

State of Iowa

1986

**FORTY-SIXTH BIENNIAL REPORT
OF THE
ATTORNEY GENERAL**

BIENNIAL PERIOD ENDING DECEMBER 31, 1986

THOMAS J. MILLER

Attorney General

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ATTORNEYS GENERAL OF IOWA

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



**PERSONNEL
OF THE
DEPARTMENT OF JUSTICE**

MAIN OFFICE

THOMAS J. MILLER, 1/79- <i>J.D., Harvard University, 1969</i>	Attorney General
BRENT R. APPEL, 1/83- <i>J.D., University of California, 1977</i>	Deputy Attorney General
EARL M. WILLITS, 7/79- <i>J.D., Drake, 1974</i>	Deputy Attorney General
ELIZABETH M. OSENBAUGH, 1/79- <i>J.D., University of Iowa, 1971</i>	Deputy Attorney General
JOHN R. PERKINS, 12/72- <i>J.D., University of Iowa, 1968</i>	Deputy Attorney General
WILLIAM C. ROACH, 1/79-	Administrator
DEBRA E. LEONARD, 2/84-	Administrative Assistant
SHELLEY JOHNSON CHAMBERS, 11/81-	Administrative Assistant
EVELYN K. GALLAGHER, 1/79-	Administrative Assistant
KAREN A. HEGE, 10/80-	Accountant
CONNIE J. CHAPMAN, 8/83-	Legal Secretary
KAREN J. GOSLIN, 6/86-	Secretary/Receptionist
MANDA STUART, 10/83-6/86	Secretary/Receptionist

ADMINISTRATIVE LAW

DONALD G. SENNEFF, 7/85- <i>J.D., University of Iowa, 1967</i>	Division Head
HOWARD O. HAGEN, 2/79-7/85- <i>J.D., University of Chicago, 1973</i>	Division Head
ANN M. BRICK, 3/86- <i>M.A., J.D., Drake, 1980</i>	Assistant Attorney General
MERLE W. FLEMING, 7/80- <i>M.A., J.D., University of Iowa, 1980</i>	Assistant Attorney General
SCOTT M. GALENBECK, 1/84- <i>J.D., University of Iowa, 1974</i>	Assistant Attorney General
KEVIN M. KIRLIN, 7/84- <i>J.D., University of Iowa, 1984</i>	Assistant Attorney General
LYNDEN D. LYMAN, 1/84-12/85- <i>J.D., University of Iowa, 1983</i>	Assistant Attorney General
JULIE F. POTTORFF, 7/79- <i>J.D., University of Iowa, 1978</i>	Assistant Attorney General
LYNN M. WALDING, 7/81- <i>M.A., J.D., University of Iowa, 1981</i>	Assistant Attorney General
THERESA O. WEEG, 10/81- <i>J.D., University of Iowa, 1981</i>	Assistant Attorney General
MELANIE L. RITCHEY, 8/85-	Legal Secretary
F. ANN BAUSSERMAN, 1/79-7/85	Administrative Assistant

AREA PROSECUTIONS

HAROLD A. YOUNG, 7/75- <i>J.D., Drake, 1967</i>	Division Head
VIRGINIA D. BARCHMAN, 10/86- <i>J.D., University of Iowa, 1979</i>	Assistant Attorney General
ROBERT J. BLINK, 8/83-6/86 <i>J.D., Drake, 1975</i>	Assistant Attorney General
JAMES E. KIVI, 2/80- <i>J.D., University of Iowa, 1975</i>	Assistant Attorney General

THOMAS H. MILLER, 10/85-	Assistant Attorney General
<i>J.D., University of Iowa, 1975</i>	
JAMES W. RAMEY, 10/81-5/86	Assistant Attorney General
<i>J.D., Drake, 1975</i>	
DOUGLAS F. STASKAL, 9/82-5/86	Assistant Attorney General
<i>J.D., University of Iowa, 1979</i>	
KEVIN B. STRUVE, 7/86-	Assistant Attorney General
<i>J.D., University of Iowa, 1979</i>	
CHARLES N. THOMAN, 7/84-	Assistant Attorney General
<i>J.D., Creighton University, 1976</i>	
MICHAEL E. WALLACE, 8/84-	Assistant Attorney General
<i>J.D., University of Iowa, 1971</i>	
RICHARD A. WILLIAMS, 7/75-	Assistant Attorney General
<i>J.D., University of Iowa, 1971</i>	
ALFRED C. GRIER, 9/72	Pilot
SCOTT D. NEWHARD, 3/79-	Investigator
BILLIE J. RAMEY, 11/79-	Legal Secretary

CIVIL RIGHTS

TERESA BAUSTIAN, 4/81-	Assistant Attorney General
<i>J.D., University of Iowa, 1979</i>	
RICHARD R. AUTRY, 9/86-	Assistant Attorney General
<i>J.D., Drake, 1986</i>	
STEVEN M. FORITANO, 8/81-8/86	Assistant Attorney General
<i>J.D., University of Iowa, 1981</i>	

CONSUMER PROTECTION

RICHARD L. CLELAND, 4/79-	Division Head
<i>J.D., University of Iowa, 1978</i>	
MICHAEL K. BOTTS, 4/85-	Assistant Attorney General
<i>J.D., Drake, 1983</i>	
SUSAN BARNES BRAMMER, 4/84-	Assistant Attorney General
<i>J.D., William and Mary, 1978</i>	
DEAN A. LERNER, 2/83-	Assistant Attorney General
<i>J.D., Drake, 1981</i>	
LINDA T. LOWE, 8/79-	Assistant Attorney General
<i>J.D., University of Iowa, 1979</i>	
JOANNE L. MACKUSICK, 8/84-	Assistant Attorney General
<i>J.D., University of Iowa, 1984</i>	
TERRENCE M. TOBIN, 7/83-	Assistant Attorney General
<i>J.D., University of Iowa, 1980</i>	
TERESA D. ABBOTT, 5/78-1/86	Investigator
EUGENE R. BATTANI, 5/77-	Investigator
KATHLEEN C. BURDOCK, 10/84-	Investigator
DEBRA J. GILLIAM, 10/84-	Investigator
MARJORIE A. LEEPER, 7/82-	Investigator
LISE D. LUDWIG, 5/85-	Investigator
DEBRA A. MOORE, 12/84-	Investigator
NORMAN NORLAND, 1/80-	Investigator
ELIZABETH A. STANTON, 1/79-5/85	Investigator
JANICE M. BLOES, 3/78-	Legal Secretary
M. SUSAN CONREY, 6/86-	Legal Secretary
CHERYL A. FREEMAN, 4/69-	Legal Secretary
MARILYN W. RAND, 10/69-	Legal Secretary
DANELIA I. ROBINSON, 8/82-5/86	Legal Secretary
KATHY M. ZAPF, 3/83-	Legal Secretary
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CRIMINAL APPEALS

ROXANN M. RYAN, 9/80-	Division Head
<i>J.D., University of Iowa, 1980</i>	
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BRADLEY V. BLACK, 7/86-	Assistant Attorney General
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ANN E. BRENDEN, 3/85-	Assistant Attorney General
<i>J.D., Drake, 1981</i>	
ELIZABETH E. CIEBELL, 7/85-10/86	Assistant Attorney General
<i>J.D., Drake, 1985</i>	
REBECCA L. CLAYPOOL, 1/84-4/86	Assistant Attorney General
<i>J.D., University of Iowa, 1983</i>	
PAMELA GREENMAN DAHL, 7/84-	Assistant Attorney General
<i>J.D., University of Iowa, 1984</i>	
ANN M. DIDONATO, 5/85-10/86	Assistant Attorney General
<i>J.D., University of Iowa, 1982</i>	
DAVID L. DORFF, 4/85-	Assistant Attorney General
<i>J.D., Drake, 1982</i>	
MICKEY W. GREENE, 8/84-3/85	Assistant Attorney General
<i>J.D., University of Iowa, 1984</i>	
LONA J. HANSEN, 7/77-	Assistant Attorney General
<i>J.D., University of Iowa, 1976</i>	
STEVEN HANSEN, 2/84-3/85	Assistant Attorney General
<i>J.D., University of Iowa, 1983</i>	
BRUCE KEMPKES, 9/86-	Assistant Attorney General
<i>J.D., University of Iowa, 1980</i>	
THOMAS D. McGRANE, 6/71-	Assistant Attorney General
<i>J.D., University of Iowa, 1971</i>	
CHRISTIE J. SCASE, 7/85-	Assistant Attorney General
<i>J.D., Drake, 1985</i>	
SHONNA K. BURNS, 5/81-	Legal Secretary
CHRISTY J. FISHER, 1/67-	Legal Secretary
CONNIE L. ANDERSON LEE, 12/76-	Legal Secretary
KATHERINE SMITH, 3/84-	Secretary/Receptionist

ENVIRONMENTAL LAW

JOHN P. SARCONI, 3/79-	Division Head
<i>J.D., Drake, 1975</i>	
ELENA-MARIA HAMILTON, 7/84-8/85	Assistant Attorney General
<i>J.D., Drake, 1984</i>	
ELIZABETH J. LORENTZEN, 10/83-	Assistant Attorney General
<i>J.D., Drake, 1983</i>	
STEVEN G. NORBY, 11/79-	Assistant Attorney General
<i>J.D., University of Iowa, 1979</i>	
ELIZA J. OVRUM, 7/79-	Assistant Attorney General
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MICHAEL H. SMITH, 9/84-	Assistant Attorney General
<i>J.D., University of Iowa, 1977</i>	
KIMBERLY K. PEACOCK, 6/86-	Legal Secretary
ROXANNE C. PETERSEN, 5/79-	Legal Secretary

FARM

TAM B. ORMISTON, 1/79-	Division Head
<i>J.D., University of Iowa, 1974</i>	

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STEPHEN H. MOLINE, 6/86- <i>J.D., University of Iowa, 1986</i>	Assistant Attorney General
HARRY E. CRIST, 7/85-	Investigator
CHARLES G. RUTENBECK, 12/74	Investigator
BEVERLY A. CONREY, 4/85-	Legal Secretary
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HEALTH

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

HUMAN SERVICES

GORDON E. ALLEN, 8/82- <i>J.D., University of Iowa, 1972</i>	Division Head
SARAH J. COATS, 2/84- <i>J.D., University of Iowa, 1983</i>	Assistant Attorney General
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ROBERT J. GLASER, 7/86- <i>J.D., Creighton University, 1978</i>	Assistant Attorney General
LUCILLE M. HARDY, 5/86- <i>J.D., University of Iowa, 1985</i>	Assistant Attorney General
DANIEL W. HART, 7/85- <i>J.D., University of Iowa, 1983</i>	Assistant Attorney General
MARK A. HAVERKAMP, 6/78- <i>J.D., Creighton, 1976</i>	Assistant Attorney General
PATRICIA M. HEMPHILL, 2/83- <i>J.D., Drake, 1981</i>	Assistant Attorney General
ROBERT R. HUIBREGTSE, 6/75- <i>L.L.B., Drake, 1963</i>	Assistant Attorney General
LAYNE M. LINDEBAK, 7/78- <i>J.D., University of Iowa, 1979</i>	Assistant Attorney General
ELEANOR E. LYNN, 7/83-6/85	Assistant Attorney General
VALENCIA V. McCOWN, 6/83- <i>J.D., University of Iowa, 1983</i>	Assistant Attorney General
BRUCE C. McDONALD, 7/78-9/85 <i>J.D., University of Iowa, 1978</i>	Assistant Attorney General
E. DEAN METZ, 5/78- <i>L.L.B., Drake, 1955</i>	Assistant Attorney General
KATHRINE MILLER-TODD, 1/85- <i>J.D., Wake Forest, 1974</i>	Assistant Attorney General
CANDY S. MORGAN, 9/79- <i>J.D., University of Iowa, 1973</i>	Assistant Attorney General
JOHN M. PARMETER, 11/84- <i>J.D., Drake, 1982</i>	Assistant Attorney General
CHARLES K. PHILLIPS, 8/84- <i>J.D., Columbia University (NY), 1982</i>	Assistant Attorney General
STEPHEN C. ROBINSON, 8/73- <i>L.L.B., Drake, 1962</i>	Assistant Attorney General
JAY A. TENTINGER, 3/84-7/85 <i>J.D., Hamline University (St. Paul), 1976</i>	Assistant Attorney General
JANE A. McCOLLOM, 10/76-	Legal Secretary

INSURANCE

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

PUBLIC SAFETY

GARY L. HAYWARD, 6/76- Assistant Attorney General
J.D., University of Iowa, 1976

PROSECUTING ATTORNEYS TRAINING COUNCIL

DONALD R. MASON, 9/80- Exec. Dir., Training Coordinator
J.D., University of Iowa, 1976
 KAY L. CHOPARD, 3/86- Assistant Attorney General
J.D., University of Iowa, 1983
 NORUNN L. STANGLAND, 4/85-12/85 Assistant Attorney General
J.D., Hamlin University, 1982
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 JONI M. KLAASSEN, 9/85- Legal Secretary

REVENUE

HARRY M. GRIGER, 1/67-8/71, 12/71- Division Head
J.D., University of Iowa, 1966
 SHERIE BARNETT, 7/83- Assistant Attorney General
J.D., Drake, 1981
 THOMAS M. DONAHUE, 6/78- Assistant Attorney General
J.D., Drake, 1974
 GERLAD A. KUEHN, 9/71- Assistant Attorney General
J.D., Drake, 1967
 MARCIA E. MASON, 7/82- Assistant Attorney General
J.D., University of Iowa, 1982
 JAMES D. MILLER, 12/79-4/82, 10/86- Assistant Attorney General
J.D., Drake, 1977
 ELIZABETH A. NELSON, 8/84-5/85 Assistant Attorney General
J.D., Drake, 1980

SPECIAL LITIGATION

WILLIAM F. RAISCH, 7/74-4/86 Assistant Attorney General
J.D., Drake, 1974
 ROBERT P. BRAMMER, 11/78- Investigator
 DAVID H. MORSE, 3/78- Investigator
 LAUREN N. MARRIOTT, 8/84- Legal Secretary

TORT CLAIMS

JOHN R. SCOTT, 9/80-8/86 Division Head
J.D., University of Iowa, 1969

CRAIG A. KELINSON, 11/86-	Division Head
<i>J.D., University of Iowa, 1976</i>	
PATRICK J. HOPKINS, 3/82-10/85	Assistant Attorney General
<i>J.D., Creighton, 1975</i>	
CHARLES S. LAVORATO, 9/83-	Assistant Attorney General
<i>J.D., Drake, 1975</i>	
KREG A. KAUFFMAN, 11/82-1/85	Assistant Attorney General
<i>J.D., University of Iowa, 1977</i>	
JAMES M. PETERS, 2/83-11/86	Assistant Attorney General
<i>J.D., University of Iowa, 1980</i>	
JAMES M. REDMOND, 3/85-12/86	Assistant Attorney General
<i>J.D., University of Iowa, 1971</i>	
SHIRLEY ANN STEFFE, 9/79-	Assistant Attorney General
<i>J.D., University of Iowa, 1979</i>	
CYNTHIA WICKSTROM THU, 7/84-11/86	Assistant Attorney General
<i>J.D., University of Iowa, 1984</i>	
MATTHEW W. WILLIAMS, 7/83-	Assistant Attorney General
<i>J.D., University of Nebraska, 1983</i>	
ROBERT D. WILSON, 12/86-	Assistant Attorney General
<i>J.D., University of Iowa, 1981</i>	
KAREN M. LIKENS, 8/77-	Investigator
CATHLEEN L. RIMATHE, 8/78-	Investigator
CYNTHIA L. BAKER, 8/84-	Legal Secretary
MARCIA A. JACOBS, 8/82-	Legal Secretary
LINDA S. HURST, 3/86-	Secretary/Receptionist

TRANSPORTATION

CHARLES J. KROGMEIER, 5/86-	Division Head
<i>J.D., Drake, 1974</i>	
LESTER A. PAFF, 1/78-1/86	Division Head
<i>J.D., St. Louis University, 1973</i>	
JOHN W. BATY, 9/72-	Assistant Attorney General
<i>J.D., Drake, 1967</i>	
ROBERT P. EWALD, 2/81-	Assistant Attorney General
<i>J.D., Washburn University, 1980</i>	
DAVID A. FERREE, 3/84-	Assistant Attorney General
<i>J.D., University of Iowa, 1979</i>	
ROBIN FORMAKER, 4/84-	Assistant Attorney General
<i>J.D., University of Iowa, 1979</i>	
CRAIG M. GREGERSEN, 2/79-	Assistant Attorney General
<i>J.D., University of Iowa, 1978</i>	
MARK HUNACEK, 7/82-	Assistant Attorney General
<i>J.D., Drake, 1981</i>	
ARDETH T. METIER, 7/86-	Assistant Attorney General
<i>L.L.B., J.D., University of Iowa, 1951</i>	
RICHARD E. MULL, 7/78-	Assistant Attorney General
<i>J.D., University of Iowa, 1977</i>	
DANIEL W. PERKINS, 11/84-	Assistant Attorney General
<i>J.D., University of Washington, 1982</i>	
MERRELL M. PETERS, 7/84-	Assistant Attorney General
<i>J.D., Drake, 1984</i>	
CATHERINE L. WINSLOW, 7/84-10/86	Assistant Attorney General
<i>J.D., University of Iowa, 1984</i>	
CARMEN C. MILLS, 7/82-1/86	Paralegal
MICHAEL J. RAAB, 1/85-	Paralegal
BRENDA M. SCHULTE, 4/83-1/85	Paralegal
LYNN M. SCHULTE, 9/83-8/86	Paralegal
CAROLYN L. SHOJAAT, 4/83-	Paralegal
DAVETTE D. SMITH, 8/86-	Paralegal
KRISTI WOLTER, 5/84-4/86	Paralegal

**ATTORNEY GENERAL
OFFICE
ADMINISTRATIVE DIVISIONS**



Administrative Law Division

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

Depending on the needs of the particular department, legal representation ranges from advice on open meetings and administrative procedures to full participation in all stages of the hearing process. Attorneys from the Administrative Law Division appeared in a considerable number of administrative hearings during the biennium. Throughout 1985-86, informal department inquiries also increased as the Division increased its representation of clients.

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

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

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

During the 1985-86 biennium approximately 100 opinions were issued by the Administrative Law Division.

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

Area Prosecutions Division

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

The Division is staffed by six general trial attorneys, three specialist attorneys, one investigator and one secretary. The specialists include one attorney assigned to prosecute crimes in penal institutions, one assigned to state tax prosecutions and a training/legal advisor for the Department of Public Safety. The specialist positions are funded by the departments of Corrections, Revenue and Public Safety, respectively.

General requests from county attorneys constitute the major portion of the workload of the Division. During these two years these cases included thirty-

six homicide prosecutions, thirty other forcible felony prosecutions and approximately 150 other felony cases.

Civil Rights Division

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

In 1985-86, the Division was chiefly involved with handling the docket of cases scheduled for public hearing. Twenty-two public hearings were held during the biennium, and of the twenty decisions rendered during this period, twenty were in the complaints' favor. Ten of the cases pending public hearing were settled in the course of pre-trial preparation. Because of the substantial increase in the number of the cases placed on the hearing docket, however, thirty-four cases remained in the Division's inventory awaiting public hearing at the end of 1986.

The activity in the district and appellate courts has also increased, as a result of appeals from Commission decisions. At the end of the biennium, twenty-seven cases were pending in the district court and four had been settled at that level over the previous two years. Seventeen cases had been decided in the district courts throughout the state, with the Commission succeeding outright in fifteen of these cases, and winning, in part, in an additional case.

During the biennium, the Division represented the Commission in nine appeals to the Iowa Supreme Court. These appeals have involved interpretation of the substantive provisions of chapter 601A and the Commission's administrative rules and construction by the court of the meaning of various procedural requirements. Seven of the cases were resolved — four in the Commission's favor, two with mixed results and one was settled. Two cases remain pending before the appellate courts.

In the most significant appellate decision during this period the Supreme Court held that chapter 601A does authorize the award of emotional distress damages and affirmed such an award in a case involving racial harassment.

Consumer Protection Division

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

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

The Division's results for 1985 and 1986 were as follows:

1. New Complaints Received	16,650
2. Complaints Closed	19,417
3. Complaints Pending at End of 1986	4,092
4. New Lawsuits Filed	71
5. Lawsuits Closed	76
6. Lawsuits Pending at End of 1986	67
7. Monies Saved and Recovered for Complainants	\$2,823,147.23
8. Costs and Expenses Recovered for State	\$ 29,800.00
9. Attorney General Opinions Issues	4
10. Investigative Subpoenas Issued	188
11. Official Demands for Information Issued	61
12. Formal Assurances of Voluntary Compliance Filed	17

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

The Consumer Protection Division was engaged on several significant fronts during 1985 and 1986.

In 1985, emphasis was placed on the deceptive practices of health clubs that took thousands of dollars in pre-opening memberships and never built the promised facilities. Numerous odometer rollback fraud lawsuits were filed which recovered thousands of dollars for Iowans. An attack on fraudulent television and telephone nationwide marketing schemes was begun in 1985 and continued in 1986. By means of lawsuits and voluntary assurances, a large number of such fraudulent marketing schemes ceased doing business in Iowa.

A significant advance in 1986 was the creation of task forces which targeted certain high priority consumer issues. The health fraud task force worked to create consumer awareness of health fraud which costs Iowans approximately \$25 million per year. The Division held a Health Fraud Conference for health related professionals to help accomplish this goal. The automobile advertising task force reviewed hundreds of advertisements for automobiles which resulted in a report on advertising of credit terms in auto ads and consumer fraud enforcement guidelines for auto advertising. A primary goal of this task force was an educational effort to assist car dealers in complying with consumer fraud and consumer credit advertising statutes.

During the calendar years 1985 and 1986, the top ten areas that Iowans complained about were:

1. Advertising	2,353
2. Credit Code	2,108
3. Automobiles	2,044
4. Mail Order	1,154
5. Health Clubs	1,125
6. Magazines	894
7. Business Opportunity	591
8. Trade & Correspondence Schools	490
9. Failure to Furnish Merchandise (Other Than Mail Order)	428
10. Travel & Transportation	255

In 1985, the Division was able to assist eighty-one percent of those Iowans that complained to it while in 1986, the Division was able to assist eighty-six percent of complainants.

Criminal Appeals Division

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

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

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

In 1985-86, 899 criminal appeals were taken to the Iowa Supreme Court and 514 defendant-appellant briefs were filed in those cases. The Division filed 521 briefs on behalf of the state.

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

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

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

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

Environmental Law Division

The Environmental Law Division represents the state in issues affecting the environment. The Division has a staff of five attorneys and two secretaries and represents the Department of Natural Resources, the Department of Agriculture and Land Stewardship, Division of Soil Conservation, and the State Archaeologist. Prior to reorganization of state government which became effective July 1, 1986, the Division represented the Iowa Conservation Commission, the Department of Water, Air and Waste Management, the Department of Soil Conservation, the Energy Policy Council and the Iowa Geological Survey. With the exception of the Department of Soil Conservation, these agencies essentially were reorganized into the Department of Natural Resources.

As of January 1, 1985, the Division had ninety-five cases pending. During 1985-1986, fifty-eight cases were opened and closed, leaving ninety-five cases pending at the end of the biennium. During the biennium, the Division issued two formal and nineteen letter opinions regarding state environmental and related issues. In addition, the Division provided advice concerning administrative law, real property and drainage law matters, and advised the Iowa Boundary Commission.

During 1985 and 1986, the Division handled fifty-one cases for the Natural Resources Division (Conservation) of the Department of Natural Resources. Seventeen cases were officially closed during the biennium leaving thirty-four cases pending. The Division issued sixty-nine title opinions and forty-nine title vesting certificates and provided assistance in drafting administrative rules.

The Division was also involved in sixty-three cases on behalf of the Environmental Protection Division of the Department of Natural Resources during the biennium concerning enforcement of chapter 455B. Twenty-three cases were opened during the biennium and twenty-seven were closed leaving thirty-six cases pending as of January 1, 1987.

Twenty-nine cases involving the Department of Agriculture and Land Stewardship, Division of Soil Conservation, were handled during the biennium. Fifteen cases were opened and eleven were closed, leaving eighteen cases pending as of January 1, 1987.

The Division also continued to work with attorneys general from the states of Missouri and Nebraska in a very complex administrative and water law case entitled *Missouri et al. v. Andrews et al.*, 787 F.2d 270 (8th Cir. 1986), having successfully completed an appeal in the Eighth Circuit Court of Appeals.

Farm Division

The Farm Division is charged with two primary responsibilities including the enforcement of the Consumer Fraud Act as it relates to agricultural transactions and acting as legal counsel to the Iowa Department of Agriculture, the Agricultural Development Authority, the Grain Indemnity Board, the Grain Warehouse Division, the State Fair Board and other related agencies. The Farm Division also regulates the Corporate or Partnership Land Ownership Act and the Non-Resident Alien Land Ownership Act in conjunction with the Iowa Secretary of State.

In 1986, the Attorney General was designated as the Farm Crisis Program Coordinator under the Family Farm Act. In that capacity the Division helped develop and now provides the oversight for Mandatory Mediation Program for agricultural creditors and farmers and the Legal Assistance for Farmers project.

A major activity of the Farm Division is the enforcement of the Consumer Fraud Act in connection with agricultural transactions. Over the past two years, litigation in conjunction with Minnesota resulted in recovery of \$1.3 million in the nationwide sale of an alternative crop called "Jerusalem Artichokes." Because of the continuing farm crisis the Division has continued to bring lawsuits against loan brokers who fraudulently promise credit. Actions have also been taken against livestock and chemical sellers who misrepresent their products. During the past two years the Farm Division has opened 588 files and recovered \$1,197,161.04 for Iowa agriculture.

The Farm Division has focused on litigation which will have a positive impact on Iowa agriculture. In *State of Iowa v. Block*, the Division sued the United States Secretary of Agriculture for his failure to implement the Emergency Disaster Payments Program and prevailed in the Eighth Circuit Court of Appeals. Working with several other midwestern states, the Division has filed cooperative litigation, amicus briefs and filed comments on federal regulations relating to USDA, the Farm Credit System, and Farmers Home Administration. The Division has also defended challenges to recent Iowa legislation dealing with the farm crisis. Finally, the Division coordinated the preparation and presentation of federal legislation to Congress which was adopted as Borrower's Rights section of the 1985 Credit Act.

The Division in 1983 formed the Ag-Alert Network, a consortium of forty states dedicated to concentrating on agricultural fraud. Iowa has co-hosted two national seminars, established an agricultural fraud clearinghouse and coordinated a number of multi-state enforcement efforts. In 1986, the Network

was officially made the Agricultural Committee of the National Association of Attorneys General.

The Farm Division has a staff of four attorneys, two investigators and a secretary.

Health Division

Two assistant attorneys general represent the Iowa State Department of Health and the Division of Health Facilities in the newly created Department of Inspections and Appeals. One attorney primarily represents the Division of Health Facilities and the other the Department of Health. The attorneys provide daily advice and counsel, meet in conferences to resolve disputes between the department and aggrieved persons, represent the departments in administrative hearings and litigation, prepare orders and decisions for division heads and the Commissioner of Public Health where appropriate, and render assistance and advice in drafting administrative rules and legislation.

The assistant attorney general assigned to the Division of Health Facilities is responsible for representing this division in disputes arising out of the division's regulatory authority. 1986 Iowa Acts ch. 1245, § 514(3), vests the Department of Inspections and Appeals with the responsibility for licensing and investigating complaints against health care facilities in the state. These facilities include residential care, intermediate care and skilled nursing facilities. There are approximately 760 such facilities in the state with a combined licensed bed capacity of 445,500. The Health Facilities Division performs annual inspection of these facilities and investigates complaints. The assistant attorney general assigned to Health Facilities renders advice concerning these activities and represents the department at informal and formal administrative hearings which may occur as a result of the department's power to issue citations, levy civil fines, and take action against a facility's license whenever facilities are found to be in noncompliance with statutory or regulatory provisions.

In 1985 and 1986, approximately 1,125 complaints were received by the Health Facilities Division, 162 formal citations were issued, and \$75,800 in fines were assessed. A total of forty-five informal hearings were conducted, and four formal hearings were held. Six petitions for judicial review were filed in district court arising from departmental actions.

The second Health Division assistant attorney general represents the Office for Health Planning and Development and handles all legal problems concerning implementation and enforcement of Iowa's Certificate of Need Law and related federal laws. The purpose of the laws is to provide adequate institutional health services while avoiding unnecessary duplication of services, so that health care costs are controlled.

The attorney serves as legal counsel to the Iowa Health Facilities Council, a five-member body which makes initial decisions on certificate of need and related federal reimbursements. In 1985-86, 132 projects were reviewed by the Council. The assistant attorney general represents the Health Department in any court actions arising from the state and federal programs on certificate of need.

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

In 1985-86, the Health Division attorneys also served as legal counsel to fifteen professional licensing boards, providing general advice and representation in administrative hearings and court litigation. A total of twelve formal hearings regarding licensee discipline were held.

The Division attorneys also prepared formal Attorney General opinions and provided frequent informal written and oral advice to the public. The attorneys

participated in conferences and panel discussions on health topics at the request of Health Department agencies and other groups or organizations.

Human Services/Corrections Division

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

The legal services which are provided include: (1) defending suits in state and federal courts (1,080 lawsuits were pending as of June 1986), including prisoner civil rights litigation, juvenile appeals before the Iowa Court of Appeals and Supreme Court which had been handled by the county attorneys at the district court level, matters involving mental health and correctional state institutions, and appeals to district courts from administrative hearings; (2) providing consultation and advice with regard to statutes, judicial decisions, policy, state and federal regulations, proposed legislation, and rules; (3) inspecting and approving contracts and leases, and handling real estate matters; (4) researching and preparing opinions of the Attorney General; (5) handling collections of welfare overpayments, fraud, delinquent accounts; and (6) recovering Title XIX Medicaid payments from liable third parties.

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

Summary of monies recovered and collected for the state by the Division during the biennium:

Welfare Overpayments	\$90,798.00
Title XIX Medical Subrogation	583,605.00
Miscellaneous Accounts	86,021.00
Child Support Collections	68,600,000.00
Mental Health County Reimbursements	147,535.00
TOTAL RECOVERIES	\$69,507,959.00

Insurance Division

The Insurance Division of the Department of Justice consists of one assistant attorney general. The Division's most important function is rendering legal advice to the Insurance Division of the Department of Commerce. This function consumes at least sixty percent of the Division's time. The legal questions presented span a wide range but mostly involve construction of the statutes in Title XX of the Iowa Code dealing with insurance. The Division also assists the Insurance Division in preparing and drafting administrative rules and handles litigation in which the Insurance Division is a party. In the biennium, three cases carried over from the previous biennium were resolved and twelve new cases were filed. Five of the twelve were disposed of, with nine cases pending at the end of the biennium (two pending cases carried over the previous biennium).

The Division attorney also fulfills the statutorily-prescribed role of reviewing documents of insurance companies such as articles of incorporation and reinsurance treaties. The assistant attorney general reviewed numerous documents of this nature in the biennium. The attorney also advised the Commissioner of Insurance on legal questions relating to insurance company mergers, acquisitions, and reorganizations. Considerable attention was given by the Division to new insurance company insolvencies in the biennium, of which there were two judicial liquidations, two judicial rehabilitations, and one nonjudicial supervision.

Prosecuting Attorneys Council

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

The structure of the office and its place within the department were somewhat altered through amendments to Code chapter 13A contained in the state government reorganization legislation in 1986. Effective July 1, 1986, the Council remained constituted as described above only in an advisory capacity and the office was placed under the direct supervision of the Attorney General. The Executive Director (interchangeably referred to in the statute as the Prosecuting Attorneys Training Coordinator) remains the chief administrative officer and continues to be responsible for the performance of the functions and duties of the office but now serves at the pleasure of the Attorney General.

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

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

Within its other broad responsibilities, in which it has acted as a clearinghouse of information and support services, the office: (1) provided research assistance to prosecuting attorneys; (2) published newsletters, bulletins and handbooks to keep prosecutors and others in the criminal justice system informed of developments in related areas of law; (3) acted as liaison for prosecuting attorneys with the courts, executive departments and agencies, General Assembly, other divisions of the office of the Attorney General, law enforcement agencies, and such other local, state or federal entities; (4) conducted annual surveys of county attorney budgets and disseminated the resulting data; (5) assisted with the development and implementation of standards of conduct for prosecuting attorneys to help them avoid conflicts of interest and encourage uniform prosecutorial practices in all counties; (6) assisted prosecutors and the public in the resolution of complaints and other concerns involving questions of prosecutorial ethics and conduct; and (7) coordinated the promulgation of model forms for use in criminal cases in compliance with all requirements of law.

Public Safety Division

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

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

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

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

Revenue Division

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

During the 1985-86 biennium, the Division participated in the resolution of informal proceedings for 332 protests filed by audited taxpayers, pursuant to Department of Revenue Rule 701 I.A.C. § 7.11. The Division also handled sixty-nine contested case proceedings before a department hearing officer or the Director of the Department of Revenue and Finance. Of these, twenty were won, four were lost, forty-one were settled, and four were pending decision at the end of the biennium.

In the biennium, thirty-six contested cases were disposed of before the State Board of Tax Review in which seventeen were won, two were lost, and seventeen were settled.

During the biennium, eighty-four Iowa District Court cases were resolved by the Division. Of these, twenty-two were won, four were lost, fifty-seven were settled, and one was pending decision. In addition, eight federal district court cases were disposed of in which two were lost and six were settled.

On the appellate court level, the Division received decisions in sixteen cases from the Iowa Supreme Court and two from the Iowa Court of Appeals. This is the largest number of Iowa appellate court cases handled in a biennium by this Division. The Division successfully resisted a writ of certiorari in one case to the United States Supreme Court and filed an amicus brief, with which fifteen other states joined, in another case in the Supreme Court. Of the Iowa appellate court cases decided, twelve were won and six were lost. Several of these cases deserve mention.

The Iowa sales tax processing exemptions were construed by the Iowa appellate courts in *North Star Steel Co. v. State Board of Tax Review*, 380 N.W.2d 677 (Iowa 1986); *Southern Sioux County Rural Water Systems v. Iowa Department of Revenue*, 383 N.W.2d 585 (Iowa 1986); *Atlantic Bottling Co. v. Iowa Department of Revenue*, 385 N.W.2d 565 (Iowa 1986); *Mississippi Valley Milk Producers*

Assn. v. Iowa Department of Revenue, 387 N.W.2d 611 (Iowa App. 1986); *Hy-Vee Food Stores, Inc. v. Iowa Department of Revenue*, 379 N.W.2d 37 (Iowa App. 1985).

In *Sturtz v. Iowa Department of Revenue*, 373 N.W.2d 131 (Iowa 1985), the Iowa Supreme Court held that delivery of tangible personal property by the seller in Iowa subjected the transaction to Iowa sales tax, even if the sales contract (offer and acceptance) occurred outside of Iowa. In *Good's Furniture House, Inc. v. State Board of Tax Review*, 382 N.W.2d 145 (Iowa 1986), the Iowa Supreme Court held that the presence in Iowa of a foreign retailer's transient deliverymen required the retailer to collect Iowa use tax from its Iowa customers.

In *Van Duzer v. Iowa State Board of Tax Review*, 369 N.W.2d 407 (Iowa 1985), the Iowa Supreme Court upheld imposition of inheritance tax on transfers involving an irrevocable inter vivos trust, upheld the Revenue Department's formula to prorate the federal estate tax deduction between Iowa and non-Iowa property, and allowed the surviving spouse's settlement share from a will contest to be considered as the taxable or exempt share. In *South Iowa Methodist Homes, Inc. v. Board of Review of Cass County*, 393 N.W.2d 404 (Iowa 1986), the Iowa Supreme Court held that local assessing officials could not revoke improperly granted property tax exemptions by use of the omitted assessment technique.

A total of twenty-three formal and letter Attorney General opinions were issued by the Division. An additional twenty informal advice letters disposing of opinion requests were issued. The Division also assisted the Department of Revenue in disposing of thirty-two petitions for declaratory rulings. In addition, 569 proposed rules of the department were reviewed for content and legality at the department's request.

In addition to the above activities, the Division rendered advice to Department personnel and responded to questions from other state officials concerning the tax laws of Iowa.

As a result of the Division's activities on behalf of the Revenue Department during the biennium, \$43,592,393 of tax revenue was directly collected or requested refund amounts were not paid.

Special Litigation Division

The Special Litigation Division enforces the Iowa Competition Law. The Division also provides assistance to other divisions in the Attorney General's office for complex litigation and prosecutes actions involving areas of the law not specifically assigned to other divisions in the Attorney General's office.

The Division investigates and prosecutes civil and criminal violations of the Iowa Competition Law, Iowa Code chapter 553, and prosecutes certain types of civil actions for violations of the federal antitrust laws. These range from administrative actions to state civil, criminal and appellate actions to federal civil, bankruptcy and appellate actions. The Division also defends state officials named in antitrust or securities actions.

The Division has available for its antitrust enforcement a pre-petition discovery process, injunctive relief, civil penalties, criminal penalties and suits for damages on behalf of the state under chapter 553. It may also bring suits on behalf of the citizens of the state in federal court for violations such as price-fixing, bid-rigging, tying arrangements, requirement contracts, territorial and customer allocation, resale price maintenance and group boycotts. The Division also advises state agencies, the state legislature and Congress regarding laws and rules which may have an anticompetitive effect.

Tort Claims Division

The Tort Claims Division provides the state with legal representation in tort and workers' compensation, including Second Injury Fund, litigation. Additionally, the Division is charged with the investigation of all administrative claims made to the State Appeal Board under Iowa Code chapters 25 and 25A.

During 1985 and 1986, the legal staff, which is comprised of seven attorneys, defended 150 tort lawsuits and 150 workers' compensation cases, including Second Injury Fund cases. A large percentage of the caseload, approximately forty percent, involved representation of agencies and institutions that provide medical care and services.

Administrative claims handled by the Division fall into two categories: general and tort. In 1985 and 1986, a total of 4,533 claims were received from the State Appeal Board for investigation.

Transportation Division

Pursuant to Iowa Code 1307.23, a special assistant attorney general serves as General Counsel to the Iowa Department of Transportation. Eleven assistant attorneys general work under the special assistant's direct supervision. The Division provides legal services to the department, including litigation representation and agency advice. Three legal assistants represent the department in administrative hearings relating to driver's license revocations.

The three main areas of litigation activity are tort claims, judicial review proceedings, and condemnation appeals. The legal staff represents the department in tort claims which involve highway accidents or accidents on property owned or controlled by the DOT. During 1985 and 1986, ninety-six tort cases were opened and 104 were closed, for a total savings of \$51,049,208 (the difference between amount claimed and the amount paid). The legal staff also represents the department when judicial review is sought of department action involving, for example, driver's license revocation or suspension, dealer's license revocation or suspension and certain tax matters. During 1985 and 1986, 582 judicial review proceedings were opened and 380 were closed. The legal staff also represents the department in judicial condemnation actions. During 1985 and 1986, thirty-five condemnation appeals were filed and forty-one were closed, representing a savings of nearly \$2,088,021 (the difference between the total amount claimed and the amount paid).

In addition to the three main areas of litigation, the Department of Transportation is engaged, either as plaintiff or defendant, in extensive miscellaneous litigation, all of which is handled by the Transportation Division. Such litigation, at the trial and appellate level in both federal and state court, involves, for example, breach of contract disputes, employment discrimination claims, constitutional challenges, environmental issues, railroad issues and certain tax matters. Regulatory actions before federal and state agencies are also handled by the legal staff. During 1985 and 1986, 129 miscellaneous cases were opened and 131 were closed, representing a savings of nearly \$1,620,116.

The legal staff also provides non-litigation services to the department. Consultation routinely occurs with respect to statutes, court decisions, state and federal regulations, and policy matters. Department contracts, easements, and other agreements are reviewed and approved. The legal staff is also consulted with regard to proposed legislation and administrative rules. Additionally, the legal staff is responsible for researching and drafting Attorney General opinions regarding transportation-related matters.

**ATTORNEY GENERAL
OPINIONS**

**JANUARY 1985
TO
DECEMBER 1986**

JANUARY 1985

January 7, 1985

MUNICIPALITIES: Governmental Zoning Immunity. Iowa Code §§ 384.24(3)(d) and 384.25 (1983). A city is authorized to construct a sewage treatment plant and extension outside the corporate limits of the city. While under the test applied by the Iowa Supreme Court a city would not be subject to county zoning ordinances in the construction of such a sewage treatment plant, the city's site selection and any deviation from substantive county zoning requirements should have a reasonable basis. (Walding to Hammond, State Representative, 1-7-85) #85-1-1(L)

January 7, 1985

ENVIRONMENTAL LAW: Licenses. Iowa Code §§ 109.1, 109.38, 109.40 (1983); 1984 Acts, ch. 406, § 12. A fur harvester's license does not authorize hunting of coyote or groundhog. In order for a hunter to legally take, by means of hunting, coyote or groundhog, he or she must have a hunting license. (Sarcone to Wilson, Director, State Conservation Commission, 1-7-85) #85-1-2(L)

January 7, 1985

COUNTIES AND COUNTY OFFICERS: County Auditor; Filing Fees; Clerk's Transfer of Title. Iowa Code sections 331.507(2)(a), 558.66, 602.8102(79) (1983); Iowa Code section 333.15 (1979); 1984 Iowa Acts, H.F. 4. County auditors are entitled to receive the five dollar per-parcel-or-lot fee provided in section 331.507(2)(a), as amended by 1984 Iowa Acts, H.F. 4, as well as the one dollar fee provided in Iowa Code sections 558.66 (1983) and 602.8102(79) (Supp. 1983) for certificates of transfer of title by clerks of court. (Ovrom to Short, Lee County Attorney, 1-7-85) #85-1-3(L)

January 7, 1985

COUNTIES AND COUNTY OFFICERS: Dissolution of County Library District. Iowa Code ch. 358B (1983); Iowa Code §§ 331.425, 358B.2, 358B.4, 358B.8(8), 358B.10, 358B.11, 358B.12, and 358B.16 (1983); Senate File 2122 (1984 Session). 1. The effective dates for county withdrawal and termination of a county library district are not specified in Iowa Code ch. 358B. 2. A city council which moves or a board of supervisors which calls for the withdrawal from a county library district must assure that a plan for continuing adequate library services is presented, which plan must be implemented. 3. A proposition of termination requires neither a public hearing nor a plan for continuing adequate library services. 4. While county withdrawal must be approved by a majority of the voters voting on the issue, district termination and city withdrawal require the approval of a majority of the total votes cast at a general or city election and not just a majority of the votes cast on the issue. (Walding to Welsh, State Senator, 1-7-85) #85-1-4(L)

January 7, 1985

MUNICIPALITIES: Medical Payments; Pensions. Iowa Code §§ 85.27, 410.8, 410.18, 411.6, and 411.15 (1983). A city must pay for medical treatment for work-related injuries and diseases for members of its police and fire departments receiving accidental disability pensions for injuries and diseases incurred in the performance of duty. (Hansen to Pavich, State Representative, 1-7-85) #85-1-5(L)

January 7, 1985

COUNTIES AND COUNTY OFFICERS: Community Action Programs; 28E Agreements. Iowa Code §§ 7A.21-28; ch. 28E; § 331.302(1); § 331.304(1); § 331.756(7); § 364.5. (1) A public agency or combination may establish a community action agency by ordinance or resolution under § 7A.21. (2) Public agencies should amend or terminate a chapter 28E agreement where a significant provision is not being followed. (3) Whether employees of a community action agency are employees of a public agency is dependent upon the specific relationship in question. (4) While § 7A.22 does not require

that the establishment of an advisory board or a contract with a delegate agency board be in writing, §331.302(1) would require that a county acting as the public agency do so by motion, resolution, or ordinance. (5) The governing board of a public agency acting as a community action agency has some oversight authority over the duties of an advisory or delegate agency board under §§ 7A.22(2) and 7A.23(1). (6) We cannot determine in the abstract whether an entity which administers certain grant funds for a public agency under § 7A.22(2) can independently control other grant funds from separate sources. (7) A county board of supervisors which acts as the governing body of a community action agency by virtue of their position as county supervisors are not thereby a separate and distinct entity from the board of supervisors. (8) A county board of supervisors acting as the governing body for a community action agency may obtain advice from the county attorney upon matters in which the county is interested, but the community action agency may also engage legal counsel for the agency and the governing board as part of its authority to administer the community action program under §7A.25. (Osenbaugh to Glaser, Delaware County Attorney, 1-7-85) #85-1-6(L)

January 10, 1985

HOUSING: Zoning; Manufactured Homes. S.F. 2228 §§1, 2. Enforcement of a zoning ordinance which restricts residential districts to residential structures that comply with Uniform Building Code standards and operates to exclude from residential districts manufactured homes that meet federal construction and safety standards under §5401 *et. seq.* violates Senate File 2228 if the exclusion is based solely on the variation between Uniform Building Code standards and federal construction and safety standards governing the same aspect of performance. (Pottorff to Davis, Scott County Attorney, 1-10-85) #85-1-7(L)

January 11, 1985

COUNTIES AND COUNTY OFFICERS: County Conservation Board. Iowa Code §§ 68B.2, 331.342 (1983). County conservation board members are county officers governed by the conflict of interest prohibition in §331.342. (Smith to Heitland, Hardin County Attorney, 1-11-85) #85-1-8(L)

January 25, 1985

COUNTIES AND COUNTY OFFICERS: Local Board of Health; Child Care Centers; Licensing: Regulation of Child Care Center by Local Board of Health. Iowa Const. art. III, §39A; §§ 137.6, 137.21, 331.301, 331.302, 237A.4, 237A.12, The Code 1983. A local board of health may promulgate more stringent regulations regarding child care centers than those promulgated by the Department of Human Services. Those regulations may be promulgated as rules, pursuant to chapter 137, or as ordinances, pursuant to chapter 331. A local board of health may charge fees for inspections of child care centers. (Phillips to Bauch, Black Hawk County Attorney, Burk, Assistant Black Hawk County Attorney, 1-25-85) #85-1-9(L)

January 25, 1985

COUNTY HOME RULE: Highways: Weeds. Iowa Code §§314.7, 317.10, 317.11, 317.18, 317.24 (1983). Under County Home Rule, the county may include bushes and shrubs as noxious weeds under county weed ordinance. Trees are not noxious weeds. The responsibility for maintenance of secondary road right-of-way is on the county board of supervisors, §317.11. Landowners have no duty to maintain right-of-ways except as provided by §317.10 and §317.18. The appropriate action by a private party to force the maintenance of the right-of-way would be to file a complaint with the county attorney's office. Section 317.24. (Peters to Hultman, State Senator and Andersen, Audubon County Attorney, 1-25-85) #85-1-10(L)

January 25, 1985

COMPTROLLER, STATE: Allowable Growth Formula. Iowa Code §442.7(7)(i). Comptroller's process of adding 1982-83 per pupil share of temporary school funds to basic allowable growth for the year beginning July 1, 1985 is consistent with Iowa Code §442.7(7)(i). (Galenbeck to Krahl, State Comptroller, 1-25-85) #85-1-11(L)

January 25, 1985

COUNTIES AND COUNTY OFFICERS: Investment of Public Funds; Drainage District Obligations. Iowa Code chs. 453 and 455 (1983); Iowa Code §§ 452.10, 453.9 and 455.77; 1984 Iowa Acts ch. 1230, §§ 3 and 14. A county may not invest otherwise idle funds in drainage district warrants or improvement certificates. (Lyman to Thole, Osceola County Attorney, 1-25-85) #85-1-12(L)

January 25, 1985

PUBLIC RECORDS: Reasonable Access; Parole Board; Department of Corrections; Visitor's Application. Iowa Code §§ 17A.2(7)(f), 28A.2(3), 28A.5, 28A.8(1), ch. 68A, §§ 68A.3, 692.3; 291 I.A.C. 20.3(1)(f)(1-7), 291 I.A.C. § 20.13(2). The Department of Corrections has, by requiring a limited category of persons to submit to prior approval before attending Parole Board meetings, reasonably provided public access to on-site Parole Board meetings held in secure correctional institutions consistent with § 28A.5. Neither the appeal of the denial of entry into a correctional facility to visit an inmate or to attend a Parole Board meeting is a matter which must be decided by an agency after notice and an opportunity for evidentiary hearing. The only avenue for appeal of the refusal of the Department of Corrections to permit attendance at a Parole Board meeting is an original ch. 28A action. That statute gives some latitude under the reasonable access language to governmental bodies in reasonably tailoring restrictions regarding attendance at meetings. (Morgan to Angrick, 1-25-85) #85-1-13(L)

January 30, 1985

CONSTITUTIONAL LAW: Separation of Powers; Executive Power of Appointment. Iowa Const. art. III § 1; Iowa Const. art. IV §§ 1, 9, 10, 16; ch. 2, § 2.32. It is likely that both statutes conditioning gubernatorial appointments to positions within the executive branch of government on senate confirmation and statutes providing procedures for senate confirmation would be upheld as constitutional if these statutes were challenged in court as violative of the separation of powers doctrine. (Pottorff to Ritsema, State Senator, 1-30-85) #85-1-14

Mr. Douglas J. Ritsema, State Senator: You have requested an opinion of the Attorney General concerning senate confirmation of gubernatorial appointments to positions within the executive branch of government. You point out that the Iowa Constitution contains a separation of powers clause which provides that "no person charged with the exercise of powers properly belonging to one of the departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted." Iowa Const. art. III, § 1. You further point out that the Iowa Constitution does not contain any express provision authorizing senate confirmation of gubernatorial appointees to positions within the executive branch of government. Numerous statutes, however, provide for gubernatorial appointments to positions within the executive branch of government "subject to confirmation by the senate." See e.g., Iowa Code § 154A.2 (1983). Section 2.32, moreover, provides an express procedure for senate confirmations. In light of these constitutional and statutory provisions, you specifically inquire whether statutes conditioning gubernatorial appointments to positions within the executive branch of government on senate confirmation and statutory procedures for senate confirmation are constitutional.¹ In our opinion it is likely that both statutes conditioning gubernatorial appointments to positions within the executive branch of government on senate confirmation and statutes providing procedures for senate confirmation would be upheld as constitutional if these statutes were challenged in court.

¹We construe this opinion request to be confined to the issue whether senate confirmation unconstitutionally intrudes into the gubernatorial power of appointment. Accordingly, we do not address the related issue whether confirmation may be accomplished by a two-thirds majority of the Senate alone rather than all of the members elected to each branch of the General Assembly. See Iowa Const. art. III, § 17.

The Iowa Constitution divides the powers of Iowa government into three separate departments. Section 1 of article III provides:

Departments of government. Section 1.

The powers of the government of Iowa shall be divided into three separate departments—the Legislative, the Executive, and the Judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted. [Iowa Const. art. III, § 1]

Under this language persons charged with the exercise of powers properly belonging to one department are prohibited from exercising any function appertaining to either of the other two departments.

The Iowa Constitution does not confer upon the General Assembly confirmation powers over appointments within the executive branch of government. The legislative power is vested in the General Assembly. Iowa Const. art. III, § 1. This legislative power, however, does not expressly include the power of confirmation for executive branch appointments. Cf. U.S. Const. art. II, § 2 (“[H]e [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for. . . .”; Iowa Const. art. V, § 16 (“The appointive members [of the State Judicial Nominating Commission] shall be appointed by the Governor subject to confirmation by the Senate.”). The legislative power, moreover, has not been construed by courts to include the power of confirmation of executive appointments in the absence of express provision. See generally, *Myers v. United States*, 272 U.S. 56, 169, 47 S.Ct. 21, 43, 71 L.Ed. 160, 187 (1926) (confirmation power “super added” to powers possessed by legislature). Indeed, courts generally view the power of confirmation as an ancillary part of the power of appointment. See e.g., *Bradner v. Hammond*, 553 P.2d 1, 7 (Alaska 1976); *Wittler v. Baumgartner*, 180 Neb. 446, 144 N.W.2d 62, 71 (1966). The power of confirmation in Iowa, therefore, is statutorily based. See e.g., Iowa Code § 154A.2 (1983).

Since the power of confirmation in Iowa is statutorily rather than constitutionally based, we must determine whether the requirement and process of confirmation violate separation of powers by intruding on a constitutional function delegated to the Governor. Clearly, the General Assembly may not act through a statute to intrude on a constitutional function expressly delegated to the Governor. In *Slater v. Olson*, 230 Iowa 1005, 299 N.W. 879 (1941), for example, the court reviewed the constitutionality of a statute which prohibited a convicted felon from employment in the civil service. The court pointed out that the Iowa Constitution vests pardoning power exclusively in the Governor. *Id.* at 1009, 299 N.W. at 881. See Iowa Const. art. IV, § 16. In exercising the pardoning power, moreover, the Governor absolves a party from all legal consequences of a crime. *Id.* at 1009, 299 N.W. at 880. A statute which imposes legal consequences for a crime on a pardoned party, therefore, interferes with the exercise of the constitutional power to pardon. *Id.* at 1010, 299 N.W. at 881. The power of appointment, however, is not expressly delegated like the power to pardon.

The Iowa Constitution does not expressly confer a general, executive power of appointment on the Governor to appoint positions in the executive branch of government. The executive power is vested in the Governor. Iowa Const. art. IV, § 1. The Governor, in turn, is empowered to “take care that the laws are faithfully executed.” Iowa Const. art. IV, § 9. The Governor, however, is expressly constitutionally empowered to make appointments only when an “office shall, from any cause, become vacant, and no mode is provided by the Constitution and laws for filling such vacancy.” This appointment power, moreover, is implemented by granting a commission “which shall expire at the end of the next session of the General Assembly, or at the next election by the people.” Iowa Const. art. IV, § 10. Under this provision, the constitutional gubernatorial power of appointment is exercised only for the purpose of filling vacancies and only for filling vacancies which neither the constitution nor

statutes provide a mode of filling. See *City of Nevada v. Slemmons*, 244 Iowa 1068, 1073, 59 N.W.2d 793, 795-96 (1953). See also 1967 Op.Att'yGen. 188, 189-190.

There is a conflict of authority on the question whether, in the absence of express constitutional provision, a power of appointment to positions in the executive branch of government vests in the Governor through the general conferral of executive power in a fashion which renders it totally immune from statutory encroachment by the General Assembly in the confirmation process. In *Bradner v. Hammond*, 553 P.2d at 6, the Supreme Court of Alaska construed general state constitutional provisions, which vest executive power in the governor and charge the governor with responsibility for faithful execution of the laws, as sufficient to clothe the governor with constitutional power to appoint subordinate executive officers to aid the governor in carrying out the laws of Alaska. Accordingly, the Alaska Supreme Court struck down a statute which would have subjected subordinate executive officers appointed by the governor to confirmation by a majority of the members of the legislature. *Id.* at 7-8. In *Clark v. State ex. rel. Mississippi State Medical Association*, 381 So.2d 1046 (Miss. 1980), by contrast, the Supreme Court of Mississippi rejected the claim that virtually identical state constitutional provisions confer on the governor constitutional power to appoint such subordinate executive officers. *Id.* at 1049. The Court concluded that, in the absence of more express constitutional provision, a general power of appointment vests in the governor only when conferred by legislative enactment. *Id.* at 1050. Accordingly, the Mississippi Supreme Court upheld a statute which limited the appointment of members on the state board of health to nominees submitted by the state medical association. *Id.* at 1049-50.

We consider the latter position espoused by the Mississippi Court to represent the view more likely to be adopted by the Iowa courts. Generalizations about the position of state courts on this issue is difficult because differences in state constitutions cause variation in state court decisions. In *Bradner*, however, the Alaska Supreme Court's position was bolstered by a separate constitutional provision which conferred upon the governor power to appoint the head of each principal department subject to confirmation by a majority of the legislature. The Court construed this language to delineate the full extent of the legislature's power to confirm and to prohibit statutory confirmation of additional, subordinate executive officers. *Bradner v. Hammond*, 553 P.2d at 7-8. In *Clark*, the Mississippi Supreme Court's decision was based, in part, on a separate constitutional provision which stated that the governor may in cases of emergency, make "provisional appointments" but in all cases not otherwise provided for in the constitution the legislature may determine the mode of filling all vacancies. *Clark v. State ex. rel. Mississippi State Medical Association*, 381 So.2d at 1049-50. We distill from these cases the principle that whether the conferral of general executive power upon the Governor carries with it the power to appoint positions in the executive branch unfettered by a legislative confirmation process turns on the existence of other constitutional provisions which address the power of appointment.

The Iowa Constitution, like the Mississippi Constitution, combines a conferral of general executive power with a limitation on the power of appointment. The Iowa Constitution expressly confers the Governor with totally unfettered executive appointment power only when an "office shall, from any cause, become vacant, and no mode is provided by the Constitution or laws for filling such vacancy." Iowa Const. art. IV, § 10. Adopting the reasoning of the Mississippi Supreme Court, we believe this express constitutional power of appointment cannot be limited by a statutory confirmation process. When an appointment is not made pursuant to such express constitutional provision, however, no constitutional infirmity is created by limiting the appointment through reservation by the General Assembly of the ancillary power of confirmation. We note the Attorney General of Tennessee has reached a similar conclusion in reviewing statutes which provide for gubernatorial appointment of positions in the executive branch of government but reserve the power of confirmation to the General Assembly. See Tennessee Op.Att'yGen. #121 (2-3-78).

