STATE OFFICERS AND DEPARTMENTS: Insurance; Securities. §§ 502.3(4), 502.3(6), 502.4, 502.5 and 502.11, 1962 Code of Iowa. An Issuer whose only function is issuing stock which is an exempt security under § 502.4 is not a "dealer" within the meaning of § 502.11.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

December 30, 1965

Mr. William E. Timmons
Commissioner of Insurance
Insurance Department of Iowa
State Office Building
LOCAL

Dear Mr. Timmons:

On December 7 you submitted the following questions:

> "(1) If securities exempt from registration by virtue of Section 502.4 are offered and sold by agent representatives of the issuer, must the issuer of such exempt securities be registered as a dealer and must the agent representatives be registered as salesmen?
>
> "(2) If securities exempt from registration by virtue of Section 502.4 of the Code are offered and sold by the issuer without appointed agents, must such issuer qualify as a dealer prior to making an offer of such exempt securities?"

In addition, your letter set out the following paragraphs:

> "The only legal interpretation of these concepts known to this department is to be found at page 84, Opinions of the Attorney General, 1932. This opinion, which was actually handed down in 1931, appears to have been reasoned from a factual situation which envisioned using hired agents to distribute securities, a situation which would fall within question 1 of our opinion request.
>
> "From an administrative standpoint, the department feels that requiring the registration of issuers

of exempt securities, either as a dealer or issuer-dealer, is not feasible or consistent with the Iowa Securities Law. This is particularly true in distributions which do not involve appointed agents. (See question 2 of our opinion request)

"The continued existence of the 1931 Attorney General's Opinion in its present broad form presents the department with a number of practical problems many of which involve non-agent cases. The citation of a few examples may be helpful.

"Example 1. XYZ Church wishes to sell bonds exclusively to the members of the congregation in order to finance a new addition. Under the 1931 opinion XYZ Church would have to register as a securities dealer even though the bonds are exempt from registration and will not be sold through appointed agents.

"Example 2. X Manufacturing Company, whose securities are listed on the New York Stock Exchange (exempt securities), for incentive purposes wishes to sell a few shares of stock to its wholesale representatives in Iowa. The 1931 Opinion would require dealer registration of X Manufacturing Company, even though the only offer of sale is by mail with no appointed agents representing the issuer in Iowa.

"Example 3. Y Lodge wishes to pay off its real estate mortgage by selling long term unsecured notes (exempt securities) exclusively to its members. Applying the 1931 Opinion, Y Lodge would be required to register as a dealer even though the lodge does not employ agents to offer the notes.

"It should be noted that dealer registration is rather burdensome, particularly for those who are not actually in the securities business. For instance, the Code and departmental policy requires that all such applicants file a bond, submit audited financial statements, pay an annual registration fee of $50.00 and, in certain cases, submit to qualification examinations."

The basic problem which your questions present is a determination of the meaning of the language in the first and last paragraphs of Section 502.11, 1962 Code of Iowa. They read as follows:

> "Registration of dealers and salesmen. No dealer or salesman shall engage in business in this state as such dealer or salesman or sell any securities including securities exempted in section 502.4, except in transactions exempt under section 502.5, unless he has been registered as a dealer or salesman in the office of the commissioner of insurance pursuant to the provisions of this section.
>
> * * *
>
> "Any issuer or owner of a security required to be registered under the provisions of this chapter, selling such securities except in exempt transactions as defined in section 502.5, shall be deemed a dealer within the meaning of this section and required to comply with all the provisions hereof, but such issuer or owner shall be required to pay only one fee which shall be either the fee for registration of the security or for dealer's registration, whichever is the greater, and the issuer shall not be required to furnish the bond herein prescribed."

The last paragraph of Section 502.11 was formulated by Chapter 10, Section 11, of the Acts of the 43rd General Assembly in 1929. At that time this paragraph read as follows before subsequent amendments:

> "Any issuer of a security required to be registered under the provisions of this act, selling such securities except in exempt transactions as defined in section 5 hereof, shall be deemed a dealer within the meaning of this section and required to comply with all the provisions hereof, but such issuer shall be required to pay only one fee which shall be either the fee for registration of the security or for dealer's registration, whichever is the greater, and shall not be required to furnish the bond herein prescribed."

The plain meaning of the statute, of course, is the basic consideration in statutory interpretation. In re Klug's Estate, 251 Iowa 1128, 104 N.W.2d 600 (1960). By reading the last paragraph of Section 502.11 in the light of what it was prior to its amendment

it is apparent that the section must be read to mean that any issuer of or owner of a security that is required to be registered under this chapter who sells such security, except in a transaction under Section 502.5, shall be deemed a dealer and shall be required to comply with this section. If an issuer is deemed to be a dealer, the first paragraph of Section 502.11 would then apply. The effect of the last paragraph of Section 502.11 must be considered in the light of Section 502.4(4) which reads as follows:

> "502.4 Exempt securities. Except as hereinafter otherwise provided, the provisions of this chapter shall not apply to any of the following classes of securities:
>
> * * *
>
> "4. Any security issued by a corporation, organized exclusively for religious, educational, fraternal, or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any private stockholder or individual."

From the language of Section 502.4, particularly in the first phrase, it is apparent that exempt securities under that section are not required to be registered under the provisions of this chapter and, therefore, the language as contained in the last paragraph of Section 502.11 was meant to exempt issuers or owners under Section 502.4 so that they would not be considered to be dealers. If they are not to be considered to be dealers. they are not governed by the first paragraph of Section 502.11, unless they actually engage in the business of selling securities.

Therefore, it is my opinion that an issuer whose only function is issuing stock is not a dealer because of the language of Sections 502.4 and 502.11. However, the first paragraph of Section 502.11 does require people who engage in the business of selling certain securities, including exempt securities, to register. This would include agent representatives if they are in fact "dealers" or "salesmen" as included in the definition section of Sections 502.3(4) and 502.3(6). A salesman is defined as follows:

> "'Salesman' shall include every natural person, other than a dealer, employed or appointed or authorized by a dealer or issuer, to sell securities in any manner in this state. The partners of a partnership and the executive officers of a corpora-

> tion or other association registered as a dealer shall not be salesmen within the meaning of this definition."

It is obvious from this language that a salesman working for an issuer selling exempt securities would have to register, whereas the issuer himself would not have to register.

It is apparent that the Attorney General's opinion of 1931, which is cited as 32 OAG 84, appears to be reasoned from the standpoint of agent solicitation and so far as it conflicts with this present opinion, it is hereby withdrawn.

Respectfully submitted,

/s/ Timothy McCarthy

TIMOTHY McCARTHY
Solicitor General
State of Iowa

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CITIES AND TOWNS: Effect of repeal of statute authorizing a housing commission. § 403A.5, 1962 Code of Iowa; Chapter 334, Acts of 61st G.A. Repeal of § 403A.5, Code of 1962, which authorized the establishment of a municipal housing commission, operated ipso facto to repeal any municipal ordinance creating such commission and to abolish any offices provided for. Such repeal and re-enactment thereof as Chapter 334, Acts of 61st G.A., results in the requirement for election as provided in Chapter 334.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

December 30, 1965

Honorable Gene W. Glenn
State Representative
Rural Route 7
Ottumwa, Iowa

Dear Mr. Glenn:

Reference is herein made to yours of the 10th inst., in which you submitted the following:

> "By resolution of the Ottumwa City Council, November 22, 1965, a new authority designated the 'Low Rent Housing Agency of the City of Ottumwa' was created, and an ordinance establishing its predecessor 'The Ottumwa Housing Commission' a year earlier was repealed. Under the provisions of Section 403A.25, Code of Iowa, 1962, the electors of Ottumwa had earlier approved participation in the low-rent housing program.
>
> "The new authority was created under the provisions of Senate File 9, an amendment to Chapter 403A, Code of Iowa, 1962, by the 61st General Assembly. Section 2, Senate File 9, provides in part that 'any such agency shall not undertake any low-rent housing project until such project has been approved by a referendum as provided in section four hundred three A point twenty-five (403A.25).' Section 4, Senate File 9, further provides in part that 'no municipality nor any low-rent housing agency shall proceed with the acquisition of any property for, or with the erection or operation of any low-rent housing project unless authorized by a vote of at least fifty (50) percent of the electors of such municipality voting on the proposition at any regular, primary or general election or by special election called by the governing body of the municipality.'

"Following the repeal of the ordinance establishing 'The Ottumwa Housing Commission' and creation of 'Low Rent Housing Agency of the City of Ottumwa,' the Mayor and Council then appointed three members of 'The Ottumwa Housing Commission' to the 'Low Rent Housing Agency of the City of Ottumwa.' Two other members of 'The Ottumwa Housing Commission,' whose terms did not expire until 1966 and 1969 respectively, were not appointed to the new agency. A further resolution approving and ratifying all actions of 'The Ottumwa Housing Commission' was adopted by the City Council.

"I request an opinion in the following specifics:

"1. Is it necessary that a new election be held under the provisions of Section 403A.25, Code of 1962, as amended, for the 'Low Rent Housing Agency of the City of Ottumwa' to proceed further with acquisition of building sites and construction of units?

"2. May the new agency increase the number of units planned to be constructed by 'The Ottumwa Housing Commission' without a new election, and/or hearings by the new agency?

"3. May members of 'The Ottumwa Housing Commission,' whose terms are not expired, be replaced without notice and hearing by repeal of an ordinance establishing said commission, and creation of a successor 'Low Rent Housing Agency of the City of Ottumwa?'"

1. Insofar as your third question is concerned, based upon the foregoing facts, I am of the opinion that the ordinance repealing the establishment of the Ottumwa Housing Commission and adopted November 22, 1965, is a nullity and of no force and effect. According to authority, repeal of a statute under the authority of which an ordinance was adopted, operated also ipso facto as a repeal of the ordinance. Section 403A.5, Code of 1962, was repealed by Chapter 334, Acts of the 61st General Assembly.

Sutherland Statutory Construction, paragraph 2023, has this to say with respect to this situation:

> "As a municipal ordinance draws its authority from a statutory enactment, the withdrawal of the authoritative enactment by specific provision or by implication from subsequent legislation upon the subject matter operates to repeal any ordinance which was dependent upon the repealed statute for its existence."

Insofar as such repeal of an ordinance is concerned, the view of this department, as far as offices are concerned, was set forth in 1907 where the Report of this department for that year at page 45 stated:

> "It is a well settled rule of law that the repeal of a statute creating an office abolishes the office. Throop on Public Officers, sec. 304; Chandler v. City of Lawrence, 128 Mass. 215.
>
> "Under this rule all of the offices created by section 7 of the act of the thirtieth general assembly are abolished by its repeal, and the tenure of office of the officers named therein expired when the law repealing that section went into effect.
>
> "The act became a law on the 12th day of April, 1906.
>
> "At that time the tenure of office of all officers named in section 7 terminated, and the persons who had previously thereto filled the offices therein named ceased to be such officers. It follows, therefore, that wherever any of the offices named in section 7 of the act of the thirtieth general assembly are re-created by the acts of the thirty-first general assembly, the office so re-created is in effect a new office and must be filled by a new appointment made in the manner provided by the act of the thirty-first general assembly."

On the basis of the foregoing, I am of the opinion that upon the repeal of Section 403A.5, Code of 1962, the offices of members of

the Ottumwa Housing Commission were abolished. No one has a vested interest in a public office.

2. Insofar as your first and second questions are concerned, it is to be observed that by Senate File 9, Acts of the 61st General Assembly, Section 403A.5, 1962 Code of Iowa, was repealed and a substitution made therefor. This constitutes a substantial re-enactment of the repealed Section 403A.5. In such situation the result is the same as if no repeal had been effected. The pertinent rule is stated in Sutherland Statutory Construction, Section 2035, to-wit:

> "The re-enactment of a statute which has been repealed by specific provision or by implication from later legislation upon the subject matter invalidates the previous repeal and restores the statute to effective operation. When, however, an existing statute is re-enacted by a later statute in substantially the same terms, a repeal by implication is effectuated only of those provisions which are omitted from re-enactment, while the unchanged provisions which are reiterated in the new enactment are construed as having been continually in force."

This rule would have applicability to your questions and election thereafter would not be required were it not for the fact that the re-enacted statute, Chapter 334, Section 4, Acts of the 61st General Assembly, provided, in addition to the repealed statute, that:

> "No municipality nor any low-rent housing agency shall proceed with the acquisition of any property for ... any low-rent housing project unless authorized by a vote of at least fifty (50) percent of the electors ...."

Such power does not appear to exist in Section 403A.5 and, in addition,

it appears that Chapter 334, Section 4, provides that in such election the form of the question submitted shall include the power to "specify the maximum number of housing units in said project." The question shall also include whether the municipality shall proceed with the acquisition of any property for any low-rent housing project.

I am of the opinion, therefore, that the answer to your first question is in the affirmative and the answer to your second question is in the negative. These questions should be submitted to the electors at an election as provided for in Section 4, Chapter 334, Acts of the 61st General Assembly.

Very truly yours,

/s/ Oscar Strauss

OSCAR STRAUSS
First Assistant Attorney General

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SCHOOLS: School bus drivers. Sections 321.1(27), 321.177, 321.375, 321.376, 1962 Code of Iowa, and Chapter 274, Acts of the 61st G.A. The provisions of Chapter 321, 1962 Code of Iowa, apply indiscriminately to private as well as public school bus operators and both having an approved driver's education program may be licensed at the age of sixteen years.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

January 14, 1966

Mr. Earl T. Klay
Sioux County Attorney
Orange City, Iowa

Dear Mr. Klay:

This is in reply to your request for an opinion on the following question:

> In regard to Section 321.375, 1962 Code of Iowa, and Chapter 274, Acts of the 61st General Assembly, at what age may an individual operate a school bus in Iowa?

The answer to this question is dependent on the statutory interpretation of Chapter 321, 1962 Code of Iowa.

Under the provisions of this Chapter, specifically, Section 321.376, 1962 Code of Iowa, it was stated prior to amendment by Chapter 274, Acts of the 61st General Assembly, that:

> "The driver of every school bus shall have a regular or special chauffeur's license issued by the department of public safety, and in addition thereto, must hold a school bus driver's permit issued by the department of public instruction.
>
> "Notwithstanding the provision of subsection 2 of section 321.177, the department of public safety is hereby authorized to issue a special chauffeur's license to a person sixteen years of age to operate a school bus on request of local school board and recommendation of the state superintendent of public instruction."

Following the enactment of Chapter 274, 321.376, 1962 Code of Iowa was amended to read as follows:

> "The driver of every school bus shall have a regular or special chauffeur's license issued by the department of public safety, and in addition thereto, must hold a school bus driver's permit issued by the department of public instruction.
>
> "Notwithstanding the provision of subsection 2 of section 321.177, the department of public safety is hereby authorized to issue a special chauffeur's license to a person sixteen or seventeen years of age, if such person has successfully completed an approved driver's education course, to operate a school bus on request of local school board and recommendation of the state superintendent of public instruction."

Section 321.375, 1962 Code of Iowa, as amended by Chapter 274, Acts of the 61st General Assembly must also be considered. Prior to amendment, this provision stated:

> "The drivers of school busses must: (1) be at least sixteen years of age, (2) be physically and mentally competent, (3) not possess personal or moral habits which would be detrimental to the best interests of safety and welfare of the children transported, (4) have an annual physical examination and meet all established requirements for physical fitness.
>
> "Use of alcoholic beverages or immoral conduct on the part of the driver shall automatically cancel his contract and his re-employment for the balance of the year is hereby prohibited."

By Chapter 274, Acts of the 61st General Assembly this provision was amended to read as follows:

> "The drivers of school busses must: (1) be at least eighteen years of age, unless such person has successfully completed an approved driver education course, in which case, the minimum age shall be sixteen years, (2) be physically and mentally competent, (3) not possess personal or moral habits which would be detrimental to the best interests of safety and

> welfare of the children transported, (4) have an annual physical examination and meet all established requirements for physical fitness.
>
> "Use of alcoholic beverages or immoral conduct on the part of the driver shall automatically cancel his contract and his re-employment for the balance of the year is hereby prohibited."

In light of the language of the Code, prior to and following amendment of these sections, and from the plain meaning of the statute which is to govern unless a contrary intent is shown, Case v. Olsen, 234 Iowa 869, 14 N.W.2d 717 (1944), it is evident that a school bus driver must: (1) have a chauffeur's license; and (2) have completed an approved drivers education program in order to have such license at the age of sixteen years.

Furthermore, it can be witnessed in the statutory language that the legislature has not seen fit to delineate between public and private school bus operators. The reason for such lack of distinguishment between public and private schools is due to the fact that the inquiry is presently directed to the motor vehicle law of the State of Iowa, rather than the school laws, as can be seen from the general tenor of Chapter 274, Acts of the 61st General Assembly.

Continued support for Chapter 274, applying equally to public and private schools may be found in an opinion from this office in 56 OAG 44. Therein it was stated:

> "For the purpose of Chapter 321, Code of Iowa 1954, (Motor Vehicles and Law of the Road) the following definition appears in subsection 27 of section 321.1
>
> > '"School Bus" means every vehicle operated for the transportation of children to or from school, except privately owned vehicles, not operated for compensation, or used exclusively in the transportation of the children in the immediate family of the driver.'
>
> "The foregoing definition does not exclude private school buses. It follows that unless the context of any specific provision of the chapter relating to school busses connotes otherwise, the provision will apply to busses of both public and private schools."

Under the present 321.1(27), 1962 Code of Iowa, the same definition of school bus appears. Hence, the 1956 opinion from this office is in full force and effect.

Therefore, it is our opinion that the provisions of Chapter 321, 1962 Code of Iowa, as amended apply indiscriminately to private as well as public school bus operators and that both, if they have completed an approved driver's education program may be licensed at the age of sixteen years.

Very truly yours,

Richard Thornton

RICHARD THORNTON
Assistant Attorney General

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COUNTIES AND COUNTY OFFICERS: A County Attorney may, with the approval of the County Board of Supervisors, maintain an investigator to supplement his staff for the purpose of investigating applicants and recipients of the various State Welfare programs.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

January 19, 1966

Mr. Rey A. Fenton
Polk County Attorney
Court House
Des Moines, Iowa

Dear Mr. Fenton:

This is in answer to your letter of October 22, 1965, wherein you requested an opinion on the following question:

> "Does a county board of supervisors have the authority to hire and maintain an investigator to supplement the county attorney's staff for the purpose of investigating the activities of the applicants and recipients of the various state welfare programs?"

Section 336.2(1), 1962 Code of Iowa, provides:

> "It shall be the duty of the county attorney to:
>
> "(1) Diligently enforce or cause to be enforced in his county, all of the laws of the state, actions for a violation of which may be commenced or psosecuted in the name of the state of Iowa, or by him as county attorney, except as otherwise specially provided;"

On July 3, 1936, an unofficial letter opinion was issued by the Attorney General's office with regard to the following question:

"During the year 1934, warrants totaling $1,715.00 were drawn in favor of the Polk County Attorney for payments made by him to alleged criminal investigators.

"I can find no provision in the Code of Iowa which would authorize such payments.

"Section 5184 of the 1931 Code provides for criminal investigation to be made by the Sheriff when so requested in writing, and the Sheriff is required to file a detailed, sworn statement of his expenses, accompanied by the written order ofthe County Attorney before the Board of Supervisors can audit and allow his claim.

"Section 5146 of the 1931 Code also provides that each warrant issued by the auditor shall be made payable to the person performing the service.

"It would, therefore, seem that these payments are not only unauthorized but in direct violation of Section 5146 of the 1931 Code.

"Kindly advise."

In response, this office stated:

"It is true that Section 5184 of the Code [now section 337.4] authorizes a sheriff to make special investigations of alleged infractions of the law when so directed in writing by the County Attorney. This section simply adds an additional duty to the sheriff's office under certain conditions. This statute does not exclude other investigations that might be necessary to be made for the purpose of enforcing the criminal laws of the state by the County Attorney and in accordance with the expressed duty of the County Attorney is [as] contained in paragraph 1 of Section 5180 of the 1935 Code of Iowa, [now Section 336.2(1)] which is as follows, to-wit:

'. . . [Section 336.2(1) quoted] . . .'

"This section of the Code makes it the express

> duty of the County Attorney to diligently enforce or cause to be enforced the criminal laws in his jurisdiction. It is the general rule of law that where a county official has express authority to do or to perform a certain duty, he necessarily has the additional implied authority to incur necessary expense for the purpose of carrying out and administering his duties as expressly provided for."

Op. Atty. Gen., 1936, 521,522.

The Iowa Supreme Court has yet to speak with regard to the implied powers of public officials as such, but it was stated in State v. Tolson,(1951), 248 Iowa 733, 82 NW 2d 105:

> "A prosecuting attorney should use his best efforts to represent the State, vigorously and forcefully, in presenting its case within the bounds of proper legal procedure."

On the subject of implied powers, it is the generally accepted principle that:

> "The duties of a public office include all those which fairly lie within its scope, those which are essential to the accomplishment of the main purposes for which the office was created, and those which, although incidental and collateral, are germane to, or seem to promote or benefit, the accomplishment of the principal purpose."

Am. Jur. Public Officers, Section 250, p.69

I believe it is sufficiently clear that without the power to thoroughly and effectively investigate alleged in-

fractions of the law, it would be virtually impossible for a county attorney to "diligently enforce or cause to be enforced" the laws of the State of Iowa.

The welfare programs of the State each contain punitive provisions in the event a fraud is perpetrated by a recipient or other person when truth and veracity are essential and required. Section 239.14, 1962 Code of Iowa, concerning Aid to Dependent Children, states:

> "Whoever obtains, or attempts to obtain, or aids or abets any person to obtain, by means of a willfully false statement or representation, or by impersonation, or any fraudulent device, any assistance under this chapter to which the recipient is not entitled, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punishable by fine, not exceeding five hundred dollars or by imprisonment in the county jail for not more than three months, or by both such fine and imprisonment." (emphasis added)

Similar provisions concerning other welfare programs are: Section 241.19, Aid to the Blind; Section 241A.12, Aid to Disabled Persons; Sections 249.46 and 249.47, Old Age Assistance; and Section 249A.15, Medical Assistance for the Aged, to list only the most prominent. While the terminology and severity of the penalty may vary from section to section, each make an indictable misdemeanor the mark of violation.

In summary, by virtue of Section 336.2(1), the County Attorney's office of each county is commissioned by the General Assembly of Iowa to "diligently enforce" the penalty provisions of each welfare program; and according to the authority above quoted, it is clear that the county attorney, in carrying out his statutory duty, has at least the implied power to institute and perform investigations when necessary. The remaining question is, therefore, who has the authority to hire and maintain such an investigator to supplement the County Attorney's staff.

Section 341.1, 1962 Code of Iowa, provides:

> "Each county auditor, treasurer, recorder, sheriff, county attorney, clerk of the district court, may, with the approval of the board of supervisors, appoint one or more deputies or assistants, respectively, not holding a county office, for whose acts he shall be responsible. The number of deputies, assistants, and clerks for each office shall be determined by the board of supervisors, and such number together with the approval of each appointment shall be by resolution made of record in the proceedings of such board."

Chapter 309, Section 2, 61st G.A., states in pertinent part:

> "The county attorney shall also receive his necessary and actual expenses incurred in attending upon his official duties other than his residence and county seat, which shall be credited and allowed by the board of supervisors of the county."

In accordance with the foregoing, it is the opinion of this office that a county attorney may, with the approval of the county board of supervisors, hire and maintain an investigator to supplement his staff for the purpose of investigating applicants and recipients of the various state welfare programs.

Very truly yours,

WILLIAM N. KOSTER
Special Assistant Attorney General

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ROADS AND HIGHWAYS: Board of Supervisor's duty to repair and maintain. §§ 4.1(5), 306.2, 306.3, 309.67, 1962 Code of Iowa. Board of Supervisor's duty to repair and maintain a dedicated highway is dependent upon whether there was an acceptance of the dedication by the public; such acceptance being a prerequisite to the existence of a public road as defined in §§ 4.1(5) and 306.2, 1962 Code of Iowa.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

January 25, 1966

Mr. Arlen F. Hughes
Attorney at Law
Mount Ayr, Iowa

Dear Mr. Hughes:

Your letter of December 13, 1965, presents the following proposition:

> "Land in Riley Township was deeded to Riley Township for cemetery purposes prior to the year 1900. At that time, and at later dates, deeds were made to Riley Township for a strip of land twenty-five (25) feet in width, which would extend from a public road three-eighths (3/8) of one (1) mile north of the cemetery down to the cemetery, and for all years subsequent to these deeds of the twenty-five (25) foot strip, this said strip has been used as access by the public to the cemetery.
>
> "As of now, the twenty-five (25) foot road has suffered wash-outs and brush and trees have grown into the same so as to make it impassable without some grading and clearing work. The Trustees of Riley Township have requested the Ringgold County Board of Supervisors to provide the necessary maintenance for this twenty-five (25) foot road as a public highway. The Board of Supervisors question whether or not this twenty-five (25) foot strip is a public highway, and a part of the Secondary Road System of Ringgold County, Iowa, so as to justify their expenditure of labor and material for maintenance of this twenty-five (25) foot road."

Your inquiry is directed to the question of whether a strip of land deeded to a township for access to a township-owned cemetery comprises a part of the Secondary Road System of a county.

Sections 306.4, 306.12 and 306.20, 1962 Code of Iowa, provide for the establishment of roads and highways by statute; however, they may be established also by common law dedication by the owner as

evidenced by the cases of Henry Walker Park Association v. Mathews, 249 Iowa 1246, 91 N.W. 2d 703 (1958); City of Sioux City v. Tott, 244 Iowa 1285, 60 N.W. 510 (1953); Dugan v. Zurmuehlen, 203 Iowa 1114, 211 N.W. 986 (1927); Baldwin v. Herbst, 54 Iowa 168, 6 N.W. 257 (1880).

A dedication is a devotion to public use of land, or an easement in it. In order to constitute an effective dedication, there must be present an intent on the part of the owner coupled with a setting aside of the physical property for public use in praesenti which constitutes an offer and there must be an acceptance of the dedication. De Castello v. City of Cedar Rapids, 171 Iowa 18, 153 N.W. 353 (1915); 56 O.A.G. 29.

An offer of dedication to bind the dedicator need not be accepted by the governmental body, but may be accepted by the general public. Henry Walker Park Association v. Mathews, supra., Wolse v. Kemler, 228 Iowa 733, 293 N.W. 322 (1940). Although the last burial in the cemetery in question was in approximately the year 1940, the cemetery is still open to use by the public generally, as stated in Henry Walker Park Association v. Mathews, supra. This is evidenced by the fact that members of the general public go into the cemetery on Memorial Day and other occasions for the purpose of decorating and providing upkeep for the graves of their families. It is said that "the road is open to public use" means to all those who have occasion to use it. Henry Walker Park Association v. Mathews, supra.

It must be determined from the particular facts whether there has been a dedication of the twenty-five (25) foot strip of land and an acceptance of the dedication by the public. If, from the facts, it is determined that there has been a dedication accepted by the public, and there is in existence a public road as defined in Sections 4.1 (5) and 306.2, 1962 Code of Iowa, and 56 O.A.G. 29, then such a public road is part of the secondary road system and is under the jurisdiction and control of the Board of Supervisors, as provided in Section 306.3, and they are charged by Section 309.67 with the duty of repair and maintenance of said road.

That there was such a dedication can not be questioned by the facts, the land was deeded to Riley Township for cemetery purposes and was used for general public since that time as it was deeded to provide access to the cemetery. The question as to whether or not the road has been accepted by the public can also be answered in the affirmative due to the road being there for use of anyone who had occasion to use it and it, in effect, is being so used.

With the above conclusions in mind, it can be reasonably stated that the Ringgold County Board of Supervisors can legally repair and

maintain this roadway as a part of the secondary road system of Ringgold County and, in fact, has a duty to do the aforesaid.

Very truly yours,

RAYMOND T. WALTON
Special Assistant Attorney General

RTW/jw

COUNTY AND COUNTY OFFICERS: County Boards of Supervisors. Admission of a person to a Hospital-School for Mentally Retarded. Chapter 252A, 1962 Code of Iowa; §§ 3, 14, 15, 61, 78, 79, and 81, Chapter 207, Acts of the 61st G.A. (1) Until a person is able to be received in a hospital-school, the responsibility and proper placement for said person is mandated to the County Board of Supervisors. (2) The parents of a child who is placed in a foster home until he may be received by a hospital-school pursuant to Sec. 15 of Chapter 207, would not be liable for any of the "costs" of the "care" for said child.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

January 25, 1966

Mr. Ray A. Fenton
Polk County Attorney
Room 406 Court House
Des Moines, Iowa

Dear Mr. Fenton:

This is in response to your request for an opinion concerning Chapter 207, Acts of the 61st G.A., relating to mentally retarded persons and reads as follows:

> "I have received a letter from Mr. B. E. Newell, Polk County Supervisor from the 4th District, asking that I obtain an Attorney General's Opinion regarding a mentally retarded child five years old, which letter reads as follows:
>
> "'This morning an attorney appeared before the Board representing a client who has a mentally retarded five year old child. This child has been to Woodward and evaluated and is eligible for admission to Woodward. However, they have had a policy not to accept a child under six years of age unless the circumstances are extreme. After reading the history of the child, I think it could certainly be classified as extreme.
>
> "'However, they say they do not have any room at Woodward and the attorney stated that it is the responsibility of the Board of Supervisors to place the child in a home.
>
> "'We, therefore, would like an Attorney General's Opinion as to whether Woodward can refuse the

admittance of this child; if the statement is true that it is the responsibility of the Board of Supervisors to place this child in a home. If so, does the Board assume the responsibility of the child, who has the authority of saying where it shall be placed, and are the parents liable for any of the costs for the care and keep of this child.'"

Section 14 of Chapter 207 provides for the voluntary admission of a person believed to be mentally retarded to a state hospital-school.

Section 3 of Chapter 207 defines hospital-school as follows:

"Sec. 3. When used in this Act, unless the context otherwise requires:

"1. 'Hospital-schools' means the Glenwood state hospital-school and the Woodward state hospital-school."

Section 14 provides:

"The parent, guardian, or other person responsible for any person believed to be mentally retarded within the meaning of this Act may on behalf of such person request the county board of supervisors or their designated agent to apply to the superintendent of any state hospital-school for the voluntary admission of such person either as an inpatient or an outpatient of the hospital-school. After determining the legal settlement of such person as provided by this Act, the board of supervisors shall, on forms prescribed by the board, apply to the superintendent of the hospital-school in the district for the admission of such person to the hospital-school. The superintendent shall accept the application providing a preadmission diagnostic evaluation confirms or establishes the need for admission, except that no application may be accepted if the hospital-school does not have adequate facilities available or if the acceptance will result in an overcrowded condition." (Emphasis Supplied)

The Superintendant of the Woodward Hospital-School may not admit a person if the acceptance will result in an overcrowded condition.

The circumstances of the present case indicate there is "no room" at the Woodward Hospital-School for this child.

Therefore, the Superintendent of the Woodward Hospital-School may properly refuse to admit this child by authority of Sec. 14, supra.

Section 15 of Chapter 207, provides for the person who is unable to be received in a hospital-school.

Section 15 provides:

> "Sec. 15. If the hospital-school is unable to receive a patient, the superintendent shall notify the county board of supervisors of the county from which the application in behalf of the prospective patient was made of the time when such person may be received. Until such time as the patient is able to be received by the hospital-school, the care of said person shall be provided as arranged by the county board of supervisors." (Emphasis Supplied)

The word "shall" as used in a statute is generally construed to be mandatory. State v. Hanson, 210 Iowa 773, 231 N.W. 428, 1930. "Care" has been defined as responsibility, charge or oversight. (Emphasis Supplied). Emery v. Wheeler, 129 Me. 428, 152 A. 624 (1930).

Until this child is able to be received in a hospital-school, the responsibility and proper placement for said child is mandated to the county board of supervisors.

In addition, you present the following:

> "This poses another question, not specifically asked by Mr. Newell. Assuming the county is required to place this child in a foster home because of Woodward's refusal to accept this child, is the county allowed to charge the parents more than the average minimum cost of the care of a normally intelligent, non-handicapped minor of the same age and sex, as established by the Board of Control?"

Section 79 of Chapter 207 reads in part as follows:

> "Sec. 79. The father and mother of any person admitted or committed to a hospital-school as either an inpatient or an outpatient, and any person, firm, or corporation bound by contract hereafter

> made for support of such person shall be and remain liable for the support of such person. Such person and those legally bound for the support of the person shall be liable to the county for all sums advanced by the county to the state under the provisions of sections sixty-one (61) and seventy-eight (78) of this Act. The liability of any person, other than the patient, who is legally bound for the support of any patient under twenty-one (21) years of age in a hospital-school shall in no instance exceed the average minimum cost of the care of a normally intelligent, nonhandicapped minor of the same age and sex as such minor patient." (Emphasis Supplied)

This section refers to the liability of the parents of a person who has been admitted or committed to a hospital-school.

A person placed in a foster home pursuant to Section 15 of Chapter 207 is a "prospective patient" and has not been admitted or committed to a hospital-school.

Sec. 61 and 78 referred to in Sec. 79 of Chapter 207 again pertains to a person who is admitted or committed to a hospital-school.

Sec. 81 of Chapter 207 provides for <u>the liability of the person</u> who is admitted or committed to a facility forcare.

Chapter 252A of the 1962 Code of Iowa is entitled Uniform Support of Dependents Law. Sec. 252A.3 reads in part as follows:

> "1. A husband in one state is hereby declared to be liable for the support of his wife and <u>any child or children</u> under seventeen years of age and any other dependent residing or found in the same state or in another state having substantially similar or reciprocal laws, and, if possessed of sufficient means or able to earn such means, may be required to pay for their support a fair and reasonable sum according to his means, as may be determined by the court having jurisdiction of the respondent in a proceeding instituted under this chapter." (Emphasis Supplied)

Chapter 252A, which was enacted in the Acts of the 53rd General Assembly pertains to a general subject matter concerning the support of any person who is a dependent.

Chapter 207 of the 61st General Assembly is a Special Act which provides for the treatment, training, institution, care, habilitation and support of a mentally retarded person.

It is a well known rule of statutory construction that where there is a statute covering a general subject matter and another statute covering a special part of that subject matter, the special statute will control and take precedence over the general statute, especially where the special statute was enacted later. State ex rel Weede v. Iowa Southern Utilities Co. of Delaware, 231 Iowa 784, 2 N.W.2d 372, (1942).

It would seem then that Chapter 207 of the 61st General Assembly would apply to our situation rather than Chapter 252A of the 1962 Code of Iowa.

It would therefore appear that the parents of a child who is placed in a foster home until he may be received by the Woodward Hospital-School pursuant to Section 15 of Chapter 207, Acts of the 61st G.A., would not be liable for any of the "costs" of the "care" for said child.

Respectfully submitted,

ROBERT D. BERNSTEIN
Assistant Attorney General

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DRAINAGE DISTRICTS: Attorneys Fees. §§ 455.2 and 455.166, 1962 Code of Iowa. Attorneys fees arising out of legal services performed by way of litigation for a joint drainage district are payable from the joint drainage district fund.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

January 26, 1966

Winnebago County Board of Supervisors
Winnebago County Court House
Forest City, Iowa

Gentlemen:

Reference is herein made to the request of December 17 which reads as follows:

"Joint Drainage District 3-11 is the drainage district located in Winnebago and Kossuth Counties, and is under the supervision of the joint boards of supervisors of Winnebago and Kossuth Counties.

"In 1962 certain repairs or improvements were made to Lateral 8 in said district, which is located entirely in Winnebago County and is one of eleven laterals in the district.

"In connection with certain litigation arising out of this repair or improvement, the drainage district has become indebted to their drainage attorneys for services in connection with this litigation. The Winnebago County Board of Supervisors wishes to know whether this expense for legal fees should be charged to said Lateral 8 or to the entire district.

"The litigation involved the following matter: No notice of the repairs or the improvement (the trial court held that whether it was a repair or an improvement was immaterial) was given to the property owners benefited, nor was notice given them of the subsequent assessments which were levied upon their properties.

"Section 455.135 provides that such notice shall be given if the cost of the repair exceeds 50% of the original total cost 'of the district' (or if an improvement, more than 25% of such cost). The trial court held in a suit by the property owners to enjoin collection of the assessments, that these percentages should be applied as against the original cost of

Lateral 8 rather than against the original cost of the joint drainage district, and accordingly, all the assessments were void.

"This matter is now on appeal to the Supreme Court. This litigation is not directly involved in the question which I have asked above, but you may feel that it has some bearing on the matter. The specific question which the Board wishes to know at this point is whether these counsel fees should be charged to the Lateral or to the Joint Drainage District."

What you describe is an inter-county drainage district and, subject to the specific provisions pertinent to inter-county districts as set forth in Chapter 457, Code of 1962, is controlled by the provisions of Chapter 455, Code of 1962. See Section 457.28. Therefore, no provision being made in Chapter 457 for the employment of counsel and compensation therefor, the provisions of Chapter 455 in that respect are controlling. In that view it is to be observed that the term "board" as used in Chapters 455 and 457 shall embrace the board of supervisors, and the joint board of supervisors in case of inter-county levees or drainage districts.

Sections 455.2 and 455.166, Code of 1962, authorize the board (in the case under consideration this being the joint board) to employ counsel to advise and represent in any matter in which they are interested. Attorney's fees and expenses are authorized to be paid out of the drainage fund of the district for which the services are rendered or may be appropriated equitably among two or more districts.

Section 455.169 provides the details involved in making claims for attorney's fees for services performed for a board to be paid from the drainage funds of the district. It would appear that the

litigation described involved the joint district. The statute does not endow each county in a joint district with power to employ counsel. Such power, according to the statute, is vested in the district, and as far as compensation for attorney's fees is concerned under the statute, it is the joint district fund from which payment therefor is made.

Laterals appear to have no status as employers of legal counsel and payment of such compensation may not be made from a lateral fund.

In my opinion, therefore, these attorney's fees are payable from the joint drainage district fund.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

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CITIES AND TOWNS: Legal publication. §§ 366.7(1) and 618.14, 1962 Code of Iowa. Publication of municipal ordinances is accomplished by posting where there is no newspaper published in the city or town. Publication of other municipal activities where no newspaper is published may be satisfied by the use of § 618.14.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

January 27, 1966

Honorable James P. Denato
State Representative
835 Fifth Avenue
Des Moines, Iowa

Dear Mr. Denato:

Reference is herein made to a recent letter in which it was stated that the town of Norwalk does not have a newspaper published there and the question was asked as to what would be the requirements of legal publication for ordinances, rezoning, bids, etc., in that situation.

1. As far as ordinances are concerned in the stated situation where publication is required in a newspaper published in a city or town and there is no such newspaper published in that city or town, publication by posting is authorized by Section 366.7(1), 1962 Code of Iowa, which reads as follows:

> "1. Upon passage by the council, ordinances shall be published once in the manner provided by section 618.14 in cities and towns in which a newspaper is published, but in cities and towns in which no newspaper is published notice of the passage of ordinances shall be given by posting same in three public places within the city or town limits."

2. Insofar as other municipal activities are concerned where

publication is required in a newspaper published in the city or town and there is no such newspaper published therein, such requirement is satisfied by resort to the provisions of Section 618.14, 1962 Code of Iowa, providing as follows:

> "Publication of matters of public importance. The governing body of any municipality or other political subdivision of the state is authorized to make publication, as straight matter or display, of any matter of general public importance, not otherwise authorized or required by law, by publication in one or more newspapers, as defined in section 618.3 published in and having general circulation in such municipality or political subdivision, at the legal or appropriate commercial rate, according to the character of the matter published.
>
> "In the event there is no such newspaper published in such municipality or political subdivision or in the event publication in more than one such newspaper is desired, publication may be made in any such newspaper having general circulation in such municipality or political subdivision."

3. To remove any question of the legality of making use of Section 618.14 in this situation, it may be advisable, in addition to publication under that section, to publish also by posting in three places in such city or town.

Very truly yours,

/s/ Oscar Strauss

OSCAR STRAUSS
First Assistant Attorney General

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TAXATION: Exemptions--Sections 411.13 and 422.66, Code of Iowa, 1962. All pensions, annuities, retirement allowances and other rights mentioned in Section 411.13 are exempt from any tax of this state. Refund may be applied for under the provisions of Section 422.66.

LAWRENCE F. SCALISE
ATTORNEY GENERAL

STATE OF IOWA
DEPARTMENT OF JUSTICE
DES MOINES, IOWA

January 27, 1966

Mr. Ray A. Fenton
Polk County Attorney
Room 406 Court House
Des Moines, Iowa

Dear Mr. Fenton:

This is in reply to your letter dated January 20, 1966, in which you ask the following questions:

> "1. Do peace officers on pension under Chapter 411, of the Code of Iowa, have to pay State Income Tax on the retirement benefits they receive?
>
> "2. If the answer to question No. 1 is 'No', is a peace officer who has paid State Tax on any of these retirement benefits entitled to a refund of said tax?"

Section 411.13, Code of Iowa, 1962, provides as follows:

> "411.13 Exemption for tax and execution. The right of any person to a pension, annuity, or retirement allowance, to the return of contributions, the pension, annuity, or retirement allowance itself, any optional benefit or death benefit, any other right accrued or accruing to any person under the provisions of this chapter, and the moneys in the various funds created under this chapter, are hereby exempt from any tax of the state

> and shall not be subject to execution, garnishment, attachment, or any other process whatsoever, and shall be unassignable except as in this chapter specifically provided."

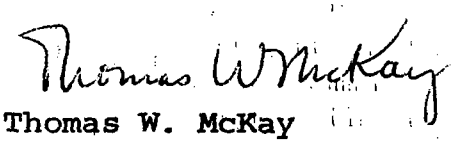
This office, in opinion No. 65-5-11, dated May 18, 1965, addressed to Mr. Gene L. Needles, Director, Law Enforcement Division, Iowa Liquor Control Commission, advised that all pensions, annuities, retirement allowances and other rights mentioned in Section 97A.12, Code of Iowa, 1962, as well as that portion of the monthly benefit attributable to the amounts contributed by the employee are exempt from any tax of this state. Since Sections 411.13 and 97A.12 are substantially identical, that opinion would be applicable to pensions under Chapter 411, Code of Iowa, 1962.

In reply to your second question, a refund of State income tax may be applied for under the provisions of Section 422.66, Code of Iowa, 1962, which provides as follows:

> "422.66 Correction of errors. If it shall appear that, as a result of mistake, an amount of tax, penalty, or interest has been paid which was not due under the provisions of this chapter, then such amount shall be credited against any tax due, or to become due, under this chapter from the person who made the erroneous payment, or such amount shall be refunded to such person by the commission. No claim for refund or credit that has not been filed with the commission within five years after the tax payment upon which a

refund or credit is claimed became due, or one year after such tax payment was made, whichever time is the later, shall be allowed by the commission."

Very truly yours,



Thomas W. McKay
Special Assistant Attorney General

TWM:dj

SCHOOLS AND SCHOOL DISTRICTS: Leasing Junior College Dormitories. §§ 262.35, 262.36, 1962 Code of Iowa, and Chapter 242, Acts of the 61st G.A. Chapter 242, Acts of the 61st G.A., does not authorize school boards to lease dormitories for the district's junior college.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

January 31, 1966

Mr. David A. Fitzgibbons
Emmet County Attorney
602 Central Avenue
Estherville, Iowa

Dear Mr. Fitzgibbons:

This is in response to your recent request regarding the application of Chapter 242, Acts of the 61st General Assembly. In the request you stated that:

> "The Estherville Community School District operates a Junior College that presently has an enrollment of approximately 507 students. It is the judgment of the Board that student housing is necessary to house and feed students presently enrolled and to house and feed additional students that are expected to enroll in the future.
>
> "A local Lessor has advised the Board that he will construct a dormitory complex that will eventually house 325 Junior College students. The first dormitory will house and feed approximately 100 students. However, in order to secure the necessary financing he needs a long term lease with the School District."

You then specifically ask:

1. "Is a dormitory or student housing unit or complex included under the 'existing schoolhouse facilities' [phrase of Chapter 242, Acts of the 61st General Assembly], so that the School District can enter into a long-term lease for rental of student housing facilities?"

2. "The Lessor proposes to feed and house the students and the School District would collect the dormitory room and board charge from the student.

   " a. Can the School District collect this money and use the entire amount for rental payments under the lease?

   " b. Would the rental obligation under the lease be considered an 'indebtedness' of the school corporation under Section 296.1?"

3. "Chapter 242, Acts of the 61st General Assembly further provides that an extended lease agreement must be approved by 60 percent of the voters. What proposition must be presented to the voters?"

In response to your first question, I refer you to Chapter 242, Acts of the 61st General Assembly, which provides in part:

> "The Board may, with the approval of sixty (60) per cent of the voters, * * *, make extended time contracts not to exceed twenty (20) years in duration for rental of buildings to supplement existing schoolhouse facilities; . . . ." (Emphasis Added)

Are dormitories "schoolhouse facilities"? Is the leasing of a dormitory, furnishing "schoolhouse facilities" within the meaning that the 61st General Assembly intended to attach to those words? The use of the word "schoolhouse" would seem to manifest a legislative intent to limit the operation of Chapter 242, Acts of the 61st General Assembly, to instructional buildings rather than residential-type buildings. If that was the legislative intent, the Attorney General must not stray so far from the language as to be ridiculous. Nor may the Attorney General amend Chapter 242, Acts of the 61st General Assembly in the guise of construing the same. Case v. Olson, 234 Iowa 869, 14 N.W.2d 717 (1944).

In construing this Act to determine whether a dormitory is a "schoolhouse", "it is proper * * * to take into consideration the object which the Legislature sought to obtain, and the evil which it endeavored to remedy, and the surrounding circumstances and the ends intended to be accomplished, as well as the context; and statutes should be construed as to give effect to the evident legislative intent." State v. Claiborne, 185 Iowa 170, 177, 178; 170 N.W. 417, 420; 3 A.L.R. 392, 397 (1919).

Let us view the circumstances that precipitated this statute. School districts have had a difficult time providing adequate classroom space for pupils because of increased enrollment and the districts' inability to obtain the passage of favorable bond issues. 64 OAG 351, 352. Therefore, school boards were forced to find other methods by which they could obtain additional classroom space. Initially the school boards leased additional classroom space, 64 OAG 351. However, before long purchase options were inserted in the classroom lease contracts. In this manner, school boards were able to purchase additional classroom space, at a substantial cost to the district's residents, without the necessity of submitting the proposal to the district's electors. Evidently, the Legislature decided that it was proper for electors to have a voice in determining whether a district should incur the substantial expense of entering into lease or lease-purchase option contracts for additional classroom space, because the 61st General Assembly enacted Chapter 242, as a remedy for the above situation. It is also persuasive that Chapter 242, Acts of the 61st General Assembly was adopted at the first regular legislative session after the Attorney General ruled that a school board could enter into a lease for additional classroom space. 64 OAG 351. From the above discussion it is evident that the evil which the Legislature sought to remedy was the school board's leasing of classroom space without voter approval. It does not appear that the leasing of dormitories was within the legislative mind when this statute was enacted. Therefore, in accord with the cited directive in State v. Claiborne, supra, I feel constrained to construe the phrase "rental of buildings to supplement existing schoolhouse facilities" in accord with the evident legislative intent i. e. the leasing of additional classroom space.

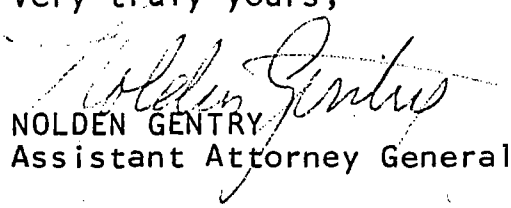
Your attention is directed to the Code sections empowering the State Board of Regents to provide dormitory facilities. Sections 262.35 and 262.35, 1962 Code of Iowa, provide respectively:

> "The state board of regents is authorized to:
>
> " '1. Erect from time to time at any of the institutions under its control such dormitories as may be required to the good of the institutions.'"
>
> "The erection of such dormitories is a public necessity and the said board is vested with full power to purchase or condemn at said institutions, or convenient thereto, all real estate necessary to carry out the powers herein granted."

The above specific statutory authorization that the Legislature felt it was necessary to employ in vesting the State Board of Regents with the authority to provide dormitory facilities is to be compared with the general language by which you seek to lease dormitory facilities. In the absence of an express enactment amending Chapter 242, Acts of the 61st General Assembly, similar to Sections 262.35 and 262.36, I am of the opinion that the word "schoolhouse" was not intended to include dormitories.

In view of my answer to question one, your second and third questions are now moot.

Very truly yours,



NOLDEN GENTRY
Assistant Attorney General

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TAXATION: Real Property; Exemptions--Section 427.1(9)(24), 1962, Code of Iowa. Property owned by a school district, which is used as the residence of the school administrator, rent-free, is exempt from taxation provided Sections 427.1 (9) and (24) are fully complied with.

