward to Noonan, 10-21-87) #87-10-4(L)

NOVEMBER 1987

November 2, 1987

CRIMINAL LAW: Complaints, Certificates under penalty of perjury; Oaths. Iowa Code §§622.1, 801.4(11), 804.22, 805.6(4) (1987); Iowa R. Cr. P. 35; Iowa Const. art. I, §11. The use of unsworn certificates under penalty of perjury, in lieu of sworn complaints under oath, are legally insufficient to commence valid complaints charging simple misdemeanors. (Zbieroski to Martin, Dickinson County Attorney, 11-2-87) #87-11-1

Jon M. Martin, Dickinson County Attorney: You have requested an attorney general's opinion on whether unsworn certifications under penalty of perjury, pursuant to Iowa Code section 622.1 (1987), may be used to commence valid complaints charging simple misdemeanors, in lieu of sworn statements under oath. You indicate that the manner of bringing misdemeanor complaints varies among Iowa counties.

Some counties, contrary to long standing procedure requiring complaints to be sworn under oath, are using unsworn statements under penalty of perjury. They rely on section 622.1 which provides in part:

> When the laws of this state or any lawful requirement made under them requires or permits a matter to be supported by sworn statement written by the person attesting the matter, the person may attest the matter by an unsworn written statement if that statement recites that the person certifies the matter to be true under penalty of perjury under the laws of this state, states the date of the statement's execution and is subscribed by that person.

These counties view the use of section 622.1 certifications as a convenient method of assuring the truthfulness of complaints from police officers and citizens at "after hours" times without resort to the sometimes cumbersome procedure of requiring an oath before one authorized to administer oaths. This view is not without support. Although amendments of prior law ordinarily must be express, section 622.1 may be read as amending by implication prior criminal statutes requiring complaints to be sworn under oath. *See Caterpillar Davenport Employees Credit Union v. Huston*, 292 N.W.2d 393, 396 (Iowa 1980); *State v. Rauhauser*, 272 N.W.2d 432, 434 (Iowa 1978); *Sutherland Statutory Construction*, §22.13 (C. Sands 4th ed. 1985).

Other counties question the legal sufficiency of unsworn certifications in a criminal context. Mindful of the protections afforded by our criminal procedures, there is concern over the lack of legislative intent to implicitly amend special statutes requiring complaints to be sworn under oath or affirmation. Moreover, there is doubt that the general language found in section 622.1 clearly and unmistakably amends special procedural provisions long established under Iowa law. *See* Iowa Code §§4.7, 801.4(11), 804.22, 805.6(4) (1987); Iowa R. Cr. P. 35. For example, Iowa Code section 801.4(11) defines a "complaint" as:

> a statement in writing, under oath or affirmation, made before a magistrate or district court clerk or clerk's deputy as the case may be, of the commission of a public offense, and accusing someone thereof. A complaint shall be substantially in the form provided in the Iowa rules of criminal procedure.

Rule 35 of the Iowa Rules of Criminal Procedure specifically requires that charges for simple misdemeanors be commenced by the filing of subscribed and sworn to complaint.[1]

The question, therefore, is whether those special criminal procedures, requiring complaints to be sworn under oath or affirmation, have been impliedly amended by the general provisions of section 622.1. Based on established rules of statutory construction, we conclude that section 622.1 certifications are legally insufficient substitutes for sworn criminal complaints.

Due to the lack of clear and unmistakable intent to the contrary and mindful of the effect that such complaints have on the rights and character of individuals, we do not believe the legislature intended to implicitly amend long standing criminal procedures requiring complaints to be sworn under oath. The Iowa Supreme Court has long acknowledged the presumption against amendment of statutes by implication. *See Caterpillar Davenport Employees Credit Union v. Huston*, 292 N.W.2d 393, 396 (Iowa 1980); *Lemon v. City of Muscatine*, 272 N.W.2d 429, 431-32 (Iowa 1978); *State v. Rauhauser*, 272 N.W.2d 432, 434 (Iowa 1978); *Sutherland Statutory Construction* §22.13 (C. Sands 4th ed. 1985). The presumption is "simply an aid to ascertaining legislative intent and is never invoked to defeat it." *Dan Dugan Transport Co. v. Worth County*, 243 N.W.2d 655, 657 (Iowa 1976). However, the presumption against implicit amendments is so great that the legislature will not be found to have changed a law unless the intent to amend is clear and unmistakable. *Peters v. Iowa Employment Security Comm'n.*, 235 N.W.2d 306, 309 (Iowa 1975); *Wendelin v. Russell*, 259 Iowa 1152, 147 N.W.2d 188 (1966). Absent clear and unmistakable legislative intent, a finding of implied amendment constitutes a usurpation of legislative authority. *State v. Rauhauser*, 272 N.W.2d 432, 435 (Iowa 1978). In determining legislative intent, Iowa courts "assume the legislature knew the existing state of the law and prior judicial interpretations of similar statutory provisions...." *Jahnke v. Incorporated City of Des Moines*, 191 N.W.2d 780, 787 (Iowa 1971).

Furthermore, to opine otherwise would run afoul of another rule of construction found in Iowa Code section 4.7 (1987). Under section 4.7, if there is a conflict between statutory provisions, the special provision prevails as an exception to the general provision. It is our belief that the special provisions of Iowa Code sections 801.4(11), 804.22, 805.6(4) (1987) and Iowa R. Cr. P. 35 prevail as exceptions to the general provisions of section 622.1 under the rule stated in section 4.7. *See Lemon v. City of Muscatine*, 272 N.W.2d 429, 431-32 (Iowa 1978) (presumption against implicit amendments is stronger where a repeal is claimed of a special statute by a more general one).

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[1] Similarly, there is concern that the use of unsworn statements would be problematic in criminal extradition proceedings; since unsworn certifications under section 622.1 would not be legally sufficient to support a demand for extradition in all jurisdictions. *See* Iowa Code §820.13 (1987); 18 U.S.C.A. §3182 (1985) (such documents must be sworn to before a magistrate); *Morrison v. Dwyer*, 143 Iowa 502, 121 N.W. 1064 (1909); 35 C.J.S. *Extradition* §14(2), at 412-13 (1960); Uniform Criminal Extradition Act (U.L.A.) §3 (1974); *see also* 2A C.J.S. *Affidavits* §30, at 464 (1972) (affidavits under penalty of perjury are improper in federal court).

Amendments by implication are not only disfavored by the courts in doubtful cases, but also are disfavored when they raise constitutional questions. *Sutherland Statutory Construction* §22.13 (C. Sands 4th ed. 1985). Without deciding the issue here, it is questionable whether unsworn criminal complaints would be permitted under our Constitution. Section 11 of Article I of the Constitution of the State of Iowa provides:

> All offenses less than felony and in which the punishment does not exceed a fine of One hundred dollars, or imprisonment for thirty days, shall be tried summarily before a Justice of the Peace, or other officer authorized by law, on *information under oath*, without indictment, or the intervention of a grand jury, saving to the defendant the right of appeal.... (Emphasis added).

In construing our constitution, the Iowa Supreme Court instructs us to look to the intent of the framers by first examining the words employed and giving them meaning in their natural sense and as commonly understood. *Redmond v. Ray*, 268 N.W.2d 849, 853 (Iowa 1978). A "complaint" charging a simple misdemeanor under our present law is said to be the equivalent of the term "information" contemplated by our state constitution. *State v. Phippen*, 244 N.W.2d 574, 575 (Iowa 1976). As earlier mentioned, a "complaint" is defined as "a statement in writing, under oath or affirmation, made before a magistrate or district court clerk or clerk's deputy as the case may be, of the commission of a public offense, and accusing someone thereof." Iowa Code § 801.4 (11) (1987). In Iowa, there appears to be no vital distinction between the term "oath" and the concept of an "affirmation". Iowa Code § 4.1 (12) (1987) ("The word 'oath' includes affirmation in all cases where an affirmation may be substituted for an oath, and in like cases the word 'swear' includes 'affirm' "). *See State v. Phippen*, 244 N.W.2d 574, 575-76 (Iowa 1976).

It is commonly assumed that a complaint "under oath" connotes something of the notion that the declarant is first sworn, or at least, that the oath is administered by someone. 67 C.J.S. *Oaths & Affirmations* §5(b), at 11 (1978). The Iowa legislature has indulged that assumption by creating the office of notary public and empowering other officers to administer oaths and take affirmations. *See* Iowa Code Chapter 77, §§78.1-2, 805.6 (1987); *see also* Iowa R. Cr. P. 35 (prosecutions must be commenced by filing a subscribed and sworn to complaint with a magistrate or district court clerk or the clerk's deputy); Iowa Code § 804.22 (1987) ("When an arrest is made without a warrant,... the grounds on which the arrest was made shall be stated to the magistrate by complaint, subscribed and sworn to by the complainant, or supported by the complaint's affirmation....")

Although no specific form is usually required, to make a valid oath it is generally assumed that it must be given in the presence of an officer authorized to administer an oath. *Cf. State v. Phippen*, 244 N.W.2d 574 (Iowa 1976) (jurat was insufficient to prove an oath was actually administered by officials authorized to administer oaths and take affirmations under the Iowa Code); *Miller v. Palo Alto Board of Supervisors*, 248 Iowa 1132, 1134, 84 N.W.2d 38, 39 (1957) (although no specific form is required some act of each person should characterize the taking and administering of the oath); *Dalbey Bros. Lumber Co. v. Crispin*, 234 Iowa 151, 12 N.W.2d 277 (1943) (quoting 39 Am. Jur. 499, par. 12, *Oath and Affirmation*, the court stated: "Hence, to make a valid oath, there must be in some form, in the presence of an officer authorized to administer it, an unequivocal and present act by which the affiant consciously takes upon himself the obligation of an oath"); *see also Youngstown Steel Door Co. v. Kosydar*, 33 Ohio App. 2d 277, 294 N.E.2d 676 (1973) ("That an oath is to be administered has been generally assumed.")

This office has previously opined that although "law enforcement officers charging traffic and scheduled violations by uniform citations and complaints need not appear before a magistrate to file 'a subscribed and sworn to complaint,'" such complaints still require verification before one authorized to administer oaths. 1980 Op.Att'yGen. 784.[2]

Thus, the question raised is whether the unsworn certifications under penalty of perjury, provided under section 622.1, constitute a complaint under oath as required by Article I, section 11, of our state constitution. It is not our place to decide that constitutional question here.[3] We merely raise the issue to show that it is doubtful the legislature intended to amend by implication those laws requiring criminal complaints to be sworn under oath or affirmation.

Many valuable rights depend upon the veracity of those filing complaints. For instance, the complaint is an essential basis for the issuance of an arrest warrant. *See* Iowa R. Cr. P. 38 (Immediately upon the filing of a complaint, a warrant of arrest or citation may issue). A formal complaint under oath or affirmation is designed to secure freedom from illegal restraint for trivial causes. 5 Am.Jur. 2d *Arrest* § 12, at 705-06 (1962).

Requiring a sworn criminal complaint before someone legally empowered to take oaths or affirmations creates an additional protective check on the conscience of those filing criminal complaints. Anything less tends to detract from the seriousness of the step being taken in formally accusing someone of violating the law. Accordingly, we do not believe Iowa courts would uphold implicit amendments of our criminal procedures in doubtful cases or when they raise constitutional questions.

In summary, when all relevant statutes are considered in the light of the foregoing rules of construction, it is our opinion that the filing of a certificate under penalty of perjury under section 622.1, does not implicitly amend Iowa law requiring that a sworn complaint under oath be used to commence prosecutions for simple misdemeanors.

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[2] In an even earlier opinion, this office was asked the following question: "Must the uniform traffic complaint be sworn to when filed, pursuant to [Iowa Code section 762.2 (1973)], or is a uniform traffic complaint exempt from oath by [Iowa Code section 754.1 (1973)]." Our office opined that the uniform traffic citation and complaint need not be sworn to before a magistrate as it was specifically exempted under Iowa Code section 754.1 (1973). 1974 Op.Att'yGen. 232. That opinion was limited to the necessity of filing a sworn complaint before a magistrate and did not opine as to whether an oath could be dispensed with entirely. In this regard it should be noted that the current uniform citation and complaint procedures now instruct the officer to verify such complaints "before the chief officer of the law enforcement agency, or the chief officer's designee, and the chief officer of each law enforcement agency of the state is authorized to designate specific individuals to administer oaths and certify verifications." Iowa Code § 805.6(4) (1987).

[3] We are aware that New York (and other states) have upheld similar certification statutes as applied to criminal prosecutions. N.Y. Crim. P. Law § 100.30 (McKinney Supp. 1987); *People v. Sullivan*, 56 N.Y.2d 378, 437 N.E.2d 1130 (1982) (a statement containing a form notice alerting one to possible criminal prosecution is no different from a statement under oath); Cal. Civ. Proc. Code § 2015.5 (West 1985); *People v. Salazar*, 266 Cal. App. 2d 113, 71 Cal. Rptr. 894 (1968) (use of unsworn complaint is not inconsistent with the provisions of the California Constitution); 34 Op.Cal.Att'yGen. 234. New York's statute was designed to provide a convenient method of assuring the truthfulness of misdemeanor complaints and dispensing with the traditional requirement of swearing to such documents. N.Y. Crim. P. Law § 100.30 (McKinney Supp. 1987).

November 6, 1987

MUNICIPALITIES: Civil Service: Promotional Examinations. 1986 Iowa Acts, Ch. 1138, § 5; Iowa Code §§ 20.9, 400.8(3), 400.9(3), and 400.28 (1987); and Iowa Code § 400.9(3) (1975). The 1986 amendment to § 400.9(3) does not evince a legislative intent to expand the qualified applicants to civil service promotional grades to include employees willing to take voluntary demotions or lateral transfers. An employee with a civil service status, however, continues to be allowed to fill a vacancy in a lower or equivalent grade by entrance examination in the absence of a qualified applicant. Thus, our prior opinion, 1978 Op.Att'yGen. 15, is valid despite the recent legislative revision. As such, a civil service commission lacks the authority to establish procedures for voluntary demotions or lateral transfers, and such procedures would not be a mandatory topic of bargaining nor subject to negotiation. Finally, an employee appointed to a civil service promotional grade holds full civil service rights to the position and is not subject to a probationary period. (Walding to Lind, State Senator, 11-6-87) #87-11-2(L)

November 16, 1987

TAXATION: Tax Sales; Notice Of Expiration Of Right Of Redemption. Iowa Code §§ 447.9, 447.10, and 447.12 (1987). Judgment creditors of record and holder of sheriff's certificate of sale of record are entitled to service of notice of expiration of right of redemption from tax sale. County treasurer, whose county was not holder of tax sale certificate of purchase at time when notice of expiration of right of redemption was served or when tax deed was requested, is not on inquiry notice to investigate and determine whether all those entitled to notice of expiration of right of redemption were served. However, if treasurer has actual knowledge that persons entitled to notice of expiration of right of redemption were not served as required by statute, treasurer has no legal obligation or right to issue a tax deed. (Griger to Folkers, Mitchell County Attorney, 11-16-87) #87-11-3

Jerry H. Folkers, Mitchell County Attorney: You have requested an opinion of the Attorney General with respect to notice of expiration of the right of redemption from tax sale. In the situation posed, certain real property was sold at an Iowa Code § 446.18 (1987) scavenger tax sale by the Mitchell County Treasurer in June, 1986. In June, 1987, the holder of the tax sale certificate of purchase served notice of expiration of the right of redemption upon the owner of the property. The county was not the tax sale purchaser and has not been the holder of the tax sale certificate of purchase.

At the times of the tax sale and of service of notice of expiration of the right of redemption, a number of judgment creditors had judgments of record in Mitchell County that constituted liens upon the subject real estate. Prior to the tax sale, one of these judgment creditors caused the real property to be sold at sheriff's sale by the Mitchell County Sheriff and a sheriff's certificate of sale was issued and filed for record.

The return of service of notice of expiration of right of redemption from tax sale was presented to the county treasurer and the holder of the tax sale certificate of purchase has demanded that the treasurer issue a tax deed. There is no evidence that service of notice of expiration of right of redemption from tax sale was served upon any judgment creditors or upon the holder of the sheriff's certificate of sale.

On the basis of these circumstances, you have posed four questions:

> (1) Are judgment creditors of record in the County where the real estate is situated "persons who have an interest of record" entitling them to Notice of the Expiration of Right of Redemption?
>
> (2) Is the holder of a sheriff's certificate of sale a "person who has an interest of record" entitling him to Notice of the Expiration of Right of Redemption?

(3) What is the responsibility of the Treasurer to determine that all required notices have been served or that evidence of service on all parties entitled to notice is filed in her office prior to issuance of the tax deed?

(4) Shall a Treasurer refuse to issue a tax deed when she has actual knowledge that persons entitled to Notice of Expiration of Right of Redemption have not been served in accordance with statute?

We conclude that judgment creditors of record and the holder of a sheriff's certificate of sale of record are entitled to notice of the expiration of right of redemption from tax sale. We further conclude that the county treasurer, whose county is not the holder of the tax sale certificate of purchase at the time when notice of expiration of right of redemption was served or when the tax deed was requested, is not on inquiry notice to investigate and determine whether all those entitled to the notice were served. The county treasurer may rely upon the affidavits of completed service filed with the treasurer by the holder of the tax sale certificate of purchase. However, if the treasurer has actual knowledge that persons entitled to notice have not been served, the treasurer would have no legal obligation or right to issue the tax deed to the holder of the tax sale certificate of purchase.

Notice of expiration of right of redemption from tax sale is required by Iowa Code §447.9 (1987). In 1986, §447.9 was amended to expand the list of those to whom the holder of the tax sale certificate of purchase must give the notice. 1986 Iowa Acts, ch. 1139, §7 and 1986 Iowa Acts, ch. 1241, §43. Chapter 1241, §43 divided §447.9 into two paragraphs and provided in relevant part that the notice was to be made by mail on "any mortgagee having a lien upon the real estate, a vendor of the real estate under a recorded contract of sale, a lessor who has a recorded lease or memorandum of a recorded lease, and any other person who has an interest of record, at the person's last known address."

It is well settled that redemption from tax sale can be made by one having an interest in the property. *Clarkson v. McCoy*, 215 Iowa 1008, 247 N.W.2d 270 (1933). Judgment creditors are entitled to redeem from a tax sale because they have an interest in the property. *German Savings Bank v. Walker*, 190 Iowa 1096, 181 N.W. 443 (1921); *Swan v. Harvey*, 117 Iowa 58, 90 N.W. 489 (1902). A holder of a lien interest in the property sold at tax sale is entitled to redeem to protect the person's lien interest. *In Re Hoyt's Estate*, 246 Iowa 292, 67 N.W.2d 528 (1955). However, while those having an interest in the property were entitled to redeem from a tax sale, unless listed in the statutes as entitled to be served with notice of expiration of right of redemption, the holder of the tax sale certificate of purchase need not have caused these unlisted persons who had an interest in the property to be served with the notice. Thus, prior to the 1986 amendments to §447.9, the statute did not require *all* persons who have an interest of record to be served with the notice. The 1986 amendments clearly require service of the notice upon persons who have an interest of record so as to notify those persons that they may redeem from a tax sale to avoid the loss of their interests. If no redemption is made, a tax deed that is properly issued to the holder of the tax sale certificate of purchase cuts off all prior interests, including liens, in the property. *White v. Hammerstrom*, 224 Iowa 1041, 277 N.W. 483 (1938).

With respect to your first question, it is clear that a judgment creditor of record has an "interest of record" in the property sold at tax sale. Accordingly, such judgment creditor is entitled to notice of expiration of right of redemption from tax sale.

In regard to your second question, the holder of a recorded sheriff's certificate of sale has an interest in the property as long as the holder is not barred by Iowa Code 626.97 (1987) from obtaining a deed. *Appleby v. Farmers State Bank of Dows*, 244 Iowa 288, 56 N.W.2d 917 (1953). Assuming, therefore, that the holder of the sheriff's certificate of sale has a valid certificate that has not

expired, the holder is entitled to notice of the expiration of the right of redemption from tax sale as a "person who has an interest of record."

Concerning your third question, we are of the opinion that the responsibility to determine those who are entitled to service of notice of the expiration of the right of redemption from tax sale is upon the holder of the tax sale certificate of purchase. In *Burks v. Hedinger*, 167 N.W.2d 650 (Iowa 1969), the holder of the tax sale certificate of purchase caused service of notice of expiration of right of redemption by publication pursuant to Iowa Code § 447.10. The person to whom the property was taxed had died and no one lived on the property at the time the notice was served. However, another person did store some lumber on the property. The holder of the tax sale certificate of purchase had observed that lumber was kept upon the property. The holder did not serve the notice upon "the person in possession of the real estate" as required by § 447.9. The Iowa Supreme Court held that the holder was on inquiry notice that there was a person in possession of the property upon whom the notice should have been served, namely, the person who stored lumber on the property. Therefore, the Court held the right of redemption from tax sale had not expired because of the holder's failure to serve the person in possession with the notice.

In *Pendergast v. Davenport*, 375 N.W.2d 684 (Iowa 1985), property was sold at scavenger tax sale to Woodbury County. The Woodbury County Treasurer, pursuant to § 447.9, served notice of expiration of right of redemption upon all those entitled to such notice, except for a telephone company which had erected a public pay telephone station upon the property. Subsequent to the service of the notice, the tax sale certificate of purchase was assigned by the county to an individual. Thereafter, a treasurer's tax deed was issued to that individual. The executor of the owner's estate challenged the validity of the tax deed on the ground that the person in possession of the property (the telephone company) had not been served with notice of expiration of right of redemption. The Iowa Supreme Court held that the tax deed must be set aside because the treasurer and the assignee "were put on inquiry notice as to the telephone company being in possession of the property." 375 N.W.2d at 690. The Court noted that "our case law refers to conduct that gives notice to the holder of the certificate of purchase in determining whether a party is in possession." *Id.* The Court further noted that the requirement for service of notice of the expiration of right of redemption from a tax sale was an "absolute" and the failure to serve the notice upon all of those entitled to notice in § 447.9 prevented the period of redemption from expiring so that the tax deed was void. *Id.*

If, as in the situation which you posed, the property was sold at scavenger tax sale to someone other than the county and the county was not the holder of the tax sale certificate of purchase at the times when notice was given or when a tax deed was requested, the county treasurer is not on inquiry notice to investigate and ascertain whether all those entitled to notice of expiration of right of redemption pursuant to § 447.9 were, in fact, served with notice. The county treasurer may rely upon the affidavits of service filed with the treasurer by the tax sale certificate of purchase holder or the holder's agent or attorney in accordance with Iowa Code §§ 447.10 and 447.12 (1987).

With respect to your fourth question, if the county treasurer has actual knowledge that persons entitled to notice of the expiration of right of redemption have not been served, then the county treasurer has actual knowledge that service of the notice has not been completed. Such actual knowledge rebuts the presumptive evidence supplied by the certificate holder's affidavit concerning completion of service of the notice. Iowa Code § 448.1 (1987) authorizes the treasurer to make out a tax deed only after the expiration of ninety days from the date of completed service. The county treasurer who has actual knowledge that proper service of notice has not been completed would have no legal obligation or right to issue a tax deed. *White v. Hammerstrom*, 224 Iowa 1041, 277 N.W. 483 (1938).

November 17, 1987

COURTS; CLERK OF THE SUPREME COURT: Iowa Code §§ 46.4, 46.9A, 69.16A, 602.11111(3) (1987); 1987 Iowa Acts, chapter 218, §§ 4 and 8. The Clerk of the Supreme Court has the authority to determine the requirements for eligibility for the elective positions of the judicial nominating commission to the extent necessary to state the eligibility requirements and to give notice as required by statute. The gender balance objective which has been set for all other judicial districts applies to judicial district 5C and the Clerk may determine that certain gender requirements are necessary when stating the requirements for eligibility for election in district 5C. The gender balance requirements, as well as the transition period elements in judicial nominating district 5C, are met by the election of a woman to fill the opening in 1988, and a man and a woman to fill the openings in 1992. (Skinner to Richardson, Iowa Supreme Court Clerk, 11-17-87) #87-11-4(L)

November 18, 1987

DEPARTMENT OF HEALTH; COUNTIES: Indigent Obstetric Program. Iowa Code Chapters 255, 255A. The legislation does not address whether Chapter 255A must be used before using Ch. 255 for providing indigent obstetric care at the University of Iowa Hospital. The Department of Health therefore has authority to reasonably resolve this question in any manner not inconsistent with the statute. The department's rule providing that a county's quota is used when an individual is certified for local delivery is reasonable; however, there is not specific statutory language which would prohibit the department from promulgating rules which would allow for the reversion of a quota. (McGuire to Hammond, 11-18-87) #87-11-5(L)

November 23, 1987

PUBLIC EMPLOYEES: Veterans Preference. Iowa Code §§ 70.1, 70.6, 70.8, 400.11 (1987). The provisions of Iowa Code chapter 70, the Iowa Veteran's Preference Law, apply to both permanent part-time and temporary or seasonal positions of a public employer. Rigid compliance with Chapter 70 is not however required in emergency situations where the notice and selection requirements of Chapter 70 cannot realistically be satisfied. (Dorff to Beine, Cedar County Attorney, 11-23-87) #87-11-6(L)

November 25, 1987

ENGINEERING AND LAND SURVEYING EXAMINING BOARD; ARCHITECTURAL EXAMINING BOARD: Engineers' exemption from ch. 118. Iowa Code Chapter 114 (1987), § 114.1; Iowa Code Chapter 118 (1987), § 118.17; House File 587, 72d G.A., 1st Sess. There is no reference in House File 587 which expressly alters the engineer exemption nor is there any indication that section 118.17 has been impliedly amended. The provisions in section 118.17, which exempt engineers from the "Registered Architects" statute, stand. Professional Engineers are therefore exempt from the requirements of Chapter 118 as amended. (Skinner to Pulley and Kalleen, 11-25-87) #87-11-7(L)

November 25, 1987

CRIMINAL LAW; COUNTY ATTORNEY; CONFIDENTIALITY; PUBLIC RECORDS: Confidentiality of grand jury minutes. Iowa Code § 22.2 (1987); Iowa R. Cr. P. 4(6)(b) and 5(5). Minutes of evidence filed with an indictment or trial information remain confidential from the general public and the news media after termination of a prosecution at the trial level. However, whether they may be disclosed to any county attorney if they are relevant to an independent investigation should be resolved by the courts or addressed by the Supreme Court's rulemaking procedures. (Bennett to Schroeder, Keokuk County Attorney, 11-25-87) #87-11-8

Mr. John E. Schroeder, Keokuk County Attorney: You have requested an opinion of the Attorney General concerning the following question: "[D]o minutes of testimony [attached to a trial information] become public records to which

the general public has access after the criminal prosecution has been completed or do they instead remain confidential?" You have informed us in your letter that you seek this opinion for guidance as to: (1) whether you, in prosecuting a criminal case in your county, should be able to obtain minutes of evidence (testimony) from other counties when that information will be relevant, necessary, or helpful to your prosecution; (2) whether the minutes of evidence filed in a prosecution now completed can be released to the family of the victim of the crime. You further have informed us that you have learned from personal experience that the various counties have different policies regarding this, with some denying requests for minutes from all persons (including county attorneys and other county officials), some deny access to the general public but provide them to law enforcement personnel, and others provide access to the general public once a criminal prosecution has concluded.