While we conclude that the confirmation statutes presented here would survive a separations of powers attack, we wish to emphasize the narrowness of this opinion. Nothing in this opinion should be construed to suggest that the General Assembly, itself, could directly appoint persons to positions within the executive branch of government. Cf. 1978 Op.Att'yGen. 251 (legislators prohibited from serving in an executive agency appointive position). In addition, the General Assembly may not constitutionally attempt generally to strip the Governor of the power to appoint key policy makers in state government. Such legislation might so disrupt the functioning of the executive branch that it could offend article IV, section 9 of the Constitution which directs the Governor to "take care that the laws are faithfully executed." Iowa Const. art. IV, §9.

In summary, it is likely that both statutes conditioning gubernatorial appointments to positions within the executive branch of government on senate confirmation and statutes providing procedures for senate confirmation would be upheld as constitutional if these statutes were challenged in court as violative of the separation of powers doctrine.

FEBRUARY 1985

February 12, 1985

SCHOOLS: Bond Issues. Iowa Code § 278.1(7) (1983). Funds obtained from a tax levy imposed pursuant to Iowa Code § 278.1(7) can be used to construct a new school building. Rejection of a bond issue proposal conducted under chs. 297 and 75 to build a school building does not limit the use of the § 278.1(7) funds. The legislature has provided three sources of schoolhouse funds and the existence of one method does not restrict, by implication, the use of other methods. After the voters have approved a tax levy for a period of years for particular purposes under Iowa Code § 278.1(7), they do not have power to rescind the tax levy or narrow the scope of the purposes for which the funds may be used. (Fleming to Benton, State Superintendent of Public Instruction, 2-12-85) #85-2-1

Dr. Robert D. Benton, State Superintendent of Public Instruction: You have asked for our opinion on issues pertaining to the use of schoolhouse funds by school districts and the relationship of negative votes on bond issues to the use of schoolhouse funds obtained from other statutory sources. The specific questions presented will be set out and discussed separately below.

1) Assuming that the voters of a school district have approved the levying of a schoolhouse tax pursuant to Code section 278.1(7) for the broadest possible scope of permitted expenditures under the statute, can such tax funds be used for the construction of an entirely new school building on a previously undeveloped site?

It is clear under the terms of Iowa Code § 278.1(7) that schoolhouse funds created by levy of a tax pursuant to that section may be used for the construction of a new school building. That section provides specifically that voters shall have the power to "[v]ote a schoolhouse tax, . . . for construction of schoolhouses or buildings, . . ." In our view, funds obtained from a § 278.1(7) tax levy may be used to construct a new school building. The first principle of statutory construction is that when the language of a statute is clear and unambiguous, there is no need to search for meaning beyond its express terms. *State v. Rich*, 305 N.W.2d 739, 745 (Iowa 1981); *In re Johnson's Estate*, 213 N.W.2d 536, 539 (Iowa 1973). Moreover, we examine a statute to see what the legislature said and not what it might have said. See *State v. Vietor*, 208 N.W.2d 894, 898 (Iowa 1973); Iowa Rule of Appellate Procedure 14(f)(13). You have explained that the questions were submitted because voters of a school district have rejected bond issue proposals for financing projects which the school board subsequently decided to finance with funds levied under § 278.1(7). We cannot read into § 278.1(7) a legal limitation that is absent. See *State v. Vietor*, 208

N.W.2d at 898. If the voters have approved the levy of the tax under that statute, those funds can be used for any of the authorized purposes.

2) Is there any conflict between Code section 278.1(7) which permits a schoolhouse tax to be authorized by a simple majority of a school district's voters, and Code chapter 296 which requires a 60% affirmative vote to authorize a school district to contract indebtedness and issue general obligation bonds to defray the cost of building a schoolhouse?

The Iowa Supreme Court observed many years ago that the General Assembly had provided three separate methods for financing the construction of schoolhouses or acquisition of sites. See *Chappell v. Board of Directors*, 241 Iowa 230, 237, 30 N.W.2d 628, 631 (1950). The sources listed at that time included (1) a schoolhouse tax voted by the electors under § 278.1; (2) a tax voted by the directors under § 297.5; and (3) a bond issue. *Id.* Those statutory sources for schoolhouse funds continue to exist. Cf. Iowa Code §§ 278.1(7) and 297.5 (1983) and Iowa Code ch. 296 (1983). The details of those sections have been amended since *Chappell* was decided, but the basic sources of schoolhouse funds remain intact. In addition, school districts may accept gifts for schoolhouse purposes. See Iowa Code § 279.42 (1983); Op.Att'yGen., issued August 25, 1983, No. 83-8-4.

The Constitution of Iowa limits the indebtedness of school corporations. See Iowa Const. XI, sec. 3. The requirement of an approval by sixty percent of the voters for issuance of bonds has been upheld. *Adams v. Fort Madison Community School Dist.*, 182 N.W.2d 132 (Iowa 1970). We do not believe that the extra majority requirement for approval of general obligation bonded indebtedness is inconsistent with a simple majority for approval of a tax levy pursuant to Iowa Code § 278.1(7).

The 60% majority required by Iowa Code § 296.6 (1983) applies to bond issues that mature "within a period not exceeding twenty years from date of issue." There is no ceiling on the amount that may be levied for such a bond issue so long as the total indebtedness of the school district is within the constitutional limit. The General Assembly has made a policy decision to require an extra majority for long-term indebtedness. In contrast, Iowa Code § 278.1(7) allows a levy of "not exceeding sixty-seven and one-half cents per thousand dollars in any one year," i.e., there is a limit on the amount that may be levied by a majority vote. The legislature has broadened the authority of a board of directors of a school district to encumber, in advance of collection, the funds derived from a § 278.1(7) tax levy as approved by the voters. See 1983 Iowa Code Supp. ch. 297 (Providing for new Iowa Code § 297.36 which authorizes loan agreements). But lease agreements that are to be financed from a § 278.1(7) levy cannot be made until the voters have approved the levy. We note that the levy for schoolhouse purposes that is authorized by Iowa Code § 297.5 requires no direct vote by the people. The school board has power to certify a schoolhouse tax "not exceeding twenty-seven cents per thousand . . ." Iowa Code § 297.5 (1983). However, funds derived from such a levy may be used for very limited purposes, "purchase and improvement of sites or for major building repairs," as carefully defined in that Code section.

In summary, the legislature has provided that tax levies for schoolhouse purposes may be authorized by three different methods. There is no constitutional or other reason that the legislature must provide precisely the same requirements with respect to the sources of schoolhouse funds.

3) Is there any conflict between Code section 278.1(7) which permits a schoolhouse tax to be authorized by a simple majority of a school district's voters, and Code section 75.1 which requires a 60% affirmative vote to authorize a school district to issue bonds for a new school building on a new site?

What we have said in response to your second question applies with equal force to the third issue. Iowa Code ch. 75 applies to issuance of bond issues by all Iowa political subdivisions. In addition to the 60% voter requirement for the issuance of bonds, see § 75.1, that chapter provides the procedures for the sale of bonds. See Iowa Code §§ 75.2 - 75.13. See also Iowa Code ch. 76

(1983) (maturity and payment of bonds). The policy reasons for the 60% majority were discussed at length in *Adams v. Fort Madison Com. Sch. Dist.*, 182 N.W.2d at 135-141. As Justice Uhlenhopp observed, "It is not for us to say which ones of the controls should be employed That is a policy determination for the legislature." *Id.* at 141.

In summary, the existence of a 60% majority requirement in Iowa Code § 75.1 for issuance of general obligation bonds does not create a conflict with a legislative decision to authorize tax levies by different mechanisms.

4) Can the voters, by implication, limit the school board's authority to expend the schoolhouse tax for specific projects by their rejection of similar projects proposed by the School Board for bonding referendum? If so, would rejection by a majority of the voters be required, or would rejection by the mere 41% necessary to block a bonding referendum be sufficient?

It is undisputed that school districts have only those powers which are expressly granted or necessarily implied in governing statutes. See *Silver Lake Cons. Sch. Dist. v. Parker*, 238 Iowa 984, 990, 29 N.W.2d 214, 217 (1947); and *Barnett v. Durant Com. Sch. Dist.*, 249 N.W.2d 626, 627 (Iowa 1977). There is nothing in Iowa Code § 278.1(7) or in chs. 276 and 75 that suggests that the expenditures of those funds are limited by the outcome of bond issue elections. Limitations are not read into statutes when limitations have not been enacted by the General Assembly. See *State v. Vietor*, 208 N.W.2d at 898. See also 1980 Op.Att'yGen. 867. (Section 278.1 does not authorize a transfer of funds from the general fund to the schoolhouse fund by vote of the electorate.) It is our opinion that a vote by the electorate to approve or reject a bond issue does not, by implication, control the expenditure of funds from other sources. Thus, we do not reach the second part of your fourth question.

5) To what extent and by what means can the voters, having once approved the levying of a schoolhouse tax pursuant to Code section 278.1(7) for the broadest possible scope of permitted expenditures under the statute, subsequently limit the scope of such permitted expenditures? Can the voters expressly limit the school board's authority to expend the schoolhouse tax by a subsequently passed limiting referendum effective for the remainder of the period of time originally authorized for the tax?

We think the answers to these questions are clear under the following express terms:

The power to levy a schoolhouse tax, *when voted, shall continue* for the period of time authorized by the voters. . . . Authorized levies for the period of time presently approved shall not be affected as a result of a failure of a *proposition proposed to expand the purposes* for which funds may be expended.

Iowa Code § 278.1(7) (emphasis added).¹

We have discussed the applicable principles of statutory construction above. The statute provides no express power for the voters to limit the scope of

¹ Some version of Iowa Code § 278.1(7) has been in force since Iowa public schools were established. During the era of one room schools, the electors of a school district met in an annual meeting to elect a board and vote on other matters including bond issues or a schoolhouse tax similar to that now authorized by § 278.1(7). The Iowa Supreme Court held that taxpayers could rescind a tax if the tax had not, in fact, been levied and none had been collected. *Hibbs v. Board of Directors*, 110 Iowa 306, 81 N.W. 584 (1900). The relevant Code section, Iowa Code § 2749(7) (1897) was quite brief and did not contain the directives set out above. The power to rescind a tax was limited. In other cases of the period, it was held that if the tax had been certified and collections had begun, the tax could not be rescinded. See *Kirchner v. Board of Directors*, 141 Iowa 43, 51, 118 N.W. 51, 54 (1908).

expenditures of the funds derived from a tax levy that has been approved earlier. There is authority provided in the statute for *expansion* of the purpose for which such a voted fund may be used. See *In re Wilson's Estate*, 202 N.W.2d 41, 44 (Iowa 1972) (Express mention in statutes of one thing implies the exclusion of others). We believe that if the legislature intended that the voters could limit the purposes for which the authorized tax levy could be spent, it would have done so when it added the language that permits expansion. Moreover, we believe that the new authorization for school boards to enter into loan agreements, based on a § 278.1(7) levy, provides further support for the view that, once approved, the purposes under that section cannot be limited.

Operation of a school district requires planning, both as to staff and to physical facilities. If the voters could levy a tax and then rescind it or adopt new limitations on the expenditure of a voted fund, tax collection processes and school district operations would be even more complex than is presently the case. We are of the opinion that the legislature has provided for predictability in school district fiscal planning by enacting the statutory language set out above.

It is our opinion that the voters cannot narrow the scope of purposes for which a tax levy has been approved in an earlier election. If voters desire to keep close control of expenditures under an Iowa Code § 278.1(7) tax levy, they can do so by authorizing such a levy for only a year or two at a time. Because we answer your fifth question in the negative, we need not consider the impact of 1983 Iowa Code Supp. § 297.36 on "subsequent restrictions" on the use of funds derived from a § 278.1(7) tax levy.

In summary, funds obtained from a tax levy imposed pursuant to Iowa Code § 278.1(7) can be used to construct a new school building. Rejection of a bond issue proposal conducted under chs. 296 and 75 to build a school building does not limit the use of the § 278.1(7) funds. The legislature has provided three sources of schoolhouse funds and the existence of one method does not restrict, by implication, the use of other methods. After the voters have approved a tax levy for a period of years for particular purposes under Iowa Code § 278.1(7), they do not have power to rescind the tax levy or narrow the scope of the purposes for which the funds may be used.

February 22, 1985

OPEN RECORDS: City Owned Gas and Electric Utilities; Applications for Service. Ch. 68A: §§ 68A.1, 68A.2; ch. 537: §§ 537.7102, 537.7103; 1984 Iowa Acts ch. 1014 § 1; 1984 Iowa Acts ch. 1145 § 1; 1984 Iowa Acts ch. 1185 §§ 5, 6. Applications which elicit personal credit history would be public records when maintained by city owned gas and electric utilities. (Pottorff to Junkins, State Senator, 2-22-85) #85-2-2(L)

February 22, 1985

INSURANCE: Public Employees; Continuing Right of Retired Public Employee to Participate in Public Employer's Group Health Insurance Plan. 1984 Iowa Acts, ch. 1129, § 2, ch. 1285, §§ 24, 25; Iowa Code sections 3.7, 4.3, 97A.6(5), 97B.41(12), 411.6(6), 509A.1, 509A.2, 509A.7, 509A.11(2) (1983) [new Code §§ 91A.2; 509A.13]. A retired public employee who wishes to take advantage of amended Iowa Code ch. 509A to participate at his own expense in his employer's group health insurance plan after retirement must have continuously participated in that plan after retirement. The right to participate in the plan includes employees who retire for disability reasons pursuant to statute. An employee who retires at age 55 may take advantage of amended Iowa Code ch. 509A to continue to participate in his employer's plan until age 65 and thereafter. Whether an employee who retired prior to July 1, 1984 can opt back into the plan at the present time depends upon the facts and circumstances of each case. (Haskins to Miller, State Senator, 2-22-85) #85-2-3(L)

February 22, 1985

COUNTIES AND COUNTY OFFICERS: County Auditor. Iowa Code §§ 441.29, 441.65 (1983). Iowa Code § 441.65 does not authorize the auditor to obtain a survey-plat when the description of property boundaries in an instrument of conveyance filed for transfer refers to a stream channel whose

alignment can be discerned from an aerial photograph that is reasonably available to the auditor. The auditor should maintain the plat book required by § 441.29 in accordance with the stream channel alignment as shown on a recent available aerial photograph unless a document eligible to be recorded as an instrument affecting real estate provides a reasonable basis for the auditor to use a different description contained or referenced therein. (Smith to Partridge, Washington County Attorney, 2-22-85) #85-2-4(L)

February 22, 1985

PHYSICAL THERAPISTS: Podiatrists. Iowa Code §§ 148A.1, 148.2(4), 149.1, and 149.2(1); H.F. 2211, 70th G.A. 1984. The term "physician," as used in Iowa Code section 148A.1, as amended in H.F. 2211 (70th G.A. 1984), is not construed to include the term "podiatrist." Physical therapists may not treat patients referred to them by podiatrists. (Hart to Peick, State Representative, 2-22-85) #85-2-5(L)

February 22, 1985

SCHOOLS: Conflict of Interest. Iowa Code §§ 71.1, 277.27, 297.7, 301.28 (1983). It is not prohibited or a conflict of interest for a school board member to vote on a contract, let after public notice and competitive bidding, on which the board member has submitted a subcontract bid. However, the school board member would be well advised to abstain from voting in such circumstances in order to avoid the appearance of impropriety. (Hansen to Angrick, Citizens' Aide/Ombudsman, 2-22-85) #85-2-6(L)

MARCH 1985

March 1, 1985

COUNTIES AND COUNTY OFFICERS: Mental Health; Substance Abuse. Iowa Code §§ 125.75, 125.81, 125.82, 125.91, 229.6, 229.11, 229.22, 602.53, 602.54, 602.58. Peace officers detaining a mentally ill person or a substance abuser should, when possible, seek a court order before transporting the detainee to a treatment facility. The staff of a substance abuse facility may question the peace officer's determination as to the inaccessibility of the court. However, the staff of a mental health facility may not.

Magistrates within counties with treatment facilities must perform emergency commitments for surrounding counties where they are the nearest available magistrate. Those magistrates may not receive additional compensation for the performance of emergency commitment. However, judicial hospitalization referees may receive compensation for each case processed.

After an emergency hospitalization, formal commitment procedures may be initiated in either the county of residence or the county of hospitalization. Such proceedings may be initiated by either county attorney in their respective counties. The county sheriff of the county where formal proceedings are brought may be directed by that court to transport the patient.

The county of legal settlement is responsible for the costs associated with detention and commitment of a mentally ill person. In this regard, each county must bear its own expenses for the arrest, detention and commitment of substance abusers. (Williams to Riepe, Henry County Attorney, 3-1-85) #85-3-1

Mr. Michael A. Riepe, Henry County Attorney: You ask several questions regarding the mental health and substance abuse emergency procedures delineated by Iowa Code §§ 229.22 and 125.91. Specifically, you ask:

1. Whether a peace officer is required to apply to the district court for an order for immediate custody prior to utilization of emergency detention procedures?
2. Whether a treatment facility has a responsibility to refuse to examine an emergency detainee where the detaining officer could have obtained an order for immediate custody?

3. Whether the magistrates of a county with a treatment facility must perform emergency commitments for surrounding counties?
4. May judicial magistrates and referees receive additional compensation for the performance of their respective duties in emergency commitments?
5. Where a patient has been hospitalized pursuant to an emergency procedure, should formal commitment proceedings be brought in the county of hospitalization or the county of origin?
6. Which county attorney is responsible for initiating and pursuing formal commitment procedures, and which county sheriff is responsible for transporting the detainee?
7. Which county bears ultimate liability for the costs of detention and commitment?

I.

The emergency procedure for detaining substance abusers is delineated by Iowa Code § 125.91. The emergency procedure for hospitalizing the mentally ill is found at Iowa Code § 229.22.

As we noted in 82 Op.Att'yGen. 271, use of these procedures is permitted only where, *inter alia*, there is no means of access to the district court. Specifically:

The procedure prescribed by this section shall only be used for an intoxicated person who has threatened, attempted, or inflicted physical self-harm or harm on another, and is likely to inflict physical self-harm or harm on another unless immediately detained, or who is incapacitated by a chemical substance, if that person cannot be taken into immediate custody under sections 125.72 and 125.81 because immediate access to the court is not possible.

Iowa Code § 125.91(1).

The procedure prescribed by this section shall not be used unless it appears that a person should be immediately detained due to serious mental impairment, but that person cannot be immediately detained by the procedure prescribed in sections 229.6 and 229.11 because there is no means of immediate access to the district court.

Iowa Code § 229.22(1).

The above provisions distinguish "immediate custody" from "emergency detention." "Immediate custody" is part of the formal commitment process. Iowa Code §§ 125.75, *et. seq.*, and 229.6, *et. seq.* Immediate custody is ordered by the district court where a formal application for an order of involuntary hospitalization has been made to the court and the court finds that the patient may be a danger if left at liberty. Iowa Code §§ 125.81 and 229.11.

Alternatively, the emergency detention procedures delineated by Iowa Code §§ 125.91 and 229.22 are designed to be used where a "person cannot be immediately detained by the procedure described in [the immediate custody provisions] because there is no means of immediate access to the district court." Iowa Code §§ 125.91(1) and 229.22(1). The clear import of these provisions is that where a means of immediate access to the court exists, peace officers must in all cases obtain an order from immediate custody before attempting to place an individual at a treatment facility.¹ The statutes provide that a court order is unnecessary only where the court is inaccessible.

II.

The statutory duty of the facility to evaluate the availability of the courts (and hence the necessity for a court order) differs with respect to substance abusers and mental health patients.

¹ Treatment facilities are defined by §§ 125.81(2), (3), and 229.11(2), (3); *see also*, 82 Op.Att'yGen. 271, 274.

In reviewing these statutory procedures, we apply familiar rules of statutory construction. The goal in construing a statute is to ascertain the legislative intent and, if possible, give it effect. *Doe v. Ray*, 251 N.W.2d 496 (Iowa 1977). In doing so, one must look to what the legislature said, rather than what it might have or should have said. *Kelly v. Brewer*, 239 N.W.2d 109 (Iowa 1976); *Steinbeck v. Iowa District Court*, 224 N.W.2d 469 (Iowa 1974). In statutory construction, one must seek a meaning which is both reasonable and logical and try to avoid results which are strained, absurd, or extreme. *State v. Berry*, 247 N.W.2d 263 (Iowa 1976). Application of these principles to specific language used in sections 125.91 and 229.22 reveals a distinction in the responsibilities of the substance abuse and mental health treatment facilities.

The emergency detention procedure for substance abusers, § 125.91, directs the treatment facility administrator and the chief medical officer (CMO) to consult to determine whether there are reasonable grounds to believe that the person is intoxicated, "threatened, attempted, or inflicted physical self-harm or harm on another, or is likely to inflict physical self-harm or harm on another unless immediately detained, or who is incapacitated by a chemical substance, [and] if that person cannot be taken into immediate custody under §§ 125.75 and 125.81 because immediate access to the court is not possible." (Emphasis supplied.) Iowa Code § 125.91. The legislative directive to facility staff is clear: the administrator and CMO should evaluate the arresting officer's conclusion that access to the court is not possible. Where that conclusion is unreasonable, the emergency detention procedure is inapplicable and should not be followed. Rather, the arresting officers were legislatively directed to pursue an immediate custody order rather than the emergency procedure.²

In contrast, the mental health emergency procedure does not direct the staff of the treatment facility to consider the availability of court access.

The peace officer who took the person into custody, or other party who brought the person to the hospital, shall describe the circumstances of the matter to the chief medical officer. If the chief medical officer finds that there is reason to believe that the person is seriously mentally impaired, and because of that impairment is likely to physically injure himself or herself or others if not immediately detained, the chief medical officer shall at once communicate with the nearest available magistrate as defined in section 801.4, subsection 6.

Iowa Code § 229.22(2).

In both statutes the legislature saw fit to delineate the exact process which the treatment facility staff should follow. The legislative intent, evidenced by the distinct wording of sections 125.91(2) and 229.22(2), unmistakably distinguishes between substance abuse and mental health facility responsibilities. This difference may have been sparked by the comparative frequencies of substance abuse and mental illness admissions, or by the availability and effectiveness of services that do not require hospitalization. However, we decline to speculate as to the legislature's motive in establishing different procedures.

The legislature clearly intended that § 229.11 process be afforded, where possible, prior to involuntary detention or transportation to a treatment facility. This legislative preference is consistent with the due process concerns voiced in *C.R. v. Adams*, 649 F.2d 625 (8th Cir. 1981). As a practical matter, such process would normally be afforded in the county where the patient is originally located. By requiring detaining officials to pursue formal proceedings, where possible, the legislature evidenced a clear intent that the judicial resources of the county of origin be utilized unless unavailable. In other words, we do not believe the legislature intended that counties with treatment facilities should become responsible for processing all involuntary commitments. Nor is this legal framework created by the legislature consistent with the overutilization of the judicial resources in counties with treatment facilities by counties without treatment facilities.

² For a discussion of the detaining officer's duties see 82 Op. Att'y Gen. 271, 275.

III.

If an emergency detainee requires further detention, both §§ 125.91(1) and 229.22(2) direct the staff of the treatment facility to "communicate with the nearest available magistrate as defined by section 801.4, subsection 6." *Id.* (Emphasis supplied.) In an earlier opinion, we concluded that the phrase "nearest available facility" within § 229.22(2) meant "any public or private facility which is closest in distance." 82 Op.Att'yGen. 271, 274 (emphasis supplied).

It is a rule of statutory construction that when the same or substantially the same phrases appear in a statute, they will be given a consistent meaning absent a contrary legislative intent.

Kehde v. Dept. of Job Service, 318 N.W.2d 202, 205 (Iowa 1982); *Ida County Courier v. Attorney General*, 316 N.W.2d 846 (Iowa 1982).

We conclude that the treatment facility staff must contact the closest available magistrate. Therefore, both § 125.91(2) and § 229.22(2) direct that the magistrate "shall" take charge of emergency detention procedures. No mention of the patient's county of residence or county of origin is contained in either statute.

"The word 'shall' imposes a duty." Iowa Code § 4.1(36)(a). Thus, that magistrate has a duty to proceed according to §§ 125.91 and 229.22.

Of course, neither § 125.91 nor § 229.22 require counties with treatment facilities to make magistrates "available" on a 24 hour basis. As a practical matter, however, 24 hour access to at least one magistrate constitutes the general practice of our district courts. See generally, Iowa Code chs. 804 and 808. The closest available magistrate has the responsibility to process those individuals referred by the treatment facility regardless of the individual's county of residence.

IV.

The compensation of judicial magistrates is governed by Iowa Code § 602.1605, which expressly provides that "[a] magistrate shall not accept any compensation, fee or reward from or on behalf of anyone for services rendered in the conduct of official business except the compensation provided by law." *Id.* "Magistrates shall receive the salary set by the general assembly, subject to § 602.6402." Iowa Code § 602.1501.

There are two statutory exceptions which relate to "actual and necessary expenses incurred in the performance of his or her duties," Iowa Code § 602.1509(1), and half-salaries for part time magistrates. Iowa Code § 602.6402. Additionally, Court Rule 207 authorizes magistrates to receive a fee of \$5.00 for performing after-hours marriage ceremonies. None of these exceptions appear to relate to the question of additional compensation for emergency commitments. Accordingly, we conclude that judicial magistrates are statutorily precluded from receiving compensation above and beyond "the sum set by the general assembly," Iowa Code § 602.54, as payment for duties relating to emergency commitment proceedings.

Judicial hospitalization referees are not so limited. The use of hospitalization referees is authorized by Iowa Code §§ 125.90 and 229.21. Iowa Code § 229.21(2) provides that "[t]he referee shall hold office at the pleasure of and receive compensation at a rate fixed by the chief judge of the district." *Id.* Iowa Code § 602.1508 provides that referees generally receive compensation set by the Supreme Court. However, the specific hospitalization referee statute prevails as an exception to the general provisions of § 602.1508. Iowa Code § 4.7; see also, Temp. Ct. Trans. R. 8.4. It is our understanding that several districts compensate referees for each case they process. We have found nothing in the Code which prohibits this practice.

V.

Both the substance abuse and mental health commitment provisions authorize formal commitment proceedings to be commenced in "the district court of the county where the respondent is presently located, or which is the respondent's place of residence." Iowa Code §§ 125.75 and 229.6.

The Code states no preference. However, should no formal application be filed, the emergency detention order automatically dissolves 48 hours after it is issued. Iowa Code §§ 125.91(4) and 229.22(4). Thus, if a formal application is not filed in either county, the treatment facility has no option but to release the detainee.

VI.

As noted above, the Code states no preference of which county should be the site of a formal commitment proceeding. Nor do the provisions which delineate the responsibility of county attorneys imply a preference.

At a commitment hearing, evidence in support of the contentions made in the application shall be presented by the applicant, or by an attorney for the applicant, or by the county attorney if the county attorney is the applicant.

Iowa Code § 125.82(1).

At the hospitalization hearing, evidence in support of the contentions made in the application shall be presented by the county attorney.

Iowa Code § 229.12(1).

Bearing in mind the tenets of statutory construction cited in section I of this opinion, it is clear that each county attorney is responsible only for those actions initiated in the district court of that county. *See* Iowa Code § 331.756(2). Any other conclusion would lead to an absurd result and is not the clear intent of our legislature.

Likewise, little guidance is found in those provisions which specify duties of the sheriff with respect to the transportation and custody of the detainee. *See e.g.*, Iowa Code §§ 125.81, 125.91, 229.11 and 229.22. Neither chapter 125 nor 229 specify that any county sheriff is responsible for transporting the detainee. 81 Op.Att'yGen. 8-34(l). However, Iowa Code §§ 331.653(1), (24), (64), and (73) require the sheriff to follow the transportation directives of the court. *See also*, 80 Op.Att'yGen. 614, 615. As with the county attorney, it is clear that the sheriff of the county in which formal proceedings were initiated is the logical recipient of court orders to transport. *See e.g.*, Invol.Hosp. Rule 22.

VII.

A county which contains a mental health treatment facility may recoup its expenditures attendant to the commitment of patients from the county of legal settlement. Iowa Code § 230.1.

This issue of liability is not so easily resolved with respect to substance abusers. While Iowa Code §§ 125.43 and 125.45 delineate liability for "the cost of care, maintenance and treatment," ch. 125 is silent with respect to the costs related to the taking into custody and commitment of a substance abuser.

Generally, the costs of activities of the county sheriff, county attorney and county court have been paid by the county. Iowa Code § 331.424(3)(9). *But see*, 1983 Iowa Acts, ch. 186. (Transferring administration and costs of "county" courts to state.) Only where a specific statute authorizes payment by another, is liability shifted outside the county. *See e.g.*, Iowa Code ch. 625, §§ 230.1 and 815.1. Accordingly, we conclude that each county must bear its own expenditures with respect to the detention and commitment of substance abusers.

VIII.

In summary, peace officers detaining a mentally ill person or a substance abuser should, when possible, seek a court order before transporting the detainee to a treatment facility. The staff of a substance abuse facility may question the peace officer's determination as to the inaccessibility of the court. However, the staff of a mental health facility may not.

Magistrates within counties with treatment facilities must perform emergency commitments for surrounding counties where they are the nearest available magistrate. Those magistrates may not receive additional compensation for the performance of emergency commitment. However, judicial

hospitalization referees may receive compensation for each case processed.

After an emergency hospitalization, formal commitment procedures may be initiated in either the county of residence or the county of hospitalization. Such proceedings may be initiated by either county attorney in their respective counties. The county sheriff of the county where formal proceedings are brought may be directed by that court to transport the patient.

The county of legal settlement is responsible for the costs associated with detention and commitment of a mentally ill person. In this regard, each county must bear its own expenses for the arrest, detention and commitment of substance abusers.

March 4, 1985

COUNTIES AND COUNTY OFFICERS: Board of Supervisors; County Compensation Board; Reductions to Compensation Board's Recommendations. Iowa Code § 331.907(2) (1983). Reductions to the compensation board's recommendations are to be made in the total amount of the recommended compensation rather than in the amount of the recommended increase. There are no limitations in the percentage amount by which the supervisors may reduce the recommendations, so long as the percentage is equal for each officer, even if the equal percentage reduction may result in an officer receiving a salary which is less than that received the preceding year. (Weeg to Martens, Iowa County Attorney, 3-4-85) #85-3-2(L)

March 5, 1985

PUBLIC SAFETY, DEPARTMENT OF: Private Investigations. 1984 Iowa Acts, chapter 1235, § 1(6) [Iowa Code ch. 80A]. The definition of "private detective businesses" subject to licensing in 1984 Iowa Acts, chapter 1235, § 1(6), does not encompass individuals engaged simply to analyze evidence, photograph evidence, or give expert testimony. It does include persons who conduct searches or investigations to locate and secure evidence so that it can be analyzed or photographed. (Hayward to Welsh, State Senator, 3-5-85) #85-3-3(L)

STATE OFFICERS AND DEPARTMENTS: Merit Compensation and Pay Plans; Comparable Worth. 1984 Iowa Acts, ch. 1314, §§ 3 and 4; Iowa Code §§ 19A.9(1) and (2) (1983). It is not necessary to follow the procedures prescribed in §§ 19A.9(1) and (2) to implement the comparable worth adjustments required by ch. 1314. (Weeg to Mitchell, Chairperson, Iowa Merit Employment Department, 3-5-85) #85-3-4(L)

March 7, 1985

COUNTIES AND COUNTY OFFICERS: Board of Supervisors; County Judicial Nominating Commission; Incompatibility of Office. Iowa Code § 331.216 (1985); Iowa Code §§ 602.6501, 602.6503 (Supplement 1983). A board of supervisors may appoint themselves as members of a county judicial nominating commission. (Weeg to Herrig, Dubuque County Attorney, 3-7-85) #85-3-5(L)

March 11, 1985

GENERAL ASSEMBLY: Statutes; Titles; Public Utilities; Constitutionality of Advertising Requirements. Iowa Const., art. III, § 29; 1984 Iowa Acts, ch. 1225; Iowa Code chapter 476 (1985); §§ 4.6(6); 476.1; 476.18(3). 1) 1984 Iowa Acts, ch. 1225, an act requiring public utilities to disclose advertising costs paid by customers, is not an unconstitutional violation of art. III, § 29; and 2) the legislature intended that ch. 1225 apply to all public utilities rather than only to public utilities subject to rate regulation. (Weeg to Royce, Administrative Rules Review Committee, 3-11-85) #85-3-6(L)

March 12, 1985

OPEN MEETINGS: Reasonable Access; Parole Board; Television. Iowa Code §§ 21.4(2), 906.7 (1985). In the proper circumstances, parole board interviews with prospective parolees would be reasonably accessible to the public under the Iowa Open Meetings Statute, even when access is via closed-circuit television. (McGrane to George, 3-12-85) #85-3-7(L)

March 22, 1985

MUNICIPALITIES: Official Newspapers. Iowa Code §364.1 (1985) and Iowa Code §§ 618.3 and 618.14 (1983). A city may publish a notice or other matter of general public importance in a publication which does not qualify as an official newspaper if the publication is supplemental to publication of the same material in an official newspaper and is in furtherance of the city's home rule powers and duties. (Hamilton to Huffman, Pocahontas County Attorney, 3-22-85) #85-3-8(L)

APRIL 1985

April 4, 1985

STATE OFFICERS AND DEPARTMENTS: Iowa Development Commission and Development Commission Foundation; Mileage Reimbursement; Acceptance of Gifts. Iowa Code §§ 18.117; 28.11-28.16; 68B.2(5), (6) and (9); 68B.5; 79.11 (1983). 1) In this instance the Foundation should not be considered a state agency; 2) Commission employees may claim mileage reimbursement under § 18.117 for the business use of vehicles leased for them by the Foundation; 3) use by Commission officials and employees of vehicles leased by the Foundation for business and personal purposes does not violate § 68B.5; and 4) § 79.11 does not prohibit payment of mileage reimbursement to Commission employees using Foundation—leased vehicles on state business. (Weeg to Johnson, State Auditor, 4-4-85) #85-4-1(L)

April 4, 1985

STATE OFFICERS AND DEPARTMENTS: Comptroller; Department of Transportation; Interest on Funds, Iowa Code §§ 453.7(2), 327H.18, 327H.21, 49 U.S.C. § 1654. The federal share of repaid funds loaned for rail assistance may be placed in an interest-bearing account with the accumulated interest to be used for further loans or grants for rail assistance as provided by 49 U.S.C. § 1654 pursuant to Iowa Code §§ 453.7(2), 327H.18-.21. (Hansen to Krahl, State Comptroller, 4-4-85) #85-4-2(l)

April 4, 1985

RACING COMMISSION: Horse Track Pari-Mutuel Tax. Iowa Code § 99D.15(2) (1985). The tax credit provided by Iowa Code § 99D.15(2) (1985) applies only to facilities constructed by pari-mutuel licensees which have a genuine bona fide use in the operation of the pari-mutuel enterprise. The credit is only applicable to debt incurred after the enactment of § 99D.15(2) and is not applicable to debt incurred as a result of renovation or remodeling projects. (Hayward to Priebe, State Senator, 4-4-85) #85-4-3(L)

April 8, 1985

SCHOOLS: Area Colleges; Athletics; School Rules; U.S. Constitution, Equal Protection Clause. Iowa Code chapter 280A (1985); Iowa Code §§ 280A.16, 280.25(5) (1985). Area school athletic rules which limit participation in sports on the basis of where the student attended or graduated from high school are not facially unconstitutional. (Osenbaugh to Lonergan, State Representative, 4-8-85) #85-4-4(L)

April 11, 1985

CRIMINAL LAW AND PROCEDURE: Child Restraint Law; Appearance in Court. Iowa Code §§ 321.446, 805.9, 805.10. Defendants charged with violation of the child restraint law, § 321.446, must appear in court under § 805.10. (Hansen to Draheim, Chief Judge, 2nd Judicial District, 4-11-85) #85-4-5(L)

April 24, 1985

TAXATION: Sales Tax. Iowa Code §422.45(12) (1985). The sales tax imposed on purchases of food sold through vending machine does not violate the equal protection clause of the United States Constitution. (Barnett to Van Camp, State Representative, 4-24-85) #85-4-6(L)

April 24, 1985

CLERK OF COURT: Duty or Power to Conduct Lien Searches. Iowa Code §§22.2, 22.3, 321.24, 321.50(7) (1985); Iowa Code chs. 570, 571, 572, 574, 580, 581, 582, 584, §§554.9407(2), 613A.2, 613A.8, 811.4, 903A.5 (1983); Iowa Code interim supplement §§602.1215(2), 602.8102(44), (82), (130), 602.8104(2)(g), 602.8105(1)(p), 602.11101(5) (1983). The clerk of the district court has no statutory duty to conduct lien searches at the request of a private party. However, the clerk may search public records in order to make them available for public examination and copying. The clerk has no statutory duty to certify or warrant the results of any search undertaken. A clerk could search lien records for only a limited class of persons if a reasonable basis exists for the discrimination. (Kirlin to Vanderpool, Cerro Gordo County Attorney, 4-24-85) #85-4-7(L)

April 25, 1985

COURTS: Counties; Jury Selection; Computer Selection Process. Iowa Code chapter 609, §609.24(2) (1983 Supp.). Section 609.24(2), which allows for either manual drawing or computer selection of persons to be called to serve as petit jurors, does not eliminate the duties of the clerk of court, the county sheriff or the ex officio jury commission members as set forth in chapter 609. (Ryan to Davis, Scott County Attorney, 4-25-85) #85-4-8(L)

April 25, 1985

HEALTH: Insurance. Iowa Code §§509.3(6), 514.7, 514B.1(2) (1985); 1984 Iowa Acts, ch. 1290. Covered diabetic outpatient self-management programs must be provided by knowledgeable health care professionals and directed by a physician, but the legislature did not mandate that each program be provided by registered nurses and licensed pharmacists. The Department of Health has authority to adopt standards for covered programs. (McGuire to Pawlewski, Commissioner of Public Health, 4-25-85) #85-4-9(L)

MAY 1985

May 1, 1985

GENERAL ASSEMBLY: Statutes; Subject Matter. Art. III, § 29, Constitution of Iowa, Senate File 395, 71st G.A. (1985). Senate File 395, an act related to state and local revenues, may contain provisions concerning local option taxes and wine sale without violating article III, § 29. (Appel to Miller, State Representative, and Taylor, Ritsema, and Vande Hoef, State Senators, 5-1-85) #85-5-1

The Honorable Thomas H. Miller, State Representative, The Honorable Ray Taylor, The Honorable Douglas Ritsema, The Honorable Richard Vande Hoef, State Senators: We are in receipt of your request for an opinion regarding the constitutionality of various provisions of S.F. 395, a recently enacted measure generally relating to state and local revenue matters. Specifically, you ask whether inclusion in the bill of provisions establishing a dual system of wine sales and providing for local option taxes violates article III, section 29, of the Iowa Constitution. Article III, section 29 requires that all provisions in any bill passed by the General Assembly relate to one subject. In our view, the inclusion of both the wine sales and local option tax provisions in the revenue measure meets the minimum requirements of article III, § 29.

I.

The legal environment established by article III, § 29 is not demanding. A party attacking an Act of the legislature on constitutional grounds must

overcome a strong presumption of constitutionality. When faced with a constitutional challenge, a court will seek to uphold the statute from constitutional attack. *Keasling v. Thompson*, 217 N.W.2d 687, 689 (Iowa 1974). A court will hold a statute unconstitutional only where there is literally no constitutionally adequate approach or interpretation. *Id.* See also *Hearth Corporation v. C-B-R Development Company, Inc.*, 210 N.W.2d 632, 636-7 (Iowa 1973); *State v. Vick*, 205 N.W.2d 727, 729 (Iowa 1973).

In addition, the courts traditionally have been reluctant to void legislation on grounds that the General Assembly violated constitutional provisions which structure the legislative process. See e.g., *Sampson v. City of Cedar Falls*, 231 N.W.2d 609 (Iowa 1975) (provision authorizing joint public-private ownership of utilities related to bill concerning municipal utilities); *State ex rel Turner v. Iowa State Highway Comm.*, 186 N.W.2d 141 (Iowa 1971) (relocating resident engineer offices sufficiently related to highway funding); *Webster Realty Co. v. City of Fort Dodge*, 174 N.W.2d 413 (Iowa 1970) (various urban renewal provisions embrace one subject). As one author of an exhaustive survey of "one subject" rule cases has observed:

The most remarkable fact that emerges from the investigation is that, while the rule has been invoked in hundreds of cases, in only a handful of cases have the courts held an act to embrace more than one subject.

Rudd, *No Law Shall Embrace More Than One Subject*, 42 Minn.L.Rev. 389, 477 (1958).

It thus appears that a reviewing court, while always seeking to uphold statutes from constitutional attack, will be especially differential to the legislature when it considers "one subject" rule challenges. Primary responsibility for enforcement of the constitutional values embodied in article III, §29 rests with the legislature, whose members are sworn to uphold the constitution. See 1980 Op.Att'yGen. 5, 8-9 (Shantz to Rush).

II.

Constitutional analysis of legislation challenged under the "one subject" rule is a two step process. First, the subject of the bill must be determined. Second, the relationship between the challenged provisions and the subject must be examined to determine whether the connection is sufficient to meet minimal constitutional requirements.

In an opinion published in 1979, we considered the question of whether inclusion of usury provisions in a bill authorizing credit unions to provide share drafts was constitutional. 80 Op.Att'yGen. 5 (Shantz to Rush). We sustained the constitutionality of the legislation, noting that usury and share drafts were both related to the broad subject of "commerce." The 1979 opinion stands for the proposition that the subject of a bill may be broadly characterized in order to arrive at an interpretation that removes any potential "one subject" defect.

We today reaffirm the expansive approach to subject definition. Applying the established analysis to S.F. 395, we believe the subject may be broadly characterized as "state and local revenues." Indeed, the bill itself is entitled "An act relating to state and local revenues. . . ." See S.F. 395 (Committee on Ways and Means) at 1.

The next question is whether the wine sales and local option tax provisions are sufficiently related to the broad general subject of "state and local revenues" to satisfy article III, §29. In reviewing the relationship, the Iowa Supreme Court has held that bills must be upheld from "one subject" challenge unless the provisions through "no fair intentment can be considered as having any legitimate connection or relation to each other (emphasis supplied)." *Long v. Supervisors of Benton County*, 142 N.W.2d 378, 381 (1966). Where the constitutionality is merely "doubtful" or "fairly debatable," the courts will not interfere. *Id.*

Using the extremely differential *Long* standards, we believe it is clear that the local option tax provision would survive a constitutional attack under article III, §29. Beyond question, a local option tax authorization has at least a "fairly debatable" relationship to the subject of state and local revenues.

The question whether the wine sales provisions have a constitutionally sufficient relationship to the subject of state and local revenues is more difficult. However, the issue is whether the wine sales provisions have *any* conceivable relationship to the general subject. We think it does. While the precise fiscal effect of the new wine sales and tax policies is not clear, the new provision will have *some* impact, for better or worse, on state revenues. Therefore, the provisions of S.F. 395 which allow taxable wine sales at private outlets has a connection with the general subject of "state and local revenue."

III.

We do not suggest that the legislative process might not have more closely approached the constitutional ideal if S.F. 395 were divided into two or more separate bills. As we have stated in our 1979 opinion, the courts, for sound institutional reasons, have not insisted on the ideal in reviewing challenges under article III, § 29. *See* 80 Op. Att'y Gen. at 8. Rather, the courts have indicated that they can police only a minimum standard, a low floor beneath which combinations of subjects are so alien that their marriage in a single bill will not be tolerated. *Id.* In our opinion, S.F. 395 meets the minimum constitutional requirement that the courts would be willing to impose on the coordinate branch of government.

May 1, 1985

SCHOOLS: Sale or Lease of School Sites. Iowa Code §§ 278.1(2); 297.22; 297.23; 297.24. A school district may sell part of a tract of land without submitting the issue to the voters if the value of the land to be sold does not exceed \$25,000. All sales of property owned by a school district are subject to the competitive bidding requirements of Iowa Code §§ 297.23 and 297.24. A school district may not evade the competitive bidding statutes by executing a lease containing an option to buy. (Fleming to Hultman, State Senator, 5-1-85) #85-5-2(L)

May 6, 1985

TAXATION: Apportionment of Net Income of Non-Farm Corporations Which Ship Goods to Non-Iowa Destinations. Iowa Code § 422.33(2) (1985). The mere shipment of goods via common carrier to non-Iowa destinations by a non-farm corporation conducting its business within Iowa would not render the corporation's business partly within and partly without Iowa so as to allow apportionment of net income pursuant to Iowa Code § 422.33(2). Whether apportionment of net income would be allowed if the goods were shipped in the corporation's own vehicles would depend on the facts and circumstances of the case. (Kuehn to Bair, Director of the Iowa Department of Revenue, 5-6-85) #85-5-3(L)

May 6, 1985

STATE OFFICERS AND DEPARTMENTS: Merit System Exemptions; Iowa State Fair Board. Iowa Code sections 19A.1, 19A.3, 19A.3(17), 173.14(7) (1985); 570 I.A.C. 7.4(2), 8.5 and 8.8. Part-time employees of the Iowa State Fair who are hired by the Fair Board pursuant to section 173.14(7) as patrol officers are subject to coverage under the Iowa merit system and Iowa Code chapter 19A. (Benton to Van Winkle, Director, Iowa Merit Employment Department, 5-6-85) #85-5-4(L)

May 7, 1985

CONSTITUTIONAL LAW: Special Corporation; State Officers and Employees: The Iowa Development Commission, Iowa Development Commission Foundation, Inc., Iowa Product Development Corporation, Iowa Venture Capital Fund. Iowa Const. art. I, § 6, art. III, § 30, art. VIII, § 1; Iowa Code sections 28.7(1), (2), (3), 28.11, 28.14, 28.15, 28.16, 28.61, 28.63, 28.64, 28.65, 28.83(1), (2), 28.87(2), (4), (7), 28.88(3), 28.89, 28.90, 28.91, 69.16, 69.19; 1963 Iowa Acts ch. 71, 1983 Iowa Acts ch. 207, 1984 Iowa Acts ch. 1164, § 3; Neb. Const. art. XII, § 1, Wisc. Const. art. IV, § 31. The Iowa Development Commission Foundation, Product Development Corporation and Venture Capital Fund were established to accomplish a state-wide public purpose, and therefore the statutes creating these corporations are not special laws in contravention of Iowa Const. art VIII, § 1. The Product Development

Corporation is a distinct arm of state government and accordingly is subject to state law. Because the question of whether the Iowa Development Commission Foundation and Venture Capital Fund are subject to laws governing state agencies requires a specific factual and statutory context, we cannot generalize in this opinion as to their status. (Benton to Johnson, Auditor of State, 5-7-85) #85-5-5

Honorable Richard D. Johnson, Auditor of State: This is in response to your request for our opinion concerning the constitutionality under Iowa Const. art. VIII, § 1 of the Iowa Development Commission Foundation, Inc., the Iowa Product Development Corporation, and the Iowa Venture Capital Fund. These corporations have been established under various provisions of Iowa Code chapter 28 (1985) and are managed by the Iowa Development Commission. Iowa Const. art. VIII, § 1 provides:

No corporation shall be created by special laws; but the General Assembly shall provide, by general laws, for the organization of all corporations hereafter to be created, except as hereinafter provided.

Under chapter 28 the Development Commission is required to cooperate with the private sector to enhance the state's economic well-being. Your request requires that we examine the complex interrelationship between government and the private sector which this cooperation has generated under art. VIII, § 1, a consideration which we undertake as a matter of first impression.

QUESTIONS PRESENTED

Specifically, you have asked:

Were these corporations created by special laws?

(a) If so, does the action constitute a violation(s) of article VIII, section 1 of the Constitution of Iowa? And if so, what action should be taken?

(b) If not:

(1) Are these corporations required to follow the laws governing state agencies since they are managed by the Iowa Development Commission?

(2) What are the tax implications for each of these corporations?

Before turning directly to your question concerning art. VIII, § 1, it may be helpful to outline both the general provisions under which the Development Commission operates and the legislation under which the corporations described in your letter were established.

STATUTORY BACKGROUND

As we noted at the outset, the Iowa Development Commission has been established in large part to use the resources of government to aid the private economic development of the state, creating a relationship in which the boundaries between the public and private sector are sometimes obscured. It is the duty of the Commission, under Iowa Code section 28.7(1) (1985), to collect information regarding industrial opportunities to encourage both new and existing industries. The Commission is directly charged with fostering closer cooperation between the public and private sectors in Iowa Code section 28.7(2) (1985). Iowa Code section 28.7(3) (1985) requires that the Commission:

Encourage new industrial enterprises to locate in Iowa, by legitimate educational and advertising mediums directed to point out the opportunities of the state as a commercial, industrial, and agricultural field of opportunity, and by solicitation of industrial enterprises.

Taken together, these provisions demonstrate a clear legislative intent that the Commission co-operate with the private sector to encourage and foster economic growth within the state.

This legislative intent has also been manifested in the legislation which

establishes the three corporations to which your letter refers. The Iowa Development Commission Foundation, Inc. has been established under the authority of Iowa Code section 28.11 (1985), which states:

The Iowa development commission is hereby authorized to form a corporation under the provisions of chapter 504 *for the purpose of receiving and disbursing funds from public or private sources to be used to further the overall development and well-being of the state.*

(Emphasis supplied). Iowa Code chapter 504 refers to corporations not organized for pecuniary profit. The chairperson and the director of the Commission and a member of the Commission selected by the chairperson are the Foundation's incorporators. § 28.14. The members of the Commission or their successors in office are to serve as the Foundation's board of directors. § 28.15. The Foundation is authorized, under section 28.16, to accept grants of money or property from the federal government or any other source to accomplish its purposes. The Foundation's amended articles of incorporation grant it general corporate powers to accomplish its purposes, including the authority to enter contracts, acquire property, and to borrow money secured by its notes.

In 1983, the General Assembly enacted legislation establishing the Iowa Venture Capital Fund with the express purposes, under section 28.61, of encouraging both capital investment in the state and the establishment or expansion of business and industry, as well as providing additional jobs and encouraging research and development activities. To accomplish these goals, section 28.63 authorized the Commission to establish the Iowa Venture Capital Fund as an Iowa corporation. As the central provision concerning the Fund, section 28.63 states in pertinent part:

There may be incorporated under chapter 496A a corporation which shall be known as the Iowa venture capital fund. The corporation shall be established by the Iowa development commission, and the initial board of directors shall be appointed by the governor. The initial board of directors shall consist of five members, not more than three of whom shall be from the same political party. The purpose of the corporation shall be to organize and manage an investment fund which shall be capitalized through the sale of common stock to the public. The Iowa development commission may expend an amount not to exceed one hundred thousand dollars of the funds necessary to establish the corporation which funds shall be repaid to the Iowa development commission upon completion of its public offering of stock. The corporation shall be subject to and have the powers and privileges conferred by this division, and those provisions of chapter 496A which are not inconsistent with and to the extent not restricted or limited by this division.

Fund investments are to be made with the objective of encouraging the development of additional business operations and employment in the state through venture capital financing to selected business ventures under section 28.64. The Fund is subject to examination by the Commission and is required to make reports of its condition to the Commission "not less than annually." § 28.65.

The General Assembly also established the third corporation to which your letter refers, the Iowa Product Development Corporation, in 1983. However, unlike the Commission Foundation and the Venture Capital Fund, the Product Development Corporation is not incorporated under general corporation statutes such as chapter 504 or 496A. Instead, the legislature in Iowa Code section 28.83(1) provided:

There is created a corporate body called the "Iowa product development corporation." *The corporation is a quasi-public instrumentality and the exercise of the powers granted to the corporation in this division is an essential governmental function.* (Emphasis supplied)

Under section 28.87, the purpose of the corporation is to "stimulate and encourage the development of new products within Iowa by the infusion of

financial aid for invention and innovation in situations in which financial aid would not otherwise be reasonably available from commercial sources." To accomplish this purpose, section 28.87 grants the corporation general corporate powers, such as the authority to make and enter contracts necessary to the performance of its duties.

Beyond the general powers granted the corporation, it is specifically authorized in section 28.87(2) to:

... enter into venture agreements with persons doing business in Iowa upon condition and terms which are consistent with the purposes of this division for the advancement of financial aid to the persons. The financial aid advanced shall be for the development of specific products, procedures, and techniques which are to be developed and produced in this state. The corporation shall condition the agreements upon contractual assurances that the benefits of increasing and maintaining employment and tax revenues shall remain in Iowa.

Section 28.88 provides the procedure through which applicants may seek financial aid through an Iowa product development corporation fund created under section 28.89. The corporation is authorized specifically in sections 28.90 and .91 to issue notes and bonds sufficient to achieve its corporate purposes. With this overview of the purpose of these corporations and the statutes which authorize or create them, we can turn now to a consideration of whether they have been created by "special laws" in contravention of the Iowa Constitution.

CONSTITUTIONAL PROVISIONS AND CASE LAW

Iowa is one of several states with constitutional provisions which forbid the creation of corporations by special laws.¹ In construing Iowa Const. art. VIII, §1, we should bear in mind the conditions which led the drafters of the Constitution to include this language, and the evils which they intended to suppress by its inclusion. In his dissent in *Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1932), Justice Brandeis described the conditions in the several states which led to the passage of constitutional provisions like Iowa's. Writing in *Liggett*, Justice Brandeis noted that early in the 19th century:

There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations. So at first the corporate privilege was granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable.

Liggett, 288 U.S. at 548, 549. However, the special grants of incorporation created scandals and favoritism which in turn led to general laws for business incorporation as Justice Brandeis noted:

That the desire for equality and dread of special privilege were largely responsible for the general incorporation laws is indicated by the fact that many States included in their constitutions a prohibition of the grant of special charters.

¹ See, Ala. Const. art. XII, § 229; Ariz. Const. art. XIV, § 2; Ark. Const. art. XII, § 2; Cal. Const. art. XII, § 1; Colo. Const. art. XV, § 2; Del. Const. art. IX, § 1; Fla. Const. art. III, § 11; Idaho Const. art. XI, § 2; Ind. Const. art. XI, § 13; Kan. Const. art. XII, § 1; La. Const. art. IV, § 4; Me. Const. art. IV, pt. 3, § 14; Md. Const. art. III, § 48; Minn. Const. art. IV, § 33, art. X, § 2; Mo. Const. art. III, § 40; Mont. Const. art. XV, § 2; Neb. Const. art. XII, § 1; Nev. Const. art. VIII, § 1; NJ Const. art. IV, § 7(9); NY Const. art. X, § 1; N.C. Const. art. VIII, § 1; N.D. Const. art. VII, § 131; Ohio Const. art. XIII, § 1; Ore. Const. art. XI, § 2; Pa. Const. art. III, § 32; S.C. Const. art. III, § 34; S.D. Const. art. XVII, § 1; Tenn. Const. art. XI, § 8; Utah Const. art. XII, § 1; Vt. Const. art. II, § 65; Va. Const. art. IV, § 14; Wash. Const. art. XII, § 1, art. II, § 28; W.Va. Const. art. XI, § 1; Wis. Const. art. IV, § 31, art. XI, § 1.

Liggett, 288 U.S. at 549, n.4. The various state constitutional provisions were thus animated by a distrust of corporate wealth and a desire to avoid the abuses which followed granting corporative privileges or powers not available to the general citizen.

An examination of the debates at the time the present Iowa Constitution was adopted demonstrates that the framers were also concerned with a concomitant desire to avoid monopoly and insure equal treatment for all business enterprises. The debates reveal concern for uniformity in the treatment of business enterprises in the following passage:

A new feeling seems to have dawned upon the subject of corporations within the last ten or fifteen years. *Under the old system the legislatures of the different states granted acts of incorporation to special companies.* The idea of a general incorporation law had never entered into the legislative history, at least to no considerable extent. *While grave legislative bodies doled out to citizens associated together in one section of the state, such privileges as they desired, they withheld them from the mass of the people. This kind of legislation was partial in its effect, and in many instances was wrong and oppressive.* (Emphasis supplied)

1 Debates of the Constitutional Convention 1857, at 155. The drafters of art. VIII, § 1 obviously intended to prevent the legislature from giving certain benefits or privileges not generally available to all corporate bodies. We can be guided by the drafter's intent in our determination of whether these provisions are special laws. There are no cases reported which have construed this provision.

While there is no direct authority construing the term "special laws" within art. VIII, § 1, there are similar provisions in the Iowa Constitution to which we can turn for guidance. Iowa Const. art. III, § 30 states in pertinent part:

The General Assembly shall not pass local or special laws in the following cases: For the assessment and collection of taxes for state, county, or road purposes; For laying out, opening, and working roads or highways; For changing the names of persons; For the incorporation of cities and towns; For vacating roads, town plats, streets, alleys, or public squares; For locating or changing county seats.

In all the cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State . . .

Similarly, art. I, § 6 provides:

All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.

These constitutional provisions, like art. VIII, § 1, seem to be intended to prevent the legislature from extending to any individual or corporation special benefits not generally available to others similarly situated. By definition, special legislation refers to such legislation as grants some special right, privileges, or immunity, or imposes some particular burden on a portion of the public. 82 C.J.S. *Statutes*, § 166, p. 278-280 (1953). In examining particular legislative classifications, the Iowa Supreme Court has ruled that the same test should be applied under art. I, § 6, and art. III, § 30. *Matter of Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 334 N.W.2d 290, 294 (Iowa 1983). Given that art. VIII, § 1 was intended to serve essentially the same purpose as art. I, § 6 and art. III, § 30, we believe that the former should be reviewed under the same criteria.

