SCHOOLS: Gifts of School Property. §§ 291.13, 297.5, The Code 1981; § 297.22, The Code 1981, as amended by 1981 Session, 69th G.A., Ch. 93, p. 269. Where a school district board conveys real estate to another governmental unit by gift, as provided by Section 297.22, it does not hold power to spend school funds to demolish school buildings to satisfy the wishes of the donee of the gift because such expenditure would not be for a school purpose. (Fleming to Cady, Franklin County Attorney, January 8, 1982) #82-1-1(L)

Mr. G.A. Cady, III
Franklin County Attorney
P.O. Box 456
Hampton, Iowa 50441

January 8, 1982

Dear Mr. Cady:

You have asked for our opinion, on an expedited basis, concerning resolution of problems pertaining to the proposed conveyance of school property that is no longer needed for school purposes by the Hampton Community School District.

We note at the outset that any proposed action by a school district must be explored in the context of the operation of Dillon's Rule: The only powers of a school district are those expressly granted or necessarily implied in governing statutes. McFarland v. Board of Education, 277 N.W.2d 901, 906 (Iowa 1979); Barnett v. Durant Community School District, 249 N.W. 2d 626, 627 (Iowa 1977); Silver Lake Consolidated School District v. Parker, 238 Iowa 984, 990, 29 N.W.2d 214, 217 (1947).

Moreover, the use of school funds has been and continues to be very tightly restricted by the legislature. The general school fund and the schoolhouse fund are kept distinctly separate. See §291.13, The Code 1981. The schoolhouse fund consists mostly of funds from taxes levied pursuant to §297.5, The Code 1981

or from taxes or the sale of bonds authorized by election. See §§278.1(7) and 296.1. The general fund consists primarily of funds collected as property taxes and as state school foundation aid. See §§442.1, 442.2 and 442.5. If a school district accumulates a surplus in the schoolhouse fund, the electors, not the district board, hold power to transfer money to the general fund, see §278.1 (5). The code does not grant power to the electors or the board to transfer money in the general school fund to the schoolhouse fund. See Op.Atty.Gen. #11-26-1980.

FACTS

We respond to your inquiry based on our understanding of the facts as follows. The Hampton Community School District consolidated with the Hansell Community School in 1961. From that time until the end of the 1980-81 school year, the school facilities located in Hansell, Ingham Township of Franklin County, were used for school purposes by the school district.

During the 1980-81 school year the Hampton Community School District Board decided that the Hansell facility would no longer be needed for school purposes, and the buildings were closed permanently commencing with the 1981-82 school year.

The school board has rejected a bid of $10,000 for the entire site, including the school buildings and approximately five acres.

The school board proposes to convey the property to the Town of Hansell and the Ingham Township Trustees, and with the expectation that the property will be used by a group of Hansell residents as a site for constructing low-rent retirement housing.

The school board voted to convey to the Town of Hansell and the Township, by gift, the land surrounding the school buildings, retaining only the school buildings and the land on which they sit.

QUESTIONS

In the factual setting summarized above you ask three questions. The first is:

> 1. Does the term "dispose of" as used in Section 297.22 (1981 Code, as amended) allow a school district to use school district funds in order to demolish an unused and vacant school building?

Section 297.22, as you point out, was amended by the General Assembly in 1981 and in pertinent part is as follows:

> The board of directors of a school district may sell, lease, or dispose of, in whole or in part, a schoolhouse, site, or other property belonging to the district for which the value does not exceed twenty-five thousand dollars. If the value exceeds twenty-five thousand dollars, the board shall submit the question at an election under section 278.1, subsection 2, to authorize the sale, lease or disposal.
>
> Proceeds from the sale, lease, or disposition of real property shall be placed in the schoolhouse fund and proceeds from the sale, lease or disposition of property other than real property shall be placed in the general fund.
>
> Before the board of directors may sell, lease or dispose of any property belonging to the school district it shall comply with the requirements set forth in sections 297.15 to 297.20 and sections 297.23 and 297.24. Any real estate proposed to be sold shall be appraised by three disinterested freeholders residing in the school district and appointed by the chief judge of the judicial district of the county in which said real estate is located from the list of compensation commissioners.
>
> The board of directors of a school corporation may sell, lease, exchange, give or grant and accept any interest in real property to, with or from any county, municipal corporation, school district or township if the real property is within the jurisdiction of both the grantor and grantee. The provisions of sections 297.15 to 297.20,

> sections 297.23 and 297.24, and the property value limitation and appraisal requirements of this section do not apply to the transaction.

§297.22, The Code 1981 as amended by 1981 Iowa Acts, Ch. 93, page 269 (Emphasis added).

You thus request construction of the term "dispose of" as it appears in the first sentence of §297.22. In our opinion, the only function of the sentence is to grant a district board the power to make decisions concerning the sale, lease or dispos[itior of property valued at less than $25,000. without submitting the issue to the electors of the district for approval. The phrase "dispose of" in the first sentence of §297.22 encompasses the "exchange, give or grant and accept" language of the fourth paragraph of §297.22 and cannot be interpreted to vest a school board with power to improve the school property for the benefit of a donee. Therefore, if the school district holds power to use school funds to demolish school buildings in connection with a proposed gift of property to a "municipal corporation" or "township" as provided in the fourth paragraph of§297.22 as amended, that power must be found elsewhere in §297.22.

The second paragraph of §297.22 provides that "[p]roceeds from the sale, lease or disposition of real property shall be placed in the schoolhouse fund." There is no express grant of power to the school board to spend schoolhouse funds in connection with a conveyance of property as a gift.

As we understand the facts, the use of school money to demolish the buildings in this circumstance, would not be for a school purpose but would be to meet the wishes of either

the town of Hansell and Ingham Township or the group that intends to use the site for a housing project.

We note that "[a] school district is an organization simply for the purpose of carrying on the schools, for that and nothing else." Larsen v. School District, 223 Iowa 691, 701, 272 N.W. 632 (1937); See also Ford v. Independent School District, 223 Iowa 795, 798, 273 N.W.870 (1937). We are compelled to conclude that the express power of the district board to "sell, lease, or dispose of" school property without approval of the voters, pursuant to the first paragraph of §297.22 and the express power to "sell, lease, exchange, give or grant and accept any interest in real property," pursuant to the fourth paragraph of §297.22, do not include the authority to spend schoolhouse funds to demolish school buildings for the benefit of a donee. Nor do we believe that the authority to do so is "necessarily implied," McFarland v. Board of Education, 277 N.W.2d at 906, from the express power that is granted.

Moreover, we conclude that a board's power to tax found in § 297.5 "for the purchase and improvement of sites or for major building repairs" does not relate to the power to "sell, lease or dispose of" school property that is no longer needed for school purposes. We are of the opinion that all of the activity allowed by §297.5, second unnumbered paragraph, including "demolition work", relates to acquisition and improvement of property that is to be used by the district for school purposes.

Nor do we believe that a school district could justify expenditure of money in the general school fund to improve, by demolition or otherwise, a school site for the benefit of a donee even though that donee is a municipal corporation or

township within the jurisdiction of the school district. See e.g. § 442.26, (State aid may be used for any "school general fund purpose) (emphasis added); and see §§262.30, 280.7, 280.11, 280.20, 290.4, 298.22, The Code 1981 (specific expenditures from the general fund authorized by statute). See also §§442.12 and 442.13 (School budget review committee and review of school district budgets).

Pursuant to Dillon's Rule, the legislature has been very specific in granting power to school district boards to expend school funds. We conclude that the "dispose of" language in the first sentence of §297.22, cannot be construed as a grant of power to spend general school funds to demolish school buildings that are no longer needed by the district.

Your remaining questions are:

> 2. If the answer to the above is in the affirmative, is the school district after demolition then allowed to transfer by gift the schoolhouse site to the town and township within which the school site lies pursuant to Section 297.22 (1981 Code, as amended)?
>
> 3. If the answers to 1 and 2 above are in the affirmative, what steps should the school district Board of Directors take to insure that the costs of the demolition of the vacant school building and subsequent transfer of the site to the town and township will not be construed as the school district making a gift of the cost of demolition to the grantees?

Inasmuch as your second and third questions presume an affirmative answer to your first question, we do not reach them.

Sincerely yours,

Merle Wilna Fleming

MERLE WILNA FLEMING
Assistant Attorney General

MWF/scj

JUVENILE LAW: Commingling of Juvenile Offenders with Non-offender in a juvenile correctional facility. 1981 Session, 69th G.A., Ch. 11, § 2(1); Sections 4.7, 4.11, 232.2(5), (11), (32), (43), .52(2)(e), .102(4), Ch. 242, Ch. 244, Section 244.15, The Code 1981; The Juvenile Justice and Delinquency Prevention Act of 1974, as amended, 42 USC § 5633(12) (Supp. 1981); 46 Fed. Reg. 44413, § 31.304(b), (c), (f), (g), (h), (i) (Sept. 3, 1981). With the passage of 1981 Session, 69th G.A., Ch. 11, § 2(1), state law allows the placement of an offender, secure program and a non-offender, non-secure program together upon the Toledo campus of the Iowa Juvenile Home. Such action, however, would present a conflict with the federal law prohibiting the housing of offenders with non-offenders in a juvenile correctional facility. Compliance with the federal act may be shown in one of two ways. The offender population may be housed in the same non-secure manner in which non-offenders are handled and the facility would then not fall within the definition of juvenile "correctional" facility. Alternatively, a determination might be requested from the Office of Juvenile Justice and Delinquency Prevention, Department of Justice, Washington, D.C., to hold that the two programs (secure and non-secure) are not considered as to be a "set of buildings" constituting a "facility", but instead be treated as two separate entities for compliance purposes. (Brent Hege to Commissioners, The Advisory Commission on the Appropriate Uses of the Women's Correctional and Juvenile State Institutions, 1/11/82) #82-1-2(L)

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Department of Justice

ADDRESS REPLY TO:
SOCIAL SERVICES DIVISION
SECOND FLOOR
HOOVER BUILDING
DES MOINES, IOWA 50319
(515) 281-8330

January 11, 1982

Commissioners
The Advisory Commission on the Appropriate Uses
of the Women's Correctional and
Juvenile State Institutions
Legislative Fiscal Bureau
State Capitol
Des Moines, Iowa 50319

Dear Commissioners:

You have requested an opinion relating to the co-campusing of adjudicated delinquent children and children in need of assistance together at the Iowa Juvenile Home, Toledo, Iowa. As you note, recent legislation has mandated the closing of the delinquent female institution at Mitchellville, with that population transferred to the Iowa Juvenile Home, previously a placement for children in need of assistance exclusively. 1981 Session, 69th G.A., ch. 11, § 2(1). Your specific inquiry is that "The Advisory Commission is interested in learning of any conflict with current state or federal law".

This advice assumes the State's desire for continued participation in and compliance with The Juvenile Justice and Delinquency Prevention Act of 1974, as amended, 42 U.S.C. § 5633(12) (Supp.. 1981).

Previous to the above state legislation, Iowa law provided separate facilities for adjudicated offenders (delinquents) and non-offenders (CHINAs). Sections 232.2(5), (11), (32), (43); .52(2)(e); .102(4); ch. 242; ch. 244; Section 244.15, The Code 1981. Each of these provisions requiring separation of offenders and nonoffenders was abrogated by the following language:

> Notwithstanding any provision of the Code to the contrary, both children in need of assistance and juveniles adjudicated to have committed a delinquent act may be placed at the Iowa juvenile home at Toledo. That

> portion of the juvenile home housing delinquent juveniles shall be considered a second campus of the Eldora training school.

1981 Session, 69th G.A., ch. 11, § 2(1).

Two principles of statutory construction must be applied to irreconcilable statutes: first, the specific prevails over the general and second, the latest in date of enactment is applicable in lieu of earlier statutes. Sections 4.7, 4.11, The Code 1981. Therefore, H.F. 849 is controlling and an offender (secure) population may be housed with a non-offender (non-secure) population at Toledo. 1981 Session, 69th G.A., ch. 11, § 2(1). There is no conflict in state law.

On the other hand, with the enactment of 1981 Session, 69th G.A., ch. 11, § 2(1), state law came into apparent conflict with the pertinent federal statute. The Juvenile Justice and Delinquency Prevention Act of 1974, as amended, Section 223(12), 42 U.S.C. § 5633(12) (Supp. 1981), provides that offenders and non-offenders may not be placed in a correctional facility:

> (a) In order to receive formula grants under this part, a State shall submit a plan for carrying out its purposes consistent with the provisions of section 3733(a)(1), (3), (5), (6), (8), (10), (11), (12), (15), and (17) of this title. In accordance with regulations established under this subchapter, such plan must--
>
> . . .(12)(A) provide within three years after submission of the initial plan that juveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult, or such nonoffenders as dependent or neglected children, shall not be placed in juvenile detention or correctional facilities; . . .

The most recent federal regulations implementing the Juvenile Justice and Delinquency Prevention Act define the following terms:

> (b) Secure. As used to define a detention or correctional facility this term includes

> residential facilities which have fixtures designed to physically restrict the movements and activities of persons in custody such as locked rooms and buildings, fences, or other physical structures.
>
> (c) Facility. A place, an institution, a building or part thereof, set of buildings or an area whether or not enclosing a building or set of buildings which is used for the lawful custody and treatment of juveniles and may be owned and/or operated by public and private agencies.

46 Fed. Reg. 44413, § 31.304(b), (c) (Sept. 3, 1981). See, § 31.304(f), (g), (h), and (i) (Sept. 3, 1981). These provisions, when read in pari materia, would prohibit the placement of offenders (delinquents) and non-offenders (CHINAs) in a correctional (secure) facility (set of buildings).

An apparent conflict then arises between state and federal law. The conflict may be ameliorated in one of two ways.

First, the offender (delinquent) population may be housed in a non-secure manner. 46 Fed. Reg. 44413, § 31.304(b) (Sept. 3, 1981); Section 232.2(32), The Code 1981. That is, the offender population would be housed and programmed in the same non-secure way that non-offenders are treated at Toledo. The Iowa Juvenile Home would not then be a "correctional" facility under the federal law and no conflict would exist between state and federal law.

A second alternative, possibly available to the State of Iowa, would be a request to the Office of Juvenile Justice and Delinquency Prevention, Department of Justice, Washington, D.C., for a determination of the definition of "facility". By virtue of the definition, a "set of buildings", its application results in the entire program being a correctional facility, when an offender, secure component is placed upon the same campus as a non-offender, non-secure program.

A determination request finding compliance, based upon this premise, was recently granted to Polk County in the operation of both a detention (secure) and shelter care (non-secure) program on the same campus. Based upon the separation of program activity, separation of administrative control and an intervening non-justice activity between the buildings, it was determined that the two components were not a single "facility" and therefore, compliance with the mandate of 42 U.S.C. § 5633(12)

(Supp. 1981) was met. A copy of the Consulting Report, Mr. Robert Kihm, recommending a compliance determination to the Office of Juvenile Justice and Delinquency Prevention is supplied for clarification and analysis.

The questions of the definition of "facility" applied to the Toledo campus and compliance with the "facility" criteria would initially be for the agency, the Office of Juvenile Justice and Delinquency Prevention, to determine.[1]

In summary, state law presently allows the placement of an offender, secure program and a non-offender, non-secure program upon the Toledo campus of the Iowa Juvenile Home. Federal law, namely The Juvenile Justice and Delinquency Prevention Act of 1974, as amended, 42 U.S.C. § 5633(12) (Supp. 1981), however, prohibits the placement of offenders and non-offenders in a correctional (secure) facility. If the offender (delinquent) population is housed in a secure manner, the entire facility would be correctional and state practice would conflict with federal law. Alternatively, if the offender (delinquent) population is held in the same non-secure manner as non-offenders, the facility would not be "correctional" and no conflict would be present. On the other hand, given adequate functional separation, the secure component and non-secure component may be deemed not to be a single facility and compliance could be determined by the Office of Juvenile Justice and Delinquency Prevention, Department of Justice, Washington, D.C.

Sincerely,

Brent D. Hege

Brent D. Hege
Assistant Attorney General

BDH/jam

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[1] While the regulations possibly could be challenged as beyond the scope of the implementing statute, the adoption of a functional standard, the three criteria test to define "facility", by OJJDP probably brings the regulation within the scope of statute and a challenge would be unsuccessful.

COURTS: CIVIL PROCEDURE: PAUPERS or INDIGENTS: Use of in forma pauperis status by prisoners in small claims cases. §§ 606.7(3), 606.15(1), 631.1, and 631.2(2), The Code 1981. The clerk of court may not automatically refuse to waive filing fees and court costs in civil actions for money judgments, including small claims cases, but may do so where the court denies the petition to proceed in forma pauperis. (Mann to Short, Lee County Attorney, 1/11/82) #82-1-3(L)

January 11, 1982

Mr. Michael P. Short
Lee County Attorney
609 Blondeau Street
Keokuk, Iowa 52632

Dear Mr. Short:

You requested an opinion of the Attorney General on the question of whether inmates of penal institutions may file small claims for money judgments in forma pauperis. Specifically, you asked the following question:

> The question presented for your opinion is as follows: May the Clerk of District Court refuse to waive the filing fee for small claims money judgment action in all cases, including those cases wherein the petitioner alleges in forma pauperis.

The Iowa small claims statute is found at ch. 631, The Code 1981. It permits an action for money judgments where the amount in controversy is one thousand dollars or less, exclusive of interest and costs. § 631.1, The Code 1981. The clerk of court is required to maintain a separate docket for small claims, including a separate fee book as required by § 606.7(3), The Code 1981. § 631.2(2), The Code 1981. The clerk is also required to charge and collect fees for the filing of any petition, appeal, or writ of error. § 606.15(1), The Code 1981.

The question is whether the clerk may refuse to waive the fees required by § 606.15 where the petitioner is incarcerated in a penal institution and alleges indigency. We addressed a similar question in a prior opinion of this office, 1978 Op. Att'yGen. 512, where we concluded that filing fees and other court costs in state proceedings of a civil nature must be paid by incarcerated persons and other indigents unless such fees have been waived by the courts in a dissolution proceeding or, if in other civil actions, such fees are waived by the court in the interest of justice. We relied on Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), and Hightower v. Peterson, 235 N.W.2d 313 (1975), cases in which both the Iowa and United States Supreme Courts noted the special nature of the marital relationship and its concomitant associational interest and held that a person who makes the requisite showing of indigency is entitled to have filing fees and other court costs waived in dissolution of marriage proceedings.

We have reviewed a number of cases decided subsequent to Boddie and believe, as a result thereof, that the appropriate rule is that a court has broad discretion to deny a prisoner the privilege of proceeding in forma pauperis in civil actions not involving dissolution of marriage or other fundamental interest. Ortwein v. Schwab, 410 U.S. 656, 93 S.Ct. 1172, 35 L.Ed.2d 572 (1973); Evans v. Croom, 650 F.2d 521 (4th Cir. 1981); Vicaretti v. Henderson, 645 F.2d 100 (2d Cir. 1980); In Re Smith, 600 F.2d 714 (8th Cir. 1979); Daye v. Bounds, 509 F.2d 66 (4th Cir. 1975), cert. den. 421 U.S. 1002, 95 S.Ct. 2404, 44 L.Ed.2d 671 (1975); Green v. Wilson, 517 F.Supp. 332 (E.D.Ky. 1981); Scellato v. Department of Corrections, 438 F. Supp. 1206 (W.D.Va. 1977). We believe that this rule requires a court evaluation of a petition to proceed in forma pauperis, and a conclusion by the court as to whether the petitioner is indigent, and if so, whether the interest of justice will best be served by permitting or denying the petition.

Accordingly, we advise that the clerk of court may not automatically refuse to waive filing fees and court costs in civil actions for money judgments, including small claims cases, but may do so where the court denies the petition to proceed in forma pauperis.

Sincerely,

Thomas Mann, Jr.
Assistant Attorney General

TM/jam

COUNTY OFFICERS: COUNTY ATTORNEY: §§ 135C.24 and 222.18, The Code 1981, Acts, 69th G.A., 1981 Session, Chapter 117, § 756. The county attorney is responsible for opening guardianships and conservatorships under the provisions of §§ 135C.24(5) and 222.18, The Code 1981 and such responsibility is a mandatory duty. The responsibility for continued handling of these matters after the estate is opened is not the personal obligation of the person occupying the office of county attorney when the guardianship or conservatorship is established; rather, it is the responsibility of the office of county attorney, such responsibility being carried out by the current occupant of the office. (Fortney to Shepard, President, Iowa County Attorneys Association, Inc., 1/12/82) #82-1-4(L)

January 12, 1982

Gene W. Shepard, President
Iowa County Attorneys Association, Inc.
Hoover State Office Building
L O C A L

Dear Mr. Shepard:

You have requested an opinion of the Attorney General regarding the role of the county attorney in particular probate matters. You have expressed particular concern relative to the apparent duty of the county attorney to become involved in guardianships and conservatorships pursuant to §§ 135C.24(5) and 222.18, The Code 1981. You have raised two specific questions:

1. Are county attorneys responsible for opening guardianships and conservatorships under the provisions of §§ 135C.24(5) and 222.18, The Code 1981? If so, is this responsibility a mandatory duty?

2. If the county attorney has an obligation to handle these matters and does so, does the responsibility devolve upon a successor county attorney who had no involvement with the opening of the guardianship or conservatorship? For example, would the successor county attorney be responsible for filing annual reports in a conservatorship or would this duty remain with the attorney who opened the matter?

We are of the opinion that the county attorney is responsible for opening guardianships and conservatorships under the provisions of §§ 135C.24(5) and 222.18, The Code 1981 and such responsibility is a mandatory duty. The responsibility for continued handling of these matters after the estate is opened is not the personal obligation of the person occupying the office of county attorney when the guardianship or conservatorship is established; rather, it is the responsibility of the office of county attorney, such responsibility being carried out by the current occupant of the office.

We begin our analysis with the basic proposition that a county attorney cannot be required to perform any duty save such as the law requires of him. Dubuque County v. Fitzpatrick, et al., 144 Iowa 86, 90, 121 N.W. 15, 17 (1909); Bevington v. Woodbury County, 107 Iowa 424, 78 N.W.222 (1899).

Until July 1, 1981, the Iowa Code did not contain a compilation of the duties of the county attorney. The duties were scattered throughout the Code in association with various substantive areas of the law. The only summary of the county attorney's duties was found in § 336.2, The Code 1981. In prior opinions, we stated that "although § 336.2 is considered to be only an outline of the county attorney's duties by this Department, they necessarily constitute the duties which he is obligated to perform." 1978 Op. Att'y Gen. 52, citing 1962 Op. Att'y Gen. 155.

Chapter 336 was repealed by Acts, 69th G.A., 1981 Session, Chapter 117, § 1244. Unlike previous Codes, Chapter 117 contains a comprehensive listing of the duties of the county attorney. Chapter 117, § 756 provides, in pertinent part:

> The county attorney shall:
>
> 27. Serve as attorney for the county health care facility administrator in matters relating to the administrator's service as a conservator or guardian for a resident of the health care facility as provided in section 135C.24.
>
> 43. Carry out duties relating to the appointment of a guardian or commitment of a mentally retarded person as provided in section 222.18.

The sections referenced in Chapter 117, §§ 756(27) and (43) provide as follows:

> The admission of a resident to a health care facility and his presence therein shall not in and of itself confer on such facility, its owner, adminstrator, employees, or representatives any authority to manage, use, or dispose of any property of the resident, nor any authority or responsibility for the personal affairs of the resident, except as may be necessary for the safety and orderly management of the facility and as required by this section.
>
> 5. The provisions of this section notwithstanding, upon the verified petition of the county board of supervisors the district court may appoint the administrator of a county care facility as conservator or guardian, or both, of a resident of such county care facility, in accordance with the provisions of chapter 633. Such administrator shall serve as conservator or guardian, or both, without fee. The county attorney shall serve as attorney for the administrator in such conservatorship or guardianship, or both, without fee. The administrator may establish either separate or common bank accounts for cash funds of such resident wards.

§ 135C.24.

> The county attorney shall, if requested, appear on behalf of any petitioner for the appointment of a guardian or commitment of a person alleged to be mentally retarded under this chapter, and on behalf of all public officials and superintendents in all matters pertaining to the duties imposed upon them by this chapter.
>
> Upon the filing of the petition, the court shall enter an order directing the county attorney of the county in which the allegedly mentally retarded person resides to make a full investigation regarding the financial condition of that person and of those persons legally liable for his support under section 222.78.

§ 222.18.

We cannot avoid the express language of the three statutes set forth above. All employ the word "shall." The use of the word "shall" when addressed to public officials will ordinarily be given the "imperative" construction. Hansen v. Henderson, 244 Iowa 650, 56 N.W.2d 59 (1953). Furthermore, as Chapter 117 was enacted in 1981, it is subject to the rule of construction found in § 4.1(36), The Code 1981:

> Unless otherwise specifically provided by the general assembly, whenever the following words are used in a statute enacted after July 1, 1971, their meaning and application shall be:
>
> a. The word 'shall' imposes a duty.

Because of the express language employed in Chapter 117, §§ 756(27) and (43), §§ 135C.24 and 222.18, The Code 1981, as well as the rules of statutory construction enunciated by both the General Assembly and the Iowa Supreme Court, we are compelled to state that the county attorney is responsible for opening guardianships and conservatorships under the foregoing sections and such responsibility is a mandatory duty.

With regard to your second question relating to continuing responsibility for management of cases opened pursuant to either § 135C.24 or § 222.18, we believe that the principle has been long established in this State that when a particular individual ceases to occupy the office of county attorney, his authority, duty and responsibility with regard to that office ceases and devolves upon his successor. State v. Interstate Power Co., 214 Iowa 1109, 243 N.W. 149 (1932) presents a rather complicated procedural situation involving the issues you raise. A county attorney commenced a civil action in the name of the State. Later, while still occupying the office of county attorney, he amended the petition such that the suit was brought in his capacity as a taxpayer and citizen. The amended petition did not purport to be brought in the name of the State. After he left office as county attorney, he again sought to amend the petition in order to reinstate the action as originally brought in the name of the State. The Iowa Supreme Court stated:

> We see no escape from the conclusion that the action was never legally reinstated as an action by the appellee as relator acting in his official capacity as county attorney. Under the record, the action had entirely

> ceased to be prosecuted in that manner, and relief was not sought in any such capacity. The appellee had ceased to be county attorney, and, at the time his office terminated, the only action pending was one by him as a private citizen and not in an official capacity. He had no power thereafter to reinstate the original action and prosecute it in his official capacity as county attorney if he was not county attorney. Nor could the court reinstate it in the official capacity of Hook as county attorney, for he occupied no such position. [Emphasis supplied.]

243 N.W. 149, 151.

The Court reached its conclusion in reliance on decisions from sister jurisdictions. A brief review of the authorities cited by our Court is helpful in disposing of your inquiry. In People ex rel. Warfield v. Sutter Street Ry. Co., 117 Cal. 604, 49 P. 736, a retiring Attorney General sought to dismiss a pending suit brought in his official capacity. The Court said:

> He [the retiring attorney general] had ceased to have any authority over the matter when he signed and sent the letter which purports to be an order of dismissal. There could not be at the same time two attorneys general, and it is of no moment if the attorney general gave Hart permission to continue to act as such.

49 P. 736, 737.

Other authorities cited in State v. Interstate Power Co. include the following:

> When his [attorney general's] term of office expired in January, 1896, by operation of law he ceased to have any right, as attorney general, to represent the commonwealth in that case or any other. He was then functus officio, and the duties and responsibilities of that office at once devolved upon his successor.

Hendrick v. Posey, 104 Ky. 8, 45 S.W. 525, 528, 46 S.W. 702.

> The policy of the law seems to be, to have but one recognized prosecuting officer and attorney for a county; and the rendering of the official services required by law is dependent upon and follows the office, as in cases of clerks, etc.; and the fact that a portion of the business in the hands of the attorney is unfinished, on the assumption of office by his successor, does not give him any authority to conclude it.

Cole v. McKune, 19 Cal. 422.

> Now, the relation of attorney and client, between the county attorney and the county, subsists only by virtue of the occupancy of the office, and terminates with the end of the official term. So long as he holds the office of county attorney, he is authorized to represent the county. This authority comes with his office, and goes when his official term expires. Whenever the people elect a successor, it is tantamount to a revocation of authority.

Munson v. Comm'rs. of Morris County, 18 Kan. 240.

Based on the decision of the Iowa Supreme Court in State v. Interstate Power Co., 214 Iowa 1109, 243 N.W. 149 (1932) and the cases from other jurisdictions cited therein, we are of the opinion that the responsibility for continued handling of matters commenced pursuant to §§ 135C.24 or 222.18 is not the personal obligation of the person occupying the office of county attorney when the guardianship or conservatorship is established; rather, it is the responsibility of the office of county attorney, such responsibility being carried out by the current occupant of the office. Such a conclusion with regard to these specific civil matters is consistent with the practice governing criminal matters. If an indictment is returned or a county attorney's information is filed in the last days of a particular county attorney's administration, that county attorney ceases to have jurisdiction over the matter when his term of office expires. The successor county attorney assumes responsibility for pending criminal cases. The same rule is equally appropriate in the civil area.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

STATE OFFICERS AND DEPARTMENTS: Merit Commission; Layoffs; Affirmative Action. Ch. 19A, § 19A.9(14). Section 19A.9(14) does not preclude the Merit Employment Commission from promulgating an affirmative action layoff rule. The specification that primary and secondary consideration, respectively, be given to "performance record" and "seniority in service" does not exclude consideration of additional, tertiary factors which are reasonably related to the layoff rules. Affirmative action is reasonably related to layoff rules as a means to ensure that seniority-based layoffs do not disproportionately impact on recent hiring gains made through affirmative action programs. (Pottorff to Van Winkle, Director, Merit Employment Department, 1/15/82) #82-1-7 (L)

Fran Van Winkle, Director
Merit Employment Department
L O C A L

January 15, 1982

Dear Director Van Winkle:

You have requested our opinion concerning whether the Merit Employment Commission has the statutory authority to make provision in the rules governing layoffs for the optional exemption of a percentage of affected employees within a class for purposes of affirmative action. You point out that various negotiated collective bargaining contracts for state employees have provided an optional exemption for a percentage of affected employees within a class for this purpose. The statute governing non-contract employees, however, expressly refers only to performance record and seniority in service as factors in determining layoffs. You specifically inquire whether this statute limits the Commission's authority to promulgate an affirmative action layoff rule.

The statutory authority to promulgate rules governing layoffs lies in § 19A.9(14), The Code 1981. This section provides:

> 19A.9 Rules adopted. The merit employment commission shall adopt and may amend rules for the administration and implementation of this chapter in accordance with chapter 17A. The director shall prepare and submit proposed rules to the commission. The rules shall provide:
>
> * * *
>
> 14. For layoffs by reason of lack of funds or work, or organization, and for re-employment of employees so laid off, giving

> primary consideration in both layoffs and re-employment to performance record and secondary consideration to seniority in service. Any employee who has been laid off may keep his or her name on a preferred employment list for one year, which list shall be exhausted by the agency enforcing the layoff before selection of an employee may be made from the register in his or her classification. Employees who are subject to contracts negotiated under chapter 20 which include layoff provisions shall be governed by the contract provisions.

The language of § 19A.9(14) expressly states that the Commission shall adopt rules which provide for layoffs, giving "primary consideration" to "performance record" and "secondary consideration" to "seniority in service."

We recognize that the scope of the rulemaking authorized under this section turns upon the scope of the statutory mandate. Two principles of rulemaking are pertinent. Generally, an agency cannot validly enact rules which contravene statutory provisions or exceed statutory authority. Iowa Auto Dealers Assoc. v. Iowa Dept. of Revenue, 301 N.W.2d 760, 762 (Iowa 1981). A rule should be considered valid, however, when a rational agency could conclude that the rule is within its delegated authority. Histerote Homes, Inc. v. Riedemann, 277 N.W.2d 911, 913 (Iowa 1979).

In order to determine whether the Commission, acting as a rational agency, could conclude that promulgation of an affirmative action layoff rule is within the agency's delegated authority under § 19A.9(14), it is necessary to construe the statutory language. We observe the principle that a statute should be accorded a logical, sensible construction which gives harmonious meaning to related sections and accomplishes the legislative purpose. McSpadden v. Big Ben Coal Co., et al., 288 N.W.2d 181, 188 (Iowa 1980). When § 19A.9(14) is construed in the light of this principle, two salient aspects of the statute suggest that "performance record" and "seniority in service" are not an exhaustive list of the factors which may be considered by the Commission in promulgating layoff rules.

First, we point out that § 19A.9, generally, delegates to the Commission broad rulemaking authority. Under § 19A.9, the Commission is authorized to make rules governing twenty-three separate subjects, including the subject of layoffs set out in § 19A.9(14). §§ 19A.9(1)-(23), The Code 1981. A review of all

twenty-three subsections in § 19A.9 indicates that the Legislature merely outlined the scope of rulemaking on these subjects. The delegation of authority in some of these subsections, notably, consists only of one phrase setting out the subject without further detail. See, e.g., §§ 19A.9(15), 19A.9(19), The Code 1981. A harmonious reading of all of these related subsections, therefore, suggests that the Legislature did not endeavor to exhaustively delineate the factors to be included in rulemaking under § 19A.9 by express statutory reference.

Second, we point out that the specific language used in § 19A.9(14) does not expressly exclude consideration of additional factors from layoff rulemaking. Section 19A.9(14) provides in relevant part that the Commission shall adopt rules "[f]or layoffs by reason of lack of funds or work, or organization, and for re-employment of employees so laid off, giving primary consideration in both layoffs and re-employment to performance record and secondary consideration to seniority in service." In construing this language, we observe the principle that words in a statute are given their ordinary meaning unless defined differently by the Legislature or possessed of a peculiar and appropriate meaning in law. American Home Products v. Iowa State Board of Tax Review, 302 N.W.2d 140, 143-44 (Iowa 1981). The ordinary meaning of "primary" and "secondary" is first and second, respectively, in rank, importance, or value. Webster's New Collegiate Dictionary, 906, 1035 (2d Ed. 1974). The terms "primary consideration" and "secondary consideration," therefore, merely denote a priority between the factors of "performance record" and "seniority in service" in the promulgation of layoff rules.

In our opinion, this denotation of priority would not necessarily exclude from rulemaking consideration of additional, tertiary factors. The ordinary meaning of "primary" and "secondary" is not sole or exclusive. If the Legislature had intended to restrict the promulgation of layoff rules to the factors of "performance record" and "seniority in service," the Legislature could have drafted language expressly limiting the scope of rulemaking.

We stress that the range of additional, tertiary factors which may be considered in layoff rulemaking is not unbounded. We recognize that even rules which deal with a subject matter within the agency's delegated authority, may be invalid if they are not reasonably related to the purpose of the enabling legislation. Mourning v. Family Publications Service, 411 U.S. 356, 369, 913 S.Ct. 1652, _____ 36 L.Ed.2d 318, 329-30 (1973). Several

considerations, however, support the conclusion that an affirmative action provision would be reasonably related to layoffs.

We are mindful that the success of an affirmative action program may be closely tied to layoff rules. We recognize that recent hiring gains made through affirmative action programs may be lost during seniority-based layoffs, unless the layoff procedure includes some affirmative action provision for the retention of these employees. In order to ensure that seniority-based layoffs do not disproportionately impact on minorities, employers and employees in the private sector have bargained for an affirmative action clause in contract provisions governing layoffs. See Tangren v. Wackenhut, No. 79-3796 (9th Cir. Oct. 5, 1981).

The potential for layoffs to disproportionately impact on recently hired minorities also exists in public sector employment. The Commission's current layoff rules are based, at least in part, on seniority. See 570 I.A.C. § 11.1(3). In view of these factors, an affirmative action provision, minimally, appears to be reasonably related to layoffs.

Another consideration supports this conclusion. We point out that state agencies in Iowa are subject to Executive Order No. 15 which provides:

> State officials who are responsible to the Governor shall appoint, assign and advance employees solely on the basis of merit and fitness. Each state agency responsible to the Governor shall promulgate a clear and unambiguous wirtten Affirmative Action Program containing goals and time specifications in Personnel Administration. Each such agency shall regularly review its personnel practices and procedures with a view to correcting any such personnel practices and procedures which may contribute to discrimination in appointment, assignment or advancement. Each such agency shall conduct programs of job orientation and provide training and organizational structure for upward mobility and shall place emphasis upon fair practices in employment. Each such agency shall also bar from all employment application forms any inquiry as to race,

> creed, color, sex, age or physical or mental disability, except for statistical purposes unless it relates to a bona fide occupational qualification.

Exec. Order No. 15, art. II (1973). Under the terms of this Order, state agencies must promulgate a written affirmative action program. The agencies, further, must regularly "review personnel practices and procedures with a view to correcting any such personnel practices and procedures which may contribute to discrimination in appointment, assignment or advancement."

In our opinion, the directive to promulgate a written affirmative action program reinforces the conclusion that affirmative action is reasonably related to layoffs. The Executive Order requires agencies to promulgate an affirmative action program not exclusively with respect to hiring but broadly encompassing "Personnel Administration." Applying the principle that words are given their ordinary meaning unless defined differently by the Legislature or possessed of a peculiar and appropriate meaning in law, American Home Products v. Iowa State Board of Tax Review, 302 N.W.2d at 143-44, we would construe the term "Personnel Administration" to include rules regarding the layoff of personnel. The Executive Order itself, therefore, appears to relate affirmative action to layoff rules.

In summary, we advise that § 19A.9(14) does not preclude the Merit Employment Commission from promulgating an affirmative action layoff rule. The specification that primary and secondary consideration, respectively, be given to "performance record" and "seniority in service" does not exclude consideration of additional, tertiary factors which are reasonably related to layoff rules. Affirmative action is reasonably related to layoff rules as a means to ensure that seniority-based layoffs do not disproportionately impact on recent hiring gains made through affirmative action programs.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP:sh

MUNICIPALITIES: State Building Code. Chapter 103A, The Code 1981; §§ 103A.3(4), 103A.3(7), 103A.7, 103A.10(1), 103A.10(2)(b), 103A.10(3), 103A.10(4), 103A.12, 103A.19, 103A.22(1), and 103A.22(2), The Code 1981; Acts, 69th G.A., 1981 Session, Chapter 117, § 303. Three options avail a governmental subdivision in the selection of a building code. It can: (1) adopt the state building code, without alteration; (2) adopt or enact any building regulation, provided the regulations comply with certain provisions of the state building code which have statewide effect; and (3) elect not to provide for a building code. Thus, if a city permits a county building code to apply within the incorporated area of the city, pursuant to § 303, Acts, 69th G.A., 1981 Session, Chapter 117, it is not required to adopt or enact a separate building code under Ch. 103A of the Code. Once a building code is adopted or enacted, however, the governmental subdivision has the responsibility to enforce its building code. The prescribed manner in which a building code is administered and enforced, including the designation of a local building department, is the prerogative of the governmental subdivision. Hence, county enforcement of a building code relieves a city of any responsibility to enforce the building code, assuming the county has accepted responsibility for enforcement within the incorporated area. [Walding to O'Kane, State Representative, 1/15/82] #82-1-8 (L)

The Honorable James O'Kane
State Representative
1815 Rebecca Street
Sioux City, Iowa 51103

January 15, 1982

Dear Representative O'Kane:

We are in receipt of your opinion request regarding the adoption and enforcement of building codes. Specifically, you have asked:

> If a county adopts a building code pursuant to [§ 303, Acts, 69th G.A., 1981 Session, Ch. 117] and a city within that county exercises its option under paragraph 3a to permit the county building code to apply within the city limits, is the city by virtue of county enforcement of a building code relieved of any responsibility to adopt and enforce a building code under Chapter 103A?
>
> Would the answer to the prior question differ if the county adopted the state building code rather than its own individualized building code?

Chapter 103A, the State Building Code Act, was enacted in 1972 to insure the health, safety, and welfare of the citizens of Iowa through the promulgation and enforcement of a state building code. Section 103A.7, The Code 1981, empowers and directs the state building code commissioner, with approval of the advisory council, to formulate, adopt, and amend or revise rules which are the state building code. Adoption and enforcement of a building code are discussed separately herein.

I. ADOPTION

As previously noted, provision is made for a state building code. Pursuant to § 103A.10(2)(b), The Code 1981, the state building code shall be applicable in each governmental subdivision where the governing body has adopted a resolution accepting the application of the Code. Section 103A.12, The Code 1981, provides that, "The state building code shall be applicable in each governmental subdivision of the state in which the governing body has adopted or enacted a resolution or ordinance accepting the applicability of the code . . . ." For the buildings and structures to which it is applicable, the state building code constitutes a lawful local building code. See § 103A.10(1), The Code 1981.

Essential is the definition of a governmental subdivision. According to § 103A.3(4), The Code 1981, "'Governmental Subdivision' means any city, county, or combination thereof." [Emphasis added] Such a definition is consistent with § 303, Acts, 69th G.A., 1981 Session, Ch. 117 which authorizes a county building code to apply within the incorporated area of a city.

In addition, § 103A.22(1), The Code 1981, provides:

> Nothing in this chapter shall be construed as prohibiting any governmental subdivision from adopting or enacting any building regulations relating to any building or structure within its limits, but a governmental subdivision in which the state building code has been accepted and is applicable shall not have the power to supersede, void, or repeal or make more restrictive any of the provisions of this chapter or of the rules adopted by the commissioner.

Therefore, unless a governmental subdivision has accepted the state building code, it may adopt or enact any building regulations relating to any building or structure within its limits. Nevertheless, it should be noted that a governmental subdivision which adopts or enacts such regulations must still comply with certain provisions of the state building code which have statewide effect. See § 103A.10(3) and (4), The Code 1981. If a governmental subdivision has accepted the state building code, however, it may not alter the provisions of the chapter or the rules adopted by the commissioner.

Finally, in a prior opinion, Op.Att'y.Gen. # 79-4-23, our office held that there is no statutory provision in the Code which requires a city to adopt or enact a building code. Thus, a governmental subdivision can elect not to provide for a building code.

Accordingly, three options avail a governmental subdivision in the selection of a building code. It can: (1) adopt the state building code, without alteration; (2) adopt or enact any building regulations, provided the regulations comply with certain provisions of the state building code which have statewide effect; and (3) elect not to provide for a building code.

II. ENFORCEMENT

Provision for enforcement of a building code is also found in Ch. 103A. In particular, § 103A.19, The Code 1981, provides in pertinent part:

> The examination and approval or disapproval of plans and specifications, the issuance and revocation of building permits, licenses, certificates, and similar documents, the inspection of buildings or structures, and the administration and enforcement of building regulations shall be the responsibility of the governmental subdivisions of the state and shall be administered and enforced in the manner prescribed by local law or ordinance. [Emphasis added]

Similarily, § 103A.22(2), The Code 1981, provides:

> Nothing in this chapter shall be construed as abrogating or impairing the power of any governmental subdivision or local building department to enforce the provisions of any building regulations, or the applicable provisions of the state building code, or to prevent violations or punish violators except as otherwise expressly provided in this chapter.

A local building department, mentioned in the aforementioned section, is defined in § 103A.3. According to that section, "'Local building department' means an agency of any governmental subdivision charged with the administration, supervision, or enforcement of building regulations, approval of plans, inspection of buildings, or the issuance of permits, licenses, certificates and similar documents, prescribed or required by state or local building regulations." Section 103A.3(7), The Code 1981.

Emerging from the prior sections are two principles. First, a governmental subdivision has the responsibility to enforce its building code. A ruling to that effect was previously issued by our office. See, 1978 Op.Att'y.Gen. 843. Second, as the underscored portion of § 103A.19 makes evident, a governmental subdivision shall prescribe the manner in which its building code is to be administered and enforced. A local building department can be charged with the administration and enforcement of a building code.

Accordingly, once a building code is adopted or enacted, the governmental subdivision has the responsibility to enforce its building code. The prescribed manner in which a building code is administered and enforced, including the designation of a local building department, is the prerogative of the governmental subdivision.

Applying the foregoing to your question, if a city permits a county building code to apply within the incorporated area of the city, pursuant to § 303, Acts, 69th G.A., 1981 Session, Ch. 117, it is not required to adopt or enact a separate building code under Ch. 103A of the Code. As previously discussed, one of the options which avails a governmental subdivision, which includes a city, is to elect not to provide for a building code. Further, county enforcement of a building code relieves a city of any

responsibility to enforce the building code, assuming the county has accepted responsibility for enforcement within the incorporated area. While a governmental subdivision has the responsibility to enforce its building code, the prescribed manner in which a building code is administered and enforced, including the designation of a local building department, is the prerogative of the governmental subdivision. Our response, it should be noted, is not predicated on the form of the county building code.

In summary, three options avail a governmental subdivision in the selection of a building code. It can: (1) adopt the state building code, without alteration, (2) adopt or enact any building regulations, provided the regulations comply with certain provision of the state building code which have statewide effect, and (3) elect not to provide for a building code. Thus, if a city permits a county building code to apply within the incorporated area of the city, pursuant to § 303, Acts, 69th G.A., 1981 Session, Ch. 117, it is not required to adopt or enact a separate building code under Ch. 103A of the Code. Once a building code is adopted or enacted, however, the governmental subdivision has the responsibility to enforce its building code. The prescribed manner in which a building code is administered and enforced, including the designation of a local building department, is the prerogative of the governmental subdivision. Hence, county enforcement of a building code relieves a city of any responsibility to enforce the building code, assuming the county has accepted responsibility for enforcement within the incorporated area.

Very truly yours,

Lynn M. Walding

LYNN M. WALDING
Assistant Attorney General

LMW/nm

STATE OFFICERS AND DEPARTMENTS. Department of Health. Practices of Audiology and Hearing Aid Fitting. Sections 147.151(5), 147.152(2), 154A.1(4), 154A.19, The Code 1981. Whether a particular activity falls within the scope of the practice of audiology or hearing aid fitting can be fairly determined only by evaluating a questioned activity in light of statutory language. The provisions of the division governing the practice of audiology and the provisions of chapter 154A governing the practice of hearing aid dealers contemplate overlapping activities by audiologists and hearing aid dealers. Whether certain activities are overlapping can be determined, again, only by evaluating such activities in light of statutory language. (Freeman to Pawlewski, Commissioner of Public Health, 1/19/82) #82-1-11(L)

Norman L. Pawlewski
Commissioner of Public Health
Lucas State Office Building
Des Moines, Iowa 50319

January 19, 1982

Dear Commissioner Pawlewski:

You have requested an opinion from the Attorney General concerning the definition of the practice of audiology as set forth in chapter 147, The Code 1981, and the definition of the practice of hearing aid fitting as set forth by chapter 154A, The Code 1981. Your question goes on to state the following:

> In particular the Department needs to know exactly what practices are encompassed within these definitions and if there is any overlap of authority between the two professions. That is, are there some practices which can be performed by either or both and other practices which are exclusive to one profession to the exclusion of the other and if so what specifically are these practices and which profession has authority to practice these procedures.

Section 147.151(3) states that an audiologist is one who engages in the practice of audiology. The "practice of audiology" is defined by section 147.151(5), The Code as

> The application of principles, methods, and procedures for measurement, testing, evaluation, prediction, consultation, counseling, instruction, habilitation, rehabilitation, or remediation related to hearing and disorders of hearing and associated communication disorders for the purpose of nonmedically evaluating, identifying, preventing, ameliorating, modifying, or remediating such disorders and conditions in individuals or groups of individuals, including the determination and use of appropriate amplification.

A hearing aid dealer is defined by the Code as "any person engaged in the fitting, dispensing and sale of hearing aids and providing hearing aide services or maintenance" by means of procedures proscribed by chapter 154A or by the board of examiners of hearing aid dealers. Section 154A.1(4), The Code 1981. "Hearing aid fitting" means

> The measurement of human hearing by any means for the purpose of selections, adaptations, and sales of hearing aids, and the instruction and counseling pertaining thereto, and demonstration of techniques in the use of hearing aids, and the making of earmold impressions as part of the fitting of hearing aids.

Section 154A.1(5), The Code.

Neither the definition of the practice of audiology nor the definition of the practice of hearing aid fitting can be viewed in isolation but must be read in conjunction with other provisions of their particular Code division or chapter. See Stearns v. Kean, 303 N.W. 2d 408, 413 (Iowa 1981). Of special note are sections 147.152(2) and 154A.19. Section 147.152(2) provides that nothing in the division governing the licensing of speech pathologists and audiologists shall be construed to apply to "hearing aid fitting, the dispensing or sale of hearing aids and the providing of hearing aid service and maintenance by a hearing aid dealer...." Section 154A.19 provides in part that "This chapter shall not prevent any person from engaging in practices covered by this chapter, provided the person, or organization employing the person, does not dispense or sell hearing aids."

These latter sections indicate that some overlapping activity between the practice of audiology and the practice of fitting a hearing aid may, indeed occur. Pursuant to section 147.152(2), an act which falls within the scope of the practice of audiology may be performed by a licensed hearing aid dealer without the receipt of a license to practice audiology so long as the act also falls within the scope of the practice of a hearing aid dealer. By the same token, a licensed audiologist may, pursuant to section 154A.19, perform an act which falls within the practice of a hearing aid dealer without receiving a hearing aid dealer's license so long as that act falls within the practice of audiology and so long as the licensed audiologist does not sell or dispense hearing aids. The dispensing or selling of a hearing aid is defined by section 154A.1(6) and primarily means a transfer of title to or of the right to use by lease, bailment, or any other means a hearing aid, excluding wholesale transactions with distributors or dealers and the temporary, charitable loan or educational loan of a hearing aid without enumeration.

The initial and crucial question in determining whether a person is practicing outside the scope of his or her profession and inside the scope of another profession is whether the act or acts being performed fall with-

in the scope of that person's license. If a particular act does fall within the practice of the profession for which that person has a license, it is then irrelevant whether that act also falls within the practice of another profession. If, on the other hand, a particular act falls outside the scope of the practice of the profession for which the person has a license, then it becomes necessary to determine whether the act falls within the practice of another profession before legal action can be taken against that person for practicing within the scope of another profession without a license. Consequently, a hearing aid dealer cannot be charged with practicing audiology without a license for engaging in a certain act until it has been determined that the particular act falls outside the scope of a hearing aid dealer's license and inside the scope of the practice of audiology. The conclusion that a specific act falls within the practice of audiology is, alone, insufficient since the act might also fall within the scope of practice of a hearing aid dealer. The same analysis must be applied with respect to a charge brought against a licensed audiologist for practicing as a hearing aid dealer without a license. An act that falls within the scope of the practice of a hearing aid dealer might also fall within the practice of audiology and, thus, be a proper practice by the licensed audiologist.

Our office is not in the position of listing those activities which legitimately fall within the practices of either hearing aid dealers or audiologists. Whether a particular act falls within the scope of one or another or both of these professions must be determined on a case by case basis by reviewing the questioned activity in light of the statutory language governing the practice of these two professions.

Our office did note, in an earlier opinion issued by us, that hearing aid dealers are not specifically limited by the Code in the methods they may use to measure human hearing so long as such measurement is done only for the purpose of selecting, adapting, and selling hearing aids. O.G.A. # 81-8-5(L). Questioned activities of a hearing aid dealer must be measured in light of this limited purpose. In the same vein, audiologists may apply principles, methods, and procedures to accomplish any one of the activities detailed by section 147.151(5) for the purpose of nonmedically evaluating, identifying, preventing, ameliorating, modifying or remediating hearing disorders and associated communication disorders in individuals. Questioned activities of audiologists must be measured in light of this stated purpose. Furthermore, in determining whether an activity constitutes the practice of audiology or falls within the scope of a hearing aid dealer's license or both, the entire statutes governing the practices of these professions must be evaluated since no one statutory phrase or provision can be, as noted above, viewed in isolation from the other portions of a statute. Stearns, 303 N.W. 2d at 413.

In conclusion, we are unable to directly answer your specific question of exactly what practices are encompassed within the definitions of audiology and hearing aid fitting and which practices of these two professions overlap, if any. Whether a particular activity falls within or without

the practice of a profession can be fairly evaluated only by examining that activity in light of the statutory language governing the practice of that profession. The language of those provisions comprising the division governing the practice of audiology, sections 147.151 through 147.156, and those provisions of chapter 154A governing the practice of hearing aid dealers, envisions that certain activities engaged in by practicing audiologists and hearing aid dealers will overlap but, again, which activities actually do overlap can be determined only by evaluating particular activities in light of statutory language.

Sincerely yours,

Jeanine Freeman

Jeanine Freeman
Assistant Attorney General

JF:gh

ELECTIONS; ELECTRONIC VOTING MACHINES. Ch. 49, §§ 49.12, 49.25, 49.43; Ch. 52, § 52.27. Code sections relative to voting machines should be applied to govern the use of electronic voting systems. (Pottorff to Whitcome, Director of Elections, Office of the Secretary of State, 1/27/82) #82-1-14(L)

January 27, 1982

Louise Whitcome
Director of Elections
Office of the Secretary of State
State Capitol
L O C A L

Dear Ms. Whitcome:

You have requested an opinion concerning the use of electronic voting systems which utilize ballot cards and electronic tabulating devices in each precinct. You indicate that the ballot cards are marked in ordinary voting booths described in § 49.25(3), The Code 1981, and tabulated in electronic tabulating devices. You point out that this system combines some of the features of paper balloting with some of the features of voting machine balloting. In view of this combination of features, you ask the following questions:

1. How many people should be appointed to serve on the election board in each precinct using the electronic system?

2. In those precincts where voters will be voting on public measures as well as candidates, must the public measures be printed on a separate, colored card (see Linn County sample ballot) or could the back side of the candidate card be used for the public measures? By printing public measures on the back side of the candidate card considerable expense could be avoided. Voting machine ballot strips include public measures printed on a white ballot. Other states using this system of voting allow the printing of public measures on the back of the candidate card (see sample Orange County ballot).

3. If it is determined that the public measures may be printed on the back of the white candidate card, would the ballot card for a public measure to be voted at a special election where no candidates are to be elected also be printed on white card stock when using the electronic tabulating system?

The procedure for using electronic voting systems is set out in Chapter 52 of the Code. §§ 52.26-52.37, The Code 1981. These sections do not address the specific questions which you pose. Section 52.27, however, does state that "[a]ll provisions of chapter 49 relative to times and circumstances under which voting machines are to be used in any election and the number of voting machines to be provided shall also govern the use of electronic voting systems, when applicable." This language indicates that Code sections relative to voting machines should be applied to govern the use of electronic voting systems.

Since, in our view, Code sections relative to voting machines govern the use of electronic voting systems, we rely on the terms of these sections to answer your specific inquiries:

1. Five precinct election officials should be appointed to serve on the election board in each precinct using the electronic voting system. However, in precincts using only one voting booth at any one time, and in precincts voting by ballot cards where no more than one hundred votes were cast in the last preceding similar election, the board should consist of three precinct election officials. In precincts using more than two voting booths one additional precinct election official may be appointed for each such additional booth. See § 49.12, The Code 1981.

2. In precincts using electronic voting systems, public measures need not be placed on a separate ballot card of some color other than white. The back side of the candidate card could be used. However, if it is impossible to place all the public measures on the back side of the candidate card or if only a portion of the qualified electors are entitled to vote upon any measure presented, the commissioner may provide a separate ballot card of any color, including white, for the public measure or measures. See § 49.43, The Code 1981.

3. Ballot cards for public measures to be voted at a special election where no candidates are to be elected may be printed on white card stock. See § 49.43, The Code 1981.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP:sh

GAMBLING: Amusement Concession: License Revocation -- §§ 99B.1(14), 99B.2(1), 99B.3 and 99B.4, The Code 1981, as amended by 1981 Session, 69th G.A., ch. 44, § 4. According to section 99B.2(1) as amended, a gambling license can not be issued by the department of revenue for any location for which a previous gambling license or liquor license was revoked within the preceding two years. This location restriction does not apply to an amusement concession license revoked by the department of revenue. An amusement concession license is issued by the department for a particular game and not for a specific location. The revocation of a license for an amusement concession that was located at a fair does not preclude use of the fairgrounds by other legal amusement concessions, with proper authorization from the fair sponsor, notwithstanding this location restriction. (Richards to Poppen, Wright County Attorney, 1/29/82) #82-1-15(L)

January 29, 1982

Mr. Lee E. Poppen
Wright County Attorney
P.O. Box 111
Clarion, Iowa 50525

Dear Mr. Poppen:

You have requested an opinion of the Attorney General regarding the impact of a gambling license revocation on the location of the game. Specifically you raise the following question:

> If the holder of an amusement concession gambling license under Section 99B.3 of the Code is convicted of a violation of Chapter 99B or if his license is revoked pursuant to Division IV of Chapter 99B, is the county fair grounds where the illegal game was conducted precluded for having any legal amusement concession for a period of two years due to Section 4 of Chapter 44 of the laws of the 69th General Assembly?

Section 4 of Chapter 44, Acts of the 69th General Assembly, 1981 Session, amends section 99B.2(1), The Code 1981, which outlines the game licensing function of the Iowa Department of Revenue. As amended that section provides:

> The department is the agency responsible for issuing any license required by this chapter. A license shall not be issued, except upon submission to the department of an application on forms furnished by the department and the required fee. A license may be issued to any applicant who is an

> eligible applicant. However, a license shall not be issued to an applicant who has been convicted of or pled guilty to a violation of this chapter, or who has been convicted of or pled guilty to a violation of chapter 123 that resulted, at any time, in revocation of a license issued to the applicant under chapter 123 or that resulted, within the twelve months preceding the date of application for a license required by this chapter, in suspension of a license issued under chapter 123. A license also shall not be issued for a location for which a previous license issued under this chapter or chapter 123 has been revoked within the preceding two years. Except as otherwise provided in this chapter, a license is valid for a period of two years from the date of issue. The license fee is not refundable, but shall be returned to the applicant if an application is not approved.

(Emphasis added.) The above highlighted portion of section 99B.2(1) as amended is generally patterned after a revocation provision in the Iowa Beer and Liquor Control Act. See § 123.40, The Code 1981 ("In the event a license or permit is revoked the premises which had been covered by such license or permit shall not be relicensed for one year.") The legislative intent reflected in these respective sections is to prevent license violators from escaping some of the consequences of their illegal acts by transferring the property covered by the license to some third party, such as a "shell" corporation, who could relicense and continue the affected business.

Your question is directed only to the amusement concession privilege created by sections 99B.3 and 99B.4, The Code 1981. The preambles of these respective provisions indicate the nature of this privilege. "A game of skill or game of chance is lawful when conducted by a person at an amusement concession, but only if "certain specified conditions are met including "(t)he location where the game is conducted by the person has been authorized as provided in section 99B.4," section 99B.3(1)(a), The Code 1981, and "(t)he person conducting the game . . . has been issued a license for the game . . . ," section 99B.3(1)(b), The Code 1981. (Emphasis added.) "A game of skill or game of chance lawfully may be conducted by a person at an amusement concession, but only if the person has been authorized to conduct the game at a

specific location as follows: (1) At a fair, by written permission given to the person by the sponsor of the fair. . . ." § 99B.4, The Code 1981 (emphasis added).

We believe the answer to your query lies in the above emphasized portions of the statute and in the definition of amusement concession, section 99B.1(14), The Code 1981:

> 'Amusement concession' means any place where a single game of skill or game of chance is conducted by a person for profit, and includes the area within which are confined the equipment, playing area and other personal property necessary for the conduct of the game.

(Emphasis added.) Upon review it is our considered opinion that the above highlighted location restriction in section 99B.2(1), The Code 1981, as amended by 1981 Session, 69th General Assembly, chapter 44, section 4, does not apply to an amusement concession license revoked by the department of revenue. The location restriction of section 99B.2(1) as amended seemingly applies to licenses issued by the department for a specific location. By the very terms of sections 99B.3 and 99B.4, the department issues an amusement concession license "for the game" and not for a particular location. Authorization to conduct an amusement concession at a specific location emanates from some body other than the department of revenue, such as a fair's sponsor. In short, the revocation by the department of revenue of an amusement concession license does not trigger the location restriction of section 99B.2(1), The Code 1981, as amended. Consequently if an amusement concession license is revoked by the department of revenue, the county fairgrounds where the illegal game was conducted can be used by other legal amusement concessions with proper authorization notwithstanding section 99B.2(1), The Code 1981, as amended.

Sincerely,

Richard Lee Richards

RICHARD L. RICHARDS
Assistant Attorney General

bje

TAXATION: Property Acquisitions By Tax Exempt Political Subdivisions. §427.1(1), The Code 1981; 12 U.S.C.§1714 (1980). Real property acquired by the Federal Housing Administration through foreclosure proceedings continues to be subject to the real property and drainage taxes that would have been payable had the property remained in private ownership. (Schuling to Jensen, Monona County Attorney , 1/29/82) #82-1-16(L)

January 29, 1982

Michael Paul Jensen
Monona County Attorney
610 Iowa Avenue
Onawa, IA 51040

Dear Mr. Jensen:

You have requested the opinion of this office concerning the application of Section 427.1(1), The Code 1981. The question posed is whether the Federal Housing Administration is liable for real property and drainage taxes of the previous owner on real property acquired in a foreclosure action.

In answer to your question, these taxes are not abated by the exempt status of the federal government. Section 427.1(1), The Code 1981, states as follows:

> Federal and state property. The property of the United States and this state, including state university, university of science and technology, and school lands. The exemption herein provided shall not include any real property subject to taxation under any federal statute applicable thereto, but such exemption shall extend to and include all

> machinery and equipment owned exclusively by the United States or any corporate agency or instrumentality thereof without regard to the manner of the affixation of such machinery and equipment to the land or building upon or in which such property is located, until such time as the Congress of the United States shall expressly authorize the taxation of such machinery and equipment. (Emphasis added)

It must be recognized that §427.1(1) is not a blanket exemption for all federal property. If an applicable federal statute allows for taxation of real property, then such real estate of the United States is subject to tax.

Such is the case in the factual situation you present. Title 12 U.S.C. §1714 (1980) states, "Nothing in this subchapter shall be construed to exempt any real property acquired and held by the Secretary under this subchapter from taxation by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed."

Waiver of local tax immunity of property owned by the Federal Housing Administration was intended. United States v. San Diego County, 249 F.Supp. 321, 322 (S.D. Cal. 1966). Real property acquired by the Federal Housing Administration is thus taxable to the same extent, according to its value, as other real property. Resultingly, the doctrine of merger cannot arise where no exemption exists.

In conclusion, real property acquired by the Federal Housing Administration through foreclosure proceedings continues to be subject to the real property and drainage taxes that would have been payable had the property remained in private ownership.

Sincerely,

Mark R. Schuling

Mark R. Schuling
Assistant Attorney General

TAXATION: Failure To Timely Apply for Industrial Real Estate New Construction Tax Exemption. Sections 427B.3 and 427B.4, The Code 1981. A claimant for the industrial real estate new construction tax exemption who fails to timely file an application for exemption as set forth in §427B.4 for the actual value added to the industrial project is not eligible to receive the exemption for the entire five year period set forth in §427B.3. (Griger to Riffel, Bremer County Attorney, 1/29/82) #82-1-17(L)

January 29, 1982

Paul W. Riffel
Bremer County Attorney
104 Second Street, N.W.
Waverly, IA 50677

Dear Mr. Riffel:

You have requested an opinion of the Attorney General concerning the local option industrial real estate new construction tax exemption contained in chapter 427B, The Code 1981. In your written request, you state:

> "Specifically Section 427B.4 of the Code provides that an owner of real estate desiring to make application for partial exemption from property taxation shall file an application for exemption with the local assessor by February 1 of the assessment year in which the value added is first assessed for taxation.
>
> My question is whether an owner who fails to file an application by the deadline contained in Section 427B.4 is ineligible to receive a partial exemption from taxation for the entire period of five years or would such an owner be eligible to file an application subsequent to February 1 of the first assessment year and, thereby, be eligible for partial exemption for the second, third, fourth or fifth years of the five year period."

The answer to your question is that a claimant for this property tax exemption who fails to timely file an application for exemption as set forth in §427B.4, The Code 1981, is not eligible to receive the exemption for the actual value added to the industrial project for the entire five year period.

An overview of the tax exemption contained in chapter 427B was set forth in Op. Att'y Gen. #80-3-19, a copy of which is attached to this opinion. In the event that a city or county has elected to provide for the industrial real estate new construction exemption as authorized by §427B.1, The Code 1981, those exemption claimants, who seek to procure such exemption and who have not received "prior approval" as set forth in §427B.4, must file application for the exemption with the local assessor in accordance with the first paragraph of §427B.4, which states:

> An application shall be filed for each project resulting in actual value added for which an exemption is claimed. The application for exemption shall be filed by the owner of the property with the local assessor by February 1 of the assessment year in which the value added is first assessed for taxation. Applications for exemption shall be made on forms prescribed by the director of revenue and shall contain information pertaining to the nature of the improvement, its cost, and other information deemed necessary by the director of revenue." (emphasis supplied).

The "value added" to be exempted from property taxation is set forth in §427B.3, The Code 1981, as follows:

> "The actual value added to industrial real estate for the reasons specified in section 427B.1 is eligible to receive a partial exemption from taxation for a period of five years. "Actual value added" as used in this chapter means the actual value added as of the first year for which the exemption is received, except that actual value added by improvements to machinery and equipment means the actual value as determined by the assessor as of January 1 of each year for which the exemption is received. The amount of actual value added which is eligible to be exempt from taxation shall be as follows:
>
> a. For the first year, seventy-five percent.
> b. For the second year, sixty percent.
> c. For the third year, forty-five percent.

d. For the fourth year, thirty percent.
e. For the fifth year, fifteen percent.

This schedule shall be followed unless an alternative schedule is adopted by the city council of a city or the board of supervisors of a county in accordance with section 427B.1.

However, the granting of the exemption under this section for new construction constituting complete replacement of an existing building or structure shall not result in the assessed value of the industrial real estate being reduced below the assessed value of the industrial real estate before the start of the new construction added."

It is clear that §427B.4 requires the exemption claimant to file an exemption application with the local assessor by February 1 of the assessment year in which the "value added", as defined in §427B.3, is "first assessed for taxation." Therefore, if value is added to a project in the year 1980, the "value added" will be first subject to property tax assessment as of January 1, 1981, in the 1981 assessment year. See §§428.4 and 441.46, The Code 1981. An examination of §427B.4 clearly discloses that there is no statutory authority to file for the tax exemption in a year in which value is not added as set forth in §427B.3. In addition, it should be pointed out that the Attorney General has opined that unless a tax exemption is timely claimed by the date set forth in a statute, the property is not entitled to exemption. See, e.g. 1976 Op. Att'y Gen. 392; 1978 Op. Att'y Gen. 636. Consequently, in the event the property is not eligible for the chapter 427B tax exemption by reason of the claimant's failure to timely file for exemption by February 1 of the appropriate assessment year, it follows that the property is ineligible for exemption for the "value added" for the entire five year period.

Very truly yours,

Harry M. Griger

Harry M. Griger
Special Assistant Attorney General

Enclosure

JUVENILE LAW: A judicial magistrate has authority to issue an order allowing the detention of a juvenile in an adult jail or lock-up. §§ 232.22(4); 602.39; 602.60, The Code 1981. (Hege to Jay, State Representative, 1/29/82) #82-1-18(L)

January 29, 1982

The Honorable Daniel Jay
State Representative
State House
Des Moines, Iowa 50319

Dear Representative Jay:

You have requested an opinion concerning the authority of a judicial magistrate to issue an order under Section 232.22(4) authorizing the detention of a juvenile in a facility intended or used for the detention of adults, i.e., adult jails or lock-ups.

The short answer to your inquiry is yes; the magistrate has the authority by specific grant of Section 232.22(4), The Code 1981.

Generally, Chapter 602 defines a magistrate as:

> Judicial magistrate defined. As used in this chapter, "judicial magistrate" and "magistrate" mean only those persons appointed to office under the authority of sections 602.50 and 602.58.

Section 602.39, The Code 1981.

The general jurisdiction of a judicial magistrate is found in Section 602.60, which provides in pertinent part:

> Jurisdiction, venue. Judicial magistrates shall have jurisdiction of simple misdemeanors, including traffic and ordinance

> violations, preliminary hearings, search warrant proceedings, and small claims. They shall also have jurisdiction to exercise the powers specified in sections 644.2 and 644.12 and the power to hear complaints, or preliminary informations, issue warrants, order arrests, make commitments and take bail. . . . (Emphasis added.)

Section 602.60, The Code 1981.

In the adult criminal justice system, the right to bail is of constitutional magnitude. U.S. Const. amend. VIII; Ia. Const. art. I § 12. Generally, however, the juvenile justice system has not included a right to bail, or release upon monetary security being paid to insure appearance. Davis, Rights of Juveniles, § 3.10, p. 3-39 (2d.Ed. 1980). Traditionally, the juvenile justice system, in lieu of bail, includes an alternative scheme of release and detention; that is, a presumption of release, with the state having the burden of proving the need for the exception of detention under certain specified conditions. In Re William M., 3 Cal.3d 16, 473 P.2d 737, 89 Cal. Rptr. 33 (1970); §§ 232.19(2), .22(1), The Code 1981. Such an alternative scheme in lieu of bail has been found constitutional when properly administered. In Re William M., 3 Cal.3d 16, 372 P.2d 737, 89 Cal. Rptr. 33 (1970) (release or detention pre-adjudication); In Interest of Kelly, 236 N.W.2d 50 (Iowa 1975) (stay of juvenile court order pending appeal).