Because your opinion request reaches two, discrete inquiries, we recast it as follows:

> 1. Whether minutes of evidence remain confidential, not subject to access by the general public, upon completion of a criminal prosecution?;
>
> 2. Whether, if minutes do remain confidential, can county attorneys nevertheless obtain them from other counties when relevant to a present investigation or prosecution?

Iowa Rule of Criminal Procedure 4, which expressly governs indictments, provides in subsection (6)(b) as follows:

> *Copy to defense.* Such minutes of evidence shall not be open for the inspection of any person except the judge of the court, the prosecuting attorney, or the defendant and his or her counsel. The clerk of the court must, on demand made, furnish the defendant or his or her counsel a copy thereof without charge.

Provisions governing indictments are equally applicable to trial information, unless otherwise provided for by statute or the Rules of Criminal Procedure, or when "the context requires otherwise." Iowa R. Cr. P. 5(5). We have previously rendered an opinion on the confidentiality of minutes of evidence, attached to either an indictment or information, prior to completion of the prosecution at the trial level. In that opinion we concluded that, although minutes were public records under chapter 68A, entitled "Examination of Public Records," of the 1975 Code of Iowa (now chapter 22), they nevertheless were shielded from inspection by the general public or the news media because of the express requirement of confidentiality contained in Iowa Code section 772.4 (1975), the predecessor of Rule 4(6)(b). It was determined that although they were public records, they were not public records subject to open inspection by anyone other than those specified in section 772.4. 1976 Op.Att'yGen. 466.[1]

As is apparent from the language of Rule 4(6)(b), there is no temporal provision regarding extinguishment or lapse at some point of the confidentiality mandate. Because of this, and also in view of the fact that this rule, as is true of the Rules of Criminal Procedure generally, is cast in terms of regulating an extant

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[1] In concluding in our prior opinion that minutes of evidence were public records, but nevertheless confidential, we took note of Iowa Code §68A.2 (1975). That section provided that the public and the news media had the right to examine all public records unless some other statutory provision expressly required a particular record to be kept confidential. We recognize that Iowa Code §22.2 (1987), the successor to §68A.2, does not contain this limitation on the right to examine public records. However, we do not believe there is any basis for concluding that this omission was intended as an implied repeal of the numerous confidentiality statutes which have consistently been retained in the Code of Iowa.

prosecution at the trial level, there appears to be some ambiguity regarding the length of the confidentiality provision. Furthermore, it is somewhat problematical exactly when a prosecution terminates. Is it at the conclusion of prosecution at the trial level, whether it be by dismissal of the charge, acquittal, or conviction; or does it come later, at the conclusion of either a direct appeal or at the end of a direct appeal and all collateral attacks upon a conviction, since the granting of relief by a reviewing court could result in new trial court proceedings? In some cases, it is quite some time before the prosecution is truly at an end. The policies served by confidentiality of the minutes prior to entry of the first judgment may be equally applicable after an appellate court's reversal of the conviction and remand for a new trial.

Because of this ambiguity in the Rule, it is necessary to construe and interpret its provision regarding confidentiality. When a statute or rule does not answer a question raised under it, one must look beyond the words to ascertain its meaning. *See Emery v. Fenton*, 266 N.W.2d 6, 8 (Iowa 1978). The intent of the drafters of a court rule will prevail even over the literal import of its words, as the primary rule of statutory construction is to give effect to the drafters' intention. *See State v. Link*, 341 N.W.2d 738, 740 (Iowa 1983); *State v. Berry*, 247 N.W.2d 263, 264 (Iowa 1976). In ascertaining intent, the goal sought to be achieved and the evil sought to be prevented must be considered; a reasonable construction which will best achieve the purpose of a court rule, and avoid absurd results, is to be sought. *State v. Link*, 247 N.W.2d at 740. To that end, it is instructive to review the grand jury as an institution and the applicable policy of secrecy regarding grand jury proceedings.

Grand jury proceedings, with only several exceptions, traditionally have been protected by secrecy. The grand jury is an ex parte investigatory body which has broad powers to determine whether a person should be charged with a crime, which necessarily includes a concomitant protection of citizens from unfounded accusations from either the State or private individuals that they have committed a crime. *United States v. Calandra*, 414 U.S. 338, 343-44, 94 S. Ct. 613, 38 L. Ed.2d 561, 568-69 (1974); *Maley v. District Court of Woodbury County*, 221 Iowa 732, 266 N.W. 815, 817 (1936), overruled on other grounds, *Uhl v. District Court in and for Monona County*, 231 Iowa 1046, 2 N.W.2d 741 (1942), which was later overruled, *Steinbeck v. Iowa District Court in and for Linn County*, 224 N.W.2d 469 (Iowa 1974). To enable the grand jury to fulfill this historical role, these proceedings are protected by a policy of secrecy. *Id.* At present, Iowa law requires the secrecy of grand jury proceedings to be maintained except in certain discrete situations, such as when disclosure of a witness' testimony is necessary for a charge of perjury against that witness. Iowa R. Cr. P. 3(4)(d) and 13(6)(d). The secrecy policy is founded not only upon considerations which are primarily imminent only during the time of a grand jury's investigation, such as avoidance of alerting an investigatory target to the existence of the investigation and protection of the grand jurors from outside pressure during the investigation, but it also shields the grand jury from publicity which can later result in challenges to the manner in which an investigation was conducted. *See United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681, 78 S. Ct. 983, 2 L. Ed.2d 1077, 1081 n.6 (1958); *Maley v. District Court of Woodbury County*, 266 N.W. at 817; *State v. Gibbs*, 39 Iowa 318, 322 (1874); *State v. Falcone*, 292 Minn. 365, 195 N.W.2d 572, 575 n.3 (1972).

The grand jury's investigative function is promoted by the rule of confidentiality and secrecy, for it allows the grand jury to do its sworn duty in an environment free from the fear that at some later time the integrity of the process might be called into question. Such a pressure carries the potential risk that some grand jurors might, intentionally or not, conduct themselves as petit jurors with an eye towards proof of guilt beyond a reasonable doubt. To the elimination of such pressure, Iowa law expressly provides that no juror "shall be questioned for anything he or she may say or any vote the juror may

give in the grand jury relative to a matter legally pending before it," except in cases of perjury of a grand juror. Iowa R. Cr. P. 13(6)(d). Furthermore, our Supreme Court has generally indicated that although the need for grand jury secrecy may not be as critical after trial as it is before, it nevertheless is to be maintained. *State v. Hall*, 235 N.W.2d 702, 731 (Iowa 1975), *cert. denied*, 434 U.S. 822, 98 S. Ct. 66, 54 L. Ed.2d 79 (1977). Moreover, in *State v. Gibbs*, the Supreme Court noted, when reviewing secrecy statutes comparable to Rules 3(4)(d) and 13(6)(d), that the secrecy requirement is "general and without limitation as to time." 39 Iowa at 322-23.

If minutes of evidence were to be released to the public after a trial prosecution of an offender, great potential exists for public controversy regarding the grand jury's investigation and return of an indictment if the minutes should describe witnesses and potential testimony which ultimately had not been presented at the trial. The minutes might contain proposed testimony which had been found legally inadmissible at the trial, or was found wanting by the prosecutor as not persuasive support of the State's evidentiary burden. Putting such information into the public domain could have deleterious effects, not only to the integrity of the specific grand jury investigation, but also to an accused if there should be a retrial at some point. It is true generally that the public has a broad right of access to public records, and confidentiality exceptions are to be narrowly drawn. *See City of Dubuque v. Telegraph Herald, Inc.*, 297 N.W.2d 523, 526 (Iowa 1980). We, however, conclude that, in light of the longstanding policy of secrecy for grand jury proceedings and the potential problems that release of minutes could create, the drafters of the rule intended that minutes attached to an indictment shall remain confidential beyond the conclusion of a trial prosecution of a criminal defendant, without limitation as to time.

Nor does there appear to be any principled reason to conclude differently as to minutes attached to a trial information. As previously noted, rules applicable to indictments are applied to information unless specifically required otherwise or a particular situation dictates an opposite conclusion. The same potential problems from disclosure would also inhere with minutes attached to an information. Furthermore, the county attorney's investigatory power is comparable in breadth to that of the grand jury. *Brown v. Johnston*, 328 N.W.2d 510, 511-12 (Iowa), *cert. denied*, 463 U.S. 1208, 103 S. Ct. 3540, 77 L. Ed.2d 1390 (1983).

You also have asked whether a county attorney can obtain minutes of evidence deriving from a prosecution in another county, when those minutes would be relevant, and necessary or helpful, to an existing investigation or prosecution. We first note that Rule 4(6)(b) limits disclosure of minutes to "the judge of the court, *the* prosecuting attorney, or the defendant and his or her counsel." (emphasis supplied). Textually, it could be argued that this limits disclosure to the county attorney or other prosecuting attorney in the present criminal prosecution, for which the minutes were developed and filed. In the federal courts, Federal Rule of Criminal Procedure 6(e) provides a comprehensive regulatory scheme for disclosure of grand jury materials in certain situations. Disclosure of such material without a court order is limited to the government prosecutors involved in the criminal prosecution to which the materials pertain. Disclosure to other government attorneys for use in other legal actions, such as civil suits brought by the government, requires a court order; obtaining such an order requires a showing of "particularized need." Fed. R. Crim. P. 6(e)(3)(A)(i) and 6(e)(3)(C)(i); limited *States v. Sells Engineering, Inc.*, 463 U.S. 418, 420, 427-29, 442-43, 103 S. ct. 3133, 77 L. Ed.2d 743, 750, 754-55, 764 (1983). Iowa has no similar comprehensive procedure for limited disclosure of grand jury proceedings.

Given the above matters, we believe that whether a county attorney in a particular prosecution or investigation should be able to obtain minutes from

another county is a question which in the first instance should be resolved by the courts. This office does not give advice on the nature of judicial orders which may or may not appropriately be issued. We also must point out that, given the apparent conflicting practices regarding release of minutes (as noted in your letter), it would appear to be appropriate for this issue to be brought to the attention of the Supreme Court's Committee in Rules of Criminal Procedure. The Court's rulemaking procedures would be able to promulgate standards, if found warranted, for the release of minutes of evidence to county attorneys in appropriate circumstances while still preserving sufficient protection of the grand jury process.

In sum, we believe that minutes of evidence remain confidential after termination of a prosecution at the trial level and should not be disclosed to the general public or the news media.

November 25, 1987

INSURANCE; COUNTIES: Reciprocal or inter-insurance contracts. Iowa Code section 520.1 (1987). An Iowa county may exchange reciprocal or inter-insurance contracts with a county of another state. (Haskins to Arnould, State Representative, 11-25-87) #87-11-9(L)

November 30, 1987

COUNTIES AND COUNTY OFFICERS: County Compensation Board. Iowa Code chapter 331, § 331.905 (1987). The spouse or relative of a county official whose salary is reviewed by the county compensation board may have a pecuniary interest or the potential to be influenced. If so, a conflict of interest exists and these individuals should not be selected to serve on the county compensation board. Employees of the federal government are not prohibited from serving on the county compensation board. Persons serving as unpaid commissioners, board members or other elected or appointed officials in county, city or township government are prohibited from serving on the county compensation board since the statute specifically prohibits them from serving. (Skinner to Scieszinski, Monroe County Attorney, 11-30-87) #87-11-10(L)

DECEMBER 1987

December 15, 1987

TAXATION: The Entire Area Of A City Can Be Designated As A Revitalization Area Under Ch. 404. Iowa Code § 404.1 (1987). Section 404.1 does not prohibit the governing body of a city from designating its entire area as a revitalization area if other substantive criteria and procedural requirements are met. (Miller to Carpenter, State Representative, 12-15-87) #87-12-1

Dorothy F. Carpenter, State Representative: You have requested an opinion of the Attorney General concerning Iowa Code ch. 404 (1987), Urban Revitalization Tax Exemptions. Specifically, you ask whether the chapter allows a city to designate the entire city as a revitalization area under Iowa Code § 404.1 (1987).

Section 404.1 states the following:

> The governing body of a city may, by ordinance, *designate an area of the city* as a revitalization area, if that area is any of the following:
>
> 1. An area in which there is a predominance of buildings or improvements, whether residential or nonresidential, which by reason of dilapidation, deterioration, obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, the existence of conditions which endanger life or

> property by fire and other cause or a combination of such factors, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency or crime, and which is detrimental to the public health, safety, or welfare.
>
> 2. An area which by reason of the presence of a substantial number of deteriorated or deteriorating structures, predominance of defective or inadequate street layout, incompatible land use relationships, faulty lot layout in relation to size, adequacy, accessibility or usefulness, unsanitary or unsafe conditions, deterioration of site or other improvements, diversity of ownership, tax or special assessment delinquency exceeding the actual value of the land, defective or unusual conditions of title, or the existence of conditions which endanger life or property by fire and other causes, or a combination of such factors, substantially impairs or arrests the sound growth of a municipality, retards the provision of housing accommodations or constitutes an economic or social liability and is a menace to the public health, safety, or welfare in its present condition and use.
>
> 3. An area in which there is a predominance of buildings or improvements which by reason of age, history, architecture or significance should be preserved or restored to productive use.

(Emphasis added). This section clearly allows the governing body of a city to designate an area of the city for revitalization purposes assuming certain criteria are met. These criteria are set out in subsections 404.1(1)-404.1(3) which describe the type of areas which may be designated as revitalization areas. The procedural requirements necessary for a city to follow in designating a revitalization area are set out in Iowa Code § 404.2 (1987).

The focus of this opinion is not whether the conditions in the entire area of the city actually exist as described in § 404.1. Such a question would be highly factual and would not be the subject of an Attorney General's opinion. Rather, this opinion will focus on whether the statute prohibits any city from designating its *entire* area as a revitalization area or whether, by implication, it can only designate a portion of that city for such a use.

The answer to this question hinges upon the definition of the word "area" as contained in § 404.1. The word "area" as defined in Webster's Ninth New Collegiate Dictionary 101 (1985) is:

> 1: a level piece of ground 2: the surface included within a set of lines; *specif*: the number of unit squares equal in measure to the surface... 4: a particular extent of space or surface or one serving a special function....

"Area" is also defined in Black's Law Dictionary 97 (5th ed. 1979) to be as follows:

> A surface, a territory, a region. *[Fleming v. Farmers Peanut Co.*, 128 F.2d 404, 406 (5th Cir. 1942)]. Any plane surface, also the inclosed space on which a building stands. A particular extent of space or surface or one serving a special purpose....

As can be seen, the term "area", by itself, contains no limitation as to the extent of any particular area. In *Fleming*, 128 F.2d at 406, the Circuit Court stated that an area "may be of any extent, and hence the need of defining it." It was also stated in *People v. Ferris*, 18 Ill. App. 2d 346, 152 N.W.2d 183, 186 (1958) that "the word 'area' has an elastic meaning. Originally it meant a broad piece of level ground, but in modern use it can mean any plane surface or tract...." [citations omitted]. "Standing alone the word 'area' implies nothing as to size. It may be of large or small extent." *See also State v. Armstrong*, 97 Neb. 343, 149 N.W. 786, 788 (1917); 6 C.J.S. Area, at 522 (1975).

It is a principle rule of statutory construction "that the legislature is its own lexicographer when it deems it advisable to define a word or phrase." *Iowa State Commerce Com'n v. Northern Natural Gas Co.*, 161 N.W.2d 111, 113 (Iowa 1968). If the legislature had intended to prohibit a city from designating its entire area as a revitalization area, it would have done so through specific legislation defining the extent a city could be so designated. The word "area" by itself, simply does not place any limitation upon a city in designating revitalization areas.[1]

The only limitations regarding a designated area found in ch. 404 are in subsections 404.1(1)-404.1(3). Those limitations, however, only describe the substantive conditions of what a designated area may include. They do not limit the size of a particular area, either within itself, or as compared to the total area of a city.[2] Absent statutory restraints placing a limitation upon the total area of a city which may be designated as a revitalization area, the phrase "an area of the city" can include the entire city. This is assuming, of course, that the city has met the substantive criteria in subsections 404.1(1)-404.1(3) and the procedural requirements of § 404.2.[3]

December 23, 1987

STATE OFFICERS AND DEPARTMENTS: Professional Licensing and Examining Boards; Board of Dental Examiners. Iowa Code §§ 147.14(4) and 147.18 (1987). Section 147.14(4) does not prevent a dental hygienist member of the board of dental examiners from accepting a faculty position at an area college. Section 147.18 does not prohibit acceptance of this position, provided the board member does not have an ownership interest in that school. (Weeg to Price, Executive Director, Iowa Board of Dental Examiners, 12-23-87) #87-12-2(L)

December 31, 1987

FORCIBLE ENTRY OR DETENTION OF REAL PROPERTY: Three day notice to quit. Iowa Code §§ 648.3, 648.4, 562A.27(2), 562B.25(2) (1987). The three-day notice of §§ 562A.27(2) and 562B.25(2) is a distinct and separate notice from the three-day notice to quit of §§ 648.3 and 648.4. The legislature has amended however § 648.3 twice, in 1981 and then in 1984, to make the three-day notice to quit concurrent with the three-day notice for failure to pay rent. Thus, under the current statutes, when a landlord of a mobile home or a mobile park has given a tenant a three-day notice as provided in § 562B.25(2), this landlord may commence a forcible entry action without giving a three-day notice to quit required by § 648.3. (Phan-Quang to Doyle, State Senator, 12-31-87) #87-12-3(L)

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[1] Interpreting this statute to prohibit the designation of an entire city as a revitalization area could lead to unreasonable or absurd results. For instance, a city could meet such a requirement by merely designating 99.99 percent of its total area as a revitalization area even though the whole city would otherwise meet the necessary revitalization criteria. Statutory construction which leads to "strained, impractical or absurd results" is to be avoided. *Armstrong's v. Iowa Department of Revenue*, 320 N.W.2d 623, 626 (Iowa 1982).

[2] The only limitation within this statute as to the size or scope of a designated area of a city was discussed in a previous Attorney General's Opinion. *See*, 1980 Op.Att'yGen. 786. There, it was found that the statute prohibited a *single* structure or building within a city to be designated a revitalization area.

[3] A second question in this request dealt with the assumption that if an entire city can become a revitalization area, then can the city make the decision to abate the property tax on all new construction within the city for the time period provided by chapter 404. Iowa Code § 404.2(2)(f) clearly allows a city to make this decision with respect to all property assessed as residential, agricultural, commercial or industrial property within the designated area.

JANUARY 1988

January 6, 1988

PUBLIC RECORDS: Ipers membership. Iowa Code ch. 22; §§ 22.1, 22.2, 22.7. Iowa Code ch. 97B; § 97B.11. 5 U.S.C. §§ 551(l), 552(b)(6). Iowa Admin. Code Ch. 581; §§ 21.23(1), 21.23(2). The names of legislators who elect membership in IPERS is not personal information which would be a confidential record under § 22.7(11). Disclosure of such information would be treated similarly under § 552(b)(6) of the federal Freedom of Information Act. (Pottorff to Tyrrell, State Representative, 1-6-88) #88-1-1(L)

January 14, 1988

BEER AND LIQUOR: Licensing of Food Establishments. 1987 Iowa Acts, Ch. 22, §§ 4 and 5; 1986 Iowa Acts, Ch. 1245 and Ch. 1246; Iowa Code Ch. 123 and 170 (1987); Iowa Code §§ 123.4, 123.30, 123.30(1), 170.1(1), 170.1(2), 170.2, 170.4, 170.5, 170.55 (1987). A class "E" liquor licensee is subject to the liquor licensing requirements of chapter 123, as well as the food establishment licensing provisions in chapter 170. A conflict does not exist between the Iowa Alcoholic Beverages Control Act and the food establishment licensing provisions found in chapter 170. (Walding to Sweeney, Director, Department of Inspection and Appeals, 1-14-88) #88-1-2(L)

January 15, 1988

COUNTY AND COUNTY OFFICERS: Mentally ill; Cost of Commitment is county obligation. Iowa Code §§ 230.1; 230.10; 230.15; 230.26; 1987 Iowa Acts, ch. 36, § 1. A county may not establish accounts receivable nor keep an index for the cost associated with civil commitments of mentally ill persons. (Robinson to Welsh, State Senator, 1-15-88) #88-1-3(L)

January 19, 1988

LAW ENFORCEMENT: Peace Officers; Municipalities; Arrest; Implied Consent: Arrest outside jurisdiction. Iowa Code ch. 80D, §§ 28E.3, 28E.21, 28E.22, 28E.23, 28.E.24, 28E.25, 28E.26, 28E.27, 28E.28, 321J.1(1)(b), 321.J.1(7), 321J.6, 321J.6(1), 321J.6(1)(b), 321J.6(1)(c), 321J.6(1)(d), 321J.6(1)(e), 331.562(1)(a), 331.562(1)(b), 331.562(1)(c), 331.562(1)(d), 804.9, 804.22 (1987). 1. A municipal police officer does not have the authority to arrest as a peace officer outside of the boundaries of the municipality unless the municipality is part of a joint law enforcement district or the officer is a special or reserve sheriff's deputy. 2. A municipal police officer who is qualified to administer implied consent has the authority to administer implied consent outside of the municipality. (Ryan to Davis, Scott County Attorney, 1-19-88) #88-1-4(L)

January 20, 1988

GOVERNOR: State Officers and Departments; Governor's Authority over State Purchases. Iowa Const., Art. III, § 24, Art. IV, §§ 1, 9; Iowa Code §§ 8.3, 8.31, 8.39, 18.3(1), 18.115(9). The Governor's directive to state agencies to purchase ethanol-blended state fuel as implemented by the state vehicle dispatcher is not inconsistent with statute. Section 18.115(9) authorizes the vehicle dispatcher to issue guidelines for the purchase of gasoline by all state agencies; section 8.3(2) charges the Governor with the efficient and economical administration of state departments. It does not appear that the budgetary impacts of the decision would necessitate the diversion of funds from other appropriated purposes to such an extent that the legislative objectives of the appropriations to the various agencies could not be met. (Brick to Jochum, State Representative, 1-20-88) #88-1-5(L)

January 20, 1988

STATE OFFICERS AND DEPARTMENTS: Professional licensing and examining boards; Architectural examining board. Iowa Code chapter 118, 1987 Iowa Acts, chapter 92, section 8. The definition of "professional architectural services" lists activities all of which are modified by the phrase "related to architecture". In turn, certain defined services are related to architecture only if the safeguarding of life, health or property is concerned or involved. The question of whether a particular activity fits the definition of the "practice of architecture" should be determined in a specific factual context. A request for an advance determination of the boundaries of the "practice of architecture" is most appropriately addressed to the architectural examining board. (Barnes to Hatch, State Representative, 1-20-88) #88-1-6(L)

January 20, 1988

SCHOOLS: Offsetting Tax, Trusts. Iowa Code § 282.1 (1987); Iowa Code § 282.2 (1987); Iowa Code § 282.2 (1983). Property tax on trust property for which a parent is not liable is not available to offset nonresident tuition changes. (Fleming to Osterberg, State Representative, 1-20-88) #88-1-7(L)

January 21, 1988

SCHOOLS: Teachers; Wages; Collective Bargaining. Iowa Code Supp. ch. 294A (1987); Iowa Code § 91A.3 (1987); Iowa Code ch. 20 (1987). The terms of Iowa Code Supp. 294A (1987), the Educational Excellence Program, are not in conflict with the Wage Payment Collection law or the Public Employment Relations law. It is our opinion that a school district ordinarily will include Phase I salary payments in a teacher's regular paycheck but under the terms of Iowa Code § 91A.3, by agreement between the school district and the teachers as a group or as individuals, the schedule for distribution may be different. The distribution of Phase II money is to be accomplished by mutual agreement in districts with collective bargaining and by decision of the district board in other districts. We express no opinion concerning the method for payment of Phase III funds because of the variety that is possible under the terms of the law in school district Phase III plans. (Fleming to Murphy, State Senator, 1-21-88) #88-1-8(L)

January 21, 1988

MUNICIPALITIES: Library Board of Trustees; Charge. Iowa Code § 392.5 (1987); Iowa Code § 378.10 (1971); 1972 Iowa Acts, ch. 1088, §§ 196 and 199. A restriction on a library board of trustee's authority to set the compensation of library personnel in an ordinance which previously granted exclusive control over expenditures and compensation to the library board would constitute an alteration of the "charge of a library board," as used in § 392.5, and would be void absent approval by referendum. A county attorney does not have a duty to react to an invalid municipal ordinance. (Walding to Swaim, Davis County Attorney, 1-21-88) #88-1-9(L)

January 21, 1988

HIGHWAYS; SCHOOLS: Minors' school licenses. Iowa Code § 321.194 (1987) Iowa Administrative Code 761- 600.5(2); 670-6.11(2). A student holding a minor's school license may drive unaccompanied only to those extracurricular activities held on the actual school grounds of the schools in which the minor licensee is enrolled and attends. (Olson to Harbor, State Representative, 1-21-88) #88-1-10(L)

January 21, 1988

COUNTIES, COURTS: Designation of smoking areas in courthouses. Iowa Code Supp. §§ 98A.3 and 98A.4 (1987); Iowa Code § 622.1303 (1987). The Court and not the County Board of Supervisors is the person in custody and control of areas of a courthouse assigned to the Court and its employees, and authorized to designate in which portions of such areas smoking can be permitted. (Hayward to Mullins, 1-21-88) #88-1-11(L)

January 19, 1988

REVENUE; DELINQUENT PROPERTY TAX; COUNTIES AND COUNTY OFFICERS; TREASURER; ASSESSOR: Costs of Tax Sale Publications. Iowa Code §§446.9(2); 446.15; 446.29 (1987). A ten dollar fee for tax sale publication costs should be charged per assessment roll, regardless of the amount of property included in that assessment roll. (Weeg to Van Maanen, State Representative, 8-20-87) #87-8-2(L) Clarified 1-19-88

FEBRUARY 1988

February 8, 1988

SCHOOLS: Postsecondary Enrollment Options Act; Shared Time Agreements. Chapter 261C, Iowa Code Supplement 1987; Iowa Code §256.12 (1987). The Chapter 261C Postsecondary Enrollment Option applies only in relation to public school pupils. Section 256.12 does not allow nonpublic school students to participate in the "Postsecondary Enrollment Options Act", and a school district is therefore not allowed to pay tuition costs to an "eligible postsecondary institution," on behalf of nonpublic school students. Iowa Code section 256.12 does give a school district's board of directors virtually complete control over the terms by which a nonpublic school student will be accepted under a section 256.12 "sharing agreement", subject only to Chapter 290 review. (Donner to Wise, State Representative, 2-8-88) #88-2-1(L)

February 10, 1988

JUVENILE LAW: Arrest and Detention of Juveniles for Offenses Excluded From Jurisdiction of Juvenile Court. Iowa Code §232.8 (1987); Iowa Code chs. 106, 106A, 109, 109A, 110, 110A, 110B, 232, 321, and 321G (1987); Iowa Code Supp. §805.1(8) (1987). Iowa Code Supp. §805.1(8) (1987), prohibiting the arrest of juveniles for an enumerated list of offenses, does deprive law enforcement officers of the authority to seize or detain for a significant length of time juveniles accused of those offenses. (Phillips to Fey, State Representative, and Sturgeon, State Senator, 2-10-88) #88-2-2

The Honorable Al Sturgeon, State Senator and The Honorable Tom Fey, State Representative: You recently wrote and requested of this office an opinion concerning Senate File 522, a bill passed by the General Assembly during the 1987 Session. Your inquiry refers to section 6 of that bill, Iowa Code Supp. §805.1(8) (1987), which states:

> A peace officer shall issue a citation in lieu of arrest to a person under eighteen years of age accused of violating a simple misdemeanor under the provisions of chapter 106, 106A, 109, 109A, 110, 110A, 110B, 111, 321, or 321G, and shall not detain or confine the person in a facility regulated under chapter 356 or 356A.