Under this test, legislation will pass constitutional muster if there is any reasonable ground for the classifications in the law and if it operates equally upon all within the same class. *Richards v. City of Muscatine*, 237 N.W.2d 48, 61 (Iowa 1975). There are two Iowa cases which are particularly instructive in applying this test to constitutional challenges to the uniformity of particular legislation. In *Dickinson v. Porter*, 240 Iowa 393, 408, 35 N.W.2d 66 (1948), the Iowa court stated:

A classification is not arbitrary which rests upon some reason of public policy. Public policy may also warrant a particular classification. Any classification is permissible which has a reasonable relation to some permitted end of governmental action.

This is consistent with the general principle that a law intended to serve a particular need, in order to meet some special evil or to promote some public interest, is not a special law. 82 C.J.S. *Statutes*, § 166, p. 279-280 (1953).

The Court in *John R. Grubb, Inc. v. Iowa Housing Finance*, 255 N.W.2d 89, 93 (Iowa 1977), set forth the scope of its review of a legislative finding of a public purpose in the following terms:

... we will not find absence of public purpose except where such absence is so clear as to be perceptible by every mind at first blush.

An examination of *Dickinson, supra*, and decisions from other jurisdictions discloses a plain judicial intent to permit the concept of 'public purpose' to have that flexibility and expansive scope required to meet the challenges of increasingly complex social, economic, and technological conditions.

Under these cases, there is a clear nexus between a legislative classification and the public purpose which supports it, and the court has recognized further that the legislature must be given some latitude in defining a public purpose to meet changing economic conditions. The legislation which has established these corporations must be scrutinized with these principles in mind. Moreover, in examining these provisions it must be borne in mind that there is a strong presumption of constitutionality which attaches to regularly enacted statutes, and such enactments will be struck down only if they clearly, palpably and without doubt violate the constitution. *Chicago Title Ins. Co. v. Huff*, 256 N.W.2d 17, 25 (Iowa 1977).

IOWA DEVELOPMENT COMMISSION FOUNDATION, INC.

Section 28.11 authorizes the Commission to incorporate the Iowa Development Commission Foundation Inc., so we must decide whether this statute and related provisions create an arbitrary classification. The statute which authorizes the Commission to incorporate the Foundation provides that the corporation is to receive and disburse public or private funds to "further the overall development and well-being of the state." § 28.11. Neither the present statute nor the original legislation granting the authorization at 1963 Iowa Acts ch. 71 set forth specifically the public purpose which the legislation was intended to accomplish. However, section 28.11 must be considered together with other provisions which set forth the Commission's purposes. Statutes relating to the same subject matter must be harmonized where possible. *Doe v. Ray*, 251 N.W.2d 496, 501 (Iowa 1977). Consequently, it is reasonable to infer that the same purposes which underlie the Commission's other efforts was intended to be accomplished by authorizing the Commission to create the Foundation. The Commission generally has an affirmative duty both to encourage new industrial enterprises in the state and the expansion of already existing industries within the state. § 28.7(1). Under section 28.7(2), the Commission must encourage closer cooperation between the public and private sectors to enhance industrial expansion. The Foundation's purpose to distribute funds to the private sector comports with the Commission's duties to foster economic expansion and governmental cooperation with the private sector. The legislature could reasonably conclude that a distinct nonprofit entity was necessary to efficiently utilize grants or other sources of revenue to accomplish its various duties under section 28.7. Encouraging new industry and nurturing present industry, with their impact upon employment and tax revenues, are activities clearly supported by a public purpose and therefore the statute authorizing the Commission to incorporate the Foundation reflects such a purpose. Given that there is a clear public purpose supporting section 28.11, we must also conclude that the statute concerns no arbitrary classification. *Dickinson*, 240 Iowa at 408.

Section 28.11 is uniform in its operation as well. There are no conditions

within sections 28.11 through 28.16 which limit the availability of the assistance which the Foundation administers to any particular type of business or industry, nor is the assistance limited to any geographical area. See *Grubb*, 255 N.W.2d at 96. The Foundation is incorporated under a general incorporation statute, chapter 504, and is therefore subject to the same requirements which that law imposes on other non-profit corporations. There is no indication that the Foundation has been granted any special privilege not generally available to other nonprofit corporations. The mere fact that the Foundation is incorporated by a state agency does not create a special benefit. It is our conclusion that the Iowa Development Commission Foundation, Inc. was not created by special laws and therefore does not violate art. VIII, § 1.

IOWA VENTURE CAPITAL FUND

Our analysis of the Iowa Venture Capital Fund must utilize the same criteria. Again, we must decide whether the statutes authorizing the Commission to incorporate the Fund contain a classification which is arbitrary and therefore repugnant to the Constitution. Section 28.63 authorizes the Commission to incorporate the Fund to manage an investment fund and to invest those monies in suitable Iowa businesses. The express purposes of the Fund are to encourage capital investment, industrial expansion and to provide additional jobs. § 28.61. The preamble to the legislation establishing the Fund at 1983 Iowa Acts, ch. 207, describes it as an "Act for the purposes of improving the Iowa economy and providing improved employment conditions . . ." The goal of creating additional jobs through the expansion of private businesses seems a public purpose. Consequently, although section 28.63 applies only to the Fund, it does not contain an arbitrary classification. *Dickinson*, 280 Iowa at 408. It was not irrational for the legislature to conclude that the Development Commission should utilize a distinct corporate entity such as the Fund to facilitate capital investment in small Iowa businesses. See *Matter of Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 334 N.W.2d at 294-295. It could be argued that only those companies in which the Fund invests actually benefit and that this defeats the public purpose of the legislation. However, a law may serve the public interest although it benefits certain individuals or classes more than others. *Grubb*, 255 N.W.2d at 95. With this public purpose established, we must conclude that there exists a reasonable ground for the legislative classification.

Further, the statute enabling the Commission to incorporate the Fund operates uniformly and does not charter the Fund with the type of special privileges which could lead to the types of abuses art. VIII, § 1 was intended to proscribe. First, the Fund is incorporated under the general corporation statute and is expressly made subject to the provisions of chapter 496A which are not inconsistent with the provisions of chapter 28, § 28.63. Secondly, the reach of the Act is not limited by geographical or political barriers. The Fund may invest in companies in any part of the state with the only qualification found in section 28.64 that the company meet the small business administration definition of a small business. The problems of unemployment, although perhaps more severe in certain localities, transcend geographical and governmental lines. And the social costs of unemployment are not confined to certain areas but permeate throughout the state. See *Grubb*, 255 N.W.2d at 56. The legislation authorizing the incorporation of the Iowa Venture Capital Fund is not special legislation but a general enactment, and therefore passes muster under art. VIII, § 1.

PRODUCT DEVELOPMENT CORPORATION

Finally, your letter refers to the Product Development Corporation, a corporate body directly created under section 28.83(1), and we must decide whether this provision contains an arbitrary classification. The central function of this corporation is to establish a direct partnership with private businesses through venture agreements in which the Corporation advances financial aid for the development of specific products, procedures and techniques. § 28.87(2). The purpose of the Corporation under section 28.87 is to stimulate and encourage

the development of new products within Iowa, and the agreements must contain assurances that the "benefits of increasing or maintaining employment and tax revenues shall remain in Iowa." §28.87(2). As we have already discussed in connection with the Venture Capital Fund and the Commission Foundation, the purposes of increasing employment and the tax revenues are clearly legitimate public purposes, and these purposes are not diminished by the fact that some enterprises may benefit directly from the venture agreements while others will not. The statutes authorizing the creation of the Corporation are not arbitrary.

The fact that the Corporation is directly created legislatively rather than incorporated under a general statute also does not render these provisions "special acts." In the closely analogous *John R. Grubb, Inc.* case, the Iowa court considered the constitutionality under art. III, §30, of the legislation creating the Iowa Housing Finance Authority. *Grubb*, at 91. Although considered under a different constitutional provision, we believe that the analysis employed in *Grubb* is applicable here. Like the Product Development Corporation, the Authority was created as a public instrumentality with the power to issue notes and negotiable bonds to accomplish the purpose of providing housing assistance to those to whom adequate housing might not otherwise be available. *Grubb*, 255 N.W.2d at 92. And like the Corporation, the Authority is also a corporate entity separate and distinct from the state with various corporate powers. *Grubb*, 205 N.W.2d at 97. After finding the Authority was supported by a public purpose, the court disposed of the challenge under art. III, §30, by concluding that the classifications embodied in the statute were reasonable and that it operated equally upon all within this class. *Grubb*, 255 N.W.2d at 96. As in *Grubb* we have found the classification within §§28.83 *et seq.* to be reasonable since it is founded in legitimate public policy. And as in *Grubb*, the statutes operate uniformly; the authority to enter venture agreements is not limited by political or geographical criteria.

The court's analysis in *Grubb* was recently re-affirmed in *Train Unlimited Corp. v. Iowa Ry. Finance*, 362 N.W.2d 489 (Iowa 1985), in which the court considered the constitutionality under art. III, §30 of the Iowa Railway Finance Authority (IRFA). The IRFA is an autonomous body empowered to acquire railway facilities and extend financial assistance to better the state's rail transportation. *Train Unlimited Corp.*, 362 N.W.2d at 491. After concluding that the legislation creating the IRFA was supported by a public purpose, that is to insure adequate rail transportation facilities, the court concluded that this public purpose was not defeated simply because it benefits certain individuals more than others. *Train Unlimited Corp.*, 362 N.W.2d at 495. Since the statute operated equally upon all it was intended to benefit, it could survive a constitutional challenge under art. III, §30. *Train Unlimited Corp.*, 362 N.W.2d at 495. As we have outlined above, the statutes pertaining to the Product Development Corporation work equally upon those intended to be benefited by their public purpose. We conclude that the Iowa Product Development Corporation was created by general enactments and not special laws.

SUPPORT FOR FINDINGS

Our conclusion regarding the constitutionality of these corporations under art. VIII, §1 is buttressed by an examination of decisions from other states construing similar constitutional provisions. Under Wisc. Const. art. IV, §31 the state is prohibited from enacting special laws for granting corporate powers. In *State ex rel Warren v. Nusbaum*, 208 N.W.2d 780 (Wis. 1973) the Wisconsin Supreme Court, in finding that legislation creating a state-wide Housing Authority did not constitute a special law, explained its rationale in terms apposite to Iowa's constitutional prohibition:

Sec. 31, art. IV Wis. Const. was not meant to deny the legislature the authority to grant limited corporate powers to the entities it creates to promote a public and state purpose. Ch. 234, Stats. does not involve the promotion of private or local interests, as condemned by the framers of sec. 31, but a legitimate governmental and state-wide purpose as declared by the legislature. Ch. 234 is not objectionable as either a special

or private law.

Nusbaum, 208 N.W.2d at 813.

Similarly, in *State ex rel Douglas v. Neb. Mortgage Finance*, 283 N.W.2d 12 (Neb. 1979) the Nebraska Supreme Court reviewed the Nebraska Mortgage Finance Fund Act under Neb. Const. art. XII, § 1 which provides, "No corporations shall be created by special law." In upholding the Act, the Nebraska court found that it applied generally and not specially for an isolated class, and that the legislature could reasonably determine that the statute's public purpose could best be accomplished by creating a single entity to accomplish that purpose. *State ex rel Douglas*, 283 N.W.2d at 20.

We believe that the rationale of these cases is sound, and should be followed here. The Iowa General Assembly has chosen to utilize these corporations to accomplish what we have identified as valid public purposes. The Wisconsin and Nebraska cases provide that as long as the purpose to be achieved is state-wide and of legitimate public concern, a single entity may be utilized without contravening the constitutional proscription against the creation of corporate entities through special acts. It is our view that these statutes pertaining to the corporations you have identified are general and not special acts because, although they pertain to individual entities, they serve a state-wide public purpose. The corporations to which your letter refers were not created by special laws and, therefore, we find no violation(s) of art. VIII, § 1.

STATE AGENCY STATUS

Your second question asks if the corporations are not created by special laws, are they required to follow the laws governing state agencies since they are managed by the Iowa Development Commission. There are, of course, several Iowa laws applicable to state agencies and it is beyond the scope of this opinion to determine to what extent each applies to each of the corporations.²

Although the Iowa Product Development Corporation is denominated a corporation and granted certain corporate powers in section 28.87, it is our view that the Corporation is a unit of state government to which state laws should apply, unless provided otherwise in the statutes. Taken together, the various statutes pertaining to the Corporation demonstrate that the legislature intended it to be a governmental body. Section 28.83(1) describes it as a "quasi-public instrumentality" and states further that the exercise of its powers is "an essential governmental function." The board of directors serve at the pleasure of the governor and are subject to the requirements of Iowa Code sections 69.16 and 69.19 (1985). § 28.83(2). The Corporation has, pursuant to Iowa Code chapter 17A, promulgated administrative rules. See 642 I.A.C. *et seq.* Under section 28.87(4), the approval of the director of the department of general services is required from the Corporation to acquire, lease, or otherwise

²In attempting to determine to what extent these corporations are a part of state government, there should be some discussion as to whether Iowa Const. art. VIII, § 1 is applicable exclusively to private corporations. The Iowa Supreme Court in *Iowa Eclectic Medical College Ass'n. v. Schrader*, 87 Iowa 659, 668, 55 N.W. 24 (1893) held that art. VIII did not apply to the State Board of Medical Examiners, since it was a branch of government. Similarly, in 1902 Op. Att'y Gen. 52, our office held that art. VIII did not apply to the Iowa Department of Agriculture. We would infer from this authority that Iowa would be within the line of authority from other states holding that the constitutional prohibition against the creation of corporations by special acts applies exclusively to private corporations. See *Board of Regents of University of Arizona v. Sullivan*, 42 Ariz. 245, 42 P.2d 619, 623 (1935); *Ennis v. State Highway Commission*, 231 Ind. 311, 108 N.E.2d 687, 694 (1952); *Webb v. Port Commission of Morehead City*, 265 N.C. 663, 172 S.E. 377, 382 (1934); *State v. Stahl* 89 S.E.2d 653, 700 (1955). Accordingly, to the extent that these corporations are either themselves distinct governmental bodies or a part of a governmental unit, the prohibition within art. VIII, § 1 would not apply.

dispose of property. The Corporation's assistants, agents, and other employees are considered to be state employees. §28.87(7). Finally, in 1984, the General Assembly amended section 28.88(3) to provide that the Corporation keep confidential information on the applications for financial assistance, notwithstanding the state's open meetings and public records laws. *See*, 1984 Iowa Acts, chapter 1164, §3. The implication from this amendment is that, prior to its passage, the General Assembly regarded the Corporation as subject to these provisions, another indication that the Corporation is a governmental body. The conclusion we must draw from these provisions is that the Product Development Corporation is a part of state government and subject generally to the laws governing those bodies, except where the General Assembly has provided otherwise.

The General Assembly has not provided specifically that the Iowa Development Commission Foundation, Inc. and the Venture Capital Fund are a part of state government. The question as to whether these entities are state agencies and subject to the laws governing such agencies is accordingly complex and requires a consideration of a variety of factors. These entities may be state agencies when performing one function, and private corporations when acting in another capacity. *See* #85-4-1(L). The determination of whether the Fund and Foundation are state agencies therefore demands a specific factual and statutory context which is absent in your request. We cannot answer generally whether they are state agencies without these facts. The applicability of specific provisions to the Foundation and the Fund can be determined through more direct, specific questions. As these specific questions occur, we suggest that you consult with legal counsel.

Similarly, an analysis of the tax consequences for each of these entities is so broad as to be beyond the scope of this opinion. Because the determination of tax consequences almost always requires a specific factual context, the opinion process is rarely suited to determining whether an entity or specific property is subject to taxation. Such a discussion would require a specific factual context and an identification of the tax provisions involved.

CONCLUSION

In conclusion, we believe that the Iowa Development Commission Foundation Inc., the Iowa Product Development Corporation and the Iowa Venture Capital Fund were not created by special laws in violation of Iowa Const. art. VIII, §1. The purposes for which these corporations were formed, to assist economic development, create jobs and increase tax revenues, are legitimate public purposes. Their public purpose is not diminished by the fact that the Foundation and the Fund are incorporated under general incorporation statutes. The legitimate state-wide purpose which these corporations are designed to serve establishes that they were created under general and not special laws. The Iowa Product Development Corporation is a distinct part of state government as a quasi-public instrumentality and as such is governed by the statutes applicable to state agencies unless otherwise exempted. We cannot generalize as to whether the Foundation and the Fund are subject to laws governing state agencies without a more fully developed factual and statutory background.

May 14, 1985

SCHOOLS: Certification of Teachers. Iowa Const., art. IX, §15; Iowa Code §§258A.1, 258A.2(1) and 260.12 (1985). Recertification procedures which would require teachers to demonstrate that they are up-to-date in the materials they present and in the methods of presentation are related to the general welfare and are "applicable to the profession." Thus, the repeal of the statutory provision for permanent teaching certificates in order to impose recertification requirements would not result in the deprivation of property rights without due process to those currently holding such certificates where the procedures for obtaining or demonstrating the requisites for recertification would be attainable by reasonable study or application and reasonably suited to accomplish the purpose of protecting the general welfare. (Hamilton to Brown, State Senator, 5-14-85) #85-5-6(L)

May 15, 1985

SCHOOLS: Teacher Termination; Coaching Contracts. Iowa Code §279.19A (1985); §279.19B (1985); 1984 Iowa Acts, ch. 1296. If a school district terminates the contract of a tenured teacher who held one contract that encompassed both teaching and coaching duties for the past year, the entire contract must be terminated. For the year beginning July 1, 1985, coaching duties must be assigned in a separate contract and such contracts will be governed by Iowa Code §279.19A and §279.19B (1985). (Fleming to Pellett, State Representative, 5-15-85) #85-5-7(L)

May 21, 1985

COUNTIES: Relief. Iowa Code §§252.1, 252.24, 252.25, 331.301(1). A county may, at its option, provide general relief to "needy persons." However, there is no statutory authority which requires the county of legal settlement to reimburse the county relief for such general relief provided to "needy persons." (Williams to Huffman, Pocahontas County Attorney, 5-21-85) #85-5-8(L)

JUNE 1985

June 7, 1985

TAXATION: Notice of Tax Sale; Compensation for Publication of Notice of Tax Sale. Iowa Code §§446.9, 446.10, and 446.12 (1985). Section 446.10 provides for compensation not to exceed one dollar for each description for each weekly newspaper publication of the notice of tax sale. (Griger to Metcalf, Black Hawk County Attorney, 6-7-85) #85-6-1(L)

June 7, 1985

TAXATION: Soil Conservation Subdistricts. Iowa Code §§107.16, 110.3, 427.1, 441.17, 441.21, 455.50, 467A.20 (1985). Section 467A.20 does not authorize the levy of special annual soil conservation subdistrict tax on assessed value of property that is exempted from taxation by §427.1(1). (Smith to Casper, Madison County Attorney, 6-7-85) #85-6-2(L)

June 19, 1985

COUNTIES AND COUNTY OFFICERS: Board of Supervisors; County Budget; Authority of Board of Supervisors to Refuse Claims of Elected County Officers. Iowa Code §§331.433; 331.434; 331.435; 331.437; and 331.476 (1985). A county board of supervisors may not disapprove a claim submitted by elected county officers on the ground that claim exceeds the appropriation for the particular line item category that claim falls within. (Weeg to Schouten, Sioux County Attorney, 6-19-85) #85-6-3

Mr. Mark Schouten, Sioux County Attorney: You have requested an opinion of the Attorney General on several questions relating to the authority of the board of supervisors over the budgets of other elected county officers. Your specific questions are as follows:

1. Does the Sioux County Board of Supervisors have the authority to refuse to approve a claim submitted to them by an elected county official when that claim would cause expenditures made under a specific line item categorization to exceed the amount appropriated for that line item by the Supervisors?

2. Does the Board of Supervisors have the ultimate authority to determine whether a claim is coded properly and paid out of the appropriate line item category?

3. What is the Auditor's responsibility in determining whether an official has properly coded his or her claim in such a way as to comply with the original budget categories?

This office has previously held in a number of opinions that a county board of supervisors may not refuse to pay a claim filed by another county official if that claim is within the approved budget for that official's office and the expenditure is for a legitimate purpose. See 1982 Op. Att'y Gen. 389 (#82-4-2(L)); 1980 Op. Att'y Gen. 664; 1968 Op. Att'y Gen. 614. Because we believe these opinions are relevant to your first question, further discussion of them, in particular the 1980 opinion, is appropriate.

In 1980 Op. Att'y Gen. 664, we reviewed a number of statutory provisions, particularly those contained in Iowa Code ch. 344 (1979),¹ which related to the supervisors' authority over the county budget process. We noted these provisions vested the supervisors with considerable authority over that process. However, once the budgets submitted by other county officers were reviewed and approved by the supervisors, we concluded there was no express statutory authority which would authorize the supervisors to exercise any additional control over the budgets of elected county officials except to "examine and settle all accounts of the receipts and expenditures of the county, and to examine, settle and allow all claims against the county, except as otherwise provided by law." Iowa Code § 332.3(5) (1979).² See also Iowa Code §§ 331.437 and 331.476 (1985).

Following our review of this authority, we concluded the supervisors were required to exercise some oversight function with regard to the budget, but solely to ensure the following: 1) that claims submitted by other elected county officials were within that official's approved budget, and 2) that those claims were for a legitimate purpose. 1980 Op. Att'y Gen. 664. This supervisory authority did not allow the supervisors to refuse to pay claims which otherwise satisfied this criteria. *Id.* Our conclusion relied in part on two Iowa Supreme Court decisions, which set forth the principle that Iowa law vests elected county officers with considerable autonomy, and holds those officers accountable to the electorate rather than to the board of supervisors. See 1980 Op. Att'y Gen. 663, 665, citing *McMurray v. Board of Supervisors of Lee County*, 261 N.W.2d 688, 690 (Iowa 1978), and *Smith v. Newell*, 254 Iowa 496, 502-3, 117 N.W.2d 883, 887 (1962). *Cf. Smith v. Board of Supervisors of Des Moines County*, 320 N.W.2d 589 (Iowa 1982). If the supervisors had unlimited authority to refuse any claim submitted by other elected county officials, we reasoned, they could potentially interfere with or unduly hinder the official business of those elected county officials. This would be impermissible.

These previous opinions did not address the specific question of whether, after approving a line item budget, the supervisors could refuse a claim submitted by an elected county officer because that claim exceeds the amount appropriated for the particular line item category which that claim falls within. However, we believe the reasoning of these prior opinions and existing statutory and decisional law similarly requires us to conclude that refusal of such claims for this reason is impermissible.

The provisions governing county budgets are now found in Iowa Code §§ 331.433-331.437 (1985). They provide that county officers are to annually submit a budget "estimate itemized in the detail required by the board," showing "proposed expenditures of the office" and "an estimate of the revenues . . . to be collected for the county by that office" for the next fiscal year. § 331.433(1). Section 331.433(2) authorizes the board to consult with county officers concerning these estimates and requests and allows the board to "adjust the requests for any county office or department." First, the language of § 331.433(1) makes clear the supervisors are authorized to require county officers to submit

¹ Chapter 344 has since been repealed but reenacted, with some substantive changes, as Iowa Code §§ 331.433-331.437 (1985).

² A similar provision is now found in Iowa Code § 331.401(1)(q) (1985).

a line item budget if the supervisors so choose.³ Further, these sections provide that the budget figures submitted by county officers are proposals, or estimates, and that the supervisors have the authority at this stage of the budget process to alter those figures.

The procedure for adoption of the final county budget by the supervisors is set forth in §§ 331.434(1) through (5). The final budget is final by definition. However, that final budget is based on figures which the statutory language recognizes can only be estimates or proposals, and subsequent statutory provisions recognize that this final budget is subject to change. See §§ 331.434(6) and 331.435. As the final step in the budget process, § 331.434(6) requires the supervisors to then appropriate the amounts deemed necessary for each county office and department for the next fiscal year, and further provides:

... Increases or decreases in these appropriations do not require a budget amendment, but may be provided by resolution at a regular meeting of the board, as long as each class of proposed expenditures contained in the budget summary published under subsection 3 of this section is not increased. However, decreases in appropriations for a county officer or department of more than ten percent or five thousand dollars, whichever is greater, shall not be effective unless the board sets a time and place for a public hearing on the proposed decrease and publishes notice of the hearing not less than ten nor more than twenty days prior to the hearing in one or more newspapers which meet the requirements of section 618.14.

This section authorizes the supervisors to alter the amounts appropriated to various county offices and departments without amending the budget, so long as actual expenditures do not exceed the amount of estimated expenditures published prior to adoption of the final budget. Increases in expenditures are allowed if the budget is amended pursuant to § 331.435. Thus, the supervisors control the actual amount of the total appropriation to each county office or department, and may increase or decrease that appropriation subject to the limitation applicable when a decrease in the appropriation exceeds ten percent or five thousand dollars. However, while the supervisors control the total amount of money appropriated to an elected county office, there is no express statutory authority which would allow the supervisors to exercise further control over particular expenditures from the budgets of elected county officers.

A more thorough review of two Iowa Supreme Court cases referred to above is appropriate at this point. In *McMurray v. Board of Supervisors of Lee County*, *supra*, the Court struck down several resolutions by the supervisors which attempted to prescribe employment policies for the deputies of elected county officers on the ground that these policies were beyond the board's statutory authority. The Court began its decision with the following statement:

The board appears to have proceeded as though our system of county government consisted of central management with subsidiary departments. With few exceptions, however, our statutes establish autonomous county offices, each under an elected head.

McMurray, supra, 261 N.W.2d at 690. The Court, citing a number of opinions from this office, concluded that "authority over personnel matters relating to deputies resides with the elected principals unless a statute expressly gives authority to the board." *Id.* at 691. While the Court also based its decision on statutory provisions unrelated to the question at hand, and referred to the pre-home rule principle that the supervisors have only those powers expressly or impliedly conferred by statute, we believe the Court's overall view of the relationship between the supervisors and elected county officers was a significant factor in its decision and one that applies at the present time. The

³ We can find no express statutory requirement in ch. 331 or any other chapter that counties use line item budgeting. You state in your opinion request that the State Auditor's Office and the State Comptroller's Office likewise know of no requirement, other than that which may be imposed by the supervisors pursuant to § 331.433(1), that counties use line item budgeting.

home rule implementation legislation, ch. 331, has not fundamentally altered the relationship between boards of supervisors and other independently-elected county officials.

The *McMurray* decision is consistent with the Court's earlier decision in *Smith v. Newell*, 254 Iowa 496, 117 N.W.2d 883 (1962). In that case the supervisors refused to approve the sheriff's appointment of several bailiffs and a deputy on the ground they were beyond the compulsory retirement age. A statutory provision existed which allowed an "employer" to approve continued employment of an employee beyond the compulsory retirement age. The Court concluded with regard to the bailiffs that the supervisors had no authority over such appointments and therefore the sheriff's decision to appoint them was final and could not be overruled by the supervisors. With regard to the appointment of the deputy, the Court held that, though the supervisors had statutory authority to approve appointments of persons serving as deputies for elected county officers, that authority could not be exercised in an unreasonable manner. The supervisors' refusal to approve this deputy's appointment on the basis of age and their subsequent refusal to consider the statutory exception to compulsory retirement were found by the Court to be unreasonable. In support of its decision, the Court stated:

In the case at bar it is the responsibility of the sheriff to keep the peace in the county, and to employ deputies who will assist him. This responsibility does not rest in the Board, nor any member thereof.

In granting to the sheriff and other county officers the power to appoint deputies, bailiffs, and other employees it was the intention of the legislature that the elected sheriff could secure as deputies, able and loyal people for public service.

Smith v. Newell, 117 N.W.2d at 887. This decision not only emphasized the autonomy of elected county officers from the board of supervisors in performing those functions delegated to them by statute but also affirmed that, even when the supervisors are given a certain degree of statutory approval authority over elected county officers' functions, that authority must be exercised in a limited and reasonable manner. See also *State v. Rhein*, 149 Iowa 76, 127 N.W. 1079 (1910) (board of supervisors has no authority to require county treasurer to deposit county funds in a bank selected by the board absent the treasurer's approval when the statute designates the treasurer as the county officer responsible for that decision).

This office has followed the Court's lead in these two cases in a number of opinions dealing with the relationship between the supervisors and elected county officers. See e.g. Op.Att'yGen. #84-10-5 (supervisors may not enter into a ch. 28E agreement with other governmental entities for the provision of certain law enforcement functions without the approval of the sheriff); Op.Att'yGen. #83-11-4(L) (supervisors may not initiate discipline against employees of elected county officers); Op.Att'yGen. #83-6-9(L) (board of supervisors may provide longevity pay to certain county employees, but only elected county officers have authority to determine whether their deputies should receive longevity pay). Compare 1982 Op.Att'yGen. 391 (supervisors may promulgate policy for reimbursement of certain expenses incurred by county officers and employees).⁴

A more recent decision of the Court, however, raises some concerns regarding

⁴ In 1982 Op.Att'yGen. 391 [#82-4-11(L)] we concluded the supervisors have authority pursuant to home rule to adopt policies for the reimbursement of expenses incurred by county officers and employees, including elected officials, when attending meetings or schools of instruction. This opinion may be distinguished from other opinions which conclude the supervisors have no supervisory authority over elected county officials by the fact that the supervisors are expressly authorized by statute to approve claims for mileage and expenses of county officers and employees, Iowa Code § 331.324(1) (1985), including expenses for attending educational seminars, § 331.215(2). This specific authority differs from the general authority in the present case for the supervisors "to examine and settle all accounts of the receipts and

these conclusions. In *Smith v. Board of Supervisors of Des Moines County*, 320 N.W.2d 589 (Iowa 1982), the supervisors adopted an ordinance under their home rule powers requiring all county officials, presumably elected county officers as well, to follow centralized purchasing procedures developed by the board. Violation of the ordinance constituted a simple misdemeanor. The Court upheld this ordinance against a challenge that the county home rule amendment was unconstitutional. Though it is unclear whether the issue was raised or argued by the parties, the Court went on to state:

... Finally, we note that the centralized-purchasing ordinance is not inconsistent with any statute. In fact, section 332.10, The Code 1979,⁵ expressly requires the defendants to provide the county officers such needs:

The board of supervisors shall also furnish each of said officers with fuel, lights, blanks, books, and stationery necessary and proper to enable them to discharge the duties of their respective offices, but nothing herein shall be construed to require said board to furnish any county attorney with law books or library.

We conclude the home-rule amendment and the ordinance under which it was enacted are not invalid on any of the grounds urged.

This language, in conjunction with the conclusion upholding the ordinance's applicability to all county offices, at least raises a question as to whether this opinion limits the Court's earlier statements concerning the autonomy of elected county officers. We believe it does not. First, the *McMurray* and *Smith v. Newell* decisions and their underlying principles were not even discussed in the *Smith v. Des Moines County* case. Second, this latter case may be distinguished on the ground that an ordinance requiring centralized purchasing involves minor housekeeping functions of county government and its effect on the ability of elected county officers to conduct their substantive business is insignificant. In this sense *Smith v. Des Moines County* may be contrasted with *McMurray* and *Smith v. Newell*, which dealt with personnel matters, and the present case, which concerns expenditure of budgeted funds, all issues which more directly affect an elected county officer's ability to perform his or her official duties.

With regard to elected county officers, we believe they must act in good faith when submitting budget proposals in accordance with §331.433(1), and must reasonably attempt to follow the final budget adopted by the supervisors. Nonetheless, we believe that in order to properly fulfill their statutory duties and effectively exercise their responsibility to the people of the county, these officers must have the option of adjusting their budgets to fit the changing needs of their offices. See 1942 Op.Att'yGen. 88 (supervisors may increase salaries of employees in county engineer's office above the amount approved in the final budget so long as those adjustments may be made within the budget for that office). That flexibility is limited only by the appropriations made by the supervisors, the supervisors' general oversight authority over the budget of elected county officers as discussed in 1980 Op.Att'yGen. 664, and the provisions of §§ 331.437 and 331.476, set forth below.

We therefore conclude that a county board of supervisors may require line item budgeting, but it may not disapprove claims submitted by elected county officers because the claims exceed the appropriation for the particular line item category that claim falls within. The supervisors may exercise a significant

expenditures of the county and all claims against the county, except as otherwise provided by law." § 331.401(1)(q). This general authority, read in conjunction with the statutes discussed above governing the county budget process, §§ 331.433-331.437, does not give the supervisors the direct authority to disapprove otherwise proper claims of elected county officers. When the legislature fails to expressly vest the supervisors with specific authority over elected county officers, the supervisors may not interfere with an elected officer's exercise of his or her official duties.

⁵ Section 332.10 was repealed in 1981; a similar provision is now found in Iowa Code § 331.322(1)(5) (1985).

degree of control over elected county officers' budgets prior to adoption of the final budget, *see* §331.433(2), but once the budget is final, the supervisors' authority is significantly curtailed. The board may increase or decrease appropriations subject to the provisions of §331.434(6) and may allow increases in expenditures pursuant to §331.435, but there is no authority to exercise more than this general authority in overseeing the budgets of elected county officers. Consistent with 1980 Op.Att'yGen. 664, the supervisors may only disapprove a claim when that claim exceeds the total amount budgeted for that county office or when that claim is for an unlawful item or purpose.

Of course, we note that all county officials are bound by the following provisions:

331.437 Expenditures exceeding appropriations.

It is unlawful for a county official, the expenditures of whose office come under this part, to authorize the expenditure of a sum for the official's department larger than the amount which has been appropriated for that department by the board.

A county official in charge of a department or office who violates this law is guilty of a simple misdemeanor. The penalty in this section is in addition to the liability imposed in section 331.476.

* * *

331.476 Expenditures confined to receipts.

Except as otherwise provided in section 331.478, a county officer or employee shall not allow a claim, issue a warrant, or execute a contract which will result during a fiscal year in an expenditure from a county fund in excess of an amount equal to the collectible revenues in the fund for that fiscal year plus any unexpended balance in the fund from a previous year. A county officer or employee allowing a claim, issuing a warrant, or executing a contract in violation of this section is personally liable for the payment of the claim or warrant or the performance of the contract.

We discussed these provisions in 1938 Op.Att'yGen. 77 in holding that the supervisors may not approve, and the auditor may not issue, warrants for claims which are in excess of available funds.

Your second and third questions concern the supervisors' and auditor's authority to ensure that claims are properly coded and paid out of the appropriate line item category in the original budget. As set forth above, the supervisors have authority to adopt a final budget, but there are no specific statutory provisions governing the supervisors' or the auditor's authority over the coding of claims against the budget. The supervisors' oversight authority over the budget is also set forth above, and §§ 331.437 and 331.476 impose penalties in the event a county officer expends an amount beyond that budgeted for his or her office. The only other arguably relevant statutory duty the supervisors have in this regard is found in § 331.303(1)(c), which requires the board to keep a claim register "which records all claims for money filed against the county" and details how that register is to be kept. Similar bookkeeping duties for the auditor are set forth in §§ 331.504(2), (5), (7), and (8).

June 19, 1985

TAXATION: Applicability of Sales and Use Tax to Alcohol Sold, Given Away or Dispensed by Air Common Carriers. Iowa Code §§ 123.36(5)(c), 123.98, 422.43, 423.2 (1985). Section 123.36(5)(c) imposes a \$7.00 per gallon tax on alcoholic beverages sold, given away or dispensed in or over Iowa. This tax is substituted for a sales or use tax imposed by §§ 422.43 and 423.2. (Nelson to Bair, Director, Iowa Department of Revenue, 6-19-85) #85-6-4(L)

June 19, 1985

COUNTIES AND COUNTY OFFICERS: Assessor. Iowa Code §§ 428.5, 441.17(3)(1985), 327G.77(1981). If railroad company provides county assessor with information showing that right-of-way abandoned in 1982 has reverted to successors in interest of original grantor, assessor should list right-of-

way to owner(s) of adjoining land. If owner of adjoining land provides assessor with information showing break in chain of title to fee underlying right-of-way, assessor should list right-of-way to unknown owners. (Smith to Fulton, Decatur County Attorney, 6-19-85) #85-6-5(L)

June 19, 1985

SCHOOLS: Laboratory Schools. Iowa Code §§ 265.1; 279.10; 299.1; S.F. 77 (1985 Iowa Legis. Serv. 9). The requirement in S.F. 77 enacted by the 1985 session of the General Assembly that requires school districts to commence school no sooner than the first day of September does not apply to the Malcolm Price Laboratory Schools operated by the University of Northern Iowa. (Fleming to Lind, State Senator, 6-19-85) #85-6-6(L)

June 19, 1985

ELECTIONS: Privilege of an Elector; Notification of Legal Determination of Retardation or Incompetency; Notification of Criminal Conviction. Iowa Const. art. II, § 5; ch. 47, § 47.7; ch. 48, §§ 48.30, 48.31; ch. 701, § 701.7; ch. 907, § 907.3. The terms "idiot" and "insane person" in article II, § 5 of the Iowa Constitution are functionally limited to persons who have been determined to be retarded or incompetent in a statutory adjudicative proceeding. The term "infamous crime" means any crime punishable by imprisonment in the penitentiary. Under current statutes, infamous crimes include crimes punishable by confinement for a period of more than one year. The terms "privilege of an elector" mean voting and other activity for which the legislation imposes qualification or eligibility to vote as a prerequisite. The term "felony" in § 48.30 includes any public offense which the statute defining the crime declares to be a felony. Deferred sentences and deferred judgments are not convictions of which the clerk of court must notify the commissioner of elections pursuant to § 48.30. The state registrar has no authority to compare electronic voter registration files with other electronic files regarding criminal convictions and to provide the information to the county commissioners of elections for the purpose of cancelling the registration. (Pottorff to Whitcome, January Chair, Voter Registration Commission, 6-19-85) #85-6-7(L)

June 28, 1985

BEER AND LIQUOR CONTROL: Sunday Sales. Senate File 395, §§ 3, 4, 9, 24, 28, 41, 42, 69 and 70; Iowa Code ch. 123; Iowa Code §§ 1, 4, 2(8), 21(11), 24(2), 24(3), 34(3), 36(6), 49(2), 49(2)(b), 49(2)(k), 49(4), 79(2), 134(5) and 178(1). The General Assembly, in enacting Senate File 395, contemplated the Sunday sale of wine by Class "B" wine permittees if authorization is obtained. The Iowa Beer and Liquor Control Department should implement this provision by rulemaking. The Department may not impose an additional twenty percent of the permit fee for this authorization. (Walding to Hutchins, State Senator, 6-28-85) #85-6-8(L)

JULY 1985

July 1, 1985

STATE OFFICERS AND DEPARTMENTS: Substance Abuse; State and County Reimbursement of Substance Abuse Treatment Costs. Iowa Code §§ 125.44 and 125.45 (1985). In the absence of express statutory language to the contrary, the statutes requiring treatment costs to be reimbursed 75% by the state and 25% by the county of residence must be followed, despite some indications that the legislature intended the state assume 100% responsibility for substance abuse treatment costs in fiscal year 1985-1986. (Weeg to Krahl, State Comptroller, 7-1-85) #85-7-1

Mr. William Krahl, State Comptroller: You have requested an opinion of the Attorney General on several questions relating to the funding of substance abuse programs in the state of Iowa for fiscal year 1985-1986. Your questions arise from the following facts.

Prior to fiscal year 1984-1985, the cost incurred by private substance abuse facilities in treating substance abusers who were unable to pay for such treatment was reimbursable, 75% from the state Department of Substance Abuse (department), and 25% from the county of the patient's residence. See Iowa Code §§ 125.44-.45 (1983). In the event basic levies were insufficient to meet a county's portion of these costs, § 331.424(1)(a)(4) (1983 Supplement) expressly authorized the county to certify a supplemental levy in an amount sufficient to pay the charges for care and treatment of a person at a ch. 125 substance abuse facility.

In 1984, the General Assembly amended this statutory scheme to provide that, notwithstanding the provisions of §§ 125.44 and .45, the department assume the entire cost of unpaid substance abuse treatment incurred at ch. 125 facilities for fiscal year 1984-1985. See 1984 Iowa Acts, ch. 1312, § 1. While ch. 125 was not amended, § 331.424(1)(a)(4), the provision authorizing supplemental levies for certain treatment programs, was amended to strike that portion referring to treatment at a ch. 125 substance abuse facility. See 1984 Iowa Acts, ch. 1312, § 8.

In 1985, the Department of Substance Abuse received an appropriation of \$7,348,958 for program grants, an amount we are told by you and the department constitutes 100% of the substance abuse treatment costs anticipated for fiscal year 1985-1986. See 1985 Iowa Acts, H.F. 571, § 4. Compare 1984 Iowa Acts, ch. 1312, § 1 (\$7,150,958 appropriated to the department for program grants for fiscal year in which department assumed 100% funding obligation). A bill was introduced amending ch. 125 to permanently provide for this change. See H.F. 244.¹ This bill passed the House, passed the Senate with an amendment, but back in the House it failed to pass in the last hours of the 1985 session. In addition, the House voted to reduce the amount of the previously-approved appropriation to the Department of Substance Abuse by two million dollars, an amount which represents approximately 25% of the total amount of the 1985-1986 fiscal year appropriation for substance abuse program grants. See H.F. 781.² That bill did not pass the Senate.

On May 30, 1985, the Department of Substance Abuse received a letter signed by three legislative leaders. That letter asserts that these leaders are committed

¹ H.F. 244, § 12, amended § 125.44 to authorize the director to enter into agreements with ch. 125 facilities to pay 100% of substance abuse treatment costs. Later in that bill, § 22 repealed § 125.45.

² In addition to the two million dollar reduction in the appropriation, H.F. 781, § 2, further provides:

The reduction in this section shall take effect only if House File 244 or other legislation requiring counties to assume less than twenty-five percent of the cost for substance abuse treatment pursuant to section 125.45 filed in the 71st General Assembly is not enacted.

to providing 100% state funding for substance abuse treatment programs, and that it is their intent next legislative session "to give top priority to reinstatement of full state funding and to make it retroactive to July 1, 1985." The letter requests that the 25% funding obligation of the counties not come due until the last quarter of the fiscal year, and states: "We are committed to passage of a bill at that time."

Given these facts, we are asked whether the department may fund treatment programs on a 100% basis for the next nine months, using 75% of the funds allocated to it for this fiscal year. The remaining 25% of the funds could be used to fund the last quarter's obligations if subsequent legislation so provides. Because many counties assumed the state would continue 100% funding this fiscal year, county budgets for this fiscal year do not include funds to meet the county's 25% statutory obligation. Further, as noted above, 1984 Iowa Acts, ch. 1312, § 8, eliminated the counties' authority to certify a supplemental levy for funding treatment expenses at ch. 125 facilities. If the department does not assume 100% funding until the next legislative session, county budgets will be subject to serious strain and the provision of substance abuse treatment programs may be hampered.

You ask a number of questions, all related to whether the department may implement the plan set forth above to pay 100% of treatment costs for the next nine months, thereby relieving the counties of their obligation until the legislature clarifies this situation next legislative session. A review of the relevant statutes is necessary to resolving this question.

Iowa Code § 125.44 (1985) states:

The director may, consistent with the comprehensive substance abuse program, enter into written agreements with a facility as defined in section 125.2 to pay for seventy-five percent of the cost of the care, maintenance and treatment of a substance abuser, except that the state's liability shall be one hundred percent of the total cost of care, maintenance and treatment when a substance abuser is a state patient. All payments for state patients shall be made in accordance with the limitations of this section. Such contracts shall be for a period of no more than one year. The commission shall review and evaluate at least once a year all such agreements and determine whether or not they shall be continued.

The contract may be in such form and contain provisions as agreed upon by the parties. Such contract shall provide that the facility shall admit and treat substance abusers regardless of where they have residence. *If one payment for care, maintenance, and treatment is not made by the patient or those legally liable therefor within thirty days after discharge the payment shall be made by the department directly to the facility. Payments shall be made each month and shall be based upon the facility's average daily per patient charge.* Provisions of this section shall not pertain to patients treated at the mental health institutes.

* * *

(emphasis added). Section 125.45(1) then provides:

Except as provided in section 125.43, *each county shall pay for the remaining twenty-five percent of the cost of the care, maintenance, and treatment under this chapter of residents of that county.* The commission shall establish guidelines for use by the counties in estimating the amount of expense which the county will incur each year. *The facility shall certify to the county of residence once each month twenty-five percent of the unpaid cost of the care, maintenance, and treatment of a substance abuser.* However, the approval of the board of supervisors is required before payment is made by a county for costs incurred which exceed a total of five hundred dollars for one year for treatment provided to any one substance abuser, except that approval is not required for the cost of treatment provided to a substance abuser who is detained pursuant to section 125.91.

(emphasis added). These provisions authorize the department to contract with a facility to pay 75% of the cost of treatment of *each* substance abuser if not

a state patient.³ That payment is to be made to the contracting facility within thirty days of the patient's discharge if that cost is unpaid at that time, and is based on the facility's average daily per patient charge. Correspondingly, the county has a mandatory duty to pay the remaining 25% of that cost for its residents.⁴ See § 4.1(36)(a) ("The word 'shall' imposes a duty."). See also *Taylor v. Department of Transportation*, 260 N.W.2d 521, 522-523 (Iowa 1977) ("If the prescribed duty is essential to the main objective of the statute, the statute ordinarily is mandatory . . ."). The county is to be billed once each month by the facility for 25% of the unpaid cost of treatment for a resident substance abuser.

You also ask whether the department would be authorized to pay 100% of treatment costs for the first nine months of the next fiscal year given: 1) the language in § 125.44 that payments "shall be based on the facility's average daily per patient charge," and 2) that § 125.7(1) and (2) authorizes the commission to act as the sole agency to allocate funds appropriated to the department and to approve funding for substance abuse programs.

First, the § 125.44 language cited above simply appears to provide a method for calculating the costs to be reimbursed by the department for each substance abuser, and has been so construed by the department. This language does not give the department the authority to alter the percentage amount of reimbursement.

Further, the general language of § 125.7 setting forth the commission's duties would not authorize the commission to ignore the more specific provisions of § 125.44 regarding the department's responsibility to reimburse 75% of unpaid treatment costs. See § 4.7; *Ritter v. Dagle*, 261 Iowa 870, 156 N.W.2d 318 (1968).

This statutory scheme is straightforward: unpaid costs are to be apportioned monthly by the facility to the state and the county of residence on a 75%-25% basis. In response to several of your questions, there is no authority whereby the department or the county may alter the percentages due, or whereby the department may impose on contracting facilities a condition that they not bill the counties of residence 25% of the unpaid costs required by statute. Nor is there any authority for the department to contract with a county to provide the county with funds to meet the county's 25% statutory obligation.

The only question remaining is whether §§ 125.44 and .45, which appear clear on their face, have been impliedly repealed as a result of recent legislative action, which may be summarized as: 1) the failure to enact an amendment to §§ 125.44 and .45 providing for 100% state funding this past legislative session; 2) the appropriation of program grants to the department for fiscal year 1985-1986 in an amount sufficient to pay 100% rather than 75% of the estimated cost of substance abuse treatment programs for this period; 3) the intent expressed in the letter of May 30th to the department from several legislative leaders; and 4) the elimination in 1984 of express statutory authority for a county levy for payment of substance abuse treatment.

³ This mandatory duty is subject to the condition that the supervisors approve payment for costs which exceed \$500 per patient per year, with one exception. We have previously opined that this authority does not authorize the supervisors to disapprove properly-expended amounts. See Op.Att'yGen. #83-4-8(L). *But cf. State ex rel. Palmer v. Board of Supervisors of Polk County*, 365 N.W.2d 35 (Iowa 1985).

⁴ You ask whether use of the permissive term "may" in the first sentence of § 125.44 gives the director the authority to pay 100% rather than 75% of the specified costs. While use of the term "may" does grant the director the discretion whether to enter into agreements for payment, if an agreement is entered into, the statute specifically states 75% is to be paid by the department. Had the legislature intended to give the director the discretion to fix the percentage amount of payment, it would not have provided for a specific percentage. See *Consolidated Freightways Corp. v. Nicholas*, 258 Iowa 115, 137 N.W.2d 900, 905 (1965) (agency's attempt to alter the statutory formula by agreement "would be a departure from the meaning expressed by the words of the statute.").

The issue of implied repeal in analogous circumstances was addressed by this office in 1982 Op.Att'yGen. 190 (#81-8-6). In that case, the budget of the Department of Environmental Quality (DEQ) was cut by \$230,000. A number of factors tended to indicate that \$150,000 of that reduction was intended to eliminate the water supply program run by DEQ. (\$150,000 was the state's cost of that program.) However, DEQ's appropriation bill contained only general language and did not make any reference whatsoever to the water supply program, nor were there any amendments to the substantive statutory provisions governing the state's water supply program, though a bill to that effect was introduced but failed to pass.

In that opinion we concluded the appropriations bill did not modify, suspend, or repeal the statutes establishing the water supply program. 1982 Op.Att'yGen. 190. In reaching this conclusion we relied on the following legal principles:

. . . A finding of repeal by implication requires a clear showing of legislative intent.

There is a presumption against repeal of statutes by implication. Such repeals are not favored by the courts and will not be sustained unless legislative intent to repeal is clear in the language used and such a holding is absolutely necessary. *State v. Rauhauser*, 272 N.W.2d 432, 434 (Iowa 1978) (prior statute punishing public intoxication not repealed by enactment of revised Criminal Code). The appropriations bill contains absolutely no language suspending operation of the water supply statutes. Had the legislature clearly deleted all funding for the water supply program in an appropriations bill with specific line items, one could conclude that the legislative intent not to enforce such program was clear in that such bill would be incapable of harmonization with the statutes during the period covered by the appropriations bill. However, nothing on the face of this appropriations bill even suggests a change in substantive law. We are advised that there was much debate in the legislature and legislative subcommittees concerning abolition of the water supply program and that individual legislators were aware that the budget cut was to suspend enforcement of the water supply program. While legislative history is admissible to clarify a statute of doubtful meaning, *Lenertz v. Municipal Court*, 219 N.W.2d 513, 516 (Iowa 1974), legislative history of a silent general appropriations bill cannot, in our opinion, provide the clear expression of legislative intent sufficient to suspend the operation of an existing statute. *United States v. Langston*, 118 U.S. 389, 6 S.Ct. 1185, 30 L.Ed. 165 (1886) (appropriation of salary of \$5,000 for ambassador did not repeal statute setting salary at \$7,500 absent words that expressly or by clear implication modified or repealed prior law).

1982 Op.Att'yGen. at 191. Given this authority, in addition to DEQ's mandatory statutory obligation to establish and operate a water supply program and the fact that it would not be absolutely impossible to continue the program under existing funding, we concluded that the agency must perform its statutory duties. We recognized that this situation created a very serious problem for DEQ, but that legislative action was the only clear solution.

The present dilemma concerning substance abuse treatment funding presents similar facts. The appropriation to the department for fiscal year 1985-1986 is couched in general terms and makes no specific reference to treatment programs, nor does it state that the amount of the appropriation in fact constitutes 100% funding. Instead, it provides:

There is appropriated from the general fund of the state to the Iowa department of substance abuse for the fiscal year beginning July 1, 1985, and ending June 30, 1986, the following amounts, or so much thereof as is necessary, to be used for the purposes designated:

1. For salaries and support of not more than twenty and five-tenths fulltime equivalent positions annually funded from both state and federal funds, maintenance, and miscellaneous purposes \$ 385,129
385,129

2. For program grants \$7,348,958

1985 Iowa Acts, H.F. 571, § 4.

Further, other facts tend to cloud the issue of legislative intent. First, H.F. 244, the bill which sought to amend §§ 125.44-.45 to provide for 100% funding, was considered but not enacted by the legislature. It would be a dangerous expansion of traditional statutory construction principles for this office to construe that fact as evidence of mere oversight on the part of the legislature and find instead that legislative intent was to enact that bill. See *In Interest of Clay*, 246 N.W.2d 263 (Iowa 1976) (courts search for legislative intent by what the legislature said, rather than what it should or might have said).

Also, another bill passed by the House late in the 1985 legislative session sought to reduce the department's appropriation by two million dollars in the event H.F. 244 or other legislation reducing the counties' responsibility for substance abuse treatment funding were not enacted. See H.F. 781. That bill was not enacted by the legislature. However, as set forth above, the amount of that proposed reduction represents approximately 25% of the department's appropriation for treatment purposes, an indication that legislative intent on the issue of 100% state funding is not so unanimous as it appears at first blush. In any event, the Executive Branch cannot act in contravention of existing law based on commitments for future legislative change as there is no way to predict with certainty what action will be taken in the next legislative session in response to this issue. See *Iowa State Education Association v. Public Employment Relations Board*, 269 N.W.2d 446, 448 (Iowa 1978) (" . . . we are usually unwilling to rely upon the interpretation of individual legislators for statutory meaning").

Finally, while in 1984 the legislature did eliminate express authority for a supplemental levy to fund treatment costs at ch. 125 facilities, see 1984 Iowa Acts, ch. 1312, § 8, that act does not leave the counties without any alternative to meet this unexpected cost. Section 331.423 authorizes basic levies for general county services. "General county services" is defined in § 331.421(1) as services "which are primarily intended to benefit all residents of a county . . . but excluding services financed by other statutory funds." This definition arguably encompasses provision of substance abuse treatment for county residents. It is only when basic levies are insufficient that supplemental levies for specified purposes are authorized pursuant to § 331.424. While there is no longer specific authority for the county to certify a supplemental levy for substance abuse treatment costs, there are other alternatives in the event basic levies are insufficient. See e.g. §§ 331.425 (special levy election) and 331.426 (additions to basic levies). County budgets for the upcoming fiscal year have been finalized. However, § 331.435 allows amendments to these budgets to permit increases in any class of proposed expenditures.

For these reasons, we must conclude that, as in our prior opinion, there has not been a clear expression of legislative intent sufficient to suspend the operation of §§ 125.44-.45. Accordingly, it is our opinion that for fiscal year 1985-1986 the unpaid costs of substance abuse treatment provided at ch. 125 facilities must be paid pursuant to §§ 125.44-.45. As in our 1982 opinion, we recognize that this conclusion may create serious difficulties for the counties in the state, but that legislative action is the only way these difficulties may be resolved. We also note that the legislature will be able to retroactively reimburse the counties when it assembles in January if its intent is to provide 100% state funding.

July 2, 1985

CONSERVATION: Sanitary Districts. Iowa Code §358.9 (1985). The Iowa Conservation Commission has a duty to appoint two additional trustees to a sanitary district only if the state owns at least four hundred acres of land that is within district boundaries and contiguous to lakes within district boundaries. (Smith to Hart, Palo Alto County Attorney, 7-2-85) #85-7-2(L)

July 9, 1985

TAXATION: Propriety of Assessing Property Taxes Against Right to Extract or Mine Coal. Iowa Code §84.18 (1985). The right to extract or mine coal (whether it be in the form of a lease agreement or easement) must be assessed and taxed separately to the owner of such a right. (Kuehn to Scieszinski, Monroe County Attorney, 7-9-85) #85-7-3(L)

July 15, 1985

COUNTIES AND COUNTY OFFICERS: Insurance; Voluntary Contributions by Counties To An Insurance Program. Iowa Code §§331.301; 331.424(1); 331.427(2); 507A.4-5(1); 515.8; 515.10; 515.12; 515.69-70; 521.1; 521.13 (1985). It is not a violation of state insurance laws for counties to make voluntary contributions to the Iowa State Association of Counties to support the insurance program offered to counties by that organization. Counties have home rule authority to make such contributions pursuant to their general authority to purchase liability and other insurance. (Haskins and Weeg to Doderer, State Representative, 7-15-85) #85-7-4

The Honorable Minnette Doderer, State Representative: You have requested an opinion of the Attorney General on several questions relating to the insurance program offered to counties throughout the state by the Iowa State Association of Counties ("ISAC"). You state in your opinion request that ISAC has requested voluntary contributions from member counties across the state to support its insurance program. Your specific questions are as follows:

1. Can ISAC legally collect a volunteer assessment of tax dollars for this purpose or more accurately, can counties make a contribution from public funds to bail-out an unregulated or regulated foreign insurance company?
2. Were any insurance laws violated to create this shortage or are the laws inadequate to regulate insurance purchases by public bodies from companies not Iowa based?
3. Are the records of this insurance company available for inspection by Iowa officials?

I.

Your first two questions concern the legality under the insurance and other laws of Iowa of contributions requested by the Iowa State Association of Counties (ISAC) from its member counties to support its insurance program. The facts surrounding this program are as follows.