LAWRENCE F. SCALISE
ATTORNEY GENERAL

STATE OF IOWA
DEPARTMENT OF JUSTICE
DES MOINES, IOWA

January 31, 1966

Mr. Robert W. Burdette
Decatur County Attorney
Box 61
Leon, Iowa

Dear Mr. Burdette:

This is in reply to your request for an opinion on the following:

On January 30, 1963, the Mormon Trail Community School District voted to buy a house for use of administrator personnel under the school board's policy of furnishing a residence rent-free to its administrators in order to secure teachers more easily since satisfactory rental homes are difficult to obtain in Garden Grove. On May 2, 1963, the purchase was completed and deed made and delivered to the school district and on June 22, 1963, the administrator took possession of the residence. Such residence has been furnished rent-free to the school district's administrators since that time. The district, however, failed to file the deed until December 4, 1965, and no exemption certificate was filed under Section 427.1(24). The taxes are on the treasurer's books for 1963 and 1964, and the property is on the tax roll for 1965, the 1965 taxes having been levied at the Supervisor's meeting of December 8, 1965.

"1. Is school property used as residence of school administrator exempt under Section 427.1(2)?

"2. Does the requirement of the Code requiring charitable societies to record their deed (Section 427.1(9)) also require filing of deed if property is exempt under Section 421.1(2)?

"3. Is an exemption application under Section 427.1(24) required if property is exempt under other subsections than subsection 6 or 9?"

In the leading case of The Trustees of Griswold vs. The State of Iowa, 46 Iowa 275 (1877), the Iowa Supreme Court was asked to interpret Iowa Code Section 797 (now Iowa Code, Section 427.1(9)) in order to determine whether two residence properties owned by a college and a church and occupied, respectively, by a professor at the college and a bishop who was rector of the church were exempt from taxation under the Iowa Code.

The court, in holding that both residences were exempt from taxation under the Iowa Code stated:

> "It is proper to say, that exempting these buildings from taxation is not an incentive to these institutions to build up a class of property for the purpose of holding it exempt from taxation. The buildings in question were erected or purchased with the money of the corporation owning them, they are not leased or otherwise used with a view to pecuniary profit, and are used to sustain the college and the church in the same ways that the money invested in them would have been used, if the interest of it had been appropriated to pay the rent of residence for the professor and the rector."

As recently as 1963, in the case of Trinity Lutheran Church of Des Moines vs. V.L. Browner, 255 Iowa 197, 121 N.W. 2d 131, the Iowa Supreme Court was again asked to interpret this same section of the Iowa Code (Section 427.1(9)) in an action to have declared exempt from taxation a church owned residence located near but not on church grounds and occupied by the church's teaching minister who acted as organist, choir director, and religious teacher and who, as part of his remuneration, was given use of the residence in which to live; the Court states:

> "In 1877 under an almost identical statutory provision this Court considered a situation so similar as to make the pronouncements controlling."

The Court then cites the Griswold College case discussed above and continues:

> "The Court held that under the provisions of the statute the residence properties so used were exempt.
>
> "The majority opinion concludes with these prophetic words of invitation:
>
> > '...If it be the legislative will that the exemption of this class of property be further restricted than it now is, that will can easily be expressed in appropriate legislation.'
>
> "The legislature has not accepted the invitation to change the interpretation of its own expressed policy and under that construction of legislative policy church parsonages have

> been exempt from taxation for over 85 years. By legislative silence the construction has been approved. It is not for us to now change what has been accepted as the legislative intent for so many years.
>
> "The Griswold case has been cited and followed consistently and states the Iowa rule to date."

The Attorney General has also previously considered this problem in 1954 OAG 130, where it was held that a home owned by a school district in which the school janitor was permitted to live rent-free in lieu of part of his salary, was not subject to taxation.

In answer to your second question, I refer first to A.M. McCall, et al vs. Dallas County, et al, 220 Iowa 434, 262 N.W. 824, a case in which the County of Dallas was given land to be used for the purpose of education. On page 439 of the opinion, the court stated:

> "...The school system of a county in this state is an 'educational institution', and if this is true it necessarily follows that the property involved on this appeal is exempt from taxation. It cannot be questioned that the county or state school systems of this state are educational institutions."

In the In re Estate of Cooper, 229 Iowa 921, 295 N.W.448 case, the Iowa Supreme Court in deciding that several educational institutions would qualify as charitable organizations under Section 6944(9) of the Iowa Code (now Section 427.1(9)) stated on page 930:

> "And it has frequently been held that an educational institution, under the provisions of section 6944, is also a charitable organization, and that educational institutions are within the provisions of subsection 9 of section 6944."

Section 427.1(9) of the Iowa Code specifically demands that the deed be filed:

> "...All deeds or leases by which such property is held shall be filed for record before the property herein described shall be omitted from the assessment."

Since the deed for the residence of the property in question was filed on December 4, 1965, the only impediment left in securing the exemption is a procedural one. Section 427.1(24) provides the procedure for claiming an exemption of property by any society or organization claiming such exemption through Section 427.1(9). The necessity of filing for the exemption is pointed out in 1964 OAG 437 where it was held that where statutory provisions have not been followed regarding time to file an application for exemption, the board of supervisors has no authority to excuse or forgive any previous taxes paid or allow an exemption that has not been timely filed.

It is the opinion of this office then that the property in question is exempt from taxation, but only when the provisions of Section 427.1(24) are complied with. Consequently, the property was not exempt during the taxable years 1963, 1964, and 1965.

Very truly yours,

David W. Kelly

David W. Kelly
Assistant Attorney General

DWK:dj

CITIES AND TOWNS: Police and fire retirement benefits. Chapters 410 and 411, 1962 Code of Iowa, as amended. After January 1, 1966, firemen employed in the departments of cities of ten thousand population or more, or under civil service, shall not be required to remain on duty for periods aggregate in each month more than fifty-six hours per week except that there is no such restriction applicable to the chief, or other persons when in command of a fire department, or to firemen who are employed subject to call only, and no such restriction applicable in case of serious emergencies. To be eligible for the full pension amount provided for by section 410.6 of the 1962 Code of Iowa, as amended, a fireman is not required to serve the necessary 22 years subsequent to the date upon which the retirement program was adopted in a specific community.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

February 2, 1966

Honorable J. P. Denato
State Representative
836 5th Avenue
Des Moines, Iowa

Dear Mr. Denato:

I am in receipt of your request for an opinion relative to the following questions:

I

What is the maximum number of hours during which a fireman can be on duty in Iowa?

Chapter 410, 1962 Code of Iowa, as amended, is applicable to firemen appointed prior to March 2, 1934; Chapter 411, 1962 Code of Iowa, as amended, is applicable to firemen appointed after that date. The provisions of sections 410.19 and 411.16 are identical and state:

> "Firemen employed in the fire department of cities of ten thousand population or more, or under civil service, shall not be required to remain on duty for periods of time which will aggregate in each month more than an average of sixty-three hours per week effective January 1, 1964, and fifty-six hours per week effective January 1, 1966 and no single period of time, or shift, shall exceed twenty-four hours in length, provided that in cases of serious emergencies such firemen may be required to remain on duty until such emergency has passed, when so ordered by the chief of the department or person acting in his place. Firemen called back to duty under this provision shall be duly compensated in accordance with their regular hourly wage."

Section 410.20 states:

> "The provisions of section 410.19 shall not apply to the chief, or other person when in command of a fire department, nor to firemen who are employed subject to call only."

The language of section 411.17 is identical to that of section 410.20 except that section 411.17 makes reference to section 411.16.

The above quoted statutes are the only Iowa statutes regulating this matter. The language of these statutes makes it clear that at the present time firemen employed in the departments of cities of ten thousand population or more, or under civil service, shall not be required to remain on duty for periods aggregating in each month more than fifty-six hours per week after January 1, 1966, except in case of serious emergencies, or except in those cases described in sections 410.20 and 411.17 of the Iowa Code quoted above.

II

> "Must a fireman who retires under the provisions of Chapter 410 of the 1962 Code of Iowa, as amended, serve as a fireman for 22 years subsequent to the time the retirement program is adopted in a specific community before he is eligible for the full pension amount provided for by Section 410.6 of the 1962 Code of Iowa, as amended?"

The Iowa law on this point appears to be quite clear. In Mathewson v. Board of Trustees of Firemen's Pension Fund, 226 Iowa 61, 283 N.W. 256 (1938) Mr. Mathewson became 50 years of age on December 14, 1936, and applied for benefits February 13, 1937. Under section 6310 of the 1935 Code the legislature had changed the eligibility provisions of the 1913 Code Supplement. Section 6310 contains the same language of the present section 410.6 of the Code. The question facing the court was whether the plaintiff had to complete 22 years of service subsequent to the 1935 enactment or whether his years of service before 1935 could be considered in computing his eligibility record. The court on page 65 of the Iowa Reports stated:

> "There is nothing in section 6315 of the Code which requires that the service, to wit, the twenty-two years, be after the city elected to go under the provisions of the pension act."

And on page 67 of the Iowa Reports, the court stated:

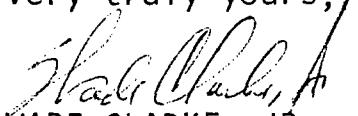
> ". . . When the legislature enacted section 6315 it did not therein specify that the time of service was to commence with the time that the fire department became a pension paying department. Rather it said, 'any member of said department who shall have served twenty-two years.'"

This language and decision of the court was recently reaffirmed by the Iowa court in City of Iowa City v. White, 253 Iowa 41, 111 N.W.2d 266 (1962).

Thus, to be eligible for the full pension amount provided for by section 410.6 of the 1962 Code of Iowa, as amended, a fireman is not required to serve the necessary 22 years subsequent to the date upon which the retirement program was adopted in a specific community. He can be eligible for full retirement benefits though a portion of the 22 years service time was served prior to the date the retirement program was adopted.

In conclusion then, it is the opinion of this office that after January 1, 1966, firemen employed in the departments of cities of ten thousand population or more, or under civil service, shall not be required to remain on duty for periods aggregate in each month more than fifty-six hours per week except that there is no such restriction applicable to the chief, or other persons when in command of a fire department, or to firemen who are employed subject to call only, and no such restriction applicable in case of serious emergencies. To be eligible for the full pension amount provided for by section 410.6 of the 1962 Code of Iowa, as amended, a fireman is not required to serve the necessary 22 years subsequent to the date upon which the retirement program was adopted in a specific community.

Very truly yours,



WADE CLARKE, JR.
Assistant Attorney General

bj

COUNTY AND COUNTY OFFICERS: Rabies vaccination of dogs. §§ 351.1, 351.3, 351.4 and 351.9, 1962 Code of Iowa; Chapter 311, Acts of 61st G.A. The effective date of a dog license under Chapter 311 is January 1, unless there is a subsequent application under § 351.4. The Department of Agriculture has by rule approved a vaccine and has indicated a two-year effective period for it. The certificate of vaccination signed by the veterinarian shall show that the vaccine given to the dog will have an effective period of six months or more from the effective date of the dog license.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

February 16, 1966

Mr. Richard G. Davidson
Page County Attorney
Page County Court House
Clarinda, Iowa

Dear Mr. Davidson:

You have asked the following questions:

"It has come to our attention that Chapter 311 of the 61st General Assembly, to the extent that it amends Chapter 351 of the 1962 Code of Iowa, requires that a 'certificate of vaccination' signed by a licensed veterinarian must be presented showing that a rabies vaccination for a certain animal would not expire prior to six months from the effective date of the dog license.

"The three questions involved are as follows:

"1. Is the effective date of the dog license under the statute the date of application for the dog license?

"2. Must the veterinarian certify the expiration date, if in his professional judgment he knows of no way to determine the exact expiration date, particularly if the expiration date might be within six months?

"3. If in fact the veterinarian certificate does not show expiration date of vaccination, is the County Auditor obligated to issue a license for the animal, or may she refuse to do so until such time as the certified veterinarian's certificate is presented showing expiration date longer than six months?"

The statutory provisions which apply are Sections 351.1, 351.3, 351.4 and 351.9, 1962 Code of Iowa. They read as follows:

> "351.1 Annual license. The owners of all dogs three months old or over, except dogs kept in kennels and not allowed to run at large, shall annually obtain license therefor, as herein provided."
>
> "351.3 Application by owner. The owner of a dog for which a license is required shall, on or before the first day of January of each year, apply to the auditor of the county in which he resides for a license for each dog owned by him."
>
> "351.4 Subsequent application. Such application for license may be made after January 1 and at any time for a dog which has come into the possession or ownership of the applicant, or which has reached the age of three months after said date."
>
> "351.9 Duration of license. All licenses shall expire on January 1 of the year following the date of issuance."

Section 1, subsection 2, of Chapter 311, Acts of the 61st General Assembly, reads as follows:

> "2. Before a license is issued for any dog, the owner must present evidence with the application required by section three hundred fifty-one point three (351.3) that the dog has been vaccinated against rabies, or if the dog license fee is paid to the assessor, as permitted in section three hundred fifty-one point sixteen (351.16), such evidence must be presented to the assessor. Such evidence shall be a certificate of vaccination signed by a licensed veterinarian, and the certificate shall show that the vaccination does not expire within six (6) months from the effective date of the dog license."

I.

Your first question concerns the effective date of the dog license as those words are used in Chapter 311, Acts of the 61st General Assembly. The last complete phrase of the applicable subsection

is as follows:

> "... the certificate shall show that the vaccination does not expire within six (6) months from the effective date of the dog license."

From the provisions of Chapter 351, which are quoted above, it is apparent that the dog license is an annual license and that the effective date in the usual situation will be January 1 of each year. In cases of subsequent applications, as pointed out in Section 351.4, applications after January 1 are recognized and in those cases the licenses become effective when issued.

II.

There is no requirement under Chapter 311 that the veterinarian certify the expiration date of the vaccine. However, the veterinarian shall show that the vaccine does not expire within six months from the effective date of the dog license.

The Department of Agriculture has tried to clear up this particular problem by using the authority in Section 1, subsection 3, Chapter 311, to determine the type of vaccine to be used. The Department has recently adopted rules and regulations. The rule in regard to the length of vaccination reads as follows:

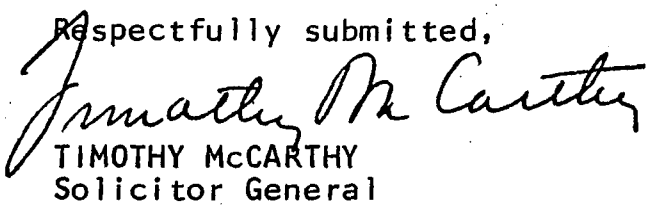
> "1.132 (351) Control and Prevention of Rabies
> 1.132 (1) Anti-Rabies Vaccine
> a. Modified live virus chick embryo rabies vaccine is the designated vaccine approved by the Iowa Department of Agriculture and will be recognized for a period of two years." (Emphasis supplied)

III.

Chapter 311 does not require that there be any showing of the expiration date of the vaccination, but rather the certificate must only show that the vaccination will last six or more months from the effective date of the dog license. Your Auditor should issue a license whenever the requirements of Section 1, subsection 2, of Chapter 311, Acts of the 61st General Assembly, are complied with. Additional information is available to your Auditor through Section 351.5 of the 1962 Code of Iowa, as amended, which states as follows:

"Such application shall be in writing on blanks provided by the county auditor and shall state the breed, sex, age, color, markings, and name, if any, of the dog, and address of the owner and be signed by him. Such application shall also state the date of the most recent rabies vaccination, the type of vaccine administered, and the date the dog shall be revaccinated."

Respectfully submitted,



TIMOTHY McCARTHY
Solicitor General

ew

CITIES AND TOWNS: Firemen's & Policemen's Retirement System. §411.8(1)(a), 1962 Code of Iowa; Section 3, Chapter 341, Acts of the 61st G.A. Increases in the contribution rates provided by Section 3, Chapter 341, Acts of the 61st G.A., and payable by members of the retirement program provided for in Chapter 411, 1962 Code of Iowa, as amended, should not be applied retroactively under the language of Section 411.8(1)(a) of the Code.

February 18, 1966

Honorable Minnette Doderer
State Representative
2008 Dunlap Court
Iowa City, Iowa

Dear Madam:

The Attorney General has referred to me your recent request for an opinion on the following question:

> Must the recent increases in contribution rates payable by members of the retirement program provided for by Chapter 411, 1962 Code of Iowa, as amended, be applied retroactively under the language of Section 411.8(1)(a) of the Code?

Section 411.8(1)(a) of the 1962 Code of Iowa, as amended, states in part:

> "The annuity savings fund shall be the fund in which shall be accumulated contributions from the compensation of the members to provide for their annuities. The rates of contribution payable by members according to their ages when becoming members shall be as follows:"

Various rates of contribution are then listed for the various ages at which the contributing parties became members. Section 3, Chapter 341, Acts of the 61st G.A., increased these rates of contribution by one per cent.

It is an important principle of statutory construction that statutes are to be considered as being prospective in operation unless the contrary intent is expressed or clearly implied. Hill v. Electronics Corp. of America, 253 Iowa 581, 113 N.W. 2d 313 (1962);

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Jacobs v. Miller, 253 Iowa 213, 111 N.W. 2d 673 (1962). This principle has been applied in numerous instances involving the construction of statutes granting pensions to public officers. Fisher v. New York State Employees' Retirement System, 110 NYS 2d 16 (1952); Kane v. Policemen's Relief & Pension Fund, 336 Pa 540, 9 A.2d 739 (1939); Reynolds v. United States, 292 U.S. 443, 78 L.Ed. 1353, 54 S.Ct. 800 (1934).

Because there is no expressed or clearly implied intent evident in the language of Section 411.8(1)(a) to make the provisions of that section applicable retroactively, that section has no retroactive application.

Thus, it is the conclusion of this office that the increase in contribution rates provided by Section 3, Chapter 341, Acts of the 61st G.A., and payable by members of the retirement program provided for in Chapter 411, 1962 Code of Iowa, as amended, should not be applied retroactively under the language of Section 411.8(1)(a) of the Code.

Very truly yours,

WADE CLARKE, JR.
Assistant Attorney General

bj

INSURANCE: Group credit life insurance on bank deposit. § 509.1(2), 1962 Code of Iowa. Customers of a bank, who maintain savings accounts, are not eligible to purchase group life insurance in an amount equal to their deposit.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

March 8, 1966

Mr. Robert J. Link
First Deputy Commissioner
Insurance Department of Iowa
State Office Building
LOCAL

Dear Mr. Link:

You have submitted the following question:

> "Are the customers of a bank, who maintain savings accounts, eligible to purchase group life insurance in an amount equal to their deposit in the bank?"

The statute which applies to the issuance of group credit life insurance is Section 509.1(2) which reads as follows:

> "509.1 Form of policy. No policy of group life, accident or health insurance shall be delivered in this state unless it conforms to one of the following descriptions: * * *
>
> "2. A policy issued to any one of the following to be considered the policyholder:
>
> "a. An advisory, supervisory, or governing body or bodies of a regularly organized religious denomination to insure its clergymen, priests, or ministers of the gospel.
>
> "b. A teachers' association, to insure its members.
>
> "c. A lawyers' association to insure its members.
>
> "d. A volunteer fire company, to insure all of its members.
>
> "e. A fraternal society or association, or any subordinate lodge or branch thereof, to insure its members.

"f. A common principal of any group of persons similarly engaged between whom there exists a contractual relationship, to insure the members of such group.

"g. An association, the members of which are students, teachers, administrators or officials of any college, to insure the members thereof. For the purpose of this paragraph the students, teachers, administrators or officials of or for any such school or college shall constitute an association. * * *" (Emphasis supplied)

I have underlined the key language which sets the requirements that must be met in order for your question to be answered in the affirmative.

It is possible that a bank could be considered to be "a common principal" as this office in its opinion of November 19, 1959, the headnote of which is cited as 60 OAG 140, stated that a credit union could be a principal to its member depositors. However, a bank customer is different than a credit union member. We must determine whether or not bank depositors that maintain savings accounts are a "group of persons similarly engaged between whom there exists a contractual relationship."

The nature of a bank depositor is spelled out in 9 Corpus Juris Secundum, Banks and Banking, at Section 267c as follows:

"The primary duty of a bank is to its depositors, and it has been said that the contract between a bank and a depositor is not materially different from any other contract by which one person becomes bound to take charge of and repay another's funds. The relation between a bank and a depositor may be dual in character, the bank being the depositor's debtor with respect to one thing and his agent with respect to another, or his debtor at one time and his agent at another; and while the relation between the bank and a depositor with respect to a general deposit is generally regarded as that of debtor and creditor, yet in another sense the depositor is the owner of the deposit, in that he can demand repayment at any time."

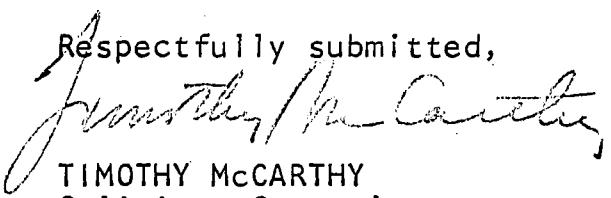
It would require a straining of the meaning of "similarly engaged"

to say that, because of the fact of a savings account, the depositors would have a common interest comparable to the interests which are required under Section 509.1(2). In the credit union situation which was discussed in the opinion cited above, Section 553.5 of the 1958 Code of Iowa was referred to which required credit union organizations to be limited to groups having a common bond of occupation or association or to be limited to neighborhoods, communities, or rural districts. There is no such restriction on banks.

Because of the credit union arrangement whereby the depositors became members, it was the Attorney General's opinion that there was a contractual area between the members of the credit union. I know of no similar situation which exists between a bank and its depositor. There is a contractual relationship between the depositor and the bank, but there is no membership or any other similar arrangement whereby contractual relationship between the depositors exists. Therefore, even though a bank could be considered to be a common principal, and even if a strained construction might be argued where it might be said that the depositors were similarly engaged, a contractual relationship between the depositors does not exist which is required by Section 509.1(2).

Therefore, it is my opinion that the customers of a bank who maintain a savings account are not eligible to have a group policy issued to the bank to insure the depositors in an amount equal to their deposit as no contractual relationship exists between these depositors which is required by Section 509.1(2).

Respectfully submitted,



TIMOTHY McCARTHY
Solicitor General
State of Iowa

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CITIES AND TOWNS: Compatibility of office between Urban Renewal Director and Low-Rent Housing Law Director. §§ 403.15, 403.16, 403.17 and 403A.22, as amended, 1962 Code of Iowa; Chapter 334, Acts of 61st G.A. The directors of Urban Renewal law and Low-Rent Housing law are not public officers and the common law rule of compatibility of office does not apply. There are statutory limitations under § 403A.22, as amended, which restrict actions of employees under the Low Rent Housing law. There is no incompatibility of office between the positions of relocation officer under Urban Renewal and secretary of the River Front Commission.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

March 8, 1966

Honorable Cleve Carnahan
State Representative
708 North Elm
Ottumwa, Iowa

Dear Mr. Carnahan:

You have submitted the following two questions:

"1. Is it a violation of Iowa law for the same man to be the director of the Ottumwa Urban Renewal Agency and also the director of the Ottumwa low-rent housing program.

"2. Is it a violation of Iowa law for the same man to hold the position of Relocation Officer under the Ottumwa Urban Renewal Program, Secretary of the Ottumwa Coliseum for the Riverfront Commission, and holder of the concessions of soft drinks and confectionaries at the Ottumwa Coliseum?"

The following statutes apply:

"403.15 Agency created. * * *
5. The mayor shall designate a chairman and vice-chairman from among the commissioners. An agency may employ an executive director, technical experts and such other agents and employees, permanent and temporary, as it may require, and the agency may determine their qualifications, duties and compensation. For each legal service as it may require, an agency may employ or retain its own counsel and legal staff. An agency authorized to transact business and exercise powers under this chapter shall file, with the local governing body, on or before March 31 of each year, a report of its activities for the preceding calendar year, which report shall include a complete financial statement setting forth its

assets, liabilities, income and operating expense as of the end of such calendar year. At the time of filing the report, the agency shall publish in a newspaper of general circulation in the community a notice to the effect that such report has been filed with the municipality, and that the report is available for inspection during business hours in the office of the city clerk and in the office of the agency."

"403.16 Personal interest prohibited. * * * No commissioner or other officer of any urban renewal agency, board or commission exercising powers pursuant to this chapter shall hold any other public office under the municipality, other than his commissionership or office with respect to such urban renewal agency, board or commission. Any violation of the provisions of this section shall constitute misconduct in office."

"403.17 Definitions. The following terms wherever used or referred to in this chapter, shall have the following meanings, unless a different meaning is clearly indicated by the context: * * *

19. 'Public Officer' shall mean any officer who is in charge of any department or branch of the government of the municipality relating to health, fire, building regulations, or to other activities concerning dwellings in the municipality."

"403A.22 Personal interest prohibited. No public official or employee of a municipality or board or commission thereof[and no commissioner or employee of a low-rent housing agency which has been vested with low-rent housing project powers under section two (2) of this Act] shall voluntarily acquire any personal interest direct or indirect, in any municipal housing project, or in any property included or planned to be included in any municipal housing project of such municipality, or in any contract or proposed contract in connection with such municipal housing project. Where such acquisition is not voluntary, the interest acquired shall be immediately disclosed in writing to the local governing body, and such disclosure shall be entered upon the minutes of the governing body. If any such official, commissioner or employee presently owns or controls, or has owned or controlled within the preceding two years, any interest direct or indirect, in any property which he knows is included or planned to be included in a municipal

housing project, he shall immediately disclose this fact in writing to the local governing body, and such disclosure shall be entered upon the minutes of the governing body; and any such official, commissioner or employee shall not participate in any action by the municipality, or board or commission thereof affecting such property. Any violation of the provisions of this section shall constitute misconduct in office." (Emphasis supplied - underlined material in brackets is amendment enacted by 61st General Assembly, Chapter 334, Section 3.)

Chapter 334, Section 2, Acts of the 61st General Assembly, which repealed Section 403A.5, reads in part as follows:

"Any municipality may create, in such municipality, a public body corporate and politic to be known as the 'Low-Rent Housing Agency' * * *

If the low-rent housing agency is authorized to transact business and exercise powers hereunder, the mayor, by and with the advice and consent of the local governing body, shall appoint a board of commissioners of the low-rent housing agency which board shall consist of five (5) commissioners. * * *

The powers of a low-rent housing agency shall be exercised by the commissioners thereof. * * *

The mayor shall designate a chairman and vice-chairman from among the commissioners. An agency may employ an executive director, technical experts and such other agents and employees, permanent and temporary, as it may require, and the agency may determine their qualifications duties and compensation. * * *"

I.

From the above statutes it must be noted that Section 403.15 provides for the employment by the commissioners of an executive director "and such other agents and employees" for the urban renewal agency. Chapter 334, Acts of the 61st General Assembly, in part of Section 2 thereof, provides for a similar appointment of employees by the commissioners of the low-rent housing agency. It is apparent from these two statutes that the positions which constitute a public office are those of the commissioners, rather than the directors of the agency. The Iowa legislature has chosen that the sovereign functions of government be exercised by the

commissioner, rather than employees of the commission. The general rule is that a public office is that office created by statute with the duties prescribed by statute. Hutton v. State, 235 Iowa 52, 16 N.W.2d 18 (1944).

While, as a practical matter, the urban renewal agency may be handled by the director and the low-rent housing law may be run by a director, under the statutes the director is an employee and statutory authority and duty is reposed among the commissioners.

Therefore, inasmuch as the positions you mentioned in your first question are not positions of "public office," there is not a per se conflict of office whereby the offices are incompatible. However, the statute must be further examined to see if there is an incompatibility which is created by statute. Section 403.16, in its last two sentences, has been quoted above. These key sentences involve a limitation of holding of other public office and use the words "no commissioner or other officer of any urban renewal agency, board of commission ... shall hold any other public office under the municipality...." (Emphasis supplied) While it can be argued that the word "officer" in this section can mean the executive director, technical experts and such other agents or members, the correct interpretation is in part controlled by the definition of "public officer" in Section 403.17(19) cited above. The meaning of the word "officer" as contained in Section 403.16 is also limited by the statutory language of that section which applies to "other officer ... exercising powers pursuant to this chapter...." The Urban Renewal Director has no statutory powers.

Inasmuch as the executive director of the urban renewal law only exercises those powers delegated by the commissioner and the word "officer" has generally been defined as a public officer, it is not a proper construction to assume that the word "officer" as used in Section 403.16 refers to the executive director of the urban renewal agency.

The other section which must be examined in the same context is Section 403A.22, quoted above. There is a restriction there contained in the next to the last sentence whereby "any such official, commissioner or employee shall not participate in any action by the municipality or board or commission thereof affecting such property." There does appear to be a possibility that the director of a low-rent housing law, if he also holds the position of director of the urban renewal law, while director of the low-rent housing law he will be confronted with situations where, while acting as director of the urban renewal agency, he will be called upon to act on property covered by the low-rent housing agency

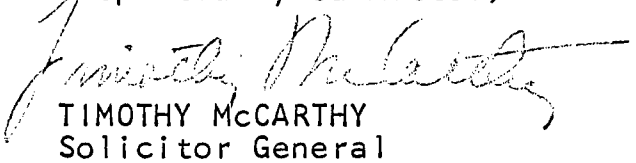
and this is prohibited by Section 403A.22.

Therefore, it is the position of this office that the positions described in the first question of your letter are not incompatible as these positions do not involve the holding of public office. These are positions of employment and there are statutory restrictions of action upon employees in Section 403A.22, as amended.

II.

The relocation officer under the urban renewal program does not hold public office and there would be no incompatibility of office if he also acted as the concessionaire at the Ottumwa Coliseum, or as secretary of the Ottumwa Riverfront Commission, which also is not a public position under Chapter 372 of the 1962 Code of Iowa.

Respectfully submitted,



TIMOTHY McCARTHY
Solicitor General

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ELECTIONS: Precinct Caucus. Section 36, Chapter 89, Acts of 61st G.A. Persons voting at a precinct caucus need not be registered voters.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

March 8, 1966

Honorable Clark Rasmussen
State Representative
500 Shops Building
Des Moines, Iowa

Dear Mr. Rasmussen:

The Attorney General has referred to me your recent request for an opinion upon the following question:

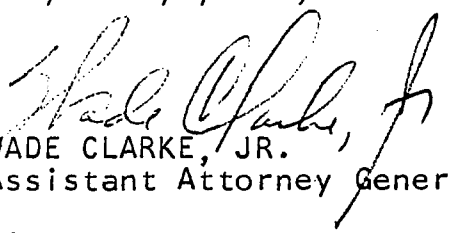
> Section 36, Chapter 89, Acts of the 61st G.A. states in part: "Any person voting at a precinct caucus must be an eligible voter and resident of the precinct." Does this section require an individual to be a registered voter in the precinct in registration cities?

A precinct caucus is not an "election" within the registration provisions of Chapters 47 and 48 of the 1962 Code of Iowa, as amended. Because of this fact, and because the Iowa court has indicated that the words "eligible voter" refer simply to persons who are eligible to vote under Article 2, section 1 of the Iowa Constitution, Edmonds v. Banbury, 28 Iowa 267, 4 Am Rep. 177 (1869), Pauser v. Sioux City, 220 Iowa 308, 262 N.W. 551 (1935), there is no requirement that such persons be registered voters. If the legislature had intended that such persons be registered, they could easily have stated that fact.

Article 2, section 1 of the Iowa Constitution requires that a party voting be a "... citizen of the United States, of the age of twenty-one years, who shall have been a resident of this State six months next preceding the election, and of the County in which he claims his vote sixty days...." If a person meets these constitutional

requirements and is a resident of the precinct, he may legally vote at the precinct's caucus. It is my opinion that there is no requirement that persons voting at a precinct caucus must be registered voters.

Very truly yours,



WADE CLARKE, JR.
Assistant Attorney General

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CITIES AND TOWNS: Private use of public funds - §§ 24.22, 24.24, 66.1, 368.26, 397.38, 397.39, 397.40, and 404.23, 1962 Code of Iowa. Private or unauthorized use of public funds is forbidden. Taxpayers may bring legal action and the form of the action is certiorari. The action of the city council in diverting public funds to an unauthorized use constitutes willful maladministration. This action is grounds for removal from office. Unauthorized expenditure of public money creates a personal liability upon the city council members who caused the expenditure.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

March 11, 1966

Honorable John L. Buren
State Senator
Forest City, Iowa

Dear Senator:

You have submitted the following fact situation for our consideration:

> "In the fall of 1964 the Town Council of Lake Mills, Iowa, unanimously voted to install four inch water main and a sewer line for a building owned by Compact Industries in Lake Mills. The water and sewer line went across 501 feet of the property owned by the industry and, in fact, was installed right up to the building. Several months ago the bill for this installation was paid by the Council from funds transferred from the municipal light plant. In addition to these facts, the manager and owner of 47% of the stock of Compact Industries was the mayor's brother. In addition, the City Attorney at that time was also representing Compact Industries."

In addition, you have submitted to us the following questions:

> "1. Can public funds be used to benefit a private industry by furnishing water and sewer directly into their building and across private property? (No easements of any kind were secured.) Complaint is not being made of the cost or payment of the main sewer line that was extended in the street for we understand this is perfectly permissible. If legal action can be brought who is to institute it and what type of

action will it be.

"2. Does the action of the Council and Mayor in this matter amount to a malfeasance and would they be personally liable for the costs of the water and sewer line installation? (The entire project was installed at a cost exceeding $10,000.00.)"

I.

Your first question really presents a problem as to whether the city, through its council members, has the authority to expend public funds for private use. We find the following language in Chapter 15 of Charles S. Rhyne's textbook entitled Municipal Law, at page 341:

> "Introduction. Municipalities, before any appropriated money can be expended, must relate their expenditures to the tests which govern the exercise of their powers. This requires a determination that the purpose for which the municipal money may be expended is within its corporate powers, is not limited by the state's constitution, and therefore can be authorized by the legislature and is at all times a public purpose. Consideration of the resources necessary to support these expenditures is found in other chapters.
>
> "Corporate Power of Expenditure. The authority or power to spend moneys for a particular purpose by a municipality must be granted by its charter or by general statutes of incorporation and organization, and the disbursement of public funds must be made in accordance with these statutes or charter. Whenever moneys are raised for an authorized particular purpose, such moneys must be devoted solely to such use." (Emphasis supplied)

The Iowa rule is found in the case of Love v. City of Des Moines, 210 Iowa 90, 230 N.W. 373 (1930), at page 94 of the Iowa reports as follows:

> "... One of the fundamentals of popular government is that the power of taxation and of the expenditure

of taxes shall not be exercised for private benefit, or for the purpose of mere gratuities to private interests. This fundamental principle has its recognition in Section 31 of Article III of our Constitution, as follows:

"'No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor shall any money be paid on any claim the subject-matter of which shall not have been provided for by pre-existing laws, and no public money or property shall be appropriated for local or private purposes, unless such appropriation, compensation, or claim, be allowed by two thirds of the members elected to each branch of the general assembly.'

"Generally speaking, it is vital to the legality of any and every payment or promise of public funds that there shall be a consideration therefor in the nature of a public benefit. If there be want of consideration in this case, this is its nature."

The statutory authority of cities and towns in regard to extension of drains and sewers is found at Section 368.26, subsections 1 and 2, as amended, which read as follows:

"368.26 Drains and sewers.

1. They shall have power to provide drainage systems for flood and other surface waters and to regulate the connection of private drains thereto. They may order connections thereto from abutting private property when public health or safety requires such connection and in the event such orders are not complied with they may cause the work to be done and the cost thereof to be assessed against the property.

2. They shall have power to provide sewer systems and sewage disposal plants and to regulate sewer connections to private property. They may order sanitary toilet facilities to be installed by any property owner whose property abuts on a sewer line and the abandonment and removal of all other toilet facilities and in the event such order is not complied with may cause the work to be done and the cost to be assessed against the property, which assessment may be

> spread over a period not to exceed ten years. The council may provide by resolution for the issuance of certificates payable to bearer or to the contractor who has installed the facilities and may negotiate the same. The provisions of chapter three hundred ninety-six (396) of the Code shall be applicable."

It is clear that this section provides that private connections must be assessed against the property.

It is the opinion of this office that the general rule in the State of Iowa is that public funds may not be spent for private purposes and that the situation that you describe requires that an assessment be made against the adjoining property. Public funds cannot be used to benefit this private industry. The only circumstance where public funds may be used in regard to industry is under Chapter 247, Acts of the 60th General Assembly, which provides authority for cities and towns to issue revenue bonds for the purpose of securing and developing new industry. This is not your present situation.

In the second part of your first question you inquire as to whether legal action can be brought and who is to institute it. The case of Collins v. Davis, 47 Iowa 256, 10 N.W. 643 (1881) is a case where a city illegally reduced an assessment from $35,000.00 to $17,000.00. The court held that the city's action was without authority and was void. The court held that taxpayers had the right to bring the action and the form of action was certiorari.

II.

As to your second question, Section 404.23 of the 1962 Code of Iowa applies and reads as follows:

> "404.23 Diversion of funds. Any councilman or officer of a municipal corporation who shall participate in, advise, consent, or allow the proceeds of any tax or assessment caused to be levied by such municipal corporation, or the proceeds of any source of municipal revenue other than taxation, to be diverted to any purpose not authorized by law, or who shall in any way become a party to such diversion, shall be guilty of willful maladministration."

Additionally, Section 24.22 provides that the transfer of funds of a municipality from one fund to another fund requires approval of the State Appeal Board. Sections 397.38, 397.39 and 397.40 provide the circumstances under which transfers may be made from the municipal utility funds. Generally, permission is required of the State Comptroller. It would appear that the transfer requires either the approval of the State Comptroller or the State Appeal Board and if Section 24.22 actually applies, Section 24.24 provides a penalty as follows:

> "24.24 Violations. Failure on the part of any public official to perform any of the duties prescribed in chapters 22, 23, and 24, and sections 8.39 and 11.1 to 11.5, inclusive, shall constitute a misdemeanor, and shall be sufficient ground for removal from office."

It should be noted that you advise that this project cost over $10,000.00. Iowa Code Section 23.2 requires preparation of plans, notice of hearing, hearing and competitive bidding on all public improvements over $5,000.00. There are requirements for a valid contract. You do not advise whether this was done or not.

The action of the council is set out in the statutes as being willful maladministration under Section 404.23 and sufficient grounds for removal from office under Section 24.24. Either of these would amount to sufficient grounds for removal under Section 66.1 which reads as follows:

> "66.1 Removal by court. Any appointive or elective officer, except such as may be removed only by impeachment, holding any public office in the state or in any division or municipality thereof, may be removed from office by the district court for any of the following reasons:
> 1. For willful or habitual neglect or refusal to perform the duties of his office.
> 2. For willful misconduct or maladministration in office.
> 3. For corruption.
> 4. For extortion.
> 5. Upon conviction of a felony.
> 6. For intoxication, or upon conviction of being intoxicated."

It is the general rule of law that a public officer who goes outside of his public authority is personally liable for his acts

and is not entitled to the protection of his office. 67 Corpus Juris Secundum, Officers, Section 126.

Therefore, it is my opinion that the action of the city council amounts to malfeasance and that the council members are personally liable for any loss the city may suffer.

Respectfully submitted,

TIMOTHY McCARTHY
Solicitor General

ew

LABOR: Commissioner of Labor. Inspection of low pressure boilers located in places of public assembly. Chapter 108 of the Acts of the 61st G.A.; Chapter 89 of the 1962 Code of Iowa. A low pressure boiler, the location of which would constitute a danger to those who are present in a place of public assembly, is under the purview of Chapter 108, Acts of the 61st G.A.

March 14, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Mr. Robert Chesher
Deputy Commissioner
Department of Labor
L O C A L

Dear Mr. Chesher:

This is in reply to your request for an opinion concerning Chapter 108 of the Acts of the 61st General Assembly, an amendment to Chapter 89, 1962 Code of Iowa, wherein you present the following:

> "Senate File 87 of the 61st General Assembly amended Chapter 89 of the Iowa Code to provide for annual inspection of low pressure boilers in places of public assembly.
>
> "We have run into a number of public places that are heated by low pressure boilers where the boiler is located in a separate building apart from the main structure, although the steam and waterlines, gauges and valves, etc. run directly into the building itself. The distance of the boiler room to the place of public assembly ranges from five feet up to approximately 3/4 of a block.
>
> "I would like a formal opinion as to whether or not the above described low pressure boilers should be covered by Chapter 89 of the Iowa Code."

Section 89.2(1) of the 1962 Code of Iowa as amended by Section 1 of Chapter 108 of the 61st G.A. is as follows:

> "1. It shall be the duty of the state boiler inspector, to inspect or cause to be inspected internally and externally, at least once every

> twelve months, in order to determine whether all such equipment is in a safe and satisfactory condition, and properly constructed and maintained for the purpose for which the same is used, all steam boilers, tanks, jacket kettles, generators, all steam boilers used for heating purposes carrying a pressure of not more than fifteen (15) pounds per square inch gauge and LOCATED IN PLACES OF PUBLIC ASSEMBLY, all hot water heating boilers carrying a pressure of not more than thirty (30) pounds per square inch gauge located in places of public assembly." (Underline indicates amendment - Captilization indicates emphasis)

"Places of public assembly" is defined by Sec. 3(4) of Chapter 108 and reads as follows:

> "'4. Place of public assembly. "Place of public assembly" shall mean any building or portion thereof designed, intended and used for occupation by persons for purposes of entertainment, instruction or amusement and shall be construed to include theatres, motion picture theaters, hospitals, places of worship, schools, colleges and institutions.'" (Emphasis Added)

Combining the appropriate parts of Section 1 and Section 3(4) of Chapter 108 supra, we have the phrase "located in any building or portion thereof." The ultimate question would seem to be the determination of the meaning of the above phrase.

In seeking construction of a statute, one should look not only to the language of a statute, but to the subject matter of the act, the object to be accomplished, or the purpose to be subserved, and the law should be construed to give effect to the legislative purpose. State v. Balsley, 242 Iowa 845, 853, 48 N.W.2d 287 (1951).

It would seem appropriate to determine the purpose and object the legislature intended by the inspection of low pressure boilers located in places of public assembly.

Chapter 89 of the 1962 Code of Iowa is enacted under Title V, which is entitled "Police Power." The State under the "police power" may enact all manner of laws reasonably designed for the protection of the safety of the public. Two Guys from Harrison, Inc. v. Furman, 156 A.2d 57, 62, 58 N.J.Sup. 313. (1959)

The Supreme Court of Minnesota, in the case of State ex rel Graham v. McMahon, 65 Minn. 453, 68 N.W. 77 (1896), in talking about the inspection of steam boilers said, to-wit:

> "The object of the act of 1889 was to provide for the inspection of steam boilers, and the examination, as to qualifications, of persons intrusted with their management, or with the management of any machinery operated by steam within this state, that its citizens might be protected from the greatly-increasing hazards arising out of defective construction, or want of care and repair, of boilers, as well as unskillfulness and incompetency on the part of the hundreds of persons engaged in handling them and their appliances. It was intended as a police regulation designed to secure public safety; and in view of the universal use of steam in all kinds of manufacturing and mechanical business, and even in farming operation,-small as well as large,-no one should doubt the wisdom of the enactment and enforcement of a reasonable measure in reference to the inspection of such dangerous agencies as steam boilers, and the machinery connected therewith, and the examination, as to their qualifications, of those who are intrusted with their management."

It is clear that the above reasoning is equally applicable in describing the object and purpose of Chapter 108.

The literal meaning of the phrase "located in any building or portion thereof" would assume being "inside of, within the bounds or limits of;" an enclosure. Board of Chosen Freeholders of Hudson County, et al v. Central R. Co. of New Jersey, et al, 59 A. 303, 307, 68 N.J. Eq. 500 (1904). If this meaning were adopted then a boiler, so long as it was separated from the building constituting a public place, would not be required to be inspected for safety regardless of the fact that the danger would be just as inherent as if the boiler was located "within" the "four walls" of the "place of public assembly." If fairly possible, keeping the object and purpose of Chapter 108 in mind, said act should be construed to avoid this unreasonable consequence. Worthington v. McDonald, 246 Iowa 466, 68 N.W.2d 89 (1955). It is a well known rule of statutory construction, that the intent of the legislature should be considered when literal words would bring about an end completely at variance with the purpose of the statute. U.S. v. Merchants Mut. Bonding Co., 220 F.Supp. 163 (1963).

Statutes, the purpose of which is the protection of lives and physical well-being of people, are construed to prevent the dangers thereof and to provide a remedy in accordance with said purpose. Chicago, M & St. Paul Ry. Co., v. Voelker, 129 F. 522, 65 C.C.A., 226, 70 L.R.A. 264 (1904). Such is the purpose of Chapter 108. Having ascertained the intent of Chapter 108, we must now give effect to that end.

For the reasons above, it is the opinion of this office that a low pressure boiler, the location of which would constitute a danger to those who are present in a place of public assembly, is under the purview of Chapter 108, Acts of the 61st General Assembly, an amendment to Section 89.2 of the 1962 Code of Iowa.

Respectfully submitted,

ROBERT D. BERNSTEIN
Assistant Attorney General

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STATE OFFICES AND DEPARTMENTS. Department of Health. Licensing and Qualifications of Physical Therapists. §59; Chapter 167, Acts of the 61st G.A. The term "office" as used in Sec. 5(1) may refer to a doctor's office or a private office of a physical therapist.

March 17, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Arthur P. Long, M.D.
Commissioner of Public Health
State Office Building
L O C A L

Dear Dr. Long:

This is in response to your inquiry concerning Chapter 167, Acts of the 61st G.A., wherein you state the following:

"Questions have arisen in regard to the administration of Chapter 167, Acts of the 61st General Assembly (S.F. 275), relating to licensing and qualifications of physical therapists.

" 1. What date, if any, would be considered the termination date of granting licenses under Section 5, paragraphs 1, 2 and 3?

" 2. In Section 5, paragraph 1, reference is made, 'in a hospital, sanitorium, clinic, office or': Does the word office, as used, apply to a Doctor's office or a private office of a physical therapist?"

In respect to Question 1, Section 5(3) of Chapter 167, Acts of the 61st G.A., provides:

"3. That on or before the effective date of this Act he has graduated from a school or course of physical therapy approved by the board of physical therapy examiners. The application under this title shall be filed with the physical therapy examiners and accompanied by a fee of twenty (20) dollars, and submitted within ninety (90) days after the effective date of this Act." (Emphasis Added)

Since the effective date of Chapter 167, Acts of the 61st G.A., was July 4, 1965, it would seem that the termination of granting licenses pursuant to Section 5 would be ninety (90) days from that date. However, a statute which requires the fixing of a time period for doing something which may effectively be done at another time is regarded as directory and not mandatory. Yengel v. Allen, 179 Iowa 633, 161 N.W. 631, (1917).

Because the filing of this application after ninety (90) days would not injuriously affect other's rights, this office feels that said period should be considered as a guideline only, and that the time for granting of a license under Sec. 5(3) of Chapter 167, may extend beyond this ninety (90) day period. Bechtel v. Board of Supervisors of Winnebago County, 217 Iowa 251, 251 N.W. 633 (1934).

In answer to Question 2, Section 5(1) is as follows:

> "1. That, under the direction of a licensed physician or surgeon or osteopathic physician or surgeon, he has practiced physical therapy either in a hospital, sanitorium, clinic, office or nursing home for not less than three (3) years within a five (5) year period immediately before application; . . . ."

It is a well known rule of statutory construction, that if the particular language of a statute is clear it must be given its plain and ordinary meaning and there is no room for construction of same. Cook v. Bornholdt, 250 Iowa 696, 95 N.W.2d 749 (1959). As long as a person has practiced physical therapy under the direction of a licensed physician or surgeon or osteopathic physician or surgeon the term "office" may refer to a doctor's office or a private office of a physical therapist.

Respectfully submitted,

Robert D. Bernstein

ROBERT D. BERNSTEIN
Assistant Attorney General

ms

SCHOOLS AND SCHOOL DISTRICTS: Attachment. §§275.1, 275.18, 285.12 and Chapter 240, Acts of the 61st G.A. An attachment appeal taken under Chapter 240, Acts of the 61st General Assembly does not suspend the effective date or operation of the attachment.

March 17, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Mr. Lorne R. Worthington
Auditor
State of Iowa
State House
L O C A L

Dear Mr. Worthington:

This is in response to your letter dated January 21, 1966, wherein you stated:

> "* * * the 61st G.A. amended Section 275.1 of the Code and required all areas of the state to be in a high school district by July 1, 1966. There was also provision for appeal of the attachment to a particular district which could effectively postpone the official reorganization."