Since bail is not inherent in the juvenile justice system, some other authority must grant a judicial magistrate the authority over the release/detention determination in juvenile delinquency proceedings. That authority is found in Section 232.22(4) which states:

> 4. No child shall be detained in a facility under subsection 2, paragraph "c" for a period in excess of twelve hours without the written order of a judge or a magistrate authorizing such detention. (Emphasis added.)

Section 232.22(4), The Code 1981. This provision grants an additional, specific authority to a judicial magistrate which augments the general authority provided by Section 602.60. This authority is limited to a situation in which a juvenile must be detained in an adult jail or lock-up. Section 232.22(2)(c), The Code 1981.

It is axiomatic, however, that the other criteria specified must be satisfied for the magistrate to issue such detention order. Sections 232.19(2), .20, .22(1), The Code 1981. Specifically, the magistrate must be satisfied that:

> (1) The child is at least fourteen years of age; and
> (2) The child has shown by his or her conduct, habits, or condition that he or she constitutes an immediate and serious danger to himself or herself or to another, or to the property of another and a facility or place enumerated in paragraph "a" or "b" of this subsection is unavailable, or the court determines that the child's conduct or condition endangers the safety of others in the facility; and

Section 232.22(2)(c)(1) and (2), The Code 1981. Furthermore, the facility must meet the following specifications:

> (3) The facility has an adequate staff to supervise and monitor the child's activities at all times; and
> (4) The child is confined in a room entirely separated from adults.

Section 232.22(2)(c)(3) and (4), The Code 1981. See, Op. Att'y Gen. #82-1-6.

In summary, a judicial magistrate is empowered to order the detention of a juvenile in an adult jail or lock-up pursuant to the specific authority granted by Section 232.22(4), The Code 1981.

Sincerely,

Brent D. Hege

Brent D. Hege
Assistant Attorney General

BDH/kap

NEPOTISM: § ~~17.1~~ 71.1, The Code, relating to limitations on nepotism in state goverment does not conflict with § 19A.1, The Code, requiring that appointment to governmental employment be made on merit alone. § ~~17.1~~ 71.1, The Code, applies not only to the head of an agency or other division of government, but applies to any person holding a public position who has been delegated the authority to hire or discharge employees. The prohibition on nepotism applies only to those jobs over which the person holding a public position has the authority to hire or discharge. (Black to Reagen, Department of Social Services, 1/29/82) #82-1-19(L)

Dr. Michael V. Reagen
Commissioner
Iowa Department of Social Services
Fifth Floor, Hoover Building
LOCAL

January 29, 1982

Dear Commissioner Reagen:

We have reviewed your opinion request of December 10, 1981 and believe that the memorandum of Stephen O'Meara attached to it still represents the best judgment of our office as how to interpret § 71.1, The Code. It is, therefore, our judgment that your policy should be broadened to include all Departmental officials to whom the Commissioner has delegated his authority to hire or discharge employees. Obviously the law would apply only with respect to the positions over which the official had been delegated employment and discharge authority.

It would appear that the proper "officer, board, council or commission" to approve exceptions would be the Council on Social Services. If it is believed that there are a large number of instances of nepotism in the Department, it might be possible to consider some delegation of fact finding and preliminary determination to another component of the Department, but official approval should come from the Council.

With respect to your final question, we do not consider that your proposed policy on nepotism conflicts with § 19A.1, The Code. Certainly, if your policy authorized employment based on nepotism, it would be in conflict. We understand, however, that your policy is the reverse -- it prohibits employment of certain related parties. The merit procedure is utilized in your appointments and we cannot conclude that there is a conflict between § 71.1 and § 19A.1, The Code, such that § 19A.22 would become operative and cause § 71.1 to yield to § 19A.1. We recognize that it is possible to argue that any non-skill related employment criteria is in conflict with § 19A.1, but we conclude that "inconsistent with" must be read as those provisions which frustrate or defeat implementation of Chapter 19A, and we

conclude that it would be the allowance of nepotism which would frustrate the merit system rather than the limitation of nepotism.

We note that Mr. O'Meara in his memorandum of several years ago, recommended adoption of nepotism rules by the Merit Commission as well as legislative clarification of the intent of § 71.1. These still remain the preferrable solution in order to have enforceable and consistent state policy, and we would recommend that the Department support these methods of solution of the problem.

Yours very truly,

John G. Black
Special Assistant Attorney General

JGB/sm

MUNICIPALITIES: Special Assessments: Deficiency Assessments. Section 362.1, 362.2(11), 384.37, 384.46, and 384.63, The Code 1981. Private improvement, as used in § 384.63, The Code 1981, means any valuable addition to private property or an amelioration in its condition, excluding a public improvement, costing labor and capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes. Mere repairs or fixtures, however, do not qualify as private improvements. A deficiency assessment should be the difference between what the council's valuation of the fair market value of a lot would have been had the private improvement been constructed prior to their determination and the value at which the council did assess the property. During the period of amortization, the council has a duty to asssess a deficiency on a lot subject to a deficiency when a private improvement is constructed on the lot. Finally, a change in the ownership of a lot does not have an effect on a deficiency assessment. (Walding to Davitt, State Representative, 2/24/82) #82-2-14(L)

The Honorable Philip A. Davitt
State Representative
State Capitol
L O C A L

February 24, 1982

Dear Representative Davitt:

You have requested an opinion of the Attorney General regarding deficiency assessments of property within special assessment districts. Specifically, you have asked:

> 1. Section 384.63 of the Code provides for a 'deficiency assessment' for certain property within a special assessment district. Certain officials are to 'notify the [city] council when a private improvement is subsequently constructed on any lot subject to a deficiency.'
>
> I would request your opinion as to what constitutes [a 'private] improvement' for purposes of this section. Would the addition of a room, deck or attached garage to an existing dwelling be considered [a private] improvement? Would the addition of a separate garage or other unconnected building be considered [a private] improvement?
>
> 2. Section 384.63 also states that '[w]hen a private improvement is constructed on a lot subject to a deficiency, during the period of amortization, the council shall, by resolution, assess a pro rata portion of the

> deficiency on that lot, . . . subject to the twenty-five percent limitation of section 384.62.'
>
> With regard to this provision, is the council to assess only the value of the [private] improvement, or may it reassess the lot with the [private] improvement in place and take advantage of the appreciated value of the lot? Is it mandatory that the council make the assessment or may it choose to ignore the improvement? Does a change of ownership of the lot have any effect on the deficiency assessment?

Section 384.63, The Code 1981, provides in part:

> If the special assessment which may be levied against a lot is insufficient to pay its proportion of the cost of the improvement, or if no special assessment may be levied against a lot, the deficiency shall be paid from the city fund or funds designated by the council.
>
> The council shall, by resolution, provide that the deficiencies for the lots specially benefited by a public improvement shall be certified to the county auditor, who shall record them in a separate book entitled 'Special Assessment Deficiencies', and to the appropriate city official charged with the responsibility of issuing building permits, who shall notify the council when a private improvement is subsequently constructed on any lot subject to a deficiency. Certification to county auditor shall include a legal description of each lot. The council shall establish by ordinance a period of amortization for a public improvement for which there are deficiencies, based upon the useful life of the public improvement, but not to exceed ten years. Deficiencies may be assessed only during the period of amortization, which shall also be certified to the county auditor and the city official charged with the responsibility of issuing building permits. Certification to the county auditor shall include a legal

> description of each lot. When a private improvement is constructed on a lot subject to a deficiency, during the period of amortization, the council shall, by resolution, assess a pro rata portion of the deficiency on that lot, in the same proportion to the total deficiency on that lot as the number of full calendar years remaining in the period of amortization is to the total number of years in the period of amortization, subject to the twenty-five percent limitation of section 384.62. A deficiency assessment becomes a lien on the property and is payable in the same manner, and subject to the same interest and penalties as the other special assessments . . . .

A response to your first inquiry is complicated by the fact that no definition is provided for a private improvement in § 384.37, The Code 1981. Nevertheless, a workable definition can be extracted from case law. In Mazel v. Bain, 272 Ala. 640, 641-42, 133 So.2d 44, 45 (1961), the court, citing to Blacks Law Dictionary 890 (4th ed. 1951), defined an "improvement" as "[a] valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement of waste, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes." Some limitation to the term "private improvement" can be attached. In Quist v. Duda, 159 Neb. 393, 398, 67 N.W.2d 481, 485 (1954), the court noted that the term "improvement" is much broader than the term "repair" and includes the making of substantial additions or changes in existing buildings. Further, the term "improvement", according to Mutual Life Ins. Co. of Philadelphia v. Doughty, 187 N.J. Eq. 442, 447-48, 6 A.2d 184, 187 (1939), "necessarily includes much more than the term 'fixtures.'" Accordingly, a "private improvement", as used in § 384.63, The Code 1981, means any valuable addition to private property or an amelioration in its condition, excluding a public improvement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes. Mere repairs or fixtures, however, do not qualify as private improvements.

A response to your second inquiry is provided in three parts. First, two sections of the Code are equally relevant to a determination of the subject of a deficiency assessment. According to § 384.46, The Code 1981, the council's valuation of a lot is its "present fair market value." [Emphasis added]

Thus, the base year, on which subsequent valuations would be calculated, would be the year of the original valuation of a lot, as to that assessment. Further, § 384.63, The Code 1981, provides for an assessment of a deficiency. A deficiency, of course, refers to a shortage or deficit. Accordingly, a deficiency assessment should be the difference between what the council's valuation of the fair market value of a lot would have been had the private improvement been constructed prior to their determination and the value at which the council did assess the property. Second, the council, during the period of amortization, has a duty to assess a deficiency on a lot subject to a deficiency when a private improvement is constructed on the lot. According to § 384.63, The Code 1981, "[w]hen a private improvement is constructed on a lot subject to a deficiency, during the period of amortization, the council shall, by resolution, assess a pro rata portion of the deficiency on that lot . . . ." [Emphasis added] As used in the city code of Iowa, "'[s]hall' imposes a duty." Section 362.2(11), The Code 1981. Chapter 384 is included in the city code of Iowa. See § 362.2, The Code 1981. Finally, a deficiency assessment, according to § 384.63, The Code 1981, becomes a lien on the property. Accordingly, a change in the ownership of a lot does not have an effect on a deficiency assessment.

In summary, private improvement, as used in § 384.63, The Code 1981, means any valuable addition to private property or an amelioration in its condition, excluding a public improvement, costing labor and capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes. Mere repairs or fixtures, however do not qualify as private improvements. A deficiency assessment should be the difference between what the council's valuation of the fair market value of a lot would have been had the private improvement been constructed prior to their determination and the value at which the council did assess the property. During the period of amortization, the council has a duty to assess a deficiency on a lot subject to a deficiency when a private improvement is constructed on the lot. Finally, a change in the ownership of a lot does not have an effect on a deficiency assessment.

Very truly yours,

LYNN M. WALDING
Assistant Attorney General

LMW/nm

GRAIN DEALERS AND GRAIN WAREHOUSES. 1981 Session, 69th G.A., Ch. 180, §§ 11 and 27, amending §§ 542.11(1) and 543.36(1). The provisions of §§ 542.11(1) and 543.36(1) do not subject accountants or employees of grain dealers or grain warehouses to charges of fraudulent practice unless those persons withhold or falsify information in any records required to be submitted or maintained under Chs. 542 or 543. Accordingly, accountants and employees of grain dealers or grain warehouses are not required to take affirmative action to inform the Commerce Commission of information disclosing violations of those chapters unless that information is necessary to compile accurate financial statements or other records required to be kept by Chs. 542 and 543. (Weeg to Pellett, State Representative, 2/24/82) #82-2-13(L)

February 24, 1982

The Honorable Wendell C. Pellett
State Representative
State Capitol
L O C A L

Dear Representative Pellett:

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

> Do §§ 542.11(1) and 543.36(1), The Code 1981, as amended by Ch. 180, Acts of the 69th G.A, 1981 Session, subject either (a) the accountant for or (b) the employee of a licensed grain dealer or grain warehouse to criminal charges of fraudulent practice if that person does not inform the Iowa Commerce Commission of violations of Chs. 542 or 543, The Code 1981, which the employee or accountant has knowledge of?

I. Chapter 542

Chapter 542, The Code 1981, provides for licensing and regulations of Iowa grain dealers. Section 11 of Ch. 180, Acts of the 69th G.A., 1981 Session (H.F. 841) amends § 542.11(1) to read as follows:

> A person who knowingly submits false information to or knowingly withholds information from the commission or any of its employees when required to be submitted or maintained under this chapter, commits a fraudulent practice.

In order to determine the scope of this section, it is necessary to review its actual terms. First, the term "person" is by definition so broad that no person or group of persons is excluded. Therefore, the provisions of amended §§ 542.11(1) apply to both employees of the grain dealer as well as to C.P.A.'s employed by the grain dealer.

Second, while the class of persons to which this provision applies is all-inclusive, the situations in which § 542.11(1) governs are narrowly proscribed by the statute itself: knowingly withholding or falsifying information is prohibited only when that information is "required to be submitted or maintained under this chapter."

To elaborate, as we recently stated in Op.Att'y.Gen. #82-1-11, House File 841 was enacted in response to the financial collapse of several grain elevators in this state with severe losses to farmers with grain stored there. One of the chief mechanisms of H.F. 841 to help prevent future failures is to require that one of the following two documents be submitted with an application for a license to operate as a grain dealer: (1) a financial statement with an unqualified opinion based on an audit by a C.P.A., or (2) a financial statement accompanied by a report of a C.P.A. based on a review, which in the case of a class 1 license holder results in two inspections annually by the Commerce Commission. See §§ 542.3(4) and 542.3(5).

Any financial statement prepared by a C.P.A. for a grain dealer pursuant to § 542.3 constitutes information required to be submitted or maintained under § 542.11(1). Consequently, if a C.P.A. knowingly falsifies or withholds information from that financial statement he or she has committed a fraudulent practice in violation of § 542.11(1). Accordingly, if in the course of compiling a financial statement a C.P.A. becomes aware of facts that would place the client-grain dealer in non-compliance with the provisions of Ch. 542, and that information must be included in order to complete an accurate financial statement, the C.P.A. must include that information or commit a fraudulent practice under § 542.11(1). In any event, § 542.11(1) requires no more than that in the course of his or her professional duties a C.P.A. uphold the standards established by the profession itself. See 10 I.A.C. §§ 11.4(2) and 11.4(3).

Furthermore, § 542.11(1) does not require a C.P.A. to disclose any confidential client information in contravention of 10 I.A.C. § 11.5(1). Section 542.3 requires that a grain dealer submit a financial statement prepared by a C.P.A. to the Commerce Commission. While a grain dealer is required to employ a C.P.A. to prepare the financial statement pursuant to this section, it is the grain dealer who must submit the statement, not the C.P.A.

Finally, if a C.P.A. prepares a financial statement which discloses information revealing that the grain dealer is in noncompliance with the provisions of Ch. 542, and the grain dealer refuses to disclose or permit inspection of that document, the grain dealer, not the C.P.A., is guilty of a serious misdemeanor pursuant to the provisions of §§ 542.11(2).

The above analysis regarding a C.P.A.'s responsibilities under § 542.11(1) applies with equal force to the responsibilities of an employee of a grain dealer under that section. Thus, if an employee knowingly withholds information from or falsifies records required to be kept under Ch. 542, e.g., such as those required by amended § 542.12, that employee commits a fraudulent practice under § 542.11(1).

II. Chapter 543

Chapter 543, The Code 1981, provides for licensing and regulation of grain warehouses. Section 27 of Ch. 180, Acts of the 69th G.A., 1981 Session, (H.F. 841) amends § 543.36(1) to read as follows:

> A person who knowingly withholds information from or knowingly submits false information to the commission or any of its employees in a document or a book, account, or record required to be submitted or maintained under this chapter commits a fraudulent practice.

Chapter 543 requires that grain warehouses follow licensing procedures identical to those imposed on grain dealers by Ch. 542. See § 543.6. However, the language of § 543.36(1) is even more explicit than that of § 542.11(1): a fraudulent practice is committed under § 543.36(1) if a person knowingly withholds or falsifies information in a document or a book, account, or record required to be submitted or maintained under Ch. 543. Consequently, our previous analysis of the provisions of § 542.11(1) applies equally to the almost identical provisions of § 543.36(1).

III. Conclusion

In conclusion, the provisions of §§ 542.11(1) and 543.36(1) do not subject accountants or employees of grain dealers or grain warehouses to charges of fraudulent practice unless those persons withhold or falsify information in any records required to be submitted or maintained under Chs. 542 or 543. Accordingly, accountants and employees of grain dealers or grain warehouses are not required to take affirmative action to inform the Commerce Commission of information disclosing violations of those chapters unless that information is necessary to compile accurate financial statements or other records required to be kept by Chs. 542 and 543.

Sincerely,

Theresa Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW/nm

COUNTIES: COUNTY COMPENSATION BOARD: Ch. 340A, The Code 1981, § 340A.6. Chapter 340A establishes no limitations on what factors the county compensation board can consider before reaching its final salary recommendations. (Weeg to Heintz, Chickasaw County Attorney, 2/24/82) #82-2-12(L)

February 24, 1982

William A. Heintz
Chickasaw County Attorney
New Hampton, Iowa 50659

Dear Mr. Heintz:

You have requested an opinion of the Attorney General as to whether the county compensation board is permitted to consider factors other than "the compensation paid for comparable offices in other counties of this state, . . ." in reaching its recommended compensation schedule for elective county officers. It is our opinion that Ch. 340A, The Code 1981, establishes no limitations on what factors the compensation board can consider before reaching its final salary recommendations.

Chapter 340A governs the county compensation board. In particular, § 340A.6 sets forth the steps for the board to follow in reaching its recommended salary schedule. As you note in your opinion request, this section requires the board to include in its consideration a review of salaries paid for comparable offices in other counties and levels of government. Section 340A.6 further requires the board to publish its recommended schedule and hold a public hearing before submitting a final recommendation to the board of supervisors. The publication is to include a comparison of a county officer compensation study with the board's own recommended schedule in the event such a study has been received from the legislature within the preceding five years.

While § 340A.6 does require that the board consider one particular factor and that a comparison study be published if available, nothing in § 340A.6, nor in Ch. 340A as a whole, limits the compensation board to consideration of only those

two narrow factors. Indeed, we are of the opinion that it is necessary for the board in the exercise of its official duties to consider any other factors which it believes are relevant to the setting of appropriate salaries for county salaries for county officers. Factors such as the state of the national and local economies are arguably relevant to the board's consideration. Furthermore, under an exercise of county home rule authority and in the absence of countervailing state legislation, the board is empowered to give weight to any factors it deems significant.

For these reasons, it is our opinion that the county compensation board is subject to no limitations on what factors it can consider before establishing its final salary recommendations.

Sincerely,

Theresa Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:sh

PENSIONS: Retirement Systems for Policemen and Firemen, Chapter 411, The Code, 1981. Persons who have terminated their employment prior to becoming vested under a Chapter 411 Retirement System, are not entitled to recovery of their contributions made to that system. (Swanson to Welsh, State Representative, 2/24/82) #82-2-11(L)

The Honorable Joseph J. Welsh
State Representative
State Capitol Building
L O C A L

February 24, 1982

Dear Representative Welsh:

We have received your request for an opinion from this office concerning the legality of prohibiting the recovery of contributions to a retirement system under Chapter 411, The Code, by persons who have terminated their employment prior to becoming vested.

You state that an employee covered by a Chapter 411 pension plan is required to contribute to the plan but does not become eligible for benefits until the fifteenth year. Therefore, an employee could pay into the system for any number of years less than fifteen, terminate his or her employment, and would have been deprived of his or her money while accruing no benefit.

Although the Iowa Supreme Court has recognized that rights in a public employees' pension system "vest" in the sense that, when a pension right has once accrued, authorities charged with administration of the system cannot, absent explicit statutory authority, refuse to pay the pension, the court has consistently refused to recognize any such vested right as will bar repeal or modification of the statute. Rockenfield v. Kuhl, 46 N.W.2d 17 (Iowa 1951). The fact that a particular pension statute calls for compulsory contributions by participating employees is viewed as not affecting the nonvested character of their pension rights. Lage v. Marshalltown, 235 N.W. 761 (Iowa 1931).

The amount retained in these cases, although called part of the prospective pensioner's compensation, has never been received or controlled by him, and its appropriation to the pension fund cannot be prevented by him; it remains a part of the public funds beyond his power of disposition. Pennie v. Reis, 132 U.S. 464, 10 S.Ct. 149, 33 L.Ed. 426.

Consequently, the general rule, based upon the great weight of authority, is that in the absence of any legislative provision for refund, a member leaving the system before becoming eligible for retirement has no right to a refund of the amounts contributed from his pay to the pension fund. Robbins v. Police Pension Fund (D.C.N.Y.), 321 F.Supp 93; Muzquiz v. San Antonio (D.C.Tex.), 378 F.Supp. 949; Grace v. Los Angeles, 249 Cal.App.2d 577, 58 Cal.Rptr. 388: Derby v. Police Pension and Relief Board, 412 P.2d 897 (Colo. 1966); Jud v. San Antonio (Tex.Civ.App.), 313 S.W.2d 903 (1958). A statutory merger of pension funds has been held to be constitutional under this rule, and not violative of any vested rights. Penny v. Reis, above. In accord is the case of Flemming v. Nestor, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d. 1435 (1960).

A case illustrative of the general rule is Sandell v. Saint Paul Police Relief Ass'n, 236 N.W.2d 170 (Minn. 1975). There the retirement system provided for retirement pensions after 20 years minimum service. The issue raised was whether plaintiff members of the St. Paul Police Relief Association who voluntarily terminated their employment with the police department prior to becoming eligible for retirement pension benefits were entitled to a refund of their compulsory contributions to the pension fund in the absence of express statutory authority to either refund or retain those contributions. The court held that in light of the legislative intention not to allow refunds, the lack of any contractual provision for refund, and the decisions of other jurisdictions uniformily denying refunds under similar circumstances, the plaintiffs were not entitled to refunds.

In summary, we conclude that persons who have terminated their employment prior to becoming vested under Chapter 411, The Code, are not legally entitled to recovery of their contributions to that retirement system.

Sincerely,

Gary H. Swanson

GARY H. SWANSON
Assistant Attorney General

GHS/mel

SENTENCING, CONFIDENTIAL RECORDS, DEFERRED JUDGMENT, DEFERRED SENTENCE: Chapter 68A and sections 901.5, 907.1, 907.3, and 907.9. There is a significant difference between a "deferred sentence" and a "deferred judgment." The essential characteristic of a deferred sentence is that the court pronounces judgment but defers imposition of sentence. When the court defers judgment, both the adjudication of guilt and the imposition of sentence are deferred. Prior to completion of probation the record of the deferred judgment or deferred sentence is not a confidential record. When the defendant is discharged from a deferred judgment the criminal record is expunged. (Cleland to Nystrom, State Senator, 2/24/72) #82-2-10(L)

February 24, 1982

Honorable Senator John N. Nystrom
P.O. Box 177
Boone, Iowa 50036

Honorable Senator John N. Nystrom:

You have requested an Attorney General's Opinion regarding the following questions:

1. What is the difference between a "deferred judgment" and a "deferred sentence"?

2. Is it legal to release for publication and to the public in general, information as to the name and address of persons granted deferred judgments or sentences?

I

Before considering these questions it is necessary to define some relevant terms. A "judgment" consists of an "adjudication of guilt" and "imposition of sentence." State v. Farmer, 234 N.W.2d 89, 92 (Iowa 1975). "An adjudication of guilt is a judicial declaration of the defendant's legal guilt of the offense." Id. "Final judgment" in a criminal case refers to "entry of sentence." 239 N.W.2d at 90. The term conviction may mean either (1) the "status of being guilty, and sentenced for, a criminal offense," or (2) a verdict of guilty or a plea of guilty, depending on the intent of the legislature. State v. Hanna, 179 N.W.2d 503, 507-508 (Iowa 1970).

Prior to the adoption of the new criminal code the court had two probation options under § 789A.1, The Code 1977. It could defer judgment pursuant to § 789A.1(1) or it could suspend sentence pursuant to § 789A.1(2).[1]

As part of the new criminal code revision, the legislature enacted what is now § 907.3(1), The Code 1981. That section provides in relevant part:

> With the consent of the defendant, the court may defer judgment and place the defendant on probation upon such conditions as it may require, or defer sentence and assign the defendant to the judicial district department of correctional services. Upon a showing that such a person is not co-operating with the program or is not responding to it, the court may withdraw the person from the program and impose any sentence authorized by law. Upon fulfillment of the conditions of probation, the defendant shall be discharged without entry of judgment . . . .

(Emphasis added.) Also relevant to our inquiry is § 901.5, The Code 1981, which provides in relevant part:

> At the time fixed by the court for pronouncement of judgment and sentence, the court shall act accordingly:
> 1. If authorized by section 907.3, the court may defer judgment and sentence for an infinite period in accordance with chapter 907 . . . .

---

[1]While the Supreme Court did on occasion use the term "deferred sentence," see State v. Hesford, 242 N.W.2d 256, 257 (Iowa 1976), we do interpret this to mean that a "deferred sentence" was a separate and distinct alternative. A "deferred judgment" necessarily includes a "deferred sentence;" that is, a sentence may not be imposed without either an explicit or implicit adjudication of guilt. Thus, reference to a "deferred sentence" prior to the adoption of the new criminal code was merely a reference to that part of the "deferred judgment" which was the "deferred sentence."

> 5. If authorized by section 907.3, the court may defer the sentence and assign the defendant to the judicial district department of correctional services . . . .

It is clear from comparing § 789A.1, The Code 1977, with §§ 901.5 and 907.3(1), The Code 1981, that there has been a substantial change in the relevant statutory language. The question, then, is whether a substantive change was also intended. See Emery v. Fenton, 266 N.W.2d 6, 10 (Iowa 1978).

It is logical to presume that since the legislature used both "deferred judgment" and "deferred sentence" in the same sections, §§ 907.3(1) and 901.5, that the legislature must have intended that they have different meanings. Why use both terms when under the prior code the single term "deferred judgment" was sufficient? If the elements of judgment are (1) an adjudication of guilt, and (2) imposition of sentence, then "deferred judgment" must refer to deferring the "adjudication of guilt" and "deferred sentence" must refer to deferring "imposition of sentence." Since sentence cannot be imposed without an adjudication of guilt, both the adjudication of guilt and imposition of sentence is deferred when the court defers judgment. Thus, through the process of eliminating possible alternatives, deferred sentence as used in § 907.3(1) must mean the court enters an adjudication of guilt (pronounces judgment) but does not impose a sentence. This does not mean that a deferred sentence is the same as a "suspended sentence." See § 907.3(2), The Code 1981. When the court enters a deferred sentence, it retains the power to sentence the defendant to any sentence it could have originally imposed in the event there is a showing that the defendant is "not co-operating with the program or not responding to it . . . ." § 907.3(1), The Code 1981. This is not the case with regard to a suspended sentence. When the court enters judgment and sentence and then suspends sentence, a revocation of the suspended sentence results in the execution of sentence already pronounced.

This change is not without significant consequences. A defendant granted a deferred sentence must be assigned to the judicial district department of correctional services. Compare § 907.1, The Code 1981, with

§ 907.3(1). A defendant who successfully completes the terms of a deferred sentence is not entitled under § 907.3 to be discharged "without entry of judgment" because judgment (adjudication of guilt) has already been entered. The clerk of the district court need not report a deferred sentence to the supreme court administrator under § 907.4, The Code 1981, and defendant's criminal record is not expunged under the provisions of § 907.9, The Code 1981, when defendant is discharged from a deferred sentence.

Where the legislature intended the ordinary legal meaning of the term conviction to apply, see State v. Hanna, 179 N.W.2d 503, 508-509 (Iowa 1970) (verdict of guilty or plea of guilty), distinguishing between "deferred judgments" and "deferred sentences" has no significance. The significance of this distinction is less clear with regard to those instances where the legislature intended the technical definition, to wit: the status of being guilty of, and sentenced for, a criminal offense, to apply. For example, it is possible that the legislature intended that a formal declaration of defendant's guilt of the offense is sufficient to support an habitual offender charge under § 902.8, The Code 1981. In this instance, however, we believe that the principle of Emery v. Fenton, 266 N.W.2d 6, 10 (Iowa 1978) (absent a clear and unmistakable manifestation of legislative intent to the contrary, the new criminal code will not be read as altering prior law) controls. It is our opinion that there is insufficient evidence that the legislature intended to alter the technical definition of the word "conviction" to reach that conclusion. If the legislature desires to alter the technical definition of the term "conviction," a provision setting forth the desired definition added to either chapter 702 or § 801.4, The Code, would be an appropriate way to manifest such intent.

II

We have reviewed chapter 68A and § 907.9, The Code 1981, and we can find nothing in these provisions that would make a record of a deferred judgment or a deferred sentence confidential. Under the appropriate circumstances the court could enjoin the release of such information under § 68A.8. Moreover, the defendant is

protected against disclosure after discharge from a deferred judgment under § 907.9.

Sincerely,

Richard L. Cleland

RICHARD L. CLELAND
Assistant Attorney General

RLC:mlr

TAXATION: Listing of Accreted Lands for Property Taxation. §§427.13, 428.1, 428.2, 428.4, 441.18, 441.19, 441.24, and 443.18, The Code 1981. Accreted lands, not heretofore listed and assessed for taxation, should be listed and assessed for property taxation in the 1982 assessment year, even if the acreage of such lands has to be estimated. (Griger to Maher, Fremont County Attorney, 2/10/82) #82-2-8(L)

February 10, 1982

Richard B. Maher
Fremont County Attorney
Fremont County Courthouse
Sidney, IA 51652

Dear Mr. Maher:

You have requested an opinion of the Attorney General regarding the property taxation of certain accreted lands along the Missouri River in Fremont County. Apparently, in some instances the amount of land recorded is inaccurately described in the recorded instrument and in other instances there is simply no recordation of such land as to size or owner. Your basic question is how are these accreted lands to be listed and taxed.

In Mather v. State, 200 N.W.2d 498 (Iowa 1972), the Iowa Supreme Court set forth the standards to apply to determine the ownership of accreted lands in a dispute between riparian owners and the State of Iowa in 200 N.W.2d at 500:

> Accretion results from a gradual and imperceptible addition to the shoreline by action of the water to which the land is contiguous. Land may accrete to an island or on the riverbed itself as well as long the shoreline.

> One who owns land fronting on a navigable stream owns to the ordinary high water mark. The term "ordinary high water mark" has been defined as being "co-ordinate with the limit of the bed of the water, and that, only, is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation and destroy its value for agricultural purpose."
>
> The State owns the river bed from the ordinary high water mark to the center or thread of the stream. Land which accretes to an island in a navigable stream or to the bed of the stream itself becomes the property of the State.
>
> Land which accretes at or above the ordinary high water mark becomes the property of the landowner to whose shore it attaches.

For purposes of your inquiry, accreted land which would be owned by the state would not be subject to property tax. See §427.1(1), The Code 1981. Therefore, the remainder of this opinion assumes a situation where the land is owned or managed by a person who is not entitled to a property tax exemption. It is also assumed that the amount of accreted land, at this time, is not accurately set forth in the plat book which the county auditor furnishes to the assessor in accordance with §441.29, The Code 1981.[1]

Every person who owns, controls, or manages real property in this state has the duty to list such property for taxation with the assessor. See §§427.13, 428.1, 428.2, 428.4, 441.18, 441.19, 441.24 and 443.18, The Code 1981. There is no exception in the Iowa property tax statutes which would prevent accreted lands from being listed and assessed for property taxation. Therefore, the following statement in Read v. Schulmeister, 229 Iowa 844, 850, 295 N.W. 169, 172 (1940) is applicable to the situation you pose:

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[1]Generally, the county auditor would furnish to the assessor a plat book which would depict the owner and description of each tract of land. It is our understanding that survey work is being conducted in Fremont County and that this should result in a determination of the amount of accreted land contiguous to particular tracts. The results of such survey can then become part of the plat book mentioned in §441.29. However, whether accreted lands are excluded from or inaccurately described in the plat book or not set forth in a recorded instrument would not preclude the assessor from assessing them for property tax purposes.

> Under our statutes, the legislature has imposed upon every property owner the duty, first, to assist the assessor in properly listing all of his property for taxation . . . and, second, if the assessor fails to get the property entered on his assessment roll before turning it in, it is the owner's duty to go to the auditor or county treasurer and have his property entered on the proper records and have the same assessed and pay the taxes thereon. . . . If there are any discrepancies and errors in description, the law provides a way for correcting the same at any time before the tax is paid.

Even if the property taxpayer, because of the absence of a survey, is unable to list for the assessor the actual amount of accreted land, an estimated acreage should be listed. Talley v. Brown, 146 Iowa 360, 364 125 N.W. 248, 250 (1910). And, of course, the assessor has the authority, in the exercise of his or her discretion, to make an estimate of the amount of accreted land and is not bound by the property taxpayer's estimate. Tiffany v. County Bd. of Rev. In and For Greene Co., 188 N.W.2d 343, 349 (Iowa 1971); Talley v. Brown, 146 Iowa at 364. Therefore, such heretofore untaxed accreted lands should be included upon the assessment rolls for the 1982 assessment year. See §§441.26 through 441.28, The Code 1981. In the event that the taxpayer would be dissatisfied with the assessor's assessment of the accreted lands, he or she has the opportunity to appeal to the board of review. See §441.37, The Code 1981.

In conclusion, accreted lands, not heretofore listed and assessed for taxation, should be listed and assessed for property taxation in the 1982 assessment year, even if the acreage of such lands has to be estimated.[2]

Very truly yours,

Harry M. Griger

Harry M. Griger
Special Assistant Attorney General

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[2]This opinion does not deal with the question of omitted assessment of accreted lands for years prior to 1982. See §§443.6 through 443.17, The Code 1981; Jewett v. Foote, 119 Iowa 359, 93 N.W. 364 (1903).

MOTOR VEHICLES: Chauffeur's License. §321.1(43) Iowa Code 1981. Rescue units and ambulances are not fire apparatus. A volunteer firefighter does not need a chauffeur's license to operate rescue units and ambulances if there is no expectation of remuneration, other than reimbursement for fuel. (Ewald to Junkins, Senator, 2/10/82) #82-2-7(L)

February 10, 1982

The Honorable Lowell L. Junkins
State Senator
Forty-Third District
Statehouse
Des Moines, IA 50319

Dear Senator Junkins:

You have requested an Opinion of the Attorney General concerning the following questions:

1. Are rescue units and ambulances operated by volunteer firefighters considered fire apparatus?

2. If such vehicles are not fire apparatus, are volunteer firefighters required to hold a chauffeur's license when they operate such vehicles?

3. Are volunteer firefighters subject to the requirement of a chauffeur's license if there is no fee or charge attached to the service provided?

All of these questions involve an interpretation of Section 321.1(43), Code of Iowa 1981, which defines the term "chauffeur." That section was amended by Senate File 557 in 1981 to read as follows:

> "Chauffeur" means any person who operates a motor vehicle, including a school bus, in the transportation of persons~~, including school buses,~~ for wages, compensation or hire, or any person who operates a truck tractor, road tractor or any motor truck which is required to be registered at a gross weight classification exceeding five tons, or any such motor vehicle

> exempt from registration which would be within ~~such~~ the gross weight classification if not so exempt except when ~~such~~ the operation by the owner or operator is occasional and merely incidental to ~~his~~ the owner or operator's principal business or is by a volunteer firefighter operating fire apparatus.

Acts of the 69th G.A., 1981 Session, Chapter 101.

A few months before passage of Senate File 557, this office construed §321.1(43). Op.Atty.Gen. #81-3-12(L), attached. There we opined that a volunteer firefighter who operates a firetruck must possess a chauffeur's license, but a volunteer firefighter who operates an ambulance need not possess a chauffeur's license if he or she receives no compensation other than reimbursement for fuel expenses. Op.Atty.Gen. #81-3-12(L) at 3-4.

The last line of Senate File 557 now clearly indicates that the Legislature intended to exempt volunteer firefighters operating fire trucks and other fire apparatus from the requirement of obtaining a chauffeur's license. Thus, with respect to volunteer firefighters operating fire trucks, Senate File 557 supersedes Op.Atty.Gen. #81-3-12(L).

We now turn to your first question which asks if rescue units and ambulances are "fire apparatus." Iowa courts have apparently never construed this term. Decisions from other jurisdictions, however, and our own interpretation of the words, lead us to conclude that the term "fire apparatus" was not intended to include rescue units or ambulances. Admittedly, the word "apparatus" is a general term meaning, inter alia, a collection or set of machines, materials, implements, or utensils for a given work or task. See, e.g., Illinois Bell Tel. Co. v. Miner, 136 N.E.2d 1, 16, 11 Ill.App.2d 44 (1956). However, where the given task is firefighting, the term apparatus would be limited to those machines, implements, etc. used to fight fires. Inasmuch as rescue units and ambulances are not customarily used to fight fires, we would not classify them as fire apparatus, even if we were to liberally construe the term "firefighting." See State Employment Retirement System v. Workmen's Comp. Appeals Bd., 73 Cal. Rptr. 172, 175 (Cal.App. 1968) (process of firefighting includes persons performing tactical and logistical functions as well as those who extinguish flames).

Your second and third questions ask whether volunteer firefighters are required to hold a chauffeur's license to operate rescue units or ambulances, although such vehicles do not qualify as fire apparatus, if there is no fee or charge attached to the service.

We partially answered these questions in our earlier opinion:

> [If the ambulance driver] in question is truly a volunteer firefighter, and if [any] fees collected are merely reimbursement for fuel, that individual would not be required to possess a chauffeur's license. Op.Atty.Gen. 81-12-3(L) at 4.

We see no reason not to reaffirm that opinion, since Senate File 557 does not affect operators of rescue units or ambulances, which we assume do not exceed a gross weight of five tons. Thus the license requirements for ambulance and rescue unit drivers would seem, now as before, to turn on whether the person in question is "truly a volunteer firefighter."

We recognize the fact that many Iowa volunteer fire departments also perform rescue operations and operate ambulances. Therefore, we would construe the term "firefighter" to include persons who perform emergency duties as a member of a volunteer fire department, even though some of these duties may not involve responding to fire alarms or extinguishing fires.

All such persons, however, are not necessarily "volunteers." A "volunteer" is a person who performs a service without promise of remuneration, either express or implied. Seavert v. Cooper, 187 Iowa 1109, 175 N.W.19, 21 (1919). "Remuneration" means reward, recompense, salary; whatever consideration a person gets for giving his or her services. Black's Law Dictionary 1460 (rev. 4th ed. 1968); See Kaus v. Unemployment Compensation Commission, 230 Iowa 860, 299 N.W. 415, 419 (1941) (remuneration includes commission payments, percentage retention, and other indirect methods of collecting compensation); Stiles v. Des Moines Council, Boy Scouts of America, 209 Iowa 235, 229 N.W. 841, 844 (1930) (payment of expenses does not constitute remuneration).

Thus a true volunteer firefighter would be a person who performs emergency duties as a member of a volunteer fire department, and who does so with no expectation of receiving any payment, fee, salary, "donation," compensation or remuneration, however small, for the services performed. The only recognized exception, if it can be called such, is that money received as reimbursement of fuel expenses does not constitute remuneration. Op.Atty.Gen. #81-3-12 at 4.

Accordingly, in answer to your second question, volunteer firefighters need not hold a chauffeur's license when they operate rescue units and ambulances, if they do not expect to receive any remuneration, other than reimbursement for fuel.

In answer to your third question, if there is no fee or charge attached to the rescue or ambulance service, and if the driver receives no remuneration, except reimbursement for fuel, then he or she is exempt from the chauffeur's license requirement.

If, on the other hand, the volunteer fire department does charge a fee for its rescue or ambulance services, and if this fee or any portion of it is passed on to the driver, except as reimbursement for fuel, then such driver would need a chauffeur's license. If the fees collected are not passed on to the driver, but rather used for equipment, operating expenses, etc., then the driver's volunteer status would not be affected, and the driver would not need a chauffeur's license.

Sincerely,

Robert P. Ewald

Robert P. Ewald
Assistant Attorney General

Encl: Op.Atty.Gen. #81-3-12(L)

SCHOOLS: School Lunches for Staff Members. Ch. 283A, The Code 1981. The Iowa Code does not allow school districts to provide school lunches without charge to staff members, except where staff members are on lunch room supervisory duty or pursuant to contract. (Fleming to Schwengels, State Senator, 2/10/82) #82-2-6(L)

February 10, 1982

Honorable Forrest V. Schwengels
State Senator
State Capitol
L O C A L

Dear Senator Schwengels:

You have requested our opinion on the following matter:

> Is there a prohibition against providing free school lunches to administrators and other staff members under Chapter 283A of the Code, School Lunch program?

Chapter 283A grants school district boards the power to operate or provide for the operation of school lunch programs at all public schools in each district. See § 283A.2, The Code 1981. The Code defines "school lunch program" in § 283A.1(3) as:

> . . . a program under which lunches are served by any public school in the state of Iowa on a nonprofit basis to children in attendance, including any such program under which a school receives assistance out of funds appropriated by the Congress of the United States.

No section in Ch. 283A speaks directly to the issue you have raised. Moreover, the rules and regulations that have been promulgated by the State Board of Public Instruction pertaining to the operation of school lunch programs do not deal with the issue you have raised. See Ch. 670 I.A.C. §§ 10.1-10.3. Furthermore, the statute and rules make no reference to the availability of school lunches to the teachers, administrators and other staff members on any basis, free or otherwise.

We note at the outset that any issue relating to school districts must be explored in the context of the operation of Dillon's Rule: The only powers of a school district are those expressly granted or necessarily implied in governing statutes. McFarland v. Board of Education, 277 N.W.2d 901, 906 (Iowa 1979); Barnett v. Durant Community School District, 249 N.W.2d 626, 627 (Iowa 1977); Silver Lake Consolidated School District v. Parker, 238 Iowa 984, 990, 29 N.W.2d 214, 217 (1947). Thus under the rubric of Dillon's Rule, where the power to make school lunches available to employees of the district is not "expressly granted", the power to make lunches available on any basis to the staff must be "necessarily implied" in the governing statutes.

We understand that many, if not most, school districts allow staff members to purchase school lunches. We do not challenge that practice nor do we understand your question as a challenge to that practice. We mention it in passing because of the statutory silence on the availability of "school lunches" to staff.

You are probably familiar with the aphorism "There is no such thing as a free lunch." It is our opinion that the Iowa Code does not permit school districts to provide "free school lunches to administrators and other staff members" except in the circumstances we shall discuss below.

A. Lunch room supervision.

We assume that students must be supervised during the lunch period. When staff members are required to be on duty to supervise students during the lunch period, making a "free" lunch available to those on supervisory duty could be "necessarily implied" from the power to operate a school lunch program for children in attendance. Furthermore, we believe that the cost of the lunch for those on duty would be a cost "incident to the operation of the lunch program." See 1966 Op. Att'y Gen., § 14.23, p. 302, 303.

B. As a contract right.

School boards hold power to contract with teachers and nurses pursuant to § 279.13 and with administrators pursuant to § 279.23. Both of those sections state that contracts entered into by a district with its employees may contain "any other matters as may be mutually agreed upon." §§ 279.13(1) and 279.23(5). See also § 29.9 (Scope of Negotiations under Public Employment Relations Act: "other matters mutually agreed upon").

We note that the list of mandatory negotiable items in § 20.9 has been given a narrow construction by the Iowa Supreme Court. See Charles City Community School Dist. v. P.E.R.B., 275 N.W.2d 766, 773 (1979). We do not believe that a "free lunch" falls under any of the mandatory subjects of negotiation but could be "added with agreement of both parties." Id. at 772. If such a contractual right is acquired, the expense incurred by the district in providing lunches to employees should be reflected in the district's instructional and administrative costs and not in the cost of serving lunches "on a non-profit basis to children in attendance" in the public school.

In sum, we conclude that the Iowa Code does not allow school districts to provide school lunches without charge to staff members, except where staff members are on supervisory duty or pursuant to contract.

Sincerely yours,

Merle Wilna Fleming

MERLE WILNA FLEMING
Assistant Attorney General

MWF:sh

TAXATION: Improvement Projects Commenced Prior to Designation of Urban Revitalization Area. Sections 404.3 and 404.4, The Code 1981. In the event that an improvement project is begun prior to January 29, 1979, or one year prior to the adoption by the city of a plan of urban revitalization, whichever occurs later, improvements made during the time the area is designated as an urban revitalization area are not eligible for the property tax exemption authorized in Chapter 404, The Code 1981. (Griger to Murray, State Senator, 2/5/82) #82-2-4(L)

February 5, 1982

The Honorable John S. Murray
State Senator
2330 Lincoln Way
Ames, IA 50010

Dear Senator Murray:

You have requested an opinion of the Attorney General concerning the urban revitalization tax exemptions contained in Chapter 404, The Code 1981. Specifically, you inquire whether construction projects in progress at the time of the adoption by a city of a plan of urban revitalization pursuant to §404.2, The Code 1981, qualify for the tax exemptions allowed by Chapter 404. In the situation you pose the city council adopted a plan of revitalization on December 1, 1981.

In answer to your question, any construction project which is begun after December 1, 1980, would be eligible for the exemption for the actual value added during the time the area was designated as a revitalization area, assuming all other conditions set forth in Chapter 404 for exemption qualification have been met.

Chapter 404 allows a city the local option of designating an area which meets the criteria set forth in §404.1, The Code 1981, as a revitalization area. Generally, such an area would contain deteriorated or older structures or improvements. The purpose of granting this tax exemption is to create an incentive for the rehabilitation or

improvement of the designated revitalization area.[1] There are a number of conditions, which pursuant to §404.2, must be met as a prerequisite for properly designating a particular area as a revitalization area. Once those conditions have been met and the city has thereby adopted its ordinance for designation of the revitalization area, the "qualified real estate" located in the revitalization area is eligible for property tax exemption, as authorized by §404.3, The Code 1981.

The term "qualified real estate" is defined in §404.3(7), The Code 1981, and it is the actual value added to "qualified real estate" which is eligible for this property tax exemption. Legislative definitions are controlling in the interpretation of statutes. S & M Finance Co. Fort Dodge v. Iowa Sate Tax Comm'n, 162 N.W.2d 505, 507 (Iowa 1968).

When the present Chapter 404 was introduced in the legislature, as House File 81, in 1979, the definition of "qualified real estate" in Section 3(6) read as follows:

> "6. 'Qualified real estate' as used in this Act means real property, other than land, which is located in a designated revitalization area and to which improvements have been added, during the time the area was so designated, which have increased the actual value by at least fifteen percent, or at least ten percent in the case of real property assessed as residential property. 'Qualified real estate' also means land upon which no structure existed at the start of the new construction, which is located in a designated revitalization area and upon which new construction has been added during the time the area was so designated. 'Improvements' as used in this Act includes rehabilitation and additions to existing structures as well as new construction on vacant land or on land with existing structures. 'Actual value added by the improvements' as used in this Act means the actual value added as of the first year for which the exemption was received." (Emphasis supplied).

The third unnumbered paragraph in Section 4 of House File 81 stated in relevant part:

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[1]Section 404.1(3) also allows a city to designate such an area in which the predominance of buildings or improvements is such that by reason of age, history, architecture or significance, they should be preserved or restored to productive use.

> "The governing body of the city shall approve the application, subject to review by the local assessor pursuant to section five (5) of this Act, if the project is in conformance with the plan for revitalization developed by the city, is located within a designated revitalization area and if the improvements were made during the time the area was so designated. . ." (Emphasis supplied).

This language appears in Section 404.3, unnumbered paragraph 3.

An examination of the above underscored language in House File 81 clearly discloses a legislative intent that the actual value added which would qualify for the property tax exemption must have been made when the area was designated as a revitalization area, and not before.

As amended and passed by the House of Representatives, House File 81, Section 3(7), read:

> "7. 'Qualified real estate' as used in this Act means real property, other than land, which is located in a designated revitalization area and to which improvements have been added, during the time the area was so designated, which have increased the actual value by at least fifteen percent, or at least ten percent in the case of real property assessed as residential property or which have, in the case of land upon which is located more than one building and not assessed as residential property, increased the actual value of the buildings to which the improvements have been made by at least fifteen percent. 'Qualified real estate' also means land upon which no structures existed at the start of the new construction, which is located in a designated revitalization area and upon which new construction has been added during the time the area was so designated. 'Improvements' as used in this Act includes rehabilitation and additions to existing structures as well as new construction on vacant land or on land with existing structures. However, new construction on land assessed as agricultural property shall not qualify as 'improvements' for purposes of this Act unless the governing body of the city has presented justification at a public hearing held pursuant to section two (2) of this Act for the revitalization of land

> assessed as agricultural property by means of new construction. Such justification shall demonstrate, in addition to the other requirements of this Act, that the improvements on land assessed as agricultural land will utilize the minimum amount of agricultural land necessary to accomplish the revitalization of the other classes of property within the urban revitalization area. However, if such construction, rehabilitation or additions were begun prior to January 29, 1979, or one year prior to the adoption by the city of a plan of urban revitalization pursuant to section two (2) of this Act, whichever occurs later, the value added by such construction, rehabilitation or additions shall not constitute an increase in value for purposes of qualifying for the exemptions listed in this section. 'Actual value added by the improvements' as used in this Act means the actual value added as of the first year for which the exemption was received." (Amendatory language underscored).

The above underscored langauge in Section 3(7) dealt with three matters. First, nonresidential buildings, under the circumstances therein, must have increased in actual value by at least fifteen percent to be eligible for the exemption. Second, certain criteria for tax exemption eligibility of new construction on land assessed as agricultural property is set forth. Third, in the event that improvements were begun prior to January 29, 1979, or one year prior to the city's adoption of an urban revitalization plan, whichever occurs later, the value added by such improvements does not qualify for the tax exemption.

As finally enacted by the legislature in 1979, Section 3(7) of House File 81 was again amended, but an examination of §404.3(7) - into which section 3(7) of House File 81 was codified - reveals that those amendments do not bear upon the question posed in your opinion request.

In essence, §§404.3(7) and 404.4, unnumbered paragraph 3, contain language requiring that the improvements be made during the time that the city has designated an area as an urban revitalization area as a prerequisite for such improvements to qualify for the urban revitalization tax exemption. Section 404.3(7) states that improvements begun prior to January 29, 1979, or one year prior to the city's adoption of an urban revitalization plan, whichever occurs later, cannot qualify for the tax exemption. Does such language mean that if a construction project was in progress when the city adopted the urban revitalization plan, the value added by such project can still qualify for tax exemption?

Statutes should be construed so that all portions are given effect and no portion is rendered meaningless or inoperative, if reasonably possible to do so. Goergen v. State Tax Commission, 165 N.W.2d 782, 786 (Iowa 1969).

The legislature has clearly stated that in order to qualify for the urban revitalization tax exemption, the actual value added by improvements must be made during the time that the city has designated the area as a revitalization area. To say that improvements which were actually made after June 29, 1979, or within one year of the city's adoption of an urban revitalization plan, whichever occurs later, but which were made prior to the time of such adoption, would qualify for the tax exemption would render provisions in §§404.3(7) and 404.4 in conflict and would render the statutory language requiring the improvements to be made during the time of urban revitalization designation inoperative and meaningless. Moreover, to say that such improvements qualify for exemption, although made before urban revitalization designation, would broaden the scope of the exemption and not strictly construe it. In the event of doubt whether improvements qualify for this tax exemption, such doubt should be resolved against exemption and in favor of taxation. See Op. Att'y Gen. #80-5-8, a copy of which is attached hereto.

A rational interpretation of the language disqualifying for tax exemption projects begun prior to January 29, 1979, or one year prior to the adoption by the city of a plan of urban revitalization, whichever occurs later, is that the value added by such construction made during the time the area was designated as a revitalization area is ineligible for the exemption. Therefore, in the situation you pose, wherein the city adopted its urban revitalization plan on December 1, 1981, construction projects which were in progress and which had begun on or prior to December 1, 1980, cannot receive any exemption for improvements made on or after December 1, 1981. However, if a construction project was commenced after December 1, 1980, and before December 1, 1981, the improvements made on or after December 1, 1981, can be eligible for this tax exemption. Such a construction gives effect to all portions of Chapter 404 and to the rule of strict construction of tax exemption statutes. Clearly, a construction project can take more than one year to complete. The legislature manifested an intent to make ineligible for the tax exemption improvement projects commenced prior to January 29, 1979, or one year prior to the city's adoption of an urban revitalization plan, whichever occurred later, notwithstanding that a portion of the project improvements were made during the time of revitalization area designation.

Very truly yours,

Harry M Griger

Harry M. Griger
Special Assistant Attorney General

Enclosure

CITIES: HOUSING CODE. Use of administrative search warrants to inspect rental housing. Iowa Const., Art. V, § 6. §§ 364.17, 602.1, 602.60, The Code 1981. City officials may seek and Iowa Courts may issue administrative search warrants pursuant to § 364.17 to fulfill the obligation to inspect rental housing. For warrants to be issued other than on a showing particularized to an individual property, a city council must by ordinance either prescribe reasonable legislative standards for inspections or require an appropriate city official to adopt reasonable administrative standards for inspections. (Schantz to Reusch, Assistant City Attorney, Council Bluffs, 2/5/82) #82-2-3(L)

February 5, 1982

Mr. Jack E. Reusch
Assistant City Attorney
209 Pearl Street
Council Bluffs, Iowa 51501

Dear Mr. Reusch:

You have requested an opinion concerning the availability of "administrative search warrants" in connection with a program of inspection of rental housing undertaken to enforce the provisions of a city housing code adopted pursuant to the requirements of § 364.17, The Code 1981.

Section 364.17 requires cities of at least 15,000 population to adopt one of the five housing codes specified in § 364.17(1)(a)-(e), or it shall be considered by virtue of § 364.17(2) to have adopted the housing code promulgated by the International Conference of Building Officials.

Section 364.17(3) requires a city to which § 364.17(1) or (2) is applicable to:

> adopt enforcement procedures, which shall include a program for regular rental inspections, rental inspections upon receipt of complaints, and certification of inspected rental housing, and may include, but are not limited to the following. . . .

Employment of administrative search warrants is not expressly listed as an enforcement tool. The statute by its plain terms, of course, does not limit the creativity of a city in devising an effective program of enforcement.

You advise that the City of Council Bluffs enacted a new housing code pursuant to the mandate of § 364.17 and that as part of the enforcement procedures for the code a provision was included requiring owners and occupants to permit warrantless entries for inspection purposes. This provision was challenged in court and held unconstitutional because of the decision in Camara v. Municipal Court of San Francisco, 387 U.S. 583 (1967). You do not question, nor do we, the court's ruling that, absent consent of the owner or occupant, an inspector may not make a warrantless inspection. Such inspections are "searches" within the meaning of the Fourth Amendment to the Constitution of the United States. Although Camara permits "civil or administrative searches" on a lesser showing of probable cause than that required in the context of criminal law enforcement, it does make plain that, absent consent, the Fourth Amendment ordinarily requires a warrant for an administrative search used to determine compliance with many regulatory provisions. We should also note at this point that the General Assembly is presumed to have been aware of the Camara decision, inasmuch as it came down more than a decade before the enactment of § 364.17 by the 68th General Assembly in 1980. State v. Fluhr, 287 N.W.2d 857, 862 (Iowa 1980).

The question you pose, then, is not whether an administrative warrant is required for a compulsory inspection, but whether city officials may seek and Iowa courts may issue administrative warrants for housing code inspections absent explicit statutory authorization of and delineation of procedures for obtaining administrative warrants. You advise that a local magistrate has expressed doubts about his authority to issue an administrative warrant.

I.

The questions of whether a city official may seek and a court may issue an administrative warrant are analytically

distinct, but in this instance we believe the issues merge. If, in other words, the legislature has authorized the use of administrative warrants, we believe an Iowa court has authority to issue them.

This proposition is supported by the statutory grant of jurisdiction to Iowa courts, pronouncements of the Supreme Court of Iowa, and decisions of the federal courts in analagous contexts.

Article V, § 6 of the Iowa Constitution provides that the District Court shall have jurisdiction in civil and criminal matters "in such manner as prescribed by law." Section 602.1, The Code 1981, is the principal statute implementing this provision. It provides:

> There shall be a unified trial court in the state of Iowa, known as 'Iowa District Court.' The Iowa district court shall have exclusive, general and original jurisdiction of all actions, proceedings, and remedies, civil, criminal, probate, and juvenile, except in cases where exclusive or concurrent jurisdiction is conferred upon some other court, tribunal, or administrative body, and it shall have and exercise all the power usually possessed and exercised by trial courts of general jurisdiction and shall be a court of record. (Emphasis added.)

Many years ago in another context, the Supreme Court of Iowa stated: "When the legislature gave the power to try, it gave every other power necessary and proper for the accomplishment of the object proposed." State v. Nash, 7 Iowa (7 Clarke) 347, 365 (1858). This language reflects the principle that when the legislature creates substantive rights and duties, a court of general jurisdiction possesses subject matter jurisdiction to develop procedures and remedies to implement these substantive directions, unless the legislature otherwise limits this authority.

Several federal decisions involving OSHA inspections support this reasoning. The leading case is the decision of the United States Supreme Court in Marshall v. Barlows, Inc., 436 U.S. 307 (1978). There, the Court addressed the constitutionality of 29 U.S.C. § 657(a), a provision of the Occupational Safety and Health Act of 1970 (OSHA), which authorized agents of the Secretary of Labor to inspect the work area of any employer subject to the Department's jurisdiction under the Act. No search warrant or other process in aid of such inspections was expressly authorized by the Act. The Supreme Court held that to the extent the Act authorized warrantless inspections without consent, it was unconstitutional. 436 U.S. at 324. However, the Court appeared to indicate that the Secretary could provide by regulation for a procedure for obtaining warrants, 436 U.S. at 315, 324 and nn. 15 and 23, a suggestion that would have been somewhat disingenuous if the Court perceived that district courts lacked authority to issue the administrative warrants in question.

Nonetheless, in subsequent OSHA cases, employers challenged the authority of OSHA to seek, and of the federal courts to issue, warrants under the Act. In Empire Steel Mfg. Co. v. Marshall, 437 F.Supp. 873, 881-82 (D. Mont. 1977), the court expressly resolved the authority issue in a manner consistent with the above reasoning:

> The question of whether the courts have the power to issue search warrants based on probable cause is a horse of a different color. To find that the courts or magistrates have such a power does not require the engrafting of additions to the Occupational Safety and Health Act itself. Rather, such authority stems from the inherent powers of the courts as well as the duties and powers of the courts to effectuate the intent of Congress. OSHA was designed to effectuate a plan to implement safe and healthful working conditions for persons employed by industries that affect interstate commerce. The intent of Congress as manifested in

> the provisions, especially the inspection provisions, of the Occupational Safety and Health Act, can be implemented by applying the statute to a given set of facts in a manner consistent with the Fourth Amendment.

See also Matter of Establishment Inspection of Gilbert L. Bennett Mfg. Co., 589 F.2d 1335 (7th Cir. 1979); Matter of Establishment Inspection of Keokuk Steel Castings, 493 F.Supp. 842 (S.D. Iowa 1980).

Finally, in Marshall v. Huffines Steel Co., 478 F.Supp. 986 (N.D. Tex. 1980), a federal district court was presented with a petition to hold an employer in contempt for failure to honor an OSHA search warrant. The employer moved to dismiss on the ground that a United States Magistrate lacked authority to issue an administrative warrant. The court denied the motion, reasoning that judicial authority must be inferred from Congressional intent to provide a constitutional but effective method of detecting violations of the Act:

> Congress clearly intended this remedy to be constitutional. . . . Further, Congress did not intend to enact an unenforceable statute. To interpret the statute to mean that warrants are constitutionally required but that the courts lack the jurisdiction to issue them would be to render the statute meaningless and to undermine Congress' stated objectives. This court is unwilling to so hold.

478 Supp. at 488.

We believe the Supreme Court of Iowa would adopt a similar approach. Thus, we must ascertain, employing familiar principles of statutory construction, the legislative intent underlying § 364.17.

The ultimate purpose of any exercise of statutory construction is to ascertain the intent of the General Assembly, its purpose for the enactment of the provision in

question, and to give effect to that intent or purpose whenever possible. City of Des Moines v. Elliott, 267 N.W.2d 44 (Iowa 1978). In searching for legislative intent, the Supreme Court considers the object sought to be accomplished by the subject statute and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect the purpose of the statute, rather than one which will defeat it. Doe v. Ray, 251 N.W.2d 496 (Iowa 1977). Intent to enact an unworkable statute is not to be imputed to the legislature unless statutory language expressly requires it. Janson v. Fulton, 162 N.W.2d 438 (Iowa 1968). When one of two possible statutory interpretations leads to unconstitutionality and the other to constitutionality, courts must adopt the view which upholds rather than defeats the statute. Iowa Nat. Indus. Loan Co. v. Iowa State Dept. of Revenue, 224 N.W.2d 437 (Iowa 1974).

Section 364.17, as previously noted, requires cities of 15,000 population to enact a housing code from an approved list. Such a city must adopt enforcement procedures and these procedures must include a program for regular rental inspections and inspections upon receipt of complaints. § 364.17(3). The enforcement procedures must be designed to improve housing conditions. § 364.17(3)(g). Thus, the legislature made completely clear that it believed regular inspections were necessary to effective enforcement procedures for improving housing conditions. Absent consent, warrantless inspections would be unconstitutional, a fact of which the legislature was presumably aware. Thus, the inference that the legislature intended to empower housing officials to seek administrative warrants is virtually compelled.[1] In our opinion, city officials seeking to

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[1] The legislative intent here is considerably clearer than in the OSHA cases. There, the Secretary was merely authorized to utilize inspections. Here, § 364.17 imposes a duty to inspect.

enforce housing codes may seek, and Iowa courts[2] may issue, administrative search warrants for rental properties.

II.

Your opinion request also correctly notes that the Camara decision does not require the same showing of probable cause required for issuance of a search warrant in connection with a criminal investigation. Camara v. Municipal Court of San Francisco. 387 U.S. at 538. The point was repeated in Marshall v. Barlow's, Inc., 436 U.S. at 320-21:

> Whether the Secretary proceeds to secure a warrant or other process, with or without prior notice, his entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].

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[2] Section 602.60 expressly confers jurisdiction upon judicial magistrates, inter alia, over "search warrant proceedings" and confers the power to "issue warrants." We see no reason why this grant of authority to permit entry of homes to conduct full searches in criminal investigations would not include the lesser authority to permit the more limited intrusion involved in a housing code inspection. Therefore, we believe judicial magistrates may issue administrative warrants sought pursuant to § 634.17 when presented with the necessary justification.

> Camara v. Municipal Court, 387 U.S. at 538, 18 L.Ed.2d 930, 87 S. Ct. 1727. A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights. (Emphasis added.)

We need not canvas the intricacies of probable cause in this context, but we would note one requirement when a city seeks to establish "area probable cause" based upon information concerning an entire neighborhood, or other general standard, rather than attempting to make a showing particularized to an individual apartment or building. Camara and Marshall make clear that "area probable cause" may be sufficient to justify an administrative warrant. Camara, supra 387 U.S. at 538-39; Marshall, supra 436 U.S. at 321. But these decisions also plainly require that the discretion of individual field personnel be structured by the existence of reasonable legislative or administrative standards of general applicability. We believe that an Iowa court could not constitutionally issue an administrative warrant based on "area probable cause" absent a showing that the proposed inspection is authorized by such standards. Therefore, we advise that a city council should by ordinance either specify legislative standards for seeking administrative warrants or should require an appropriate supervisory official to promulgate such standards by administrative rule. Absent such standards, a program of "regular rental inspections" would likely be unconstitutional and administrative warrants could be issued only if supported by the more particularized probable cause derived from a complaint or similar evidence. See State ex rel. Accident Prevention Division v. Foster, 570 P.2d 398 (Ore. 1977).

Sincerely,

Mark E. Schantz

Mark E. Schantz
Solicitor General

MES:ab

COUNTIES: Township Trustees; Transfer of Funds. Ch. 359, § 359.30, The Code 1981. It is beyond the power of the township trustees to transfer cemetery tax funds to another fund for the purchase of ambulance or fire equipment. (Weeg to Jensen, Monona County Attorney, 2/3/81) #82-2-2(L)

February 3, 1982

Michael Jensen
Monona County Attorney
610 Iowa Avenue
Onawa, Iowa 51040

Dear Mr. Jensen:

You have requested an opinion from the Attorney General regarding the authority of the township trustees to use cemetery tax funds for township purposes other than that of maintaining cemeteries, such as purchasing ambulance or fire equipment.

Townships are governed by the provisions of Chs. 359 and 360, The Code 1981. Chapter 359 includes express grants of authority to a township to levy taxes for the limited purposes of establishing and maintaining public grounds or buildings (§ 359.28 - § 359.41) and fire protection and ambulance services (§ 359.42 - § 359.43). In particular, § 359.30 grants a township the authority to levy a tax for the improvement and maintenance of cemeteries located within the township. No provisions are contained in this chapter which would permit the transfer of funds levied for one purpose into a fund designated for another purpose.

On the other hand, Ch. 360 contains provisions authorizing a township to levy taxes for the construction and repair of a township hall. However, § 360.3 specifically provides that upon petition of the electors a township may transfer funds raised under this chapter to the school fund in the event that the funds are no longer needed for purposes related to the township hall.

Because Ch. 359 governs the township's use of cemetery tax funds but provides no authority for the transfer of these funds, while Ch. 360 permits the transfer of certain funds in some circumstances, it is our opinion that the Legislature did not intend to grant townships the authority to transfer cemetery tax funds to a different fund. This is in accord with the Iowa Supreme Court's consistent holding that where certain exceptions are enumerated in a statute, it is presumed that the Legislature intended that no others be created. Iowa Farmers Purchasing Association v. Huff, 260 N.W.2d 824, 827; In Re Estate of Wilson, 202 N.W.2d 41, 44 (Iowa 1972).

Additional support for our position is found in the provisions of §§ 24.21 and 24.22 of The Local Budget Law, The Code 1981. These sections expressly permit the transfer of money from one fund of a "municipality" to another fund, subject to specified requirements. These sections would appear to provide authority for the township to transfer funds. However, the definition of "municipality" contained in § 24.2(1) expressly excludes townships from the terms of Ch. 24.

In Op. Att'y Gen. 1925, 1926, p. 64, we noted that when Ch. 24 was originally enacted, the term "municipality" as applied to this section included townships. However, the statute was amended so that the definition of municipality expressly excluded townships. Therefore, we concluded that in view of that change in the statute, §§ 24.21 and 24.22, the sections relating to the transfer of funds, did not apply to township funds.

Furthermore, in Op. Att'y Gen. 1925, 1926, p. 471, we held that any attempt to divert funds raised by taxation for one purpose to a fund spent for another purpose would be beyond the power of the board of trustees. There, township funds raised by taxation for road purposes could not be transferred to the township building fund and used to buy a township hall.

Finally, any argument that the township trustees could transfer these funds pursuant to Article III, Sections 38A and 39A of the Iowa Constitution, the municipal and county home rule amendments, are not relevant because these amendments apply only to municipalities and counties, not townships. In any event, these amendments expressly disallow home rule authority to levy any tax unless expressly authorized by the General Assembly.

In conclusion, it is our opinion that it is beyond the power of the township trustees to transfer cemetery tax funds to another fund for the purchase of ambulance or fire equipment.

Sincerely,

Theresa Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:sh

STATE OFFICERS AND DEPARTMENTS: Board of Psychology. §§ 147.72, 154B.4, The Code 1981. Section 154B.4; The Code 1981. Section 154B.4, The Code, prohibits an unlicensed person who is not otherwise exempt from the provisions of Chapter 154B from using the title "psychotherapist" in connection with an offer to practice or the practice of psychology. Section 147.72, The Code does not prohibit the use of said title by an unlicensed person. An applicant for licensure as a psychologist is subject to the same restrictions on using the title "psychotherapist" as are other unlicensed individuals. (Brammer to Scott, Chairman, Board of Psychology Examiners, 3/31/82) #82-3-31(L)

March 31, 1982

Norman A. Scott, Ph.D., Chairman
Iowa Board of Psychology Examiners
Iowa Department of Health
Licensing and Certification
LOCAL

Dear Dr. Scott:

You have requested an opinion of the Attorney General regarding the use of the title "psychotherapist" by a person who is not a licensed psychologist. Specifically, you have asked if there are any statutory provisions or case law decisions which would "prohibit or restrict the use of this title by an individual who is not licensed to practice psychology in Iowa". Your second question was whether a psychology licensure applicant may be prohibited or restricted from using the "psychotherapist" title.