ISAC offers its members a general liability and property insurance program through an Iowa unauthorized insurance company. ISAC does not itself underwrite any risks in that program. The actual insurance is underwritten by Fremont Indemnity Company ("Fremont"), an insurance company domiciled in California but authorized to do business in Iowa. A portion of the risk undertaken by Fremont for the program is reinsured by Government Insurance Funds ("GIF"), an insurance company domiciled in Bermuda but admitted in neither Iowa nor California. (Fremont remains primarily liable, though, even as to this portion of the risk.)¹ GIF is owned and operated by ISAC. Iowa

¹ As to each loss occurrence, Fremont is responsible for the first \$500,000 of a member's liability, having a right over and against GIF for the first \$100,000 of that liability. Each ISAC member then assumes the risk over \$1,000,000 on a given occurrence. Most ISAC members participating in the program purchase substantial "excess" insurance for this exposure.

insurance law requires that an Iowa domestic or foreign² stock insurer have \$1,000,000 in actual paid-up capital and \$1,000,000 in surplus. See Iowa Code §§ 515.8, 515.10, 515.69 (1985). Bermuda law requires substantially less for its domestic insurers. (Under the Insurance Act, 1978, as amended in 1984, the Bermuda Minister of Insurance requires \$400,000 as a reserve. See *Insurance Company Asks Iowa's 99 Counties for \$10,000 Donations*, Des Moines Reg., Dec. 8, 1984, at 2A.) Fremont is presently liable for existing losses under ISAC's program. However, were GIF to be dissolved for failure to meet the financial requirements of Bermuda, it is likely that Fremont would discontinue underwriting ISAC's program in the future. ISAC is thus requesting a \$10,000 contribution from each of its members in order to meet the requirements imposed by Bermuda. We are informed that ISAC has received sufficient contributions to maintain GIF's legal status.

The transfer and assumption of the risk of loss is the essence of "insurance." See Anderson, *Couch: Cyclopedia of Insurance Law* §1:3, at 6-7 (1984); *Huff v. St. Joseph's Mercy Hospital*, 261 N.W.2d 695, 700 (Iowa 1978). With certain exceptions, the business of insurance in this state must be conducted by an authorized insurance company. See §§ 507A.5(1), 515.12 (1985). Since ISAC's insurance plan is directly underwritten only by Fremont, which is an authorized insurer, this requirement is satisfied. Because GIF merely underwrites Fremont's, and not ISAC's, risks, GIF is not considered to be doing business in Iowa. See Iowa Code § 507A.4 (1985) ("The [Unauthorized Insurers Act] shall not apply to: . . . 2. The unlawful transaction of reinsurance by insurers."). That is, GIF is nothing more than a reinsurer of Fremont's as to ISAC's risks.

This reinsurance arrangement is indeed permitted under Iowa law. Iowa domiciled insurance companies may only reinsure with those foreign insurance companies which are authorized to do business in Iowa (referred to as "admitted" insurers). See Iowa Code §§ 521.1, 521.13 (1985). However, there is no requirement in Iowa law that authorized foreign insurers reinsure only with other authorized companies, either domestic or foreign.³ Thus, it is lawful under Iowa law for Fremont to reinsure with GIF, an insurer not admitted in Iowa.

In sum, then, in response to your second question, neither ISAC's insurance program nor the contributions requested of its members conflict with the insurance laws of Iowa. The latter are simply voluntary assessments made to fund a foreign reinsurer whose operations are lawful under Iowa insurance laws. Whether those laws are presently inadequate is a policy issue which is not for this office to address.

A remaining question exists as to whether it is lawful for the counties to make these contributions requested by ISAC. There are a number of statutory provisions governing the counties' authority with regard to liability insurance. First, Iowa Code ch. 613A (1985), the Municipal Tort Claims Act, expressly includes counties within the definition of municipality. See § 613A.1(1). Section 613A.7 authorizes a county to obtain liability insurance:

The governing body of any municipality may purchase a policy of liability insurance insuring against all or any part of liability which might be incurred by such municipality or its officers, employees and agents under the provisions of section 613A.2 and section 613A.8 and

²In the statutory terminology, a "domestic" insurance company is an insurer organized under the laws of Iowa, a "foreign" insurance company is an insurer organized under the laws of another state, and an "alien" insurer is an insurance company organized under the laws of another country. Compare Iowa Code § 515.69 (1985) with Iowa Code § 515.70 (1985). Thus, Fremont is a "foreign" insurer, while GIF is an "alien" insurer.

³An administrative rule of the insurance department is sufficiently broad to be read to require that foreign insurers reinsure only with Iowa authorized companies. See 510 I.A.C. § 5.31. However, it has not been the insurance department's policy to require that of foreign insurers. See generally *Dameron v. Neumann Bros.*, 339 N.W.2d 160, 162 (Iowa 1983) (administrative agency's construction of its own regulation is of "controlling weight" unless plainly erroneous).

may similarly purchase insurance covering torts specified in section 613A.4. The premium costs of such insurance may be paid out of the general fund or any available funds or may be levied in excess of any tax limitation imposed by statute.

In addition, the supervisors are authorized by §331.427(2) to appropriate money from the general fund for general county services, which include:

1. Services listed in section 331.424, subsection 1 . . .

Section 331.424(1) provides that in the event a county's basic levies are insufficient, the county may certify a supplemental levy for, *inter alia*:

1. Tort liability insurance to cover the liability of the county or its officers as provided in chapter 613A.

In the event the liability of a county officer or employee is not fully indemnified by insurance, §331.324(4) requires the board to pay the amount of the loss beyond the amount of insurance. Finally, §331.404 establishes the county indemnification fund, which is to be used:

. . . to indemnify and pay on behalf of a county officer, . . . deputy, assistant, or employee of the county . . . , all sums that the person is legally obligated to pay because of an error or omission in the performance of official duties, . . .

§331.404(1). This fund "does not relieve an insurer issuing insurance under §613A.7 from paying a loss incurred." §331.404(2). See Op.Att'yGen. #83-11-1(L).

These provisions thus generally authorize counties to obtain liability insurance and provide a method of payment for claims which exceed the amount of insurance. There are no specific statutory guidelines which would either authorize or prohibit the type of voluntary insurance payments being requested by ISAC in the present case.

In the absence of statutory authority on this particular question, we believe the county's home rule power may be invoked. See Iowa Const., art. III, §39A. Section 331.301(1) provides in part:

A county may, except as expressly limited by the Constitution, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the county or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents. . . .

Subsection (3) subsequently provides that:

. . . A county may exercise its general powers subject only to limitations expressly imposed by state law.

Thus, while the counties have been generally authorized by statute to purchase liability insurance, we believe their home rule powers authorize them to exercise their discretion in making specific decisions regarding the purchase of that insurance.

Therefore, because the county is authorized to purchase liability insurance, and because the voluntary payments here under discussion are not expressly prohibited by law, we conclude that it is within the discretion of each county board of supervisors, acting pursuant to their home rule authority, to decide whether these payments are an appropriate expenditure of county funds. As elected public officials, the supervisors are accountable to the electorate of the county for their decision to make these contributions.

While this portion of our opinion has dealt with the question of liability insurance, we noted earlier that the insurance program offered to member counties by ISAC includes liability and property insurance. While there are

no express statutory provisions authorizing counties to purchase property insurance, it is our opinion the counties may purchase such insurance pursuant to its home rule authority. The question of whether the counties may make the payments requested by ISAC in the present case with regard to the property insurance program may be answered as was the question relating to the liability insurance program.

In concluding, we do note that there is a resource available to counties and other municipalities in Iowa to assist them in making decisions regarding the purchase of insurance. Sections 18.160-18.169 establish a risk management division within the Iowa Department of General Services. Section 18.165(2) gives the division the optional authority to develop risk management programs for governmental subdivisions, participation in which is to be on a voluntary basis only. Optional authority to acquire insurance coverage on behalf of governmental subdivisions is provided in § 18.166(4).

Your final question asks whether the records of this insurance company are available for inspection by Iowa officials. As indicated above, GIF is a Bermuda insurer, not an Iowa insurer, nor even a foreign insurer admitted here. Thus, the insurance department does not possess the records on it which that department would possess for even a foreign admitted insurer. Nevertheless, those records which the department does possess on ISAC's program are available for public inspection by virtue of Iowa Code § 22.2 (1985), the Public Records Law.

July 15, 1985

MUNICIPALITIES: Member Contribution Refunds to Pension Accumulation Fund. Iowa Code chapter 411 (1985); Iowa Code §§ 411.6, 411.6(1)(a), 411.6(1)(b), 411.6(2), 411.8(1), 411.8(1)(f), 411.11, 411.21(7) (1985); Iowa Code §§ 411.1(17), 411.6(2), 411.6(10), 411.8(1), 411.8(3) (1977). A member of an Iowa Code chapter 411 retirement system who terminates service except by disability or death prior to establishing eligibility for a service retirement benefit is not entitled to reimbursement of the amount of his or her accumulated contributions to the retirement system. Those members who contributed to the annuity savings fund prior to July 1, 1979, and who have served at least five years, may receive their accumulated contributions to that now abolished fund in accordance with the provisions of Iowa Code § 411.21(7) (1985). (DiDonato to Peterson, Muscatine County Attorney, 7-15-85) #85-7-5(L)

July 18, 1985

LOTTERY: Beer and Liquor Licensees: Sale of Lottery Tickets on Premises of Class "C" Beer Permittees; Sale of Lottery Tickets on Premises of Liquor Licensees and Class "B" Beer Permittees. Iowa Code §§ 99B.1(1)-(3), (12), and (13), 99B.6, 99B.12(2), 99B.15, and 123.49(2)(a) (1985), as amended by 1985 Iowa Acts, S.F. 395, § 39; §§ 99E.9(3) and 99E.16, as enacted by 1985 Iowa Acts, H.F. 225, §§ 109(3) and 116. Holders of Class "C" beer permits may be licensed to sell lottery tickets, and lottery tickets may be sold on their premises. Holders of Class "A," Class "B," Class "C," or Class "D" liquor control licenses, or Class "B" beer permits may not be licensed to sell lottery tickets, and lottery tickets may not be sold on their premises. (Willits to Stanek, Lottery Commissioner, 7-18-85) #85-7-6

Mr. Edward J. Stanek, Iowa Lottery Commissioner: You have requested an opinion of the Attorney General on the following questions:

- (1) May the Lottery¹ license to sell lottery tickets establishments which are liquor control licensees or Class "B" beer permittees?
- (2) May lottery tickets legally be sold on the premises of liquor control licensees or Class "B" beer permittees?

Our answer to both of these questions is "No" for the following reasons.

¹As used in this opinion, the capitalized word "Lottery" refers to the state lottery created and operated under H.F. 225, enacted by the 1985 session of the 71st General Assembly. The result of this opinion is limited to that Lottery.

IOWA STATUTES

Pertinent statutes include Iowa Code § 123.49(2)(a) (1985) which, as amended this year by § 39 of Senate File 395, provides:

2. A person or club holding a liquor control license or retail wine or beer permit under this chapter, and the person's or club's agents or employees, shall not do any of the following:

a. Knowingly permit any gambling, except in accordance with chapter 99B, or knowingly permit solicitation for immoral purposes, or immoral or disorderly conduct on the premises covered by the license or permit.

As can be clearly seen from this provision of the Beer and Liquor Act, no holder of a liquor control license or retail wine or beer permit may allow any gambling on its premises, unless that gambling is in accordance with Iowa Code ch. 99B (1985).

In turn, Iowa Code § 99B.6(1) (1985) flatly prohibits gambling other than social games on licensed liquor premises or premises holding a permit for on-premises beer consumption. While this section is lengthy, it is appropriate to set it forth in full, to illustrate the tight, explicit and specific regulation and control the legislature has placed on gambling in bars:

99B.6 Games where liquor or beer is sold.

1. *Gambling is unlawful on premises for which a class "A," class "B," class "C" or class "D" liquor control license, or class "B" beer permit has been issued pursuant to chapter 123 unless all of the following are complied with:*

a. The holder of the liquor control license or beer permit has submitted an application for a license and an application fee of one hundred dollars, and has been issued a license, and prominently displays the license on the premises.

b. *The holder of the liquor control license or beer permit or any agent or employee of the license or permit holder does not participate in, sponsor, conduct or promote, or act as cashier or banker for any gambling activities, except as a participant while playing on the same basis as every other participant.*

c. *Gambling other than social games is not engaged in on the premises covered by the license or permit.*

d. *Concealed numbers or conversion charts are not used to play any game, and a game is not adapted with any control device to permit manipulation of the game by the operator in order to prevent a player from winning or to predetermine who the winner will be, and the object of the game is attainable and possible to perform under the rules stated from the playing position of the player.*

e. The game must be conducted in a fair and honest manner.

f. *No person receives or has any fixed or contingent right to receive, directly or indirectly, any amount wagered or bet or any portion of amounts wagered or bet, except an amount which the person wins as a participant while playing on the same basis as every other participant.*

g. *No cover charge, participation charge or other charge is imposed upon a person for the privilege of participating in or observing gambling, and no rebate, discount, credit, or other method is used to discriminate between the charge for the sale of goods or services to participants in gambling and the charge for the sale of goods or services to nonparticipants. Satisfaction of an obligation into which a member of an organization enters to pay at regular periodic intervals a sum fixed by that organization for the maintenance of that organization is not a charge which is prohibited by this paragraph.*

h. *No participant wins or loses more than a total of fifty dollars or more consideration equivalent thereto in one or more games or activities permitted by this section at any time during any period of twenty-four consecutive hours*

or over that entire period. For the purpose of this paragraph a person wins the total amount at stake in any game, wager or bet, regardless of any amount that person may have contributed to the amount at stake.

i. No participant is participating as an agent of another person.

j. A representative of the department of revenue or a law enforcement agency is immediately admitted, upon request, to the premises with or without advance notice.

k. No person under the age of eighteen years may participate in the gambling except pursuant to sections 99B.3, 99B.4, 99B.5 and 99B.7. Any licensee knowingly allowing a person under the age of eighteen to participate in the gambling prohibited by this paragraph or any person knowingly participating in such gambling with a person under the age of eighteen, shall be guilty of a simple misdemeanor.² (emphasis added)

Finally, Iowa Code § 99B.15 (1985) contains a broad statement of intent that gambling be authorized in Iowa only to the extent allowed by chapter 99B:

99B.15 Applicability of chapter.

It is the intent and purpose of this chapter to authorize gambling in this state only to the extent specifically permitted by a section of this chapter. Except as otherwise provided in this chapter, the knowing failure of any person to comply with the limitations imposed by this chapter constitutes unlawful gambling, a serious misdemeanor.

Notably, a close examination of ch. 99E,³ the lottery statute, reveals that it contains nothing amending or overriding these statutes. It is simply silent on the question of whether lottery tickets should be sold in bars. The provisions in 99E concerning licenses to sell lottery tickets are as follows. Section 99E.9(3) gives rulemaking authority to the lottery board:

3. Except as provided in subsection 3, paragraph "b," the board shall make rules in accordance with chapter 17A for implementing and enforcing this chapter. The rules shall include but are not limited to the following subject matters:

a. The fees charged for a license to sell lottery tickets or shares.

* * *

i. The locations at which tickets or shares may be sold.

* * *

k. The issuing of licenses to sell tickets or shares. In addition to any other rules made regarding the qualifications of an applicant for a license, a person shall not be issued a license unless the person meets the criteria established in section 99E.16, subsection 7.

1. The compensation to be paid licensees including but not limited to provision for variable compensation based on sales volume or incentive considerations.

As referenced above, § 99E.16 sets forth numerous requirements for licensees. Due to its length it will not be quoted in its entirety here. It deals with locations which can sell lottery tickets, disqualification for eligibility, bonding requirements, and revocation of licenses. Nowhere in its voluminous detail is there any direct answer to the question of whether bars can sell lottery tickets, nor is there anything to contravene the provisions of § 99B.6 set forth above.

² As used in this and other sections, any class A, B, C, and D "liquor control license" includes both liquor and wine. See Iowa Code § 123.30 (1985) as amended by § 22 of S.F. 395 enacted in 1985. Also, for ease of reference throughout the opinion, the premises referred to in 99B.6(1) will be referred to collectively as "bars," since that is what is primarily at issue in the opinion. These licenses do include any premise licensed for beer or liquor by the drink sales for on-premises consumption.

³ H.F. 225 creating the lottery is codified as ch. 99E.

LOTTERY IS GAMBLING

At the outset, it should be made clear that the lottery constitutes gambling within the meaning of these and any other Iowa statutes. It has been suggested that these problems of statutory interpretation be avoided by a determination that the purchase and sale of lottery tickets is not gambling. There is no credible authority that the operation of a lottery is not gambling.

Prior to 1972, article III, § 28, of the Iowa Constitution provided:

No lottery shall be authorized by this State; nor shall the sale of lottery tickets be allowed.

This constitutional lottery prohibition was repealed by a vote of the people in 1972. This repeal allowed the General Assembly to enact ch. 99B, legalizing certain limited forms of gambling, including bingo, and, now, ch. 99E, the lottery.

Cases decided under the former constitutional provision held that a lottery is gambling. Even though the constitution has been amended, the cases are compelling precedent on this question. In *State v. Mabrey*, 245 Iowa 428, 60 N.W.2d 889, 893 (1954), the Iowa Supreme Court specifically held "A lottery is a species of gambling." This view is supported by earlier Iowa cases.⁴ See e.g. *St. Peter v. Pioneer Theatre Corp.*, 227 Iowa 1391, 291 N.W. 164 (1940); *State v. Hundling*, 220 Iowa 1369, 264 N.W. 608, 609 (1936); *Brenard Mfg. Co. v. Jessup & Barrett Co.*, 186 Iowa 872, 173 N.W. 101 (1919). The decisions in other states and the weight of authority are overwhelming that a lottery is gambling. In addition to Iowa, at least twelve other states have held that a lottery is gambling. *American Legion, Clopper Michael Post No. 10, Inc. v. State*, 294 Md.1, 447 A.2d 842 (1982); *Tinder v. Music Operating, Inc.*, 237 Ind. 33, 142 N.E.2d 610 (1957); *Westerhaus Co. v. City of Cincinnati, Ohio*, 165 Ohio St. 327, 135 N.E.2d 318, 327 (1956); *State v. Johnson*, 140 Conn. 560, 102 A.2d 359 (1954); *Rohan v. Detroit Racing Ass'n.*, 314 Mich. 326, 22 N.W.2d 433 (1946); *State v. Hudson*, 375 E.2d 553, 558 (Ct. App. W.Va. 1946); *Commonwealth v. Malco-Memphis Theatres*, 293 Ky. 531, 169 S.W.2d 596 (1943); *Darlington Theatres v. Laker*, 190 S.C. 282, 2 S.E.2d 782, 786 (1939); *State v. Barbee*, 187 La. 529, 175 So. 50, 53 (1937); *City of Roswell v. Jones*, 41 N.W. 258, 67 P.2d 286 (1937); *Lee v. City of Miami*, 121 Fla. 93, 163 So. 486 (1935); *State v. Ak-Sar-Ben Exposition Co.*, 118 Neb. 851, 226 N.W. 705, 708 (1929). 54 C.J.S. *Lotteries* § 1, p. 844. There is no major precedent to the effect that a lottery is not gambling.

The question thus remains as to whether lottery tickets may be sold on the premises of Class "C" beer permittees and/or bars.

LOTTERY TICKETS MAY BE SOLD ON CLASS "C" BEER PERMIT PREMISES

Section 123.49(2)(a), set forth above, raises another question which, while not specifically presented, is referred to in your opinion request. That question is:

May the holder of a Class "C" beer permit be licensed to sell lottery tickets on its premises?

It should be noted that this question is the one which first arose and that we addressed in our June 27, 1985, memorandum to you. This question presents a more serious problem for the lottery than the question of sales in bars.

The question arises because § 123.49(2)(a) prohibits the holder of a "retail beer permit" from permitting any gambling on its premises, except in accordance with ch. 99B. Section 123.3(34) defines "Retail beer permit" as a class "B" or class "C" beer permit. In turn, §§ 123.129 and 123.132 provide that the holder

⁴H.F. 225 itself also supports the view that a lottery is gambling. Section 99E.10(1)(a) requires that one-half of one percent of the gross revenues of the lottery shall be deposited in a gamblers assistance fund. This fund is to be used by the Department of Human Services to assist addictive gamblers.

of a class "C" beer permit shall be allowed to sell beer for consumption off the premises. Most commonly, class "C" beer permits are held by grocery stores, convenience stores, gas stations selling food, and some bars. Obviously, if lottery tickets could not be sold in these locations, the outlets for the sale of lottery tickets would be severely limited.

Section 99B.6, set forth above, does not include class "C" beer permit premises in its list of premises on which gambling is expressly prohibited. It lists all classes of liquor licenses and class "B" permits (on-premises beer consumption), but not class "C" beer permits. The express mention of one thing implies the exclusion of others. *Lenertz v. Municipal Court of City of Davenport*, 219 N.W.2d 513 (Iowa 1974). Thus, the § 99B.6 limitations do not expressly prohibit gambling on class "C" beer permit premises.

While § 99B.6 does not preclude the sale of lottery tickets at class "C" beer permit premises, § 123.49(2)(a) does, unless the gambling is in accordance with ch. 99B. The remaining problem in ch. 99B is § 99B.15 which states that gambling is authorized in Iowa only to the extent specifically permitted by a section of ch. 99B. Thus, strictly construed, §§ 123.49(2)(a) and 99B.15 prohibit the sale of lottery tickets by any person selling beer.

Although ch. 99E does not amend ch. 99B, we believe § 99B.15 has been amended by implication to authorize the state lottery.

Chapter 99E, creating the state lottery, and § 99B.15 are in direct conflict, and it is apparent that the legislature did not intend that participation in the state lottery would be unlawful under § 99B.15. After extensive debate and the passage of a comprehensive lottery bill, it is clear that the legislature intended to create an exception to the § 99B.15 general prohibition against gambling.

The general rule is that amendments or repeals by implication are not favored. *Dan Dugan Transport Co. v. Worth County*, 243 N.W.2d 655 (Iowa 1976). Amendments by implication will not be upheld unless the intent to amend clearly and unmistakably appears from the language used, and such a holding is absolutely necessary. *Peters v. Iowa Employment Security Comm'n.*, 235 N.W.2d 306 (Iowa 1975); *Wendelin v. Russell*, 259 Iowa 1152, 147 N.W.2d 188 (1966).

Although the burden to establish amendment by implication is great, we believe it is met in this situation. If the § 99B.15 prohibition were to be used to prohibit the sale of lottery tickets, no effect would be given to the major legislation creating the lottery. There would be no lottery. Therefore, it is our opinion that H.F. 225 implicitly amended § 99B.15 so as to permit gambling which is permitted by ch. 99E, the lottery.

Under strict construction, the purchase of a state lottery ticket would be a serious misdemeanor. That is obviously contrary to legislative intent.⁵

Since § 99B.15 has been amended by implication, the sale of lottery tickets by class "C" beer permittees is not expressly prohibited. Thus, the requirements of § 123.49(2)(a) are met, since the sale of lottery tickets by class "C" beer permittees is "in accordance with ch. 99B," as amended by implication. Lottery tickets may, in the discretion of the lottery commissioner and board, be sold on premises holding class "C" beer permits.

This legal position would be enhanced if both the Lottery Board and the Beer and Liquor Control Department engage in rulemaking to authorize class "C" beer permittees to sell lottery tickets. Courts give deference to administrative interpretations of statutes. *Burlington Community School District v. Public Employment Relations Board*, 268 N.W.2d 517 (Iowa 1978). Rule-making would strengthen considerably the Lottery's position in the event of a challenge to the sale of lottery tickets on class "C" beer permit premises. Also, rulemaking by both agencies likely would protect licensees from criminal action or beer permit revocation if a court were to determine ultimately that § 123.49(2)(a) prohibits lottery sales by class "C" beer permittees. We encourage both departments to adopt appropriate administrative rules on this subject as soon as possible. We also encourage the legislature to reconcile clearly all three chapters (Gambling, ch. 99B; Beer and Liquor, ch. 123; and Lottery, ch. 99E) at its next session.

We note that Lottery officials have informed us that in other states a very high proportion of lottery tickets are sold in establishments which also sell carry-out beer. The Lottery has informed us that these outlets must be licensed to sell lottery tickets if the Lottery is to meet anticipated revenues. The result reached in this portion of the opinion resolves a major issue in favor of the lottery's success.

**LOTTERY TICKETS MAY NOT BE SOLD
ON PREMISES LICENSED FOR LIQUOR
SALES OR ON-PREMISES BEER CONSUMPTION**

Statutory Provisions

At the outset of this discussion, it should be emphasized that the issue here is that existing statutes, unamended by the lottery bill, prohibit the sale of lottery tickets in bars.

Section 99B.6 is set forth in its entirety at the beginning of this opinion. Significant portions of that section are underlined, and highlight how the sale of lottery tickets in bars would constitute direct violation of this statute.

Other sections which aid in interpretation of these provisions include § 99B.1(12):

12. "Social games" means and includes only the activities permitted by section 99B.12, subsection 2.

In turn, § 99B.12(2) defines the following as social games:

2. Games which are permitted by this section are limited to the following:

a. Card and parlor games, including but not limited to poker, pinochle, pitch, gin rummy, bridge, euchre, hearts, cribbage, dominoes, checkers, chess, backgammon and darts. However, it shall be unlawful gambling for any person to engage in bookmaking, or to play any punchboard, pushcard, pull-tab or slot machine, or to play craps, chuck-a-luck, roulette, klondike, blackjack, chemin de fer, baccarat, faro, equality, three-card monte or any other game, except poker, which is customarily played in gambling casinos and in which the house customarily provides a banker, dealer or croupier to operate the game, or a specially designed table upon which to play the same.

b. Games of skill and games of chance, except those prohibited by paragraph "a" of this subsection.

c. Wagers or bets between two or more individuals who are physically in the presence of each other with respect to a contest specified in section 99B.11, subsection 2, except as provided in subsection 1, paragraph "g," or with respect to any other event or outcome which does not depend upon gambling or the use of a gambling device unlawful in this state.

Pertinent to this section are the following definitions, §§ 99B.1(1)-(3):

1. "Game of skill" means a game whereby the result is determined by the player directing or throwing objects to designated areas or targets, or by maneuvering water or an object into a designated area, or by maneuvering a dragline device to pick up particular items, or by shooting a gun or rifle.

2. "Game of chance" means a game whereby the result is determined by chance and the player in order to win aligns objects or balls in a prescribed pattern or order or makes certain color patterns appear and specifically includes but is not limited to the game defined as bingo. Game of chance does not include a slot machine.

3. "Raffle" means a *lottery* in which each participant buys a ticket for a chance at a prize with the winner determined by a random method and the winner is not required to be present to win. "Raffle" does not include a slot machine. (emphasis added)

Note that the definition of "social games" nowhere mentions lotteries and, in fact, while explicitly including games of skill and chance, does not include raffles, 99B's term for a lottery.

One final definition is pertinent. Section 99B.1(13) provides:

13. A person "conducts" a specified activity if that person owns, promotes, sponsors, or operates a game or activity. A natural person does not "conduct" a game or activity if the person is merely a participant in a game or activity which complies with section 99B.12.

Thus, § 99B.6 expressly provides that gambling other than limited social games is illegal in bars. The Lottery is not defined as a "social game." Lottery ticket sales are therefore prohibited.

It should be emphasized that there were no amendments to these very specific limitations on gambling in bars in H.F. 225 or any other legislation in the 1985 session.

Legislative History

We are not unmindful of the 1985 legislative history concerning the sale of lottery tickets in bars. When the House of Representatives debated H.F. 225, on Wednesday, February 13, 1985, Representative Osterberg and seven co-sponsors offered an amendment, H-3095, to § 109(3)(i) of the bill. The amendment provided:

Tickets or shares shall not be sold in establishments that serve alcoholic beverages as defined in section 321.1, subsection 85, for on-premise consumption.

This amendment was defeated on a close vote, 45-50. 1985 H. Journal, p. 362. Thus, H.F. 225 went from the House to the Senate without any express prohibition in the *lottery bill* itself concerning the sale of lottery tickets in bars.

In the Senate, the Journal shows no record of an amendment to H.F. 225 on this subject being considered. However, on an earlier date on another lottery bill, the Senate did address this question. The Senate debated and passed S.F. 57, creating a state lottery. Section 5(3)(h) of that bill provided, *inter alia*, that "Tickets shall not be sold in establishments that serve alcoholic beverages." Division B of the State Government Committee amendment to S.F., S-3067, struck this language. That amendment was adopted by a comfortable margin, 29-15. S. Journal, Feb. 1, 1985, p. 237.

For reasons unrelated to this opinion, the House of Representatives chose to ignore S.F. 57 and start its own lottery bill, H.F. 225, which was ultimately enacted. Thus, the Senate history is of questionable relevance.

Applicable Rules of Construction

When interpreting statutes, it is not for a court, or this office, to rule according to what the legislature might have said, but to rule as to what the legislature *has* said and done. *State ex rel Fenton v. Downing*, 261 Iowa 965, 155 N.W.2d 517 (1968). See Iowa R. App. P. 14(f)(13). Statutes should be accorded a logical, sensible construction which gives harmonious meaning and accomplishes legislative purposes. *McSpadden v. Big Ben Coal Co.*, 280 N.W.2d 181 (Iowa 1980). In construing a statute, all provisions of the Act of which it is a part and other pertinent statutes must be considered. *Maguire v. Fulton*, 179 N.W.2d 508 (Iowa 1970).

When one statute deals with a subject in general terms and another in a more detailed way, the two shall be harmonized where possible. *Northern Natural Gas Co. v. Forst*, 205 N.W.2d 692 (Iowa 1973).

Finally, and importantly, if the language of statutes is plain and the meaning clear, unambiguous and consistent with related statutory provisions, no duty of interpretation arises and there is no occasion to probe for legislative intent. *State v. Baker*, 293 N.W.2d 568 (Iowa 1980); *In re Johnson's Estate*, 213 N.W.2d 536 (Iowa 1973). Legislative history cannot be used to defeat the plain words

of statutes. *LeMars Mutual Insurance Co. of Iowa v. Bonnecroy*, 304 N.W.2d 422 (Iowa 1981).

Analysis

Earlier, this opinion discussed amendment by implication in the situation where two statutes, ch. 99E and § 99B.15, were in direct conflict. One created the lottery, the other prohibits gambling except under ch. 99B. An amendment to § 99B.15 was implied, since literal effect could not be given to both statutes.

That is not the case here. Two major statutes, ch. 99E, creating the lottery, and § 99B.6, regulation of gambling in bars, can be harmonized. They can be read together and effect can be given to both. On the one hand, the state lottery can be instituted successfully. On the other, gambling in bars, including the sale of lottery tickets, is prohibited except for social gambling. Both statutes are specific as to their respective subject matter. In short, the two laws are not incompatible.

The § 99B.6 prohibitions on gambling are directly applicable to the lottery. A point by point comparison is instructive.

1. Section 99B.6(1)(b) prohibits a bar owner from conducting or promoting any gambling activities, except as an equal participant. The Lottery fully expects its licensees to promote and encourage the sale of lottery tickets, to insure the success of the lottery. Thus, lottery ticket sales by bars would be inconsistent with § 99B.6(1)(b).

2. Section 99B.6(1)(c) prohibits gambling other than social games in bars. Sections 99B.12(2) and 99B.1(1)-(3) in turn define social games. Raffles and lottery ticket sales are not included in the definition of social games and are clearly distinguished and excluded. Thus, lottery ticket sales by bars would be inconsistent with § 99B.6(1)(c).

3. Section 99B.6(1)(d) prohibits the use of concealed numbers to play any game in bars. A lottery includes rubbing material off concealed numbers on lottery tickets. Thus, lottery ticket sales by bars would be inconsistent with § 99B.6(1)(d).

4. Section 99B.6(1)(f) prohibits the bar owner, or any other person in the bar, from receiving any portion of amounts bet. Lottery licensees will receive a percentage of their lottery ticket sales to encourage them to promote the sales of more tickets and compensate them for their costs. Receipt of this fixed percentage amounts to receipt of a portion of the amount bet. Thus, lottery ticket sales by bars would be inconsistent with § 99B.6(1)(f).

5. Section 99B.6(1)(g) prohibits any charge for the privilege of participating in gambling. A lottery, by definition, requires a charge to buy a ticket and participate in the gambling. Thus, lottery ticket sales by bars would be inconsistent with § 99B.6(1)(g).

6. Section 99B.6(1)(h) prohibits any participant from winning or losing more than \$50 in any 24 hour period. Obviously, there will be lottery winnings in excess of \$50, some derived from tickets purchased in bars. Thus, lottery ticket sales by bars would be inconsistent with § 99B.6(1)(h).

In sum, the sale of lottery tickets in bars is inconsistent with all of the provisions above. While any one of them would prohibit such sales, collectively the provisions are all-encompassing. There can be no doubt that § 99B.6 prohibits the sale of lottery tickets in bars.

Arguments have been made that the legislative history set out above establishes that the legislature intended to permit the sale of state lottery tickets in bars. Those arguments are unpersuasive. Even if it were apparent, in light of those votes, that the legislature intended to authorize the sale of lottery tickets in bars, that history cannot be considered in the face of the clear, plain and unambiguous words of § 99B.6. While legislative history may be used to resolve ambiguities, it cannot be used where there is no ambiguity. *LeMars Mutual Insurance Co. of Ia. v. Bonnecroy, supra*.

Thoughtful analysis shows the wisdom of this rule. Trying to determine

legislative intent involves attempts to divine the thinking of 150 individuals. For example, did all 50 of the Representatives who voted against the prohibition on the sale of lottery tickets in bars do so because they wanted tickets sold there? Or did some of them do so because they thought it was already prohibited by § 99B.6, and, thus, redundant? This is one reason courts are unwilling to rely upon the interpretation of individual legislators for statutory meaning. *Iowa State Education Ass'n v. Public Employment Relations Board*, 269 N.W.2d 446, 448 (Iowa 1978). Courts avoid such speculation by construing what the legislature actually wrote, rather than guessing what it intended, or what it should or might have said. *In Interest of Clay*, 246 N.W.2d 263 (Iowa 1976).

As discussed above, amendments by implication are disfavored, even where a new statute has been enacted. In this case, no statute amending the limitations on gambling in bars has been enacted. The presumption against amendment by implication is therefore even greater. If defeated amendments to enacted bills were to be held as amending existing statutes, great uncertainty in the laws of this state would result. Statutes cannot be amended by *not* passing amendments. They can only be amended by passage of amendments in identical form in both houses, with gubernatorial approval.

In this case, the legislature created a Lottery. Earlier legislatures prohibited most gambling in bars. Both statutes are laws of the State of Iowa, and effect can and must be given to both.

Lottery officials inform this office that only a small percentage of lottery ticket sales are in bars in other states. Further, if Iowa has no such sales, it cannot be assumed that all those sales are lost. Presumably, many of those lottery ticket purchases will be made elsewhere. Damage to the lottery through lost revenues will be minimal.⁶ There is far more damage to the fabric of this state if our laws are ignored. Laws should not be ignored for the convenience of the moment. The proper remedy is legislative action. (This office would support legislation to allow lottery ticket sales in bars. The legislature can and should consider this issue when it next meets.)

Answers to Questions

You requested our opinion on two questions.

The discussion above concerning § 99B.6 disposes of your first question. Establishments which are liquor control licensees or Class B beer permittees may not be granted licenses to sell lottery tickets. To do so would place the permittees in violation of a number of the prohibitions of § 99B.6.

As to your second question, the language of § 99B.6 prohibits gambling, except as authorized by that section, on bar premises by anyone, not just the licensee. Thus, lottery tickets may *not* be sold legally on the premises of liquor control licensees or Class B beer permittees.

CONCLUSION

Class "C" beer permittees may be licensed to sell lottery tickets, and tickets may be sold on their premises since § 99B.15 limiting gambling in Iowa has been amended by implication. Liquor control licensees or Class "B" beer permittees may not be licensed to sell lottery tickets, and tickets may not be sold on their premises, since § 99B.6, which prohibits the sale of lottery tickets in bars, has not been amended.

⁶ Estimates of lottery revenue losses in the millions of dollars are sheer nonsense. These estimates ignore two important considerations: 1) lottery tickets will be readily available at thousands of outlets across the state. A person in a bar who wants to buy a lottery ticket can easily purchase a ticket elsewhere. 2) the legislature can quickly change the law in January or at a special session. Lottery tickets would be unavailable in bars for only a few months.

July 24, 1985

MUNICIPALITIES: Public Utility Franchise Fees and Elections. Iowa Code §§ 364.2(4), 364.2(4)(f), 364.3(4), 476.1, 4.4(2), 4.4(3) (1985), and 368.2 (1973). A city may charge a franchise fee to public utilities as a condition of granting a franchise. Alternative proposals concerning the length of time that a franchise is to be granted may be submitted on the ballot at a franchise election. (DiDonato to Osterberg, State Representative, 7-24-85) #85-7-7(L)

July 25, 1985

SECRETARY OF STATE: Credit Union Administrator. Iowa Code §§ 496A.103, 496A.142 (1985). Credit unions organized outside Iowa must comply with Iowa Code chapter 533 (1985) and rules of Credit Union administrator before doing business in Iowa; they do not need a certificate of authority pursuant to § 496A.103 *et seq.* (Galenbeck to Odell, Secretary of State, 7-25-85) #85-7-8(L)

August 1, 1985

TAXATION: Property Taxation; Race Track Property Owned by Private Nonprofit Corporation. Iowa Code §§ 99D.2, 427.1, 427.13 (1985). Race track property, as defined in § 99D.2, is not exempt from property taxation merely because it is owned by a private nonprofit corporation. (Mason to Gronstal, State Senator, 8-1-85) #85-7-9(L)

AUGUST 1985

August 2, 1985

MOTOR VEHICLES: Personalized Registration Plates. Iowa Code § 321.34(5) (1985). Department of Transportation has statutory authority to require \$25 application fee for personalized license plates replaced during registration year in which new metal plates are issued. (Ewald to Angrick, Citizens' Aide/Ombudsman 8-2-85) #85-8-1(L)

August 5, 1985

CIVIL RIGHTS: Age Discrimination: Police Officer and Fire Fighter Retirement Benefit Allowance. 29 U.S.C. § 621; Iowa Code chapters 411, 601A (1985); §§ 411.1(11), 411.1(13), 411.6(1)(a), 411.6(2). Chapter 411 does not discriminate on the basis of age by failing to necessarily provide increased benefits for additional longevity of service beyond twenty-two years. (Baustian to McIntee, State Representative, 8-5-85) #85-8-2(L)

August 6, 1985

COMPTROLLER: Federal Regulation of Social Security Number Information. PL 93-579; 5 U.S.C. § 553(c)(2)(C)(i-ii). State may require disclosure of employee's social security number; number may subsequently be used in conjunction with benefit programs. (Galenbeck to Krahl, State Comptroller, 8-6-85) #85-8-3(L)

August 6, 1985

CRIMINAL LAW: Obscene Materials. Iowa Code §§ 728.1(1), 728.1(2), 728.3, 728.4 (1985). An opinion will not be rendered on an issue which is presently the subject of litigation. In order for a seller of magazines containing advertisements for hard core pornography to be convicted of aiding and abetting the sale of hard core pornography as proscribed in § 728.4, proof that the seller had prior knowledge that hard core pornography was being offered would be required. (Dorff to Van Maanen, State Representative, 8-6-85) #85-8-4(L)

August 6, 1985

MUNICIPALITIES: Amendment to Veteran's Preference Under Civil Service. Iowa Code §§ 4.5, 19A.9(21), 400.10, 400.11 (1985). Senate File 266, which amends the veterans preference provisions of the civil service, applies only to certified eligible lists certified after the amendment's effective date of July 1, 1985. The additional points to be added to a veteran's grade or score are added to the grade or score of veterans qualifying for passage of the examination for appointment to a position. (DiDonato to O'Kane, State Representative, 8-6-85) #85-8-5(L)

August 6, 1985

TAXATION: Bankrupt Railroads. Iowa Code § 444.3 (1985). Property taxes collected upon valuations excluded from use in computing the levy under section 444.3 shall be distributed to the various taxing districts if collected within 60 days of delinquency. Property of railroads that are not bankrupt or in bankruptcy proceedings at the time of levy shall be included in computing the levy. (Hunacek to Johnson, Auditor of State, 8-6-85) #85-8-6(L)

August 8, 1985

COUNTIES AND COUNTY OFFICERS: Auditors and Boards of Supervisors; Incorporation of Rural Water Districts. Iowa Code ch. 357A (1985). Proposed rural water district area may include existing benefitted districts, and rural service areas of other water systems not organized under ch. 357A; a petition for organization of a district would not be void under § 357A.2 where it described the area as "all unincorporated land in the county" rather than by sections. (Smith to Hughes, Ringgold County Attorney, 8-8-85) #85-8-7(L)

August 12, 1985

TOWNSHIPS AND TOWNSHIP TRUSTEES: Fire Protection and

Ambulance Services. Iowa Code § 359.42 (1985). The township trustees have implied authority to define what fire protection and ambulance services will be provided in their township. The trustees have no authority to provide supplemental ambulance services when the county has already provided for ambulance services. (Weeg to Goeke, Bremer County Attorney, 8-12-85) #85-8-8(L)

August 13, 1985

COUNTIES AND COUNTY OFFICERS: County Attorney; Conflict of Interest With Civil Litigation. Iowa Code § 331.755(2) (1985); Iowa Code of Professional Responsibility, Canon 7 and Canon 9. A county attorney has a conflict of interest in representing an individual in civil litigation in his or her county which has resulted in criminal charges being filed for violation of a state law, including traffic offenses; this is true even if a special prosecutor is appointed to represent the State of Iowa in the criminal case. (Blink to Belson, Ida County Attorney, 8-13-85) #85-8-9(L)

August 26, 1985

LAW ENFORCEMENT: Public Safety, Department of. Iowa Code §§ 692.17-692.18 (1985). The provisions of Iowa Code § 692.17 (1985) are applicable only to the Iowa Department of Public Safety, and the provisions of Iowa Code § 692.18 (1985) are applicable only to information received from that department and not to information generated by local law enforcement agencies. (Hayward to Metcalf, 8-26-85) #85-8-10(L)

August 27, 1985

SUBSTANCE ABUSE: Mental Illness; Court Costs. Iowa Code chapter 125, §§ 230.10, 625.1 (1985). Costs incurred in unsuccessful commitment proceedings under chapter 230 may not be taxed to the individual or their family. Chapter 125 does not provide for taxing applicants in unsuccessful proceedings and absent a court order assessing costs against an applicant as a "losing party," applicants should not be assessed costs pursuant to § 625.1. (McGuire to Norland, Worth County Attorney, 8-27-85) #85-8-11(L)

SEPTEMBER 1985

September 4, 1985

COUNTIES AND COUNTY OFFICERS: Law Enforcement; County Sheriff; Responsibility for Transporting Prisoners. Iowa Code chs. 804 and 820 (1985); §§ 331.651-.660; 331.751-.759; 804.28. A person arrested on a state charge in a county other than the one in which the crime occurred should generally be returned to the original county by the county sheriff's office. A person arrested elsewhere in the state on a municipal charge should generally be returned by the city in which the violation occurred. The extradition provisions of ch. 820 apply when a person is arrested outside of the state on either a state or municipal charge. The county sheriff has a mandatory statutory duty to accept responsibility for housing persons arrested by the department of public safety, even if that county's jail is closed. (Weeg to Neighbor, Jasper County Attorney, 9-4-85) #85-9-1(L)

September 17, 1985

COUNTIES AND COUNTY OFFICERS: Board of Supervisors; County Hospital; County Care Facility; County Contribution of Funds to County Hospital; Election Requirement. Iowa Constitution, art. III, § 31; Iowa Code §§ 253.1; 331.361(3); 331.461(1)(d); 347.7; 347.14(12); 347.26 (1985). The county board of supervisors may contribute funds to the county hospital, and the board of hospital trustees may accept those funds, on the condition that the funds be used for the construction and operation of a health care facility. These funds may be expended by the hospital trustees for this purpose without submitting the question to the voters. (Weeg to Schroeder, Keokuk County Attorney, 9-17-85) #85-9-2(L)

September 25, 1985

MOTOR VEHICLES: Driver's Licenses. Iowa Code §§ 111.3, 111.35, 111.36, 111A.10, 279.8, 297.9, 321.1(2)(a), 321.1(48), 321.174, 321.176, 321.236(5), 321.248, 364.12(2) (1985). No driver's license is required to operate a motor vehicle on public lands that are not "highways." However, authorities vested with jurisdiction over various types of public property may regulate or prohibit use of motor vehicles thereon. (Ewald to McKean, State Representative, 9-25-85) #85-9-3(L)

OCTOBER 1985

October 7, 1985

MUNICIPALITIES: Cable Television Franchise Renewal. Iowa Code § 364.2(4) (1985); 47 U.S.C. §§ 521, 522, 546, 555, 556. The Cable Communications Policy Act of 1984 expressly preempts any state regulations concerning cable television to the extent that they are inconsistent with the Cable Act. The process of cable television franchise renewal must therefore be consistent with the requirements of 47 U.S.C. § 546. The requirement under Iowa Code § 346.2(4)(a) (1985) that a franchise be renewed by an ordinance adopted by a city council is consistent with 47 U.S.C. § 546, as long as the council follows the requirements of 47 U.S.C. § 546. The requirement under Iowa Code § 346.2(4)(b) (1985) that allows cable television franchise renewal to be made only by the passage of an ordinance and approval at an election is void as preempted and superseded by 47 U.S.C. § 546. In order to comply with the Cable Act, Iowa's cable franchising renewal process must follow the federal procedure, if timely invoked, which includes limiting the circumstances in which a franchise renewal may be denied and providing for an administrative proceeding to be invoked at the initiative of the cable operator or the franchising authority to consider the denial of a proposal for renewal. The current requirements of § 364.2(4) regarding franchise renewal may be followed if the federal procedure is not timely invoked. (DiDonato to Kinley, State Senator, 10-7-85) #85-10-1

The Honorable George R. Kinley, State Senator: You have requested an opinion of the Attorney General regarding the applicability of the federal Cable Communications Policy Act of 1984 (Cable Act) upon cable television franchise renewal pursuant to Iowa Code section 364.2(4) (1985). The specific question that you have presented is:

Did the Cable Communications Policy Act of 1984, codified as 47 U.S.C. § 521, preempt and supersede Iowa Code sections 364.2(4)(a) through (d) (1985) which require an ordinance with approval by election before a cable television franchise may be removed?

I.

Pursuant to Iowa Code § 364.2(4) (1985), the authority to grant and renew a franchise for cable television is given to a city. As you noted in your request for an opinion, Iowa law provides that a cable television franchise may only be renewed by an ordinance which is approved by the voters at any city election. Iowa Code § 364.2(4)(a) and (b) (1985).

Although a franchising authority and cable operator are free to reach a renewal agreement at any time without complying with the Cable Act's provisions, Congress has established a renewal procedure which may be invoked by the cable operator or the franchising authority between thirty and thirty-six months prior to the expiration of the franchise agreement. 47 U.S.C. §§ 546(a), (b). If section 546 procedures are invoked in a timely manner, cable television franchises must be renewed unless the franchising authority, by an administrative proceeding, determines to deny renewal. 47 U.S.C. § 546(c)(1). Renewal of the franchise may be denied only if the franchising authority makes adverse findings with respect to at least one of the following standards:

(A) the cable operator has substantially complied with the material

terms of the existing franchise and with applicable law;

(B) the quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix, quality, or level of cable services or other services provided over the system, has been reasonable in light of community needs;

(C) the operator has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal; and

(D) the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.

47 U.S.C. § 546(c)(1).¹

It should be noted that a cable operator may seek relief in U.S. district or state court where the operator's proposal for renewal was denied by a final decision of the franchising authority or the franchising authority failed to act in accordance with § 546. 47 U.S.C. §§ 546(c)(1), 555.

In order to determine the preemptive effect of the federal law upon the Iowa statute in this area, a review of the history of cable television regulation and Congress' objectives are necessary.

The Cable Act was signed into law on October 30, 1984. The Cable Act amends the Communications Act of 1934, which provided the framework for the regulation of the communications industry and was enacted before the advent of cable television. The Cable Act establishes for the first time a comprehensive national cable television policy. 47 U.S.C. § 521(1). The Cable Act provides guidelines for the regulation of cable service in such areas as ownership, channel usage, franchise, rates, and service regulations.

Prior to the Cable Act, the franchise process was primarily regulated at the state and local level.² The Cable Act continues the reliance on the local franchising process as the primary means of cable television regulation, but defines and limits the authority of the franchising authority. 47 U.S.C. § 521(3). Congress found that the franchise process in every city has significant national implications for the full development of cable television and seeks by the Cable Act to provide "stability and certainty" to the franchise granting and renewal process. H.R. Rep. No. 934, 98th Cong., 2d Sess. 22 (1984). The intent of the Cable Act is to establish a national process governing franchise renewal. *Id.* at 25. The purpose of section 546 is to establish a process which protects the cable operator against an unfair denial of a renewal by a franchising authority. 47 U.S.C. § 521(5). The intent of section 546 is also to protect the consumer/subscriber by encouraging greater investment by the operator in the cable system by establishing a renewal expectancy, whereby if the standards of section 546(c)(1) are met, renewal is granted. H.R. Rep. No. 934, 98th Cong., 2d Sess. 26 (1984).

¹ The term "cable television" as used in § 364.2(4) is not defined. "Cable service" is defined in 47 U.S.C. § 522(5) as: "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service." For purposes of the Cable Act's effect on Iowa's regulation in this area, it is assumed that these terms refer to the same thing.

² In 1972, the FCC adopted standards covering the award of franchises, duration, system construction, schedules, access to cable systems and consumer complaints. Since 1978 most FCC standards are in effect as voluntary guidelines. H.R. Rep. No. 934, 98th Cong., 2d Sess. 24 (1984). Prior to the enactment of the Cable Act, 47 C.F.R. § 76.31 (1984) provided nonmandatory procedures to be followed in the local franchising process.

II.

It is clear that Congress intended to preempt state and local regulations in the area of franchise renewals. While Congress recognized the need for states to exercise authority in the regulation of cable television, states may not exercise authority which is in conflict with federal regulations. The specific intent to preempt state and local regulations on matters regulated by the Cable Act is evidenced by 47 U.S.C. § 556(c) which provides:

Except as provided in section 557 of this title, any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed preempted and superseded.

The Cable Act does not intend to completely preempt state and local authority in the area of cable television, but allows such dual regulation only to the extent that it is not inconsistent with the Cable Act:

Nothing in this subchapter shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare to the extent consistent with the express provisions of this subchapter.

47 U.S.C. § 556(a).

It is well-settled that under the Supremacy Clause, U.S. Const. art. VI, cl. 2, a state law may be preempted by federal law when Congress in enacting a statute expresses a clear intent to preempt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604, 614 (1977); or when it is clear, despite the absence of explicit preemptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation and thereby "left no room for the states to supplement" federal law. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447, 1459 (1947). When Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with the federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 10 L.Ed.2d 248, 257 (1963), or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581, 587 (1941). These principles apply even where the area regulated is of special concern to the states. *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664, 675 (1982), citing *Free v. Bland*, 369 U.S. 663, 666, 82 S.Ct. 1089, 8 L.Ed.2d 180, 182 (1962). A state law is void to the extent that it conflicts with a federal statute, *Maryland v. Louisiana*, 451 U.S. 725, 747, 101 S.Ct. 2114, 68 L.Ed.2d 576, 596 (1981); *Oberschachtsiek v. Iowa Department of Social Services*, 298 N.W.2d 302, 304 (Iowa 1980).

In order to determine if there is an unconstitutional conflict between state and federal regulations in an area, the construction of both statutes must first be ascertained and then a determination made as to whether they are in conflict. *Chicago and Northwestern Tr. Co. v. Kalo Brick and Tile*, 450 U.S. 311, 319, 101 S.Ct. 1124, 67 L.Ed.2d 258, 266 (1981), citing *Perez v. Campbell*, 402 U.S. 637, 644, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971). In determining whether a state law conflicts with the federal law, the effect is looked to, rather than the purpose of the state law. *New York State Commission on Cable Television v. FCC*, 669 F.2d 58, 62 (2d Cir. 1982); citing *Perez v. Campbell*, 402 U.S. 637, 652, 91 S.Ct. 1704, 1712, 29 L.Ed.2d 233 (1971).

Under the Cable Act, franchise renewal is a two-step process. Between thirty and thirty-six months prior to the expiration of the franchise, a proceeding to review the cable operator's past performance and to identify future cable-related community needs and interests may be initiated by the operator or franchising authority. 47 U.S.C. § 546(a). At the completion of the first stage, the franchising authority may require a cable operator to submit a proposal for renewal. 47 U.S.C. § 546(b)(1). After submission of the operator proposal

and within four months of the completion of the initial public proceedings, the franchising authority must renew the franchise or issue a preliminary determination of denial. In the latter event, an administrative proceeding may be commenced if the cable operator requests or on the initiative of the franchising authority. 47 U.S.C. § 546(c)(1). If the franchising authority indicates that it will accept the operator's proposal, no administrative proceeding need be conducted. 47 U.S.C. § 546(h), H.R. Rep. No. 934, 98th Cong., 2d Sess. 73 (1984). Any denial of a renewal proposal must be based upon a failure of the cable operator to meet one of the standards established in 47 U.S.C. § 546(c)(1). 47 U.S.C. § 546(d). A franchising authority and cable operator are free to reach an agreement at any time without regard to the procedural or substantive standards of section 546, although the public must be given adequate notice and an opportunity for comment. 47 U.S.C. § 546(h). It should be noted that if the procedures of section 546 have been timely invoked, the cable operator retains the option of using those procedures if renewal is not granted under the procedure employed pursuant to section 546(h).

Pursuant to § 364.2(4), a franchise is renewed by the passage of an ordinance which is approved at an election. Iowa Code § 364.2(4)(a)(b) (1985). No limitations on when a franchise renewal may be denied are expressed in this section, nor is there a requirement that the renewal process begin at any certain time before the franchise expiration and that an administrative proceeding to consider the operator's proposal be provided for.

It is the opinion of this office that 47 U.S.C. § 546 preempts Iowa Code § 364.2(4) (1985) to the extent that it is inconsistent with the Cable Act. The cable television franchise renewal procedure must follow the requirements of 47 U.S.C. § 546, which includes denial only if one of four specified standards in 47 U.S.C. § 546(c)(1) are not met. The requirement of § 364.2(4) that a franchise renewal be granted by an ordinance passed by a city council is not in conflict with 47 U.S.C. § 546. The Cable Act does not specify the way in which a renewal is granted. A city council easily comes within the broad definition of a franchising authority under 47 U.S.C. § 522(9) of "any governmental entity empowered by Federal, State, or local law to grant a franchise." However, to the extent that § 364.2(4)(b) provides that the only way in which a franchise may be renewed is pursuant to an ordinance and approval at an election, it is void as preempted and superseded by 47 U.S.C. § 546(c)(1) and (d). If a cable operator or franchise authority invokes the procedure established in 47 U.S.C. § 546, that method of renewal must be allowed. An election requirement is at odds with the terms of section 546(c)(1) and (d), which require that a renewal must be granted unless one of four standards are not met by the cable operator. In an election, the voters are free to grant or deny a franchise renewal, regardless of whether the renewal should be granted pursuant to 47 U.S.C. § 546. In addition, an election, where the outcome cannot be a certainty even if a cable operator has satisfied the standards of 47 U.S.C. § 546(c)(1), would frustrate the objectives of Congress to protect "cable operators against unfair denials of renewal where the operator's past performances and proposal for future performance meet the standards established by" the Cable Act. 47 U.S.C. § 521(5).

In conclusion, the Cable Communications Policy Act of 1984 expressly preempts any state regulations concerning cable television to the extent that they are inconsistent with the Cable Act. Under 47 U.S.C. § 546, franchise renewal may be denied by the franchising authority only if one of four specified factors are not met by the cable operator. In addition, it is a stated purpose of the Cable Act to protect cable operators against unfair denials of renewal where the standards of 47 U.S.C. § 546(c)(1) are met. The renewal process established under § 364.2(4)(a) requiring that a franchise renewal be granted only after the passage of an ordinance by the city council is not inconsistent with the Cable Act. However, the § 364.2(4)(b) requirement that allows cable television franchise renewal to be made only by the passage of an ordinance and approval at an election is void as it is preempted and superseded by the Cable Act. In order to comply with federal law, Iowa's cable franchising renewal process must follow the federal procedure, if timely invoked, which includes limiting the circumstances in which a franchise renewal may be denied and

providing for an administrative proceeding to be invoked at the initiative of the operator or the franchising authority to consider the denial of a proposal for renewal. The current requirements of § 364.2(4) regarding franchise renewal may be followed if the federal procedure is not timely invoked. We would suggest that consideration be given to legislative amendment of Iowa Code § 364.2(4) to reflect the changes now required by federal law.

October 21, 1985

HOSPITALS: County Hospitals. Iowa Code chapter 347 (1985). A county public hospital does not have the authority to operate a medical clinic. (McGuire to Casper, Madison County Attorney, 10-21-85) #85-10-2(L)

HOSPITALS: County Hospitals. Iowa Code ch. 347 (1985). Op.Att'yGen. #85-10-2(L), opining that a county public hospital does not have authority to operate a medical clinic, was withdrawn on June 25, 1986, by letter from Elizabeth M. Osenbaugh to John E. Casper. Specific fact situations should be analyzed on the basis of 1980 Op.Att'yGen. 388 and the amendments to chapter 347 contained in H.F. 2229 and 2395, 71st General Assembly, 2nd Session.