You then raised the following questions:

> "1. If the attachments have been legally made, but are under appeal at August 15, how can the school board know whether or not to levy taxes on the property?
>
> "2. If the new district cannot levy, can the old non-high school levy? If the old district cannot levy, how can the money be raised to cover the cost of educating the children?
>
> "3. If the matter of legally attaching the non-high school districts is not settled by levy time, is there any way for the school district to educate the children without placing a disproportionate amount of taxes on the present district?"

In answer to your first question I refer you to the third paragraph of Section 275.1, as amended by Chapter 240, Acts of the 61st General Assembly, which provides:

> "It is further declared to be the policy of the state that all the area of the state shall be in a district maintaining twelve grades by July 1, 1966. If any area of the state is not a part of such a district by April 1, 1966, or is not included in a reorganization petition filed in accordance with section two hundred seventy-five point twelve (275.12) of the Code on or before April 1, 1966, the area shall be attached by the county board of education to a district, or districts maintaining twelve (12) grades, <u>such attachment to become effective July 1, 1966</u>, and provided such attachment has the approval of the state board of public instruction. Any such district or part thereof attached by the county board of education, with the approval of the state board of public instruction, shall have the right to appeal this attachment to a court of record in the county in which said district or part thereof is located within twenty (20) days after the date of the approval by the state board of public instruction.
>
> "'Any area included in a reorganization petition filed on or before April 1, 1966, and not becoming a part of a district maintaining twelve (12) grades because of the subsequent failure of the proposal to carry or by reason of judicial appeal proceedings, shall be attached to a district, or districts maintaining twelve (12) grades by the county board of education. <u>Such attachment shall become effective July 1, 1966, or if impossible by said date because of later vote or appeal proceedings, on such date as fixed by the state board of public instruction.</u> The authority of the county board of education to make such attachments shall extend beyond July 1, 1966, when necessary by reason of later vote or appeal proceedings.'" (Emphasis Added)

School district alterations or attachments become effective at the precise time set by statute. <u>78 C.J.S., School and School Districts, § 47, p. 741</u>. On the effective date of the alteration or attachment, the district or portion thereof being attached loses its separate existence and it becomes integrated into the

district to which it is attached. State ex rel. Consolidated School District No. 8 of Pemiscot County v. Smith, 343 Mo. 288, 121 S.W.2d 160, (1938); 78 C.J.S., Schools and School Districts, § 48, pp. 741-742. After an attachment becomes effective "* * * the officers or directors of a district to which territory is added acquire and have jurisdiction of such added territory as fully as over the territory previously comprised within the district, while the officers or directors of a district from which territory is detached possess no further authority or jurisdiction with respect thereto after the transfer." 78 C.J.S., Schools and School Districts, supra. (Emphasis Added). Applying the above principles to the facts presented by you, it is my opinion that on July 1, 1966, the attached non-twelve grade district goes out of existence and that territory becomes a part of the district maintaining twelve grades to which it was attached. Thereafter, the non-twelve grade area is subject to taxation within the twelve grade district. Missouri-Kansas-Texas Railroad Company v. Cowden, 184 Okla. 260, 86 P.2d 776, (1939); Grout v. Illingworth, 131 Iowa 281, 108 N.W. 528 (1906).

Chapter 240, Acts of the 61st General Assembly provides in part:

> "Any such district or part thereof attached by the county board of education, with the approval of the state board of public instruction, shall have the right to appeal this attachment to a court * * * in the county in which said district or part thereof is located within twenty (20) days after the date of the approval by the state board of public instruction." (Emphasis Added)

In view of the foregoing, we must determine whether an appeal will defer the operation of the attachment so as to preclude the board from levying taxes on property in the attached area. It is relevant to note that the Legislature did not provide for a suspension of the effective date of an attachment pending the final determination of an appeal. The case of State ex rel. Schilling v. Community School District of Jefferson, Greene County, 252 Iowa 491, 106 N.W.2d 80 (1961), lends support to the proposition that where the Legislature has not expressly provided for a stay pending appeal none was intended. In State ex rel Schilling v. Community School District of Jefferson, Greene County, supra, at page 498 of the Iowa Reports, the Supreme Court said:

> "The statute contains the mandatory provision that the county superintendent 'shall call a special election * * * within thirty days from the * * * final determination of such boundaries, * * *.' Joint districts only are excepted from

> this provision in case of appeal. 'In the absence of express statutory authorization, it is apparent that the appellant is not entitled to a supersedeas or stay of proceedings as a matter of right.' 3 Am. Jur., Appeal and Error, section 538; 42 Am. Jur., Public Administrative Law, section 238.1, page 678.
>
> "A right of appeal is purely a creature of statute and is not an inherent constitutional right, but is one which the legislature may grant or deny at pleasure. Everding v. Board of Education, 247 Iowa 743, 76 N.W.2d 205, and citations. 2 Am. Jur., Appeal and Error, section 6. By the same token the legislature has the right to refuse a stay or [sic] proceedings pending appeal." (Emphasis Added)

The Legislature has expressly provided for a stay in the proceedings pending appeal in Section 275.18 which postpones the reorganization election in joint districts until the appeal has been disposed of and Section 285.12 which stays the order of the county board pending final order on appeal. If the Legislature had intended to suspend the effective date of an attachment pending final order on appeal they could and would have so stated. This office cannot under the guise of construction extend or enlarge enactments of the Legislature. It is my opinion that the operation of an attachment is not suspended pending an appeal. Therefore, the board of the enlarged twelve grade district may levy taxes on the property in the attached area on August 15.

In view of the above answer your second and third questions are now moot.

Very truly yours,

NOLDEN GENTRY
Assistant Attorney General

ms

TAXATION: Personal Property Tax - Pick-up Campers--Sections 321.1(1), 321.1(2), and 321.130, Code of Iowa, 1962. A 'camper' which is permanently mounted on a pick-up truck is not subject to taxation as personal property. If the 'camper' is easily or conveniently detachable, however, it is subject to taxation as personal property.

STATE OF IOWA
DEPARTMENT OF JUSTICE
DES MOINES, IOWA

March 18, 1966

Honorable Gene W. Glenn
State Representative
R.R. 7
Ottumwa, Iowa

Dear Representative Glenn:

This is in response to your recent inquiry concerning the following:

> "Personal property taxes have been imposed on camping trailers. It is my understanding that the license fees paid by many pick-up truck owners includes the gross weight of the camping attachment and the truck. Thus, the camper owner pays taxes on the camper as personal property and also a higher license fee because of the weight of the camper.
>
> "On the other hand, stock trucks are not taxed as personal property. This gives rise to a feeling of inequity on the part of many camper owners, whose campers are more or less permanently installed on the pick-up trucks.

> "Some question has arisen about the propriety of taxing campers as personal property. I would appreciate an Attorney General's Opinion in this matter at your early convenience."

To answer your inquiry it is necessary to consider the following provisions of Chapter 427, Code of Iowa, 1962, Property Exempt and Taxable. Code Section 427.1 provides:

> "The following classes of property shall not be taxed:
> ..."

Code Section 427.13 provides:

> "All other property, real or personal, is subject to taxation in the manner prescribed, and this section is also intended to embrace:
>
> "11. Every description of vehicle, including bicycles, exempt as otherwise provided."

In interpreting the foregoing statutes our courts have adopted the rule that all property is taxable unless there is a specific exemption in the law. The specific exemption relative to the situation being discussed here is Section 321.130, Code of Iowa, 1962, which provides:

> "321.130 Fees in lieu of taxes. The registration fees imposed by this chapter upon private passenger motor vehicles or

> semitrailers shall be in lieu of all taxes, general or local, to which motor vehicles or semitrailers may be subject, and if a motor vehicle or semitrailer shall have been registered at any time under this chapter it shall not thereafter be subject to a personal property tax unless such motor vehicle or semitrailer shall have been in storage continuously as an unregistered motor vehicle or semitrailer during the preceding registration year."

In order for a 'camper' to qualify for the above exemption, then, it must qualify as a motor vehicle. Chapter 321, Code of Iowa, 1962, defines vehicle and motor vehicle as follows:

> Section 321.1, Definition of words and phrases, provides:
>
> > "The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them.
> >
> > "1. 'Vehicle' means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks.

> "2. 'Motor vehicle' means every vehicle which is self-propelled but not including vehicles known as trackless trolleys which are propelled by electric power obtained from overhead trolly wires, but not operated upon rails. The terms 'car' or 'automobile' shall be synonymous with the term 'motor vehicle.'"

In light of the above definitions, a pick-up truck would obviously qualify for the exemption of Section 321.130. However, a pick-up truck with a 'camper' presents a somewhat more difficult question and it is necessary to consider the following Iowa Supreme Court case in which an almost identical situation is considered by the Court. In Crown Concrete Co. vs. Conkling, 247 Iowa 609, 75 N.W. 2d 351 (1956), the issue was whether a cement mixer mounted on a licensed truck is subject to taxation as personal property. On page 613 of the case, the Court stated:

> "Undoubtedly plaintiff's trucks are registered motor vehicles within the meaning of Section 321.130. If a truck and the mixer mounted on it are to be viewed as an integral whole it seems the mixer, as well as the chassis, clearly falls within the statutory exemption from personal property tax. If however the mixer and the truck may be viewed as separate pieces of property and the mixer may be dissected from the truck for the purpose of subjecting it to the tax here in dispute, of course section 321.130

> does not exempt the mixer. We do not think the mixer may be dissected from the truck for such purpose. ...The evidence clearly shows each mixer is in fact an integral part of the truck upon which it is mounted, the whole constitutes a single unit and is used as such. ..."

It should be noted here that the Court based its decision on the fact that the cement mixers are permanently mounted on the trucks for the Court stated on page 611:

> "... The mixers are purchased separately from the trucks and then securely and permanently mounted thereon. Rarely is a mixer removed from the truck on which it is mounted. Such removal would take two men a day and a half." (Emphasis added)

In accordance with the foregoing, it is the opinion of this office that a 'camper' which is permanently mounted on a pick-up truck is not subject to taxation as personal property. If the 'camper' can be easily or conveniently detached from such pick-up truck, however, it is subject to taxation as personal property.

Very truly yours,

David W. Kelly

David W. Kelly
Assistant Attorney General

DWK:dj

COUNTY AND COUNTY OFFICERS: Group insurance programs. Chapter 365A, as amended, and §332.3, 1962 Code of Iowa; Chapter 232, Acts of the 60th G.A., and Chapter 394, Acts of the 61st G.A. There is no authority for the establishment of health insurance plans under Chapter 365A, as amended, for county boards of supervisors who are not county employees. There is no authority for the contribution of a flat sum in addition to ordinary compensation to county employees whereby said employees would purchase individual health insurance plans.

March 24, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Mr. John W. Shafer
Allamakee County Attorney
23 Allamakee Street
Waukon, Iowa

Dear Mr. Shafer:

Reference is herein made to your letter of February 10 in which you stated:

> "I have been requested by the Allamakee County Board of Supervisors to request an opinion of you as to the legality of the Board of Supervisors paying a portion of the cost of health insurance for county employees and county officers.
>
> "In examining this problem I find that Section 10 of Chapter 332.3 gives the Board of Supervisors the power to fix compensation for all services of county and township officers not otherwise provided by law, and to provide for the payment of same. Chapter 232 of the Laws of the 60th General Assembly allowed payment and establishment of group insurance plans for employees of state, county school district, etc. Chapter 394 of the Laws of the 61st General Assembly allowed contributions wholly or in part by the governing body.
>
> "My query is whether the Board of Supervisors can pay or contribute toward insurance plans for county officers when their salaries are already set by law. The further query that was requested was whether or not the Board of Supervisors could contribute a flat sum in addition to ordinary compensation to the employees and allow them to pay toward their own health insurance plans without any group plan being organized."

In reply thereto I advise:

1. I find no authority in Chapter 365A, Code of 1962, Chapter 232, Acts of the 60th General Assembly, or Chapter 394, Acts of the 61st General Assembly for the establishment of health insurance plans for county officers and, therefore, it follows that the Board of Supervisors cannot contribute to the payment of such insurance. The group insurance authorized under these chapters is limited to county employees.

2. The second question is answered in the negative. It is plain from the foregoing chapters that the use of public money for the payment of such insurance is confined to group insurance. There is no authority to use such funds for individuals' insurance or to pay therefrom the individual employee's health insurance premiums.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

ew

MILITARY CODE AND RELATED MATTERS: Accrual of state vacation time by National Guard technicians. Section 79.1, 1962 Code of Iowa, as amended. National Guard technicians may not be credited with their periods of service as technicians in connection with accrual of annual vacation under §79.1 nor may their period of service as technicians be considered in connection with salary eligibility under the provisions of the classification and compensation plan promulgated by the State Personnel Director.

March 25, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Joseph G. May
Col, GS, Iowa ARNG
Assistant Adjutant General
Camp Dodge
L O C A L

Dear Colonel May:

I am in receipt of your letter to the Attorney General in which you request an opinion concerning the following:

> "This Department currently has several employees, formerly employed as National Guard technicians, but presently employed under the Departmental Table of Organization authorized by the Director of Personnel, office of the State Comptroller.
>
> "Are the former National Guard technicians now employed under the Departmental Table of Organization of the State Personnel Division creditable with the period of service as technicians in connection with accrual of annual vacation eligibility under the provisions of Section 79.1 Code 1962, as amended, and in connection with determination of salary eligibility and longevity credit under the provisions of the 'Classification and Compensation Plan' promulgated by the State Personnel Direction?"

In order to answer your question some discussion is necessary relative to the rather complex employment status of the National Guard technician. He is paid by the Federal government which also prescribes the duties required of him in his particular job classification. Along with the receipt of a salary from the Federal government, a technician is entitled to medical, hospital, and loss of pay benefits if injured on the job or if he suffers illness which may be attributed to job performance under the Federal Employees Compensation

Act (63 Stat. 865 et seq) as amended (5 USC 751 Et seq). He is also entitled to benefits of the Federal Unemployment Compensation Act (68 Stat. 1130 et seq) as amended (42 USC 1361 et seq). National Guard Regulation 51, and Air National Guard Regulation 40-10 set out in detail eligibility requirements for annual leave and sick time. It is also noteworthy to mention that these technicians are eligible for benefits of the Federal Old Age Survivors Insurance program under the Social Security Act (49 Stat. 622 et seq) as amended (42 USC 401 et seq).

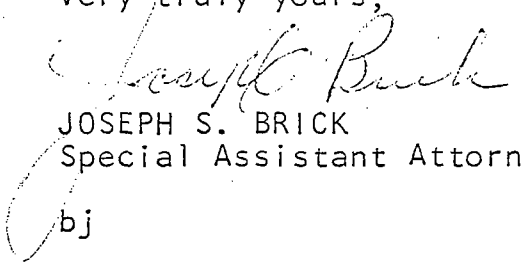
On the other hand, the State Adjutant General hires the technician and may, in certain instances, terminate the technician's employment.

We are not unmindful of the previous opinion of this office under date of February 16,1966, which held that these technicians are eligible to participate in the state-sponsored insurance program, and that they also participate in the Iowa Public Employment Retirement System.

In this regard we again mention the fact that a National Guard technician may be considered a State employee for some limited purposes, but for the most part, he performs Federal services and he must be considered a Federal employee. To allow these persons to accrue longevity for purposes of vacation time and salary classification under state law at a time when they are performing services almost exclusively for the Federal government would be an anomaly of reason and logic.

We are therefore of the opinion that National Guard technicians may not be credited with their periods of service as technicians in connection with accrual of annual vacation under the provisions of section 79.1 of the 1962 Code of Iowa, as amended, and further that their period of service as technicians can not be considered in connection with salary eligibility under the provisions of the classification and compensation plan promulgated by the State Personnel Director.

Very truly yours,



JOSEPH S. BRICK
Special Assistant Attorney General

bj

SCHOOLS AND SCHOOL DISTRICT - Authority of board of the Reorganized school district to terminate teachers' contract. §§275.25, 279.13, 1962 Code of Iowa. The new Board of Directors of a Reorganized School District does have the authority to terminate a contract of a teacher of a rural school district which by virtue of the reorganization becomes a part of the reorganized school district.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

March 30, 1966

The Honorable Keith H. Dunton
State Representative, Keokuk County
Box 77
Thornburg, Iowa

Dear Representative Dunton:

Your letter of request under date of March 17, 1966, states as follows:

> "A problem exists relative to teacher employment in our newly-organized high school districts, upon which I would appreciate a ruling.
>
> "Section 275.25, Code of Iowa, states, 'the new Board of Directors shall have a complete control of the employment of all personnel for the newly-formed community school district for the ensuing school year.' My question is this: In these rural districts that will become a part of a high school district July 1, 1966, and in which the board of the said rural independent district has failed to notify the presently employed rural teacher in a legal manner of termination of her contract at the close of the present school year, does the new board of the community district of which this rural district becomes a part have the authority to terminate this contract by a legal notice, including consideration of termination before April 1?"

Before answering, resort must be had to portions of certain Code sections pertinent to your inquiry:

> "275.25 ... The new board shall organize

within fifteen (15) days following their election upon call of the county superintendent. The new board of directors shall have complete control of the employment of all personnel for the newly formed community school district for the ensuing school year. Following the organization of the new board they shall have authority to establish policy, organize curriculum, enter into contracts, and complete such other planning and take such action as is essential for the efficient management of the newly formed community school district."

"279.13 Contracts with teachers - automatic continuation - exchange of teachers.

"* * *

"Said contract shall remain in force and effect for the period stated in the contract and thereafter shall be automatically continued in force and effect for equivalent periods, except as modified or terminated by mutual agreement of the board of directors and the teacher, until terminated as hereinafter provided. On or before April 15, of each year the teacher may file his written resignation with the secretary of the board of directors, or the board may by a majority vote of the elected membership of the board, cause said contract to be terminated by written notification of termination, by a certified letter mailed to the teacher not later than the tenth day of April; provided, however, that at least ten (10) days prior to mailing of any notice of termination the board or its agent shall inform the teacher in writing that (1) the board is considering termination of said contract and that (2) the teacher shall have the right to a private conference with the board if the teacher files a request therefor with the president or secretary of the board within five (5) days; and if within five (5) days after receipt by the teacher of such written information the teacher files with the president or secretary of the board a written request for

a conference, the board shall, before any notice of termination is mailed, give the teacher written notice of the time and place of such conference and shall hold a private conference between the board and teacher and his representative if the teacher appears at such time and place. In event of such termination, it shall take effect at the close of the school year in which the contract is terminated by either of said methods. The teacher shall have the right to protest the action of the board, and to a hearing thereon, by notifying the president or secretary of the Board in writing of such protest within twenty days of the receipt by him of the notice to terminate, in which event the board shall hold a public hearing on such protest at the next regular meeting of the board, or at a special meeting called by the president of the board for that purpose, and shall give notice in writing to the teacher of the time of the hearing on the protest. Upon the conclusion of the hearing the board shall determine the question of continuance or discontinuance of the contract by a roll call vote entered in the minutes of the board, and the action of the board shall be final. The foregoing provisions for termination shall not affect the power of the board of directors to discharge a teacher for cause under the provisions of section 279.24. The term 'teacher' as used in this section shall include all certificated school employees, including superintendents."

"279.15 Nonemployment of teacher-when. No contract shall be entered into with any teacher to teach an elementary school when the average daily attendance of elementary pupils in such school the last preceding term therein was less than eight such pupils of school age, resident of the district or subdistrict, as the case may be, nor shall any contract be entered into with any teacher to teach an elementary school for the next ensuing term when it is apparent that the average daily attendance of elementary pupils in such school will be less than eight or the enrollment less than ten such pupils of school age, resident of the district or subdistrict, as

> the case may be, regardless of the average daily attendance in such school during the last preceding term, unless the parents or guardians of ten or more such elementary children subscribe to a written statement sworn to before the county superintendent or a notary public certifying that such children will enroll in and will attend such elementary school if opened and secure from the county superintendent written permission authorizing the board to contract with a teacher for such school for a stated period of time not to exceed three months."

We assume that this is a valid reorganized school district, that the new board of directors has been elected, and that they have had the required organization meeting and that a division of assets and liabilities has or will occur as recited in sections 275.28 or 275.29 of the 1962 Code of Iowa.

Research does not disclose any Iowa authorities specifically confronted with the problem you have raised. However, Missouri has had occasion to deal with this problem in McClure v. Princeton Reorganized School District R-5, 328 S.W. 2d 65 (1959). The court's statement of the facts of this case is as follows:

> "A general statement of the facts is advisable. On and prior to January 1, 1955, there existed in Mercer County 43 rural school districts, one of which was Nigh School District No. 85. There were other districts with which we are not concerned.
>
> "On January 31, 1955, a petition was filed for the purpose of consolidating said 43 districts into a reorganized district. An election was held on the following March 14th and the vote favored the consolidation. An interim board of directors was elected, and on April 7th, at the regular school election, a new board of directors was elected. This reorganized district was designated 'Consolidated District C-2'. Subsequent to the events giving rise to this cause of action, Consolidated C-2 became a part of Reorganized School District R-5, the defendant in this case. This subsequent reorganization is of no importance relative to the issues on this appeal, except that defendant R-5 will be required to pay the judgment if affirmed. There is no dispute about that being correct.

> "The material facts giving rise to this suit are: That plaintiff had a teacher's contract with the Nigh District for the teaching year of 1953-54, which was entered into on April 13, 1953; and that on April 7, 1954, she was again employed by the Nigh District for the school year of 1954-55, which would end in April, 1955. However, on February 11, 1955, the board of directors of Nigh District entered into a written contract with her to teach the Nigh School during the year of 1955-56. This is the contract upon which the suit is founded. It will be observed that this contract was entered into about one month prior to the formation of Reorganized District C-2."

It is noted the additional fact, not raised in your letter, that the rural school district had entered re-employment for the ensuing school year, was present in this case. The court, concluding that a notice of termination of employment by the Reorganized school district's board of directors was effective, held as follows:

> "1. Plaintiff seems to contend that the board of directors of Consolidated District C-2 could not terminate her contract because Section 165.290 provides that when a number of districts are consolidated under certain sections, the original district shall continue until June 30th following such organization, and then turn over its books, papers and records. This section was repealed, Laws of 1955, page 537, but was in force at the time of the instant reorganization. However, this section would not prevent the Consolidated District C-2 from terminating plaintiff's contract, if it did so properly; because after the consolidation, Nigh District 'had no power to do anything except to finish the business then under way, and at the end of the school year, June 30th, make the turnover as required by (said section).' State ex rel Fleener v. Consolidated School District No. 1, Mo. App., 238 S.W. 819, 821."

Although the cited Missouri case is not controlling, it is persuasive. Additionally, in considering Sections 279.13 and 279.15 specifically, in respect to continuing contracts with teachers when enrollment falls below the minimum, the Attorney General held in 1950 OAG at page 63:

> "(3) If no notice was given pursuant to the terms of section 279.13 and not enough pupils were available and such was apparent, the continuing contract, being a new contract of employment made pursuant to the terms of 279.13, would be void."

The notice referred to in this conclusion, of course, in your situation would refer to the rural school district, however, it is felt that it is not difficult to analogize this conclusion to your circumstances that it could be an immpossibility if there was a plan for division of assets and liabilities pursuant to Section 275.28, for the rural school district to notify the teacher of termination as provided in 279.15.

With the above in mind, and turning to your specific question: "Does the new board of the community district of which this rural school district becomes a part have the authority to terminate this contract by a legal notice, including consideration of termination, before April 1?" In the portion of Section 275.25 cited before, it is noted that the new board has "complete control of the employment of all personnel of the newly formed community school district for the ensuing school year." It is also stated that the new board shall "take such action as is essential for the efficient management of the newly formed community school district." It is the writer's opinion that to exercise complete control over the employment for the ensuing school year also gives authority not to employ and to avoid automatic employment if that is their decision, and that giving such notice is consonant with the policy of taking such action resulting in the efficient management of the newly formed community school district for the ensuing school year.

For the foregoing stated reasons, I am of the opinion that your question, "Does the new board of the community district of which this rural school district becomes a part have the authority to terminate this contract by a legal notice, including consideration of termination, before April 1?", should be answered in the affirmative.

Respectfully submitted,

MICHAEL S. McCAULEY
Assistant Attorney General

mrs

TOWNSHIPS: Cities and towns: Power of city to levy taxes for cemeteries - §§359.29 through 359.41, 368.28, 404.1, 404.2, as amended, and 404.10(1)(2), as amended, 1962 Code of Iowa. §368.28 does not authorize a city to extend its tax levy to property outside the city's corporate limits.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

April 4, 1966

Mr. Charles E. Vanderbur
Story County Attorney
537 Main Street
Ames, Iowa

Dear Mr. Vanderbur:

You have submitted the following question:

> "A township board of trustees has refused to take over the ownership, management and control of a private cemetery now owned and managed by a private cemetery association. This cemetery serves a particular town. The cemetery association has now asked that town to assume the ownership, management and control. Is Section 368.28 broad enough to make Sections 359.29-41 applicable to a town and thereby allow the town to accept the cemetery association property as a gift, allow the town to levy a tax sufficient to maintain the cemetery and allow the town to extend its levy to the property outside the corporation within the township?"

You refer to Section 368.28 of the 1962 Code of Iowa which reads as follows:

> '368.28 Burials, cemeteries - crematories. They shall have power to regulate the burial of the dead; to provide places for the interment of the dead; to cause any body interred contrary to such regulations to be taken up and buried in accordance therewith; to exercise over all cemeteries within their limits, and those without their limits established by their authority, the powers conferred upon township trustees with reference to cemeteries; or they may, by ordinance,

> transfer such duties and the general management of such cemeteries to a board of trustees; and to authorize the establishment of crematories for the cremation of the dead, within or without the limits of such corporation and regulate the same."

The powers of the township trustees are contained in Sections 359.28 through 359.41. These powers include the power to condemn land anywhere within the township, to accept gifts, to levy a tax, and to control the cemetery, to appoint trustees for the same, or to sell the same. They may sell lots and make rules and regulations in regard thereto. The levy they may make can be extended within a town or city unless the town or city has a cemetery or has levied a tax to support a cemetery.

The crucial language of Section 368.28 is:

> "... to exercise over all cemeteries within their limits, and those without their limits established by their authority, the powers conferred upon township trustees with reference to cemeteries...."

The above language is subject to interpretation as it is unclear as to what powers were intended to be conferred by the legislature, especially as to the powers of taxation. We must consider the powers of a city to tax as contained in Section 404.10, subsections 1 and 2, as amended, which reads as follows:

> "404.10 Municipal enterprises. Municipal corporations shall have power to annually cause to be levied for a fund to be known as the municipal enterprises fund an annual tax on all taxable property within the corporate limits and allocate the proceeds thereof to be spent for the following purposes:
>
> 1. To pay for land acquired for cemetery purposes and the interest accruing on the cost thereof.
>
> 2. For the care, preservation, and adornment of any cemetery utilized for burial purposes by the people of the city or town, whether such cemetery is located within the limits of such municipality or is established by its authority outside of its corporate limits. Said fund may be used for any cemetery owned and controlled by said municipal corporation within or without the corporate limits, or for any cemetery owned and controlled by any private or incorporated cemetery association, township, or other municipality, even though situated in

> an adjoining county, if actually utilized for burial purposes by the people of the city or town. Said tax may be so expended for the support and maintenance of any such cemetery after it is no longer used for the purpose of interring the dead."

This section provides for a levy only on taxable property within the corporate limits for cemetery purposes. Subsection 2 recognizes that a cemetery may be without the corporate limits, but there is no provision for township-wide levy.

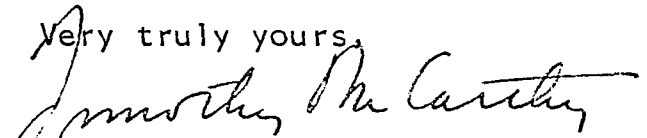
Sections 404.1 and 404.2 indicate that the municipal corporation's power to levy taxes must be specifically provided for except as modified by Chapter 404.

This office's opinion to you of May 26, 1965, indicated that the legislature has the power to create special taxing districts for the purpose of making local improvements and its boundaries need not coincide with the boundaries of counties or other municipalities.

The legislature has not specifically set up a special taxing district for cities, either in Chapter 368 or Chapter 359. Chapter 404 prohibits municipal levies beyond corporate limits of the city.

Therefore, it is my opinion that while Section 368.28 does allow a city to accept cemetery lands as a gift, it does not allow a town to extend its levy beyond the corporate limits.

Very truly yours,



TIMOTHY McCARTHY
Solicitor General
State of Iowa

ew

CITIES AND TOWNS: Low-rent housing law amendment - Chapter 403A, 1962 Code of Iowa, as amended; Chapter 334, Acts of 61st G.A. Low-rent housing proceedings commenced under Chapter 403A but not completed by July 4, 1965, the effective date of Chapter 334, Acts of the 61st G.A., are not affected by the amending provisions of Chapter 334 and are controlled until concluded by Chapter 403A.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

April 8, 1966

Honorable Don S. McGill
State Senator
Chariton, Iowa

Dear Senator:

I am in receipt of your recent letter to the Attorney General concerning the legality of the procedure undertaken by the City of Chariton in order to participate in low-rent housing activities under Chapter 403A of the 1962 Code of Iowa, as amended. In explanation you state that the city council of Chariton held a successful election on July 1, 1965, under authority of section 403A.25, and subsequently on September 7, 1965, staged a public hearing pursuant to section 403A.5. You further point out that the aforeenumerated sections were repealed as of July 4, 1965, by Chapter 334, Acts of the 61st G.A., and that the amendments inserted in lieu of these repealed sections prescribe a different procedure to be followed by the municipality before it may engage in low-rent housing activities.

The answer to your question rests within the determination of whether proceedings instituted under section 403A.25 before the passage of Chapter 334, Acts of the 61st G.A., will be affected by the amendment or will continue to be governed by the original statute.

I am of the opinion that the proceedings are controlled throughout by Chapter 403A in its original state.

The primary rule of statutory construction cases is to ascertain and give effect to the intention of the legislature. Dingman v. Council Bluffs, 249 Iowa 1121, 90 N.W.2d 742 (1958); Grant v. Norris, 249 Iowa 236, 85 N.W.2d 261 (1957); 50 Am.Jur. Statutes §478.

Although Chapter 334, Acts of the 61st G.A., does not contain a saving clause, I think we may turn to section 4.1(1) of the 1962 Code of Iowa, as amended, for aid in giving effect to the legislature's intention in this matter. Section 4.1(1) in pertinent part reads as follows:

> "... repeal of a statute does not ... affect any right which has accrued ... or any proceedings commenced under or by virtue of the statute repealed."

The Iowa Supreme Court in the case of Manilla Community School District v. Halverson, 251 Iowa 496, 501, 101 N.W.2d 705 (1960) stated in respect to the aforequoted statute:

> "To the extent that such directions are applicable they become a part of the statute in question and must govern our course in the pursuit and discovery of that illusive legislative intent."

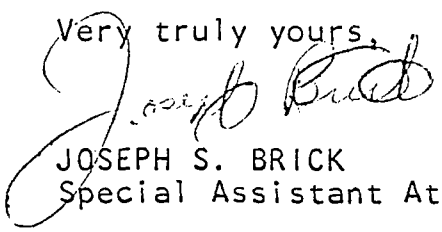
This provision contained in the Iowa code under title of "Construction of Statutes" indicates a general legislative intent that repealed laws continue in force until a completion of proceedings begun under them, and unless the amending statute contains language which expressly or explicitly manifests a legislative intent to the contrary, this general intent should prevail. A cursory view of Chapter 334, Acts of the 61st G.A., reveals no such contrary intent.

A repealing statute, although absolute in terms, may for some purposes and to some extent, continue in force the provisions of the repealed statute. State ex rel Bates v. Payton, 139 Iowa 125, 117 N.W. 43 (1908).

Based on the foregoing it is the opinion of this office that Chapter 403A controls the proceedings outlined in your letter, and accordingly, if all provisions of Chapter 403A have been complied with the City of Chariton is certainly eligible to participate in low-rent housing activities with regard to the specific project outlined in the notice of the public hearing required by section 403A.5, 1962 Code of Iowa. Low-rent housing activities beyond the scope of this project must be initiated in compliance with Chapter 334, Acts of the 61st G.A.

This opinion is intended to govern any inconsistent conclusions that may be drawn from a prior opinion of this office under date of May 20, 1965.

Very truly yours,



JOSEPH S. BRICK
Special Assistant Attorney General

bj

TAXATION: Property Tax Redemption Certificates. Chapter 447, 1962, Code of Iowa. The right of redemption requires an interest in the property itself. Mere possession with no claim of right or color of title is insufficient to permit redemption. A redemption certificate having been issued to one not entitled to redeem can be cancelled only by declaratory judgment or other appropriate legal action.

STATE OF IOWA
DEPARTMENT OF JUSTICE
DES MOINES, IOWA

April 12, 1966

Mr. DeWayne A. Knoshaug
Wright County Attorney
Clarion, Iowa

Dear Mr. Knoshaug:

This is in reply to your request for an opinion on the following:

> "The following factual situation exists in Wright County: in 1959 Mr. B., observing that a parcel of real estate located in Wright County was uninhabited, took possession thereof and stored personal property thereon although having no color of title and apparently being only a squatter. B. has remained in possession since and is in possession at the present time. On December 3, 1962 this same parcel of real estate, being listed as 'Owner unknown' was sold at tax sale to Mr. R. who has paid all subsequent taxes and filed notice for deed on September 7, 1965. Subsequent thereto notice was given to B. who has paid the amount necessary for redemption and was issued the redemption certificate in question.
>
> "Based on the above facts, I request the opinion of your office in regards to the following questions:
>
> > "1. Under the above factual situation does Mr. B. have the right to redeem under the provisions of Iowa Code Chapter 447?

> "2. If it is your opinion that Mr. B. does not have the right to redeem what proceeding should be invoked to remove or cancel the tax sale certificate in his possession?"

Chapter 447, Code of Iowa, 1962, provides for redemption from tax sales but does not specify what persons shall be entitled to redeem. Section 447.5 provides:

> "The auditor shall, upon application of any party to redeem real estate sold for taxes, and <u>being satisfied that he has a right to redeem</u> the same upon the payment of the proper amount, issued to such a party a certificate of redemption, ...". (Emphasis added)

This provision is the only statutory provision making reference to a "right to redeem."

Iowa case law has established the rule that only persons having an interest in the property are entitled to redeem from tax sales. <u>Penn vs. Clemans</u>, 19 Iowa 372 (1866); <u>Garrigan vs. Knight</u>, 47 Iowa 525 (1877); <u>Hart vs. Delphe</u>, 157 Iowa 316, 136 N.W. 702 (1912); and <u>Clarkson vs. McCoy</u>, 215 Iowa 1008, 247 N.W. 270 (1933).

What constitutes sufficient interest to redeem has been determined on a case by case basis. In <u>Cummings vs. Wilson</u>, 59 Iowa 14, 17, 12 N.W. 747 (1882) the Court stated:

> "We conclude that when one seeks to redeem from a tax sale under an equity or a claim not based upon a recorded title, when the law provides shall support the right of redemption, the county officers must permit the redemption if they

> are satisfied, he in good faith, relied upon such equity or claim. They are not to determine whether the law will enforce his claim, but whether in good faith he makes it. It will, of course, be understood the claim or equity must pertain to an interest in the land, which if enforced, will vest some title, lien or right to the property itself." (Emphasis added)

On the basis of the foregoing the right to redeem depends on whether the person seeking to redeem has an interest of some kind in the property itself. In the instant fact situation the person to whom the redemption certificate was issued is merely a squatter. He is a mere possessor with no claim of right, color of title or interest in the property itself. Mere possession is not an interest in the property, but merely a physical act of occupation. Goulding vs. Shonquist, 159 Iowa 647, 141 N.W. 24 (1913).

It is our opinion, therefore, that a mere possessor does not have an interest in the property sufficient to permit him to redeem and, therefore, the answer to question number one (1) is no.

With respect to your second question, concerning the procedure for removing or cancelling a tax redemption certificate, the mere act of the auditor or treasurer in making a notation that the same is cancelled and void is not sufficient. Ellsworth vs. Low, Adams and French, et al, 62 Iowa 178, 181, 17 N.W. 450 (1883). In that case the auditor issued a redemption certificate after the period of redemption had expired. Recognizing his error the auditor noted on his certificate stub:

> "The redemption cancelled by reason of the time specified by the Code of Iowa having expired, and that fact not noticed by me at the time redemption was made or being made."

The Court concluded as follows:

> "It is evident that the party making the redemption is not bound by this action of the auditor, unless he or his agent acquiesced therein and surrendered the certificate and received the money paid as for redemption."

It is our opinion that the only manner in which the redemption certificate can be removed or cancelled effectively is by tendering refund of the amount paid for the certificate of redemption. If the redemption certificate is not voluntarily surrendered then a declaratory judgment or other appropriate legal action must be pursued to cancel the certificate of redemption.

Very truly yours,

Roger D. Bindner
Assistant Attorney General

RDB:dj

TAXES: Personal Property Taxes; Tax on leased personalty in possession of lessee: Section 428.1, 428.4 and 428.9, Code of Iowa, 1962. Leased personalty must be listed and taxed to the owner thereof, unless the property is voluntarily listed by the lessee, or unless the owner does not reside in the county where the lessee has possession of the property, in which case it is listed and taxed to the lessee.

LAWRENCE F. SCALISE
ATTORNEY GENERAL

STATE OF IOWA
DEPARTMENT OF JUSTICE
DES MOINES, IOWA

April 13, 1966

Mr. Richard E. Lee
Hamilton County Attorney
528 Second Street
Webster City, Iowa

Dear Mr. Lee:

This is in regard to your letter of February 25, 1966, requesting an opinion on the following:

> "To whom are propane gas tanks assessed against, that are placed on various farms throughout the County, when they are owned by the gas company and leased by the land owner and user?"

As you stated in your letter, this problem involves the interpretation of Sections 428.1 and 428.4, Code of Iowa, 1962, along with Section 428.9.

Section 428.1 in pertinent part provides:

> "Every inhabitant of this state, of full age and sound mind, shall list for the assessor all property subject to taxation in the state, of which he is the owner, or has the control or management, in the manner herein directed:
>
> "6. Property under mortgage or lease is to be listed by and taxed to the mortgagor or lessor, unless listed by the mortgagee or lessee."

In the case of Arie vs. Burnside, 182 Iowa 1107, 166 N.W. 376 (1918), in deciding that the mortgagor, owner of the personal property, was liable for personal property tax instead of the mortgagee, the Court stated at page 1113:

> "It is so axiomatic that it would hardly seem necessary to say that a person cannot, under any theory of the taxing power, be made liable for the tax on property that he does not own at the time it became subject to assessment."

Though the lessor-lessee language of paragraph 6 of Section 428.1 has never been interpreted by the Iowa Supreme Court or by the Attorney General, the Court has construed the mortgagor-mortgagee language of paragraph 6 to mean exactly what it says, "Property under mortgage or lease is to be listed by and taxed to the mortgagor or lessor unless listed by the mortgagee or lessee." The same interpretation should be applied to the lessor-lessee language of paragraph 6. Porter vs. Lafferty, 33 Iowa 254 (1871), Dayton vs. Rice, 47 Iowa 429 (1877), Arie vs. Burnside, supra.

Section 428.4, Code of Iowa, 1962, provides in pertinent part as follows:

> "...personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January ..." (Emphasis added)

The Iowa Supreme Court, and the Attorney General have held numerous times that the language quoted above means exactly what it says: "...that personal property shall be listed and assessed in the name of the owner on the first day of January ...". Tackaberry & Co. vs. City of Keokuk, 32 Iowa 155 (1871); Arie vs. Burnside, supra; Cownie vs. Local Board of Review, 235

Iowa 318, 16 N.W. 2d 592 (1944); Ogden vs. Lowry, 249 Iowa 1183, 91 N.W. 2d 378 (1958); 98 OAG 71; 98 OAG 179; 18 OAG 210; 20 OAG 358; 40 OAG 510; 50 OAG 51; 56 OAG 119; 62 OAG 469; 62 OAG 471.

Under the fact situation presented here it is clear that the lessor under Section 428.1 and the owner under Section 428.4 are one and the same person. Under the provisions of both statutes the property must be listed and taxed to the owner.

There are two basic exceptions, however, where the property shall not be listed and taxed to the owner. One arises pursuant to Section 428.1(6) where the lessee or mortgagee voluntarily lists the property in his own name. In that instance, however, it is only because the lessee lists it in his own name that it is not listed and taxed to the owner.

The other exception arises pursuant to Section 428.9 which applies when the owner of the goods does not reside in the county wherein another person is in possession of the goods. The statute provides in pertinent part as follows:

> "... persons having in their possession property belonging to another subject to taxation in the assessment district where said property is found, when the owner of the goods does not reside in the county, are, for the purpose of taxation to be deemed the owners of the property in their possession."

There are no Iowa cases interpreting the foregoing provision but it seems clear that when one not the owner is in possession of the goods as lessee, or otherwise, and the owner does not reside in the county where the goods are located, the one in possession shall be deemed the owner. In that instance the property must be listed and taxed to him and not to the owner. 62 OAG 471, at 473.

Under the factual situation presented here it is our opinion that the propane tanks must be listed and taxed to the owner, unless listed by the lessee, or unless the owner does not reside in the county wherein the tanks are located in the possession of another. In the latter instance the one in possession is deemed to be the owner, hence the tanks must be listed and taxed to him.

Very truly yours,

Roger D. Bindner
Assistant Attorney General

RDB:dj

SCHOOLS AND SCHOOL DISTRICTS: Compensation for school Treasurer. §§ 275.27, 277.26 and 279.29, 1962 Code of Iowa. A community school district does not come within the exception of Section 279.29, allowing some school district to compensate the school treasurer.

State of Iowa
April 6, 1966 DEPARTMENT OF JUSTICE
Des Moines

Mr. James W. McGrath
Van Buren County Attorney
Keosauqua, Iowa

Dear Mr. McGrath:

This is in response to your recent letter wherein you request an opinion from this office regarding the compensation of school treasurers which I have paraphrased as follows:

> In a reorganized community school district embracing several small towns, none of which individually have a total population of 1,000, but which collectively have a population exceeding 1,000, may the Board of Education of said school district pay the school treasurer a reasonable compensation under the provisions of Section 379.29, 1962 Code of Iowa.

It appears that inadvertently the erroneous section of the Code was cited in your letter and that Section 279.29, 1962 Code of Iowa, as follows below, was intended:

> "279.29 Compensation of officers. The board shall fix the compensation to be paid the secretary. No member of the board or treasurer shall receive compensation for official services, except that in school townships, rural or village independent districts, and in consolidated districts that contain a city or town having a population less than one thousand, the board may pay a legally qualified school treasurer a reasonable compensation."

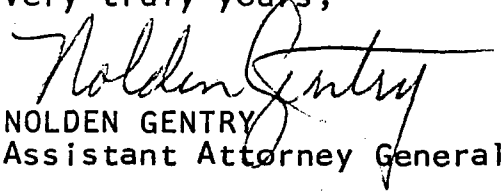
The above section is an exception to the general rule under Section 277.26, 1962 Code of Iowa, that in districts composed in whole or in part of cities or towns a <u>treasurer</u>

shall serve without compensation and the said exception should therefore be strictly construed. Palmer v. State Board of Assessment and Review, et al., 226 Iowa 92, 283 N.W. 415 (1939).

A community school district as defined in Section 275.27, is a district which is created under the provisions of Chapter 275. In your request you indicate that the Fox Valley School District is a community school district reorganized under the provisions of Chapter 275, 1962 Code of Iowa. It would appear that a school district created or enlarged under the provisions of Chapter 275 and designated a "community school district" does not fall within the type of school organization excepted in Section 279.29: i.e. school townships, rural or village independent districts and consolidated districts containing a city or town with less than 1,000 population. "Where stated things are enumerated, things not named are excluded." Pierce v. Bekins Van & Storage Company, 185 Iowa 1346, 1350, 172 N. W. 191, 192 (1919).

It is my opinion that the Fox Valley Community School District does not come within the statutory exception provided in Section 279.29, therefore, they cannot pay their school treasurer.

Very truly yours,



NOLDEN GENTRY
Assistant Attorney General

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ELECTIONS: Naturalized citizens - § 48.6, 1962 Code of Iowa. The commissioner of registration is not required to obtain papers of naturalized citizens who are registering to vote but must secure information of date of naturalization papers and court, also date of naturalization of parents.

April 19, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Honorable Daryl H. Nims
225 Main
Ames, Iowa

Dear Senator Nims:

Reference is herein made to your letter received April 15 in which you submitted the following:

> "A constituent of mine is preparing a leaflet for state-wide distribution which will outline the voting and registration procedures of Iowa. While assembling the material, she has found that some registration clerks require naturalized citizens to present their papers in order to be registered and some do not. Because of this variation in registration requirements, she has asked me to seek your opinion as to which one is required by Iowa law."

In reply thereto I would advise you that insofar as registration of naturalized citizens is concerned, Section 48.6, Code of 1962, provides:

> "*** The following information concerning each applicant for registry shall be entered on the card: ***
> 3. f. Citizenship. (If naturalized give date of papers and court; also date of naturalization of parents.)"

The commissioner of registration, in the performance of this registration duty, is a ministerial officer exercising ministerial powers. In that aspect in requiring such naturalized citizens to

present their papers to the commissioner, is an excess of the authority of the commissioner. Such is not a requirement of the statute.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

jls

CIVIL RIGHTS - National Guard. §§ 29.2 and 29.6, 1962 Code of Iowa; § 2, Chapter 73, Acts of the 60th G.A.; §§ 1 and 2, Chapter 86, and §§ 2(2) and 2(5), Chapter 121, Acts of the 61st G.A. The Iowa National Guard is an agency of the State, therefore, it comes within the statutory definition of "person."

April 21, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Mr. James A. Thomas
Executive Director
Iowa Civil Rights Commission
State House
L O C A L

Dear Mr. Thomas:

This is in response to your recent letter wherein you request an opinion on the following:

> "A question has arisen in a matter before this Commission concerning the status of the Iowa National Guard as a 'person' under the Iowa Civil Rights Act of 1965.
>
> "I would like to have an opinion from you as to whether or not the Guard is covered by the Act, either as a 'person' or as an 'employer'."

Sections 2(2) and 2(5), Chapter 121, Acts of the 61st General Assembly, defines "person" and "employer" as follows:

> "'Person' means one or more individuals, partnerships, associations, corporations, legal representatives, trustees, receivers, <u>and the state of Iowa</u> and all political subdivisions <u>and agencies thereof</u>. (Emphasis Added)
>
> "'Employer' means the state of Iowa or any political subdivision, board, commission, department, institution, or school district thereof, and any person employing employees within the state."

In reply to your inquiry I refer you to the following provisions of the 1962 Code of Iowa:

> "Section 1. There shall be an agency of the state government to be known as the department of public defense of the state of Iowa, which shall be composed of the military agency as provided in the laws of this state . . . ;
>
> "Section 2. There shall be within the department of public defense, . . . a state military agency which shall be styled and known as the 'military division, department of public defense', . . . The term military division shall include . . . the military forces of the state of Iowa as provided in the laws of the state." (Emphasis Added) Chapter 86, Acts of the 61st General Assembly.
>
> "There is hereby created the Iowa national guard to consist of the Iowa army national guard and the Iowa air national guard." Section 29.2, as amended by § 2, Chapter 73, Acts of the 60th General Assembly. (Note: § 29.2 has been renumbered § 29A.2 by the Code Editor.
>
> "The military forces of the state of Iowa shall consist of the national guard and the militia." Section 29.6. (Note: § 29.6 has been renumbered § 29A.6 by the Code Editor).

In discussing the status of the national guard and the militia as a governmental agency American Jurisprudence states:

> "It is a generally accepted rule that the organized militia of the states is a state institution--a governmental agency. It is so recognized by the various Constitutions. The chief executive of the state is commander in chief of the state militia. It is a part of the executive branch of the state government to be used as a last resort to compel obedience to the laws." (Emphasis Added) 36 Am. Jur. Military, §47, p. 216.

Apparently the terms "state institution" and "governmental agency" were used synonymously. See Baker v. State, 200 N.C. 232, 156 S.E. 917 (1931), and In Re Funk's Estate, 353 Pa. 321, 323, 45 A.2d 67, 68 (1946).

The Supreme Court of Florida in the case of State of Florida ex rel John Milton, Jr., et al, v E. T. Dickinson, et al, 44 Fla. 623, 627, 628; 33 So. 514, 516 (1902) in interpreting provisions substantially similar to those found in Iowa declared that:

> "From these provisions of our organic law it will be seen that that instrument recognizes and provides for the militia as a State Institution, of which the chief executive of the State is made the commander-in-chief, and it is designated therein as being 'the militia of the State,'. . . ."