Your letter indicates that law enforcement personnel have appeared before your committee and testified that they have been advised by counsel that this provision prohibits them from detaining or taking into custody juveniles who do not cooperate after being stopped for one of the enumerated offenses. Apparently there is concern that, because of the language prohibiting arrest, a law enforcement officer is powerless to deal with the juvenile who will not comply with the citation procedure that is to be used in these situations. In response to this concern, you have submitted the following questions:

> 1. Is there a distinction under Iowa law between "an arrest" and "in custody"?

2. Does section 6 of S.F. 522 prohibit a law enforcement officer from detaining a juvenile accused of committing a simple misdemeanor under chapter 106, 106A, 109, 109A, 110, 110A, 110B, 111, 321, or 321G?

To answer these questions succinctly, it is the opinion of this office that there is no authority to take a person into custody, or to detain a person for a significant length of time, that is distinct from the authority to arrest. Accordingly, Iowa Code Supp. section 805.1(8) (1987) does deprive law enforcement officers of the authority to detain or confine the subject juvenile against his or her will for the offenses specified in that statute. It is important to note, however, the statute does not affect the officer's ability to detain or confine juveniles for any other offense. For most offenses, the means of arresting and detaining juveniles are still those set forth in the juvenile code, Iowa Code Ch. 232. Iowa Code Supp. § 805.1(8) (1987) pertains only to those offenses made criminal under the listed Code chapters; those are crimes which are excluded from the jurisdiction of the juvenile court under Iowa Code § 232.8 (1987). Section 805.1(8) does not affect the authority to arrest juveniles for offenses made criminal by statutes other than those listed in the section. Amongst the offenses to which it does not apply is the crime of failure to appear. Iowa Code § 805.5 (1987).

Under Iowa law, an arrest is "the taking of a person into custody when and in the manner authorized by law." Iowa Code section 804.5 (1987). This taking into custody can be either a restraint of the person, or that person's submission to custody. *Id.* The breadth and simplicity of this definition suggests that any lawful taking into custody of a person is an arrest under Iowa law, and that there is no authority to seize a person under criminal statutes absent the power of arrest. This conclusion is supported by the extensive body of federal and Iowa case law that defines when arrest occurs under constitutional standards. That body of case law suggests that virtually any non-consensual transportation of a party from one place to another is an arrest for purposes of implementing the Fourth Amendment requirement of probable cause. *See Hayes v. Florida*, 470 U.S. 811, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985) (must have probable cause to transport suspect to police station for fingerprinting); *Dunaway v. State of New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979) (must have probable cause to transport subject to police station for questioning); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-882, 95 S.Ct. 2574, 45 L.Ed.2d 607 (immigration officials may stop cars and question drivers, but any further detention or search requires probable cause or consent); *State v. Lathum*, 380 N.W.2d 743 (Iowa App. 1985) (defendants' Fourth Amendment rights violated by transportation to scene of crime occurring without probable cause). The case law indicates that detaining a party longer than is necessary to conduct a brief investigation is also an arrest under constitutional standards. *United States v. Sharpe*, 470 U.S. 675, 684, 84 L.Ed.2d 605, 105 S.Ct. 1568 (1985) (summarizing case law establishing when a brief investigatory stop becomes an arrest). Generally, a person is under arrest for the purpose of the United States Constitution if they are deprived of their freedom of action in any significant way. *Orozco v. Texas*, 394 U.S. 224, 227, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969).

This broad definition of arrest under constitutional standards suggests, although it does not mandate, the conclusion that an arrest under Iowa law consists of any extensive restraint on a person's freedom, and that, conversely, a prohibition of arrest prohibits the taking into custody and detention of individuals. A narrow definition of arrest, one that excludes certain types of custodial seizures and detentions, would make little sense, for regardless or whether a seizure would be an arrest under Iowa law, it would still have to conform to the constitutional requirement of probable cause that extends to virtually all significant deprivations of freedom of action. Accordingly, it is reasonable to assume that the Iowa definition of arrest, like the constitutional one, does not exclude any types of non-consensual seizures of the person, and that, therefore, a prohibition of arrest effectuates a prohibition of such seizures.

As new Iowa Code §805.1(8) prohibits arrest for a certain enumerated list of offenses, it does, therefore, prevent law enforcement officers from taking a juvenile into custody, or detaining them for a significant length of time for those offenses.

February 12, 1988

CONSTITUTIONAL LAW; STATE OFFICERS AND DEPARTMENTS: Iowa Department of Economic Development. Iowa Constitution, Article VIII §1; Iowa Code §§15.108(4)(a), 28.106, 28.107, 28.108(1)(2), 496A, Iowa Code Supp. §15A.1 (1987). The statute establishing the Iowa Export Trading Company is a general, not a special enactment, and is therefore constitutional under Article VIII, §1; once the company is funded through the public sale of stock, factors suggest the company will become a private, not a public or quasipublic entity. The provision that the Director of the Department of Economic Development serves as agent to the company once it becomes private may serve a public purpose. (Skinner to Thoms, 2-12-88) #88-2-3

Mr. Allan T. Thoms, Department of Economic Development: You have requested an opinion of the Attorney General concerning the constitutionality of certain aspects of the statute creating the Iowa Export Trading Company. An earlier opinion issued by this office on August 20, 1987, clarified that the establishment of an Iowa Export Trading Company is mandatory for the Iowa Department of Economic Development. Op.Att'yGen. #87-8-3(L). The issue in this opinion is whether the duties of the Director of the Department of Economic Development identified in Iowa Code §§28.106, 28.107, and 28.108 (1987) are constitutional. You have also requested an interpretation of the responsibilities of an agent, acting in a public capacity, for a company that is made private through a public stock offering to Iowa residents.

Iowa Code §28.106 (1987) states the legislature's intent to "enhance Iowa's agricultural exports, to assist exporters and producers of agricultural products, and to take advantage of the Export Trading Company Act of 1982, Pub. L. No. 97-290."

Section 28.107 provides that the Iowa Export Trading Company be established by the Director of the Iowa Department of Economic Development,[1] expending up to $100,000 to establish and operate the company until the completion of a public stock offering. The funds used shall be repaid to the department upon completion of the public offering of stock. This section further provides that the Director of the Iowa Department of Economic Development shall be an "ex officio member of the board representing the state of Iowa" and "shall also serve as an agent for the company."

I.

Preliminary to the discussion of the agent's duties in the Export Trading Company, we review the proposed structure of the company and ask whether the law itself is within permissible parameters of the Constitution. Using the analysis of an earlier opinion and applying it to this statute, we must determine whether the statute is arbitrary, and whether it is uniformly applied in order to decide if it is in contravention of the Constitution. 1986 Op.Att'yGen. 19.

Feb. 88 Constitutional Law 3rd paragraph

[1] It is the opinion of the office of the Attorney General that the establishment of an Export Trading Company is mandatory upon the Iowa Department of Economic Development. Op.Att'yGen. #87-8-3(L). *See,* Iowa Code §15.108(4)(a) (1987).

The Iowa Constitution forbids the creation of corporations by special laws, with the intent of the framers to avoid monopolies and insure equal treatment for all business enterprises.[2] While there is no direct authority construing the term "special laws" within Article VIII, § 1, an extensive discussion of the proper tests used to determine constitutionality can be found in our previous opinion. The same tests will be applied in reviewing the proposed status of the Export Trading Company. The legislation will pass constitutional muster if there is any reasonable ground for the classifications in the law and if it operates equally upon all within the same class. *Richards v. City of Muscatine*, 237 N.W.2d 48, 61 (Iowa 1975).

We also note the general legal principle that a law intended to serve a particular public need, in order to meet some special evil or promote some public interest, is not a special law. 82 C.J.S. *Statutes*, § 166, pp. 279-280 (1953). The concept of public need and the phrase "public purpose" have been addressed by the Court in *John R. Grubb, Inc. v. Iowa Housing Finance*, 255 N.W.2d 89, 93 (Iowa 1977),[3] and *Train Unlimited Corp. v. Iowa Ry. Finance*, 362 N.W.2d 489 (Iowa 1985),[4] by this office in Attorney General's opinions,[5] and by the 1987 Legislature.[6] Public purpose has been found to be present in cases where employment is increased, where tax revenue is increased, and in situations where public money is spent unless there is an "absence of public purpose" which is "so clear as to be perceptible by every mind at first blush." *John R. Grubb, Inc. v. Iowa Housing Finance Authority*, 255 N.W.2d at 96.

Feb. 88 Constitutional Law Part I., 2nd paragraph

4G [2]"No Corporation shall be created by special laws . . . ." Iowa Const. Art. VIII, § 1. *See*, 1986 Op.Att'yGen. 19 for an historical discussion of this section.

Feb. 88 Constitutional Law Part I., 3rd paragraph

[3]The Iowa Housing Finance Authority was found to be constitutional as a public instrumentality with the power to issue notes and negotiate bonds to accomplish the purpose of housing assistance.

Feb. 88 Constitutional Law Part I., 3rd paragraph

[4]The Iowa Railway Finance Authority was created for a public purpose to insure adequate rail transportation facilities, and was not defeated simply because it benefited certain individuals more than others.

Feb. 88 Constitutional Law Part I., 3rd paragraph

[5]In 1986 Op.Att'yGen. 113 we concluded that governmental financing of economic development may, in appropriate circumstances, serve a public purpose; our opinion, 1986 Op.Att'yGen. 19, concluded the Iowa Development Commission Foundation, the Product Development Corp., and Venture Capital Fund were established to accomplish a state-wide public purpose, and therefore the statutes creating these corporations are not special laws in contravention of Iowa Constitution Art. VIII, § 1.

Feb. 88 Constitutional Law Part I., 3rd paragraph

[6]"Economic development" is a public purpose for which the state, a city, or a county may provide grants, loans, guarantees, and other financial assistance to or for the benefit of private persons. Iowa Code Supp. § 15A.1 (1987).

The Export Trading Company is to be established to assist agricultural exporters, expand existing markets, and develop new markets. §28.108. Only Iowa residents may be owners of the stock of the company. §28.107. Under the guidance of the previous examples of public purpose, we view the purposes to be served by the Export Trading company as legitimate public purposes. The statutes authorizing the creation of the company are not arbitrary on their face.

Further, the statute enabling the Export Trading Company to incorporate operates uniformly and does not contain any special privileges which could lead to abuses which Article VIII is designed to prohibit. The corporation is incorporated under the express provision of Iowa Code ch. 496A (1987). The funds used by the Department of Economic Development to establish the corporation will be paid back to the department at the completion of the public offering of stock. The board will consist initially of members appointed by the director and eventually of members elected by the stockholders. The articles of incorporation and prospectus on the issuance of stock shall provide that only Iowa residents may be owners of the stock and shall include a prohibition against a takeover of the company. The statute provides opportunities and benefits to all Iowa residents and is not confined to certain areas or individuals. The public purposes of the statute as well as its uniform application support the conclusion that the statute is not a "special law" but a general enactment, and therefore passes as constitutionally acceptable under Art. VIII, § 1.

II.

To determine the permissible extent of state involvement in the Export Trading Company, we first analyze whether the company should be considered a "unit of state government" once the company is funded through the public sale of stock.

Section 28.108(1) states the purposes of the company are to "assist agricultural exporters, expand existing markets, and develop new markets through, but not limited to, direct contracts with foreign governments or their agencies, specialty-type deliveries, and countertrade options." Section 28.108(2) states the company has the powers necessary to fulfill the purposes of this division and those provided in Chapter 496A.[7]

We have stated in a previous opinion that the question of whether entities are state agencies and subject to laws governing such agencies is complex and requires consideration of a variety of factors. *See*, 1986 Op.Att'yGen. 19. Entities may be state agencies when performing one function, and private corporations when acting in another capacity. *See*, 1986 Op.Att'yGen. 16 (#85-4-1(L)). The determination of whether an entity is a state agency demands a specific factual and statutory context, and this office cannot generalize as to whether an entity is subject to laws governing state agencies without specific factual and statutory background. 1986 Op.Att'yGen. 19. The factors which have previously been used to determine that an entity is a unit of state government are not present here.[8] In contrast to the Iowa Product Development Corporation, which was

Feb. 88 Constitutional Law Part II., 2nd paragraph

[7] Iowa Code chapter 496A provides definitions and procedures for "business corporations."

Feb. 88 Constitutional Law Part II., 3rd paragraph

[8] The Iowa Product Development Corporation was found to be a unit of state government to which state laws should apply because of the following factors: the statute described the corporation as a "quasi-public instrumentality" and

found to be a unit of state government, the statute creating the Iowa Export Trading Company does not contain directives to suggest state agency status. There is no statement that the exercise of powers is an essential government function; the board is not appointed by the governor and is not subject to state appointment statutes; there is no stated authority to promulgate state administrative rules; and there is no state requirement that the corporation comply with open meetings and public record laws. The only statutory tie to state government after the company becomes funded by the public sale of stock is that the Director of the Department of Economic Development is an ex officio board member and an agent of the company. The absence of other factors suggests the company may become a purely private company, although the two director functions may be sufficient to enable it to function as a public or as a quasi-public entity.

III.

Assuming that the Export Trading Company would be found to be a private entity, we address the question of whether the agent status of the Director of the Department of Economic Development once the company is funded by the public sale of stock is constitutional. If the Director of the Department of Economic Development, a public official, serves as an agent for this company, is his time and salary apportioned to the company an impermissible use of public funds into a potentially private company?

We must first examine what function "an agent" for the company might perform. Of course, a future reviewing court would examine the specific functions the director had in fact assumed. We will look to the general definition of an "agent" as well as the statutory definition of a "grain trade agent" to examine whether the director's agency relationship to the Export Trading Company would be *per se* unconstitutional.

In general legal principles, an agent is defined as "a person authorized by another to act for another, one entrusted with another's business; one who represents and acts for another under the contract or relation of agency; a business representative, whose function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between principal and third persons; one authorized to transact all business of principal, or all of principal's business of some particular kind, or all business at some particular place." *Black's Law Dictionary 59* (5th ed. 1979).

The Export Trading Company is authorized to incorporate under ch. 496A. Within this chapter we find references to an "officer or agent." *See* §§ 496A.45, 496.46, 496A.47. "Officers and agents as may be deemed necessary may be elected or appointed by the board of directors or chosen in such other manner as may be prescribed by the bylaws.... All officers and agents of the corporation as between themselves and the corporation, shall have such authority and perform such duties in the management of the corporation as may be provided in the bylaws or as may be determined by resolution of the board of directors not inconsistent with the bylaws." § 496A.45.

The term "bargaining agent" is used in ch. 542A to mean a person, group, firm, association or corporation who bargains with buyers for the sale of grain for agricultural producers. Iowa Code § 542A.1 (1987).

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n.[8] continued
the exercise of its powers as "an essential governmental function"; the board of directors serve at the pleasure of the governor and are subject to governmental appointee statutes; the corporation promulgated administrative rules pursuant to Iowa Code ch. 17A; the approval of the director of the department of general services is required for the corporation to acquire, lease, or otherwise dispose of property; and the corporation's assistants, agents and other employees are considered to be state employees.

To determine whether a public official serving as an agent is an impermissible use of public funds once the company becomes private requires a determination of whether a public purpose is met. The question whether a specific economic program serves a public purpose must be determined in light of specific circumstances.[9] As noted above, the purpose of the company is to, *inter alia*, expand and develop markets. The legislature has gone on record to establish that grants, loans, guarantees and other *financial assistance* be considered a public purpose if it is for economic development. Iowa Code Supp. § 15A.1 (1987). The designation as agent along with the commitment of time and resources to serve as agent may be considered a public purpose given the legislative intent that the Department of Economic Development cooperate with the private sector to encourage and foster economic growth within the state.[10] This legislative intent is further manifested by the statute at issue here. Iowa Code § 15.108(4)(a) (1987) states that:

> The department [Economic Development] has the following areas of primary responsibility:
>
> (4) *Exporting.* To promote and aid in the marketing and sale of Iowa industrial and agricultural products and services outside of the state. To carry out this responsibility the department shall:
>
> (a) Establish and carry out the purposes of the Iowa export trading company as provided in section 28.106 and 28.108.

While legislative support of this company can be viewed as advocation of a public purpose, this must be tempered with the fact that a public official's time and expertise could potentially be utilized by a private company. We note the judicial deference to the concept that public purpose is to be given flexible and expansive scope in order "to meet the challenges of increasingly complex, social, economic, and technological conditions." *John R. Grubb, Inc.*, 255 N.W.2d at 93. The agent's participation in the Iowa export trading company may be such that a public purpose is served, but until the company is actually established and the agent's role is defined, a firm determination is premature.

We add that it is advisable to clearly identify the duties and responsibilities of such an agent. The agent's function should be circumscribed in the bylaws of the company and all other appropriate documents so that the limits of his authority are explicitly delineated and so that the director, and any subsequent reviewing court, can be assured that the functions carried out by the director serve a public purpose.

To summarize, we conclude that the statute establishing the Iowa Export Trading Company is a general, not a special enactment, and is therefore constitutional under Art. VIII, § 1; once the company is funded through the public sale of stock, factors suggest the company will become a private, not a public or quasi-public entity. The provision that the Director of the Department of Economic Development serves as agent to the company once it becomes private may serve a public purpose.

Feb. 88 Constitutional Law Part III., 6th paragraph

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[9] The constitutionality of county appropriations of money for low interest or no-interest loans to private businesses within the context of legislative statements of public purpose is addressed in 1986 Op.Att'yGen 113.

Feb. 88 Constitutional Law Part III., 6th paragraph

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[10] The statutory background of Iowa Development Commission and Iowa Department of Economic Development are discussed in 1986 Op.Att'yGen 19.

February 16, 1988

AUDITOR OF STATE: Audits of area schools. Iowa Code § 11.18 (1987). The Auditor's decision to audit an area school constitutes a policy choice within his or her discretion under Iowa Code § 11.18 (1987). No special conditions must exist or findings be made. An area school is permitted to contract for an audit by a certified public accountant if the Auditor has not expressed an intention to audit the area school. (Galenbeck to Boswell, State Senator, 2-16-88) #88-2-4(L)

February 18, 1988

REAL PROPERTY/COUNTY RECORDER AND AUDITOR: Recording notice of nonjudicial mortgage foreclosure. Iowa Code §§ 558.57, 558.64 (1987); Iowa Code Supp. §§ 655A.3, 655A.7, 655A.8 (1987). The county recorder and auditor must treat a notice of nonjudicial mortgage foreclosure as an instrument unconditionally conveying real estate by collecting the transfer fee and updating the auditor's transfer books. (Smith to Metcalf, Black Hawk County Attorney, 2-18-88) #88-2-5(L)

February 18, 1988

OPEN MEETINGS; PUBLIC RECORDS; SCHOOLS: Advisory Committees. Iowa Code §§ 20.9, 20.17(3); 21.2(1); 22.1, 22.2(1), 294A.15; Iowa Acts Ch. 224 § 11. A committee appointed by a board of directors of a school district or an area education agency pursuant to Iowa Code § 294A.15 is not a governing body subject to chapter 21 pertaining to open meetings because such a committee possesses no more than advisory authority. A committee appointed by a board of directors of a school district or an area education agency pursuant to Iowa Code § 294A.15 is a committee of a school corporation and the records of such a committee are public records subject to chapter 22 pertaining to public records. (Johnson to Miller, State Representative, 2-18-88) #88-2-6(L)

MARCH 1988

March 1, 1988

CHIROPRACTORS: Board of Chiropractic Examiners. Iowa Code §§ 151.1(3); 151.8; 151.10. Iowa Code § 151.10 allows an individual to choose not to be tested in or utilize chiropractic physiotherapy as a condition for licensure. Chapter 151 does not address whether individuals can be required to take courses in the procedures authorized by law if they do not intend to utilize those procedures. (McGuire to Miller, State Senator, 3-1-88) #88-3-1(L)

March 4, 1988

COUNTIES: Board of Review. 701 Iowa Admin. Code § 71.20(1)(a). Under 701 Iowa Admin. Code § 71.20(1)(a), a retired farmer does not qualify as a farmer under Iowa Code § 441.31 (1987), and consequently may not serve on the county board of review, unless the retired farmer "remains in reasonable contact" with the prior farming operation. The prior opinion of Benton to Martens, Iowa County Attorney, #86-5-4(L) is overruled. (Benton to Martens, Iowa County Attorney, 3-4-88) #88-3- 2(L)

March 10, 1988

SCHOOLS; HEALTH: Withholding of life-sustaining procedures. Iowa Code §§ 144A.2(4); 144A.3, 144A.7, 144A.9(1)(c); Uniform Rights of the Terminally Ill Act, § 1(3). A school is not a health care provider under chapter 144A. Thus a school has no mandatory duty under the statute to either withhold life-sustaining procedures for a terminally ill child or transfer the child to another facility. Given the difficulties of application of the statute to minors and the significance of the decision in question, a school would be well advised

under the current Iowa law to require a court order before agreeing to neither summon medical personnel nor administer first aid to a terminally ill child. (Osenbaugh to Lepley, Director, Iowa Department of Education, 3-10-88) #88-3-3(L)

March 15, 1988

CONSTITUTIONAL LAW; ELECTIONS: Campaign Finance Disclosure. First Amendment, U.S. Const.; Iowa Code Supp. §56.2(6) (1987); 1987 Iowa Acts, Ch. 112, §2. If Iowa Code Supp. §56.2(6) (1987) were challenged in a court of law, it would be held unconstitutional under the First and Fourteenth Amendments of the U.S. Constitution because the U.S. Supreme Court has held that the enforcement of campaign disclosure laws regarding expenditures for publications or broadcasts must be limited to publications or broadcasts contain- ing express advocacy. The 1987 amendment goes beyond regulating express advocacy to require disclosure when publications or broadcasts are favorable or unfavorable to an identifiable candidate. (Bolin to Williams, Executive Director, Campaign Finance Disclosure Commission, 3-15-88) #88-3-4

Ms. Kay Williams, Executive Director: You have requested an official opinion of the Attorney General regarding the constitutionality of an amendment to section 56.2(6) of the Iowa Code. This amendment to chapter 56, the Campaign Finance Disclosure Act, was contained in section 2 of the 1987 Iowa Acts, ch. 112, which was passed by the legislature and signed into law by Governor Branstad in 1987.

Section 2 of the 1987 Iowa Acts, ch. 112 (hereinafter "the amendment"), amended Section 56.2(6) of the Iowa Code by adding the following language to the definition of a "political committee:"

> 'Political committee' also includes a committee which accepts contributions, makes expenditures, or incurs indebtedness in the aggregate of more than two hundred fifty dollars in a calendar year to cause the publication or broadcasting of material in which the public policy positions or voting record of an identifiable candidate is discussed and in which a reasonable person could find commentary favorable or unfavorable to those public policy positions or voting record.

1987 Iowa Acts, ch. 112, §2.

Prior to the passage of §2 of 1987 Iowa Acts, ch. 112, section 56.2(6) of the Act contained two definitions of a political committee:

> 'Political committee' means a committee, but not a candidate's committee, which accepts contributions, makes expenditures, or incurs indebtedness in the aggregate of more than two hundred and fifty dollars in any one calendar year for the purpose of supporting or opposing a candidate for public office or ballot issue,
>
> or
>
> an association, lodge, society, cooperative, union, fraternity, sorority, educational institution, civic organization, labor organization, religious organization, or professional organization which makes contributions in the aggregate of more than two hundred fifty dollars in any one calendar year for the purpose of supporting or opposing a candidate for public office or a ballot issue.