October 21, 1985

STATE OFFICERS AND DEPARTMENTS: Fidelity Bonds. Iowa Code §§ 11.7, 18.164, 18.165, 18.169 and 64.6 (1985). Fidelity bond coverage for state officers or employees may not include a deductible provision, unless the state's liability under the bond coverage is in excess of subrogated insurer payments meeting or exceeding amounts required for bonding by statute. (Lyman to Johnson, Auditor of State, 10-21-85) #85-10-3(L)

October 22, 1985

COUNTIES AND COUNTY OFFICERS: Sheriff; Residency Requirement for Deputy Sheriffs; Home Rule Authority. Iowa Const. art. III, § 39A; Iowa Code §§ 331.301(1) and (2); 341A.11(7) (1985). A county sheriff has authority to impose a requirement that deputy sheriffs reside in designated areas of the county if that requirement is reasonably related to law enforcement purposes. (Weeg to O'Meara, Page County Attorney, 10-22-85) #85-10-4(L)

October 29, 1985

HIGHWAYS: Road Use Tax Fund; Employee Day Care Services. Iowa Constitution, article VII, § 8; Iowa Code § 312.1 (1985). The use of road use tax funds to provide day care services to children of DOT, county secondary road, and municipal street department employees does not violate article VII, § 8. (Weeg to Welden, State Representative, 10-29-85) #85-10-5(L)

October 30, 1985

HOSPITALS: University Hospital; Indigent Patients. Iowa Code ch. 255 (1985). Payment for medical treatment of indigent persons may be authorized after the treatment has been received. Patients who are admitted for care near the end of a fiscal year but discharged from the hospital during the following fiscal year are allocated to the county's quota for the year in which they were admitted. When a person has been discharged from the hospital, a new court order is required for a new admission to maintain proportionality among Iowa counties. (Fleming to Heitland, Hardin County Attorney, 10-30-85) #85-10-6(L)

October 30, 1985

SCHOOLS: Sick Leave for Part-Time Employees. Iowa Code § 279.40 (1985). Part-time public school employees are included within the term "public school employees" in Iowa Code section 279.40. School districts may determine the amount of sick leave which part-time employees receive by bargaining or by rulemaking. (Botts to Benton, State Superintendent of Public Instruction, 10-30-85) #85-10-7(L)

NOVEMBER 1985

November 6, 1985

AUDITORS: Real Estate Transfer Fees. Iowa Code section 331.507(2)(a); 1985 Iowa Acts, ch. 97 (S.F. 393). Fee charged by auditor for transfer of property is not applicable to correctional deeds. (Ovrom to Maher, Fremont County Attorney, 11-6-85) #85-11-1(L)

November 7, 1985

MUNICIPALITIES: Chapter 411 Retirement Systems. Iowa Code ch. 411 (1985); Iowa Code §§ 411.1(11), 411.3, 411.4, 411.6, 411.8(1)(f), 411.11 (1985). A member of a chapter 411 retirement system who terminates service prior to having served at least twenty-two years may not continue to contribute to the retirement system as a substitute for the number of years needed to establish eligibility for the service retirement benefit. If a member has served at least twenty-two years and terminates service, no further contribution to the retirement system is permitted or necessary in order to establish eligibility for a service retirement benefit upon reaching the age of fifty-five. A member of a chapter 411 retirement system who terminates service after eleven years of service may not continue to contribute to the retirement system for four years as a substitute for four additional years of service in order to establish eligibility for a prorated service retirement benefit. (DiDonato to Connors, State Representative, 11-7-85) #85-11-2(L)

November 7, 1985

LOTTERY: Public Funds; Payment of Lottery Prizes. Iowa Code §§ 8.6(2), 12.5, 99E.9(3)(e), 99E.19 (1985); 1985 Iowa Acts, ch. 33 [H.F. 225] (S.F. 395). The lottery board has authority to adopt rules specifying the manner of payment of lottery prizes and may authorize the lottery commissioner to issue checks without requiring a comptroller's warrant. (Osenbaugh to Krahl, State Comptroller, 11-7-85) #85-11-3(L)

November 8, 1985

BEER AND LIQUOR: Wholesale Distribution of Wine. Iowa Code §§ 4.4(2), 4.4(3), 4.8, 123.23, 123.30, 123.172, 123.178(3), 123.181(1), 123.181(2) and 123.183 (1985); Senate File 395, §§ 63, 68, 69, 72 and 74; 1985 Iowa Acts, ch. 32. Senate File 395 authorizes the Iowa Beer and Liquor Control Department to continue to sell wine for retail resale. A class "B" wine permittee is therefore permitted to sell wine purchased from the department. The department can avail itself of certain market techniques, including offering price discounts, and delivery from the state liquor store. Extension of credit by the department may not be implied from the delegation of authority to the department but is prohibited. (Allen to Hutchins, Drake, Nystrom and Welsh, State Senators and McIntee, State Representative, 11-8-85) #85-11-4

The Honorable Bill Hutchins, State Senator; The Honorable Joe Welsh, State Senator; The Honorable Richard F. Drake, State Senator; The Honorable John McIntee, State Representative; The Honorable John N. Nystrom, State Senator: You have all requested an opinion of the Attorney General regarding the Iowa Beer and Liquor Control Department's implementation of the wine bill, 1985 Iowa Acts, S.F. 395. Because of the similarity of your questions, we combine our response. The specific questions posed are as follows:

1. Is a class "B" wine permittee authorized to sell wine purchased from the Department?
2. Is the Department authorized to offer a 25 percent discount on the price of wine sold to wine retailers from the price of the wine charged to the general public in state liquor stores?
3. Is the Department authorized to deliver wine to wine retailers?
4. Is the Department authorized to sell wine on credit to wine retailers?

5. If the Department is authorized to extend credit for the sale of wine and/or deliver wine to wine retailers, are either its credit policy or delivery policy a rule of general application which must be adopted through the rulemaking procedure of Iowa Code § 17A.4 (1985)?

You indicate that your questions relate to recent policies of the Iowa Beer and Liquor Control Department (hereinafter referred to as "Department") in the distribution of wine. The Department, which has continued to distribute wine since the July 1, 1985, effective date of the Act, announced a twenty-five percent discount to class "B" wine permittees and liquor control licensees (i.e. wine retailers) off the price of wine sold in state liquor stores. Further, the Department announced that it would deliver, weekly, to wine retailers purchasing minimum orders of fifty cases at a per case cost of thirty-five cents. A policy was also adopted to permit qualified wine retailers to make payment for wine thirty days from the date of delivery. The Department has since altered the terms of sale.¹

A brief overview of the history of State regulation and distribution of alcoholic beverages helps put into context the recent legislative activity. The prior system of distribution relied upon two basic regulatory schemes. The monopolistic scheme designated a certain class of alcoholic beverages which the State would own, distribute and sell in the State liquor stores for sale to the general public or for sale to licensees for consumption on their premises. The regulatory scheme provided for the taxation of the product but the ownership and sale was left to the domain of the private sector.

The regulatory scheme was used primarily in beer sales and distribution. The monopolistic scheme described Iowa's interest in alcoholic beverages with an alcoholic content in excess of five percent, which beverages included wine. Iowa Code § 123.3(8) (1985). Those latter products were distributed by the Department from its warehouse to the State liquor stores where the general public and certain licensees could acquire such alcoholic beverages at the shelf price. The shelf price was the same price at which these beverages were offered to the general public in the State stores. The Department did not deliver wine to the licensee. The wine was obtained from the State liquor stores and not from the Department warehouse.

Beverages with less than five percent but more than one-half percent alcohol by weight under the regulatory scheme, which beverages consisted primarily of beer, cooking wines, or wine coolers, were simply taxed by the Department. The Department did not own these beverages at any time or seek to store, market, distribute or sell these products in the Iowa market.

Senate File 395 authorized the private distribution and sale of wine for off-premise consumption at the wholesale and retail level,² S.F. 395, §§ 68 and 69, respectively, creating a three-tier wine market. Prior to the July 1 effective date, the State operated under a dual wine distribution system with the Department having exclusive authority to wholesale and retail wine, a system which had been in place since the repeal of Prohibition in 1933. Thus, the recent legislation ended the Department's half-century monopoly in the wholesale and retail distribution of wine. Your first question concerns the authority of the Department to continue to sell wine destined for subsequent retail resale.

¹ The current practice of the Department, as of the date of this opinion, is to deliver wine semiweekly to wine retailers who purchase a minimum order of twenty-five cases of wine. A corresponding change was made to increase the per case cost from thirty-five cents from the date of delivery to fifty cents from the date of invoice. Those changes have been effective since August 26, 1985.

² This opinion does not concern the retail sale of wine for consumption on the premises, authorized by Iowa Code § 123.30 (1985). References hereinafter to retail sales of wine refer to wine sales for off-premise consumption only.

I. STATE DISTRIBUTION OF WINE TO RETAILERS

It has been suggested that the Iowa legislature by adopting S.F. 395, has shifted the regulation and sale of wine in Iowa from a State monopoly to a State regulatory scheme. Concisely stated, wine which had previously been like alcohol is now like beer. Under this analysis, the statute even as amended is exclusively a two model system, even though the term "wine" is inserted in parallel with the terms "beer" and "liquor." The chapter is to be cited as the "Iowa Beer, Wine and Liquor Act." In fact, in S.F. 395 the term "wine" is inserted throughout sections 3, 4, 5(7), (10), 6, 7, 8-14, 16, 18, 21-28, 30-44, 48, 50-57, and 60. Throughout these insertions, wine is separate from both alcohol and beer.

Section 18 of S.F. 395 amends Iowa Code § 123.22. Alcoholic liquor remains in the exclusive monopoly of the Department, but the amendment removes wine along with beer from that monopoly. However, the following sentence added by the amendment in § 18 specifically treats wine differently than beer is treated under the pure regulatory scheme.

The department may continue to purchase wine from persons holding a vintner's certificate of compliance or a class "A" wine permit for resale in state liquor stores.

S.F. 395, § 18.

Iowa Code § 123.178(3), as added by S.F. 395, § 69, states:

A person holding a class "B" wine permit may purchase wine for resale *only from the department or from a person holding a class "A" wine permit.* (Emphasis added.)

Juxtaposed with that provision is Iowa Code § 123.181(1), as added by S.F. 395, § 72, which provides:

A holder of any class "B" wine permit shall not sell wine except wine which is purchased from a person holding a class "A" wine permit and on which the tax imposed by § 123.183 has been paid or wine purchases from a manufacturer of native wines.

Sections 18, 19 and 69 expressly contemplate the sale of wine by the Department both to the general public through the State liquor stores and to class "B" wine permit holders. Wine is therefore, subsequent to these amendments, neither like beer nor like alcohol. Wine like alcohol is now sold by the Department. Wine like beer is now regulated by the Department. A third or hybrid scheme of regulation has been created.

It has been suggested that § 72 of S.F. 395 authorizes a class "B" wine permittee to purchase wine from class "A" wine permittees, to the exclusion of the Department. That interpretation prohibits a retail wine permittee from selling wine purchased from the Department. Thus, an irreconcilable statutory conflict is alleged, the only resolution of which, it is argued, requires the conclusion that the Department may not sell wine for retail resale.

In construing the aforementioned sections, statutory rules of construction are applicable. Iowa Code § 4.4(2) (1985) provides that effect is intended to be given to an entire statute. Just and reasonable results are intended. Iowa Code § 4.4(3) (1985). Furthermore, the provision listed last in an Act prevails in the event that provisions of the Act are irreconcilable. Iowa Code § 4.8 (1985).

The rules of statutory construction set forth from chapter 4 represent merely a codification of the pre-existing common law rules. 1973 Op.Att'yGen. 119, 121. Common law provides that, if fairly possible, unreasonable or absurd consequences should be avoided. *Jansen v. Fulton*, 162 N.W.2d 438, 442 (Iowa 1968). The construction of any statute must be reasonable and must be sensibly and fairly made with a view of carrying out the obvious intentions of the legislature. *Id.* The goal in construing a statute is to ascertain legislative intent in order, if possible, to give it effect. *State v. Prybil*, 211 N.W.2d 308, 311 (Iowa 1973). Effect is to be given to the entire statute in construing same. *Id.*

Emerging from the foregoing statutory rules and common law principles is the requirement that S.F. 395 be construed in its entirety, with an intent to give effect to all of the Act's provisions. In reconciling the two provisions, reasonable results are presumed to be intended. Should the two provisions not be reconcilable, § 72 of the Act shall prevail, because listed last in the Act.

Of significance in ascertaining the intent of the legislature is the fact that S.F. 395 was included in the Omnibus Economic Development Bill. As disclosed by the title, S.F. 395, in addition to the wine amendments, exempts certain farm and industrial machinery from sales tax, phases out personal property tax, and provides new job tax credits. In addition, S.F. 395 includes revenue raising measures, among them a new gallonage tax on wine to offset the revenue lost to tax reductions designed to stimulate economic development. The creation of this hybrid regulatory scheme which involved sharing wine sales with private industry was enacted as an economic measure to increase employment, stimulate construction and promote acquisition of real and personal property in both retail and wholesale markets. The legislature believed that the beer distribution industry had been successful over the past fifty years in establishing a wholesale distribution system both for on and off-premises consumption which was sufficiently worthwhile such that wine distributors were expected by the legislature to make a similar contribution to economic development. This legislative initiative toward emulation was obviously not, however, universally accepted. As discussed, § 18 of S.F. 395 opted for a hybrid regulatory scheme wherein the Department would continue to purchase wine for resale. Had the legislature wished to exclude the Department from the sale of wine to class "B" wine permit holders for resale, the legislature could have expressly so stated in § 18 and § 69(3). Apparently the concern was that class "B" permit holders (restaurants, motels and clubs) in certain locations might not have immediate access to inventories sufficient to meet their needs without the Department as an available supplier.

Your first question addresses the apparent conflict between § 69(3) and § 72(1) of the Act. If § 69(3) is read to authorize the sale of wine to retailers by the Department, it is suggested that it is inconsistent with § 72(1) which prohibits a class "B" permittee from selling any wine other than that purchased from a class "A" permittee and on which the tax has been paid. The conclusion that follows from this interpretation reaches the result that the holder of a class "B" wine permit could purchase wine from the Department, but is not authorized to resell the product purchased. Surely if the legislature had intended to permit a wine retailer to make a purchase from the Department, it would authorize the subsequent resale of the wine.

It is our judgment that through application of the rules and principles above stated, and a review of the legislative history, that the two provisions are in fact reconcilable. Our interpretation is based on the view that the former section, S.F. 395 § 69, is the provision designating the class of wine sellers from which a class "B" wine permittee may purchase wine for resale: class "A" wine permit holders and the Department. Section 72 of the Act is a prohibition against the retail sale of wine in the absence of the wine gallonage tax imposed by § 74. A class "B" wine permittee may not sell wine purchased from a class "A" wine permittee unless a tax of \$1.50 per gallon has been collected. That interpretation construes the word "and" as used in that provision, as it is ordinarily used as a conjunctive. See *Ahrweiler v. Bd. of Supervisors of Mahaska County*, 226 Iowa 229, 283 N.W. 889 (1939). The Department is not mentioned in § 72(1) because the wine gallonage tax imposed by § 74 is not imposed on the State. There being no tax on the Department, there is no purpose in listing the Department as a potential seller of wine in § 72(1).

Effect is given to both provisions under this interpretation. Accordingly, it is our opinion that S.F. 395 authorizes the Department to continue to sell wine both to the general public and to class "A" and class "B" wine permittees. Class "B" wine permittees are therefore permitted to sell wine purchased from the Department.

II. MARKETING OF WINE

The next three questions regarding the Department's marketing techniques in the wholesale distribution of wine are raised by our affirmative response to your first inquiry. In particular, you question the Department's authority to price discount, deliver wine, and sell wine on credit.

An administrative agency has the statutory authority to adopt a rule or regulation if a "rational agency" could conclude that the rule or regulation is within its statutory mandate. *Iowa Auto Dealers v. Iowa Dept. of Revenue*, 301 N.W.2d 760, 762 (Iowa 1981); *Hiserote Homes, Inc. v. Riedemann*, 277 N.W.2d 911, 913 (Iowa 1979); *Davenport Comm. School Dist. v. Iowa Civil Rights Comm.*, 277 N.W.2d 907, 910 (Iowa 1979). An administrative body may not make law or change the legal meaning of the common law or the statutes. *West Des Moines Ed. Ass'n v. P.E.R.B.*, 266 N.W.2d 118, 124 (Iowa 1978); *Holland v. State of Iowa*, 115 N.W.2d 161, 164 (Iowa 1962). Agency rules or regulations which contravene statutory provisions or exceed an agency's statutory authority are invalid. *Dunlap Care Center v. Iowa Dept. of Social Services*, 353 N.W.2d 389 (Iowa 1984).

In summary, an agency may not do that which is expressly prohibited by the statute. Similarly, an agency must do that which is mandated by the statute. Within that area of activity delegated to the agency by the legislature, which is neither prohibited nor mandated, a "rational agency" may conduct its regulatory function in fulfillment of those powers and duties necessarily implied from the express legislative directives.

Applying these principles to the Department's policies for the marketing of wine described above, we believe the agency is acting within its statutory authority. As previously discussed, *supra* at 3-6, the Department is authorized by Iowa Code §123.178(3) to continue to sell wine for resale. The express authority to sell necessarily includes the implied power to implement that authority in a reasonable manner. Any decision of the agency to elect not to pursue effectuating business practices is a policy question for the agency and beyond the scope of this opinion.

Although it is our opinion that there is adequate authority implied from the statute to permit price discounting by the Department, additional statutory authority exists for those discounts. Iowa Code §123.23 (1985), provides in part:

The department may, from time to time, as determined by the director, fix the prices of the different classes, varieties, or brands of alcoholic liquor and wine to be sold.

Prior opinions of this office (1968 Op.Att'yGen. 190 and 1964 Op.Att'yGen. 269) have discussed this price-setting section of the statute. The observation in the 1964 opinion that §123.23 (previously 123.18) is the only statutory authority conferred on the Iowa Liquor Control Commission relative to fixing prices on liquor to be sold is still accurate. That opinion concluded, and we agree, that no authority exists for the Department to give a special price to a liquor licensee. The statutory language does not prohibit, however, the Department from giving a special price on a quantity purchased as opposed to a purchase of a single bottle, but such price differentials must be given uniformly. The price must extend to all purchasers without distinction between a liquor licensee and a non-liquor licensee. Section 123.23 by its express terms confers upon the Department through its director the authority to fix the prices of classes of wine to be sold. It does not confer upon the Department the authority to fix the prices of wine sold to different classes of purchasers. Given the express language of the section, we conclude that the Department has the authority to give price discounts based on quantity purchases to a class "B" permittee, but only if such discount is extended to all purchasers uniformly and upon the same basis.

Additionally, as described, the Department has chosen to deliver wine to selected wine retailers who purchase a minimum order of twenty-five cases with a delivery charge imposed, and for qualified retailers credit may be extended for a period of up to thirty days from the date of delivery. It is initially observed that a class "A" wine permittee is statutorily *required* to deliver wine

to all class "B" wine permittees, Iowa Code § 123.172 as added by S.F. 395, § 63, and may extend credit to a retail liquor licensee or wine permittee for a period not exceeding thirty days from the date of delivery. Iowa Code § 123.181(2) as added by S.F. 395, § 72.

Section 18 of S.F. 395 concerns itself directly with the authority of the Department. That section confers authority to purchase wine for "resale at state liquor stores." Section 69(3) permits class "B" permittees to purchase wine for resale from the Department. The terms "state liquor store" and "warehouse" are defined terms. Iowa Code §§ 123.3(21) and (22). The use of the term "state liquor store" rather than "warehouse" must be considered an express limitation upon the authority of the Department in its resale of wine to class "B" permittees. Prior to the enactment of S.F. 395, the Department in the exercise of its monopolistic scheme sold alcohol and wine only from the State liquor store and not from the warehouse, as those terms were defined. In light of the express language limiting the resale of wine to State liquor stores, the authority to sell directly from the warehouse as that term is defined in the statute cannot be implied from the legislature's creation of the hybrid monopoly/regulatory scheme for wine. Delivery to class "B" purchasers directly from the warehouse is not a sale from the "state liquor store" and is prohibited. Delivery in and of itself is not prohibited, however, and may be implied from the statutory requirement imposed upon class "A" permittees of § 123.172 as added by § 63 of S.F. 395. If economic stimulus is the primary motivation of the legislature in the creation of the hybrid system for wine, general availability on a statewide basis is an obvious secondary consideration. Delivery of products by the Department from the State liquor store should it choose to do so serves the secondary purpose of the legislature.

The extension of credit by the Department, however, is expressly prohibited by the statutory constraints on the business practices of the Department.

Section 123.24(1) prohibits credit sales (other than cash or traveler's check) by State liquor stores to "persons." As that term is defined, § 123.3(10) and section 123.3(27), retailers are "persons" who may not buy from the Department other than by cash or traveler's checks.

Accordingly, it is our opinion that the Department, in offering wine for subsequent resale, has authority in its statutory mandate to adopt policies for the marketing of wine. That authority includes the power to offer price discounts on quantities, and delivery from the State liquor store but does not include authority to offer credit purchases.

The Department has initiated rule-making procedures pursuant to Iowa Code chapter 17A. We must therefore decline to answer as moot your remaining question addressing the necessity of those rule-making procedures.

November 12, 1985

TAXATION: Property Tax; Interest Penalty; Rounding to Nearest Dollar. Iowa Code §§ 135D.24(1) (1985), 445.5 (1985), 445.39 (1985), as amended by 1985 Iowa Acts, H.F. 640, 447.1 (1985). If a \$445.5 tax receipt includes two or more parcels which were separately listed, assessed, and taxed, H.F. 640 requires interest penalty to be rounded to the nearest whole dollar for each parcel. House File 640 has prospective application for property taxes becoming delinquent on and after July 1, 1985. House File 640 does not affect the tax sale redemption penalty computation in § 447.1 and does not affect the computation of penalty imposed upon delinquent mobile home taxes in § 135D.24(1). (Griger to Johnson, State Auditor, 11-12-85) #85-11-5(L)

November 12, 1985

TAXATION: Administrative Rules; Sales Tax Exemptions; Health Care Facilities. Iowa Code § 422.45 (1985), amended by 1985 Iowa Acts S.F. 564. The Department of Revenue cannot, by administrative rule, provide a refund provision or tax exemption which effectively relieves contractors from paying tax on building materials used in the fulfillment of construction contracts with health care facilities. (Barnett to Priebe, State Senator and Chair of the Administrative Rules Review Committee, 11-12-85) #85-11-6(L)

November 26, 1985

CLERK OF COURT: Satisfaction of Child Support Judgments. Iowa Code sections 598.22; 624.37 (1985); 1985 Iowa Acts, ch. (H.F. 495). The clerk of court is not allowed to enter an agreed-upon amount on the payment record as satisfaction of a judgment for a child support obligation when payments are made to a person other than the clerk of the district court. (Robinson to Davis, Scott County Attorney, 11-26-85) #85-11-7(L)

DECEMBER 1985

December 10, 1985

ELECTIONS: Political Nonparty Organizations; Duplication of Designated Titles. Iowa Code ch. 43; §§ 43.2, 43.3. Ch. 44; §§ 44.1, 44.11, 44.12. Ch. 45; §§ 45.1, 45.4. Ch. 49; §§ 49.31(1), 49.36. A candidate who files a petition and affidavit of candidacy pursuant to chapter 45 which designates the title of a political nonparty organization ordinarily should be listed on the ballot under the title designated pursuant to the authority of § 49.31(1). If two candidates file petitions and affidavits of candidacy for the same office pursuant to chapter 45 which designate the same title of a political nonparty organization, the duplication constitutes a failure to designate which creates a duty on the part of the commissioner of elections to select a suitable title for each of the nominees. If a candidate files a petition and affidavit of candidacy pursuant to chapter 45 which designates the title of a political nonparty organization and a candidate is nominated by convention or caucus pursuant to chapter 44 by the same political nonparty organization, the duplication constitutes a failure to designate which creates a duty on the part of the commissioner of elections to select a suitable title for each of the nominees. (Pottorff to Steinbach, Director of Elections, 12-10-85) #85-12-1(L)

Honorable Ruhl Maulsby, State Representative: You have requested an opinion of the Attorney General concerning the application of Senate File 261 to incumbent township trustees. You point out that, under Iowa Code § 39.22, township trustees in townships which include a city shall be elected by voters of the township who reside outside the corporate limits of the city. Senate File 261 amended § 39.22 to further require that "the officers shall reside in the township outside the corporate limits of the city." In view of this amendment, you specifically ask what effect Senate File 261 has on the term of office of a township trustee elected by voters of the township who reside outside the corporate limits of the city but who, himself, lived within the corporate limits of the city when Senate File 261 became effective. It is our opinion that Senate File 261 created a vacancy under these circumstances.

Prior to amendment, § 39.22 did not require township trustees elected by the voters who reside outside the corporate limits of the city to reside outside the corporate limits of the city as well. Section 39.22 provided:

Township trustees and the township clerk shall, in townships which embrace no city or town, be elected by the voters of the entire township. In townships which embrace a city or town, said officers shall be elected by the voters of the township who reside outside the corporate limits of such city or town; *but any such officer may be a resident of said city or town.*

Iowa Code § 39.22 (1985) (emphasis added). Under this language, a township trustee elected by the voters who reside outside the corporate limits of the city were expressly permitted to "be a resident of said city or town." Senate File 261, however, struck this permissive language and amended § 39.22 to provide:

Township trustees and the township clerk in townships which do not include a city, shall be elected by the voters of the entire township. In townships which include a city, the officers shall be elected by the voters of the township who reside outside the corporate limits of the city and the officers shall reside in the township outside the corporate limits of the city.

S.F. 261. The terms of this amendment imposed a requirement of residency outside the corporate limits of the city which did not previously exist.

We have determined in prior opinions that, under circumstances in which residence is imposed as a qualification to hold office, violation of the requirement creates a vacancy in the office. This ground for vacancy is codified in chapter 69. Section 69.2 includes as one of six definitions of vacancy "[t]he incumbent ceasing to be a resident of the state, district, county, township, city or ward by or for which the incumbent was elected or appointed, or in which the duties of the office are to be exercised." Iowa Code § 69.2(3) (1985). We have applied this statutory language to various situations in which elected officials have moved out of the district or ward from which they were elected and required to reside. See 1980 Op.Att'yGen. 494, 495; 1976 Op.Att'yGen. 730, 730-31; 1972 Op.Att'yGen. 18, 19. In these cases we opined that vacancies resulted.

Although the issue which you raise involves a statutory change in the residency requirement rather than a physical change of residence by the elected official, our analysis is not significantly different. The General Assembly clearly may alter or add to the qualifications for holding a statutory office even during the term for which an incumbent was elected. In *State v. Huegle*, 135 Iowa 100, 112 N.W. 234 (1907), the Iowa Supreme Court reviewed a challenge to the right of elected county superintendent to continue to hold office on the ground that she did not meet statutory qualifications. The office holder, apparently, had not met the statutory qualifications when she was elected and took office. In ruling that she was not qualified, however, the Court clarified the scope of the General Assembly's authority by stating:

[T]he legislature, in the absence of constitutional prohibition, may at pleasure alter or add to the qualifications for office. And an office created by statute may be abolished, the term increased, or diminished, the manner of filling it changed by will of the legislature at any time even during the term for which the then incumbent was elected or appointed. It may also declare the office vacant, or abolish the office by leaving it devoid of duties.

Id. at 101-02, 112 N.W. at 235 (citations omitted). An example of the principles set out in *Huegle* often occurs when redistricting pursuant to statute ousts the incumbent from the district in which he or she is required to reside. See e.g., *Drake v. Polk County Board of Supervisors*, 340 N.W.2d 247 (Iowa 1983) (terms of elected county supervisors terminated by statute following mandatory redistricting); *Mauk v. Lock*, 70 Iowa 266, 30 N.W. 566 (1886) (term of elected road supervisor terminated by redistricting for highway purposes).

Senate File 261 is another express example of the legislative authority to alter the qualifications for office during the terms of incumbents. Under § 39.22 township trustees from townships which include a city had been elected by voters of the township who reside outside the corporate limits of the city. Senate File 261 altered the qualifications for office by requiring that such township trustees reside within the area in which the electorate reside.

Under circumstances in which the township trustee resided inside the corporate limits of the city when Senate File 261 became effective, a vacancy resulted. By its terms, § 69.2(3) defines a vacancy as "[t]he incumbent ceasing to be a resident of the state, district, county, township, city or ward" by which the incumbent was elected. Iowa Code § 69.2(3) (1985) (emphasis added). The term "district" should be construed to effect a logical, workable, sensible and practical meaning. See *Hansen v. State*, 298 N.W.2d 263, 265-66 (Iowa 1980). Under this principle, the "district" of a township trustee elected from an area outside the corporate limits of the city should logically be defined as the geographic area in which his electorate reside. The residency requirement of

Senate File 261 became effective on July 1, 1985. See Iowa Code § 3.7 (1985). On that date, the township trustee ceased to be a resident of the "district" within the township by which he or she was elected and required by statute to reside. See Iowa Code § 69.2(3) (1985). A vacancy, therefore, resulted. Any vacancies should be treated according to the provisions of chapter 69. See Iowa Code § 69.8(7) (1985) ("Vacancies shall be filled . . . [i]n township offices, including trustees, by the trustees, but where the offices of the three trustees are all vacant, the county board of supervisors shall have the power to either instruct the county auditor to fill the vacancies or adopt a resolution stating that the board will exercise all powers and duties assigned by law to the trustees of the township in which such vacancies exist, until such time as the vacancies may be filled by election.").

December 10, 1985

COUNTIES AND COUNTY OFFICERS: Board of Supervisors; Publication of Claims. Iowa Code §§ 349.16 and 349.18 (1985). Expenditures of every county office or department which are approved by the board of supervisors must be published in accordance with §§ 349.16 and 349.18. (Weeg to Johnson, Auditor of State, 12-10-85) #85-12-2(L)

December 10, 1985

TAXATION: Property Tax Assessment; Forest Reservation. Iowa Code §§ 161.2, 161.12, 443.6 (1985). If the county board of supervisors designates the county conservation board to inspect an area to determine if it satisfies the criteria for a tax-exempt forest reservation, the county assessor may not overrule the conservation board in initially granting the exemption, but the assessor may later add the property to the tax list as "omitted property," under the authority of § 443.6. A portion of a tract of land may be exempt from property tax as a forest reservation while the remainder of the tract is taxable and should be assessed. An aerial photograph can be sufficient to indicate the location of the forest reservation, in lieu of having the reservation surveyed and given a separate legal description. (Mason to Bair, Director of Iowa Department of Revenue and Wilson, Director of State Conservation Commission, 12-10-85) #85-12-3(L)

December 11, 1985

ELECTIONS: Township Trustees; Residency Requirement. Iowa Code ch. 39; § 39.22. Ch. 69; § 69.2(3). S.F. 261. Under circumstances in which the township trustee resided inside the corporate limits of a city when Senate File 261 became effective, a vacancy resulted. (Pottorff to Maulsby, State Representative, 12-11-85) #85-12-4

December 12, 1985

SCHOOLS: Board of Regents; Lobbyists. Iowa Code §§ 280A.16, 280A.23, 262.9 (1985). A merged area school is not prohibited by law from hiring a lobbyist, but spending of such schools is subject to the approval of the State Board of Public Instruction. The difference in the governance of Regents' institutions and of merged area schools does not create a distinction in connection with the legality of hiring lobbyists or legislative liaison staff. (Fleming to Paulin, State Representative, 12-12-85) #85-12-5(L)

December 18, 1985

MUNICIPALITIES: City Finance; Capital Improvements Reserve Fund. Iowa Code § 384.7 (1985). A capital improvements levy, established for a specified time period, may not be repealed prior to the lapse of that period. (Walding to Black, State Representative, 12-18-85) #85-12-6(L)

December 24, 1985

TAXATION: Property Tax; Consideration of Value of Mineral Rights Underlying Agricultural Land in Valuing Land. Iowa Code §§ 84.18 and 441.21(1)(a), (e) and (g) (1985). Assessor should not give any consideration to the value of minerals, or any rights or interests thereto, underlying agricultural land in determining the actual value of agricultural land. Where § 84.18 applies, the underlying mineral rights or interests are separately assessed and taxed, independently of the agricultural land, to the owner of such rights or interests. (Kuehn to Gustafson, Crawford County Attorney,

12-24-85) #85-12-7(L)

December 30, 1985

EMPLOYMENT SECURITY: Unemployment Compensation Fund; Employer Bonding or Security Requirements. 1975 Iowa Acts, ch. 92, § 17, Iowa Code §§ 4.5, 4.13, 96.6(14), 96.7(10), 96.7(14), 96.11(6) (1985); Iowa Code §§ 96.7(10), 96.7(11) (1975); 1976 Iowa Acts, ch. 1068, § 21; 1975 Iowa Acts, ch. 92, § 17. All nonprofit reimbursable employers who make payments in lieu of contributions to the state unemployment compensation fund are required to post bond or other security, notwithstanding an election to make payments in lieu of contributions prior to the effective date of 1975 Iowa Acts, ch. 92, § 17, Iowa Code §§ 4.5, 4.13, 96.6(14), 96.7(10), 96.7(14), 96.11(6) (1985); Iowa Code §§ 96.7(10), 96.7(11) (1975); 1976 Iowa Acts, ch. 1068, § 21; 1975 Iowa Acts, ch. 92, § 17. (Lyman to Freeman, Director, Department of Job Services, 12-30-85) #85-12-8

Richard G. Freeman, Director, Iowa Department of Job Service: You have requested an opinion of the Attorney General regarding the necessity of the posting of security by a nonprofit reimbursable employer who makes payments in lieu of contributions to the state unemployment compensation fund. Specifically, you inquire whether a statutory amendment mandating the posting of security is applicable to those employers who elected to make payments in lieu of contributions prior to the effective date of the amending legislation.

Formerly, the Iowa Code authorized the Employment Security Commission to exercise its discretion as to the need for security from such employers. See Iowa Code § 96.7(10) (1975). In 1975, however, the legislature amended the statute to require that "any nonprofit organization who elects to become liable for payments in lieu of contributions shall be required" to post a surety bond, or alternatively deposit cash or securities with the Department of Job Service. 1975 Iowa Acts, ch. 92, § 17. The amendment made no express provision for a retroactive application thereof; thus, it is necessary to consider the relevant standards of statutory construction in the examination of your question.

I.

As a general proposition, a statute—as well as the reenactment, revision, amendment, or repeal thereof—is presumed to be prospective in its operation, unless expressly made retrospective. Iowa Code § 4.5 (1985); *Slockett v. Iowa Valley Community School Dist.*, 359 N.W.2d 446, 448 (Iowa 1984). Moreover, where an enactment relates to "substantive" (vested) rights, it is not subject to a retrospective construction. *Appleby v. Farmers State Bank of Dows*, 244 Iowa 288, 292, 56 N.W.2d 917, 919 (1953). A statute may, however, be applied both prospectively and retrospectively if it relates to "procedural" (non-vested) rights, and if such a construction is necessary to effectuate legislative intent. *Baldwin v. City of Waterloo*, 372 N.W.2d 486, 491-92 (Iowa 1985); *State ex rel. Turner v. Limbrecht*, 246 N.W.2d 330, 332 (Iowa 1976). This distinction arises by operation of the Fourteenth Amendment of the United States Constitution, which prohibits states from enacting laws which divest rights of property or other accrued interests arising prior to the effective date of legislation. See 2 *Sutherland Statutory Construction*, § 41.06 (3d ed. 1973). While the Iowa Constitution does not include a similar provision, Iowa Code § 4.13 does provide that the revision or amendment of a statute does not affect any "validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder."

A central issue thus appears whether nonprofit reimbursable employers who elected to make payments in lieu of contributions prior to the 1975 amendment of Iowa Code § 96.7(10) accrued some substantive right which could not be abrogated by the revision in the law. However, this line of inquiry is illusory. It must be recalled that the prior language of § 96.7(10) only authorized the Employment Security Commission to *wave* the requirement of security. Since waiver by the commission was purely discretionary, no nonprofit reimbursable employer had an expectation, much less a right, not to be required to post security. Moreover, while it is questionable whether the commission was

empowered to revoke a standing waiver of security short of an employer violation of Iowa Code §96.7(11) (1975), authority indicates that an employer's interests in maintaining such an exempt status was subject to legislative amendment.¹

In view of the fact that nonprofit reimbursable employers accrued no vested rights under the pre-amendment language of §96.7(10), the statute, and the revision thereof, can be deemed procedural in nature, and thus possibly subject to retrospective application.

II.

While it is clear that a retrospective application of the 1975 amendment to Iowa Code §96.7(10) would be constitutionally and otherwise legally permissible, it is nonetheless necessary to consider whether the legislature intended the amendment to operate as such. More succinctly stated, did the legislature act to remove *all* authority on the part of the Employment Security Commission, in the determination of minimum security requirements for nonprofit reimbursable employers who elected to make payments in lieu of contributions, through the enactment of 1975 Iowa Acts, S.F. 485, ch. 92, §17?

For purposes of determining legislative intent as to the retrospective application of a statute, it is necessary to (1) examine the language of the act; (2) consider the "manifest evil" to be remedied; and (3) determine whether there was a previously existing statute governing or limiting the mischief which the new act is intended to remedy. *Manilla Community School Dist. v. Halverson*, 251 Iowa 496, 504-05, 101 N.W.2d 705, 710 (1960).

In review of the amended statute, it is apparent, as previously stated, that no express language was included relating to retrospective application. However, at least two implicit factors weigh toward such application. First, the statute requires security to be posted by "any" nonprofit reimbursable employer who elects payments in lieu of contributions. On several occasions, the Iowa Supreme Court has noted that the utilization of this term in such circumstances gives rise to the application of an enactment to all transactions, prospective as well as retrospective. *Appleby v. Farmers State Bank of Dows*, *supra*, 244 Iowa at 29, 56 N.W.2d at 921; *Aetna Insurance Co. v. Chicago Great Western Railroad Co.*, 190 Iowa 487, 489, 180 N.W. 649, 651 (1920). Second, companion legislation contained at Iowa Code §96.7(14) (1985) includes express grandfather clauses, reflecting an intent that at least this section of the Employment Security Law not be applied retrospectively. While enacted and amended during different sessions of the legislature than that involving §96.7(10), this fact at least creates an inference that in situations where the general assembly intended that amendments made to the Employment Security Law not be applied retrospectively, its intent was expressly stated.

Considering next the condition which the legislature acted to remedy, it likewise appears that §96.7(10) was intended to be applied retrospectively. Your opinion request indicates that the 1975 amendment to §96.7(10) was a legislative response to the failure of Parsons College, which resulted in "a major drain of trust fund monies for former employees of the reimbursable non-profit

¹It should be noted that uncodified provisions enacted during the creation of the Iowa Employment Security Law and found at 1936 Iowa Acts (Ex. Sess.) ch. 4, §21 and 1937 Iowa Acts ch. 102, §21 state that "the General Assembly reserves the right to amend or repeal all or any part of this act at any time; and there shall be no vested private rights of any kind against such amendment or repeal. All rights, privileges, or immunities conferred by this act or by acts done pursuant thereto shall exist subject to the power of the General Assembly to amend or repeal this act at any time." The authority of the legislature to so act was upheld in *Needham Packing Co. v. Iowa Employment Sec. Commission*, 255 Iowa 437, 123 N.W.2d 1 (1963). This holding may have been narrowed considerably by the decisions *Cook v. Iowa Dept. of Job Service*, *et al.*, 299 N.W.2d 698 (Iowa 1980), and *Green v. Iowa Department of Job Service*, 244 N.W.2d 651 (Iowa 1980), but these cases can be distinguished in that they clearly involved substantive rights of discharged employees.

[institution] which was without bond or other security." Thus, in an attempt to avoid such an instance from recurring, the legislature acted to protect the trust fund by requiring security from "all" nonprofit reimbursable employers. A prospective application of the amended statute alone would fail to fulfill this directive as, according to information supplied by you to us, only 176 of the approximately 552 nonprofit reimbursable employers presently within the employment security program have been required to file a bond or other security. This would seem to be the exact situation which the legislature desired to avoid, as the unemployment compensation fund remains open to a considerable risk of loss.

Turning to the third prong of the *Halverson* test for legislative intent as to the retrospective application of a statute, an identical inference is drawn. The operation of the pre-amended statute—which depended upon the discretion of the commission—did not provide sufficient safeguards: the failure of Parsons College and the resulting drain on the unemployment compensation fund proved its ineffectiveness. Arguably, the commission was formerly without authority to revoke an employer's waiver of security, regardless of the employer's financial condition.²

III.

There are no legal barriers to the retrospective application of Iowa Code §96.7(10). Additionally, it appears to us that the legislature intended for the statute to be so applied. Thus, it is the opinion of this office that all nonprofit reimbursable employers who make payments in lieu of contributions to the state unemployment compensation fund are required to post bond or other security, notwithstanding an election to make payments in lieu of contributions prior to the effective date of 1975 Iowa Acts, ch. 92, § 17.

To effectuate the legislative intent, and give bite to the §96.7(11) (1985) enforcement provisions, a retrospective application of §96.7(10) becomes necessary.

²The interplay between §§96.7(10) and 96.7(11) (1975) is somewhat problematic. Subsection 10 allowed the commission to require, within 30 days of an employer's election to make payments in lieu of contributions, to post security. Subsection 11 outlined the violations by which the election could be terminated, but did not address the revocation of a security waiver. In view of the fact that §96.7(11) only applied to insufficient security, the question becomes whether the commission was empowered to alter the status of an unsecured employer who failed to make scheduled payments. Quite possibly, the commission may have been limited to penalties and civil actions under §96.14, which would have been of little avail in the case of an employer whose financial condition was deteriorating. A prospective application of 1975 Iowa Acts, ch. 92, § 17 might very well place the Department of Job Service in an equally unenviable situation.

JANUARY 1986

January 8, 1986

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

January 8, 1986

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

January 8, 1986

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

January 8, 1986

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

January 8, 1986

MUNICIPALITIES: Police and Fire Pensions. Iowa Code § 411.1(11) (1985); 1984 Iowa Acts, ch. 1285, § 22. Merit pay is to be included as earnable compensation if it is part of the regular compensation for the member's rank or position rather than special additional compensation. (Walding to Billingsley, Jasper County Attorney, 1-8-86) #86-1-5(L)

January 14, 1986

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

January 15, 1986

CONSTITUTIONAL LAW: Separation of Powers; Legislative Appointment. Iowa Const. art. III, § 1; Senate File 577. If Senate File 577 [Iowa Code § 175A.3] were challenged in a court of law under the separation of powers doctrine, a court would hold the appointments to the agency by a legislative committee to be unconstitutional. (Miller and Pottorff to McNarney, Executive Director, Iowa Housing Finance Authority, 1-15-86) #86-1-7

William H. McNarney, Executive Director, Iowa Housing Finance Authority: You have requested an opinion of the Attorney General concerning the constitutionality of the process by which members are appointed to the Iowa

Economic Protective and Investment Authority [hereinafter the IEPIA] pursuant to Senate File 577. You point out that Senate File 577, which was passed in the 1985 legislative session, creates the IEPIA and vests the IEPIA with executive responsibilities. Appointment to the five-member agency, however, is made by a committee composed of the majority and minority floor leaders of the senate, the speaker of the house of representatives and the minority floor leader of the house of representatives.

This committee's power to appoint members of the IEPIA prompts you to pose the following questions:

1. Is section 4 of Senate File 577 which allows for the appointment of the members of the authority's board unconstitutional in violation of Article III of the Iowa Constitution or any other constitutional provision?
2. Is the Iowa Economic Protective and Investment Authority unconstitutional?
3. If the Iowa Economic Protective and Investment Authority or any section of Senate File 577 pertaining to the authority is unconstitutional or contrary to law, can the authority be implemented and, if so, how?

In order to facilitate a response, we narrow and consolidate your questions. In question number one you ask whether the appointment process violates Article III of the Iowa Constitution "or any other constitutional provision." We will respond to your specific question about Article III in terms of the separation of powers provision in section 1 but will not speculate on the applicability of other constitutional provisions to which you have not drawn our attention. In question number two you ask whether the agency, itself, is unconstitutional. We construe this question to restate the issue posed in question number one and, therefore, consolidate questions number one and number two. Accordingly, we proceed with two questions: first, whether section 4 of Senate File 577 which allows for the appointment of the members of IEPIA is unconstitutional in violation of Article III of the Iowa Constitution; and, second, if section 4 is unconstitutional, whether and how the IEPIA can be implemented.

Article III of the Iowa Constitution addresses the distribution of powers among the separate departments of state government. Section 1 of Article III expressly provides:

Departments of government. Section 1. The powers of the government of Iowa shall be divided into three separate departments—the Legislative, the Executive, and the Judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted. [Iowa Const. art. III, § 1]

Under this language persons charged with the exercise of powers properly belonging to one department are prohibited from exercising any function appertaining to either of two departments.

Generally, the power of appointment is considered to be an executive function. The power of appointment, however, is not considered to be exercisable exclusively by the governor. *Hutchins v. City of Des Moines*, 176 Iowa 189, 204-05, 157 N.W. 881, 888 (1916); *State v. Barker*, 116 Iowa 96, 112, 89 N.W. 204, 209 (1902). See 1 Sutherland, *Statutes and Statutory Construction* § 3.20 (4th ed. 1985). Members of the executive, legislative and judicial departments of government may utilize the power of appointment. *Hutchins v. City of Des Moines*, 176 Iowa at 204-05, 157 N.W. at 888; *State v. Barker*, 116 Iowa at 112, 89 N.W. at 209. See e.g., Iowa Code § 8.4 (1985) (State Comptroller appointed by governor); Iowa Code § 2.41(11) (1985) (Code Editor appointed by Legislative Council); Iowa Code § 602.1215 (1985) (Clerk of District Court appointed by district judges of each judicial election district). The Iowa Supreme Court, however, has required a nexus between the appointed position and the discharge of functions by the appointing department.

The nexus between the appointed position and the discharge of functions by the appointing department was first explained in *State v. Barker*, 116 Iowa

96, 89 N.W. 204 (1902). In *Barker* the legislature had created a board of waterworks trustees for certain cities and authorized the appointment of the board by the district court of the county in which the cities were located. The validity of the appointments was challenged under the separation of powers doctrine. The Supreme Court struck down the statute on the grounds that the appointments were "in no manner connected with the discharge of judicial duties." *Id.* at 112-13, 89 N.W. at 209-10.

Although the *Barker* decision struck down the statute granting appointment power to the district court, *Barker* has been criticized by commentators as positing too lax a test for the constitutionality of the exercise of appointment power. See 1 Sutherland, *Statutes and Statutory Construction* §3.20 at pp. 76-77. Indeed, *Barker* focused on the character of the service the appointees would perform and the relationship of this service to the appointing department. *State v. Barker*, 116 Iowa at 112-13, 89 N.W. at 209-10. Dicta in later cases, however, more narrowly states that "each department may make such appointments as are essential to the proper and independent discharge of its functions." *Hutchins v. City of Des Moines*, 176 Iowa 189, 205, 157 N.W. 881, 887 (1916).

Since the *Barker* and *Hutchins* decisions, two significant opinions of this office have addressed the scope of the appointment power in nonexecutive departments of government. In 1980 we reviewed the court appointment of juvenile probation officers under the separation of powers doctrine. We concluded that the functions of the juvenile probation officers were "central to the role of the juvenile court" and, therefore, exercise of the appointment power by the courts would not violate the doctrine of separation of powers. 1980 Op.Att'yGen. 605, 610-13. Earlier, in 1976, we reviewed the court appointment of the Code Editor under the separation of powers doctrine. We, similarly, concluded that appointment of the Code Editor furthered the Supreme Court's judicial function of prescribing and formulating rules of court and rules of civil procedure by providing for an assistant to carry out these duties and, therefore, exercise of the appointment power by the Supreme Court would not violate the separation of powers doctrine. 1976 Op.Att'yGen. 527, 529. In both opinions the constitutionality of the exercise of the appointment power turned on the role of the appointee in the discharge of the functions of the appointing department.

Consideration of the Iowa case precedent and prior opinions of the Attorney General on this subject leads us to conclude that the constitutionality test for the exercise of the power of appointment by the three departments of government is whether the appointment is essential to the proper and independent discharge of the appointing department's functions. Generalizations about the positions of other state courts on this issue are difficult because differences in state constitutions cause variation in state court decisions. Other state courts, however, have recognized that the appointment must further the discharge of the appointing department's functions in order to pass constitutional muster. See e.g., *Opinion of the Justices*, 302 Mass. 605, 19 N.E.2d 807 (1939); *Alexander v. State*, 441 So.2d 1329 (Miss. 1983); *McLeod v. Younce*, 274 S.C. 81, 261 S.E.2d 303 (1979).

Application of the constitutionality test demonstrates that appointments made by the legislative committee to the IEPIA would not be essential to the proper and independent discharge of legislative functions. The IEPIA accepts appropriations, gifts, grants, loans or other aid from public or private entities, issues negotiable bonds, notes, debentures, capital stock or other obligations and funnels resources into the private sector through the operations assistance program. S.F. 577 §§ 7.4, 7.6, 7.11. The IEPIA may bring court actions to vindicate the interests of the holders of obligations. S.F. 577 §§ 11. The IEPIA, moreover, may make and execute agreements, contracts and other instruments to carry out the purposes of the act. S.F. 577 § 7.4, 7.10. We find no nexus between appointees carrying out these duties and the discharge of legislative functions.

We point out that the IEPIA does perform functions which relate to the flow of information by acting as an instrumentality for financial assistance

programs. Specific duties include: preparation of an annual report including a record of all gifts or grants accepted; conduct of studies of farm and small business operational and expense needs; and gathering and compilation of data to facilitate decision making and facilitation and encouragement of maximum use of available federal farm and small business aid. S.F. 577 §§ 7.6-7.9. The United States Supreme Court has characterized agency functions which relate to the flow of information, i.e., investigation, receipt and dissemination of data, as legislative in nature since these functions could be delegated to a committee of a legislative body. *See generally, Buckley v. Valeo*, 424 U.S. 1, 135-37, 96 S.Ct. 612, 689-91, 46 L.Ed.2d 659, 754-55 (1976). These informational duties, however, are not a sufficient proportion of the IEPIA duties to characterize the appointments as essential to the proper and independent discharge of legislative functions.

Inclusion of informational duties, alone, will not render a multipurpose agency sufficiently legislatively-related to justify legislative appointments. Indeed, the informational duties analyzed in *Buckley* surpassed those imposed on the IEPIA. In *Buckley* the Federal Elections Commission, the agency in issue, had substantial informational duties involved in the fulfillment of statutory duties to receive, disseminate and investigate campaign finance disclosure reports filed with the agency. *Id.* The informational duties imposed on the IEPIA, by contrast, concern preparation of an annual report on agency activities and conduct of studies and compilation of data to facilitate and assist in future activities. S.F. 577 §§ 7.6-7.9. These informational duties do not significantly exceed those imposed on other Iowa agencies charged with gathering and reporting information to the General Assembly. *See e.g., Iowa Code § 258A.4(2)* (1985) (licensing boards obligated to gather and report disciplinary data).

Based on the foregoing analysis it is our opinion that, if Senate File 577 were challenged in a court of law under the separation of powers doctrine, a court would hold the appointments to the agency by a legislative committee to be unconstitutional. There are many options for a judicial remedy for unconstitutional agency appointments. If Senate File 577 were challenged in a court of law, the remedy would be up to a court to decide. We believe, however, the best approach is a legislative remedy.

January 20, 1986

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

FEBRUARY 1986

February 4, 1986

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

February 4, 1986

STATE OFFICERS AND DEPARTMENTS: Judicial Hospitalization Referees. Iowa Code §§ 25A.2(3), 229.21 (1985); Op.Att'yGen. #84-6-9(L). Judicial hospitalization referees appointed pursuant to Iowa Code § 229.21

are employees of the state within the meaning of §25A.2(3), the State Tort Claims Act. (McCown to Riepe, Henry County Attorney, 2-4-86) #86-2-2(L)

February 5, 1986

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

February 18, 1986

ENVIRONMENTAL QUALITY: Water Rights. U.S. Const. art. I, §10; Iowa Const. art. I, §21; Iowa Code Supp. §§29C.6; 455B.263, .266, .271 (1985); 1982 Iowa Acts, ch. 1125, §1; 1985 Iowa Acts, ch. 7, §6 (S.F. 163). Senate File 163 does not on its face unconstitutionally impair a contract obligation of the State or nullify a water storage contract between the State and Iowa Southern Utilities Company. The Iowa Department of Water, Air and Waste Management should exercise emergency regulatory authority cautiously to avoid an unnecessary compensable taking of water rights protected by State water storage contracts. (Smith to Jay, State Representative, 2-18-86) #86-2-4 [Citation corrected]

The Honorable Daniel J. Jay, State Representative: You have requested an opinion of the Attorney General concerning whether 1985 Iowa Acts, ch. 7, §6 (S.F. 163) impairs a contract obligation of the State of Iowa, in violation of U.S. Const. art. I, §10 and Iowa Const. art. I, §21, or nullifies a water storage contract between the State of Iowa and Iowa Southern Utilities Company (Iowa Southern). Senate File 163 amended the Iowa water rights code administered by the Iowa Department of Water, Air and Waste Management (Department). The 1985 amendment created a new priority scheme for allocation of water during a water shortage. Pertinent provisions of the priority scheme are in Iowa Code Supp. §455B.266, subsections 2 and 3 (1985). Subsection 2 authorizes the Department to issue emergency orders suspending or restricting usage of water on a local or statewide basis in accordance with a priority list which ranks nine water usage categories. Subsection 3 limits the circumstances in which the Department can impose a suspension or a further restriction, other than conservation, on the three highest-ranked categories and a tenth category. The tenth category consists of water rights protected by a water storage contract with the State.

Uses of water pursuant to a contract with the State are given special recognition in subsection 3 which prohibits their restriction or suspension except following a disaster emergency declaration by the Governor. The recipient of an emergency order suspending or restricting use is entitled to an administrative hearing and judicial review. Iowa Code Supp. §455B.271(3) (1985). Subsection 2 does not require that any category of use be suspended; it confers discretionary power. Subsection 3 limits the delegation of discretionary power. The effects of the delegated power on water storage contract rights depend on how the power is exercised.

Since 1965, the Iowa water rights code has encouraged water users to purchase storage space in federal reservoirs to assure that water will be available to the purchasers during shortages. Criteria for contracts to assure release of water from federal reservoir storage were enacted in 1965 Iowa Acts, ch. 373, §1, presently codified (with minor amendments) as Iowa Code Supp. §455B.263(3)-(6) (1985). Subsections 3 and 4 require the Water, Air and Waste Management Commission to negotiate agreements with the Federal Government for release of water from federal reservoirs and inclusion of conservation storage features in the reservoirs. Subsections 5 and 6 provide for contracts between the State and local users who benefit from inclusion of conservation storage in the reservoirs as follows:

5. A water user who benefits from the development by the federal government of conservation storage for water supply shall be encouraged to assume the responsibility for repaying to the federal government any reimbursable costs incurred in the development, and a user who accepts benefits from the developments financed in whole or part by the state shall assume by contract the responsibility of repaying to the state the user's reasonable share of the state's obligations in accordance with a basis which will assure payment within the life of the development. An appropriation, diversion, or use shall not be made by a person of any waters of the state that have been stored or released from storage either under the authority of the state or pursuant to an agreement between the state and the federal government until the person has assumed by contract the person's repayment responsibility. However, this subsection does not infringe upon any vested property interests.

6. In its contracts with water users for the payment of state obligations incurred in the development of conservation storage for water supply, the commission shall include the terms deemed reasonable and necessary:

a. To protect the health, safety, and general welfare of the people of the state.

b. To achieve the purposes of this chapter.

c. To provide that the state is not responsible to any person if the waters involved are insufficient for performance.

The commission may designate and describe any such contract, and describe the relationships to which it relates, as a sale of storage capacity, a sale of water release services, a contract for the storage or sale of water, or *any similar terms suggestive of the creation of a property interest*. The term of the contracts shall be commensurate with the investment and use concerned, but the commission shall not enter into any such contract for a term in excess of the maximum period provided for water use permits.

(Emphasis added). These subsections establish a framework which encourages local water users to purchase water storage in a federal reservoir by entering contracts with the State which acts as intermediary with the federal government. The emphasized language plainly expresses a legislative intent to delegate authority to create private property rights in water stored pursuant to State contract. In 1982 the General Assembly specifically authorized the Iowa Natural Resources Council (a predecessor of the Department) to enter a contract with the federal government:

... for the acquisition of storage in Saylorville reservoir for municipal and industrial water supply if the council also enters into binding contracts on behalf of this state with the local water users who will benefit from the storage so that all costs incurred by this state in its contract with the federal government are borne by those local water users.

1982 Iowa Acts, ch. 1125, § 1. Your opinion request attached copies of a contract between the State and the United States for purchase of water storage space in Saylorville Reservoir and a contract by which the State has suballocated a percentage of the storage space to Iowa Southern. As noted in your request, the State has also entered a suballocation contract with the Des Moines Water Works. The suballocation contracts obligate the two water users to pay all the costs incurred by the State in acquiring water storage space in the federal reservoir. These costs are substantial (several hundred thousand dollars per year for 25 years followed by continuing operation and maintenance costs).

In its suballocation contract with Iowa Southern, the State reserved certain rights to reassign and reallocate storage space without reducing the quantity or reliability of Iowa Southern's water supply from the purchased reservoir storage. The suballocation contract provides that Iowa Southern has the right to utilize an undivided percentage of storage space in Saylorville Reservoir estimated by the U.S. Army Corps of Engineers to be equivalent to maintenance

of a continuous flow of 25 cubic feet per second in the Des Moines River with a reliability of not less than 99%. Iowa Southern withdraws water from the Des Moines River for consumptive cooling use at its Ottumwa Generating Station pursuant to a permit which requires Iowa Southern to obtain an auxiliary source of water when the flow in the Des Moines River drops below a specified "protected" level.