The Court of Appeals of Kentucky in the case of Commonwealth on Relation, etc., v. Sparks, 201 Ky. 5, 8, 255 S.W. 859, 860 (1923), stated that "an organized state militia by whatever name called is strictly a state institution and performs exclusively a state service." (Emphasis Added)

It should be pointed out that the national guard has certain federal aspects. The federal-state relationship of the national guard is described as follows:

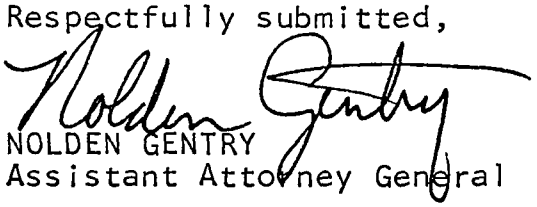
> "The United States Constitution, Art. I, Sec. 8, made provision for the calling of the State militias into Federal service, and reserved to the States the appointment of officers and the training of the militia. The whole government of the militia remained with the States, except when employed in the service of the United States. United States ex rel. Gillett v. Dern, 64 App.D.C. 81, 74 F.2d 485. By the National Defense Act of 1916, 39 Stat. 197, 32 U.S.C.A. § 1 et seq., the President was invested with power to call the 'Guard' into active Federal service pursuant to constitutional provision and in addition to order the federally recognized National Guard, as a reserve component of the National forces, into active federal service. 32 U.S.C.A § 81. The only effective control exercised by the Government and the regular armed forces relative to organizing, equipping, training and policies of the National Guard of any of the States comes from the control of funds which may be granted to or with-

> held from the National Guard units pursuant to granting or withdrawing federal recognition. To obtain federal recognition, certain conditions and requirements must be met before application by the National Guard unit will be granted. The application is the voluntary act of the unit and cannot be required or enforced. The penalty is the loss of federal aid which includes funds and equipment." Lederhouse v. United States, 126 F.Supp. 217, 218, 219 (W.D.N.Y. 1954). (Reversed on other grounds 230 F.2d 112).

Similar descriptions of the federal-state relationship of the national guard can be found in Satcher v. United States, 101 F.Supp. 919 (W.D.S.C. 1952) and Williams et al v. United States, 189 F.2d 607 (10th Cir. 1951).

In view of the above rulings the Iowa national guard is an agency of the state until it is ordered into the active service of the United States. Therefore, until the Iowa national guard is ordered into federal service I am of the opinion that it is a state agency within the definition of "person" in the Iowa Civil Rights Act of 1965.

Respectfully submitted,



NOLDEN GENTRY
Assistant Attorney General

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WELFARE: MEDICAL FEES: Notwithstanding the employment contract entered into between the College of Osteopathy and Surgery, full time and part time professors are eligible for authorization and payment for the care of their College Clinic patients by the State Board of Social Welfare so long as they fulfill the same requirements and qualifications for such authorization and payment as do related private practitioners.

April 22, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines,

Mr. Ray A. Fenton
County Attorney
Room 406 Court House
Des Moines, Iowa

Dear Sir:

This is in answer to your letter dated March 25, 1966 requesting the opinion of this office concerning the following question:

> "Whether a person otherwise eligible for assistance under Chapter 249A, Code of Iowa, 1962, is entitled to assistance as to payment of his medical fees when his doctor has an employment contract with the College of Osteopathic Medicine and Surgery . . . or is the fact that the person's doctor has such an employment contract a valid basis for denying assistance to the person?"

The employment contracts which are referred to in the above question are of two types: one type being part time employment; the other, for full time employment.

The full time contract states the effective date of employment, salary computation, status of employment, certain benefits, and especially, the following:

> "All fees from your professional activities will be to the benefit of the College of Osteopathic Medicine and Surgery."

The implication from the above quoted clause is that the full time professors on the staff of the college are expected to carry on a certain amount of patient care, and further, that this clause is inserted in the contract by the College to guard against conflict of interests between a full-time professor's

college duties and his patient care practice. Along the same line, it has been brought to my attention that the amount of expected fees is taken into consideration by the college in the computation of all professors' salaries. In other words, a professor is expected, by virtue of his professional fees, to reimburse the college for a portion of his salary; also, if this clause were not in the employment contract, a professor's salary would necessarily be lower. Each professor, then, is apparently expected to furnish the college with a part of the funds which comprise his salary. The conclusion, therefore, is that such professors are employed for the purpose of instructing students of osteopathy rather than for treatment of patients as would be a physician member of a hospital, clinic, nursing home or private institution staff. It is significant that the physicians with whom we are concerned, are employed by the College of Osteopathy and Surgery as members of the staff of the College, not as members of the staff of the hospital.

With respect to the professor's treatment of a patient, it is my opinion that such professor should be considered as being on the same standard as any private practitioner.

Under the rules and regulations governing the procedures of the State Board of Social Welfare, payment is made through the medical program to those licensed physicians to whom an authorization has been issued by the County Department of Social Welfare, based upon a request submitted by a recipient of public assistance or Medical Assistance for the Aged. Such authorization will not be issued and payment not made to physicians who are members on the staff of a hospital, clinic, nursing home or other private institution, due to the fact that such physicians are totally compensated by such institution for services rendered. This practice is due to the justifiable refusal to reimburse a physician for performing services which he receives his salary for performing, that is, double payment.

With the immediate problem, however, it does not appear that double payment is involved, since, by virtue of the above described contract, the physician does not obtain the benefit of the payment made on behalf of a particular welfare patient inasmuch as such physician, upon receipt of payment, is obliged to assign it to the college.

It may be helpful to recall that payment for a physician's services may be made only to licensed practitioners and for this reason, payment cannot be properly made directly to the College. [See Chapters 249 and 249A, 1962 Code of Iowa]

With regard to the part time employment contracts, the main provisions are basically the same, however, the reimbursement clause differs:

> "All professional services performed by you on College of Osteopathic Medicine and Surgery institutional patients will be to the benefit of the College of Osteopathic Medicine and Surgery."

The distinction between the above clause and the clause of the full time contract is the specific limitation that the patients be "College of Osteopathic Medicine and Surgery institutional patients". This indicates that the reimbursement to the College of the professional fees obtained by a part time professor need only be made when such fees are for services rendered to certain patients, part time professors still being allowed to carry on a private practice and retain the fees resulting therefrom.

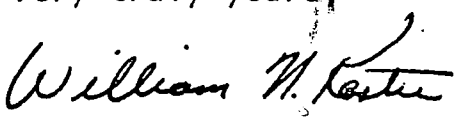
I can see no reason to consider payment by the Welfare Department for services rendered in a different manner, whether such payment concerns the limited type of patients, treated by part time professors or the patients treated by full time professors; and, therefore, these two categories shall be treated as one.

With this background, it is possible to answer your question. As I understand the problem, it is whether the State Board of Social Welfare can refuse to make payments for services rendered to welfare recipients by professors employed by the College of Osteopathy and Surgery by virtue of the above described employment contracts, such refusal being based upon the existence of such contract.

In order to justify a refusal of payment, there need exist a logical distinction between the situation of the professor of the college and private practitioners. As has been pointed out, the employment contract taken alone will not provide the requisite distinction.

It is, therefore, the opinion of this office that, notwithstanding the employment contract entered into between the College of Osteopathy and Surgery, full time and part time professors are eligible for authorization and payment for the care of their College Clinic patients by the State Board of Social Welfare so long as they fulfill the same requirements and qualifications for such authorization and payment as do related private practitioners. That is to say, the nature of the contract is such that it alone cannot be deemed to prevent such authorization and payment.

Very truly yours,



WILLIAM N. KOSTER
Special Assistant Attorney General

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COUNTY AND COUNTY OFFICERS: Group insurance programs. Chapter 365A, as amended, (now designated as § 509.15, et seq.); and § 332.3, 1962 Code of Iowa; Chapter 232, Acts of the 60th G.A.; and Chapter 394, Acts of the 61st G.A. Deputy county officers are employees and, as such, are eligible for benefits of health insurance plans under Chapter 365A, as amended,(now designated as § 509.15, et seq.). Members of boards of supervisors and the elective county officials are not employees and are not entitled to such benefits.

April 22, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Mr. D. Quinn Martin
Black Hawk County Attorney
309 Court House Building
Waterloo, Iowa 50703

Dear Mr. Martin:

Reference is herein made to your letter of March 28 in which you submitted the following:

> "The salaries for many deputy county officers are set by statute, e.g., the First Assistant County Attorney in my county receives $8800 which amount is set without discretion on the part of any county official. In such a case, is the individual a county officer or an employee within the meaning of Chapter 365A as amended?
>
> "The salaries of many deputy county officers are set within certain percentage limits of the officer's salary by the Legislature, and the county officer has the discretion to set the salary within the said limits, e.g., in my county, Assistant County Attorneys may be paid a salary ranging from 60% to 75% of the principal officer's salary. Are these deputy officers considered officers or employees within the meaning of Chapter 365A as amended? If such a deputy were paid less than the statutory maximum allowed, would it be permissible for the county to pay for his health insurance under a group plan for county employees if the amount so expended in addition to the amount paid him as salary remained within the statutory maximum salary which he can be paid?"

I advise that I find an answer thereto in the terms of the statute, Chapter 232, Acts of the 60th General Assembly, and in prior adjudications. Officers are not expressly designated in the foregoing chapter as entitled to the benefits thereof. If they are deemed to be so entitled, it is by interpretation.

The term "employee" is defined in Section 7 of Chapter 232 as follows:

> "The word 'employee' as used in this chapter shall not include temporary or retired employees; however, nothing herein shall be construed as preventing a retired employee from voluntarily continuing in force, at his own expense, an existing contract."

The word "employee" as used in this chapter is defined in Section 365A.7, Code of 1962, as follows:

> "With reference to group life insurance policies, 'employee' as used in this chapter is defined to be a person employed by the city on a weekly, monthly or yearly basis and who is actually performing duties under such employment, including the members or the employees in the police department, fire department and the waterworks. With reference to group accident and health insurance policies, 'employee' as used in this chapter is defined to be a person employed by the city on a weekly, monthly, or yearly basis and who is actually performing duties under such employment."

Obviously, under the provisions of Section 7, Chapter 232, Acts of the 60th General Assembly, the foregoing section was repealed and re-enacted in its terms by the provisions of Section 7 of Chapter 232, but as far as legislation is concerned, Section

365A.7 was re-enacted with the restriction that "the word 'employee' as used in this chapter shall not include temporary or retired employees; however, nothing herein shall be construed as preventing a retired employee from voluntarily continuing in force, at his own expense, an existing contract." In the terms of this legislation there is inconsistency between the statutory Section 365A.7 and the repeal and re-enactment thereof by Chapter 232. While Section 365A.7 treated only of cities and towns and their employees, the repeal and re-enactment of Chapter 232 treated of employees of the state, county, school district, cities and towns and, generally speaking, conferred upon those subdivisions and their governing bodies the power previously granted to cities and towns alone.

As controlling this situation, Sections 2035 and 2036 of Sutherland Statutory Construction, Vol. 1, state:

> "§ 2035. Repeal and re-enactment. The re-enactment of a statute which has been repealed by specific provision, or by implication from later legislation upon the subject matter invalidates the previous repeal and restores the statute to effective operation. Likewise, where a statute has been amended and changed by a later enactment, the reaffirmation of the statute in its original form operates to repeal any inconsistent amendments and modifications which have been engrafted upon the statute since its original enactment. When, however, an existing statute is re-enacted by a later statute in substantially the same terms, a repeal by implication is effectuated only of those provisions which are omitted from re-enactment, while the unchanged provisions which are reiterated in

> the new enactment are construed as having been continuously in force. Those statutes which prove inconsistent with the re-enactment are, of course, repealed by implication."
>
> "§ 2036. Effect of re-enactment upon intermediate acts. The re-enactment of a statute is a continuation of the law as it existed prior to the re-enactment in so far as the original provisions are repeated without change in the re-enactment. Consequently, an intermediate statute which has been superimposed upon the original enactment as a modification of its provisions is likewise not repealed by the re-enactment of the original statute, but is construed as being continued in force to modify the re-enacted statute in the same manner that it did the original enactment. However, this immunity from repeal is extended only to those provisions of intermediate acts which are consistent with the re-enactment, and therefore, any provisions in the intermediate act which are inconsistent with the re-enactment are repealed."

See Leach v. Exchange State Bank, 200 Iowa 185, 195 (1925).

Therefore, an employee is defined by Section 365A.7, Code of 1962, as repealed and re-enacted by Chapter 232, Acts of the 60th General Assembly, as follows:

> "...'employee' as used in this chapter is defined to be a person employed by the state, county, school district, city, town or institution supported in whole or in part by public funds on a weekly, monthly, or yearly basis and who is actually performing duties under such employment."

The foregoing is a re-enactment of Section 365A.7, Code of 1962, to the extent authorized under the foregoing rule. This definition differentiates employees from officers.

The term "office and employment" in public service is described in 42 American Jurisprudence, Public Officers, page 889, as follows:

> "Public office, as hereinbefore defined and characterized, is in a sense an employment, and is very often referred to as such. But there is a distinction between a public office and a public employment which is not always clearly marked by judicial expression and is frequently shadowy and difficult to trace. The distinction, however, is one which in many instances becomes important and which the courts are called upon to observe. Although every public office may be an employment, every public employment is not an office, and the word 'employee' as used in statutes has in many cases been construed as not including officers.
>
> "When a question arises whether a particular position in the public service is an office or an employment merely, recourse must be had to the distinguishing criteria or elements of public office. These have been set forth and explained in previous sections and need only be summarized here. Briefly stated, a position is a public office when it is created by law, with duties cast on the incumbent which involve some portion of the sovereign power and in the performance of which the public is concerned, and which also are continuing in their nature and not occasional or intermittent; while a public employment, on the other hand, is a position in the public service which lacks sufficient of the foregoing elements or characteristics to make it an office. However, even where the appointment is in the nature of an employment, the appointee may be a public officer if the necessary elements of an office are present."

The foregoing description of officer and employee appears not to have been adjudicated in Iowa in the terms of the foregoing

but is plainly implied in the definition of an officer in State v. Spaulding, 102 Iowa 639, 72 N.W. 288 (1897), where it is stated starting at page 647 of the Iowa Reports:

> "From all the authorities, we think the following rules may properly be laid down for determining whether one is a public officer within the contemplation of our statute, relating to embezzlement of such officers (Code, 1873), section 3908. (1) The office itself must be created by the constitution of the state, or authorized by statute. (2) If authorized by statute, its creation may be by direct legislative act; or the law making power, when not inhibited by the constitution or public policy from so doing, may confer the power of creating an office upon official boards or commissions which are themselves created by the legislature, when such office is necessary to the due and proper exercise of the powers conferred upon them, and the rightful discharge of duties enjoined. (3) A position so created by the constitution, or by direct act of the legislature, or by a board of commissions duly authorized so to do, in a proper case, by the legislature, is a public office. (4) To constitute one a public officer, at least within the purview of the criminal law, so that he may be liable for the misappropriation of the public funds, his appointment must not only have been made or authorized as above stated, but his duties must either be prescribed by the constitution or the statutes of the state, or necessarily inhere in and pertain to the administration of the office itself. (5) In any event, the duties of the position must embrace the exercise of public powers or trusts; that is, there must be a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public. (6) The following, among other requirements, are usually, though not necessarily attached to a public office: (a) An

> oath of office; (b) salary or fees; (c) a fixed term of duration or continuance."

This distinction between officers and employees is disclosed by the terms of Section 1 of Chapter 232, Acts of the 60th General Assembly, which provides:

> "The governing body of the state, county, school district, city, town or any institution supported in whole or in part by public funds may establish plans for and procure group insurance, health or medical service for the employees of the state, county, school district, city, town or tax-supported institution."

Thus, the governing body of the county is the board of supervisors; of the city, the city council; of the state, the Executive Council; of the school district, the board of directors. That members of these bodies are officers will not be denied. As a matter of fact, members of the boards of supervisors are designated as officers. See Chapter 341, Code of 1962. In order to avail themselves of the benefits of Chapter 232, they are required to be employees. Obviously the statute does not contemplate that members of the board of supervisors be both officers and employees. If that be the view, the board of supervisors would, as officers, be dealing with themselves as employees under the authority of Chapter 341, Code of 1962. Chapter 232 is administered by officers and is enacted for the benefit of employees.

In view of the foregoing, I am of the opinion that the governing body of each county and city consists of officers, and not

employees, and, as officers, are not eligible to the benefits of Chapter 232.

Insofar as this concerns deputy county officers, I find no statutory authority for the existence of first and second deputy county officers in the provisions of Chapter 341, Code of 1962. Section 341.1 provides:

> "Each county auditor, treasurer, recorder, sheriff, county attorney, clerk of the district court, may, with the approval of the board of supervisors, appoint one or more deputies or assistants, respectively, not holding a county office, for whose acts he shall be responsible. The number of deputies, assistants, and clerks for each office shall be determined by the board of supervisors, and such number together with the approval of each appointment shall be by resolution made of record in the proceedings of such board."

It is true that as far as first and second deputies of county officers are concerned, compensation is authorized by Chapter 307, Section 6, Acts of the 61st General Assembly. While such deputy county officers are required to file a bond and take an oath of office, both characteristic of an officer, they are not so designated by the statute. They lack a general characteristic of an officer and that is tenure. Under the terms of Section 341.3, Code of 1962, treating of deputy officers, it is provided:

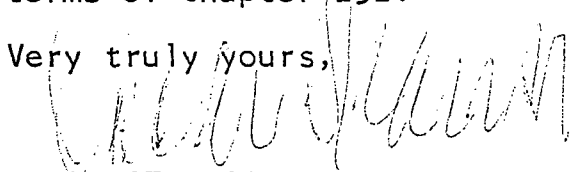
> "Any certificate of appointment may be revoked in writing at any time by the officer making the appointment, which revocation shall be filed and kept in the office of the auditor."

As far as the status of first and second county deputies is concerned, where statutory authority is not present, it is said in State v. Spaulding, supra, at page 649 of the Iowa Reports:

> "It is said that, even though there was no authority originally in the commission to create the office of treasurer, still the above provision was a recognition of the fact that there was such an office. We cannot so consider it. Here we have a position created without authority of the legislature, which alone could authorize its creation. The lawmaking power never prescribed any duties, nor authorized any one else to prescribe them, for such an officer. No part of the sovereign functions of government was ever delegated by the legislature to the individual who might fill such place, and none of the usual requisites of an office were provided for by the legislature."

Therefore, I am of the opinion that deputy county officers are employees and, as such, are entitled to the benefits of Chapter 232, Acts of the 60th General Assembly. The members of the Board of Supervisors and the elective county officials are officers and are excluded from the terms of Chapter 232.

Very truly yours,



OSCAR STRAUSS
First Assistant Attorney General

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TAXATION: Agricultural Land Tax Credit to life tenants - Chapter 426, 1962 Code of Iowa; Chapter 356, Acts of 61st G.A. A domiciliary of the state of Iowa who owns the life interest in real estate may qualify as an "owner" and is entitled to the Agricultural Land Tax credit.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

April 27, 1966

Mr. Jack H. Bedell
Dickinson County Attorney
Dickinson County Court House
Spirit Lake, Iowa

Mr. Earl E. Hoover
Clay County Attorney
Clay County Court House
Spencer, Iowa

Gentlemen:

You have submitted what is substantially the same question and that question is whether the holder of a life estate of real property is entitled to the Agricultural Land Tax credit if the holder of the life estate is a resident of the state of Iowa and if one or more of the remaindermen is outside of the state of Iowa.

There have been many problems having to do with the Agricultural Land Tax credit which have arisen out of the amendment of Chapter 426 of the 1962 Code of Iowa by Chapter 356, Acts of the 61st General Assembly. Prior to the latest amendment, the credit was given to certain agricultural land and now many more factors must be determined before the credit may be allowed. This office has issued opinions dated September 17, 1965 and April 13, 1966.

The language which must be interpreted of Chapter 356, Acts of the 61st General Assembly, is in part as follows:

> "'Agricultural land tax credit computed after January 1, 1966, payable in 1967, will not be paid to any owner who is not a bona fide resident of the state of Iowa, or to any corporation which does not have a situs in the state for the purpose of paying the tax imposed upon corporations under division III, chapter four hundred twenty-two (422) of the Code....'"

In the introductory part of our opinion of April 13 the following analysis was made:

> "This office, in our opinion of December 17, 1965, to Marvin R . Seldon, determined that the words 'bona fide resident' used in the statute have the legal effect of domicile. The opinion did not go into the meaning of the word 'owner' as used in the statute, but it was pointed out that there was no statutory definition of the word in Chapter 426 or the 61st General Assembly amendment and that such a word should be construed as provided in Chapter 4 of the 1962 Code of Iowa according to the context and the approved usage of the language....'
>
> "The word 'owner' in the Iowa cases has been defined as the absolute owner, or one who has complete dominion of the property. In re Bigham, 227 Iowa 1023, 290 N.W. 11 (1940). It has also been defined to include anyone who has an estate or interest in the land. Monroe v. West, 12 Iowa 119 (1861). In the case of Chiesa & Company v. The City of Des Moines, 158 Iowa 343, 138 N.W. 922 (1912), the court stated as follows:
>
> "'The word "owner" is of frequent use in our statutes pertaining to property and property rights, and, like most words, its significance is subject to some degree of variance, dependent upon its context and the subject-matter to which it is applied. In common speech it is doubtless most often used to designate the person in whom the legal or equitable title rests, as distinguished from a mere occupant or tenant. As used in law, it is very often given a wider and more comprehensive meaning. In its strictest sense, the owner of land is he who had the sole right of dominion, use, enjoyment, and disposition. It may happen, however, and does happen every day, that with respect to a given item of real property the various elements or estates which together make up what we may call absolute ownership are vested in different persons. One may hold the legal title, another the equitable title, another a tenancy for life, and another a term of years. Each owns a property right in the

land, and each is, for many purposes, the actual owner thereof.'"

From this general analysis of the word "owner" we turn to the specific nature of a life estate of real property. This has been described as follows by the Iowa Supreme Court in the case of Holzhauser v. Iowa State Tax Comm., 245 Iowa 525, 535, 62 N.W.2d 229 (1954):

> "A life tenant has full control and possession of his tenancy, without any interference from those holding a remainder or reversion. He must not materially injure the permanent rights of the latter in the land. There is no tenure or privity of contract between them. The remainderman does not succeed to the life tenant's title, but gets it from another and independent title. Beeman v. Stilwell, 194 Iowa 231-237, 189 N.W. 969, quoting 31 C.J.S., Estates, sections 30 to 34, pages 39 to 43."

At page 532 of the Iowa Reports the Iowa court indicated the general rule of Iowa law as follows:

> "A life tenant of real estate is required to pay the ordinary taxes, the interest on special assessments and on mortgages on the real estate."

The annotation at 89 A.L.R. starting at page 511 is concerned with the estate or interest in real property to which a homestead claim may attach. The Homestead exemption is the nearest tax situation to the Agricultural Land Tax Credit. The Iowa Homestead law contains the definition of "owner" and, therefore, we must look to other states for cases where the undefined word "owner" is discussed. Two of these cases are found at page 522 and 523 of the A.L.R. annotation and they represent the general rule. They are as follows:

> "In Deere v. Chapman (1861) 25 Ill. 610, 79 Am. Dec. 350, holding that under a statute exempting land of a stated value 'owned' by the debtor, a claim of homestead could attach to a life estate, the court said: 'Owning an estate for his own life, in the premises, the home of his family, we do no violence to the language of the act by considering him the owner for all the purposes of the act, and the property vesting in him as owner,

> according to the nature and extent of his estate. He is, to all intents and purposes, the owner of the immediate freehold and seised thereof, and as such must be protected by the homestead act, and this is neither a liberal nor forced definition of the word "owner." It seems to us to be its most natural meaning, regarding, as we must, the purposes and object of the act.'"
>
> "In the reported case (Re Banfield (Or.) ante, 504) it was held that the holder of a life estate had title sufficient to support a homestead claim, as he was the 'owner'within the meaning of the statute using the term 'owner' in describing the person entitled to a homestead exemption without defining the term."

Another case which graphically demonstrates the ownership interest of the holder of a life estate is In re McCarty's Estate, 285 N.Y.S. 641, 158 Misc. 287 (1936), where the court stated:

> "It is familiar law that during his life the life tenant is the exclusive owner of the land so held by him, with the exclusive right to its possession, control, and enjoyment, subject only to certain well-defined limitations or duties; the owner of the reversion or remainder in fee has no present right of enjoyment, no tangible and physical ownership of the land, but has a future incorporeal interest or estate in the land which will ripen into ownership of the land itself on the death of the life tenant."

While tax exemptions are to be strictly construed, any construction should take into consideration the intent of the legislature. The intent of the legislature was to allow Agricultural Land Tax credit to resident owners. It is the opinion of this office that such resident ownership must constitute substantial ownership of the property. It is our further opinion that a life estate constitutes such substantial ownership. Generally, at the time of taxation:

1. The tenant must pay the taxes;

2. The tenant has the sole right of possession;

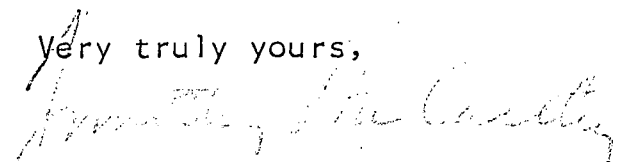
3. The remainderman, during the tax period, has no

present right to the land or to the income from the land; and

4. The remainderman's rights are only future rights.

Therefore, it is my opinion that a life tenant who is a bona fide resident of the state of Iowa should be allowed the Agricultural Land Tax credit as he is the "owner" of the real estate. This is true even if the remaindermen, or any one of them, are not bona fide residents of the state of Iowa as the future interest of the remaindermen will not defeat the present substantial interest of the life tenant.

Very truly yours,



TIMOTHY McCARTHY
Solicitor General

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CRIMINAL LAW: OMVI Conviction sentencing - § 321.281 as amended by Chapter 278, Acts of the 61st G.A. A defendant who pleaded guilty to OMVI may be committed to a private hospital as well as a public institution.

April 25, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Mr. Thomas L. Root
Assistant County Attorney
Pottawattamie County
Council Bluffs, Iowa 51501

Dear Mr. Root:

This is in response to your recent letter wherein you state the following:

> "A question has arisen in this county with regard to the new section on treatment of alcoholism of OMVI defendants, laws of the 61st General Assembly, Chapter 278.
>
> "More specifically my question is whether or not, under this chapter, a defendant who has entered a plea of guilty to an OMVI information can be, in lieu of imposition of punishment, committed as a state patient to a private hospital or institution in Iowa providing such treatment, such as St. Bernards Hospital, rather than to the State Mental Institution at Clarinda."

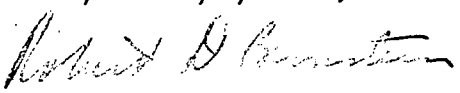
Chapter 278, Acts of the 61st G.A., which was an amendment to Section 321.281, 1962 Code of Iowa, to which you refer reads as follows:

> "'In lieu of, or prior to imposition of, the punishment above described for second offense, third offense and each offense thereafter, the court upon hearing may commit the defendant for treatment of alcoholism to any hospital or institution in Iowa providing such treatment. The court may prescribe the length of time for

> such treatment or it may be left to the discretion of the hospital to which the person is committed. A person committed under this Act shall be considered a state patient."

Clear, unambiguous language of a statute must be given its ordinary meaning in ascertaining legislative intent. Scott v. Wamsley, 218 Iowa 670, 253 N.W. 524 (1934). Therefore, pursuant to Chapter 278, Acts of the 61st G.A., a defendant could be committed to any hospital in the court's discretion, whether private or state, so long as it provides facilities for the treatment of alcoholism.

Very truly yours,



ROBERT D. BERNSTEIN
Assistant Attorney General

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COUNTY AND COUNTY OFFICERS: Justice of the Peace compensation - §§ 601.131, 740.19, 1962 Code of Iowa. That which is provided in § 601.131 as compensation for justices of the peace is a salary and is not predicated on the handling of criminal cases.

April 29, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

B. Michael Dunn
Cerro Gordo County Attorney
Cerro Gordo County Court House
Mason City, Iowa

Dear Mr. Dunn:

Reference is made to your letter in which you submit the following issue:

> "Is a Justice of the Peace entitled to compensation under the provision of Section 601.131, Code of Iowa, 1962, which provides for a sum in full compensation for all criminal cases heard, when in fact the Justice of the Peace heard no criminal cases during the year 1964?

In reply to the preceding question we advise that this office, in an opinion on October 11, 1951, discussed the compensation in Section 601.131 and referred to it as being a salary. This salary was provided by the Acts 1951, (54 G.A.) Ch. 205, Section 1 and 2. Section 79.1, Code of Iowa, 1962, provides that:

> "Salaries specifically provided for in an appropriation Act of the general assembly shall be in lieu of existing statutory salaries, for the positions provided for in any such Act, and all salaries shall be paid in equal monthly or semi-monthly installments and shall be in full compensation of all services, except as otherwise expressly provided."

The Iowa Supreme Court very succinctly stated the power of

the legislature to fix salaries in Polk County v. Cope, 176 Iowa 19, 24,25:

> "...It can hardly be soberly argued that the state by its legislature may not fix the compensation of justices of the peace, limit the amount thereof, and provide how and when it shall be paid. It may provide that compensation shall be by a scale of fees which the officer is authorized to retain, or it may provide that his payment shall be by stated salary paid from the public treasury, and that all fees be passed over to the county. The man who seeks or accepts the office takes it with its burdens as well as its benefits. If he doesn't like the pay, he may decline the honor; or if so minded, he may accept the honor and perform the duty without pay. The doctrine or rule of quantum meruit has no application in cases of this nature ....".

There appears to be no qualification of any type put upon the Justice of the Peace dependent upon the number of cases that he hears.

In Bryan v. Cattell, 15 Iowa 538, 552, a district attorney was called to military duty. He was paid his salary during this time in the services but did not discharge any of the duties of his office. The Supreme Court, while looking at this problem in the abstract stated that the State should not be required to pay the salary if no duties were performed. However, realizing that this problem was of a practical rather than an abstract nature, the Court went on to state that:

> "...The better and safer rule doubtless is that if he is in point of law actually in office, he has a legal right to the salary pertaining to it....".

Although admitting that this is perhaps not the best solution to this problem, the Court realized that in the absence of a statutory provision, the public officer was entitled to his salary so long as he was in office.

Iowa is not bound by other State decisions, however, the language of the Supreme Court of Georgia, in Tucker v. Shoemaker, 99 S.E. 865, is easily applicable to the present situation. In referring

to an act which provided for compensation for a sheriff in return for a duty imposed to register persons who had liquor licenses, the court stated at page 866:

> "Under the circumstances, the act of 1915 should be construed as providing for compensation of the sheriffs in the nature of a salary, which will not be dependent upon the performance by the officer of the duties so imposed."

As provided in 67 C.J.S., Officers, Section 83, at pages 320-321:

> "Where provision is made for compensation for a public office, the right to the compensation is an incident to the office or to the right or title thereto, and the person rightfully holding the office is entitled to the compensation attached thereto. In general, the right of compensation is not an incident of the exercise of the functions of the performance of the duties of the office; hence, in the absence of the constitutional or statutory provision to the contrary, the fact that the officers have not performed the duties of the office does not deprive them of the right to compensation, provided their conduct does not amount to an abandonment of the office."

As Section 601.131 has no reference to any provision of the Code providing for fees in civil cases, this salary would in no way be affected by civil fees retained during the year.

You also suggest that a Justice of the Peace could avoid his duties and still collect his salary. However, Section 740.19, Code of Iowa, 1962, provides:

> "When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision has been made for the punishment of such delinquency, is a misdemeanor."

Therefore, it is my opinion that Section 601.131, Code of Iowa, 1962, provides a fixed salary imposed by the legislature and is not made conditional upon the performance of any minimum number of criminal cases. Although the Iowa Supreme Court has questioned the desirability of such an interpretation, the Court explicitly stated that an officer was entitled to the salary so long as he was in office. If the officer is derelict in his duties, other methods of punishment are provided in the Code.

Very truly yours,

Michael S. McCauley

MICHAEL S. McCAULEY
Assistant Attorney General

mrs

SCHOOLS AND SCHOOL DISTRICTS: Driver Education. §§ 279.10, 279.11, 282.6 and Chapter 280, 1962 Code of Iowa; § 2(6)(a), Chapter 226, § 1, Chapter 248 and Chapter 274, Acts of the 61st G.A. School districts may offer driver education in summer school and school boards have the discretionary power to waive instructional fees in "hardship cases". Driver education must be offered during the regular school year.

May 6, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Mr. W. T. Edgren, Asst. Superintendent
Department of Public Instruction
217 7th Street
Des Moines, Iowa

Dear Mr. Edgren:

This is in response to your recent request in which you posed the following questions relating to driver training:

"1. If driver training is offered during the summer months, may a fee or tuition be charged resident pupils of school age under chapter 248, Acts of the 61st General Assembly?

"2. Would the answer to the first question vary, depending on whether or not driver training were offered during the regular school term in addition to the summer offering?

"3. Reading the mandatory requirements of chapter 274, 61st G.A., together with the permissive waiver for hardship cases in chapter 248, 61st G.A., must the local board make provision for waiver of fee in hardship cases, if tuition or fee is charged resident pupils taking driver training?

"4. May a fee or tuition be charged resident pupils of school age, for driver training given at any time other than during the summer months?

"5. If tuition or a fee is charged to a resident pupil, at any time, for driver training offered or made available under chapter 274, 61st G.A., should the sum of such fee be subtracted from the cost of providing driver training to each pupil so charged, for the purpose of determining reimbursable cost under section 5?"

I

The answer to your first question is found in Section 282.6 as amended by Section 1, Chapter 248, Acts of the 61st General Assembly which provides in part:

> "Every school shall be free of tuition to all actual residents between the ages of five and twenty-one years * * *, provided, however, fees may be charged covering instructional costs for a summer school program. The Board of Education may in a hardship case, exempt a student from payment of the above fees." (Emphasis Added)

The underlined portions above were added to Section 282.6, by the 61st General Assembly to empower public school districts with the discretionary authority to charge instructional fees for summer school. See 64 OAG 365. The said statute is general in scope and does not except any summer school courses once the school board in its infinite wisdom decides to charge instructional fees for the said summer program.

The Driver Education Act does not appear to contain an express exception exempting the said course from the operation of the summer instructional fee provision of Section 282.6 as amended. See Chapter 274, Acts of the 61st G.A.

The Supreme Court of Iowa has stated: "[E]xemptions are statutory and while it is true that such grants are to be liberally construed, yet the grant must appear in the statute or no exemption can exist." (Emphasis Added) In Re Estate of Lucy Todd, 243 Iowa 930, 936, 54 N.W.2d 521, 524 (1952). In accord with the above is 82 C.J.S. Statutes, § 382(A) which provides.

> "[A] statute, in order to be held an exception to the general provisions of another conferring power * * *, must be couched in language so clear and unambiguous as to be free from doubt as to the legislative intent in declaring it to be an exception . . . ."

In reviewing Section 282.6, as amended, by Chapter 248, Acts of the 61st General Assembly, and Chapter 274, Acts of the 61st General Assembly, I have been unable to find an express exemption for driver education from the instructional summer school fee. Therefore, it is my opinion that a fee covering the instructional costs of driver education may be charged by a district charging fees for all courses offered in the summer.

In conclusion, it should be remembered that in the summer a school district is only empowered to charge a fee to cover instructional costs. Section 282.6, as amended by Section 1, Chapter 248, Acts of the 61st G.A. The State has obligated itself to pay each public school district an amount not to exceed thirty dollars per pupil for each student completing an approved driver education course. One of the essential elements of the driver education statute was listed as follows:

> "(3) [t]o reimburse school districts in the amount of $30 per pupil with state aid. Local property taxes are now paying 100 percent of the cost of driver education. Under this proposal the state would support 60-75 percent of this program with funds from increases in driver's and chauffeur's license fees;"
> H. F. 390, Acts of the 61st G.A.

Therefore, school districts charging instructional fees for summer driver education will only be entitled to collect from the students the amount of instructional cost which is not paid for by the State. In other words, if, state aid pays for 75% of the instructional costs of driver education in a given district, the said district may only assess to the student the remaining 25% of the instructional costs.

II

In reply to your second question please be advised that school districts are only required to operate schools for thirty-six weeks of five days each during the year. Section 279.10. School boards in Iowa satisfy the above requirement by operating schools for the said thirty-six week period between the months of August and the following June.

School boards have discretionary authority to operate their respective schools for periods in excess of the thirty-six week requirement. Sections 279.10, 279.11. When schools are operated for periods substantially in excess of the thirty-six week period, the excess period in which schools are in operation is commonly designated as summer school.

There are no state required courses that must be offered at summer school. The selection of courses to be offered in summer school is left to the discretion of the school board. Therefore, I am of the opinion that a school district may offer driver education in summer school and charge for the same, if the charges are determined in a manner consistent with my answer to your first question.

The second question presented assumes that a school board has the authority to offer required driver education only in summer school. This office cannot adopt that assumption. The enactment of Chapter 274, Acts of the 61st General Assembly was a legislative attempt to improve the public safety on our streets and highways by educating our youthful drivers. The explanation which accompanied this Act when it was in bill form provided:

> "Iowa drivers, ages 16-24, comprise only 19.7 percent of the total drivers, yet they were involved in 32 percent of all fatal accidents in 1964. Traffic authorities feel this poor record is due to lack of knowledge, lack of sound and proper attitudes, lack of judgment, and inexperience.
>
> "Driver education is recognized throughout the nation as the best approach for giving these young drivers the fundamentals they need. Findings from over 30 studies indicate that trained drivers had only one-third of one-half as many traffic accidents and violations as untrained drivers during the critical teenage years.
>
> "The essential elements of this bill are as follows: (1) To raise the age for driving to 18 unless the person has successfully completed a driver education course in which case the minimum age is 16. The age limit would be raised over a two-year period to give the schools, the teachers and the pupils adequate time to work into it; (2) <u>To make driver education available to all young people between 15 and 21 years of age</u>; (3) To reimburse school districts in the amount of $30 per pupil with state aid. Local property taxes are now paying 100 percent of the cost of driver education. Under this proposal the state would support 60-75 percent of this program with funds from increases in driver's and chauffeur's license fees; (4) The approved course would require a minimum of 30 clock hours of classroom instruction and 6 clock hours of laboratory instruction including at least 3 clock hours behind the wheel of a car." H. F. 390, Acts of the 61st G.A. (Emphasis Added)

Inasmuch as, all of our young people in the said permissive age group will at sometime be registered in a school situated within one of our public school districts, the Legislature placed the responsibility of providing driver education on the public school district.

Driver Education was made a required course for every public school district in the following manner: "Every public school district in Iowa shall offer or make available to all students residing in the school district an approved course in driver education." Section 5, Chapter 274, Acts of the 61st G.A. The power of a Legislature to require that certain courses be offered or made available cannot be questioned. Waddell v. Board of Directors of Aurelia Consolidated Independent School District, 190 Iowa 400, 175 N.W. 65 (1919).

In view of the above it appears to this office that driver education should be offered by school districts in the same manner as the courses required by Chapter 280 are offered. It would be absurd to think that a public school district could comply with the state requirement, that courses in the constitution of the United States shall be offered, by offering the same only during summer school. In the same vein, Section 2(6)(a), Chapter 226, Acts of the 61st General Assembly, provides:

> "A high school, grades nine (9) through twelve (12), shall teach annually the following as a minimum program:
>
> "a. Four (4) units of science including physics and chemistry."

School districts cannot satisfy the above requirement by offering the units of physics and chemistry solely in summer school. Here, as in the case of driver education the Legislature intended that the required courses be offered during the regular school year.

Chapter 274, Acts of the 61st General Assembly, in as far as it relates to a required course of instruction is in pari materia with the Educational Standards Act, Section 2(6), Chapter 226, Acts of the 61st General Assembly. The Supreme Court of Iowa has stated:

> "It is a well-known and established rule in this jurisdiction that statutes in pari materia shall be construed together, and this applies with particular force to statutes passed at the same legislative session. (Citations omitted) Thus where as here we find two Acts adopted at the same session of the legislature relating to the same subject matter [required courses], the

> statutes should be construed together. It is presumed that such Acts are imbedded with the same spirit and actuated with the same policy, and they are to be construed together as if part of the same Act." Manilla Community School District of Crawford and Shelby Counties v. Halverson, et al., 251 Iowa 496, 503, 101 N.W.2d 705, 709 (1960). (Emphasis Added)

The above indicates that same construction relative to the time when required courses are to be offered under Section 2(6) of the Educational Standards Act is also applicable to the required course under the Driver Education Act.

For the reasons stated above, it is the opinion of this office that school districts must offer or make driver education available for at least one semester during the thirty-six week regular school term.

III

The answer to your third question will depend on the proper construction to attribute to the word "may" as it is used in the phrase "[t]he Board of Education may, in a hardship case, exempt a student from payment of the above [summer school] fees."

The word "may" in a statute is generally permissive and its use is illustrative of the Legislature's intent to confer discretion. Wolf v. Lutheran Mutual Life Insurance Company, 236 Iowa 334, 18 N.W.2d 805 (1945). On the subject of discretion the Supreme Court of the United States has stated:

> "* * * if the word 'discretion' means anything * * *, it means that the recipient must exercise his authority according to his own understanding and conscience." United States ex rel Accardi v. Shaughnessy, 347 U.S. 260, 266, 74 S.Ct. 499, 503. (1954)

The Iowa Supreme Court has adopted the following definition of "discretion":

> "'Discretion may be defined, when applied to public functionaries, as the power or right conferred upon them by law of acting officially under certain circumstances, according to the dictates of their own judgment and conscience, and not controlled by the judgment or conscience of others.'" First National Bank of Remsen v. J. M. Hayes, 186 Iowa 892, 902; 171 N.W. 715, 718 (1919). (Emphasis Added)

From the above, it would appear that the word "may" was used in the permissive sense. Therefore, it is my opinion that Boards of Education are not required to waive the payment of summer school tuition fee in hardship cases.

At this juncture it should be pointed out that the fee waiver provision of Chapter 248, Acts of the 61st General Assembly, could possibly require School Boards to make three determinations. First, the board in the exercise of its discretion must decide whether or not it will waive fees in any "hardship case". If the board decides to waive fees, it must secondly determine the students that qualify as "hardship case[s]." Thirdly, the board in the exercise of its discretion may exempt some students, who are in the "hardship" group. When making the latter determination, the Equal Protection Clause requires that the boards have a rational basis for waiving the fees of some "hardship" students and not waiving them for others.

IV

In our reply to your second question we advised you that Driver Education is a required school course. In addition, Section 282.6, as amended, provides in part:

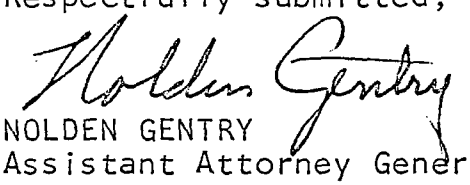
> "Every school shall be free of tuition to all actual residents between the ages of five and twenty-one years . . . ." (Emphasis Added)

In view of the above it is my opinion that a fee cannot be charged for driver education when it is offered during the thirty-six week regular school year.

V

Your fifth question is answered in the last two paragraphs of my reply to your first question.

Respectfully submitted,



NOLDEN GENTRY
Assistant Attorney General

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ELECTIONS: Branch and Mobile Voter Registration. §§ 48.6, 48.16, 48.19, 1962 Code of Iowa, as amended; Section 1, Chapter 93, Acts of the 61st G.A. The commissioners of registration must appoint branch and mobile deputy registrars from the lists furnished to them by the county chairmen; the commissioners may exercise their discretion in determining which of the parties on the lists they wish to appoint. Branch and mobile deputy registrars need not be notary publics and need not notarize each new voter's registration as it is secured. Branch deputy registrars are to be compensated as provided by Section 48.18, 1962 Code of Iowa, as amended.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

May 11, 1966

Mr. B. Michael Dunn
Cerro Gordo County Attorney
Cerro Gordo County Court House
Mason City, Iowa

Dear Mr. Dunn:

The Attorney General has referred to me your recent request for an opinion on the following questions relating to branch and mobile voter registration:

1

Can a commissioner of registration require that branch and mobile deputy registrars meet a number of specific requirements. For example, can he require that these deputy registrars:

a. have previous experience in business management or office procedures
b. have legible handwriting
c. have a high school education
d. have a good personality for public relations
e. attend a mandatory school of instruction for registrars?

It will be helpful to set out in part the statutory provisions with which we are concerned before discussing your inquiry more specifically. Section 1, Chapter 93, Acts of the 61st General Assembly, relating to branch registration states in part:

> "The commissioner of registration shall appoint two (2) persons to act as deputy registrars in each branch registration place. <u>Such appointments shall be made from lists supplied for that purpose by the official county chairmen of the two (2) political parties</u> polling the highest vote in the jurisdiction at the last preceding general election...." (Emphasis added)

And Section 1(2), Chapter 93, Acts of the 61st General Assembly, relating to mobile deputy registrars states in part:

> "The commissioner of registration shall appoint at least six (6) persons from each ten thousand (10,000) inhabitants, or major fraction thereof, within his jurisdiction as mobile deputy registrars. An equal number of these appointees shall be appointed from lists supplied for that purpose from the county chairmen of the two (2) political parties polling the highest vote in the jurisdiction in the last preceding general election...." (Emphasis added)

Compliance must be had with the above statutory sections governing the appointment of branch and mobile deputy registrars. Those sections both require that the commissioner's appointees be appointed from lists supplied by the county chairmen. Because the ultimate object in construing a statute is to determine the statute's real purpose and meaning, Builders Land Co. v. Martens, 255 Iowa 231, 122 N.W.2d 189 (1963), it is clear that the lists supplied to the commissioners by the county chairmen must contain the names only of persons who are reasonably qualified to carry out the functions required of them. If this were not the case the commissioners would possibly not be able to meet their own statutory duty of selecting persons who are qualified to carry out the functions required of them. Since, so far as the commissioners are concerned, the statute only sets out the requirement that they shall appoint from the lists supplied for that purpose by the county chairmen, the commissioners may exercise their discretion in determining which of the parties on the lists they wish to appoint and may appoint whichever of those parties they feel to be best suited for the position. However, the commissioners may not carry out the function allotted by statute to the county chairmen of determining which parties are qualified for placement on the list of persons submitted to the commissioner by the county chairmen. That is a determination which is the responsibility of the county chairman.

II

> Is it permissible to require that a branch or mobile deputy registrar be a notary public?

I believe the answer to the question just discussed adequately discusses the right of a commissioner to require this. As was seen, a commissioner may exercise his own discretion in selecting persons from the list submitted to him.

So far as a general statutory requirement that branch and mobile deputy registrars must be notary publics is concerned, there is no specific section of Chapter 48, 1962 Code of Iowa, as amended, which requires that registrations must be notarized as they are secured. Section 48.6 is the only section of Chapter 48 which states the requirements of that part of the registration process in which the registrant participates; no notarization is required by that section. Because of this fact, and because the provisions of Section 48.16 concerning fraudulent registration appear to make an oath by the registrant superfluous, branch and mobile deputy registrars acting under the authority of Section 1, Chapter 93, Acts of the 61st General Assembly, need not be notary publics and need not notarize each new voter's registration as it is secured.

III

Who will pay the compensation of the deputy registrars at the branch registration places?

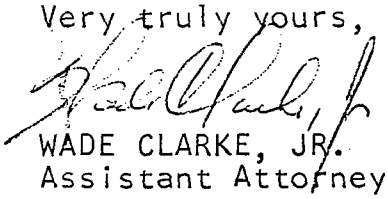
As you know Section 1, Chapter 93, Acts of the 61st General Assembly, amended Chapter 48, 1962 Code of Iowa by adding two new sections to that latter chapter. Chapter 48 deals with permanent registration and the two new sections set out provisions authorizing branch registration places and mobile deputy registrars respectively.

Section 1(2), Chapter 93, Acts of the 61st General Assembly, provides that "Mobile deputy registrars shall serve without pay from the municipality", but nowhere in Section 1, Chapter 93, Acts of the 61st General Assembly, is any mention made of the source of compensation for the branch deputy registrars.

Section 48.18, 1962 Code of Iowa, as amended, sets out the general provisions concerning the sharing of the expense of maintaining the permanent registration system. The provisions of Section 1(2), Chapter 93, Acts of the 61st General Assembly, concerning the pay of mobile deputy registrars sets out an exception to those general provisions. It has been held by the Iowa courts on a number of occasions that statutory exceptions must be strictly construed and that all doubts should be resolved in favor of the general provision rather than the exception so as not to encroach unduly upon the general statutory provision to which it is an exception. Heiliger v. City of Sheldon, 236 Iowa 147, 18 N.W.2d 182 (1945); Wood Bros. Thresher Co. v. Eicher, 231 Iowa 550, 1 N.W.2d 655 (1942). Because there is no statutory provision indicating that branch deputy registrars should be compensated in any manner other than the usual one, and because it is a rule of statutory construction that any doubts should be resolved in favor of a general statutory provision covering the particular subject matter involved, it appears that branch deputy registrars are to be compensated as provided by Section 48.18, 1962 Code of Iowa, as amended.