The definition of political committee is a critical one under the Act, because political committees are within the definition of Committee,[1] the primary focus

[1]Committee also includes candidate's committees which are defined as designated by the candidate to receive contributions, expend funds, or incur indebtedness in excess of two hundred fifty dollars in any calendar year on behalf of the candidate.

of the Act's regulation. Under sections 5 and 6 of Chapter 56, all Committees[2] are required to file organizational and quarterly statements containing information concerning, among other things, contributors, debts, parties to Committee contracts, and the affiliation of Committee-supported candidates.

The Campaign Finance Disclosure Act provides for criminal penalties for failure to file campaign finance disclosure reports. Under section 56.16 of the Iowa Code, any person who willfully violates any provisions of the act shall upon conviction be guilty of a serious misdemeanor. The maximum sentence for a serious misdemeanor under the Iowa Code is one year's imprisonment and/or a fine of five thousand dollars. Iowa Code § 903.1(b) (1987).

You state that prior to the passage of § 2 of the 1987 Iowa Acts, ch. 112, the Campaign Finance Disclosure Commission (Commission) limited enforcement of the Committee filing requirements to those organizations whose "support or opposition" involved express advocacy. You further state that the Commission has limited its determination of express advocacy to those words used to request, advise, or recommend that the electorate elect, vote for, support or oppose a candidate or ballot issue. *See Declaratory Ruling to Wilbur Bump* (Iowa Campaign Fin. Disclosure Comm'n. (June 1982)).

In evaluating the constitutionality of this amendment to the Campaign Finance Disclosure Act, several important principles are applicable. Campaign expenditures are so intrinsically related to speech that any regulation must be constrained by prohibitions of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1982). A presumption exists in favor of the constitutionality of legislation. However, this presumption must be balanced against the preferred place given to First Amendment freedoms. *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430 (1945).

State statutes are subject to the restrictions of the First Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1939). The First Amendment affords the broadest protection to political expression in order to assure unfettered interchange of ideas for bringing about political and social change. *Buckley v. Valeo*, 424 U.S. 1, 49, 96 S.Ct. 612, 46 L.Ed.2d 659 (1982); *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, 95 A.L.R. 2d 1412 (1964), *quoting Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1414, 89 L.Ed. 2013 (1945), and *Roth v. United States*, 354 U.S. at 484, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). Review of any regulation of First Amendment rights in connection with the electoral process requires the strictest scrutiny. *First National Bank v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), *reh. denied* 438 U.S. 907, 98 S.Ct. 3126, 57 L.Ed.2d 1150 (1978). Legislative intrusion into First Amendment protected expression must first, be justified by a sufficiently important or compelling interest, and second, be coupled with means closely drawn to avoid unnecessary abridgment of associational freedoms. *Buckley v. Valeo*, 424 U.S. at 91; *Thomas v. Collins*, 323 U.S. at 530.

Because First Amendment freedoms need breathing space to survive, a government may regulate in the area only with narrow specificity. A statute cannot be so broad as to regulate more than that justified by a compelling state interest. *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). In *NAACP v. Button*, the U.S. Supreme Court found a Virginia statute unconstitutional on overbreadth grounds and stated:

March 88 Constitutional Law, paragraph beginning "The definition"

[2] Under Chapter 56, only Committees are required to file reports. The statute regulates individuals and organizations other than Committees only in connection with contributions, and not with regard to expenditures.

March 88 Constitutional Law, paragraph beginning "The Supreme Court"

> [a statute cannot] be susceptible of sweeping and improper application. First Amendment freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the application of sanctions.

371 U.S. at 522.

A statute must be carefully drawn to punish only unprotected speech and not be susceptible of application to protected expression. *Gooding v. Wilson*, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). If a statute subjects a violator to criminal penalties, procedural due process requirements also must be met. *Smith v. Gouguen*, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). When a law restricts speech, procedural due process requirements under the Fourteenth Amendment must be met.

The leading case which scrutinized the constitutionality of campaign finance disclosure law is *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1982). In *Buckley*, the United States Supreme Court addressed several challenges to the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431 *et seq.*, 18 U.S.C. §§ 591 *et seq.* (hereinafter, Federal Campaign Act), and invalidated expenditure limitations as unconstitutional infringements on First Amendment freedoms. 424 U.S. at 19-22. In *Buckley*, the Court articulated the state interests justifying the regulation of such freedoms as being: (l) deterring corruption by providing notice that contributions and expenditures would be exposed and (2) informing voters so that they might better predict a candidate's future performance in office. 424 U.S. at 66-67.

The *Buckley* Court stated that state interests in regulating political speech were compelling only when pertaining to the electoral process and held that express advocacy was the line of regulation demarcation. The Court defined express advocacy as communications that in express terms advocated the election or defeat of a clearly identified candidate. *Buckley v. Valeo*, 424 U.S. at 44. The Court noted that this construction would restrict regulation to communications containing express words advocating election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," or "reject." *Id.* Note 52 at 44.

Under *Buckley*, the state can impose regulations regarding election expenditures only where express advocacy is involved. Therefore, if a group publishes a pamphlet which advocates an issue and discusses how certain elected officials have voted on the issue, the group will not be required to register unless it engages in express advocacy, i.e. advocates the election or defeat of the officials whose records are discussed.

Not only must a statute regulating speech be narrowly drawn, it must also be specific and clear. In *Buckley*, the Court invalidated one section of the Federal Campaign Act on vagueness grounds. In reviewing a section of the act which contained references to "expenditures relative to a candidate," the Court found the word "relative" impermissibly vague. *Buckley v. Valeo*, 424 U.S. at 41. A statute must not burden speech in terms that are so vague that they include protected speech in the prohibition, or leave an individual without clear guidance as to the nature of speech punishable. *State v. Princess Cinema of Wisconsin, Inc.*, 96 Wis. 2d 646, 292 N.W.2d 807, 813 (1980). Therefore, governmental regulation of the First Amendment rights must be drawn with narrow specificity. *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963), *citing Cantwell v. Connecticut*, 310 U.S. 296, 311, 60 S.Ct. 900, 906, 84 L.Ed. 1213 (1940). The rationale is that, when criminal penalties exist for violation of a statute, those subject to its purview must have sufficient notice regarding their exposure, *Palmer v. Euclid*, 402 U.S. 544, 91 S.Ct. 1563, 29 L.Ed.2d 98 (1971), and those responsible for regulation must have limited discretion in enforcement. *Papachristou v. Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).

We rely on the above authorities to determine whether Iowa Code Supp. § 56.2(6) (1987) would be held constitutional in a court of law. The amendment must: 1) be supported by a compelling state interest; 2) be narrowly drawn so that it regulates only express advocacy; and 3) be sufficiently clear that it provides adequate notice to those covered by the statute, and limited discretion to authorities enforcing the statute.

First, the amendment to Section 56 is not supported by a sufficiently compelling state interest. In *Buckley v. Valeo*, 424 U.S. 1, the Court stated that a section of the Federal Campaign Act under review was not supported by the act's compelling state interest, i.e. deterring corruption in the electoral process. The Court also found that such an interest would only support regulating express advocacy.

The amendment's standard is not whether commentary amounts to express advocacy as required under *Buckley v. Valeo*, but rather whether the commentary is "favorable or unfavorable." Although the amendment does allude to the electoral process by referring to "identifiable candidates," it fails to restrict the scope of regulation to those organizations whose publications amount to "express advocacy."

The Supreme Court recently discussed the definition of express advocacy in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1987), a case concerning the Federal Campaign Act. The Court held that a newsletter, published prior to an election, which admonished readers to vote pro-life and identified specific candidates' positions regarding abortion, was express advocacy. The Court stated that the publication was a pointed exhortation to vote for candidates and not "a mere discussion of public issues that by their nature raised the names of certain politicians" 93 L.Ed. at 551.[3]

Here, the amendment reaches beyond pointed exhortations to vote—beyond express advocacy, and therefore fails to meet the *Buckley* test. Under the amendment, organizations become political committees even without recommending an electoral result. Instead, the amendment focuses on what is favorable or unfavorable to an identifiable candidate. The amendment infringes on First Amendment rights of speech and press by failing to manifest a rational relationship to a legitimate purpose of government.

Second, the amendment may be overbroad. Although the Campaign Finance Disclosure Commission has the authority and agency discretion to construe and enforce the statute through contested case proceedings and declaratory rulings, within the limits of the constitution, the amendment's "favorable or unfavorable" standard is not sufficiently specific to assure that in all cases First Amendment rights are not inhibited.

Finally, the amendment may also be vague. The amendment's standard "which a reasonable person could find favorable or unfavorable," affords neither notice to those regulated, nor limited discretion to those regulating. In 1983, the Supreme Court invalidated a California loitering statute requiring "credible" identification. *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). The Court found the word credible too unclear and indefinite to define the crime of loitering, and stated that there must be "sufficient

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[3] The Court went on to hold that a corporation could not be prohibited from making political contributions if it: was formed for the express purpose of promoting political ideas and did not engage in business activities; had no shareholders or other persons affiliated so as to have a claim on its assets or earnings; and was not established by a business corporation or a labor union and had a policy of not accepting contributions from such entities.

definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* at 909. Here, the amendment provides no definition of "favorable," or "unfavorable." These words are certainly as indefinite and unclear as the word "credible." By departing from the express advocacy test of *Buckley*, the amendment leaves persons uncertain as to when commentary about a candidate crosses the statutory threshold where disclosure is required.

For the above reasons, we believe that if § 2 of the 1987 Iowa Acts, ch. 112, were challenged in a court of law, it would be held unconstitutional. A statute regulating political speech and press in connection with campaign expenditures must be limited to those publications or broadcasts which in express terms recommend election or defeat. Further, such a statute must be drawn so that it does not regulate more than express advocacy, and so that its terms are clear, definite, and easily understood by both those subject to them and those enforcing them.

March 16, 1988

STATE OFFICERS AND EMPLOYEES: Professional and Occupational Licensing Boards; Iowa Accountancy Examining Board; Gender Balance. Iowa Code §§ 69.16A, 69.19, 116.3(1), 116.9 (1987). Members of both the Accountancy Examining Board and the Accounting Practitioner Advisory Council are appointed by the governor, confirmed by the senate, and serve terms commencing May 1st. The gender balance of this eight member Board can be either five-three or four-four. (Weeg to Henze, Chairman, Accountancy Examining Board, 3-16-88) #88-3- 5(L)

March 22, 1988

PUBLIC RECORDS: Abstract of Driver's Operating Record. §§ 22.2, 22.3 and 321A.3(1), Iowa Code (1987). A copy of a computer master tape of the abstract of driver operating records of the Department of Transportation is a public record and can be obtained without paying the fee required for a certified abstract of an operating record by Iowa Code § 321A.3(1) (1987). (Krogmeier to Rensink, 3-22-88) #88-3-6(L)

March 29, 1988

ENVIRONMENTAL PROTECTION: Hazardous waste generators. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6925, 6926, 6973(a); Comprehensive Environmental Response Compensation and Liability Act (CERCLA) 42 U.S.C. §§ 9604, 9607; Iowa Code Supp. §§ 455B.301A, 455B.304-455B.306, 455B.310, 455E.3, 455E.5, 455E.6, 455E.11 (1987); 1985 Iowa Acts, ch. 260, § 12 (House File 476); 1987 Iowa Acts, ch. 233, § 204(5) (Senate File 511). Provisions of the groundwater protection act establishing a solid waste account within a groundwater protection fund and provisions relating to closure, postclosure leachate control and treatment do not immunize generators of waste later classified as hazardous from liability for cleanup costs. Generators of hazardous waste must follow federal RCRA requirements. (Sarcone to Scieszinski, Monroe County Attorney, 3-29-88) #88-3-7(L)

March 31, 1988

BANKS: Loan Production Facilities. Iowa Code §§ 524.213 and 524.1201. The Superintendent of Banking has discretion to authorize loan production facilities which do not perform core banking functions at any location in Iowa. (Senneff to Tubbs, Superintendent of Banking, 3-31-88) #88-3-8

Mr. Edward L. Tubbs, Superintendent of Banking: You have asked for our opinion concerning the supervisory powers of the Superintendent of Banking. The specific question is:

> Does the Superintendent of Banking have discretion under his supervisory powers to authorize state banks to establish loan production facilities?

It is our understanding that the loan production facility that you are considering authorizing will only be involved in the activity of originating loans.

The functions of approval of loans, execution of loan documents obligating the customer to the bank and disbursement of the loan proceeds will all take place at the main bank location or any chartered bank office location.

In addition, it is our understanding that no core banking functions (deposit taking, paying checks or lending money) will be performed at the loan production facility.

Iowa banking law does not explicitly either authorize or prohibit loan production facilities. In a previous opinion of this office, we concluded that it was within the supervisory powers of the Superintendent of Banking to discourage loan production facilities since their establishment violated Iowa Code §524.1201 which is the statute prohibiting branch banking. 1974 Op.Att'yGen. 366, 367.

Since that opinion, the case of *Clarke v. Securities Industry Ass'n.*, 479 U.S. 388, 93 L.Ed.2d 757, 107 S.Ct. 750 (1987), was decided. The United States Supreme Court there held that branch bank restrictions of the National Bank Act were not violated by the Comptroller of the Currency's decision to permit national banks to offer discount brokerage services to the public at nonchartered offices both inside and outside of their home states so long as core banking functions were not performed at these locations.

Both the Federal Reserve Board and the Comptroller of the Currency have authorized the establishment of loan production offices which perform limited functions. *See* 12 C.F.R. 250.141 and 12 C.F.R. 7.7380. A challenge to the Comptroller's decision authorizing loan production offices was held barred by laches in *Independent Bankers Ass'n of America v. Heimann*, 627 F.2d 486 (D.C. Cir. 1980).

Iowa Code §524.213 states that "[t]he superintendent shall have general control, supervision and regulation of all state banks . . . ." The Superintendent is given broad discretionary power to carry out this role. *Nordbrock v. State of Iowa*, 395 N.W.2d 872, 876-77 (Iowa 1986). Iowa Code §524.102(5) (1987) sets forth that one of the purposes of the Banking Act is to give state banks competitive equality with national banks. Under §524.802(6), a state bank possesses powers incidental to the conduct of the business of banking. Given the developments in federal law which reflect the changing nature of the business of banking, we believe the Superintendent could reasonably conclude that a loan production facility at which no core banking functions are performed would not violate Iowa Code §524.1201 (1987).

In summary, it is our opinion that the Superintendent of Banking has the discretion under his supervisory powers to determine whether state chartered banks may establish loan production facilities which do not perform core banking functions at any location in the state of Iowa. Furthermore, a loan production facility which is conducted in compliance with agency rules and which does not perform any core banking functions would not violate the branch banking provisions of Iowa Code §524.1201 (1987).

APRIL 1988

April 1, 1988

SCHOOLS: Offsetting tax. Iowa Code §282.2 (1987). A tenant, who under terms of a lease must pay property taxes on real estate, is entitled under Iowa Code §282.2 (1987) to deduct the portion that is school tax from tuition required to be paid for a child who attends school in a district in which the tenant is not a resident. (Willits to Bruner, Carroll County Attorney, 4-1-88) #88-4-1(L)

April 4, 1988

HIGHWAYS, CONSTITUTIONAL LAW: Road use tax fund expenditures for bicycle use. Iowa Const., Art. VII, §8; Iowa Code chapter 308A (1987). Article VII, §8 does not prohibit expenditure of road use tax funds for the widening or upgrading of roads or other thoroughfares for bicycle use. (Krogmeier to Rosenberg, State Representative, 4-4-88) #88-4-2

The Honorable Ralph Rosenberg, State Representative: You have requested an opinion of the Attorney General concerning Article VII, §8 of the Iowa Constitution. Your specific question is as follows:

> The Iowa Constitution places restrictions on the appropriation of revenue raised by the gas tax. Generally, the restriction limits the expenditures of funds "for roads."
>
> My question is whether the constitutional guidelines would encompass expenditures of dollars for widening or upgrading roads or other thoroughfares (e.g. abandoned railways) for bicycle use.

In a previous opinion, 1978 Op.Att'yGen. 31, we discussed the authority of the Department of Transportation to use primary road funds for bikeways on separate right of way designated only for bicycle use. Article VII, §8 of the Constitution was discussed in that opinion. It was determined that the "antidiversion" amendment did not prohibit the use of road use tax funds for the building of bikeways. 1978 Op.Att'yGen. 31, 34. We do not reverse previous opinions of this office unless they are clearly erroneous. Therefore, we will review the question you raise with this prior opinion in mind.

Article VII, §8 of the Iowa Constitution was adopted by the voters of the state in 1942. The "antidiversion" amendment is as follows:

> All motor vehicle registration fees and all licenses and excise taxes on motor vehicle fuel, except the cost of administration, shall be used exclusively for the construction, maintenance, and supervision of the public highways exclusively within the state or for the payment of bonds issued or to be issued for the construction of such public highways and the payment of interest on such bonds.

Many previous Attorney General's opinions have discussed various uses of the funds mentioned in Article VII, §8. See 1946 Op.Att'yGen. 7 (claims against state sounding in tort do not fall within a category of construction, maintenance, and supervision and are not payable out of the Primary Road Fund); 1968 Op.Att'yGen. 494 (Use of Primary Road Fund for safety rest areas is constitutional); 1970 Op.Att'yGen. 162 (Primary Road Funds cannot be spent on flood control projects entirely unrelated to the protection of highways or other highway purposes); 1970 Op.Att'yGen. 181 (providing for maintenance garages for road machinery is permissible use of road use tax funds under Art. VII, §8); 1979 Op.Att'yGen. 508 (§8 does not prohibit the use of road use tax funds for sidewalk construction); 1972 Op.Att'yGen. 115 (State highway patrol salaries were sufficiently related to highway purposes that they could properly be paid from the Primary Road Fund); 1972 Op.Att'yGen. 362 (§8 prohibits the use of Primary Road Funds for the removal of billboards, signs and junkyards along the state highways); 1978 Op.Att'yGen. 31 (bikeways may be built with road use tax funds on the same or on separate right of way as a highway where it could be shown that bicycle traffic would be diverted from a highway); 1978 Op.Att'yGen. 270 (ferry service not a "highway purpose"); 1978 Op.Att'yGen. 542 (wind erosion control program for state highways not constitutionally permissible); 1980 Op.Att'yGen. 107 (overruling 1978 opinion and finding that erosion control program was part of "construction, maintenance and supervision" of state highways and therefore authorized under §8); 1984 Op.Att'yGen. 154 (overruling 1946 opinion and allowing payment of highway related tort claims from the Road Use Tax Fund).

Our 1978 opinion regarding bikeways relied on the Iowa Supreme Court's interpretation of the antidiversion amendment in *Edge v. Brice*, 253 Iowa 710, 113 N.W.2d 755 (1962). In upholding the constitutionality of a statute authorizing reimbursement for the cost of relocating utility facilities, the Court first noted conflicting case law from other states on the question of construction of similar state antidiversion amendments, and concluded that a "liberal, living and practical view" of Article VII, §8 was preferable to a "narrow, strict one." 113 N.W.2d at 759. The Supreme Court further observed:

> From the language used, needs, and circumstances, we think it is fair to say the intent and purpose was to assure adequate highways and that a source of funds be available for that purpose; and at the same time limit the use of the funds, not to maintain the status quo of highway construction but to keep such fees and taxes at a reasonable rate and not to allow the same to become a general revenue measure to be used for governmental purposes totally foreign to highways. The necessity for the removal of utility facilities was not then totally foreign to highway construction, of relocation. It is fair to say the intent of the term "construction as used in the amendment includes all things necessary to complete accomplishment of a highway for all uses properly a part thereof."

113 N.W.2d at 759.

Also reinforcing the 1978 opinion are early court decisions concerning the use of highways by bicyclists. As early as 1917, bicycles were held to be subject to the same rules of the road as were automobiles or other vehicles. *Walterish v. Hamilton*, 179 Iowa 607, 161 N.W. 684 (1917). Bicyclists have the same duties and responsibilities as other operators of vehicles, even though a bicycle is not defined as a vehicle by the motor vehicle chapter of the Code. *Mass v. Mesic*, 142 N.W.2d 389, 391 (Iowa 1966). Courts in other states have also indicated that bicycles are entitled to reasonable use of the highways. *Westman v. Bingham*, 300 N.W. 525 (Mich. 1941). We believe it was well known both prior to the 1942 Amendment and since that time that bicycles do use the public highways of the State of Iowa.

The Iowa General Assembly over a period of several years has adopted various statutory provisions concerning the regulation of bicycles and their safe use on the highways of the state. Iowa Code §321.1(3(c) defines a bicycle. Iowa Code §321.234(2) subjects a person riding a bicycle to many of the same provisions of ch. 321 as the operator of a motor vehicle. Various other sections of the Code deal with the regulation of bicycles and their use. See Iowa Code §§321.234(3); 321.234(4); 321.236(10); 321.434; 321.358(1); 805.8(2)(j).

Finally, modern highway design guidelines take into consideration the appropriateness of providing for bicycle lanes or bike paths or making other provisions in the construction of highways for the safe and efficient operation of bicycles along with motor vehicle traffic. *See Guide for Development of New Bicycle Facilities*, American Association of State Highway and Transportation Officials (1981); *A Bikeway Criteria Digest*, U.S. Dept. of Transportation (1980). The guidelines indicate that construction of bicycle lanes or separate bike paths or bikeways may be appropriate as part of the overall construction of a highway system.

We believe the 1978 opinion to be correct and reaffirm it here. As in that opinion, we are of the opinion that the fees and taxes mentioned in Article VII, §8 may be used for the construction, maintenance and supervision of roads or other ways for bicycle use when such bikeways are reasonably appropriate to provide for safe and efficient bicycle travel as a compliment to highway travel. This can include expenditures as part of a highway construction project or separately for the purpose of widening roads or other thoroughfares for bicycle use or the construction of separate bikeways.

April 11, 1988

ANTITRUST: Monopolies; Beer and Liquor; Class "A" Beer Permit Authority. 15 U.S.C. §§2, 13. Iowa Code §§123.122, 123.124, 123.130, and 553.5 (1987). 185 Iowa Admin. Code §§4.31 and 4.33. A challenge to "dual pricing" in which distributors sell beverages, candy and cigarettes at lower prices to grocery stores than to bars or restaurants is potentially governed by the Iowa Competition Law, the Sherman Act and the Robinson-Patman Act. An opinion of the Attorney General is not the proper vehicle to determine whether a person has violated those provisions. A class "A" beer permittee is not authorized to sell beer at retail nor, under the present statute and administrative rules, is the holder of a class "C" beer permit authorized to deliver beer at the premises of a beer wholesaler. (Walding to May, State Representative, 4-11-88) #88-4-3(L)

April 19, 1988

STATE OFFICERS AND DEPARTMENTS: Department of Personnel. Iowa Code chs. 19A and 22 (1987); §§19A.2(f); 19A.9; and 22.1. Jurisdiction over personnel records: Each employing agency is the lawful custodian of personnel records within its physical possession. However, IDOP may adopt rules regarding applicant and employee records subject to the limitations set forth in this opinion. (Weeg to Donahue, Director, Department of Personnel and Lepley, Director, Department of Education, 4-19-88) #88-4-4

Mr. Thomas E. Donahue, Director and Dr. William L. Lepley, Ed.D., Director: You have both requested an opinion of the Attorney General on the question of the scope of the Iowa Department of Personnel's (IDOP's) authority over agency personnel records. Because those requests are related, they will be jointly addressed. Mr. Lepley asks who is the custodian of an agency's personnel records. Mr. Donahue asks whether IDOP has authority to adopt rules establishing its jurisdiction over employee and applicant records that are in the physical possession of other agencies in the executive branch of state government.

As a preliminary matter, it is our understanding that each agency of state government has within its physical possession personnel records for the employees working within that agency. It is also our understanding that IDOP has within its possession copies of many, but not necessarily all, of those same records. Both the employing agency and IDOP possess those records to assist them in the exercise of their official duties.

We turn now to the questions posed.

A.

With regard to Mr. Lepley's inquiry, the question of custody over personnel records is answered by reference to Iowa Code Chapter 22 (1987), the Iowa Public Records Law. The term "public record" is defined in §22.1 as including all records or other information "of or belonging to" this state. This same section defines the "lawful custodian" of a public record as:

> . . . *the government body currently in physical possession of the public record.* The custodian of a public record in the physical possession of persons outside a government body is the government body owning that record. . . . "Lawful custodian" does not mean an automated data processing unit of a public body if the data processing unit holds the records solely as the agent of another public body, nor does it mean a unit which holds the records of other public bodies solely for storage.

(emphasis added). Nothing in this section prohibits more than one agency from being the lawful custodian of the same public records. Given the express language of this section, we believe both the employing agency and IDOP are lawful custodians for personnel records within their physical possession. For purposes of Fair Information Practice Act rules, then, each agency should

describe those personnel records it physically possesses. The related question of authority to decide whether such records may be released under Chapter 22 will be addressed below.

B.

The question remains as to whether IDOP has jurisdiction over employee and applicant records in the physical possession of other state agencies, and if so, whether it has authority to adopt rules governing those records. If such rulemaking authority exists, a question remains as to the extent of that rulemaking authority.

The general rule governing agency rulemaking authority is that to be valid, a rule adopted by an agency must be within the scope of powers delegated to it by statute. *See, e.g., Iowa-Illinois Gas & Electric Co. v. Iowa State Commerce Commission*, 334 N.W.2d 748, 752 (Iowa 1983); *Hiserote Homes, Inc. v. Riedemann*, 277 N.W.2d 911, 913 (Iowa 1979). In the present case, Chapter 19A establishes and governs the operations of the Department of Personnel. Specifically with regard to management of personnel records, § 19A.2 provides that:

> The department is the central agency responsible for state personnel management, including the following:
>
> * * *
>
> (f) Personnel records and administration, including the preaudit of all personnel-related documents.

This authority clearly provides IDOP is the central agency with jurisdiction to manage personnel records for state government.

The only other provision in ch. 19A relating to personnel records is found in § 19A.9, which authorizes the Personnel Commission to adopt rules for the administration and implementation of ch. 19A, including rules:

> 13. For establishing in *co-operation with the appointing authorities* a system of service records of all employees in the executive branch of state government, excluding employees of the state board of regents, which service records shall be considered in determining salary increases provided in the pay plan as a factor in promotion tests; as a factor in determining the order of layoffs because of lack of funds or work and in reinstatement; as a factor in demotions, discharges, or transfers; and for the regular evaluation, at least annually, of the qualifications and performances of those employees.