Summarizing the statutory scheme, Iowa Code §455B.263 (1985) and 1982 Iowa Acts, ch. 1125, encourage and authorize public contracts under which water users purchase federal reservoir storage to provide municipal and industrial water supply. Iowa Code Supp. §§455B.266(2) and (3) (1985) at least recognize that the state police power can be exercised in an officially-declared emergency to temporarily reallocate water contrary to the provisions of a public water storage contract. In determining whether the latter statute violates the contract clauses of the Federal and Iowa Constitutions, we must consider those clauses as well as the related clauses that prohibit taking of private property for public use without payment of just compensation. U.S. Const. amend. V, amend. XIV, §1; Iowa Const. art. I, §18.

The contract clauses of the Federal and Iowa Constitutions employ identical language that prohibits state laws impairing the obligation of contracts. Although the constitutional prohibition is facially absolute, the courts have long recognized that the prohibition must be accommodated to the inherent police power of the state to safeguard the vital interests of its people. *Home Building & Loan Ass'n v. Blaisdell*, 200 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934); *Des Moines Joint Stock Land Bank v. Nordholm*, 217 Iowa 1319, 253 N.W. 701 (1934). An impairment of a state's own contract obligations is constitutional under the Federal Contract Clause if the impairment is reasonable and necessary to serve an important public purpose; the extent of the impairment is a relevant factor in determining its reasonableness. However, impairment of a state's own contract obligation may receive a greater degree of judicial scrutiny than where state exercise of police power impairs the obligation of a private contract. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977). Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid. *Id.*, 431 U.S. 19, 97 S.Ct. 1516, 52 L.Ed.2d 108. Iowa Code Supp. §29C.6(12) authorizes the Governor to commandeer or utilize any private property which the Governor finds necessary to cope with an officially-declared disaster emergency. However, the authorization is expressly made subject to "any applicable requirements for compensation."

One of the express purposes of Iowa Code Supp. §455B.266(3) is to limit the circumstances under which reserved state police power can be exercised to temporarily reallocate "contract" water released from federal reservoir storage, i.e., the police power can only be exercised during a disaster emergency declared by the Governor. Although the legislature has recognized that an emergency may justify temporary reallocation, the Department should not assume that such an emergency reallocation can be accomplished without compensation for damages arising from breach of contract. We must presume that the General Assembly intends its enactments to comply with the State and Federal Constitutions. Iowa Code §4.4(1) (1985); *Hewett Wholesale, Inc. v. Department of Revenue, State of Iowa*, 343 N.W.2d 487 (Iowa 1984). Therefore, we must presume that the General Assembly did not intend its limited delegation of emergency police power to immunize the State from a claim for just compensation if the emergency reallocation of water breaches a contract obligation of the State to the financial detriment of the local water user. If the Department issues an emergency order temporarily suspending or restricting a water use protected by a state storage contract, the water user should demand a hearing to allege its right to just compensation and notify the Department of its anticipated economic losses.¹ This procedure would enable the Department

¹The water user could argue alternatively that a suspension or restriction of water released from contract storage would violate its right to due process of law as guaranteed by the Fourteenth Amendment of the U.S. Constitution.

to consider the advisability of modifying the order to avoid any unnecessary compensable taking.

We conclude that Iowa Code Supp. §455B.266 (1985) does not on its face violate the Contract Clause of the Federal or Iowa Constitution and does not nullify the water storage contract between the State and Iowa Southern. However, it is our opinion that an unconstitutional taking of private property rights could result from suspension or restriction of a permitted water use for the purpose of temporarily reallocating water released from federal reservoir storage pursuant to the user's contract with the State. The Department should exercise its discretion cautiously and consult the Governor in deciding whether to order temporary emergency suspension or restriction of a water use protected by contract with the State.

February 20, 1986

CONSTITUTIONAL LAW: Constitutional Amendment. Iowa Const. art. X, §§ 1, 2. The constitutional requirement that the same amendment or amendments be approved by two general assemblies can be met even if another proposed amendment which was approved in the same resolution in the 70th General Assembly is rejected by the 71st General Assembly. (Osenbaugh to Spear, Beatty, and Daggett, State Representatives, 2-20-86) #86-2-5

The Honorable Clay Spear, State Representative; The Honorable Horace Daggett, State Representative; The Honorable Linda Beatty, State Representative: You have requested an opinion of the Attorney General concerning Article X, § 1, of the Iowa Constitution, governing constitutional amendments. Section 1 in relevant part requires that any amendment or amendments to the Iowa Constitution be approved by two successive general assemblies.¹

You point out that during the 70th General Assembly, Senate Joint Resolution 2001, containing two proposed amendments to the Iowa Constitution, was adopted by both the House and the Senate. Those proposed amendments were as follows:

1. Beginning with the 1990 general election, the candidates for Governor and Lieutenant Governor of each party will run as a team; and
2. Following the 1987 general election, the duties of the Lieutenant Governor will be prescribed by law or assigned by the Governor.

While each of the proposed amendments changes several sections of the Constitution, the two amendments are delineated in S.J.R. 2001. Each proposed amendment is contained in a separate section of S.J.R. 2001. Each amendment

n.¹ continued

The relationship of the Taking Clause and Due Process in the context of a police power regulation is discussed in *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. , 87 L.Ed.2d 126, 105 S.Ct. (1985).

¹ Article X, § 1, states in full:

Any amendment or amendments to this constitution may be proposed in either house of the general assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature to be chosen at the next general election, and shall be published, as provided by law, for three months previous to the time of making such choice; and if, in the general assembly so next chosen as aforesaid, such proposed amendment or amendments shall be agreed to, by a majority of all the members elected to each house, then it shall be the duty of the general assembly to submit such proposed amendment or amendments to the people, in such manner, and at such time as the general assembly shall provide; and if the people shall approve and ratify such amendment or amendments, by a majority of the electors qualified to vote for members of the general assembly, voting thereon, such amendment or amendments shall become a part of the constitution of this state.

and *State v. Brookhart*, 113 Iowa 250, 84 N.W. 1064 (1901), also hold that an amendment is not properly adopted unless the full text of the proposed amendment was entered on the journal of each house of the general assembly by which it was first proposed and adopted. The purpose of the record entry in full is to "preserve *** the identical amendment proposed, and in an authentic form which, under the Constitution, is to come before the succeeding General Assembly." *Jones v. McClaghry*, 169 Iowa 281, 301, 151 N.W. 210, 217 (1915), citing *Koehler*.

More recently *Selzer v. Synhorst*, 253 Iowa 936, 952, 113 N.W.2d 724, 733 (1962), has been cited as requiring that amendments be approved "in the same form" by two general assemblies. The *Selzer* case does state:

A constitutional amendment so initiated by the legislature must be passed in the same form by two successive sessions of the legislature and then approved by a vote of the people.

Whether a constitutional amendment had been properly adopted, however, was not at issue in *Selzer*. This quotation is merely dicta in the Court's explanation of why a proposed constitutional change would not affect the legal result under the existing constitution. The "same form" language in *Selzer*, therefore, is not helpful to the analysis required here.

Other jurisdictions have focused squarely on the issue. The Virginia Supreme Court has held that the deletion of one of four amendments proposed in one bill by the previous general assembly resulted in none of the amendments meeting the constitutional requirement for approval by two succeeding general assemblies. *Coleman v. Pross*, 219 Va. 143, 246 S.E.2d 613 (1978). This decision appears to be based on two basic principles. First, the requirement that "the same" amendment or amendments be approved by two general assemblies precludes revision of the amendatory resolution. 246 S.E.2d at 620-621. Second, the amendments are not severable. 246 S.E.2d at 620-622. The deleted amendment, the Court found, "... was not intended to be submitted separately from the general scheme of amendments included in a single resolution," 246 S.E.2d at 620-621, and "... was an integral part of a package of four interrelated amendments. . . ." 246 S.E.2d at 621.

We believe it unlikely that an Iowa court would follow this approach because the Virginia and Iowa Constitutions differ in one key respect. The Iowa Constitution requires that the electorate be able to vote separately on proposed amendments. Iowa Const. art. X, §2. Where several amendments are jointly proposed, the legislature must separately designate the amendments for ultimate submission to the voters. The proposing general assembly would be aware of the possibility that only one of the two proposed amendments might ultimately be adopted. Accordingly, the Iowa courts would view the two proposed amendments as severable since they must be submitted separately to the electorate.

A more persuasive view is espoused by the North Carolina Supreme Court. In *Trustees of the University of North Carolina v. McIver*, 72 N.C. 76 (1875), the general assembly had adopted eight of seventeen amendments proposed in one bill by the prior general assembly and the Court held that the amendments were properly approved. The Court stated:

The [the approved amendments] have been adopted in accordance with the language of the Constitution, because each amendment has passed through all the forms of legislative enactment prescribed by that instrument. They do not violate the spirit of the Constitution in the manner of their adoption for although they finally assumed the shape of eight separate bills, they are yet the eight identical amendments adopted by the first Legislature, and it cannot be shown why the amendments adopted in eight bills would not have been as valid in one bill, as originally passed, or why they should have been less valid because they were adopted in eight bills instead one. The substance and even the precise form of the amendments adopted were the same and unaltered from their inception to their consummation in the Constitution.

is immediately preceded by the sentence, "The following amendment to the Constitution of the State of Iowa is proposed:".

During the first regular session of the 71st General Assembly in 1985, the Senate again approved the two proposed constitutional amendments with the adoption of Senate Joint Resolution 1. S.J.R. 1 contains the same two amendments as found in S.J.R. 2001. At this time, the House of Representatives has approved the first of the proposed amendments but has deleted provision 2 regarding the duties of the Lieutenant Governor.

In view of the constitutional requirement that the same amendment or amendments be approved by two successive general assemblies, the proposal to strike provision 2 prompts you to pose the following question: Is the constitutional requirement that the same amendment or amendments be approved by two successive general assemblies met when the first general assembly approves two amendments in the same resolution but the second general assembly approves one amendment and rejects the other amendment? In our opinion the constitutional requirement is met with respect to the one amendment approved by the second general assembly.

Although the Iowa Supreme Court has not ruled on this specific issue, the court has articulated some parameters in the constitutional analysis. Two successive general assemblies must approve an amendment in identical language before it is submitted to the electorate. A finding that an amendment approved by the 18th General Assembly contained certain words not contained in the amendments as adopted by the 19th General Assembly was found to be a fatal defect in *Koehler v. Hill*, 60 Iowa 543, 14 N.W. 738, 15 N.W. 609 (1883), even though the amendment had been subsequently approved by the voters. *Koehler* 72 N.C. at 80. Under the North Carolina analysis the essential inquiry is whether the same amendments have been approved by two successive general assemblies not whether the amendments have been presented to two successive general assemblies in the same manner.

Language in other related authority suggests the Iowa Supreme Court would adopt the North Carolina view. In *Jones v. McClaughry*, 169 Iowa 281, 300-302, 151 N.W.2d 210, 217 (1915), the Iowa Supreme Court determined that entry and approval of one resolution containing several amendments was constitutionally sound under section 1 of Article X. The Court reasoned that "Surely the larger number includes the less, and each amendment contained therein may be said to have been entered and the yeas and nays taken thereon." *Id.* Consistent with the *Jones* decision, later opinions of this office have determined that the resolution is merely the vehicle by which the proposed amendments are presented to the general assembly. See 1968 Op.Att'yGen. 751, 752; 1918 Op.Att'yGen. 41, 50. These authorities suggest that the focus of the constitutional requirement of approval is on the text of the amendment.

The language of the resolution in fact will often differ in the two general assemblies. The resolution of the proposing general assembly will normally recite that the proposed amendments will be referred to the next general assembly.² The resolution in the succeeding general assembly will recite the amendment's approval by the prior general assembly and provide for its submission to the voters.³ The clauses of resolutions proposing amendments

²So here, section 3 of S.J.R. 2001 as passed by the 70th General Assembly states:

The foregoing proposed amendments to the Constitution of the State of Iowa are referred to the general assembly to be chosen at the next general election for members of the general assembly and the secretary of state is directed to cause them to be published for three consecutive months before the date of that election as provided by law.

1984 Iowa Acts, ch. 1319, §3.

³S.J.R. 1 in the 71st General Assembly, proposing the identical constitutional amendments as S.J.R. 2001, states in section 3:

The foregoing proposed amendments[sic], having been adopted and agreed

or submitting amendments to the electorate are not part of the proposed amendment. As such, those clauses are surplusage and are not properly included on the ballot for submission to the voters. 1968 Op. Att'y Gen. 751. It cannot therefore be said that the requirement that "the same" be approved by two general assemblies and by the electors requires approval of the same resolution.

In light of the North Carolina precedent, the *Jones* decision approving the presentation of multiple amendments in one resolution and subsequent opinions of this office characterizing the constitutional requirement of approval by two successive general assemblies to be satisfied when it can be determined that the same amendments have been presented and approved. This determination is not affected by the fact that other amendments presented at the same time failed to be approved. It is therefore our opinion that the requirement that the same amendment or amendments be approved by two general assemblies can be met even if another proposed amendment which was approved in the same resolution in the 70th General Assembly is rejected by the 71st General Assembly.

February 25, 1986

ENVIRONMENTAL QUALITY: Bottle Redemption. Iowa Code §§ 455C.3(2), 4.1(2), 455C.4(1), 455C.2(1) (1985), and 900 Iowa Admin. Code § 107.2(18). Distributors are under no duty to accept beverage containers which are not the type the distributor sells. (Lorentzen to Daggett, State Representative and Boswell, State Senator, 2-25-86) #86-2-6(L)

February 26, 1986

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

February 27, 1986

REAL PROPERTY: Judgment Liens. Iowa Code Supp. § 624.24 (1985); Iowa Code §§ 617.13 and .14 (1985); U.S. Const. amend. XIV, § 1; Iowa Const. art. I, § 9. Prospective purchasers or encumbrancers of real estate are not deprived of property without due process of law by Iowa Code § 624.24 as amended by 1985 Iowa Acts, ch. 100, § 9 (S.F. 244), which establishes a statewide lien of a support judgment upon entry of the judgment. Legislation providing for establishment of a centralized index of statewide support liens would be desirable but is not constitutionally required. (Smith to Criswell, Warren County Attorney, and Soorholtz, State Senator, 2-27-86) #86-2-8

Mr. John W. Criswell, Warren County Attorney; The Honorable John E. Soorholtz, State Senator: Each of you has requested our opinion concerning the constitutionality of 1985 Iowa Acts, ch. 100, § 9 (S.F. 244), which amended Iowa Code § 624.24. Section 624.24 governs when a judgment lien attaches to the judgment debtor's interest in real estate. This section and its statutory precursors have long provided that if the judgment is entered in a different county than where the real estate is located, the lien attaches when an attested copy of the judgment is filed in the office of the clerk of the district court in the county where the real estate lies. Section 602.8104(2)"g" (1985) requires the clerk to maintain a county-wide lien index.

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to by the Seventieth General Assembly, thereafter duly published, and now adopted and agreed to by the Seventy-first General Assembly, in this Joint Resolution, shall be submitted to the people of the state of Iowa at the general election in November of the year nineteen hundred eighty-six (1986) in the manner required by the Constitution of the State of Iowa and the laws of the State of Iowa.

The 1985 amendment has created an exception to the attachment process by providing that the lien of a judgment for spousal or child support attaches to the debtor's interest in real estate in a foreign county from the time of entry of the judgment. The amendment requires each clerk to maintain a county-wide index of support liens and also requires the Child Support Recovery Unit of the Iowa Department of Human Services to maintain a statewide index of those support liens held by the Unit. The amendment does not require establishment of any statewide index for support liens other than those held by the Child Support Recovery Unit. Therefore, the amendment has created a species of statewide lien but required only that a partial centralized statewide index be established and maintained.

The first question you have posed is whether S.F. 244, §9, violates the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and Article I, §9 of the Iowa Constitution by providing for attachment of a support lien without real or constructive notice to subsequent purchasers or encumbrancers. We note that statutes in other states generally provide for liens only on the real estate of the judgment debtor situated in the county in which the judgment is rendered, or recorded or enrolled, or in which a transcript thereof has been filed. 46 Am.Jur.2d *Judgments* §255 (1969). However, judgment liens are creatures of statutory provisions, owe their life and force entirely to legislation, and do not exist except by its authority. *Jeffrey v. Moran*, 101 U.S. 285, 25 L.Ed.2d 785 (1879); *Hunter v. Citizens' Savings & Trust Co.*, 157 Iowa 168, 138 N.W. 475 (1912). Accordingly, the General Assembly has authority to modify the process by which a support lien attaches to the debtor's interest in real estate located in a county other than where the judgment is entered.

The question that logically follows is whether failure of the legislature to require a centralized index of statewide liens deprives purchasers or encumbrancers of property without due process of law. It might be argued that constructive notice of a statewide lien cannot be imputed to a purchaser or encumbrancer if the relevant records are dispersed among the offices of ninety-nine district court clerks. Constructive notice has been defined as information or knowledge of a fact imputed by law to a person, (although he or she may not actually have it), because the person could have discovered the fact by proper diligence and was in a situation which created a duty of inquiry. *Black's Law Dictionary*, Fifth Edition (1979). *Simmons Creek Coal Co. v. Doran*, 142 U.S. 417, 12 S.Ct. 239, 35 L.Ed. 1063 (1892). In Iowa, as in many other states, the duty of prospective purchasers or encumbrancers of real estate to inquire into the existence of liens or other clouds on title is largely performed through reliance on the attorney-abstract system of title examination.

Legislative creation of statewide support lien attachment without mandating (and funding) a centralized index for all support liens has made the duty of inquiry more difficult and expensive, whether performed by abstracters, title examiners, or their clients. The difficulty and expense could be significantly reduced if a centralized support lien index service were established. In the absence of such an index, we assume many title examiners will require affidavits from sellers and mortgagors concerning the existence of judgments for support. Of course an affidavit cannot eliminate the risk that the affiant may give false information. If the private sector establishes a statewide centralized support lien index in response to the need for a statewide support lien search, real estate transaction costs will be higher, but the statewide lien will not have significantly increased the risk to purchasers or encumbrancers; if a statewide centralized index is not made available, real estate transactions will be both more expensive and risky.

Assuming that the statewide support lien statute has increased both the expense and risk of purchasing or encumbering real estate, those effects do not deprive the prospective purchaser or encumbrancer of property without due process of law because the purchaser or encumbrancer can factor the transaction expense and risk into the calculation of the value of the property interest being transferred. The prospective purchaser is still charged with knowledge of support liens because the statute tells the purchaser where to look. Relegating to the private sector the burden of establishing an efficient statewide support lien index is

analogous to relegating to abstracters the burden of maintaining a tract index to supplement the grantor and grantee indexes maintained by the county recorder.

In the absence of a central index, the statewide support lien poses a risk similar to the risk of a mechanic's lien. The latter can be difficult for the purchaser or encumbrancer to discover. Yet if a mechanic's lien is perfected by filing within the period prescribed by Iowa Code §572.9 (1985), it will encumber the property in the hands of one who purchased or took a mortgage on the property before filing. Iowa Code §572.18 (1985). The Iowa Supreme Court has rejected a due process attack on the mechanic's lien statute. *Keith Young & Sons Construction Co. v. Victor Senior Citizens Housing, Inc.*, 262 N.W.2d 554 (1978).

The second and third questions posed by Senator Soorholtz are as follows:

2. Does the purchaser of real estate to which a "support lien" has attached take that real estate free and clear of the lien if that lien has not been entered in the general lien index of the county where the real estate is located?

3. Does a subsequent lien, properly filed and entered into the general lien index of the county where the real estate is located, have priority over a "support lien" which has not been so filed and indexed?

Our answers to these questions are based on our conclusion that S.F. 244 does not deprive prospective purchasers or encumbrancers of property without due process of law. We must conclude that failure to file an attested copy of a support judgment with the clerk in a foreign county cannot be the basis for a purchaser to take the property free of the support lien, and cannot be the basis for another lien to have priority over the support lien. Priority between a support lien and the lien of another judgment could in certain circumstances be affected by a related 1985 amendment of Iowa Code §624.23.¹ Analysis of this related amendment is outside the scope of your respective requests and this opinion.

The last question posed by Senator Soorholtz is whether S.F. 244, §9 overrides the notification, indexing and constructive notice provisions of Iowa Code §§617.13 and 617.14 (1985). These sections establish the procedures for filing a lis pendens notice to charge third persons with constructive notice that a petition has been filed commencing an action affecting real estate in a foreign county. Assuming that the clerk must file a lis pendens notice at the plaintiff's request in certain actions for support,² the effect of the lis pendens notice is to create a pre-judgment encumbrance on property of the defendant. We cannot find any language in S.F. 244 purporting to alter the procedures for creation of a pre-judgment encumbrance.

¹Senate File 244, §8, amended Iowa Code §624.23 (1985) (Iowa's automatic judgment lien statute) by adding a new paragraph to subsection 1 specifically addressing liens of judgments and administrative orders for child or spousal support. Arguably, the amendment makes unmaturing periodic support payments a lien on real property of the debtor from entry of the judgment or order, thus superseding the rule established by the Iowa Supreme Court in *Slack v. Mullenix*, 245 Iowa 1180, 66 N.W.2d 99 (1954). See discussion of automatic lien statutes in 59 A.L.R.2d 656 (1958).

²When a claim for support is made in a petition for dissolution of marriage, the applicability of the lis pendens provisions is open to question. In *Joneson v. Joneson*, 251 Iowa 825, 102 N.W.2d 911 (1960), the Supreme Court held that a divorce action may constitute lis pendens where specific property is described and sought to be charged with payment of alimony. Subsequently, the legislature enacted Iowa Code §598.26, which has been interpreted by 1976 Op.Att'yGen. 484 to preclude the clerk from indexing dissolution actions in the lis pendens book.

Enactment of S.F. 244, §9 may well have been a response to the Federal Support Enforcement Amendments of 1984, Pub. L. No. 98-378, §3(b), 98 Stat. 1306, codified at 42 U.S.C. §666(a)(4). This Federal legislation conditions Federal Aid to Families with Dependent Children assistance to states on the existence of state procedures for imposition of liens against real or personal property of an absent parent who resides or owns property in the state. *See also* implementing regulations in 45 C.F.R. §303.103. The General Assembly might reasonably have determined that Congress required establishment of state procedures to make it easier to impose liens of support judgments on the judgment debtor's property. The General Assembly could reasonably distinguish judgment liens from pre-judgment encumbrances.

In conclusion, legislation establishing a centralized index of statewide support judgment liens would be desirable to reduce the risk and expense of real estate transactions. However, the Due Process Clauses of the Federal and Iowa Constitutions do not require that the State provide a centralized index in order for prospective purchasers or encumbrancers of real estate to be charged with constructive notice of the existence of the liens of support judgments.

February 28, 1986

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

MARCH 1986

March 6, 1986

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

March 11, 1986

COUNTIES AND COUNTY OFFICERS: Clerk of Court; Filing Fees. Iowa Code §§79.5, 252A.10, 602.8105(1). There is no \$35.00 filing fee under Iowa Code §602.8105(1)(a) for suits brought under the Uniform Support of Dependents Law if the action is brought by an agency of the state or county by operation of Iowa Code §252A.10. The state or county is not required to pay in advance the \$25.00 fee for various services and docketing procedures

under Iowa Code § 602.8101(1)(b) but would be required to pay these if either became the losing party to which the costs are assessed. (Robinson to Norland, 3-11-86) #86-3-2(L)

March 24, 1986

TAXATION: Sales Tax; Constitutionality of Sales Tax on Lobbying Service. 1985 Iowa Acts, ch. 32, § 83 [Iowa Code § 422.43(11)]. Imposition of sales tax upon compensation of professional fee lobbyists does not violate constitutional guarantees associated with freedom of speech and petition and with equal protection of the laws for the reasons brought to our attention. However, imposition of sales tax on the salary of lobbyists results in differential taxation in violation of the First Amendment to the United States Constitution. (Griger to Drake and Small, State Senators, 3-24-86)#86-3-3

The Honorable Richard Drake, State Senator; The Honorable Arthur Small, State Senator: You have requested an opinion of the Attorney General with respect to the constitutionality of imposition of Iowa retail sales tax on "lobbying service." Iowa Code § 422.43(11) (1985) was amended by 1985 Iowa Acts, ch. 32, § 83 (S.F. 395) to impose the sales tax on "lobbying service." On September 11, 1985, the Department of Revenue published its "Notice of Intended Action" by which it commenced rulemaking proceedings and set forth its proposed rule for lobbying service taxation. 8 Iowa Admin. Bull. 549. Your opinion requests generally raised several constitutional issues regarding the tax statute and the proposed rule.¹

On November 26, 1985, Deputy Attorney General Elizabeth M. Osenbaugh acknowledged receipt of your opinion requests and further stated to you in her letter that we had identified a constitutional issue concerning imposition of sales tax upon the salary of lobbyists, but that we could not address "other suggested violations absent further illumination." This office invited interested persons to submit briefs or position papers regarding the precise constitutional issues raised. One letter was received which contained arguments that the sales tax on lobbying services violated United States and Iowa constitutional guarantees associated with freedom of speech and the right to petition for redress of grievances and guarantees associated with equal protection of the laws.²

¹Your letters described the constitutional issues as follows:

It would appear that both the statute and rule raised serious constitutional rights relating to first amendment rights, free speech, the right to petition one's government, and equal protection arguments. The proposed administrative rule raises a significant selective enforcement question. Finally, for those lobbyists who are also licensed attorneys, a violation of the attorney-client privilege is raised.

A constitutional challenge to legislation or agency action must be specific and point out with particularity the details of the claimed transgression. *McSpadden v. Big Ben Coal Company*, 288 N.W.2d 181, 184 (Iowa 1980).

²U.S. Const. amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. (Emphasis supplied).

This constitutional provision applies to the states through the Fourteenth Amendment to the United States Constitution. *Lee Enterprises, Inc. v. Iowa State Tax Commission*, 162 N.W.2d 730, 754 (Iowa 1969).

Iowa Const. art. I, § 7 provides in relevant part:

Every person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech, or of the press.

Iowa Const. art. I, § 20 provides:

The people have the right freely to assemble together to counsel for

With respect to the constitutional guarantees of freedom of speech and of petition, the letter raises three points. First, it is alleged that a sales tax on lobbying services is unconstitutional since there is no compelling state interest to justify the tax. Second, it is argued that the tax violates the principles articulated by the Supreme Court in *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 75 L.Ed.2d 295, 103 S.Ct. 1365 (1983) (*Star Tribune*) in that the "professional service" of lobbying is taxed whereas professional services generally are not. Third, it is contended that Iowa Const. art. I, §20 expressly guarantees to Iowans the right to engage in lobbying services which is being infringed by the tax and that this Iowa constitutional provision creates a broader constitutional protection than the First Amendment to the United States Constitution.

With regard to the constitutional guarantees of equal protection of the laws, it is claimed that the lobbying service tax is invalid because persons who employ professional lobbyists are treated differently than those who do not employ such professionals.

We conclude that the imposition of sales tax upon compensation of professional fee lobbyists is not unconstitutional for the reasons brought to our attention. However, we also conclude that imposition of sales tax on the salary of lobbyists while salaries of others engaged in the rendition of services are not subject to sales tax results in differential taxation in violation of the First Amendment to the United States Constitution.

Section 83 of ch. 32 (S.F. 395) expanded the scope of the sales tax by adding various services to an enumerated list of taxable services. One of the added services was "lobbying service" which was defined in the statute as follows:

For purposes of this subsection, 'lobbying service' means the rendering, furnishing or performing, for a fee, salary or other compensation, activities which are intended or used for the purpose of encouraging the passage, defeat, or modification of legislation or for influencing the decision of the members of a legislative committee or subcommittee or the representing for a fee, salary or other compensation, on a regular basis an organization which has as one of its purposes the encouragement of the passage, defeat or modification of legislation or the influencing of the decision of the members of a legislative committee or a subcommittee. 'Lobbying service' does not include the activities of a federal, state, or local government official or employee acting within the course of the official's or employee's duties or a representative of the news media engaged only in the reporting and dissemination of news and editorials.

The Department of Revenue's proposed rule provides:

730-26.35(422,423) Lobbying. On and after July 1, 1985, the gross receipts from any 'lobbying service' shall be subject to tax. For purposes of this rule 'lobbying' means rendering, furnishing, or performing, for compensation, activities which are intended or used for the purpose of encouraging the passage, defeat, or modification of legislation or for influencing the decision of the members of a legislative committee or subcommittee; or the representing, for compensation, on a regular basis

n.² continued

the common good; to make known their opinions to their representatives and to petition for a redress of grievances.

U.S. Const. amend. XIV provides in relevant part that "No state shall...deny to any person within its jurisdiction the equal protection of the laws." Iowa Const. art. I, §6 provides in relevant part that "All laws of a general nature shall have a uniform operation . . ."

These Iowa and United States constitutional provisions are so similar that they provide for the same constitutional guarantees and if the federal constitution is not violated by S.F. 395 as alleged, there will be no violation of similar provisions in the Iowa constitution. *City of Waterloo v. Selden*, 251 N.W.2d 506, 509 (Iowa 1977); *Des Moines Register & Tribune Co. v. Osmundson*, 248 N.W.2d 493, 498 (Iowa 1976).

of an organization which has as one of its purposes the encouragement of the passage, defeat or modification of legislation or the influencing of the decision of the members of a legislative committee or subcommittee. Excluded from the definition of 'lobbying' are the activities of any federal, state, or local government official or employee acting within the course of the official's or employee's duties or the activities of a representative of the news media engaged only in the reporting and dissemination of news and editorials. The gross receipts from any lobbying service for an 'employer' as defined in Iowa Code section 422.42(13) are exempt from tax.³

8 Iowa Admin. Bull. 549.

It is clear that lobbying activities are entitled to constitutional protection under the First Amendment. *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 76 L.Ed.2d 129, 103 S.Ct. 1997 (1983); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 30 L.Ed.2d 642, 92 S.Ct. 609 (1971). However, the First Amendment does not prohibit all regulation of those entitled to First Amendment constitutional guarantees. *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 581, 75 L.Ed.2d 295, 302, 103 S.Ct. 1365 (1983). Thus, the Supreme Court would hold that a generally applicable sales tax, which does not single out for differential taxation those activities covered by the First Amendment, would be constitutional. 460 U.S. at 586, 75 L.Ed.2d at 305. For example, lobbyists' incomes are subject to Iowa income taxes in common with other persons.

If a tax is imposed with the intention of punishing or penalizing those who engage in First Amendment activities, the tax is invalid. *Grosjean v. American Press Co.*, 297 U.S. 233, 80 L.Ed. 660, 56 S.Ct. 444 (1936).⁴ For purposes of the instant opinion, we cannot presume that the legislature "intended to get lobbyists." Instead, we must analyze the constitutional attacks upon the S.F. 395 sales tax on lobbying services in light of the structure of the Iowa sales tax upon services to ascertain whether it can pass muster under the First Amendment. *Star Tribune*, 460 U.S. at 580, 75 L.Ed.2d at 301-2. Therefore, the First Amendment issue with respect to imposition of the sales tax on lobbying services boils down to whether this tax is part of a generally applicable tax on services.

Section 83 of S.F. 395, in imposing the tax on lobbying services, expands the sales tax which already applies to a great number of services since the inception of the services tax in 1967. See 1967 Iowa Acts, ch. 348, §§20, 25.

When the 1967 legislation was enacted, one of the included services subject to tax was advertising services. Advertisers and advertising media challenged

³This proposed rule does not expressly mention the imposition of sales tax on salary of lobbyists. To the extent that the last sentence in the proposed rule would be construed as exempting such salary from sales tax, that portion of the proposed rule would conflict with §83 of S.F. 395 which expressly subjects lobbyists' salaries to sales tax. However, because of the results which we reach in this opinion concerning the unconstitutionality of taxing the salary of lobbyists in S.F. 395 and because we do not find a constitutional violation for taxation of fee lobbyists who are independent contractors, we deem it unnecessary to consider the proposed rule's validity.

⁴In this case, Louisiana had imposed a license tax on gross receipts of sales of newspapers with a circulation of over 20,000. The newspapers had been critical of Senator Huey Long and his political machine which, in essence, controlled state and local government. It was clear that Senator Long had the tax imposed "to get the press." The Supreme Court emphasized this political setting in the State and the legislative motive to punish the press as the reason why the license tax violated the First Amendment. The Court emphasized, however, that "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government." 297 U.S. at 250, 80 L.Ed. at 668.

this sales tax on advertising services upon a number of grounds, including allegations that the tax violated the First Amendment and equivalent provisions in the Iowa constitution. *Lee Enterprises, Inc. v. Iowa State Tax Commission*, 162 N.W.2d 730, 754-5 (Iowa 1968). The Iowa Supreme Court rejected this constitutional challenge to the advertising tax because the sales tax was not merely directed at advertising, but, rather, was applicable to "most business services rendered by citizens of this state." *Id.* at 755. In essence, the Iowa Court found that so many services were subject to the tax that it could not be said that the tax on advertising services was not part of a generally applicable economic measure.⁵

We are of the opinion that, like the advertising tax, the sales tax on lobbying services of fee lobbyists who are independent contractors also is part of a general economic regulation in the form of a sales tax on the receipts from substantial numbers of services. Iowa Code §422.43(11), as amended by §83 of S.F. 395, imposes the Iowa sales tax on a large body of services performed by citizens of this state. The fact that a variety of so-called professional services, such as those performed by doctors, engineers, architects, accountants, and lawyers, among others, are not, per se, subject to the sales tax does not seem to us to lead to a conclusion that the fee lobbyist has been singled out for differential taxation. Rather, we believe that as long as substantial numbers of services are taxable, the tax is of general application.

Section 83 of S.F. 395 does impose a differential tax upon the salaries of lobbyists. Section 83 expressly includes lobbying activities "for a fee, salary, or other compensation." Salaries paid to nonlobbyists are not subject to the sales tax because of the "employer" exemption found in Iowa Code §422.42(13) (1985). Thus, salaries paid to employees who are lobbyists for their employer are taxable whereas salaries paid to others for performing activities taxable in §422.43(11) are not taxable.

In *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 75 L.Ed.2d 295, 103 S.Ct. 1365 (1983), the Supreme Court considered the constitutionality, under the First Amendment, of a Minnesota special use tax imposed upon newsprint and ink components incorporated into newspapers which were produced for sale. The Supreme Court noted that imposition of a nondiscriminatory sales tax upon the press would be constitutionally permissible. 460 U.S. at 587, 75 L.Ed.2d at 305-306, n.9. However, the Court pointed out that the Minnesota newsprint and ink tax singled out the press for differential taxation because all other producers of tangible personal property to be sold were not taxed on their purchases of components to be incorporated into such property. 460 U.S. at 582, 75 L.Ed.2d at 303. Since no "adequate justification" was offered by the State in imposing this differential tax upon the press, the Court held that the newsprint and ink tax violated the First Amendment. 460 U.S. at 590, 75 L.Ed.2d at 308.

The Iowa sales tax imposed upon the salary of lobbyists, as with the differential tax situation in *Star Tribune*, results in singling out lobbyists' salaries for differential taxation not accorded to salaries of other persons who perform services enumerated in §422.43(11). We are not aware of any adequate justification for this differential taxation of an activity accorded First Amendment constitutional guarantees. Therefore, it is our opinion that §83 of S.F. 395 violates the First Amendment to the extent that it imposes sales tax upon the salary of lobbyists.

We view Iowa Const. art. I, §§7 and 20 as containing the same constitutional guarantees of free speech and petition as does the First Amendment. We have

⁵ Several recent cases involving taxation of First Amendment activities have been sustained because the Courts perceived the taxes to be of general applicability. See *Assessment of Use Taxes Against Village Publishing Corporation*, 312 N.C. 211, 322 S.E.2d 155 (1984), *app. dismissed*, 53 USLW 3868 (1985); *Chicago Tribune Company v. Johnson*, 106 Ill.2d 63, 477 N.E.2d 482 (1985), *app. dismissed*, 54 USLW 3270 (1985).

been presented with no justification for construing Iowa Const. art. I, §20 as somehow prohibiting a tax upon free speech and petition activities as long as they are part of a generally applicable economic regulation as opposed to differential taxation. Obviously, because we view the taxation of salary of lobbyists as differential taxation since all other salaries are untaxed, we are of the opinion that the portion of §83 of S.F. 395 which imposes the tax on the salary of lobbyists violates Iowa Const. art. I, §20.

The argument that §83 of S.F. 395 violates equal protection constitutional guarantees because those who employ lobbyists are taxed whereas volunteers who lobby are not taxed should be rejected. The tax in question is a generally applicable sales tax on services performed for a consideration. Sales taxes never apply to those who perform a service gratuitously. Therefore, the supposed differential classification of lobbyists is, in reality, no classification at all since S.F. 395 treats virtually all compensated lobbyists alike. Indeed, as previously explained, the legislature exceeded constitutional bounds by its differential taxation of salaried lobbyists. A tax upon gratuitous lobbying would be unconstitutionally differential since uncompensated services are never subject to the Iowa sales tax.

For the reasons stated in this opinion, we are of the opinion that the sales tax imposed by §83 of S.F. 395 upon fee lobbyists who are independent contractors is not unconstitutional for the reasons urged. However, the tax on salaried lobbyists is unconstitutional since it is a differential tax in that other salaried employees who perform §422.43(11) enumerated services on behalf of their employer are not taxed.

March 26, 1986

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

APRIL 1986

April 7, 1986

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

April 7, 1986

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

April 7, 1986

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

April 7, 1986

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

April 18, 1986

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

MAY 1986

May 6, 1986

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

May 12, 1986

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

May 12, 1986

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

May 20, 1986

COUNTIES AND COUNTY OFFICERS: Board of Review. Iowa Code §§ 175.2(5); 441.31, 441.35(1) and (2), 455B.104(1), 455B.419(2) (1985); 11 U.S.C. § 101(17); Treas. Reg. § 1.61-4(d). A retired farmer may qualify as a farmer under § 441.31, and consequently may serve on the county board of review. (Benton to Martens, Iowa County Attorney, 5-20-86) #86-5-4(L)

May 27, 1986

TAXATION: Real Estate Transfers; Transfers in Lieu of Forfeiture or Foreclosure; Transfers Pursuant to Alternative, Nonjudicial, Voluntary Foreclosure. Iowa Code §§ 428A.1-3, 654.18 (1985 & Supp. 1985). A deed transferring real property pursuant to the alternative, nonjudicial, voluntary foreclosure procedure in Iowa Code § 654.18 is a deed issued in lieu of forfeiture or foreclosure within the meaning of the tax exemption in § 428A.2(18). (Barnett to Doyle, State Senator, 5-27-86) #86-5-5

The Honorable Donald V. Doyle, State Senator: You have requested an opinion of the Attorney General with respect to the following question: Is a document transferring real property pursuant to the alternative, nonjudicial, voluntary foreclosure procedure in Iowa Code § 654.18 (Supp. 1985) exempt from the real estate transfer tax imposed by Iowa Code § 428A.1 (1985)?

The real estate transfer tax is imposed upon "each deed, instrument, or writing by which any lands, tenements, or other realty in this state shall be granted, assigned, transferred, or otherwise conveyed." Iowa Code § 428A.1 (1985). "Any person, firm or corporation who grants, assigns, transfers, or conveys any land, tenement, or realty by a deed, writing, or instrument" is liable for the tax *except* public officials who execute taxable instrument with respect to the performance of their official duties. Iowa Code § 428A.3 (1985).

Numerous exemptions from the transfer tax are contained in Iowa Code § 428A.2 (1985). "Deeds giving back real property to lienholders in lieu of forfeitures or foreclosures" are exempt from the tax. Iowa Code § 428A.2(18) (1985) (effective July 1, 1982); 730 Iowa Admin. Code § 79.2(6). If conveyances of real property to lienholders pursuant to § 654.18 are "in lieu of forfeitures or foreclosures," deeds issued to lienholders pursuant to this section are not subject to the tax imposed by § 428A.1.

In order to determine whether the legislature intended deeds issued pursuant to § 654.18 to be within the scope of the exemption in § 428A.2(18), it is necessary to examine the state of the law when § 428A.2(18) was enacted.¹ *See Doe v. Ray*, 251 N.W.2d 496, 501 (Iowa 1977); *Egan v. Naylor*, 208 N.W.2d 915, 918 (Iowa 1973). At that time, real property could be foreclosed in Iowa only "by action in court by equitable proceedings." Iowa Code § 654.1 (1981), *amended*

¹ Section 428A.2(18) was enacted by the legislature as part of a bill which provided numerous exemptions to the transfer tax. 1982 Iowa Acts, ch. 1027. This exemption became effective on July 1, 1982. *See* Iowa Code § 3.7 (1981).

by, Iowa Code § 654.1 (Supp. 1985). Deeds transferring property following a mortgage foreclosure were considered to be taxable instrument, but if the deed was executed by a public official, no one was liable for the tax pursuant to the language in § 428A.3 (1981). 1970 Op. Att'y Gen. 376 (citing *Railroad Federal Savings & Loan Association v. United States*, 135 F.2d 290 (2nd Cir. 1943)). If, however, for some reason a defaulting mortgagor actually executed the transferring instrument, the tax applied as the transferring instrument was within the terms of § 428A.1, and the mortgagor was liable for the tax under § 428A.3.² 1970 Op. Att'y Gen. 376; see 730 Iowa Admin. Code § 79.2(6). Following the enactment of § 428.2(18), deeds issued by mortgagors to lienholders in lieu of forfeiture or foreclosure were exempt from the tax as well as instruments actually executed by public officials pursuant to judicial foreclosure proceedings. Section 428A.2(18) removed any transfer tax advantage which occurred when property was judicially foreclosed and transferred by a public official as opposed to a transfer by a defaulting mortgagor to a lienholder when foreclosure was inevitable. In the absence of a clear, contrary intent, we do not believe that reinstatement of this tax advantage, by enactment of § 654.18, was intended by the legislature.

Although the procedure in section 654.18 is clearly a method of foreclosure, it is a proceeding in lieu of judicial foreclosure which was the only way to foreclose a real property mortgage when § 428A.2(18) was enacted.³ In light of the fact that § 428A.2(18) was apparently enacted to insure that voluntary transfers by defaulting mortgagors were accorded the same transfer tax status as transfers by public officials, it is not reasonable to conclude that the legislature intended deeds issued in accordance with the newly codified, voluntary foreclosure statute to be taxable. Section 654.18 provides a procedure which combines some of the elements of a voluntary transfer motivated by foreclosure with some of the elements of a judicial foreclosure pursuant to court action. It is clear, however, that the procedure in § 654.18 is in lieu of judicial foreclosure. Given this result and the state of the law when § 428A.2(18) was enacted, it seems to us that the voluntary methodology in § 654.18 is "in lieu of foreclosures" within the meaning of § 428A.2(18).

It is our opinion that a deed transferring real property pursuant to the alternative, nonjudicial, voluntary foreclosure procedure in § 654.18 is a deed issued in lieu of forfeiture or foreclosure within the meaning of the tax exemption in § 428A.2(18).

May 28, 1986

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

May 29, 1986

HIGHWAYS: Conflict of Interest; Public Officers and Employees; Counties; Board of Supervisors. Iowa Code section 341.2 (1985). The fact that a person

² Iowa's transfer tax has been construed in the same manner as the former, federal transfer tax except when the provisions of chapter 428A are inconsistent with the federal statute. 730 Iowa Admin. Code § 79.2(1), .2(6). Section 428A.3 does not make public officials liable for the tax although the federal statute did not exclude public officials. Compare Iowa Code § 428A.3 (1985) with Excise Tax Technical Changes Act of 1958, Pub. L. No. 85-859, § 4384, 72 Stat. 1275, 1303-04 (deleted 1976).

³ At the time that § 654.18 was enacted, the legislature passed another statute specifically providing for a transfer of agricultural realty used for farming to a mortgagee "[i]n lieu of a foreclosure action *in court*." 85 Iowa Acts ch. 252, § 47 (codified at Iowa Code § 654.19 (Supp. 1985)) (emphasis added).

is a member of a county board of supervisors does not *per se* invalidate all contracts entered into by that person's employer for highway construction with governmental bodies other than that county. (Weeg to Tekippe, Chickasaw County Attorney, 5-29-86) #86-5-7(L)

JUNE 1986

June 1, 1986

TAXATION: Sales Tax; Casual Sale Exemption. Iowa Code § 422.42(12) (1985 Supp.) and § 422.45(6) (1985). A liquidation sale of a business is not exempt from sales tax as a "casual sale" unless the business is sold to a purchaser who is going to carry on the business as a going concern, thereby satisfying Iowa Code § 422.42(12)(b) (1985 Supp.). (Mason to Holden, 6-2-86) #86-6-1

June 5, 1986

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

June 25, 1986

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

June 25, 1986

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

June 25, 1986

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

June 27, 1986

MUNICIPALITIES: Administrative Agencies; Airports. Iowa Code ch. 330 (1985); Iowa Code ch. 392 (1985); Iowa Code §§ 330.17, 330.18, 330.19, 330.20, 330.21, 330.22, 330.23, 330.24, 362.2(23), 364.1, 364.2(3), 392.1, 392.2, 392.3, 392.4; Iowa Const. art. III, § 38A. An airport commission is "an agency which is controlled by state law" so that the definition of an "administrative agency" in section 362.2(23) precludes the authority of a municipality to establish

an airport board other than pursuant to chapter 300. However, a board which does not have the power to manage and control the municipal airport, such as an advisory board, may be established pursuant to chapter 392. (DiDonato to O'Kane, State Representative, 6-27-86) #86-6-6(L)

June 27, 1986

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

June 27, 1986

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

June 27, 1986

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

JULY 1986

July 8, 1986

CORPORATIONS: Professional Corporations. Iowa Code §§ 496C.10 to 496C.11 (1985). Shares of stock in a professional corporation may be issued only to individuals who are licensed to practice the same profession. Sections 496C.10 and 496C.11 prohibit the issuance of shares in a professional corporation to another professional corporation even though that corporation is authorized to practice the same profession. (Brick to Odell, Secretary of State, 7-8-86) #86-7-1(L)

July 8, 1986

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

July 16, 1986

MUNICIPALITIES: Application of Veterans Preference to City Administrator or City Manager. Iowa Code ch. 70 (1985); Iowa Code §§ 70.1, 70.8, 372.4, 372.6, 372.7, 372.8, 400.6, 400.10 (1985); House File 2403, 71st G.A., 2d Sess. § 3 (1986); 1986 Iowa Acts, ch. 1138, § 3. A city manager is excepted from application of the veterans preference law under section 70.8. The position of city manager or city administrator is also exempt from application of the veterans preference law under the civil service statute. (DiDonato to Spear, State Representative, 7-16-86) #86-7-3(L)

July 16, 1986

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

July 31, 1986

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

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

1. If a taxpayer is assessed by the Department after December 31, 1985 and prior to September 2, 1986, will the taxpayer be eligible for amnesty under the Act, if the tax delinquency relates to a period prior to December 31, 1985?
2. If a taxpayer pays all tax liabilities due from the taxpayer to the State through December 31, 1985 plus interest equal to fifty percent of the interest that would have been owed through December 31, 1985, must the taxpayer pay all taxes due and/or penalty and/or interest accruing on or after January 1, 1986, in order to qualify for amnesty under the Act?

3. If a taxpayer submits an amnesty application and pays all delinquent tax liabilities as of December 31, 1985 plus fifty percent of the interest that would have been owed through December 31, 1985, will the taxpayer be permitted to file a claim for refund for any reason within the applicable statute of limitations?
4. Assuming a taxpayer properly filed a return and that the statute of limitations has expired pertaining to the collection of any delinquent taxes with respect to that return, are such taxes "delinquent" within the provisions of the Act which require the payment of "all taxes delinquent as of December 31, 1985 and due to this state" in order to qualify for amnesty?
5. Are taxes "delinquent" within the provisions of the Act, if a protest has been timely filed by a taxpayer and the taxpayer has a reasonable basis for the protest?
6. Will it be possible for a taxpayer to make an amnesty payment subject to the condition that if amnesty is not granted by the Department the payment will be returned to the taxpayer?

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

Sec. 3. AMNESTY PROGRAM.

1. The director shall establish a tax amnesty program. The amnesty program shall apply to tax liabilities delinquent as of December 31, 1985, including tax on returns not filed, tax liabilities on the books of the department as of December 31, 1985, or tax liabilities not reported nor established but delinquent as of December 31, 1985. For a taxpayer who has a tax liability, the director shall accept cash, certified check, cashier's check or money order for the full amount of the tax liability.
2. The amnesty program shall be for a period from September 2, 1986 through October 31, 1986 for any tax liabilities which are delinquent as of December 31, 1985.
3. The amnesty program shall provide that upon written application by a taxpayer and payment by the taxpayer of amounts due from the taxpayer to this state for a tax covered by the amnesty program plus interest equal to fifty percent of the interest that would have been owed through December 31, 1985, the department shall not seek to collect any other interest or penalties which may be applicable and the department shall not seek civil or criminal prosecution for a taxpayer for the period of time for which amnesty has been granted to the taxpayer. Failure to pay all taxes delinquent as of December 31, 1985 and due to this state except those adjustments made pursuant to a federal audit completed after the effective date of this Act shall invalidate any amnesty granted pursuant to this Act. Amnesty shall be granted for only the taxable periods specified in the application and only if all amnesty conditions are satisfied by the taxpayer.
4. Amnesty shall not be granted to a taxpayer who is a party to an active criminal investigation or to a criminal litigation which is pending in a district court, the court of appeals, or the supreme court of this state for nonpayment or fraud in relation to any state tax imposed by a law of this state.
5. The director shall prepare and make available amnesty application forms which contain requirements for approval of an application. The director may deny any application inconsistent with sections 1 through 4 of this Act.

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

of December 31, 1985. *Id.*

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

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

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

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

In *American Home Products Corporation v. Iowa State Board of Tax Review*, 302 N.W.2d 140, 142-3 (Iowa 1981), the Iowa Supreme Court listed some general rules of statutory construction as follows:

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

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

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

Mindful of the foregoing discussion of the amnesty law, which establishes a taxpayer remedy, and of the listing in the case law of some of the rules of statutory construction, we will now respond to the six questions contained in your opinion request.

1. This office issued an opinion, Op.Att'yGen. #86-6-8(L), in which we opined

that a timely application for amnesty should not be denied by the Department merely because the pre-1986 tax delinquency was assessed in 1986. The opinion states that, under these circumstances, the application for amnesty would be timely if made no later than October 31, 1986.

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

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

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

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

3. A taxpayer who submits an amnesty application and who pays all taxes delinquent as of December 31, 1985 plus fifty percent of the interest owed through December 31, 1985 should be eligible to file a tax refund claim for overpaid taxes within any applicable period of limitations associated with the tax refund statute as long as the refund claim involved a situation within the scope of the refund statute. For example, if the taxpayer has overpaid Iowa retail sales tax "as a result of mistake" in making an amnesty payment, the taxpayer would have to claim a refund "with the department within five years

after the tax payment upon which a refund or credit is claimed became due, or one year after such tax payment was made, whichever time is the later." Iowa Code § 422.73(1) (1985).

The amnesty statute does not contain any language which would preclude refund claims for overpaid taxes. The amnesty statute does not expressly address refund claims. However, it is appropriate to consider the taxpayer remedy in the amnesty statute as in pari materia with other applicable tax statutes, including tax refund statutes. *Northern Natural Gas Company v. Forst*, 205 N.W.2d 692, 696 (Iowa 1973). Moreover, it would be absurd and unreasonable to construe the amnesty statute as precluding tax refunds in the event of mistaken overpayment where a refund would be statutorily claimable by non-amnesty tax delinquents. Such a result would not comport with a liberal interpretation of the amnesty statute and could stand as an obstacle to thwart the objective of the amnesty law, namely, to encourage taxpayers to pay pre-1986 delinquent taxes covered by the amnesty program.

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

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

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

5. Even if a taxpayer has filed a protest pursuant to Department rule 730 Iowa Admin. Code § 7.8 to contest a Department assessment of delinquent pre-1986 taxes and, has a reasonable basis for the protest, the taxes are still "delinquent" as long as they are due and owing. *Matter of Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 334 N.W.2d 290, 293 (Iowa 1983). The mere fact that the taxpayer, in good faith, challenges the Department on the question of whether a tax is due does not convert an otherwise delinquent tax into nondelinquent status. The amnesty statute does not contain any language which would make any such distinction. Of course, it follows that taxpayers who have protested a Department assessment of pre-1986 taxes are eligible for amnesty as long as they are not otherwise disqualified. Should these taxpayers elect to pay only their undisputed pre-1986 tax delinquencies and continue even to the point of litigation to resist payment of disputed pre-1986 taxes, their amnesty would be entirely invalidated in the event that the Department prevails with respect to the dispute. Section 3(3).

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

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

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

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

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

AUGUST 1986

August 4, 1986

DEPARTMENT OF HEALTH: Hospitals; Health Care Facilities: Inspections and Appeals. S.F. 2175, 71st G.A. 2d Sess. (1986); Iowa Code chapters 10A [new Code chapter]; 135, 135B, 135C (1986). Inspections and Appeals has the authority to license, inspect and investigate hospitals and health care facilities and to adopt rules to implement those procedures. The Department of Health retains the authority to establish standards for hospitals and health care facilities. (McGuire to Sweeney, Director, Department of Inspections and Appeals, 8-4-86) #86-8-1

Mr. Charles Sweeney, Director, Department of Inspections and Appeals: You requested an Attorney General's opinion concerning the authority of the newly created Department of Inspections and Appeals regarding hospitals and health care facilities. You question whether there is a conflict between the authority of the Department of Inspections and Appeals and the Department of Public Health over hospitals and health care facilities under Senate File 2175, 71st G.A. 2d Sess. (Iowa 1986).

It is the opinion of this office that the Department of Inspections and Appeals has the authority to license, inspect and investigate hospitals and health care facilities and to adopt rules relative to their procedures in implementing that authority. The Department of Public Health retains authority to adopt rules establishing standards for hospitals and health care facilities. The hospital licensing board, which has authority to recommend and approve rules regarding standards for hospitals before adoption by the Department of Public Health, has, however, been transferred to the Department of Inspections and Appeals.

I.

In the 1986 legislative session the legislature restructured state government. Senate File 2175, 71st G.A. 2d Sess. (Iowa 1986). Through this reorganization

the Department of Inspections and Appeals was created. S.F. 2175, §502 [new Code §10A.102]. Inspections and Appeals was "created for the purpose of coordinating and conducting various audits, appeals, hearings, inspections, and investigations related to the operation of the executive branch of state government." S.F. 2175, §503 [new Code §10A.103].

This new legislation authorizes the Appeals and Fair Hearings Division of Inspections and Appeals to conduct hearings and appeals relative to hospital, hospice and health care facility licensure. S.F. 2175, §508(1)(g) [new Code §10A.201(1)(g)]. Most decisions of this division are subject to review by other agencies which retain the final adjudicatory authority. See S.F. 2175, §508(a)-(d), (f), (h)-(l) [new Code §10A.202]. Although typically Inspections and Appeals' hearing authority is limited to the preparation of proposed decisions which are subject to the review of another agency, the Department of Inspections and Appeals is the reviewing authority for decisions relative to the licensure or certification of hospitals, hospices, and health care facilities. S.F. 2175, §508(1)(g) [new Code §10A.202(1)(g)]. Also, Inspections and Appeals was granted the authority to investigate and inspect hospitals, hospices and health care facilities relative to standards and licensure. S.F. 2175, §§512(4) [new Code §10A.402(4)]; 514(3) [new Code §10A.502(3)]; 1112 (amending Code §135.94) (hospices). Previously the Department of Health (Health) had this authority. See Iowa Code ch. 135B and 135C (1985).

In addition, the legislature specified that "The Division [of Inspections and Appeals] shall be the sole designated licensing authority for these programs and facilities [hospices, hospitals and health care facilities]." S.F. 2175, §514(3) [new Code §10A.502(3)]. This licensing authority was apparently delegated to Inspections and Appeals to comply with the views of federal officials that federal regulations for the Title XIX (medicaid) program require inspection and licensing authority to be in the same agency. See Summary of the Conference Committee Report Prepared by Legislative Service Bureau, April 22, 1986; and letter dated February 28, 1986, Edward Brennan, Health Care Financing Administration, to Paul Carlson, Acting Commissioner of Health.

Inspections and Appeals was given the authority to adopt rules necessary to implement and administer new Code chapter 10A. S.F. 2175, §504(5) [new Code §10A.104(5)].

In the reorganization bill, Health was given the duty to "administer chapters . . . 135B, 135C . . ." S.F. 2175, §1104(17), amending Code §135.11. Chapter 135B governs licensure and regulation of hospitals and chapter 135C governs health care facilities. Chapters 135B and 135C still provide for administration by the Department of Health. In view of this apparent conflict you have questioned what authority the two agencies have regarding hospitals and health care facilities.

II.

To determine what authority has been given to the respective agencies regarding hospitals and health care facilities, all applicable statutes need to be examined. It is clear that administrative agencies have only the powers and authority conferred by the legislature. *Foley v. Iowa Department of Transportation*, 362 N.W.2d 208 (Iowa 1985); *Franklin v. Iowa Department of Job Service*, 277 N.W.2d 877 (Iowa 1979).