In conclusion, the commissioners of registration must appoint branch and mobile deputy registrars from the lists furnished to them by the county chairmen; the commissioners may exercise their discretion in determining which of the parties on the lists they wish to appoint. Branch and mobile deputy registrars need not be notary publics and need not notarize each new voter's registration as it is secured. Branch deputy registrars are to be compensated as provided by Section 48.18, 1962 Code of Iowa, as amended.

Very truly yours,



WADE CLARKE, JR.
Assistant Attorney General

bj

LIQUOR, BEER AND CIGARETTES: Section 123.27(7)(e), 1962 Code of Iowa, as amended. Liquor control licenses in effect at the time a county votes to prohibit the sale of liquor by the drink, under the provisions of Section 123.27(7)(e), 1962 Code of Iowa, as amended, may be renewed annually for a three year period from the date of such election, with all such liquor control licenses being subject to revocation at the expiration of the three year period from the date of the election.

May 10, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Mr. Norman R. Hays, Jr.
Marion County Attorney
Knoxville, Iowa

Dear Mr. Hays:

This will acknowledge receipt of your recent letter requesting the opinion of this office on substantially the following:

> This county, under the provisions of Section 123.27(7)(e), 1962 Code of Iowa, as amended, has voted to prohibit the sale of alcoholic beverages. The three year period during which liquor control licenses in effect at the time of the election may remain in effect will expire in February, 1967.
>
> Under the above circumstances:
>
> 1) In an instance where a liquor control license expires in November, 1966, will the licensee be allowed to renew his license?
>
> 2) If response to the above question is affirmative, will the license be renewable for a full one year, or for one year subject to revocation in February, 1967?
>
> 3) May a special license be obtained for the period from November, 1966, to February, 1967?

Section 123.27(7)(e), 1962 Code of Iowa, as amended, in pertinent part, provides:

> "If a majority of the ballots cast are 'YES', the board shall not issue any new licenses. However, if at the time of such election there are <u>liquor control licenses in effect in the county, they shall not be revoked except for cause for a period of three years</u>. No new election shall be held for a period of four

> years. ... Except for filing of the petition and the conduct of elections, whenever the word 'board' appears in this paragraph it shall include the county board of supervisors and city and town councils." (emphasis ours)

The General Assembly, by specifically providing that those liquor control licenses which were in effect in the county at the time of an election under Section 123.27(7)(e), shall not be revoked [except for cause] for a period of three years, and by further providing that a new election to decide the question of whether the county shall allow the retail sale of alcoholic beverages by the drink shall not be held for a period of four years subsequent to an election in which the majority of voters have determined that alcoholic beverages shall not be sold by the drink in their county, have clearly manifested that once a county has voted to prohibit the sale of liquor by the drink, there shall be a one year period during which no licenses to sell liquor by the drink shall be in effect in that county. We must adhere to this manifested intention of the Iowa General Assembly.

We have previously examined the language as found in Section 123.27(7)(e), 1962 Code of Iowa, as amended in 1964 O.A.G. 270 and therein concluded that:

> " ... the board is prohibited from issuing new licenses, however, liquor control licenses in effect cannot be revoked except for cause for a period of three (3) years. Thus, a board of supervisors or a city or town council is expressly prohibited from issuing new additional permits until at least four (4) years later when another election might be held and a contrary result obtained."

The above quoted language clearly prohibits a county board of supervisors or a city or town council from issuing a special license to a licensee until a period of four years from the date your county has voted to prohibit the sale of alcoholic beverages by the drink has elapsed, thus precluding the issuance of a special license to a person who held a different class liquor control license at the time of the election.

Response to your questions must be predicated on the basis that those licensees which had valid liquor control licenses for the retail sale of alcoholic beverages by the drink at the time of the election, at which election the voters of a county determined to prohibit the sale of liquor by the drink, shall be allowed to keep such licenses in effect for a period of three years, unless revoked for cause. This would mean that upon the license of such a licensee being subject to renewal during the last year of the

three year period, such license could be renewed, subject to revocation at the end of the three year period as specified in Section 123.27(7)(e). To determine this question in any other manner would result in a serious inequality in the application of this law and would add elements to the expressed intention of the General Assembly. This we cannot do.

Thus, response to your specific inquiry would be that: 1) Upon a liquor control license (such license having been in effect at the time of the vote on the question of whether to prohibit the sale of liquor by the drink) being subject to renewal some time during the last year of the three year period which the legislature has stated such licenses may remain in effect, such licenses may be renewed until the expiration of the three year period from the date of the election. 2) Such license would be renewable for one year and subject to revocation at the expiration of the three year period from the date of the vote. It should be noted that, while a license in effect at the time of the vote may not be revoked except for cause during the three year period subsequent to the vote, at the time that said three year period has elapsed such a license would be subject to immediate revocation. Under such circumstances the licensee would be entitled to a refund of that portion of his license fee allowed by the liquor control act. 3) A special license which would be issued for the period to run from the regular expiration of a liquor control license to the end of the three year period would not be permitted as such as a license would constitute a new license, the granting of which is specifically prohibited by Section 123.27(7)(e), 1962 Code of Iowa, as amended. The renewal of an existing license would not, of course, constitute an issuance of a new license.

Very truly yours,

RONALD A. RILEY
Assistant Attorney General

nl

COUNTIES AND COUNTY OFFICERS: Board of Supervisors; Repair of county buildings - §§ 332.7, 332.8, 345.1 and 345.3, 1962 Code of Iowa. The maximum amount the Board of Supervisors can expend, without election, for remodeling or reconstruction of a building other than the courthouse, jail or county home, where funds are available in the General Fund, is $20.000. There is no money limitation upon repairs to buildings other than the bidding, advertising and specification requirements of §§ 332.7 and 332.8.

May 11, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Mr. Ray A. Fenton
Polk County Attorney
406 Court House
Des Moines, Iowa

Dear Mr. Fenton:

On April 21 you submitted the following letter from the Polk County Board of Supervisors:

> "The Board of Supervisors is contemplating trading the Welfare Building at 701 5th Street for the Harger-Blish Building on an even exchange basis, as you know.
>
> "The Board has been considering the problem of rehabilitating the building and requests that you seek an Attorney General's opinion with reference to the provisions of Chapter 345 of the Iowa Code, as amended, relative to the requirement for voter approval of expenditures in excess of $25,000. We understand that the Code provisions have reference to remodeling, extensions or reconstructions of Court Houses, Jails, County Homes, but no reference is made to the repair of buildings.
>
> "We would be of the opinion that many of the things contemplated in the Harger-Blish Building would be in the nature of repairs rather than remodeling. Such repairs would be perhaps to the heating system, lavatories, floors, painting, etc. We would have funds available in the General Fund not appropriated for other purposes and could expend additional monies above the $25,000 without additional tax levy.
>
> "Since the proposed exchange is quite imminent, we would appreciate your getting a very early reply from the Attorney General."

Together with that letter you submitted the following two questions:

"1. What is the maximum amount a Board may expend for the remodeling of an existing building without submitting the question to the voters if there are funds available for that purpose?

"2. Is there any limitation on the expenditure of money for making necessary repairs other than the requirement of advertising for bids as provided by Sections 332.7 and 332.8 of the 1962 Code of Iowa?"

I.

Your first question calls for an interpretation of Sections 345.1 and 345.3 of the 1962 Code of Iowa which read as follows:

"345.1 Expenditures--when vote necessary. The board of supervisors shall not order the erection of, or the building of an addition or extension to, or the remodeling or reconstruction of a courthouse, jail, county hospital, or county home when the probable cost will exceed ten thousand dollars, or any other building, except as otherwise provided, when the probable cost will exceed ten thousand dollars, nor the purchase of real estate for county purposes exceeding ten thousand dollars in value, until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition at a general or special election, notice of the same being given as in other special elections. Except, however, such proposition need not be submitted to the voters if any such erection, construction, remodeling, reconstruction, or purchase of real estate may be accomplished without the levy of additional taxes and the probable cost will not exceed twenty thousand dollars." (Emphasis supplied)

"345.3 Improvements authorized. The board of supervisors in any county having a population of forty thousand or over, with a county seat having a population of more than five thousand, may also make necessary additions to such courthouse, jail,

> or county home where the funds are available in the general fund, unappropriated for other purposes, without additional tax levy and without submitting the proposition to the voters of such county, provided the cost thereof does not exceed twenty-five thousand dollars."

The answer to your question plainly is that the limitation is twenty thousand dollars. Section 345.1 refers, in addition to courthouses, jails, and county hospitals to "or any other building." Section 345.3 refers only to courthouses, jails or county homes, but Section 345.1 is much broader. The second sentence, which is the exception clause, allows an expenditure of twenty thousand dollars when the money is available.

II.

Sections 332.7 and 332.8 read as follows:

> "332.7 Contracts and bids required. No building shall be erected or repaired when the probable cost thereof will exceed two thousand dollars except under an express written contract and upon proposals therefor, invited by advertisement for three weeks in all the official newspapers of the county in which the work is to be done."

> "332.8 Bids--plans and specifications. Contracts for buildings and repairs specified by section 332.7 shall be let to the lowest responsible bidder at a time and place which shall be distinctly stated in the advertisement. The board may on the day fixed for letting such contract adjourn the hearing to some later date and place, of which all parties shall take notice. The board may reject any and all bids and advertise for new ones. The detailed plans and specifications for such improvements shall be on file and open to public inspection in the office of the auditor of the county in which the work is to be done before advertisement for bids."

Again, the answer to your question is clear that there are no limitations on the expenditures of money for necessary repairs, other than the bidding, advertising and specification requirements of Sections 332.7 and 332.8. However, if your board plans on spending more than twenty thousand dollars, they should make

sure that they are engaging in "repairs" rather than "remodeling" or "reconstruction."

It has been long held that counties and municipal corporations are creatures of the state and only have the powers which are granted to them by the legislature and, if power is exercised contrary to imposed restrictions, a contract entered into in violation thereof is not merely voidable, but void. Madrid Lumber Co. v. Boone County, 255 Iowa 380, 121 N.W.2d 523 (1963).

Therefore, you should be sure that your board of supervisors is contracting for repairs, rather than remodeling or reconstruction.

Following are some citations from Words and Phrases under the topic "Repairs" which will assist you in advising your board:

> "An 'alteration,' as of leased building, denotes substantial change therein, while 'repair' means to restore to soundness or work done to keep property in good order. Ten-Six Olive, Inc. v. Curby, C.A.Mo., 208 F.2d 117, 122."

> "'Repair' means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction, and is snynonymous with 'mend' and 'renovate,' but, generally does not mean to alter or change condition or to replace with new or different material. Mozingo v. Wellsburg Electric Light, Heat & Power Co., 131 S.E. 717, 718, 101 W.Va. 79."

> "The word 'repair,' as defined by Webster: 'Act of repairing; restoration or state of being restored, to a sound or good state after decay, waste, injury, etc.'--is applied by courts in the construction of statutes and contracts. The word 'improvement,' defined by the same authority as 'a valuable addition or betterment as a building, clearing, drain, fences, etc., on land,' is a broader word than 'repair,' but includes the latter and is also practically applied by the courts. Garland v. Samson, C.C.A. Minn., 237 F.31, 35."

> "Rights of buyer of patented machine are limited to use and repair thereof, without right to rebuild or reconstruct machine, and legal limit of

'repair' is passed and realm of 'reconstruction' invaded if repairs are so extensive that identity of machine is lost. Ideal Wrapping Mach. Co. v. George Close Co., D.C.Mass., 23 F.2d 848, 850."

"The words 'repairing' and 'remodeling' are not synonymous or included within the meaning of the word 'building,' within an ordinance prohibiting the erection of a wooden building within the fire limits. City of Mayville v. Rosing, 123 N.W. 393, 395, 19 N.D. 98, 26 L.R.A., N.S., 120.

"The constitutional provision prohibiting a county from borrowing money except for purpose of 'erecting' necessary public buildings prohibits borrowing money to remodel, alter, or repair a building already existing unless such processes amount in fact to erection of a building, and unless the term 'remodeling' is invariably included within the meaning of 'erecting' and 'building.' Const. art. 9, § 10. The 'repair' of a building may involve 'remodeling' thereof. Frequently, the terms 'repair' and 'remodel' are used interchangeably, but it may be assumed that 'remodel' is a word of larger signification than 'repair.' 'Remodel' means to model, shape, form, fashion, afresh, or to recast, and is also defined as meaning to model anew; to reconstruct. It is a word of broad meaning. Among other definitions it means to reform, reshape, reconstruct, to make over in a somewhat different way. 'Remodeling' of a building is more than 'repairing' it or making minor changes therein. The ordinary significance of the term imports a change in the remodeled building practically equivalent to a new one. In common understanding, the 'building' of a house means the 'erection' or 'construction' of a new house and not the 'repair' or 'remodeling' of an old one. Board of Com'rs of Guadalupe County v. State, 94 P.2d 515, 520, 43 N.M. 409."

Very truly yours,

TIMOTHY McCARTHY
Solicitor General

ew

CONSERVATION: Dissolution of a drainage district; when a Board of Supervisors must meet - §§ 331.15, 331.16, 331.22, 1962 Code of Iowa, as amended, 331.23 as amended and 455.35. Next meeting of Board of Supervisors for the purpose of examining and disposing of a petition for dissolution of a drainage district is the next session of regular meeting of the Board of Supervisors and the performance of such duty by the Board is mandatory.

May 11, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Honorable Gene Glenn
Rural Route 7
Ottumwa, Iowa

Dear Mr. Glenn:

Reference is herein made to your letter of April 7 in which you submitted the following:

> "When upwards of fifty (50) per cent of landowners in a drainage district, owning in the agregate more than sixty (60) per cent of the land in said district, petition the Board of Supervisors by petitions filed with the Auditor for dissolution of said district, and said petitions recite that more than two years have elapsed from the establishment of the district, that no appeal or litigation has been brought against said district for more than two years, and that the Board of Trustees of said drainage district have become inactive and operation of said district is defunct, is the Board of Supervisors under a duty to examine said petitions and dissolve the district?
>
> "It is my understanding that the residents of the Jefferson Park Drainage District in Ottumwa have filed such petitions approximately four weeks ago, but no action has been taken to date. These constituents are most anxious that the district be dissolved, in order that direct jurisdiction of the area may be assumed by the City of Ottumwa and steps taken to alleviate the danger from spring flooding."

The statute under which the situation arises in Section 455.35, Code of 1962, which provides as follows:

> "455.35 Dissolution. When for a period of two years from and after the date of the establishment of a drainage district, or when an appeal is taken or litigation brought against said district within two years from the date such appeal or litigation is finally determined, no contract shall have been let or work done or drainage certificates or bonds issued for the construction of the improvements in such district, a petition may be filed in the office of the auditor, addressed to the board of supervisors, signed by a majority of the persons owning land in such district and who, in the aggregate, own sixty percent or more of all the land embraced in said district, setting forth the above facts and reciting that provision has been made by the petitioners for the payment of all costs and expenses incurred on account of such district. The board shall examine such petition at its next meeting after the filing thereof, and if found to comply with the above requirements, shall dissolve and vacate said district by resolution entered upon its records, to become effective upon the payment of all the costs and expenses incurred in relation to said district. In case of such vacation and dissolution and upon payment of all costs as herein provided, the auditor shall note the same on the drainage record, showing the date when such dissolution became effective."

According to the terms thereof, dissolution of a drainage district is effected in the manner and pursuant to the requirements of this section. Speaking of the duty of the Board of Supervisors in connection with a petition for dissolution, the statute specifically says, "The board shall examine such petition at its next meeting after the filing thereof, and if found to comply with the

above requirements, shall dissolve and vacate said district by resolution...." Thus, there is devolved upon the Board of Supervisors, at the next meeting after the filing of the petition for dissolution, the duty to examine the petition and, if found to comply with the requirements, to dissolve the district.

Statutory meetings of the Board of Supervisors are of two kinds: regular and special. Section 331.15, Code of 1962, provides, with respect to regular meetings, the following:

> "331.15 Meetings. The members of the board of supervisors shall meet at the county seat of their respective counties on the second secular day in January and on the first Monday in April, and the second Monday in June, September, and November in each year, and shall hold such special meetings as are provided by law, but in the event a quorum of said board fails to appear on a day set for a regular or an adjourned meeting the auditor of said county shall adjourn said meeting from day to day until a quorum is present."

Special meetings are held under the following provisions of Section 331.15, i.e., members of the board of supervisors "shall hold such special meetings as are provided by law...."

Application of the foregoing to the duty that is imposed upon the Board of Supervisors by Section 455.35 draws in question the meaning of the words "next meeting following the filing of the petition." If this language were to be literally applied, it not being a special meeting provided by law, it means a regular meeting which is held according to the provisions of Section 331.15 at the time therein prescribed. This may involve a

delay of months before the duty of the board required by Section 455.35 could be fulfilled. Such regular meeting lasts until the day before the day of the next regular meeting. See 62 OAG 174.

In addition to the described statutory meetings, there is statutory reference to special sessions of the Board of Supervisors described by Section 331.16 as meetings called by "the chairmen or a majority of the board." Section 331.16 reads as follows:

> "331.16 Special sessions. Special sessions of the board of supervisors shall be held only when requested by the chairman or a majority of the board, which request shall be in writing addressed to the county auditor, shall fix the date of meeting and shall specify the objects thereof, which may include the doing of any act not required by law to be done at a regular meeting."

In addition to the regular and special meetings of the Board of Supervisors and special sessions of the Board, there is statutory recognition of sessions of the Board of Supervisors in determining the statutory compensation of members of the Board of Supervisors. These appear to be sittings of the Board and not statutory meetings of themselves and are the sittings going to make up the statutory meetings. As such they are recognized by Sections 331.22 and 331.23, Code of 1962, as amended, providing as follows:

> "331.22 Compensation of supervisors. The members of the board of supervisors shall each receive seventeen dollars and fifty cents per day for each day actually in session, and seventeen dollars and fifty cents per day exclusive of mileage when not in session but employed on committee service ...."

> "331.23 Maximum session pay. Except as provided in sections 331.22 and 331.24, members of such board shall not receive compensation for a greater number of days of session service each year than specified in the following schedule.
>
> In counties having a population of:
>
> 1. Ten thousand or less, thirty days.
>
> 2. More than ten thousand and less than twenty-three thousand, forty-five days.
>
> 3. Twenty-three thousand and less than forty thousand, fifty-five days."

This situation has had pertinent comment in the case of Town of Hodgenville v. Kentucky Utilities Co., 61 S.W.2d 1047, 250 Ky. 195, where it is said:

> "'Sessions,' as used in statute providing that no ordinances of third-class cities shall be effective until they shall have been read and passed at two 'sessions' of council held on different days, embraces 'sittings' as well as 'meetings' and was meant to cover two 'sittings' held on different days, whether of same or different 'meetings.' Ky.St. §3279. 'Session' does not have a single fixed, and definite meaning, but is variously used in statutes and constitutions, and may be used symonymously with 'meeting,' or it may be used in its literal sense of 'sitting.' A 'meeting' may run for a day with a morning session, an adjournment for lunch, an aftermoon session, an adjournment for dinner, and then an evening session, or it may run for several days with one or more sessions each day; such sessions being but sittings of the 'meeting." The 'meeting' may embrace but one session, or the meeting, though extending over several days, may be called a session of the body which is meeting, and it is in the latter sense that reference is made to 'sessions' of the Legislature."

From the foregoing statutes and references, it is clear that "next meeting" provided by Section 455.35 does not mean a special meeting or a special session, nor from the context of Section

455.35, a regular meeting, and therefore, "next meeting" means a "next session" of a regular meeting. Delaying to the next regular meeting could and might seriously affect the public interest.

This duty imposed upon the Board of Supervisors that it shall meet after the filing of the petition and, if it finds the statutory requirements of Section 455.35 have been complied with, it shall then dissolve the district, is a mandatory duty. The use of the word "shall" when addressed to public officers is generally construed to be mandatory. Wisdom v. Board, 236 Iowa 669, 19 N.W. 2d 602 (1945). Even the word "may" is construed to mean "shall" whenever the rights of the public or third persons depend upon the exercise of the power or performance of the duty to which it refers.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

ew

POLICE POWER: Railroad workshops. §88.3, 1962 Code of Iowa, as amended. Buildings or structures used by railroads to house section cars or trucks and for the storage of tools, supplies and materials can not be classified as workshops within the intent and meaning of Section 88.3, 1962 Code of Iowa, as amended.

May 19, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

Mr. Robert Chesher
Deputy Commissioner of Labor
State of Iowa
E. 7th and Court
L O C A L

Dear Mr. Chesher:

I am in receipt of your recent request for an opinion concerning the following:

> "Section hands on the various railroads work at any number of locations along the tracks or right of way of their specific division of a given road. In most instances, however, they are directed to a specified location where they congregate each day to begin their day's work and then return to the same location at the end of that day's work. In most instances, that specified location has a building of some sort to house the section car or truck as the case might be and for storage of tools, supplies and materials.
>
> "I respectfully ask an official opinion; 1. As to whether or not this building would be classified as a workshop, as mentioned in section eighty-eight point three (88.3) of the Code, and 2. If it is classed as a workshop, is the character of the work performed by the employees such that it should require a change of clothing as also mentioned in chapter eighty-eight point three (88.3) of the Code."

First of all I will set out Section 88.3 of the 1962 Code of Iowa, as amended, with which we are concerned, to wit:

> "In factories, mercantile establishments, mills, and workshops, adequate washing facilities shall be provided for all employees; and when the labor performed by the employees is of such a character as to require or make necessary a change of clothing, wholly or in part, by the employees, there shall be provided a dressing room, or rooms, lockers for keeping clothing, and adequate washing facilities separate for each sex, and no person or persons shall be allowed to use the facilities assigned to the opposite sex. A sufficient supply of water suitable for drinking purposes shall be provided."

This section, along with other sections of Chapter 88, were enacted for the safety and comfort of laborers and other persons assembled in factories and buildings throughout the state. See O.A.G. 1906 page 377. Apparently, the legislature felt it necessary to provide minimum standards of safety and comfort for persons, who spend their working hours within an enclosed area or building, performing their assigned tasks.

The term "workshop" as it relates to railroad activities was construed in Richmond and D.R. Co. v. Commissioners of Alamance, 84 NC 504 as embracing "foundries, engine houses, depots, machine shops, necessary offices, and all the usual appliances for the manufacture or repair of engines and other stock required for the operation of the road".

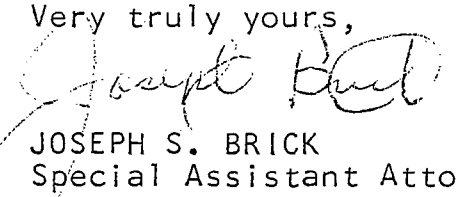
Similarly, in Fort Smith Aircraft Co. v. State Industrial Commission, 1 P2d 682, 151 Okla 67, the term "workshop" was held applicable to an airport equipped with power driven machinery for building, cleaning, and repairing airplanes. Also, in Hoffmeier v. State, 77 N.E. 372, 37 Ind App. 526 it was held that a shop maintained by a street railroad company, where the principal work was repair of cars or other appliances used in carrying on the business, was a "workshop".

It appears that the term "workshop" must be interpreted to mean a building or structure maintained by a railroad corporation for the manufacture and repair of engines and other stock and appliances used in carrying on the business of the railroad. This type of structure would be built or designed by the railroad primarily with the idea in mind of housing railroad employees for all or the greater part of their work day and not simply for the storage of vehicles and supplies used by these employees in their daily work.

Referring to your statement of facts one can readily see that the particular buildings or structures in question are not constructed nor used in such a manner as to include them within the normally accepted definition of the term "workshop". The employees in question do not work in these buildings but only visit them briefly twice a day, and there would, therefore, be no need for installing the safety and comfort facilities required by Section 88.3.

I am, therefore, of the opinion the buildings or structures used by railroads to house section cars or trucks and for the storage of tools, supplies and materials can not be classified as workshops within the intent and meaning of Section 88.3. Consequently, it becomes unnecessary to answer question two of your inquiry.

Very truly yours,



JOSEPH S. BRICK
Special Assistant Attorney General

bj

SCHOOLS AND SCHOOL DISTRICTS. Driver Education. Title 1 Public Law 89-10, § 274.7, 1962 Code of Iowa; § 4(1), Chapter 226, §4(2), Chapter 226 and § 5, Chapter 274, Acts of the 61st G.A. Public schools may not send their driver education instructor into a private school. The public school district "offering" driver education must "offer" the same to all residents between the ages of 15 and 21.

May 20, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Mr. Adrian Brinck
State Representative
Lee County
West Point, Iowa

Dear Mr. Brinck:

This is in response to your recent inquiry wherein you presented the following:

> "Under the shared time section of the standards bill [Chapter 226, Acts of the 61st G.A.] will it be legal for a school board to send their driver education instruction teacher to a nearby parochial school [in the same district] and offer driver education during the regular school period?"

In reply to your inquiry it is relevant that we understand what is contemplated by a shared time project instituted under Section 4(2), Chapter 226, Acts of the 61st General Assembly. "Shared time is defined as an arrangement whereby non-public schools send their pupils to public schools for instruction in one or more subjects during a regular school day." See opinion to Senator John Kibbie, April 28, 1965. In contrast to the above definition of shared time the arrangement set out in your request appears to be a sharing of instructors with the salary of the same to be paid by the public school district.

Section 4(2), Chapter 226, Acts of the 61st General Assembly, expressly authorizes shared time in the following manner:

"The state board, when necessary to realize the purposes of this chapter, shall approve:

"* * *

"2. The enrollment in public schools for specified courses of students who also are enrolled in private schools, when the courses in which they seek enrollment are not available to them in their private schools, provided such students have satisfactorily completed prerequisite courses, if any, in schools maintaining standards equivalent to the approval standards for public schools, or have otherwise shown equivalent competence through testing."

The sharing of instructors between private and public schools is not provided for in the above section. Authority may not be implied to include the sharing of instructors within the shared time provision because a power may be implied only where it is essential to effectuate the powers expressly given by statute. City of Des Moines v. Fowler, 218 Iowa 504, 255 N.W. 880 (1934). You should also be aware of the rule of statutory construction which provides that express mention of one thing in a statute excludes what is not mentioned. Pierce v. Bekins Van & Storage Company, 185 Iowa 1346, 172 N.W. 191 (1919). In view of the above it is my opinion that the sending of a driver education instructor to a private school is not included within the shared time provision of Section 4(2), Chapter 226, Acts of the 61st General Assembly.

The sharing of an instructor is possible under Section 4(1), Chapter 226, Acts of the 61st General Assembly, which provides as follows:

"The state board, when necessary to realize the purposes of this chapter, shall approve:

"1. The sharing of the services of a single instructor by two (2) or more schools in two (2) or more school districts;" (Emphasis Added)

The above provision allows the sharing of an instructor by two or more school districts which is quite different than the sharing of an instructor by a private school and public school in the same district. In addition, you should be cognizant of the decision of the Iowa Supreme Court indicating that the

school laws of Iowa concern only public schools unless otherwise expressly indicated. Silver Lake Consolidated School District v. Parker, 238 Iowa 984, 29 N.W.2d 214 (1947). Therefore, assuming without actually deciding whether educating drivers is one of the purposes of Chapter 257, as amended, it is my opinion that Section 4(1), Chapter 226, Acts of the 61st General Assembly does not authorize the public school district to send it's driver education instructor to a private school within the public school district.

This opinion is to be distinguished from the opinion issued April 14, 1966, to Mr. Paul F. Johnston, State Superintendent of Public Instruction, wherein we stated that under Title I of the Elementary-Secondary Education Act of 1965, school districts may provide non-instructional public school teachers and equipment to private schools. The federally funded Elementary-Secondary Education Act of 1965 contemplated that non-instructional services of teachers and materials, hired or purchased with federal funds, would be provided on private school premises. The Driver Education Act, however, is a state financed program and it does not give the slightest hint that the said instruction may be offered by the public school district on private school premises.

In accord with the above it is the opinion of this office that public school driver education instructors may not be sent to private schools.

Due to the apparent widespread misconceptions concerning the offering of driver education it is appropriate for us to devote a few lines to that subject at this time. Section 5, Chapter 274, Acts of the 61st General Assembly, the Driver Education Act, provides in part as follows:

> "Commencing with the September, 1965, school term, the state of Iowa shall reimburse each public school district in an amount not to exceed thirty (30) dollars per student for each student completing an approved driver education course offered or made available by the school district. Every public school district in Iowa shall offer or make available to all students residing in the school district an approved course in driver education. Funds for such reimbursement shall be appropriated by the legislature to a special driver education fund to be administered by the department of public instruction. Two (2) percent of the annual amount allocated to the

special driver education fund, shall be available to the department of public instruction for use in discharging the cost of administration of this Act.

"Student, for purposes of this Act shall mean any person between the ages of fifteen (15) years and twenty-one (21) years who resides in the public school district and who satisfies the preliminary licensing requirements of the department of public safety."

In construing the above provision this office has stated:

"The controlling language within the above section is found in the legislative definition of the word 'student' the key word in determining eligibility for participation in the driver training course. As defined student means 'any person between the ages of fifteen (15) years and twenty-one (21) years who resides within the public school district * * *.' H.F. 390, § 5, Acts of the 61st General Assembly. The above definition extends the application of this enactment to 'any person' in clear and unambiguous language. 'Where language of a statute is plain and unambiguous, there is no occasion for construction, * * *, but the statute must be given effect according to its plain and obvious meaning * * *.' Smith v. Sioux City Stock Yards Co., 219 Iowa 1142, 1149; 260 N.W. 531, 534 (1935).

"There can be no doubt as to the meaning of House File 390, when we consider the definition of student to mean 'any person between the ages of fifteen (15) years and twenty-one (21) years who resides in the public school district.' This means that as long as a person lives within the school district and is within the permissive ages of House File 390, he will be considered a student and will be permitted to take the driver training course regardless of school attendance. In accordance with the Legislature's definition of student it is not necessary for a person to be enrolled in any

> school to be eligible for the course. Therefore, I am of the opinion that private and parochial school students will be eligible to participate in the driver education courses offered by the school district in which they reside." Opinion to Paul E. Craig, Oct. 29, 1965.

In accord with the above it is evident that school boards "offering" driver education must offer the said course to all students between the ages of fifteen (15) and twenty-one (21), regardless of whether the students are enrolled in public school, private school or no school. In this there is no room for discretion, the legislative language is mandatory.

Driver Education must be offered for at least one semester during the regular school term and it may be offered during the summer. See opinion to W. T. Edgren, Assistant Superintendent of Public Instruction, May 6, 1966. There will probably be no problem in offering the course to the regular public school pupils at the above times. The mechanics of offering driver education to the non-public school students and those not enrolled in any school is left to the sound discretion of the local school board. Presumably, the said course will be offered to the non-public school students under a Section 274.7 dual enrollment plan or during summer school, however, the local board is not limited to the above two possibilities. It should be remembered that regardless of what procedure for offering driver education is selected the local school must offer the same to all on a reasonable basis.

Very truly yours,

NOLDEN GENTRY
Assistant Attorney General

NG:ms

ELECTIONS: Registration. § 48.11, 1962 Code of Iowa. Applications for registration must not be received for nine full days between the last day of registration and election day as to that particular election. For any other election, however, applications for registration must continue to be received.

May 26, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Mr. Jack M. Fulton
Linn County Attorney
Linn County Court House
Cedar Rapids, Iowa

Dear Mr. Fulton:

The Attorney General has referred to me your recent request for an opinion on the following question:

> "If two or more elections are scheduled to be held within a ten-day period, may the duly authorized clerk, under authority of Section 48.11 of the Code of Iowa, close the registration books ten days before the first election and not open registration at any time subsequent for further registration, until the last election in the series has been held?"

It will be helpful to set out the statutory provisions with which we are here concerned. The relevant portion of Section 48.11 states:

> "The commissioner of registration, or a duly authorized clerk acting for him, shall, up to and including the tenth day next preceding any election, receive the application for registration of all such qualified voters as shall personally appear for registration at the office of the commissioner or at any other place as is designated by him for registration, who then are or on the date of election next following the day of making such application will be entitled to vote...."

Section 48.13 states:

> "The commissioner of registration shall have nine full days between the last day of registration and election day to perfect his election registers and, for that purpose, nine days before

> any election day shall be days upon which voters may not register. During these nine days the commissioner shall complete the election registers and, on the day before election day, he shall deliver them as required by law to each election precinct."

The ultimate object in the construction of a statute is to determine legislative intent. Richardson v. City of Jefferson, ____ Iowa ____, 134 N.W.2d 528 (1965). And in determining the correct construction of a statute, it is proper to consider the evil sought to be remedied by it and the object and purposes sought to be obtained by it. State v. Bishop, ____ Iowa ____, 132 N.W.2d 455 (1965). The constitutional and statutory provisions relative to voting and voter registration have generally been enacted in order to provide adequate proof of the existence of the requisite constitutional requirements for voting and to prevent fraud by providing in advance an authentic list of qualified voters. See 18 Am.Jur. Elections §85, 29 C.J.S. Elections §37.

When read in conjunction with Section 48.13, 1962 Code of Iowa, and in the light of the general purposes of the registration and voting laws, it appears clear that Section 48.11 was meant to provide the commissioner an adequate time to complete the election registers so that an authentic list of qualified voters might be delivered to each election precinct on the day before election day. The legislature determined that 10 days provided an adequate time in which to do this without infringing upon the suffrage rights of Iowa citizens.

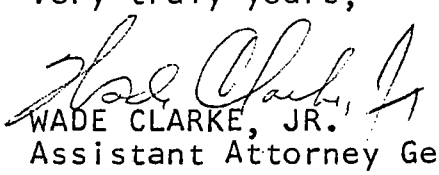
Because registration acts should be construed so as to give the elector the fullest opportunity to vote that is consistent with their purposes, it does not appear that an interpretation of the language of Section 48.11 should diminish to any extent the suffrage rights of Iowa voters unless such an interpretation is absolutely necessary. Such a necessity does not seem to exist in this instance. Consequently, it appears that what is meant by this language is that applications for registration must not be received nine days before election day as to that particular election. For any other election, applications for registration should continue to be received.

This same result was reached in the only two cases which we have found dealing with this specific problem. Gunter et al v. Gayden et al, 84 SC 48, 65 S.E. 948 (1909), State ex rel Lawhead v. Kanawha County Court, 129 W.Va 167, 38 S.E.2d 897 (1946). In reaching this conclusion, the court in the Lawhead case was dealing with a similar statute involving a thirty day period. In that case the court stated:

> "It is entirely possible that numerous voters could be disfranchised, or their right to register restricted, by the calling of special elections of which they may have no knowledge, and upon presenting themselves for registration the pendency of such election could be utilized as a bar to their right of registration....
>
> * * *
>
> "Upon consideration of the constitutional provisions and statutes enacted pursuant thereto on the subjects of voting and elections, we think that under Section 26 of the Permanent Registration Law, as amended, that the pendency of an election to be held within thirty days from the date demand is made by a qualified voter to register does not preclude his right to register, but he is only entitled to vote at elections to be held thirty days or more from the date of his demand. Giving to the statute this interpretation, we make effective what we believe was the true intent of the Legislature, and avoid the unhappy consequences which would follow if the contentions of respondents were upheld."

Thus, it is my opinion that under Section 48.11, 1962 Code of Iowa, applications for registration must not be received for nine full days between the last day of registration and election day as to that particular election. For any other election, however, applications for registration must continue to be received.

Very truly yours,



WADE CLARKE, JR.
Assistant Attorney General

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WELFARE: Claims For Medical Attendance. §§ 252.28, 252.34, 252.35, 347.16 and 347.21, 1962 Code of Iowa. The County Board of Supervisors may reject or diminish an indigent medical attendance claim only when the charge is more than is usually charged for like services in the neighborhood where such services were rendered.

May 26, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Mr. John Walker
State Senator
Williams, Iowa

Dear Senator Walker:

This is in response to your recent inquiry concerning the Hamilton County Public Hospital's charges for county welfare patients. Your letter revealed the following information regarding room charges for welfare patients:

> "The Board of Supervisors have refused to pay more than $12.50 per day for room charges for welfare patients. Of the 76 beds available only three ward beds are priced at $14.50 per day with two-bed accommodations priced from $15.50 to $16.50 per day. Private rooms are priced between $17.00 and $19.00 a day. These room prices are the lowest of any hospital in our district. To accept $12.50 per day would be accepting $2.00 per day less than our cheapest room.
>
> "A survey of all welfare patients the first nine months of 1965 (62 cases) revealed that our actual billing came to $19.29 per day average for all welfare patients with the county paying an average of $16.67 per day. The difference results from partial insurance coverage and patients paying part of the cost of care when funds were available. The average cost per patient day of service for all cases in the hospital during 1965 was $26.02. It is apparent that welfare patients already are being cared for at a less cost per day than other patients. For this reason it is felt that we cannot accept less than our regular charges in treating welfare patients, especially when the regular charges billed for welfare patients are less than the average cost per day in maintaining hospital service."

Your letter seeks to determine whether the Board of Supervisors may set $12.50, as a maximum amount that they will pay for hospital rooms for indigents treated at the Hamilton County Public Hospital. In reply to your inquiry I direct your attention to the following relevant provisions of the 1962 Code of Iowa:

> "347.16 * * * In cases other than tuberculosis, care and treatment in such county public hospital to any indigent persons shall likewise be furnished to such residents of the county as have established legal settlement in the county as defined in section 252.16 and have been found by the board of hospital trustees to be indigent and entitled to said care. In integrated counties where the board of hospital trustees have no social service department, then under the supervision of the board of hospital trustees, * * * the director of social welfare shall determine whether or not said persons are indigent and entitled to said care. Cost of said care shall be the liability of the county, and upon claim made therefor paid under the authority and in the manner specified by section 252.35. . . ." (Emphasis Added)

> "252.34 Allowance by board. The board of supervisors may examine into all claims, including claims for medical attendance, allowed by the township trustees for the support of the poor, and if they find the amount allowed by said trustees to be unreasonable, exorbitant, or for any goods or services other than for the necessaries of life, they may reject or diminish the claim as in their judgment would be right and just."

> "252.35 Payment of claims. All claims and bills for the care and support of the poor shall be certified to be correct by the proper trustees and presented to the board of supervisors, and, if they are satisfied that they are reasonable and proper, they shall bepaid out of the county treasury."

Section 347.16 provides for the medical treatment of indigent persons and it authorizes the Hamilton County Director

of Social Welfare to determine indigency. The above section also requires that the cost of said treatment shall be a liability of Hamilton County. Sections 252.34 and 252.35 authorize the County Board of Supervisors to check the amount of claims submitted for the care of indigent persons. The latter two sections do not have built-in guidelines to aid the Board of Supervisors in determining what is a reasonable charge for hospital rooms and medical care for the indigent. Apparently, the Hamilton County Board of Supervisors have viewed Sections 252.34 and 252.35 as giving them the absolute power to determine hospital room rate for indigents. Acting under what they viewed as an absolute grant of power the Hamilton County Board of Supervisors set $12.50 as the maximum to be paid for indigent room charges. If the Board of Supervisors is correct in assuming they have the absolute authority to set a $12.50 maximum indigent room rate, it would seem that they could also set a $5.00 maximum for indigent room charges and yet the Hamilton County Public Hospital could not refuse to take indigent patients on this basis. The $5.00 maximum rate may be a slightly tortured example but it illustrates the consequences inherent in the Board of Supervisors' determination that they have the absolute power to set a maximum indigent room rate without regard to other factors.

Your letter indicated that the Hamilton County Public Hospital room rates are $14.50 for ward beds, $15.50 to $16.50 for double rooms and $17.00 to $19.00 for single rooms. You also indicated that the room rates at the Hamilton County Public Hospital are the lowest of any hospital in the district. If Hamilton County had to contract with a private hospital for the medical care of its indigents or if it sent the said people to a county hospital in another county the Hamilton County Board of Supervisors would have to pay the fair and reasonable cost of such care and hospitalization. See Sections 347.16 and 347.21. Therefore, it would be absurd to believe that the Legislature has given the Board of Supervisors the power to require the Hamilton County Public Hospital to receive, house and treat Hamilton County's indigent persons at a rate less than a fair and reasonable cost. We cannot accept that view because statutory constructions that produce inconvenience and absurdity should be avoided. Quinn v. First National Bank of Logan, 200 Iowa 1384, 206 N.W. 271 (1925). In Trainer v. Kossuth County, 199 Iowa 55, 201 N.W. 66 (1924), the Iowa Supreme Court, at page 59 of the Iowa Reports stated:

> "* * * Ad absurdum is a 'Stop' sign, in the judicial interpretation of statutes. It is indicative of fallacy somewhere, either in the point of view or in the line of approach. In such case, it becomes the duty of the court to seek a different construction, and to presume always that absurdity was not the legislative intent. To this end, it will limit the application of literal terms of the statute, and, if necessary, will even engraft an exception thereon."

The Board of Supervisors power to review, reject or diminish claims for medical attendance must be viewed within the context of all the legislation on that subject. Daily Record Company v. Armel, 243 Iowa 913, 54 N.W.2d 503 (1952).

Sections 347.16 and 252.28 provide in part:

> "347.16 Cost of said [medical attendance] care shall be a liability of the county, ..."

> "252.28 When medical services are rendered by order of the trustees * * *, no more shall be charged or paid therefor than is usually charged for like services in the neighborhood where such services are rendered."

Section 347.16 authorizes the Hamilton County Public Hospital to file claims with the County Board of Supervisors based on the cost of medical care. Section 252.28 limits the amount of the claim to the usual costs of like services in the area. See 48 OAG 261. It is the opinion of this office that the Board of Supervisors power to reject or diminish claims is limited to cases in which the claim is not based on costs incurred by the hospital or when the claim is not in accord with the amount usually charged for like services in the area. Therefore, the Hamilton County Board of Supervisors is not authorized to set a $12.50 maximum for room charges unless $12.50 is the amount that it costs the hospital to maintain the said room or $12.50 is the amount charged for a like room in the neighborhood where the services are rendered.

Very truly yours,

NOLDEN GENTRY
Assistant Attorney General

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ELECTIONS: Vacancy in office - §§ 43.11(1), 43.81, as amended by § 14, Ch. 89, Acts of the 61st G.A., 69.8(4) and 69.13, 1962 Code of Iowa. No candidate for office named in § 43.11 shall have his name printed upon official ballot unless nomination papers are filed as therein provided. Where a vacancy in the office of sheriff occurs after the time for filing nomination papers, to fill the vacancy such nomination may be made by the county convention if the convention has not been previously held. If the county convention has been held prior to the vacancy, nomination may be made by the party county central committee. If the vacancy in the office of sheriff occurs within fifty (50) days of the general election, it will be filled by the board of supervisors and the appointee shall serve until the next general election.

June 7, 1966

Mr. R. T. Smith
O'Brien County Attorney
Primghar, Iowa 51245

My dear Dick:

I have yours of the 31st ult. in which you submitted:

"It is anticipated that our Sheriff will resign some time this summer and the question of election of a successor will be coming up without much time to wait for an opinion as to election, etc.

"Assume that the Sheriff resigns as of September 1, 1966:

"1. May persons seeking the position enter into the 1966 Primary Elections by Nominating Petitions? (Assuming the present Sheriff submits a letter of resignation in adequate time for Nomination Petitions to be circulated and filed.)

"2. Assuming the present Sheriff does not submit a letter of resignation until after the time for filing Nomination Petitions for the Primaries, would the nominees for the office be named at County Conventions prior to the general election in the Fall, and if so, what are the time limitations?"

In reply thereto, I would advise as follows:

1. Persons seeking nominations obtain the right to have their name printed upon the primary ballot if their nominating petitions

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are filed within the statutory time. This statutory time is fixed by section 43.11(1) and such filing dates provided therein for the office of sheriff is at least fifty-five days prior to the day fixed for holding the primary election. The primary election day is September 6, 1966. According to section 43.13, no candidate for any office named in section 43.11 shall have his name printed on the official primary ballot of his party unless nomination papers are filed as therein provided.

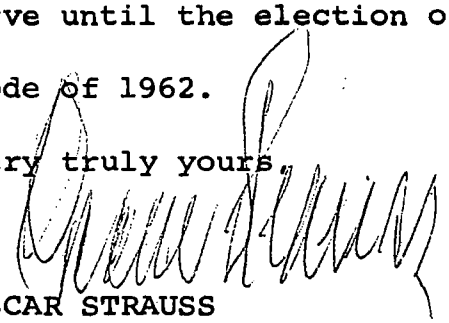
2. If the present sheriff does not resign from office until after the time for filing the nomination papers for the vacancy in the office of sheriff, then according to section 43.81, as amended by chapter 89, section 14, Acts of the 61st G.A., such a nomination shall be made by the county convention for the office in question if the convention has not been previously held. If the county convention has been held prior to the vacancy, the vacancy shall be filled by the party central committee for the county.

3. However, if the vacancy in the office of sheriff occurs fifty days prior to the general election which will be held on November 8, 1966, it may be filled at such election. If such vacancy occurs within fifty days of the 1966 election, a vacancy is created and the vacancy filled by the Board of Supervisors.

The persons so appointed shall serve until the election of 1968.

See sections 69.8(4) and 69.13, Code of 1962.

Very truly yours,



OSCAR STRAUSS
First Assistant Attorney General

kfm

CITIES AND TOWNS: COUNTIES AND COUNTY OFFICERS: Off street parking. §332.3 and Chapter 390, 1962 Code of Iowa; Chapter 83 and Chapter 329, Acts of the 61st G.A. City and county may enter into joint venture to establish "off-street parking."

June 29, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Mr. Stanley R. Simpson
Boone County Attorney
Lippert Building
Boone, Iowa 50036

Dear Mr. Simpson:

The Attorney General has referred to me your recent request for an opinion on the following question:

> "The Boone County Board of Supervisors and the Boone City Council have jointly discussed the matter of acquiring 'off-street parking' across the street from the present Boone County Courthouse here in the City of Boone, Iowa.
>
> "The legal proposition is whether or not the City of Boone and Boone County, Iowa can enter into a joint venture, or undertaking, for the acquisition of 'off-street parking.'"

Under §332.3(4), (6), (12), (15) and (18), 1962 Code of Iowa, the County Boards of Supervisors are given the authority to construct a parking lot for the use of the county.

Under Chapter 390, 1962 Code of Iowa and Chapter 329, Acts of the 61st G.A., cities are given the authority to construct public parking facilities.

Chapter 83, Acts of the 61st G.A., states in part as follows:

> "Section 1. The purpose of this Act is to permit state and local governments in Iowa to make efficient use of their powers by enabling them to provide joint services and facilities with other agencies and to cooperate in other ways of mutual advantage. This Act shall be liberally construed to that end.

"Sec. 2. For the purposes of this Act, the term 'public agency' shall mean any political subdivision of this state; any agency of the state government or of the United States; and any political subdivision of another state. The term 'state' shall mean a state of the United States and the District of Columbia. The term 'private agency' shall mean an individual and any form of business organization authorized under the laws of this or any other state.

"Sec. 3. Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state having such power or powers, privilege or authority, and jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States permit such joint exercise or enjoyment. Any agency of the state government when acting jointly with any public agency may exercise and enjoy all of the powers, privileges and authority conferred by this Act upon a public agency.

"Sec. 4. Any public agency of this state may enter into an agreement with one (1) or more public or private agencies for joint or cooperative action pursuant to the provisions of this Act, including the creation of a separate entity to carry out the purpose of the agreement. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involved shall be necessary before any such agreement may enter into force."

The remainder of Chapter 83, Acts of the 61st G.A. sets out requirements which must be met if action is taken under that chapter.

It appears to be clear that both counties and cities are "political subedivisions of the state" within the meaning of Chapter 83. In re Estate of Frentress, 249 Iowa 783, 89 N.W.2d 367 (1958); Shirkey v. Keokuk County et al., 225 Iowa 1159, 281 N.W. 837 (1938); City of Mason City v. Zerble, 250 Iowa 102, 93 N.W.2d 94 (1958).

Thus, the City of Boone, Iowa and Boone County, Iowa may legally enter into a joint venture for the purpose of establishing "off street parking."

Very truly yours,

Wade Clarke, Jr.