The statutory provision most directly applicable to your questions is section 154B.4, The Code 1981, which provides in pertinent part, that an unlicensed person shall not:

> [U]se a title or description, including the term 'psychology' or any of its derivatives, such as 'psychologist', 'psychological', 'psychotherapist' or modifiers such as 'practicing' or 'licensed' in a manner which implies that he or she is certified under this chapter, or offer to practice or practice psychology, except as otherwise permitted in this chapter. The use by a person who is not licensed under this chapter of such terms is not prohibited by this chapter, except when such terms are used in connection with an offer to practice or the practice of psychology.

Thus, section 154B.4 would only prohibit an unlicensed person from using the title "psychotherapist" if this term was used in connection with an offer to practice or the practice of psychology. Section 154B.1 defines various acts which constitute the practice of psychology, and an unlicensed person[1], not otherwise exempt from the requirements of Chapter 154B, would be prohibited from using the title "psychotherapist" while engaging in or offering to engage in any of those activities. If, on the other hand, an unlicensed person merely referred to himself or herself as a "psychotherapist" in a social conversation without any attempt to engage in or offer to practice psychology, such a reference would not be forbidden by section 154B.4, The Code. There have been no interpretations of this Code section by the Iowa appellate courts.

Another provision, section 147.72, The Code, also refers to the permissible use of professional titles. This section provides, in pertinent part, that:

> Any person licensed to practice a profession under this title may append to his name any recognized title or abbreviation, which he is entitled to use, to designate his particular profession, but no other person shall assume or use such title or abbreviation. . . .

Once again, there are no Iowa appellate court decisions interpreting the above-quoted statute. The question thus presented is whether "psychotherapist" is a recognized title to designate the profession of psychology. Although the Legislature referred to the term "psychotherapist" as a derivative of the term "psychology" in section 154B.4, The Code, the following definitions suggest that psychotherapy is broader in scope than the practice of psychology.

> Psychotherapy may be defined as the effort of a healer to relieve a sufferer's distress and disability primarily through verbal communication, often with the participation of a group. . . . Two broad systems of psychotherapy can be distinguished, both originating in the distant past: the religo-magical, which invokes the aid of supernatural powers, and the naturalistic, which does not . . . practitioners of naturalistic psychotherapies have spread to include members of nonmedical professions such as psychologists, social workers, and ministers, as well as sub- and paraprofessionals such as mental health associates.

9 B. Wolman, International Encyclopedia of Psychiatry, Psychology, Psychoanalysis and Neurology 311 (1977).

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[1]Section 154B.3, The Code, contains a list of categories of persons who are exempt from the provisions of Chapter 154. A person fitting within one of the five categories would not be subject to the restrictions contained in section 154B.4.

> Psychotherapy. A generic term for the treatment of mental and emotional disorders based primarily upon verbal or nonverbal communication with the patient. A major treatment method of psychiatrists and other physicians trained in psychiatric medicine. Nonmedical psychotherapy may be carried out by psychologists, social workers, nurses, pastoral counselors and other professionals with special training in the technique.

American Psychiatric Association, A Psychiatric Glossary 128-29 (1975). Based on the foregoing, it appears that "psychotherapist" is not a recognized title used to designate a practitioner of psychology or any other particular profession, and therefore, the use of said title would not be proscribed by section 147.72, The Code.

In answer to your second question, we have not located any statutory provision which would mandate any differential treatment to a psychology licensure applicant who desires to use the title "psychotherapist". In other words, if such an applicant is not otherwise exempt from the provisions of Chapter 154B, The Code, he or she may not use the title "psychotherapist" in connection with an offer to practice or the practice of psychology.

In conclusion, a person who is not a licensed psychologist is prohibited from using the title "psychotherapist" if this term is used in connection with an offer to practice or the practice of psychology, provided that this person does not come within one of the exemptions enumerated in section 154B.3, The Code. Section 147.72, The Code, does not prohibit an unlicensed person from using the title "psychotherapist". Applicants for licensure as psychologists are subject to the same restrictions on the use of the term "psychotherapist" as are other unlicensed individuals.

Very truly yours,

Susan Barnes Brammer

Susan Barnes Brammer
Assistant Attorney General

SBB/jmc

COUNTIES AND COUNTY OFFICERS: PRISONERS: County liability for emergency medical care provided to a prisoner. § 356.5(2) and 356.15, The Code 1981. The county in which a prisoner is taken into custody is responsible for the provision of life necessities to such prisoners, including emergency medical care. (Mann to Jensen, Monona County Attorney, 3/31/82) #82-3-30(L)

March 31, 1982

Mr. Michael Paul Jensen
Monona County Attorney
610 Iowa Avenue
Onawa, Iowa 51040

Dear Mr. Jensen:

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

> Is the County responsible for emergency medical care, under Section 356.5 of the Code of Iowa (1981), of an individual who was severly injured during the course of an arrest with a warrant issued by a Monona County Magistrate and who was also an escapee from the Cherokee State Mental Health Institute but who was never formally booked or jailed in the Monona County Jail because it was necessary to transport him out of the County for surgery and other emergency medical care?

The Iowa Surpeme Court considered a closely related question in the case of Miller v. County of Dickinson, 68 Iowa 102, 26 N.W. 31 (1885). There the court held that where circumstances are such that a prisoner cannot be confined in jail, the county will be liable for necessaries furnished to the prisoner at the place of confinement.

Additionally, this office has addressed a number of similar questions in opinions previously issued. In 1976 Op.Att'yGen. 184 we opined that the county in which an individual is held awaiting extradition is liable for any medical expenses incurred while the individual is detained in the county jail. In 1968 Op.Att'yGen. 545 we opined that the charges and expenses for the safekeeping of a prisoner, including emergency medical costs, is borne by the county in which the emergency arises. In 1964 Op.Att'yGen. 128 we opined that the keeper of a jail in which a prisoner is confined has primary responsibility for any medical aid rendered prisoners in custody, even though the prisoners may be eligible for poor relief in the form of medical assistance. In all of those opinions we relied on §§ 356.5(2) and 356.15 of the Code for our opinion that the county must bear the expenses of medical care for county prisoners. We now reaffirm our view and advise that Monona County is liable for the cost of emergency medical care provided to a prisoner under the circumstances described in your inquiry.

Sincerely,

Thomas Mann, Jr.

Thomas Mann, Jr.
Assistant Attorney General

TM/jam

COURTS: A petition or application to modify a decree of dissolution is a "petition" and the clerk of court is required to collect a $25 filing fee from the party moving to initiate such an action. 1981 Session, 69th G.A., ch. 117, § 704 and ch. 189, § 4; § 598.21(8); Ia. R. Civ. P. 48. (Hege to Tofte, State Representative, 3/31/82) #82-3-29(L)

March 31, 1982

The Honorable Semor Tofte
Representative
State Capitol
Des Moines, Iowa 50319

Dear Representative Tofte:

You have requested an opinion on the subject of court costs charged by clerks of the district court. Specifically, you question "whether the Clerk of Court should tax a $25.00 Filing Fee when there is a Petition to Modify a Dissolution Decree".

It is the opinion of this office that a $25 filing fee is required for initiating an action in district court to modify a previously entered decree of dissolution.

In the 1981 Session, 69th G.A., Ch. 117, § 704, the legislature directed clerks of court to collect certain fees.

> Sec. 704. NEW SECTION. FEES--COLLECTION AND DISPOSITION.
>
> 1. The Clerk shall collect the following fees:
>
> a. For filing a petition, appeal, or writ of error and docketing them, eight dollars.

A subsequent amendment provided:

> Sec. 4. Acts of the Sixty-ninth General Assembly, 1981 Session, Senate File 130, section 704, subsection 1, paragraph a, is amended to read as follows:

> a. For filing a petition, appeal, or writ of error and docketing them, ~~eight~~ twenty-five dollars.

1981 Session, 69th G.A., ch. 189, § 4.

The crux of the inquiry becomes whether an attempted modification of a dissolution decree falls within the definition of "petition". While we believe that "petition" must be narrowly construed to prevent the $25 filing fee from being charged for every conceivable legal document that might be filed, we conclude that an action initiated to attempt modification of a dissolution of marriage decree is a "petition".

Generally, the principle distinction between a "petition" and a "motion" is that a petition is always in writing, while a motion, usually made in writing, may be made orally. Halter v. Schoreck, 69 Ill.App.2d 104, 216 N.E.2d 278, 281 (Ill. ____). The Iowa Rules of Civil Procedure distinguish pleadings, which include a petition, and motions, which are not pleadings. Iowa R. Civ. P. 68; 69(b). Furthermore, in this state, a civil action is commenced by the filing of a petition with the court. Iowa R. Civ. P. 48(b).

In an action to modify a decree of dissolution, the district court has authority to modify a decree based upon a showing of a substantial and material change in circumstance since the entry of the original decree. Section 598.21(8), The Code 1981; In Re Marriage of Jensen, 251 N.W.2d 252 (Iowa 1977). Further, even though a modification is auxiliary or supplementary to the original divorce action and the court retains jurisdiction for modification purposes, some form of petition or application and notice to the adverse party are required. Van Gundy v. Van Gundy, 244 Iowa 488, 56 N.W.2d 43 (Iowa 1953).

In Moen v. McNamara, 272 N.W.2d 438 (1978), the Iowa Supreme Court concluded that under Section 598.21, the district court has the authority, but not the unrequested duty to amend a decree to reflect a substantial change in circumstance. The Court further held:

> The involvement of the trial court in proceedings subsequent to the decree turns on an application, notice and hearing.

Moen v. McNamara, 272 N.W.2d 438 441 (Iowa 1978).

In the case of In Re Marriage of Meyer, 285 N.W.2d 10 (Iowa 1979), the Iowa Supreme Court determined what notice was

required. In an action to modify a divorce decree entered eight months earlier, the husband having moved to Minnesota, notice of the pendency of the action was not served upon him personally, but upon his attorney in the original divorce. The court addressed the issue of jurisdiction to enter the modification decree.

> [3] Although subject matter jurisdiction in dissolution matters is retained, the parties are entitled to notice and an opportunity to resist before changes in the original decree are made.
>
> . . .
>
> Steven, however, insists the court did not have jurisdiction over his person and thus was without authority to enter personal judgment against him. We believe this contention is good.

Meyer, at 11.

The Court further implied that due process required personal service of an notice of the modification pursuant to Iowa R. Civ. P. 56.1(a), unless that was shown to be impossible, in which case, alternative service could be used if it met constitutional minimums. Meyer, at 11. Iowa R. Civ. P. 56.1(a) is the provision requiring personal service of an original notice and copy of a petition upon defendant or respondent and applies to all actions to initiate a civil proceeding in this state. That procedure is required before the court obtains personal jurisdiction over the parties in the original dissolution action.

Since an action for modification of a decree of dissolution requires personal service of a copy of the notice and a pleading setting forth the basis of the claim, the initiation of such action constitutes a "petition". Iowa R. Civ. P. 49, 50, 52, 53 and 56.1(a).

Further support for this conclusion is found in Ch. 598A, The Code 1981. If child custody is at issue in an attempted modification, the proceeding is controlled by Ch. 598A, The Code 1981, the Uniform Child-Custody Jurisdiction Act. Section 598.21(8), The Code 1981. Section 598A.6 indicates that such an action is initiated by a petition. In Barcus v. Barcus, 278 N.W.2d 646, 650 (Iowa 1979), the Supreme Court of Iowa found that a non-custodial parent's request for custody made him a "petitioner" for purposes of Sections 598A.6 and 598A.8(1).

In summary, for the purposes of 1981 Session, 69th G.A., Ch. 189, § 4, a petition or application for modification of a dissolution decree is a "petition" and the clerk of court is required to collect a $25 filing fee from the party moving to initiate such an action.

Sincerely,

Brent D. Hege

Brent D. Hege
Assistant Attorney General

BDH/kap10A

MUNICIPALITIES: Civil Service. Section 400.13, The Code 1981; Acts, 65th G.A., 1973 Session, Ch. 233, § 2. An ordinance imposing disparate salaries between members and nonmembers of the police department vying for the office of the chief of police violates § 400.13, The Code 1981. (Walding to Welsh, State Representative, 3/31/82) #82-3-28(L)

March 31, 1982

The Honorable Joe Welsh
State Representative
State Capitol
L O C A L

Dear Representative Welsh:

We are in receipt of your opinion request of February 25, 1982, regarding Ch. 400 of the Code. Specifically, we have been asked whether § 400.13, The Code 1981, is violated by an ordinance passed by the Maquoketa City Council to the effect that if a police chief is retained from outside of the Maquoketa Police Department, he or she will receive the whole of an annual $1 salary.

Section 400.13, The Code 1981, provides in pertinent part:

> The chief of the fire department and the chief of the police department shall be appointed from the chiefs' civil service eligible lists. Such lists shall be determined by original examination open to all persons applying, whether or not members of the employing city. [Emphasis added]

A 1973 amendment rewrote the section to include the underscored language. See Acts, 65th G.A., 1973 Session, Ch. 233, § 2. Prior to that amendment, an Attorney General's opinion had ruled that the office of the chief of police, in a city operating under civil service, had to be filled by an active member of the police department. See 1968 Op.Att'y. Gen. 515. The legislative intent in including the underscored language, therefore, was to expand the chiefs' civil service

eligible lists for the office of the chief of police beyond active members of the police department. Disparate salaries between members and nonmembers of the police department vitiates that intent. Accordingly, an ordinance imposing disparate salaries between members and nonmembers of the police department vying for the office of the chief of police violates § 400.13, The Code 1981.

Sincerely,

LYNN M. WARDING
Assistant Attorney General

LMW/nm

ELECTIONS; SCHOOL ELECTIONS; PRECINCTS. Ch. 49, §§ 49.1, 49.3, 49.11; ch. 277, § 277.3. Precincts drawn pursuant to section 49.3 are applicable in school elections. These precincts may be temporarily merged under sections 49.11(1), 49.11(3)(a), or 49.11(3)(b). The merger of precincts under section 49.11(3)(b) is restricted by the population and geographic limitations of section 49.3. The merger of precincts under sections 49.11(1) and 49.11(3)(a) are not restricted by the population and geographic limitations of section 49.3. (Pottorff to Hall, State Representative 3/31/82) #82-3-27(L)

March 31, 1982

Honorable Hurley Hall
State Representative
State Capitol
L O C A L

Dear Representative Hall:

You have requested an opinion of the Attorney General concerning the election precincts which are applicable in school elections pursuant to Chapter 277. You indicate that the Linn-Mar Community School District is composed of four separate precincts as drawn pursuant to section 49.3 of the Code. You point out that in the last school election a total of only 300 people voted in all four of these precincts. In view of the practical and economic problems of establishing a polling place in each precinct to accommodate few voters, you inquire whether election precincts for school elections must meet the requirements of section 49.3.

Section 49.3 provides that election precincts shall be drawn by the county board of supervisors in the unincorporated portions of each county and by the city council of each city in which it is necessary or advisable to establish more than one precinct. § 49.1, The Code 1981. This section further establishes a total population ceiling of three thousand five hundred [3,500] in each precinct. § 49.1(1), The Code. The precinct, moreover, must be contained wholly within an existing legislative district unless a specific statutory exception applies. § 49.3(2), The Code.

Statutory authority indicates that the precincts drawn pursuant to section 49.3 are applicable in school elections. Section 49.3 is included in Chapter 49 which generally addresses the method of conducting elections. By express provision, Chapter 49 is applicable "to all elections except those special elections which by the terms of the statutes authorizing them are exempt from the provisions" of the chapter. § 49.1, The Code. Chapter 277, in turn, addresses school elections. This chapter, however, does not exempt school elections from the provisions of Chapter 49. Chapter 277 states that the provisions "of chapters 39 to 53 shall apply to the conduct of all school elections." § 277.3, The Code. When Chapters 49 and 277 are read together, therefore, provisions of Chapter 49, including section 49.3, are made applicable to school elections.

Although precincts drawn pursuant to section 49.3 are applicable in school elections, precincts may be temporarily merged. Section 49.3 states that "[p]recincts established as provided by this chapter shall be used for all elections, except where temporary merger of established precincts is specifically permitted by law for certain elections, and no political subdivision shall concurrently maintain different sets of precincts for use in different types of elections." § 49.3, The Code. (Emphasis added.) Section 49.11, in turn, sets out three circumstances under which temporary merger of established precincts is specifically permitted by law. First, for any election other than a primary election, a general election, or a special election held pursuant to section 69.14, the county commissioner of elections may consolidate two or more precincts into one precinct. Under certain circumstances this consolidation can be blocked by a petition of eligible electors. § 49.11(1), The Code. Second, for any election including a primary election and a general election, the county commissioner may consolidate precincts if "[o]ne of the precincts involved consists entirely of dormitories that are closed at the time the election is held." § 49.11 (3)(a), The Code (Election Laws Supp.) 1981. Third, for any election including a primary election and a general election the county commissioner may consolidate precincts if the precincts, as consolidated, "would meet all the requirements of section 49.3 and a combined total of no more than three hundred fifty [350] voters voted in the consolidated precincts in the last preceding similar election." § 49.11(3) (b), The Code (Election Laws Supp.) 1981. Assuming the commissioner were presented with an appropriate factual situation, precincts in a school election could be merged under any of these three provisions.

We separately consider whether the merger of precincts under section 49.11 is restricted by the population and geographic limitations which apply to single precincts under section 49.3. In construing the three merger provisions of section 49.11, we observe the principle that the meaning of a statute is determined by considering all provisions of the statute. See Boomhower v. Cerro Gordo County Board of Adjustment, 163 N.W.2d 75, 76 (Iowa 1968). Considering all three merger provisions, therefore, we note that a merger under section 49.11(3)(b) is contingent in part upon the condition that the "consolidated precincts, if established as a permanent precinct, would meet all requirements of section 49.3." § 49.11(3)(b), The Code (Election Laws Supp.) 1981. Neither a merger under section 49.11(1) nor a merger under section 49.11(3)(a) is restricted by this language. See §§ 49.11(1), 49.11(3)(a), The Code (Election Laws Supp.) 1981. The legislature could have restricted all three merger provisions by imposing the limitations of section 49.3 upon all merged precincts. Since the legislature specifically included the population and geographic limitations of section 49.3 only with respect to precinct mergers under section 49.11(3)(b), we conclude that precinct mergers under sections 49.11(1) and 49.11(3)(a) are not restricted by the population and geographic limitations of section 49.3.

Accordingly, we advise that precincts drawn pursuant to section 49.3 are applicable in school elections. These precincts may be temporarily merged under section 49.11(1), 49.11(3)(a), or 49.11(3)(b). The merger of precincts under section 49.11(3)(b) is restricted by the population and geographic limitations of section 49.3. The mergers of precincts under sections 49.11(1) and 49.11(3)(a) are not restricted by the population and geographic limitations of section 49.3.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP:sh

MUNICIPALITIES: Police and Fire Pensions. Section 411.1(12), The Code 1981; Acts, 67th G.A., 1978 Session, Ch. 1060, § 42; Acts, 66th G.A., 1976 Session, Ch. 1089, § 18. Base wages and longevity, holiday pay, and educational pay included in a wage are to be included as earnable compensation. Acting pay and educational pay not included in a wage are not to be included. As to corrective measures in the event that a municipality has incorrectly computed the earnable compensation, the judgment of the police and fire pensions boards prevail. (Walding to Slater, State Senator, 3/31/82) #82-3-26(L)

March 31, 1982

The Honorable Tom Slater
State Senator
State Capitol
L O C A L

Dear Senator Slater:

We are in receipt of your opinion request regarding Chapter 411 of the Code. Specifically, you have asked whether "earnable compensation" includes base wages and longevity, holiday pay, acting pay, and college pay. Further, you have posed a series of questions concerning corrective measures in the event that a municipality has incorrectly computed the earnable compensation.

Section 411.1(12), The Code 1981, provides:

> "Earnable compensation" or "compensation earnable" shall mean the regular compensation which a member would earn during one year on the basis of the stated compensation for the member's rank or position including compensation for longevity and excluding any amount received for overtime compensation or other special additional compensation, meal and travel expenses, and uniform allowances and excluding any amount received upon termination or retirement in payment for accumulated sick leave or vacation.

The legislative history of the aforementioned section includes an amendment to the term "earnable compensation" "excluding any amount received for overtime compensation, meal and travel expenses, and uniform allowances and excluding any amount received upon termination or retirement

in payment for accumulated sick leave." Acts, 66th G.A., 1976 Session, ch. 1089, § 18. More recently, a 1978 amendment added "including compensation for longevity and" and "or other special additional compensation" and "or vacation" to the subsection. Acts, 67th G.A., 1978 Session, ch. 1060, § 42.

A response to your inquiry concerning the computation of earnable compensation can be gleaned from the aforementioned section and prior opinions of our office. First, earnable compensation would include base wages and longevity. According to § 411.1(12), The Code 1981, earnable compensation means, in part, "[t]he regular compensation which a member would earn during one year on the basis of the stated compensation for the member's rank and position including compensation for longevity." Further, we have previously held that earnable compensation includes holiday pay, 1977 Op.Att'yGen. 55, and hold so now. Conversely, acting pay, which is compensation for temporarily filling in for a superior, has been held to be excluded from earnable compensation. See 1977 Op.Att'yGen. 102. The opinion classified acting pay as overtime compensation, which is expressly excluded from earnable compensation.

A more difficult question concerns the inclusion or exclusion of college pay in the computation of earnable compensation. College pay, more commonly referred to as educational pay, has been addressed by a prior opinion of our office. In that opinion, 1977 Op.Att'yGen. 55, we stated that, "education pay appear[s] to be [an] item other than [a] normal wage." 1977 Op.Att'yGen. 55, 58. The opinion continues, noting that, "[e]ducational pay, if that term means payments made as reimbursement for education while employed, is normally not included within a wage." Id. In holding that educational pay is not to be included as earnable compensation, our opinion was predicated on a finding that the educational pay in question could not have been classified as a normal wage. Thus, educational pay included in a wage is earnable compensation.

As presented to us, the applicable educational pay:

> is not a reimbursement for college tuition, but a permanent monthly payment for each credit hour earned above 12 hours and up to $110. In the Police Department, an Associates Degree is a mandatory requirement at the entry level and college pay is automatically paid on the same basis as a

> base wage. In the Fire Service, college pay is also received for credit hours earned. Although it is encouraged by the City, it is not a mandatory requirement. [Emphasis added]

It is our judgment that that educational pay should be included as earnable compensation. The fact that a degree is a mandatory requirement of the police department, and not of the fire department, is irrelevant. Rather, it is decisive that the educational pay, as the underscored language indicates, is an automatic monthly payment included in the base wage.

The second part of your inquiry concerned corrective measures in the event that a municipality has incorrectly computed the earnable compensation. No legislative guidance is provided as to how to reverse an error in the computation of the earnable compensation; Ch. 411 does not contemplate noncompliance. The obvious intent, however, should be to undue the harm done. Exactly how that is to be done is a municipal affair. Accordingly, we defer to the judgment of the city's police and fire pensions boards.

In summary, base wages and longevity, holiday pay, and educational pay included in a wage are to be included as earnable compensation. Acting pay and educational pay not included as a wage are not to be included. As to corrective measures in the event that a municipality has incorrectly computed the earnable compensation, the judgment of the police and fire pensions boards prevail.

Sincerely,

Lynn M. Walding

LYNN M. WALDING
Assistant Attorney General

LMW:rcp

SUBSTANCE ABUSE: MENTAL HEALTH: Privacy and Confidentiality Requirements. 21 U.S.C. §§ 1175(a) and 1175(b)(2)(c), 42 U.S.C. § 4582(a); 42 C.F.R. § 2.12(a)(1-4), § 2.23, § 2.64(g), § 2.65(c); §§ 4.1(36)(a), 68A.7, 125.1(1), 125.33(2) and (3), 125.37, 217.30 (1)(d), 217.30(4), 229.25, 622.10, 703.3, 719.1, 719.2, 804.15, 808.1; §§ 803-3.9 and 805-3.9, I.A.C.

Section 622.10, which creates a physician-patient testimonial privilege, does not preclude a physician from testifying in a civil or criminal proceeding as a result of a diagnostic examination performed to determine a person's mental or physical condition.

Section 68A.7's confidentiality requirements do not bar the non-consensual disclosure of medical records where sought by subpoena or court order.

Section 125.33(2) and (3) and section 125.37 generally prohibit substance abuse treatment facilities from disclosing the fact that a person is participating in a treatment program, and from disclosing information on the nature of the treatment given, but does not prohibit the non-consensual disclosure of non-treatment related information where required to do so by court order in pursuit of the administration of justice.

Section 217.30(1)(d) generally prohibits the disclosure of medical or psychiatric data by a treatment facility, including diagnosis and past history of disease or disability of a patient, but pursuant to § 217.30(4) such information shall be disclosed without a patient's consent to law enforcement officials for use in connection with their official duties relating to law enforcement where authorized by court order.

Section 229.25 general prohibition on the disclosure of medical records may be abrogated where non-treatment related information is sought pursuant to court order.

The constitutional right to privacy precludes the non-consensual disclosure of confidential medical information, unless such disclosure is justified by compelling state interests.

Neither the constitution nor statutory confidentiality provisions would permit a treating physician/psychiatrist or other medical staff to testify at an involuntary commitment hearing under ch. 229 to communications and observations gained as a result of treating a patient, and not as a result of a diagnostic evaluation performed pursuant to court order.

A treatment facility's staff may report to law enforcement officials, without violating § 125.33, neutral facts surrounding the possession of a weapon by a patient, so long as the identity or identities of patients are not disclosed.

If the identity or identities of patients involved in suspected criminal violations are sought by law enforcement officials, such information should not be disclosed by a treatment facility unless authorized to do so by court order.

Law enforcement officials may execute a search warrant at a treatment facility since search warrants are court orders, and searches are proper when made under the authority of a validly issued search warrant.

Absent a court order affirmatively authorizing a treatment facility's staff to assist in the execution of a search warrant, said staff must passively observe the execution of the search warrant.

A treatment facility's staff will not incur criminal liability under §§ 703.3, 719.1 and 719.2, where said staff abides by statutory or constitutional confidentiality requirements and refuse to disclose confidential information to law enforcement personnel, so long as they do not affirmatively act to obstruct law enforcement personnel in the performance of their duties. (Mann and Freeman to Wilson, Buchanan County Hospitalization Referee, 3/31/82) #82-3-25(L)

THOMAS J. MILLER
ATTORNEY GENERAL
JOHN G. BLACK
SPECIAL ASSISTANT ATTORNEY GENERAL
STEPHEN C. ROBINSON
ASSISTANT ATTORNEY GENERAL
JONATHAN GOLDEN
ASSISTANT ATTORNEY GENERAL
CANDY MORGAN
ASSISTANT ATTORNEY GENERAL
THOMAS MANN JR.
ASSISTANT ATTORNEY GENERAL
CRAIG S. BRENNEISE
ASSISTANT ATTORNEY GENERAL
LAYNE M. LINDEBAK
ASSISTANT ATTORNEY GENERAL
BRENT D. HEGE
ASSISTANT ATTORNEY GENERAL
PATRICIA M. HULTING
ASSISTANT ATTORNEY GENERAL

Department of Justice

March 31, 1982

ADDRESS REPLY TO:
SOCIAL SERVICES DIVISION
SECOND FLOOR
HOOVER BUILDING
DES MOINES, IOWA 50319
(515) 281-8330

Mr. Denny R. Wilson
Buchanan County Hospitalization Referee
Craig, Wilson & Flickinger
316 First Street East
Independence, Iowa 50644

Dear Mr. Wilson:

You requested an Opinion of the Attorney General on the following question:

> I am writing to you as Buchanan County Hospitalization Referee in regard to an area in both Substance Abuse Hearings and Mental Hospitalization Hearings. The question involved having a patient at MHI in either the Substance Abuse Treatment Program or a voluntary mental patient, and the patient is asking to be discharged. There is no family involvement and the staff at MHI feels that the person should be committed involuntarily, based on statements made by the patient (i.e., admissions on habitual drinking or a danger to himself or others or incapacitation, or some other indication of serious mental impairment). The only people who could testify at the hearing would be the staff at MHI.
>
> My question would involve whether there would be a breach of confidentiality if the staff were allowed to testify at the Committal Hearing. The possible people testifying would be either the doctor, staff psychologist, nursing staff, staff social workers or counselors.

In addition, we received the following questions from Mr. Michael Reipe, Henry County Attorney:

> Questions for which opinion is sought:
> a) Can persons at the Mental Health Institute report the possession of the weapon and circumstances surrounding the possession of the weapon by Patient A to a law enforcement officer, law enforcement agency, and testify to those facts in any court, grand jury or administrative proceeding without violating Section 125.33, Code of Iowa?
>
> b) What information concerning Patient A can be revealed to law enforcement officers, or concerning which can testimony be given by staff members of a Mental Health Institute, without violation of Section 125.33, Code of Iowa?
>
> c) Specifically, may the staff members from a Mental Health Institute provide information concerning the name and address of Patient A, and the circumstances surrounding the observation or seizure of the weapon from Patient A by staff members of the Mental Health Institute, provided that no information is given for the reason or application for admission, the treatment of Patient A or observations made during his stay at the hospital or the circumstances of his release or any other reports concerning the diagnosis and treatment of Patient A while at the Mental Health Institute?

We also received the following questions from Linn County Attorney, Mr. Eugene Kopecky:

> 1. Does section 125.37, The Code, prohibit a chemical substance abuse facility from providing information to law enforcement agencies, particularly identification information which will aid in the execution of an arrest warrant?

2. If providing such information is prohibited, can these competing interests be reconciled so as not to violate section 125.37?

Would section 804.15 provide the law enforcement agency with the authority to effect the arrest without the cooperation of the facility?

3. If the facility is not prohibited from providing the information but declines to do so, or fails to cooperate in some other fashion which will allow the arrest to take place but not violate its duty under section 125.37, would the facility officers and/or staff be subject to prosecution under either section 719.1, interference with official acts, or section 719.2, refusing to assist officer?

The above questions require that we undertake a comprehensive review of confidentiality questions applicable to public health care facilities. Although we addressed the subject of the physician-patient privilege in a prior opinion, Op.Att'yGen. # 80-7-13, we believe that the above questions raise issues much broader than the physician-patient privilege concept.

Accordingly, we will review and analyze the privilege concept, statutory confidentiality requirements, and the constitutional right to privacy.

A. Physician/Psychotherpist--Client Relationship

Historically, the duty of confidentiality arises out of the professional relationship between a service provider and client. The disclosure of confidential information about a patient obtained by a physician/psychotherapist during the course of treatment has been characterized as reprehensible in view of the Hippocratic Oath, and unaccepted practice since a patient may quite readily, in order to affect a cure, reveal to his doctor information which may be embarrassing, disgraceful, or even incriminating, and since a physician may, as a result of an examination, discover other information about the patient which the latter would not normally wish to have disclosed. Best, Privilege - Psychotherapist-Patient, 44 A.L.R.3d 24 (1972); Schiffres, Doctor - Disclosure of Information, 20 A.L.R.3d 1109 (1968).

However, there was no privilege as to communications between physician and patient under the common law. Privileges exist only pursuant to statute. Boyles v. Cora, 232 Iowa 822, 6 N.W.2d 401 (1942); 81 Am.Jur.2d Witnesses § 230 (1976); Annotation, Physicians and Surgeons - Professional Secrets, 9 A.L.R. 1254 (1920).

Iowa has such a statute. Section 622.10, The Code 1981, creates a physician-patient testimonial privilege. The physician-patient privilege, as a general concept, is a testimonial communications rule which precludes the disclosure of confidential information about a patient by a physician testifying in a civil or criminal action. Op.Att'yGen. # 80-7-13. This includes involuntary commitment hearings for the seriously mentally impaired. Id. The privilege does not, however, preclude a physician from testifying as a result of a diagnostic examination performed to determine a person's mental or physical condition pursuant to a court order. Snethen v. State, 308 N.W.2d 11 (Iowa 1981); State v. Cole, 295 N.W.2d 29 (Iowa 1980); In Interest of Hoppe, 289 N.W.2d 613 (Iowa 1980); Op.Att'yGen. # 80-7-13.

B. Statutory Confidentiality

By statute, medical records must be kept confidential. Statutory provisions applicable to Iowa mental health and substance abuse treatment facilities include §§ 68A.7, 125.33, 125.37, 217.30, and 229.25, The Code 1981. Each section shall be discussed herein.

1. First, Chapter 68A, The Code 1981, gives citizens the right to copy and the media the right to publish public records, unless a statutory exemption or provision such a § 68A.7 specifies otherwise. Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289 (Iowa 1979). Section 68A.7 requires that "Hospital records and medical records of the condition, diagnosis, care, or treatment of a patient or former patient, including outpatient" shall be kept confidential. Mental health facilities are "hospitals" within the meaning of § 68A.7, The Code. Op.Att'yGen. # 81-10-10; § 229.1(10), The Code 1981. Thus, they are bound by § 68A.7's confidentiality requirements.

Those requirements, however, are not absolute. The legislature intended that ch. 68A be read liberally to insure broad public access to public records. City of Dubuque v. Telegraph Herald, Inc., 297 N.W.2d 523 (Iowa 1980). Thus, in determining whether disclosure is permissible the interests of the public must be balanced against the private interests involved. Id. Where the public interests outweigh the privacy

interests, disclosure may be had. In fact, the Iowa Supreme Court recently held that ch. 68A's exemption for medical records and personal information in confidential personnel records is not applicable to administrative subpoenas. Iowa Civil Rights Commission v. City of Des Moines, 313 N.W.2d 491 (Iowa 1981).

We accordingly advise that § 68A.7's confidentiality requirements do not bar the non-consensual disclosure of medical records where sought by subpoena or court order.

We note in passing that § 68A.7 permits a court, the lawful custodian, or another person duly authorized to release information which should otherwise be kept confidential. We previously addressed the question of who is a "lawful custodian" and concluded that it is a person "who is delegated the responsibility of compiling and preserving the records in question". Op.Att'yGen. # 80-9-19. As applied to substance abuse or mental health facilities, we believe that this includes the chief executive of a department of state government, or chief executive of a private facility, or the director or superintendent of a facility under the umbrella of a department of state government as designated by the chief executive of the department. A lawful custodian is free to designate some other person as "another person duly authorized to release information". Op.Att'yGen. # 80-9-19.

2. In addition to ch. 68A, other statutory provisions require that medical records be kept confidential, of which are §§ 125.33(2) and (3), The Code 1981, statutes which are specifically applicable to substance abuse treatment facilities. Their prohibition on disclosure of medical records reads, in pertinent part, as follows:

> The licensed physician and surgeon or osteopathic physician and surgeon or any employee or person acting under his or her direction or supervision, or the facility shall not report or disclose the name of the person or the fact that treatment was requested or has been undertaken to any law enforcement officer or law enforcement agency; nor shall such information be admissible as evidence in any court, grand jury, or administrative proceeding unless authorized by the person seeking treatment. If the person seeking such treatment or rehabilitation is a minor who has personally made application for treatment, the fact that the minor sought treatment or rehabilitation or is receiving treatment or rehabili-

> tation services shall not be reported or disclosed to the parents or legal guardian of such minor without the minor's consent, and the minor may give legal consent to receive such treatment and rehabilitation.
>
> 3. . . Any facility providing or engaging in such treatment or rehabilitation shall not report or disclose to a law enforcement officer or law enforcement agency the name of any person receiving or engaged in such treatment or rehabilitation; nor shall any person receiving or participating in such treatment or rehabilitation report or disclose the name of any other person engaged in or receiving such treatment or rehabilitation or that such program is in existence, to a law enforcement officer or law enforcement agency. Such information shall not be admitted in evidence in any court, grand jury or administrative proceeding. However, any person engaged in or receiving such treatment or rehabilitation may authorize the disclosure of his or her name and individual participation.

On a surface analysis, the above provision could hardly be clearer. There appears to be an absolute statutory prohibition on the disclosure of information gained by a facility during the course of treating a substance abuser, absent the consent or authorization of the patient.

However, we cannot read the statute that broadly, for we do not feel that such an interpretation will accurately reflect the intent of the legislature. The goal in construing a statute is to ascertain the intent of the legislature and, if possible, give it effect. Doe v. Ray, 251 N.W.2d 496 (Iowa 1977). 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).

It is our opinion that the legislature did not intend that the above sections be read so broadly as to preclude disclosure of any information under any circumstances and, in effect, grant by implication, immunity from prosecution to substance abuse

patients. A broad interpretation of the above provisions would have that effect. For example, an interpretation prohibiting any disclosure of information by a facility would prohibit the disclosure of the fact that a substance abuse patient had assaulted a member of a facility's staff. Obviously, non-disclosure would preclude prosecution. Other examples come to mind. A substance abuse patient might bring a concealed weapon to a facility, or rob another patient, or commit a more grevious injury upon another patient. Under each of the above examples, a broad interpretation of the statutory provisions would prohibit disclosure.

We do not believe that the legislature intended such an unjust result, and we are unwilling to construe the above statutory provisions in such a manner as to produce those results, in the absence of clear legislative intent to grant immunity.

More appropriately, we think that the legislature intended to prohibit the disclosure of treatment information. In other words, we believe that the legislature intended to encourage persons suffering from the abuse of chemical substances to seek treatment for that illness in order that the person could resume a socially acceptable and productive role in society. Section 125.1(1), The Code 1981. In doing so, the legislature sought to assure the person seeking treatment that s(he) would not be subjected to prosecution for violation of the controlled substances laws. The legislature sought to achieve this result by prohibiting the disclosure of "the name of any person receiving or engaged in such treatment or rehabilitation". We believe that this legislative goal can be accomplished by interpreting § 125.33 in a way which will generally prohibit the disclosure of the fact that a person is receiving substance abuse treatment, or the disclosing of information on the nature of that treatment, while at the same time permitting the disclosure of non-treatment related information where it is essential to furthering the administration of justice on non-treatment related matters.

We believe that this approach will best accommodate the interests of society and the interests of patients in protecting their records from disclosure. Courts which have considered this or similar issues have adopted this kind of balanced approach. Nixon v. Administrator of General Services, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977) (Privacy rights must be weighed against the public interests); Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) (Privacy rights must be weighed against the public interests); United States v. Westinghouse Electric Corporation, 638 F.2d 570 (3d Cir. 1980) (Privacy rights

balanced against public interests); Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), cert. den. 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979) (Privacy interests must be balanced); Caesar v. Mountamos, 542 F.2d 1064 (9th Cir. 1976) (Constitutional right to privacy did not provide absolute protection for communications between patients and psychotherapists); United States v. Providence Hospital, 507 F. Supp. 519 (E.D. Mich. 1981) (Although literal language of medicare regulations prohibit disclosure of medical records unless there is a written consent of the patient, records could be obtained by subpoena); Lukaszewicz v. Ortho Pharmaceutical Corporation, 90 F.R.D. 708 (E.D. Wis. 1981) (Privacy interests of non-party patients balanced against defendant's need for information); Miller v. Colonial Refrigerated Transportation Incorporation, 81 F.R.D. 741 (M.D. Pa. 1979) (The interests of the state in seeing that truth is ascertained in legal proceedings and in fairness in the adversary process would justify a patient-litigant exception to confidentiality); Lora v. Board of Education of the City of New York, 74 F.R.D. 565 (E.D. N.Y. 1977) (Privacy rights, whether statutory or constitutional, are not absolute; they are qualified and must be balanced against legitimate and weighty competing private and state interests); Robinson v. Magovern, 27 F.R.Serv.2d 1372 (W.D. Pa. 1979) (Claims of privacy rooted in the Constitution are not absolute, but are qualified and are to be balanced against weighty competing private and state interests); Office of Mental Retardation v. Mastracci, 77 A.D.2d 473, 433 N.Y.S.2d 946 (1980) (The confidentiality accorded the hospital records of mental patients is not absolute; in a proper case, it must yield to the needs of justice); Civil Service Employees Association, Inc. v. Director, Manhattan Psychiatric Center, 72 A.D.2d 526, 420 N.Y.S.2d 909 (1979) (Confidentiality of hospital records of mental patients must yield to the needs of justice in a proper case).

We recognize that this is a grey area. It may be difficult to determine what is non-treatment related information, and it may be even more difficult to preclude disclosure of the fact that a person is participating in a treatment program when disclosing non-treatment related information. Accordingly, a balancing of the competing interests must be obtained, and a mechanism must be established which will ensure that disclosure does not occur where the information sought is treatment related or non-essential. We believe that such a mechanism has been created under the federal law applicable to substance abuse treatment facilities found at 21 U.S.C. § 1175(b)(2)(c), which reads as follows:

> (2) Whether or not the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, gives his written consent, the content of such record may be disclosed as follow:
>
> (C) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary shall impose appropriate safeguards against unauthorized disclosure.

Interpretative regulations for the above provision were adopted by the Department of Health and Human Services, and in pertinent part, are found at 42 C.F.R. §§ 2.64(g) and 2.65(c), as follows:

> Any order authorizing disclosure shall--
>
> (1) Limit disclosure to those parts of the patient's record deemed essential to fulfill the objective for which the order was granted;
>
> (2) Limit disclosure to those persons whose need for information is the basis for the order; and
>
> (3) Include any other appropriate measures to keep disclosure to a minimum for the protection of the patient, the physician-patient relationship, and the treatment services.

42 C.F.R. § 2.64(g).

> Criteria. A court may authorize disclosure of records pertaining to a patient for the purpose of conducting an investigation of or a prosecution for a crime of which the patient is suspected only if the court finds that all of the following criteria are met:

> (1) The crime was extremely serious, such as one involving kidnapping, homicide, assault with a deadly weapon, armed robbery, rape, or other acts causing or directly threatening loss of life or serious bodily injury, or was believed to have been committed on the premises of the program or against personnel of the program.
>
> (2) There is a reasonable likelihood that the records in question will disclose material information or evidence of substantial value in connection with the investigation or prosecution.
>
> (3) There is no other practicable way of obtaining the information or evidence.
>
> (4) The actual or potential injury to the physician-patient relationship in the program affected and in other programs similarly situated, and the actual or potential harm to the ability of such programs to attract and retain patients, is outweighed by the public interest in authorizing the disclosure sought.

42 C.F.R. § 2.65(c).

According to federal law, the above regulations apply to the personnel of all alcohol or drug abuse programs conducted, regulated, or directly or indirectly assisted by the federal government. 21 U.S.C. § 1175(a); 42 U.S.C. § 4582(a); 42 C.F.R. § 2.12(a). Direct or indirect assistance by the federal government is broadly defined to include such things as grants, contracts, revenue sharing funds, tax deductions and tax exempt status. 42 C.F.R. § 2.12(a)(1-4). The Iowa Department of Substance Abuse regulation found at § 805-3.9, The Iowa Administrative Code, provides that all programs, regardless of whether the program is or is not assisted by the federal government, must comply with federal confidentiality regulations unless a conflict exists between federal and state law and/or regulation, in which event a program receiving no federal funds shall minimally comply with state law and regulation. Essentially all of Iowa's substance abuse programs are subject to federal confidentiality regulations. § 803-3.9, The Iowa Administrative Code. The federal regulations further provide that where disclosure is permitted under federal law but not permitted under state law, state law shall prevail, and where disclosure is permitted under state law, but not permitted under federal law, federal law shall prevail. 42 C.F.R. § 2.23.

We believe that utilization of the mechanism established under federal law will adequately protect the interests of the substance abuse patient and society's interests in pursuing the administration of justice in non-treatment related matters.

Moreover, we believe that utilization of this mechanism is consistent with the intent of the legislature. The confidentiality requirements of ch. 125 were adopted in 1977. Laws of the Sixty-Seventh General Assembly, 1977 Session, ch. 74. The original proposal, introduced as House File 594, did not contain a confidentiality provision. Officials of the Department of Substance Abuse advise that it was recommended to the legislature that H.F. 594 include a provision on confidentiality so that state laws would be consistent with federal substance abuse laws, and to ensure that federal substance abuse funding would not be jeopardized. Indeed, House Amendment 4187, § 25 to H.F. 594 was adopted, incorporating therein the present statutory language on confidentiality. House Journal, Sixty-Seventh General Assembly, 1977 Session, pp. 2177, 2211,2212. Thus, the legislative history establishes that ch. 125's confidentiality requirements were adopted to ensure state compliance with federal confidentiality requirements. We believe this to be ample justification for the utilization of the mechanism established by the federal government to ensure the protection of confidential information.

Accordingly, it is our opinion that substance abuse facilities are generally prohibited from disclosing the fact that a person is participating in a treatment program and from disclosing information on the nature of the treatment given, but may disclose non-treatment related information without a patient's consent where required to do so by court order in pursuit of the administration of justice.

3. Section 125.37, The Code 1981, also applies to substance abuse treatment facilities and it contains a general requirement that such facilities maintain the confidentiality of their patient's records. We believe that our analysis of the more specific provisions of § 125.33, The Code 1981, will apply as well to this section. Accordingly, we advise that disclosure may be obtained under this section pursuant to the same procedure and standards applicable to § 125.33, The Code 1981, as set out above.

4. Section 217.30(1)(d) generally prohibits the disclosure of "medical or psychiatric data, including diagnosis and past history of disease or disability, concerning a particular individual". In addition to the quoted non-disclosure language, the statute also contains the following relevant provisions:

> 4. a. The general assembly finds and determines that the use and disclosure of information as provided in this subsection are for purposes directly connected with the administration of the programs of services and assistance referred to in this section and are essential for their proper administration.
>
> b. Confidential information described in subsection 1, paragraphs "a", "b", and "c" shall be disclosed to public officials, for use in connection with their official duties relating to law enforcement, audits and other purposes directly connected with the administration of such programs upon written application to and with approval of the commissioner or his designee. (Emphasis added.)

§ 217.30(4), The Code 1981.

It is clear from a reading of the above statute that the legislature intended, as a general proposition, to prohibit the disclosure of confidential patient information. However, it is equally clear that the legislature intended that, in specified circumstances, otherwise confidential information should be disclosed. The legislature made a specific finding that the disclosure of confidential information "to public officials, for use in connection with their official duties relating to law enforcement" would be for a purpose directly connected with the administration of social services programs, and consequently, not a violation of § 217.30. Op.Att'yGen. # 81-1-10(L); Op.Att'yGen. # 79-6-17. The word "shall" as used by the legislature, imposes a duty. Section 4.1(36)(a), The Code 1981. Thus, § 217.30(4) imposes a duty to disclose confidential information to appropriate law enforcement authorites for use in connection with their official duties.

As previously indicated, we believe that a balance must be struck between the competing interest of protecting the patient from embarrassing and harmful disclosures of purely private information on the one hand, and ensuring that law enforcement personnel have access to non-treatment related information where essential. To achieve this balance, we again recommend for use the procedure outlined for obtaining prior court approval as previously discussed herein.

5. Section 229.25, The Code 1981, is a specific provision of the mental health code that requires state mental health

facilities to keep patients' medical records confidential. It reads, in pertinent part, as follows:

> 229.25 Medical records to be confidential - exceptions. The records maintained by a hospital or other facility relating to the examination, custody, care and treatment of any person in that hospital or facility pursuant to this chapter shall be confidential, except that the chief medical officer shall release appropriate information under any of the following circumstances:
>
> 1. The information is requested by a licensed physician, attorney or advocate who provides the chief medical officer with a written waiver signed by the person about whom the information is sought.
>
> 2. The information is sought by a court order. (Emphasis added).

Our review of the above provision convinces us that it is not materially different from ch. 125 and § 217.30 as previously discussed. We accordingly reach the same conclusions with respect to disclosure of medical records under this provision. Non-treatment related information essential to the administration of justice may be disclosed without the patient's consent where sought by court order.

C. Constitutional Right to Privacy

It is not uncommon for the concept of confidentiality to be interchanged with the right to privacy.

> Although both concepts are concerned with protecting a person's identity and private life from unauthorized disclosure, they are distinct legalities which must be distinguished both in their origins and in their applicability to the services being provided to developmentally disabled individuals . . . [P]rivacy is a constitutionally derived right which protects a limited zone of individual intimacy from unwarranted intrusions. Confidentiality, on the other hand, is derived from an explicit or implicit agreement between two persons that the information shared between them will not be disclosed to third persons. Confidentiality is not a

> constitutional right of the individual client; it is rather, an obligation placed upon the professional to keep all client communications private.

Legal Concepts, published by the Joint Commission on Accreditation of Hospitals (1978).

The courts, however, have not followed a strict statutory confidentiality/constitutional right to privacy distinction. In fact, some courts explicitly hold that a patient's interest in keeping psychiatric records confidential has its roots in his/her constitutionally protected right of privacy. Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977); United States v. Westinghouse Electric Corporation, 638 F.2d 570 (3d Cir. 1980); Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978); cert. den. 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979); Caesar v. Mountanos, 542 F.2d 1064 (9th Cir. 1976); Gotkin v. Miller, 514 F.2d 125 (2d Cir. 1975); Hawaii Psychiatric Society v. Ariyoshi, 481 F. Supp. 1028 (D. Hawaii 1979); Miller v. Colonial Refrigerated Transportation Incorporation, 81 F.R.D. 741 (M.D. Pa. 1979); Lora v. Board of Education of the City of New York, 74 F.R.D. 565 (E.D. N.Y. 1977); Robinson v. Magovern, 27 F.R.Serv.2d 1372 (W.D. Pa. 1979); Horne v. Patton, 287 S.2d 824 (Ala. 1974); Mavroudis v. Superior Court, 102 Cal.App.3d 594, 162 Cal.Rptr. 724 (1980); Estate of Berthiaume v. Pratt, 365 A.2d 792 (Me. 1976); Barber v. Time, Inc., 159 S.W.2d 291 (Mo. 1942); In Re B, 394 A.2d 419 (Pa. 1978).

The constitutional right to privacy has no precise definition, nor does it depend upon one particular provision of the constitution for support. It may flow from the penumbras of the Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution.

> Although "[t]he Constitution does not explicitly mention any right to privacy," the Supreme Court has recognized that one aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment is "a right of personal privacy, or a guarantee of certain areas or zones of privacy." Carey v. Population Services Inter., supra, 431 U.S. 678, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675, Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct. 705, 706, 35 L.Ed.2d 147 (1973) . . . .
>
> The Supreme Court has recognized an individual's right to make decisions free

from unjustified governmental interference on matters relating to marriage, Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); procreation, Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 1113-4, 86 L.Ed. 1655 (1942), contraception, Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 1038-39, 31 L.Ed.2d 349 (1972); Carey v. Population Services Inter., supra, 97 S.Ct. at 2016; family relationships, Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944); child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 1923); and abortion, Roe v. Wade, supra, the Court implicitly expressed the opinion that decisions regarding medical care also fall within this protected zone of autonomy. 97 S.Ct. at 876-79; see Plante v. Gonzalez, supra, 575 F.2d at 1131.

An individual's decisions whether or not to seek the aid of a psychiatrist, and whether or not to communicate certain personal information to that psychiatrist, fall squarely within the bounds of this "cluster of constitutionally protected choices," Carey v. Population Services Inter., supra, 97 S.Ct. at 2016. The Supreme Court has consistently been concerned with protecting individuals against governmental intrusion into matters affecting the most fundamental personal decisions and relationships. See id., at 2017. No area could be more deserving of protection than communications between a psychiatrist and his patient. Such communications often involve problems in precisly the areas previously recognized by the Court as within the zone of protected privacy, including family, marriage, parenthood, human sexuality, and physical problems. Constitutionally protected privacy must, at a minimum, include the freedom of an individual to choose the circumstances under which

> and to whom, certain of his thoughts and feelings will be disclosed.

Ariyoshi, supra, at 1038.

Although the concept of privacy has no precise definition, four distinct interests areas are identifiable. They are (1) an intrusion upon a person's physical and mental solitude or seclusion, (2) the public disclosure of private facts, (3) publicity which places a person in a false light in the public's eye, and (4) appropriation for the benefit of another, a person's name or likeness. Pratt, supra. See also Whalen v. Roe, 429 U.S. 589, 51 L.Ed.2d 64, 97 S.Ct. 869 (1977), where the Supreme Court held that privacy involves at least two kinds of interests, one of which is the individual interest in avoding disclosure of personal matters, while another is an interest in independence in making certain kinds of important decisions.

Clearly, then, the concept of confidentiality grows out of a constitutional right, not merely a statutory one. Even further, Iowa has recognized a constitutional privacy right. In Howard v. Des Moines Register and Tribune Co., 283 N.W.2d 289 (Iowa 1979), the Iowa Supreme Court held that the right of privacy is a fundamental social value which is also constitutionally protected. "We recognize a public interest in preventing wrongful intrusions into privacy". 283 N.W.2d at 301.

The constitutional right to privacy is not absolute. It may be violated where compelling state interests justify the violation.

> That the right to privacy extends to decisions regarding psychiatric care does not, however, automatically render Section 8 of Act 105 invalid. Psychiatric care may be regulated in ways that do not infringe protected individuals choices, and even a burdensome regulation may be validated by a sufficiently compelling state interest. See Carey v. Population Services Inter., supra, 97 S.Ct. at 2016. But, as the Supreme Court has written in the context of abortions:
>
> > "'Compelling' is of course the key word; where a decision as fundamental as that whether to bear or

> beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."
>
> Roe v. Wade, supra, 93 S.Ct. at 727-28. This court's inquiry, therefore, must be whether Section 8 burdens the individual's liberty to make decisions regarding psychiatric care, and if so, whether the State has demonstrated that the statute represents the least restrictive means to achieve a compelling state interest.

Ariyoshi, supra at 1039. Accord, Mavroudis, supra; Gabor v. Hyland, 166 N.J. Super. 275, 399 A.2d 993 (1979); Civil Service Association, Inc. v. Director, Manhattan Psychiatric Center, 72 A.D.2d 526, 420 N.Y.S.2d 909 (1979); Matter of Dee Children, 93 Misc.2d 749, 402 N.Y.S.2d 958 (1978); State v. Washington, 83 Wis.2d 808, 266 N.W.2d 597 (1978). Cf. City of Dubuque v. Telegraph Herald, Inc., 297 N.W.2d 523 (Iowa 1980).

Distinctions, then, between statutory confidentiality and the constitutional right to privacy are being blurred as the right to privacy, as a concept, matures.

In summary, the constitutional right to privacy precludes the non-consensual disclosure of confidential medical information, unless such disclosure is justified by compelling state interest.

D. Application of Statutory Provisions and Right of Privacy to Issues Herein.

To restate our general conclusions, §§ 68A.7, 125.33(1) and (3), 125.37, 217.30, 229.25, and 622.10, The Code 1981, prohibits the disclosure of treatment related information about patients receiving treatment at substance abuse or mental health treatment facilities. However, non-treatment related information may be disclosed where it is essential to furthering the administration of justice and it is sought by court order. The constitutional right to privacy precludes the disclosure of confidential medical information, unless such disclosure is justified by compelling state interests. We will now apply these conclusions to the specific questions raised herein.

First, you ask whether the staff of a treatment facility may testify to communications or observations gained during the course of treatment in support of a petition for involuntary commitment. We addressed a similar question in a prior opinion of this office, Op.Att'yGen. # 80-7-13, where we concluded that a psychiatrist is free to testify at an involuntary commitment hearing where the psychiatrist has performed a diagnostic evaluation pursuant to a court order. We relied on Iowa case law which held that the physician-patient privilege does not arise where, on order of the court, a person is examined to determine his/her mental or physical condition. Snethen v. State, supra; State v. Cole, supra; In Interest of Hoppe, supra.

Your question, however, is broader than the physician-patient privilege question that was addressed in our prior opinion, for your question asks if persons other than the treating physician/psychiatrist may testify at an involuntary commitment hearing, and further, whether they may testify to communications and observations gained as a result of treating a patient, and not as a result of a diagnostic evaluation performed pursuant to court order. It is our opinion that neither the referred to statutes nor the constitution would permit such testimony. Information needed for involuntary commitment could be obtained pursuant to a court-ordered diagnostic evaluation. This approach, we believe, will best meet the competing interests of protecting the patient's privacy interests in treatment related information, and in providing a mechanism through which essential information can be obtained for involuntary commitment purposes.

Secondly, you ask whether the staff at a mental health facility may report to law enforcement officials the possession of a weapon and the circumstances surrounding the possession of a weapon by a patient, and testify to those facts in a court, grand jury, or administrative proceeding, without violating § 125.33 of the Code. It is our view that a facility's staff may report neutral facts surrounding the possession of a weapon to law enforcement officials. That is to say that circumstantial information could be reported as long as the identity or identities of patients are not disclosed.

Further, we advise that if law enforcement officials act upon such a report and seek the identity or identities of patients involved, such information should not be disclosed, unless sought by court order. As previously indicated, otherwise confidential information may be disclosed pursuant to court order in judicial and quasi-judicial proceedings, as court orders are to be followed by administrative officers, unless and until they are revoked or modified by the issuing court or a reviewing court. Bernklau v. Bennett, 162 N.W.2d 432 (Iowa 1968); Shaw v. Allison, 236 Iowa 720, 18 N.W.2d 796 (1945).

You next inquire as to what information may be disclosed by a treatment facility's staff members without violating § 125.33 of the Code. We believe that we answered this question in our earlier discussion of § 125.33 where we advised that substance abuse treatment facilities are generally prohibited from disclosing the fact that a person is participating in a treatment program, or disclosing information on the nature of the treatment given, but may disclose non-treatment related information without the patient's consent where required to do so by court order.

We are next asked whether § 125.37 of the Code will prohibit a chemical substance facility from providing information to law enforcement agencies, particularly identification information which will aid in the execution of a search warrant. As stated above, we advise that a facility's staff may disclose neutral information to law enforcement officials so long as the identity of a patient is not disclosed. We again reiterate that the names of patients or other identifying material may not be disclosed by a facility's staff, unless they are authorized to do so by court order.

We do not mean to suggest, however, that law enforcement personnel are prohibited from executing a search warrant at a treatment facility. A search warrant is a court order and searches are proper when made under the authority of a validly issued search warrant. State v. Moore, 261 Iowa 1100, 156 N.W.2d 890 (1968); § 808.1, The Code 1981; Cf. State v. Iverson, 272 N.W.2d 1 (Iowa 1978). While a facility's staff may not impede the execution of a validly issued search warrant, they are not free to voluntarily provide assistance to law enforcement personnel in the execution of the warrant, unless directed to do so by court order. Absent a court order affirmatively authorizing a facility's staff to disclose confidential information, they must passively observe the execution of a search warrant.

We are next asked if society's competing interests in vigorous law enforcement can be reconciled with the prohibition on disclosure placed on a treatment facility's staff. In response thereto, we advise that it is our belief that the procedures outlined above adequately reconcile the conflicting interests discussed. If practical experience proves to the contrary, this question should be addressed to the legislature.

We are next asked if § 804.15, The Code 1981, will provide law enforcement personnel the authority to effect an arrest without the cooperation of a facility's staff. As we have already advised that the duty that is imposed upon a facility's staff

is one of non-disclosure, and not one of obstructing law enforcement officials in the performance of their duties, we need not regurgitate the law on arrests or searches, with or without warrants.

You finally ask if a facility's staff will be subject to prosecution under §§ 719.1 and 719.2, The Code 1981, if it fails to cooperate in some fashion which will allow an arrest to take place. It is our opinion that a facility's staff will not incur any criminal liability if they abide by the confidentiality requirements as described above. Those requirements merely require non-disclosure of the names and medical records of patients receiving treatment at a facility. Refusal to supply such names or medical information, absent a court order, will not subject a person to prosecution under §§ 703.3, 719.1 or 719.2, The Code 1981.

There is no criminal liability for failure to make a report of a suspected criminal violation. Although § 703.3, The Code 1979, makes a person an accessory after the fact to a criminal violation where the person harbors, aids or conceals an accused person with the intent to prevent apprehension of the accused person, a mere passive failure to disclose the commission or suspected commission of a crime does not make a person an accessory after the fact. State v. Lott, 255 N.W.2d 105 (Iowa 1977); State v. Vesey, 241 N.W.2d 888 (Iowa 1976); State v. Kittelson, 164 N.W.2d 157 (Iowa 1969); State v. Philpott, 222 Iowa 1334, 271 N.W. 617 (1937); State v. Hudson, 50 Iowa 157 (1878); State v. Franks, 377 So.2d 1231 (La. 1979); State v. Atkinson, 298 N.C. 673, 259 S.E.2d 858 (1979); State v. Satterfield, 483 S.W.2d 171 (Ark. 1972); Robinson v. State, 5 Md. App. 723, 249 A.2d 504 (1969). To be an accessory after the fact there must be an overt act to prevent the apprehension of the accused. Id.; 22 C.J.S. Criminal Law §§ 95, 96, and 99 (1961).

Likewise there is no criminal liability under § 719.1 unless there is an affirmative effort to obstruct a peace officer in the performance of his/her duties. Under § 719.1 there must be actual opposition through the use of actual or constructive force making it reasonably necessary for the peace officer to use force in carrying out his/her duties. State v. Donner, 243 N.W.2d 850 (Iowa 1976). We do not advise the staff of treatment facilities to oppose law enforcement officials in pursuit of their duties to execute arrest or search warrants, or other legal process. We advise the adoption of a passive posture of non-disclosure of confidential information, in the absence of a court order.

We reach the same conclusion with respect to § 719.2. That section makes it a criminal act for any person to "unreasonably and without lawful cause" refuse to render assistance upon the request of a magistrate or peace officer. Without unduly belaboring the point, we advise that refusal to render assistance to a peace officer under the circumstances described herein is neither unreasonable or without lawful cause. Unreasonable refers to that which is not based on reason, arbitrary, capricious and absurd. Wisconsin Telephone Co. v. Public Service Commission, 232 Wis. 274, 287 N.W.2d 122 (1939); Cf. Ryan v. City of Emmetsburg, 232 Iowa 600, 4 N.W.2d 435 (1942). We think that a facility's staff will have both a reason and lawful cause for their passive posture, as the statutes previously discussed herein prohibit disclosure of confidential information, and as §§ 68A.6, 125.33(6) and 217.30(7), The Code, 1981, makes it a criminal offense to violate confidentiality requirements. Accordingly, we advise that no criminal liability will exist under § 719.2.

In summary, § 622.10, which creates a physician-patient testimonial privilege, does not preclude a physician from testifying in a civil or criminal proceeding as a result of a diagnostic examination performed to determine a person's mental or physical condition.

Section 68A.7's confidentiality requirements do not bar the non-consensual disclosure of medical records where sought by subpoena or court order.

Section 125.33(2) and (3) and Section 125.37 generally prohibit substance abuse treatment facilities from disclosing the fact that a person is participating in a treatment program, and from disclosing information on the nature of the treatment given, but does not prohibit the non-consensual disclosure of non-treatment related information where required to do so by court order in pursuit of the administration of justice.

Section 217.30(1)(d) generally prohibits the disclosure of medical or psychiatric data by a treatment facility, including diagnosis and past history of disease or disability of a patient, but pursuant to § 217.30(4) such information shall be disclosed without a patient's consent to law enforcement officials for use in connection with their official duties relating to law enforcement where authorized by court order.

Section 229.25 general prohibition on the disclosure of medical records may be abrogated where non-treatment related information is sought pursuant to court order.

The consitutional right to privacy precludes the non-consensual disclosure of confidential medical information, unless such disclosure is justified by compelling state interests.

Neither the constitution nor statutory confidentiality provisions would permit a treating physician/psychiatrist or other medical staff to testify at an involuntary commitment hearing under ch. 229 to communications and observations gained as a result of treating a patient, and not as a result of a diagnostic evaluation performed pursuant to court order.

A treatment facility's staff may report to law enforcement officials, without violating § 125.33, neutral facts surrounding the possession of a weapon by a patient, so long as the identity or identities of patients are not disclosed.

If the identity or identities of patients involved in suspected criminal violations are sought by law enforcement officials, such information should not be disclosed by a treatment facility unless authorized to do so by court order.

Law enforcement officials may execute a search warrant at a treatment facility since search warrants are court orders, and searches are proper when made under the authority of a validly issued search warrant.

Absent a court order affirmatively authorizing a treatment facility's staff to assist in the execution of a search warrant, said staff must passively observe the execution of the search warrant.

A treatment facility's staff will not incur criminal liability under §§ 703.3, 719.1, and 719.2, where said staff abides by statutory or constitutional confidentiality requirements and refuse to disclose confidential information to law enforcement personnel, so long as they do not affirmatively act to obstruct law enforcement personnel in the performance of their duties.

Sincerely,

Thomas Mann, Jr.
Assistant Attorney General

Jeanine Freeman
Assistant Attorney General

TM/JF/jam

MUNICIPALITIES: Conflict of Interest. Section 362.6, The Code 1981. Section 362.6, The Code 1981, does not require an interested officer to disqualify himself or herself on a measure before a municipal committee. (Walding to Nystrom, State Senator, 3/25/82) #82-3-24(L)

March 25, 1982

The Honorable Jack Nystrom
State Senator
State Capitol
L O C A L

Dear Senator Nystrom:

We are in receipt of your opinion request of February 2, 1982. Specifically, you have made inquiry as to a possible conflict of interest in a matter before the Ordinance Committee of the Boone City Council.

The applicable chapter of the Code is Ch. 362. In particular, section 6 provides in pertinent part:

> A measure voted upon is not invalid by reason of conflict of interest in an officer of a city, unless the vote of the officer was decisive to passage of the measure. If a specific majority or unanimous vote of a municipal body is required by statute, the majority or vote must be computed on the basis of the number of officers not disqualified by reason of conflict of interest. [Emphasis added]

Section 362.6, The Code 1981.

As presented to us, the Ordinance Committee is considering a building code. In addition to addressing housing inspection requirements, the building code is concerned with rental inspections. Further, we are told that a council member owns two ren-

tal units in the City of Boone.

It is our judgment that § 362.6, The Code 1981, does not require an interested officer to disqualify himself or herself on a measure before a municipal committee. As the underscored portion of the aforementioned section makes evident, the interested officer's vote must be decisive to passage of the measure to be invalid. Passage of a measure contemplates the action of the council as a whole, not that of a municipal committee. Accordingly, the council member owning rental property can act on the building code before the Ordinance Committee.

The council, however, is not without recourse. The internal rules and procedures of the council can be amended to disqualify an interested officer on measures before a municipal committee. Absent such an amendment, however, the interested officer need not disqualify himself on the measure before the Ordinance Committee of the Boone City Council.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW/nm

WORKER'S COMPENSATION: Agricultural Exemptions. U.S. Const. amend. XIV; Iowa Const. art. I, § 6; 1976 Session 66th G.A. Ch. 1084, § 1; §§ 85.1, 87.1 The Code 1981. That portion of § 85.1 which exempts certain "persons engaged in agriculture" from the Iowa Worker's Compensation statute violates neither U.S. Const. amend. XIV nor Iowa Const. Art. I, § 6. (Benton to Comito, State Senator, 3/24/82) # 82-3-23(L)

Senator Richard Comito
State Capitol
L O C A L

Dear Senator Comito:

This letter is in response to your inquiry regarding certain provisions within Chapter 85, The Code 1981, Iowa's Worker's Compensation statute. Specifically, you have questioned whether the agricultural exemptions found in § 85.1, The Code 1981 violate either the Federal or Iowa Constitutions. Please note that this response is in letter form rather than a formal opinion of this office.

From its enactment in 1913, the Iowa Worker's Compensation Act has, in some manner, exempted from its provisions "persons engaged in agriculture". In fact such exclusions are common in the various states with such legislative schemes. 81 Am.Jur.2d Workmen's Compensation, § 121 p. 804. The precursor to the present statute stated the exemption in this manner:

> 3. Persons engaged in agriculture, insofar as injuries shall be incurred by employees while engaged in agricultural pursuits or any operations immediately connected therewith, whether on or off the premises of the employer, except that employers engaged in agriculture and also engaged in any other trade or business not excluded by the provisions of this section, may, by serving notice thereof upon the industrial commissioner by registered United States mail, elect to provide, secure, and pay workmen's compensation in the manner as by this chapter provided for all personal injuries sustained, arising out of and in the course of the employment. Upon such

> an election the employee, except as otherwise provided by this chapter, shall accept compensation in the manner provided by this chapter and the employer shall be relieved from other liability for recovery of damages, or other compensation for such injury.