As noted previously, S.F. 2175 authorized Inspections and Appeals to be the "sole" licensing authority for hospitals and health care facilities. Inspections and Appeals thus has the authority to issue licenses for hospitals and health care facilities. Additionally, Inspections and Appeals has the authority to refuse or revoke a license. See *Arrow Express Forward Co. v. Iowa State Commerce Commission*, 130 N.W.2d 451 (Iowa 1964). The power to grant a license includes, either expressly or impliedly, the power to refuse a license. *Id.* at 455. Additionally, the "power to refuse a license is coextensive with the power to revoke." *Id.*

To the extent S.F. 2175 conflicts with chapters 135B and 135C, S.F. 2175 prevails. Pursuant to statutory construction: "If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in

date of enactment by the general assembly prevails. If provisions of the same Act are irreconcilable, the provision listed last in the Act prevails." Iowa Code §4.8 (1985). *See also* 1974 Op.Att'yGen. 119.

It is irreconcilable to designate Inspections and Appeals as the sole licensing authority and still give effect to all of the provisions of chapters 135B and 135C authorizing Health to license hospitals and health care facilities. Senate File 2175 being enacted later in time prevails over the provisions in chapters 135B and 135C authorizing Health to issue licenses.

The same analysis applies regarding the authority to inspect and investigate hospitals and health care centers. Consistent with the purpose of creating Inspections and Appeals, it was given the authority to inspect and investigate hospitals and health care facilities relative to licensure, standards and practices. To the extent chapters 135B and 135C conflict with S.F. 2175 regarding inspections and investigations, S.F. 2175 prevails. *See* Iowa Code §4.8.

This is further supported by the bill itself. Senate File 2175, §2067, states: "The duties, powers, responsibilities, and missions of state agencies included in this Act shall be as specified in this Act and the provisions of this Act shall govern in that regard and shall supersede any provisions to the contrary elsewhere in the law."

In order to implement these statutory duties, Inspections and Appeals was given the authority to adopt rules. S.F. 2175, §504(5) [new Code §10A.104(5)]. Chapters 135B and 135C need to be examined to determine what rulemaking authority remains in Health. Chapters 135B and 135C have always authorized Health to establish standards for hospitals and health care facilities. Iowa Code §§135B.7; 135C.14. Senate File 2175 does not expressly delegate this authority to Inspections and Appeals, or remove the authority from Health. Indeed legislative action in this session confirms the Department of Public Health's rulemaking authority for hospitals and health care facilities. As noted above, S.F. 2175, section 1104(7) [amending Code §135B.11] provides that the Department of Public Health shall administer chapters 135B and 135C. Further, section 528 provides that the hospital licensing board, although transferred to Inspections and Appeals, is to review and approve rules prior to their "adoption by the department of health." Additionally, section 206 of H.F. 2484, an appropriations bill providing for an Inspections and Appeals demonstration waiver project for the development of residential care facilities, refers repeatedly to standards adopted by the board of health and provides for future adoption of standards by the board of health.

Given these legislative actions confirming the Health Department's authority to adopt licensing standards for hospitals and health care facilities, we would not construe the language designating the division of inspections as the "sole licensing authority" as impliedly repealing Health's rulemaking authority.¹

The general rule is that amendments or repeals by implication are not favored. *Dan Dugan Transport Co. v. Worth County*, 243 N.W.2d 655 (Iowa 1976). Amendments by implication will not be upheld unless the intent to amend clearly and unmistakably appears from the language used, and such a holding is absolutely necessary. *Peters v. Iowa Employment Security Comm'n.*, 235 N.W.2d 306 (Iowa 1975); *Wendelin v. Russell*, 259 Iowa 1152, 147 N.W.2d 188 (1966).

Op.Att'yGen. #85-7-6.

It would appear then that Health retains authority to establish standards. Such a conclusion is consistent with rules of statutory construction that statutory provisions be reconciled to give meaning to all parts, if possible. *State v. Berry*, 247 N.W.2d 263 (Iowa 1976); *Boomhower v. Cerro Gordo County Board of Adjustment*, 163 N.W.2d 75 (Iowa 1968). A determination that Health had no

¹Senate File 2175, sections 1111 and 1112 [amending Code §§135.91, 135.94] specified Inspections and Appeals was to license and inspect hospices but left unchanged the authority to promulgate rules with the Health Department.

authority whatsoever regarding hospitals or health care facilities would render the statutory provision, S.F. 2175, § 1104(7), meaningless as it pertains to chapters 135B and 135C.

The conclusion that rulemaking authority has been retained by the Board of Health is also consistent with the differing functions of those departments generally. We would note that other than the Hospital Licensing Board, Inspections and Appeals has no policy-making body. The Health Department has a policy-making body in the Board of Health which has general expertise on health issues. Iowa Code ch. 136. The expertise of Inspections and Appeals concerns inspections, investigations, and appeals. The legislature could therefore conclude that the Board of Health should adopt standards for hospitals and health care facilities with rules regarding hospitals to be approved by the Hospital Licensing Board within Inspections and Appeals.

The legislature has authority to create agencies and to define their powers. *Foley v. Iowa Department of Transportation*, 362 N.W.2d 208 (Iowa 1985). We have found no authority requiring that the rulemaking and adjudicatory functions be included within the same body. See e.g. *Donovan v. International Union, Allied Industrial Workers*, 722 F.2d 1415, 1418-1419 (8th Cir. 1983) (Occupational Safety and Health Review Commission's functions solely adjudicatory). We must, therefore, conclude that S.F. 2175 did not repeal the rulemaking authority of the Board of Health to adopt standards for hospitals and health care facilities.

It is the determination of this office that Inspections and Appeals has authority to license, inspect and investigate hospitals and health care facilities and to adopt rules to implement those procedures. Health retains the authority to establish standards for hospitals and health care facilities and can adopt rules with the approval of the State Board of Health. Health retains authority to establish standards for hospitals, by rule, subject to approval of the Board of Health and the hospital licensing board. See § 135B.11, 136.3(7).

August 13, 1986

MUNICIPALITIES: Source of Funds for Payments Pursuant to Iowa Code Section 411.15 (1985). Iowa Code §§ 411.1(14), 411.8(1), 411.11, 411.15 (1985). Pursuant to Iowa Code section 411.15 (1985), payments for hospital, nursing and medical attention for treatment for injuries or diseases for the members of the police and fire departments of cities shall be paid out of the appropriation for the department to which the injured person belongs or belonged, and are not to be paid from the pension accumulation fund. (DiDonato to Gronstal, State Senator, 8-13-86) #86-8-2(L)

August 13, 1986

COUNTIES AND COUNTY OFFICERS: Ownership and Management of Cemeteries. Iowa Code §§ 331.301, 359.28, 359.30, 384.24(3)(k), 384.25(1), 566.14-566.18, 566A.1 (1985). Counties, under home rule, have the authority to acquire and maintain a cemetery. (Lorentzen to Wibe, Cherokee County Attorney, 8-13-86) #86-8-3(L)

August 13, 1986

COUNTIES AND COUNTY OFFICERS: Municipalities; Effect of a County Ordinance Within Municipalities in the County. Iowa Const. art. III, section 39A; Iowa Code § 331.301(1), (3) and (4) (1985). In accordance with the county home rule amendment, a county has authority to enact an ordinance effective in municipalities within the county so long as that authority does not conflict with the power and authority of a municipality. In the event of a conflict, the authority of the municipality prevails. (Weeg to Metcalf, Black Hawk County Attorney, 8-13-86) #86-8-4

Mr. James M. Metcalf, Black Hawk County Attorney: You have requested an opinion of the Attorney General on the question of whether home rule authorizes a county board of supervisors to pass legislation binding upon the municipalities in the county. You state this question arises because the supervisors have enacted an ordinance restricting the possession and use of stun guns in the unincorporated areas of the county, but are interested in extending that ordinance to the cities and towns in the county, if they were so authorized.

As an initial matter, you have not asked and therefore we do not address the question of whether the supervisors have the authority to enact an ordinance governing possession and use of stun guns in the county. We refer you to 1982 Op.Att'yGen. 27, in which we held that counties cannot levy fines or other penalties for violation of a county ordinance absent express legislative authority to do so. This opinion was issued on February 6, 1981. A provision authorizing a fine or imprisonment for violation of a county ordinance became effective July 1, 1981. See 1981 Iowa Acts, chapter 117, section 301. That provision is now found in Iowa Code section 331.302(2) (1985). See also 1986 Iowa Acts, H.F. 2393 (amending section 331.302 and adding new provisions establishing civil penalties for violating county ordinances). While the enactment of section 331.302(2) effectively overruled the conclusion we reached in 1982 Op.Att'yGen. 27, there is language in that opinion which states that the state has preempted the entire area of criminal law, thereby foreclosing a county from legislating in this area. We have not since addressed this issue. We enclose a copy of that opinion for your review.

We also note the 1986 session of the General Assembly considered, but took no final action on, several pieces of legislation concerning regulation of stun guns. See House Files 2073 and 2086; Senate Files 2004, 2135, and 2141.

We next address your question whether the county may enact an ordinance which is binding within the limits of incorporated cities in the county. Iowa Constitution art. III, section 39A, the County Home Rule Amendment, grants counties home rule power and authority, "not inconsistent with the laws of the general assembly, to determine their local affairs and government," subject to certain limitations expressed therein. One such limitation provides:

If the power or authority of a county conflicts with the power and authority of a municipal corporation, the power and authority exercised by a municipal corporation shall prevail within its jurisdiction.

An initial question exists as to whether counties in Iowa have the power and authority to legislate at all in cities within the county. Some authorities have set forth a general rule that a county has no power to legislate for a municipality within the county on any subject within the scope of the powers granted to the municipality. See 1 C. Antieau, *Municipal Corporations Law*, § 1.32(1972); 62 C.J.S. *Municipal Corporations* § 114(1949). See also 56 Am.Jur.2d *Municipal Corporations* § 18 (1981). However, a review of authorities in other jurisdictions makes clear the question of whether this general rule is applicable in a particular state depends entirely on the constitutional and statutory provisions governing the relationship between counties and municipalities in that state.

In *Mayor and Council of Forest Heights v. Frank*, 291 Md. 331, 435 A.2d 425 (1981), for example, the Maryland Supreme Court faced a situation involving the interplay of a county ordinance, which licensed fortune tellers in the county, with the ordinances of two municipalities within the county which prohibited fortune telling within their boundaries. Deciding a direct conflict between these ordinances did exist, the court concluded that in the absence of a constitutional or statutory provision governing whether the authority of a home rule county or a municipality prevails in the event of a conflict, the authority of the county prevails. See also *Appeal of City of Lenexa to Decision of Board of County Commissioners of Johnson County*, 232 Kan. 568, 657 P.2d 47 (1983); *Hialeah Gardens v. Dade County*, 348 So. 2d 1174 (Fla. App. 1977).

Other jurisdictions have concluded that a county cannot make police regulations effective within a municipality. For example, in *Hobbs v. Abrams*, 104 Ida. 205, 657 P.2d 1073, 1075 (1983), the Idaho Supreme Court held that a county ordinance governing the sale of keg beer in the county was not effective in incorporated municipalities in the county. However, that result was dictated by the fact that the Idaho Supreme Court had consistently interpreted its constitution as prohibiting a county from making police regulations effective within a municipality. See also *Ex parte Roach*, 104 Cal. 272, 37 P. 1044, 1046 (1894) (constitution provides that county and city each have exclusive right of legislation within its boundaries); *Clyde Hess Distributing Co. v. Bonneville*

County, 210 Ida. 798, 210 P.2d 798, 801 (1949).

It is our opinion that counties in Iowa have the power and authority to legislate in cities within the county, subject to the limitation expressed in the county home rule amendment that in the event of a conflict, the power and authority of the municipality prevail within that municipality. We have found no Iowa authorities which delineate the relationship between counties and municipal corporations located within those counties. Therefore, our primary support for this conclusion lies in the language of the amendment itself. By expressing that municipal power and authority prevails in the event of a conflict between county and municipal power or authority, it is our opinion the constitution does not exclude, but impliedly recognizes, the authority of the county to legislate county-wide, subject to that expressed limitation.

Further, while we have found no Iowa cases on point, various statutes providing for local regulations indicate that Iowa's counties and cities have not historically been regarded as having entirely exclusive jurisdiction. Some statutes do specifically limit county regulation to unincorporated areas. *See* § 123.32(1) (beer and liquor control permits); § 358A.3 (county zoning authority). Some county regulations are applicable within incorporated cities only if the city so elects. *See* Iowa Code § 331.304(3)(a) (county building code). Others are applicable in cities unless the city takes action to assume the authority. *See* § 137.5 (boards of health); § 455B.144(2) (local air pollution control programs). The legislature has conferred certain regulatory powers in the county which expressly apply in incorporated areas. *See* § 317.9 (weed control). Those statutes providing for county regulation within cities were no doubt intended to avoid unnecessary duplication of services and duties and to thus promote greater efficiency and expertise. These statutes indicate that the authority of counties in Iowa has not traditionally been entirely restricted to unincorporated areas.

Having concluded that a county can enact penal ordinances effective within incorporated areas, we note that questions may arise concerning what constitutes a conflict with the "power and authority" of a city. Clearly a valid city ordinance in direct conflict with a county ordinance would prevail. In 1980 Op. Att'y Gen. 55, 59, we stated that "where a conflict exists between municipal and county law, the law of the municipality prevails within city limits." Under what circumstances a conflict exists between the power and authority of a county and the power and authority of a city is an issue we would address when a particular dispute arises.

August 26, 1986

SCHOOLS: Taxes. Iowa Code § 297.5 (1985); 1980 Iowa Acts, ch. 1089. Iowa Code § 297.5 requires a vote of the people to authorize an addition to a schoolhouse which is financed by the § 297.5 levy. (Fleming to Benton, Commissioner, Department of Education, 8-26-86) #86-8-5(L)

August 26, 1986

COUNTIES AND COUNTY OFFICERS: Board of Supervisors; Reimbursement of Expenses of County Officers and Employees. Iowa Code §§ 79.9 to 79.13; 331.215(2); 331.324(1)(b) (1985). A county board of supervisors may set a ceiling on the amount the county will reimburse its officers and employees for meal expenses incurred while attending meetings pertaining to county government. (Weeg to Noonan, Benton County Attorney, 8-26-86) #86-8-6(L)

August 28, 1986

TAXATION: Tax Amnesty; Challenges to Tax Assessments and Eligibility for Tax Refunds. Iowa Code §§ 422.28, 422.54(2), 422.73, and House File 764, 71st G.A., 2d Sess. §§ 1-4. (1) Taxpayer can elect to pursue tax protest and obtain amnesty. (2) Taxpayer who tenders amnesty payment and successfully pursues protest can receive tax refund for protest period. (3) Taxpayer who is entitled to refund for successful pursuit of protest can receive interest to extent authorized by statute. (4) Taxpayer who unsuccessfully pursues protest after making proper amnesty payment does not owe any further tax, interest or penalty for amnesty protest period except for federal audit adjustments. (5) Taxpayer who pursues protest after making amnesty payment can file refund claim for non-protest periods as long as

refund is timely filed and is within the scope of the refund statute. (6) Given the answer in (5) above, taxpayer can receive interest to extent authorized by statute. (7) Taxpayer who fails to timely appeal income tax or sales tax assessment and who makes amnesty payment cannot receive a refund for the assessment amounts based upon a collateral attack upon the assessment, but in the discretion of the Department of Revenue and Finance may be eligible for abatement and, if so, can recover back tax and accrued interest if abatement is granted. (8) Taxpayer who, in addition to the tax assessment paid in (7), pays amounts not covered by assessment for amnesty purposes can file refund claim as long as refund is timely filed and is statutorily authorized. (Griger to Hatch, State Representative, 8-28-86) #86-8-7

Honorable Jack Hatch, State Representative: You have requested an opinion of the Attorney General concerning the Iowa Tax Amnesty Act in House File 764, 71st G.A., 2d. Sess., §§ 1-4. In your request, you pose two series of questions. In each series, your questions assume that the taxpayer's situation is otherwise eligible for amnesty and that the taxpayer tenders payment of the proper amnesty amount of tax and interest.

This office has issued two recent opinions relating to the amnesty statute. Op.Att'yGen. #86-6-8(L) and Op.Att'yGen. #86-7-5. These opinions dealt with the scope, operation, and purpose of the amnesty law.

Your first series of questions assumes the following circumstances: The Department of Revenue and Finance (Department) issued an assessment against the taxpayer for pre-1986 tax periods (protest periods). If the assessment would ultimately be payable, the assessed tax would be delinquent as of December 31, 1985. The taxpayer timely filed a protest pursuant to Department rule 730 Iowa Admin. Code § 7.8 in which the assessment is challenged (in whole or in part). During the period of the amnesty program, September 2, 1986 through October 31, 1986, the status of the protest is that it is either pending in the informal process (rule 730 Iowa Admin. Code § 7.11), in contested case proceedings (rule 730 Iowa Admin. Code § 7.14), before the State Board of Tax Review (rule 730 Iowa Admin. Code, ch. 2), or in judicial review. The taxpayer tenders payment of amnesty amounts which, in the opinion of the Department, would be considered delinquent as of December 31, 1985.

In Op.Att'yGen. #86-7-5 at 9, we stated that "taxpayers who have protested a Department assessment of pre-1986 taxes are eligible for amnesty as long as they are not otherwise disqualified." With respect to the above circumstances involving a taxpayer protest to a Department assessment, you pose six questions.

First, you ask whether the taxpayer can continue to pursue the protest or whether, as a condition for amnesty, the taxpayer must forego any further challenge to the Department's assessment. The amnesty statute does not explicitly address your question.

In Op.Att'yGen. #86-7-5 at 4, we stated:

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

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

situations appear to be eligible for the amnesty program.

The amnesty statute is, therefore, designed to encourage and motivate taxpayers to come forward and pay their pre-1986 tax delinquencies. To the extent that interpretation of the statute is necessary, the act should be reasonably or liberally construed to effectuate its purposes. See *Isaacson v. Iowa State Tax Commission*, 183 N.W.2d 693, 695 (Iowa 1971).

We also pointed out that the amnesty law established a taxpayer remedy and that the Iowa Supreme Court had expressly held that "Laws which establish taxpayer remedies are to be liberally construed." *Id.* at 5; *Northern National Gas Company v. Forst*, 205 N.W.2d 692, 697 (Iowa 1973). If there are perceived defects or omissions in the amnesty statute, the Department has no authority to cure the defects or obviate the omissions so as to make law. *Sorg v. Iowa Department of Revenue*, 269 N.W.2d 129 (Iowa 1978); *City of Ames v. Iowa State Tax Commission*, 246 Iowa 1016, 71 N.W.2d 15 (1955).

The amnesty statute does not contain any provisions, in our opinion, which would preclude a taxpayer who qualifies for amnesty from continuing to pursue the protest. The taxpayer can elect not to continue with the protest, but as a condition for amnesty the Department lacks statutory authority to require the taxpayer to discontinue the challenge to the assessment.

A continuation by the taxpayer of a protest, under these circumstances, is not inconsistent with the purposes of the amnesty statute that we listed in Op.Att'yGen. #86-7-5. We are unable to find any other statutes which would preclude taxpayer pursuit of the protest.¹ Accordingly, we are of the opinion that a taxpayer who satisfies the conditions for amnesty can elect to continue to pursue the protest and receive amnesty.

Second, you ask whether the taxpayer who successfully continues to pursue the protest, after tendering amnesty payment, can receive a refund for overpayments made for the protest periods. In Op.Att'yGen. #86-7-5 at 7-8, we stated:

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

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

¹Section 18 of H.F. 764 provides that for contested case proceedings to be commenced, the taxpayer who is protesting an assessment must pay all of the tax, interest and penalty in dispute or, alternatively, a bond can be required by the Department's hearing officer. A suggestion has been made that § 18 is indicative of a legislative intent to preclude pursuit of a protest by the amnesty taxpayer. Section 18 is made effective January 1, 1987 "for assessments made on or after that date." House File 764, § 46. Assessments made in 1987 are not eligible for the amnesty program which ends on October 31, 1986. Thus, there is no interrelationship between §§ 1-4 and § 18 of H.F. 764.

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

The thrust of our views with respect to tax refunds in Op.Att'yGen. #86-7-5 is that refunds would be allowable for amnesty overpayments as long as they are statutorily authorized. In other words, as long as the situation comes within the scope of the applicable tax refund statute, a refund could be obtained, regardless whether the overpayment was made as a result of an amnesty or non-amnesty payment.

In the non-amnesty situation, a taxpayer who made a payment of disputed taxes for the protest periods while the protest was pending could pursue the protest and, if successful, recover the amount of erroneous overpayment.² In our opinion, there are no provisions in the amnesty law which would preclude that same result if disputed pre-1986 taxes, alleged by the Department to be delinquent, are paid pursuant to the amnesty program. Therefore, the taxpayer who pays disputed pre-1986 taxes for protest periods covered by the amnesty program can receive a refund to the extent that the taxpayer is successful in the pursuit of the protest.

Third, given the answer to your second question, you ask whether the successful taxpayer is entitled to receive interest on any overpaid amounts for the protest periods.³ The rule in Iowa is that interest is payable upon a tax refund only if statutorily authorized. *Herman M. Brown v. Johnson*, 248 Iowa 1143, 82 N.W.2d 134 (1957); *Wieting v. Morrow*, 151 Iowa 590, 132 N.W. 193 (1911); *Home Savings Bank v. Morris*, 141 Iowa 560, 120 N.W. 100 (1909).

The amnesty statute does not address interest upon tax refunds. We have opined that tax refund statutes would be in pari materia with the amnesty statute. Op.Att'yGen. #86-7-5 at 7. Likewise, we are of the view that statutory provisions authorizing interest upon tax refunds would be in pari materia with the amnesty statute. As examples, interest is payable upon income tax refunds pursuant to Iowa Code §422.25(3) (1985), but interest is not generally payable upon sales tax refunds, *Herman M. Brown v. Johnson*, 248 Iowa 1143, 82 N.W.2d 134 (1957), except judgment interest in Iowa Code §535.3 (1985), *United Telephone Co. v. Iowa Department of Revenue*, 365 N.W.2d 647 (Iowa 1985) (unpublished per curiam opinion). Thus, entitlement to interest for amnesty tax refunds, and the amount of such interest, depend upon the existence of statutory provisions authorizing payment of interest upon tax refunds.

Fourth, you ask whether the taxpayer who has made the proper amnesty payment and who unsuccessfully pursues the protest has any further liability for any tax, penalty or interest for the protest periods. Since your question assumes that the proper amount of tax was paid in amnesty, we do not see how the taxpayer could have any further liability for any tax covered by the amnesty program except for tax associated with federal audit adjustments. See House File 764, §3(3).

In Op.Att'yGen. #86-7-5, we opined that upon the appropriate amnesty payment of taxes delinquent as of December 31, 1985, and half of the interest thereon accrued through December 31, 1985, no further interest or penalty would be owed. The only exception would be any interest or penalty associated with federal audit adjustments. Thus, the taxpayer who initially made the appropriate

²If a taxpayer makes a payment of disputed taxes during the pendency of a §7.8 protest, the protest and associated proceedings are treated by the Department as a claim for refund.

³The taxpayer would be entitled to receive amnesty interest which was part of the original amnesty payment. We assume that your question is concerned with receipt of interest, if any, that could accrue upon the overpaid protested taxes.

amnesty payment and who unsuccessfully pursues the protest has no further tax, interest, or penalty liabilities for taxes covered by the amnesty program except for amounts associated with federal audit adjustments.

Fifth, you ask whether a taxpayer who is pursuing a protest can file a refund claim with the Department to recover amnesty overpayments not involved in the protest periods. For example, assume that the Department has assessed the taxpayer for alleged tax delinquencies in 1980 through 1983. The taxpayer timely filed a protest under rule § 7.8. The taxpayer makes an amnesty payment which, under H.F. 764, must include all alleged tax delinquencies in pre-1986 years for any period for which the applicable statute of limitations has not expired. Op.Att'yGen. #86-7-5 at 8. In the example, assume that these tax delinquencies are in 1984 and in 1985. Assume further that these 1984 and 1985 delinquencies have not been assessed by the Department. Your question is whether the taxpayer can file a refund claim for 1984 and 1985 amnesty payments. The answer is generally yes as long as the refund claim is timely filed with the Department and comes within the scope of the refund statute.

Sixth, given the answer to your fifth question, you ask whether the taxpayer can receive interest on the overpaid amounts from the date of payment. The answer to this question is the same as the answer to your third question.

Your second series of questions assumes the following circumstances: The Department has issued an assessment against the taxpayer for either sales tax or use tax (hereinafter collectively referred to as "sales tax") or for income tax. The tax periods involved in such assessment predate 1986 and, if the taxes are delinquent, the delinquencies would exist on or before December 31, 1985. The taxpayer fails to timely file a rule § 7.8 protest. Iowa Code §§ 422.28 (1985) (90 days) and 422.54(2) (1985) (30 days).⁴ After the applicable time periods to protest the assessment have expired, the taxpayer tenders payment to the Department of the proper amnesty amounts. The amnesty payment includes amounts covered by the assessment and amounts not covered by the assessment. Based upon these circumstances, you pose two questions.

First, you ask whether the taxpayer, within the appropriate time limitation in Iowa Code Supp. § 422.73 (1985), can file a claim for refund of amnesty overpayments which were covered by the assessment and receive a refund, assuming that on the merits of the claim the taxpayer is otherwise entitled to a refund.

When a taxpayer is assessed by the Department for income tax or sales tax and the taxpayer elects to dispute all or a portion of the assessment, the taxpayer's remedies are in §§ 422.28 and 422.54(2). These statutes provide for the opportunity to protest and to have a hearing with respect to income tax or sales tax assessments. The hearings constitute contested cases as defined in Iowa Code § 17A.2(2) (1985). The contested case proceedings and subsequent judicial review of them are governed by the Iowa Administrative Procedure Act, Iowa Code ch. 17 (1985). *LeaseAmerica Corporation v. Iowa Department of Revenue*, 333 N.W.2d 847 (Iowa 1983); *Grimm v. Iowa Department of Revenue*, 331 N.W.2d 137 (Iowa 1983).

If the taxpayer fails to protest an income tax or sales tax assessment within the time frame in § 422.28 (income tax) or § 422.54(2) (sales tax), the assessment becomes final agency action. The assessment "becomes fixed as a matter of law." Department rule 730 Iowa Admin. Code § 43.5 and cases cited therein. This final agency action would not be judicially reviewable because the taxpayer failed to exhaust all adequate administrative remedies as required by Iowa Code § 17A.19(1) (1985). *Grimm*, at 139-140. Therefore, under the circumstances in your inquiry, the taxpayer has waived his opportunity to challenge the assessment before the Department and has waived opportunity for judicial review of the assessment. *City of Council Bluffs v. Pottawattamie County*, 254 N.W.2d 18 (Iowa 1977).

⁴ Section 422.54(2) applies to use tax imposed in Iowa Code ch. 423 (1985). See Iowa Code § 423.16 (1985).

If the taxpayer who fails to timely protest the assessment subsequently pays it and files a refund claim purportedly pursuant to § 422.73, the taxpayer is attempting to do indirectly what the taxpayer cannot do directly, namely, to challenge the assessment by collateral attack. This collateral attack upon the assessment should not be allowed. *Pacific Intermountain Express Co. v. State Tax Commission*, 7 Utah 2d 15, 316 P.2d 549 (1957).

If the taxpayer is allowed, by refund claim, to challenge an assessment after failure to timely protest it, the time frame requirements in §§ 422.28 and 422.54(2) would be rendered superfluous. In the interpretation of statutes, such construction should be avoided. *Iowa Auto Dealers Association v. Iowa Department of Revenue*, 301 N.W.2d 760, 765 (Iowa 1981); *Gorgen v. Iowa State Tax Commission*, 165 N.W.2d 782, 786 (Iowa 1969).

We believe that §§ 422.28, 422.54(2) and 422.73 should be construed so that all provisions are given effect. *Northern Natural Gas Company v. Forst*, 205 N.W.2d 692, 697 (Iowa 1973). As construed, §§ 422.28, 422.54(2) and 422.73 authorize tax refunds to the extent that the taxpayer is successful within the context of a timely filed protest to an assessment of income tax or sales tax.⁵ Where the Department has not made any assessment, §§ 422.28 and 422.54(2) are not implicated, but § 422.73 will authorize a refund as long as the refund claim is within the scope of this statute, including the time periods for claiming the refund. We believe that these interpretations of §§ 422.28, 422.54(2) and 422.73 give reasonable effect to all of these statutes.

In Op. Att'y Gen. #86-7-5, we opined that, where possible, the amnesty statute should be construed in *pari materia* with other tax statutes that would be operative in non-amnesty situations. We see no reason to depart from such a result with respect to the circumstance where the taxpayer fails to timely protest a tax assessment but does tender an otherwise proper amnesty payment. Accordingly, if the taxpayer tenders an amnesty payment of amounts covered by an assessment which the taxpayer failed to timely appeal, the taxpayer is not entitled to claim a refund of the assessed amounts.

However, §§ 422.28 and 422.54(2) allow the Director of Revenue and Finance (Director), upon the Director's motion, to abate income tax or sales tax assessments after the time period for protesting them has expired.⁶ Implicit in the Director's abatement authority is the exercise of discretion. This discretion is not unlimited. Iowa Code § 17A.19(8)(g). Non-exclusive examples of income tax assessments where abatement may or may not be requested are in Department rule 730 Iowa Admin. Code § 7.8. We have been informed by the Department that it has historically been the Department's practice that if the Department does grant abatement and, as a result, tax and interest are overpaid, the Department will return such overpayment to the taxpayer. Accordingly, we are of the opinion that if the taxpayer tenders the proper amnesty payment to the Department which includes amounts covered by an assessment that the taxpayer failed to timely protest, the taxpayer may not claim a refund of any overpaid tax covered by the assessment, but may, in the discretion of the Director, recover overpaid amounts to the extent that the Director abates the assessment.⁷ Whether the taxpayer obtains abatement or not does not affect the validity of the taxpayer's amnesty payment.

⁵ As long as there is a timely protest of the income tax or sales tax assessment which is paid, the protest would be considered to be a timely claim for refund, regardless whether the assessment was paid before or after the filing of the protest.

⁶ Such abatement provisions do not exist with respect to all taxes covered by the amnesty program. For example, no abatement provisions are in the inheritance tax law. See Iowa Code § 450.94 (1985).

⁷ It is not possible in an opinion of the Attorney General to speculate upon all the circumstances whereby the Director could grant abatement or, in the exercise of reasonable discretion, decline to do so.

Second, you ask whether the taxpayer, under these circumstances, can file a refund claim for all taxes which were paid to the Department but which were not covered by the assessment. The answer to this question is the same as the answer to your fifth question.

August 28, 1986

CONSTITUTIONAL LAW: Counties: Financial Assistance to Local Business.

Iowa Const. art. III, §31; Iowa Code §452.4, 721.2(5) (1985). Article III, §31, of the Iowa Constitution prohibits a loan of money solely to benefit a private business. However, government financing of economic development may, in appropriate circumstances, serve a public purpose. The legislature has so found in establishing certain programs to alleviate adverse economic conditions in the State. The question whether a specific loan program to businesses for the creation of jobs serves a public purpose must be determined in light of the specific circumstances. The treasurer's good faith payment of funds authorized by the supervisors for such a program would not violate §452.4. A loan which is not for public purposes could be found to violate Iowa Code §721.2(5). (Osenbaugh to Fillenwarth, Emmet County Attorney, 8-28-86) #86-8-8

Ms. Lynn Fillenwarth, Emmet County Attorney: You have requested an opinion whether a county board of supervisors' appropriation of money for low interest or no-interest loans to private businesses within the county violates Article III, Section 31, of the Iowa Constitution or Iowa Code Section 452.4 (1985).

You state that your county has the highest unemployment rate in the state. In order to improve the unemployment problem and also to increase the tax base and population, the board of supervisors wants to appropriate money for low interest or no-interest loans to new or existing businesses within the county. You state that the board will try to loan money to financially stable businesses, with the primary concern being whether the company will provide jobs in the county.

Iowa Constitution, Art. III, § 31

Article III, section 31 of the Iowa Constitution states:

[N]o public money or property shall be appropriated for local, or private purposes, unless such appropriation, compensation, or claim, be allowed by two thirds of the members elected to each branch of the General Assembly.

We will assume that this provision is applicable to counties. The Supreme Court has held this provision applicable to appropriations by city councils.¹ *Love v. City of Des Moines*, 210 Iowa 90, 101, 230 N.W. 373, 378 (1930); see also *Willis v. City of Des Moines*, 357 N.W.2d 567, 570, 572 (Iowa 1984). Our office has assumed it would likewise apply to all governmental subdivisions or agencies with respect to public funds and property they control. 1984 Op.Att'yGen. 47, n.1 (#83-5-6).

The expenditure of public funds strictly for private gratification clearly violates the public purpose requirement. See 1979 Op.Att'yGen. 102 (retirement dinner for municipal utility employee might serve a public purpose); 1980 Op.Att'yGen. 720 (city may not authorize private use of city property as fringe benefit). "However, a statutory scheme which advances a public purpose will not be invalidated because it benefits certain individuals or classes more than others. Necessary incidental benefits which may accrue to housing sponsors or investors will not void this legislation." *John R. Grubb, Inc. v. Iowa Housing Finance Authority*, 255 N.W.2d 89, 96 (Iowa 1977) (citations omitted).

The test applied by the Supreme Court to determine whether statutes authorizing the expenditure of public money are for private purposes is whether there is an "absence of public purpose" which is "so clear as to be perceptible

¹In *Richards v. City of Muscatine*, 237 N.W.2d 48, 61 (Iowa 1975), the court assumed arguendo that this clause applied to cities.

by every mind at first blush." *John R. Grubb, Inc.*, 255 N.W.2d at 93; *Dickinson v. Porter*, 240 Iowa 393, 417, 35 N.W.2d 66, 80 (1948). The traditional view was that lending money to a private individual or corporation to encourage industry was not a public purpose for which public moneys could be spent. See, e.g., McQuillin, *Municipal Corporations* §39.26, p. 83-85 (3rd ed. 1985); 56 Am.Jur.2d, *Municipal Corporations* §589, p. 638-640 (1971). However, the concept of public purpose is to be given flexible and expansive scope in order "to meet the challenges of increasingly complex, social, economic, and technological conditions." *John R. Grubb, Inc.*, 255 N.W.2d at 93.

The goals of reduction of unemployment and increased tax base appear to be valid public purposes under the test established in *Grubb* and *Dickinson v. Porter*. Statutes providing financial incentives for economic development have been upheld by the Supreme Court in challenges under Article III, section 31. See, e.g., *Train Unlimited Corp. v. Iowa Railway Finance*, 362 N.W.2d 489, 494 (Iowa 1985) (upholding statute authorizing bonds secured by tax and other revenues to finance rail transportation facilities); *John R. Grubb, Inc.*, 255 N.W.2d at 91 (upholding statute authorizing Iowa Housing Finance Authority to sell bonds and loan proceeds to mortgage lenders to promote housing for low income, disabled and elderly people); *Green v. City of Mt. Pleasant*, 256 Iowa 1184, 131 N.W.2d 5 (1964) (upholding industrial revenue bond statute allowing cities to finance local industry construction or expansion through sale of bonds); *Dickinson v. Porter*, 240 Iowa at 397, 35 N.W.2d at 70 (upholding tax credit legislation on agricultural land in effort to encourage agriculture). In Op.Att'yGen. #85-5-5, p. 10, this office, in concluding that statutes creating corporations for economic development did not violate the prohibition against creating corporations by special laws contained in Article VIII, § 1, of the Iowa Constitution, stated:

Encouraging new industry and nurturing present industry, with their impact upon employment and tax revenues, are activities clearly supported by a public purpose and therefore the statute authorizing the Commission to incorporate the Foundation reflects such a purpose.

The Supreme Court, while not bound by legislative findings of public purpose, does rely on them in determining whether public money is being used for private purposes. *John R. Grubb, Inc.*, 255 N.W.2d at 93.

In recent years the legislature has repeatedly found that adverse economic conditions within the state require public efforts to expand and create businesses and that a public purpose is served by economic development. For example, in the past session, H.F. 2451, section 2 (71st G.A., 1986 Sess.),² states, "The General Assembly finds and declares that a continuing need for programs to alleviate and prevent adverse economic conditions exists in this state, and that it is accordingly necessary to create and expand businesses, including agricultural businesses, to strengthen and revitalize the state's economy."

In Senate File 2291, creating an Iowa Economic Development Bond Bank Program to provide financing for economic development, the legislature found in section 2 (new Iowa Code § 20.93) that:

(1) economic development and expansion of business, industry, and farming in the state is dependent upon the availability of financing of the development and expansion at affordable interest rates.

Subsections 2, 3 and 4 find that the pooling of private financing is necessary to make financing available to businesses and farmers at favorable interest rates. Subsection 5 states, "All of the purposes stated in this section are public purposes and uses for which public moneys may be borrowed, expended, advanced, loaned, or granted." Section 3 authorizes the Iowa Finance Authority to issue bonds and make loans for the acquisition and construction of projects.

²This section amended 1985 Iowa Acts, ch. 33, § 301(1), and provides for allotments of lottery moneys for the Iowa Plan Fund for Economic Development created in Iowa Code § 99E.10, providing for loans and grants to aid in economic development.

The Act authorizes loans to cities and counties for projects for which municipal bonds or notes may be issued under Iowa Code § 419.1(2).

In 1985 Iowa Acts, ch. 252, § 2 (Iowa Code Supp. § 175A.1 (1985)), establishing the Iowa Economic Protective and Investment Authority,³ the legislature found, "There exists a serious problem in this state regarding the ability of farmers and small businesses to obtain adequate affordable operating loans and to service the debt on existing operating, machinery, and land loans." § 2(3). The legislature also found that, "The inability of farmers and small businesses to obtain adequate affordable operating loans . . . is conducive to economic decline and poverty and impairs the economic value of vast areas of the state, which are characterized by depreciated property values, impaired investments, and reduced capacity to pay taxes." The legislature further found in subsection 6 that, "These conditions result in a loss of population and further economic deterioration, accompanied by added costs to communities for creation of new public facilities and services." The Act authorizes the Authority to issue obligations and to provide grants for interest rate reduction on operating loans and other economic assistance programs for farming or small businesses. The legislature found that "[t]he establishment of the authority is in all respects for the benefit of the people of the state of Iowa, for the improvement of their health and welfare and for the promotion of the economy which are public purposes." § 2(1). Additionally, the legislature stated in subsection 9, "The public purpose of this chapter is to maximize the economic potential of the state and to thereby stabilize the economic condition of the state."

In 1982, the legislature created the Small Business Loan Program. The Iowa Finance Authority is authorized to make loans for the acquisition and construction of projects which result in the creation of jobs in Iowa, increased revenues for the borrower for a more modern or expanded facility, or service facilities needed in the community. Iowa Code § 220.63. The legislature found that, "A viable small business community is essential to the continuing welfare of Iowans who depend on small business for employment." § 220.61(1)(a). The legislature also found that small business expansion and development was dependent upon having financing available at interest rates which the businesses could reasonably pay, that private financing at low interest rates was unavailable to assist small business expansion and development, and that the Small Business Loan Program was necessary to encourage the investment of private capital in small business expansion and development through the use of public financing. Iowa Code § 220.61(1). The legislature stated the purposes of the Small Business Loan Program in § 220.61(2) as follows:

- a. To promote the business prosperity and economic welfare of Iowa and Iowans.
- b. To assist, through loans, investments, and other transactions, the location of new small business and industry in the state.
- c. To assist through loans, investments, and other transactions, existing small business and industry in the state.
- d. To provide employment opportunities and thereby improve the standard of living of Iowans.
- e. To promote industrial, commercial, and recreational development in this state.

The legislature then stated in § 220.61(3) that, "All of the purposes stated in this section are public purposes and uses for which public moneys provided by the sale of revenue bonds may be used." To advance those purposes, the authority may make loans for the acquisition and construction of projects and issue obligations payable solely from bond proceeds to pay the cost. Section 220.5(5) authorizes all political subdivisions to enter into contracts and otherwise cooperate with the Authority.

³This office found that the provisions for appointing this authority violated Article III, § 1 of the Iowa Constitution. Op.Att'yGen. #86-1-7.

Iowa Code chapter 419 authorizes counties and cities to enter into loan agreements for land, buildings or improvements for projects including manufacturing industries. The funds come from municipal revenue bonds which are limited obligations of the municipality. See Iowa Code §§ 419.1(9), 419.3. Section 419.8 provides, "No municipality shall have the power to pay out of its general fund or otherwise contribute any part of the cost of a project. . . ."⁴

There are other economic development statutes which authorize cities to expend certain funds for economic development. For example, Iowa Code ch. 403, the urban renewal statute, as amended by 1985 Iowa Acts, ch. 66, authorizes cities to designate areas for economic development. See § 403.2; § 403.17(2). To exercise the powers conferred in that chapter, a municipality is required to adopt a resolution making specific findings regarding public purpose. Iowa Code § 403.4. Additionally, loans are provided to cities under the Iowa Community Development Loan Program for public works and facilities which include the acquisition of real property for industrial parks. See Iowa Code §§ 7A.41-7A.49. Section 364.18 specifically authorizes cities to accept grants from state and federal government and provides that, "Upon a finding of public purpose, the city may disburse the assistance to any person to be used for economic development projects."

Thus, the legislature has provided that the ultimate goals of creation of jobs, expansion of businesses, and economic development of communities in response to the present adverse economic conditions of the State serve a public purpose. Each of the cited statutes provides specific mechanisms to carry out the public purpose. Many of those statutes provide express criteria for use of the proceeds, limit the source of funds which may be used, or provide a state agency to carry out the purposes of the program.

The community economic betterment program does provide for loans to be made through cities and counties for low-interest business loans to create jobs. 1985 Iowa Acts, ch. 33, § 301(2); 1986 Iowa Acts, H.F. 2412, § 19 (71st G.A., 2d Sess.). The community economic betterment account established in 1985 Iowa Acts, ch. 33, § 301(2), provided that only a political subdivision⁵ of the state could apply to receive funds for any of the purposes stated. The purposes include a buy-down program to reduce the principal of business loans, a similar interest buy-down program to reduce the interest on a business loan, grants and loans to aid in economic development, site development or infra-structure cost directly related to a project resulting in new employment, and road construction projects. In ranking applications for funds, the Development Commission is to consider, among other factors, the proportion of political subdivision match to be provided, the total number of jobs to be created, and the impact of the proposed project on the economy of the political subdivision. In 1986 Iowa Acts, ch. 1207, H.F. 2412, § 2, the legislature added the following purpose, "Funds for guaranteeing business loans by local development corporations as described in section 28.29."

The 1985 and 1986 Iowa Acts concerning the community economic betterment program provide evidence of legislative recognition that cities and counties may expend public funds for loans to aid economic development and for programs to reduce the principal or interest of business loans. The legislature also has specifically provided that the creation of jobs is a primary criteria to consider in determining whether the Development Commission will provide state-appropriated funds for that purpose.

We therefore conclude that Article III, § 31, requiring that public funds be spent for public purposes, does not *per se* prohibit cities and counties from providing loans to businesses in order to create jobs. In 1976 Op. Att'y Gen. 811,

⁴ As noted below at page 10, we are not here addressing the effect of the limitations contained in section 419.8.

⁵ The Development Commission has construed eligible political subdivisions as cities, counties and merged area schools. 520 Iowa Admin. Code 8.2.

this office held that a city's subsidy to employers who hire persons laid off due to the closing of an industry in the city violated Article III, section 31. That opinion stated that the funds would be "for the benefit of those employees recently laid off due to the closing of a large industry in the city. This is for the benefit of only those private individuals." That opinion was rendered prior to the legislative findings that the creation of jobs in light of the present adverse economic conditions constitutes a public purpose. Additionally, the opinion relied upon early cases which did not reflect recent case law indicating that economic development serves a public purpose. That opinion is therefore overruled to the extent inconsistent with this opinion.

Green v. City of Mount Pleasant, 256 Iowa 1184, 131 N.W.2d 5 (1964), establishes that Iowa is one of the many jurisdictions that has accepted that the general objective of economic development is a public purpose. See cases cited in *Common Cause v. State*, 455 A.2d 1, 24 (Me. 1983).

As noted above, the Iowa Supreme Court gives deference to legislative findings that a particular spending program serves a public purpose. *John R. Grubb*, 255 N.W.2d at 93. In *Grubb* and other cases, the Court has also evaluated the evidence in the record to determine whether the statutory scheme was for a public or a private purpose. While we find no specific standard for evaluating whether a particular expenditure for economic development meets the public purpose test, we are aided by case law from other jurisdictions. The South Carolina Supreme Court, in analyzing whether a statute providing for a Jobs-Economic Development Authority met the public purpose test, stated:

In *Elliott v. McNair*, [250 S.C. [75] at 86, 156 S.E.2d [421] at 427 [1967]], we recognized that economic development and creation of jobs were, as a general proposition, matters of public concern. Thus, the question before the Court is whether the provisions of the Act are reasonably related to its legitimate public goals. The findings of the legislature are critical to resolution of the public purpose issue. Here, the legislature's findings are detailed and comprehensive. They indicate the General Assembly undertook a thorough investigation of the employment-development problems faced by this State, determined the problems were severe enough to warrant legislative intervention and made a reasoned judgment as to the appropriate remedies.

Carll v. South Carolina Jobs-Economic Development Authority, 327 S.E.2d 331, 334 (S.C. 1985).

In *Common Cause v. State*, 455 A.2d 1, 24 (Me. 1983) (upholding state and city loans for development of private dry dock), the Maine Supreme Court rejected an argument that the doctrine of public purpose barred any public subsidy of a private business unless it benefited the public directly, as in the case of slum clearance, or ultimately produced something which the public would have a right to use, for example, railroads. 455 A.2d at 21. In determining whether indirect economic benefits to the public are inadequate to establish a public purpose, the court held it would examine whether:

... the plan threatens a detriment to the public which outweighs the benefit that could have been anticipated. [Note, *Legal Limitations on Public Inducements to Industrial Location*, 59 Colum. L.Rev. 618, 647 (1959).] In such a weighing, both direct and indirect benefits are relevant. Accordingly, we now hold that indirect economic benefits may be taken into consideration in deciding whether public spending by the state is justified.

The Maine court there upheld the expenditure of millions of dollars from general obligation bonds by the state and a city to assist in the creation of a ship repair and overhaul facility to be operated by a private corporation for profit. The court considered evidence that the corporation was a large, stable and experienced operation with strong ties to the state, that the plan would require many employees, and that the facilities would make the port more attractive to sea-borne commerce. The court also found significant the fact that the private corporation was contractually bound to invest several millions of dollars and stated, "That substantial private investment serves as an added measure of

assurance of the soundness of the project, distinguishing this case from an outright donation, which would permit a private enterprise to take a risk-free, speculative gamble at public expense." (The court did note that financial risk did not of itself preclude public spending, citing *Wright v. City of Palmer*, 486 P.2d 326, 330 n.11 (Ala. 1970).) 455 A.2d at 26.

The requirement within Art. III, §31, that "no public money or property shall be appropriated for local or private purposes . . ." should be considered in connection with other constitutional provisions which generally prohibit special laws for the benefit of individuals or corporations. For example, Iowa Const. Art. III, §30 states that the General Assembly shall not pass local and special laws in certain specified instances, and Art. I, §6 provides in part that the General Assembly shall not, "grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms should not equally belong to all citizens." Similarly, art. VIII, §1 prohibits the creation of corporations by "special laws." Taken together, these provisions evince a clear intent by the drafters of the Constitution to restrain the legislature from granting benefits or privileges not generally available to all citizens or corporate bodies. See Op. Att'y Gen. #85-5-5, p. 7. By proscribing the appropriation of money or property for a local or private purpose, the drafters similarly intended to prohibit favoritism in the granting of governmental benefits to individuals or businesses which would not be generally available. This prohibition on legislative favoritism must be borne in mind in examining whether a particular measure is supported by a public purpose.

In determining whether a specific loan program would serve public rather than private purposes, we believe a reviewing court would review the adequacy of the governing body's findings of public purpose for a particular program and the reasonableness of the program created to carry out the goal of economic development. The court would also consider any evidence tending to show that the expenditure is in fact for a private purpose. We recommend that the governing body consider all relevant factors including those that the legislature has provided in 1985 Iowa Acts, ch. 33, §301(2), and thus balance the benefits to the public in general along with the costs incurred. In evaluating the public benefits to be obtained, the governing body would be advised to consider and document the number of jobs created, the level of need, the economic conditions in the community, the unavailability of other financing, and the impact of the proposed project on the economy of the political subdivision. In evaluating the costs, the governing body would be advised to consider not only the initial costs, but the likely recapture of funds that would occur and the risk to the taxpayers of the municipality.

Additionally the governing body should impose conditions to assure that the loan program provides the public benefits upon which the public purpose is founded. See Op. Att'y Gen. #80-5-7(L).

Your letter does not indicate the proposed source of the funds to be used for this purpose.⁶ We have analyzed only the constitutional issue posed and not whether the use of particular funds would be authorized for this purpose.

⁶Some courts have held that the mode of financing is not relevant to the issue of public purpose. *Minnesota Energy and Economic Redevelopment Authority*, 351 N.W.2d 319, 340-341 (Minn. 1984); *R. E. Short Co. v. City of Minneapolis*, 269 N.W.2d 331, 339 (Minn. 1978); *People ex rel. City of Urbana v. Paley*, 68 Ill. 2d 62, 73, 11 Ill. Dec. 307, 312, 368 N.E.2d 915, 920 (1977). Although the Iowa cases on industrial development concerned revenue bonds, in other contexts the court has upheld financial assistance to private entities as serving a "public purpose" where the source of funds was taxation. See *Richards v. City of Muscatine*, 237 N.W.2d 48 (Iowa 1975) (tax-increment financing of urban renewal); *Train Unlimited Corp. v. Iowa Railway Finance*, 362 N.W.2d 489, 494 (Iowa 1985) (bonds for railroad development paid from diesel fuel tax, wheel car tax, and delinquent railroad property tax). The court in those cases discussed the mode of financing in determining other constitutional limitations governing the creation of debt or extension of credit but did not expressly consider the financing methods in determining whether there was a violation of Article III, §31.

A county cannot expend funds for economic development in a manner prohibited by state law. *See, e.g.*, Iowa Code §419.8 (no payment by municipality out of its general fund for projects as defined in Iowa Code §419.1(2)).

Iowa Code Section 452.4

You also ask if the board of supervisors' loan program violates Iowa Code section 452.4. That section states:

A county treasurer shall be guilty of a serious misdemeanor for loaning out, or in any manner using for private purposes, state, county, or other funds in the treasurer's hands.

This is a criminal statute prohibiting the county treasurer from misappropriating public funds for private use. It is a well-established principle of statutory construction that penal statutes are to be construed strictly, with doubts to be resolved in favor of the accused. *See State v. Williams*, 315 N.W.2d 45, 49 (Iowa 1982). We therefore believe it is unlikely section 452.4 will be held to apply to the situation where the treasurer in good faith issues warrants in a manner authorized by the board of supervisors.

It should also be noted that Iowa Code §721.2(5) (1985) makes it a serious misdemeanor for any public officer who:

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

This office has previously noted that the line between expenditures violating section 721.2 and those truly yielding of public benefit is not easily drawn. 1980 Op.Att'yGen. 102, 103. A municipality's finding of public purpose would not be binding on a trier of fact in a criminal trial. 1980 Op.Att'yGen. 720, 722. The motive for the expenditure is highly relevant to criminal liability. 1980 Op.Att'yGen. 102, 105. However, this office cannot within the scope of the opinion process make determinations as to whether violations of the criminal law have or will occur under a given set of facts. As we stated in 1980 Op.Att'yGen. 105, 106, "Whether criminal charges would ever be brought . . . would rest with the sound discretion of the county attorney." (citations omitted).

CONCLUSION

It is therefore our opinion that Art. III, §31, does not *per se* prohibit publicly subsidized loans to businesses for the creation of jobs where there are adequate findings of need to combat adverse economic conditions. The legislature has declared that the general goals of creation of jobs and expansion of businesses under the present economic conditions are public purposes. We believe the courts would give deference to those legislative findings that these goals are public purposes. We also believe that the court would consider these legislative findings in evaluating analogous county findings and programs. In determining whether a proposed loan program by a municipality is for a public rather than a private purpose, the governing body of the municipality should make findings which adequately establish that the loan program would further public purposes, should establish criteria which prevent favoritism, and should structure the program to assure that moneys provided are used to further the public purposes.

The county has authority to provide such loans from community economic betterment funds under 1986 Iowa Acts, ch. 1207, H.F. 2412, and 1985 Iowa Acts, ch. 33, §301(2), if the public purpose test is met. Whether home rule or statutory authority exists for loans from other sources should be examined in light of the specific uses to which the loans would be put and the source of funds to be used to provide the loans.

In conclusion, Article III, §31, of the Iowa Constitution prohibits a loan of money solely to benefit a private business. However, government financing of economic development may, in appropriate circumstances, serve a public purpose. The legislature has so found in establishing certain programs to alleviate

adverse economic conditions in the State. The question whether a specific loan program to businesses for the creation of jobs serves a public purpose must be determined in light of the specific circumstances. The treasurer's good faith payment of funds authorized by the supervisors for such a program would not violate §452.4. A loan which is not for public purposes could be found to violate Iowa Code §721.2(5).

August 29, 1986

MUNICIPALITIES: Consolidation of and Appointments in Police and Fire Departments Under Department of Public Safety. Iowa Code Supp. § 372.13(4) (1985); Iowa Code §§ 4.1(36)(a); 364.1, 364.2(3); 372.4; 372.5; 400.6(4); 400.13 (1985); House File 2035, 71st, G.A., 2d Sess. §§ 1, 2 (Iowa 1986); 1986 Iowa Acts, ch. 1171, §§ 1, 2, House File 2403, 71st, G.A., 2d Sess. § 3 (Iowa 1986); 1986 Iowa Acts, ch. 1138, § 3, Iowa Const. art. III, § 38A. A city under the mayor-council form of government may create a department of public safety including the police and fire departments. A city under civil service is required to appoint a chief of the police department and a chief of the fire department pursuant to Iowa Code section 400.13 (1985). A director of public safety should not simultaneously occupy both the police chief and the fire chief positions. Pursuant to H.F. 2035, the city council has the authority to adopt an ordinance providing the public safety director with the authority to appoint the police and fire chiefs. A director of public safety may exert supervisory and management control over the police chief and the fire chief and their respective divisions, although they should be given considerable latitude to perform their statutory duties. The director of the department of public safety is exempt from civil service requirements pursuant to H.F. 2403. A director of public safety department does not have to meet the requirements of section 400.13. (DiDonato to Diemer, State Representative, 8-29-86) #86-8-9(L)

SEPTEMBER 1986

September 2, 1986

MENTAL HEALTH: Rule 16 Of The Supreme Court Involuntary Hospitalization Rules. Iowa Code §§229.11, 229.12, 229.19. When Involuntary Hospitalization proceedings are transferred pursuant to Rule 16, the receiving court acquires jurisdiction in the cause and conducts the hospitalization proceedings. Those advocates appointed by the receiving court are obligated to represent the interests of those persons hospitalized by that court. (McCown to Sandy, Dickinson County Attorney, 9-2-86) #86-9-1(L)

September 2, 1986

CORPORATIONS: Environmental Law. 40 C.F.R. §§264.147, 265.147; Iowa Code §496A.4(8) (1985). A parent corporate guarantee given as additional financial responsibility for owners and operators of hazardous waste facilities to satisfy the liability requirements under federal law is fully valid and enforceable in Iowa by third parties injured as a result of the operation of the facilities. (Haskins to Wilson, Director, Department of Natural Resources, 9-2-86) #86-9-2(L)

September 17, 1986

COUNTIES AND COUNTY OFFICERS: Board of Supervisors; Auditor; Chapter 28E Agreements; County Public Safety Commission; Authority Of Supervisors To Compel Auditor To Serve As Treasurer For An Entity Created By A Chapter 28E Agreement. Iowa Code chapter 28E (1985); §§28E.21 to 28E.27; 28E.28; 331.431; 331.502(37); 331.504(2); 331.504(3); 331.506(1); 331.507(1). A county board of supervisors may not compel the auditor to serve as treasurer for a county public safety commission created by a chapter 28E agreement. However, even if the auditor elects not to serve as treasurer, the auditor may be required to perform services for that commission that fall within the scope of that office's statutory duties. (Weeg to Swaim, Davis County Attorney, 9-17-86) #86-9-3(L)

September 22, 1986

DOMESTIC RELATIONS: Duty Of Peace Officer To Take Violators Of Orders Or Consent Agreements Issued Pursuant To Chapter 236 Into Custody. Iowa Code §§4.4(1), (2) (1985); Iowa Code chapter 236; House File 2433, 71st G.A., 2d Sess. §2 (Iowa 1986). A peace officer who has probable cause to believe a violation of a civil or criminal order or approved consent agreement issued pursuant to Iowa Code chapter 236 has occurred is required to take the violator into custody. Iowa Code §236.11, as amended by House File 2433, 71st G.A., 2d Sess. §2 (Iowa 1986), applies only to orders or approved consent agreements issued pursuant to chapter 236. (Dorff to Zenor, Clay County Attorney, 9-22-86) #86-9-4

Mr. Michael L. Zenor, Clay County Attorney: You have requested an opinion of the Attorney General concerning the effect of recent amendments to Iowa Code §236.11. The following questions are posed for our consideration:

1. Does the language of 236.11 deprive the peace officer of discretion and make it mandatory that the peace officer arrest a person under the circumstances described in that section?