(emphasis added). This provision vests the Personnel Commission with authority to adopt rules governing personnel records for employees in the executive branch. We note this authority is to be exercised "in cooperation with the appointing authorities."

Thus IDOP, through the Commission, has authority to adopt rules managing personnel records held by agencies employing persons in the executive branch. The question remains as to the extent of that authority. In Mr. Donahue's opinion request, a number of categories that could be a potential subject for rulemaking are listed. They include:

> 1. What information shall or shall not be collected;
>
> 2. What forms shall be used for collection;
>
> 3. How long, where, and in what manner information will be kept;
>
> 4. What information collected conforms to the provisions of Iowa Code subsection 22.7(11);
>
> 5. What information will be subject to disclosure and under what circumstances; and

6. What measures will be taken to protect personal information in confidential personnel files.

With regard to items one through three, it is our opinion these areas are a proper subject of rulemaking for IDOP, as they clearly fall within IDOP's responsibility under § 19A.2(f) for the management of state personnel records and personnel-related documents. However, such rules must be reasonably related to the scope of IDOP's authority over each individual agency, and must not conflict with that agency's authority to administer its particular statutes. The scope of IDOP's rulemaking authority over items four through six is not so easily answered.

Item four concerns IDOP's authority to adopt rules concerning what information in personnel records falls within the definition of § 22.7(11). Items five and six are related to item four, and concern what information is subject to disclosure and under what circumstances, and what measures may be taken to protect personal information in confidential personnel records. These subjects all relate to § 22.7(11), which provide that "the lawful custodian of public records may, but is not required to, keep confidential personal information in confidential personnel records of public bodies . . . ." As set forth above, the term "lawful custodian" is defined in § 22.1 as "the government body currently in physical possession of the public record." Thus, while we have stated above that IDOP has general rulemaking authority with regard to management of personnel records, there is tension between this authority and the authority of chapter 22, which vests discretion in the lawful custodian of personnel records to make decision regarding their disclosure. *See* 1982 Op.Att'yGen. 512 and 1980 Op.Att'yGen. 825 (discussing discretion of custodian to release public records under ch. 22).

It is a well-accepted principle of statutory construction that two statutes which appear to be conflicting should be reconciled to the extent possible. *See, e.g. State v. Harrison*, 208 N.W.2d 770, 772 (Iowa App. 1982); *Egan v. Naylor*, 208 N.W.2d 915, 918 (Iowa 1973); *Northwestern Bell Telephone Co. v. Hawkeye State Telephone Co.*, 165 N.W.2d 771, 774 (Iowa 1969). Keeping this principle in mind, we seek a result which harmonizes IDOP's authority to manage personnel records with the express authority of other state agencies under § 22.7(11) to make decisions regarding release under § 22.7(11) with regard to records in their physical possession.

IDOP is the central personnel agency of state government. *See* § 19A.2. It also has the rulemaking authority set forth in § 19A.9(13) and discussed above. It therefore has considerable expertise in issues relating to personnel management, including management of personnel records; and specifically has general expert perspective on the issue of confidentiality of information in personnel files. Therefore, we believe that IDOP does have general authority to adopt rules setting forth guidelines for agencies to follow in determining what information in personnel files is "personal," and what personnel files are "confidential," under § 22.7(11). We believe that authority extends to adopting rules setting forth guidelines for determining what information should be disclosed, and under what circumstances, and what measures should be taken by agencies to protect information determined to be confidential. However, we believe this authority is not absolute, but is circumscribed as described below.

While other state agencies may not have the specific personnel management expertise of IDOP, these agencies have expertise over the subject matters they administer under their enabling acts. IDOP's general expertise is likely to be of considerable assistance in managing the routine personnel issues that arise among state agencies. However, because of the number of state agencies, the variety of subject matters they ad- minister, and the diversity of factual situations that confront decision makers in those agencies, we believe that those agencies should retain final decision-making authority over whether

information is confidential, and whether that information should be released. We believe it would be contrary to the express language of both §§22.1 and 22.7(11) to deprive agencies of that final authority. Should such special confidentiality provisions exist, they should be recognized by IDOP rules.

We also believe that, while IDOP rules establishing general guidelines for agencies to use in making these decisions may be helpful, rules requiring absolute uniformity regarding release of information in personnel records are not desirable. Two agencies faced with similar decisions regarding release of personnel information may reach two different results based on differences in a number of factors, including the governing philosophies of those agencies, the nature of the programs being administered, and the variety of factual circumstances in which release questions arise. We also note from the perspective of this office each attorney representing a state agency must have the flexibility to advise that agency regarding release decisions. Those decisions must necessarily be made on a case-by-case basis after an evaluation of the individual facts of each case and how the decision may impact on the agency's legal position, for example, in litigation.

Finally, if IDOP adopts rules regarding release of personnel records, those rules must take into consideration any special confidentiality provisions imposed on individual agencies by state or federal law. Should such special confidentiality provisions exist, they should be recognized by IDOP rules. In addition, we note that records in the Department of Personnel are subject to a separate confidentialtiy provision. *See* Iowa Code § 19A.15 (1987). The standard for release of those records may therefore be different than the standard for release under §22.7(11). *See* 1982 Op.Att'yGen. 3 (discussing relationship between §§22.7(11) and 19A.15).

Thus, it is our opinion that each employing agency is the custodian of personnel records within its physical possession. However, because IDOP is the central agency for personnel management in state government, and because IDOP has express rulemaking authority over personnel records, IDOP may adopt rules governing what information is to be included in personnel files, the forms to be used in that process, and how information in those files is to be maintained, so long as those rules are within IDOP's authority and do not interfere with an agency's administration of its statutes. IDOP also has authority to adopt rules setting forth guidelines that agencies may use in exercising their discretion to release information in personnel records under §22.11(7). These guidelines could address the questions of what information in personnel files is personal, what files are confidential, what information is subject to disclosure, and what measures may be taken to protect the confidentiality of those records. However, these guidelines cannot be mandatory for the reasons set forth above. In sum, the employing agency which physically possesses a record is authorized to exercise its discretion regarding release of that record.

This conclusion obviously does not foreclose IDOP from adopting mandatory rules governing release of information from personnel files of employees actually employed by IDOP. Also, IDOP has authority to adopt mandatory rules governing release of personnel records of other agency employees which are in its physical possession. However, for the reasons set forth above, the other agency in possession of the same records could make release determination contrary to IDOP's. Also, nothing in the law reviewed above would prohibit a state agency from delegating to IDOP the authority to make release decisions concerning its personnel records. There may be many agencies who would prefer to defer to IDOP's expertise in this area and to do so would be an appropriate exercise of an agency's discretion.

April 19, 1988

CONSTITUTIONAL LAW: Counties; Cities; Mutual Funds. Art. VIII, §3, Const. of Iowa; Iowa Code §§452.10, 453.1, 453.16 (1985). Political subdivisions may not legally invest in mutual funds because such investment

is not authorized under the Iowa Code. Further, a mutual fund's investment and collateralization consistent with §§ 453.1 and 452.10 of the Iowa Code would not make a political subdivision's investment in a mutual fund legal under the Iowa Code. (Bolin to Richards, Story County Attorney, 4-19-88) #88-4-5

Mary E. Richards, Story County Attorney: This formal opinion confirms a previous written informal opinion given to Story County in March 1987. You have requested a formal opinion concerning the legality of investing county funds in mutual funds[1] which are invested in state bonds. Two issues are involved in the question you ask: first, whether counties can legally invest in mutual funds, and second, whether the securities in which a mutual fund invests will affect the legality of county investment therein. The analysis of these issues involves a review of the investment characteristics of mutual funds and the law regarding investment by political subdivisions.

Investments in mutual funds are a type of equity investment. An investor in a mutual fund receives a share of stock in the management investment company which owns the mutual fund. Thus an investor in a mutual fund receives both an undivided equity interest in the assets of the fund and the right to share in the profits and losses obtained from the mutual fund's investment. *See* Loss, *Fundamentals of Securities Regulation* (1983), p. 56.

The investment in stock is constitutionally prohibited for the Treasurer of State under Article VIII §3 of the Iowa Constitution. However, there is no such constitutional prohibition for counties' investment in stock. (*See* Op.Att'yGen. #87-1-10, Kirlin to Chapman). The question is whether these investments would be inconsistent with state law. 1980 Op.Att'yGen. 54, 59-62 (#79-4-7). The legislature has preempted cities and counties by express statutory restrictions and by a long-standing state scheme restricting the investment authority of all political subdivisions. (Op.Att'yGen. #87-l-10, Kirlin to Chapman). Relevant to this analysis are §§ 453.1 and 452.10 of the Iowa Code.

Section 453.1 requires the treasurer of each political subdivision to invest all funds not needed for current operating expenses in either: 1) time certificates of deposit in depositories approved pursuant to chapter 453 of the Iowa Code, or 2) investments permitted by § 452.10.[2] Section 452.10 provides that the treasurer of each political subdivision of the state shall invest public funds not currently needed for operating expenses in:

1) notes,

2) certificates,

3) bonds,

4) bankers acceptances,

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[1] The mutual fund is a type of management investment company. A management investment company is a company whose business is the buying, holding, and/or selling of securities of other entities. Mutual funds are "open end" investment companies, i.e., mutual funds' assets are not fixed at the time of the offering and the mutual fund continuously sells and redeems its shares. (The value of the mutual fund's capital does not depend solely on the market valuation. Profits and losses will also result from the purchase and sale of securities.) Lobell, *The Mutual Fund: A Structural Analysis*, 47 Va. L. Rev. 181, 182-4 (1961).

[2] Chapter 453 requires that if such investments are in excess of the amount insured by the F.D.I.C. or F.S.L.I.C., or are not guaranteed by the U. S. government or its agencies, the county treasurer must obtain security for the deposit or investment as required under section 453.16.

5) commercial paper[3] rated within the two highest classifications of prime (as established by the superintendent of banking),

6) perfected repurchase agreements,

7) evidences of indebtedness which are obligations of or guaranteed by the United States of America or any of its agencies,

8) time deposits in depositories as provided in chapter 453 and receive time certificates of deposit therefore, or,

9) savings accounts in depositories.

Neither investments in stock nor investments in mutual funds are included in either §452.10 or §453.1 of the Iowa Code. The question then, is whether the lack of an authorizing provision means that such investments are prohibited. In the field of statutory interpretation, legislative intent is expressed by omission as well as by inclusion; express mention of certain conditions of entitlement implies exclusion of others. *Barnes v. Iowa Dept. of Transpor., Motor Vehicle Div.*, 385 N.W.2d 260 (1986). The express mention of one thing in a statute implies the exclusion of others. *North Iowa Steel Co. v. Staley*, 253 Iowa 355, 112 N.W.2d 364 (1962). In §§453.1 and 452.10 of the Iowa Code the legislature has specifically stated which types of securities are authorized for counties' investment. Neither stock nor mutual fund shares are included in this list. Therefore such investments must be prohibited.

You have specifically asked whether a county's investment in a mutual fund investing in state bonds is legal. Although §452.10 authorizes counties' investing in bonds, this does not mean that a mutual fund can qualify as an investment through such investing. We believe that a mutual fund does not meet the requirements of either Iowa Code §§453.1 or 452.10,[4] by making investments that are allowed under those sections. The issue that controls is whether the security in question has been approved by the legislature. An investment in a mutual fund has characteristics which distinguish it from the assets it holds, thus a mutual fund investment is a different security, here one that is not statutorily sanctioned.[5]

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[3] The total investment in commercial paper of any one corporation is limited to an amount not more than twenty percent of the total stockholders' equity of that corporation.

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[4] For the sake of discussion, it is assumed that such investment is collateralized as required by section 453.16.

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[5] These characteristics result from the equity nature of the investment which make ownership of the asset securities not outright, but indirect. With indirect ownership are differences in control and cost. An owner of a share in a mutual fund has less control over investment decisions. He or she may vote on many decisions regarding the fund, but action consistent with the owner's vote depends on voting with the majority. Furthermore, most decisions are not made by mutual fund investors but by the mutual fund board or a fund manager. Mutual funds, as with most investment companies, are typically managed by investment advisors who contract to manage the funds for fees. In most cases virtually the only decision made by the mutual fund investor is the initial investment decision. Thereafter, the fund board and/or the fund manager make the investment and/or other business decisions. In addition mutual funds investors bear additional expenses incurred by the fund for advertising funds and for fund management. Lobell, *Rights and Responsibilities in the Mutual Fund*, 70 Yale L. Jour. 1258 (1961).

In sum, county investment in mutual funds is not authorized under the Iowa Code. Furthermore, the investment and collateralization of the assets of a mutual fund consistent with §§453.1 and 452.10 of the Iowa Code would not make a county's investment in a mutual fund legal. Therefore, a county cannot legally invest in a mutual fund which is invested in state bonds.

April 25, 1988

JUDICIAL DEPARTMENT; PUBLIC EMPLOYEES: Retirement. Iowa Code §§602.9115A, 602.9106 (1987). The term "retired" is defined as the time that a judge qualifies for an annuity under §602.9106, not the time a judge resigns from the bench. A qualifying judge who has resigned from the bench but has not yet met the age requirement to be eligible to receive an annuity may make the annuity election provided by §602.9115A before the judge reaches retirement age. (Osenbaugh to O'Brien, State Court Administrator, 4-25-88) #88-4-6(L)

MAY 1988

May 4, 1988

STATE OFFICERS AND DEPARTMENTS: Professional Licensing Boards; Confidentiality of professional licensing examinations scores: Iowa Code §§114.32; 116.16; 117.52; 118.27, and 147.21 (1987). The professional licensing examination score of a candidate for licensure may be released to the public, but the name of that candidate may not be released along with the score unless the candidate authorizes that release. (Weeg to Thayer, 5-4-88) #88-5-1

K. Marie Thayer, Department of Commerce: You have requested an opinion of the Attorney General on the question of whether professional licensing examination scores of candidates for licensure by your division may be released to the public.

Provisions governing the confidentiality of professional licensing examination scores are found in most professional licensing agencies' enabling statutes. The language uniformly provides:

> A member of the board shall not disclose information relating to the following:
>
> * * *
>
> 3. Information relating to the examination results other than final score except for information about the results of an examination which is given to the person who took the examination. A member of the board who willfully communicates or seeks to communicate such information, and any person who willfully requests, obtains, or seeks to obtain such information, is guilty of a simple misdemeanor.

See Iowa Code §§114.32 (engineering and surveying examiners); 116.16 (accountancy examining board); 117.52 (real estate commission); 118.27 (architectural examiners); and 147.21 (1987) (boards for the "practice professions," including medicine, nursing, dentistry, pharmacy, and other health-related professions.

This office has previously issued two opinions interpreting this language. In 1976 Op.Att'yGen. 232, we held that the nursing board may disclose information regarding examination scores to boards of other jurisdictions for purposes of endorsement. We further held that the board may give final scores to schools of nursing without a release from the applicant, and may give other information upon written request or approval of the applicant. This opinion

did not specifically state that exam scores may not be released by name. However, there was considerable discussion in that opinion regarding the applicant's authority to authorize release of information otherwise confidential by statute. 1976 Op.Att'yGen. at 233-234. We specifically stated that the board's release of confidential information pursuant to applicant's request was not a violation of the statute. *Id.* at 234.

We believe 1976 Op.Att'yGen. 232 holds that release of examination scores by name, for purposes of endorsement to another state or to nursing schools, may occur only with the express authorization of the applicant. The final scores that may be released to nursing schools without a release refers only to statistical information regarding those scores. Information as to the range of scores received by students at a particular school, or scores received by applicants at other schools or statewide, may be released, but may not be released with applicants' names without authorization.

This conclusion is supported by our holding in 1976 Op.Att'yGen. 430, which expressly relied on 1976 Op.Att'yGen. 232 in reaching its conclusion. In that opinion, we decided that the statutory language in question authorizes release of an applicant's final exam score "to responsible parties."[1] We later stated:

> We see nothing in the statutory language which would prohibit the disclosure of statistical information of the nature outlined in your request for an opinion[2] to department heads in the Engineering College at Iowa State [University] provided *that individual applicant's names are not included in such a report.* Any further information about the results of the examination may not be released to anyone other than the person who took the examination in accordance with [the statute].

(emphasis added). 1976 OpAtt'yGen. at 431.

This opinion makes clear that exam scores may not be released by name to anyone other than the applicant.

We further believe this conclusion is supported by a fair reading of the statute. To interpret the prohibition against release of exam results "other than final score" or allowing release of scores along with applicant names would render the prohibition meaningless, for after releasing scores with names, there is nothing concerning examination results that remains to be kept confidential. Under this interpretation, the prohibition against release of this information would be meaningless. It is a well-established principle of statutory construction that courts should avoid constructions that render part of a statute superfluous, as it is presumed the Legislature included every part of a statute for a purpose, and intend each part to be given effect. *See e.g., George H. Wentz, Inc. v. Sabasta,* 337 N.W.2d 495, 500 (Iowa 1983).

In conclusion, it is our opinion that the professional licensing examination score of a candidate for licensure may be released to the public, but the names of that candidate may not be released along with the scores unless the candidate authorizes that release.

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[1] We question whether use of the language "responsible persons" is appropriate. If a record is a public record, not confidential by statute, it is subject to release to any person upon request under the language of the Iowa public records law. *See* § 22.2 ("*Every person* shall have the right to examine and copy public records . . .") (emphasis added). We do not believe boards should engage in an evaluation of whether a requesting party is "responsible" or not.

[2] The information requested in this case was how many students from the engineering college at ISU passed the exam and how many failed, as well as the total number of persons who took the exam and how many received passing scores.

May 4, 1988

LAW ENFORCEMENT, PUBLIC SAFETY: Missing Persons; Iowa Code §§694.1, 694.2, 694.3 and 694.10 (1987). The phrase "a law enforcement agency having jurisdiction" in Iowa Code §694.2 (1987) refers to any such agency which is in a position to conduct an investigation of the case within its territorial jurisdiction whether because it is the place of residence of the missing person, where the person was last seen, where witnesses or pertinent evidence may be located, where the person is likely to be coming or intended to go, or where there are any other factors providing the base for an investigation. There may be several agencies having jurisdiction in a given case. Reports in the Missing Person Information Clearinghouse cannot be withdrawn so long as the subject of the reports continues to be a missing person as defined in Iowa Code §694.1 (1987). (Hayward to Shepard, Commissioner, Department of Public Safety, 5-4-88) #88-5-2(L)

May 10, 1988

ENVIRONMENTAL PROTECTION: Beverage Container Deposit Law. Iowa Code Chapter 455C; Iowa Code §§455C.1(5), 455C.2, 455C.3, 455C.6, 455C.7 (1987); 567 Iowa Admin. Code §107.4(1). If a grocery chain engages in the sale of beverages in beverage containers to its dealers, it is a "distributor" under the bottle law and is required to pay the one-cent handling fee to a redemption center for the dealer served by the distributor. An unapproved redemption center could, in certain circumstances, be a "redemption center for a dealer served by the distributor." (Ovrom to Beres, Hardin County Attorney, 5-10-88) #88-5-3(L)

May 10, 1988

REAL ESTATE: Licensing: Iowa Code §§117.1, 117.3, 117.5(1)(2), 496C, and 496A (1987). The real estate statute does not as a matter of law limit the creation of corporations, associations, or partnerships by broker associates but it does, in effect limit the licensing of the separate entity only to those which have one officer or member who is a broker as defined in §117.3, Iowa Code (1987). Even if a salesperson or broker-associate were to incorporate, the new entity cannot rise above the brokermember limitation to obtain a license nor could the corporation engage in any activity that requires licensing under the real estate statute. (Skinner to Skow, State Representative, 5-10-88) #88-5-4(L)

May 12, 1988

HIGHWAYS, CONSTITUTIONAL LAW: Road Use Tax Fund Expenditures for Public Transit. Iowa Const., Art. VII, §8; Iowa Code chapter 312. The use tax proceeds included in the road use tax fund in §312.1(3) are not the type of revenue dedicated to highway purposes by Article VII, §8 of the Constitution. The allocation of use tax proceeds in §312.2(17), as amended by the 1988 session of the General Assembly, is made before these proceeds are commingled with other revenues in the road use tax fund thereby avoiding any implication of Article VII, §8. (Krogmeier to Harbor, State Representative, 5-12-88) #88-5-5(L)

JUNE 1988

June 7, 1988

CONSTITUTIONAL LAW: Constitutional amendments. Iowa Const. Art. X, §2; 1986 Iowa Acts, ch. 1251, and 1988 Iowa Acts, ch. 1285 (S.J.R. 1), proposing amendments to Iowa Const., Art. IV, §§2, 3, 4, 5, 15, 18, 19. The general assembly has proposed two separate constitutional amendments, one concerning the selection of the Lieutenant Governor and one concerning the duties of that office. These two amendments should be separately submitted to the voters. (Osenbaugh to Halvorson, State Representative, 6-7-88) #88-6-1(L)

June 7, 1988

TAXATION: Collection And Compromise Of Tax On Buildings On Leased Land. Iowa Code §§ 428.4, 445.8, 445.32 (1987). Delinquent property taxes on buildings on leased land are collected by enforcing the § 445.32 tax lien on the building by selling the building at a distress sale. The County has no authority to compromise the delinquent tax. (Mason to Riepe, Henry County Attorney, 6-7-88) #88-6-2(L)

June 28, 1988

ELECTIONS: Voter Registration. Change of Name, Address or Telephone Number. Iowa Code Ch. 39: § 39.3. Ch. 43: §§ 43.41, 43.42. Ch. 48: §§ 48.6, 48.7. Submission of an alternate registration form, with no party affiliation marked, as a notice of change to the name, address or telephone number of an existing registration pursuant to § 48.7 is insufficient to terminate a previously declared affiliation with a political party. (Pottorff to Nelson, State Registrar of Voters, 6-28-88) #88-6-3(L)

June 28, 1988

MOTOR VEHICLES: Juveniles. Iowa Code §§ 321.213; 321J.4. Iowa Code section 321.213, as amended in 1986, was not intended to alter prior law and should be construed, in conjunction with section 321J.4(1), to require revocation of the driving privileges of juveniles "finally adjudicated" guilty of OWI. (Ewald to Rensink, 6-28-88) #88-6-4

Mr. Darrel Rensink, Director: You have requested an Opinion of the Attorney General on the following question:

> Does the DOT have authority under Iowa Code sections 321J.4 and 321.213 (1987) to revoke the driving privileges of a juvenile who has been "finally adjudicated" of violating Iowa Code section 321J.2 and who has not been revoked under sections 321J.9 or .12?

You noted that before sections 321.213, 321.209 and chapter 321B (now 321J) were amended in 1986, it was clear that juveniles adjudicated guilty of OWI were subject to revocation in a manner similar to adults. However, the 1986 amendments have clouded the issue by repealing subsection 321.209(2) and restating its substance in subsection 321J.4(1) without making any reference to chapter 321J in the "for purposes of" phrase of amended section 321.213. *See* 1986 Iowa Acts. ch. 1220, §§ 4, 31, 33 and 46.

Iowa Code section 321.213, as amended in 1986, provides:

> Upon the entering of an order at the conclusion of an adjudicatory hearing under section 232.47 that the child violated a provision of this chapter or chapter 321A or chapter 321J for which the penalty is greater than a simple misdemeanor, the clerk of the juvenile court in the adjudicatory hearing shall forward a copy of the adjudication to the department. Notwithstanding section 232.55, a final adjudication in a juvenile court that the child violated a provision of this chapter or chapter 321A or chapter 321J constitutes a final conviction of a violation of a provision of this chapter or chapter 321A or chapter 321J *for purposes of* section 321.189, subsection 2, paragraph "b" and sections 321.193, 321.194, 321.200, 321.209, 321.210, 321.215, and 321A.17.

Iowa Code § 321.213 (1987) (emphasis added).

A strict, literal reading of this provision, when considered in conjunction with subsection 321J.4(1) (1987), would require the DOT to revoke the driving privileges of an adult or juvenile who has refused to submit to a chemical blood alcohol test or who has failed such a test. However, with respect to persons convicted (or adjudicated) of OWI the DOT could only revoke adult drivers, not juveniles.

This result, which departs radically from the prior statutory scheme, follows from the fact that as part of revisions made during the same legislative session

subsection 321.209(2) was repealed and its substance transferred to new subsection 321J.4(1), but without adding section 321J.4 to the statutes listed in the "for purposes of" phrase of section 321.213. The retained reference in section 321.213 to section 321.209, which prior to revision provided the basis for revoking the driving privileges of anyone convicted of OWI, was rendered ineffective with respect to juveniles by the simultaneous repeal of subsection 321.209(2).

A number of well-established principles of statutory construction will guide our analysis. First and foremost we must try to determine the intent of the legislature by considering the purpose and history of the statutes involved. *Beier Glass Co. v. Brundige*, 329 N.W.2d 280 (Iowa 1983); *State v. Vietor*, 208 N.W.2d 894 (Iowa 1973). The manifest intent of the legislature will prevail over the literal import of the words used. *Iowa National Industrial Loan Co. v. Iowa Dept. of Revenue*, 224 N.W.2d 437 (Iowa 1974). Revisions will not be construed as altering a particular statute absent clear and unmistakable legislative intent. *Le Mars Mutual Ins. Co. of Iowa v. Bonnecroy*, 304 N.W.2d 422 (Iowa 1981); *State v. LeFlore*, 308 N.W.2d 39 (Iowa 1981). The legislature will not be attributed with intending an absurd result or illogical consequences. *Egy v. Winterset Motor Co.*, 231 Iowa 680, 2 N.W.2d 93 (1942); *Olsen v. Jones*, 209 N.W.2d 64 (Iowa 1973). Statutes relating to the same subject matter or to closely allied subjects are in pari materia and must be construed, considered and examined in light of their common purposes and intent. *Northwestern Bell Telephone Co. v. Hawkeye State Telephone Co.*, 165 N.W.2d 771 (Iowa 1969). Nonpenal statutes are not subject to strict construction, but should be given a sensible, practical and workable construction consistent with the manifest legislative intent. *State v. Williams*, 315 N.W.2d 45 (Iowa 1982); *Koethe v. Johnson*, 328 N.W.2d 293 (Iowa 1982).