The present language providing for an agricultural exemption was added by 1976 Session, 66th G.A., Ch. 1084 § 1. As your letter notes, the present statute provides in pertinent part:

> 3. Persons engaged in agriculture, insofar as injuries incurred by employees while engaged in agricultural pursuits or any operations immediately connected therewith whether on or off the premises of the employer, except:
>
> a. This chapter shall apply to such persons not specifically exempted by paragraph "b" of this subsection if at the time of injury such person is employed by an employer whose total cash payroll to one or more persons other than those exempted by paragraph "b" of this subsection amounted to one thousand dollars or more during the preceding calendar year.
>
> b. The following persons or employees or groups of employees shall be specifically included within the terms of the exemption from coverage of this chapter provided by this subsection:
>
> (1) The spouse of the employer and parents, brothers, sisters, children and stepchildren of either the employer or the spouse of the employer; and
>
> (2) Any person engaged in agriculture as a farm operator or spouse of such farm operator or parents, brothers, sisters, children and stepchildren of either such farm operator or spouse while exchanging labor with another farm operator or spouse of such other farm operator or parents, brothers, sisters, children, and stepchildren of either such other farm operator or spouse for the mutual benefit of any or all such

> persons; and
>
> (3) The president, vice president, secretary, treasurer, of a family farm corporation and their spouses and parents, brothers, sisters, children and stepchildren of such officers and their spouses who are employed by such corporation, the primary purpose of which, although not necessarily the stated purpose, is farming or ownership of agricultural land, and while such officer or person related to the officer is engaged in agricultural pursuits or any operation immediately connected therewith whether on or off the premises of the employer.

Before turning to an analysis of whether this exemption offends the equal protection guarantees of either the Federal or state constitutions, it may be helpful to briefly review those constitutional provisions germane to your inquiry.

When the constitutionality of a statute is challenged it must be accorded every presumption of constitutionality, and it will be found unconstitutional only if it clearly infringes on constitutional rights and then only if every reasonable basis in support of its validity is negated. Woodbury Cty. Soil Conservation Dist. v. Ortner, 279 N.W.2d 276, 277 (Iowa 1979). Your letter asks whether the exemptions within § 85.1 violate either the equal protection clause of the United States Constitution or the uniform operation clause of the Iowa Constitution. U.S. Constitutional amendment XIV states in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Iowa Const. 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.

The Iowa Supreme Court has held that the same standards should be applied under art. I § 6 as are applied under the Federal equal protection clause. Bierkamp v. Rogers, 293 N.W.2d 577, 580 (Iowa 1980). Therefore, the same tests used to determine whether a statutory classification offends the equal protection guarantee should be applied to determine if the classification violates Iowa's equivalent Constitutional provision.

Although it is frequently necessary for government to classify individuals for legitimate state purposes, the Courts have held that the equal protection clause requires that these classifications not be based upon impermissible criteria or be arbitarily or unreasonably drawn. Redmond v. Carter, 247 N.W.2d 268, 271 (Iowa 1976). In examining governmental classifications, the first step must be to decide what level of scrutiny should be applied.

The Courts employ, with some variations, two basic levels of scrutiny in considering the constitutional validity of a statutory classification. Classifications based upon race, alienage or national origin are viewed as suspect and therefore in examining these classifications the Courts require the government to demonstrate a compelling state interest to justify the classification. State v. Kramer, 235 N.W.2d 114, 116 (Iowa 1975). By the same token, if the classification operates to restrict what the Courts view as a fundamental right, such as voting, the Courts will also subject the statute to a strict scrutiny and thus require the government to show a compelling state interest. Hill v. Stone, 421 U.S. 289, 287, 95 S.Ct. 1637, 1643, 44 L.Ed.2d 172, 179 (1975); Lunday v. Vogelmann, 213 N.W.2d 904, 907 (Iowa 1973).

The second level of scrutiny is applied generally to statutes not based upon a suspect class and not infringing upon a fundamental right. Under what might be called the "rational basis" test, the Courts require only that the challenged classification bear a rational relationship to a legitimate governmental purpose in order to pass constitutional

muster. Hawkins v. Preisser, 264 N.W.2d 726, 729 (Iowa 1978). As a variation on the traditional rational basis test, the Iowa Supreme Court has recently employed a more heightened standard of scrutiny in two tort-related cases. For example, in Gleason v. City of Davenport, 275 N.W.2d 431 (Iowa 1979), the Iowa Court considered the validity under equal protection of a statute providing for a 30 day notice provision for tort suits against special charter cities, while for actions against all other cities a 60 day notice provision applied. The effect, of course, was to handicap the class of tort claimants against special charter cities with a shorter period in which they had to give notice of their action. In holding the 30 day provision unconstitutional as violative of equal protection, the Court found that there was not a rational basis for distinguishing between tort claimants against special charter cities and those claimants against cities. Gleason at 436. Similarly, in Bierkamp v. Rogers, 293 N.W.2d 577 (Iowa 1980), the Iowa Supreme Court struck down as violative of art. I § 6 of the Iowa Constitution the Iowa "guest statute", which had precluded automobile passengers from suing the vehicle operator arising from car accidents, unless the operator had acted with recklessness. The Court held that this classification, which differentiated automobile guests from guests in other conveyances, bore no rational relationship to a legitimate state purpose and therefore was violative of the Iowa Constitution. Bierkamp at 585. Apparently under the "means scrutiny" hybrid of the "rational basis" test, the Court will more critically examine whether the discriminatory statute actually advances its articulated purpose, and moreover the Court will not speculate as to that purpose, it must be advanced by those defending the statute. 67 Iowa L.Rev. 309, 319 (1982).

Given these varying levels of scrutiny, we would conclude that a reviewing Court would apply the traditional rational basis test to the agricultural exemptions within § 85.1. First, it is clear that this provision does not repress a fundamental right, nor is it based upon a suspect criteria. Therefore the strict scrutiny level of examination is inapplicable. Secondly, the means scrutiny test, which is basically a variation of the rational basis test, has not been applied uniformally by the Iowa Court. See, for example, Rudolph v. Iowa Methodist Medical Ctr., 293 N.W.2d 550, 558 (Iowa 1980). Moreover, Gleason and Bierkamp, where the Court employed means scrutiny, involved tort cases where a class of individuals would in effect be denied access to the Courts because of the statutory classification. Although the distinctions within § 85.1 may seem unfair to other employers who are required to purchase compensation liability insurance by § 87.1

The Code 1981, they are less onerous than the distinctions struck down in Gleason and Bierkamp. Accordingly, we will consider § 85.1 under the traditional rational basis test.

In Hunter v. Colfax Consol. Coal Co., 175 Iowa 245, 154 N.W. 1037 (1916) Iowa Supreme Court upheld the validity under equal protection of the agricultural exemption found in the statutory predecessor to the present § 85.1. Employing what was tantamount to a rational basis test, the Iowa Court stated:

> We shall see, presently, that the power to classify is primarily in the legislature, that the courts accord it the widest latitutde in performing this function, and that a classification adopted by it will be sustained unless it is so palpably arbitrary as that there is no room for doubt that discretion has been abused by indulging in an unjustifiable discrimination. Certainly, we should not say the legislature discriminated thus in determining that there were substantial differences in hazard and situation between those within the act and household or domestic servants, farm laborers engaged in agricultural pursuits, and those in an employment of a casual nature. Hunter at 288-289.

The United States Supreme Court in New York C.R. Co. v. White, 243 U.S. 188, 375 S.Ct. 247, 61 L.Ed. 667 (1916) upheld as constitutional under the equal protection clause, the provision of the New York Workmen's Compensation Act which exempted farm laborers. In fact the weight of authority is that such exclusions are not unconstitutional as class legislation. 81 Am.Jur.2d Workmen's Compensation, § 121 p. 804.

We conclude that the exemption for "persons engaged in agriculture" within § 85.1 violates neither the equal protection clause of the Fourteenth Amendment nor art. I § 6 of the Iowa Constitution, and we believe that if faced with such a challenge, the Iowa Supreme court would so hold. Classifications do not offend equal protection simply because they result in some inequality. Bierkamp at 581. Under the traditional rational basis standard, equal protection is offended only if the statutory classification rests on grounds irrelevant to the State's purpose; the resulting discrimination will not

be set aside if any state of facts may be conceived to justify it. As the Court noted in Hunter, we can not say that the legislative distinction between agricultural employees and others is wholly without a rational basis. Based on the character of the work, its seasonal nature and other factors, the legislature could rationally conclude that "persons engaged in agriculture" should for the most part be excluded from Chapter 85 and the related statutes. Particularly in light of the heavy burden on those mounting a constitutional challenge, it appears dubious that a Court would strike down this provision.

In sum, the legislature could reasonably exclude "persons engaged in agriculture" from § 85.1, and therefore this provision does not deny equal protection of the laws to those to whom it applies.

Sincerely,

Timothy D. Benton

TIMOTHY D. BENTON
Assistant Attorney General

TDB/nm

MENTAL HEALTH: County liability for Costs of Care of Mental Patients Admitted to Private Hospitals. §§ 125.34(2), 229.22, 229.22(2), 230.20(5), 444.12(3), The Code 1981. The county of legal settlement is responsible for the costs of care and treatment of a mental patient treated at a private facility under § 229.22. Where the legal settlement of the patient is in another state or is unknown, the county of admission or commitment is liable for the costs of care and treatment of mental patients treated at private facilities under § 229.22.

Detention of a person purusant to § 229.22 does not constitute an arrest within the meaning of the criminal law, but rather constitutes the taking of a person into protective custody to prevent injury to the detainee or others.

Where a court enters an order placing a person in the custody of a private facility, such order estinguishes all prior rights to custody that may have been reposed in either a city, county, or state agency, unless specifically excepted by the order.

Where a person detained pursuant to § 229.22 is treated at a state mental health facility, and the person's legal settlement is in another state or is unknown, the state is liable for the costs of such care and treatment. If legal settlement is in a county in Iowa, and the patient is treated at a state mental health facility, the county is liable for eighty percent of the costs of care and treatment and the state is liable for the remainder. (Mann to Smith, State Representative, 3/24/82) #82-3-22(L)

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Department of Justice

March 24, 1982

ADDRESS REPLY TO:
SOCIAL SERVICES DIVISION
SECOND FLOOR
HOOVER BUILDING
DES MOINES, IOWA 50319
(515) 281-8330

The Honorable Jo Smith
State Representative
State Capitol
L O C A L

Dear Representative Smith:

You recently asked for an opinion from this office on the following questions:

1. Who, the county, city, state or others is responsible for payment for psychiatric evaluation or treatment for indigent persons admitted to a private hospital according to the provisions of Sections 229.22 where:

   a. The person hospitalized is not the subject of an arrest by the city peace officer who delivered the hospitalized person pursuant to Section 229.22(2).

   b. The person hospitalized has been arrested for violation of a state law or city ordinance by the city peace officer who delivered the hospitalized person pursuant to Section 229.22(2), but the person so hospitalized has not yet been arraigned and committed to the county jail.

   c. The same facts as in a or b above, but the person hospitalized is detained at

the private hospital beyond the forty-eight hour period allowed under § 229.22 by additional proceedings initiated by others under the provisions of §§ 229.6 through 229.13.

2. Does the order of a magistrate pursuant to Section 229.22(2) placing custody of a person in a private hospital extinguish or terminate the custody of the county, city or state which effectuated the arrest of the person hospitalized.

3. Does Section 444.12(3) require the county to pay for hospitalizations of all indigent persons committed pursuant to the provisions of Section 229.22.

We addressed your first question in a recent opinion of this office, Op.Att'yGen. # 81-10-24(L). There we concluded that the county of legal settlement is responsible for the costs of care and treatment of a mental patient treated at a private facility under § 229.22, The Code 1981. We further opined, that where the legal settlement of the patient is in another state or is unknown, the county of admission or commitment is liable for the costs of care and treatment of mental patients treated at private facilities under § 229.22 We reaffirm those positions and further state that we see nothing in either fact situation outlined in subsections a, b, and c of your question that would cause us to change our position.

You ask in question number two whether an order of a magistrate issued pursuant to § 229.22(2) placing custody of a person in a private hospital extinguishes or terminates the custody of the county, city or state which effectuated the arrest of the person hospitalized.

We first advise that the detention of a person pursuant to § 229.22(2) does not constitute an arrest within the meaning of the criminal law, but rather constitutes the taking of a person into protective custody to preclude injury to the detainee or others. Cf. § 125.34(2), The Code 1981.

Secondly, we advise that where a court enters an order placing a person in the custody of a private facility, such order

extinguishes all prior rights to custody reposed in either a city, county, or state agency, unless such rights are specifically excepted thereby. Court orders are binding and are to be followed by administrative officers, unless and until they are revoked or modified by the issuing or a reviewing court. Bernklau v. Bennett, 162 N.W.2d 432 (Iowa 1968); Shaw v. Allison, 236 Iowa 720, 18 N.W.2d 796 (1945).

You finally ask if § 444.12(3), The Code 1981, requires the county to pay for all indigent persons committed pursuant to the provisions of § 229.22.

As aforementioned, we addressed this question in Op.Att'y Gen. # 81-10-24(L), where we concluded that either the county of admission or county of legal settlement has liability for such costs where a patient is treated at a private facility. We also stated that where such a person detained pursuant to § 229.22 is treated at a state mental health facility, the state will be liable for the costs of care and treatment if the patient's legal settlement is in another state or is unknown. If legal settlement is in a county in Iowa, and the patient is treated at a state mental health facility, the county is liable for eighty percent of the costs of care and treatment and the state is liable for the remainder. Op.Att'yGen. # 81-9-6(L); § 230.20(5), The Code 1981, as amended.

In summary, we advise that the county of legal settlement is responsible for the costs of care and treatment of a mental patient treated at a private facility under § 229.22. Where the legal settlement of the patient is in another state or is unknown, the county of admission or commitment is liable for the costs of care and treatment of mental patients treated at private facilities under § 229.22.

Detention of a person pursuant to § 229.22 does not constitute arrest within the meaning of the criminal law, but rather constitutes the taking of a person into protective custody to prevent injury to the detainee or others.

Where a court enters an order placing a person in the custody of a private facility, such order extinguishes all prior rights to custody that may have been reposed in either a city, county, or state agency, unless specifically excepted by the order.

Where a person detained pursuant to § 229.22 is treated at a state mental health facility, and the person's legal settlement

is in another state or is unknown, the state is liable for the costs of such care and treatment. If legal settlement is in a county in Iowa, and the patient is treated at a state mental health facility, the county is liable for eighty percent of the costs of care and treatment and the state is liable for the remainder.

Sincerely,

Thomas Mann, Jr.
Assistant Attorney General

TM/jam

COUNTIES: Historical preservation tax funds. 1981 Session, 69th G.A., ch. 117, § 421.18. Historical preservation tax funds may be used for the preservation of historical buildings. (Weeg to Howell, State Representative, 3/24/82) #82-3-21(L)

The Honorable Rollin Howell
State Representative
State Capitol
L O C A L

March 24, 1982

Dear Mr. Howell:

You have requested an opinion of the Attorney General as to whether historical preservation tax funds may be used to preserve existing structures. You further request that we consider our holding in Op.Att'yGen. #80-5-7 in answering this question. We find nothing in that opinion which prohibits such an expenditure. Therefore it is our opinion that such funds may be used to preserve buildings that are considered historical structures of the area. Our reasons are as follows.

Historical preservation tax funds are levied under the provisions of 1981 Session, 69th G.A., ch. 117, § 421, which provides in relevant part:

> The board [of supervisors] may levy the following taxes each year . . .
>
> * * * *
>
> 18. For a local, non-profit historical society organized under chapter 504 or 504A, not to exceed three cents per thousand dollars to be used for collecting and preserving historical materials, artifacts, places, and structures of the area, maintaining a historical library and collections, conducting historical studies and researches, issuing publications, providing public lectures of historical interest, and otherwise disseminating a knowledge of the area to the general public. . . .

(emphasis added) The terms of § 421.18 are clear: historical

preservation tax funds may be used by a non-profit historical society for, among other purposes, the preservation of historical buildings in the area.

In Op.Att'yGen. #80-5-7 we construed this identical statutory provision to mean that historical preservation tax funds could not be used to construct and maintain an addition to a museum owned and operated by a non-profit historical society. This opinion reasoned that this statute contained no express authority to spend these funds for the construction or maintenance of a museum and that authority to make such a large capital expenditure could not lightly be inferred.

On the other hand, § 421.18 does contain express authority for a historical society to spend these funds to preserve historical structures. This conclusion comports with the obvious legislative intent that historical preservation tax funds be used for the collection and preservation of any historical object. An historical building does fall within this category, but as we concluded in our earlier opinion, a museum does not.

Sincerely,

Theresa O'Connell Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

COUNTIES; COUNTY OFFICERS; Incompatibility. Chapter 174, The Code 1981; 1981 Session Laws, 69th G.A., ch. 117, §§ 500 to 511. The positions of deputy county auditor and secretary to a county agricultural society are not public offices and therefore are not incompatible. (Weeg to Swaim, Davis County Attorney, 3/23/82) #82-3-20(L)

March 23, 1982

R. Kurt Swaim
Davis County Attorney
104 E. Franklin St.
P. O. Box 190
Bloomfield, Iowa 52537

Dear Mr. Swaim:

You have requested an opinion of the Attorney General as to whether the positions of Deputy County Auditor and Secretary of the Davis County Agricultural Society are incompatible. In 1968 Op. Att'y Gen. 934 we held that the position of county auditor is not incompatible with the position of secretary of a fair board. Further, our office recently issued a detailed opinion concerning the proper analysis when a question of incompatibility arises. See Op. Att'y Gen. #81-8-26. We have enclosed a copy of the latter opinion. In accord with these two opinions, we remain of the opinion that the two positions in question are not incompatible. Our reasons are as follows.

First, the doctrine of incompatibility of public offices is applicable only in the event that the two positions here in question are public offices. The five essential elements that make public employment a public office are set forth on p. 7 of Op. Att'y Gen. #81-8-26.

In the present case, the position of Deputy County Auditor does not constitute a public office because the provisions of 1981 Session, 69th G.A., ch. 117, § 502.2 make a county officer deputy an employee of that officer. Because under this section a deputy auditor may be appointed or removed by the auditor, the position is not a permanent and continuous one and therefore does not meet the five-factor definition of public office.

Application of these five factors also establishes that a secretary of a county agricultural society does not hold a public office. See 1968 Op. Att'y Gen. 934. First, ch. 174, The Code 1981, governs functions of a county agricultural society. While § 174.1(3) defines "management" of the society as including the secretary to the society, we do not believe that mere mention of the position actually "creates" that position, especially in light of the fact that there are no statutorily-defined duties for that position or any other management positions. Second, while ch. 174 authorizes an agricultural society to exercise some governmental powers (e.g. §§ 174.3-174.6), these provisions are narrowly limited and do not encompass all the functions of the society. Third, § 174.2 expressly states:

> In addition to the powers granted herein the society shall possess the powers of a corporation not for pecuniary profit under the laws of this state and those powers ennumerated in its articles of incorporation.

Thus, because an agricultural society is to function as a corporation, although vested with some governmental powers, its management personnel, including the secretary, function more as corporate officers than as public officials. See 1968 Op. Att'y Gen. 934. In addition, the management of the society is subject in numerous ways to the revisory power of the board of supervisors, and therefore the society does not function independently. See §§ 174.13-174.17. 174.19.

For these reasons, we believe that the positions of deputy county auditor and secretary to a county agricultural society are not public offices, and therefore the incompatibility doctrine is inapplicable. However, even in the event both of these positions were to be considered public offices, a comparison of the county auditor's statutory duties, §§ 500-511, with the statutory functions of a county agricultural society, ch. 174, indicates no express conflicts.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:sh

Enclosure

SOCIAL SERVICES: Reimbursement From Third Parties for Medicaid Payments: Assignment of rights to benefits vis-a-vis the states subrogation statute. 42 U.S.C. §§ 1396a(a)(25), 1396k(a), 42 CFR § 433.146, § 249A.6(1), Code of Iowa. The Department of Social Services meets the requirements of federal law pertaining to the assignment of rights to benefits by Medicaid recipients against third parties for the purpose of reimbursement by those legally liable to pay for such medical assistance. (Stephen C. Robinson to Don Kassar, Chief, Bureau of Medical Services, Department of Social Services, 3/23/82) #82-3-19(L)

March 23, 1982

Don Kassar, Chief
Bureau of Medical Services
Department of Social Services
Hoover State Office Building
Des Moines, Iowa 50319

Dear Don:

You recently asked for an opinion of this office as follows:

> Under federal regulations a State Medicaid agency may require individuals, as a condition of eligibility for medical assistance, to assign to the State their rights to any medical support or other third party payments for medical care.
>
> In the past our Bureau has been under the impression that assignment of rights in Iowa was automatic because of our subrogation rights under 249A.6, Code of Iowa. Recently the Region VII Medicaid office has taken a stance that our subrogation law does not give us assignment of rights as a condition of eligibility. If the regional office is correct, we may be required to obtain an individually executed assignment from all Medicaid applicants and recipients.

> To resolve this issue I would greatly appreciate your opinion as to whether or not the Department of Social Services has assignment of rights, as a condition of eligibility, under 249A.6, Code of Iowa.

In our opinion the Iowa Department of Social Services meets the requirements of federal law pertaining to the assignment of rights by Medicaid recipients against third parties for the purpose of reimbursement by those legally liable to pay for such medical assistance because of our subrogation statute found in 249A.6, Code of Iowa.

At 42 U.S.C. § 1396a(a)(25)[1] the federal statute requires that the state agency will seek reimbursement from third parties who have a legal liability to pay for medical assistance (Medicaid). 42 U.S.C. § 1396k(a)[2] further provides the state plan <u>may</u> provide as a condition of eligibility that an individual

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1 "(25) provide (A) that the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties to pay for care and services (available under the plan) arising out of injury, disease, or disability, (B) that where the State or local agency knows that a third party has such a legal liability such agency will treat such legal liability as a resource of the individual on whose behalf the care and services are made available for purposes of paragraph (17)(B), and (C) that in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability;"

2 "(a) For the purpose of assisting in the collection of medical support payments and other payments for medical care owed to recipients of medical assistance under the State plan approved under this subchapter, a State plan for medical assistance may -- (1) provide that, as a condition of eligibility for medical assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required --

(A) to assign the State any rights, of the individual or of any other person who is eligible for medical assistance under this subchapter and on whose behalf the individual has the legal authority to execute an assignment of such rights, to support (specified as support for the purpose of medical care by a court or administrative order) and to payment for medical care from any third party; and . . ."

execute an assignment of rights to the state for payment for medical care from any third party legally liable.

These statutes are further refined in 42 C.F.R. §§ 433.145-.149, and § 435.604. 42 C.F.R. § 433.146 is the most apropos to our discussion. It provides:

> § 433.146 Rights assigned; assignment method.
>
> (a) Except as specified in paragraph (b) of this section, the agency must require the individual to assign to the State --
> (1) His own rights to any medical care support available under an order of a court or an administrative agency, and any third party payments for medical care; and
> (2) The rights of any other individual eligible under the plan, for whom he can legally make an assignment. . . .
> (c) If assignment of rights to benefits is automatic because of State law, the agency may substitute such an assignment for an individual executed assignment, as long as the agency informs the individual of the terms and consequences of the State law.

It is with particular reference to subparagraph (c) of the above quoted regulation that we reach the conclusion that the assignment of rights to benefits is automatic because of our State law pertaining to subrogation. Section 249A.6, Code of Iowa, states:

> (1) When payment is made by the department for medical care or expenses through the medical assistance program on behalf of any recipient, the department shall be subrogated, to the extent of those payments, to all monetary claims which the recipient may have against third parties as a result of the medical care or expenses received or incurred. No compromise, including but not limited to a settlement, waiver or release, of any claim to which the department is subrogated under this section shall defeat the department's right of recovery except pursuant to the written agreement of the commissioner or the commissioner's designee.

American Jurisprudence Second defines legal assignment as the "transfer or setting over of property, or some right or interest therein, from one person to another, and unless in some way qualified, it is properly the transfer of one's whole interest in an estate, or chattel, or other thing." 6 Am.Jur.2d Assignments § 1.

Subrogation is broadly defined "as the substitution of one person in the place of another with reference to a lawful claim or right." 73 Am.Jur.2d, Subrogation, § 1. We also find under § 4, the heading Comparisons and distinctions and this comment:

> Subrogation effects an assignment by operation of law and so it is sometimes termed "equitable assignment." But it has been regarded as differing from an ordinary assignment of the debt in that such assignment assumes the continued existence of the debt, while subrogation follows upon its payment. However, it has been asserted that regardless of whether a transfer is technically called assignment or subrogation or equitable assignment or assignment by operation of law, its ultimate effect is the same: to pass the title to a cause of action from one person to another. (Emphasis added.) (Citations omitted.)

Similar definitions are found in 6A C.J.S. Assignments, §§ 2, 4, 83 C.J.S. Subrogation, §§ 1, 3.

Iowa case law, while not in the area of welfare, is in accord. Glancy v. Ragsdale, 251 Iowa 793, 802, 102 N.W.2d 890, 896 (Iowa 1960) states:

> It was the right of the insurer, even without the loan receipt, to have the action brought in the name of the insured. It is true the collision insurance policy is not in evidence; but Calvert's right of subrogation is not dependent upon contract. We said in Rursch v. Gee, supra, at page 1397 of 237 Iowa, at page 315 of 25 N.W.2d: "The collision carrier became subrogated by operation of law when it made the payment. And this would be true whether the collision insurance policy expressly provided for subrogation or not." This is but a statement

of generally established law. (emphasis added)

We are aware of cases like Demmery v. National Union Fire Ins. Co., 210 Pa.Super. 193, 232 A.2d 21, 24, and H. B. "Buster" Hughes, Inc., v. Bernard, La.App., 306 So.2d 785, 789, which hold that "subrogation" operates only to secure contribution and indemnity whereas an "assignment" transfers the whole claim. Under the federal statutes and regulations, our interest is to recover from third parties what has been paid out in Medicaid. Even under these cases the right of indemnification offered by subrogation is sufficient and there is no need for the "transfer of the whole claim".

We trust this clarifies the situation.

Sincerely,

Stephen C. Robinson
Assistant Attorney General

SCR/kap

Juvenile Law: A juvenile probation officer should qualify as a "law enforcement" or public safety" officer under the federal "Public Safety Officers' Death Benefits" program, entitling their family to the $50,000 death benefits to a public safety officer who is "killed as a direct and proximate result of personal injury sustained in the line of duty". 42 U.S.C. § 3796, et. seq.; §§ 231.10; 232.19(1); 232.28; 232.29; 232.45(4); 232.47(7); 232.48; 801.4(7), The Code 1981. Secondly, Senate File 474, amending ch. 613A - Tort Liability of Governmental Subdivisions, would apply to limit the liability of juvenile probation officers, since counties are municipalities under ch. 613A and juvenile probation officers are employees of the county. Senate File 474, §§ 1-6; ch. 613A; § 231.10, The Code 1981. (Hege to Welsh, State Representative, 3/23/82) #82-3-18(L)

March 23, 1982

The Honorable Joe Welsh
House of Representatives
State Capitol
Des Moines, Iowa 50319

Dear Representative Welsh:

You have requested an opinion regarding certain benefits and liabilities enjoyed or imposed upon juvenile probation officers in this State. Specifically, you inquire if:

1. The families of juvenile probation officers are entitled to the $50,000 death benefits provided by the federal government to families of peace officers killed in the line of duty, and

2. If Senate File 474, relating to the liability of municipal officers and employees, applies to limit the liability of juvenile probation officers to juveniles who are in their custody.

The short answer to both your questions is in the affirmative.

As you point out, juvenile probation officers are created and their employment requirements and job-related duties are set out by statute. Ch. 231, The Code 1981. In addition, they are defined as "peace officers" under Iowa law. Section 801.4(7), The Code 1981. Case law has interpreted the position as

employment by the county (counties - if the officer works for more than one) vis-a-vis the judicial district, and under the direction and control of the judicial branch of government. McClure v. Union, et al. Counties, 188 N.W.2d 283 (Iowa 1971). See generally, Op. Att'y Gen. #80-3-1 (Golden to Rush and Redmond, State Senators, 3/3/80).

Federal Death Benefits.

The $50,000 death benefits you note is a federal program to compensate the families of public safety officers who are killed "as a direct and proximate result of personal injury sustained in the line of duty". 42 U.S.C. § 3796(a). The general program is entitled "Public Safety Officers' Death Benefits" and is found in 42 U.S.C. § 3796, et. seq. The program is presently administered by the Law Enforcement Assistance Administration, Department of Justice, Washington, D.C.

The determination as to whether a given person qualifies for the benefits is charged to the Administrator of L.E.A.A. 42 U.S.C. § 3796 (a).

The definitions under the federal act appear to be broad enough to apply to Iowa's juvenile probation officers. Those definitions, in pertinent part, provide:

> (5) "law enforcement officer" means a person involved in crime and juvenile delinquency control or reduction, or enforcement of the criminal laws. This includes, but is not limited to, police, corrections, probation, parole, and judicial officers;
>
> (6) "public agency" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, the Commonwealth of the Northern Mariana Islands, and any territory or possession of the United States, or any unit of local government, combination of such States, or units, or any department, agency, or instrumentality of any of the foregoing; and
>
> (7) "public safety officer" means a person serving a public agency in an official capacity, with or without compensation, as a law enforcement officer or a fireman.

Under subsection five, the definition addresses a person involved in crime control, reduction or enforcement in either the adult or juvenile sphere. Secondly, the following sentence is inclusive, but not exclusive of the named positions of police, corrections, probation, parole and judicial officers. Moreover, the duties imposed upon Iowa's juvenile probation officers appear to fall within the terms "juvenile delinquency control or reduction, or enforcement of the criminal law". Sections 231.10; 232.19(1); 232.28; 232.29; 232.45(4); 232.47(7); 232.48; 801.4(7), The Code 1981.

Under subsection six, the juvenile probation officer's employer being a county or counties it would fall within the definition of "public agency", the county being a "unit of local government".

In summary to your first inquiry, although the determination would be made by L.E.A.A., it seems clear that families of Iowa juvenile probation officers would qualify for the benefits of the Public Safety Officers' Death Benefits program, 42 U.S.C. § 3796, et. seq.

Senate File 474.

Your second question is one relating to state law protections from liability which are afforded to a juvenile probation officer.

A comprehensive review of the state and municipal tort claims statutes are beyond the scope of this opinion. However, you are correct in asserting the juvenile probation officers would enjoy whatever protection that is afford within Senate File 474 and ch. 613A.

Senate File 474 includes several amendments to ch. 613A, Tort Liability of Government Subdivisions, The Code 1981. Senate File 474, §§ 1-6.

The provisions of ch. 613A would apply to juvenile probation officers, who are county employees by virtue of the definition of "municipality", which is:

> 1. "Municipality" means city, county, township, school district, and any other unit of local government except a soil conservation district as defined in section 467A.3, subsection 1.

Section 613A.1(1), The Code 1981.

Therefore, since juvenile probation officers are county employees, McClure, and counties are municipalities under § 613A.1(1), juvenile probation officers would enjoy the same protections from liability as provided generally by ch. 613A to city employees or officers.

In summary, the answer to both of your questions would be in the affirmative. Families of Iowa juvenile probation officers would qualify for the $50,000 death benefits under the federal Public Safety Officers' Death Benefits program. 42 U.S.C. § 3796, et. seq. Secondly, juvenile probation officers would enjoy a protection from liability similar to city police or other county employee since the county falls within the definition of "municipality" under § 613A.1(1), The Code 1981.

Sincerely,

Brent D. Hege

Brent D. Hege
Assistant Attorney General

BDH/kap10A

COUNTIES; COUNTY ATTORNEY; 28E ORGANIZATIONS: Chapter 28E, Sections 28E.11; 1981 Session, 69th G.A., Ch. 117, §§ 756, 756.2, 756.6, 756.7. A county attorney is not required to represent a 28E organization to which the county belongs as a part of his or her official duties. However, in the event a 28E agreement so provides, a county attorney may represent the organization in his or her official capacity so long as no conflict of interest problem appears. Further, in the absence of a contrary provision, a 28E organization has the implied authority to hire private legal counsel, which could include a part-time, but not a full-time, county attorney. (Weeg to Swearingen, State Representative, 3/23/82) #82-3-17(L)

Honorable George R. Swearingen
State Representative
State Capitol
L O C A L

March 23, 1982

Dear Representative Swearingen:

You have requested an opinion of the Attorney General as to whether, in the course of his or her official duties, a county attorney is required to represent a 28E organization to which the county belongs, that organization being comprised of the county and certain cities and towns in that county for the purpose of operating the county's sanitary landfill. We are of the opinion that the county attorney is not obligated to serve in his official capacity as the attorney for a 28E organization, but that there are situations in which a county attorney may represent such an organization.

You have enclosed in your opinion request the bylaws of the organization here in question, the Keokuk County Regional Service Agency (hereinafter "Agency"), which appears to have been organized in 1971 under the provisions of Ch. 28E and § 455B.76, The Code 1981. Article I of the Agency's bylaws states that the agreement was entered into by Keokuk County and certain incorporated cities and towns in Keokuk County. Article VI provides the Agency is to be managed by the Executive Committee, which consists of three representatives selected by the board of supervisors and four representatives selected from the member cities and towns. The bylaws do not expressly provide for legal representation.

As you note in your request, Section 756 of Ch. 117, 1981 Session, 69th G.A., expressly sets forth the duties of a county attorney. These duties include, inter alia, appearing for the state and county in all cases and proceedings to which the state or county is a party (§ 756.2), prosecuting and defending all actions in which a county officer or the county is interested as a party (§ 756.6), and advising county officers upon matters in which the state or county is interested (§ 756.7). Nowhere in this extensive list of duties is there included the duty to represent a 28E organization of which the county is a member. Consequently, it is our opinion that the county attorney is not obligated to represent such an organization.

Further, it is our opinion that the county attorney has no duty to represent the Agency under the provisions of Ch. 28E. This chapter provides for the joint exercise of governmental power by private and governmental agencies pursuant to a voluntary agreement. The creation of a separate entity to carry out the purposes of the agreement is also provided for. See § 28E.4. In the event the parties to the agreement elect to create a separate entity, that entity necessarily assumes an existence distinct from that of the individual agencies which created it. By analogy, a 28E organization becomes a separate entity in a manner similar to that by which individuals form a corporation: the corporation becomes an entity apart from the individual persons who created it. At this point, the duties of the organization, such as securing legal counsel, devolve upon the organization itself, not upon its member agencies.

However, in the past some confusion has been centered on the provisions of § 28E.11. That section provides:

> Any public agency entering into an agreement pursuant to this chapter may appropriate funds and may sell, lease, give, or otherwise supply the administrative joint board or other legal or administrative entity created to operate the joint or cooperative undertaking by providing such personnel or services therefor as may be within its legal power to furnish. [Emphasis added.]

The emphasized portion of this provision was construed in 1974 Op. Att'y Gen. 133 as requiring the participating governmental units to provide legal counsel to a 28E organization in the form of a county or city attorney acting in his or her official capacity. Accordingly, that opinion held that because the county attorney had an official duty to represent the organization, an assistant county attorney could not be employed as private counsel for a 28E organization.

This portion of that opinion was withdrawn in 1974, Op. Att'y Gen. 605, where we concluded that a 28E organization necessarily has the implied authority to hire independent private counsel, "the reason for this being that the underlying purpose for creating a separate legal entity can only be served effectively if the entity is able to act independently of any of its participating members." That opinion held that a 28E organization could retain private counsel or hire a city or county attorney as private counsel, unless the 28E agreement provided otherwise.

We are now of the opinion that because of the permissive language of § 28E.11, the conclusion reached in 1974 Op. Att'y Gen. 605 remains authoritative, i.e., that the various members of a 28E organization may, but are not required to, provide personnel such as legal counsel to the organization. [1] However, as we concluded earlier in this opinion, if a 28E agreement does not provide for counsel, a county attorney is not required to represent the organization.

In the event a 28E agreement does specify that a county attorney is to serve as legal counsel, there nonetheless may be certain situations in which a conflict of interest would render it impermissible for the county attorney to represent the 28E organization. See Iowa Code of Professional Responsibility, §§ 5-14, 5-15. In the event a county attorney's duty to represent the county's interests conflicts with his or her duty to represent the organization's interests, the county attorney would be obliged to withdraw as counsel for

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[1] In the event that a 28E organization were to hire private counsel, we note that while a part-time county attorney could be hired in this capacity, a full-time county attorney could not. See 1981 Session, 69th G.A., ch. 117, § 751 (full-time county attorney required to refrain from private practice of law).

the organization, which would in turn be required to hire private counsel.

We have previously recognized that a 28E organization may be established for purposes that do not raise a conflict of interest problem for a county attorney designated as legal counsel for that organization. See Op. Att'y Gen. #80-4-1 (a county attorney for one county may handle child support recovery duties for another county as well, pursuant to a 28E agreement). However, the determination of whether a conflict of interest exists is a factual question which must be resolved on a case-by-case basis. We therefore do not attempt to define the parameters of the neutral situation where a county attorney could represent a 28E organization.

We note for the purposes of the present case that the Agency is a county-wide organization whose purpose is to operate the county landfill, and therefore Keokuk County has an interest in the operations of the Agency. Consequently, under the provisions of § 756, the county attorney has a duty to represent the county with regard to the county's interest in the Agency's operation. Because of the possibility of a conflict between the interests of the county and the various member cities and towns regarding the Agency's operation, the county attorney may not be the proper person to serve as the Agency's legal counsel. However, in the absence of a complete factual picture, we are unwilling to decide whether an actual conflict of interest exists.

In sum, a county attorney is not required to represent a 28E organization to which the county belongs as a part of his or her official duties. However, in the event a 28E agreement so provides, a county attorney may represent the organization in his or her official capacity so long as no conflict of interest problem appears. Further, in the absence of a contrary provision, a 28E organization has the implied authority to hire private legal counsel, which could include a part-time, but not a full-time, county attorney.

Sincerely,

Theresa Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:sh

NATIONAL GUARD: ARMORY BOARD: Authority to lease or accept donated property to be used for training purposes. §§ 29A.12; 29A.13; 29A.57; 29A.58; 29A.59; 565.3; 565.4, The Code. The state armory board may lease or accept donated property to be used for the purpose of training units of the Iowa National Guard. Lease of property must be approved by state executive council. (Swanson to Gilbert, Adjutant General, 3/23/82) #82-3-16(L)

March 23, 1982

Roger W. Gilbert
Major General, Iowa ANG
The Adjutant General
Headquarters Iowa National Guard
Camp Dodge, R.R. #1
Grimes, Iowa 50111

Dear General Gilbert:

Reference is made to your request for an opinion from this office concerning the authority of the Adjutant General to enter into lease agreements for use of land, buildings or facilities to be used for the purpose of training units of the Iowa National Guard.

You further request an opinion relative to the authority of the National Guard to accept donated property for such training purposes without cost to the government.

The powers and duties of the Iowa Adjutant General are set out in Section 29A.12, Code, 1981. Section 29A.13, Code, 1981, provides that operating expenses, including the purchase of land, shall be paid from funds appropriated for the support and maintenance of the national guard. Claims for payment of such expenses are subject to the approval of the adjutant general; however, this section does not authorize the adjutant general to lease property for training purposes.

An Armory Board exists in Iowa by virtue of Section 29A.57, Code, 1981, as amended by Chapter 14, section 20, Acts of the 69th General Assembly. The board consists of the adjutant general as chairperson, at least two officers from the active commissioned personnel of the national guard, and at least one other person appointed by the governor.

The Armory Board has been given specific authority by the Iowa General Assembly to lease such property as you describe. Section 29A.58, Code, 1981, as amended, in part, by Chapter 14, section 21, Acts of the 69th General Assembly, provides:

> "29A.58. Armories leased. The armory board as lessee, may lease property to be used for armory purposes and other training of the national guard. Leases may be made for any term not to exceed twenty years. Rents under such leases shall be paid from funds appropriated for the support and maintenance of the national guard . . . ." (Emphasis supplied).

No statutory provision provides for delegation of this authority to the Adjutant General acting alone. The Armory Board must act as lessee, and the action of the board must be with the approval of the state executive council. Section 29A.59, Code, 1981.

A leasehold interest in real property may be donated or given to the state or an institution thereof under the provisions of sections 565.3 through 565.5, Code, 1981.

Gifts may be made to the state for the benefit of any institution thereof, including the Iowa National Guard through its Armory Board, under the provisions of section 565.5, Code, 1981, which provides as follows:

> "Gifts, devises, or bequests of property, real or personal, made to any state institution for purposes not inconsistent with the objects of such institution, may be accepted by its governing board. . . ."

Such property must be held and managed in the same way as other property of the state, and any conditions attached to such gift become binding upon the state, upon the acceptance thereof. Section 565.4, Code, 1981.

In conclusion, the Armory Board may lease property to be used for training of the national guard. Rents under such leases must be paid from funds appropriated for the support and maintenance of the national guard. The transaction must be approved by the state executive council.

The Armory Board may also use property donated for the purpose of training units of the national guard without cost to the government.

We hope that the above information adequately answers your questions. If we can be of further assistance, please advise.

Yours very truly,

Gary H. Swanson

GARY H. SWANSON
Assistant Attorney General
Telephone: 515/281-3110

GHS/mel

COUNTIES AND COUNTY OFFICERS; BOARD OF SUPERVISORS; Selection of Representation Plan. Ch. 331, §§ 331.207, 331.208, 331.209, and 331.210. A special election held under section 331.207, which results in a change in the supervisor representation plan, requires a transition in the membership on the board of supervisors pursuant to section 331.207(4). New members must be elected under the new supervisor representation plan at the general election pursuant to section 331.208, 331.209, or 331.210. The terms of current members who were elected under the previous representation plan must expire in January following the general election. The length of terms of the new members should be determined by lot pursuant to section 331.208(4). (Pottorff to Hutchins, State Senator, 3/23/82) #82-3-15(L)

Honorable C. W. Bill Hutchins March 23, 1982
State Senator
State Capitol
L O C A L

Dear Senator Hutchins:

You have requested an Attorney General's opinion concerning the impact of changing the representation plan for boards of supervisors upon the next general election for membership on the board. You point out that Guthrie County changed its supervisor representation plan in 1982 from Plan Two to Plan Three. In light of this change and with respect to the November, 1982, general election, you pose the following questions:

> If a plan is adopted changing the Supervisor representation plan currently in effect in a county in 1981 and the county is a county having five (5) supervisors, do all five (5) supervisors have to stand election for the year beginning 1983?
>
> Providing your answer to the preceding question says that all five (5) do have to stand election, what determines which supervisor runs for the two-year term and which runs for the four-year term?

The Code establishes three representation plans under which the voters may elect members to the board of supervisors. Plan One provides for election of members at large without district residence requirements. Plan Two provides for election of members at large but with a residency requirement in equal population districts. Plan Three provides for election of members from equal population districts in which the electors of each district elect one member who must reside in that district. § 331.207(3), The Code (Election Laws Supp.) 1981.

The Code provides that, upon petition, a special election shall be held to select the representation plan for boards of supervisors. § 331.207, The Code (Election Laws Supp.) 1981. A special election to select a representation plan must be held at least one hundred days before the primary election in a general election year. § 331.207(2), The Code (Election Laws Supp.) 1981.

We point out section 331.207 specifically provides that a special election which results in a change in the representation plan triggers a transition in the membership on the board of supervisors. If the special election results in the selection of a representation plan different from the plan which was in effect at the time of the special election, "the terms of the county supervisors serving at the time of the special election shall continue until the second day in January which is not a Sunday or holiday following the next general election, at which time the terms of the members shall expire and the terms of the members elected under the requirements of the new supervisor representation plan at the general election as specified in section 331.208, 331.209, or 331.210 shall commence." § 331.207(4), The Code (Election Laws Supp.) 1981. Under this language, therefore, a change in representation plans triggers two events: 1) the election of new members to be elected under the new supervisor representation plan at the general election pursuant to section 331.208, 331.209, or 331.210; and, 2) the expiration of the terms of current members, who were elected under the previous supervisor representation plan, in January following the general election. Since you indicate that Guthrie County voted at the special election to change from Plan Two to Plan Three, therefore, new members must be elected in the November, 1982, general election and the terms of current members will expire in January, 1983.

We note that section 331.209, which addresses election of members under Plan Three, also addresses the mandatory redistricting of the equal population supervisor districts which must be accomplished following every federal decennial census. § 331.209(1), The Code (Election Laws Supp.) 1981. The deadlines imposed in subsection 1 are keyed to the next general election following the federal decennial census. Accordingly, this redistricting should be accomplished by and effective during the general election in November, 1982. § 331.209(1), The Code. Pursuant to this mandatory redistricting, subsection 1 provides that if more than one incumbent supervisor resides in the same supervisor district after the

districts have been redrawn, the terms of those supervisors shall expire on the second day of January that is not a Sunday or a holiday following the next general election. § 331.209(1), The Code.

Because the special election to change representation plans happened to be held in Guthrie County in the general election year that followed the federal decennial census, both section 331.207(4) which provides that the terms of all members expire and section 331.209(1) which provides only that the terms of incumbents residing in the same district after the districts have been redrawn expire appear to be applicable. This conflict, however, is reconcilable and does not detract from our conclusion that the terms of all current members expire. Section 331.207(4) is a specific statute addressing special elections to change representation plans which occur only upon petition. Section 331.209(1), by contrast, is a general statute addressing mandatory redistricting which occurs regularly every ten years. We observe the principle that a specific statute prevails in a conflict between a specific statute and a general statute. Peters v. Iowa Employment Security Commission, 248 N.W.2d 92, 96 (Iowa 1976). The terms of all members, therefore, would expire under section 331.207(4).

In anticipation of our conclusion that the terms of all current members will expire under section 331.207(4), you inquire how the length of terms of new members is to be determined. The Code does provide that the terms of five-member boards shall be staggered. Two members of the board are elected for initial terms of two years and three members are elected for terms of four years. § 331.208(3), The Code (Election Laws Supp.) 1981. When it is necessary to determine which terms shall be for two years and which terms shall be for four years, the length of terms "shall be decided by lot before the primary election, and the results of the determination indicated on the ballot in the primary and general elections." § 331.208(4), The Code (Election Laws Supp.) 1981.

In summary, we advise that a special election held under section 331.207, which results in a change in the supervisor representation plan, requires a transition in the membership on the board of supervisors pursuant to section 331.207(4). New members must be elected under the new supervisor representation plan at the general election pursuant to

section 331.208, 331.209, or 331.210. The terms of current members who were elected under the previous representation plan must expire in January following the general election. The length of terms of the new members should be determined by lot pursuant to section 331.208(4).

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP:sh

SCHOOLS: Minors' School License. §§ 17A.19, 321.194, Ch. 613A, The Code 1981. A school board or school superintendent who issues a "statement of necessity" to a student who wishes to apply for a minor's school license performs a ministerial act. A student whose application for such "statement of necessity" and has been rejected has recourse by way of an administrative appeal pursuant to Chs. 17A and 290, The Code 1981. The school district or official would be exempt from any claims of liability in connection with such a ministerial act under the terms of § 613A.4(3), The Code 1981. (Fleming to Angrick, Citizens' Aide/ Ombudsman, 3/23/82) #82-3-14(L)

William P. Angrick, II
Citizens' Aide/Ombudsman
L O C A L

March 23, 1982

Dear Mr. Angrick:

You have asked for further clarification concerning the operation of § 321.194, The Code 1981, and rules promulgated for its implementation following issuance of our opinion of October 23, 1981. The opinion giving rise to this request may be summarized as follows: When an applicant for a minor's school driver's license meets the specific requirements of § 321.194, a school superintendent or school board does not have discretion to deny the issuance of a "statement of necessity" based on criteria wholly unrelated to those set out in § 321.194, and administrative rules promulgated thereunder. See Op. Att'y Gen., Oct. 23, 1981 (Angrick).

At the outset, we note that Iowa law has provided for the issuance of a restricted license to certain minors, generally known as a "school license" since 1931. The "school license" has been issued only if other transportation, i.e., public or school bus, is unavailable and allows the student to drive to and from school or authorized school activities. See Acts 1931 (44th G.A.) ch. 114, § 5; § 4960-d5, The Code 1931 (restricted license may be issued to persons between the ages of 14 and 16 years); Acts 1965 (61st G.A.) ch. 274, § 7 (changed age limit from 16 to 18). The current version of the "school license" law, in pertinent part, is as follows:

> 321.194. Minors' school license. Upon certification of a special need by the applicant's school, the department may issue a restricted license to any person between the ages of fourteen and eighteen

> years which license shall entitle the holder, while having the license in his or her immediate possession, to operate a motor vehicle during the hours of 6 a.m. to 9 p.m. over the most direct and accessible route between the licensee's residence and school of enrollment for the purpose of attending duly scheduled courses of instruction and extracurricular activities at such school or at any time when accompanied by a parent or guardian, driver education instructor, or prospective driver education instructor who is a holder of a valid operator's or chauffeur's license, and who is actually occupying a seat beside the driver. The license shall expire on the licensee's eighteenth birthday or upon issuance of a probationary operator's or operator's license. Each application shall be accompanied by a statement from the school board or superintendent of the applicant's school. The statement shall be upon a form provided by the department. The department of public instruction shall adopt rules pursuant to chapter 17A establishing criteria for issuing a statement of necessity . . .
> The fact that the applicant resides at a distance less than one mile from his or her school is prima-facie evidence of the nonexistence of necessity for the issuance of such a license . . . [Emphasis supplied.]

§ 321.194, The Code 1981. It is clear form the language of the statute that a minor's right to operate a motor vehicle pursuant to such a license is a very narrow right. Moreover, the Iowa Supreme Court has held that a student who was operating an automobile outside the narrowly prescribed authority of the state "was not a licensed operator." McCann v. Iowa Mut. Liability Ins. Co. of Cedar Rapids, 231 Iowa 509, 515, 1 N.W.2d 682, 686 (1942).

I.

You ask two questions, the first being in two parts as follows:

> If, as you have indicated, a school administrator has no discretion under Section 321.194, The Code 1981, to deny the issuance of statements of necessity based on criteria wholly unrelated to those specified in that section and the administrative rules promulgated thereunder, providing all circumstances are

> in compliance with the requirements of the Code;
>
> a. Can the certification of the criteria required on the statement of necessity for a minor's school license by either the superintendent or the school board be interpreted as a purely ministerial function as you have opined in other instances?
>
> b. What recourse does a license applicant have if such criteria are met and the superintendent and/or school board nonetheless refused to sign?

In our opinion, the answer to part (a) is yes. The Iowa Supreme Court has stated:

> A ministerial act is one which is to be performed upon a given state of facts, in a prescribed manner, in observance of the mandate of legal authority and does not require the person or board charged with the duty of performing the act to exercise his or its own judgment.

Headid v. Rodman, 179 N.W.2d 767, 769 (Iowa 1970). Under the terms of § 321.194 set out above, the right to obtain a minor's school license is based upon satisfying requirements that are purely factual. The school superintendent or school board were, no doubt, selected by the Legislature as the person or organization in possession of the facts or having ready access to the facts concerning a student's actual need to operate a motor vehicle pursuant to § 321.194 and the relevant Department of Public Instruction regulation, 670 I.A.C. 6.11 (1 and 2).

Pursuant to its powers and duties, a school district must obtain information about the students in attendance in its schools. See, e.g., § 291.9 (School Census); § 285.10(2) (Power of local board to establish, maintain and operate bus routes so as to provide for economical and efficient operation); § 285.11 (Basis of operation of bus routes). From the variety of records that are on hand in a school in the ordinary course of its operation, it is possible for a school superintendent or school board to determine whether a student meets the specific requirements of the statute and regulations. We believe the function assigned to the superintendent or the school board in § 321.194, The Code 1981, falls well within the definition of a ministerial act set out above.

The answer to part (b) of your question is that a rejected applicant does have recourse as provided by Chs. 17A and 290, The Code 1981.

The board of directors of a school district holds power to employ a superintendent who exercises powers and duties as "may be prescribed by rules adopted by the board or by law." § 279.20, The Code 1981. If a school superintendent denies an application for a statement of necessity, the applicant could determine if the district rules provide for an appeal to the district board, and if so, the superintendent's decision could be appealed to the district board.

In the alternative, the student could reapply to the board because § 321.184 provides that either the district board or the superintendent may certify "a special need."

If the district board rejects the application submitted to it or affirms the superintendent's denial of the "statement of necessity", the applicant would then have the right to appeal to the State Board of Public Instruction pursuant to the provisions of Ch. 290. Such an appeal is required to be conducted in compliance with the terms of Ch. 17A, The Code 1981.

We note that the purpose of Ch. 17A includes "increas[ing] the fairness of agencies in their conduct of contested case proceedings; and simplif[ication of] the process of judicial review of agency action as well as increase its ease and availability." § 17A.1(2), The Code 1981. Inasmuch as local governmental units are not included in the definition of "agency" in § 17A.2(1), The Code 1981, the rights provided in Ch. 17A accrue to a person challenging a local board's action by exercising the right of appeal to the State Board provided in § 290.1, The Code 1981.

Following an appeal to the State Board of Public Instruction, either party would have the right to take an administrative appeal to the District Court in the county in which the petitioner resides or has its principal place of business or in the District Court for Polk County. See § 17A.19(2), The Code 1981. We note that parents of a student whose application for a statement of necessity was not acted upon appealed the matter to the Board. The merits of the appeal turned on certain district policies relating to student licenses and the State Board overruled the decision of the school district. Gavin v. Wellsburg Community School Dist., 2 D.P.I. App. Dec. 139.

In sum, the answer to your first question is that the granting or denial of a statement of necessity is a ministerial act and an applicant has recourse from the denial thereof by way of an administrative appeal pursuant to Chs. 17A and 290, The Code 1981.

II.

Your second question is presented because certain school administrators have expressed fear of personal liability arising from the exercise of duty assigned to them by § 321.194. Your question is as follows:

> If a school administrator signs the statement of necessity, does this subject him/her or the school district to liability for damages should an accident occur involving a minors' school license or should the licensee be involved in the operation of a vehicle outside of the prescribed operating entitlement found in § 321.194, The Code 1981?

The answer is no. Liability for negligence is imposed only when the breach of a duty proximately causes personal injury to an individual to whom that duty is owed. The "duty" prescribed by section 321.194 requires the local school board or superintendent to certify that a student has a special need for a minors' school license whenever the student meets the criteria established by rule by the Department of Public Instruction. Those criteria are based exclusively upon the student's need for transportation and are wholly unrelated to the student's ability to drive. See 670 I.A.C. § 611. The school board or superintendent thus certifies need and not ability. Responsibility for determining the student's ability to operate a motor vehicle remains entirely with the Iowa Department of Transportation. See § 321.186, The Code 1981; 820 I.A.C. [07, C] § 13.5(2). Accidents are caused by the failure to drive properly, not the need to drive. A school district cannot be held liable, therefore, for issuing a statement of necessity.

Sincerely yours,

Merle Wilna Fleming

MERLE WILNA FLEMING
Assistant Attorney General

MWF:rcp

OMVUI: IMPLIED CONSENT: Ch. 321B. A refusal to sign the implied consent form following an oral consent to the withdrawal of a blood specimen for chemical testing to determine blood alcohol content does not constitute a refusal of the test. (Gregersen to Ritchie, Buena Vista County Attorney, 3/22/82) #82-3-13(L)

March 22, 1982

Mr. Corwin Ritchie
Buena Vista County Attorney
111 West Sixth Street
Storm Lake, IA 50588

Dear Mr. Ritchie:

You have requested an Opinion of the Attorney General regarding Iowa's "implied consent" law, ch. 321B, The Code 1981. In your letter you state:

> Assume that an individual has been arrested for OMVUI and the proper request for the withdrawal of a blood specimen has been made. The arrestee orally states that he will give a blood sample, but refuses to sign the signature blank at the bottom of the implied consent form.
>
> Question: Is the arrestee's oral statement of willingness to take the test a sufficient showing of his consent to enable the officer to conduct the withdrawal of a blood specimen? Or, should the refusal to sign be considered a refusal of the test and therefore, require the officer to request an alternate specimen?

Initially, it should be noted that chapter 321B does not contain an explicit requirement that an individual sign the written request to submit to chemical testing for blood alcohol content. State v. Epperson, 264 N.W.2d 753, 756 (Iowa 1978). Therefore, if such a requirement is to exist, it must be implicit in the language of the statute.

Section 321B3 provides that "[a]ny person who operates a motor vehicle in this state upon a public highway . . . shall be deemed to have given consent to the withdrawal . . . of specimens . . . and to a chemical test or tests thereof, for the purpose of determining the alcoholic content of his blood. . ." (Emphasis added). This section clearly provides that consent to testing has already been given by an individual arrested for OMVUI.[1] Consent having been granted, the administration of the test may not be conditioned upon the arrested person signing the implied consent form. State v. Moore, 614 P.2d 931 (Hawaii 1980); Hanlon v. Comm. of Motor Vehicles, 123 N.W.2d 136 (S.D. 1963). See Epperson, supra at 756.

The answer to your question, then, is that there is no requirement, either explicit or implicit, that an arrested person must sign the implied consent form prior to the withdrawal of a specimen of blood. A refusal to sign the form following an oral consent to submit to the withdrawal of a specimen of blood does not constitute a refusal of the test.

Sincerely,

CRAIG GREGERSEN
Assistant Attorney General

[1]An individual may not be forced, however, to submit to chemical testing under present Iowa law. State v. Hitchens, 294 N.W.2d 686, 687 (Iowa 1980).

CRIMINAL LAW, CONTRIBUTING TO JUVENILE DELINQUENCY, CLASSIFICATION OF PUBLIC OFFENSES: §§ 233.1, 233.2, 701.8, 801.4(3), 903.1, The Code 1981. Contributing to juvenile delinquency in violation of § 233.1, The Code 1981, is a simple misdemeanor. (Cleland to Heitland, Hardin County Attorney, 3/19/82) #82-3-12

March 19, 1982

Jon E. Heitland
Hardin County Attorney
P.O. Box 720
Iowa Falls, Iowa 50126

Dear Mr. Heitland:

You have requested an Attorney General's Opinion regarding the following questions:

> Does the language of § 233.2, The Code 1981, which contemplates imposition of both fine and imprisonment, raise a violation of § 233.1, The Code 1981, from a simple misdemeanor to an indictable misdemeanor, and, if so, would the offense be classified as a serious or aggravated misdemeanor?

Section 233.1, The Code 1981, provides as follows:

> It shall be unlawful:
> 1. To encourage any child under eighteen years of age to commit any act of delinquency defined in chapter 232.
> 2. To send, or cause to be sent, any such child to a house of prostitution or to any place where intoxicating liquors are unlawfully sold or unlawfully kept for sale, or to any policy shop, or to any gambling place, or to any public poolroom where beer is sold, or to induce any such child to go to any such places, knowing them to be such.

> 3. To knowingly encourage, contribute, or in any manner cause such child to violate any law of this state, or any ordinance of any city.
> 4. To knowingly permit, encourage, or cause such child to be guilty of any vicious or immoral conduct.
> 5. For a parent willfully to fail to support his child under eighteen years of age whom he has a legal obligation to support.

Section 233.2, The Code 1981, provides, in relevant part:

> A violation of section 233.1 shall be punishable by a fine of not exceeding one hundred dollars or by imprisonment in the county jail not exceeding thirty days, or by both such fine and imprisonment.

You note that there is an apparent conflict between § 903.1, The Code 1981, and § 233.2. Section 903.1 provides:

> When a person is convicted of a misdemeanor and a specific penalty is not provided for, the court shall determine the sentence, and shall fix the period of confinement or the amount of fine, if such be the sentence, within the following limits:
> 1. For an aggravated misdemeanor, imprisonment not to exceed two years, or a fine not to exceed five thousand dollars, or both.
> 2. For a serious misdemeanor, imprisonment not to exceed one year, or a fine not to exceed one thousand dollars, or both.
> 3. For a simple misdemeanor, imprisonment not to exceed thirty days, or a fine not to exceed one hundred dollars.

(Emphasis added.) Section 903.1 has no applicability to a violation of § 233.1 because § 903.1 applies only when "a specific penalty is not provided for . . . ." Section 233.2 provides a specific penalty for a violation of § 233.1.

Section 701.8, The Code 1981, provides:

> All public offenses which are not felonies are misdemeanors. Misdemeanors are aggravated misdemeanors, serious misdemeanors, or simple misdemeanors. Where an act is declared to be a public offense, crime or misdemeanor, but no other designation is given, such act shall be a simple misdemeanor.

Section 233.1 constitutes a public offense. See § 701.2, The Code 1981. Since § 233.1 provides no other designation, it is properly classified under § 701.8 as a simple misdemeanor.

Section 801.4(13), The Code 1981, provides that an indictable offense is an offense "other than a simple misdemeanor." Thus, a violation of § 233.1 is not an indictable offense, and thus Iowa R.Crim.P. 32-56 are applicable to prosecutions under § 233.1. See Iowa R.Crim.P. 1, 32.[1]

Sincerely,

Richard L. Cleland

RICHARD L. CLELAND
Assistant Attorney General

RLC:mlr

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[1]Some ambiguity is created in Iowa R.Crim.P. 4(2), which provides "offenses in which the punishment exceeds a fine of one hundred dollars or exceeds imprisonment for thirty days may be prosecuted to final judgment either on indictment or on information . . . ." It is arguable that the penalty provided for in § 233.2 exceeds that provided for in Iowa R.Crim.P. 4(2). It is our opinion, however, that Iowa R.Crim.P. 4(2) means no more than all offenses except simple misdemeanors may be prosecuted by indictment or information. This opinion is based on three factors. An indictment charging a violation of § 233.1 would not be an indictment as that term is defined in Iowa R.Crim.P. 4(1). Iowa R.Crim.P. 4(2) appears to allow the use of informations to prosecute a violation of § 233.1, but Iowa R.Crim.P. 5(1) specifically limits the use of informations to indictable offenses. Finally, Iowa R.Crim.P. 35 provides that "[p]rosecutions for simple misdemeanors must be commenced by filing a subscribed and sworn to complaint with a magistrate or district court clerk or the clerk's deputy."

HIGHWAYS: Sale of excess right of way - preference of sale. §306.23, The Code 1981. In the proposed sale of excess right of way by the Department of Transportation, present owners of adjacent land from which a piece of land was originally bought or condemned for highway purposes are not allowed to ascertain the highest bid and make a subsequent offer after the close of the sealed bidding process. (Dundis to Taylor, State Senator, 3/17/82) #82-3-11(L)

March 17, 1982

The Honorable Ray Taylor
State Senator
Iowa Statehouse
Des Moines, IA 50319

Dear Senator Taylor:

You have requested an attorney general's opinion concerning §306.23, The Code 1981. This section deals with the requirement that notice of the proposed sale of excess right of way by the Iowa Department of Transportation be given to present owners of adjacent land from which said piece of land was originally bought or condemned for highway purposes. It contains the following language:

> "...Said notice shall give an opportunity to the present owner of adjacent property to be heard and make offers for the tract, parcel or piece of land to be sold, and if such offer is equal to or exceeds in amount any other offer received, it shall be given preference by the board in control of such land..."

You ask, "Does the plural use of 'offers' give the adjacent landowner more than one opportunity such as a subsequent offer?"

The plural use of "offer" indicates that the adjacent owner of the type of land specified in §306.23 could, as any other bidder, change his, her, or its bid as many times as desired before the close of bidding. This is in accord with standard bidding procedure. The Department also interprets

this provision as affording the adjacent owner an opportunity each time a particular piece of property is placed on the market by the Department. This anticipates situations where no bids are accepted and the land is retained by the Department, later to be offered for sale again. This also seems a logical reading of the statute.

However, your use of the term "subsequent offer" suggests a third possibility - when a sale is by sealed bidding, the adjacent owner would be able to ascertain the highest bid after the close of that bidding and then have the opportunity to match it, thereby obtaining the subject property. Department procedures do not allow for this interpretation and we opine that the statutory language cannot be strained to this result.

Section 306.23 simply states that if the adjacent owner's offer is equal to or exceeds in amount any other offer received, it shall be given preference. Its language does not give the adjacent owner an opportunity to match the highest offer after the close of bidding. Such an intent could and logically would have been made much more express by the legislature. Also, the phrase "exceeds in amount any other offer received" would be nonsensical, if one accepts this third interpretation. If the adjacent owner was aware of the highest offer after the close of sealed bidding, that owner would have no cause to offer a sum that exceeded that amount rather than just matched it. This language in fact anticipates the situation where the adjacent owner is not aware of the amount of other bids.

In our opinion, while the plural use of "offer" in §306.23 indicates an adjacent owner can make a number of bids before the close of bidding and be accorded the chance to make an offer as many times as the subject property is put on the market by the Department, it does not allow that owner to ascertain the highest bid and make a subsequent offer after the close of the sealed bidding process.

Sincerely,

Stephen P. Dundis

STEPHEN P. DUNDIS
Assistant Attorney General

slh

IOWA PUBLIC EMPLOYEES RETIREMENT SYSTEM; AREA EDUCATION AGENCIES; Retirement Age of Employees. Ch. 97B, §§ 97B.41, 97B.46; Ch. 273, §§ 273.2, 273.9. Area Education Agencies are "political subdivisions" which constitute "employers" within the meaning of Section 97B.41(3). An employee of an Area Education Agency, therefore, is not an employee of the "state" as the term is used in Sections 97B.41 and 97B.46 of the Code. (Pottorff to Tieden, State Senator, 3/17/82) #82-3-10(L)

Honorable Dale Tieden
State Senator
State Capitol
L O C A L

March 17, 1982

Dear Senator Tieden:

You have requested an Attorney General's opinion concerning the status of Area Education Agencies as "employers" with respect to the Iowa Public Employees' Retirement System. We note that "employers" subject to the Iowa Public Employees' Retirement System are delineated in section 97B.41(3) of the Code. The "state of Iowa" is included in this list of employers. § 97B.41(3), The Code 1981. Chapter 97B separately provides that members of the retirement system who are employees of the state and not members of any other retirement system in the state maintained by public contribution may remain in service beyond the date the employee attains the age of sixty-five. § 97B.46(1), The Code. By contrast, members of the retirement system who are not employees of the state may remain in service beyond the date the employee attains the age of sixty-five until attaining the age of seventy. § 97B.46(2), The Code. In view of this statutory scheme, you pose the following questions:

1) Is an Area Education Agency as established in Chapter 273 of the Iowa Code, included within the definition of "employer" under Section 97B.41 of the Iowa Code?

2) In view of the special status accorded Area Education Agencies under Chapter 273, are the employees of such agencies covered under Section 1 or Section 2 of 97B.46 of the Iowa Code?

3) Specifically, is an AEA employee "an employee of the state" or "not an employee of the state"?

In our view, Area Education Agencies are "political subdivisions" which constitute "employers" within the meaning of Section 97B.41(3). An employee of an Area Education Agency, therefore, is not an employee of the "state" as the term is used in Sections 97B.41 and 97B.46 of the Code.

The term "employer" is defined in Chapter 97B as "the state of Iowa, the counties, municipalities, and public school districts and all of the political subdivisions and all of their departments and instrumentalities, including joint planning commissions created under the provisions of chapter 473A." § 97B.41(3)(a), The Code 1981. This definition delineates categories of entities which constitute an "employer" within the meaning of Chapter 97B. Area Education Agencies, therefore, must fall within one of these delineated categories in order to constitute an employer.

The nature of Area Education Agencies can be gleaned from their statutory source. Area Education Agencies are created under Chapter 273 of the Code. An Agency is established in each merged area of the state and has conterminous boundaries. § 273.2, The Code 1981. The function of the Agency is to furnish educational services and programs to pupils enrolled in approved public or nonpublic schools located within its boundaries and provide special education services and media services for the local school districts in the area. Additional services may be furnished to the local school districts within the limits of available funds. § 273.2, The Code. The Agency itself "is a body politic as a school corporation for the purpose of exercising powers granted" under Chapter 273. It may sue and be sued, hold property, and execute lease-purchase agreements. § 273.2, The Code.

In determining whether Area Education Agencies, as described, fall within any of the categories constituting employers under Section 97B.41, some categories can be summarily eliminated. Area Education Agencies plainly are not "counties" or "municipalities." Area Education Agencies, similarly, are not "public school districts." The Agencies, rather, provide services to and are partially funded by the public school districts. See §§ 273.2, 273.9, The Code 1981. The Agencies,

therefore, must either fall within the category of the "state of Iowa" or fall within the category of "the political subdivisions and all of their departments and instrumentalities" in order to constitute an "employer."

Under principles of statutory construction, the "state of Iowa" and its "political subdivisions" must be considered separate entities. Generally, a statute should be construed so that none of its terms are rendered superfluous. Iowa Auto Dealers Associations v. Iowa Department of Revenue, 301 N.W.2d 760, 765 (Iowa 1981). The terms "political subdivisions" would be superfluous, however, if the terms "state of Iowa" included all the political subdivisions of the state. Political subdivisions, therefore, are separately categorized in the definition of employer.

We considered the nature of political subdivisions in an earlier opinion of this office. We have observed that political subdivisions are geographic divisions of the state which have been empowered to perform certain functions of local government. 1976 O.A.G. 823, 825. The attributes of a political subdivision often include the election of public officials and the wielding of power for the peculiar benefit of people residing within specific boundaries. 1976 O.A.G. at 826.