WADE CLARKE, JR.
Assistant Attorney General

bj

CITIES AND TOWNS: Indebtedness for long term rental leases - §§ 407.1, 407.2, 407.3, and 407.12, 1962 Code of Iowa. Long term rental lease agreements of equipment by a city or town created an indebtedness, the creation of which must be authorized by § 407.3 of the 1962 Code of Iowa.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

July 5, 1966

Mr. Lorne R. Worthington
Auditor of State
State House
LOCAL

Dear Mr. Worthington:

Reference is herein made to your recent letter in which you submitted the following:

> "During the course of our audit of the City of Burlington for 1965, we noted that the City had entered into a so-called rental lease agreement with Motorola Communications and Electronics, Inc., of Chicago, Illinois, effective March 10, 1965. This lease agreement was for one 'Total Control Communications Control Center' including ten (10) railroad crossing indicator lights, completely installed. The total cost of the equipment was $59,095.97. The total cost of the contract over the seven (7) year period is $83,892.48 which represents 84 monthly payments of $998.72. The service charge of $24,796.51 is computed at a rate of 6% on the original $59,095.97 equipment cost amount. The actual rate of service cost is 11.71% computed at a simple interest rate.
>
> "The City did not have a public hearing or public notice, nor did they ask for bids in any manner whatsoever.
>
> "In reference to the above data and a copy of the lease agreement, we would like to have your opinion on the following:
>
> "1. Is any lease rental type of equipment acquisition agreement permissible under the Iowa Statute in any manner whatsoever?

"2. May a council bind another council for a period of 84 months under such a lease rental contract, considering that equipment may go back to the vendor at any time if the City defaults or stops payment? It would appear that even though a council does have the right to refuse to make any payments and could break the lease, they would be accountable for the equity investment made to date.

"3. Section 368.35 states that public notice must be given when a city leases out its own property. Now, if lease rental agreements are legal in Iowa would a 7 year rental lease require:

(a) public notice (Section 391.31, Chapter 391A)
(b) public hearing (Section 391.31, Chapter 391A)
(c) taking of bids (Section 391.31, Chapter 391A)

"4. Does lease rental of equipment circumvent the statutory requirements for creating an indebtedness in that it makes it easy to acquire large equipment items over a long period of time?

"5. In the before mentioned Burlington and many other similar contracts is the so-called serving charge of 6% per annum computed on the original asset cost illegal in any way since in reality it computes to 11.71%, a simple rate? If not, is there any limitation which cities may pay under the Code of Iowa for service costs, etc.?"

The basic question which you present is the one which you have numbered four. Assuming that the city had the authority to make a long term lease of equipment over a period of years, the basic question which arises is whether this is an indebtedness which is authorized by statute and for which bonds are necessary.

Article XI, Section 3, of the Constitution, as well as Sections 407.1 and 407.2 of the 1962 Code of Iowa, sets out the debt limitations of a city.

Section 407.3 sets out the purposes for which indebtedness can be incurred. It reads as follows:

"Cities and towns when authorized to acquire the following named public utilities and other improvements may incur indebtedness for the purpose of:

1. Purchasing, erecting, extending, reconstructing, or maintaining and operating waterworks, gasworks, electric light and power plants, or the necessary transmission lines therefor, and heating plants.
2. Purchasing or erecting garbage disposal plants.
3. Erecting and equipping community center houses and recreation grounds.
4. Acquiring lands and establishing, constructing and equipping a recreation building, juvenile playgrounds, swimming pools, and recreation centers thereon or on lands already owned or to be leased by the city or town.
5. Constructing, purchasing, remodeling, or purchasing and remodeling city and town halls, jails, police stations, fire stations, or garages for the storage, repair and servicing of city or town motor vehicles and other equipment and acquiring sites therefor.
6. Erecting a building or buildings for a public library.
7. Purchasing sites for hospitals or sites with a building or buildings and constructing or reconstructing buildings to be used for hospitals.
8. Purchasing or constructing dams across streams for any proper municipal purpose."

Section 407.12 indicates the following:

"If the municipality is authorized to incur the indebtedness, the council shall issue bonds and make provisions for the payment thereof with interest."

It would appear elementary that a debt has been created. Note the following definition in 42 Corpus Juris Secundum, Indebtedness, at page 555:

"Judicial definitions of the term 'indebtedness' are numerous, and they must be read in connection with the facts out of which their necessity arises, for, although the term has been said to have a fixed and well understood meaning, it is a wide term of large meaning, and it must be construed in every case in accord with its context. The term ordinarily, or primarily, may

> be defined as meaning the condition of owing money; the state of being indebted, without regard to the ability or inability of the debtor to pay the debt; the state of being by voluntary obligation, express or implied, under legal liability to pay in the present or at some future time for something already received, or for something yet to be furnished or rendered; and in this sense implies or requires the existence of an actual liability or a legal obligation. The term also indicates or refers to amount, and may then be defined as meaning the amount owed; a sum owed or owing; the sum owed, hence debts collectively; whatever one owes; and may mean or include present, current, future, fixed, or contingent debts."

It also would appear that Section 407.3 does not provide for any authority for entering into a debt arrangement in regard to a "Total Control Communications Control Center," nor is this an ordinary expense for which a municipal corporation may incur debt. Dively v. The City of Cedar Falls, 27 Iowa 227 (1869).

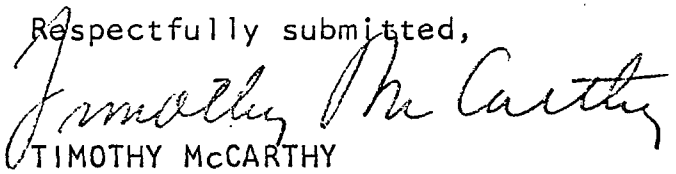
The Iowa Supreme Court pointed out that cities are limited in the financial arrangements they can enter into. There are legislative limitations and safeguards to avoid abuses. Note the case of Brodkey v. Sioux City, 229 Iowa 1291, 296 N.W. 351 (1941). At pages 1300 and 1301 of the Iowa Reports there is a long discussion in regard to a situation where a city went into debt to purchase parking meters with an arrangement that the revenue from the parking meters would be used to pay the debt. The Court made the following statement:

> "The untrammeled power that the city assumed, to raise and disburse funds solely by reason of authority it conjured out of its own enactments, was in derogation of all the limitations and safeguards the legislature has with such care provided to avoid abuses, even in case of an unquestionably authorized expending of funds by a municipality. Complete evasion of these limitations has been accomplished by the city, were we to hold the course it pursued was lawful and authorized. The revenue produced was not the city's funds. It was not in the city's control or possession. No city official was accountable for its disbursement or dissipation. Others were hired and paid for performing the duties that were official in character. We have affirmed the rule that the pledging by a city of revenue is unauthorized in absence of express statutory authority. (Cases cited)."

It is my opinion that the long term rental lease agreement for equipment by a city or town creates an indebtedness, the creation of which must be authorized by Section 407.3 of the 1962 Code of Iowa.

Further, it is my opinion that the other questions you have raised are not necessary of answer because of the lack of authority to create this indebtedness. It is also my opinion that Chapter 235, Acts of the 60th General Assembly, as interpreted by Richardson v. City of Jefferson, -- Iowa --, 134 N.W.2d 528 (1965), would not change this opinion.

Respectfully submitted,



TIMOTHY McCARTHY
Solicitor General

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STATE OFFICES AND DEPARTMENTS: State Board of Regents; Delegation of legislative power - §§ 23.1, 23.2, 262.9, 262.17, and 262.34, 1962 Code of Iowa; Ch. 233, Acts of the 61st G.A. Ch. 233, Acts of the 61st G.A., cannot be interpreted so as to allow the Board of Regents to delegate its statutory duties to a party not necessarily contemplated by the Iowa statutes and under such terms and conditions as may be desired or determined by the Board of Regents rather than the legislature.

July 12, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Mr. Carl Gernetzky, Chairman
Finance Committee
State Board of Regents
State Office Building
LOCAL

Dear Mr. Gernetzky:

On behalf of the Board of Regents you have submitted to this office temporary rules which provide that the Board of Regents delegate power and authority with reference to the handling of matters relating to capital improvements whereby the Chief Business Officer of the Board of Regents, together with the president of the institution involved, subject to certain safeguards and restrictions, may:

1. Award bids;
2. Approve contract changes;
3. Accept contract work as complete; and
4. Approve final plans and specifications.

The apparent authority for these rules is found in Chapter 233, Acts of the 61st General Assembly, at Section 2 which reads as follows:

"Sec. 2. Chapter two hundred sixty-two (262), Code 1962, is amended by adding a new section as follows:

'The board of regents shall also have and exercise all the powers necessary and convenient for the effective administration of its office and of the institutions under its control, and to this end may create such committees, offices and agencies from its own members or others, and employ persons to staff the same, fix their compensation and tenure and delegate thereto, or to the administrative officers and faculty of the institutions under its control, such part of

the authority and duties vested by statute in the board, and shall formulate and establish such rules and regulations, outline such policies and prescribe such procedures therefor, all as may be desired or determined by the board as recorded in their minutes. Employees of the board hereunder shall not come under the division of personnel provided for in section eight point five (8.5), Code 1962.'"

It should be noted that the 61st General Assembly did not change Section 262.34, as amended by Chapter 166, Acts of the 60th General Assembly, Section 23.1 and Section 23.2. These read as follows:

"262.34 Improvements--advertisement for bids. When the estimated cost of construction, repairs, or improvement of buildings or grounds under charge of the state board of regents shall exceed ten thousand dollars, the said board shall advertise for bids for the contemplated improvement or construction and shall let the work to the lowest responsible bidder; provided, however, if in the judgment of the board bids received be not acceptable, the said board may reject all bids and proceed with the construction, repair, or improvement by such method as the board may determine. All plans and specifications for repairs or construction, together with the bids thereon, shall be filed by the board and be open for public inspection. All bids submitted under the provisions of this section shall be accompanied by a deposit of money or a certified check in such amount as the board may prescribe." (Emphasis supplied)

"23.1 Terms defined. * * *
The word 'municipality' as used in this chapter shall mean county, except in the exercise of its power to make contracts for secondary road improvements, city, town, township, school district, state fair board, state board of regents, and state board of control. * * *" (Emphasis supplied)

"23.2 Notice of hearing. Before any municipality shall enter into any contract for any public improvement to cost five thousand dollars or more, the governing body proposing to make such contract shall

> adopt proposed plans and specifications and proposed form of contract therefor, fix a time and place for hearing thereon at such municipality affected thereby or other nearby convenient place, and give notice thereof by publication in at least one newspaper of general circulation in such municipality at least ten days before said hearing." (Emphasis supplied)

The question that you present is whether Chapter 233, Acts of the 61st General Assembly, can be interpreted to allow the Board of Regents to delegate its statutory duties to a party not necessarily contemplated by the Iowa statutes and whether such authority may be delegated under such terms and conditions as may be desired or determined by the Board of Regents.

Article III, Section 1, of the Iowa Constitution provides for the distribution of legislative, judicial and executive powers and under this section a body of law has been judicially formulated and judicial restrictions of delegation of power have arisen, particularly in regard to delegation of legislative power. For example, see 30 Iowa Law Review 288 (1945).

As we have seen from Sections 262.34, 23.1 and 23.2, which have not been repealed, the Board of Regents has certain statutory duties and it is not contemplated by these statutes that any other party exercise these duties. The duties under Chapter 23 refer to counties, cities and other governmental subdivisions. The contracting procedure in that chapter involves contracts of the sovereign or its subdivisions. Section 262.9 refers to "powers and duties" of the Board of Regents. The duties contained therein are much more than those duties of making policy or giving advice. The Board of Regents has management duties concerning the institutions under their jurisdiction. The only assistance they had prior to Chapter 233, Acts of the 61st General Assembly, was the Finance Committee which was abolished by said Chapter 233. The Code had provided that the Finance Committee would perform certain ministerial duties for the Board of Regents. Section 262.17 states that the Board of Regents "shall govern" the seven institutions under their jurisdiction and no other person has statutory duties or statutory powers under the present Iowa law.

The Board of Regents is an administrative agency, created by statute. Administrative agencies are purely creatures of the legislature without inherent or common law powers. Amery v. Keokuk, 72 Iowa 701, 30 N.W. 780 (1886). All the powers of the Board of

Regents are from the Iowa Legislature. To have a valid delegation of legislative power, the legislature must declare the policy or purpose of the law and fix the legal principles which are to control in given cases by setting up standards or guides to indicate the extent or prescribe the limitation of discretion which may be exercised under the statute by the administrative officials. 42 American Jurisprudence, Public Administrative Law, Section 44.

It can be seen from the general statement above that, for a proper delegation to occur, proper standards and guidelines must be set by the legislature. Chapter 233 allows the Board of Regents to set guidelines for the persons to whom it is going to sub-delegate its power. This appears to be contrary to the general statement of law found at 42 American Jurisprudence, Public Administrative Law, Section 73, which reads as follows:

> "It is a general principle of law, expressed in the maxim 'delegatus non potest delegare,' that a delegated power may not be further delegated by the person to whom such power is delegated. Apart from statute, whether administrative officers in whom certain powers are vested or upon whom certain duties are imposed may deputize others to exercise such powers or perform such duties usually depends upon whether the particular act or duty sought to be delegated is ministerial, on the one hand, or, on the other, discretionary or quasi-judicial."

The American Jurisprudence quote is in accord with the rules set out in Sutherland Statutory Construction, 3rd Edition, Vol. 3, page 278, wherein it is stated that the authority to sub-delegate discretionary powers and duties, in the absence of extenuating circumstances making it essential to the proper and efficient operation of the agency, is usually regarded with disfavor.

The legislature did not change the specific duties contained, among other places, at Sections 262.34, 23.1 and 23.2. These are powers of the sovereign and do not appear to be the type of power which can be delegated to persons who are not public officers. By "public officer" I refer to the technical definition of public officer which contemplates a person with statutory duties and powers. The legislature did not create in Chapter 233 any other party who has a statutory duty or power, but gave a broad grant to the Board of Regents to select just anybody. In addition to being the powers of the sovereign, the power involved is a

discretionary power and the rules and regulations are not set up by the legislature to limit the discretion.

It also must be further noted that violations in public contracting procedures may result in the contract being held void by the courts. It is very possible that one of the large university contracts could be attacked in court if the contract procedures under Sections 262.34, 23.1 and 23.2 were not followed. Note Madrid Lumber Co. v. Boone County, 255 Iowa 380, 121 N.W.2d 523 (1963).

Therefore, my answer to the issue presented is that Chapter 233, Acts of the 61st General Assembly, must be interpreted so as to keep the Board of Regents from delegating its statutory duties which relate to contracting for capital improvements.

In keeping with the rule that a constitutional interpretation is preferred, I, therefore, narrowly interpret the statute granting powers to the Board of Regents so as to otherwise sustain its validity and avoid a result of unconstitutionality. Sutherland Statutory Construction, 3rd Edition, Volume 3, page 280.

Very truly yours,

Lawrence F. Scalise

LAWRENCE F. SCALISE
Attorney General
State of Iowa

LFS:TMcC:ew

ELECTIONS: Proposed election procedures for City-County Authority. Chapter 49, 1962 Code of Iowa; §§ 49.1, 49.73 and 52.25, 1962 Code of Iowa and Chapter 239, Acts of the 60th G.A. (1) Chapter 49 applies to the election procedures of a county-city authority formulated under Chapter 239, Acts of the 60th G.A. (2) The calling of an election under Chapter 239, Acts of the 60th G.A. is the obligation of the Authority. (3) The County Board of Supervisors retains its duties imposed by Chapter 49, 1962 Code of Iowa. (4) Voting machines may be used in an election under Chapter 239, Acts of the 60th G.A. (5) If the election occurs during the statutory period of daylight time, daylight time must be used. (6) Separate elections are not required. (7) A separate public measure pertaining to the city bond issue may also be voted on at the same time as the voting on the city-county building project.

July 20, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Mr. Robert W. Burns
Dubuque County Attorney
461 Fischer Building
Dubuque, Iowa

Dear Mr. Burns:

Reference is herein made to your letter of May 24 in which you submitted the following questions:

> "The County and City of Dubuque have created the County-City of Dubuque Authority under Chapter 239 of the 60th General Assembly. The Authority has been developing plans for a proposed County-City Building and is now at the state of meeting the requirements of Section 12 of the Act. It provides:
>
> "After the incorporation of said Authority, and before the sale of an original issue of revenue bonds as provided in this Act, the Authority shall submit to the legal voters of said city or town and county, at a general, primary or special election for that purpose, the question whether such Authority shall issue and sell revenue bonds (stating the amount) for any of the purposes provided in Section two (2) of this Act. An affirmative vote of a majority of the votes cast on said proposition shall be required to authorize the issuance and sale of said revenue bonds. A notice of the election shall be published once each week for at least four weeks in some newspaper published in the county. Such notice shall name the time when such question shall be submitted, and a copy of the question to be submitted shall be posted at each polling place during the day of election.

"The act does not set forth the election procedures to be followed and does not specifically incorporate by reference the provisions of the Code relative to the manner of conducting elections.

"The specific questions with respect to which we seek your counsel and opinion are the following:

"(1) Do the provisions of Chapter 49 of the Iowa Code apply to an election called to determine if the Authority shall issue and sell revenue bonds (stating the amount) for the purposes provided in Section 2 of the Act?

"(2) Should the calling of the special election and the giving of the required published notice be at the direction of the Authority, or the Authority, City Council and County Board of Supervisors?

"(3) In such a special election are the duties imposed upon the Board of Supervisors in Chapter 49 performed by the Supervisors or are they to be performed by the members of the Authority?

"(4) May voting machines be used at the special election or must paper-marked ballots be used?

"(5) In view of daylight time, what hours should the polls be open for voting (Sec. 49.73)?

"(6) Are separate elections necessary to be held in the City and in the County, or will a single election suffice?

"(7) May a separate public measure pertaining to the City of Dubuque only, namely, 'whether the City of Dubuque should issue general obligation bonds to finance the City's share of the cost of a floodwall?', also be voted on at a Special Election called on the County-City Building project? If both

> measures can be voted upon at the same election, are any of the supervisory duties of the election to be performed by the City Council and if so, to what extent?"

1. In answer to your first question, I am of the opinion that Chapter 49, Code of 1962, is applicable to the election called to determine if the Authority shall issue and sell revenue bonds subject only to such specific duties as are imposed upon the Authority by Chapter 239, Acts of the 60th General Assembly, particularly calling the election and the publication of the notice of election. Section 49.1, which applies, reads as follows:

> "49.1 Elections included. The provisions of this chapter shall apply to all elections known to the laws of the state, except school elections."

2. In answer to your second question, I am of the opinion that the calling of the special election is the obligation of the Authority by proper resolution. The county and city should, pursuant to the provisions of Chapter 239, Acts of the 60th General Assembly, after the incorporation of each of the foregoing units, city and county, and the creation therein of the Authority, and after the election of members of the board of commissioners of the Authority, proceed to the election of a chairman thereof and a secretary and a treasurer, all as provided by statute. Thereupon, it will be the duty of the board of commissioners to issue a notice of election, which shall include a copy of the resolution

calling the election, and which shall fix the time thereof and other information as provided by statute.

3. In answer to your third question, I am of the opinion that the duties imposed upon the Board of Supervisors in Chapter 49, Code of 1962, in the organization of this election and the submission of the question are required to be performed by the Board of Supervisors and not by the Authority.

4. In answer to your fourth question, I am of the opinion that voting machines may be used at this special election. Section 52.25, Code of 1962, is authority for this. It reads in part as follows:

> "52.25 Summary of amendment or public measure. Constitutional amendments and public measures including bond issues may be voted on the voting machines in the following manner: * * *"

5. In answer to your fifth question, I am of the opinion that the provisions of Section 49.73, Code of 1962, control the hours for opening and closing of the polls. If this election is held during the period daylight time is in force, the hours should be daylight time hours as provided for by Chapter 140, Acts of the 61st General Assembly. Section 49.73 reads as follows:

> "49.73 Time of opening and closing polls. At all elections the polls shall be opened at eight o'clock in the forenoon, except in cities where registration is required, when the polls shall be opened at seven o'clock in the fore-

> noon, or in each case as soon thereafter as vacancies in the places of judges or clerks of election have been filled. In all cases the polling places shall be closed at eight o'clock in the evening."

6. In answer to your sixth question, I am of the opinion that a single election, including both the city and county electors, is all that is authorized. See Section 12 of Chapter 239, Acts of the 60th General Assembly, the first sentence of which reads as follows:

> "After the incorporation of said Authority, and before the sale of an original issue of revenue bonds as provided in this Act, the Authority shall submit to the legal voters of said city or town and county, at a general, primary or special election called for that purpose, the question whether such 'Authority' shall issue and sell revenue bonds (stating the amount) for any of the purposes provided in Section two (2) of this Act."

7. In answer to your seventh question, I am of the opinion that a separate public measure pertaining to the city of Dubuque as to whether the City of Dubuque should issue general obligation bonds may also be voted on at a special election at the same time as the special election called for voting on the county-city building project. This is a separate city election and the city is required to give notice of such election, print its own ballots, and generally provide its own election supplies. Separate poll books and ballot boxes are required for such special election. However, the same judges and clerks that

serve the election for the county-city building may perform the services for this special election. See 38 OAG 768; Section 49.19, Code of 1962. Generally, Chapter 49, Code of 1962, will control the election process herein under consideration unless specific provision is made otherwise.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

ew

TAXATION: Property tax exemptions. Section 427.1(9), Code of Iowa, 1962. Senior citizens' homes qualify as charitable or benevolent institutions or societies if the purpose and use of their property results in the amelioration of persons in unfortunate circumstances, assistance to the needy, care and comfort of those in ill health and not pecuniary profit.

LAWRENCE F. SCALISE
Attorney General

STATE OF IOWA
DEPARTMENT OF JUSTICE
DES MOINES

July 20, 1966

Mr. Ballard B. Tipton
Director
Property Tax Division
L O C A L

Dear Mr. Tipton:

This is in response to your request for an opinion on the following matter:

> "According to facts submitted to the Property Tax Division there have been, and are being, corporations organized under the laws of the State of Iowa, as nonprofit corporations, whose stated purpose is to establish, develop, and operate in the State of Iowa, economically constructed rental facilities designed for senior citizens. In order to qualify for becoming a resident of such a home for senior citizens, it is generally required that the individual applicant for admission have an adjusted gross income that is not in excess of a specified amount for a tax year. In some cases, the adjusted gross income shall not exceed $6,000.00 per year. There is the requirement of some such corporations that an applicant for admission as a resident shall have been a resident of a community with a population not exceeding a specified number. In some cases, the community population must be under 5,500

> persons. Some such corporations specify that applicants for admission as a resident of the home must have attained a specified age, which in some cases is 62 years. It appears that the rent charged the senior citizen residents is somewhat nominal. In some cases, for example, the maximum rent per apartment has been set at $90.00 per month, with the Corporation furnishing water and heat, and each resident will furnish his own telephone and electricity. The Corporation will name and provide the operating staff. It appears that most of such facilities will not or do not have an infirmary. A number of such corporations, it appears, are seeking or have obtained a loan from the Farmers Home Administration, a Federal Agency, in financing the construction and operating of their senior citizens' home."

With the foregoing facts in mind, the following question is presented:

> 1. Can Corporations of the kind and with the purpose referred to above qualify as either charitable or benevolent institutions or societies and thus be entitled to a property tax exemption under Subsections 9, 24 and 25 of Section 427.1, Code of Iowa, 1962?

Section 427.1(9), Code of Iowa, 1962, exempts property of religious, literary, and charitable societies as follows:

> "All grounds and buildings used by literary, scientific, charitable, benevolent, agricultural, and religious institutions

> and societies solely for their appropriate objects, not exceeding three hundred twenty acres in extent and not leased or otherwise used with a view to pecuniary profit. All deeds or leases by which such property is held shall be filed for record before the property herein described shall be omitted from the assessment."

At the outset it is emphasized that Section 427.1, Code of Iowa, 1962, is an exempting statute and as such must be strictly construed. If there is any doubt upon the question, it must be resolved against the exemption and in favor of taxation. Chicago, Burlington & Quincy Railroad Co., vs. Iowa State Tax Commission, _____ Iowa _____, 142 N.W. 2d 407 (1966), National Bank of Burlington v. Huneke, 250 Iowa 1030, 98 N.W. 2d 7 (1959); Trinity Lutheran Church of Des Moines vs. V.L. Browner, 255 Iowa 197, 121 N.W. 2d 131 (1963).

Many senior citizens' homes are operated under the auspices of an established religion, but this fact, of itself, does not qualify them as religious institutions or societies within the meaning of the statute, since their primary aims are not in the furtherance of specific religious purposes. Therefore, in order to establish whether they qualify for the exemption, it must be determined whether they are charitable or benevolent in nature within the meaning of section 427.1(9).

No Iowa case has squarely decided what constitutes a charitable or benevolent institution or society. The only Iowa case on senior citizens' homes is South Iowa Methodist Homes, Inc., vs. Board of Review of Cass County, _____ Iowa _____, 136 N.W. 2d 488 (1965), but because of a stipulation between the parties it was not necessary for the Court to discuss or determine the meaning of the terms "charitable" and "benevolent". However, in the case of Topeka Presbyterian Manor, Inc. vs. Board of County Com'rs of Shawnee

County, 195 Kansas 90, 402 P. 2d 802 (1965), the Kansas Court found it essential and determined that their meanings included the accomplishment of some social interest, amelioration of persons in unfortunate circumstances, assistance to the needy, whatever proceeds from sense of moral duty or feeling of kindness and humanity for relief and comfort of another, philanthropic, humane, having a desire or purpose to do good to men, intended for the confiring of benefits, rather than for gain or profit, and loving others and actively desirous of their well being.

The terms "charitable" and "benevolent", although not synonymous in all contexts, are usually found to be so when employed conjunctively in tax exemption statutes. Boston Chamber of Commerce vs. Assessors of Boston, 315 Mass. 712, 54 N.E. 2d 199 (1944). Charitable and benevolent are synonomous when used in connection with the tax exemption of senior citizens' homes. Oregon Methodist Homes vs. Horn, 226 Or. 298, 360 P. 2d 293 (1961). Haines, et al vs. St. Petersburg Methodist Home, Inc., _____ Fla. _____ 173 So. 2d 176 (1965); Topeka Presbyterian Manor vs. Board of County Com'rs, supra.

Of the cases that relate to the tax exempt status of senior citizens' homes the decisions have turned on the specific facts of each individual case. In Fredericka Home for the Aged vs. San Diego County, 35 Cal. 2d 789, 221 P. 2d 68 (1950), the Court upheld the exemption, though the Home catered to those with ability to pay, stating that the concept of charity is not confined to the relief of the needy and destitute, for the aged people require care and attention apart from financial assistance, and the supply of this care and attention is as much a charitable and benevolent purpose as the relief of their financial wants. Only 65% of the Home's expenses were met by the admission fees with 35% of the expenses being paid by an endowment fund. Hence, there was no pecuniary profit to the founders or shareholders. An exemption was upheld in the case of Topeka Presbyterian Manor, Inc. vs. Board of County Com'rs Of Shawnee County, supra, where the home was similar to the one in the Fredericka case. An additional factor in

the Topeka case was that out of eighty-two residents, eleven had paid no admission fee and five others had paid less than the normal rate, thus indicating a charitable purpose.

Courts have denied the exemption where the home provides a luxurious type of care and the charges exceed the costs of operation, thus resulting in a profit. Fifield Manor v. County of Los Angeles, 188 Cal 2d 1, 10 Cal Rptr 242, (1961). Also, where admission fees, alone, ranged from five-thousand to twenty thousand dollars, it was concluded that, though altruistically motivated and serving a socially constructive purpose, the home was substantially recompensed its expenditures and was a financially viable institution not entitled to the exemption. Oregon Methodist Homes vs. Horn, supra, Haines, et al vs. St. Petersburg Methodist Home, Inc., supra.

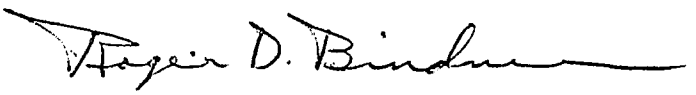
Use of the property rather than character declaration controls in determining exempt status. Theta Xi Building Assoc. of Iowa City v. Board of Review, 217 Iowa 1181, 251 N.W. 76 (1933). Where the exemption is claimed by a corporation the objects and purposes of the corporation as stated in its articles are not conclusive. It is the actual use of the property by the corporation which determines whether it is entitled to the exemption. Readlyn Hospital vs. Hoth, 223 Iowa 341, 272 N.W. 90, (1937).

In answer to your question it is the opinion of this office that senior citizens' homes of the kind you refer to do not qualify as charitable or benevolent institutions or societies, unless the property of said homes is actually used for charitable or benevolent purposes. It is our opinion that each case depends on its own specific facts and a determination whether such property is used for charitable or benevolent purposes requires consideration by the assessor of (1) the amount of admission fees; (2) monthly charges; (3) the amount of founders' fees; (4) age requirements for residents; (5) limited income requirement of residents; (6) whether needy residents charged less than normal rates; (7) whether medical care is provided; (8) the overall type of care provided; (9) whether

partially supported by endowment funds; (10) if a corporation, its stated purposes and objects along with actual use and operation; (11) whether operated with a view to pecuniary profit; and (12) whether the home is actually operated at a profit.

If upon consideration of the foregoing factors it can be determined that the use of the property results in the amelioration of persons in unfortunate circumstances, assistance to the needy, care and comfort of those in ill health and not pecuniary profit, it qualifies as property used by charitable or benevolent institutions or societies within the meaning of Section 427.1(9), Code of Iowa, 1962.

Very truly yours,



Roger D. Bindner
Assistant Attorney General

RDB:ceb

STATE OFFICES AND DEPARTMENTS: Peace officers' retirement system. § 97A.6(8)(f), 1962 Code of Iowa. The monthly benefits mentioned under § 97A.6(8)(f), 1962 Code of Iowa, are to be paid regardless of the type of benefit plan selected by the widow.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

July 22, 1966

Mr. James P. Hayes
Deputy Commissioner
Department of Public Safety
State Office Building
L O C A L

Dear Mr. Hayes:

The Attorney General has referred to me your recent letter in which you request the opinion of this office upon the following question:

> Are the monthly benefits mentioned under subsection 97A.6(8)(f), 1962 Code of Iowa, to be paid regardless of the type of benefit plan selected by the widow from the options provided to her under subsection 97A.6(8), 1962 Code of Iowa, or are the monthly benefits mentioned under subsection 97A.6(8)(f) linked with only one or the other of the alternative benefit plans?

Section 97A.6(8), 1962 Code of Iowa, deals with the "ordinary death benefit" available under the peace officers' retirement system. That subsection sets out the alternative plans available to members and the options available to members' widows, and, in the last subsection, subsection (f), states:

> "In addition to the benefits herein enumerated, there shall also be paid for each child of a member under the age of eighteen years the sum of twenty dollars per month."

In determining what the language "benefits herein enumerated" has reference to, it is useful to look at a number of rules of statutory construction which the courts use in instances of this type. Courts generally attempt to interpret this type of a reference in light of the legislative intent. In this regard Sutherland, Statutory Construction § 4921 states:

> "Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. Thus a proviso is construed to apply to the provision or clause immediately preceding it. But where the sense of the entire act requires that the qualifying words apply to several preceding or even succeeding sections, the word or phrase will not be restricted to its immediate antecedent. Thus it is apparent that the rule relating to relative or referential terms is of no great force and will be applied only when its application is consistent with the legislative intention."

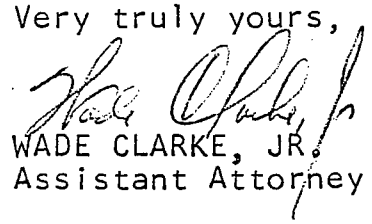
The Iowa court has stated that ordinarily in statutory construction the grammatical sense of the words is to be adhered to, unless that sense is contrary to the clear intent and purpose of the statute. Haugen v. Humboldt-Kossuth Joint Drainage Dist. No. 2, 231 Iowa 288, 1 N.W.2d 242 (1941).

Because pension statutes have as their object the promotion of the general welfare, the language of these statutes is liberally construed. Kochen v. Consolidated Police & Firemen's Pension Fund Commission, 71 N.J. Super 463, 177 A.2d 304 (1962); Richardson v. City of San Diego, 193 Cal App 2d 648, 14 Cal Rptr 494 (1961); People ex rel Doud v. Rochester, 116 Misc 703, 190 N.Y. Supp 559 (1921).

Subsection (f) is itself a separate subsection under subsection 97A.6(8) and is from a grammatical standpoint linked equally with each of the subsections describing the options made available. Because of this fact, the fact that pension statutes and the legislative intent with regard to them is to be liberally construed, and the fact that there is no apparent reason to link the benefits of subsection (f) with only one or the other of the alternative benefit plans, it appears that the monthly benefits mentioned under paragraph (f) should be paid regardless of the type of benefit plan ultimately selected.

Thus, in my opinion, the monthly benefits mentioned under subsection 97A.6(8)(f), 1962 Code of Iowa, are to be paid regardless of the type of benefit plan selected by the widow.

Very truly yours,



WADE CLARKE, JR.
Assistant Attorney General

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POLICE POWER: Practice of architecture and engineering regarding certain structures. §§ 11412, 114.16, 118.16, 118.18, 1962 Code of Iowa, as amended. Persons not registered as architects under Chapter 118, 1962 Code of Iowa, as amended, may perform architectural services in connection with the excepted structures under Section 118.18, 1962 Code of Iowa, as amended, but persons not registered as professional engineers under Chapter 114, 1962 Code of Iowa, as amended, may not perform engineering services in connection with these structures.

July 22, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Mr. Edward F. Samore
Woodbury County Attorney
204 Court House
Sioux City, Iowa 51101

Dear Mr. Samore:

I am in receipt of your recent letter to the Attorney General con cerning the following:

> "Your attention is called to Chapter 118 which relates to architects and as amended in 1965 states that its unlawful to practice architecture without being registered. The Amendment states further that the chapter shall not prevent persons performing services in connection with certain structures, i.e. residential buildings not more than three stories high, warehouses, light industrial and commercial buildings over two stories high, etc.
>
> "Your attention is called to Chapter 114 which relates to engineers, as amended in 1965, It defines engineering documents as plans, speci fications, etc. 'If the preparation thereof constitutes or requires the practice of pro- fessional engineering.' As amended Chapter 114 requires all engineering documents to be signed by a registered engineer and states that no municipal corporation shall approve any engineering document which does not com- ply with this section.
>
> "Your opinion is requested as follows:
>
> > "1. May the city of Sioux City refuse to grant a building permit on the basis that the building plans submitted do not

have the signature of either a registered engineer or architect where the plans relate to the excepted type of structure in Chapter 118, i.e. residential buildings not more than three stories high, warehouse, light industrial and commercial buildings not over two stories high etc.?

"2. Does not the exception in Chapter 118 inferentially exclude such documents from the definition of 'engineering documents' in Chapter 114 on the basis that they do not involve the practice of professional engineering?"

For purposes of easy reference I shall set out pertinent sections of Chapters 114 and 118, 1962 Code of Iowa, as amended by Chapters 136 and 138, Acts of the 61st G.A.

Section 114.2, 1962 Code of Iowa, as amended, states in part:

"The practice of 'professional engineering' within the meaning and intent of this chapter includes any professional service, such as consultation, investigation, evaluation, planning, designing, or responsible supervision of construction in connection with structure, buildings, equipment, processes, works or projects wherein the public welfare, or the safeguarding of life, health, or property is or may be concerned or involved, when such professional service requires the application of engineering principles and data.

* * *

"The term 'engineering documents' as used in this chapter includes all plans, specifications, drawings, and reports, if the preparation thereof constitutes or requires the practice of professional engineering."

Section 114.16, 1962 Code of Iowa, as amended, states in part:

"All engineering documents and land surveying documents shall be dated and shall contain the following: (1) the signature of the registrant in responsible charge; (2) a certificate that the work was done by such registrant or under his direct personal supervision; and (3) the Iowa registration number or legible seal of such registrant.

* * *

"No agency of this state and no subdivision or municipal corporation of this state, nor any officer thereof, shall file for record or approve any engineering document or land surveying document which does not comply with this section."

Section 118.16, 1962 Code of Iowa, as amended defines the practice of architecture as follows:

"The practice of architecture includes any professional service, such as consultation, investigation, evaluation, planning, and design, or responsible supervision of construction, in connection with the construction of buildings, or related structures and projects, or the addition to or alteration thereof, wherein the safeguarding of life, health, or property is concerned or involved."

Section 118.18, 1962 Code of Iowa, as amended, also states:

"Nothing contained in this chapter shall prevent persons from performing those services enumerated herein in connection with any of the following:

"a. Residential buildings not more than three (3) stories and outbuildings in connection therewith;

"b. Buildings used primarily for agricultural purposes including grain elevators and feed mills;

"c. Nonstructural alterations to existing buildings not otherwise excluded;

"d. Warehouses, light industrial and commercial buildings not more than two (2) stories in height;

"e. Churches or church properties."

As can readily be seen the legislature rather explicitly defines the practice of architecture and forbids anyone not registered as a professional architect from engaging in the practice, with the exception of persons performing architectural services in connection with any of the enumerated structures in Section 118.18.

On the other hand the legislature was just as explicit in defining the practice of engineering, and likewise forbid anyone not registered as a professional engineer from engaging in the practice. There are no stated exceptions to the application of Chapter 114. It is well to keep this idea in mind as we proceed.

Statutes relating to the same subject matter, when they are in pari materia, must be construed together. France v. Benter, 128 N.W.2d 268 (1964). Furthermore, it is a cardinal principle of statutory construction that the statutes in pari materia must be construed together, particularly if statutes are passed the same legislative session, and it is presumed that such acts are imbued with the same spirit and actuated with the same policy, and they are to be construed together as if a part of the same act. Manilla Community School District v. Halverson, 251 Iowa 496, 101 N.W.2d 705 (1960). The Iowa Supreme Court in State v. Kroll, 244 Iowa 173, 55 N.W.2d 251 (1952) adopted the principle that where there are two statutes concerning the same subject matter they should be construed, if it can be done, so that both may have full force and effect.

The amendments to Chapters 114 and 118, with which we are concerned, were passed by the same general assembly and concern the same general subject matter requiring, of course, that the statutes be construed together. Apparently the legislature's prime concern in requiring that only registered persons practice architecture and engineering in regard to the plan and design of buildings or structures, is the protection of the general public in its use or occupancy of the buildings or structures, and although the legislature excepted certain types of these buildings or structures from the requirements of Chapter 118 they enacted no exceptions to the application of Chapter 114. If the legislature had intended that the certain excepted types of buildings or structures should be free from requirements and application of Chapter 114 along with Chapter 118, it would have been an easy matter for them to so state. One is easily led to the conclusion that the excepted structures in Chapter 118 are more properly included within the practice of engineering under Chapter 114. This is admittedly conjecture, but other reasons are not readily apparent as the safeguarding of life, health or property may certainly be involved or of some concern in the design or planning of these excepted structures.

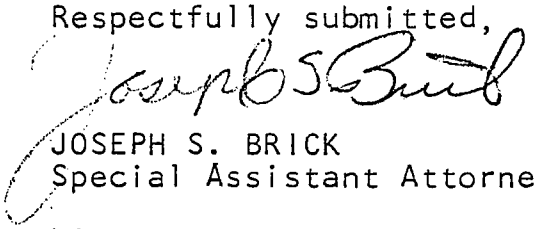
Based on the foregoing I am of the opinion that the City of Sioux City may refuse to file for record or approve building plans, even though they relate to the excepted types of structures under Section 118.18 if the preparation of said plans constitutes or requires the practice of professional engineering and said plans do not contain the required identification of a registered engineer.

Persons may perform architectural services in connection with the excepted structures, but not engineering services unless they are registered professional engineers.

The respective practices of architecture and engineering are closely related and it will be a difficult decision for public officials charged with the responsibility of determining whether the preparation of a particular building plan, relating to any of the last four enumerated types of structures in Section 118.18, constitutes or requires the practice of professional engineering. (I think that it may be conceded that the preparation of building plans for residential structures of not more than three stories in height and outbuildings in connection therewith would not constitute the practice of professional engineering.) Although recognizing the difficulty of this determination we are powerless to interpret the statutes differently without giving less than the full force and effect to the provisions of Chapter 114.

In summary your first question must be answered in the affirmative, and your second question in the negative.

Respectfully submitted,



JOSEPH S. BRICK
Special Assistant Attorney General

bj

COUNTY AND COUNTY OFFICERS: County Boards of Supervisors and their power to appropriate funds for a Pre-Trial Release Project - §§ 332.3 and 763.3, 1962 Code of Iowa. County Boards of Supervisors have the authority to appropriate funds in order to furnish to the District Court Judge of that county sufficient information for the purposes of determining the amount of bail, if any, that would be necessary in a particular criminal case.

July 26, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Ray A. Fenton, Esq.
Polk County Attorney
Polk County Courthouse
Des Moines, Iowa

Dear Mr. Fenton:

You have requested our opinion on the question as to whether a county board of supervisors may appropriate funds for utilization in connection with a Pre-Trial Release Project. Our understanding of such a project is that personnel is made available to interview persons accused of crimes in Polk County for the purpose of determining which of such persons may be released prior to adjudication of their case without posting a bail bond as provided in Section 763.3, 1962 Code of Iowa. The investigation, which is voluntary on the part of the defendant, concerns his "community ties" which are considered an index of whether he will make necessary court appearances. The result of this investigation must be merely advisory to the judge setting bail. Final responsibility for determining the amount of bail that is "sufficient" by the clear language of Section 763.3, supra, rests with the judge.

The method used by the project in Polk County was adopted from a pioneer project which has been functioning in the criminal courts of New York City. (See, Hearings before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary of the United States Senate Eighty-Eighth Congress on S. 2838, S. 2839, and S. 2840, pp. 104-120, pp. 467-468; and 14 Drake Law Review 98.)

I

The U.S. Supreme Court has pointed out:

> "The fundamental tradition in this country is that one charged with a crime is not, in ordinary circumstances, imprisoned until after a judgment of guilt ... . This traditional right to freedom during trial and pending judicial review has to be squared with the possibility

> that the defendant may flee or hide himself. Bail is the device we have borrowed to reconcile the conflicting interests. 'The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court.'" Citing Reynolds v. U.S., 80 S.Ct. 30, 32, 40 L.Ed.2d 46. Bandy v. U.S., 81 S.Ct. 197, 5 L.Ed.2d 218 (1960).

It would seem quite clear that in those instances where the court is satisfied that the purpose of bail is fulfilled by a nominal amount, or none at all, that the court may rule that amount "sufficent" for the purposes of Section 763.3, 1962 Code of Iowa. As Justice Douglas relates in Bandy, supra, to demand a substantial bond which a defendant cannot secure, raises a problem of equal administration of the law. This is even more clearly the case when defendants equally situated as regards the legal purpose of bail, receive different treatment, with those financially unable to post bail being placed in the county jail.

Yet, without factual data regarding a particular defendant, courts set bail in a vacuum, usually with regard to the only fact available to them; the seriousness of the alleged offense. An excellent evaluation of the application of bail in Iowa is found in 51 Iowa Law Review 883, 943, et seq, "Iowa Criminal Law - A Need for Reform." The research done for this article found that in one Iowa county 62 percent of defendants were incarcerated between arrest and final disposition of their cases. The duration of imprisonment averaged 28.7 days. In another Iowa county, only these two counties having been surveyed, 50 percent were incarcerated, averaging 15.9 days in jail. The legal problem involved, as Justice Douglas points out, is that the law presumes these citizens still innocent of any crime. Des Moines courts, with the information provided by the Pre-Trial Release Project, found 75 percent of its defendants, who were Polk County residents, eligible for release without bail in the first year of the project. Seven hundred sixteen persons were released without bail.

These statistics pose two problems for jurisdictions where judges require bail in all cases because they are not provided with information to help them determine which defendants need not be required to post bail. Their imposition of bail discriminates against defendants who are unable to post bail because they lack the financial means to do so, and, their orders setting the bail are necessarily arbitrary and capricious because they are not based upon legally relevant facts. We have couched these as problems involving the federal constitution, because we feel these problems are in that category. To require the courts to determine what amount of bail is sufficient, but to deny them this proven method of making the determination creates a duty to perform an act with no ability to perform it adequately. All public bodies have implied powers to do what is required to enable

them to perform their duties. In re Estate of Frentress, 249 Iowa 783, 786, 89 N.W.2d 367 (1958).

This office has previously held that when the federal constitution requires an act by our state courts, and no state statute provides for the act, or the appropriations required to perform it, the court nevertheless has the authority to perform it and the county must appropriate for it. 1964 O.A.G. 160.

II

Section 332.3, 1962 Code of Iowa, provides:

> "The board of supervisors at any regular meeting shall have power:
>
> * * *
>
> "2. To make such rules not inconsistent with law, as it may deem necessary for its own government, the transaction of business, and the preservation of order.
>
> * * *
>
> "6. To represent its county and have the care and management of the property and business thereof in all cases where no other provision is made.
>
> * * *
>
> "10. To fix the compensation for all services of county and township officers not otherwise provided by law, and to provide for the payment of the same."

In absence of specific enabling statutes, it has been held that counties may retain and compensate a shorthand reporter for the grand jury when the appointment serves the interests of the state and the administration of justice. Heller v. Montgomery County, et al, 188 Iowa 981, 176 N.W. 966 (1920), and employ an agent to find a buyer for county owned real estate. Call v. Hamilton County, 62 Iowa 448, 17 N.W. 667 (1883).

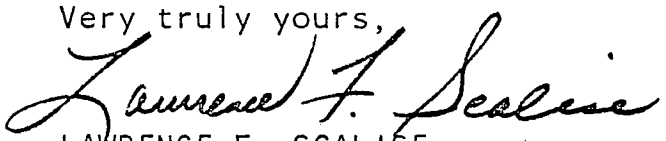
Most closely on point are two opinions of this department. One holds that the Polk County Attorney has authority to retain and receive compensation for "criminal investigators." 36 O.A.G. 521. The other, 34 O.A.G. 241, holds the county boards have power to hire county parole officers. The latter opinion sets out three prerequisites for exercise of such authority; the duties of the office created cannot be the same as one already created by law, the boards must not exceed an express provision of any statute

concerning employment, and the action must be for the benefit of the county. 34 O.A.G. 241, 242. Both of these situations are analagous to the proposed bail program, and it is clear that the program meets the three prerequisites.

III

We hold that county boards of supervisors do have authority to employ and compensate persons to inquire for the courts into the circumstances of persons accused of crimes for the purpose of determining what amount of bail, if any, is sufficient in a particular case. We feel that such inquiry is necessary to secure equality before the law, and provide courts with information so their decisions can be in accordance with the legally relevant facts of the case before them.

Very truly yours,



LAWRENCE F. SCALISE
Attorney General of Iowa

nl

CITIES AND TOWNS: Authority to lease - §§ 368 18, 1962 Code of Iowa. A city or town has no statutory authority to execute a contract for the lease of a town hall and fire department building to be built by private parties on municipally owned land.

August 2, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Mr. Lorne R. Worthington
Auditor of State
State House
LOCAL

ATTN: LaVerne E. Heithoff

Gentlemen:

Reference is herein made to your letter of April 4 in which you submitted the following:

> "I would like to have an official opinion given on a question which concerns long-term lease arrangements between a city and various private corporations. We have currently been noting instances whereby cities seem to have engaged in long-term lease agreements.
>
> "May a city or town enter into a long-term lease with a private corporation, to lease a building for a city or town hall and fire department to be built by the private corporation on municipal owned property?"

The basic question that you raise is whether a city or town has the authority to enter into a long-term installment contract for the purpose of a building to be used as a city hall to be erected on municipally owned or private ground.

The basis of any authority is found in Section 368.18 of the 1962 Code of Iowa which reads as follows:

> "368.18 Municipal buildings and property.
> 1. They shall have power by a three-fourths majority vote of the council to <u>acquire</u>, erect, or <u>purchase</u> buildings and building sites to the extent necessary to house and carry on authorized governmental functions or purposes of the municipal corporation.
> 2. They shall have power to maintain and keep in repair all municipally owned buildings and property.

3. In any municipal corporation having a population of fifty thousand or more they shall have power by a three-fourths majority vote of the council to lease a building and grounds for a municipal auditorium. The term of any lease for auditorium purposes shall not exceed twenty years." (Emphasis added)

If there is any statutory authority to enter into this transaction, the authority must be derived from the words which authorize the city to acquire or to purchase.

The Iowa Supreme Court in Boss v. Polk County, 236 Iowa 384, 19 N.W.2d 225, 227 (1945), defined the word "acquire" by using the definitions of two other cases. The following is the Court's language:

"In the case of National Surety Company v. McGreevy, supra, 64 F.2d 899, 901, it is stated, in construing the word 'acquired,' used in a bond contract as follows:

"'The word "acquired," as used in this contract, means to become the owner of. The New Century Dictionary defines the word as follows: "To get as one's own." In Webster's New International Dictionary the word is defined as: "To gain by any means; usually by one's own exertions; to get as one's own; as to acquire a title, riches, knowledge, good or bad habits." In 1 Bouv. Law Dict., Rawle's Third Revision, p. 114, the word is defined as follows: "To make property one's own. To gain permanently. It is regularly applied to a permanent acquisition. A man is said to obtain or procure a mere temporary acquisition." See, also, Federal Trade Commission v. Thatcher Mfg. Co., 9 Cir., 5 F. 2d 615; in re Okahara, 191 Cal. 353, 216 p. 614; Wulzen v. Board of Supervisors, 101 Cal. 15, 35 P. 353, 40 Am.St.Rep. 17; Hartigan v. Los Angeles, 170 Cal. 313, 149 P. 590; Parker v. Schrimsher, Tex.Civ.App., 172 S.W. 165; Creamer v. Briscoe, Tex.Civ.App., 107 S.W. 635.'