It is clear that at the time the 1986 amendments were enacted, both adults and juveniles were subject to revocation for identical periods based either on an OWI conviction or adjudication. Iowa Code §§ 321.209(2), .213, 321B.13, .16 (1985). Thus, unless we can discern a clear and unmistakable legislative intent to treat juveniles more leniently than adults under the 1986 revisions, we must construe amended section 321.213 as still requiring the revocation of juveniles adjudicated guilty of OWI. *Le Mars Mutual*, 304 N.W.2d 422 (Iowa 1981).

In 1986 the legislature repealed the major provisions relating to OWI in chapter 321 and all of chapter 321B. 1986 Iowa Acts. ch. 1220, §§ 31, 47, 50. The substance of the repealed provisions was then incorporated into new chapter 321J, which now contains virtually all the provisions dealing with the crime of OWI and administrative revocation for chemical test refusal or failure. *See* 1986 Iowa Acts. ch. 1220; Iowa Code ch. 321J (1987).

Along with this recondition, a number of substantive changes were made. For example, an administrative revocation could be based on a refusal to provide a urine sample for drugs other than alcohol, § 321J.6(3); work permit eligibility was codified and liberalized to include education, treatment, and health care of dependents, § 321J.20; and under certain circumstances a person was allowed to reopen a hearing based on the discovery of new evidence or the issuance of certain court orders in the criminal OWI proceedings. Iowa Code § 321J.13(4).

Two new provisions directly affected the length of revocation. Subsection 321J.4(1) reduced the mandatory one-year revocation based on an OWI conviction to 180 days if the person has no prior alcohol-related revocations within the previous six years and if the person's driving privileges have not been revoked under section 321J.9 or .12. But subsection 321J.4(6) potentially lengthened the revocation period for juveniles by providing that it be for the statutory period "or until the defendant reaches the age of eighteen [,] whatever period is longer." 1986 Iowa Acts, ch. 1220, § 4.

Mindful of the principle that illogical or absurd results should be avoided in construing statutes, we must consider amended section 321.213 in light of amended section 321J.4(6). The latter provides a potentially greater sanction for juveniles than for adults in the form of a longer revocation period. Indeed, the revocation period could be as long as four years for a fourteen-year-old. It strikes us as illogical, even absurd, to provide a potentially longer administrative revocation period for juveniles under subsection 321J.4(6), but to have no revocation at all for juveniles who somehow avoid administrative revocation but are adjudicated guilty of OWI by the district court. We must therefore construe section 321.213 to avoid this result.

Our interpretation of section 321.213 must also be consistent with the purpose of chapter 321J, which is "to promote public safety by removing dangerous drivers from the highway," *Taylor v. Dept. of Transportation*, 260 N.W.2d 521, 523 (Iowa 1977); *Downing v. Iowa Dept. of Transportation*, 415 N.W.2d 625, 628 (Iowa 1987), and "to help reduce the appalling number of highway deaths resulting in part. . .from intoxicated drivers." *State v. Knous*, 313 N.W.2d 510, 511 (Iowa 1981). Since an intoxicated juvenile driver presents at least as great a threat to public safety as an intoxicated adult, section 321.213 should not be construed in a manner which would allow juveniles adjudicated guilty of driving while intoxicated to avoid revocation.

CONCLUSION

Iowa Code section 321.213, as amended in 1986, was intended by the legislature to require revocation of the driving privileges of a juvenile "finally adjudicated" guilty of OWI. This conclusion is based on the absence of any evidence of an intent to alter prior law, the avoidance of an absurd result, and consideration of the purpose of chapter 321J.

June 30, 1988

HIGHWAYS, CONSTITUTIONAL LAW, APPROPRIATIONS: Limitations on Highway or Bridge Construction in Appropriation Bills. Iowa Const., Article III §29 and §30; Iowa Code §307A.2(11); 1987 Iowa Acts, ch. 233, §218. The prohibition of the authorizing of the construction of a bridge in 1987 Iowa Acts, ch. 233, §218, is to be construed to apply only to the appropriations contained in the same legislative act, for to give a broader, more indefinite application would result in a conflict with Article III, §29 and §30 of the Iowa Constitution. (Krogmeier to Wilson, 6-30-88) #88-6-5(L)

JULY 1988

July 11, 1988

CONSTITUTIONAL LAW: Item Veto. Iowa Const. art. III §16 (amend. 27); Iowa Const. art. III §25 (amend. 28); 1987 Iowa Acts ch. 227; Iowa Code §§2.12, 2.14. Senate File 504 is not an appropriation bill subject to item veto because Senate File 504 does not have the primary and specific aim of making appropriations of money from the public treasury. (Pottorff to Carr, State Senator, and Mann, State Senator, 7-11-88) #88-7-1

The Honorable Robert M. Carr, State Senator and The Honorable Thomas Mann, Jr., State Senator: You have requested an opinion of the Attorney General concerning the constitutionality of the item veto by Governor Branstad of Senate File 504. 1987 Iowa Acts ch. 227. You point out that Senate File 504 specifies salary rates and ranges for public officials and employees, provides adjustments for salaries, provides coverage and adjustments for health, life, disability and dental insurance, changes retirement benefits received by certain members of the Iowa Public Employment Retirement System, creates a county

compensation board and a judicial compensation board, and makes coordinating amendments to the Code. Senate File 504 does not, however, contain an appropriation of funds.

Governor Branstad item vetoed portions of section 14 which:

1. raise per diem and expense reimbursement for the lieutenant governor from sixty to seventy-three dollars during the interim or special sessions, and authorize the lieutenant governor to elect to become a member of any state group insurance plan or disability insurance program on the same basis as a full-time state employee;
2. raise the per diem for legislators from forty to seventy-three dollars per day in outlying counties and from twenty-five to fifty dollars per day in Polk County during the legislative session;
3. raise the per diem for legislators from forty to seventy-three dollars per day during the interim;
4. raise the per diem for legislators from forty to seventy-three dollars per day during special sessions; and
5. provide membership for legislators in any state group insurance plan on the same basis as a full-time state employee.

In view of the fact that no appropriations are contained in Senate File 504, you specifically inquire whether Senate File 504 is an appropriation bill to which the item veto authority applies. In our opinion Senate File 504 is not an appropriation bill subject to item veto.

The gubernatorial power to exercise an item veto is specifically provided in the Iowa Constitution. Amendment 27 to section 16 provides:

> Item veto by Governor. The Governor may approve *appropriation bills* in whole or in part, and may disapprove any item of *an appropriation bill*; and the part approved shall become a law. Any item of *any appropriation bill* disapproved by the Governor shall be returned, with his objections, to the house in which it originated, or shall be deposited by him in the office of the Secretary of State in the case of *an appropriation bill* submitted to the Governor for his approval during the last three days of a session of the General Assembly and the procedure in each case shall be the same as provided for other bills. Any such item of *an appropriation bill* may be enacted into law notwithstanding the Governor's objections, in the same manner as provided for other bills.

Iowa Const. art. III § 16, (amend. 27) (emphasis added). Under this language the Governor may disapprove an item only in an appropriation bill.

In a previous opinion we have analyzed the issue of what constitutes an appropriation bill. Relying on the United States Supreme Court decision in *Bengzon v. Secretary of Justice and Insular Auditor of the Philippine Islands*, 299 U.S. 410, 57 S.Ct. 252, 81 L.Ed. 312 (1937), we determined in 1980 that an appropriation bill is a bill the "primary and specific aim of which is to make appropriations of money from the public treasury." 1980 Op.Att'yGen. 864, 866 *quoting from Bengzon v. Secretary of Justice and Insular Auditor of the Phillipine Islands*, 299 U.S. at 413, 57 S.Ct. at 254, 81 L.Ed. at 314. *See also* Muyskens, *Item Veto Amendment to the Iowa Constitution*, 18 Drake L. Rev. 245, 248 (1969). We concluded that an attempt to veto a portion of a bill which is not an appropriation bill would be unconstitutional and the bill would become law in the form enacted. 1980 Op.Att'yGen. at 867 *citing to Turner v. Iowa State Highway Commission*, 186 N.W.2d 141, 151 (Iowa 1971).

In our view the *Bengzon* decision continues to represent the current law defining appropriation bills. Federal case law on this issue is limited because the United States Constitution does not contain an item veto provision. Federal decisions, like *Bengzon*, therefore, generally arise in construction of constitutions

of territories and protectorates. *See, e.g., Government of the Virgin Islands v. Eleventh Legislature of the Virgin Islands,* 536 F.2d 34 (3rd Cir. 1976) (Virgin Islands); *Fitzsimmons v. Leon,* 141 F.2d 886 (1st Cir. 1944) (Puerto Rico); *Thirteenth Guam Legislature v. Bordallo,* 430 F.Supp. 405 (D.C. Guam 1977) (Guam). There have been no decisions from the United States Supreme Court following our 1980 opinion which have modified the *Bengzon* decision. State courts, moreover, continue to cite the *Bengzon* principles with approval. *See e.g., Harbor v. Deukmejian,* 43 Cal.3d 1078, 240 Cal.Rptr. 569, 742 P.2d 1290 (1987); *Thompson v. Graham,* 481 So.2d 1212 (Fla. 1985); *Cenarrusa v. Andrus,* 99 Idaho 404, 582 P.2d 1082 (1978); *Kelly v. Marylanders for Sports Sanity,* 310 Md. 437, 530 A.2d 245 (1987).

We note that in 1986 the legislature codified the *Bengzon* definition of an "appropriation bill." Iowa Code § 3.4 (1987) ("An 'appropriation bill' means a bill which has as its primary purpose the making of appropriations of money from the public treasury.") Ultimately, the construction of state constitutional provisions is to be determined by the courts. *Junkins v. Branstad,* 421 N.W.2d at 134-35. The codified terms, however, are consistent with the *Bengzon* decision. *See Bengzon,* 299 U.S. at 413, 57 S.Ct. at 254, 81 L.Ed. at 314.

Under the foregoing authorities, Senate File 504 is not an appropriation bill subject to item veto. Senate File 504 does not have the "primary and specific aim" of making appropriations of money from the public treasury. Rather, the bill sets salary ranges and establishes levels of compensation and allowances. None of these matters, however, are funded by an appropriation in Senate File 504. In fact, this bill makes no appropriations whatsoever.

In his item veto message Governor Branstad criticized the General Assembly and expressed his concern about "the efforts of the General Assembly to use legal drafting devices to evade" his item veto authority. He particularly referred to the fact that the appropriations for salary adjustments for public officials and employees set out in Senate File 504 were separately contained in another appropriation bill. 1987 Iowa Acts ch. 227, pp. 480-82. Appropriations for certain salary adjustments were, in fact, contained in Senate File 511. 1987 Iowa Acts ch. 233, § 120. However, Senate File 511 did not fund the items struck by the item veto. The actual appropriation to fund these particular increases is a standing appropriation under chapter two of the Iowa Code. *See* Iowa Code §§ 2.12, 2.14.

We do not perceive enactment of the salary adjustments and the appropriations in two separate bills, alone, as an impermissible limitation on gubernatorial item veto authority. In an opinion issued in 1982 we specifically addressed application of the item veto power to a condition and an appropriation which appear in separate bills and concluded that the governor remains obligated to comply with the constitutional limitations on his item veto power. Op.Att'yGen. #82-9-17(L). We did recognize that passage of legislation imposing a condition on an appropriation contained in a separate bill which had already been enacted into law and was, therefore, beyond the reach of a veto could constitute "legislative evasion" of the item veto power. *Id.* at 4. Both Senate Files 504 and 511, however, were sent to the governor on May 10, 1987. 1987 S.J. 1899. Senate File 504 was signed on June 8, 1987 and Senate File 511 was signed on June 9, 1987. 1987 Iowa Acts pp. 479, 588. Governor Branstad was presented with the option of vetoing both Senate File 504[1] and the appropriation contained in Senate File 511.

[1] 1Even though Senate File 504 is not an appropriation bill, Governor Branstad could have vetoed the bill in its entirety. *See* Iowa Const. art. III § 16.

We note that most issues concerning the validity of the item vetoes have been rendered moot by enactment of subsequent statutes in 1988. Senate File 2321 returned legislative session per diems to the previous level of forty dollars and restored provisions for insurance coverage for the lieutenant governor and legislators with minor changes but additionally provided for a seventy-five dollar per month allowance for each member of the general assembly to pay for postage, travel, telephone costs and other expenses. Senate File 2321, 72nd G.A., 2nd Sess. §§ 12, 13 (Iowa 1988). Senate File 2311, similarly, returned special session per diems to the previous level of forty dollars. Senate File 2311, 72nd G.A., 2nd Sess. § 29 (Iowa 1988). Restatement of statutory language which addresses per diems and insurance coverage effectively reenacts these provisions. *See Women Aware v. Reagen*, 331 N.W.2d 88, 90-91 (Iowa 1983). These provisions will become effective, therefore, regardless of the validity of the item vetoes in Senate File 504. The issue of the validity of the item vetoes, however, presents a matter of public importance that is likely to recur. *See, e.g., Junkins v. Branstad*, 421 N.W.2d 130, 134 (Iowa 1988); *Rush v. Ray*, 332 N.W.2d 325, 326 (Iowa 1983). A court, therefore, would likely reach the merits of the controversy. *See, e.g., Colton v. Branstad*, 372 N.W.2d 184, 187 (Iowa 1985); *Rush v. Ray*, 332 N.W.2d at 326-27.

Based on the foregoing analysis, it is our opinion that Senate File 504 is not an "appropriation bill" subject to item veto because Senate File 504 does not have the primary and specific aim of making appropriations of money from the public treasury.

July 14, 1988

COUNTIES: County Hospitals. Iowa Code § 347.13(15). A notice published pursuant to Iowa Code § 347.13(15) that lists each job classification and category and the range of salaries paid for that job classification complies with the requirements of § 347.13(15). (McGuire to Fulton, Decatur County Attorney, 7-14-88) #88-7-2(L)

July 14, 1988

TRANSPORTATION, MOTOR VEHICLES: Commercial vehicle driver qualifications. Iowa Code § 321.449; 1988 Iowa Acts, Senate File 2314, § 50. Rules adopted under § 321.449 for a driver of commercial vehicle do not apply to a driver of a commercial vehicle for a private carrier, not for hire, when the vehicle is operated exclusively intrastate and not more than one hundred miles from the driver's work location. This new exemption in S.F. 2314 does not exempt drivers from the statutory minimum age requirement in § 321.449 or from rules regulating the transportation of hazardous materials adopted under other laws. The Department of Transportation may choose to develop policy under § 321.449 by rule, contested case, or both. (Krogmeier to Priebe, 7-14-88) #88-7-3(L)

July 19, 1988

MOTOR VEHICLES: Special Mobile Equipment. Iowa Code §§ 321.1(17); 321.17; 321.18(4). Iowa Code § 321.18(4) exempts Special Mobile Equipment, as defined in § 321.1(17), from the registration requirements of § 321.17. If an owner of Special Mobile Equipment carries it on a transport vehicle, certification of the Special Mobile Equipment under § 321.21 allows the owner to declare only the weight of the transport vehicle pursuant to § 321E.12. (Peters to Rensink, 7-19-88) #88-7-4

Darrel W. Rensink, Director, Iowa Department of Transportation: You have requested an opinion of the Attorney General concerning the registration of Special Mobile Equipment. Specifically, you ask:

> Are Special Mobile Equipment vehicles required to carry a certificate and display plates when operated on the highways pursuant to Iowa Code sections 321.21, 321E.12 or some other section?

Your question requires us to construe several statutory provisions. In reading statutes, every attempt should be made to give effect to each statute. Iowa Code §4.7. The starting point in any case involving interpretation of a statute is the state itself. *United States v. Hepp*, 497 F.Supp. 348, 349 (N.D. Iowa 1980), *aff'd* 656 F.2d 350 (8th Cir. 1981). "When a statute is plain and its meaning is clear, we do not search for meaning beyond its express terms." *State v. Tuitjer*, 385 N.W.2d 246, 247 (Iowa 1986)(citations omitted).

Iowa Code §321.1(17) defines Special Mobile Equipment (SME) to include vehicles "not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways, . . ." Section 321.18(4) specifically exempts an SME from the registration requirement.

These statutes lead to the conclusion that as a general rule, an SME does not need to be registered. At first reading, §321.21 appears to be in conflict with §321.18(4). It allows for an SME owner to apply for a certificate of identification and for issuance of a license plate with a general distinguishing number. §321.21(2)&(3). The intent of the provision is specifically stated in paragraph 6. "The certificate and plates issued shall be for purposes of identification only and shall not constitute a registration as required under this chapter." Therefore, §321.21 is not in conflict with §321.18(4). The certificate issued under §321.21 is not in conflict with §321.18(4). The certificate issued under §321.21 serves a separate function from vehicle registration required by §321.17.

The final section to which your question refers is §321E.12. Chapter 321E is entitled "Movement of Vehicles of Excessive Size and Weight." Specifically, §321E.12 is captioned "Registration Must Be Consistent." The section requires that permits for overweight or oversize transportation include the gross weight of the vehicle *and load*. An exception is made for an SME. The statute provides: "Any person owning special mobile equipment registered and in compliance with section 321.21, may use a transport vehicle registered for the gross weight of the transport without a load."

The statutory exception is limited by its very language to the situation where an SME is transported by another vehicle. If the SME has been certified, then the overweight permit need only cover the weight of the transport vehicle and not include the weight of the SME.

The purpose of requiring the SME certification is to assure that the person using the transport vehicle is also the owner of the SME. Without the certificate there is no efficient way to identify ownership of the SME. The section, however, does not address the need for a registration plate when the SME is operated on a highway. Only if the SME owner wants top take advantage of the SME exception which exempts the weight of the load from the weight of the transport vehicle permit, is there a need to have the SME certified.

In conclusion, an SME is not required to display plates and carry certification when operating on the highway. If an SME owner wants to carry the SME on a transport vehicle, certification of the SME allows the owner to declare only the weight of the transport vehicle.

July 27, 1988

STATE OFFICERS AND DEPARTMENTS; ADMINISTRATIVE RULES: Rulemaking authority within Personnel Department. Iowa Code §§17A.4, 19A.1, 19A.8, 19A.9, 19B.3(j); 79.1(2), 79.1(8) (1987); 1986 Iowa Acts, ch. 1245, §§2(5), 4(6). Rulemaking authority granted to the Department of Personnel is vested in the Personnel Commission except where expressly conferred on the director or other entity, or where the intent to confer rulemaking authority on the director or other entity can be necessarily implied. Thus the Commission would have authority to adopt rules where a statute provides for rules by the Department *if* the subject matter of the rules is within the scope of chapter 19A. (Osenbaugh to Donahue, 7-27-88) #88-7-5(L)

July 28, 1988

STATE OFFICERS AND DEPARTMENTS: Iowa Peace Institute. Iowa Code sections 8.2(1), 8.39, 11.1, 11.2, 11.5, 11.18 (1987); Iowa Code Supp. sections 38.1, 38.2, 38.4(6), 38.5, 99E.10, 99E.20(2), 99E.32(4)(d) (1987); 1987 Iowa Acts, chapter 231, sections 15 through 19. The Iowa Peace Institute is a "department" as defined in § 11.1, but is not a "governmental subdivision" as defined in § 11.18. Our office cannot in this opinion make the factual determinations necessary to decide whether contributions to the Peace Institute from other state departments from their appropriated funds constitute interdepartmental transfers under § 8.39(2). (Benton to Johnson, 7-28-88) #88-7-6(L)

July 28, 1988

AGRICULTURE, DEPARTMENT OF: Racing Commission; Statutory Construction. Iowa Code §§ 99D.12 (1987) and 99D.22 (1987) as amended. Legislative history indicates that it was the legislature's intent to provide for supplemental purses to both the owners of Iowa-foaled horses who win races restricted to Iowa-foaled horses and to the owners of Iowa-foaled horses who place first, second, third or fourth in any race not restricted to Iowa-foaled horses, and this intent is to be given effect. Legislative history indicates that it was the legislature's intent to provide for breeders' awards to the breeders of Iowa-foaled horses who win any race, including races not restricted to Iowa-foaled horses. (Donner to Cochran, Secretary of Agriculture, 7-28-88) #88-7-7(L)

July 28, 1988

COUNTY HOME RULE; HIGHWAYS; CONSERVATION: Roadside trapping. Iowa Const. art. III, § 39A; Iowa Code §§ 331.301, 331.302 (1987); Iowa Code § 109.92 as amended by 1988 Iowa Acts, H.F. 395, § 33; Iowa Code § 716.7 as amended by 1988 Iowa Acts, H.F. 2258. Statewide restrictions on roadside trapping enacted by the General Assembly preempt county boards of supervisors from enacting local regulations of roadside trapping for public safety purposes. (Smith to Richards, Story County Attorney, 7-28-88) #88-7-8(L)

July 28, 1988

COUNTIES: Bonding Requirements for Detention Facilities. Iowa Code § 232.141(2) (1987), Iowa Code Supp. §§ 331.441(2)(b)(5) and 331.441(2)(C)(9) (1987). The establishment of a juvenile detention facility is an essential county purpose within the meaning of Iowa Code Supp. § 331.441(2)(b)(5) (1987) such that a county need not hold a special bonding election in order to fund such a facility unless its costs exceed those set forth in that section. (Phillips to O'Meara, Page County, 7-28-88) #88-7-9

Mr. Stephen Patrick O'Meara, Page County Attorney: You have requested a formal opinion regarding the manner in which a county may raise funds to establish a juvenile detention facility, or, more specifically, regarding the manner in which a group of counties may raise funds to establish a multi-county juvenile detention facility. Iowa Code § 232.142(2) (1987) provides, in part, "For the purpose of providing and maintaining a county or multi-county home, the board of supervisors of any county may issue *general county purpose bonds* in accordance with sections 331.441 to 331.449.11" (emphasis added). The sections referred to describe the means for issuing general county purpose bonds, and also for issuing essential county purpose bonds. Despite the language of § 232.142(2), they indicate that juvenile detention facilities are to be built with both types of bonds. They define both the terms "general county purpose" and "essential county purpose" so as to include the building of juvenile detention facilities. Under Iowa Code Supp. § 331.441(2)(b)(5) (1987), essential county purpose is defined to include the provision and maintenance at juvenile detention facilities where that provision does not exceed a certain cost dependent upon the size of the county involved. Under Iowa Code Supp. § 331.441(2)(c)(9) (1987)

general county purpose is defined to include the provision of juvenile detention facilities when they exceed that cost. You have raised the question of whether juvenile detention facilities should be funded solely through the use of general county purpose bonds as indicated in Iowa Code §232.142(2), or through the use of either type of bond, depending upon the cost of the project, as indicated in §331.441. You indicate that this question is of some import as essential county purpose bonds may be issued without the special election, and the cost of your contemplated project may be such that those bonds would be appropriate under §331.441 et seq., if §232.142(2) does not mandate the use of general county purpose bonds.

The question you present is not an easy one. This may be seen when the problem is stated in its most simplified form. Iowa Code §232.142(2) (1987) essentially states that if a county or counties wish to build a juvenile detention center they must go through the general purpose bonding procedure in accordance with chapter 331. Chapter 331, however, states that if a juvenile detention center is to be built, the general purpose bonding procedure is to be used only if the detention center is expected to cost above a certain level. Otherwise, the essential purpose bonding procedure is to be used. Hence, there appears to be a legitimate conflict between the statutes where an "inexpensive" detention center — one whose cost is below the designated levels — is planned. Section 232.142(2), the section in the juvenile code specifying how such detention centers are to be funded, states that it may be funded through general county purpose bonds which require elections. The statutes setting forth the bonding procedure, Iowa Code §331.441 et seq., states that it may be funded through essential county purpose bonds, which do not require such an election.

There is a longstanding rule of statutory construction, now codified into statute form, that in construing a statute one is to give meaning to all its words, and to interpret the entire statute. Iowa Code §4.4(2) (1987). Here, if meaning is given to §232.142(2) in its entirety, then the portions of §331.441 providing for funding juvenile detention centers though essential purpose bonds would be a nullity. Likewise, if those sections are given meaning, then that portion of §232.142(2) requiring funding through general purpose bonds would appear to be ineffective. This is particularly troublesome because those portions were not originally a part of that statute, but were instead added later. 1983 Iowa Acts, ch. 123, §90. The legislature specifically added to §232.142(2) the language that referred to general county purpose bonding procedures as opposed to just bonding procedures. *Id.* Hence, the legislature apparently intended to state that juvenile detention centers should be funded through general county purpose bonds. *See Fenton v. Downing*, 155 N.W.2d 517, 521 (Iowa 1968) (It is presumed that changes in language indicate an intent to change the law). There does appear, therefore, to be a legitimate conflict between the statutes.

How is this conflict to be resolved? While arguments can be made either way, it is the opinion of this office that the best resolution of this matter is one holding that, when funding a juvenile detention center, a county should follow the bonding procedures set forth in Iowa Code §331.441 et seq. Several factors support this conclusion.

First, the bonding procedures of section 331.441 are set forth in part three of division IV of chapter 331. The second to last section of that of that part states, ". . . this part and the procedures prescribed for exercising the powers and functions enumerated in this part control in the event of a conflict with any other law." Hence, there is explicit statutory authorization for giving §331.441 precedent over §232.142(2).

Second, there is, as you have pointed out in your own opinion, an axiom of statutory interpretation that when specific and general statutes conflict, the more specific statute controls as an exception to the more general. Iowa Code §4.7 (1987). While that axiom does not precisely fit this situation, as §331.441

tends to nullify the "general purpose bond" language of §232.142(2), not provide an exception to it, the latter section does seem to embody the legislature's most deliberate and specific efforts towards setting forth the bonding process for juvenile detention centers. By contrast, § 232.142(2) merely seems to be a general reference section, a statute designed to guide one from the juvenile code to the bonding sections when one is attempting to ascertain how juvenile detention centers are built. This, in and of itself does not suffice to negate the fact that the legislature specifically added the "general purposes bond" language in §232.142(2). However, this, in combination with another factor, suggests that the "general purpose bond" language is not absolutely binding. That factor is simply this. Under Iowa law, the word "may" confers a power, the word "shall" a duty. Iowa Code § 4.1(36). Iowa Code § 232.142(2) says counties *may* issue general purpose bonds to build juvenile detention centers. By contrast § 331.441 defines the building of inexpensive detention centers as an essential county purpose, and the section on issuing essential county purpose bonds, Iowa Code § 331.443(1), states that a county that proposes to carry out an essential county purpose *shall* do so in accordance with that section. Hence, the conflict is one between a statute which confers a power on a county and one which imposes a duty. The latter type of statute prevails because of its mandatory nature.