In our opinion, Area Education Agencies satisfy these criteria. The Agencies cover specific geographic divisions of the state. See § 273.2, The Code 1981. The Agencies furnish educational services and programs to those school districts within their boundaries. See § 273.2, The Code. Education, in turn, is considered a function of local government. See generally, State v. Moorhead, 308 N.W.2d 60, 62-64 (Iowa 1981). The Agencies, moreover, are headed by elected officials. The board of directors of an Area Education Agency are elected at director district conventions by school board members of the school districts within the Agency boundaries. § 273.8, The Code 1981. Finally, the Agencies are primarily responsible for providing services for the benefit of those persons who reside within their boundaries. See §§ 273.3-7, The Code. We, therefore, conclude that Area Education Agencies are "political subdivisions" which constitute an "employer" within the meaning of § 97B.41(3).

Since we view Area Education Agencies as "political subdivisions" which are distinct from the "state of Iowa," the retirement age of Agency employees is controlled by Section 97B.46(2). The term "state" reappears in Section 97B.46 to distinguish between the retirement ages of classes of employees. As previously noted, Section 97B.46(1) provides that members of the retirement system who are employees of the "state" and not members of any other retirement system in the state maintained by public contribution may remain in service beyond the date the member attains the age of sixty-five. Section 97B.46(2) provides, however, that members of the retirement system who are not employees of the "state" may remain in service beyond the date the member attains the age of sixty-five until attaining the age of seventy. Generally, statutes relating to the same subject matter should be construed together. State v. Schmidt, 290 N.W.2d 24, 26 (Iowa 1980). Under this principle, the term "state" should be construed to exclude "political subdivisions" consistent with the construction applied to Section 97B.41(3). Employees of Area Education Agencies, therefore, would not be employees of the state. Accordingly, the retirement age of these employees is controlled by Section 97B.46(2).

In summary, we advise that Area Education Agencies are "political subdivisions" which constitute "employers" within the meaning of Section 97B.41(3). An employee of an Area Education Agency, therefore, is not an employee of the "state" as the term is used in Sections 97B.41 and 97B.46 of the Code.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP:sh

TAXATION: Application of the Board of Review's or Court's Final Disposition of a Real Property Tax Assessment Protest Filed for a Reassessment Year to the Assessed Value of the Property for the Following Interim Assessment Years. §§441.37, 441.35, The Code 1977. The board of review's or court's final disposition of a real property tax assessment protest filed pursuant to §441.37 for a reassessment year shall also control and set the assessed value of the property on the assessment rolls for the following interim assessment years provided that the assessor or board of review did not change the assessed value for an interim assessment year or that a protest was not filed by the taxpayer (property owner) for an interim assessment year successfully showing that the assessed value had changed for the particular interim assessment year being protested. (Kuehn to Martens, Emmet County Attorney, 3/17/82) #82-3-9(L)

March 17, 1982

John G. Martens
Emmet County Attorney
120 North Seventh Street
Estherville, IA 51334

Dear Mr. Martens:

You have requested an opinion of the Attorney General regarding a question which has arisen concerning a successful protest from a property tax assessment by an owner of real estate (hereinafter referred to as the taxpayer) in Emmet County, Iowa. The taxpayer (a realty company) timely protested its 1978 assessed valuation made by the Emmet County Assessor in a reassessment year.[1] See §428.4, The Code 1977. The decision of the board of review upholding the assessment was appealed under §441.38, The Code 1977, to the district court which entered a ruling holding that the 1978 valuation by the assessor of a certain improvement addition to the property was excessive and ordered a reduction of the value of the taxpayer's property on the property tax assessment rolls. Subsequently, the district court decision was appealed to the Court of Appeals of Iowa which affirmed the district court decision.

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[1]Any property owner or aggrieved taxpayer dissatisfied with his or her assessment could file a protest with the board of review pursuant to §441.37, The Code 1977.

Neither the assessor nor the board of review made any changes in the valuation of the taxpayer's property pursuant to §§428.4 or 441.35, The Code 1979, for either of the interim assessment years, 1979 and 1980.[2] See 1979 Session, 68th G.A., ch. 25, §2.

The question you have posed in your request for an opinion of the Attorney General is a determination as to whether or not the district court decision which set the value on the assessment rolls for 1978 (a reassessment year) should also control or set the values for 1979 and 1980 (the following interim assessment years).

In order to answer your question, it is necessary to analyze the Iowa Code provisions which set forth the grounds on which any taxpayer can protest or appeal a valuation that is placed on the assessment rolls for interim assessment years. The second paragraph of §441.37, The Code 1979, discusses the taxpayer's right to protest interim assessment years and provides, "In addition to the above the property owner may protest annually to the board of review under the provisions of section 441.35, ..." (Emphasis supplied). Section 441.35, The Code 1979, provides:

> Powers of review board. The board of review shall have the power:
>
> * * *
>
> In any year after the year in which an assessment has been made of all of the real estate in any taxing district, it shall be the duty of the board of review to meet as provided in section 441.33, and where it finds the same has changed in value, to revalue and reassess any part or all of the real estate contained in such taxing district, and in such case, it shall determine the actual

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[2]The year 1979 was an equalization year and the Director of the Iowa Department of Revenue, pursuant to §441.47, The Code 1979, ordered an increase in the level of assessment of the class of property in which the taxpayer's property was classified. The state ordered equalization raised the assessed value of the class which in turn raised the assessed value of taxpayer's property. Since the taxpayer did not protest the Iowa Department of Revenue's equalization order pursuant to §16, 1979 Session, 68th G.A., Ch. 25, your opinion request concedes that any valuation increase of the taxpayer's property resulting from the equalization order is not an issue.

> value as of January 1 of the year of the revaluation and reassessment and compute the taxable value thereof, and any aggrieved taxpayer may petition for a revaluation of his property, but no reduction or increase shall be made for prior years. . . . (Emphasis supplied)

The Iowa Supreme Court has clarified the grounds set forth in the above Code sections upon which a taxpayer can protest an assessment during an interim assessment year. In James Black Dry Goods Company the court stated:

> We do not so construe the statute [§441.37]. The words 'same manner and upon the same terms' do not refer to the grounds of complaint. They refer to how and when an interim year protest shall be heard. The manner and terms for the protest are set forth in the first part of section 441.37 * * * The authorized ground for an interim year protest appears in section 441.35,* * *. The only ground applicable to interim years is a change in value. During an assessment year an individual taxpayer by following the provisions of section 441.37 may protest on any or all of the grounds set forth therein but in interim years the grounds for protest are limited by section 441.35. (Emphasis supplied)

James Black Dry Goods Company v. Board of Rev. for the City of Waterloo, 260 Iowa 1269, 1277-1278, 151 N.W.2d 534, 539 (1967); Grundon Holding Corp. v. Board of Rev. of Polk County, 237 N.W.2d 755, 758 (Iowa 1976).

Since neither the Emmet County assessor nor the board of review made any changes in the assessed value of the taxpayer's property for either of the interim assessment years of 1979 and 1980, the only remaining grounds upon which the taxpayer could have protested an assessment for the interim years would have been on the grounds that the taxpayer alleged a change occurred in the assessed value for an interim year. Apparently, the taxpayer did not think there was such a change in assessed value because no protest was filed for either 1979 or 1980.

If the taxpayer had filed a protest in both 1979 and 1980 alleging that the 1978 assessed value by the assessor of a certain improvement addition to its property was excessive (for the 1978 reassessment year), said protest must fail because the board of review would have no subject matter jurisdiction in that the grounds upon

which the board of review can hear an interim assessment year protest are limited to situations where there has been a change in value of the property for the interim year being protested. See Section 441.35, The Code 1979; James Black Dry Goods Company v. Board of Review, supra; Grundon Holding Corp. v. Board of Review, supra. It would be absurd and unreasonable to argue that the taxpayer must file a protest with the board of review for 1979 and 1980 protesting the 1978 assessed value when the board of review has no subject matter jurisdiction. Equally absurd and unreasonable would be the conclusion that the court's final disposition of the taxpayer's property tax assessment protest for the reassessment year of 1978 is limited to the reassessment year and the taxpayer would be required to pay property taxes based upon an assessment roll containing an excessive assessed value for the following interim assessement years.

Section 441.37 sets forth the grounds and procedures for protesting an assessment during a reassessment year (1978). The only construction that can be attributed to §441.37 which would be reasonable, logical and workable is one which would conclude that the board of review's or court's final disposition of a property tax assessment protest filed pursuant to §441.37 for a reassessment year shall also control and set the values on the assessment rolls for the following interim assessment years.[3]

Such an interpretation of §441.37 meets statutory construction criteria applied by the Iowa Supreme Court. In Isaacson v. Iowa State Tax Comm'n, 183 N.W.2d 693, 695 (Iowa 1971), the court stated:

> Construction of any statute must be reasonable, sensible and fairly made with the view of carrying out the obvious intention of the legislature enacting it. Construction resulting in unreasonableness and absurd consequences will be avoided. (Emphasis supplied)

The same legal reasoning was applied by the court in Janson v. Fulton, 162 N.W.2d 438, 443 (Iowa 1968), which stated:

> The construction of any statute must be reasonable and must be sensibly and fairly made with a view of carrying out the obvious intention of the legislature enacting it. To put the matter differently, a statute should be given . . . practical, workable and logical construction. (Emphasis supplied)

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[3]Such a construction presupposes that the assessor or board of review did not change the values for the following interim years or, further, that a protest had not been filed by the taxpayer in the interim years successfully showing that the values had changed for the particular interim assessment year being protested.

In summary, the only construction that can be attributed to §441.37 which would be practical, workable, and logical would be one which would determine that the intent of the legislature was to provide that the outcome of a protest filed by a taxpayer pursuant to §441.37 for a reassessment year should also set the assessed values for the following interim assessment years. Any changes in the assessed value for an interim assessment year would be limited to situations where the assessor or board of review made a change in the assessed value for a particular interim assessment year or, further, where a protest was filed by a taxpayer for an interim assessment year successfully showing that the assessed value had changed for the particular interim assessment year under protest.

Since neither the assessor, the board of review, nor the taxpayer requested any changes for either the 1979 or 1980 interim assessment years, the district court's decision reducing the taxpayer's assessed value for the 1978 reassessment year must control the assessed values in the 1979 and 1980 interim assessment years.

Based upon the foregoing, it is the opinion of the Attorney General that the board of review's or court's final disposition of a real property tax assessment protest filed pursuant to §441.37 for a reassessment year shall also control and set the assessed value for the property on the assessment rolls for the following interim assessment years provided that the assessor or the board of review did not change the assessed value for an interim assessment year or that a protest was not filed by the taxpayer for an interim assessment year successfully showing that the assessed value had changed for the particular interim assessment year being protested.

Very truly yours,

Gerald A. Kuehn
Assistant Attorney General

COUNTIES AND COUNTY OFFICERS: Medical Examiner. Ch. 339, The Code 1981; § 339.7. The county in which a death occurs is liable for the costs of an autopsy, the exception being where the death occurred in the manner specified in § 339.6(10). Accordingly, a county may not attempt to recover those costs from either the county of the deceased's residence if the death occurred in a different county, or from the deceased's estate. (Weeg to Gustafson, Crawford County Attorney, 3/10/82) #82-3-8(L)

Thomas E. Gustafson
Crawford County Attorney
Courthouse
Denison, Iowa 51442

March 10, 1982

Dear Mr. Gustafson:

You have requested an opinion from the Attorney General regarding a county's liability for an autopsy performed by the county medical examiner. You have posed two specific questions, as follows:

1. Must the costs of an autopsy ordered to be performed under Section 339.7 of the Iowa Code be paid by the county in which the death occurred, or can the county of residence of the deceased be charged for such expense?

2. If the county in which the death occurred makes payment of the fees and expenses of the county medical examiner as well as the costs of an autopsy ordered under Section 339.7, may that county attempt to recover such costs from either the estate of the deceased or from the county of his or her residence?

We are of the opinion that, pursuant to Ch. 339, The Code 1981, the county in which a death occurs is liable for the costs of an autopsy, the exception being where the death occurred in the manner specified in § 339.6(10). Accordingly, a county may not attempt to recover those costs from either the county of the deceased's residence, if the death occurred in a different county, or from the deceased's estate.

Chapter 339 governs the appointment and designates the responsibilities of the county medical examiner. As you note in your opinion request, this chapter does not expressly address the question of liability for costs incurred by the medical examiner, with two exceptions. First, § 339.4 provides that in the event a death occurs in a manner specified by § 339.6 (i.e., deaths affected with the public interest), the medical examiner is to conduct a preliminary investigation and submit a written report to the county attorney. According to this section, the medical examiner is to receive actual expenses and a fee set by the board of supervisors; the county is to be billed for these expenses.

The second exception is found in § 339.7, which states the medical examiner is to investigate each death that occurs in a manner specified in § 339.6; at that point, the examiner is to determine whether an autopsy should be performed. However, in the event the manner of death occurs as specified in § 339.6(10), i.e., the death of an infant from unknown causes or possible sudden infant death syndrome, § 339.7 expressly provides that the department of health shall reimburse the medical examiner for costs incurred. This section makes no similar provision in the event the manner of death occurs as specified in § 339.6(1) through § 339.6(9).

The above-cited excerpts from Ch. 339 do not contradict our opinion but are instead included among the factors supporting it. First, the language of Ch. 339 itself establishes that the county bears responsibility for the office of the medical examiner. In particular, § 339.1 requires the county board of supervisors to appoint a medical examiner every two years. Section 339.3 provides that the supervisors may provide laboratory facilities as well as any other professional, technical, and clerical assistance the examiner may require. The above-cited provisions of § 339.4 expressly impose liability on the county for costs of the examiner's initial investigation and report.

Finally, while § 339.7 does allow the county to recover the cost of an autopsy from the department of health in narrowly proscribed circumstances, that section makes no other express provision for costs of any other autopsies performed by the medical examiner. This exception supports

our opinion, particularly in light of the Iowa Supreme Court's consistent holding that when certain exceptions are ennumerated in a statute, it is presumed that the legislature intended that no others be created. Iowa Farmers Purchasing Association v. Huff, 260 N.W.2d 824, 827 (Iowa 1977); In Re Estate of Wilson, 202 N.W.2d 41, 44 (Iowa 1972).

Our opinion is further supported by the fact that § 333.11 provides in relevant part that:

> The county auditor shall, during the month of July of each year, compile and prepare a financial report, which shall contain schedules showing:
>
> . . .
>
> (5) The expenses of the county medical examiner.

This section foresees payment by the county of all costs incurred by the medical examiner in the course of his official duties.

Finally, in prior opinions we have held that the county is liable for the cost of autopsies performed by the medical examiner. In Op. Att'y Gen. 1938, p. 166, we concluded that fees for holding inquests and for paying the coroner were to be paid from the county general fund. That opinion was upheld in Op. Att'y Gen., April 24, 1961 and in Op. Att'y Gen., January 18, 1962, where we stated further that the medical examiner's costs were to be paid by the county in which the death occurred. Also, in Op. Att'y Gen., May 26, 1971 and in Op. Att'y Gen., June 1961, we held that because the medical examiner's costs were a county expense, a county was not authorized to file a claim to recover those costs from the estate of the deceased.

The opinions of the Attorney General cited above provide a conclusive answer to your second question. First, these opinions establish that the costs of an autopsy are to be borne by the county in which the death occurs. See Op. Att'y Gen., January 18, 1962; Op. Att'y Gen., April 24, 1961. Consequently, the county which performs the autopsy of a person who dies in that county cannot seek to recover those costs from the county of the deceased's residence.

Furthermore, several prior opinions have concluded that the county which performs the autopsy may not attempt to recover those costs from the estate of the deceased. See Op. Att'y Gen., May 26, 197; Op. Att'y Gen., June 1961. In addition, § 340.19, The Code 1957, authorized the county to file a claim against the decedent's estate for the cost of the medical examiner's expenses. That section was repealed in 1959, evidencing the legislature's clear intent to impose liability for the medical examiner's expenses solely on the county.

It could be argued that Article III, Section 39A of the Iowa Constitution, the County Home Rule Amendment, vests the county with the authority to maintain an action for recovery of these costs from either another county or the estate of the deceased. However, the terms of this amendment grant home rule authority unless an exercise of that authority is inconsistent with the laws of the General Assembly. Because Ch. 339 manifests the legislature's intent to impose responsibility on the counties for the office of the medical examiner, a county cannot attempt to avoid liability for the costs of the medical examiner by an exercise of home rule authority.

Sincerely,

Theresa Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

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STATE DEPARTMENTS AND OFFICERS: REAL ESTATE COMMISSION. Exemption from real estate licensing requirements. § 117.3, The Code 1981. Attorneys who engage in real estate transactions for a client incident to the practice of law are not required to seek a real estate license. However, the mere fact that a person is licensed as an attorney does not exempt that person from the licensing requirements of Chapter 117 if the person engages in real estate practices subject to licensure outside the attorney-client relationship. (Thomas to Dreeszen and Waldstein, State Senators, 3/9/82) #82-3-7(L)

March 9, 1982

Honorable Elvie Dreeszen
State Senator, 24th District

and

Honorable Arne Waldstein
State Senator, 3rd District
State House
Des Moines, IA 50319

Dear Senator Dreeszen and Senator Waldstein:

You have requested an opinion of this office relative to the authority of attorneys to practice the real estate profession without licensure by the Iowa Real Estate Commission.

Specifically you have asked that we "render an opinion in the matter of attorneys' exemption from the real estate broker licensing provisions specifically outlining the limits, if any, of their authority to sell real estate without a broker's license."

The area under consideration is found in § 117.7(3), 1981 Code of Iowa wherein it is stated:

> The provisions of this chapter shall not apply to the sale, exchange, purchase, rental, or advertising of any real estate in any of the following cases:
>
> * * *
>
> 3. Nor shall the provisions of this chapter apply to an attorney admitted to practice in Iowa.

In essence, your request inquires as to whether the § 117.7(3) exception means that the mere fact a person is licensed to practice law exempts them from Chapter 117 for all purposes or whether the exemption was intended to exempt attorneys only with respect to activities related to the practice of law. This office has consistently taken the narrower view, the view that reflects the rather consistent approach of other jurisdictions.

On January 30, 1934, the attorney general responded to the Iowa Real Estate Commission question as to whether the exemption granted attorneys (as currently codified) would allow attorneys to employ real estate salespeople.

The attorney general stated that :

> The intent of the legislature, in passing this act and making this exemption, was for the express purpose of exempting an attorney at law from the provisions of this chapter by reason of the nature of the work of his profession.
>
> Accordingly, an attorney at law being exempted under the provisions of this chapter cannot employ salesmen as set out in Section 1905-c25, Code, 1931, as it is expressly stated in Section 1905-c26 that "the provisions of the chapter shall not apply to an attorney at law." Hence, an attorney at law cannot employ real estate salesmen as would one who had secured a broker's license.

1934 Op.Att'yGen., p. 455

We again adopt that language and will further clarify that opinion as it is not clearly erroneous or factually obsolete. In addition, it is of note that a related question was asked by the Commission to which the attorney general responded on March 21, 1934.

In the March 21, 1934, opinion the factual basis was that two parties were operating a business. One of the parties was a licensed real estate broker, the other was unlicensed but was admitted to practice as an attorney. The question was whether the attorney could transact any and all real estate business which might come into their office.

The attorney general, citing the previous ruling stated that in this factual situation the same ruling would apply. The attorney, "...in accordance with the exemption allowed by law, would be exempted in his practice as an attorney at law. However, if...engages in the real estate business and desires to employ salesmen, then, he should have a broker's license." 1934 Op.Att'yGen., p. 476

The opinion also stated that the exemption is to facilitate the practice of law in that every time a lawyer transacted business for his client involving real estate it would not be necessary for the lawyer to have a broker's license. This type of legal service to a client would permit real estate services incident to the duty a lawyer owed the client.

The key wording of the opinion is that:

> ...But if he desires to engage in the real estate business and especially so, if he wishes to employ salesmen in the conducting of business of this nature, then it would be necessary to have a broker's license.

1934 Op.Att'yGen., P. 476

It is generally accepted that interpretations by the attorney general have important bearing upon statutory meaning since the attorney general is required by law to issue opinions and interpretations to those who administer the law. See Sutherland Statutory Construction, 4 Ed. § 49.05

As the General Assembly has not specifically overruled the 1934 opinions previously cited then, the inference

is that the legislature has acquiesced to the interpretation of the attorney general. Goble & Cherry v. Mazie Dependent School District 488 P.2d 156 (Okla. 1971) The legislature has had opportunity to amend Chapter 117 or overrule the opinion of this office. Indeed, as the Minnesota Supreme Court said, "Rulings of the attorney general, when they have been acted upon and gone unchallenged for many years, are of much persuasive weight in statutory construction." In Re Adoption of Anderson, 235 Minn. 192, 199, 50 NW2d 278, 284 (1951)

Your question asked for specific outlines as to when attorneys must have real estate license. First, it is necessary to look at what licenses are available.

Under the current Iowa Real Estate Commission statute, a person engaging in real estate transactions for another for a fee must be licensed as a broker, broker-associate or salesperson. Salespeople cannot operate real estate offices without being under the supervision of a broker. Salespeople also cannot complete transactions without the supervision and approval of the broker with whom they are licensed. Broker-associates are brokers who are in the employ of another broker and who act in the capacity of salespeople for the employing broker. Although a broker-associate could work for himself as a broker, if he chooses to work for another he must surrender his independent licensure status to the employing broker. He is then treated under Chapter 117, The Code, as a real estate salesperson.

Construction of statutes is done under strict principles under the Canons of Statutory Construction by the Courts and this office. In reviewing the overall scheme of Chapter 117 it is readily seen that the statute's purpose includes establishing standards for the real estate profession, regulating the profession and determining who can engage in the profession.

Exemptions granted under a general statute are to be construed narrowly and the overall statute broadly to effectuate the purposes intended by the statute. The Iowa Supreme Court stated in Hansen v. State, 298 N.W.2d 263, 265 (Iowa 1980):

> The goal in construing statutes is to ascertain legislative intent. In doing this we may consider the language

> used in the statute, the objects sought to be accomplished, the evils and mischief sought to be remedied, and we may place a reasonable construction on the statute which will best effect its purpose rather than one which will defeat it. Crow v. Schaeffer, 199 N.W.2d 45, 47 (Iowa 1972). It is a well-known rule of statutory construction that the intent of the legislature prevails over the literal language of a statute. Northern Natural Gas Co. v. Forst, 205 N.W.2d 692, 695 (Iowa 1973). The spirit of the statute must be considered as well as the words. Dobrovolny v. Reinhardt, 173 N.W.2d 837, 840 (Iowa 1970).

Chapter 117 has, as its purpose, the intent to set licensing standards for those who would engage in the real estate profession. All the exemptions set forth in § 117.7 are narrowly focused and carry forth the overall intent of the statute. That is, that only those people who qualify in certain, specific manners are exempt from the statute's provisions.

The legislative purpose, therefore is to regulate the transactions in real estate of those persons who would engage in continuing transactions of real estate. Those persons desirous of engaging in continuing real estate transactions must be licensed.

Other states have met this issue through statutes as well as court decisions and opinions issued by the attorney general of the particular state. Of note in this area would be Kentucky, South Dakota and Minnesota. Kentucky exempts attorneys by statute but the exemption is rather narrowly drawn.

In Kentucky the real estate license law declares that the law does not apply to "...any attorney-at-law who is performing his duties as attorney-at-law." Ky. Rev. Stat. § 324.030(3) Minnesota similarly provides that "the term real estate broker does not include a licensed practicing attorney acting solely as an incident to the practice of law..." Minn. Stat. Ann. § 82.02(3)

South Dakota provides an even stricter view:

> This chapter shall not be construed to include an attorney at law, admitted to practice in South Dakota, unless he holds himself out to be in the real estate business or solicits real estate business, in which event he shall obtain a real estate license without examination but he shall be subject to the provisions of this chapter.

S.D. Codified Laws, § 36-21-19

Many of the other jurisdictions, with the exception of New York and Pennsylvania, have language identical to or similar to the language of Kentucky and Minnesota. Attention is directed to the statutes of Arkansas, Alabama, Illinois, California, Kansas, Indiana and Michigan. New York permits attorneys to share in brokerage commissions on a co-brokerage basis although the New York statute also states that its provisions shall not apply to an attorney. N.Y. Real Property Law, § 442-f McKinley. Pennsylvania does not prohibit attorneys from acting as brokers although some attorneys in that state are licensed as real estate brokers. Also see Arkansas (Ark. Stat. Ann. § 71-1302); Alabama (Ala. Code § 34-27-2 [1975]); Illinois (Ill. Ann. Stat. ch. 111, § 5711); California (Cal. Bus. & Prof. Code § 10133.1); Kansas (Kan. Stat. Ann. § 58.3003); Indiana (Ind. Code Ann. § 25-34-1-22 [Burns]). Each of these states has exempted attorneys from licensure when the attorney is acting as an attorney.

The attorney exemption was addressed by the Michigan Supreme Court in Krause v. Boraks, 341 Mich 149, 67 N.W.2d 202 (1955). In Krause, the plaintiff was an attorney who had secured purchasers for particular property. He later sued two brokers who had paid him less than he thought he should receive for the services rendered.

The Michigan statute under Krause read: "...nor shall this act be construed to include in any way the services rendered by an attorney at law in the performance of his duties as such attorney at law..." Mich. Comp. Laws Ann. § 451.202. That Michigan statute has, subsequent to Krause, been repealed but the successor language carries the same intent: "This article shall not include the services rendered by an attorney at law as an attorney at law..." Mich. Comp. Laws Ann. § 339.2501.

The Michigan Supreme Court said:

> Here, Krause occupied an attorney-client relationship with the purchasers of the vendor's interest in the land contract. There is nothing to indicate a like relationship between Krause and Boraks. Under no interpretation of the facts could Krause be said to have performed legal services for Boraks.
>
> [4,5] There is no doubt that the legal aspects of real estate transactions may constitute a large portion of an average attorney's practice, and thus are inseparably connected with the practice of law. But an attorney engaging solely in the function of obtaining a prospective purchaser for an interest in realty, in conjunction with a broker, is clearly invading another scope of activity which, in the absence of being licensed so to do, is prohibited by statute. That an attorney is well qualified to engage in such endeavor cannot be denied. However, the legislature has clearly intended that one engaging in that field of activity must be licensed. Plaintiff's services were not within the exemption provision of the statute hereinbefore quoted.

Krause v. Boraks, p. 204,205

It is our opinion that the consistent intent of legislatures around the country has been only to exempt attorneys from real estate licensing when the attorneys were acting as attorneys. When the attorney steps out of this role as ". . . attorney at law to engage in the private enterprise of real estate dealers, other than as an incident or adjunct of their profession as attorneys, then their status is no different than that of others subject to the provisions of said Act." 1955-1956 S.D.Att'yGen.Rep. at 210-211.

We are not unmindful that the language of the Iowa exemption is framed in somewhat broader language than is employed in other jurisdictions, but in view of the apparent purpose of the exemption and legislature acquiesence in long standing interpretations of this office, we are satisfied that the exemption relates only to those real estate activities which are incidental to the practice of law.

Attorneys desiring to engage in real estate transactions not incident to the attorney-client relationship must have a license as either broker, broker-associate or salesperson.

We should be clear at this point that the concerns of the Real Estate Commission should relate only to what activities require real estate licenses and applications of the requirements of Chapter 117 to licensees. Whether, and in what manner, a licensed attorney may engage in the activities otherwise appropriate for a licensed real estate broker or salesperson may also involve questions relating to the appropriate conduct of licensed attorneys.

The authority to license attorneys and establish rules and standards of conduct for lawyers is vested in the Supreme Court of Iowa, which has adopted the Code of Professional Responsibility for Lawyers. It is not a proper function of this office to issue opinions construing the Code of Professional Responsibility. Attorneys seeking such guidance or persons with complaints about attorneys should seek clarification from the Committee on Professional Ethics and Conduct of the Iowa State Bar Association. That group has been delegated responsibility for addressing such matters by the Supreme Court. See Rules of Procedure, Professional Ethics and Conduct Committee of the Iowa State Bar Association, III Code of Iowa 3622 (1981).

For informational purposes, we would note that several provisions of the Code of Professional Responsibility may restrict the activities of lawyers in the real estate field. See Code of Professional Responsibility, DR3-103, DR3-102(A)(3), DR5-101 and DR5-105(B)(C)(D).

As you are aware, the Committee on Professional Ethics and Conduct recently acted upon a complaint relating to an attorney sharing in a commission for the sale of real estate. The Committee determined that

> It is the opinion of the Committee that the foregoing action on your part violated the Iowa Code of Professional Responsibility

> for Lawyers, particularly DR5-107(A)(1) and (2). Any action taken by a lawyer in behalf of a client is the practice of law. Thus, when acting in such capacity, a lawyer cannot share in a realtor's commission nor can such lawyer share in a commission of any kind unless there has been full disclosure to the client and the client approves. By "full disclosure" in this connection the Committee means explaining that the client is entitled to receive the financial benefit, if any.

Report of the Committee on Professional Ethics and Conduct, December 4, 1981, accepted for public report by the Iowa Supreme Court on January 11, 1982. In that matter before the Committee, an attorney had accepted money from a real estate licensee while representing an estate without disclosing the receipt of the money.

In summary, attorneys who wish to engage in a continuing practice of advertising or offering for sale real property, which activity is not incident to providing legal services must obtain and hold a valid real estate license. If the lawyer seeks to offer to the public the service of listing, advertising, selling, exchanging, purchasing or renting of real property to another for a fee, commission or other consideration then the lawyer is acting as a real estate broker as the term is defined in § 117.3, The Code. The lawyer then must be licensed as a real estate broker or salesperson.

Sincerely yours,

FRANK THOMAS,
Assistant Attorney General

jb

TAXATION: Tax on Grain Handled: Section 428.35, The Code 1981. The tax imposed by §428.35, The Code 1981, is an excise tax on the handling of grain. Handling occurs when the grain is received. Ownership of the grain is not a relevant consideration, and as a result when the ownership of grain changes without movement of the grain, the transaction would not be taxable under §428.35. (Schuling to Harbor, State Representative, 3/8/82) #82-3-6(L)

March 8, 1982

The Honorable William H. Harbor
State Representative
State House
L O C A L

Dear Representative Harbor:

You have requested the opinion of this office concerning the application of §428.35, The Code 1981. Section 428.35 imposes a grain handling tax on all persons engaged in handling grain. The question posed was whether taxation under §428.35 of grain moved into an elevator and taxation of the same grain subsequently purchased by the elevator constitutes double taxation.

An answer to your question requires initially an analysis of §428.35, The Code 1981. Section 428.35 provides in relevant part:

> 1. Definitions. "Person" as used herein means individuals, corporations, firms and associations of whatever form. "Handling or handled" as used herein means the receiving of grain at or in each elevator, warehouse, mill, processing plant or other facility in this state in which it is received for storage, accumulation, sale, processing or for any purpose whatsover.

* * *

> 2. Tax imposed. An annual excise tax is hereby levied on such handling of grain in the amount hereinafter provided. All grain so handled shall be exempt from all taxation as property under the laws of this state. The amount of such excise tax shall be a sum equal to one-fourth mill per bushel upon all grain as herein defined so handled.

Section 428.35, The Code 1981.

The tax imposed by §428.35 is an excise tax on the handling of grain. The important criteria for imposition of the tax is the receiving of grain. This is an excise tax on the service of receiving grain, not on the property itself. The grain is used to measure the amount of tax due.

> Example 1: A farmer moves 10,000 bushels of grain into an elevator for storage. Subsequently, the farmer sells the 10,000 bushels of grain to the elevator. The elevator is required to report that it handled 10,000 bushels of grain.

The first transaction where the elevator received 10,000 bushels of grain for storage is taxable pursuant to §428.35. Handling occurred because the elevator received grain at the elevator for storage, accumulation, sale, processing or for any purpose whatsoever.

The second transaction where the elevator purchased the 10,000 bushels of grain is not taxable. Handling under §428.35 did not occur. This transaction resulted only in a change of ownership. Ownership of the grain is irrelevant to the tax imposed §428.35. The excise tax is on the receiving of grain and only transactions which result in the receiving of grain are taxable under §428.35.

> Example 2: A farmer moves 10,000 bushels of grain into an elevator for storage. Subsequently, the farmer sells the 10,000 bushels of grain to a manufacturer who moves the grain to its storage bins. The elevator is required to report that it handled 10,000 bushels of grain and the manufacturer is required to report that it handled 10,000 bushels of grain.

The first transaction where the elevator received 10,000 bushels of grain for storage is taxable for the same reasons that were set forth for the first transaction in Example 1.

The second transaction where the manufacturer purchased and moved the 10,000 bushels of grain to its storage bins is taxable pursuant to §428.35. The transaction is not taxable because of

the change in ownership to the manufacturer but because handling occurred when the manufacturer received grain at its storage bins for storage, accumulations, sale, processing or for any purpose whatsoever.

> Example 3: A farmer moves 10,000 bushels of grain into Elevator A for storage. Subsequently, the farmer moves the 10,000 bushels of grain to Elevator B. The farmer later moves the 10,000 bushels of grain back to Elevator A. Elevator A is required to report that it handled 20,000 bushels of grain. Elevator B is required to report that it handled 10,000 bushels of grain.

The first transaction where Elevator A received 10,000 bushels of grain for storage from the farmer is taxable for the same reasons set forth for the first transaction in Example 1.

The second transaction where Elevator B received 10,000 bushels of grain for storage from Elevator A is taxable for the same reasons set forth for the first transaction in Example 1.

The third transaction where Elevator A received 10,000 bushels of grain for storage from Elevator B is taxable for the same reasons set forth for the first transaction in Example 1. Each time the grain is received by the elevator it is taxable. There is nothing in the statute to exempt grain received more than once at the same place. Section 428.35 imposes an excise tax on the receiving of grain. This third transaction is a separate taxable event for the purposes of §428.35.

In answer to your question, it must be concluded that the issue of double taxation does not arise. (See Example 1.). Ownership is not dispositive of the issue as to when a tax is imposed by §428.35. Section 428.35 imposes a tax on the receipt of grain.

Very truly yours

Mark R. Schuling

Mark R. Schuling
Assistant Attorney General

WP1

TAXATION: Application For Industrial Real Estate New Construction Tax Exemption. Sections 427B.1, 427B.3, and 427B.4, The Code 1981. A purported application for the local option industrial real estate new construction property tax exemption filed with the assessor before a city council enacted an ordinance to authorize the exemption is ineffectual and cannot be considered as an application for such exemption. Claimants must file their exemption applications between January 1 and February 1 of the assessment year in which the value added is first assessed for taxation. Department of Revenue instructions which state that if a new construction industrial project requires more than a year to construct or complete a single application for exemption may be filed upon completion of the project are inconsistent with §427B.4. (Griger to Kimes, Clarke County Attorney, 3/5/82) #82-3-5(L)

March 5, 1982

Mr. Gary G. Kimes
Clarke County Attorney
200 West Jefferson
Osceola, IA 50213

Dear Mr. Kimes:

You have requested an opinion of the Attorney General concerning the local option industrial real estate new construction tax exemption contained in chapter 427B, The Code 1981. In your written request, you state:

> I am writing to request your opinion on three questions pertaining to Section 427B of the 1981 Code.
>
> The first question deals with Section 427B.4. The Code makes no mention whether or not the application exemption form can be filed before the city passes the ordinance granting the exemption. For example, if the city passes it's ordinance on January 25th, but the application for the exemption form is filed January 10th, would the exemption be denied on the basis of being filed for before the enabling ordinance was in effect?

Question two is along the same lines. The Code states that the application for exemption must be filed with the Assessor by February 1st in the year in which added value is first assessed. It does not, however, state that the application must be filed between January 1st and February 1st. For example, what if the property owner actually filed his application on December 10th or 20th of the preceeding year?

The third question deals with the following issue. The official Department of Revenue form states that on a project taking more than one year to complete, one application may be filed at the end of the project. My question stems from the fact that the Iowa Code makes no such statement. What it does in fact state is:

> "427B.4 Application for Exemption by Property Owner. An appliction shall be filed for each project resulting in actual value added for which an exemption is claimed. The application for exemption shall be filed by the owner of the property with the local assessor by February 1 of the assessment year in which the value added is first assessed for taxation.

Since added value is assessable every year, it would stand to reason that filing one form at the end of a two or three year project would not conform to The Code.

Attorney General Opinion dated March 25, 1980 written to Senator John S. Murray at page six, paragraph four thereof states that since cities derive their authority to tax from the legislature, they must grant the exemption in harmony with the provisions of The Code, and cannot enlarge, restrict or modify the exemption beyond the clear import of the statute.

Similarly, the Department of Revenue should derive it's authority with regard to exemption from the state legislature.

Is it within the power of the Department of Revenue to approve filing one form at the end of a two or three year project in light of 427B.4?

An overview of the local option industrial real estate new construction tax exemption was set forth in Op. Att'y Gen. #80-3-19, a copy of which is attached to this opinion. In the event that a city or county elects to provide for this tax exemption as authorized by §427B.1, The Code 1981, those exemption claimants who seek such exemption must file application with the assessor in accordance with the first paragraph of §427B.4, The Code 1981, which states:

> "An application shall be filed for each project resulting in actual value added for which an exemption is claimed. The application for exemption shall be filed by the owner of the property with the local assessor by February 1 of the assessment year in which the value added is first assessed for taxation. Application for exemption shall be made on forms prescribed by the director of revenue and shall contain information pertaining to the nature of the improvement, its cost, and other information deemed necessary by the director of revenue."

However, the provisions of §427B.4 above quoted only pertain to an application for the tax exemption authorized by Chapter 427B, The Code 1981 and, unless the exemption exists, there can be no application for it. The tax exemption only exists if the requisite local option is duly exercised. Section 427B.1 provides in relevant part:

> "A city council, by ordinance, or a county board of supervisors as authorized by section 427B.2, by resolution, may provide for a partial exemption from property taxtion of the actual value added to industrial real estate by the new construction of industrial real estate and the acquisition of or improvement to machinery and equipment assesed as real estate pursuant to section 427A.1, subsection 1, paragraph 'e'."

In the situation you posed, with reference to your first question, the city passed its ordinance on January 25th, but a taxpayer purported to file an "application for exemption" on January 10th. Until the city enacted its ordinance authorizing the tax exemption, none existed. See Colonial Townhouse Coop., Inc. v. City of Lansing, 25 Mich. App. 24, 181 N.W.2d 2 (1970). Since no tax exemption existed on January 10th, any purported "application for exemption" filed at that time with the local assessor would be a nullity. Moreover, it should be remembered that Chapter 427B is a tax exemption statute which is strictly construed with all doubts resolved against exemption and in favor of taxation. Jones v. Iowa State Tax Commission, 247 Iowa 530, 74 N.W.2d 563 (1956). Consequently, a reasonable interpretation of §427B.4 and one consistent with the rule of strict construction of tax exemption statutes is that the application for exemption must, in order to be

properly considered, be filed with the assessor at the time, and not before, when the tax exemption has been authorized as provided by §427B.1. Thus, in the situation you posed, a purported filing of an application for exemption form on January 10th, before the city had enacted the tax exemption ordinance, would be ineffectual and would not entitle the claimant to the exemption.

With reference to your second question, §427B.4 requires that the exemption application be filed with the assessor by February 1 of the assessment year "in which the value added is first assessed for taxation." An assessment year is a calendar year. See §441.46, The Code 1981. Real estate is assessed for taxation as of January 1 of the assessment year. See §428.4, The Code 1981, as amended by 1981 Session, 69th G.A., ch. 140. The local option industrial real estate new construction tax exemption, as provided for in §427B.1, operates so that the claim for exemption must be filed with the assessor when the "value added," as defined in §427B.3, The Code 1981, is first assessed for taxation. For example, "value added" in the year 1981 is first assessed for taxation in the assessment year 1982, as of January 1, 1982. That value can be added up to and through December 31, 1981. It is this "value added" for the entire prior assessment year and which is first assessable for the current assessment year that constitutes the "value added" referred to in §§427B.3 and 427B.4, for which application for exemption must be made by February 1 of the current assessment year in which that "value added" would, pursuant to §428.4, be first assessed for taxation. Given such assessment practice in Iowa under the Iowa property tax scheme, it would be reasonable to conclude that the legislature intended that the claimant must file for this tax exemption during the assessment year in which the value added is first assessed for taxation, but that in any event exemption application must be filed by February 1 of such assessment year. Indeed, this conclusion is supported by the last sentence in the first paragraph in §427B.4 which provides that applications for exemption must contain information relating to the nature of the value added and its cost. Such information may not be ascertainable where the construction is being performed in December until January of the year for which the value added would first be assessed for taxation. Under such a scheme, a uniform methodology is provided for the filing of exemption applications during the first assessment year and after the value added for the prior year has been completed and is ascertainable. If the exemption claimant could file an application for exemption during the prior year, as your question implies, such uniformity would not exist and, in addition, the claimant would even be authorized to file for exemption before any "actual value" had been added, assuming the claim was filed after the exemption had been locally authorized as provided in §427B.1. If the legislature had intended such an exemption application scheme to exist, it should have clearly said so. Construction of statutes should be reasonable and sensible. Isaacson v. Iowa State Tax Commission, 183 N.W.2d 693 (Iowa 1971); American Home Products v. Iowa State Bd of Tax, 302 N.W.2d 140 (Iowa 1981). Furthermore, where statutes authorize the filing for property tax exemptions with the assessor for an assessment year, such statutes are

usually considered to provide for such filing during the current assessment year and by a date set forth in such year. See e.g., §§425.2 (homestead tax credit), §427.1(23) and (24) (exemption for war veterans organizations and charitable and religious organizations), §427.1(32) (pollution control property exemption), §427.6 (military service tax exemption) and §427A.4 (personal property tax credit). There is no reason to conclude that the legislature intended a different result with respect to the local option industrial real estate new construction tax exemption. Finally, to the extent that §427B.4 could be considered to be ambiguous on the question of whether the exemption must be claimed between January 1 and February 1 of the assessment year in which the value added is first assessed for taxation, the rule of strict construction of tax exemption statutes would require such ambiguity to be resolved against a construction of §427B.4 which would allow the exemption to be claimed during the prior year in which the value added is not assessed for taxation and in favor of only allowing application during and by February 1 of the current assessment year in which the value added is first assessed for taxation.

Your third and final question concerns certain instructions in a Department of Revenue form which you maintain are inconsistent with §427B.4. Those instructions state:

> "This application must be signed by the property owner and submitted to the city or county assessor in which the property is located by not later than February 1, of the year in which the property claimed for exemption is assessed for tax purposes. A single application may be filed upon completion of an entire project requiring more than one year to construct or complete." (Emphasis supplied).

You state that the underlined portion of the above quoted portion of the instructions does not conform to the provisions of §427B.4, since the statute clearly requires the filing of an exemption application when the actual value added is first assessable. This office agrees with your analysis and, in fact, upon bringing this point to the attention of the Department of Revenue, the Department also agrees that its instructions are in error and it has assured this office that it will take the necessary steps to correct its forms.[1] Therefore,

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[1]The second paragraph of §427B.4 provides for prior approval of a tax exemption which, if given, would not require the filing of exemption application until the project is completed. See rule 730-80.6(6), IAC, and Op. Att'y Gen. #80-3-19. The instant opinion assumes that your third question did not have reference to that situation. In any event, the Department's instructions in question are still inconsistent with §427B.4, since they do not purport to deal with such prior approval projects and because such projects could conceivably be completed in less than one year.

irrespective of the length of time taken to complete an industrial new construction project, §427B.4 requires that when value is added, as defined in §427B.3, the exemption claimant must file for exemption by February 1 of the assessment year in which such value added is first assessable for taxation.

Very truly yours,

Harry M. Griger

Harry M. Griger
Special Assistant Attorney General

TAXATION: Mobile Home Owned by a Religious Organization and Used as a Classroom, but Which Has Not Been Converted to Real Estate. Sections 135D.22, 135D.26 and 427.1(10), The Code 1981. A mobile home which is owned by a religious organization and used as a classroom, but which has not been converted to real estate would not be exempt from the semi-annual taxes imposed on mobile homes under Section 135D.22. (Donahue to Davis, Scott County Attorney, 3/5/82) #82-3-4(L)

March 5, 1982

Mr. William E. Davis
Scott County Attorney
416 West Fourth Street
Davenport, IA 52801

Dear Mr. Davis:

You have requested the opinion of this office concerning the application of Sections 135D.22, 135D.26 and 427.1(10), The Code 1981. You asked whether a mobile home which is owned by a religious organization and used as a classroom, but which has not been converted to real estate in accordance with Section 135D.26, constitutes personal property within the meaning of Section 427.1(10), thereby exempting such mobile home from the semi-annual taxes imposed under Section 135D.22.

In answer to your question, a mobile home which is owned by a religious organization and used as classroom, but which has not been converted to real estate would not be exempt from the semi-annual taxes imposed under Section 135D.22. Section 135D.22, The Code 1981, states in pertinent part as follows:

> Semiannual tax. The owner of each mobile home shall pay to the county treasurer a semiannual tax as herein provided. However, when the owner is any educational institution and the mobile

> home is used solely for student housing or when the owner is the State of Iowa or a subdivision thereof, the owner shall be exempt from the tax provided herein. . . (Emphasis added)

Section 427.1(10), The Code 1981, states in pertinent part as follows:

> Personal property of institutions and students. Moneys and credits belonging exclusively to the institutions named in subsections 7, 8 and 9 (includes religious institutions) and devoted solely to sustaining them, but not exceeding in amount or income the amount prescribed by their charters or articles of incorporation; and the books, papers, pictures, works of art, apparatus, and other personal property belonging to such institutions and used solely for the purposes contemplated in said subsections and the like property of students in such institutions used for their education. (Emphasis added)

As you can see, Section 427.1(10), The Code 1981, and Section 135D.22, The Code 1981, are in conflict. Section 427.1(10) would appear to exempt personal property owned by a religious organization and used as a classroom from the payment of property tax. However, Section 135D.22, is the specific section dealing with the payment of the semiannual tax on mobile homes. Section 135D.22 exempts only the following owners from the payment of the semiannual tax: (1) any educational institution when the mobile home is used solely for student housing, or (2) the State of Iowa or a subdivision thereof. A mobile home owned by a religious organization and used as a classroom obviously would not come within the §135D.22 exemptions set out above.

It is a basic rule of statutory construction that when a general statute (§427.1(10)) is in conflict with a specific statute (§135D.22), the more specific statute (§135D.22) ordinarily prevails, whether enacted before or after the general statute. In Ritter v. Dagel, 261 Iowa 870, 156 N.W.2d 318, 324 (1968), the Iowa Supreme Court stated:

> Kruse v. Gaines, 258 Iowa 983, 986, 139 N.W.2d 535, 536, cites nine Iowa decisions and other authority for "the basic principle that when a general statute is in conflict with a specific statute, the latter ordinarily prevails, whether enacted before or after the general statute." (Emphasis added [by Supreme Court])

It is clear that only the language of Section 135D.22, The Code 1981, is applicable to the situation you have presented. As mentioned above, Section 135D.22 exempts from the payment of the semiannual tax on mobile homes only educational institutions that use the mobile homes solely for student housing and the State of Iowa or a subdivision thereof. If the legislature had intended to specifically exempt mobile homes belonging to religious organizations and used for any religious purpose from tax under §135D.22, it could have easily done so.

The Iowa Supreme Court in In Re Estate of Wilson, 202 N.W.2d 41, 44 (Iowa 1972) stated:

> The court has also held, in the field of statutory construction, legislative intent is expressed by omission as well as by inclusion. Stated otherwise, the express mention of one thing implies the exclusion of others. See Richardson v. City of Jefferson, 257 Iowa 709, 715, 134 N.W.2d 528 (1965). (Emphasis added)

Section 135D.22, as noted, provides for two categories of exempt property. The express mention of such categories implies the exclusion of others, such as religious institution property not solely used for student housing. Consequently, it is reasonable to conclude that, in the situation your opinion request presents, the legislature did not intend to exempt the personal property from the mobile home tax. Tax exemption statutes are strictly construed with all doubts resolved against exemption and in favor of taxation. Dow City Sr. Citizens Housing, Inc. v. Board of Review of Crawford County, 230 N.W.2d 497 (Iowa 1975).

In conclusion, a mobile home which is owned by a religious organization which has not been converted to real estate would be subject to the semi-annual taxes imposed under Section 135D.22, unless the religious organization is an education institution that uses the mobile home solely for student housing.

Very truly yours,

Thomas M. Donahue

Thomas M. Donahue
Assistant Attorney General

BAIL BOND: Sections 811.2(1), 811.8, and 907.6, The Code 1981. Subject to the limitations, if any, of their contract with the defendant, the bonding company may avail themselves of the provisions of § 811.8 thereby causing the clerk of court to order the exoneration of the surety. A condition of posting a bond as a condition of probation does not affect the bonding company's rights under § 811.8, The Code. (Cleland to Slater, State Senator, 3/4/82) #82-3-3(L)

March 4, 1982

The Honorable Tom Slater
State Senator
P.O. Box 1143
Council Bluffs, Iowa 51502

Dear Senator Slater:

You have requested an Attorney General's Opinion on the following questions:

1. Does an appearance bail bond continue after sentencing of the defendant, when the defendant is given probation and custody and control of the defendant is turned over to the Fourth Judicial District Correction Services?

2. Does the appearance bond continue after sentencing when judgment is deferred and conditions are imposed for a period of a year following the date of sentencing and jurisdiction is also turned over to the Department of Corrections for the Fourth Judicial District of Iowa?

3. Is the contract through the bail bond wherein the obligor is the bonding company and the obligee the State of Iowa breached by the State of Iowa when the obligor (bonding company) no longer has control over the defendant since the same has been turned over to the Department of Corrections of the Fourth Judicial District of Iowa?

We believe that these questions can be combined into one question concerning the rights and obligations of the bonding company after defendant has appeared for sentencing and received probation.

It is our position that the sole purpose of bail is to reasonably assure the defendant's appearance. Section 811.2(1), The Code 1981. This does not mean, however, that the court may not impose a condition of posting bond as a condition of probation. Section 907.6, The Code 1981. Whether the bonding company continues the original bond is a matter between the defendant and the bonding company. In any event, the bonding company may avail themselves of the provisions of § 811.8, The Code 1981, subject to the limitations, if any, of their contract with the defendant, thereby causing the clerk of court to order the exoneration of the surety.

Sincerely,

Richard L. Cleland

RICHARD L. CLELAND
Assistant Attorney General

RLC:mlr

COUNTY HOSPITALS: Health care benefits for hospital employees. §§ 347.13(4), 347.14(10), 509A.1, 509A.2, The Code 1981. A county hospital board of trustees may establish, under Chapter 347, The Code, a trust to fund health care benefits for hospital employees. Either the county or the board may establish plans for group health care benefits for these employees, but said plans may only be funded by contributions from the hospital employees, the governing body, or a combination of both. (Brammer to Shirley, Dallas County Attorney, 4/29/82) #82-4-20(L)

Alan Shirley
Dallas County Attorney
1124 Willis Avenue
Perry, Iowa 50220

April 29, 1982

Dear Mr. Shirley:

You have asked for an opinion of the Attorney General concerning the funding of health care benefits for employees of the Dallas County Hospital. Your letter mentioned the use of a trust authorized under §501(c)(9) of the Internal Revenue Code for the funding of these benefits. The specific questions you propounded are:

1. Can the hospital or alternatively, the County establish such a trust for the purpose of funding employee health care benefits?

2. Could the hospital and/or the County under a 28E agreement establish a joint trust with a private corporation for the purpose of jointly funding health care benefits?

3. Assuming a private corporation forms such a trust for the benefit of its employees, would the hospital be authorized to contract with the privately funding trust for health care benefits in regard to hospital employees?

It is our understanding that the Dallas County Hospital is operated pursuant to Chapter 347, The Code 1981. Section 347.13(4), The Code, directs the county's board of hospital trustees to "employ an administrator, and necessary assistants and employees, and fix their compensation." Section 347.14(10) authorizes the board to "do all things necessary for the management, control and government of said hospital and exercise all the rights and duties pertaining to hospital trustees generally, unless such rights of hospital trustees generally are specifically denied by this chapter, or unless such duties are expressly charged by this chapter." Previous opinions issued by this

office have noted that these broad statutory powers granted to county hospital boards are similar to those exercised by counties pursuant to the constitutional grant of home rule. See Op.Att'yGen. #79-9-11, #79-12-3. The question of whether the trust you have proposed would qualify under §501(c)(9) of the Internal Revenue Code must, of course, be decided by the Internal Revenue Service. It is our opinion that the hospital board of trustees does have the authority under Chapter 347 to establish such a trust to fund employee health care benefits. See also 1966 Op.Att'yGen. 146.

Further authority for the establishment of group health insurance for the hospital's employees may be found in Ch. 509A, The Code. Section 509A.1, The Code, provides that:

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

The question raised by the above-quoted statutory provision is whether the Dallas County Hospital is an "institution supported in whole or in part by public funds." A previous opinion issued by this office makes reference to a county hospital as an "institution". 1928 Op.Att'yGen. 132,22. The Iowa Supreme Court has defined an "institution" as "an established society or corporation, an establishment, esp. one of a public character. . . ." Samuelson v. Horn, 221 Iowa 208, 265 N.W. 168, 69 (1936). It is our understanding that the county hospital has received support in the form of revenue derived from general obligation bonds as well as county tax levies. The hospital would, therefore, be considered an institution supported in whole or in part by public funds within the meaning of §509A.1.

Chapter 509A, The Code, not only authorizes the county and the hospital board of trustees to establish plans for group health care benefits for hospital employees, but it also apparently restricts the sources of funds which may be used to pay for said plans. Section 509A.2 provides that "The funds for such plans shall be created solely from the contributions of employees, or from contributions wholly or in part by the governing body." (Emphasis added.) In the instant case, the "governing body" would be either the county board of supervisors or the board of hospital trustees. §509A.11(1), The Code. A previous opinion of the Attorney General has construed §509A.2 as follows:

> [T]he cost of insurance programs may be borne wholly by the employee, or wholly by the governing body, or it may be shared by the employer and employee.

Op.Att'yGen. #79-7-24. (A copy of this opinion is enclosed for your convenience.) Based on the foregoing, it is our opinion that neither the county nor the hospital trustees may enter into any agreement or contract which would entail the joint funding of a health care plan for hospital employees with an outside entity.

In conclusion, the county hospital board of trustees is empowered under Ch. 347, The Code, to establish a trust to fund health care benefits for hospital employees. Chapter 509A, The Code, authorizes the county and the hospital board of trustees to establish plans for group health care benefits for hospital employees, but said plans may only be funded by contributions from the hospital employees, the governing body, or a combination of both.

Very truly yours,

Susan Barnes Brammer

Susan Barnes Brammer
Assistant Attorney General

SBB/jmc

SCHOOLS; CHANGING METHOD OF SELECTING SCHOOL BOARD MEMBERS; REDISTRICTING; SPECIAL ELECTIONS. Fourteenth Amendment, U.S. Const.; §§ 4.1(25), 275.12(2), 275.35, 275.36, 277.2, and 278.1, The Code 1981. School districts must use the latest preceding certified federal census in establishing or changing subdistrict boundaries for selecting school board members. Section 277.2 does not grant a school board the power to call a special election for the purpose of changing the method of selecting school board members. Where a petition is filed requesting an election to change the method of selecting school board members, pursuant to § 275.36, the timeliness of the petition is determined on the date the petition is filed. (Fleming to Tyrrell, State Representative, 4/29/82) #82-4-19(L)

April 29, 1982

The Honorable Phillip E. Tyrrell
State Representative
222 North Mill Street
North English, Iowa 52316

Dear Representative Tyrrell:

You have asked for our opinion concerning a petition presented to the Benton Community School District Board of Directors and a subsequent special election called by the District Board.

Because your questions concern a specific factual dispute and a complex and ambiguous statutory framework, we obtained from the school district copies of the minutes of meetings of the District Board in which the subject matter was discussed or acted upon. In addition, a copy of the petition you mention, various "plans" considered by the Board, the specific measures submitted to the voters of the school district, and the result of the election were provided and considered by us. We take notice of the fact that the measure submitted to the voters in the Benton Community School District special election held on March 9, 1982, received a majority of yes votes.

Having reviewed the statutory framework in the context of the events that occurred in the Benton Community School District, we find it necessary to address other important issues that are inextricably interrelated with those you raise.

I. THE STATUTORY FRAMEWORK

The relevant Code sections are scattered in the various chapters of Title XII on Education in the Code of Iowa, 1981. Some of those sections will be set out in full in the discussion below but the overall system may be summarized briefly.

Each Iowa school district exists as "a body politic as a school corporation," § 274.1, The Code 1981, i.e., each school district is a local governmental unit, and exercises taxing and other powers pursuant to law. The district board of directors is the policy-making body and its members are elected by the qualified electors of the district.

The electors of a school district may choose one of five different systems for selecting their representatives on the school board. See § 275.12(2), The Code 1981. The structure or method for selecting school board members are: 1) all members are selected at large from the entire district, § 275.12(2)(a); 2) the district is divided into subdistricts and each subdistrict must be represented on the board by a resident but they are elected by vote of electors of the entire district, § 275.12(2)(b); 3) not more than one half of the members are elected at large from the entire district and the remaining directors are elected from and as residents of subdistricts but voted upon by the voters of the entire district, § 275.12(2)(c); 4) the district is divided into subdistricts on the basis of population and members are elected from and by the electors of their respective subdistricts, § 275.12(2)(d); and 5) in districts having seven directors, three members are elected at large by the entire district and the others are elected from and by the voters in each of four subdistricts that are established "on the basis of population", § 275.12(2)(e).

The electors of the district may change from one of the methods summarized above to another but may not change methods more often than once every six years. See §§ 278.1(9) and 275.36. Where directors are elected as residents of and by the electors of subdistricts as in §§ 275.12(2)(d) or (e), the subdistricts are to be created "on the basis of population." Id. Having summarized the statutory framework, we turn to the events that gave rise to your request for our opinion.

II. THE EVENTS AS SHOWN IN THE SCHOOL BOARD MINUTES

A representative of a group of Atkins, Iowa residents addressed the Benton Community School District Board of Directors at its meeting on October 28, 1981, and "suggested that the Board change to 5 Director Districts" (minutes of meeting). After discussion, the Superintendent was requested to obtain further information concerning the changing of school director districts (minutes).

The Board secretary reported to the Board at its November 11, 1981 meeting that a petition had been filed requesting a change from a five-director system to a seven-director system, (minutes of November 11, 1981). The petition requested that the number of directors be increased from five to seven, that two members be elected at large, that the district be divided into five districts on the basis of population, and that the other five directors be residents of the various districts, but be elected by voters of the entire district (Petition attached to minutes). A representative of the petitioners addressed the Board. The petition called for change to the method provided in § 275.12(2)(c). The Board acknowledged receipt of the petition and the president stated it would be placed on the next Board meeting agenda (minutes of November 11, 1981). The Board attorney discussed the law concerning changing school director district lines and the number of directors. The Board voted to request the Grant Wood Area Education Agency, AEA, "to redraw five director district lines" for the district for consideration by the Board (minutes of November 11, 1981).

The minutes of December 9, 1981, show that a group of Atkins residents had filed a petition on December 8, 1981, but asked that no action be taken "at this time" on the petition. The Board attorney "continued his discussion with the Board regarding the re-districting." The Coordinator of Research and Evaluation for the Grant Wood AEA presented to the Board four alternatives for gathering population data for re-districting as follows: 1) land space pro-rated; 2) U.S. Census calcuation; 3) use of aerial maps to calculate number of residents per housing unit; 4) use of 1980 school census and available school maps (minutes of December 9, 1981). The Board voted that the 1980 school census and available school maps should be used in the preparation of alternative plans for the Board to consider in the re-districting of Benton Community School District.

Ten director district plans were presented to the Board on January 13, 1982. Following discussion, the subject matter was tabled until the next regular meeting (minutes of January 13, 1982).

A representative of the Blairstown residents who had submitted the petition on November 11, 1981, addressed the school board during its meeting on January 27, 1982 (minutes of January 27, 1982). Other persons who wished to speak were given an opportunity to do so (minutes). A motion was adopted to establish new director districts (minutes). The Board directed its attorney to prepare three separate resolutions for consideration at the next Board meeting (minutes). The resolutions were to implement each of the systems of electing school board members contained in §§ 275.12(2)(b), 275.12(2)(c) and 275.12(2)(d).

The Board next met on Tuesday, February 2, 1982. An attorney for the Blairstown area petitioners addressed the Board, and stated that the Board was obligated to place the petition's proposal before the public at an election. The Board went into closed session to discuss "possible pending litigation." Thereafter, a motion to call for a special election on March 9, 1982, to submit the proposal contained in the November 11, 1981, petition to the district's voters died for lack of a second. A motion to adopt what was called Proposal B failed by a vote of 2 to 3. A third motion was adopted to submit Proposition D, "pursuant to the Board's powers as granted by law under chapter 277, the Iowa Code" and "§275.35," to the Benton County Commissioner for the purpose of holding a special election. The proposal adopted was described as that authorized by § 275.12(2)(d) (Proposition D, attached to minutes). The Board minutes and attachments show that each of the districting plans considered, including the one submitted to the voters, was based on the 1980 Benton Community School District census. See § 291.9, The Code 1981.

The election was conducted on March 9, 1982. A certified copy of the Abstract of Votes shows that 1,143 votes were for the proposition and 811 votes were against.

III. THE QUESTIONS PRESENTED BY YOUR LETTER

Your letter of February 4, 1982, described briefly the petition filed on November 11, 1981. You noted the language in § 275.36 which provides that if a petition bearing a specified number of voters is filed with the school board "not earlier than six months and not later than two months before a regular or special school election, the board shall submit such proposition to the voters at such election." You then posed the following questions for our consideration:

1. There was no action taken by the board and still has not been, up to now, and the question becomes - why haven't they acted on the petition, i.e., can the petition, in this instance, be ignored or rejected?

2. The board has now set a date of March 9, 1982, for a special election, calling for director districts different from those proposed by petition. This would then call for a special election four months from the date of filing of the petition, yet the issue requested in the petition is being ignored. Is the board obligated to place the petition issue on the ballot?

3. If not, how can the electors express their wishes to the board without being blocked by what they feel is their right to be heard in a special election?

We believe the following issues must be considered first in the factual and statutory context presented.

A. What source of population data is to be utilized in drawing director district boundaries on the "basis of population." See § 275.12(2)(c), § 275.12(2)(d), and § 275.12(2)(e).

B. Can a school district board of directors call a special election for the purpose of changing the method of electing a district board, given the list of reasons for calling a special election in § 277.2?

IV. GENERAL INTRODUCTION TO ANSWERS

We note at the outset that the issues raised here have to do with the fundamental polity of a school district. The board of directors of a school district is the elected policy-making body of that political entity. It is the board that is responsible for the operation of the schools of the district.

See generally Chs. 279-283, 291-302, The Code 1981. Moreover, it must be kep in mind that school districts are subject to Dillon's Rule, i.e., the only powers of a school district are those expressly granted or necessarily implied in governing statutes. McFarland v. Board of Education, 277 N.W.2d 901, 906 (Iowa 1979); Barnett v. Durant Community School District, 249 N.W.2d 626, 627 (Iowa 1977); Silver Lake Consolidated School District v. Parker, 238 Iowa 984, 990, 29 N.W.2d 214, 217 (1947).

Some of the issues under consideration, see Iowa Code Ann. (West), are of first impression and therefore we must look to the statutes, the legislative history, and the relevant principles of statutory construction for guidance. Those principles are set out in Ch. 4, The Code 1981, and in case law.

V. PRELIMINARY ANSWERS

A. WHAT SOURCE OF POPULATION DATA SHOULD BE UTILIZED IN DRAWING DIRECTOR DISTRICT BOUNDARIES ON THE BASIS OF POPULATION?

Section 4.1(25), The Code 1981, is as follows:

> Population. The word "population" where used in this Code or any statute means the population shown by the latest preceding certified federal census, unless otherwise specifically provided. [Emphasis supplied.]

The term population appears in the Code sections that establish the available methods for electing members of boards of Iowa school districts. See, e.g., §§ 275.12(2)(d) and (e).

Since the U. S. Supreme Court decided Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 662 (1962) and Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), the Fourteenth Amendment and the principle of "one man, one vote" has prevailed in drawing district boundaries for representation on the policy-making bodies at all levels of government.

The Supreme Court invalidated an apportionment system based on the number of persons of school age in Hadley v. Junior College District, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970). The Court stated:

> If one person's vote is given less weight through unequal apportionment, his right to equal voting participation is impaired just as much when he votes for a school board member as when he votes for a state legislator. While there are differences in the powers of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process. It should be remembered that in cases like this one we are asked by voters to insure that they are given equal treatment, and from their perspective the harm from unequal treatment is the same in any election, regardless of the officials selected.
>
> * * *
>
> We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials. Id. 397 U.S. at 55-56, 90 S. Ct. 791, 25 L.Ed.2d 50-51. [Emphasis supplied.]

See also Mandicino v. Kelly, 158 N.W.2d 754 (Iowa 1968); Meyer v. Campbell, 260 Iowa 1346, 152 N.W.2d 617 (1967). Thus, it is clear that the Constitution requires that where a school district, pursuant to law, selects a structure that divides the district into subdistricts for the purpose of electing members of the board of directors, the latest certified federal census reports must be utilized for creating subdistricts on the "basis of population." As the Supreme Court noted:

> Neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes.

Reynolds v. Sims, 377 U.S. at 580, 84 S.Ct. 1362, 12 L.Ed. 2d at 538.

In the circumstance that gave rise to your request for our opinion, the school board decided to use school census data in determining location of director district boundaries. We recognize the importance of the school census, § 291.9, The Code 1981, to the operation of schools. A district board exercises power pursuant to § 297.1, The Code 1981, to fix the site for each schoolhouse and determine which particular school a child shall attend. The school census information is also necessary for fixing school bus routes pursuant to § 285.10, The Code 1981. But citizens vote, not school children. We believe the districting plan submitted to the Benton Community School District voters on March 9, 1982, is subject to challenge because the district boundaries were drawn on the basis of the school census and not on the basis of population of the district according to the last certified federal census as required by § 4.1(25), The Code 1981.

B. CAN A SCHOOL DISTRICT BOARD OF DIRECTORS CALL A SPECIAL ELECTION FOR THE PURPOSE OF CHANGING THE METHOD OF ELECTING THE MEMBERS OF A DISTRICT BOARD?

A regular school election is held annually in each Iowa school district on the second Tuesday in September. The election is held to elect officers of the district, the merged area, and county school system and "for the purpose of submitting to the voters thereof any matter authorized by law." § 277.1, The Code 1981. [Emphasis added.] In contrast, § 277.2 provides the following:

> Special election. The board of directors in any school corporation may call a special election at which election the voters shall have the powers exercised at the regular election with reference to the sale of school property and the application to be made of the proceeds, the

> authorization of seven members on the board of directors, the authorization to establish or change the boundaries of director districts, and the authorization of a schoolhouse tax or indebtedness, as provided by law.

Thus, § 277.2 includes the "authorization of seven members" on the board and the "authorization to establish or change the boundaries of director districts" but it does not authorize the board to call a special election for the purpose of changing the method for selecting directors. We believe that a well established principle of statutory construction applies to this situation. The principle is expressed in a Latin phrase - "expressio unius est exclusio alterius." It means what is included by specific mention excludes what is not mentioned. In re Estate of Wilson, 202 N.W.2d 41, 44 (Iowa 1972). Of course, the polestar of statutory construction is legislative intent, Doe v. Ray, 251 N.W.2d 496, 500 (Iowa 1977), and legislative intent is expressed by omission as well as by inclusion, In re Estate of Wilson, 202 N.W.2d at 44. As here, where specific reasons for calling a special election "are enumerated, it is presumed the Legislature intended no others be created," Iowa Farmers Purchasing Ass'n., Inc. v. Huff, 260 N.W.2d 824, 827 (Iowa 1977). There are three issues involved in creating a system of selecting school board members: 1) the number of board members, 2) the method of selection, and 3) the boundaries of subdistricts unless all members are elected at large from the entire district pursuant to § 275.12(2)(a). Inasmuch as a special election "may" be called to authorize "seven members" and "to establish or change the boundaries of director districts," but changing the method of selecting board members was not included in § 277.2, we conclude, under the principle of "expressio unius est exclusio alterius" discussed above, that a district board is without power to call a special election for the purpose of changing the method of selecting members. Nor do we believe a board would hold power to call a special election for the purpose of changing from a seven-member board to a five-member board.

Furthermore, careful review of the following statutes pertaining to submission of issues on this subject matter does not lead to a different conclusion.

Section 275.35:

> Change of method of elections. Any existing or hereafter created or enlarged school district may change the number of directors to either five or seven and may also change its method

of election of school directors to any method authorized by section 275.12 by submission of a proposal, stating the proposed new method of election and describing the boundaries of the proposed director districts if any, by the school board of such district to the electors at any regular or special election. The school board shall notify the county commissioner of elections who shall publish notice of the election in the manner provided in section 49.53. The election shall be conducted pursuant to chapters 39 to 53 by the county commissioner of elections. Such proposal shall be adopted if it is approved by a majority of the votes cast on the proposition.