"In the case of Helvering v. San Joaquin Fruit & Investment Co., 297 U.S. 496, 56 S.Ct. 569, 570, 80 L.Ed. 824, it is also stated:

"'* * * The word "acquired" is not a term of art in

> the law of property but one in common use. The plain import of the word is "obtained as one's own". Language used in tax statutes should be read in the ordinary and natural sense. * * *'"

It is apparent that the Iowa Court did not construe the word "acquire" to grant authority to lease.

The next question is whether the word "purchase" can be construed to grant that power. 73 Corpus Juris Secundum, Purchase, at page 1255, stated the following:

> "In its legal and enlarged sense the word 'purchase' is defined in Property § 15 as meaning all acquisitions of real estate by any means whatever, except by descent.
>
> "In the ordinary and popular acceptation, 'purchase' is the transmission of property from one person to another by voluntary act and agreement, founded on a valuable consideration, and in the common sense means no more than when a man gives money for anything, having the narrow signification of acquisition by voluntary act or agreement, for a valuable consideration." (Emphasis supplied)

The Supreme Court of Iowa interpreted this word in the case of Purczell v. Smidt, 21 Iowa 540 (1866), at page 546 of the Iowa Reports, and defined the word "purchase" as follows:

> "Purchase, in its most enlarged and technical sense, signifies the lawful acquisition of real estate by any means whatever, except by descent. In its more limited sense, purchase is applied only to such acquisitions of lands as are obtained by way of bargain and sale for money, or some other valuable consideration. In common parlance, purchase signifies the buying of real estate and of goods and chattels. 2 Bl. Com., 241; Cruise Dig., tit. 30, §§ 1 to 4; 1 Dall. 20; Bouv. Law Dic., tit. 'Purchase.' It is clear that the legislature used the word 'purchase' in some one, and not in all these significations; and in construing the act it becomes a duty and necessity to determine in which of these senses or significations the word was used."

It would appear from the plain meaning of Section 368.18 that the

legislature did not contemplate long-term leases. The case of Richardson v. City of Jefferson, 134 N.W.2d 528 (1965), interpreted Chapter 235, Acts of the 60th General Assembly, to be a rule of statutory construction, rather than a grant of power. Section 368.18 has only been analyzed as to its plain meaning and no statutory construction is necessary or can be used. Palmer v. State Board of Assessment and Review, et al., 226 Iowa 92, 283 N.W. 415 (1939).

Therefore, it is my opinion that there is no statutory authority for a city or town to lease a town hall and fire department building to be built by private parties on municipally owned land.

Very truly yours,

TIMOTHY McCARTHY
Solicitor General

ew

CITIES AND TOWNS: Annexation - Section 362.30, Code of Iowa, 1962. A voluntary annexation is invalid where all owners of territory within the perimeter of the territory to be annexed fail to join in the application and where all the territory sought to be annexed does not adjoin the city or town.

LAWRENCE F. SCALISE STATE OF IOWA
ATTORNEY GENERAL DEPARTMENT OF JUSTICE
DES MOINES, IOWA

August 2, 1966

Mr. John S. Cutting
Winneshiek County Attorney
Box 93
Decorah, Iowa

Dear Mr. Cutting:

This is in reply to your letter dated July 13, 1966, addressed to Attorney General Lawrence F. Scalise, wherein you state the following:

> "Section 362.30 of the Code of Iowa provides 'All the owners of any territory adjoining any city or town may make application, in writing, to the council of such city or town, attaching thereto a plat of such territory showing the situation thereof with reference to the existing limits of such city or town, and if the council thereof, by resolution, assents thereto, such territory shall thereafter be and become a part of such city or town.'
>
> "On June 7, 1966, the City Council of Decorah, Iowa, assented to an application of several property owners to have their property annexed to the City of Decorah, Iowa, and the City Clerk of Decorah, Iowa, has certified a transcript of the records of the action of the City Council to the Winneshiek County Recorder and Winneshiek County Auditor.

> "Said application did not include several parcels of land owned by persons, who did not make application to have their property annexed, within the perimeter of the territory to be annexed, thereby creating several 'islands' of property within the new proposed corporation lines of the City of Decorah that are not actually a part of the City of Decorah.
>
> "The Winneshiek County Auditor would like to have an opinion as to whether or not said application for annexation can be accepted for taxation purposes when all of the property within the new corporation lines is not annexed."

The application for annexation under Section 362.30 presents essentially a question of statutory construction. Two fundamental requirements must be fulfilled for the statute to be applicable: (1) All the property owners must make a written application to the city or town council, and (2) the territory must adjoin the city or the town.

According to the great weight of authority, "all" as an adjective means "every one or the whole number of particulars - the whole number." State vs. Maine Central Railroad Company, 66 Me. 488, 510 (1877). Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Co. vs. Lightheiser, 163 Ind. 247, 71 N.E. 218, 212 (1904). All does not mean some nor a part, as is the case with the present factual situation, rather it means the whole or the entire group intended to be covered by the statute. The Iowa Supreme Court is in accord with the majority interpretation: "The word all is commonly understood and usually does not admit of an exception, addition or exclusion." Consolidated Freight-

way Corporation of Delaware vs. Nicholas, ____ Iowa _____, 137 N.W. 2d 900, 904 (1965); Cedar Rapids Community School District, Linn County vs. City of Cedar Rapids, 252 Iowa 205, 211, 106 N.W. 2d 655 (1960).

The subsequent statutory provision, Section 362.31, would appear to indicate that "all" is to be construed in its ordinary sense without exceptions. Section 362.31 provides that ten percent of the adjoining territory owners may petition the city or the town council to annex their property, indicating an alternative approach when the unanimity required for a voluntary application for annexation cannot be had.

Although there is a split of authority concerning the meaning of "adjoining", most jurisdictions, including Iowa, require touching or a contact. According to this construction, "near" is insufficient. In Truax vs. Pool, 46 Iowa 256, 258, 144 N.W. 245 (1877), the Iowa Supreme Court rejected the "near to" construction.

> "We are of the opinion that the words 'adjoining to the present boundaries,' as used in the charter of Davenport, do not mean simply near to, but next to. Any other construction would force the words from their ordinary acceptation."

Although Davenport is a charter city and Decorah is not a charter city, this fact alone provides no reason to distinguish the Truax case. Even though the Truax opinion construed a provision in the Davenport charter rather than Section 362.30, no distinction should be drawn because the content and language of both provisions are similar. In the Truax case, which was similar to the facts in the annexation in Winneshiek County, the Court denied annexation for a plot of ground eighty rods distant from the boundaries

of the city. The "islands" created as a result of only partial voluntary application for annexation would appear to be analagous to the Truax case because the "islands" would not be touching or contiguous to the City of Decorah. Since the territory annexed is separated in terms of creating "islands," this would not appear to come within the statutory provision requiring the territory to be adjoining.

It is our opinion that the annexation to the City of Decorah would be invalid within the meaning of Section 362.30 because (1) only part of the property owners applied for annexation rather than all the property owners, and (2) the adjoining requirement was not fulfilled with respect to the "islands" created since the territory would at best be near or adjacent to the city boundaries rather than touching.

Very truly yours,

Thomas W. McKay

Thomas W. McKay
Special Assistant Attorney General

TWM:DAA:dj

ELECTIONS: Time of 1966 Primary Election-- § 43.37, 1966 Code of Iowa; Public Law 89-387, Eighty-ninth (89th) Congress. The 1966 Primary Election date is September 6, 1966, and in all precincts in the State under the authority of Public Law 89-387, Eighty-ninth (89th) Congress, the time for opening and closing the polls fixed by Section 43.37 of the 1966 Code of Iowa is Central Standard Daylight Savings Time.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

August 2, 1966

Miss Corrine Gillespie
O'Brien County Auditor
Primghar, Iowa

Dear Miss Gillespie:

Your letter of the 15th addressed to the Hon. Gary L. Cameron, Secretary of State, has been handed to me for answer. You state the following:

> "Please advise if according to Sec. 43.37 the polls are open from 8 to 8 on central standard time or central daylight time.
>
> "Also please advise if the supervisors are elected by districts, are they considered township officers as in Sec. 43.29 and 43.53."

66-8-3

In reply thereto, I advise the following.

The 61st General Assembly provided for statewide Standard Daylight Savings Time by the enactment of Chapter 140, Sec. 1, which provides as follows:

> "Section 1. The standard time in this state shall be the solar time of the ninetieth (90th) meridian of longitude west of Greenwich, commonly known as central standard time, except from two (2) o'clock ante meridiem of Memorial Day in every year and until two (2) o'clock ante meridiem of the day following Labor Day in the same year, standard time shall be advanced one (1) hour. The period of time so advanced shall be known as 'daylight savings time.'
>
> "In the event Memorial Day should fall on a Sunday, the effective time of the one (1) hour advance will be at two (2) o'clock ante meridiem the preceding day.",

and which became effective April 22, 1965.

Under its powers, the Eighty-ninth (89th) Congress enacted Public Law #89-387 designed to promote the observance of a Uniform System of time throughout the United States. This Act provided for Standard Daylight Savings Time beginning at 2:00 ante meridian on the last Sunday of April of each year and ending at 2:00 ante meridian on the last Sunday of October of each year. This

Act by its terms became effective April 1, 1967 subject to the following Section 6 of such Act:

> "Section 6. This Act shall take effect on April 1, 1967; except that if any State, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States, or any political subdivision thereof, observes daylight saving time in the year 1966, such time shall advance the standard time otherwise applicable in such place by one hour and shall commence at 2 o'clock antemeridian on the last Sunday in April of the year 1966 and shall end at 2 o'clock antemeridian on the last Sunday in October of the year 1966."

The State of Iowa qualifies as a State that observes Daylight Savings Time in the year 1966 (See Chapter 140, Acts of the 61st General Assembly), and has advanced Standard Time for every year between Memorial Day and the day following Labor Day.

Thus, the Federal Government has enacted legislation and the State has an enactment in contradiction thereof. In that situation, the Federal legislation prevails. 11 Am. Jur. 649-650 entitled "Constitutional Law" speaks of the applicable rule in that situation as follows:

"Section 42. Supremacy of Acts of Congress. Since the Constitution of the United States provides (Article 6, Sec. 2) that the laws made in pursuance thereof shall be the supreme law of the land, anything in the Constitution or laws of any state to the contrary notwithstanding, an act of Congress constitutionally passed within the limits of its authority becomes a part of the supreme law of the land in connection with the Federal Constitution itself. Such Federal laws control the Constitutions and laws of the respective states and cannot be controlled by them. They operate essentially as a part of the law of each state and are as binding on its authorities and people as its own local Constitution and laws in the same manner as if they were actually embodied in the Federal Constitution. Thus, the several states are subject to the supremacy of the laws made in pursuance of the Federal Constitution, and a state law is void if contrary to a valid act of Congress.

"Every judicial officer, whether of a state or of a Federal court, is under the obligation of an oath to recognize the supremacy of valid acts of Congress.

"Congress has no power by authorization or ratification to give effect to a state law or Constitution not consistent with the Constitution of the United States."

The Iowa Motor Vehicle Association et al, vs. Board of Railroad Commissioners, 207 Iowa 461, 466, 221 N.W. 364, (1928), confirms the rule in the following language:

> "The Constitution of the United States is the supreme law, anything in the Constitutions or statutes of the states to the contrary notwithstanding, and a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. As said in Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (46 L. Ed. 679):
>
> "'No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived.'"

Therefore, in answer to your question number one, the primary election for all political parties will be held at the usual places of the several precincts on the first Tuesday after the first Monday in September in each even numbered year, Section 43.7, 1962 Code of Iowa, as amended by Chapter 89, Section 3, 61st General Assembly; and Section 43.37, 1962 Code of Iowa, provides

for the opening and closing time of the polls at such election, which time shall be Central Daylight Savings Time.

In answer to question number two, the members of the Board of Supervisors are elected at large or by district, Section 331.8, 1962 Code of Iowa. In either event, they are and remain county officials.

Very truly yours,

OSCAR STRAUSS
Assistant Attorney General

OS:jms

CRIMINAL LAW: Privacy of a preliminary hearing: §761.13, 1966 Code of Iowa. When requested by Defendant, a preliminary hearing must be private and all persons, including the press, shall be excluded therefrom with the exception of the magistrate, his clerk, the peace officer who has custody of the Defendant, the attorney representing the state, and the Defendant and his counsel.

Oscar

Mr. David P. Miller
Scott County Attorney
416 West Fourth Street
Davenport, Iowa

August 8, 1966

Dear Mr. Miller:

Reference is herein made to your letter of May 13 which you submitted the following:

> "The question has been raised here locally whether the above section [Section 761.13] refers to mandatory exclusion of a legitimate member of the working press being excluded from private hearings of evidence at a preliminary examination."

Section 761.13, Code of 1962, provides:

> "761.13 Private hearing. The magistrate must also, upon request of the defendant, exclude from hearing the examination all persons except the magistrate, his clerk, the peace officer who has custody of the defendant, the attorney or attorneys representing the state, the defendant and his counsel."

In substantially this same form this section appears in the Code of 1960 as Section 45.92; in the Code of 1873 as Section 4240; in the Code of 1897 as Section 5226; in the Codes of 1924, etc., as Section 13539.

This statute is plain and specific in its terms and leaves

66-8-4

no doubt of the legislative intent in naming the specific officials and individuals entitled to be present at such private hearings. The authorization for this private hearing is recognized in Section 605.16 which provides:

> "605.16 Judicial proceedings public. All judicial proceedings must be public, unless otherwise specifically provided by statute or agreed upon by the parties."

Undoubtedly, "all persons" constitute the public, and, therefore, the public is excluded from the preliminary hearing requested by a defendant. The press, along with the butcher, the grocer, and the candlestick maker, is part of the public. The status of the press, as related to the public is set forth in the case of Shuck v Carroll Daily Herald, 215 Iowa 1276, 1281, 247 N.W. 813 (1933), where it is stated:

> "The newspaper business is an ordinary business. It is a business essentially private in its nature--as private as that of the baker, grocer, or milkman, all of whom perform a service on which, to a greater or less extent, the communities depend, but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with the public use. If a newspaper were required to accept an advertisement, it could be compelled to publish a news item. If some good lady gave a tea, and submitted a proper account of the tea, and the editor of the newspaper, believing that it had no news value, refused to publish it, she, it seems to us, would have as much right to compel a newspaper to publish the account as would a person engaged in business to compel a newspaper to publish an advertisement of the business that that person is conducting."

Exclusion of the press from a private hearing upon a preliminary information is no more of an infringement of the freedom of the press than is the barring of tape recorders from meetings of the City Council. See Attorney General's opinion to Senator Main dated June 21, 1966, a copy of which is enclosed. A private hearing may be held upon a preliminary information from which all persons are excluded with the exception of the persons and officials named in Section 761.13.

In answer to your question, therefore, I advise that the press and its representatives are subject to mandatory exclusion from a private preliminary hearing; however, I advise:

1. That before this private hearing is authorized a request, therefore, must be made by the Defendant.

2. That the State absent this statutory request cannot exclude the press from this hearing.

3. Absent this statutory request by the Defendant, the press cannot be excluded by the Defendant from the hearing.

4. Absent the statutory request the hearing is public and the public including the press may be present.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:jms

ELECTIONS: Nomination for county hospital trustees: §§ 347A.1, and 347A.25, 1966 Code of Iowa. Sections 347A.1 provides for the election of trustees of county hospitals organized under Section 347A.1. Such nominations may be made under the provisions of Chapter 45, Code of 1966. The county treasurer shall be ex officio treasurer of the Board of Hospital Trustees and all money shall be disbursed by the treasurer under the direction of the Hospital Board of Trustees without distinction of its use.

August 9, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Mr. Harlan L. Lemon
Buchanan County Attorney
714 First Street East
Independence, Iowa

Dear Mr. Lemon:

Reference is herein made to yours of the 26th ult. in which you submitted the following:

> "The following question has arisen concerning the initial election of hospital trustees for People's Memorial Hospital located in Independence.
>
> "The Hospital was formerly owned and operated by a non-profit corporation which corporation donated the hospital and all its assets to Buchanan County. The County has determined to build a new hospital payable from revenue under Chapter 347 A, of the Code, and is presently operating People's Memorial Hospital as such a Hospital payable from revenue. The Board of Supervisors appointed the initial board of Trustees of five members. These Trustees must stand for election at the General Election, November 8, according to Section 347A.1. That Section does not, nor does Chapter 347A in any other place, state specifically the method of nominating hospital trustees. I submit the following question for your determination, 'Should these Trustees stand for election according to Section 347.25 under the County Public Hospital Chapter and if so, how many names should appear on the

nominating petitions and how is it to be determined which Trustee is running for a two year term, which Trustee for a four year term, etc.' There appears to be some conflict between Chapter 347 and Chapter 45 regarding the percentage of votes cast in the last gubernatorial election and there is also a question in that Section 347.25 mentions two political parties and there were three candidates for governor in the last general election.

"Another question has arisen concerning the operation of the hospital. Chapter 347A provides that the County Treasurer shall be the ex officio treasurer of the Hospital Board of Trustees. There seems to be no requirement in Chapter 347A regarding the payment of ordinary operating expenses of the Hospital by warrant from the County Treasurer. Both the Board of Supervisors and the Board of Hospital Trustees would prefer their own accounting system and practice consistent with the bond resolution approved by the Supervisors for the construction of a new County Hospital. The County Treasurer is not particularly desirous of paying all of the bills of this new County Hospital. The Hospital regularly has its books audited by a firm of certified public accountants and there report would be made available to the Auditor on an annual basis. Is it permissible for the Hospital Board of Trustees to operate and manage this County Hospital payable from revenue without the necessity of running the normal every day bookkeeping through the Office of the County Treasurer?"

In answer thereto, I am of the opinion that:

1. Section 347A.1 provides for the election of trustees of a county hospital organized under that Chapter. Not being a political nomination, nominations for the office of trustee may be made under

the provisions of Chapter 45, Code of 1966. Such nomination for this, a county office, requires nomination papers containing two per cent of the qualified voters of the county as shown by the votes for all candidates for governor at the last preceding election in the county. The apparent conflict between the provisions of Chapter 45 and Section 347.25 described in your letter is not effective of the election provisions of Chapter 347A. In that respect, Section 347A.4 provides the independent character of hospitals organized under Section 347A from those organized under Section 347.

> "347A.4 Independent method. This chapter shall be construed as providing an alternative and independent method for the acquisition, construction, equipment, enlargement, improvement, operation and maintenance of a county hospital, and for the issuance and sale of revenue bonds in connection therewith, and shall not be construed as an amendment of or subject to the provisions of any other law."

2. I think the following provisions of Section 347A.1, to wit,

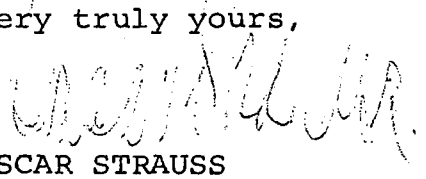
> "The county treasurer shall be ex officio treasurer of the board of hospital trustees. The board of hospital trustees may employ, fix the compensation and remove at pleasure professional, technical and other employees, skilled or unskilled, as it may deem necessary for the operation and maintenance of the hospital, and disbursement of funds in such operation and maintenance shall be made upon order and approval of the board of hospital trustees."

do not permit construction thereof that distinguishes between the payment by the treasurer of expenses for ordinary operation and

the payment of other expenses by the treasurer which are involved in the operation of the hospital. By its terms, the hospital trustees have control of the funds of the hospital for the purpose of operation and maintenance thereof, that the disbursement of its funds for such purposes is made by and through the treasurer and there is no differentiation in his duty dependent upon the purpose for which the money is used.

Therefore, in answer to your first question, the election for trustees of a hospital is conducted under the provisions of Chapter 45. In answer to your second question, the hospital board of trustees shall operate and manage the hospital with the revenue running through the office of the county treasurer.

Very truly yours,



OSCAR STRAUSS
First Assistant Attorney General

kfm

BANKS AND BANKING: Out of state banks doing fiduciary business in the State of Iowa - §§ 496A.103, 496A.104, 532.1, 532.5, 623.63, and 633.64, 1966 Code of Iowa. The Iowa law does not prohibit an Illinois state or national bank from qualifying as a fiduciary under § 633.63, 1966 Code of Iowa, provided that such state or national bank procures a certificate of authority as required by Chapter 496A 1966 Code of Iowa.

August 10, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Mr. Gary Cameron
Secretary of State
State House
LOCAL

Dear Mr. Cameron:

You have submitted an opinion request to this office wherein you ask whether state banks and national banks in the State of Illinois may qualify to do business in the state of Iowa for the specific purpose of acting as a fiduciary.

The first problem which arises is whether a state bank, chartered in the state of Illinois, has authority under the statutes of the State of Illinois to do business in the State of Iowa. It would be somewhat presumptious for this office to analyze the Illinois statutes as to whether an Illinois bank would have such powers. However, we have done some research in regard to the powers of national banks which would be chartered out of Illinois and we believe that there is substantial authority that these banks under the federal law would not be prohibited by the Federal Banking Law from handling an individual estate matter within the State of Iowa. In re Armijo's Will, 57 N.M. 649, 261 P.2d 833 (1953); Ingalls v. Ingalls, 263 Ala. 106, 81 So.2d 610 (1955).

The above cited cases construed 12 U.S.C.A. 248 which was amended in 1962 and is now cited as 12 U.S.C.A. 92a. The key sections were not changed as they relate to power of national banks. These sections read as follows:

> "§ 92a. Trust powers--Authority of Comptroller of the Currency
> (a) The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other

> corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.
>
> (b) Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this section."

The effect of this section is that national banks have the trust powers of state banks and have trust powers when these powers are not prohibited by the local state law.

Therefore, if the State of Illinois, under its statutory law, allows Illinois state banks to act in a fiduciary capacity outside the State of Illinois, the national banks may also operate outside of the State of Illinois.

The main question upon which our office may be of assistance to you is whether there is anything in the Iowa law which prohibits an Illinois state or national bank from acting as a fiduciary.

Under Chapter 532 of the 1966 Code of Iowa, Iowa trust companies, state and savings banks and national banks may act as a fiduciary in any court of record of this state when this power is authorized by the articles of incorporation of the bank. The specific authority to the national banks is contained in Section 532.5 of the 1966 Code of Iowa and does not appear to restrict this just to national banks which have their situs in the State of Iowa. Section 532.5 reads as follows:

> "532.5 National banks. When so authorized by any law of the United States now in force or hereafter enacted, national banks may exercise the same powers and perform the same duties as are by sections 532.1 to 532.4, inclusive, conferred upon trust companies, state and savings banks."

Section 532.1 in no way authorizes Illinois state banks to be fiduciaries but, on the other hand, in no way does it prohibit them. Certainly there is no prohibition contained in Chapter 532 for an Illinois national or state bank to engage in a fiduciary capacity in the State of Iowa. However, an Illinois national or state bank must meet the qualifications set out in the Iowa statutory provisions

which the Code Editor has designated as Sections 633.63 and 633.64 of the 1966 Code of Iowa and which read as follows:

> "633.63 Qualification of fiduciary. Any natural person of full age, and <u>any corporation authorized to do business in this state</u> and to act in a fiduciary capacity, is qualified to serve as a fiduciary in this state except the following:
>
> 1. One who is a mental retardate, mentally ill, a chronic alcoholic, or a spendthrift.
>
> 2. Any other person whom the court determines to be unsuitable." (Emphasis supplied)
>
> "633.64 Nonresident fiduciaries. A nonresident of this state who is qualified under the provisions of section 633.63 may, upon application, be appointed fiduciary, provided a resident fiduciary is appointed to serve with such nonresident fiduciary; and provided further that the court, for good cause shown, may appoint such nonresident fiduciary to serve alone without the appointment of a resident fiduciary."

The language underlined above clearly requires that foreign corporations must be "authorized to do business in this state" and must, therefore, have a certificate of authority. This requirement is independent of the technical questions of whether or not being a fiduciary constitutes doing business in the state.

The next question is whether an Illinois state or national bank may obtain authorization to do business in this state. Chapter 496A of the 1962 Code of Iowa provides that a foreign corporation may procure a certification of authority to transact any business which an Iowa corporation is permitted to transact. Subject to the requirements of those chapters cited in Section 496A.142, a corporation may organize in Iowa within Chapter 496A to operate in a fiduciary capacity. There is no specific section in Chapter 496A which prohibits a corporation organized under that Chapter from transacting fiduciary business. Specifically, Sections 496A.103 and 496A.104 apply. The first paragraph of Section 496A.103 reads as follows:

> "No foreign corporation shall have the right to transact business in this state until it shall have procured a certificate of authority so to do from the secretary of state. No foreign corporation shall be entitled to procure a certificate of authority under this chapter to transact in this state any business which a corporation organized under this chapter is not permitted to transact. A foreign corporation shall not be denied a certi-

> ficate of authority by reason of the fact that the laws of the state or country under which such corporation is organized governing its organization and internal affairs differ from the laws of this state, and nothing in this chapter contained shall be construed to authorize this state to regulate the organization or the internal affairs of such corporation."

Section 496A.104 reads as follows:

> "A foreign corporation which shall have received a certificate of authority under this chapter shall, until a certificate of revocation or of withdrawal shall have been issued as provided in this chapter, enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; and, except as in this chapter otherwise provided, shall be subject to the same duties, restrictions, penalties and liabilities now or hereafter imposed upon a domestic corporation of like character."

Any foreign corporation receiving a certificate of authority under Chapter 496A must meet all the requirements of that chapter and I have not attempted to set out all these requirements in this opinion. It should be further noted that I have pointed out above Section 633.64 of the 1966 Code of Iowa. This section provides that the court will usually appoint a resident fiduciary to serve with the nonresident fiduciary unless good cause is shown.

It is therefore my opinion that the Iowa law does not prohibit an Illinois state or national bank from qualifying as a fiduciary under Section 633.63 of the 1966 Code of Iowa, provided that such state or national bank procures a certificate of authority as required by Chapter 496A, 1966 Code of Iowa. This opinion should not be cited as authority for the proposition that a certificate under Chapter 496A may entitle a foreign bank to exercise general banking powers.

Respectfully submitted,

Timothy McCarthy

TIMOTHY McCARTHY
Solicitor General

ew

COUNTY AND COUNTY OFFICERS: Maintenance of graves of service men- § 250.17, 1966 Code of Iowa. A cemetery within the terms of Section 250.17 is a place legally laid out and kept for the purposes of interment. Therefore, a plot of ground, privately-owned, which is a place of burial for a service man and other non-service personnel does not qualify for maintenance out of county funds.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

August 10, 1966

Mr. R. T. Smith
O'Brien County Attorney
Primghar, Iowa

My dear Dick:

Reference is made to yours of the 7th ult. in which you submitted the following:

> "Request has been made of the Board of Supervisors of O'Brien County, Iowa, for action concerning the maintenance of the grave of a deceased Civil War veteran, who is buried in a pasture which at one time was a private family burial ground. The burial ground also contains the graves of the first white settler of O'Brien County, Iowa, and part or all of his immediate family. This site has never been maintained in the past several decades as a cemetery; a gravestone was provided some years ago for the Civil War veteran's grave, however it has been damaged by cattle since that time.
>
> "This grave site is between one-fourth and one-half mile from the nearest secondary roadway which is a gravel road. The grave site has not been maintained and is part of private property near Sutherland, O'Brien County, Iowa.
>
> "Is this veteran's grave considered to be in a cemetery within the meaning of §250.17?

> "Neither the owner of the farmland nor the tenant thereof have made application for funds for the maintenance of this grave site; however the American Legion Post of Sutherland, Iowa, has asked that something be done concerning this.
>
> "Should the owner or tenant of the grave site make the application and receive the funds for the maintenance? What limitation, if any, is there concerning the sum of money to be paid for the maintenance of this grave site? Would the County of O'Brien be authorized to expend the money for fencing this burial ground off from the rest of the property? May the County require that the burial ground first be fenced off before any funds are expended by the County for maintenance of the grave site? May the County pay the sum for the annual maintenance of the grave site directly to the American Legion Post rather than to the owner of the property?"

I would advise that I have reviewed your letter and when viewed in the light of the statute, Section 250.17, which I herewith exhibit,

> "250.17 Maintenance of graves. The board of supervisors of the several counties in this state shall each year, out of the general fund of their respective counties, appropriate and pay to the owners of, or to the public board or officers having control of cemeteries within the state in which any such deceased service man or woman of the United States is buried, a sum sufficient to pay for the care and maintenance of the lots on which they are so buried, in any and all cases in which provision for such care is not otherwise made."

an answer to your question in the affirmative would be an approval of the use of public money for a private purpose and therefore,

unconstitutional. Clearly the benefits of Section 250.17 are available to veterans whose bodies are buried in either a private cemetery or a public one. For that purpose, the benefits are available. However, for the purpose described in your letter, the statute is not authority. The statute provides for the appropriation and payment of money to the owners of a cemetery or to public officials controlling cemeteries within the state where a service man or woman is buried, for the care and maintenance of the plot. The ground involved in your letter is a plot of ground privately-owned where a service man and other non-service personnel are buried. It appears that it has not been maintained as a cemetery. This is not a cemetery within the meaning of Section 250.17. It is defined in Funk-Wagnalls New Standard Dictionary as follows:

> "cemetery - a place for the burial of the dead; formerly, a churchyard or a catacomb; now, usually a large park-like enclosure, regularly laid out and kept for purposes of interment."

Also, see Volume 6A, Words and Phrases, Pages 22-24, where the word cemetery is a number of times judicially defined as being "...a place or ground set apart for the burial of the dead...." I think legislation is required to authorize the expenditure of tax money for the purposes described in your letter.

I do not think for the reasons above that the benefits of Section 250.17 are now available.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

kfm

TAXATION: Sales and Use Tax - Exemptions. Sec. 422.45(5), Code of Iowa, 1966. A county fair association is a special type of non-profit organization and is not an agency, board, commission, division or instrumentality of county government. Thus it is not entitled to a sales tax exemption for its purchases of goods, wares or merchandise.

LAWRENCE F. SCALISE
ATTORNEY GENERAL

STATE OF IOWA
DEPARTMENT OF JUSTICE
DES MOINES

August 25, 1966

Mr. Norman R. Hays, Jr.
Marion County Attorney
111 East Robinson Street
Knoxville, Iowa 50138

Dear Mr. Hays:

This is in reply to your letter dated July 6, 1966, wherein you state as follows:

> "I have been requested to obtain the opinion of your office as to the payment of retail sales tax by the Marion County Fair Association for merchandise and supplies purchased by said Fair Association.
>
> "The Association is organized as a not-for-profit corporation as described in Section 174.1(2), and receives state and county aid as contemplated by Chapter 174. It manages the fairgrounds owned in the name of Marion County and presents a county fair each year, among other uses of the fairgrounds.
>
> "Certain merchants allow the Association to purchase supplies, etc., without the payment of sales tax under the exemption granted by Chapter 264, Section 1, Acts 60 G.A. Other merchants require the payment of the tax.

> "I accordingly request your opinion as to whether the exemption above cited applies to the Fair Association."

Prior to the passage of Section 1, Chapter 264, Acts of the 60th G.A., Section 422.45(5), provided as follows:

> "Exemptions. There are hereby specifically exempted from the provisions of this division and from the computation of the amount of tax imposed by it, the following:
>
> "5. The gross receipts of all sales of goods, wares or merchandise used for public purposes to any tax certifying or tax levying body of the state of Iowa or governmental subdivision thereof, except sales of goods, wares or merchandise used by or in connection with the operation of any municipally-owned public utility engaged in selling gas, electricity, or heat to the general public.
>
> "The exemption provided by this subsection shall also apply to all sales of goods, wares or merchandise used for public purposes to any tax certifying body of the state of Iowa or governmental subdivision thereof which are subject to use tax under the provisions of chapter 423."

The Attorney General, in an opinion dated August 25, 1955, published at 1956 OAG 93, held that the gross receipts from sales of tangible personal property to a county fair

association are subject to sales tax because such association was not a tax certifying or tax levying body.

Section 1, Chapter 264, Acts of the 60th G.A. struck all of subsection 5 of 422.45 and replaced it with the following:

> "The gross receipts of all sales of goods, wares or merchandise used for public purposes to any tax-certifying or tax-levying body of the state of Iowa or governmental subdivision thereof, including the state board of regents, board of control of state institutions, state highway commission and all divisions, boards, commissions, agencies or instrumentalities of state, federal, county or municipal government which derive disbursable funds from appropriations or allotments of funds raised by the levying and collection of taxes, except sales of goods, wares or merchandise used by or in connection with the operation of any municipally-owned public utility engaged in selling gas, electricity or heat to the general public.
>
> "The exemption provided by this subsection shall also apply to all such sales of goods, wares or merchandise subject to use tax under the provisions of chapter four hundred twenty-three (423) of the Code."

The new statute does not require the governmental entity to be tax certifying or tax levying as a prerequisite to the sales and use tax exemption on its purchase of goods,

wares or merchandise used for public purposes (Emphasis supplied). The next issue presented is: Whether a county fair association is an agency, board, commission, division or instrumentality of county government?

At the outset it is emphasized that Section 422.45(5), Code of Iowa, 1966, is an exempting statute and must be strictly construed. If there is any doubt upon the question, it must be resolved against the exemption and in favor of taxation. Chicago, Burlington & Quincy Railroad Co. vs. Iowa State Tax Commission, _____ Iowa _____, 142 N.W. 2d 407, 412 (1966); Community Drama Association of Des Moines vs. Iowa State Tax Commission, 252 Iowa 854, 862, 109 N.W. 2d 23 (1961); National Bank of Burlington vs. Huneke, 250 Iowa 1030, 1035, 98 N.W. 2d 7 (1959).

No Iowa case has decided the question whether a county fair association is an agency or instrumentality of county government. In Unemployment Compensation Commission of North Carolina vs. Wachovia Bank and Trust Co., 215 N.C. 491, 496, 2 S.E. 2d 592 (1939), the North Carolina Supreme Court articulated five tests to determine whether an agency is an instrumentality of government in borderline cases:

1. It was created by the government.
2. It is wholly owned by the government.
3. It is not operated for profit.
4. It is primarily engaged in the performance of some essential governmental function.
5. The proposed tax will impose an economic burden upon the government or materially restrict it in the performance of its duties.

Although the standards articulated by the North Carolina Supreme Court concerned an instrumentality of federal government, there is no compelling reason to make a distinction for agencies or instrumentalities at the county or state level.

The test to determine if this is an essential governmental function is whether the undertaking of the municipality is one in which only a governmental agency could engage. Britt vs. City of Wilmington, 236 N.C. 446, 451, 73 S.E. 2d 289 (1952). If the undertaking is one in which any corporation, individual or group of individuals could engage, the function is proprietary or "private." Britt vs. City of Wilmington, supra, at 451. A county in conducting a county fair is acting in a proprietary capacity, since a county fair is an activity which the county is not compelled to undertake. It is purely optional with the county whether a county fair should or should not be held. This would not qualify as a governmental function because this is not uniquely capable of being exercised by the government, since an individual or corporation is privileged to engage in this activity.

Secondly, Section 174.2 would seem to indicate that a county fair association is a special type of non-profit organization, as opposed to an agency or instrumentality of county government.

Section 174.2 provides in part:

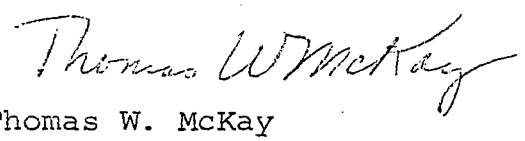
> ". . . In addition to the powers granted herein the society shall possess the powers of a corporation not for pecuniary profit under the laws of this state and those powers enumerated in its articles of incorporation, such powers to be exercised before and after the holding of such fairs." (Emphasis supplied)

If the legislature had intended a county fair association to be an agency or instrumentality of county government, it could have so stated in the statute.

Therefore, we are of the opinion that a county fair association is a special type of non-profit organization and is not an agency, board, commission, division or instrumen-

tality of county government. Consequently, a county fair association is not exempt from sales tax on its purchases of goods, wares, or merchandise.

Very truly yours,



Thomas W. McKay
Special Assistant Attorney General

TWM:ceb

CRIMINAL LAW: Restrictions on Disclosures of Defendant's Prior Record to the Grand Jury, Chapter 444, Acts of the 61st G.A., §§ 3,4, and 5. Statutory restrictions relating to disclosures of a defendant's previous criminal record applicable to a petit jury under Chapter 444, Acts of the 61st G.A., are not applicable to presentations to a Grand Jury.

August 26, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Mr. Michael Kearney
Chickasaw County Attorney
Chickasaw County Courthouse
New Hampton, Iowa

Dear Mr. Kearney:

This will acknowledge receipt of your recent letter to this office wherein you requested our opinion regarding substantially the following:

> "1. Are the statutory restrictions, on disclosure to a petit jury, of a defendant's previous criminal record, as contained in House File 565, Chapter 444, 61st G.A., page 838, 839, also applicable to a grand jury's investigation of a defendant, where such defendant has a habitual criminal record within the statutory provisions; namely, Section 747.5 of the 1962 Iowa Code?
>
> "2. If such statutory restrictions are applicable to such a grand jury, should the district court include instructions with respect thereto to the grand jury at the time it is impaneled?"

Chapter 444, Acts of the 61st General Assembly, Sections 3, 4, and 5, provide as follows:

> "SEC. 3. Chapter seven hundred sixty-nine (769), Code 1962, is hereby amended by adding after section seven hundred sixty-nine point five (769.5) the following section:
>
> "'If the offense charged is one for which the defendant, if convicted, will be subject by reason of the Code, to an increased penalty because of prior convictions, the allegation of such convictions, if any, shall be contained in the (information). A supplemental (information) shall be prepared for the purpose

of trial of the facts of the current offense only, and shall satisfy all pertinent requirements of the Code, except that it shall make no mention, directly or indirectly, of the allegation of the prior convictions, and shall be the only information read or otherwise presented to the jury prior to conviction of the current offense. The effect of this section shall be to alter the procedure for trying, in one criminal proceeding, the offenses appropriate to its provisions, and not to alter in any manner the basic elements of an offense as provided by law.'

"SEC. 4. Chapter seven hundred seventy-three (773), Code 1962, is hereby amended by adding after section seven hundred seventy-three point two (773.2) the following section:

"'If the offense charged is one for which the defendant, if convicted, will be subject by reason of the Code, to an increased penalty because of prior convictions, the allegation of such convictions, if any, shall be contained in the (indictment). A supplemental (indictment) shall be prepared for the purpose of trial of the facts of the current offense only, and shall satisfy all pertinent requirements of the Code, except that it shall make no mention, directly or indirectly, of the allegation of the prior convictions, and shall be the only indictment read or otherwise presented to the jury prior to conviction of the current offense. The effect of this section shall be to alter the procedure for trying, in one criminal proceeding, the offenses appropriate to its provisions, and not to alter in any manner the basic elements of an offense as provided by law.'

"SEC. 5. Chapter seven hundred eighty-five (785), Code 1962, is hereby amended by adding after section seven hundred eighty-five point fifteen (785.15) the following section:

"'After conviction, but prior to pronouncement of sentence, if the indictment alleges one or more prior convictions which by the Code, subject the offender to an increased sentence, he shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the

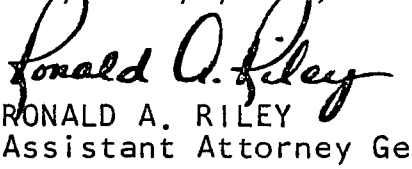
> identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted.
>
> "'The court may in its discretion reconvene the jury which heard the current offense or dismiss that jury and submit the issue of identity to another jury to be later impaneled. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in the Code.'"

Sections 3 and 4 of Chapter 444, Acts of the 61st General Assembly, dictate that a supplemental information or indictment is to be prepared for trial of only the current offense and shall be the only information or indictment read to the jury prior to conviction. The language found in the above referred to sections specifically provides that the purpose of those sections is to "alter the procedure for trying, in one criminal proceeding, the offenses appropriate to its provisions, ..." (emphasis supplied). Thus, it would appear that the General Assembly has qualified its mandate that allegations of prior convictions shall not be contained in the single supplemental indictment or information charging the current offense to be applicable only to alter the procedure insofar as the trial of the current offense is concerned.

The grand jury, being an informing and accusing body, as opposed to a trial body, does not have the function to determine the guilt or innocence of a person accused of a crime. The duty of determining guilt or innocence is imposed upon the petit jury. United States v. Direct Sales Co., Inc., et al., 40 F.Supp. 917, 920 (1941).

As the sections about which you inquire relate to the trial of the facts prior to conviction, it appears manifest that the restrictions imposed by the General Assembly are applicable only to action before a petit jury. It is, accordingly, the opinion of this office that proceedings before a grand jury are not affected by the provisions of Chapter 444, Acts of the 61st General Assembly.

Very truly yours,



RONALD A. RILEY
Assistant Attorney General

nl

SCHOOLS AND SCHOOL DISTRICTS: Equalization Levy. §§ 275.29 and 275.31, 1962 Code of Iowa. Section 275.31 is applicable only in cases where a school will be maintained in the portion of the original district which remains after the reorganization.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

August 29, 1966

Mr. Albert F. Goeldner
Keokuk County Attorney
122 South Main Street
Sigourney, Iowa 52591

Dear Mr. Goeldner:

This is in response to your recent request wherein you stated as follows:

> "The newly-reorganized high school districts are meeting before July 20th to divide their assets and liabilities. There is much concern in those instances where rural districts have not levied sufficient funds and are coming into high school districts without a balance.
>
> "Will you, therefore, please advise me in these specific instances:
>
> "1. In the case of split districts, a portion of a rural independent or township district going to two or more different high school districts, is it not possible to levy for the coming year an additional millage levy in the old district to make up this difference?

> "2. In the cases of rural independent districts (not split districts) going into a high school district with nothing but liabilities, cannot this area be given an additional tax reflected in an increased millage levy this coming year that will liquidate this liability?"

I

In reply to your first question, I direct your attention to Sections 275.29 and 275.31, 1966 Code of Iowa, which provide in part as follows:

> "275.29 Between July 1 and July 20, the board of directors of the newly formed community school district shall meet with the boards of all the old districts or parts of districts affected by the organization of the new school corporation for the purpose of reaching joint agreement on an equitable division of the assets of the several school corporations or parts thereof and <u>an equitable distribution of the liabilities of the affected corporations</u> or parts thereof.
>
> "275.31 If necessary to equalize such division and distribution, the board or boards may provide for the levy of additional taxes upon the property of any corporation or part of corporation and for the distribution of the same so as to affect such equalization." (Emphasis Added)

Section 275.29 provides that the respective boards of school districts involved in reorganizations shall meet between July 1 and July 20 to work out an equitable division and distribution of assets or liabilities as the case might be. Section 275.31 provides the statutory procedure for the levying of a tax to allow an equitable distribution and division in limited factual situations. The Attorney General has ruled on the applicability

of Section 275.31, to a case similar to the one presented by you in 60 O.A.G. 175. In the said opinion the Lincoln Township School District, which was in debt in the amount of $11,000.00, was merged in its entirety with the Central Dallas Community School District. At the division and distribution meeting between the respective boards, the Central Dallas Community School Board sought to levy a tax against the property of the former Lincoln Township School District to accumulate eleven thousand dollars to pay the said debt. This office said:

> "The inapplicability of that section [§ 275.31] to the situation outlined is shown by the fact that a levy is authorized 'upon the property of any corporation or part of corporation.' However, the Lincoln Township School District ceased to be a corporation upon the establishment of the Central Dallas Community School District, and a levy upon the property of the Lincoln Township School District or a part of that district, could not be founded upon the foregoing statute." 60 O.A.G. 175

Contrary to the suggestion in your letter, it does not appear that the provisions of Section 275.31 are applicable in your case. The purpose of Section 275.31, is to provide for an additional levy in cases where a portion of an old district is annexed to a new district with the remaining portion of the old district continuing in existence for the purpose of operating a school. An example of this situation in which Section 275.31 is applicable can be found in 56 O.A.G. 75. In that case 30 per cent of the LaMoille District was annexed to the Marshalltown School District with the remaining 70 per cent of the LaMoille District continuing in existence in order to operate the schools in the said district. The special levy in Section 275.31 supplies a method by which the LaMoille District could pay over an amount equal to 30 per cent of its assets to the Marshalltown District without depleting its revenue, which would be needed to operate the schools in the remaining portion of the LaMoille District. See Peterson, et al v Swan, et al, 231 Iowa 745, 2 N.W.2d 70 (1942). In many cases similar to the LaMoille-Marshalltown case above, the largest asset of that portion of the old district which will continue to operate a school is the schoolhouse. In this connection, we have stated:

> "Assuming, but not purporting to decide, that the plan for distribution of assets and liabilities referred to in your letter is 'equitable' within the meaning of section 275.29, it nevertheless is necessary to consider several other factors to determine whether the tax provided in section 275.31 was intended to be used for the purpose proposed in your letter, namely, easing the impact immediate settlement would have on funds on hand in the treasury. The announced purpose of the tax provided in section 275.31 is 'to equalize such division and distribution.' In Dist. Twp. of Williams v Dist. Twp. of Jackson, 36 Iowa 216 and in Dist. Twp. v Wiggins, 110 Iowa 702, it was held that schoolhouses and real estate used for school purposes are to be considered in the division of assets but that the division need not result in partition of the real estate. In other words, it was recognized that where school must be maintained in the portion of the original district remaining after boundary change, it is logical that existing school plant facilities be used therefor. It follows that where sufficient cash assets exist to make up for the proportionate value of the school plant, the law contemplates that they be used to effect the distribution. Where the cash assets are inadequate to effect the distribution as well as operate the school, it logically follows that the levy for equalization provided in section 275.31 may be properly used." 56 O.A.G. 74,75

In accord with the above, it is my opinion that Section 275.31 is applicable only in those cases where school will be maintained in the portion of the original district which remains after the reorganization.

Your request indicated that last year some of the non-twelve grade districts failed to levy sufficient funds and they were in debt on the effective date of the attachment. In this regard, please remember that Section 275.29 provides for an equitable distribution and division of assets or liabilities. In addition, I would also like to call your attention to the case of Peterson, et al v Swan, et al, supra, where on page 73 of the Northwestern Reporter 2d Series, the Iowa Supreme Court quoted from 37 Am. Jur. 656, paragraph 40, as follows:

> "' * * * Thus, if a municipal corporation goes out of existence by being annexed to, or merged in, another corporation, and if no legislative provision is made respecting the property and liabilities of the corporation which ceases to exist, the corporation to which it is annexed, or in which it is merged, is entitled to all its property and is answerable for all its liabilities. * * * When two or more municipalities are combined, the resulting municipal corporation includes the persons and places of the several municipalities; it has the same property and owes the same debts which they all had owned and owed, and the identity of the component elements is lost and absorbed in the new creation. * * * "

In conclusion, it is my opinion that in attachments where all of the non-twelve grade district is completely merged into one or more twelve grade districts, the provisions of Section 275.31 are not applicable. In these cases the assets or liabilities must be divided equitably between the receiving twelve grade districts.

II

Your second question is answered by my above reply.

Very truly yours,

NOLDEN GENTRY
Assistant Attorney General

jmw

STATE OFFICERS AND DEPARTMENTS: State legislator may not also hold office of township trustee--§ 22, Article III, Iowa Constitution; § 359.46, 1966 Code of Iowa. When a public office provides compensation, the office is a "lucrative office" under § 22, Article III of the Iowa Constitution.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

August 26, 1966

Honorable Clark Rasmussen
500 Shops Building
Des Moines, Iowa

Dear Mr. Rasmussen:

You have inquired as to whether a state legislator may hold the office of township trustee.

Section 22, Article III, of the Iowa Constitution reads as follows:

> "No person holding any lucrative office under the United States, or this state, or any other power shall be eligible to hold a seat in the General Assembly: but offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative."

Section 359.46 of the 1966 Code of Iowa provides for compensation of township trustees, although it is meager.

The issue which your question raises calls for a determination of whether meager compensation will constitute a "lucrative office." "Lucrative office" has been interpreted several times by the courts. The Oregon Supreme Court held that it is an office where pay is affixed to the performance of duties of office. Holman v. Lutz, 132 Or. 185, 284 P. 825.

The California Supreme Court has held that a lucrative office is one which has attached to it a pecuniary salary. Crawford v. Dunbar, 52 Cal. 36.