In conclusion, Iowa Code § 331.441 is the more specific statute and mandates that essential county purpose bond procedure be used. Chapter 331, Division IV, part III states that such procedures are to prevail over conflicting ones. Iowa Code § 232.142(2) is more general, and simply allows general county purpose bond procedures to be used. We believe that § 331.441 is controlling, and should be followed in funding your detention center. Thus, a county need not hold a special bonding election in order to fund such a facility unless its costs exceed those set forth in that section.

AUGUST 1988

August 2, 1988

LAW ENFORCEMENT, PUBLIC SAFETY, SHERIFFS: Disposition of prisoners. Iowa Code §§ 356.1, 356.2, 356.5, 804.21, 804.22, 804.28 (1987). Generally under Iowa Code §§ 356.1, 356.2, 804.21 and 804.22 (1987) the arresting agency and not the county sheriff is responsible for the safekeeping and custody of prisoners who have not been committed to the county jail. this includes the responsibility of making emergency medical care available. Iowa Code § 804.28 (1987) creates an exception to this rule. Under § 804.28, the Sheriff is responsible to take charge of prisoners of the Iowa Department of Public Safety. The Sheriff is responsible for such prisoners as though the Sheriff made the initial arrest. The arresting agency is not responsible for the cost of medical care made available to arrestees. (Hayward to Shepard, Commissioner of Public Safety, 8-2-88) #88-8-1(L)

August 19, 1988

HIGHWAYS: Transfer of jurisdiction by city. Iowa Code §§ 306.8; 306.43; 368.8. Severing or deannexing of a road or street by a city does not change the jurisdiction of the public road involved unless another entity agrees to accept jurisdiction in the manner prescribed by §§ 306.8 and 306.43. (Krogmeier to Metcalf, 8-19-88) #88-8-2

James M. Metcalf, Black Hawk County Attorney: You request, on behalf of the Black Hawk County Attorney's Office, an opinion of the Attorney General concerning the attempted severing of territory from the City of Evansdale and the simultaneous attempt by the City to transfer jurisdiction for a part of Dubuque Road to Black Hawk County. With your opinion request you attached copies of City Council resolutions, maps and other correspondence concerning the issue. The three questions contained in your opinion request are as follows:

1. May the city deannex a roadway that was previously its responsibility?
2. If deannexation of a street or roadway may be taken by a city, what statutory procedures must it follow?
3. In the event that a deannexation is successful, may the state or another political subdivision (county) refuse to accept responsibility for the deannexed road?

Attached to your opinion request is an application for voluntary deannexation of property from the City of Evansdale by the City of Evansdale as owner of the property known as Dubuque Road. The application states that it is made pursuant to Iowa Code § 368.8 (1987). Also attached to you opinion request are two resolutions by the City Council of the City of Evansdale which indicate the city's approval of the severing of territory from the city pursuant to § 368.8. Thus, the city is acting as the "owner" of the territory to be severed from the city and attempting to complete a voluntary severance pursuant to § 368.8.

Iowa Code § 368.8 (1987) provides as follows:

> Any territory may be severed upon the unanimous consent of all owners of the territory and approval by resolution of the council of the city in which the territory is located. The council shall provide in the resolution for the equitable distribution of assets and equitable distribution and assumption of liabilities of the territory as between the city and the severed territory. The city clerk shall file a copy of the resolution, map, and a legal description of the territory involved with the state department of transportation. The city clerk shall also file a copy of the map and resolution with the county recorder and secretary of state. The severance is completed upon acknowledgment by the secretary of the state that the secretary of state has received the map and resolution.

We believe the code section is fairly self-explanatory. When a statute is plain and its meaning is clear, it is not necessary to resort to any construction or interpretation. *State v. Twitjer*, 385 N.W.2d 246, 247 (Iowa 1986). Section 368.8 does not prohibit a city from severing its own property. If in fact the City of Evansdale is the "owner" of the territory in question, it may petition to City Council of Evansdale for the severance of the property from the city. If the severance is approved and the resolution and other documents are properly filed, the severance is completed "upon acknowledgment by the secretary of state." § 368.8. Therefore, in answer to your first question, if the city follows the correct procedure and is in fact the "owner" of the territory, it may sever the roadway as territory pursuant to Iowa Code § 368.8.

The second question you ask relates to the procedures to be followed in severing or deannexing territory from a city, with particular reference to the deannexing or severance of a street or roadway. This question is answered by reviewing the provisions of § 368.8 set forth above. The procedure for deannexing or severing of a street or roadway *owned* by a city would be the same as that for the deannexing or severing of territory owned by any other party.

The third question you ask is the more significant and central question in your opinion request. We believe this question is essentially answered by Iowa Code §§ 306.8 and 306.43. Those sections read as follows:

§ 306.8 (second paragraph):

> Transfers of the jurisdiction and control of roads and streets may take place if agreements are entered into between the jurisdictions of government involved in the transfer of such roads and streets.

§ 306.43:

> The jurisdictional transfer of roads and streets required under this chapter shall be limited to those transfers which have been executed prior to April 1, 1981 or until such time as the general assembly provides

> compensation to the state department of transportation, counties, and cities for additional roads and streets needs resulting from the reclassification and jurisdictional transfer of roads and streets. *However, transfers of roads and streets due to reclassification may be made after April 1, 1981 if agreements are entered into by the parties involved in the transfer of the roads and streets.*

(emphasis added).

We believe these two sections of ch. 306 are clear and unambiguous. Thus, we do not search for meaning beyond the terms of the statute. *State v. Tuitjer, Id.* Sections 306.8 and 306.43 allow the state or any other political subdivision to refuse to accept a deannexed or severed road into its highway or road system. The transfer of jurisdiction of a roadway may only occur pursuant to an agreement between the transferror and transferee.

While a roadway included in territory that is severed from municipality would be outside the definition of a municipal street in §306.3(7), it is clear from §§306.8 and 306.43 that the jurisdiction and responsibility for the road remains with the city until an agreement is entered into with another party. A city does have the authority to acquire and hold property outside the city limits (§364.4) and has authority to extend city services beyond its city limits (§364.4(2)). Further, the legislature has not limited a city's use of road use tax funds to streets within cities but instead has mandated that those funds be used for the "construction, maintenance and supervision of the public streets," §312.6. The definition of "public streets" is not limited solely to those streets within municipal corporate limits. §306.3(1).

We do not find that the severance provisions in §368.8 are intended to supercede the transfer of jurisdiction provisions of §§306.8 and 306.43. Sections 306.8 and 306.43 specifically apply to the jurisdiction of roads. Section 368.8 more generally covers the severance of territory from a city, whether or not part of the road system. The more specific provision in ch. 306 apply over the more general provisions of §368.8 See Iowa Code §4.7.

In summary, we are of the opinion that a city may deannex or sever territory, including a city street or road. Severing of a road or street does not change the jurisdiction of the public road involved unless another entity agrees to accept jurisdiction in the manner prescribed by §§306.8 and 306.43.

August 26, 1988

SCHOOLS: Financing. Iowa Code §§442.4, 442.4(6), 281.9. The amendment to §442.4 allowing eleventh and twelfth grade students to move from a district but to continue attending the district until graduation without the payment of tuition does not include those students who require special education and are counted in the "weighted enrollment" for the generation of funds. (Skinner to De Groot, State Representative, 8-26-88) #88-8-3(L)

August 30, 1988

COUNTIES: Joint 911 Service Board. Iowa Code ch. 39, §39.3; Iowa Code ch. 47; §47.4; Iowa Code ch. 422B, §422B.8; Iowa Code ch. 477B. 1988 Iowa Acts, ch. 1177. The surcharge referendum may be included in any election, including a special election, in which all voters of the proposed service area will be eligible to vote. We do not recommend inclusion in a primary election. A special election may not be held for the exclusive purpose of the surcharge referendum. A "subscriber" for purposes of the surcharge referendum is the person in whose name the service is billed and need not be a qualified elector. The surcharge is not a local option tax that can be presented to voters under chapter 422B. The decision whether to establish a new joint 911 service board or substitute a 28E entity is vested in the discretion of the board of supervisors. A legal entity created pursuant to chapter 28E and substituted for the joint 911 service board must meet the voting and membership requirements of §3(1). Whether a newly established joint 911

service board is a "creature of county government" raises several different issues which must be resolved specifically as they develop in context rather than generally. There is no statutory authority for the board of supervisors to appoint an acting chairperson or to ultimately select the chairperson of a joint 911 service board. The decision whether and how to weigh votes among voting members of a joint 911 service board is an internal issue for resolution by the joint 911 service board. The membership of a joint 911 service board may not be expanded by the board of supervisors beyond those members delineated by statute. Membership turns on service territory or operating area rather than headquarters. (Pottorff to Baxter, Secretary of State; Barbour, Webster County Attorney; Vander Hart, Buchanan County Attorney, 8-30-88) #88-8-4

The Honorable Elaine Baxter, Mr. Barbour and Mr. Vander Hart: We have received separate opinion requests from you concerning enhanced 911 emergency telephone communication systems. You pose numerous questions about elections for imposition of a surcharge to fund the system and formation of a joint E911 service board to administer the system. For the purpose of clarity some questions are consolidated.

I. SURCHARGE REFEREMDUM

Several questions concern the conduct of referenda to authorize a surcharge to be assessed on the monthly phone bills of subscribers in the service area:

1. Can a special election be held to present the question of imposition of the 25 cent surcharge to voters? What other elections are eligible for submission of this question to voters?
2. What does "subscriber" mean within the context of a surcharge referendum? Does the term "subscriber" include persons who would not be qualified electors for other types of elections?
3. Is the "enhanced 911 service surcharge" a "local option tax" for purposes of chapter 422B?
4. If the "enhanced 911 service surcharge" is a local option tax, is the referendum of telephone subscribers proper as an "election" required in section 422B.1(2)?
5. If the "enhanced 911 service surcharge" is a "local option tax" for which the referendum may be conducted under chapter 422B, may a board of supervisors delegate its authority under section 331.401(1)(k) to a body such as the "joint 911 service board" which is not organized pursuant to chapter 28E?

The legislature enacted House File 2400 during the 1988 legislative session for the express purpose of enabling "the orderly development, installation, and operation of enhanced 911 emergency telephone communication systems statewide." House File 2400, 72nd G.A., 2d Sess. § 1 (Iowa 1988). An "enhanced 911" telephone communication system, in turn, means "a service which provides the user of a public telephone system the ability to reach a public safety answering point by dialing the digits 911 . . . ." Under an "enhanced system," incoming 911 calls are routed to the appropriate public safety answering point where a video monitor automatically displays the name, address and telephone number of the incoming call and the public safety agency servicing the address. H.F. 2400, § 2(4).

This service may be funded "in whole or in part" by a surcharge of up to twenty-five cents per month on each telephone access line which would be collected as part of each telephone subscriber's monthly telephone bill. H.F. 2400, §6(1). Before the surcharge may be imposed, however, the issue must be presented to the subscribers in a referendum and must pass by a simple majority. The referendum may be conducted under either of two alternative mechanisms:

a. A local exchange access company providing service to subscribers within the proposed E911 service area shall provide the name and address of each subscriber to be served to the joint E911 service board proposing to provide E911 service. The names and addresses may be used by the joint E911 service board for the purpose of mailing referendum ballots. Ballots shall be returned to the subscriber's county commissioner of elections who shall report the results to the joint E911 service board. The joint E911 service board shall compile the results if subscribers from more than one county are included within the proposed service area. The board shall announce whether a simple majority of subscribers submitting valid ballots within the proposed E911 service area approved the referendum question. A subscriber may only vote once.

or

b. At the request of the joint E911 service board a county commissioner of elections shall include the question on the next eligible election ballot in each electoral precinct to be served, in whole or in part, by the proposed E911 service area. The question may be included in the next election in which all of the voters in the proposed E911 service area will be eligible to vote on the same day, such as a primary, general, or school board election. The county commissioner of elections shall report the results to the joint E911 service board. The joint E911 service board shall compile the results if subscribers from more than one county are included within the proposed service area. The joint E911 service board shall announce whether a simple majority of the compiled votes reported by the commissioner approved the referendum question.

H.F. 2400, § 6(2)(a)-(b).

When the second option is selected, the referendum "shall" be included "on the next eligible election ballot" and "may be included" in the next election in which all of the voters of the proposed service area will be eligible to vote on the same day. Cited as examples of such elections are a primary, general or school board election.

House File 2400 does not expressly address whether the surcharge referendum may be included in a special election. In order to construe the statute, therefore, we look to principles of statutory construction. *See Casteel v. Iowa Department of Transportation*, 395 N.W.2d 896, 898 (Iowa 1986). The statute does specify a primary, general or school board election as elections at which the referendum may be included.[1] Ordinarily, express mention of certain elections would imply the exclusion of others. *See Barnes v. Iowa Department of Transportation*, 385 N.W.2d 260, 262-63 (Iowa 1986). The context of the full sentence, however, indicates that these elections were intended as examples rather than items on a finite list. The elections are prefaced by the terms "such as," terms which commonly precede examples. Accordingly, we conclude that the referendum may be included in any election, including a special election, in which all voters of the proposed service area will be eligible to vote.

[1] Inclusion of a primary election as an election at which all voters of the proposed service area will be eligible to vote is internally inconsistent. Primary elections in Iowa are closed. Iowa Code § 43.38 (1987). That is, electors are allowed to vote only for candidates of a party with which the elector is registered as affiliated. *Id.* Consequently, voters who are independents are ineligible to vote in a primary election. *See* Iowa Code § 48.6(8) (1987). Joinder of other ballot issues on a primary election ballot has been viewed as improper. *See* 1964 Op.Att'yGen. 274. *See also* 1974 Op.Att'yGen. 143-44.

Application of additional principles suggests, nevertheless, that a special election may not be called *solely* for the surcharge referendum. A special election is any election, other than a general, primary, city or school election, held for any purpose authorized or required by law. Iowa Code § 39.3(7) (1987). Although this definition, itself, is not inconsistent with § 6(2)(b), the context suggests the referendum should be conducted in conjunction with another scheduled election rather than as an election scheduled specially for that purpose.

The statute provides that the referendum shall be included on "the next eligible election ballot." H.F. 2400, § 6(2)(b). Statutes should be given a construction which is logical, workable, sensible and practical. *Consumer Advocate v. Iowa State Commerce Commission*, 376 N.W.2d 878, 882 (Iowa 1985). Use of the phrase "next eligible election ballot" logically suggests the referendum should be included in an upcoming election rather than scheduled as an election called solely for that purpose.

As an alternative to inclusion of the referendum on an election ballot, the referendum may be conducted by mailing ballots to "subscribers." H.F. 2400, § 6(2)(a). The term "subscriber" is not further defined in House File 2400. Statutory terms are to be given their ordinary meaning unless possessed of a particular and appropriate meaning in the law. *Good v. Iowa Civil Rights Commission*, 368 N.W.2d 151, 155 (Iowa 1985). In the context of telephone services the term "subscriber" means the person who is billed for telephone services. *See, generally, Teleconnect Co. v. Iowa State Commerce Commission*, 404 N.W.2d 158, 166 (Iowa 1987); *Woodburn v. Northwestern Bell Telephone Co.*, 275 N.W.2d 403, 405 (Iowa 1979); *United Telephone Co. v. Iowa State Commerce Commission*, 257 N.W.2d 466, 467 (Iowa 1977). This definition is consistent with the context of House File 2400. The surcharge, if imposed by referendum, would be "collected as part of each telephone subscriber's monthly phone bill." H.F. 2400, § 6(1). If a mailed ballot referendum is used, moreover, the local exchange access company must provide "the name and address of each subscriber." The telephone bill would be paid by, and the company would maintain names and addresses of, those in whose names the service is billed.

We point out that a "subscriber" who "votes" in a mailed ballot referendum would not necessarily be a person eligible to vote in an election. Voters in elections must be qualified electors. A qualified elector, in turn, means "a person who is registered to vote pursuant to chapter 48." Iowa Code § 39.3(2) (1987). In order to register to vote certain qualifications, including a minimum age of eighteen years, must be met. *See* Iowa Code § 47.4(1) (1987). These same qualifications would not be imposed on a subscriber who casts a mailed ballot under § 6(2)(a).

Under chapter 422B a mechanism is provided for imposition of local option taxes. This chapter, however, is inapplicable to the surcharge referendum. There are two types of local option tax: 1) a local vehicle tax; and 2) a local sales and service tax. Obviously the surcharge is not a local vehicle tax. The surcharge is not a local sales and service tax under the express terms of chapter 422B and House File 2400. A local sales and service tax "may not be imposed... on any service not taxed by the state" with limited exceptions not relevant to this opinion. Iowa Code § 422B.8 (1987). The surcharge expressly is "not subject to sales or use tax." H.F. 2400, § 7(2). The surcharge, therefore, is not a local option tax under chapter 422B.

II. JOINT 911 SERVICE BOARD

Mr. Barbour poses several questions concerning the creation of a joint 911 service board, or an alternative 28E board, to perform certain statutory functions:

1. Section § 3(3) states: "A legal entity created pursuant to chapter 28E by a county or counties, other political divisions, and public or private agencies to jointly plan, implement, and operate a countywide, or larger, enhanced 911 service system may be substituted for the joint 911 service board required under subsection 1." Is it necessary for a board substituted under § 3(3) to meet the criteria delineated for joint 911 service board under § 3(1)?

2. Is it within the discretion of the Webster County Board of Supervisors to establish the existing 28E Webster County Telecommunications Commission as the joint 911 service board, rather than appointing an entirely new board?

3. If the Supervisors choose to proceed under subsection 1, rather than adopt the existing 28E group, would the new Board function as a creature of county government (such as Board of Health, Conservation Board), or would it function as an independent 28E group?

4. If the Supervisors decide to create a new Board, can the Supervisors appoint an acting chairperson at the time of inception, or should that be a function of the newly created Board members? The proposed agreement drafted by our consultant allows the Supervisors to name the chairperson to serve at the discretion of the Supervisors for the duration of the agreement. Is this permissible?

5. Do the Supervisors have the discretion to appoint members to the Board who are in addition to the required representatives from the public or private safety agencies? The proposed agreement suggests that the Sheriff, Auditor, Chairperson of the Board of Supervisors and Disaster Services Director, (all county employees), be appointed as permanent members of the new Board. Is this permissible, and if yes, would these have to be non-voting members?

6. The second sentence of subparagraph 1 of section 3 reads: "Each political subdivision of the State having a public safety agency serving territory within the county is entitled to voting membership on the joint 911 service board." Does this sentence require there to be one vote for each political subdivision which is a member of the board? Or can there be a weighted voting system established at the discretion of the newly appointed joint 911 service board?

7. If subsection 1 of section 3 is read to require one vote per each political subdivision, would the alternate board as permitted in subsection 3 also require one vote per political subdivision? To put it another way, if the intent of the Legislature was to create a board having one vote per political subdivision, then would an existing 28E board have to adjust the voting status of its members to comply with that one division, one vote intention? From yet another angle, can subsections 1 and 3 be read independently of each other as far as the voting requirements of the boards that are created?

8. Webster County has fire and ambulance service from two fire departments which are head-quartered outside of the county, but they provide service to small areas of our county. It appears that these agencies are entitled to a membership on our board, but is that a voting or non-voting membership since they are headquartered outside of this county?

Under House File 2400 operation of enhanced 911 services is vested, in part, in a joint 911 service board which must be established not later than January 1, 1989. House File 2400 provides alternate mechanisms for the formation of this board. The board of supervisors is directed to "establish" a joint 911 service board. "Each political subdivision of the state having a public safety agency serving territory within the county is entitled to voting membership on the joint 911 service board. Each private safety entity operating within the area

is entitled to nonvoting membership on the board." H.F. 2400, §3(1). Alternatively, a legal entity created under chapter 28E "by a county or counties, other political subdivisions, and public or private agencies to jointly plan, implement, and operate a countywide, or larger, enhanced 911 service system may be substituted for the joint 911 service board . . . ." H.F. 2400, §3(3).

It is not clear from the express language of the statute whether a 28E entity substituted under §3(3) must, nevertheless, meet the voting and membership requirements of §3(1). The ultimate goal in construing a statute is to ascertain and give effect to the intent of the legislature. In order to do so, we consider all portions of the statute together without attributing undue importance to any single portion. *Kohrt v. Yetter*, 344 N.W.2d 245, 246 (Iowa 1984); *Stearns v. Kean*, 303 N.w.2d 408, 412-13 (Iowa 1981). Applying these principles, it is clear that the legislature intended substitution of a 28E entity as an option in establishing a joint 911 service board. We do not, however, perceive any legislative intent to limit the voting and membership requirements otherwise imposed under §3(1). Accordingly, it is our opinion that a 28E entity substituted under §3(3) must also meet the voting and membership requirements of §3(1).

Whether the board of supervisors elects to establish a joint 911 service board or to substitute a 28E entity appears to be vested in the discretion of the board of supervisors. Reading §§3(1) and 3(3) together, we construe House File 2400 to obligate the board of supervisors to "establish a joint 911 service board not later than January 1, 1989." H.F. 2400, §3(1). The board, in whom this obligation is vested, must determine whether to establish a new board or substitute a 28E entity.

Several questions which you pose concern the nature and internal operation of the joint 911 service boards, including whether a newly established service board is a "creature of county government," whether the board of supervisors can appoint an acting chairperson and ultimately name the chairperson to serve at the board's discretion and whether and how weighted voting of members can be implemented. Some, but not all, of these questions can be answered on the face of the statute.

We are unable to address generally whether a newly established joint 911 service board is a "creature of county government." The purpose for which the nature of the board needs to be determined is unclear from the question. Several different issues may arise concerning the nature of the board in the course of its functions. For example, are joint 911 service board employees county employees? These issues will need to be resolved specifically as they develop in context rather than generally.

Other issues are more easily resolved on the face of the statute. Principles of statutory construction need not be invoked when a statute is unambiguous and the meaning is clear from the express language. *Roosevelt Hotel, Ltd. v. Sweeney*, 394 N.W.2d 353, 356 (Iowa 1986). Relying on the express language of the statute, we find no textual authority for the board of supervisors to appoint an acting chairperson or to ultimately select the chairperson of the joint 911 service board. The parties may agree to this procedure. In the absence of statutory authority, however, we do not construe House File 2400 to allow the board of supervisors to enforce their choice of chairperson on the joint 911 service board.

The statute, similarly, does not address whether and how voting among joint 911 service board members may be weighted. Like the selection of a chairperson, we consider this issue one which may be agreed to by the board of supervisors and a joint 911 service board. In the absence of agreement, however, the decision to weigh votes in any particular manner would be an internal issue for resolution by the joint 911 service board.

We find no authority to expand the membership of the joint 911 service board beyond those specified by statute. We have previously cited the principle that

express mention of certain matters would imply the exclusion of others. *See Barnes v. Iowa Department of Transportation*, 385 N.W.2d at 262-63. Applied in this context, the express delineation of members along with the voting status would exclude the addition of more members by the board of supervisors. *See* H.F. 2400, § 3(1).

Finally, we note that the statute provides for voting membership status to each political subdivision having a public safety agency "serving territory within the county" and nonvoting membership status to private safety entities "operating within the area." H.F. 2400, § 3(1). Neither of these phrases require the agency or entity be headquartered in the county but require the agency serve territory within the county or entity operate within the area. Membership turns on service territory or operating area rather than headquarters. Whether that membership is voting or nonvoting turns on the public or private nature of the agency or entity providing service. Voting status would be conferred on a political subdivision of the state having a public safety agency "serving territory within the county." Nonvoting status would be conferred on a private safety entity "operating within the area." H.F. 2400, § 3(1).

In summary it is our opinion that:

1. The surcharge referendum may be included in any election, including a special election, in which all voters of the proposed service area will be eligible to vote. We do not recommend inclusion in a primary election. A special election may not be held for the exclusive purpose of the surcharge referendum.

2. A "subscriber" for purposes of the surcharge referendum is the person in whose name the service is billed and need not be a qualified elector.

3. The surcharge is not a local option tax that can be presented to voters under chapter 422B.

4. The decision whether to establish a new joint 911 service board or substitute a 28E entity is vested in the discretion of the board of supervisors.

5. A legal entity created pursuant to chapter 28E and substituted for the joint 911 service board must meet the voting and membership requirements of § 3(1).

6. Whether a newly established joint 911 service board is a "creature of county government" raises several different issues which must be resolved specifically as they develop in context rather than generally.

7. There is no statutory authority for the board of supervisors to appoint an acting chairperson or ultimately select the chairperson of a joint 911 service board.

8. The decision whether and how to weigh votes among voting members of a joint 911 service board is an internal issue for resolution by the joint 911 service board.

9. The membership of a joint 911 service board may not be expanded by the board of supervisors beyond those members delineated by statute.

10. Membership turns on service territory or operating area rather than headquarters.

SEPTEMBER 1988

September 6, 1988

COUNTIES: County Care Facilities. Iowa Code §§ 135C.24(1); 135C.24(5)(1987). A health care facility that is not administered by or under the control of the county is not a county care facility for purposes of § 135C.24. (McGuire to Vander Hart, Buchanan County Attorney, 9-6-88) #88-9-1(L)

OCTOBER 1988

October 6, 1988

AGRICULTURE: Family Farm Corporation. Iowa Code sections 172C.1(6), 172C.1(8), 172C.1(15), 172C.4 (1987); 1987 Iowa Acts, Chapter 146, section 1; House File 2283, 72nd G.A., 2nd Sess., section 1 (Iowa 1988). The terms "farming" as used in Iowa Code sections 172C.1(6) and 172C.1(8) does not require that the shareholders, directors, officers or employees of a family farm corporation physically engage in crop or livestock production on agricultural land which the corporation leases to a farm tenant. (Benton to Gustafson, 10-6-88) #88-10-1

Mr. Thomas E. Gustafson, Crawford County Attorney: This is in response to your letter of August 12, 1988, requesting an Attorney General's opinion on Iowa Chapter 172C. Your question concerns a "family farm corporation" under Iowa Code section 172C.1(8). This statute provides:

> 'Family farm corporation' means a corporation:
>
> a. Founded for the purpose of farming and the ownership of agricultural land in which the majority of voting stock is held by and the majority of the stockholders are persons related to each other as spouse, parent, grandparent, lineal ascendants of grandparents or their spouses and other lineal descendants of the grandparents or their spouses, or persons acting in a fiduciary capacity for persons so related;
>
> b. All of its stockholders are natural persons or persons acting in a fiduciary capacity for the benefit of natural persons or family trusts as defined in subsection 211 of this section; and
>
> c. Sixty percent of the gross revenues of the corporation over the last consecutive three-year period comes from farming.