Section 275.36:

Submission of change to electors. If a petition for a change in the number of directors or in the method of election of school directors, describing the boundaries of the proposed director districts, if any, signed by eligible electors of the school district equal in number to at least thirty percent of those who voted in the last previous annual school election in the school district, but not less than twenty-five persons, and accompanied by affidavit as required by section 275.13 be filed with the school board of a school district, not earlier than six months and not later than two months before a regular or special school election, the school board shall submit such proposition to the voters at such election. If a proposition for a change in the number of directors or in the method of election of school directors submitted to the voters under this section is rejected, it shall not be resubmitted to the voters of the district in substantially the same form within the next three years; if it is approved, no other proposal may be submitted to the voters of the district under this section within the next six years. [Emphasis supplied.]

Neither § 275.35 nor § 275.36 contain a grant of power to the board to call a special election. Furthermore, § 275.36 does not grant the petitioners the right to demand that a special election be called in response to their petition. Both §§ 275.35 and 275.36 refer to "regular or special school election[s]" and § 275.36 requires that a petition be filed "not earlier than six months and not later than two months before a regular or special election." We construe that language to mean that at the time a petition is filed that either the regular or a special election is already pending. We construe § 275.35 to mean that a proposition to change the method for selection of board members or to change from a seven-member board to a five-member board could be submitted at a special election if a special election had been called for one of the permissible purposes enumerated in § 277.2.

This construction is based on several important considerations. First, statutes are to be construed, "if possible, so that effect is given to both," § 4.7, The Code 1981. Our construction of §§ 277.1, 275.35, and 275.36 gives effect to all. Another matter to be considered is the subject matter and the purpose of the statutes at issue. Doe v. Ray, 251 N.W.2d 496, 501 (Iowa 1977). The method for selecting members of the board of directors of a school district is one of the most fundamental issues in creation and maintenance of that governmental unit. The people may establish a polity in which their representatives are all elected at large, § 275.12(2)(a), or one in which each representative is selected by and from a subdistrict, § 275.12(2)(d).

Section 275.12(2)(a) does not put importance on the section or area in which the members of the Board reside while § 275.12(2)(d) creates a polity in which representation based on geographical areas of the district is assured. In addition to the right to choose one of the two very different structures, the electors may choose one of three alternatives in which the policy-making body is composed of members selected by a combination of the two basic methods. See §§ 275.12(2)(b) or (c) or (e).

The Legislature has demonstrated that it considers the decision to change the method of selection of board members to be very important. That legislative intent is shown in the extraordinary number of signatures required on a petition authorized by § 275.36 in contrast to the number of

signatures required in § 278.2 on petitions pertaining to other matters. Furthermore, the Legislature has provided that if voters approve a change in the number of directors or method of selecting directors, no other proposal on the subject may be submitted within six years. See § 275.36 and § 278.1(9). When a proposal fails, a similar or the same proposal cannot be submitted within three years. See § 275.36 and § 278.1(9). We conclude that the Legislature intended that the issue of whether to change the method for selecting members of a school board should be submitted at a regular school election pursuant to § 277.1 unless a special election on another issue specifically mentioned in § 277.2, such as a bond issue, has been called.

Given the importance of changing the method of selecting school board members, we conclude that § 277.2 does not grant a school board the power to call a special election for that sole purpose.

VI. ANSWERS TO YOUR QUESTIONS

I. THERE WAS NO ACTION TAKEN BY THE BOARD AND STILL HAS NOT BEEN, UP TO NOW, AND THE QUESTION BECOMES - WHY HAVEN'T THEY ACTED ON THE PETITION, I.E., CAN THE PETITION, IN THIS INSTANCE, BE IGNORED OR REJECTED?

The answer to this question is, in a word, yes.

At the time the petition was filed, on November 11, 1981, no school election was pending within the requisite time period. Section 275.36 is a mandatory provision -- the school board "shall" place the proposition before the voters if a petition containing the requisite number of signatures is filed. See text of § 275.36 above. But as we have pointed out, § 275.36 does not grant the petitioners the right to demand a special election nor grant the board the right to call a special election in response to such a petition.

The issue of timeliness is somewhat ambiguous and turns on the point of when is timeliness of filing to be determined. We conclude that timeliness is to be measured at the time of filing and not upon the happening of some subsequent event. Any other interpretation would produce great uncertainty.

In the circumstances outlined above, the petition was not filed in a timely fashion. November 11, 1981 was more than six months prior to a regular school election under § 277.1 and no special election was pending on that date. We do not believe that the subsequent decision of the Board caused the petition to become timely. That conclusion does not negate our view that the Board was without power to call a special election to change the method for selecting members of the Board. We note that the motion set out in the Board minutes of Feburary 2, 1982, was based on the authority granted to the Board in both Ch. 277 and § 275.35, The Code 1981.

II. WAS THE BOARD OBLIGATED TO PLACE THE PETITION ISSUE ON THE BALLOT?

This question is the other side of the first. The answer is no.

III. IF NOT, HOW CAN THE ELECTORS EXPRESS THEIR WISHES TO THE BOARD, WITHOUT BEING BLOCKED BY WHAT THEY FEEL IS THEIR RIGHT TO BE HEARD IN A SPECIAL ELECTION?

Based upon the above analysis, we have concluded that the Legislature did not intend to authorize the calling of a special election for the sole purpose of changing the method for selecting members of a school board. If the electors feel that this thwarts their ability to express their wishes on this question, they should seek legislation to expand the occasions for calling special elections.

In conclusion, we hold that the preceding certified federal census must be used in constructing subdistricts for electing members of a school district's board of directors and that a special election may not be called for the sole purpose of changing the method of selecting board members. In addition, we conclude that the timeliness of filing a petition authorized by § 275.36 is to be determined on the basis of circumstances existing at the time of filing and not upon the happening of a subsequent event.

Although we have focused on a particular situation, it has been for the purpose of interpreting the Iowa Code for the general guidance of public officials. This opinion should not be construed as an attempt to resolve a particular problem and, standing alone, this opinion does not nullify the special election

held on March 9 in the Benton Community School District. Only a decision by a court has the force of law in that sense and the decisions of the Board are effective unless reversed by them or set aside by judicial decree.

Sincerely,

Merle Wilna Fleming

MERLE WILNA FLEMING
Assistant Attorney General

MWF:sh

MOTOR VEHICLES: Truck Tractor, §321.1(6); Motor Truck, §321.1(4), §321.1(71), Code of Iowa, 1981. The modification of a truck tractor converts the vehicle into a motor truck. (Lamb to Representative Harbor, 4/29/82) #82-4-18(L)

April 29, 1982

The Honorable William H. Harbor
State Representative
State House
Des Moines, IA 50319

Dear Representative Harbor:

I am in receipt of your letter of January 25, 1982 requesting an opinion on the modification of a truck tractor to a motor truck and the purposes for which this vehicle can be used.

On March 29, 1982 legislation was signed into law which I believe specifically pertains to your query, see Senate File Number 2134. The legislation states in part:

> Section 1. Section 321.1, subsection 71, Code 1981, as amended by Acts of the Sixty-ninth General Assembly, Second Extraordinary 1981 Session, chapter 2, section 5, is amended to read as follows:
>
> 71. A "special truck" means a motor truck not used for hire with a gross weight registration of eight through twenty tons used by a person engaged in farming to transport commodities produced only by the owner, or to transport commodities purchased by the owner for the use in the owner's own farming operation or occasional use for charitable purposes. "Special truck" also means a truck tractor which is modified by removal of a fifth wheel and carries the full load on the motor truck and which by reason of its conversion becomes a motor truck.

Your question concerning modification of a truck tractor is answered by the language of the above section. This legislation renders any lengthy discussion concerning motor trucks and truck tractors irrelevant. Therefore, the modification of a truck tractor as specified in H.F. 2134 does convert the vehicle into a motor truck.

Sincerely,

Susan E. Lamb

SUSAN E. LAMB
Assistant Attorney General

SEL:slh

CRIMINAL LAW, LAW ENFORCEMENT, MOTOR VEHICLES: Implied Consent; Extraterritorial Jurisdiction. §§321B.2, 321B.3 and 400.8, The Code (1981). Probationary status under §400.8, The Code (1981), has no effect on a peace officer's authority to invoke the provisions of the implied consent law, Ch. 321B, The Code (1981). Officers included within the definition of "peace officer" in §321B.2, The Code (1981), may invoke the provisions of the Iowa implied consent law anywhere within the state. (Hayward to Poncy, State Representative, 4/21/82) #82-4-13(L)

Mr. Charles N. Poncy
State Representative
State House
Des Moines, Iowa 50319

April 21, 1982

Dear Representative Poncy:

You have asked this office for an opinion regarding limitations on the authority of local peace officers to invoke the provisions of Iowa's implied consent law, Chapter 321B, The Code (1981). Specifically you have asked three questions:

1. May a recently hired officer on probationary status pursuant to §400.8, The Code (1981), invoke the provisions of Ch. 321B, The Code (1981),

2. May a peace officer invoke the provisions of Ch. 321B, The Code (1981), outside the geographic boundaries of the entity which has vested the officer with peace officer authority, and

3. May a peace officer who makes an arrest for operating a motor vehicle in the capacity of a private citizen outside the officer's territorial jurisdiction, transport the arrestee within such territorial jurisdiction and invoke the provisions of Ch. 321B, The Code (1981).

1. Municipal police officers may invoke implied consent commencing with their appointment under civil service pursuant to Chapter 400, The Code (1981).

Under §321B.3, The Code (1981), any "peace officer" may invoke the provisions of Iowa's implied consent statute. For purposes of that chapter, §321B.2 defines the phrase "peace officer" as follows:

1. Members of the highway patrol.
2. Police officers under civil service as provided in chapter 400.
3. Sheriffs
4. Regular deputy sheriffs who have formal police training.
5. Any other law enforcement officer who has satisfactorily completed an approved course relating to motor vehicle operators under the influence of alcoholic beverages at the Iowa law enforcement academy or a law enforcement training program approved by the Department of Public Safety.
(Emphasis added.)

There is nothing in Chapter 321B, The Code (1981), which states or infers that an officer's employment status, i.e. probationary or permanent, affects his authority to enforce its provisions. Also, §400.8, The Code (1981), only provides that police officers under civil service are subject to a probationary period, not to exceed twelve months, during which they may be discharged without a right of appeal to a civil service commission. It does not state or infer any diminished authority or responsibility as a result of this probationary status. Thus, such status is not a relevant factor to his or her authority to invoke the provisions Iowa's implied consent law, Ch. 321B, The Code (1981).

It should be noted that city police officers not appointed under Chapter 400 cannot invoke implied consent until they have taken an approved course at the Iowa Law Enforcement Academy, or some other course approved by the Department of Public Safety, relating to the operation of motor vehicles under the influence of alcohol.

2. Law enforcement officers may invoke the provisions of Chapter 321B, The Code (1981), beyond the territorial limitations of their appointing authority.

The authority of peace officers to invoke the provisions of the implied consent law is not subject to the same geographic limitations as their authority to make an arrest. To construe that statute otherwise would ignore the fundamental difference between the two actions by peace officers and the intent of the legislature in enacting Chapter 321B, The Code

(1981). It is axiomatic that the goal of any exercise in statutory construction is to ascertain and effect the intent of the legislature in enacting the provision under scrutiny. The consideration of that intent should include the language used in the statute, the objects sought to be accomplished and the evils and mischiefs sought to be remedied. The result should be a construction of the statute which will best effect its purpose rather than one which will defeat it. Peffers v. City of Des Moines, 299 N.W.2d 675, 678 (Iowa 1980).

The peace officers' authority to arrest, to the extent it is different from that of the private citizen, is limited geographically. Peace officers do not carry their arrest powers with them beyond the boundaries of their bailiwick. State v. O'Kelly, 211 N.W.2d 589, 595 (Iowa 1973). However, peace officers do perform many official functions on behalf of their departments and in cooperation with other departments beyond the territorial jurisdiction of their appointing authority. Peace officers' investigatory authority is not geographically limited. They may interrogate persons and gather evidence outside their city or county, so long as the process does not require legal compulsion. They transport prisoners to and from their respective departments. They may assist other departments in emergencies. They may under Chapter 28D, The Code (1981), interchange officers or staff with other departments, and under Chapter 28E jointly exercise powers or share facilities with other departments, when such arrangements would enhance their efficiency.

The practical ramifications of the authority of officers to invoke implied consent must be considered in the process of ascertaining the legislature's intent, because the legislature cannot be presumed to have intended its laws to be irrational or impractical. Hansen v. State, 298 N.W.2d 263, 266 (Iowa 1980). The practical reality is that implied consent is not invoked at the roadside. Rather the suspected motorist is taken to a detention center or to a hospital, if there is an accident, where the provisions of the statute are invoked. It is quite possible that the detention center will not be within the arresting officer's bailiwick. It is equally likely that a hospital will not be in the bailiwick, especially in small towns or suburban areas. The definition of "peace officer" in §321B.2, The Code (1981), need not include jailers. Thus, it is possible that at either the detention center or hospital there will not be a "peace officer" for purposes of the implied consent law unless either another officer is called in or the authority to invoke the implied consent law is extraterritorial.

The object to be attained and the evil to be restrained by Chapter 321B should be clear.

> It is obvious the purpose of the Implied Consent Law is to reduce the holocaust on our highways part of which is due to the driver who imbibes too freely of intoxicating liquor.

State v. Holt, 261 Iowa 1089,1099, 156 N.W.2d 884, 890 (Iowa 1968). It would seem that a strict application of the jurisdictional limitation on arrests to the implied consent law would serve neither the legislature's intent in enacting Chapter 321B, nor its intent in enacting Chapters 28D or 28E. It would provide a disincentive to departments which desire to jointly operate a detention facility and unnecessarily complicate the procedure with many hospitalized motorists by requiring the presence of a local officer within the two hour time limit imposed by §321B.3[1]

Also, the invocation of implied consent, unlike an arrest, does not result in a loss of liberty. It presumes that a lawful arrest has already taken place. The invocation of the implied consent law is in reality a request for permission to search. A peace officer may request such permission outside of his bailiwick. No special authority is needed to conduct a search when the person subject to the search consents thereto. As is stated above, the legislature in its definition of "peace officer", was at least as concerned that the provisions of the implied consent law be properly and competently invoked as it was with the official capacity of the official invoking them.

Therefore, because the application of the geographical limitation on arrests to the implied consent law would unnecessarily inhibit its enforcement and because such limitations are not placed on consent searches by peace officers, the officer listed in the §321B.2, The Code (1981), definition

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[1]The last sentence of §321B.3, The Code (1981), states:

> If such peace officer fails to provide a test within two hours after such arrest, no test shall be required, and there shall be no revocation under the provisions of section 321B.7.

of "peace officer" may invoke the provisions of the implied consent law anywhere within the State of Iowa. For this reason, it is not necessary to address your third question.

3. Summary.

Probationary status under §400.8, The Code (1981), has no effect on a peace officer's authority to invoke the provisions of Iowa's implied consent law, Cha. 321B, The Code (1981). Officers included within the definition of "peace officer" in §321B.2, The Code (1981), may invoke the provisions of theimplied consent law anywhere within the State of Iowa.

Respectfully yours,

GARY L. HAYWARD
Assistant Attorney General
Public Safety Division

GLH:dkl

COUNTIES; SHERIFF; PAYMENT OF SHERIFF'S FEES: Sections 331.424(3)(2), 331.655(1), 331.655(2), 331.902(1). The fees collected by the sheriff under § 331.655(1)(1) for transferring prisoners pursuant to court order are not to be paid to the sheriff as a part of his or her salary, but are to pass to the county under § 331.902(1). The county may theoretically be liable for reimbursing the general fund in the event the prisoner is indigent. However, the practical effect of the prisoner's inability to pay is that the actual expenses of the transfer will be paid from the county general fund and the statutory hourly rate will not be collected. (Weeg to Tullar, Sac County Attorney, 4/21/82) #82-4-12(L)

April 21, 1982

Lon R. Tullar
Sac County Attorney
110 East State
Sac City, Iowa 50583

Dear Mr. Tullar:

You have requested an opinion of the Attorney General as to whether the county is to pay for expenses and fees incurred by the sheriff for transferring an indigent prisoner pursuant to a court order. In the event the county is liable for those payments, you ask from what county fund those payments are to be made.

We first examine the relevant statutory provisions. Section 331.655(1), Supplement to The Code, 1981, which amended § 337.1(12), The Code 1981, provides:

> The sheriff shall collect the following fees:
>
> . . .
>
> 1. For conveying one or more persons to a state, county, or private institution by order of court or commission, necessary expenses for the sheriff and the person conveyed and three dollars per hour for the time necessarily employed in going to and from the institution, the expenses and hourly rate to be charged and accounted for as fees. If the sheriff needs assistance in taking a

> person to an institution, the assistance shall be furnished at the expense of the county. [Emphasis added.]

Section 331.902(1), Supplement to The Code, 1981, which amended § 342.1, The Code 1981, provides:

> Unless otherwise specifically provided by statute, the fees and other charges collected by the auditor, treasurer, recorder, sheriff, clerk, or their respective deputies or employees belong to the county. [Emphasis added.]

Finally, Section 331.655(2), which amended § 337.14, The Code 1981, provides:

> The mileage fees allowed by law may be retained by the sheriff as an addition to the sheriff's annual salary . . .

It is our opinion that the express language of § 331.655(1)(1) requires the expenses and hourly rates incurred by the sheriff in transferring prisoners to be treated as fees. Consequently, § 331.902(1) requires those fees to be paid to the county. While § 331.655(2) provides an exception to § 331.902(1) and allows the sheriff to retain mileage expenses as part of his or her salary, the expenses incurred under § 331.655(1)(1) do not constitute mileage expenses and therefore cannot be retained by the sheriff.

This opinion is supported by our recent holding in Op. Att'y Gen. #81-5-6(L), a copy of which is enclosed. There we concluded that fees collected under the almost-identical provisions of § 337.11(12) pass not to the sheriff as a part of his or her salary but to the county general fund.

In the event the expenses due the county under § 331.655(1) cannot be paid because of a transferee's indigence, the county is liable for the actual expenses of the transfer pursuant to § 331.424(3)(2), Supplement to The Code, 1981. This section provides that salaries and expenses of the sheriff's office are to be paid from the county general fund. However, since these expenses are to be paid into the county general fund in any case, pursuant to § 331.902(1), the county would simply be reimbursing itself. Further, although the hourly rate specified by § 337.1(12)(1) is not an actual expense of the transfer but merely a fee, the county could theoretically be liable for paying this fee. However, because this fee is also to be paid into the county general fund, it is once again a situation where the county would be reimbursing itself.

You also note in your opinion request that § 337.12, The Code 1981, was repealed by Ch. 331, Supplement to The Code, 1981, and question the consequences of that repeal. Section 337.12 provided that when persons liable for fees under § 337.11 were unable to pay, the fees were to be paid by the county from the general fund or court fund. This section was repealed as a part of the complete recodification of county law resulting from ratification and passage of Iowa Constitution, Article III, § 37, the County Home Rule Amendment. We are of the opinion that § 337.12 was repealed because it conflicts with the provisions of § 331.902(1), as we noted in Op. Att'y Gen. #81-5-6(L). Because of this conflict, and because § 337.12 merely authorized the county to transfer money from the county to the county, this provision was deleted as unnecessary.

Alternatively, it is our opinion that § 337.12 was repealed because, under home rule authority, the county no longer needed express statutory authorization to pay unpaid claims from a particular fund. The supervisors now have the authority under home rule to pay such claims at their discretion.

In conclusion, it is our opinion that the fees collected by the sheriff under § 331.655(1)(1) for transferring prisoners pursuant to court order are not to be paid to the sheriff as a part of his or her salary, but are to pass to the county under § 331.902(1). The county may theoretically be liable for reimbursing the general fund in the event the prisoner is indigent. However, the practical effect of the prisoner's inability to pay is that the actual expenses of the transfer will be paid from the county general fund and the statutory hourly rate will not be collected.

Sincerely,

Theresa D. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:sh

COUNTIES; BOARD OF SUPERVISORS; Reimbursement of expenses. Sections 331.215 and 331.324(1), Supplement to The Code, 1981; §§ 79.9 through 79.13, The Code 1981. The county board of supervisors is required, under §§ 331.215 and 331.324(1), Supplement to The Code, 1981, and §§ 79.9 through 79.13, The Code 1981, to reimburse county officers and county employees for expenses incurred in the course of their official duties. In the absence of any express statutory provision, supervisors are authorized under home rule authority to promulgate policies for reimbursement of expenses, either those that must be paid or those that may be paid by the supervisors. More specifically, the supervisors have the authority to enforce a policy that both requires county officers and employees to obtain their approval before reimburseable expenses are incurred and limits reimbursement to a maximum dollar amount. (Weeg to Folkers, Mitchell County Attorney, 4/20/82) #82-4-11(L)

April 20, 1982

Jerry H. Folkers
Mitchell County Attorney
Osage, Iowa 50431

Dear Mr. Folkers:

You have requested an opinion of the Attorney General as to whether our opinion in Op. Att'y Gen. #79-10-10, which was based on an interpretation of § 343.12, The Code 1979, remains authoritative in view of the amendment of that provision in § 331.324(1), Supplement to The Code, 1981. You ask this question in order to determine whether the Mitchell County Board of Supervisors may enforce their policy regarding reimbursement of expenses incurred by county employees and officers when attending meetings or schools of instruction. That policy: 1) requires that the county's employees and officers secure the Board's written approval before attending a meeting or school of instruction, and 2) limits reimbursement for meals to a maximum dollar amount, regardless of the actual expenses incurred.

Prior to its amendment, § 343.12, The Code 1979, provided in relevant part:

> County officers, deputies and employees may attend educational seminars, short courses, schools of instruction or other educational activities related to the performance of their duties, and be reimbursed for mileage and actual expenses incurred where approved by the department head and the board of supervisors as provided in section 331.21 . . .

> The board of supervisors may provide reimbursement for actual expense incurred by members of boards and commissions appointed by the board for attendance at training functions in the discharge of their official duties . . . [Emphasis supplied.]

In Op. Att'y Gen. #79-10-10, we concluded that because the language of this section was permissive and discretionary, the board of supervisors could determine the amount to reimburse county officers for expenses, and could compel a refund of any amount paid to an officer in excess of the amount specifically approved.

As a consequence of the 1979 County Home Rule Amendment, Iowa Constitution, art. III, § 39A, Senate File 130 was enacted in order to recodify the existing county government law. Accordingly, § 343.12, The Code 1979, was replaced with § 331.324(1), Supplement to The Code, 1981, which provides in relevant part:

> 1. The board [of supervisors] shall:
>
> . . .
>
> b. Grant claims for mileage and expenses of officers and employees in accordance with section 79.9 through 79.13 and section 331.215, subsection 2,
> . . .

Sections 79.9 through 79.13, The Code 1981, provide guidelines for claims for mileage and related expenses, including the method for calculating those expenses. Section 331.215(2), Supplement to The Code 1981, provides:

> . . . The board may also authorize reimbursement for mileage and other actual expenses incurred by its members when attending an educational course, seminar, or school which is related to the performance of their official duties.

It is our opinion that this change in the law is significant only to the extent that § 331.324(1) merely simplifies § 343.12, The Code 1979. Instead of setting forth a separate provision for reimbursing county officers and employees for mileage and educational activities expenses, § 331.324(1) simply incorporates by reference: (1) those pro-

visions in §§ 79.9 through 79.13 for reimbursing public officers and employees for mileage expenses and (2) those provisions in § 331.215(2) for reimbursing members of the board of supervisors for educational activities expenses.

Further, the mandatory language of § 331.324(1) may in turn make the final provisions of § 331.215, to which § 331.324(1) refers, mandatory. In that case, the supervisors would also be required to reimburse county officers and employees for expenses incurred while attending educational activities. However, the permissive nature of the language of § 331.215, standing alone, would seem to allow the supervisors discretion in reimbursing officers and employees for educational activities expenses. It is our opinion that this latter reading of the statute is the more correct one.

In any event, § 331.215 does not contain any express guidelines for determining policies for payment of those expenses, regardless of whether that payment is mandatory or permissive. This differs from the express guidelines contained in §§ 79.9 through 79.13 regarding reimbursement for mileage expenses. In the absence of any express provisions, it is our opinion that under home rule authority a county board of supervisors is free to promulgate policies to be followed for reimbursing educational activities and meetings expenses. Consequently, we are of the opinion that while Op. Att'y Gen. #79-10-10 construed a somewhat different statute, that opinion remains authoritative to the extent it permits the supervisors to exercise their discretion in reimbursing county officers and employees for educational activities expenses.

In sum, it is our opinion that the county board of supervisors is required under §§ 331.215 and 331.324(1), Supplement to The Code, 1981, and §§ 79.9 through 79.13, The Code 1981, to reimburse county officers and county employees for expenses incurred in the course of their official duties. In the absence of any express statutory provision, supervisors are authorized under home rule authority to promulgate policies for reimbursement of expenses, either those that must be paid or those that may be paid by the supervisors. More specifically, the supervisors have the authority to enforce a policy that both requires county officers and employees to obtain their approval before reimburseable expenses are incurred and limits reimbursement to a maximum dollar amount.

Sincerely,

Theresa O'Connell Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:sh

COUNTIES; BOARD OF SUPERVISORS; PUBLICATION OF CLAIMS: Section 349.18, The Code 1981. The publication requirement of § 349.18 does not permit a board of supervisors to merely publish the total amount of the county secondary road payroll and the name of the county engineer as the individual receiving that claim. Instead, § 349.18 requires publication of each county secondary road employee's name and the amount of the total payroll claim paid to that employee. (Weeg to Folkers, Mitchell County Attorney 4/19/82) #82-4-10(L)

April 19, 1982

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

Dear Mr. Folkers:

You have requested an opinion of the Attorney General as to whether § 349.18, The Code 1981, is satisfied by publication of the total amount of the county secondary road payroll and the name of the county engineer as the individual to whom that claim is paid, or whether § 349.18 requires publication of the name of and amount of the payroll claim paid to each individual secondary road employee. It is our opinion that § 349.18 requires publication of each employee's name and the amount of the total payroll claim paid to that employee. Our reasons are as follows.

Section 349.18 requires a county board of supervisors to publish the proceedings of each of its meetings, including the schedule of bills allowed. In particular:

> . . . The publication of the schedule of bills allowed shall show [1] the name of each individual to whom the allowance is made and [2] for what such bill is filed and [3] the amount thereon, except that names of persons receiving relief from the county poor fund shall not be published . . . .

A number of previous opinions interpreting § 349.18 support our present opinion. See 1968 Op. Att'y Gen. 742; 1963 Op. Att'y Gen. 92; 1940 Op. Att'y Gen. 363; 1938 Op. Att'y Gen. 472. These opinions conclude that publication of the name of a particular county officer, such as the county engineer, satisfies the first requirement under § 349.18, i.e., that "the name of each individual to whom the allowance is made" be published by the supervisors. However, these opinions further hold that the second and third requirements under § 349.18, i.e., that the supervisors publish the purpose "for what such bill is filed" as well as "the amount" of that bill, can only be met by publication of the name of each individual who receives payment and the amount of each payment.

In sum, these opinions uniformly conclude that "bunching of claims" is illegal and contrary to the provisions of § 348.18, as well as contrary to the obvious legislative intent to require the county board of supervisors to fully disclose all expenditures of public funds. We find no support for a conclusion contrary to that reached in these earlier opinions. Consequently, it is our opinion that the Mitchell County Board of Supervisors must publish the name of and amount of the payroll claim received by each county secondary road employee.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:sh

TAXATION: Application of the "Fee Simple Title" Concept to the Owner of a House Filing for a Homestead Tax Credit. §425.11(1)(a) and (2), The Code 1981. A dwelling house cannot qualify for the homestead tax credit pursuant to §425.11(1)(a) and (2) when the house's owner does not own the land upon which the house sets. (Kuehn to Johnston, Polk County Attorney, 4/19/82) #82-4-9(L)

April 19, 1982

Mr. Dan Johnston
Polk County Attorney
Civil Bureau
372 Polk County Admn. Office Bldg.
Second and Court Avenues
Des Moines, IA 50309

Dear Mr. Johnston:

You have requested an opinion of the Attorney General as to whether a dwelling house can qualify for the homestead tax credit when the house's owner does not own the land upon which the house sets. In your request for an opinion of the Attorney General, you point out that 1942 Op. Att'y Gen. 160 and the Iowa Administrative Code [730 I.A.C. §80.1(2)(k)] state that a house located upon land that the house's owner does not own is not eligible for the homestead tax credit. Therefore, the question you have posed is whether the Attorney General's opinion and Iowa Administrative Code rule of the Department of Revenue are correct.

In order to answer your question, it is necessary to analyze the pertinent Iowa Code provisions setting forth the grounds on which an owner of a house can qualify the house for a homestead tax credit. Section 425.11(1)(a) and (2), The Code 1981, in part, provides:

> 425.11 Definitions. For the purpose of this chapter and wherever used in this chapter:
>
> 1. The word, "homestead", shall have the following meaning:
>
> a. The homestead must embrace the dwelling house in which the owner is living at the time of filing the application, except as herein provided, and said application must contain an affidavit of his intention to occupy said dwelling house, in good faith, as a home for six months or more in the year for which the credit is claimed.
>
> * * *
>
> 2. The word, "owner", shall mean the person who holds the fee simple title to the homestead . . . (Emphasis supplied)

Before an owner of a home can qualify his or her home for a homestead tax credit, the owner must hold fee simple title to the homestead unless one of the exceptions to the fee simple title requirement in §425.11(2) applies. Since those exceptions do not apply to the facts you have presented, it is necessary to determine whether it is possible to hold a fee simple title to a homestead when a person owns the dwelling house, but not the land.

For a lengthy discussion regarding the historical development and meaning of the term "fee simple title", see 4 Thompson on Real Property, §1856 (1979 Replacement). Section 1856, in part, states:

> §1856. The fee simple. -- The fee simple as thus developed has definite characteristics: (a) it is a present estate in land that is of indefinite duration as will be seen hereafter; (b) it is freely alienable by deed inter vivos, by will post-mortem and involuntarily by execution or judicial sale; (c) it carries with it the right of possession; (d) the holder may make use of any portion of the freehold without being beholden to any person except to the extent that the sovereign has not limited such right of use. It is capable of inheritance not merely through taking by representation.

> The words "fee simple" mean an absolute title or estate in lands wholly unqualified by any reversion, reservation, condition or limitation, or possibility of any such thing present or future, or precedent or subsequent.
>
> * * *
>
> It is the most extensive interest which one may possess in real property. An estate subject to an option is not in fee.
>
> * * *
>
> As now generally used and understood, the words "fee simple" denote the largest estate in real property recognized by the law, and it is an estate unlimited as to duration, disposition, and descendibility.
>
> * * *
>
> It is the entire and absolute interest and property in land . . .
>
> * * *
>
> So, too, the word "fee" and the words "fee simple" are frequently used as convertible terms, since the word "simple" adds nothing whatever to the meaning of the word "fee" standing by itself. The word "simple", however, does serve to exclude the idea that the "fee" is of an entailed or of a conditional kind.
>
> "Fee simple" is a common law term and sometimes corresponds to what in the civil law is a "perfect title." (Emphasis supplied)

Furthermore, Webster's New World Dictionary of the American Language, 512, 513 (2nd College Ed. 1974), defines the word "fee" to include: "Law an inheritance in land: see Fee Simple, Fee Tail" and, further, defines the words "fee simple" as: "absolute ownership (of land) with unrestricted rights of disposition."

The Iowa Supreme Court has set forth statutory construction criteria for construing the meaning of the word "owner" as it is

used in §425.11(2). The Court in Johnson v. Board of Supr'rs of Jefferson County, 237 Iowa 1103, 1105, 24 N.W.2d 449, 451 (1946) stated:

> In determining whether one or both of the plaintiffs are "owners" in order to be entitled to the desired credit, we are bound by the statutory definition above quoted. Eysink v. Board, 229 Iowa 1240, 1245, 296 N.W. 376, 378. We have held the act in question should be strictly construed (against those claiming the homestead credit) and those claiming exemptions thereunder must show themselves entitled thereto within the purview of the act. Ahrweiler v. Board, 226 Iowa 229, 231, 283 N.W. 889, 890, and cases cited; Eysink v. Board, supra. See also 51 Am.Jur. 526, section 524.

Furthermore, at 237 Iowa 1106 and 24 N.W.2d 452 the Court defines the words "fee simple" as follows:

> A "fee simple" estate is one by which the owner holds lands to himself and his heirs forever, without mentioning what heirs, but referring that to his own pleasure or to the disposition of the law. (Emphasis supplied)

In summary, §425.11(1)(a) states that the homestead must embrace the dwelling house in which the owner is living at the time an application is filed for the homestead tax credit. Section 425.11(2) states that the word "owner" means only those persons (exceptions not applicable here) who hold the fee simple title to the homestead. Since the authorities cited make it clear that the words "fee simple title" have reference to and encompasses land ownership, it is not possible for an owner of a house to hold fee simple title to the homestead when that owner does not own the land upon which the house sets.

Based upon the foregoing, it is the opinion of the Attorney General that a dwelling house cannot qualify for the homestead tax credit pursuant to §425.11(1)(a) and (2) when the house's owner does not own the land upon which the house sets.

Very truly yours,

Gerald A. Kuehn
Assistant Attorney General

WP2

Juvenile Law: School officials should cooperate with a child abuse investigation by allowing the child abuse investigator to interview the alleged child abuse victim in school without notifying the parents of said victim. Ch. 235A, The Code 1966; §§ 232.67-.77, The Code 1981; chs. 709, 726, The Code 1981; ch. 235A, The Code 1981; §§ 232.67, .68(2), .69, .70, .71, The Code 1981; The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; IAC 770-135.4(2). A child abuse investigator is mandated to conduct an appropriate investigation on a reported complaint of child abuse. If in the course of said investigation, the investigator determines that the child should be interviewed independently of his or her parent(s) and a school is the most appropriate setting to do so, school officials should allow the investigation without contacting the parents. No state statute could be found requiring school officials to notify parents prior to their child, an alleged victim of child abuse, being interviewed during a child abuse investigation. Similarly the Federal Family Educational Rights and Privacy Act, the so-called Buckley amendment, does not require school officials to notify parents that their child has been or will be interviewed during a child abuse investigation. Absent some affirmative duty to notify parents, the purported interests of school officials must yield to the mandatory child abuse investigation whose "primary purpose . . . shall be the protection of the child named in the report". (Hege to Krejci, Marshall Co. Atty., 4/16/82) #82-4-8(L)

Mr. Phillip L. Krejci
Marshall County Attorney
Marshalltown, Iowa 50158

April 16, 1982

Dear Mr. Krejci:

You recently requested an opinion relating to child abuse investigations and a requirement that school officials notify parents prior to allowing an interview with one of their students, who is an alleged victim of abuse. Factually, you posited the following circumstances.

> Recently, a problem arose in this jurisdiction when a child abuse investigator sought to interview a child while the child was at school. The referral was one for sexual abuse and the investigator felt that interviewing the child at home and in the presence of her parents would be an effort in futility. The school, however, refused to allow the child abuse investigator to speak with the child without notifying the parents.

Based upon these facts, you inquire,

> Does a school, in light of the fact that school personnel are mandatory reporters and in light of the immunity provided, have a duty to allow a child abuse investigator to interview a child at the school when the investigator believes that such an interview

is necessary to adequately perform the investigation?

CHILD ABUSE INVESTIGATION

The mandatory reporting of child abuse and creation of a central registry for deposit of such information is of fairly recent origin. Ch. 235A, The Code 1966. In this state, the public policy and purpose statement justifying the child abuse reporting and central registry system is found in Section 67 of the Juvenile Justice Act.

> Legislative findings -- purpose and policy. Children in this state are in urgent need of protection from abuse. It is the purpose and policy of this part 2 of division III to provide the greatest possible protection to victims or potential victims of abuse through encouraging the increased reporting of suspected cases of such abuse, insuring the thorough and prompt investigation of these reports, and providing rehabilitative services, where appropriate and whenever possible to abused children and their families which will stabilize the home environment so that the family can remain intact without further danger to the child.

Section 232.67, The Code 1981. See, also Section 235A.12, The Code 1981.

The definition of child abuse, and the standard to be used by the protective services worker conducting the investigation, is:

> 2. "Child abuse" or "abuse" means harm or threatened harm occurring through:
>
> a. Any nonaccidental physical injury, or injury which is at variance with the history given of it, suffered by a child as the result of the acts or omissions of a person responsible for the care of the child.
>
> b. The commission of any sexual offense with or to a child pursuant to chapter 709 or section 726.2, as a result of the acts or omissions of the person responsible for the care of the child.

> c. The failure on the part of a person responsible for the care of a child to provide for the adequate food, shelter, clothing or other care necessary for the child's health and welfare when financially able to do so or when offered financial or other reasonable means to do so. A parent or guardian legitimately practicing religious beliefs who does not provide specified medical treatment for a child for that reason alone shall not be considered abusing the child, however this provision shall not preclude a court from ordering that medical service be provided to the child where the child's health requires it.

Section 232.68(2), The Code 1981.

It is of great import to note that under Sections 726.2 and 709.4(4) the perpetrator of the sexual abuse may well be the parent or a family or household member. Sections 709.4(4), 726.2, The Code 1981[1].

The child abuse reporting scheme also identifies certain persons who are mandated to report instances of child abuse and classifies all other persons as permissive reporters to the central registry.

> Mandatory and permissive reporters.
> 1. The following classes of persons shall make a report, as provided in section 232.70, of cases of child abuse:
>
> a. Every health practitioner who examines, attends, or treats a child and who reasonably believes the child has been abused. . . .
>
> b. Every social worker under the jurisdiction of the department of social services, any social worker employed by a public or private agency or institution,

1 By telephone interview of March 15, 1982, you confirmed that a parent or step-parent was the alleged perpetrator of the sexual abuse.

> public or private health care facility as defined in section 135C.1, certified psychologist, certificated school employee, employee of a licensed day care facility, member of the staff of a mental health center, or peace officer, who, in the course of employment, examines, attends, counsels or treats a child and reasonably believes a child has suffered abuse.
>
> 2. Any other person who believes that a child has been abused may make a report as provided in section 232.70.

Section 232.69, The Code 1981. As you note, the definition would include the enumerated school personnel as mandatory reporters.

Once the Iowa Department of Social Services receives a report of alleged child abuse, they are required to initiate an investigation. Section 4.1(36), The Code 1981.

> 1. Whenever a report is received, the department of social services shall promptly commence an appropriate investigation. The primary purpose of this investigation shall be the protection of the child named in the report.

Section 232.71(1), The Code 1981. A previous opinion of this office has found:

> Despite what may have been the legislative intent that the Department become involved in cases only when a situation in fact constitutes neglect of a child, the law is written in such a way that it does not appear to allow screening of referrals. It states that the Department will investigate and submit reports to the Court, the County Attorney, and the Central Child Abuse Registry.
>
> We agree with your conclusion. The child abuse law, Chapter 235A, The Code, as amended does not allow screening of referrals. . . .
>
> . . . Finally, we will never know if a report of child abuse is valid or not until the

> appropriate investigation is made. Failure to perform a duty imposed by statute may have serious tort consequences.

1978 Op. Att'y Gen. 682-683.

Further, the Department is charged with the responsibility to determine the "appropriateness" of the investigation. Under the facts as you have stated them, it was within the purview of the investigator's responsibility to determine "that interviewing the child at home and in the presence of her parents would be an effort in futility".

The information required to be garnered by the investigation is set out by statute.

> 2. The investigation shall include:
>
> a. Identification of the nature, extent and cause of the injuries, if any, to the child named in the report;
>
> b. The identification of the person or persons responsible therefor;
>
> c. The name, age and condition of other children in the same home as the child named in the report;
>
> d. An evaluation of the home environment and relationship of the child named in the report and any other children in the same home as the parents or other persons responsible for their care;
>
> e. An investigation of all other pertinent matters.

Section 232.71(2), The Code 1981. In Interest of Long, 313 N.W.2d 473, 480 (Iowa 1981).

Finally, the basic police power and parens patriae - child protection authority underlying the statutory scheme is evidenced by other powers or duties conferred upon the Department.

> 3. The investigation may with the consent of the parent or guardian include a visit to the home of the child named in the report and examination of such child. If

> permission to enter the home and to examine the child is refused, the juvenile court or district court upon a showing of probable cause may authorize the person making the investigation to enter the home and examine the child.
>
> 4. The county attorney and any law enforcement or social services agency in the state shall co-operate and assist in the investigation upon the request of the department of social services. The county attorney and appropriate law enforcement agencies shall also take any other lawful action which may be necessary or advisable for the protection of the child.

Sections 232.71(3), (4), The Code 1981. See, generally, Op. Att'y Gen. #81-9-9.

REQUIREMENT UPON SCHOOL OFFICIALS TO NOTIFY PARENTS.

Your request did not identify under what authority school officials felt compelled to notify the parents of the alleged child abuse victim. It cannot be assumed that their action was without some foundation, however, given their mandatory reporter status and penalties for failure to report a suspected case of child abuse and liability for harassment of a public officer or employee. Sections 232.68(2); .75; 718.4, The Code 1981.

In an effort to identify the concerns of school officials, contact was made with the legal consultant to the Department of Public Instruction[2]. He identified the Family Educational Rights and Privacy Act of 1974, as a statute which some school officials felt compel them to contact parents. No state statute requiring notification of parents by school officials could be identified under these facts.

The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, also known as the "Buckley amendment" was enacted to assure parents access to their children's "educational records" and to require a written authorization be obtained from parents to allow "educational records" to be released under certain circumstances. §§ 1232g(a)(1)(A); 1232g(b)(1). However, the act applies only to school districts which accept federal

2 By telephone conference with Mr. Larry Bartlett, March 5, 1982.

funds. §§ 1232g(a)(1)(A); 1232g(b)(1). Further, one court has found that the act does not prohibit disclosure of information, but only cuts off federal funds to a school that has policies violative of the act's requirements of parental notification. Student Bar Ass'n. Bd. of Governors of School of Law, University of North Carolina at Chapel Hill, 293 N.C. 594, 239 S.E.2d 415 (1977). See, generally, Pennhurst State School v. Halderman, ___ U.S. ___, 101 S.Ct. 1531, ___ L.Ed.2d ___ (1981) (generally, in federal funding statutes which impose substantive requirements upon a state, the remedy is a cut-off of funds; it does not create a private cause of action to enforce substantive compliance).

Specifically, the Eighth Circuit Court of Appeals has found that the Buckley amendment, 20 U.S.C. § 1232g does not create a private cause of action allowing a student to sue a school for access to educational records or release of educational records only upon parental consent. In Girardier v. Webster College, 563 F.2d 1267, 1276-77 (8th Cir. 1977), the court succinctly stated:

> The statute does not say that a private remedy is given. Enforcement is solely in the hands of the Secretary of Health, Education and Welfare under subsection (f). Under such circumstances, no private cause of action arises by inference. See Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975); National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974). (Footnote omitted.)

Moreover, upon review of the act itself, it would have no applicability to child abuse information and an investigation under Sections 232.67-.77 for three reasons.

First, child abuse information, Section 235A.13(1), is beyond the scope of "educational records" and is almost uniformly gathered independently of any process engendering "educational" records as that term is intended in the Buckley amendment. IAC 770-135.4(2) emphasizes that the child abuse investigation begin within one hour, if an emergency exists, and within twenty-four hours if the complaint evidences a non-emergency situation. It would be difficult for the child abuse information to make its way into the child's educational records in such a short period of time, especially if the report is by someone other than school personnel. Moreover, even if a school official is the mandatory reporter, child abuse information is confidential and should not be entered upon the child's educational records. Section 235A .15, The Code 1981; 20 U.S.C. § 1232g(a)(4)(B).

In Frasca v. Andrews, 463 F.Supp. 1043 (D.C. N.Y. 1979), the federal district court rejected the contention of school officials that the Buckley amendment provided justification for censorship of a high school newspaper article discussing a student's expulsion. In so doing, the Court reasoned:

> [5] In connection with Exhibit "B", the court finds no merit in defendants' reliance upon the so-called "Buckley amendment" part of which, 20 U.S.C. § 1232g, prevents disclosure by a school district of certain information about students which is deemed to be confidential. Although some of the information in Exhibit "B" would fall within the scope of the Buckley amendment if the source of that information had been school records, the prohibitions of the amendment cannot be deemed to extend to information which is derived from a source independent of school records. Even though a school suspension is listed in protected records, as in the present case, the suspension would also be known by members of the school community through conversation and personal contact. Congress could not have constitutionally prohibited comment on, or discussion of, facts about a student which were learned independently of his school records.

Frasca, at 1050.

Under the facts as stated, the investigator wanted to interview the child, not obtain any school or educational records. The interview of the child would constitute "information which is derived from a source independent of school records" under Frasca.

Secondly, the Buckley amendment contains two exceptions to the definition of "education" records which may apply to child abuse information.

> (B) The term "education records" does not include --
>
> (i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or

> revealed to any other person except a substitute;
>
> (ii) if the personnel of a law enforcement unit do not have access to education records under subsection (b)(1) of this section, the records and documents of such law enforcement unit which (I) are kept apart from records described in subparagraph (A), (II) are maintained solely for law enforcement purposes, and (III) are not made avaiable to persons other than law enforcement officials of the same jurisdiction;

20 U.S.C. § 1232g(a)(4)(B)(i) and (ii).

Finally, the Buckley amendment provisions relating to release of educational records only with written consent of a child's parent, excludes specific agencies or institutions.

> (b)(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization other than to the following --
>
> . . .
>
> (E) State and local officials or authorities to whom such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974;

Therefore, even if the child abuse information is deemed to be an "educational" record, parental notification is not required by this exception. The mandatory child abuse reporting system has been effective since 1966. Ch. 235A, The Code 1966. Certificated school personnel became mandatory reporters prior to November 19, 1974. 1974 Session, 65th G.A., ch. 1162 § 3; codified at Section 235A.3(1)(b), The Code 1975. This exemption to release of information requirement would apply to the facts you posit and the Buckley amendment would not bar the interview of a child who

is the alleged victim of sexual abuse without parental notification.

Based upon the foregoing, it is the opinion of this office, that the Family Educational Rights and Privacy Act of 1974, Buckley amendment, 20 U.S.C. § 1232(g), does not compel school officials to notify parents of a child who is an alleged child abuse victim that the child will be or has been interviewed by a child abuse investigator. Further, no financial liability will be incurred under the Buckley amendment by school officials for allowing the interview of the child abuse victim without parental notification.

To reiterate, no provision of state law has been found which would require parental notification by school officials prior to allowing a child abuse investigator to interview the alleged victim of sexual abuse[3]. Given the affirmative duties to investigate child abuse allegations and the lack of an affirmative duty upon school officials to give parents notice, any perceived interest of school officials must yield to the child abuse investigation whose "primary purpose . . . shall be the protection of the child named in the report". Section 232.71(1), The Code 1981.

To further clarify, while the school's interest in cooperation with a child abuse investigation may not rise to a legal duty, absent mandatory reporter information, certainly the spirit of the child abuse protection scheme indicates they should cooperate for the protection of the alleged child abuse victim.

The confrontation of institutions which you outlined is most unfortunate because both school officials and child abuse or law enforcement investigators undoubtedly proceed on the assumption that the child's best interests are furthered by their action.

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3 To the contrary, two areas of interest to a child, venereal disease and substance abuse treatment, specifically empower the child to consent to treatment and one, substance abuse treatment, precludes parental notification. Sections 140.3, .9, venereal disease; Section 125.33(1), substance abuse, The Code 1981.

Perhaps a legal confrontation may be avoided by consultation and negotiation by yourself, child abuse and law enforcement, and school officials which could result in a mutually satisfactory solution to both institutions, as well as, most importantly, the child.

Sincerely,

Brent D. Hege

Brent D. Hege
Assistant Attorney General

BDH/kap

COUNTIES; CIVIL SERVICE COMMISSION; OPEN MEETINGS; PUBLIC RECORDS: Chs. 28A, 68A, and 341A; §§ 28A.3, 28A.5, 68A.2, 68A.7(11), 341A.6(4), 341A.6(11), and 341A.12. Under Ch. 28A, final action of the Civil Service Commission must be taken in open session, even if the proceedings were conducted in closed session. Because "final action" under § 28A.5(3) encompasses both the final decision and the factual findings which support that decision, and because of the presumption in favor of disclosure under Ch. 68A and the absence of any express exceptions, the Commission's decision and factual findings constitute public records under Ch. 68A. Further, the Commission has discretion under the provisions of § 341A.6(4) to conduct informal hearing of an employee's appeal of a written reprimand. (Weeg to McCormick, Woodbury County Attorney, 4/16/72) # 82-4-7(L)

Patrick C. McCormick
Woodbury County Attorney
Courthouse
Sioux City, Iowa 51101

April 16, 1982

Dear Mr. McCormick:

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

I. Where a county civil service commission conducts a disciplinary hearing to consider the appeal of a deputy sheriff's termination pursuant to § 341A.12, The Code 1981, and that hearing is closed to the public pursuant to § 28A.5(1)(i), The Code 1981, are the Commission's findings of fact and ruling a public or confidential document?

II. Is the county Civil Service Commission required to hold a hearing to consider a deputy sheriff's appeal of a written reprimand, and if not required, may the Commission hold such a hearing at its discretion?

It is our opinion that the Commission's findings of fact and ruling are public records, and that while the Commission is not required to provide a hearing for a deputy sheriff to appeal a written reprimand, the Commission may hold a hearing in its discretion. Our reasons are as follows.

I.

It appears that your question arose from the following circumstances. A deputy sheriff was terminated, and he appealed that decision under the provisions of § 341A.12. The Commission held a hearing to consider that appeal under those same provisions. The hearing was closed to the public pursuant to § 28A.5(1)(i), and the hearing was properly recorded and preserved pursuant to § 28A.5(4). The Commission took final action in an open session, as required by § 28A.3. The written findings of fact and decision were certified to the sheriff as required by § 341A.12. You ask whether these findings and decision are public records.

Chapter 68A, the Iowa Public Records Act, states:

> Every citizen of Iowa shall have the right to examine all public records and to copy such records, and the news media may publish such records, unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential . . . .

The Iowa Supreme Court has stated that this Act is to be interpreted liberally to provide broad public access to public records. City of Dubuque v. Telegraph Herald, Inc., 297 N.W.2d 523 (Iowa 1980). Because of this statutory presumption favoring disclosure, the findings of fact and decision here in question are presumed to be public records unless an express statutory exception applies.

It appears that several statutory exceptions may apply. First, under the Public Records Act itself, § 68A.7(11) provides that "personal information in confidential personnel records" is considered confidential under the statute. More specifically, § 341A.6(11) provides that the Civil Service Commission is:

> To keep records of the service of each employee in the classified service. These records shall contain facts and statements on all matters relating to the character and quality of the work done and the attitude of the individual to his work. All such service records and employee records shall be subject only to the inspection of the commission.

Finally, § 28A.5(4) of the Open Meetings Law provides that the minutes and tape recording of a closed meeting are not public records.

However, it is our opinion that none of these statutes which provide exceptions to the Public Records Act are applicable in the present case. We reach this conclusion because of the provisions of § 28A.5(3) of the Open Meetings Law, which states:

> Final action by any governmental body on any matter shall be taken in open session unless some other provision of the Code allows action to be taken in closed session.

Thus, this section requires that at the conclusion of a termination hearing conducted in closed session, the Commission announce its final decision. As is true with a final decision by a court, an administrative agency, or any other decision-making body, the factual findings upon which the decision-maker relies to support its decision are necessarily to be included as part of the actual decision itself. This satisfies the dual requirement that a party be notified of the grounds for the decision and that a reviewing court or other decision-making body have an adequate basis from which to review the decision.

This conclusion comports with our decision in Op. Att'y Gen. #79-10-9, where we held that "final action" under § 28A.5(3) occurs when a final decision is approved, signed, and dated by the members of an agency. We further noted that the final decision includes a brief statement of supporting facts and law.

In conclusion, because final action of a governmental body must be taken in open session, even if the preceding proceedings were conducted in closed session; and because "final action" under § 28A.5(3) encompasses both the final decision and the factual findings which support that decision, that decision and findings constitute public records for the purposes of Ch. 68A.

II.

Section 341A.12 sets forth procedures for the Commission to follow in the event of a disciplinary hearing. However, this section by its terms applies only to an employee's appeal of a decision to remove, suspend, or demote that employee.

In the event of such an appeal, the Commission is required to hold a hearing. It is therefore our opinion that the provisions of § 341A.12 do not extend to an appeal of a written reprimand.

Section 341A.6 ennumerates the specific powers and duties of the county Civil Service Commission. In particular, § 341A.6(4) provides that the Commission has the authority:

> To conduct informal hearings concerning matters contemplated by this chapter. The validity of any such hearing shall not be affected by the manner in which it is conducted, however, a majority of the commissioners shall affirm all orders, rules, and decisions made pursuant to such hearings.

Under a broad reading of Ch. 341A, it is our opinion that a supervisor's reprimand of an employee is a permissible, but not mandatory, subject of an informal hearing. The decision of whether to conduct a hearing on such a matter is therefore left to the discretion of the Commission.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:sh

COUNTIES AND COUNTY OFFICERS; INCOMPATIBILITY AND CONFLICT OF INTEREST. Sections 331.905 through 331.907, Supplement to The Code 1981. No incompatibility of offices exists when the county auditor serves as clerk to the county compensation board, but there may be some circumstances in which a conflict of interest problem may arise. (Weeg to Salvo, Shelby County Attorney, 4/15/82) #82-4-6(L)

April 15, 1982

J. C. Salvo
Shelby County Attorney
711 Court Street
Harlan, Iowa 51537

Dear Mr. Salvo:

You have requested an opinion of the Attorney General regarding whether a conflict of interest arises when the county auditor serves as clerk of the county compensation board.

We first consider the relevant statutory provisions. Sections 331.905 through 331.907, Supplement to The Code, 1981, govern the functions of the county compensation board. In particular, § 331.905(6) provides:

> The board of supervisors shall provide the necessary office facilities and the technical and clerical assistance requested by the county compensation board to carry out its duties.

Section 331.905(7) provides:

> The expenses of the county compensation board members, the salaries and expenses of any technical and clerical assistance, and the cost of providing any facilities shall be paid from the general fund of the county.

Finally, § 331.907(1) provides:

> The annual compensation of the auditor, treasurer, recorder, clerk, sheriff, county attorney, and supervisors shall be determined as provided in this section . . . . (emphasis added.)

Sections 331.907(1) and 331.902(2) go on to require the county compensation board to submit salary recommendations for these public officers to the board of supervisors for limited review and approval.

Next, we note that the present situation does not involve the doctrine of incompatibility of offices. This doctrine is relevant only when a person holds two public offices. After a legal analysis of the statutory duties of the relevant offices and a determination that the offices are incompatible, an individual is prohibited from holding both offices. Op. Att'y Gen. #81-10-6; Op. Att'y Gen. #81-8-26 (a copy of which is enclosed). In the present case, while the position of county auditor is a public office, the position of clerk to the county compensation board is instead one of private employment. See §§ 331.905(6), 331.905(7). Therefore, the incompatibility doctrine is inapplicable.

On the other hand, a conflict of interest does not prevent an individual from holding an office, but may prohibit the officeholder from participating in a particular decision or action. A conflict of interest generally arises whenever a person serving in public office may gain any private advantage, financial or otherwise, from such service. The question of whether a conflict exists is resolved by a case-by-case factual analysis. Op. Att'y Gen. #81-10-6; Op. Att'y Gen. #81-8-26.

Such a uniquely factual determination is generally not an appropriate subject for an opinion of the Attorney General. However, in the present case, we are prepared to state that nothing in §§ 331.905(6) and 331.905(7) prohibits the supervisors from allowing the auditor to serve as clerk to the compensation board, even though the supervisors could hire a private individual to serve in that capacity. Nonetheless, there may be situations where the auditor should decline to attend, or participate in compensation board proceedings which could raise a conflict of interest question. For example, § 331.907(1) requires the compensation board to recommend a salary for the county auditor. Consequently, the auditor should excuse himself from any proceedings at which the auditor's salary is a topic of discussion.

In addition, you express concern as to the conflict of interest that may exist if the auditor attends the compensation board's confidential meetings. You state these meetings were held to allow each elected official to voice his or her salary request. We can find no express statutory exception that would allow the compensation board to close such meetings. Therefore, they must be held in open session pursuant to the requirements of Ch. 28A, The Code 1981 (the Iowa Open Meetings Law). Once a meeting is open to the public, no conflict of interest arises simply because the auditor is present, for the auditor is entitled, as is any citizen, to attend that meeting.

In conclusion, it is our opinion that no incompatibility of offices exists when the county auditor serves as clerk to the county compensation board, but there may be some circumstances in which a conflict of interest problem may arise.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:sh

RAILROADS: The Iowa Department of Transportation is subject to statutory bidding requirements. However, the Railroad Division of the Transportation Department is not subject to public bidding procedures regarding its administration of expenditures from the railroad assistance fund as set out in Chapter 327H. Chapter 327H contains no requirement for public bids nor are railroads subject to public bidding requirements for work being done on their right-of-way. (Miller to Schwengels, State Senator, 4/15/82) #82-4-5(L)

April 15, 1982

The Honorable Forrest V. Schwengels
State Senator
Statehouse
Des Moines, IA 50319

Dear Senator Schwengels:

We have received your request for an Attorney General's Opinion regarding the applicability of statutory constraints on bidding to the Iowa Department of Transportation. In particular, you ask whether such statutory constraints apply to the Railroad Division as it administers expenditures from the railroad assistance fund as set out in Section 327H.18, The Code 1981.

Without question, the Iowa Department of Transportation is subject to the various bidding requirements set out by statute. These requirements are found in many chapters throughout the Code of Iowa. Some of these include, among others, Chapters 72, 73, 313 and 314, The Code 1981.

However, it is well established that "competitive bidding is a matter of statutory provision and construction. In the absence of some controlling constitutional or statutory provision, or of some municipal ordinance or other legislative requirement, competitive bidding is not an essential prerequisite to the validity of contracts for public work, contracts to furnish materials to public bodies, or other contracts by and with public bodies." 64 AmJur2d §34.

Nothing in chapter 327H provides for the institution of a public bidding process for the distribution of money from the railroad assistance fund. Rather, it appears that the legislature intended that distribution of these funds be through the grants or agreements entered into or approved by the Iowa Department of Transportation. Sections 327H.20 and 327H.22 both refer to the distribution of money flowing into or out of the fund to be determined by agreements.

Section 327H.18 establishes the railroad assistance fund for the purpose of providing money "for the restoration, conservation and improvement of railroad branch lines." Section 327H.20 provides for the Iowa Department of Transportation to "enter into agreements with railroads, the United States Government, persons, cities, counties, or railroad districts for carrying out the purposes of this [chapter]."

Not all of the money involved in the railroad assistance fund is acquired from public funds. Section 327H.18 mentions money received for this fund coming from such sources as "agreements, grants, gifts, or other means from individuals, companies or other business entitites . . ." These funds are aimed at providing assistance to railroad branch lines which are non-public items. It is the railroad corporations who have control of the work being done on their right-of-way. There is no statutory requirement that the railroads use a public bidding procedure to determine the means of completing these projects. However, if the projects involved such public improvements as highway approaches to the branch lines, then the appropriate bidding requirements would be applicable.

Sincerely,

James D. Miller
Assistant Attorney General

pa

DRIVER'S LICENSE; INTERSTATE COMPACTS: §§321.513, 321C.1, The Code 1981. The interstate compacts of §321.513 and §321C.1, The Code 1981, contemplate that the jurisdiction issuing the traffic citation or obtaining the traffic conviction is different than the jurisdiction issuing and suspending the driver's license. Thus, the license suspension provisions of §321.513 and §321C.1 are not applicable to drivers licensed in Iowa for failure to comply with a traffic citation issued in Iowa or convicted of a traffic offense committed in Iowa. (Mull to Kumpula, 4/15/82) # 82-4-4(L)

April 15, 1982

Mr. Glenn W. Kumpula
Assistant Dickinson County Attorney
710 Lake Street
Spirit Lake, IA 51360

Dear Mr. Kumpula:

You have requested an opinion of the Attorney General on the following question: "Whether the license penalty provisions of Section 321.513, which deals wth non-resident traffic violators, and Chapter 321C which deals with interstate drivers license compact, can be applied to Iowa [licensed drivers committing traffic offenses in Iowa] by the State of Iowa, its subdivisions and municipalities, in the same manner that the provisions of Chapter 252A of the Code has been held to be for use by the State of Iowa by Iowa residents?" In our opinion, the interstate compacts of §321.513 and 321C.1 contemplate that the jurisdiction issuing the citation or obtaining a conviction is different than the jurisdiction issuing and suspending the driver's license. Thus, the penalty provisions of §321.513 and §321C.1 are not applicable to drivers licensed in Iowa for failure to comply with a traffic citation issued in Iowa or convicted of a traffic offense committed in Iowa.

Your reference to holdings under Chapter 252A appears to be to cases such as State Ex Rel. Bishop v. Travis, 306 N.W.2d 733 (Iowa 1981), which discuss the availablility of Chapter 252A, Uniform Support of Dependents Law, for both interstate and intrastate actions. The provisions of §321.513 and §321C.1, however, contemplate only interstate actions in the sense that the traffic citation or traffic conviction must occur in a jurisdiction separate from the jurisdiction enforcing the license suspension.

Relevant definitions of §321.513(1)(a) of the nonresident violator compact are as follows:

> (5) "Home jurisdiction" means the jurisdiction that issued the driver's license of the traffic violator.
>
> (6) "Issuing jurisdiction" means the jurisdiction in which the traffic citation was issued to the motorist.
>
> * * *
>
> (8) "Motorist" means a driver of a motor vehicle operating in a party jurisdiction other than the home jurisdiction.

Section 321.513(b)(4) provides as follows: "The licensing authority of the issuing jurisdiction shall not suspend for failure to comply with the terms of a traffic citation the driving privilege of a motorist for whom a report has been transmitted."

The suspension provisions are set forth in §321.513(c) in relevant part as follows:

> Upon receipt of a report of a failure to comply, the licensing authority of the home jurisdiction shall notify the motorist and initiate a suspension action, in accordance with the home jurisdiction's procedures, to suspend the motorist's driver's license until satisfactory evidence of compliance with the terms of the traffic citation has been furnished to the home jurisdiction licensing authority...

The definition of "motorist" with the requirement of "operating in a party jurisdiction other than the home state" in §321.513(1)(a)(5) and the suspension prohibition of §321.513(b)(4) compel the conclusion that the jurisdiction suspending the driver's license is different from the jurisdiction issuing the traffic citation.

Chapter 321C authorizes Iowa to participate in an interstate driver's license compact. Section 321C.1, art. II(b) provides the following definition: "Home state" means the state which has issued and has the power to suspend or revoke the use of the

license or permit to operate a motor vehicle." Section 321C.1, art. III provides for reporting convictions in relevant part as follows: "The licensing authority of a party state shall report each conviction of a person from another party state occurring within its jurisdiction to the licensing authority of the home state of the licensee. . ."

Section 321C.1, art. IV(a) states the penalties for reported convictions in part as follows:

> The licensing authority in the home state, for the purposes of suspension, revocation or limitation of the license to operate a motor vehicle, shall give the same effect to the conduct reported, pursuant to Article III of this compact, as it would if such conduct had occurred in the home state, in the case of convictions for: . . .

The language of these provisions of §321C.1 contemplate that the jurisdiction reporting the conviction is different from the home state which will enforce the suspension.

In conclusion, the interstate compacts of §321.513 and §321C.1, The Code 1981, contemplate that the jurisdiction issuing the traffic citation or obtaining the traffic conviction is different than the jurisdiction issuing and suspending the driver's license. Thus, the license suspension provisions of §321.513 and §321C.1 are not applicable to drivers licensed in Iowa for failure to comply with a traffic citation issued in Iowa or convicted of a traffic offense committed in Iowa.

Sincerely,

Richard E. Mull

Richard E. Mull
Assistant Attorney General

pa

CRIMINAL LAW: General Assistance Application, Chapter 252, The Code 1981, as the Basis for a Perjury Charge, § 720.2, The Code 1981. Chapter 252, does not require that an application for general assistance be made under oath or affirmation. Such an application, however false the statements therein, does not necessarily furnish an adequate basis for a perjury charge under § 720.2. (Steffe to Tullar, Sac County Attorney, 4/14/82) #82-4-3(L)

April 14, 1982

Lon R. Tullar
Sac County Attorney
110 East State
Sac City, IA 50583

Dear Mr. Tullar:

You have requested an opinion from this office concerning the significance of the absence of a specific provision in Chapter 252, The Code 1981, prohibiting a person from giving false information to the Board of Supervisors or the General Relief Director for the purpose of obtaining relief under the general assistance scheme embodied in Chapter 252. Specifically, you pose in essence the following two questions:

> (1) If a person submits an application for relief which is signed and certified under oath and affirmation, would the applicant be subjected to prosecution for perjury as defined in Section 720.2, The Code 1981, if he or she knowingly makes a false statement therein?
>
> (2) If the act of giving false information does not fall within the ambit of Section 720.2, is there another statute which penalizes such action thereby allowing a county to protect the Chapter 252 fund from abuse by punishing prospective recipients for such conduct?

Section 720.2, The Code 1981 provides in relevant part:

> A person who, while under oath or affirmation in any proceeding or other matter in which statements under oath or affirmation are required or authorized by law, knowingly makes a false statement of material facts or who falsely denies knowledge of material facts, commits a class "D" felony.

The terms of § 720.2 are clear. One of the essential elements of perjury is that the sworn statements are required or authorized by law.[1] § 720.2. See generally 4 J. Yeager and R. Carlson, Iowa Practice: Criminal Law and Procedure § 443, at 114 (1979). That a person does in fact swear falsely as to the truth of an application for relief is of no significance if an oath or affirmation, § 4.1(12), The Code 1981, is not required nor authorized by law. Chapter 252 does not set forth any requirement that the application, § 252.33, The Code 1981, be made under oath or affirmation. We must therefore conclude that such an application, however false the statements therein may be, cannot subject the applicant to criminal prosecution pursuant to § 720.2.

There is some authority that it is not necessary that the "required or authorized by law" element of a perjury offense originate in a statutory requirement. Some courts have determined that valid regulations and rules of a governmental department and valid ordinances of a county requiring an oath or affidavit fall within the key phrase "required or authorized by law" so as to furnish an adequate basis for a perjury charge. United States v. Hvass, 355 U.S. 570, 78 S.Ct. 501, 2 L.Ed.2d 496 (1958); People v. Doss, 99 Ill.App.3d 1026, 55 Ill.Dec. 349, 426 N.E.2d 324 (1981); People v. Ziady, 8 Cal.2d 149, 64 P.2d 425, 108 A.L.R. 1234 (1937). See generally 70 C.J.S. Perjury § 20 at 476-477 (1951) and 60 Am.Jur.2d Perjury §§ 13-17 at 975-978 (1972). However, since your letter is silent as to the source of the oath requirement, we are in no position to decide whether these cases would lend support to an affirmative response to your first question.

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[1]As disclosed by § 720.2 one of the essential elements of perjury is also a false statement of a material fact.

Your second inquiry is predicated upon a negative response to your first question. This inquiry apparently raises the issue of whether or not the legislature has designated the act of knowingly making a false statement in conjunction with or in support of an application for Chapter 252 assistance a crime. The legislature clearly has not chosen to consider this activity as criminal activity, as it has done in the context of other welfare schemes. See §§ 234.13, 239.14, The Code 1981. The conduct described would thus not constitute a fraudulent practice. § 714.8(10), The Code 1981.[2] Moreover, the crime of theft by deception, § 714.1(3), The Code 1981, does not emanate from merely giving false information.

It thus appears that the legislature has not declared that the described conduct constitutes a basis for a criminal charge. This conclusion does not necessarily mean that such conduct is completely immune from possible penal sanctions. Your attention is drawn to the County Home Rule Amendment contained in Iowa Const. Art. III, § 39A and the recently adopted enabling legislation entitled "Home Rule for Counties" in the form of 1981 Session, 69 G.A., Ch. 117. The latter, both recognizes the broad scope of authority conferred under home rule but also expressly limits the role of the county with regard to enacting ordinances carrying criminal penalties. 1981 Session, 69 G.A., Ch. 117, §§ 300, 301. Thus, the powers and duties of the county enumerated in the recent enactment may provide a possible alternative source for providing a remedy for what may be deemed a loophole in the Code of Iowa.[3] However, we are in no position to opine as to whether or not legislation by the county encompassing the area of Chapter 252 relief is otherwise valid without knowledge of any such ordinance.