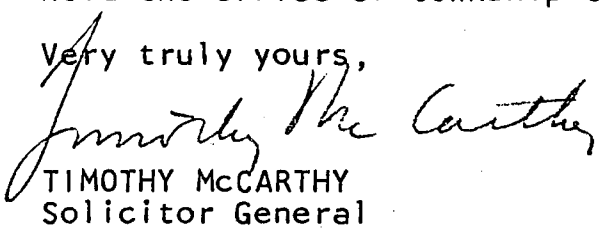
The Indiana Supreme Court has held that lucrative office means an office to which there is attached a compensation for services rendered. Book v. State Office Building Commission, 238 Ind. 120, 149 N.E. 2d 273.

The Texas Supreme Court has recently held that a lucrative office is one which yields a revenue in the form of fees or otherwise or a fixed salary. Willis v. Potts, 377 S.W. 2d 622.

In addition, the Attorney General in 22 OAG 360 has held that "A lucrative office. . . is an office which yields compensation, is gainful or profitable."

It is not for this office to judge the extent of payments or the degree of lucrativity. If compensation is provided for, it is my opinion that the office is a lucrative one under the Constitution. Therefore, it is my further opinion that a legislator cannot also hold the office of township trustee.

Very truly yours,



TIMOTHY McCARTHY
Solicitor General

lb

SCHOOLS AND SCHOOL DISTRICTS: §§ 24.2(1), 280A.16 and 280A.17, 1966 Code of Iowa. Area vocational schools and community colleges are governed by the provision in the Local Budget Law.

September 7, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Mr. Homer Young, Budget Examiner
Office of the Comptroller
L O C A L

Dear Mr. Young:

This is in reply to your recent inquiry wherein you presented the following:

> Whether the newly created system of area vocational schools and community colleges must operate within the scope of Chapter 24, 1966 Code of Iowa.

In reply to your inquiry I direct your attention to Sections 280A.16 and 280A.17, 1966 Code of Iowa, which provide in part as follows:

> "A merged area formed under the provisions of this chapter shall be a body politic as a school corporation for the purpose of exercising powers granted under this chapter, ...
>
> "The board of directors [of the merged area] shall certify the amount [to be raised by local taxation] to the respective county auditors and the boards of supervisors shall levy a tax sufficient to raise the amount." (Emphasis added)

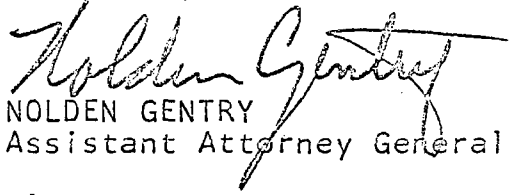
The above sections indicate that the merged area boards are school corporations vested with the power to certify a tax to be levied by the respective boards of supervisors. Section 24.2(1) provides as follows:

> "The word 'municipality' shall mean the county, city, town, school district, and all other public bodies or corporations that have power to levy or certify a tax or sum of money to be collected by taxation, but shall not include

> any drainage district, township, or road district." (Emphasis added)

In view of the provisions in the Local Budget Law defining tax certifying public corporations as "municipalities" under Chapter 24, I am of the opinion that all area vocational schools and community colleges organized under the provisions of Chapter 280A, 1966 Code of Iowa, are within purview of the Local Budget Act.

Very truly yours,



NOLDEN GENTRY
Assistant Attorney General

nl

COUNTIES: VETERANS' GRAVES.
CITIES AND TOWNS: CENETERY LOT; ABANDONMENT. The unoccupied portion of a cemetery lot in which a deceased veteran is interred is within the scope of the abandonment provisions of Chapter 566 of the Code, notwithstanding Section 250.17 of the Code which provides for the care and maintenance of cemetery lots in which such deceased veteran is interred.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

September 2, 1966

Mr. Charles E. Vanderbur
Story County Attorney
Story County Court House
Nevada, Iowa

Dear Mr. Vanderbur:

This is in response to your recent letter requesting the opinion of this office with regard to the effect of Section 250.17, Code of Iowa, upon the abandonment of cemetery lots as set forth in Sections 566.20 through 566.26 of the Code.

Section 250.17 provides:

> "The board of supervisors of the several counties in this state shall each year, out of the general fund of their respective counties, appropriate and pay to the owners of, or to the public board or officers having control of cemeteries within the state in which any such deceased service man or woman of the United States is buried, a sum sufficient to pay for the care and maintenance of the lots on which they are so buried, in any and all cases in which provision for such care is not otherwise made."

Section 566.20 provides:

> "The ownership or right in or to an unoccupied cemetery lot or portion thereof shall upon abandonment revert to the person or corporation having ownership and charge of the cemetery containing such lots."

Section 566.21 provides:

> "The continued failure to maintain or care for a cemetery lot for a period of ten years shall create and establish the presumption that the same has been abandoned."

Your question specifically was whether the maintenance and care provisions of §250.17 prevent the abandonment of the unoccupied portion of cemetery lots owned by deceased service men and women.

Section 566.27 provides:

> "Sections 566.20 to 566.26, inclusive, shall not apply to a cemetery lot or tract for which perpetual care has been provided by will, by order of court or by contract with the original grantor."

The provision of maintenance and care under §250.17 is not within the exclusions set forth in §566.27 for two reasons: (1) the maintenance and care under §250.17 is not provided for by will, order of court, or contract; and, (2) the maintenance and care under §250.17 is not necessarily perpetual. That section specifically provides that the county shall have the duty to provide for the maintenance and care of veterans' graves "in any and all cases in which provision for such care is not otherwise made." This last quoted portion of the section clearly indicates that the county's obligation ceases or will cease upon the provision of maintenance and care of a veteran's grave by some other person or means.

It is also helpful to examine the nature and purpose of the sections involved. Section 250.17 was enacted in 1925 by the Forty-first General Assembly, Chapter 94:

> "AN ACT providing for the payment by the respective boards of supervisors of the several counties for the <u>care</u> of graves of deceased soldiers and sailors of the United States." [Emphasis added]

It is evident from the above that the purpose of §250.17 was the provision of care and maintenance of the burial places of deceased soldiers and sailors (later extended to "deceased service man or woman" as presently stated); and, inasmuch as the legislature used the term "lot"* in the body of the act, it thereby provided for the care and maintenance of a veteran's grave together with

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* For purposes of this opinion the term "lot" means one tract or plot of burial ground, located in a cemetery, containing more than one grave or grave site, and which is sold or purchased as one unit of many. See Bennett v. Washington Cemetery, 62 N.Y.S. 87.

the rest of the lot upon which that grave may be located "in any and all cases in which provision for such care is not otherwise made." This last quoted portion points out the fact that §250.17 is a section to be used only in cases of necessity, i.e., when no one else will care for and maintain the grave and lot of a veteran.

I do not think it is proper or logical to assign to this enactment the idea or interpretation that the board of supervisors of each county must perpetually care for and maintain the lot in which a veteran is interred whether the entire lot is occupied or not, and under all conditions and circumstances.

I feel this position is supported by the fact that §§566.17 et.seq. were enacted in 1931 by the Forty-fourth General Assembly (Chapter 207), six years after §250.17. The Statement of Purpose of Chapter 207, 44 G.A. provides:

> "AN ACT to provide for the declaration of abandonment of rights to unoccupied and abandoned cemetery lots and reversion of ownership after abandonment."

It would be most illogical for this office to take the position that the purpose of §250.17 is to prevent the operation of §§566.20 et. seq. when the later sections were not in existence until six years after §250.17.

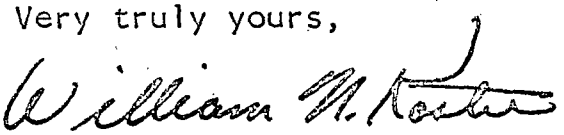
If the intent of the legislature had been that §250.17 was to prevent the operation of §§566.20 et. seq., then such intent should have been carried over into §566.27 (exclusions). Since veterans' lots are not so excluded they must be considered as included. This discussion must be limited to what the legislature said rather than what it might have said. [R.C.P. 344(13) I.C.A.]

The Iowa General Assembly by enacting §250.17 provided that in those cases when care and maintenance of a lot wherein a veteran is interred is not otherwise provided, the county shall, in respect for that veteran's service to his country, provide the care and maintenance of that lot. I do not see how the abandonment of unoccupied portions of such lot under §§566.20 et. seq. can or will violate that purpose. The abandonment of the unoccupied portion of a veteran's burial lot does not affect the obligation of a county to care for and maintain the grave sites in that lot which are occupied and for which care and maintenance is not otherwise provided.

The fact is that §250.17 is used only in instances when a veteran's lot has been abandoned by all other persons who can or might provide the necessary care and maintenance. The only time a county will act under this section is when there is a failure to maintain on the part of others and such failure must be considered an abandonment within the meaning of §§566.20 et. seq.

Accordingly, it is the opinion of this office that the unoccupied portion of a cemetery lot in which a deceased veteran is interred is within the scope of the abandonment provisions of Chapter 566 of the Code, notwithstanding Section 250.17 of the Code which provides for care and maintenance of cemetery lots in which such deceased veteran is interred.

Very truly yours,



WILLIAM N. KOSTER
Special Assistant Attorney General

dc

TAXATION: Taxing District Defined. §§ 441.35 and 441.37, Code of Iowa, 1966. "Taxing district" as used in Sections 441.35 and 441.37 means the "same assessing district."

LAWRENCE F. SCALISE
ATTORNEY GENERAL

STATE OF IOWA
DEPARTMENT OF JUSTICE
DES MOINES

September 21, 1966

Ballard B. Tipton
Director, Property Tax Division
State Tax Commission
State Office Building
L O C A L

Dear Mr. Tipton:

This is in reply to your request for an opinion requesting a definition of the term "taxing district" as used in Sections 441.35 and 441.37, Code of Iowa, 1966.

An Opinion of the Attorney General dated May 26, 1965, #65-5-15, broadly defined "taxing district" as "the area throughout which a particular tax or assessment is ratably apportioned and levied upon the inhabitants." This is a suitable general definition, but not sufficiently precise for proper interpretation of Sections 441.35 and 441.37.

> "441.35 Powers of review board. The board of review shall have the power:
>
> "1. To equalize assessments by raising or lowering the individual assessments of real property, including new buildings, personal property or moneys and credits made by the assessor.
>
> "2. To add to the assessment rolls any taxable property which has been ommitted by the assessor.
>
> "In any year after the year in which an assessment has been made, all of the real estate in any taxing district, it shall be the duty of the

the board of review to meet as provided in section 441.33, and where it finds the same has changed in value, to revalue and reassess any part or all of the real estate contained in such taxing district, and in such case, it shall determine the actual value and compute the taxable value thereof, and any aggrieved taxpayer may petition for a revaluation of his property, but no reduction or increase shall be made for prior years. If the assessment of any such property is raised, or any property is added to the tax list by the board, the clerk shall give notice in the manner provided in section 441.36, provided, however, that if the assessment of all property in any taxing district is raised the board may instruct the clerk to give immediate notice by one publication in one of the official newspapers located in the taxing district, and such published notice shall take the place of the mailed notice provided for in section 441.36, but all other provisions of said section shall apply. The decision of the board as to the foregoing matters shall be subject to appeal to the district court within the same time and in the same manner as provided in section 441.38."

"441.37 Protest of assessment - grounds. Any property owner or aggrieved taxpayer who is dissatisfied with his assessment may file a protest against such assessment with the board of review on or after May 1, to and including May 20, of the year of the assessment. In any county which has been declared to be a disaster area by proper federal authorities after March 1 and prior to May 20 of said year of assessment, the time for filing a protest shall be extended to and include the period from June 10 to June 20 of such year. Said protest shall be in writing and signed by the one protesting or by his duly authorized agent. Taxpayer may have an oral hearing thereon if request therefor in writing is made at the time of filing the protest. Said protest must be confined to one or more of the following grounds:

"1. That said assessment is not equitable as compared with assessments of other like property in the taxing district. When this ground is relied upon as the basis of a protest the legal description and assessments of a representative number of comparable properties, as described by the aggrieved taxpayer shall be listed on the protest, otherwise said protest shall not be considered on this ground.

> "2. That his property is assessed for more than the value authorized by law, stating the specific amount which the protesting party believes his property to be overassessed, and the amount which he considers to be its actual value and the amount he considers a fair assessment.
>
> "3. That his property is not assessable and stating the reasons therefor.
>
> "4. That there is an error in the assessment and state the specific alleged error.
>
> "5. That there is fraud in the assessment which shall be specifically stated.
>
> "In addition to the above, the property owner may protest annually to the board of review under the provisions of section 441.35, but such protest shall be in the same manner and upon the same terms as heretofore prescribed in this section."

The meaning of "taxing district" has been narrowly construed in many jurisdictions. "Taxing district" has been held to mean the "same assessing district" or the jurisdiction of the particular assessor. In order to be a person aggrieved within the meaning of a statute which permits a person to file a complant for the reduction of his assessment, the applicant must be a taxpayer whose property is disproportionately valued in comparison with other like property in the same assessment district. Lincoln Land Co. vs. Phelps County, 59 Neb. 249, 251, 80 N.W. 818 (1899).

> "It may be that the assessor's opinion of real estate values was influenced too much by a buoyant and optimistic temperament; but it cannot be said that the company was aggrieved ..., unless the valuation of its property was disproportionate to the valuation of other property in the particular assessment district." (emphasis added)

Although the Iowa Supreme Court has not construed the meaning of "taxing district" in Sections 441.35 and 441.37, this general proposition has been supported by the Iowa case law. The Iowa Supreme Court has applied a "same assessing district" standard as a basis of comparison with similar property for a complaining taxpayer. In Chapman Brothers vs. Board of Review of the City of Des Moines, 209 Iowa 304, 309, 228 N.W. 28 (1929), the Court held:

> "Manifestly, the property in question was assessed for more, in proportion to its value, than other similar properties in the same assessment district. The court, in fixing the assessed valuation, was abundantly fair to the board of review. The case is Affirmed." (emphasis added)

The "same assessing district" or the "same taxing district" test has received overwhelming support from the case law and is the well settled law in Iowa, Talbott vs. City of Des Moines, 218 Iowa 1397, 1403, 257 N.W. 393 (1934); Butler vs. City of Des Moines, 219 Iowa 956, 962, 258 N.W. 755 (1935); Clark vs. Lucas County Board of Review, 242 Iowa 80, 90, 44 N.W. 2d 748, 754 (1951).

In Crary vs. Board of Review of Boone, 226 Iowa 1197, 1200, 286 N.W. 428 (1939), the Iowa Supreme Court held that comparison with properties must be within the jurisdiction of the local board of review, rejecting comparison with comparable property located within the jurisdiction of another

assessor and his local board of review. In a complaint on the ground of inequality of assessment, comparison with similar property in another city is insufficient evidence:

> "The trial court found that, in considering the contention that the assessment was disproportionate and discriminatory 'comparison with but one other property in a city the size of Boone, is insufficient to afford relief.' We agree with this finding. Manifestly, an assessment is not discriminatory unless it stands out above the general level. Were the rule otherwise an isolated instance of under-assessment might result in a general reduction for all similar properties."

There are two primary advantages for the "same assessing district" rule. First, comparison with similar property in the same assessor district prevents "assessment shopping" which would result in much litigation. Otherwise, an isolated instance of a lower assessment in another taxing district might be grounds for reduction of an assessment in a taxing district which would otherwise be fair and equitable. Crary vs. Board of Review, supra. Secondly, restricting comparison to property in the same assessing district recognizes that diverse treatment in different assessing districts may be fair and equitable because of the many relevant factors which affect an assessment decision. For example, identical business property in the districts in Des Moines and Anamosa could be assessed at a higher value in Des Moines because of the productive earnings, productive capacity and the number of potential consumers, yet still be fair and equitable though the property is physically identical.

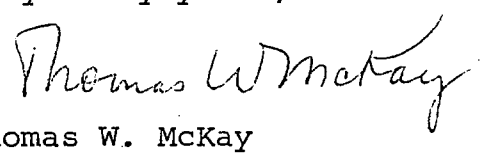
In terms of statutory construction, "taxing district" as used in Section 441.35 would appear to mean the "same assessing district."

> "In any year after the year in which an assessment has been made, all of the real estate in any taxing district, it shall be the duty of the board of review to meet as provided in section 441.33, and where it finds the same has changed in value, to revalue and reassess any part or all of the real estate contained in such taxing district ..." (emphasis added)

"Contained in such taxing district" would appear to restrict the power of the board of review to the taxing district which the particular assessor represents. If the legislature had intended otherwise, this could have been achieved by eliminating "such" and adding "any."

In answer to your question, it is the opinion of this office that a workable definition of "taxing district", as used in Section 441.35 and 441.37, means the "same assessing district" or the jurisdiction of the particular assessor. Both the case law and ordinary statutory construction support this conclusion. Consequently, comparison with other like property in the "taxing district" means within the "same assessing district," not other like property in other assessor districts.

Very truly yours,



Thomas W. McKay
Special Assistant Attorney General

TWM:ceb

TAXATION: Assessment of platted lots - Section 409.48, Code of Iowa, 1966. Assessment procedure enacted by Ch. 339, Acts of the 61st G.A., applies not only to plats recorded after July 4, 1965, but also to plats recorded within 3 years prior to that date.

September 22, 1966

Mr. James L. McDonald
Cherokee County Attorney
McDonald Building
Cherokee, Iowa

Dear Mr. McDonald:

This is in reply to your letter requesting an opinion on whether or not Chapter 339, Acts of the 61st G.A. (now Section 409.48, Code of Iowa, 1966), applies to plats filed within 3 years prior to the effective date of this new statute, July 4, 1965.

Section 409.48, Code of Iowa, 1962, which was repealed and replaced by Chapter 339, Acts of the 61st G.A., provided for lots in recorded plats to be assessed at an amount equal to the proportionate assessed valuation immediately before the platting, until leased, sold or improved.

> "409.48 Assessment of platted lots. When any plat is made, filed and recorded by the proprietor or owners under the provisions of this chapter, the individual lots contained therein shall, until sold, leased or improved, be assessed for taxation at an amount equal to each individual lots proportionate share, on an area basis, of the assessed valuation of the entire tract immediately before the platting thereof. When an individual lot has been sold, leased or improved, it shall

> be assessed for taxation as provided by Chapters 428 and 441. * * * "

The effect was to adopt a "forever" assessed valuation except when the lot was leased, sold or improved.

Chapter 339, Acts of the 61st G.A., limited the preplatting assessment basis of the lots to 3 years or such time as the lot was actually improved, which ever occurred first. The pertinent portion of Chapter 339 provides:

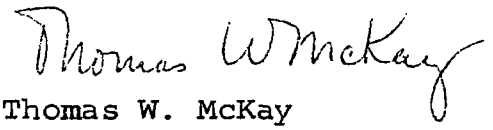
> "When any plat is made, filed and recorded by the proprietor or owner under the provisions of this chapter, the individual lots contained therein shall not be assessed in excess of the total assessment of the land as acreage or unimproved property for a period of three (3) years after the recording of said plat, or until such time as the lots are actually improved with permanent construction upon and within the boundaries of the individual lot or lots whichever period is shorter. When an individual lot has been improved with permanent construction, it shall then be assigned for taxation as provided in chapters four hundred twenty-eight (428) and four hundred forty-one (441) of the Code. * * * "

Section 409.48, Code of Iowa, 1962, having been repealed, is no longer applicable to the assessment of platted lots. The question then is: Are lots platted within 3 years prior to July 4, 1965, the effective date of Chapter 339, but unimproved at the time of assessment, to be assessed as acreage or unimproved property, or reappraised and revalued as lots?

Chapter 339 was not specifically made applicable only to plats filed after July 4, 1965. In construing statutes the courts search for the legislative intent as shown by what the legislature said, rather than what it should or might have said. R.C.P. 344(f)(13).

Therefore, it is the opinion of this office that Chapter 339, Acts of the 61st G.A., applies not only to plats recorded after July 4, 1965, but also to plats recorded within 3 years prior to July 4, 1965. The 3 year period begins to run from the date of recording of the plat. The effect of this new statute is to limit, rather than abolish the preexisting assessment procedure that was set forth in the repealed statute, Section 409.48, Code of Iowa, 1962.

Very truly yours,



Thomas W. McKay
Special Assistant Attorney General

TWM:DAA:dj

CITIES AND TOWNS: Voting rights during annexation proceedings - §§ 362.26 and 362.33, 1966 Code of Iowa. Where the annexation procedures of Section 362.26 are followed and where there are objectors whose rights have not been determined by the court, a decree of the court defaulting those residents who have not objected is not a final action of the court which should be certified by the Clerk of the District Court to the County Recorder. This has not been annexed and the residents of this area are not required to register and vote in the city, but have the right to vote in their township until the court takes final action and the action is certified by the Clerk to the Recorder.

September 29, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Mr. Francis E. Tierney
Webster County Attorney
507 State Bank Building
Fort Dodge, Iowa

Dear Mr. Tierney:

You have recently advised that annexation proceedings were started under Section 362.26 of the 1962 Code of Iowa and that the notice required by subsection 1, and council meetings required under subsection 2, as well as the election required by subsection 3, were all provided for and that a petition as required by subsection 4 was filed in the District Court and that the Court made a partial finding which was in the nature of a decree, defaulting all those defendants who did not appear or object. I understand that there are approximately twelve objectors and there has been no adjudication of the issues that they have raised.

After finding that the non-objectors' property should be annexed, the Judge of the District Court made the following entry:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the matter of establishing a perimeter description for the City limits of the City of Fort Dodge shall include the above Defendant's property but that said description shall not be made and set out until final Decree is entered herein relative to the properties and the owners thereof who are resisting said action."

The question that you raise is whether there is, in fact, an annexation of any or all of the property and whether the people in the effected area have to register as required by the city law or whether they will be able to vote in the coming election in the townships.

The applicable statutes are portions of Section 362.26 and Section 362.33 of the 1966 Code of Iowa which read as follows:

"362.26 Annexing territory. Unincorporated territory, located in any county, or in two or more counties lying contiguous to each other, adjoining any city or town may be annexed thereto and become a part thereof by proceeding as follows:

1. The clerk of the municipal corporation, on order of the council, shall cause to be published, once each week for two consecutive weeks in the manner provided by section 618.14, a notice that the council will meet at a certain date, time, and place to consider a proposed resolution for the annexation of certain described territory and to hear objectors and proponents for such annexation.

2. The council may provide at said meeting or at a subsequent meeting by resolution, adopted at least one month before any regular municipal or special election, for the annexation of territory described therein.

3. The proposition shall be submitted to the voters of said city or town at said election in the following form: 'Shall the proposition to annex the territory described as follows: (here set out the legal description of the territory); in the resolution adopted by the council of the city (or town) of ....., on the .... day of ..... be approved?' Notice of the submission of said proposition shall be given by publication once each week for three consecutive weeks in the manner provided by chapter 618.

4. If the proposition is adopted by a majority of those voting thereon, the council shall cause to be filed in the district court, in any county wherein is located part of the territory sought to be annexed, a suit in equity against the owners of the property proposed to be annexed, the petition therein setting forth that, under a resolution of the council, the territory therein described was authorized by the voters of said city to be annexed to the city or town.

5. The petition shall contain:

a. A description of the perimeter of the entire property proposed to be annexed and a list of each property owner therein as shown by the plat books in the office of the county auditor or auditors.

b. A statement of facts showing that the municipal corporation is capable of extending into such territory substantial municipal services and benefits not theretofore enjoyed by such territory.

c. A plat of such territory showing its relation to the corporate limits.

d. That said annexation is not sought merely for the purpose of increasing the revenues from taxation of such municipal corporation.

6. If the court finds that there is an affirmative showing that the municipal corporation is capable of extending into such territory substantial municipal services and benefits not theretofore enjoyed by such territory, so that the proposed annexation will not result merely in increasing the revenue from taxation of such municipal corporation; and if the court finds further that all of the proceedings and conditions precedent to annexation as required hereinbefore by subsections 1 through 5, inclusive, have been duly instituted and carried out as provided therein, the court shall decree the annexation. No costs shall be taxed against any defendant who fails to make a defense."

"362.33 Filing of records. When any territory has been annexed to or severed from any city or town the clerk thereof shall make and certify a transcript of such part of the records of such city or town as shows the final action of the council and shall file the same for record in the office of the recorder of the county in which the city or town is located. And in like manner the clerk of the district court shall make and file a certified copy of the record of the final action of the court on such proceedings and when such certified copies have been filed the annexation or severance, as the case may be, shall be complete and all persons shall be bound to take notice thereof." (Emphasis supplied)

The situation which you present is not a voluntary annexation procedure under Section 362.30 which requires that all of the property owners make written application and that all property adjoin the city. This section of the Code was interpreted by our office in an opinion dated August 2, 1966, wherein we held that a voluntary annexation is invalid where all the property owners failed to join in the application and where all the territory sought to be annexed did not adjoin the city or town.

Section 362.26 requires that all property to be annexed must be adjoining to the city or town and the procedure is set forth above. The statutory procedure does not envision separate annexations occuring in the one lawsuit. The decree which you have in your case does not purport to be a final determination of the annexation and does not purport to decree anything other than the default of those parties who have not resisted the annexation petition.

I have set out above that portion of the decree which recognizes that a final decree shall not be entered until the rights of those property owners who are resisting have been determined.

Section 362.33, which is set out above, provides when the annexation shall be complete and requires that the certified copy of the record of the final action of the court be filed in the office of the County Recorder. When that is done, the annexation shall be complete and "all persons shall be bound to take notice thereof." I am advised that the Clerk of the District Court has not filed the certified copy of the record in this case with the County Recorder. It is also my opinion that the decree of the court is not the final action as envisioned by Section 362.33.

The Iowa court many times has determined what a final judgment and decision is as Iowa Rule of Civil Procedure 331 provides that one class of appeal shall be from "a final judgment and decision." As recently as 1962, the Iowa Supreme Court in Harden v. Illinois Cent. R. Co., 254 Iowa 426, 118 N.W. 2d 76, stated:

> "A final judgment or decision is one that finally adjudicates the rights of the parties. It must put it beyond the power of the court which made it to place the parties in their original position. A ruling or order is interlocutory if it is not finally decisive of the case. (cases cited)."

Section 362.33 has been subject to the interpretation of the Iowa Supreme Court in the case of Central Iowa Power Coop. v. Cedar Rapids, 254 Iowa 1, 116 N.W.2d 422 (1962), when it was held that the court's decree of annexation was final action when the decree was filed by the Clerk of the District Court. At page 6 of the Iowa Reports the Iowa court made the following statement:

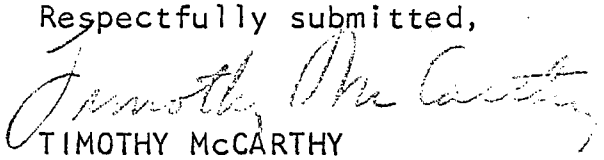
> "The purpose of the statute is to impart notice to the public of the accomplished fact of annexation. To require filing with the recorder of the preliminary steps taken by the council would be requiring a useless act. Notice that a proceeding is half over is never contemplated. Where possible a construction is placed on a statute that is meaningful and a definite purpose established. We hold the filing of a certified copy of the decree of annexation by the clerk of the district court on July 21, 1961, complies with the provisions of section 362.33, and that thereafter all persons must take notice thereof."

The court stated that when a proceeding is half over a recording

would not be required. This would certainly apply to the case at hand where the annexation proceedings are not final.

Therefore, it is my opinion that the forthcoming elections in those areas which are subject to the annexation proceedings do not require registration of those residents of the area and they may vote in the township until the annexation is final and the court records are filed by the Clerk of the District Court in certified form with the County Recorder.

Respectfully submitted,



TIMOTHY McCARTHY
Solicitor General

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STATE OFFICERS AND DEPARTMENTS: Department of Health; Length of study of postgraduate study requirements to renew optometric license - § 154.6, 1966 Code of Iowa. Approximately 6 clock hours constitute a day and approximately 12 clock hours constitute 2 days in a statute whereby an applicant for renewal of an optometric license is required to attend an educational program or clinic for a period of at least 2 days.

October 18, 1966

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

Arthur P. Long, M.D.
Commissioner of Health
State Department of Health
State Office Building
LOCAL

Dear Dr. Long:

In your request of October 5 you have submitted the following question:

> "The State Department of Health requests that you render an opinion as to the number of clock hours needed in attendance at educational programs, clinics or study group meetings to comprise the two day postgraduate study as set out in Chapter 154.6 of the 1966 Code of Iowa."

Section 154.6 of the 1966 Code of Iowa provides:

> "154.6 Expiration and renewal of licenses. Every license to practice optometry shall expire on the thirtieth day of June of each year. Application for renewal of such license shall be made in writing to the department of health at least thirty days prior to the annual expiration date, accompanied by the legal renewal fee and the affidavit of the licensee or other proof satisfactory to the department and to the Iowa state board of optometry examiners, that said applicant has attended, since the issuance of the last license to said applicant, an educational program or clinic as conducted by the Iowa optometric association, or its equivalent, for a period of at least two days. The attendance requirement at said educational program or clinic shall not be conditioned upon membership

> in said Iowa optometric association. Nonmembers shall be admitted to said annual educational program or clinic upon payment of their pro rata share of the cost. In lieu of attendance at the said annual educational program or clinic, it shall be the duty of the board of optometry examiners to recognize and approve attendance at local optometric study group meetings as shall, in the judgment of said board, constitute an equivalent to attendance at the annual educational program of said association." (Emphasis supplied)

Many judicial authorities have held that twenty-four hours comprise a day when a legal limitation or time period for the accomplishment of a particular act are involved. The question before us is different. We are asked to determine what the legislature intended when it provided that an applicant should attend an educational program or clinic for a period of at least two days. The legislature did not intend a forty-eight hour clinic, but intended that an educational program or clinic be held during at least two days. Statutes are to be construed so as to avoid unreasonable or absurd results. State ex rel. Pieper v. Patterson, 246 Iowa 1129, 70 N.W.2d 838 (1955).

The case of In re Roher's Estate, 14 Cal. App. 2d 669, 58 P.2d 948 (1936), is helpful and is the most applicable judicial decision to the facts you have presented. This case involved the construction of a statute whereby estate appraisers were to be paid ". . . not to exceed five dollars per day. . . ." The District Court of Appeals of California interpreted the word "day" as follows:

> "The statute, except as to the meaning of a 'day,' is, in our opinion, bluntly clear on its face. It provides that an appraiser is to receive 'for his services not to exceed five dollars per day.' A 'day' is defined by section 3259 of the Political Code: 'A day is the period of time between any midnight and the midnight following.' City of Eureka v. Diaz, 89 Cal. 467, 26 P. 961; Hunt v. Hammel, 142 Cal. 456, 76 P. 378; Cosgriff v. Election Commissioners, 151 Cal. 407, 91 P.98. It is apparent to us that the Legislature, when it enacted the statute under construction, did not mean that an appraiser would have to work from midnight to midnight in order to perform a day's service and earn 'not to exceed five dollars.' It is equally apparent to us that the Legislature did not mean that

> five minutes' work or an hour of one's time was equivalent to a day. Laws must be construed with reference to their purpose and the object intended to be accomplished, and if susceptible of two interpretations, that one will be adopted which renders it fair and harmonious for the purpose intended. Goldsmith v. Board of Education, 66 Cal.App. 157, 225 P. 783; Coulter v. Pool, 187 Cal. 181, 201 P.120; Evans v. Selma Union High School District, 193 Cal. 54, 222 P. 801, 31 A.L.R. 1121; 23 Cal.Jur. 764. Webster's New International Dictionary, 2d ed., defines a 'day' as follows: 'Those hours, or the daily recurring period, allotted by usage or law for work, as, an eight-hour day.' There was no evidence taken on what the usage in this state or locality is, as to what constitutes a day's work for an appraiser. The most generous proposals and discussions on the subject of a day's work at this period of our social development have fixed a minimum of six hours."

By using the words "postgraduate study" in Section 154.8 in referring to this requirement, it is clear that the Legislature intended study sessions for an academic day rather than for a workday. While there is no definite time set by law or regulation, the public school system of this State generally operates on an approximate six-hour day. College students generally do not have more than six hours of class instruction in one day. Since this statute contemplates study attendance for educational purposes, it would seem reasonable to conclude that approximately six hours should comprise one day.

Therefore, it is my opinion that approximately six clock hours constitute a day and approximately twelve clock hours constitute two days in a statute whereby an applicant for renewal of an optometric license is required to attend an educational program or clinic for a period of at least two days.

Respectfully submitted,

TIMOTHY McCARTHY
Solicitor General

ew

SCHOOLS: Elections: Effect of improper ballot used in regular school election - §§ 277.8, 277.29 and 279.6, 1966 Code of Iowa. The providing to the voters in a school election of a ballot, which ballot did not contain the write in squares and blank lines for each officer to be elected, voided the election. This failure to elect causes vacancy in office, which may be filled by remaining members of the board.

November 21, 1966

Mr. Richard Q. Madsen
Jefferson County Attorney
100½ North Main Street
Fairfield, Iowa

Dear Mr. Madsen:

Reference is herein made to your letter of September 24 in which you submit for opinion, letters of Booker Smith, Attorney for the Fairfield Community School District in which he stated the following:

> "On September 6, 1966, the Fairfield Community School District held its regular election to elect two members of the Board of Directors of the District.
>
> "J. Don Brown and S. R. Williamson, the two directors whose term expired, filed proper nomination papers and their names appeared on the ballot.
>
> "A copy of the ballot used is enclosed and as you will note, only one blank was provided for write-in vote as provided by Section 277.8 of the Code.
>
> "A write-in campaign was instituted the day before the election and the two write-in candidates received the target vote.

"The write-in vote was accomplished by making another square below the write-in blank which was checked and the name of the second write-in candidate was written opposite the penciled square. If the penciled-in square and name did not institute a legal vote, the two candidates who had filed nomination papers would be the winners.

"Two questions arise:

"1. Did the fact that only one write-in space was provided make the entire election void and if it did, what procedure should be followed as to a new election?

"2. Did the making of a second write-in space with checked square and name following make the second write-in vote as an identifiable ballot?"

The second letter states as follows:

"At a meeting October 24, 1966, the results of the election as shown by the poll books of each of the four precincts were reviewed and by the Secretary and myself certified as correct on the enclosed certificate.

"There was no error in the Lockridge, Libertyville and Pleasant Plain poll books and the ballots from these precincts were not opened.

"The ballots in the Fairfield precinct were opened in the presence of the above named persons. The Judges of the election were first required to view the initials on the individual ballots and identify same as theirs.

"The total unspoiled ballots were counted and they were equal to the number of voters shown on the poll book.

"The ballots which were correctly voted for Brown and Williamson were counted and they numbered 97.

"The ballots which were correctly voted for Brown but not for Williamson were counted and they numbered 33.

"This made a total correctly voted ballots for Brown of 130.

"The correctly voted ballots for Williamson but not for Brown were counted and they numbered 24 which made a total number of correctly voted ballots for Williamson of 121.

"A correctly voted ballot was once where a check or a cross was put in a box in front of the person voted for.

"There were 91 correctly voted ballots for Bell and Hewitt.

"The correctly voted votes for Bell and Hewitt individually were not tabulated for the reason that the Judges and Clerk did not agree with me as to what constituted a valid vote.

"There is enclosed samples of the way voting was done. In my opinion where there was no box in front of the written in name it was not a legal vote nor was it where no box check or x was made in front of a name. I am also very doubtful whether crossing off the name of the printed candidates and writing thereafter a name constitutes a good vote.

"I would suggest that on each one of these thermofax copies you inital the votes which you think are legal votes.

"It is very obvious that the election officials went haywire on the talley sheet as they only had 101 votes counted for Brown whereas there were 130 unquestionable votes for Brown.

"The same situation is true as to Williamson as the talley sheet only showed 85 votes whereas there were 121 unquestionable valid votes for him.

"The only answer can be that whichever of the election officials made the talley got in the wrong line or who ever read off the votes to the one doing the tallying read off the wrong names.

"Unquestionably the whole difficulty arose originally from the fact that there was only one write in space provided instead of two as required by statute.

"The write in campaign was intitiated by the Women teachers of the school district and was kept quiet until a few hours before the election. From the poll book it is obvious that the write in votes were by teachers themselves and by close friends of the teachers. Not knowing that a write in was planned

> the vote other than the write in vote was very small as the voters evidently did not think it necessary to vote where there was no opposition. I realize that this is no excuse for not voting but certainly the vote did not express the will and desires of the voters in general."

In reply thereto, I advise the official ballot for use at school elections and its form is provided by Section 277.8, Code of 1966, as follows:

> "277.8 Printed ballots required. In school corporations where nomination of candidates for election to office is required the secretary shall cause to be printed and delivered at the several polling places a sufficient number of ballots printed on plain, substantial paper of uniform quality, with no party designation or mark thereon. Such ballots shall contain in alphabetical order the names of all candidates for each office, filed as provided by law, and a blank line for each such officer to be elected. There shall be at the left of each name and each blank line a square, and there shall also be a direction to the voter as to the number of candidates to be voted for at said school election."

It will be noted that such statute provides specifically, "Such ballots shall contain in alphabetical order the names of all candidates for each office, filed as provided by law, and a blank line for each such officer to be elected. There shall be at the left of each name and each blank line a square, and there shall also be a direction to the voter as to the number of candidates to be voted for at said school election." From the statement of facts set forth, it appears that the official ballot insofar as a blank line is required, shows only one blank line with a square for marking the ballot. There were two offices to be filled. Therefore, the official ballot lacked a specific requirement of the statute that there should be a blank line for each office to be elected whereas there was only one such blank in this election. This

failure of the election official to provide the electors with an official ballot lacking compliance with the statutory requirements has had the consideration of our Supreme Court in the case of Honohan v. United Community School District, _____ Iowa _____, 137 N.W. 2d 601, 602, 604. There it appears that the resolution of the school board calling for an election provided that it be called "...for the purpose of building and furnishing a new school house and procuring a site therefor in and for said school district?" Subsequently, there was issued a notice of an election in accordance with the foregoing resolution. However, the ballot used for the election was in the following form:

> "'Shall the United Community School District in the Counties of Boone and Story, State of Iowa, issue bonds in the amount of $700,000 for the purpose of building and furnishing a new senior high school building and procuring a site therefor in and for said district?'"

At such election the proposition was submitted in conformity with the terms of the ballot and was declared to have carried. Thereupon certain taxpayers instituted action to enjoin the sale of the bond by reason of the variance between the proposition submitted by the Board and the language of the ballot used in the election. The Court, in reaching a conclusion that there was a failure substantially to comply with the law in the respect stated the general rule:

> "As a general rule mere irregularities in the conduct of a school election, or minor defects in the form of a ballot do not affect the result of the election, but defects in matters of substance are fatal. Headington v. North Winneshiek Community School District, 254 Iowa 430, 117 N.W. 2d 831, and 29 C.J.S. Elections §173(2)b, page 482. Also, there must be substantial compliance with specific requirements as to form and content of ballots, since

> they are mandatory. McLaughlin v. City of Newton, 189 Iowa 556, 562-565, 178 N.W. 540, O'Keefe v. Hopp, 210 Iowa 398, 405, 230 N.W. 876, Pennington v.Fairbanks, Morse & Company, 217 Iowa 1117, 253 N.W. 60, State ex rel. Warrington v. Community School District of St. Ansgar, 247 Iowa 1167, 1174, 78 N.W. 2d 86 and 29 C.J.S. Elections § 173(2)b page 483."

As to whether the variance between the proposal in the ballot was a minor irregularity or a fatal defect of substance, the Court stated:

> "And since the legislature saw fit to require the 'purpose' of the petition for election, and the notice of election of such 'purpose', be declared, this legislative mandate cannot be construed to be directory. State ex rel. Warrington v. Community School District of St. Ansgar, 247 Iowa 1167, 1174, 78 N.W. 2d 86, and Hansen v. Henderson, 244 Iowa 650, 665, 56 N.W. 2d 59. We conclude these legislative requirements have meaning and purpose, and are mendatory."

and concluded that the purported election was a nullity and no school bonds could lawfully be issued by reason thereof. The Court was faced in the Honohan case with the question of whether the variance described was of minor irregularity or affected the substance as presented here. There is authority to the effect that the failure to provide the blank spaces in the ballot as required by statute was a substantial defect. In the case of Re Elizabethville Election (1896) 5 Pa. Dist. R. 227, 17 Pa. Co. Ct. 567, as shown by an annotation appearing in 165 ALR at Page 1271, it was stated:

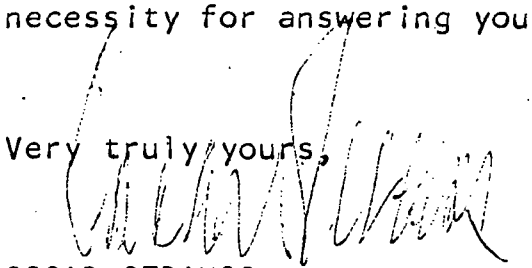
> "d. Blank spaces for writing in names
> Where the statute provided that there should be left on the ballots 'as many blank spaces as there are persons to be voted for . . . such office,' and by virtue of the statute seven councilmen where to be elected, but only three blank spaces were provided on the ballots, the

> court held, in Re Elizabethville Election (1896) 5 Pa Dist R 227, 17 Pa Co Ct 567, that the election of four persons to serve as councilmen was invalid. The court pointed out that the ommissions upon the ballots rendered them so defective that they were calculated to mislead the voters in regard to the candidates nominated therefor and that the defective condition of the ballots did affect the result of the election."

Therefore, in answer to your first question, I am of the opinion that the failure to provide the voter with an official ballot showing two blank lines and two blank squares in compliance with the requirement of statute made this election void. As a result of the foregoing and the failure to elect two Directors at the election results in two vacancies in the Board and the remaining members of the Board have the authority to fill these vacancies. See Sections 277.29 and 279.6, 1966 Code of Iowa, and opinion of the Attorney General appearing in the Report for 1944, at Page 39.

In answer to your second question, in view that the foregoing election is void, there is no necessity for answering your Question No. 2.

Very truly yours,



OSCAR STRAUSS
First Assistant Attorney General

jls

RETIREMENT FOR SCHOOL TEACHERS: Ch. 97B and §§ 294.8, 294.9 and 294.10, 1966 Code of Iowa. Any school district in the state school system may establish a pension system under the provisions of §§ 294.8, 294.9 and 294.10 and a membership therein will not be a bar to membership in IPERS, being Ch. 97B. The word "teachers" used in § 294.8 means a teacher under contract.

December 7, 1966

Mr. Paul F. Johnston
Superintendent of Public Instruction
L O C A L

Dear Mr. Johnston:

Reference is made to your letter of October 19 in which you submitted the following:

> "This department is in receipt of inquiry from the Community School District of Davenport relative to establishment of a pension system under sections 294.8 to 294.10, Code 1966.
>
> "Their questions are:
>
> 1. Whether a school district may establish its own pension system under sections 294.8 to 294.10, Code 1966.
>
> 2. Whether establishment of such a system will jeopardize the member's status in IPERS. (A corollary would be the question whether a member of such system must continue in IPERS.)
>
> 3. Whether the term "such teachers" in line 6 of subsection 1 in section 294.9 is restricted to teachers currently under contract, or whether it includes 'teachers on leave' and 'part-time teachers' and whether it refers to an absolute majority of all qualifying teachers or to a majority of those voting'.

"The Davenport school board has been in contact with the Employment Security Commission, as indicated in the enclosed letter, and it was the Commission's recommendation that the opinion of your office be obtained on the question.

"Preliminary search of the statutes indicates that there is no specific provision in either Chapter 294 or Chapter 97B which would preclude or exempt members of a local system established under Chapter 294 from simultaneous membership in IPERS. Such specific provisions do exist for federal civil service (section 97B.68), judicial retirement (section 97B.69), fire and police pensions (section 411.3), and peace officers retirement (section 97A.3, subsection 1). The existence of such specific exemption provisions for other retirement systems may indicate legislative intent that there should be no such specific exemption in the case of a system established under Chapter 294.

"With reference to Davenport's third question, it would appear to us that the majority of teachers contemplated in section 294.9 (1) would be a majority of the entire number qualified for membership in the pension system at the time the vote is taken.

"Your opinion on the three questions is hereby requested."

Also attached was a copy of a letter to you asking for a definition of teacher as used in the foregoing statute, Sections 294.8, 294.9 and 294.10, in the event the answer to your first two questions was in the affirmative, specifically, they desire to know "if more than one per cent is to be assessed, a majority of the teachers

apparently must agree. In this context, what is meant by 'majority' of teachers? Is the reference to those having current contracts; does it include teachers on leave or otherwise not currently on the school payroll; does it include part-time teachers as well as full-time teachers; and does it refer to an absolute majority of all qualifying teachers or to a majority of those voting?

Insofar as your first question is concerned, it is to be said in answer thereto, that any school district may establish its own pension system under the authority of Sections 294.8, 294.9 and 294.10, Code of 1966. These sections, as originally enacted, made them available only to independent school districts. See 37th General Assembly, Chapter 387. This was subsequently amended to its present form which provides the following:

> "294.8 Pension system. Any school district located in whole or in part within a city having a population of twenty-five thousand one-hundred or more may establish a pension and annuity retirement system for the public school teachers of such district provided said system, in cities having a population less than seventy-five thousand, be ratified by a vote of the people at a general election."

The word independent, as appears in the above statute, was stricken from Chapter 96, Section 23, Acts of the 58th General Assembly. Thus, under the authority thereof, the Davenport School

Board could establish a pension system under Sections 294.8, 294.9 and 294.10.

In answer to your Question No. 2 and its corollary, it is to be said that the establishment of the pension system by Sections 294.8, 294.9 and 294.10 or Chapter 97B, Code of 1966, known as IPERS, does not expressly place in jeopardy a member status in the state system known as IPERS. As a corollary, such local school pension system does not bar mandatory membership of such person in IPERS. There is neither express nor implied provision in Chapter 97B that bars membership in a school pension system authorized by Section 294.8. There is no power to write such a provision into the law. Independent District of Cedar Rapids v. Iowa Employment Security Commission, 237 Iowa 1301, 25 N.W.2d 492. It is true that Section 97B.42, Code of 1966, among other provisions of membership, provides that:

> "He shall continue to be a member so long as he continues in public employment except that he shall cease to be a member if after making said election he joins another retirement system in the state which is maintained in whole or in part by public contributions or payments which has been in operation prior to July 4, 1953, and which was subsequently liquidated and may have thereafter been re-established."

Obviously, it is sufficient answer to the applicability of such provision to this situation that the system here under

discussion is one being proposed and is not now in existence and was not in existence in 1953, and second, such provision in its terms, is applicable to membership in a retirement system in the state which is maintained in whole or in part by public contributions or payments and which has been in operation prior to July 4, 1953, and was subsequently liquidated and may have thereafter been re-established. This clearly is not the situation here considered. In any event, it is true that according to Section 97B.41, 3.b(2), Code of 1966, that:

> "Such persons who are members of any other retirement system in the state which is maintained in whole or in part by the public contributions other than persons who are covered under the provisions of chapter 97, Code 1950, as amended by the Fifty-fourth General Assembly on June 30, 1953, under the provisions of sections 97.50 to 97.53, inclusive."

are deemed not to be employees within the terms of Chapter 97B. However, the foregoing section is a qualification of employment in IPERS. It merely recites the ineligibility of a person for the benefits of IPERS if he be a member of a retirement system as described in that section. On the other hand, Section 97B.41 deals with persons already members of the system and fixes the conditions that will operate to terminate a membership.

In answer to your Question No. 3 whether the term "teachers"

was restricted to teachers currently under contract and whether it would include teachers on leave, or part-time teachers and whether it refers to an absolute majority of all qualifying teachers or to a majority of those voting, exact precedent for these situations does not appear to exist. However, with respect to this term "teachers" as used in Sections 294.8, 294.9 and 294.10, Code of 1966, it was stated in an opinion appearing in the Report of the Attorney General for 1930 at Page 313:

> "We are of the opinion that nurses and other employees are not subject, unless they have a certificate and do instruction work, to the pension provided for in Section 4345 of the Code of Iowa, 1927."

Section 4345, Code of 1927, is Section 294.8, Code of 1966.

According to an opinion of this department appearing in the Report for 1938, at Page 249, a teacher in retirement is not a teacher within the terms of Sections 294.8, 294.9 and 294.10, Code of 1966. It was there said:

> "Paragraphs 1 and 2 of the above section contemplate that the fund is to be made up in part from contributions by teachers from their salaries in an amount agreed, which is further indication that the system was intended to have application only to teachers and not to retired teachers."

However, there being no statutory definition of the word "teacher" in Sections 294.8, 294.9 and 294.10, resort must be had to admin-

istrative construction of the word as used in the context of the foregoing sections and on the authority of the opinions exhibited here the word "teacher" means teachers under contract including teachers on leave and part-time teachers but teachers in retirement are not teachers entitled to the benefits of Chapter 294, Code of 1966, and in reference to the term, "the majority of teachers," I am of the opinion that such majority means majority of the qualifying teachers.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

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