Under the facts described in your letter, the corporation involved meets this definition. You also indicate that the shareholders are "actually engaged in farming" as defined in Iowa Code section 172C.1(15). Family farm corporations are exempted from the general ban on the corporate ownership of agricultural land under Iowa Code section 172C.4.

Your question arises from the fact that this family farm corporation leases agricultural land on a crop-share basis. Consequently, the actual physical labor on the agricultural land which the corporation owns is performed by the tenant. This situation has led you to ask whether under these circumstances, the term "farming" as used in Iowa Code sections 172C.1(6) and 172C.1(8) requires that the shareholders, directors, etc. of the family farm corporation/landlord physically engage in crop or livestock production on the land which the corporation leases.

We can note first that § 172C.4 does not prohibit a family farm corporation from leasing its agricultural land to individuals or other permissible corporations. Section 172C.1(6) defines "farming" in the following terms:

> 'Farming' means the cultivation of land for the production of agricultural crops, the raising of poultry, the production of eggs, the production of milk, the production of fruit or other horticultural crops, grazing or the production of livestock. Farming shall not include the production of timber, forest products, nursery products, or sod and farming shall not include a contract where a processor or distributor of farm products or supplies provides spraying, harvesting or other farm services.

The term "farming" as defined in this statute is used in the definition of family farm corporation in § 172C.1(8) which requires that the corporation be one "founded for the purpose of farming". The General Assembly did not impose

any requirement in the definition of farming which requires actual physical labor in performing the various activities which constitute farming. The legislature has the prerogative of defining its own terms. *Hawkeye Bancorporation v. Iowa College Aid Com'n.*, 360 N.W.2d 798 (Iowa 1985). We cannot add such a requirement through the guise of statutory construction. *Casteel v. Iowa Department of Transp., Motor Vehicle Div.*, 395 N.W.2d 896 (Iowa 1986).

It is also instructive that in § 172C.1(15) in the definition of "[a]ctively engaged in farming," there is no requirement of actual physical labor on the farm. The definition can be satisfied if the shareholder or officer of the corporation either inspects the production activities periodically and contributes towards the cost of production, or takes an important part in farm management decisions, or performs actual physical work. Consequently, under the lexicon of the General Assembly a shareholder or officer need not perform actual physical labor to be actively engaged in farming. This is consistent with the definition of farming itself, which as we noted also does not impose such a requirement.

The legislature has in the past two sessions significantly amended Chapter 172C. *See*, 1987 Iowa Acts, Chapter 146, section 1 and House File 2283, 72nd G.A., 2nd Sess., section 1 (Iowa 1988). However, the General Assembly has not chosen to amend the provisions involved in your question, so we can conclude that it has no interest in imposing a requirement of actual physical labor in these definitions. The term "farming" as used in §§ 172C.1(6) and 172C.1(8) does not require that the shareholders, directors etc. of a family farm corporation physically engage in crop or livestock production on agricultural land which the corporation leases to a farm tenant.

October 14, 1988

COUNTIES AND COUNTY OFFICERS: County Conservation Board. Iowa Code §§ 111A.1, 111A.4 (1987); Iowa Code Supp. § 111.85 (1987). A county conservation board may not authorize a private group to control entry into a county park or charge a park admission fee. A county conservation board may charge an admission fee for use of a developed facility such as a golf course, and may subdelegate management of such a facility by concession contract. (Smith to Stoebe, Humboldt County Attorney, 10-14-88) #88-10-2(L)

October 20, 1988

TAXATION: Distribution Of Money Received From Local Sales And Services Taxes To Unincorporated Areas Of A County Under Iowa Code ch. 422B (1987). Iowa Code §§ 422B.1(3)(a), 422B.1(4) and 422B.10. Chapter 422B does not allow the allocation of money from the local sales and services tax which is attributable to an unincorporated area exclusively to that area if it results in county property taxpayers from incorporated areas paying a higher county property tax rate than taxpayers living in the unincorporated areas. (Miller to Schnekloth, State Representative, 10-20-88) #88-10-3

Honorable Hugo Schnekloth: The Attorney General is in receipt of your opinion request concerning Iowa Code ch. 422B (1987), Local Option Taxes. Specifically, you posed two questions. The first question involves whether the legislature under ch. 422B intended that the residents of unincorporated areas where a local option tax is imposed are to share equally in the revenue received from the tax by means of the Board of Supervisors allocating the unincorporated area's share of the revenue exclusively to the unincorporated area.

The second question involves whether the Board of Supervisors is required to place on the ballot at a regular or special election a petition requesting a vote on a local option tax for the unincorporated area which provides for the Board to allocate the unincorporated area's share of the revenue only to the unincorporated area, and if so, whether the Board is bound by the petition if it receives a favorable vote.

All local sales and services tax, interest and penalties attributable to each area of the county opting for the tax are to be credited by the State Treasurer to that county's account in the local sales and services tax fund. *See,* Iowa Code § 422B.10(1). Thereafter, § 422B.10(2) requires that the State Treasurer:

> *pursuant to rules of the director of revenue and finance,* shall remit at least quarterly *to the board of supervisors, if the tax was imposed in the unincorporated areas,* and each city where the tax was imposed its share of the county's account in the local sales and services tax fund as computed under subsections 3 and 4.

(Emphasis added). Basically, seventy-five percent of the money to be distributed to each area within the county imposing a tax is based upon population and twenty-five percent of the money to be distributed is based upon the sum of property tax dollars levied. *See,* Iowa Code §§ 422B.10(3) and (4).

The rule promulgated by the director for determining each area's pro rata share of money to be distributed is done in three steps which are set out in Departmental rule 701 Iowa Admin. Code § 107.10 as follows:

> 1. The total amount in the county's account to be distributed is first divided into two parts. One part is equal to seventy-five percent of the total amount to be distributed. The second part is the remainder to be distributed.
>
> 2. The part comprised of seventy-five percent of the total receipts to be distributed is further divided into an amount for each participating city or unincorporated area. This division is based upon the most recent certified federal census population. Population for each participating city and unincorporated area is determined separately and totaled. The population for each sales tax imposing city or unincorporated area is divided by the total population to produce a percentage for each city or the unincorporated area. The percentages are rounded to the nearest one-hundredth of a percent with the total of all percentages equal to one hundred percent. Each government's percentage is multiplied by seventy-five percent of the sales tax receipts to be distributed. Distributions are to be rounded to the nearest cent.
>
> 3. The remaining twenty-five percent of the amount to be distributed is further divided based upon property taxes levied. The sum of property tax dollars to be used is the amount levied for the three years from July 1, 1982, through June 30, 1985. Property taxes levied by participating cities or the board of supervisors, if the local sales tax is imposed in unincorporated areas, are to be determined separately then totaled. The property tax amount for each sales tax imposing city and the board of supervisors, if the sales tax is imposed in unincorporated areas, is divided by the totaled property tax to produce a percentage. The percentages are rounded to the nearest one-hundredth of a percent with the total of all percentages equal to one hundred percent. Each percentage is multiplied by twenty-five percent of the sales tax receipts to be distributed. Distributions are to be rounded to the nearest cent.[1]

[1] The method for distribution back to the county is not based upon each area which opted for the tax receiving back dollar for dollar what it had contributed into the fund. Since the distribution back to an area is based exclusively upon population and total tax dollars levied, it could be possible for an area which contributed no money into the fund to receive back a distribution from the fund. Conversely, it is also possible for an area of the county which contributed the largest amount of money into the fund to receive back a disproportionally smaller share of the money being distributed.

Your questions specifically deal with whether an unincorporated area's pro rata share of money received by the Board of Supervisors under this formula shall be allocated exclusively to that unincorporated area. Iowa Code § 422B.1(4) provides that local option tax revenues may be used either for local property tax relief, or for any other specified purpose or purposes, or any combination of both. There is no statutory requirement as to what percentage of the money is to be used for either property tax relief or for the other specified purposes. The only statutory restriction on the use of the money is that it be expended for a lawful purpose of the city or county. *See,* Iowa Code § 422B.10(5).

As part of the distribution to the unincorporated area, § 422B.10(4)(a) requires that twenty-five percent of the Board of Supervisor's pro rata share of the local option tax distributions be "based upon the percentage of *the total property tax dollars levied by the board of supervisors* during the above three year period." (Emphasis added). The "total property tax dollars" which are levied by the Board of Supervisors obviously includes levies on all county taxpayers, including those who reside in the county's incorporated areas.[2] This, of course, would increase the unincorporated area's pro rata share of the distribution as compared to a situation where the legislature would require that it be based upon "the total property tax dollars levied by the board of supervisors" *in the unincorporated area.* The legislature, however, did not differentiate this portion of the distribution formula between incorporated and unincorporated county taxpayers. Consequently, since the unincorporated area's pro rata share is calculated in part upon total property taxes levied within the county, the legislature did not intend for this money to be allocated exclusively to the unincorporated areas in all instances.

We need not decide whether the legislature could constitutionally create a classification of taxpayers within a county whereby unincorporated areas could receive the exclusive benefit of the local option tax money. Tax classifications which do not adversely affect a fundamental interest and are not based upon a suspect criterion are only tested under the lenient standard of rationality that is traditionally applied in evaluating equal protection challenges to regulation of economic and commercial matters. *Exxon Corp. v. Eagerton,* 462 U.S. 176, 195, 76 L.Ed.2d 497, 513 (1983). However, the legislature through this statute did not create a new classification of taxpayers based solely upon residence in an incorporated or unincorporated area of the county.

Consequently, since the present law does not create any classification of excluvise benefit in unincorporated areas, it is constitutionally mandated that all taxes be applied with uniformity and equality to all similarly situated taxpayers. As stated by the Iowa Supreme Court in *Pierce v. Green,* 229 Iowa 22, 29, 294 N.W. 237, 243 (1940),

> To accomplish the purpose of the equality and uniformity provisions of the constitution *it is necessary that there be uniformity, not only in the rate or percentage of taxation, but also in the rate or percentage of the valuation of property,* which is taken as the base to which the rate of taxation is to be applied. It needs no mathematical calculation to demonstrate that if there be lack of uniformity in either factor of the problem of taxation, there will be lack of uniformity in the tax burden.

(Emphasis added). *See also, Hanselman v. Humboldt County,* 173 N.W.2d 75 (Iowa 1969), and *Bd. of Super's of Linn County v. Department of Revenue,* 263 N.W.2d 227, 236 (Iowa 1978), where it was noted that with respect to an

[2] The total taxes levied for the "unincorporated" area in example 1, step 3, of Departmental rule 701 Iowa Admin. Code § 107.10 refers to the total taxes levied by the Board of Supervisors for the entire county and not just the total taxes levied within the unincorporated area.

equalization matter, "differing tax-related valuations are as constitutionally repulsive as dissimilar rates."[3] Providing general county property tax relief only to the taxpayers in unincorporated areas would result in unequal treatment of similarly situated city residents who are paying county taxes by their being required to pay a higher rate of county tax than their rural counterparts. *See*, 1980 Op.Att'yGen. 118.

Therefore, with respect to your first question, absent legislation to the contrary, any use of the local option tax money to provide for the general relief for property taxpayers must be uniformly applied on a county-wide basis and cannot be designated for property tax relief for taxpayers only in unincorporated areas. As far as expending money for other specified purposes, the same requirement would apply if the expenditure was applicable on a county-wide basis. In order for the unincorporated area to receive exclusive use of the money, the expenditure would have to be for a specified purpose which is already exclusively dedicated to the unincorporated area.

With regard to your second question, §422B.1(3)(a) requires the Board of Supervisors to direct the county commissioner of elections to submit the question of imposing a local option tax to the qualified electors upon receipt of a valid petition. A petition cannot direct the distribution of local option tax funds in contradiction to ch. 422B and existing law.

NOVEMBER 1988

November 10, 1988

SCHOOLS: School Districts; Dissolution; Schoolhouse Tax. Iowa Code §§275.12(5) (1987); 275.20 (1987); 275.51-.56 (1987) as amended; 278.1(7) (1987). The area of a dissolved school district is liable for the schoolhouse tax levied in the school district to which the dissolved district was attached at the time of the levy. (Barnett to Stromer, State Representative, 11-10-88) #88-11-1(L)

November 18, 1988

MUNICIPALITIES: Zoning; Historical Significant Areas. Iowa Code Ch. 176B, 414 (1987); Iowa Code §§303.20 through 303.33, 303.34, 303.34(4), 380.4, 414.1, 414.2, 414.3, 414.5, 414.21 (1987); 1988 Iowa Acts, ch. 2348, §8; 1980 Iowa Acts, ch. 1091, §§1, 2, and 3. A city, in designating an area of historical significance pursuant to Iowa Code §303.34 (1987), must comply with the substantive and procedural requirements for exercise of the general zoning power found in Iowa Code ch. 414. Accordingly, passage of an ordinance designating an area as an historically significant area would, upon written protest filed in compliance with the requirements of §414.5, as amended, require the favorable vote of at least three-fourths of all council members pursuant to §414.5, as opposed to an affirmative vote of not less than a majority of the council pursuant to §380.4. (Walding to Bruner, State Senator, 11-18-88) #88-11-2(L)

[3]The pertinent provisions mandating this duty in the Iowa Constitution are art. I, §6, art. III, §30 and art. VIII, §2 and, in the Constitution of the United States, it is amend. XIV. *Pierce*, 229 Iowa at 28, 294 N.W. at 243.

November 28, 1988

COUNTY ATTORNEY: Mental Health Commitment Hearings. Iowa Code §§28E, 331.752(4), 331.755(1), 331.756, 331.757, 331.907 (1987). A county attorney, full or part-time, may not be remunerated for handling mental health commitment hearings of outside counties which is an obligation of the county under a 28E agreement. However, a part-time county attorney in his private capacity could be appointed as an assistant county attorney to the committing counties and compensated in that capacity for handling the mental health commitments. (McCown to Wibe, Cherokee County Attorney, 11-28-88) #88-11-3(L)

DECEMBER 1988

December 7, 1988

TAXATION: Sales Tax Exemption — Machinery Or Equipment Used In "Livestock Or Dairy Production" Iowa Code §422.47C; House File 2477, 72nd G.A., 2d Sess. §8 (Iowa 1988); 1988 Iowa Acts, ch. _____ (H.F. 2477). The Iowa Department of Revenue and Finance would be correct in including poultry in the definition of "livestock" for purposes of the sales tax exemption for machinery or equipment used in "livestock or dairy production" set forth in Iowa Code §422.47C. (Willits to Branstad, Governor, 12-7-88) #88-12-1(L)

December 7, 1988

SCHOOLS; COUNTIES: County Compensation Board Membership. Iowa Code Supp. §§274.1; 331.905(2). A school district is a political subdivision of the state for purposes of Iowa Code Supp. §331.905(2), and a school board member is therefore prohibited from serving as a member of the county compensation board. (Osenbaugh to Martens, Iowa County Attorney, 12-7-88) #88-12-2(L)

December 9, 1988

NEWSPAPERS; SCHOOLS: Official Newspapers. Iowa Code sections 279.36; 618.3(1); 618.8; 618.11 (1985). A newspaper is published at the post office of entry, and not where the newspaper is printed. A "newspaper of general circulation" is determined by the diversity of its subscribers within the political subdivision and is one that contains news of a general character and interest to the community. If every newspaper of general circulation published within the political subdivision refuses to publish a notice at the rate set by statute, the district can publish notices in a newspaper published outside the district but which has general circulation within the district. (Osenbaugh to Holveck, State Representative, 12-9-88) #88-12-3(L)

December 14, 1988

CITIES: COUNTIES: 28E Agreement; Open Meeting; Competitive Bidding; Public Improvement; Sanitary Landfill. Iowa Code §§21.2, 28E.7, 384.53, 384.76, 384.95, and 384.96 (1987). The governing body of an entity created by a 28E agreement must comply with the open meeting requirements contained in Iowa Code ch. 21 (1987). The governing body of an entity created in part by a city pursuant to a 28E agreement must comply with the competitive bidding requirements of Iowa Code §384.96 (1987). Operation of a sanitary landfill does not constitute a public improvement as defined in Iowa Code §384.95(1) (1987) unless the operation includes construction work to be paid for in whole or in part by city or county funds. (Sheridan to Ollie, State Representative, 12-14-88) #88-12-4(L)

December 21, 1988

LABOR; TRANSPORTATION: Railroads. Iowa Code §88A.1(4), 88A.1(5), 327C.4. Scenic railroads do not fall under either the jurisdiction of the Division of Labor, as an amusement ride, or the Department of Transportation as a railroad. (McGrane to Royce, Rules Review Committee, 12-21-88) #88-12-5(L)

December 23, 1988

COUNTIES AND COUNTY OFFICERS; NOTICE: Computation of Time; Notice for Public Hearing. Iowa Code §§ 4.1(22), 331.305 (1987). County board of supervisors may hold a public hearing for disposition of county property on the Monday following publication of notice the previous Wednesday under Code § 331.305, which requires that notice be published not less than four days before hearing. (Osenbaugh to Folkers, Mitchell County Attorney, 12-23-88) #88-12-6(L)

December 28, 1988

CONSTITUTIONAL LAW: Item Veto. Iowa Const. art. III, § 16 (amend. 27); House File 2444, 72nd G.A., 2nd Sess. § 40, § 45, § 46. Sections 45 and 46 of House File 2444 are separate and severable items subject to item veto. (Pottorff to Running, State Representative, 12-28-88) #88-12-7

The Honorable Richard V. Running, State Representative: You have requested an opinion concerning an item veto by Governor Terry Branstad of House File 2444, an act relating to appropriations for regulatory agencies of state government. Sections 45 and 46 of this bill address "proprietary schools." A "proprietary school" is defined as "a person offering a course of instruction at the postsecondary level, for profit, that is more than four months in length and leads to a degree, diploma, or license." House File 2444, 72nd G.A., 2nd Sess. § 45 (Iowa 1988). Section 45 sets out terms for tuition refund when an enrolled student terminates study. Section 46 requires a performance bond to be posted to guarantee the refunds. Both sections were item vetoed by Governor Branstad on April 13, 1988. H.F. 2444, at 9192.

You point out that House File 2444 also includes section 40 which requires a minimum of six hours of continuing education for barbers and cosmetologists prior to bi-annual license renewal. H.F. 2444, § 40. You indicate that sections 40 and 46 were added to House File 2444 simultaneously by amendment from the House floor. Section 40, however, was not item vetoed.

In light of the relationship among these three sections, you inquire whether item veto of sections 45 and 46 but not section 40 is in violation of the item veto provision of the Iowa Constitution. It is our opinion that item veto of sections 45 and 46 would be upheld as constitutional if challenged in a court of law.

The gubernatorial power to exercise an item veto in an appropriation bill is specifically provided in the Iowa Constitution:

> Item veto by Governor. The Governor may approve appropriation bills in whole or in part, and may disapprove any item of an appropriation bill; and the part approved shall become a law. Any item of any appropriation bill disapproved by the Governor shall be returned, with his objections, to the house in which it originated, or shall be deposited by him in the office of the Secretary of State in the case of an appropriation bill submitted to the Governor for his approval during the last three days of a session of the General Assembly and the procedure in each case shall be the same as provided for other bills. Any such item of an appropriation bill may be enacted into law notwithstanding the Governor's objections, in the same manner as provided for other bills. [Iowa Const. art. III, § 16 amend. 27.]

Under this provision the governor may disapprove "any item of an appropriation bill."

In evaluating the constitutionality of item vetoes in prior opinions, we have recognized several applicable principles. *See* Op.Att'yGen. #87-1-13. Exercise of the item veto power is limited to appropriation bills. 1980 Op.Att'yGen. 864, 865-66. *See Turner v. Iowa State Highway Commission,* 186 N.W.2d 141 (Iowa 1971). An "item" of an appropriation bill is not limited to an appropriation of money but is broadly defined to include any "part" of an appropriation bill. *Colton v. Branstad,* 372 N.W.2d 184, 188-89 (Iowa 1985); *Turner v. Iowa State*

Highway Commission, 186 N.W.2d at 149. Exercise of the item veto power, however, cannot be used to veto a legislatively imposed qualification on an appropriation without veto of the underlying appropriation as well. *Welden v. Ray*, 229 N.W.2d 706, 713 (Iowa 1975). The item vetoed, moreover, must be separate and severable from the remainder of the bill. *Turner v. Iowa State Highway Commissioner*, 186 N.W.2d at 151. The question which you pose involves application of the latter principle.

In 1986 we examined the purpose of the separate and severable requirement and made the following observations:

> The Iowa Supreme Court has clarified that the vetoed "part" of an appropriation bill must be separate and severable. In *Turner* the Court quoted with approval a Virginia Supreme Court decision which had stated that an item is "something that may be taken out of a bill without affecting its other purposes and provisions. It is something which can be lifted bodily from it rather than cut out. No damage can be done to the surrounding legislative tissue, nor should any scar tissue result therefrom." *Turner*, 186 N.W.2d at 151, *quoting from Commonwealth v. Dodson*, 176 Va. 281, 290, 11 S.E.2d 121, 124 (1940). Subsequently, in *Welden v. Ray*, 229 N.W.2d at 714, the Court reiterated the separate and severable principle in analyzing the effect of an item veto on language which delineated the purpose of an appropriation.
>
> * * *
>
> The separate and severable principle set out in *Turner* and *Welden* is consistent with the view that item veto is a negative, not an affirmative, power. The Iowa Supreme Court has expressly adopted the principle that the item veto cannot be used to disapprove part of an appropriation if "the residue which would become law might be something not intended by the legislature and against the will of the majority of each house." *Welden*, 229 N.W.2d at 713, *quoting from* Note, 18 Drake L. Rev. 245, 249-50 (1969).

1986 Op.Att'yGen. at 126.

Applying the separate and severable principle, we consider sections 45 and 46 to be items subject to item veto. Sections 45 and 46 are self-contained units which respectively create terms for tuition refund and impose a bond requirement. Removal of these "items" does not affect the remaining purposes and provisions of House File 2444. Section 40, which addresses the number of continuing education hours required bi-annually, is not impacted by the item vetoes whatsoever.

We, moreover, do not consider relevant to this analysis whether sections 40 and 46 were proposed simultaneously from the House floor. In evaluating the separate and severable issue, the legislative process by which the sections are enacted is not material. Rather, the proper focus is the final bill and the relationship the statutory sections bear to each other in enacted form. *See, e.g., Turner v. Iowa State Highway Commission*, 186 N.W.2d at 151-52.

In conclusion, therefore, it is our opinion that sections 45 and 46 of House File 2444 are separate and severable items subject to veto and that item veto of sections 45 and 46 of House File 2444 would be upheld as constitutional if challenged in a court of law.

December 28, 1988

COUNTIES; SHERIFF; DEPUTY SHERIFF; CIVIL SERVICE: Reversion of sheriff to position as deputy sheriff. Iowa Code Ch. 341A (1987); §§ 341A.7; 341A.8; 341A.9; 341A.11. A county sheriff who leaves office cannot automatically revert to the rank of deputy sheriff under civil service. (Weeg to Hart, 12-28-88) #88-12-8(L)

STATUTES CONSTRUED

UNITED STATES CONSTITUTION

IOWA CONSTITUTION

CODE OF IOWA, 1971

CODE OF IOWA, 1983

CODE OF IOWA, 1985

331.324(1)(b)	87-3-2
347.13	87-1-10
347.14	87-1-10
347A.1	87-1-10
364.5	87-1-10
380.1	87-1-10
384.24	87-1-10
384.26	87-1-10
403A.10	87-1-2(L)
411.7	87-1-10
427.18	87-1-2(L)
441.46	87-1-2(L)
444.2	87-3-1
452.10	87-1-10
452.10	88-4-5
453.1	87-1-10
453.1	88-4-5
453.16	87-1-10
453.16	88-4-5
536A.2(5)	87-1-6(L)
536A.5	87-1-6(L)
562B.27(1)	87-1-11(L)
602.1601	87-1-12(L)
602.9111	87-1-10
613A.4(5)	87-1-7(L)
613A.8	87-1-7(L)
618.3(1)	88-12-3(L)
618.8	88-12-3(L)
618.11	88-12-3(L)
633.31(2)(k)	87-1-4(L)
901.2-.5	87-1-12(L)
910A.6-.9	87-1-12(L)
910A.17	87-1-12(L)

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ch. 7E	87-7-3(L)
ch. 17A	87-10-2
ch. 19A	88-4-4
ch. 20	88-1-8(L)
ch. 22	88-1-1(L)
ch. 22	88-4-4
ch. 39	88-6-3(L)
ch. 43	88-6-3(L)
ch. 47	88-8-4
ch. 48	88-6-3(L)
ch. 97B	88-1-1(L)
ch. 106	88-2-2
ch. 106A	88-2-2
ch. 109	88-2-2
ch. 109A	88-2-2
ch. 110	88-2-2
ch. 110A	88-2-2
ch. 110B	88-2-2
ch. 114	87-11-7(L)
ch. 118	87-11-7(L)
ch. 118	88-1-6(L)
ch. 123	88-1-2(L)
ch. 135	87-7-3(L)
ch. 147	87-7-3(L)
ch. 170	88-1-2(L)
ch. 176B	88-11-2(L)
ch. 232	88-2-2
ch. 250	87-5-1(L)
ch. 255	87-11-5(L)
ch. 255A	87-11-5(L)
ch. 261C	88-2-1(L)
ch. 308A	88-4-2
ch. 312	88-5-5(L)
ch. 321	88-2-2
ch. 331	87-11-10(L)
ch. 411	87-3-3
ch. 414	88-11-2(L)
ch. 422B	88-8-4
ch. 455c	88-5-3(L)
ch. 477B	88-8-4
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4.1(22)	88-12-6(L)
4.1(36)	87-8-3(L)
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