Sincerely,

Shirley Ann Steffe

SHIRLEY ANN STEFFE
Assistant Attorney General

SAS/cla

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[2]As to acts which would constitute a fraudulent practice, see § 714.8(12), The Code 1981.

[3]Note in particular § 380 and § 1039, two sections specifically dealing with Chapter 252.

COUNTIES; COUNTY CONSERVATION BOARD; BOARD OF SUPERVISORS: Sections 111A.4, The Code 1981; Sections 331.424 and 331.426, Supplement to The Code, 1981. The board of supervisors does not have the authority to refuse to pay a warrant issued by the county conservation board if that warrant 1) does not exceed the conservation board's budget limits and 2) is for a legitimate purpose. (Weeg to Wilson, Director, Conservation Commission, 4/13/82) #82-4-2(L)

April 13, 1982

Larry J. Wilson, Director
Iowa Conservation Commission
Wallace Building
L O C A L

Dear Mr. Wilson:

You have requested an opinion of the Attorney General concerning whether a county board of supervisors has the authority to refuse to sign a warrant issued by the county conservation board for the purchase of property. It is our opinion that the supervisors do not have the authority to refuse to sign a county conservation board warrant if the warrant is within the conservation board's budget and for a legitimate purpose. Our reasons are as follows.

First, Ch. 111A, Supplement to the Code, 1981, governs the establishment and functions of the county conservation board. Section 111A.4 sets forth the powers and duties of the county conservation board, which include the authority to purchase property for conservation purposes. Section 111A.4 (3) requires the conservation board to obtain the State Conservation Commission's approval of all proposals for acquisition of land, but nowhere is there a requirement that the conservation board secure the board of supervisors' approval for such a proposal. Further, § 111.A.6 refers to §§ 331.424(3) (d) and 331.422(6), sections which relate to county finances.

Section 331.424(3) provides that the expenses of the conservation board are to be paid out of the county general fund. That section states:

> Except as otherwise provided by state law, amounts expended for county government purposes shall be paid from the general fund, including but not limited to amounts for the following purposes if paid:
>
> . . .
>
> d. To the county conservation board fund, for the maintenance of lands under the jurisdiction of the state conservation commission . . . and for the payment of expenses incurred by the county conservation board in carrying out its powers and duties . . . . [Emphasis supplied.]

These powers and duties are detailed in § 111A.4 and include the purchase of land for conservation purposes. See § 111A.4(2). Alternatively, § 331.422(6) is a permissive section which authorizes the supervisors to levy a tax for the county conservation fund. In the event the supervisors elect to levy that tax, the revenues would be paid into the fund established under § 331.426. That section authorizes the county to establish permissive county funds, including:

> 2. A county conservation fund to be administered by the county conservation board in accordance with section 111A.6. The fund shall be paid out upon requisition of the county conservation board, which shall deposit in the fund all gifts and revenues it receives . . . . [Emphasis supplied.]

Regardless of whether county conservation board expenses are paid from the general fund under § 331.424(3) or a separate conservation fund under § 331.426, the mandatory language of both sections requires the supervisors to pay all amounts requisitioned by the conservation board. However, these payments are subject to the budgetary guidelines set forth in Ch. 344, The Code 1981. These guidelines require each county office or department to annually submit an itemized budget estimate, § 344.1, and require the supervisors to appropriate the funds it deems necessary for each office or department, § 344.2.

However, once a department's budget has been approved, the supervisors' authority to exercise control over expenditure of those budgeted funds is limited: the supervisors are merely to serve an "oversight" function, ensuring that the expenditures authorized are 1) within a department's budget limits, and 2) for legitimate purposes. See Op. Att'y Gen. #80-4-2 (a copy of which is enclosed). Accordingly, we held in that opinion that a county board of supervisors cannot refuse to allow payment of a specific claim or expenditure arising within the approved budget of a county department if that expenditure is within budget limits and for a legitimate purpose.

In conclusion, it is our opinion that the mandatory provisions of §§ 331.424(3)(d) and 331.426(2), in conjunction with our conclusions in Op. Att'y Gen. #80-4-2, leave a county board of supervisors no discretion to refuse payment of a county conservation board warrant if that warrant is within the conservation board's budget limits and for a legitimate purpose. In the event the supervisors do refuse to authorize payment, the conservation board's recourse is to file a mandamus action against the board of supervisors in district court. We note that the county attorney has a duty to represent the interests of the county pursuant to § 331.756, Supplement to the Code, 1981. However, the county attorney could not represent both the supervisors and the conservation board in this particular situation due to conflict of interest problems. Therefore, the conservation board may have to proceed with the assistance of private legal counsel.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:sh

Enclosure

COUNTIES; COUNTY ATTORNEY; Salaries of assistant county attorneys: Sections 331.752(2), (3), and (4); 331.903(1), and 331.904(3). An assistant county attorney's salary ceiling is based not on the county attorney's actual salary but on eighty-five percent of the statutory maximum salary for any full-time county attorney. Consequently, it is permissible for an assistant county attorney to receive a salary that exceeds eighty-five percent of the salary actually received by the county attorney. (Weeg to Johnson, Auditor of State, 4/8/82) #82-4-1(L)

April 8, 1982

Richard D. Johnson
Auditor of State
State Capitol
L O C A L

Dear Mr. Johnson:

You have requested an opinion of the Attorney General concerning the appropriate compensation for assistant county attorneys, in particular, whether the law allows assistant county attorneys to receive a salary that is greater than eighty-five percent of the county attorney's salary.

Section 331.903(1), Supplement to the Code, 1981, et seq., authorizes the county attorney to appoint one or more assistants, upon the approval of the Board of Supervisors. Section 331.904(3) provides in part:

> The annual salary of each assistant county attorney shall be determined by the county attorney within the budget set for the county attorney's office by the board. The salary of an assistant county attorney shall not exceed eighty-five percent of the maximum salary of a full-time county attorney . . . . [Emphasis added.]

This section was amended in 1978. Prior to that time, § 340.10 provided:

> Where an assistant county attorney is appointed he shall receive as compensation:
>
> 1. For the first assistant county attorney, not more than eighty-five percent of the amount of the salary of the county attorney.
>
> 2. For additional assistant county attorneys, not to exceed eighty percent of the amount of the salary of the county attorney, as fixed by the board of supervisors.

One of the significant differences arising from the 1978 amendment was the change in the limitation on assistant county attorney salaries from a stated percentage "of the amount of the salary of the county attorney" to a stated percentage "of the maximum salary of a county attorney." [Emphasis added.] It is our opinion that this amended language now allows an assistant county attorney to receive a salary that constitutes a percentage of the highest salary that could be received by the county attorney rather than a percentage of the salary that is actually received by the county attorney. Section 331.752(4), Supplement to The Code, 1981, provides in part that:

> The annual salary of a full-time county attorney shall be an amount which is between forty-five percent and one hundred percent of the annual salary received by a district court judge.

1981 Session, 69th G.A., ch. 9, § 2.6, sets forth the salary level for district court judges.

Unless a county board of supervisors provides for a change in the full- or part-time status of the county attorney pursuant to §§ 331.752(2) through 331.752(4), Supplement to The Code, 1981, the salary of the county attorney is determined by the county compensation board, subject to the approval of the supervisors. See §§ 331.752(4), 331.907, Supplement to The Code, 1981. However, the salary of each assistant county attorney is determined by the county attorney. See § 331.904(3), Supplement to The Code, 1981. Therefore, once the county attorney's salary is properly determined, i.e., falls within the forty-five to one hundred percent range of a district court judge's salary, the county attorney is free, pursuant to § 331.904(3), to set an assistant county attorney's salary at an amount not to exceed eighty-five percent of the salary received by a district court judge.

Accordingly, the assistant county attorney's salary ceiling is based not on the county attorney's actual salary but on eighty-five percent of the statutory maximum salary for any full-time county attorney. The particular amount is left to the discretion of the county attorney. Consequently, it is permissible for an assistant county attorney to receive a salary that exceeds eighty-five percent of the salary actually received by the county attorney.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney

TOW:sh

COUNTIES; COUNTY ATTORNEY; Scope of Duties: § 331.302(9), The Code 1981; § 331.756, Supplement to The Code, 1981. The statutory responsibility for periodically compiling a county code of ordinances devolves upon the county board of supervisors. Consequently, the county attorney may, but is not required to, provide the supervisors with assistance in compiling this code. Alternatively, the board of supervisors may contract with a private attorney, a part-time county attorney, or an assistant county attorney to provide any necessary assistance in compiling the county code of ordinances. (Weeg to Tullar, Sac County Attorney, 5/28/82) #82-5-17(L)

May 28, 1982

Lon R. Tullar
Sac County Attorney
110 East State
Sac City, Iowa 50583

Dear Mr. Tullar:

You have requested an opinion of the Attorney General concerning the scope of the county attorney's statutory duties. In particular, you ask whether a part-time county attorney is required, pursuant to § 331.302(9), Supplement to the Code 1981, to compile the county code of ordinances every five years. If not, you ask whether the part-time county attorney may contract with the county to compile the code of ordinances. It is our opinion that because the statutory responsibility for compiling this code devolves upon the board of supervisors, a county attorney may, but is not required to, compile that code. Our reasons are as follows.

First, the relevant statutory provision, § 331.302(9), is found in Division III, Part 1 of the County Home Rule Implementation Act (the Act), a section concerning the general powers and duties of the board of supervisors. In particular, § 331.302(9) states as follows:

> At least once every five years, the board shall compile a code of ordinances containing all of the county ordinances in effect. (emphasis added).

It is our opinion that the placement of § 331.302(9) among the supervisor's general powers and duties, in addition to the express language of that section emphasized above, indicate the legislature's obvious intent to impose responsibility for codification of county law on the board of supervisors.

Second, § 331.756, Supplement to The Code 1981, is a separate statutory provision directly relating to the duties of the county attorney and is found in Division V, Part 6 of the Act. This section expressly sets forth the duties of the county attorney. Sections 331.756(1) through (86) detail eighty-six particular duties, and § 331.756(87) provides the county attorney shall "perform other duties required by state law." Nowhere among this extensive list is the duty to codify county law included, nor reference to § 331.302(9) made. Under the maxim of statutory construction referred to as expressio unius est exclusio alterius (mention of one thing implies exclusion of another), that duty cannot be implied. Furthermore, although the county attorney often serves as legal counsel for the supervisors, that representation is limited to the duties expressed in § 331.756. See, e.g., § 331.756(6) and (7).

However, a few subsections of § 331.756 could arguably encompass the duty to compile county ordinances. For example, § 331.756(1) states the county attorney shall:

> Diligently enforce or cause to be enforced in the county, state laws and county ordinances . . .

It could be argued that this generally-stated duty to enforce county ordinances necessarily includes the duty to ensure that the county ordinances are periodically compiled in a logical and organized manner. However, we decline to read § 331.756(1) so broadly, especially in light of the numerous and detailed duties contained in later subsections of § 331.756.

Further, § 331.756(87) states the county attorney shall "perform other duties required by state law." It could be argued that this provision also necessarily includes the duty to compile county ordinances, as expressly required in § 331.302(9). However, we also decline to give § 331.756(87) this meaning. First, in our opinion the language of § 331.756(87) refers to statutory duties imposed on the

county attorney. This is evident from a reading of §§ 331.756(11) through (86), which include among the county attorney's duties those duties expressly imposed on that office in other statutory provisions. Because § 331.302(9) imposes the duty of codifying county law on the board of supervisors, and not on the county attorney, we therefore conclude that the duty described in § 331.302(9) is not one of the county attorney's duties within the meaning of § 331.756(87).

Consequently, it is our opinion that the board of supervisors, and not the county attorney, is responsible for ensuring compliance with the codification requirements of § 331.302(9). While the county attorney is not required to compile the county's ordinances, the county attorney may choose to include this duty, in whole or in part, as one of his or her official duties. In the event the county attorney does not make that election, we believe that in the exercise of home rule authority the supervisors could contract with private counsel, with a part-time county attorney,[1] or with an assistant county attorney to compile county ordinances.

In conclusion, it is our opinion that the statutory responsibility for periodically compiling a county code of ordinances devolves upon the county board of supervisors and not upon the county attorney. Consequently, the county attorney may, but is not required to, provide the supervisors with assistance in compiling this code. Alternatively, the board of supervisors may contract with a private attorney, a part-time county attorney, or an assistant county attorney to provide any necessary assistance in compiling the county code of ordinances.

Sincerely,

Theresa O'Connell Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

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[1] See § 331.752(1) (". . . A full-time county attorney shall refrain from the private practice of law.").

SCHOOLS; DRIVER EDUCATION; TUITION: §§ 4.1(36)(a); 282.1; 321.178; 442.4(1), The Code 1981. A school district that provides driver education to students enrolled in a parochial school located within the district shall charge tuition for students who are non-residents of the district. (Fleming to Chiodo, State Representative, 5/28/82) #82-5-16(L)

May 28, 1982

The Honorable Ned F. Chiodo
State Representative
3410 S. W. 12th Street
Des Moines, Iowa 50315

Dear Representative Chiodo:

You have asked for our opinion concerning a school district that provides driver education to non-resident pupils who attend a parochial school within the district. Your question pertains to West Des Moines School District and Dowling High School in particular. [1]

Your question is:

> Can public schools charge tuition for driver's education courses and more specifically, can the West Des Moines School District in conjunction with Dowling High School, charge tuition for those students who are not residents of West Des Moines School District?

The situation you describe is controlled, for the most part, by four separate statutes and the answer is yes.

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[1] It is our understanding that the Des Moines Independent School District contracts with West Des Moines to provide driver education to residents of that district who attend Dowling. Thus, the situation that gave rise to your question would appear to involve only those Dowling students who are not residents of either the West Des Moines or the Des Moines District.

Iowa public school districts are required to offer driver education to the resident pupils although driver education is not required to be taken by each student as a part of the minimum educational program prescribed in § 257.25, The Code 1981. The statute requiring schools to offer driver education, in pertinent part, is as follows:

> Every public school district in Iowa shall offer or make available to all students residing in the school district or Iowa students attending a nonpublic school in the district an approved course in driver education. Said courses may be offered at sites other than at the public school, including nonpublic school facilities within the public school districts. An approved course offered during the summer months, on Saturdays, after regular school hours during the regular terms or partly in one term or summer vacation period and partly in the succeeding term or summer vacation period, as the case may be, shall satisfy the requirements of this section to the same extent as an approved course offered during the regular school hours of the school term. A student who successfully completes and obtains certification in an approved course in driver education may, upon proof of such fact, be excused from any field test which he would otherwise be required to take in demonstrating his ability to operate a motor vehicle. [Emphasis supplied.]

Section 321.178(1) (Second Unnumbered Paragraph), The Code 1981.

Thus, § 321.178 places upon West Des Moines the responsibility for offering or making available driver education to Iowa students enrolled at Dowling. Another section requires that students who are non-residents of a district be charged tuition. The language of § 282.1, The Code 1981, is mandatory, i.e., "Non-resident children shall be charged the maximum tuition rate as determined in section 282.24. . . .". See § 4.1(36)(a), The Code 1981.

The actual fee that will be assessed such students is regulated by §§ 282.24 and 442.9(1)(a), The Code 1981. The tuition that can be charged for a part-time non-resident student

is linked to the state aid formula in § 442.4(1) (Third Unnumbered Paragraph). The formula assigns weight to various factors for computing the state aid a district receives. Part-time student enrollment (those receiving driver education from the West Des Moines School District at Dowling) is a factor in the formula. In effect, the amount of the state aid received that is attributable to one student enrolled in a driver education class is subtracted from the cost of driver education for one student and the resulting amount is the tuition charged per student. See § 442.4(1), The Code 1981 ("Tuition charges to the parent or guardian of a shared-time or part-time out-of-district pupil shall be reduced by the amount of any increased state aid occasioned by the counting of the pupil.").[2]

A student who attends a parochial school located in a different district from that in which the student resides has several options. Such a student may obtain driver education from the public school district in which he or she resides or enroll in the program for a fee at the parochial school he or she attends. Parents or guardians of such students may request their own school district to contract with the district in which the private school is located to make available driver education training to such students.

School districts may include driver education in their summer school programs if such a program is offered. We note that school districts "may" charge tuition for summer school to all students and we are aware that many of them do. See § 282.6, The Code 1981. We have included a copy of an earlier opinion issued by this office pertaining to driver education.

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[2] We note the existence of an opinion issued previously by this office pertaining to tuition charges for driver education courses. See 1966 Op. Att'y Gen. 308. The law in effect when that opinion was issued has been superseded by adoption of the Iowa School Foundation program, codified as Ch. 442, The Code 1981. See also § 257.26, The Code 1981, which authorizes the State Board to approve the sharing of instructors and services, i.e., enrollment of private school students in public schools for courses not available in the private school. Thus, the interpretations in the 1966 opinion are not applicable to the question we address in this opinion.

To summarize, a school district that offers a driver education program at a parochial school located within the district may charge non-resident pupils tuition and the fee to be charged is based on § 282.24 and 442.4, The Code 1981.

Sincerely,

Merle Wilna Fleming

(MS.) MERLE WILNA FLEMING
Assistant Attorney General

MWF:sh

Enclosure

SCHOOLS; ELECTIONS: §§ 278.1, 279.1, 280.3, 296.6, The Code 1981. School sponsorship of a vote yes poster contest or a vote yes message in a school newsletter is impermissible but school officials or employees are free to work as individuals to promote or oppose a ballot issue. (Fleming to Tullar, Sac County Attorney, 5/24/82) #82-5-14(L)

May 24, 1982

Lon R. Tullar
Sac County Attorney
110 East State
Sac City, Iowa 50583

Dear Mr. Tullar:

You have asked for our opinion concerning certain activities by a school district as follows:

1. Does having the grade school students enter into a contest encouraging a yes vote on a school bond issue and taxation violate any statute or laws? In this matter they do use school materials.

2. Does the school's encouragement of a yes vote on the school bond issue and taxation in its newsletter to parents violate any statute or laws?

3. If either of the above situations are in violation of law, what is the proper means of enforcement of the laws if the school refuses to comply with the law?

These questions pertain to the activities of a district board as it attempts to carry out its responsibility to "establish and maintain attendance centers based upon the needs of the school age pupils enrolled in the school district."

§ 280.3, The Code 1981, last unnumbered paragraph. At first blush, the activity you describe appears to be innocuous and is not expressly prohibited by statute. On close inspection, however, a number of important principles are implicated and we conclude that the school board has crossed over the delicate line between permissible and impermissible activity by sponsoring a "yes vote" poster contest and encouraging a yes vote on a school bond issue in its monthly newsletter sent to the homes of students of the district. Citizens who wish to challenge the actions of school board members may do so in a variety of ways, including the use of the ballot box at the time of the bond issue election or in the election of board members at the regular school election or by seeking relief in court.

I. QUESTIONS 1 AND 2

We discuss your first two questions together and note at the outset that a poster contest or a statement urging a yes vote in a regular monthly newsletter to a school child's home would entail little, if any, extra expenditure of school funds. A poster contest, we assume, would be conducted in the context of an art, social studies, or civics project. But great principles are at stake here and not the dollar amount.

Each Iowa school district exists as "a body politic as a school corporation," § 279.1, The Code 1981. The school corporation exercises all the powers granted by law and has exclusive jurisdiction over school matters in the territory within the district. Id.

Most of the power and responsibility for operation of the affairs of a school district is vested in the board of directors. See generally Ch. 279, The Code 1981, entitled Directors--Powers and Duties. Fundamental powers are reserved for the electors of the district See § 278.1, The Code 1981. In addition, Iowa law requires a 60% vote in favor of authorization of issuance of bonds by a school corporation. See § 296.6, The Code 1981.

It is a cardinal principle that public funds are to be used for public purposes or benefit. Carter v. Jernigan, 227 N.W.2d 131, 134 (Iowa 1975); Love v. City of Des Moines, 210 Iowa 90, 94, 230 N.W. 373 (1930). Courts have acknowledged that "it is extremely difficult to determine in many cases what are and what are not 'public purposes' for which public funds may be expended." City of Glendale v. White, 67 Ariz. 231, 194 P.2d 435, 438 (1948). It is clear that school funds must be used only for school purposes and it is essential to keep in mind that

school districts are limited to the exercise of those powers expressly granted or necessarily implied in their governing statute. See McFarland v. Board of Education, 277 N.W.2d 901, 906 (Iowa 1979); Barnett v. Durant Community School District v. Parker, 238 Iowa 984, 990, 29 N.W.2d 214, 217 (1947). A district board is required to provide schoolhouses in which instruction is to occur. It is charged with the responsibility to provide a minimum program as prescribed in § 275.25, The Code 1981. When the need arises, the school board is responsible for asking the commissioner of elections to call an election on the question of issuing bonds. See §§ 296.2, 296.3, 298.18, 298.21, The Code 1981. We believe that implied within that responsibility is the authority to disseminate information to the electors concerning reasons for the proposal, the details of the proposal, and the anticipated costs. But when the school board and/or school personnel, in their official capacities or in materials issued by the school, urge the citizens to vote yes, we believe the fine line between permissible and impermissible activity is crossed.

Various courts in other jurisdictions have held that political subdivisions may not expend public funds for the purpose of influencing the result of an election question. See Mines v. DelValle, 201 Cal. 273, 257 P. 530 (1927) (bond issue); Elsenau v. Chicago, 334 Ill. 78, 165 N.E. 129 (1929) (bond issue); Porter v. Tiffany, 11 Or.App. 542, 502 P.2d 1385 (1972) (referendum on bond issue and initiative measure). Cf. Sims v. Moeur, 41 Ariz. 486, 19 P.2d 679 (1933) (use of State workmen's compensation fund to oppose initiative measure); Stanson v. Mott, 17 Cal.3d 206, 130 Cal.Rptr. 697, 551 P.2d 1 (1976) (use of State funds to promote a bond issue). We conclude that even though the expenditure of school funds in the circumstances you describe is de minimus, it is not allowed.

There are other principles of importance at stake. The State has adopted a large body of law to assure the fairness of elections and the appearances of fairness in the electoral process. See Chs. 39-62, The Code 1981. In a previous opinion issued by this office, we stated that a school district is not subject to the campaign finance disclosure requirements of Ch. 56, The Code 1981, because its board of directors, in its official capacity, has no authority to engage in activities that would bring it within the definition of a "political committee." See Hyde to Eisenhower, Op. Att'y. Gen., June 24, 1980, No. 80-6-17. The definition of "political committee" includes the expending of funds to promote or oppose a ballot issue. For a discussion of similar issues see Anderson v. City of Boston, 380 N.E.2d 628 (Mass. 1978).

The great principle of fairness and the appearance of fairness in the election process is of crucial importance. That principle is violated when a governmental unit advocates a position which certain taxpayers oppose. See Anderson v. City of Boston, 380 N.E.2d at 639. The Court's statement of its view in Anderson is applicable here: "A political subdivision is acting outside its governmental function when it seeks to expend public funds to tell the people how to vote on . . . issues which would affect provisions for raising tax revenues." Id. at n. 16 (emphasis added).

We recognize that Iowa law, by requiring a 60% vote, operates to the advantage of those who oppose school bond issues. The validity of that provision has been challenged and found to be constitutional. See Adams v. Fort Madison Community School Dist., 182 N.W.2d 132 (Iowa 1970). The fact that the burden is great in achieving a favorable vote on a bond issue does not justify government officials telling citizens how to vote in official publications or projects.

Two other interests are threatened by the conduct you describe, the First Amendment rights of students and the First Amendment rights and academic freedom of teachers. It is an assumption of democracy that all people will not agree and we assume that some children would not want to urge a "yes vote." If a school-sponsored poster contest requires an officially dictated message the First Amendment right of the children are surely infringed. See Tinker v. Des Moines Independent School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

If a school conducts a poster contest in connection with classroom work, the rights of teachers who implement it would also be infringed. We believe that the use of a classroom for a "vote yes" campaign is not allowed. We do not suggest that a poster contest on a school bond issue election would be prohibited if the children were given freedom to decide on the content of their posters for themselves. Such a project could be quite meaningful for demonstrating the relevance of the political process to the children. But preparation of a specific message is not educational; it is use of school children, the classroom, and teachers for a "political" purpose and it cannot be condoned. As the Supreme Court stated in Tinker, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506, 89 S.Ct. 733, 21 L.Ed. 2d 731.

We believe the use of the school's monthly newsletter to promote a ballot issue is subject to similar defects. In Bonner-Lyons v. School Committee of Boston, 480 F.2d 442, 444 (1st Cir. 1973), the Court enjoined the school system from using its internal distribution system for soliciting parents to oppose bussing to achieve school integration unless people with other viewpoints were given fair and reasonable opportunity to use the same channels. We think the principles expressed in that case and in Anderson, supra, are applicable here.

What we have said is in relation to the official activity of the school. This is not to say that school board members or employees of the school district are prohibited from participating, as individuals, in a campaign for a bond issue. The Iowa Supreme Court has stated:

> The members of the board of directors are not prohibited, because of their official position, from taking an active interest in the election, or from conducting a campaign in favor of the proposition. They did not, by accepting positions as members of the school board, surrender any rights which they had as citizens. Their familiarity with the wants and needs of the district justified them in making such a campaign as they thought the needs of the district demanded.

Chambers v. Board of Education, 172 Iowa 340, 345, 154 N.W. 581, 583 (1915). See also Keokuk Water Works v. City of Keokuk, 224 Iowa 718, 277 N.W. 291 (1938); Johnson v. Inc. Town of Remsen, 215 Iowa 1033, 347 N.W. 552 (1933).

We recognize that the lines we have drawn are fine ones. A conscientious school board, faced with a crumbling school building and a lack of funds for replacing them, may lose sight of these fine demarcations. Nevertheless, those who govern must continuously and faithfully engage in an intricate balancing of the interests and principles upon which a democratic society is founded.

II. REMEDIES

As we have indicated, the conduct you describe, is impermissible but it involves principles and a de minimus use of funds. Those citizens, taxpayers, students, or teachers who wish to take action against the board have several alternatives.

Exercise of the right to vote on the bond issue or in the election of school board members in the annual regular school election is the usual way for citizens to express their views. Citizens may also express their views at a school board meeting. See Ch. 28A, The Code 1981.

In addition, citizens, taxpayers, students, or teachers could bring a suit in equity. One possibility is an injunction action. The right of residents and taxpayers to seek injunctive relief against a governmental unit is undisputed. See Douglass v. Iowa City, 218 N.W.2d 908, 913 (Iowa 1974); Patton v. Independent School Dist. of Coggon, 242 Iowa 941, 48 N.W.2d 803 (1951). Equity will enjoin public officers' acts which the facts show are beyond the area of discretion. Carter v. Jernigan, 227 N.W.2d 131, 136 (Iowa 1975).

On the other hand, the party seeking an injunction has the burden to show not only a violation of his or her rights but also that he, she, or they will suffer substantial damage unless one is granted. Myers v. Caple, 258 N.W.2d 301, 305 (Iowa 1977); see also Sellers v. Iowa Power and Light Co., 372 F.Supp. 1169 (D.C. Iowa 1974).

In sum, we conclude that: (1) school sponsorship of a vote yes poster contest in the classroom or a vote yes message in the school newsletter is impermissible; (2) school officials are free to work as individuals to promote or oppose a ballot issue; and 3) persons who wish to take action against public officials may do so in the election process or by seeking relief in court.

Sincerely,

Merle Wilna Fleming

MERLE WILNA FLEMING
Assistant Attorney General

MWF:sh

MUNICIPALITIES: Conflict of Interest. Sections 362.5(9) and 400.2, The Code 1981; Acts, 67th G.A., 1978 Session, Ch. 133, § 1. A civil service commissioner who is the president and major stockholder of a corporation has a disqualifying interest under § 400.2, The Code 1981. A contract entered into in violation of that section is probably void, and at least voidable. Recovery, if such a municipal contract is held to be void against public policy, may be based on a quantum meruit or an implied contract theory. Finally, a measure voted upon by the commission is not invalid by reason of a conflict of interest in a civil service commissioner. (Walding to Zenor, Clay County Attorney, 5/18/82) #82-5-11(L)

May 18, 1982

The Honorable Michael L. Zenor
Clay County Attorney
201 East 5th Street
Spencer, Iowa 51301

Dear Mr. Zenor:

You have requested an opinion of the Attorney General regarding a possible conflict of interest posed by a member of a civil service commission. Specifically, you have asked:

> 1. May an officer, or the controlling stockholder of a corporation which buys from, sells to or in some other manner is a party, directly, with the city in a contract to furnish supplies, materials, or labor to the city, serve as a Civil Service Commissioner?
>
> 2. Does the service of a commissioner on the Commission in violation of [§ 400.2, The Code 1981] invalidate or in any other manner affect the regularity of actions taken by the Civil Service Commission during the tenure of the person holding office in violation of said conflict of interest provision?

Section 400.2, The Code 1981, provides in pertinent part:

> Civil service commissioners shall not buy from, sell to, or in any manner become parties, directly, to any contract to furnish supplies, material, or labor to the city in which they are commissioners. A violation of this conflict of interest provision is a simple misdemeanor. [Emphasis added]

The aforementioned language was added to the section by a 1978 amendment. See Acts, 67th G.A., 1978 Session, Ch. 133, § 1. The intent of that inclusion was to assure impartial decisions on the part of the civil service commissioners and to protect the public from officers who would profit personally from their place of advantage in government.

As learned in a subsequent conversation, your first inquiry was attempting to elicit a response to a question slightly different than posed in your letter. Restated, your first question concerns whether a civil service commissioner who is the president and major stockholder of a corporation has a disqualifying interest under § 400.2, The Code 1981.

The first issue you present is a matter of first impression for the Iowa courts and our office. Legal commentators, however, have addressed the issue. See 2A ANTIEU, MUNICIPAL CORPORATION LAW § 22.65 (1974); 56 Am.Jur.2d Municipal Corporations § 298, p. 343 (1971); 10 McQUILLIN, MUNICIPAL CORPORATIONS § 29.97 (1965); 63 C.J.S. Municipal Corporations § 991, pp. 557-58 (1950). The general rule, according to those authorities, is that a municipal officer who is a member, stockholder, or employee of a firm or corporation has a disqualifying interest in any contract with the officer's city. Similarly, case law supports the invalidation of a contract between a municipality and a corporation whose president and major stockholder serves as an officer for the city. See City Council of the City of San Diego v. McKinley, 80 Ca.App.3d 204, 145 Cal.Rptr. 461 (1978) (held that the execution of a contract between a city and an architectural firm whose president and stockholder was also a member of the city's park and recreation board violated the state's conflict of interest provision); Delta Elec. Const. Co. v. City of San Antonio, 437 S.W.2d 602 (Tex. Civ. App. 1969) (held that where president and one-third stockholder of an electrical contractor was member of city electrical board, contract between water works board of trustees and contractor violated conflict of interest ordinance); Wilson v. Iowa City, 165 N.W.2d 813 (Iowa 1969) (held that city council members who owned stock in corporations which owned or had leasehold interests in real estate within proposed urban renewal project area, although ownership constituted less than five percent of the outstanding stock of the corporations, possessed a disqualifying interest in the project). Each of the three cited cases involved the construction of a statute or an ordinance

prohibiting any conflict of interest, direct or indirect. The applicable statute, however, is restricted to direct interests in municipal contracts.

The question remains, therefore, whether a civil service commissioner who is the president and major stockholder of a corporation has a direct interest in a municipal contract. Some guidance can be found in § 362.5(9), The Code 1981, which exempts from that conflict of interest provision:

> A contract with a corporation in which a city officer or employee has an interest by reason of stockholdings when less than five percent of the outstanding stock of the corporation is owned or controlled directly or indirectly by the officer or employee or the spouse or immediate family of such officer or employee.

Section 362.5(9), The Code 1981. The clear implication of that section is that stockholdings exceeding and including five percent of the outstanding stock of a corporation by a city officer or employee constitutes a "direct" interest in a contract with the corporation and that the "indirect" has reference to stockholders, via an intermediary corporation or entity such as a holding company. A corporate officer and major stockholder who serves on a civil service commission, therefore, has a personal pecuniary interest in municipal contracts constituting a direct conflict of interest. Accordingly, it is our opinion that a civil service commissioner who is the president and major stockholder of a corporation has a disqualifying interest under § 400.2, The Code 1981.

It should be noted that a contract entered into in violation of that section is probably void, and at least voidable. See 2A ANTIEU, MUNICIPAL CORPORATION LAW § 22.65 (1974); 56 Am.Jur.2d Municipal Corporations § 298, p. 343 (1971); 10 McQUILLIN, MUNICIPAL CORPORATIONS § 29.97 (1965); 63 C.J.S. Municipal Corporations § 988, pp. 551-52 (1950). Recovery, if such a municipal contract is held to be void against public policy, may be based on a quantum meruit or an implied contract theory. See 10 McQUILLIN, MUNICIPAL CORPORATIONS § 29.97 (1965). Contra 63 C.J.S. Municipal Corporations § 988, pp. 551-52 (1950).

As concerns the second issue, a measure voted upon by the commission is not invalid by reason of a conflict of interest in a civil service commissioner. A commissioner's disqualifying interest in a municipal contract would only invalidate the council's measure approving the contract.

In summary, a civil service commissioner who is the president and major stockholder of a corporation has a disqualifying interest under § 400.2, The Code 1981. A contract entered into in violation of that section is probably void, and at least voidable. Recovery, if such a municipal contract is

held to be void against public policy, may be based on a quantum meruit or an implied contract theory. Finally, a measure voted upon by the commission is not invalid by reason of a conflict of interest in a civil service commissioner.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW/maw

AGRICULTURE; BRANDING: §§ 187.1, 187.3, and 187.7, The Code 1981. Cryo-brands or hot brands consisting of Arabic numerals only may be used either alone or in conjunction with recorded hot brands for within-herd identification purposes. In either instance, the Arabic numeral hot or cryo-brands do not have to be recorded. (Willits to Lounsberry, Secretary of Agriculture, 5/18/82) #82-5-10(L)

May 18, 1982

The Honorable R. H. Lounsberry
Secretary of Agriculture
Wallace Building
L O C A L

Dear Secretary Lounsberry:

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

> Is it legal to use cryo-brands in Iowa for in-herd identification without recording them with the Iowa Department of Agriculture?

It is our opinion that the answer to your question is, "Yes."

In your request, you note that cryo-brands, also known as freeze brands, are commonly used by Iowa cattlemen for in-herd identification purposes, either in conjunction with a recorded brand or without any other brand. You further note that a June 13, 1969, letter from Assistant Attorney General Roger Ivie to Dr. E. A. Butler, then Chief of the Division of Animal Industry, Iowa Department of Agriculture. That letter states that cryo-branding may be done only for internal herd identification and then only in conjunction with recorded brands. We believe this statement is erroneous and specifically overrule it in this opinion, as set out in footnote 1.

The pertinent provisions of The Code 1981 are:

> 187.1(3). "Brand" means an identification mark that is burned into the hide of a live animal by a hot iron or another method approved by the secretary.
>
> 187.1(4). "Cryo-branding" means a brand produced by application of extreme cold temperature.
>
> 187.3. Must be recorded. No evidence of ownership by brand shall be permitted in any court in this state unless the brand shall be recorded as provided in sections 187.4 and 187.6 or 187.9. In no case shall cryo-brands be accepted as evidence of ownership.
>
> 187.7. Unlawful use of brand. It shall be unlawful to use any brand for branding any horses, cattle, sheep, mules, or asses unless the brand has been recorded as provided by this chapter. Hot brands and cryo-brands, consisting of Arabic numerals only, may be used in conjunction with recorded brands for within the herd identification and as such shall not be recorded; and when so used shall not be evidence of ownership. Anyone convicted of violating this section shall be guilty of a simple misdemeanor.

These provisions of Ch. 187, The Code 1981, dealing with cryo-brands were adopted by the General Assembly in 1967 (§§ 1, 2, and 3, Ch. 176, Acts of the 62nd G.A.)

The key provision in answering your question is § 187.7, The Code 1981, set forth above. Prior to the 1967 amendments, the section read:

> It shall be unlawful to use any brand for branding any horses, cattle, sheep, mules, or asses unless the brand has been recorded as provided by this chapter. § 187.7, Code 1966.

The second sentence of the current section was added by the 1967 legislation. The explanation to the 1967 legislation, H. F. 356, says:

> It (the bill) permits cryo-branding for within-herd identification and limits within-herd branding to numerals.

This legislative history is helpful in interpreting § 187.7, The Code 1981. As can be seen from the 1966 version of § 187.7, the use of any brand was illegal unless recorded. As the explanation to H. F. 356 makes clear, one of the purposes of the bill was to allow cryo-branding for within-herd identification and limit its use to Arabic numerals. The bill also allowed hot brand Arabic numerals for within-herd identification. Further, the bill provides that these within-herd Arabic numerals are not evidence of ownership, for the obvious reason that many animals in the state could have the same Arabic numerals. By contrast, every recorded hot brand is unique, and, thus, evidence of ownership.[1]

Cryo-brands may be used for in-herd identification without recording them with the Iowa Department of Agriculture. This opinion is based both upon the clear language of the statute and practical considerations of cryo-branding with Arabic numerals.

The language of § 187.7, The Code 1981, distinguishes hot brands and cryo-brands consisting of Arabic numerals from recorded brands. Section 187.7 explicitly provides that these Arabic numeral brands are not recorded: "Hot brands and cryo-brands, consisting of Arabic numerals only, may be used in conjunction with recorded brands for within the herd identification and as such shall not be recorded; . . .". (emphasis added).

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[1] It should be noted that § 187.7 allows in-herd brands consisting of Arabic numerals to be used in conjunction with recorded brands for within-herd identification. This permissive statutory provision in no way prohibits or limits the use of Arabic numerals alone for within-herd identification. There is no requirement that they be used only in conjunction with recorded brands.

This statutory provision is based on good common sense. Many animals could have the same Arabic numerals. There is nothing unique about them. They provide no evidence of ownership and, thus, recording them is pointless.

In conclusion, it is our opinion that cryo-brands or hot brands consisting of Arabic numerals may be used either alone or in conjunction with recorded hot brands for within-herd identification purposes. In either instance, the Arabic numeral hot or cryo-brands do not have to be recorded.

Sincerely,

Earl M. Willits

EARL M. WILLITS
First Assistant Attorney General

EMW:sh

COUNTIES; COUNTY JAILS; COST OF HOUSING PRISONERS; Ch. 356, The Code 1981; § 356.15, Ch. 356A, The Code 1981. A county is never liable for the costs of housing a prisoner who was committed for a violation of a city ordinance, regardless of whether the city in question is located within or outside the county where the prisoner is jailed. Second, a county is not liable for the cost of housing prisoners who are merely residents of that county but were charged, and convicted, in another county. Third, in the event a county cannot or will not continue to operate a jail facility for county prisoners, that county is liable for the expenses of prisoners charged and convicted within that county but housed in another county's jail facility. (Weeg to Casper, Madison County Attorney, 5/14/82) #82-5-9(L)

May 14, 1982

John E. Casper
Madison County Attorney
223 East Court Avenue
Winterset, Iowa 50273

Dear Mr. Casper:

You have requested an opinion of the Attorney General concerning a county's liability for the costs of housing prisoners from other counties or from municipalities outside the county. In particular, you pose the following questions:

1. Is Madison County liable for the costs of housing prisoners who have been committed for violation of city ordinances when the cities in question are located outside of Madison County?

2. Is Madison County liable for the costs of housing prisoners from other counties?

3. In the event Madison County cannot or does not continue to operate a county jail facility, is Madison County liable for the costs incurred by another county in housing Madison County prisoners?

We shall address each question in turn.

Chapter 356, The Code 1981, governs the operation of county jails. In particular, § 356.15 provides:

> All charges and expenses for the safe-keeping and maintenance of prisoners shall be allowed by the board of supervisors, except those committed or detained by the authority of the courts of the United States, in which cases the United States must pay such expenses to the county, and those committed for violation of a city ordinance, in which case the city shall pay expenses to the county.

First, it is our opinion that pursuant to § 356.15 Madison County is not liable for the costs of housing prisoners committed for violating the ordinances of any city, regardless of whether a particular city is within or outside the county. The "city ordinance" exception of § 356.15 does not distinguish between violations of city ordinances in cities within as opposed to outside the county. Consequently, the term "city" should be read broadly. Under that reading, cities are liable for the housing costs of all prisoners committed for violations of their ordinances, regardless of what county those prisoners are jailed in.

Second, we believe the statutory scheme of Ch. 356 is designed to ensure that the county in which a prisoner is charged and convicted is the county which is subsequently liable for the costs of housing that prisoner, regardless of whether the prisoner is a resident of that county. In particular, the mandatory language of § 356.15 imposes liability for prisoner housing costs on the county, with only two exceptions. Under the rules of statutory construction, the express mention of one thing in a statute implies the exclusion of other things. In re Wilson's Estate, 202 N.W.2d 41 (Iowa 1972); Maytag Co. v. Alward, 253 Iowa 455, 112 N.W.2d 654 (1962). Consequently, because § 356.15 expressly excludes county liability for only 1) the costs of prisoners committed or detained by the federal government and 2) costs of prisoners committed for violations of city ordinances, no additional exclusions, such as one for the costs of prisoners charged and convicted committed by Madison County but residing in an adjacent county, may be implied.

Third, it is our opinion that in the event a county responsible for housing a prisoner cannot or will not provide a jail facility, and subsequently transfers that prisoner to a county jail in another county, the original county maintains

responsibility for the costs of housing that prisoner. [1] We believe this result complies with the provisions of Ch. 356, in particular with § 356.15, as discussed above. Further, we believe this result is most equitable and ensures that counties do not escape liability for the costs of housing their prisoners by transferring those prisoners, and their accompanying expenses, to an adjacent county.

To clarify, we emphasize that the county's liability for prisoner housing costs extends to all prisoners charged and convicted in the county for violations of state law, regardless of whether those prisoners were originally arrested by city or county officers. On the other hand, prisoners charged with violations of municipal law are the responsibility of the cities.

Our conclusion is supported by past opinions which, while not directly on point, construed §§ 356.5(2) and 356.15 as requiring the county to pay the medical costs incurred by a prisoner being held at the county jail even if the prisoner is a parolee, 1968 Op. Att'y Gen. 545, or if the prisoner is being held for extradition to another state, 1975 Op. Att'y Gen. 184. This conclusion is further supported by the provisions of Ch. 356A, which allow the board of supervisors to establish county detention facilities in lieu of or in addition to the county jail. This chapter similarly imposes county liability for prisoner costs. In particular, § 356A.3 provides:

> . . . The county or city to which the cause originally belonged shall be liable for the expense of the original detention, commitment, or transfer and the subsequent expenses of maintaining such person in the facility . . . .

Further, § 356A.7 authorizes a county to contract with another county or city to house prisoners, and states:

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[1] This result applies as well to situations in which a prisoner is charged in one county but convicted in another county following a change of venue. In these cases, because the convicting county has no substantial connection with the prisoner, the county which originally charged, but did not convict, the prisoner remains liable for housing costs.

> The cost of detention and confinement shall be levied and paid by the city or from the court expense fund of the county to which the cause originally belonged . . .

In conclusion, it is our opinion that a county is never liable for the costs of housing a prisoner who was committed for a violation of a city ordinance, regardless of whether the city in question is located within or outside the county where the prisoner is jailed. Second, a county is not liable for the cost of housing prisoners who are merely residents of that county but were charged, and convicted, in another county. Third, in the event a county cannot or will not continue to operate a jail facility for county prisoners, that county is liable for the expenses of prisoners charged and convicted within that county but housed in another county's jail facility.

Sincerely,

Theresa O'Connell Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:sh

COUNTIES; AMBULANCE SERVICE BUDGET: Sections 331.422(25) and 331.423. A county may not supplement the ambulance service budget with monies transferred from the general fund once either the maximum ambulance service tax is levied or the budget reaches the ceiling imposed by § 331.422(25). However, the budget may be supplemented in the event a proposition to increase the ambulance service tax levy is approved by the voters pursuant to § 331.423. (Weeg to Casper, Madison County Attorney, 5/14/82) #82-5-8(L)

May 14, 1982

John E. Casper
Madison County Attorney
223 East Court Avenue
Winterset, Iowa 50273

Dear Mr. Casper:

You have requested an opinion of the Attorney General concerning whether the county may supplement the ambulance service budget with monies transferred from the general fund once the maximum ambulance service tax is levied. In a word, our answer is "no." Our reasons are as follows.

Section 331.422, Supplement to The Code, 1981, provides for numerous permissive tax levies by the board of supervisors. In particular, § 331.422(25) provides that the supervisors may levy a tax:

> a. For ambulance service, not to exceed twenty-seven cents per thousand dollars, if the county general fund levy authorized by section 331.421, subsection 16, is at the maximum amount permitted by that subsection, the board has exhausted its right of appeal under section 24.48, and the board finds by resolution that it is not feasible to support ambulance service from the general fund. However:
> (1) If the board has budgeted an amount from the general fund to support ambulance service which is less than the amount that would be raised in the county by a levy of twenty-seven cents per

> thousand dollars of assessed value, and the board finds by resolution that it is not feasible to provide additional support for ambulance service from the general fund, the board may levy under this subsection an amount not more than the difference between the proceeds of a levy of twenty-seven cents per thousand dollars of assessed value in the county and the amount budgeted from the general fund to support ambulance service.
>
> (2) If the county has established a county general hospital under chapter 347 and the board of trustess of that hospital has budgeted for support of ambulance service some part of the proceeds of a levy for operation and maintenance of the hospital, made under section 347.7, and the board of trustees finds by resolution that it is not feasible to provide additional support for ambulance service from the proceeds of that levy, the board of supervisors may levy under this subsection an amount not more than the difference between the proceeds of a levy of twenty-seven cents per thousand dollars of assessed value in the county and the amount budgeted to support ambulance service from the county general hospital operation and maintenance levy. A tax levied under this subparagraph is not applicable to a township in which ambulance service is being provided by the township trustees pursuant to section 359.42.
>
> b. The board shall not make a levy under this subsection unless authorized to do so by a referendum held in the county concurrently with a general election . . . . (emphasis added.)

It is our opinion that the detailed provisions of § 331.422(25) foreclose the possibility of using monies in the general fund to supplement the revenues collected by the full ambulance service levy. First, § 331.422(25)(a) provides that this tax may not be levied unless all the express statutory requirements are met. Further, § 331.422(25)(a)(1) provides that if the county budgets money from the general

fund for ambulance service, the amount of the ambulance service tax cannot exceed the difference between the maximum allowable ambulance service tax, i.e., "twenty-seven cents per thousand dollars," and the amount budgeted for ambulance service from the general fund. A similar rule applies if the ambulance service budget is supplemented by monies from the county hospital fund. See § 331.422(25)(a)(2).

These specific provisions effectively impose a ceiling on the ambulance service budget: it cannot exceed the "twenty-seven cents per thousand dollars" amount, regardless of whether those monies are collected solely from the permissive levy or supplemented by appropriations from the county general fund or county general hospital fund. Therefore, a transfer of money from the county general fund to the ambulance service budget after the maximum allowable ambulance service tax is levied is prohibited.[1]

This result may appear harsh. However, in the event the cost of operation of a county ambulance service exceeds the budget ceiling of § 331.422(25), we note that the provisions of § 331.423 provide an alternative, albeit the sole one, for supplementing the ambulance service budget. That section states:

> A county may exceed a tax levy limit contained in section 331.421, subsection 13, or section 331.422, subsection 23, 24, or 25, if the proposition to authorize an enumerated levy limit rate to be exceeded has been submitted at a special levy election and received a majority of the votes cast on the proposition. A special levy election is subject to the following: . . . (emphasis added.)

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[1] We note that because of the specific provisions of § 331.422 (25), the general authorization for the transfer of monies from one county fund to another, found in §§ 24.22 and 344.9, The Code 1981, are not applicable in these circumstances.

In conclusion, a county may not supplement the ambulance service budget with monies transferred from the general fund once either the maximum ambulance service tax is levied or the budget reaches the ceiling imposed by § 331.422(25). However, the budget may be supplemented in the event a proposition to increase the ambulance service tax levy is approved by the voters pursuant to § 331.423.

Sincerely,

Theresa O'Connell Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:sh

COUNTIES; BENEFITED STREET LIGHTING DISTRICTS: Ch. 357C. An individual property owner may not withdraw his or her property from a benefited street lighting district once that district has been established pursuant to Ch. 357C. The only way that property may be withdrawn is if the entire district is dissolved pursuant to § 357C.11. (Weeg to Criswell, Warren County Attorney, 5/14/82) #82-5-7(L)

May 14, 1982

John W. Criswell
Warren County Attorney
208 West Ashland
Indianola, Iowa 50125

Dear Mr. Criswell:

You have requested an opinion of the Attorney General concerning whether a person owning property within a benefited street lighting district can withdraw that property from the district, and if so, what procedures should be followed in withdrawing the property. It is our opinion that the only way property may be withdrawn from a benefited street lighting district is if the board of supervisors dissolves the entire district pursuant to statutory requirements. Our reasons are as follows.

Chapter 357C governs the establishment and operation of benefited street lighting districts. In particular, § 357C.1 provides that on the petition of a designated number of resident property owners, the board of supervisors must hold a public hearing on the petition. After the hearing, the supervisors may establish a benefited street lighting district or disallow the petition. See § 357C.4.

As you note in your opinion request, once a district is established pursuant to statutory requirements, § 357C.12 expressly provides for the addition of "immediately contiguous" property to the district upon the supervisors' approval of a petition submitted by the property owner.

However, there are no express provisions that authorize or establish procedures for the withdrawal of a single owner's property from the district. Instead, § 357C.11 provides for the complete dissolution of a benefited street lighting district upon petition of thirty-five percent of the resident eligible electors and the supervisors' subsequent approval of that petition.

It is our opinion that the legislature acted deliberately when it failed to provide for the withdrawal of a single owner's property from a benefited street lighting district. This conclusion is supported by two factors.

First, we compare the provisions of Ch. 357C with Chs. 357, 357A, 357B, and 358. Chapters 357 (benefited water districts) and 358 (sanitary districts) do not provide for dissolution of the district in any case, and Ch. 357B (benefited fire districts) provides for dissolution of the entire district in a manner similar to that of § 357C.11. See § 357B.5. Only Ch. 357A (rural water districts) contains a provision allowing an individual property owner to withdraw from the district while the rest of the district remains intact, but that provision applies only if the property to be withdrawn "cannot economically or adequately be served by the facilities of the district." See § 357A.16. Thus, we conclude that had the legislature intended to allow an individual property owner to withdraw his or her property from a benefited street lighting district, it would have expressly included a provision similar to § 357A.16 in Ch. 357C. It did not, and we find no authority to imply such a provision.

Second, practical considerations support our conclusion that an individual cannot withdraw his or her property from a legally-established benefited street lighting district. Common sense dictates that the most efficient and economical street lighting district would be designed to place street lights at regular intervals along the streets of a designated area. In that way, the beneficial effects of the district would be uniform as well as maximized. In the event a particular resident were permitted to withdraw from the district once the street lights were in place, that resident would continue to receive the benefits of a well-lit neighborhood without paying any of the costs incurred by others.

Further, §§ 357C.5, 357C.7, and 357C.10 suggest further considerations militating against permitting individuals to withdraw property from a street lighting district. These sections effectively establish that financing for the district

relies in large part on the assessed value of each lot and parcel of land within the district. Preliminary plats are prepared (§ 357C.5), taxes are levied (§ 357C.7), and bonds are issued (§ 357C.10) on the basis of those assessed values. If individuals were allowed to withdraw property from the district once it is established, the reduced amount of taxes collected could result in the district's inability to meet its financial obligations, and the reduced amount of property within the district could threaten the security of the bonds issued to finance the district.

Consequently, by failing to provide a means for a single resident to withdraw property from the district. Ch. 357C reflects a legislative judgment that in order to effectively implement a street lighting district, it is desirable to maintain the integrity of the district by imposing that district over all residents of an entire geographical area. See § 357C.2 (" . . . such district shall contain only such area wherein the benefits derived shall be ratably spread between those . . . to be served.") Compare § 357B.5 (benefited fire districts). The legislature concluded that similar reasons do not exist for maintaining the integrity of a rural water district and specifically provided procedures for an individual to withdraw from the district. See § 357A.16. This difference is at least partially explained by the fact that a rural water district is spread over a wide as opposed to a compact area, as with a street lighting district, and is therefore less critically affected by the withdrawal of a single member of the district.

Finally, we note that in order to make the process a fair one, Ch. 357C provides that a street lighting district cannot be established until a designated number of residents petition for the district, a public hearing is held, and the supervisors approve the petition. See §§ 357C.1; 357C.3; 357C.4. Once the district is approved, because all residents of the area benefit from the district, all residents pay for the district, regardless of whether a particular resident wished to belong to the district. Just as establishment of the district is subject to the political process, so too a citizen who does not wish to continue to participate in the district may resort to the political process to seek to dissolve the entire district. See § 357C.11.

In conclusion, it is our opinion that an individual property owner may not withdraw his or her property from a benefited street lighting district once that district has been established pursuant to the requirements of Ch. 357C. The only way that property may be withdrawn is if the entire district is dissolved pursuant to the procedures set forth in § 357C.11. In light of this conclusion, we do not need to reach the question of what procedures are to be followed in withdrawing individual property from a district.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:sh

STATE OFFICERS AND DEPARTMENTS: Public Employee Blanket Bonds. Sections 64.2, 341.4, 29A.37, 107.7, The Code 1981; 1956 Op. Atty. Gen. 51; 1964 Op. Atty. Gen. 102; 1968 Op. Atty. Gen. 408, 944. In those situations wherein the Code of Iowa provides that a certain public official must give a bond for a certain amount of coverage, such officials must give an individual bond. (Swanson to Hoeman, Risk Manager, Department of General Services, 5/14/82) #82-5-6(L)

May 14, 1982

Mr. Craig Hoeman
Risk Manager
Department of General Services
State Capitol Complex
Des Moines, IA 50319

Dear Mr. Hoeman:

Reference is made to your request for an opinion of the Attorney General concerning the following question which you propounded:

"A question has arisen concerning Fidelity Bond coverage for State Employees. When the Code of Iowa says that a certain public official must give a bond for a certain amount of coverage, does this mean that they must give an individual bond? Or, can they all be written together on a faithful performance blanket position bond, for a certain amount of coverage on each position, and thus satisfactorily fulfill this fidelity bonding requirement?"

Your question specifically relates to the approximately ninety individuals listed in Section 64.6, Code 1981, and in a few other provisions of the Code where individual bond requirements are set out.

Individual bonds now in effect for the individuals noted above are written for a specified officer, for a definite term of office, and for a specified amount as required by Section 64.6, Code 1981. Individual bonds allow private citizens to sue against the bonds.

Group bonds are similar to individual bonds in that they are for a statutorily specified amount, and private citizens may sue on them. Known also as "name schedule" bonds, the only real difference between them and individual bonds is that "group" bonds list more than one officer by name, and are not cumulative. See Op. Atty. Gen., February 26, 1979.

Blanket bonds do not list individuals by name except as to exclusions. Under such present bond covering state employees generally, "no suit, action or proceeding of any kind to recover on account of loss under [the bond] bond may be brought by anyone other than the [State of Iowa]". The present blanket bond is not mandated by any general provision of the Code, but has been obtained by the state for its approximately 18,000 employees, other than the officers listed specifically in Section 64.6, Code 1981.

Section 64.18, Code 1981, provides as follows:

> "Beneficiary of bond. [Referring to the bonds required by Sections 64.2 and 64.6, Code 1981]. All bonds of public officers shall run to the corporation, public or private, or person injured or sustaining loss, with a right of action in the name of the state for its or his use."

This provision of the Code requires a right of cause of action by private citizens on the bond. Inasmuch as the proposed faithful performance blanket position bond does not provide for such a cause of action, it would not meet this requirement, and, therefore, would not be available in the situation you describe.

In addition, a question similar to the one you now ask was previously presented to the attorney general and an opinion rendered. 1956 Op. Att'y. Gen. 51. In that prior opinion, the attorney general stated:

> "It has been the consistent opinion of this department that, unless otherwise expressly authorized, public officials are required to furnish individual bonds. This requirement is evident as to deputy county officers in the introductory words of Section 341.4 Code 1954 [now Section 341.4, Code 1981], which are as follows:
>
> > 'Each deputy shall be required to give a bond in an amount to be fixed by the officer having the approval of the bond of his principal, ...' (Emphasis supplied).

"As to the other county officer (and state officers), the matter is controlled by the provisions of Section 64.2, Code 1954 [now Section 64.2, Code 1981], wherein the introductory words appear as follows:

> 'All other public officers, except as otherwise specially provided, shall give bond with the conditions, in substance, as follows: . . . .' (Emphasis supplied).

"We have repeatedly held that the use of the word "all" in this section has the connotation similar to the word 'each' in Section 341.4, Code 1954.

"There are some cases where the legislature has expressly provided for a blanket bond; such an instance is that as set forth regarding responsible and accountable officers of the Iowa National Guard under the provisions of Section 29.37, Code 1954 [now Section 29A.37, Code 1981]. It is there provided that each such officer shall execute and deliver a bond. The section sets forth an express exception as follows:

> 'Provided, however, that the adjutant general, with the approval of the governor, may obtain an adequate indemnity bond covering all or part of the officers so accountable or responsible, in which case the officers so covered shall not be required to furnish individual bonds as hereinbefore provided.' [Emphasis supplied].

"[Similarly, Section 107.7, Code 1981, states:

> "the conservation commission may obtain an adequate public employees honesty blanket position bond covering all or part of the officers or employees accountable for property or funds of the state of Iowa in which case the officers or employees so covered shall not be required to furnish individual bonds . . . ." [Emphasis supplied].

> "In the instant case, had the legislature intended to provide for a blanket bond we must assume that a similar clear statement of authority would have been made by them in [Chapter 64, Code 1981]."

In subsequent opinions, the attorney general reaffirmed the 1956 opinion. See 1964 Op. Atty. Gen. 102; 1968 Op. Atty. Gen. 408, 944.

These prior opinions of the attorney general appear to be both legally correct and soundly reasoned. We see no reason to reach a different conclusion now.

Accordingly, it is our opinion that the state officers to which you refer must continue to furnish individual bonds. While it may well be that the use of state public employee blanket bonds is desirable and would result in certain economies to the state, any determination to authorize such blanket bonds would have to be made by the general assembly. 1968 Op. Atty. Gen. 944.

Yours very truly,

Gary H. Swanson

GARY H. SWANSON
Assistant Attorney General

GHS/mel

CRIMINAL PROCEDURE: CLERK OF COURT: GRAND JURY FEES AND EXPENSES AS COURT COSTS: Chapter 625, The Code 1981; Sections 331.422(24), 331.424(1), 331.424(2)(9), 331.426(9), 331.705(1), 331.705(2), 331.778(3), Supplement to the Code 1981. (1) There is no statutory authority to tax fees and expenses incident to grand jury proceedings as court costs against a criminal defendant. (2) A $25 fee filing and docketing fee is not chargable for the filing and docketing of an indictment or trial information. (3) Court costs recovered from a criminal defendant are properly paid into general county funds and not into the county court expense fund. Fees and expenses incident to grand jury proceedings are properly paid out of the county court expense fund where one exists. (4) Court costs may not be apportioned among several defendants. (5) Payment of court costs may be made a condition of probation. (6) The taxation of court costs against a criminal defendant creates a civil liability which is properly recovered through a civil judgment against the defendant. (Hansen to Tullar, Sac County Attorney, 5/10/82) #82-5-5(L)

Mr. Lon R. Tullar
Sac County Attorney
110 East State
P.O. Box 92
Sac City, Iowa 50583

May 10, 1982

Re: Taxation of costs incident to grand jury proceedings

Dear Sir:

You have requested an opinion concerning the taxation of fees and expenses incident to grand jury proceedings. You pose several questions which we have restated as follows:

1. May the fees and expenses incident to grand jury proceedings be taxed as costs against a criminal defendant?

2. Out of which county fund are these fees and expenses initially to be paid and if they are recoverable as costs, into which county fund are they to be paid?

3. After a grand jury indictment is returned, what fees may be taxed as costs under Section 331.705(1), Supplement to the Code 1981? For example, is there a $25 fee chargable at the time of the filing of the indictment or trial information?

4. When an indictment is returned against several defendants, may the costs be apportioned among the defendants?

5. If the payment of costs is a condition of a defendant's probation, what is the county's remedy when the defendant does not pay the costs during the probationary period?

I.

The taxation of court costs was unknown at common law and court costs cannot be taxed against a criminal defendant without specific statutory authority. Cedar Rapids v. Linn County, 267 N.W.2d 673, 673 (Iowa 1978). To answer your questions, it is therefore necessary to determine if there is statutory authority for the taxation of grand jury costs against a criminal defendant in the event of a successful prosecution. It is our opinion that no such authority exists and that grand jury costs may not be taxed against criminal defendants.

Statutory authority for the taxation of costs is found in Chapter 625, The Code 1981 and in Section 331.705(1)(aa), Supplement to the Code 1981.[1] Chapter 625, The Code 1981 deals with general taxation of costs. Section 331.705(1)(aa) authorizes the clerk of the district court to tax fees against criminal defendants for specific services provided by the clerk's office and for specific types of proceedings.[2]

Section 625.1, The Code 1981 states "Costs shall be recovered by the successful against the losing party." It has been a part of the Code of Iowa since 1851. In the two cases in which the Iowa Supreme Court has squarely considered the issue, the Court has held that Section 625.1 has no application to criminal cases. In State v. Belle, 92 Iowa 258, 260, 60 N.W. 525, 526 (1894), the Iowa Supreme Court held that the statute which is now Section 625.1, The Code 1981 was inapplicable to criminal cases. The Court reaffirmed this holding in Cedar Rapids v. Linn County, 267 N.W.2d 673, 674-75 (Iowa 1978), in

[1]This discussion excludes the taxation of attorney's fees in criminal cases which is authorized in Section 331.778(3), Supplement to the Code 1981 [formerly § 336B.6, The Code 1981].

[2]Section 815.1, The Code 1981 makes costs payable to the county by the State in parole revocation proceedings or prosecutions of inmates of any state institution when the prosecution fails or when costs and fees cannot be paid by the person liable to pay them.

holding that Section 625.1 and other sections of Chapter 625 are inapplicable to criminal cases. The Court distinguished cases[3] since Belle in which dicta suggested that Chapter 625 was applicable to both civil and criminal cases.[4] Therefore, § 625.1 provides no authority to tax grand jury expenses and fees as costs.

Section 331.705(1), Supplement to the Code 1981 sets out the fees which the clerk of the district court may charge for services provided by the clerk's office. Section 331.705(1)(aa) provides the clerk shall collect "the same fees for the same services as in civil cases. When judgment is rendered against the defendant, the fees shall be collected from the defendant." There is no authority under Section 331.705(1)(aa) to tax fees against an acquitted defendant.

Section 331.705(1) provides no authority to tax grand jury fees and expenses against any defendant. Grand jury fees and expenses are not included among the specific fees set out in §§ 331.705(1)(b)-(ee). Section 331.705(1)(af) which allows the clerk to collect "[o]ther fees provided by law" does not authorize the taxation of grand jury fees and expenses since there is no authority which would allow such taxation. Section 331.705(1) does not therefore authorize the taxation of the fees and expenses incident to grand jury proceedings.

Section 331.705(1) authorizes the taxation of fees for specific services performed by the clerk of the district court. For example, under § 331.705(1)(i) the clerk shall charge and collect $1.50 for entering a final judgment or decree. Section 331.705(1) also authorizes the clerk to collect specific fees for specific types of proceedings. For example § 331.704(1)(c) authorizes the clerk to charge and collect $5 for a cause tried by jury. These fees are to be collected from the defendant in a successful prosecution, § 331.705(1)(aa).

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[3]Haynes & Schuyler v. Clinton County, 118 Iowa 569, 92 N.W. 860 (1902); Ottumwa v. Taylor, 251 Iowa 618, 102 N.W.2d 376 (1960).

[4]The holding of Cedar Rapids v. Linn County, invalidates three opinions of the Attorney General which hold Chapter 625 to be applicable to criminal cases insofar as these opinions rely upon Chapter 625 itself, See 1976 Op. Atty. Gen. 881 (costs in a criminal proceeding where defendant has received a deferred judgment); 1962 Op. Atty. Gen. 191 (prosecution witness' fees as costs taxed to defendant); 1962 Op. Atty. Gen. 186 (blood tests in OMVUI).

You ask if a $25 fee is chargable at the time of the filing of an indictment or a trial information under Section 331.705(1)(a), Supplement to the Code 1981. It is our opinion that there is no authority under Section 331.705 for charging such a fee, Op. Att'y Gen., #81-10-15.

II.

It is our opinion that when § 331.705(1) fees are collected from the defendant, they should be paid into the general fund of the county rather than into the county court expense fund (if any). Section 331.705(2), Supplement to the Code 1981 directs that fees collected by the clerk under Section 331.705(1) be paid into the "county treasury for the use of the county." Section 331.424(1) Supplement to the Code 1981 requires that moneys received for county government purposes from taxes and other sources shall be credited to the county general fund unless otherwise required by state law. We have found no express requirement that fees collected from a convicted defendant be credited to any other county fund. If the legislature had intended these fees to be paid into the county court expense fund, it could have said so, see State v. Wilson, 287 N.W.2d 587, 589 (Iowa 1980) (Legislature is its own lexicographer).

This conclusion is consistent with the nature of the county court fund. Section 331.426(9) Supplement to the Code 1981, authorizes a county to establish a court expense fund. The court expense fund is a permissive fund and is not contemplated as a required feature of the county budget. It is funded through a specific, additional tax levy only when "the amount levied for ordinary county revenue is insufficient to pay all expenses incident to the maintenance and operation of the courts," Section 331.422(24) Supplement to the Code 1981. It is not intended for use for general county purposes, Section 331.426(9); 1948 Op. Att'y Gen. 224. When there is a court fund, court costs are paid from the general fund only "if the prosecution fails or if the costs cannot be collected from the person liable, in lieu of payment from the court fund," Section 331.424(3)(q), Supplement to the Code 1981. It is consistent with this statutory scheme for fees collected by the clerk of the district court to be paid into the county treasury as ordinary county revenue.

III.

The expenses and fees incident to grand jury proceedings are properly payable out of the court expense fund when a court expense fund exists. Section 331.426(9) authorizes the establishment of the court expense fund to pay "expenses incident to the maintenance and operation of the courts." The grand jury is a preliminary tribunal, which exercises judicial functions under the distinct court, Cosson v. Bradshaw, 160 Iowa 296,

304-05, 141 N.W. 1062, 1065 (1913). It is therefore part of the court system so that its expenses would be "expenses incident to the maintenance and operation of the courts." Section 815.2, The Code 1981 authorizes the payment of compensation for grand jury clerks and other officers. Section 607.5, The Code 1981 authorizes the payment of fees to grand jurors for each day's service or attendance. These costs and other expenses incident to grand jury proceedings are properly paid from the court expense fund. If the county has no court fund, these expenses are properly paid from general county funds.

IV.

It is our opinion that costs taxed against criminal defendants may not be apportioned among several defendants. In State v. Hunter, 33 Iowa 361, 363-64 (1871), the Iowa Supreme Court held that although defendants may be indicted together, separate judgments are entered against each so that each is taxed separately for the separate fees incident to each judgment. Separate judgment fees were to be taxed in Hunter against each defendant. However, only one fee was allowed for a joint indictment. There is no statutory authority for the apportionment of costs among defendants as Section 625.4, The Code 1981, authorizing the apportionment of costs, does not apply to criminal cases, Cedar Rapids v. Linn County, 267 N.W.2d 673, 674 (Iowa 1978).

V.

Generally the costs taxed against a criminal defendant following a successful prosecution are not a part of the penalty, but rather create a civil liability, Van Buren County v. Bradford, 202 Iowa 440, 441, 210 N.W. 443, 444 (1926). Payment of costs could be made a condition of probation if the sentencing judge felt it was a reasonable rule or condition which would "promote rehabilitation of the defendant and protection of the community," Section 907.6, The Code 1981; See State v. Rogers, 251 N.W.2d 239 (Iowa 1977).

If the payment of costs is made a condition of probation, the following safeguards governing revocation should be included in the probation conditions:

(1) The Court does not order payment of the costs unless the defendant is or will be able to pay it without undue hardship to himself or his dependents, considering his financial resources and the nature of the burden payment will impose.

(2) Probation will be revoked for nonpayment of costs ony if the defendant willfully fails to make payment, having financial ability to do so.

(3) The defendant may petition the sentencing court to adjust the amount of any installment payments, or the total amount due, to fit a changing financial situation. State v. Rogers, 251 N.W.2d 239, 245 (Iowa 1977); see Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974).

If the defendant does not pay the costs during the probationary period, one remedy other than revocation is extension of probation under Section 908.11, The Code 1981, for violation of the conditions of the probation. If the conditions are not met at the end of the maximum probationary period allowed under Section 907.7, The Code 1981, the defendant must be released from probation. The remedy in that situation would be the recovery of a civil judgment for costs against the defendant.