2. Does the section in question apply to orders issued by a court in a dissolution of marriage proceeding under Chapter 598, as well as orders issued under Chapter 236, the Domestic Abuse law?

Section 236.11 was amended by House File 2433, 71st G.A. 2d Sess. §2. This section, with the recent amendment underlined, provides as follows:

236.11 Duty of peace officer.

A peace officer shall use every reasonable means to enforce *any civil or criminal order or approved consent agreement issued pursuant to this chapter. If a peace officer has probable cause to believe that a person has violated any civil or criminal order or approved consent agreement,*

the peace officer shall take the person into custody and take the person before the court which issued the order or agreement, at which time the court shall determine whether the person has committed contempt pursuant to section 236.8. A peace officer shall not be held civilly or criminally liable for acting pursuant to this section provided that the peace officer acts in good faith, on probable cause, and *such acts do not constitute a willful and wanton disregard for the rights or safety of another.*

(emphasis added).

Your first question is whether section 236.11 deprives a peace officer of discretion and makes it mandatory that the officer arrest a person under the circumstances described in that section.

In construing a statute, no one doctrine or principle of construction is necessarily determinative. *Metier v. Cooper Transport Co.*, 378 N.W.2d 907, 912 (Iowa 1985). The polestar of all statutory construction is the intent of the legislature. *Office of Consumer Advocate v. Iowa State Commerce Com'n.*, 376 N.W.2d 878, 880 (Iowa 1985). A statute should be accorded a sensible, practical, workable and logical construction. *Id.* at 882.

It is generally presumed that statutory words are used in their ordinary and usual sense with the meaning commonly attributed to them. *American Home Products Corp. v. Iowa State Board of Tax Review*, 302 N.W.2d 140, 143 (Iowa 1981). If, in doing so, the language of the statute is precise and free from ambiguity, no more is necessary than to apply to words used their ordinary sense in connection with the subject considered. *State v. McNeal*, 167 N.W.2d 674, 677 (Iowa 1969). In other words, where the language of a statute is clear and plain, there is no room for construction. *Hinders v. City of Ames*, 329 N.W.2d 654, 655 (Iowa 1983).

In answering your first question, the pivotal question is whether use of the word "shall" in the context of the statute evinces a legislative intent to mandate arrests under the circumstances described therein.

The use of the word "shall" in a statute is ordinarily persuasive evidence that the statute is obligatory, thus excluding the idea of discretion. *Sheer Const., Inc. v. Hodgman and Sons, Inc.*, 326 N.W.2d 328, 334 (Iowa 1982). It is used in laws, regulations or directives to express what is mandatory. *Windus v. Great Plains Gas*, 254 Iowa 114, 123, 116 N.W.2d 410, 415 (1962). "When addressed to a public official, the word 'shall' is ordinarily mandatory, excluding the idea of permissiveness or discretion." *Rath v. Sholty*, 199 N.W.2d 333, 335-36 (Iowa 1972) quoting *Schmidt v. Abbott*, 261 Iowa 886, 890, 156 N.W.2d 649, 651 (1968).

Applying the foregoing legal principles, it is our opinion that a peace officer who has probable cause to believe a violation of section 236.11 has occurred must take the violator into custody.

This brings us to your second, and more problematic question: whether section 236.11 applies to orders issued by a court in a dissolution of marriage proceeding under Iowa Code chapter 598, as well as to orders issued under Iowa Code chapter 236.

The first sentence of section 236.11 provides: "A peace officer shall use every reasonable means to enforce any civil or criminal order or approved consent agreement *issued pursuant to this chapter.*" (emphasis added). The second sentence of section 236.11 provides: "If a peace officer has probable cause to believe that a person has violated any civil or criminal order or approved consent agreement, the peace officer shall take the person into custody and take the person before the court which issued the order or agreement, at which time the court shall determine whether the person has committed contempt pursuant to section 236.8." This sentence is an entirely new addition to section 236.11 under the recent amendment.

The relevant question here is, therefore, whether the second sentence expands the scope of the language in the first sentence to include orders or agreements issued pursuant to authorities other than chapter 236.

A fundamental rule of statutory construction is that when the same or substantially the same phrases appear in a statute they will be given consistent meaning absent contrary legislative intent. *Kehde v. Iowa Department of Job Service*, 318 N.W.2d 202, 205 (Iowa 1982). Statutory constructions which render a portion thereof superfluous are not to be favored. *George H. Wentz, Inc. v. Sabasta*, 337 N.W.2d 495, 500 (Iowa 1983). It is presumed that the legislature included every part of a statute for a purpose, and intended each part to be given effect. *Id.*

When the legislature amends a statute, a presumption arises that the legislature intended some change in the existing law. *Mallory v. Paradise*, 173 N.W.2d 264, 267 (Iowa 1969). A wholesale or extensive amendment to a statute is ordinarily an indication that the law was altered by the amendment. *Slockett v. Iowa Val. Community School District*, 359 N.W.2d 446, 448 (Iowa 1984).

Applying these legal principles, it is our opinion that peace officers are only required to take violators of orders issued pursuant to chapter 236 into custody. We reach this conclusion by imputing to the phrase "any civil or criminal order or approved consent agreement," as used in the second sentence of section 236.11, the same meaning given to it by the legislature in the first sentence. Since the phrase is limited in the first sentence to violations of orders and consent agreements issued "pursuant to this chapter," it is our opinion that rules of statutory construction require that the same meaning be given to the phrase in the second sentence. *Kehde v. Iowa Department of Job Service*, 318 N.W.2d at 205. To do otherwise would render the limiting language of the first sentence superfluous. We are unable to conclude that such a result was intended by the legislature, particularly absent evidence to the contrary. *Id.* at 205; *George H. Wentz, Inc. v. Sabasta*, 337 N.W.2d at 500.

Our opinion is further buttressed by the fact that under the second sentence of section 236.11, as amended, the court which issued the order or agreement is *only* instructed to determine whether "contempt pursuant to section 236.8 has been committed by the alleged violator." Also significant in our opinion is the requirement under section 236.5(4) that a certified copy of the order or approved consent agreement be issued to the "law enforcement agencies having jurisdiction to enforce the order or consent agreement." We believe these requirements provide further evidence of a legislative intent to restrict application of section 236.11 to orders or approved consent agreements issued pursuant to chapter 236.

Yet another reason compels our conclusion that only violations of orders or consent agreements issued pursuant to chapter 236 were intended to result in mandatory arrests. Assuming that section 236.11 was intended to apply to orders and consent agreements which were *not* issued pursuant to chapter 236 would result in the mandatory arrest provision being applied in situations involving orders totally unrelated to domestic abuse. In our opinion, to construe section 236.11 this broadly would run contrary to the long established policy of strictly construing statutes which are penal in nature, with doubts being resolved in favor of the accused. *State v. Soppe*, 374 N.W.2d 649, 652 (Iowa 1985). It is therefore our opinion that section 236.11 was intended to result in mandatory arrests only in those situations where the peace officer has probable cause to believe that a violation of an order issued pursuant to chapter 236 has occurred.

OCTOBER 1986

October 2, 1986

INSURANCE: Mandatory Chiropractic Coverage In Group Insurance Policies Or Plans. 1986 Iowa Acts, H.F. 2219, §§ 2, 5, 7, *amending* Iowa Code §§ 509.3, 514.7, 514B.1(2) (1985). (1) Existing group plans offered by a nonprofit service corporation which renew on the very date - July 1, 1986 - which is the effective date of 1986 Iowa Acts, H.F. 2219, mandating chiropractic coverage in certain group policies or insurance-like plans, are subject to the requirements of H.F. 2219 at that time and not later. (2) H.F. 2219 is inapplicable to a self-insured plan. The point at which a plan with a stop-loss loses its self-insured status and becomes subject to H.F. 2219 as "group" coverage is when there is an actuarial certainty of payment upon the stop-loss. (3) H.F. 2219 does not, by its own terms, exclude plans of the state or federal government providing benefits for their employees. (4) It cannot be stated that a health maintenance organization must contract with a chiropractor in its service area in order to comply with H.F. 2219. (5) The "Farm Bureau" plan is a "group subscriber contract or plan" under H.F. 2219. (6) The date of renewal of the master policy of the Iowa State Bar Association plan, rather than the anniversary date of any law firm in the plan, determines the timing of the application of H.F. 2219. (Haskins to Hager, Commissioner of Insurance, 10-2-86) #86-10-1(L)

October 22, 1986

CONSTITUTIONAL LAW: Appropriations. Iowa Const. art. III, § 24; Iowa Code §§ 8.33 and 93.15 (1985); Senate File 2305, 71st G.A., 2d Sess., § 8 (Iowa 1986), 1986 Iowa Acts, ch. 1249. Monies appropriated from the Petroleum Overcharge Fund are subject to reversion, and may not be obligated beyond the fiscal year of appropriation or other expressly established deadline, unless appropriated by the General Assembly. (Norby to Bean, Administrator, Energy and Geological Resources Division, Department of Natural Resources, 10-22-86) #86-10-2(L)

October 22, 1986

CONSTITUTIONAL LAW: Health [Public Health Nursing Grants]. House File 2484, § 204(10)(b), 71st G.A., 2d Sess. (Iowa 1986). A reasonable basis exists for the legislative classification created by H.F. 2484 and if challenged, it is unlikely a court would find it violates equal protection under either the federal or Iowa constitutions. (McGuire to Welsh, State Senator, 10-22-86) #86-10-3(L)

October 30, 1986

AUDITOR: Cities. Iowa Code § 11.18 (1985). Auditor has discretion to audit cities when the Auditor deems such action to be in the public interest. (Galenbeck to Renaud, State Representative, 10-30-86) #86-10-4(L)

October 30, 1986

MENTAL HEALTH: Mental Retardation; County Board Of Supervisors. Iowa Code §§ 222.1(2), 222.13, 222.31, 222.59, 222.59(1), 222.59(5), 222.59(6), 222.60, 222.73; Iowa Code chapter 222 (1985). The county board of supervisors has little discretion to determine what are necessary costs of admission, commitment, or treatment, training, instruction, care, habilitation, support and transportation of mentally retarded persons committed or admitted as patients in a hospital-school or special unit. The board of supervisors has some discretion to determine those costs for mentally retarded persons committed to public or private institutions. However, courts will defer to the judgment of professionals when confronted with challenges to the adequacy of treatment received by persons whose liberty interests are infringed. (McCown to O'Kane, State Representative, 10-30-86) #86-10-5(L)

NOVEMBER 1986

November 10, 1986

MUNICIPALITIES: Home Rule; Utility Boards. Iowa Const., art. III, §31; art. III, §38A; Iowa Code §§ 384.84; 384.89; 388.4; 388.5. A municipal utility board may spend utility revenues to coordinate economic development promotional efforts if it properly determines that this is a utility operating expense. The determination whether an expenditure is a proper utility operating expense is to be made by the utility board. Our prior opinion #84-12-11(L) is overruled to the extent inconsistent with this opinion. A utility board may not spend utility revenues for city purposes not related to operation of the utility but may transfer surplus revenues to other city funds as provided in Iowa Code §384.89. City boards, other than the city council, do not have home rule authority to act outside their statutory field of operation. (Osenbaugh to Priebe, State Senator, 11-10-86) #86-11-1(L)

November 17, 1986

COUNTIES AND COUNTY OFFICERS: Cemeteries; Applicability Of Law For Protection And Preservation Of Marked And Unmarked Burial Sites. Iowa Code sections 566.20-566.27 (1985); Iowa Code sections 566.31-566.34 (1987) (1986 Iowa Acts, ch. 1030, S.F. 120). Sections 566.31 and 566.32 (S.F. 120, §§ 1 and 2), which impose criminal sanctions for disturbing known burial sites, apply only to marked burial sites, while section 566.33 (S.F. 120, § 3), which requires local governments to preserve burial sites, applies to any burial site, marked or unmarked. (Weeg to Metcalf, Black Hawk County Attorney, 11-17-86) #86-11-2(L)

November 18, 1986

CONSTITUTIONAL LAW: Governor; Item Veto. Iowa Const., art. III, §16: H.F. 2484, [Iowa Code ch. 285]. It is likely that the item veto of §138 of House File 2484 would be held to be unconstitutional in violation of the separate and severable principle if the item veto were challenged in court. (Pottorff to Dieleman, State Senator, 11-18-86) #86-11-3

The Honorable William Dieleman, State Senator: You have requested an opinion of the Attorney General concerning the governor's item veto of §138 of House File 2484. You point out that §§135 through 138 of House File 2484 changed the method of reimbursement to parents who transport their children to a nonpublic school. Under prior law reimbursement was based on an amount equal to eighty dollars plus a percentage of the difference between eighty dollars and the previous school year's statewide average per pupil transportation cost as determined by the department of public instruction. Reimbursements were payable for an unlimited number of elementary school students and were payable for two high school students.

Sections 135 through 138 of House File 2484 changed this method of reimbursement in several significant respects. Section 135 reiterates the formula of eighty dollars plus seventy-five percent¹ of the difference between eighty dollars and the previous school year's statewide average per pupil costs but limits reimbursement to two elementary school students and one high school student. Section 135 further refers to §138 for purposes of calculating the reimbursements. Section 136 amends the standing appropriation in §285.2 from the general fund to pay these reimbursements to add the express provision that "[t]he portion of the amount appropriated for approved claims under section 285.1, subsection 3, shall be determined under §285.3." Section 137, similarly, amends §285.2 to expressly provide that claims for reimbursement under §285.1(3) "shall be determined under" §285.3.

¹ Previous language had provided a sliding percentage of: twenty-five percent for the school year commencing July 1, 1980; fifty percent for the school year commencing July 1, 1981; and seventy-five percent for the school year commencing July 1, 1982, and thereafter. Seventy-five percent, therefore, was already the effective figure.

Section 138, in turn, enacts §285.3 to which §§135 through 138 refer.² Substantively this section establishes the formula for calculating reimbursement. The formula, however, is based on an unlimited number of elementary school students and two high school students. Since actual reimbursement is limited to two elementary school students and one high school student under §135, a surplus is generated. This surplus creates a supplemental fund to provide supplemental payments to the parents or guardians of nonpublic school students who transport one or more family members a specified distance to their school of attendance.

You ask our office to interpret the effect of this item veto. You specifically inquire concerning the impact of the item veto on the calculation of reimbursements which were scheduled in August of 1986 and thereafter. In our opinion, this exercise of the item veto is unconstitutional and the item veto is, therefore, a nullity.

In evaluating the constitutionality of the item veto of § 138, we must determine whether § 138 constitutes an "item" subject to exercise of the governor's item veto power. See Iowa Const. art. III, §16. Exercise of the item veto power is limited to appropriation bills. 1980 Op.Att'yGen. 864, 865-66. See *Turner v. Iowa State Highway Commission*, 186 N.W.2d 141 (Iowa 1971). An "item" of an appropriation bill, in turn, is not limited to an appropriation of money but is broadly defined to include any part of an appropriation bill. *Id.* at 149-50.

The Iowa Supreme Court has clarified that the vetoed "part" of an appropriation bill must be separate and severable. In *Turner* the Court quoted with approval a Virginia Supreme Court decision which had stated that an item is "something that may be taken out of a bill without affecting its other purposes and provisions. It is something which can be lifted bodily from it rather than cut out. No damage can be done to the surrounding legislative tissue, nor should any scar tissue result therefrom." *Turner*, 186 N.W.2d at 151, quoting from *Commonwealth v. Dodson*, 176 Va. 281, 290, 11 S.E.2d 121, 124 (1940). Subsequently, in *Welden v. Ray*, 229 N.W.2d 706 (Iowa 1975), the Court reiterated the separate and severable principle in analyzing the effect of an item veto on language which delineated the purpose of an appropriation. *Id.* at 714. Ultimately the *Welden* Court invalidated the item veto on the ground that the vetoed language constituted "integral parts" of the appropriation itself and did not constitute separate and severable provisions. Item vetoes held to be unconstitutional on this ground are a nullity and of no effect. *Id.* at 715.

The separate and severable principle set out in *Turner* and *Welden* is consistent with the view that item veto is a negative, not an affirmative, power. The Iowa Supreme Court has expressly adopted the principle that the item veto cannot be used to disapprove part of an appropriation if "the residue which would become law might be something not intended by the legislature and against the will of the majority of each house." *Welden*, 229 N.W.2d at 713, quoting from Note, 18 Drake L. Rev. 245, 249-50 (1969).

Applying the separate and severable principle, we consider § 138 to be an integral part of the four sections in House File 2484 which address reimbursements and, therefore, not a separate and severable item subject to veto. The item veto of § 138, in essence, removed the statutory formula under which reimbursements were to be calculated. Sections 135 through 137, however, expressly refer to § 138 for the statutory formula to calculate reimbursements. Sections 135 through 137, moreover, constitute one half of a legislative equation. The legislature has, in effect, retained the previous formula for calculating the total amount of money to be used from the general fund for reimbursements under § 138 but has sliced the "pie" in a new manner by imposing lower ceilings on the number of reimbursable students under §§ 135-137 and allocating the surplus to a new purpose of compensating for transportation over a distance. Under this scheme, imposition of lower ceilings on the number of reimbursable children under § 135 is integrally related to the formula embodied in § 138

² Section 285.3 is not included in the 1985 Code of Iowa.

since § 138 is the mechanism by which money saved through imposition of these ceilings is allocated to another purpose. To strike § 138 by item veto and retain §§ 135-137 would materially alter the legislative purpose for which the ceilings were clearly imposed.

In summary, in our opinion it is likely that the item veto of § 138 of House File 2484 would be held to be unconstitutional in violation of the separate and severable principle if the item veto were challenged in court. It is our understanding that August, 1986, reimbursements were calculated and paid based on statutes that existed prior to July 1, 1986. The new provisions of House File 2484 and the subsequent item veto, therefore, were not involved. See Iowa Const. art. III, § 26 amend. 23; Iowa Code § 3.7 (1985). You may wish to seek curative legislation in order to clarify application of House File 2484 for future reimbursements.

November 19, 1986

TAXATION: Local Option Sales And Services Tax; Conditions For Calling Election To Consider Tax Repeal. Iowa Code § 422B.1(5) (Supp. 1985); Iowa Code § 422B.1(7) (Supp. 1985), as amended by 1986 Iowa Acts, Senate File 2302. As a condition for calling any election to consider the repeal of a local option sales and services tax imposed in only certain areas in the county, a petition signed by the eligible voters of the county equal in number to five percent of the persons in the county who voted at the last preceding state general election must be received or, alternatively, a motion or motions for repeal must be adopted by the governing body or bodies of incorporated or unincorporated areas, representing at least one half of the population of the county. (Griger to Herrig, Dubuque County Attorney, 11-19-86) #86-11-4(L)

November 19, 1986

TAXATION: Mandatory Mediation. 1986 Iowa Acts, (H.F. 2473); new Iowa Code ch. 654A; §§ 654A.1, 654A.4. Counties in their tax collecting capacity are not subject to the requirements of mandatory mediation. (Ormiston to Pillers, Assistant Clinton County Attorney, 11-19-86) #86-11-5(L)

November 19, 1986

STATE OFFICERS AND DEPARTMENTS: Licensing Board Peer Review Committees. Iowa Code ch. 25A; §§ 25A.2, 25A.21; 258A.3, 258A.8(1) (1985). A member of a peer review committee appointed under ch. 258A is an employee of the state for ch. 25A purposes when acting on behalf of the state in an official capacity. (McGuire to Marr, Chairman, Engineering and Land Surveying Examiners, 11-19-86) #86-11-6

Mr. Richard Marr, Chairman, Engineering and Land Surveying Examiners: You requested an Attorney General's opinion regarding Iowa Code chs. 25A and 258A. Specifically you asked whether a member of a peer review committee under Iowa Code ch. 258A is an employee of the state for purposes of Iowa Code ch. 25A. It is the opinion of this office that a member of a peer review committee appointed under Iowa Code ch. 258A is an employee of the state for ch. 25A purposes when acting on behalf of the state in an official capacity.

Iowa Code chapter 25A governs tort claims against the state and its employees. Section 25A.21 specifies that the state will defend, indemnify and hold harmless an employee for claims made against the employee for actions occurring within the scope of the employee's office or employment. The duty to indemnify and hold harmless will not apply if the employee's actions "constituted a willful and wanton act or omission or malfeasance in office." § 25A.21.

An employee of the state is defined as "any . . . agents . . . of any state agency . . . and persons acting on behalf of . . . any state agency . . . temporarily or permanently . . . with or without compensation . . ." § 25A.2(3). A state agency is defined as including "boards . . . of the state of Iowa." § 25A.2(1). The Engineering and Land Surveying Examiners is a board of the state. § 114.2.

Thus, from the above definitions, an agent or person acting on behalf of the board is an employee for purposes of ch. 25A. The question that needs to be answered is whether a peer review committee member is an agent of

the board or acting on behalf of the board while performing services on the committee.

The peer review committee is authorized by § 258A.3(1)(i). A board can refer "any complaint or other evidence of an act or omission which the board reasonably believes to constitute cause for license discipline." § 258A.3(1)(i). The peer review committee then investigates and reviews the complaint and reports back to the board.

The board has statutory authority to investigate, upon complaint or on its own motion, allegations which could result in licensee discipline. § 258A.3(1)(c); 258A.4(1)(a). Although referring such investigations to a peer review committee, the board retains its jurisdiction and is not relieved of its duties. § 258A.3(1)(i). The board determines whether any licensee discipline is to be imposed. § 258A.3(2); 258A.6(5).

The peer review committee is referred complaints at the discretion of the board. The committee investigates for the board, reports its findings to the board, and can take no independent action. Finally, the decision to impose licensee discipline for the complaint investigated is solely up to the board.

As such, the legislature has specifically authorized the peer review committee to act as an agent of the board in investigating referred complaints. The committee has no independent authority and acts at the discretion of the board for the board. An agent is defined as one authorized by another to act for him. *Black's Law Dictionary* 59 (5th ed. 1979).

Because the peer review committee is acting as an agent of or on behalf of the board, its members would be deemed employees of the state when acting in that capacity. As such, the state would defend, indemnify, and hold harmless a member of the committee for claims arising out of actions taken within the scope of their duties. §§ 25A.2(3); 25A.2(4); 25A.2(5)(b); 25A.21. However, should the action giving rise to a lawsuit constitute a willful and wanton act, omission, or malfeasance, the state shall not indemnify nor hold harmless the committee member. § 25A.21. It should also be noted that if the action at issue was found to be outside the scope of employment, there may be personal liability.

Additionally, section 258A.8(1) immunizes employees and agents of licensing boards from civil liability for acts, omissions, or decisions made in good faith in that capacity.

It is the opinion of this office that a member of a peer review committee is an agent of the licensing board and, as such, an employee of the state under chapter 25A for actions on behalf of the state in the member's official capacity as authorized in chapter 258A.

DECEMBER 1986

December 5, 1986

SCHOOLS: School Boards: Publication Of Expenditures. Iowa Code §§ 279.34, 279.35, 279.36 (1985). In school districts under one hundred twenty-five thousand population the school board is required to publish a list of warrants issued to employees, the names of payees, amounts after the warrants, and the reason paid. The board is not required to publish amounts withheld from the warrants. (Ovrom to Royer, State Representative, 12-5-86) #86-12-1(L)

December 5, 1986

MUNICIPALITIES: 28E Entities; Tort Liability. Iowa Code ch. 28E; § 613A.1, 613A.7. The South Area Crime Commission Service Agency is a municipality

as defined in Iowa Code § 613A.1. The agency has the statutory responsibility to defend and indemnify its officers and employees as delineated by section 613A.8. (Williams to Schwengels, State Representative, 12-5-86) #86-12-2(L)

December 5, 1986

MUNICIPALITIES: Zoning: Temporary Use Permits. Iowa Code chapter 414 (1985); House File 2220, 71st G.A., 2d Sess. § 1 (Iowa 1986). A city council may provide for its review of temporary use permits granted by a board of adjustment and remand decisions granting temporary use permits to a board of adjustment only if the temporary use permit constitutes a variance under Iowa law. (Dorff to O'Kane, State Representative, 12-5-86) #86-12-3(L)

December 5, 1986

MOTOR VEHICLES: Administrative Law: Notice Of Revocation. House File 2493, 71st G.A., 2nd Sess., §§ 9, 12, 13 (Iowa 1986), adding Iowa Code §§ 321J.9, 321J.12, 321J.13; Iowa Code § 321.16. The Department of Transportation must serve initial notice of driver's license revocation under implied consent law by certified mail or personal service. Subsequent notices sustaining the revocation may be served by certified mail sent to the person's last known address. By rule the department could authorize notice by regular mail. (Ewald to Dunham, 12-5-86) #86-12-4

Warren Dunham, Director, Iowa Department of Transportation: You have requested an opinion of the Attorney General on the following question:

If the Department of Transportation has once served a person with notice of driver's license revocation in the manner specified in House File 2493, §§ 9 and 12, or Iowa Code § 321.16, and if the Department then stays the revocation pending the outcome of an administrative hearing or an administrative appeal, must the Department again formally serve notice of revocation in order for the revocation to become effective?

Because House File 2493 does not explicitly state how the department is to serve the notices specified in your question, we will first examine the relevant statutes to discern legislative intent. *See, e.g., Beier Glass Co. v. Brundige*, 329 N.W.2d 280 (Iowa 1983) (ultimate goal of statutory interpretation is to determine legislative intent; sensible, logical construction is favored; all parts of statute should be considered together); *Kelly v. Brewer*, 239 N.W.2d 109 (Iowa 1976) (revisions of statute should not be construed as altering the law unless an intent to accomplish a change is clear and unmistakable); *Overbeck v. Dillaber*, 165 N.W.2d 795 (Iowa 1979) (consider state of law before enactment, evil to be remedied). If we determine that formal service of the initial notice of revocation is all that is statutorily required, we will then address the question whether the statutory scheme, which includes criminal penalties for driving while under revocation, comports with constitutional due process. By "formal service" we mean personal service or certified mail service which is actually delivered to the addressee. *See* Iowa Code § 321.16 (return acknowledgement of certified letter required).

Legislative Intent

Iowa first enacted an implied consent law in 1963. *See* 1963 Iowa Acts, ch. 114. Its purpose is to protect the public by removing irresponsible drivers from the highways. *Krueger v. Fulton*, 169 N.W.2d 875 (1969). The original statute provided for the revocation of a person's driving privileges if the person refused to submit to chemical testing for alcohol. The effective date of revocation was, in the original law, twenty days after the commissioner had mailed notice of revocation to the person by registered or certified mail. Iowa Code § 321B.7 (1966).

Shortly after enactment of this law the Attorney General opined that the notice provisions of the implied consent statute take precedence over those found at Iowa Code § 321.16, the first paragraph of which reads as follows:

321.16 Giving of notices

When the department is authorized or required to give notice under

this chapter or any other law regulating the operation of vehicles, unless a different method of giving notices is expressly prescribed, notice shall be given either by personal delivery to the person to be so notified or by personal service in the manner of original notice by R.C.P. 56.1, paragraph "a," or by certified mail addressed to the person at the address shown by the records of the department. Return acknowledgement is required to prove the latter service.

1964 Op.Att'yGen. 305, 307. However, the licensing agency is not precluded from giving additional notice. *Id.*

In 1982 the legislature added to the implied consent law a revocation based on a blood alcohol concentration of .10% or more. At that time it also amended the notice provisions of Iowa Code sections 321B.13 and .16. As an alternative to notice by certified mail, the peace officer was authorized to serve immediate notice of revocation after a test refusal or failure, and to confiscate the person's Iowa drivers license. 1982 Acts, ch. 1167, §§ 13, 20. This amendment represents a clear and unmistakable attempt by the legislature to remedy some of the problems associated with mailed notice or delayed personal service of notice.

In 1984 and 1986 the legislature again extensively amended chapter 321B but did not significantly change the language of sections 321B.13 or .16 regarding service of notice of revocation. *See* 1984 Acts, ch. 1292, §§ 13, 16; House File 2493, 71st G.A., 2nd Sess., §§ 9, 12 (Iowa 1986).

Significantly, since 1963 the statutory notice provisions of the implied consent law have consistently tied the effective date of revocation to the date the notice is *mailed* (or personally served) rather than to the date that it is *received*. This focus on sending rather than receiving notice indicates to us a legislative intent to minimize the licensing agency's notice obligations, and, by inference, an intent to impose a duty on a person of whom a blood alcohol test has been requested to keep the licensing agency advised of a current mailing address.

We also find nothing in the present or former implied consent statutes or elsewhere which specifically requires the Department of Transportation to formally re-serve notice of revocation where the revocation has been stayed pending a hearing or administrative appeal. On the contrary, the 1982 amendments which allow immediate personal service by the peace officer are inconsistent with an intent to require formal notice at later stages of the administrative proceeding, especially where the person's driver's license has been taken. Initial notice by certified mail should be no less effective than immediate personal service, even if the person does not surrender his or her driver's license.

We also note that the 1986 amendments which set forth the hearing and appeal procedure do not mandate notice by certified mail or personal service. Section 13(3) of H.F. 2493 provides: "After the hearing the department shall order that the revocation be either rescinded or sustained." No particular method of notice is specified. Similarly, if the decision of the hearing officer is later appealed within the agency, the review officer "shall either rescind or sustain the revocation or order a new hearing." *Id.* Again, there is no prescribed method for notifying the parties of the review officer's decision. Nor do Department of Transportation rules specify the manner of notification, *see* 820 Iowa Admin. Code [07,C] ch. 11 (71st G.A., H.F. 2493) although they could. *See* Iowa Code §§ 17A.16(1) and .12(1) (agency may provide by rule for delivery of notices by means other than personal service or certified mail).

House File 2493 does contain some instances where time is measured from *receipt* of notice. A person must request a hearing "within twenty days of receipt" of the initial notice of revocation. H.F. 2493, § 13(1). The department must then hold a hearing "within thirty days of receipt of a request." *Id.* at § 13(2). "Upon receipt of the decision of the department to sustain a revocation," the person has ten days to file an intraagency appeal. *Id.* at § 13(3). All of these receipt provisions, however, refer to deadlines within the administrative hearing process after the person has received the initial notice of revocation. We do not construe them as evincing a legislative intent to require either the person or the department to serve communications in such a manner that the date

of actual delivery can be proved by written receipt, affidavit or testimony. There is, of course, a presumption of receipt where mailed notice is properly addressed and franked. *Eves v. Iowa Empl. Security Comm.*, 211 N.W.2d 324 (Iowa 1973).

Like the implied consent law, the Iowa Administrative Procedure Act appears to emphasize issuance rather than receipt of agency orders. Iowa Code section 17A.19(3) provides that a petition for judicial review must be filed within thirty days "after the issuance" of the agency's final decision in the contested case. Failure to satisfy this requirement results in a jurisdictional defect. *Kerr v. Iowa Public Safety Co.*, 274 N.W.2d 283, 287 (Iowa 1979); *Ford Motor Co. v. Iowa Dept. of Transportation*, 282 N.W.2d 701, 703 (Iowa 1979).

We conclude from the history of the implied consent law and from the language of H.F. 2493 and chapter 17A that the legislature did not intend that the Department of Transportation be required formally to serve notice of revocation, except for the initial notice of revocation as provided in H.F. 2493, sections 9 and 12.

Due Process

A due process issue may arise where a person who has not received actual notice of a hearing officer's or review officer's decision allows an appeal period to lapse or is prosecuted for driving while his or her license is suspended or revoked. See H.F. 2493, §21 (formerly Iowa Code §321B.38).

It is well established that a driver's license is a property interest subject to due process protection. *Mackey v. Montrym*, 443 U.S. 1, 99 S. Ct. 2612, 61 L.Ed.2d 321 (1979). Traditionally, when the issue revolves around the adequacy of notice, courts have utilized the due process analysis set out in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950). See, e.g., *SMB Investments v. Iowa-Illinois Gas and Electric Co.*, 329 N.W.2d 635 (Iowa 1983); *Mammel v. M & P Missouri River Levee Dist.*, 326 N.W.2d 299 (Iowa 1982). In *Mullane* the Supreme Court established that a fundamental prerequisite of due process in any proceeding was:

[N]otice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id. 339 U.S. at 314, 70 S. Ct. at 657.

There are several important circumstances present in the revocation procedures under the implied consent law: (1) initial notice of revocation will have been served by certified mail or personal service, (2) the person will have requested an administrative hearing, and (3) subsequent revocation notices will be sent by certified mail to the person's last address as shown by the records of the department.

In our opinion, the sending of subsequent revocation notices by certified mail appears to be reasonably calculated to apprise a person of a reinstated revocation. See H.F. 2493, §§9, 12. Notification by regular mail would also be statutorily and constitutionally permissible if by rule and written notice the department advised affected persons of the method of service and of the necessity to keep the department apprised of a current mailing address. We emphasize that the initial notice of revocation has been served by certified mail or personal service. That notice included a statement of the operation of the law and the person's rights and a form and pre-addressed envelope which the person could use to request a hearing. H.F. 2493, §13(1). Once this notice has been served, the department has no further notice obligations unless and until the person sets the administrative hearing process in motion by requesting a hearing to contest the revocation. See H.F. 2493, §13(2). Thereafter, the person who potentially stands to benefit from the hearing process cannot complain of inadequate notice during the process if the department has mailed or otherwise attempted to deliver documents to the person's most current address in its files. See Iowa Code §321.16; *Daugherty v. McCullion*, 488 N.E.2d 509, 511 (Ohio Mun. 1985); *Townsend v. Dollison*, 66 Ohio St.2d 225, 421 N.E.2d 146 (1981). The governing principle is that a person who invokes the jurisdiction of a judicial or quasi-

judicial forum is ordinarily chargeable with knowledge of all subsequent steps taken in the proceeding. See *Committee on Professional Ethics v. Toomey*, 253 N.W.2d 573 (Iowa 1977).

We agree with the reasoning of the Ohio court in *Ryan v. Andres*, 50 Ohio App.3d 72, 4 Ohio Ops.3d 49, 361 N.E.2d 1086 (1976), *overruling Fell v. Bureau of Motor Vehicles*, 30 Ohio App.2d 151, 59 Ohio Ops.2d 209, 283 N.E.2d 825 (1972), *cert. denied*, 419 U.S. 1010, 42 L.Ed.2d 285, 95 S. Ct. 330. It held that a person who neglects to inform the licensing authority of a change in mailing address or who fails to claim a letter sent by certified mail may not later complain of not receiving notice of a suspension. The court found that the burden on a person to inform the licensing authority of an address change was not unreasonable when associated with the privilege to operate a motor vehicle on the state's highways. 361 N.E.2d at 1089. The court further stated:

In the interest of public safety and welfare, it is reasonable to suspend, under appropriate circumstances, this right to drive as quickly as possible. Requiring actual notification would thwart this purpose, since one could delay the suspension by moving and not leaving a forwarding address, or refusing to accept mail from the Bureau of Motor Vehicles. The Bureau would then be put to the task of sending out field investigators to serve suspension notices. This would be a costly, time consuming and unnecessary restriction upon the operation of the Bureau of Motor Vehicles.

Id. See also *State v. Morrison*, 2 Ohio App.3d 364, 442 N.E.2d 114 (1982) (constructive notice reasonably calculated to apprise licensee of security deposit suspension is all that is required); *Greene v. Lindsey*, 486 U.S. 444, 455, 102 S. Ct. 1874, 1880, 72 L.Ed.2d 249 (1982) (mail is efficient and inexpensive means of communication upon which prudent persons ordinarily rely in conduct of important affairs).

In cases where the person who requested the hearing is represented by counsel, notice to the person's attorney of matters arising in the course of a legal proceeding is ordinarily imputable to the person. *State v. Roghair*, 390 N.W.2d 123, 124 (Iowa 1986); *Moser v. Thorp Sales Corp.*, 312 N.W.2d 881, 888 (Iowa 1981). Thus, receipt by a party's attorney of a subsequent revocation notice in the course of an administrative contested case proceeding would bind the party even if the party did not receive actual notice.

We note for the record that there is no absolute requirement that the person receive actual notice as a condition precedent to the revocation taking effect. *O'Neill v. Dept. of Transportation*, 356 N.W.2d 239 (Iowa App. 1985) (adequate service where notice of revocation was personally served on petitioner's wife and she did not tell him). Driving while suspended or revoked does not require criminal intent or knowledge of the suspension or revocation. *State v. Sonderleiter*, 251 Iowa 106, 99 N.W.2d 393 (1959).

CONCLUSION

The Department of Transportation must serve initial notice of revocation under the implied consent law in the manner prescribed by House File 2493, §§ 9 or 12, or Iowa Code § 321.16. Thereafter, if the revocation is stayed pending the outcome of an administrative hearing or appeal, the department may serve subsequent notices of revocation by certified mail sent to the person's last address as shown by its records. The department could send notice by regular mail if its rules so specified and if the affected person were so advised. The person cannot avoid or delay reinstatement of a stayed revocation by refusing or by not claiming subsequent mailed notices, or by not keeping the department advised of a current mailing address. Notice to the person's attorney is imputable to the person.

December 11, 1986

BEER AND LIQUOR: Persons Age Nineteen and Twenty. Iowa Code ch. 123 (1985); Iowa Code Supp. §§ 123.3(21), 123.3(33), 123.47; Iowa Code §§ 4.4(2), 4.4(3), 123.47A and 123.90 (1985); 1986 Iowa Acts, ch. 1221, §§ 1 and 2. A college dormitory room could constitute a "private home," as used in § 123.47A.

Thus, if the room is a private residence as a factual matter, state law would not prohibit a person age nineteen or twenty from possessing alcoholic beverages within a dormitory room with the knowledge and consent of the person's parent or guardian. (Walding to Hermann, State Representative, 12-11-86) #86-12-5(L)

December 17, 1986

PLATS: Rural Subdivisions. Iowa Code chapter 409; §§ 409.1, 409.8, 409.9, 409.11 (1985); 1984 Iowa Acts, ch. 1271, §1. Rural subdivisions which do not convey a street, road, alley, or other public interest, are exempt from the acknowledgment requirement in Iowa Code § 409.8 (1985). Buyers of platted lots in this narrow category of subdivisions should be on notice that under a 1984 amendment to section 409.1, they are not covered by several of the usual protections of chapter 409. (Ovrom to Putnam, Winneshiek County Attorney, 12-17-86) #86-12-6(L)

December 17, 1986

TAXATION: Iowa Sales Tax; Fees Associated With Public Records. Iowa Code §§ 22.3, 144.46, 321.10, and 422.43 (1985). Fees paid by the public for the right of access to public records are not subject to Iowa sales tax. When the record custodian is paid a fee for a copying service, the transfer of the record copy is merely incidental to the access service performed and is not subject to sales tax. (Osenbaugh to Angrick, Citizens' Aide/Ombudsman, 12-17-86) #86-12-7(L)

December 30, 1986

COUNTIES AND COUNTY OFFICERS: General Relief; Durational Residency Requirement. U.S. Constitution Amendments IV, XIV; Iowa Code chapter 252; Iowa Code §§ 125.44, 204.409, 222.60, 230.1, 252.24, 252.25, 252.27, 321.281, 321.283(3). A county cannot use the concept of legal settlement to deny county residents eligibility for medical services. (McCown to Metcalf, 12-30-86) #86-12-8(L)

December 30, 1986

PUBLIC RECORDS: Open Meetings; Economic Development Satellite Centers. Iowa Code Supp. § 28.101 (1985); Iowa Code §§ 21.2(1)(1); 22.1 (1985). Open meetings and public records provisions of the Iowa Code apply to research and marketing centers and satellite centers established by the Iowa Department of Economic Development. The same provisions apply to regional coordinating councils established to seek a satellite center. (Osenbaugh to Chapman, State Representative, 12-30-86) #86-12-9(L)

December 30, 1986

TRANSPORTATION, DEPT. OF: Public Transit. Iowa Code § 601J.4. An entity which uses public funds for transportation, even if those funds are not initially designated for such use, is required to coordinate with the regional transit system pursuant to Iowa Code § 601J.4. (Peters to Welu, 12-30-86) #86-12-10(L)

December 30, 1986

SHERIFF: Forcible Entry And Detainer: Sheriff's Disposition Of Personal Property. Iowa Code ch. 556B (1985) and Iowa Code ch. 648 (1985) as amended by Senate File 508, 71st G.A., 2d Sess., 1986 Iowa Acts, ch. (S.F. 508); Iowa Code §§ 331.651-331.660 (1985); Iowa Code §§ 364.12, 364.14, Iowa Code § 319.13 (1985) and Iowa Code § 723.4(7) (1985). In executing a forcible entry and detainer action, the county sheriff may leave the personal property of the defendant at the curbside if the writ of removal so directs. If the property is placed temporarily on the public way and it does not obstruct the travelled portion of the street, it is unlikely that the sheriff would be found to be in violation of statutes prohibiting obstructions of public ways. (Lowe to Richards, Story County Attorney, 12-30-86) #86-12-11(L)

December 31, 1986

COUNTIES AND COUNTY OFFICERS: Official Publications; Bona Fide Yearly Subscribers; Publication Of Claims. Iowa Code §§ 349.7 (1985) and 349.18 (1985) as amended. A person obtaining a newspaper at a street sale location, vendor location, or newspaper office is not a "subscriber" unless

an implied or actual contract to pay for the paper exists beyond the immediate sale. If a contract does exist, the remaining criteria of § 349.7 must be satisfied for the subscriber to be counted as a "bona fide yearly subscriber." The list of claims allowed by a board of supervisors and published in official county newspapers under § 349.18 shall include an identification of the purpose of the payment. (Donner to Miller, State Representative, 12-31-86) #86-12-12(L)

December 31, 1986

SCHOOLS: Taxes. Iowa Code §§ 278.1(2), 279.41, 279.42, 297.5, 297.22, 422.45(7) and 442.13(7) (1985). Funds obtained from a § 297.5 levy may not be used to construct an addition to an existing building without voter approval; sales tax refunds may be spent by the school board for the project which was the source of the refund; funds received from sale of real estate may be used for the purposes listed in Iowa Code § 279.41; and contributions from the public may be used for the purpose designated by the donors but the voters, not donors, must approve new construction. (Fleming to Fulton, County Attorney, 12-31-86) #86-12-13

Robert L. Fulton, Decatur County Attorney: You have asked for our opinion on a series of questions pertaining to the authority of a school district board of directors to use schoolhouse funds derived from a variety of sources. The issues arise in the context of whether certain funds may be used to construct an auditorium as an addition to an existing building without a vote of the people.

The Central Decatur junior-senior high school building was constructed from proceeds of a \$2,900,000 bond issue which was approved by voters on October 12, 1982. We understand that you have supplied us with a substantial amount of materials to support your request, including a copy of the official ballot from the 1982 bond issue election. In addition, other materials have been submitted to us by citizens in the community who appear to oppose the construction of the proposed auditorium as an addition to the existing building without a vote of the people of the district. It is axiomatic that our legal opinions are to apply to all school districts in the state, and are not limited to the circumstances in a particular district.

You submitted the following for our consideration:

May the district's board of directors use funds obtained from the following sources:

- a) Tax levied under Sec. 297.5;
- b) Sales Tax refund from previous construction project (Sec. 422.45(7));
- c) Sales of Real Estate (Sec. 279.41 & Sec. 297.22);
- d) Contributions from the public to an auditorium fund (Sec. 279.42)

to finance an addition to the Jr.-Sr. High School for a school auditorium as provided in Sec. 297.5 (particularly last paragraph) or any other provision of law?

The first issue with respect to funds derived from the levy authorized "each year" by the board of directors as provided by Iowa Code § 297.5 (1985) was addressed in an earlier opinion. We said that "Iowa Code § 297.5 requires a vote of the people to authorize an addition to a schoolhouse which is financed by a § 297.5 levy." (Fleming to Benton, August 26, 1986, #86-8-5(L)). An additional comment seems appropriate in the context of the issues you have presented. It is clear that an affirmative vote of sixty percent or more as required by law on a bond issue is not an open-ended grant of authority to a school board to expend funds in subsequent years from other sources to construct additions to a building which was constructed from bond issue proceeds.

The second issue submitted is whether sales tax refunds to the district, pursuant to Iowa Code § 422.45(7) (1985), may be used to finance an addition to an existing building. First, it is clear from the language of § 422.45(7) that it is not a grant of authority for a governmental body to *spend*; that subsection is included in

a list of exemptions from sales tax and authorizes a refund of sales tax paid by private business in connection with government contracts. Thus, a sales tax refund from construction of a school building is not new money. Such a refund could be used for the original project.

You included in your letter the fact that authority was obtained from the budget review committee, as provided by Iowa Code § 442.13(7) (1985), to spend \$290,000 from the "unexpended cash balance" in the general fund of the district for completion of grading, ball fields, and lighting for the junior-senior high school building. The sales tax refund money and funds derived from a § 297.5 levy *could have been used* for those purposes under the clear terms of § 297.5. Instead, the district board obtained permission to utilize funds from the unexpended cash balance.

The third issue presented is whether funds obtained from sale of real estate may be used to finance an addition to an existing school building. Iowa law requires, with certain exceptions in Iowa Code § 297.22, that voters must approve the sale of real estate and the use of funds derived from such sale. The power vested in the voters is as follows:

Direct the sale, lease, or other disposition of any schoolhouse or site or other property belonging to the corporation, and the application to be made of the proceeds thereof, provided, however, that nothing herein shall be construed to prevent the sale, lease, exchange, gift or grant and acceptance of any interest in real or other property by the board of directors without an election to the extent authorized in section 297.22.

Iowa Code § 278.1(2) (1985) (emphasis added).

Further reference is made to use of funds obtained from sale of real estate in Iowa Code § 279.41 (1985). That section provides:

Any fund received from the condemnation, sale or other disposition for public purposes of schoolhouses, school sites or both schoolhouses and school sites may be deposited in the schoolhouse fund and may without a vote of the electorate be used for the purchase of school sites or the erection or repair of schoolhouses or both as ordered by the board of directors of such school district, provided, however, that the board shall comply with section 297.7.

(Emphasis added).

Ordinarily these two statutes are not in conflict inasmuch as § 278.1(2) provides for a vote on sale, etc., and the application to be made of proceeds. Even if there is a lapse of time between the § 278.1(2) vote and a decision by the school board to utilize the proceeds from the sale or other disposition of real property, a conflict between the statutes does not exist.

If, on the other hand, the decision of voters to dispose of school property did not include a vote as to "application to be made of the proceeds thereof," § 278.1(2), a different problem is presented. In that circumstance, we believe § 279.41 must be read in para materia with other statutes pertaining to the same subject matter. *Spilman v. Board of Directors of Davis County Com. Sch. Dist.*, 253 N.W.2d 593, 596 (Iowa 1977); *Messina v. Iowa Dept. of Job Service*, 341 N.W.2d 52, 56 (Iowa 1983). Section 279.41 was adopted in 1961, see 1961 Iowa Acts, ch. 161, § 1 and has not been amended. Cf. Iowa Code § 279.41 (1985). The language in Iowa Code § 297.5, "Any funds expended by a school district for new construction of schoolbuildings . . . must first be approved by the voters of the district." (emphasis supplied), was added by the General Assembly more recently. See 1980 Iowa Acts, ch. 1089; 1986 Op.Att'yGen. #86-8-5(L). Thus, § 279.41 and § 297.5 appear to be in conflict.

A number of principles of statutory construction must be considered when statutes are in conflict. There is no evidence in the history of the amendment to section 297.5 to indicate that the legislature intended to repeal § 279.41. In a recent opinion we said:

The general rule is that amendments or repeals by implication are not favored. *Dan Dugan Transport Co. v. Worth County*, 243 N.W.2d

655 (Iowa 1976). Amendments by implication will not be upheld unless the intent to amend clearly and unmistakably appears from the language used, and such a holding is absolutely necessary. *Peters v. Iowa Employment Security Comm'n.*, 235 N.W.2d 306 (Iowa 1975); *Wendelin v. Russell*, 259 Iowa 1152, 147 N.W.2d 188 (1966).

Willits to Stanek, July 18, 1985, #85-7-6. It is our opinion that §279.41 was not repealed by implication through the enactment of "Any funds expended . . . for new construction . . . must first be approved by the voters . . ." in §297.5. As a practical matter, sale or lease of schoolbuildings or sites will not ordinarily result in the acquisition of large amounts of money to be used for schoolhouse purposes. While we believe that the use of such funds may be determined by the district board under §279.41, the freedom of the district board to direct the use of those funds for schoolhouse purposes is limited to the specific funds obtained from said sale or lease.

These issues are not free from doubt. We believe the relationship between all the sections of the Code that provide sources of funding for schoolhouse purposes should be clarified by the General Assembly.

Your final issue pertains to the use of contributions from the public to the school district for an auditorium. A school board may accept gifts and bequests as provided by law:

The board of directors of any school district which receives funds through gifts, devises and bequests may utilize the same, unless limited by the terms of the grant, in the general or school-house fund expenditures.

Iowa Code §279.42 (1985). Thus, it is clear a donor may limit the use of a gift.¹ In responding to your question, we are not writing on a clean slate. A similar issue arose in 1971 in connection with a gift for construction of an auditorium. 1972 Op.Att'yGen. 303. The opinion of this office included the observation that "the board in accepting such a donation must act within the limits of its authority." *Id.* at 304. In other words, we do not believe that donors, by their gifts, may grant authority to a school board to begin new construction of a school building, or an addition to an existing building. The authority to commence new construction must be granted by the voters of the district. Iowa Code §297.5 (1985).

In summary, it is our opinion that funds obtained from a §297.5 levy may not be used to construct an addition to an existing building without voter approval; sales tax refunds may be spent by the school board for the project which was the source of the refund; funds received from sale or other disposition of real estate may be used for the purposes listed in Iowa Code §279.41; and contributions from the public may be used for the purpose designated by the donors but the voters, not donors, must approve new construction.

December 31, 1986

COURTS: State Officers And Employees; Taxation Of Fees As Costs. Iowa Code §§ 331.604; 602.8102(113); 625.14; 655.4; 655.5 (1985). The clerk of court on his or her own motion may not routinely tax as costs any fees assessed by the recorder pursuant to section 655.4. However, such fees may be taxed as costs in the event the court so orders under section 625.14. (Weeg to O'Brien, State Court Administrator, 12-31-86) #86-12-14(L)

¹The purpose must be lawful, of course.

UNITED STATES CONSTITUTION

Amendments IV, XIV	86-12-8(L)
Amend. XIV, § 1	86-2-8
Art. I, § 10	86-2-4
1654	85-4-2(L)

IOWA CONSTITUTION

Art. I, § 6	85-5-5
Art. I, § 9	86-2-8
Art. I, § 21	86-2-4
Art. III, § 1	86-1-7
Art. III, § 16	86-11-3
Art. III, § 24	86-10-2(L)
Art. III, § 29	85-3-6(L)
Art. III, § 29	85-5-1
Art. III, § 30	85-5-5
Art. III, § 31	85-9-2(L)
Art. III, § 31	86-11-1(L)
Art. III, § 38A	86-6-4(L)
Art. III, § 38A	86-6-6(L)
Art. III, § 38A	86-6-7(L)
Art. III, § 38A	86-11-1(L)
Art. III, § 39A	85-10-4(L)
Art. III, § 39A	86-3-4(L)
Art. VII, § 8	85-10-5(L)
Art. VIII, § 1	85-5-5
Art. IX, § 15	85-5-6
Art. X, §§ 1 and 2	86-2-4
5, § 553(c)(2)(C)(i-ii)	85-8-3(L)

NEBRASKA CONSTITUTION

Art. XII, § 1	85-5-5
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WISCONSIN CONSTITUTION

Art. IV, § 31	85-5-5
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CODE OF IOWA, 1973

368.2	85-7-7(L)
378.10	86-6-5(L)

CODE OF IOWA, 1975

96.7(10)	85-12-8
96.7(11)	85-12-8

CODE OF IOWA, 1977

411.1(17)	85-7-5(L)
411.6(2), (10)	85-7-5(L)
411.8(1), (3)	85-7-5(L)

CODE OF IOWA, 1979

333.15	85-1-3(L)
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CODE OF IOWA, 1981

327G.77	85-6-5(L)
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CODE OF IOWA, 1983

3.7	85-2-3(L)
4.8	85-2-3(L)
7A.21-28	85-1-6(L)
17A.2(7)(f)	85-1-13(L)
18.117	85-4-1(L)
19A.9(1),(2)	85-3-4(L)
28A.2(3)	85-1-13(L)
28A.5	85-1-13(L)
28A.8(1)	85-1-13(L)
28E	85-1-6(L)
68A.1	85-2-2(L)
68A.2	85-2-2(L)
68A.3	85-1-13(L)
68B.2	85-1-8(L)
68B.2(5)	85-4-1(L)
68B.2(6)	85-4-1(L)
68B.2(9)	85-4-1(L)
68B.5	85-4-1(L)
71.1	85-2-6(L)
79.11	85-4-1(L)
85.27	85-1-5(L)
97A.6(5)	85-2-3(L)
97B.41(12)	85-2-3(L)
109.1	85-1-2(L)
109.38	85-1-2(L)
109.40	85-1-2(L)
137.6	85-1-9(L)
137.21	85-1-9(L)
148A.1	85-2-5(L)
148.2(4)	85-2-5(L)
149.1	85-2-5(L)
149.2(1)	85-2-5(L)
237A.4	85-1-9(L)
237A.12	85-1-9(L)
277.27	85-2-6(L)
278.1(7)	85-2-1
279.7	85-2-6(L)
301.28	85-2-6(L)
314.7	85-1-10(L)
317.10	85-1-10(L)
317.11	85-1-10(L)
317.18	85-1-10(L)
317.24	85-1-10(L)
327A.18	85-4-2(L)
327H.21	85-4-2(L)
331.301	85-1-9(L)
331.302	85-1-9(L)
331.302(L)	85-1-6(L)
331.304(1)	85-1-6(L)
331.342	85-1-8(L)
331.425	85-1-4(L)
331.507(2)(a)	85-1-3(L)
331.507(2)(a)	85-11-1(L)
331.756(7)	85-1-6(L)
331.907(2)	85-3-2(L)
358B.2	85-1-4(L)
358B.4	85-1-4(L)
358B.8(8)	85-1-4(L)
358B.10	85-1-4(L)

358B.11	85-1-4(L)	ch. 358B	86-6-5(L)
358B.12	85-1-4(L)	ch. 388	86-6-7(L)
358B.16	85-1-4(L)	ch. 392	86-6-6(L)
364.5	85-1-6(L)	ch. 409	86-12-6(L)
384.24(3)(d)	85-1-1(L)	ch. 411	85-11-2(L)
384.25	85-1-1(L)	ch. 411	86-6-9(L)
410.8	85-1-5(L)	ch. 414	86-12-3(L)
410.18	85-1-5(L)	ch. 509A	86-3-4(L)
411.6	85-1-5(L)	ch. 556B	86-12-11(L)
411.6(6)	85-2-3(L)	ch. 648	86-12-11(L)
411.15	85-1-5(L)	ch. 804	85-9-1(L)
441.29	85-2-4(L)	ch. 820	85-9-1(L)
441.65	85-2-4(L)	1	85-6-8(L)
442.7(7)(i)	85-1-11(L)	2(8)	85-6-8(L)
452.10	85-1-12(L)	4	85-6-8(K)
453.9	85-1-12(L)	4.1(2)	86-2-6(L)
455.77	85-1-12(L)	4.1(36)	86-1-3(L)
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509A.2	85-2-3(L)	4.4(1)(2)	86-9-4
509A.7	85-2-3(L)	4.4(2)	85-11-4
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537.7102	85-2-3(L)	4.4(2)(3)	85-7-7(L)
537.7103	85-2-2(L)	4.4(3)	85-11-4
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558.66	85-1-3(L)	4.5	85-8-5(L)
570	85-4-7(L)	4.5	85-12-8
572	85-4-7(L)	4.6	86-7-2(L)
574	85-4-7(L)	4.6(6)	85-3-6(L)
580	85-4-7(L)	4.8	85-11-4
581	85-4-7(L)	4.13	85-12-8
582	85-4-7(L)	8.6(2)	85-11-3(L)
584	85-4-7(L)	8.33	86-10-2(L)
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602.8102	85-1-3(L)	11.18	86-10-4(L)
602.8102	85-4-7(L)	12.5	85-11-3(L)
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602.8105(1)(p)	85-4-7(L)	18.165	85-10-3(L)
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279.35.....	86-12-1(L)	331.507(2)(a).....	85-11-1(L)
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279.40.....	85-10-7(L)	331.651-660.....	85-9-1(L)
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359.42	86-7-4(L)	411.4	85-11-2(L)
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364.1	86-6-4(L)	411.6	86-6-9(L)
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384.84	86-11-1(L)	427.1	85-7-9(L)
384.89	86-11-1(L)	427.13	85-7-9(L)
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400.10	86-7-3(L)	441.21(1)(g)	85-12-7(L)
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400.13	86-8-9(L)	441.31	86-5-4(L)
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409.9	86-12-6(L)	443.6	85-12-3(L)
409.11	86-12-6(L)	443.6	86-4-4(L)
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411.1(11)	86-1-5(L)	445.11	86-4-4(L)
411.1(11)	86-6-9(L)	445.12	86-4-4(L)
411.1(12)	86-6-9(L)	445.14	86-4-4(L)
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