Sincerely,

Lona Hansen

LONA HANSEN
Assistant Attorney General

LH:mlr

TOWNSHIPS: Township Trustees: Gifts: §§ 359.1, 359.17, 359.29, 360.9, The Code 1981. Township Trustees are not authorized to transfer by gift township property to a private, non-profit corporation. Procedures for disposing of township property no longer needed for township purposes is contained in § 360.9, The Code 1981. (Fleming to Swaim, Davis County Attorney, 5/10/82) #82-5-4(L)

Mr. R. Kurt Swaim
Davis County Attorney
104 E. Franklin Street
P.O. Box 190
Bloomfield, Iowa 52537

May 10, 1982

Dear Mr. Swaim:

You have asked for our opinion on the following issues:

1. If township trustees accept a gift of a former schoolhouse site, do the township trustees have power to convey that property by gift to a private non-profit corporation?

2. If the trustees cannot convey the former schoolhouse site by gift to a private, non-profit corporation, what are the proper procedures for the township trustees to follow in disposing of the property?

Your questions are presented because the Davis County Community School District Board of Directors adopted a resolution authorizing the transfer of a schoolhouse site in Troy, Iowa, from the school district to the Township Trustees for Union Township. The school district acted pursuant to § 297.22, The Code 1981, as amended by 1981 Session, 69th G.A., ch. 93, § 2.

Our answer to your first question is no. The answer to your second question is contained in § 360.9, The Code 1981. That section sets out procedures to be followed by township trustees in disposing of property no longer needed for township purposes.

Our conclusions are based on the fact that a township is a unit of government that exercises very limited powers. Township trustees "act as fence viewers and shall perform other duties assigned them by law." § 359.17, The Code 1981.

Townships are created by a County Board of Supervisors and many township powers are subject to action by the Board of Supervisors. See, e.g., §§ 359.1, 359.3, 359.46, The Code 1981. Unlike counties and cities, see Iowa Const. Amendments 25 and 37, townships do not have home rule. Early rulings to the effect that civil townships are merely subdivisions of the county, created for governmental purposes, have not been overruled. See, e.g., Hop v. Brink, 205 Iowa 74, 217 N.W. 551 (1928); West Bend Township v. Munch, 52 Iowa 132, 2 N.W. 1047 (1879). Townships, like school districts, operate under the Dillon's Rule, i.e., the only powers exercised are those expressly granted or necessarily implied in governing statutes. Bruggeman v. Independent School District, 227 Iowa 661, 289 N.W. 5 (1940). Unlike school districts, townships lack the capacity to sue or be sued. Cf. § 274.1, and § 359.1, The Code 1981.

The powers of townships and township trustees have been narrowly circumscribed by statutes and by construction of those statutes by courts and previous opinions of this office. In addition to authority cited above, see, e.g., 1940 Op.Att'yGen. 454-455 (township trustee's selection of roads to be improved only tentative); 1966 Op.Att'yGen. 50 (only statutory authority to operate dumps is in Board of Supervisors, not in townships); 1962 Op. Att'yGen. 493-494 (township may not withdraw from a cemetery association because no provision in statute authorizing withdrawal); 1962 Op.Att'yGen. 495-496 (authority to levy a tax granted by a public vote does not furnish implied authority to issue a debt or issue bonds to pay a debt incurred for the same purpose).

This body of authority leads us to conclude that township trustees are not authorized to make a gift of township property to a private, non-profit corporation. Nor do we believe that the power to make such a gift can be inferred from the power granted in § 359.29 to accept gifts for designated purposes "or for any other public purpose."

We also conclude that the only procedures that may be followed by township trustees in disposing of property that is no longer needed by the township are those set out in § 360.9, The Code 1981.

Sincerely yours,

Merle Wilna Fleming

MERLE WILNA FLEMING
Assistant Attorney General

MWF:rcp

Black's Law Dictionary 1461 (4th ed. rev. 1968).[4] It is incumbent upon a tenant to comply with the contractual obligation to pay the rent in accordance with the terms of the rental agreement. See § 562A.9(3), The Code 1981 (payment of rent).[5] When a tenant gives a check to his or her landlord, the tenant is purporting to make payment for an existing obligation (or possibly an antecedent debt if the prescribed time for payment has arrived).[6]

Consequently, in light of the authorities referred to above we feel compelled to conclude that the specific act of giving a worthless check in payment for rent is not within the proscription of § 714.1(6) as the tenant does not obtain anything of value within the language of the statute.[7]

Sincerely,

SHIRLEY ANN STEFFE
Assistant Attorney General

SAS:mlr

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[4]The "Uniform residential Landlord and Tenant Act" defines rent as "a payment to be made to the landlord under the rental agreement." Section 562A.6(8), The Code 1981.

[5]A debt arises when time for payment arrives. Gentry v. Bodan, 347 F.Supp. 367, 375 (W.D. La. 1972).

[6]Unlike the statute in Iowa, § 714.1(6), some bad check statutes do specifically cover the giving of a bad check in payment of a past due debt or in exchange for a present consideration such as an obligation or debt of rent which is presently or past due. Compare § 714.1(6) with Ga. Code Ann. §§ 26-1704 (a), 26-1704(f) and Utah Code Ann. § 76-6-505(1). See Cobb v. State, 246 Ga. 567 (1980) as to the Georgia bad check statute. See also Curlin v. State, 110 Tex. Cr. 18, 6 S.W.2d 767, 768 (1928) wherein the court indicated that it was doubtful that one who received rent in exchange for a check obtains anything of value or money or property such as was referred to in the Texas Penal Code.

[7]This conclusion is bolstered by the fact that § 714.1(6) is a penal statute which is subject to strict interpretation with any doubts resolved in favor of the accused. State v. Wilson, 300 N.W.2d 157, 160 (Iowa 1981).

CRIMINAL LAW: Theft by Check--Worthless Check Given in Payment for Rent. Section 714.1(6), The Code 1981. A tenant does not commit theft by check in violation of § 714.1(6), when said person gives a worthless check in payment for rent. (Steffe to Trucano, State Representative, 5/10/82) #82-5-3(L)

May 10, 1982

Honorable Jo Ann Trucano
State Representative
State Capitol
LOCAL

Dear Representative Trucano:

You have requested an opinion from this office concerning the offense of theft by bad check embodied in Section 714.1(6), The Code 1981; an opinion request prompted by a letter received from one of your constituents, a landlord who has been the recipient of bad checks given for rent. Your request poses the following question for our consideration:

> 1. If a tenant gives a worthless check in payment for rent, could the tenant be subjected to prosecution for theft as defined in Section 714.1(6)?

It is our opinion that criminal liability for the issuance of a worthless check to pay for rent does not exist.

Insofar as material to your specific inquiry, a person is guilty of theft when the person "[m]akes, utters, draws, delivers, or gives any check . . . and obtains property[1] or service in exchange therefor, if the person knows that such check . . . will not be paid when presented." Section 714.1(6). By its express terms, § 714.1(6) is limited to obtaining services or property[2] by means of a worthless check. Under statutes that require obtention of "property" or "money" or "anything of value" as a requisite element, it is generally held that the giving of a worthless check in payment of a pre-existing debt or an existing obligation does not fall within the purview of such statutes as nothing has been obtained in exchange for the worthless check.[3] State v. Sinclair, 274 Md. 646, 337 A.2d 703, 708-712 (1975); 3 Wharton's Criminal Law § 449 at 527 (14th ed. C. Torcia 1980); W. LaFave & A. Scott, Criminal Law § 92 at 678-81 (1972); 32 Am. Jur.2d, False Pretenses, § 82 at 291-292 (1982); 35 C.J.S. False Pretenses § 21 at 837 (1960); Annot., 59 A.L.R.2d 1159 (1958 & Supp. 1976).

Rent is a normal incident of a landlord and tenant relationship; a relationship created by contract. 49 Am.Jur.2d, Landlord and Tenant, § at 41, § 513 at 493 (1970). Rent constitutes the consideration paid for the use, enjoyment and occupation of property. See

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[1]The Iowa Supreme Court has considered the "obtains property" element of § 714.1(6). "A person 'obtains property' within the meaning of section 714.1(6) by taking possession of it through any means." State v. James, 310 N.W.2d 197, 200 (Iowa 1981).

[2]The term "property" is defined in section 702.14, The Code 1981.

[3]The rationale for such a conclusion is that the nonpayment of a check does not impair the obligation due the recipient of the check by the giver of the check. The giver obtains nothing by the check for if the giver owed anything before giving the check, he or she still owed it afterwards. See generally, State v. Sinclair, 274 Md. 646, 337 A.2d at 708-711.

Black's Law Dictionary 1461 (4th ed. rev. 1968).[4] It is incumbent upon a tenant to comply with the contractual obligation to pay the rent in accordance with the terms of the rental agreement. See § 562A.9(3), The Code 1981 (payment of rent).[5] When a tenant gives a check to his or her landlord, the tenant is purporting to make payment for an existing obligation (or possibly an antecedent debt if the prescribed time for payment has arrived).[6]

Consequently, in light of the authorities referred to above we feel compelled to conclude that the specific act of giving a worthless check in payment for rent is not within the proscription of § 714.1(6) as the tenant does not obtain anything of value within the language of the statute.[7]

Sincerely,

Shirley Ann Steffe

SHIRLEY ANN STEFFE
Assistant Attorney General

SAS:mlr

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[4]The "Uniform residential Landlord and Tenant Act" defines rent as "a payment to be made to the landlord under the rental agreement." Section 562A.6(8), The Code 1981.

[5]A debt arises when time for payment arrives. Gentry v. Bodan, 347 F.Supp. 367, 375 (W.D. La. 1972).

[6]Unlike the statute in Iowa, § 714.1(6), some bad check statutes do specifically cover the giving of a bad check in payment of a past due debt or in exchange for a present consideration such as an obligation or debt of rent which is presently or past due. Compare § 714.1(6) with Ga. Code Ann. §§ 26-1704 (a), 26-1704(f) and Utah Code Ann. § 76-6-505(1). See Cobb v. State, 246 Ga. 567 (1980) as to the Georgia bad check statute. See also Curlin v. State, 110 Tex. Cr. 18, 6 S.W.2d 767, 768 (1928) wherein the court indicated that it was doubtful that one who received rent in exchange for a check obtains anything of value or money or property such as was referred to in the Texas Penal Code.

[7]This conclusion is bolstered by the fact that § 714.1(6) is a penal statute which is subject to strict interpretation with any doubts resolved in favor of the accused. State v. Wilson, 300 N.W.2d 157, 160 (Iowa 1981).

JUVENILE LAW: Neither Article I, § 8 of the Iowa Constitution, relating to searches and seizures, nor a school's limited in loco parentis status require school officials to notify parents of an alleged child abuse victim's interview with a child abuse investigator. Iowa Const. art. I, § 8. After review of Article I, § 8 of the Iowa Constitution and a school's limited in loco parentis status, there is no reason to depart from the previous conclusion found in Op. Att'y Gen. #82-4-8(L). (Hege to Richter, Pottawattamie County Attorney, 5/3/82) #82-5-2(L)

May 3, 1982

Mr. David E. Richter
Pottawattamie County Attorney
Courthouse
Council Bluffs, Iowa 51501

Dear Mr. Richter:

You have requested an opinion of this office relating to the "present policy directive of the Board of Education of the Council Bluffs Community School District, which concerns interrogations and searches of students on the school premises." You further state, "With regard to juvenile delinquency cases, this office has no qualms with this policy. Our concern, however, is in regard to cases of suspected child abuse."

You identified the factual parameters of the problem:

> A typical scenario is a follows: We receive information from various sources that a particular child is allegedly being abused. Realizing that the school is perhaps the best place to interview and observe the child, we send Department of Social Services investigators to the particular school to interview the child. Since school officials must

> adhere to the policy dictates to the Board of Education, the parents are immediately notified of the pending interrogation and are given an opportunity to attend or refuse permission for the interview. This, of course, defeats the purpose of our needing to talk to and observe the particular child outside the presence of his parents.

Finally, you specifically inquire:

> 1. Does Article I, Section 8 of the Iowa Constitution in any way prohibit child abuse investigators from the Department of Social Services from interviewing and observing allegedly abused children on the school premises and outside the presence of the parents? (Article I, Section 8 is the legal reference the School Board uses to support its finding.)
>
> 2. Can Section 232.71(4) of the 1981 Code of Iowa be interpreted to allow such an interview as "any other lawful action which may be necessary or advisable for the protection of the child?"

Your attention is directed to a recent opinion of this office to Mr. Phillip L. Krejci, Marshall County Attorney, #82-4-8(L), issued April 16, 1982. That opinion addressed the same general issue of school authorities refusing to allow an alleged child abuse victim to be interviewed by a child abuse investigator on school property without notifying the child's parent or parents. That opinion concluded that school authorities are under no state statutory duty to so notify parents, nor does the federal Family Educational Rights and Privacy Act of 1974 require such parental notification.

You raise the issue of whether Article I, Section 8 of the Iowa Constitution (and presumably, the Fourth Amendment to the United States Constitution) serves as a justification for such a school policy relating to child abuse cases. In addition, some schools have identified the common law doctrine of in loco parentis as requiring parental notification prior to allowing an alleged child abuse victim to be interviewed.

Article I, Section 8 of the Iowa Constitution.

The constitutional provision which you identified states as follows:

> 8. Personal security. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the papers and things to be seized.

Iowa Const. art. I, § 8. In State v. Davis, 304 N.W.2d 432, 434 (Iowa 1981), the Iowa Supreme Court stated:

> "The Supreme Court of Iowa is the final arbiter of the meaning of the Iowa Constitution, but when the federal and state constitutions contain similar provisions, they are usually deemed to be identical in scope, import, and purpose."

The Fourth Amendment and Iowa constitutional counterpart, Article I, § 8, protect individuals from government intrusion by way of an unreasonable search or seizure. Its protection is closely aligned with that of the Fifth Amendment, prohibiting the government from forcing an individual to self-incrimination.

> There is an intimate relation between the Fourth Amendment's prohibition against unreasonable searches and seizures and the Fifth Amendment's prohibition against self-incrimination. They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment. (Footnote omitted.)

68 Am.Jur.2d, Searches and Seizures, § 5, p. 664 (2d Ed. 1973), citing to Boyd v. United States, 116 U.S. 616, 65 S.Ct. 524, 29 L.Ed. 746.

The first inquiry in any analysis of the Fourth Amendment is whether there was a "search" or a "seizure" within the meaning of the Amendment. Not every action by governmental or law enforcement authority constitutes a search or seizure. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of the Fourth Amendment protection." Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, ___, 19 L.Ed.2d 576, 582 (1967). Further, the mere act of looking to observe what is in plain sight does not constitute a search. Recznik v. Lorain, 393 U.S. 166, 895 S.Ct. 432, 21 L.Ed.2d 317; Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067.

> It is clear that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person, that a careful exploration of the outer surfaces of a person's clothing all over his body in an attempt to find weapons is a "search." However, not all personal intercourse between policemen and citizens involves "seizures" of persons within the meaning of the Fourth Amendment; only where the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen is the inference that a "seizure" has occurred justifiable. (Citations omitted.)

68 Am.Jur.2d, Searches and Seizures, § 22, p. 678 (2d Ed. 1973).

Finally, and critical to our conclusion here, is the principle that evidence voluntarily turned over to police upon their request does not constitute a search. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); State v. Ege, 274 N.W.2d 350 (Iowa 1979).

Under your facts, the child abuse investigator wanted to obtain a voluntary interview with the child who was the alleged victim of child abuse. Any observations of the child would not be a search. Any statements the child volunteers are likewise not the product of a search. Further, a seizure is not implicated because the child may decline to answer and the child abuse investigator, by physical force or show of authority, does not have the authority to restrain his or her liberty.

If the child declines to be interviewed, the child abuse investigator, if warranted by the facts, may contact the county attorney for issuance of compulsory process to obtain the testimony of the child.

> The Fourth Amendment does not prevent the issuing of process to require the attendance and testimony of witnesses. Flint v. Stone Tracy Co., 220 U.S. 107, 31 S.Ct. 342, 55 L.Ed. 389; Interstate Commerce Comm. v. Baird, 194 U.S. 25, 24 S.Ct. 563, 48 L.Ed. 860; Interstate Commerce Comm. v. Brimson, 154 U.S. 447, 14 S.Ct. 1125, 38 L.Ed. 1047.

68 Am.Jur.2d, Searches and Seizures, § 26, p. 681 (2d Ed. 1973).

Based upon the foregoing, it is the opinion of this office, that a consensual interview with a child who is the alleged victim of child abuse is neither a search nor seizure under Article I, § 8 of the Iowa Constitution or the Fourth Amendment to the United States Constitution. Therefore, those provisions fail to justify a school policy requiring parental notification prior to such an interview or denying access to the alleged child abuse victim without such notification.

Moreover, even if the Fourth Amendment were implicated, that is, the child were taken into custody for an alleged delinquent act, it is the responsibility of law enforcement, not school officials, to notify the child's parents. Section 232.19(2), The Code 1981.

Common Law Doctrine of In Loco Parentis.

Black's Law Dictionary defines the term as follows:

> In Loco Parentis. In the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities. Wetherby v. Dixon, 19 Ves. 412; Brinkerhoff v. Merselis, 24 N.J.L. 683; Howard v. United States, D.C.Ky., 2 F.2d 170, 174; Meisner v. United States, D.C.Mo., 295 F. 866, 868.

At common law, the doctrine acted to transfer certain parental rights and duties to an adult who provided care for the child in the parent's absence.

In the case of a step-father contesting his step-son's adoption by third parties after the child's natural mother died, the Iowa Supreme Court discussed the doctrine.

> I. We think there is no doubt the stepfather pleaded facts sufficient to establish his right to appear and litigate the question. We said in Gerdes v. Weiser, 54 Iowa 591, 7 N.W. 42, 43: "When a man stands in loco parentis he is entitled to the rights and subject to the liabilities of an actual parent, although he may not have been legally compelled to assume that situation. Williams v. Hutchinson, 3 N.Y. 312; Stone v. Carr, 1 Esp. 1; Cooper v. Martin, 1 East., 82; and see Bradford v. Bodfish, 39 Iowa, 681."
>
> [2] That such is still the law and is applicable to stepparents who have assumed the role of in loco parentis see 67 C. J. S., Parent and Child, §§ 71-73, 78-80; 39 Am.-Jur., Parent and Child, §§ 61, 62.
>
> [3] The authorities make clear that the relationship of one in loco parentis does not arise because he is a stepparent but because he lawfully assumes the obligations of a parent: "A stepparent does not, merely by reason of the relation, stand in loco parentis to the stepchild * * *. However, a stepparent who voluntarily receives the stepchild into the family and treats it as a member thereof stands in the place of the natural parent, and the reciprocal rights, duties, and obligations of parent and child subsist and continue as long as such relation continues." 67 C.J.S., Parent and Child, § 79; 39 Am.Jur., Parent and Child, § 62.
>
> It has been said the relationship is favored by the law. Coakley v. Coakley, 216 Mass. 71, 102 N.E. 930, 931; and that a presumption arises that a stepfather who voluntarily assumes the care and custody of the child intends to assume the duties and obligations of a natural parent. Gerber v. Bauerline, 17 Or. 115, 19 P. 849.

In Re Adoption of Cheney, 244 Iowa 1180, 59 N.W.2d 685 (Iowa 1953).

School authorities have never been given the full panoply of parental rights because they did not assume full parental obligations.

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. Thus, a state may not impose and enforce unconstitutional conditions upon attendance at public institutions of learning. State-operated schools may not be enclaves of totalitarianism, and school officials do not possess absolute authority over their students. Students in state-operated schools, as well as out of school, are "persons" under the Federal Constitution, and are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the state. . . . And the conduct of pupils directly relating to and affecting the management of a school and its efficiency is within the proper regulation of the school authorities. Thus, the domain of family privacy must give way insofar as a regulation reasonably calculated to maintain school discipline may affect it; the rights of other students, and the interest of teachers, administrators, and the community at large in a well-run and efficient school system, are paramount. The superintendent, principal, and board of trustees of a public free school, to a limited extent at least, stand in loco parentis as to students attending the school, and they may exercise such powers of control, restraint, and correction over pupils as may be reasonably necessary to enable the teachers to perform their duties and to effect the general purposes of education, and the courts will not interfere in such matters unless a clear abuse of power and discretion is made to appear. (Citations omitted.) (Emphasis added.)

68 Am.Jur.2d, Schools, § 242, p. 567-568 (2d Ed. 1973).

> A schoolteacher, to a limited extent at least, stands in loco parentis to pupils under his charge and may exercise such powers of control, restraint, and correction as may be reasonably necessary to enable him properly to perform his duties as a teacher and to accomplish the purposes of education. . . .
>
> It has been held that school directors and teachers have no concern with the individual conduct of pupils wholly outside the schoolroom and school grounds, when they are presumed to be under the control of their parents, and it has been said that when a pupil enters the school, the authority of the parent ceases and that of the teacher begins; and that when the pupil is sent to his home, the authority of the teacher ends and that of the parent is resumed. (Citations omitted.)

68 Am.Jur.2d, Schools, § 256, p. 584 (2d Ed. 1973).

> It has been stated that it makes little sense to extend the influence of school administration to off-campus activity under the theory that such activity might interfere with the function of education. School officials may not judge a student's behavior while he is in his home with his family, nor does the school have jurisdiction over his acts on a public street corner. A student is subject to the same criminal laws and owes the same civil duties as other citizens, and his status as a student should not alter his obligations to others during his private life away from campus. (Citations omitted.)

68 Am.Jur.2d, Schools, § 256, p. 585 (2d Ed. 1973).

The Iowa cases discussing the in loco parentis status of schools address only the question of transference of the right to chastise or punish the child. Tinkham v. Kole, 252 Iowa 1303, 110 N.W.2d 258 (Iowa 1961); Kinzer v. Independent Sch. Dist., 129 Iowa 441, 105 N.W.686 (Iowa 1906); State v. Minzer, 45 Iowa 248, on second appeal 50 Iowa 145 (Iowa 1978). At no point, do they impose a duty upon schools to notify parents of intended punishment, much less notify parents of the acts of third parties such as a child abuse investigator.

While courts in the past have been reluctant to address questions which invade the sphere of school administration, more recently they have done so when students' constitutional rights were implicated. Tinker v. Des Moines Comm. Sch. Dist., 393 U.S. 530, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Furthermore, even their limited in loco parentis right to punish by suspension or expulsion is now subject to constitutional due process limits. Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).

While schools certainly retain the right to chastise and punish students when related to the school administration function, i.e., limited in loco parentis, the extent of their in loco parentis powers and duties are now more restricted than at common law. See, generally, Op. Att'y Gen. #79-7-13 (Teachers in public schools are not "persons responsible for the care of the child" within child abuse reporting act); Op. Att'y Gen. #80-1-10 (Confidential Juvenile Court records are not available to school officials without court order, because schools are not agencies legally responsible for the care, treatment and supervision of the child).

In short, no authority has been found under the doctrine of limited in loco parentis status that would require school authorities to notify the parents of an alleged child abuse victim that the child is or will be interviewed by a child abuse investigator.

Conclusion

School officials may be justifiably concerned when a child is interrogated in the context of a delinquency proceedings and these justifications for parental notification in that context is lauditory. However, the facts posited here and in Op. Att'y Gen. #82-4-8(L) indicate the child is an alleged victim of child abuse by a parent, step-parent or "person responsible for the care of the child". Under such circumstances, parental notification or refusal to allow the alleged child abuse victim to be interviewed may well be counter productive to protecting the child from further harm and abuse. Given the circumstances of alleged child abuse, reliance upon Article I, § 8 of the Iowa Constitution or an in loco parentis doctrine to justify parental notification is unpersuasive.

After review of the two theories in this opinion, Iowa Constitution, Article I, § 8 and in loco parentis status of schools, this office finds no reason to depart from the conclusion expressed in our recent opinion #82-4-8(L).

Sincerely,

Brent D. Hege

Brent D. Hege
Assistant Attorney General

BDH/kap14

COUNTIES AND COUNTY OFFICERS; COUNTY RECORDER; FILING FEE REQUIREMENT: Section 331.604, Supplement to The Code, 1981. Section 331.604 requires the county recorder to charge three dollars for every separate transaction filed in the recorder's office, regardless of the fact that several transactions may be contained on one page. (Weeg to Richards, Story County Attorney, 5/3/82) #82-5-1(L)

May 3, 1982

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

Dear Ms. Richards:

You have requested an opinion of the Attorney General concerning the fees to be charged by the county recorder for recording numerous assignments which are contained within one page. It is our opinion that § 331.604, Supplement to The Code, 1981, requires the recorder to charge three dollars for every separate transaction recorded, regardless of the fact that several transactions may be contained on one page. Our reasons are as follows:

Section 331.604 states:

> Except as otherwise provided by state law or section 331.605, the recorder shall collect a fee of three dollars for each page or fraction of a page of an instrument which is filed in the recorder's office.

A long line of opinions have construed this or similar statutory language to reach a number of differing results. Some opinions conclude that the term "instrument" in the statute is synonymous with the term "transaction," and therefore the recorder should charge a separate fee to file each transaction, regardless of whether a page contains one or twenty transactions. 1942 Op. Att'y Gen. 70; 1932 Op. Att'y Gen. 176 (two opinions reaching the same conclusion are found at this cite).

Some opinions conclude that despite the fact several transactions are often included in one page, that page is a single instrument for the purpose of the statute. Therefore, the recorder can only charge one fee per page. 1942 Op. Att'y Gen. 103; 1940 Op. Att'y Gen. 445.

Finally, some opinions reach a mixed result. They conclude that each transaction is a separate instrument requiring a separate charge under the statute. However, there are certain situations in which several transactions are actually part of one overall transaction. In those cases, the recorder may collect only one fee. 1971 Op. Att'y Gen. 301; 1932 Op. Att'y Gen. 225.

In order to clarify the confusion over this point of law, we first asked the Iowa State Association of Counties ("ISAC") what practice is currently followed by county recorders across the state when charging filing fees under § 331.604. ISAC informs us that recorders generally charge three dollars for every page filed, regardless of how many transactions are contained on one page. This practice is based on the conclusion that § 331.604 simply requires a three dollar per page fee.

We read § 331.604 differently. Despite the disruption this opinion may engender, it is our opinion that the language of § 331.604, when read in its entirety, requires a county recorder to charge three dollars to file each transaction.

As a general maxim of statutory construction, it is consistently held that effect is to be given to every part of a statute and that a statute is to be read in such a way that no part will be rendered superfluous. Millsap v. Cedar Rapids Civil Service Commission, 249 N.W.2d 679 (Iowa 1977); State v. Berry, 247 N.W.2d 263 (Iowa 1976); Georgen v. State Tax Commission, 165 N.W.2d 782 (Iowa 1969). Consequently, we are of the opinion that had the Legislature intended the recorder to charge three dollars per page, the statutory language would have simply stated so. Instead, the Legislature imposed a three dollar filing fee "for each page or fraction of a page of an instrument." (emphasis added)

First, the "instrument" clause clearly modifies the "page or fraction of a page" clause. "Instrument" is defined as:

> . . . a formal or legal document in writing, such as a contract, deed, will, bond, or lease . . . . a document or writing which gives formal expression to a legal act or agreement, for the purpose of creating, securing, modifying, or terminating a right . . . .

Black's Law Dictionary, 5th ed. (1979). Under this definition, the term "instrument" is singular in nature, and refers to the documentation of a particular transaction. This reading is buttressed by the references to the term "instrument" in other statutory provisions concerning county recorder filing requirements, where it is repeatedly referred to as a single transaction. See §§ 331.603(3); 331.606(1); 331.606(2). Therefore, we conclude that the term "instrument" as used in § 331.604 refers to a particular transaction. Consequently, § 331.604 requires a three dollar filing fee for each of those transactions.

Inclusion of the phrase "a fraction of a page" in § 331.604 is further support for our reading of that section. This phrase could be interpreted as imposing a three dollar fee for every page of a multi-page document that contains a single transaction, regardless of whether a page is complete or partially complete. Under an additional, but not necessarily contradictory, reading, we note that the "fraction of a page" language is also modified by the "instrument" clause. Consequently, the meaning we attach to the term "instrument" directly affects the meaning we attribute to the "fraction of a page" language: a three dollar fee for filing a fraction of a page of an instrument could also refer to that portion of a page which contained a transaction distinct from another transaction contained on the same page. In other words, each separate transaction requires a separate three dollar fee.

Further, we note that the word "page" foresees that several pages documenting one transaction may be filed with the recorder. Consequently, the recorder may charge three dollars for every page of the instrument filed, despite the fact that only one transaction may be contained therein.

Finally, we believe our opinion is supported by common sense as well as by the plain language of § 331.604. A county recorder must make a separate entry for each transaction filed in the recorder's office, regardless of whether each transaction is listed on a separate page or included on one page with other transactions. Because of the workload involved, it is our opinion that a fee per transaction is most reasonable.

In sum, it is our opinion that the plain language of § 331.604 requires the county recorder to charge three dollars for every transaction filed in the recorder's office. We recognize that there may be situations in which one general

transaction may encompass several related transactions, and therefore require payment of only one fee. We leave any such factual determination to the discretion of the county recorder. Finally, any past opinions contrary to the result reached in this opinion are hereby overruled.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:sh

COUNTIES; COUNTY OFFICERS; SHERIFF AND DEPUTY SHERIFFS. Sections 331.322(9), 331.657, and 331.904, Supplement to The Code 1981. Subject to express statutory limitations on the amount of compensation that may be received by a deputy sheriff, a county is authorized to pay a uniform allowance to both uniformed and non-uniformed deputy sheriffs for the purchase and care of clothing to be worn in the performance of their official duties. (Weeg to Burk, Assistant Black Hawk County Attorney, 6/30/82) #82-6-16(L)

June 30, 1982

Peter W. Burk
Assistant Black Hawk County Attorney
309 Courthouse Building
Waterloo, Iowa 50703

Dear Mr. Burk:

You have requested an opinion of the Attorney General as to whether the $500 uniform allowance paid by Black Hawk County to both uniformed and non-uniformed deputies is authorized by law. It is our opinion that this allowance is proper, and our reasons are as follows.

A number of Code sections are relevant to this question. First, § 331.322(9), Supplement to The Code 1981, provides that the board of supervisors shall "provide the sheriff and the sheriff's full-time deputies with necessary uniforms and accessories in accordance with § 331.657." Section 331.657, Supplement to The Code 1981, designates what the standard uniform is to be and when it is to be worn; § 331.657(2) specifically requires that these uniforms and accessories are to be provided by the county. Finally, § 331.904(5), Supplement to The Code 1981, states that deputy county officers (including deputy sheriffs) are entitled to reimbursement for "actual and necessary expenses incurred in the performance of their official duties."

It is our opinion that § 331.322(9) authorizes, indeed requires, the county to provide uniforms for the sheriff and those deputies who are required to wear uniforms. This requirement may encompass reimbursement for the cost of

maintaining these uniforms, but alternatively, § 331.904(5) provides authority for such payments. Further, in the absence of any statutory provision relating to uniform allowances for non-uniformed deputies, it is our opinion that the county is authorized under home rule authority to allow a stipend for the purchase and care of clothing required for the performance of a non-uniformed officer's official duties. See Iowa Constitution, art. III, § 39A. In all cases, the amount of the stipend is left to the discretion of the board.

We additionally note that there is one indirect statutory restriction on the payment of these stipends. Section 331.904, Supplement to The Code 1981, establishes guidelines for the salaries of deputies, assistants, and clerks of county officers. In particular, § 331.904(2) provides guidelines for deputy sheriffs' salaries and further states that:

> The total annual compensation including the annual base salary, overtime pay, longevity pay, shift differential pay, or other forms of supplemental pay and fringe benefits received by a deputy sheriff shall be less than the total annual compensation including fringe benefits received by the sheriff . . . .

It is our opinion that a uniform allowance clearly falls within the definition of "supplemental pay" or "fringe benefits," and therefore this limitation is applicable.

In conclusion, it is our opinion that, subject to the express statutory limitations on the amount of compensation that may be received by a deputy sheriff, a county is authorized to pay a uniform allowance to both uniformed and non-uniformed deputy sheriffs for the purchase and care of clothing to be worn in the performance of their official duties.

Sincerely,

Theresa O'Connell Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:sh

COUNTIES: COMMISSION ON VETERANS AFFAIRS: Sections 250.3, .5, .6, .7, The Code 1981. The county commission on veterans affairs may delegate only ministerial duties to an administrative aide and mattters of discretion may not be delegated. Ministerial decisions may include the determination of eligibility for payment of benefits by use of inflexible standards. (Morgan to Beine, Cedar County Attorney, 6/30/82) #82-6-15(L)

Mr. Lee W. Beine
Cedar County Attorney
419 Cedar Street
Tipton, IA 52772

June 30, 1982

Dear Mr. Beine:

You requested our opinion about the ability of the county commission on veteran affairs to delegate authority to determine eligibility for veterans benefits to an administrative employee of the county. Specifically, you asked:

> Our county commission on veteran affairs has been working on a set of guidelines to be used to determine who is eligible for benefits pursuant to Chapter 250 of the Code of Iowa. As part of those guidelines, they propose to allow an administrative assistant to determine, pursuant to the guidelines, persons entitled to benefits and the amounts to which each is entitled. They feel that such a provision would be particularly useful in situations where immediate action is necessary and the members of the commission are unavailable to act. Is it permissible for the county commission on veteran affairs to delegate their authority to determine eligibility for veterans benefits under any set of circumstances?

Counties are permitted to create a veterans affairs fund for the benefit of indigent men and women who served in the United States Military and Naval forces in any war. Ch. 117, Sec. 421(10), Laws of the 69th G.A. (1981 Session). The Code creates the commission, describes the qualifications for membership, the

procedures for appointment, and compensation of the commission. Sections 250.3 through .5, The Code 1981.

The statute is quite specific in describing the organization of the commission.

> The commission shall organize by the selection of one of their number as chairman, and one as secretary. . .
>
> . . .
>
> The commission shall meet monthly and at other times as necessary. At the monthly meeting it shall determine who are entitled to benefits and the probable amount required to be expended. The commission shall meet annually to shall prepare an estimated budget for all expenditures to be made in the next fiscal year and certify the budget to the board of supervisors. The board may approve or reduce the budget for valid reasons shown and entered of record and the board's decision is final.

Sections 250.6 and 250.7.

A 1942 Attorney General's Opinion stated that the commission did not have the power to employ a social worker for the purpose of determining eligibility for benefits. 1942 Op.Att'yGen. 18. The Code was amended in 1945 to provide the following assistance to the commission:

> The commission, subject to the approval of the board of supervisors, shall have the power to employ necessary administrative or clerical assistants when needed, the compensation of such employees to be fixed by the board of supervisors, but no member of the commission shall be so employed. The commission with the approval of the board of supervisors shall appoint one of the deputies of the county auditor to serve as administrative assistant to the commission, to serve without additional compensation, unless for good reason shown, this arrangement is not feasible.

Section 250.6, The Code 1981.

The commission is clearly entitled to employ necessary administrative or clerical assistance with the approval of the board of supervisors. The ability of these administrative or clerical assistants to act independently depends upon the nature of the decisions to be made by the administrative assistants. Public officials or boards may authorize the performance of a a ministerial or administrative function by employees but they may not delegate matters of judgment or discretion to others. Bunger v. Iowa High School Athletic Association, 197 N.W.2d 555 (Iowa 1972); State v. Johnston, 253 Iowa 674, 113 N.W.2d 309 (Iowa 1962).

In the Johnston case, the Court says:

> An officer may not delegate to an agent power to do an act required by statute involving judgment and discretion unless authorized by statute.

253 Iowa 674, at p. 677. The Court held that hearing officers within the Department of Public Safety had sufficient statutory authorization to determine license revocation issues.

Whether the county commission on veterans affairs may delegate the authority to establish eligibility in the amount of payment to an administrative employee will depend on the degree of discretion of that employee in making the decision. If the commission establishes clear standards for income or resource eligibility and prescribes an exact dollar amount to be paid in benefits for persons with various levels of income, so that the administrative employee has no discretion in determining the amount of benefits, the delegation would be proper. If, however, the guidelines established by the commission were so flexible as to permit discretion by the decision maker with respect to eligibility or amount of benefit, the delegation would not be permissible.

Statutes which prescribe the time and place of public officials' actions, as well as procedures for the mode of operations of public officials, are generally directory and not mandatory. Taylor v. DOT, 260 N.W.2d 521 (Iowa 1977); Younker Bros. v. Zirbel, 234 Iowa 169 (1943); Dishon v. Smith, 10 Iowa 212 (1859). As long as persons subject to the commission's power and discretion were not injured by use of an administrative assistant to establish eligibility, the commission may use administrative personnel to investigate and establish eligibility for benefits. Of course, any claims for veteran's benefits must be approved by the board of supervisors. § 250.10, The Code 1981.

We are of the opinion that the language requiring the commission to determine eligibility at the monthly meeting is directory rather than mandatory. The goal of the statute appears to be the timely determination of eligibility for qualified veterans. In construing statutes such as these, the principle area of inquiry is into the relationship between the prescribed duty of the public body and the main objective of the statute.

> If the prescribed duty is essential to the main objective of the statute, the statute ordinarily is mandatory and a violation will invalidate subsequent proceedings under it. If the duty is not essential to accomplishing the principle purpose of the statute but is designed to assure order and promptness in the proceeding, the statute ordinarily is directory and a violation will not invalidate subsequent proceedings unless prejudice is shown.

Taylor v. DOT, 260 N.W.2d 521, 522-23 (Iowa 1977).

We do not believe that a determination of eligibility made by an administrative employee of the commission in compliance with specified standards for payment would be invalid.

We can envision a system where standards would be established by the commission for use by administrative employees in determining eligibility with a timely review of administrative decisions by the full commission on a monthly basis for those who did not meet the prescribed standards, but sought to rely on the commission's discretion. An analogous procedure is set forth in Chapter 252 providing general relief to the poor. Since the 1945 amendment authorized use of administrative personnel for the veterans commission, we do not believe that a similar system would be precluded for the administration of Chapter 250.

We, therefore, conclude that if the commission requires a ministerial determination by its administrative employee of eligibility based on clear standards for eligibility and payment, the duties for establishing eligibility can be delegated. Those determinations requiring judgments or discretion must be left to the commission at its periodic meetings.

Sincerely,

Candy Morgan

Candy Morgan
Assistant Attorney General

CM/sm

COUNTIES; CLERK OF COURT; ABANDONED PROPERTY: Ch. 556; §§ 633.109, 682.31. When funds due a named heir or beneficiary who cannot be found are deposited with the county clerk of court pursuant to § 633.109 or § 682.31 (inability to distribute estate funds), the clerk is required to follow the provisions of ch. 556 (disposition of unclaimed property) in disposing of that property. (Weeg to Huffman, Pocahontas County Attorney, 6/30/82) #82-6-14(L)

Mr. H. Dale Huffman
Pocahontas County Attorney
Pocahontas, Iowa 50574

June 30, 1982

Dear Mr. Huffman:

You have requested an opinion of the Attorney General concerning the procedure to be followed by the county clerk of court in disposing of funds deposited by a fiduciary pursuant to § 682.31, The Code 1981. In particular, you pose the following questions:

> 1. When funds are deposited with the clerk of the district court pursuant to § 682.31 because the address of an heir, legatee, devisee, or other person is unknown, how long must the clerk of court continue to hold those funds, assuming no claim is made by the person entitled to them?
>
> 2. Assuming the clerk is not required to hold these funds indefinitely, and no claim is made upon them, by what procedure are these funds to be disposed of by the clerk of court?

It is our opinion that in the event funds are deposited with the clerk pursuant to § 682.31, the provisions of ch. 556, The Code 1981, the Uniform Disposition of Unclaimed Property Act, govern. Our reasons are as follows.

Section 682.31 states as follows:

> Whenever any fiduciary not governed by the probate code shall desire to make his final report, and shall then have in his posses-

> sion or under his control any funds, moneys, or securities due, or to become due, to any heir, legatee, devisee, or other person, whose place of residence is unknown to such fiduciary, or to whom payment of the amount due cannot be made as shown by the report on file, such funds, moneys, or securities may upon order of the court and after such notice as the court may prescribe, be deposited with the clerk of the district court of the county wherein such appointment was made.

We additionally note that this provision applies as well to fiduciaries who are governed by the probate code. See § 633.109, The Code 1981 (fiduciary governed by probate code to deposit unclaimed estate funds with clerk of court, who shall hold and dispose of funds in accordance with ch. 682).

Prior to 1967, §§ 682.39-44 provided that § 682.31 funds would be held by the clerk for six months, and if not paid at the expiration of that period, they would be deposited with the county treasurer. If those funds were not paid at the expiration of ten years, they then reverted to the county general fund. However, these provisions were repealed by 1978 Session, 62nd G.A., § 391.31, and were replaced by what is now ch. 556, The Code 1981, The Uniform Disposition of Unclaimed Property Act.

Chapter 556 details several categories of property that is presumed abandoned. In particular, § 556.8 provides:

> All intangible personal property held for the owner by any court, public corporation, public authority, or public officer of this state, or a political subdivision thereof, that has remained unclaimed by the owner for more than ten years is presumed abandoned.

In the event property is presumed abandoned, ch. 556 details the procedures to be followed in reporting that property to the state treasurer (§ 556.11), publishing notice that the property is abandoned (§ 556.12), and delivering the property to the office of the state treasurer (§ 556.13), who then assumes custody of the property (§ 556.14). The treasurer then may sell any property other than money (§ 556.17), and all funds are then deposited in the state's general fund

(§ 556.18). Any person claiming an interest in the property retains the right to file a claim with the treasurer (§ 556.19).

In conclusion, when funds due a named heir or beneficiary who cannot be found are deposited with clerk of court pursuant to § 633.109 or § 682.31, the clerk is required to follow the provisions of ch. 556 in disposing of that property.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

MUNICIPALITIES: Housing Codes. Sections 364.17, 364.17(1), 364.17(2), 364.17(3), and 562A.5(3), The Code 1981; Acts, 68th G.A., 1980 Session, Ch. 1126, § 1. Fraternity and sorority houses are rental dwelling units and, thus, subject to rental inspections as provided for in § 364.17, The Code 1981. (Walding to Murray, State Senator, 6/29/82) #82-6-13(L)

June 29, 1982

The Honorable John S. Murray
State Senator
2330 Lincoln Way
Ames, Iowa 50010

Dear Senator Murray:

You have requested an opinion of the Attorney General regarding a city housing code as provided for in § 364.17, The Code 1981. Specifically, you have asked:

> 1. Are fraternity and sorority residences, in which the members occupy their own property, required to be included within provisions of a city rental housing code adopted under Section 364.17?
>
> 2. If these residences are not included within a city rental housing code in the circumstances described in question 1, must they meet a rental housing code if rooms are rented in the summer or during the year to non-members on a regular basis? On a temporary basis?

Section 364.17(3), The Code 1981, provides in pertinent part: "A city which adopts or is subject to a housing code under this section shall adopt enforcement procedures, which shall include a program for regular rental inspections, rental inspections upon receipt of complaints, and certification of

inspected rental housing . . . ." Hence, rental inspections must be included in a city housing code.

Section 364.17, The Code 1981, added by Acts, 68th G.A., 1980 Session, Ch. 1126, § 1, provides that a city with a population of fifteen thousand or more adopt a housing code. Prior to January 1, 1981, a city could select between five model housing codes stipulated by the legislature. See § 364.17(1), The Code 1981. Cities with a population of fifteen thousand or more which had not adopted one of the model codes by that date, however, were considered to have adopted the uniform housing code promulgated by the International Conference of Building Officials. See § 364.17(2), The Code 1981. Provision is made for compliance by cities which subsequently attain a population of fifteen thousand. Id.

At issue is the Ames housing code. See CITY OF AMES, IA ORDINANCES Ch. 13 (1981). An examination of that code reveals two relevant statements: the purpose and the scope of the chapter. According to CITY OF AMES, IA ORDINANCES Ch. 13, § 1 (1981):

> The purpose of this chapter is to establish minimum health and safety standards for rental housing in the City of Ames, Iowa. These standards relate to the condition, maintenance, and occupancy of rental dwellings, and are intended to ensure that rental housing is safe, sanitary, and suitable.

As concerns the scope of the chapter, CITY OF AMES, IA ORDINANCES Ch. 13, § 2 (1981), provides that that chapter "applies to all rental dwelling units within the City of Ames." A "dwelling unit", it should be noted, includes a fraternity or sorority house, which is defined as, "A building, other than a hotel or motel, that is occupied as a dwelling predominantly by members, candidates for membership, employees, and guests of the same fraternity or sorority." CITY OF AMES, IA ORDINANCES Ch. 13, § 3.3 (1981). Provision is made in the chapter for inspection of rental dwelling units. See CITY OF AMES, IA ORDINANCES Ch. 13, § 9 (1981).

The issue, then, narrows to whether fraternity and sorority houses are rental property. It is our judgment that fraternity and sorority houses are rental dwelling units and, thus, subject to rental inspections as provided for in § 364.17, The Code 1981. Our analysis is threefold.

First and foremost, the purpose of rental inspections is to protect the public health, safety, and welfare. In particular, rental inspections, through preventive efforts to eliminate potential fire hazards and precautionary efforts designed for use in the event of the ignition of a fire, are intended to assure safe and suitable housing. Unlike residents in owner-occupied housing, tenants are often not apprised of the fire hazards and safety features in the premises they inhabit, nor do they usually possess the legal authority or obligation to make necessary repairs. In addition, rental dwelling units, such as apartment complexes or fraternity and sorority houses, usually involve some form of communal living. As a result, the sake of numerous individuals, individuals who often are unaware of the condition of their adjoining neighbors' units, are joined by a solitary frame. The dangers of such housing are inherent. Accordingly, construction of the statute should err in the interest of the greater public health, safety, and welfare. Inclusion of fraternity and sorority houses in rental inspections favors that interest.

Second, most fraternity and sorority houses, commonly operated as nonprofit corporations, are not owned by the individual house members. Rather, we have been advised that legal title to the property is typically in the name of the national foundation, the local chapter, an alumni association, or a college or university.[1] Further, most fraternity and sorority houses distinguish between social members and house members. Unlike house members (members who reside within the fraternity or sorority house), social members (affiliate members who reside outside the fraternity or sorority house) are not assessed a

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[1]It may be possible for a fraternity or sorority to demonstrate some alternative financial arrangement whereby the house would qualify as owner-occupied property, as distinguished from rental property, and thus be exempt from rental inspections.

rental charge. Stated otherwise, house members pay a separate fee which, in part, reflects the expense of residing within the fraternity or sorority house. Accordingly, most fraternity and sorority houses are not owner-occupied residence, as reflected by the rental charge assessed against members who reside therein.

Finally, it can be argued by statutory analogy that the legislature did not intend to exclude fraternity and sororityhouses from the coverage of § 364.17, The Code 1981. Chapter 562A, the Iowa Uniform Residential Landlord and Tenant Law, specifically excludes fraternity and sorority houses from the application of that chapter. See § 562A.5(3), The Code 1981. No such exclusion, however, was made in § 364.17, The Code 1981, which was passed subsequently. If the legislature had intended to exclude fraternity and sorority houses from rental inspection, that intent could have been designated in the statute. To the contrary, the act of specifically excluding fraternity and sorority houses from the application of Ch. 562A indicates a legislative determination that such houses do, in fact, constitute rental property.

In view of the affirmative response given to your first question, it is unnecessary to reach the second question.

Sincerely,

Lynn M. Walding

LYNN M. WALDING
Assistant Attorney General

LMW/nm

ELECTIONS: COUNTY CONVENTIONS; DELEGATES' TERMS OF OFFICE. Chapter 43; §§ 43.4, 43.90, 43.94. Delegates elected in precinct caucuses in 1980 cannot hold over to attend the county convention in 1982. (Pottorff to Connolly, State Representative, 6/29/82) #82-6-12(L)

June 29, 1982

The Honorable Michael W. Connolly
State Representative
3458 Daniels Street
Dubuque, Iowa 52001

Dear Representative Connolly:

You requested last Thursday, June 24, 1982, an opinion of the Attorney General concerning delegates to county conventions which are held pursuant to Chapter 43 of The Code. You point out that, by statute, delegates serve "for two years and until their successors are elected." § 43.94, The Code 1981. In view of this statutory language, you specifically inquire:

> In your opinion, do the delegates who were elected at the precinct caucuses in January, 1980 to the county convention continue to hold that office if:
>
> 1) no caucus was held in 1982?
>
> 2) a caucus was held in 1982 but the full complement of delegates as set by the county central committee according to Chapter 43.90 was not elected?
>
> Further, if the delegates elected at the January, 1980 caucuses do still hold office in either of these cases, then:
>
> 3) what impact does reprecincting have if the boundaries for the 1982 precincts are different from the precincts in which the delegates were elected in January, 1980?

> 4) are the votes at the county convention weighted differently for delegates elected in different years -- number of delegates to be elected from each precinct differs between years.

In our opinion, delegates elected to the county convention in January, 1980, cannot hold over to attend the county convention in 1982.

The election of delegates to the county convention is controlled by a series of interrelated statutes. Section 43.4 requires delegates to the county convention to be elected at precinct caucuses held in each even-numbered year. This section states:

> Political party precinct caucuses. Delegates to county conventions of political parties and party committee members shall be elected at precinct caucuses held not later than the second Monday in February of each even-numbered year. The state central committee of each political party shall set the date for said caucuses. In accordance therewith, the county chairperson of each political party shall issue the call for said caucuses. The county chairperson shall file with the commissioner the meeting place of each precinct caucus at least seven days prior to the date of holding such caucus.
>
> There shall be selected among those present at a precinct caucus a chairman and a secretary who shall forthwith certify to the county central committee and the county commissioner the names of those elected as party committeemen and delegates to the county convention.
>
> The central committee of each political party shall notify the delegates and committeemen so elected and certified of their election and of the time and place of holding the county convention. Such conventions shall be held either preceding or following the primary election but no later than ten days following the primary election and shall be held on the same day throughout the state.

Under this language, delegates to the county convention "shall be elected" at precinct caucuses to be held "not later than the second Monday in February of each even-numbered year." The names of the delegates elected to the county convention are, in turn, certified to the county central committee and the county commissioner of elections. § 43.4, The Code 1981.

The criteria for the selection of delegates are set out in section 43.90. This statute provides:

> Delegates. The county convention shall be composed of delegates elected at the last preceding precinct caucus. Delegates shall be persons who are or will by the date of the next general election become eligible electors and who are residents of the precinct. The number of delegates from each voting precinct shall be determined by a ratio adopted by the respective party central committees, and a statement designating the number from each voting precinct in the county shall be filed by such committee not later than the time the list of precinct caucus meeting places required by section 43.4 is filed in the office of the commissioner. If the required statement is not filed, the commissioner shall fix the number of delegates from each voting precinct.

Under this language, delegates to the county convention "shall be composed of delegates elected at the last preceding precinct caucus." § 43.90, The Code 1981.

The term of office of delegates is controlled by section 43.94.

> Term of office of delegates. The term of office of delegates to the county convention shall begin on the day following their election at the precinct caucus, and shall continue for two years and until their successors are elected.

This language establishes that the term of the delegates begins the day following the caucus election and extends "for two years and until their successors are elected." § 43.94, The Code 1981.

In order to determine whether delegates elected in January, 1980, are authorized to hold over and attend the county convention of 1982, it is necessary to construe section 43.94 which establishes the term of office. Construing this statute, we employ familiar principles of statutory construction. The purpose of all principles of statutory construction is to ascertain the intent of the enacting legislature. American Home Products Corp. v. Iowa State Board of Tax Review, 302 N.W.2d 140, 142 (Iowa 1981). One of these principles provides that a statute should be given a construction which does not render any part superfluous. Robinson v. Department of Transportation, 296 N.W.2d 809, 811 (Iowa 1980). Applying this principle, it is evident the legislature intended that delegates' terms of office may exceed two years. Section 43.94 establishes the term of office under cumulative criteria by providing that term of the delegates shall continue "for two years and until their successors are elected." § 43.94, The Code 1981 (emphasis added). If the phrase "until their successors are elected" is to be given effect, therefore, it must be construed to authorize an extension of the term beyond two years.

The requirement that the phrase "until their successors are elected" be given effect does not end the process of construction. We observe the principle that each part of a statute is presumed to have a purpose and the statute should be construed in its entirety to effect its purpose. Iowa Department of Transportation v. Nebraska-Iowa Supply Co., 272 N.W.2d 6, 11 (Iowa 1978). We are obligated, therefore, to discern the purpose of this phrase and construe the statute to give the underlying purpose effect.

In our view, the phrase "until their successors are elected" is intended to ensure that the terms of delegates do not lapse before the next precinct caucus. The delegates' successors are elected at the next precinct caucus. § 43.4, The Code 1981. We point out, however, that precinct caucuses are not scheduled by statute for a date certain. Section 43.4 provides only that caucuses be held "not later than the second Monday in February of each even-numbered year." § 43.4, The Code 1981. From January 1 to the second Monday in February

of each even-numbered year is a period of approximately five weeks. The date within this period on which the caucuses will be held is a decision delegated by statute to the "state central committee of each political party." § 43.4, The Code 1981. Under this statutory scheme any delegate's term would extend for exactly two years only if the next precinct caucus were held on the anniversary of the preceding precinct caucus at which the delegate was elected. Because there is a period of approximately five weeks during which precinct caucuses can be held, however, a delegate's term could fall nearly five weeks short of two years or could extend nearly five weeks over two years. In our opinion, the phrase "until their successors are elected" is intended to cover the latter possibility.

Although we view this phrase as authorizing the extension of delegates' terms beyond a two-year period, we do not view this phrase as authorizing delegates to hold over for a second term including attendance at the next county convention. We observe the principle that statutes relating to the same subject matter should be construed together. See State v. Schmidt, 290 N.W.2d 24, 26 (Iowa 1980). Applying this principle, we point out that section 43.4 provides that delegates to county conventions "shall be elected" at precinct caucuses held in each even-numbered year. § 43.4, The Code 1981. The term "shall" imposes a statutory obligation. Pearson v. Robinson, 318 N.W.2d 188, 191 (Iowa 1982). Reading sections 43.4 and 43.94 together, we believe that the legislature intended compliance with both statutes. In our opinion, therefore, it is unreasonable to conclude that the legislature intended section 43.94 to authorize delegates to hold over for a second term in the event that no successors or an insufficient number of successors are elected at the following precinct caucus when the election of successors at a precinct caucus is imposed as a separate statutory obligation.

Other statutory language supports our conclusion that the legislature did not intend section 43.94 to authorize delegates to hold over for a second term. We point out that the legislature also provided that the number of delegates from each voting precinct "shall be determined by a ratio adopted by the respective party county central committees" and filed with the commissioner of elections. § 43.90, The Code 1981. As you note in your opinion request, this calculation can alter the number of delegates to be elected in each precinct in succeeding caucus years. A holdover of delegates from the previous precinct caucus election, therefore, could result in either more or less delegates to the county convention than the number of delegates to which the precinct is entitled. We do not believe the legislature intended this anomoly.

Accordingly, based on application of principles of statutory construction and analysis of companion statutes addressing election of delegates,[1] it is our opinion that delegates elected to the county convention in January, 1980, cannot hold over to attend the county convention in 1982 pursuant to section 43.94 of The Code.[2]

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP:sh

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[1] Also possibly relevant here is § 43.96, which provides:

> Proxies prohibited. If any precinct shall not be fully represented the delegates present from such precinct shall cast the full vote thereof, if the rules of the convention, party bylaws or constitution so permit, and there shall be no proxies.

This section contemplates that a precinct may not be fully represented at the county convention.

[2] 1912 Op. Att'yGen. 723 held that delegates to a county convention hold over in instances where their successors are not elected at the primary election. That opinion was based on a very different statutory scheme and, in our view, is not persuasive with respect to the current statutes providing for mandatory selection of delegates at precinct caucuses.

EDUCATION: Area Education Agency: Section 273.8(2). A person who serves as a substitute aide to a school district at the request of the district, is paid an hourly wage for time served, is covered by workmens' compensation, is supplied materials by the district as needed, and is subject to the supervision of the school district's building administrator is an employee of the school district within the meaning of § 273.8(2) and is therefore not eligible to serve as a member of the AEA board of directors. (Fleming to Lind, State Representative, 6/24/82) #82-6-11(L)

June 24, 1982

Honorable Thomas A. Lind
State Representative
111 Frederic Avenue
Waterloo, Iowa 50701

Dear Representative Lind:

You have submitted a request for our opinion concerning the eligibility of certain persons to serve on the board of directors of an area education agency. The question is as follows:

> Is a person who enters into certain work relationships with a local school district eligible to serve as a member of the board of directors of an area education agency that has been created pursuant to Ch. 273, The Code 1981?

The question arises because of the following statutory provision:

> The member of the area education agency board to be elected at the director district convention may be a member of a local school district board of directors and shall be an elector and a resident of the director district, other than school district employees. [Emphasis added.]

§ 273.8(2) last sentence, second unnumbered paragraph, The Code 1981.

Your question is submitted in connection with two separate circumstances as follows:

> 1. The person serves as a noncompensated volunteer as a substitute aide. The person reports to a building principal on a day-to-day basis. The schedule for reporting is established at the initiative of the person. There is no duty on the part of the person to accept a request for service, nor is there any obligation by the building principal to contact the person on a continuing basis. The person does not receive monetary compensation but, while at the school assigned for that day, receives directions from the Building Principal, is covered by District liability insurance, and is supplied any needed materials by the District.
>
> 2. The person is contacted by the Personnel Director of the District to serve as a substitute aide on a day-to-day basis. The person is under no obligation to accept the request and the District is under no obligation to make the request. The person is paid on a per-hour basis of actual hours served, is covered by Workmens' Compensation and District liability insurance, is not part of the District bargaining unit, is subject to the supervision of the Building Administrator and is supplied such materials by the District as is needed.

Stated another way, the issue is whether the person is a school district employee within the meaning of § 273.8(2). We conclude that the person in the first situation described above is not a school district employee but the second person is a school district employee within the meaning of the statute.

The Constitution of Iowa grants power to the General Assembly to "provide for the educational interest of the State in any . . . manner that to them shall seem best and proper." Iowa Const. Art. IX, Sec. 15. Like other school corporations, an area education agency is a creature of the Iowa Legislature. The General Assembly holds power to establish such a corporation and to provide for its operation, subject, of course, to the constraints of the United States Constitution.

The language of § 273.8(2) set out above is not a good example of artful drafting, but we begin our discussion of the reasons for our conclusion with the assumption that the phrase "other than school district employees" creates a class of persons that are excluded from serving on an area educational agency (AEA) board of directors. The Iowa Constitution contains two provisions that are related to the underlying principles on which the exclusion of school district employees is based. Article III, § 1 provides for the separation of power in the state government and Article III, § 22 prohibits a member of the General Assembly from holding any "lucrative" government "office." The effect of the § 273.8(2) requirement at issue here is to maintain a separation of the policy-making body of an AEA, i.e. the board of directors, and the executive branch of the school districts within its jurisdiction, i.e. school district employees. It is safe to say that the separation of power principle is one of the foundations on which American democracy rests.

We assume that the statute is constitutional. We do, however, note that important constitutional interests are at stake in establishing qualifications for those who wish to seek public office. See Turner v. Fouche, 396 U.S. 346, 362-363, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970) and Lubin v. Panish, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974). Moreover, other citizens in the relevant area or district have important interests in having their choice of representation respected. See, e.g., Powell v. McCormack, 395 F.2d 577, 597-98 (D.C. Cir. 1968), rev'd on other grounds, 395 U.S. 486 (1969). Thus, we take care in reaching our conclusion to observe the rule that a restriction on eligibility to hold public office should be construed narrowly, i.e. in favor of eligibility. See e.g., McCutcheon v. City of St. Paul, 216 N.W. 2d 137, 139 (Minn. 1974); 63 Am.Jur.2d, Public Officers and Employees, §§ 63 and 64.

Applying these principles to the factual circumstances presented, we conclude that a person who provides uncompensated volunteer services to a school district is not a school district employee within the meaning of § 273.8(2). Even though a volunteer substitute aide is subject to the direction of a building principal, that factor is insufficient, along with the other circumstances described in example 1 above, to elevate an unpaid volunteer to the status of a "school district employee."

The second circumstance you describe is a very different matter. Black's Law Dictionary states that the term "employee" is often specially defined by statutes and that whether a person is an employee or not within a particular statute will depend upon facts and circumstances, Black's Law Dictionary, p. 618, Rev. Fourth Edition (West). Neither Chapter 273 nor any other section of the Education Title of the Code of Iowa defines the term "school district employee." Cases that seem relevant to this issue arise in two areas. In some cases, the court considers the issue of whether a person is a public "officer" or an "employee" because of a challenge under the prohibition against holding dual offices. See State v. Taylor, 260 Iowa 634, 144 N.W. 2d 289 (1967) reaffirming multi-factor test for determining whether a person is a public "officer" announced in State v. Spaulding, 102 Iowa 639, 72 N.W. 288 (1897). The second category of cases are those in which a court determines whether a person is an "employee" or an "independent contractor" for purposes of coverage under the National Labor Relations Act or coverage under workmens' compensation and related statutes and insurance cases. The labor and insurance cases are more helpful here because the focus is on the status of being an "employee."

The factors for deciding whether a person is an "employee" within the undefined terms of an insurance policy are relevant here:

> In any event, it is clear that undefined terms . . . such as "employee," must be construed in their plain, ordinary and everyday sense and the parameters of the definition should reflect the legal characteristics most frequently attributed to the word. (citations)
>
> Such guidelines suggest that economic reality and substance, rather than legalistic form, should be determinative of the word's meaning.
>
> In considering the employment relationship, the factors to which the Arkansas courts have most frequently referred include employer's right to direct and control the employee, the right or power to hire or discharge, employer's furnishing of tools, duration and time of employment, and fact, manner and basis of payment. (citations)

> These factors have usually been applied in distinguishing between an "employee" and an "independent contractor," but as the business relations have become more complex, e.g., with sub and sub-sub contractors, and temporary agencies as in Beaver, the element of control has emerged as generally being the most important determinant. [Emphasis supplied.]

Eagle Star Insurance Company, Ltd. v. Deal, 474 F.2d 1216, 1220 (8th Cir. 1973).

Applying this construction of the term "employee" to the circumstances you describe, we conclude that the hourly payment, the workmens' compensation coverage, and the exercise of supervisory control by the building principal are sufficient indicia of "employee" status to bring the person within the meaning of "school district employee" in § 273.8(2), The Code 1981. Moreover, we assume that the language encompasses any person who is an employee of any of the school districts within the boundaries of an area education agency.

In sum, a person who serves as a substitute aide to a school district at the request of the district, is paid an hourly wage for time served, is covered by workmens' compensation, is supplied materials by the district as needed, and is subject to the supervision of the school district's building administrator is an employee of the school district within the meaning of § 273.8(2) and is therefore not eligible to serve as a member of the AEA board of directors.

If you have further questions on this matter, please feel free to contact me.

Sincerely,

Merle Wilna Fleming

(MS) MERLE WILNA FLEMING
Assistant Attorney General

MWF:sh

DRIVER EDUCATION: STUDENT TEACHERS: Section 257.9, 11; 321.178, 180. The presence of the supervising teacher is not required by law when a student driver education teacher conducts behind-the-wheel classes. The Department of Public Instruction may by rule or its approval of teacher education programs require specified amounts of direct supervision of student teachers and prohibit the reassignment of the supervising teachers to other duties when the student teacher is instructing in the absence of the supervising teacher. (Gregersn to Benton, Dept. of Public Instruction, 6/24/82) #82-6-10(L)

June 24, 1982

Mr. Robert D. Benton
Department of Public Instruction
Grimes State Office Building
Des Moines, IA 50319

Dear Mr. Benton:

This letter is written in response to your request for an opinion concerning driver education instruction. The questions you ask are

1. Is it legally permissible for a student teacher to conduct behind-the-wheel instruction when the certificated supervising teacher is not present?

2. If the answer to number one is in the affirmative, may the supervising teacher be assigned concurrent duties of a different nature, such as supervising a study hall or teaching an academic class at the time the student teacher is involved in behind-the-wheel instruction?

3. If the answer to number one is in the affirmative, does the law offer any guideline as to the amount of time a supervising teacher must be present during the behind-the-wheel instruction?

4. A ". . . prospective driver education instructor" enrolled in a safety education program under the provision of Section 321.180 of the Code can be someone who has not met the prerequisites for student teaching." Can a school allow a ". . . prospective driver education instructor" who is not a qualified student teacher trainee to conduct behind-the-wheel instruction in the absence of a certificated supervising teacher?

Each question will be answered in the order presented.

I.

Section 321.178, The Code, requires any person under the age of eighteen to complete a course in driver education prior to being licensed.[1] Section 321.180 allows those possessing instruction or "learner" permits between the ages of fourteen and sixteen to drive

> . . . when accompanied by a parent or guardian, or an approved driver education instructor, or a prospective driver education instructor, who is enrolled in and has been specifically designated by a teacher education institution with a safety education program approved by the department of public instruction, or by any person who is twenty-five years of age or more if written permission is granted by the parent or guardian, who is a holder of a valid operator's or a chauffeur's license, and who is actually occupying a seat beside the driver

and those older then sixteen who possess an instruction permit to drive

> . . . when accompanied by a licensed operator or chauffeur who is at least eighteen years of age, or an approved driver education instructor, or a prospective driver education instructor who is enrolled in and has been specifically designated by a teacher education institution with a safety education program approved by the department of public instruction, and who is actually occupying a seat beside the driver.

---

[1]"License" will mean an operator's license as defined in section 321.174. Other types of "license" available to those under eighteen include school licenses, §321.194, and probationary operator's licenses, §321.178. The latter will not be available after July 1, 1982, having been replaced by a "restricted license" valid for work purposes only. 1982 Session, 69th G.A. ch. , §1 (H.F. 796).

Two requirements stand out in section 321.180. First, depending on the age of the driver, an individual from the named group must accompany the driver. Second, that person must occupy the seat next to the driver. Two persons from the group are not required; group members are listed in the disjunctive ("or") and not the conjunctive ("and").

Thus, section 321.180 does not require that the prospective teacher be accompanied by the teacher. The intent behind section 321.180 is to ensure that a person learning to drive is accompanied by another person, who possesses some minimum experience in the operation of a motor vehicle and is of sufficient maturity and seriousness of purpose.

Once one of the named individuals is present in the seat next to the driver, section 321.180 is satisfied. The presence or absence of the supervising teacher is more relevant to the requirements of an "approved" or accredited student teacher driver education course than to safety.

Department of Public Instruction (DPI) rules concerning teacher education are found in 670 I.A.C. chapter 19. Specific rules regarding student teachers are found in subrule 19.15(3). That rule is broadly written and would not alone require the constant presence of the supervising teacher. One can assume that at some point in time the supervising teacher would need to be present to adequately evaluate the progress of the student teacher. One might also assume that the constant presence of the supervising teacher would impair the learning experience of the student teacher. The degree of direct "in presence" supervision required is a matter for the Department of Public Instruction to consider when granting approval to a teacher education program.

II.

In your second question you ask whether the supervising teacher may perform other duties when the student teacher is conducting behind-the-wheel training. First, there appears to be no reason to distinguish the prospective driver education teacher from any other prospective teacher. Thus, if the DPI approves teacher education programs that allow supervising teachers in other areas of the curricula to perform other duties while the student teacher is teaching, it would be reasonable to allow such here. This conclusion flows directly from the answer to the

first question which was based upon the premise that the presence of the supervising teacher is more relevant to evaluation of the student teacher than to the safety of the permit holder and the motoring public.

Second, a search of DPI rules has revealed no provision prohibiting such an assignment of duties. It can be presumed that a program that provided for a complete reassignment of an instructor to other duties while the student was teaching would not meet standards set forth in DPI rules for evaluation of the student teacher. See 670 I.A.C. 19.15(3). A complete reassignment of the instructor could result in a course taught by a non-accredited teacher, also a violation of DPI rules. 670 I.A.C. 6.1(1).

III.

Your third question asks what guidelines are established by law concerning the amount of time a supervising instructor is present during behind-the-wheel instruction. The following Code sections are relevant to the question.

> 257.9 GENERAL POWERS AND DUTIES OF BOARD [OF PUBLIC INSTRUCTION].
> The state board shall exercise the following general powers and duties:
>
> 1. Determine and adopt such policies as are authorized by law and are necessary for the more efficient operation of any phase of public education.
>
> 2. Adopt necessary rules and regulations for the proper enforcement and execution of the provisions of the school laws.
>
> 3. Adopt and prescribe any minimum standards for carrying out the provisions of the school laws.
>
> 4. Perform such duties prescribed by law as it may find necessary for the improvement of the state system of public education in carrying out the purposes and objectives of the school laws.

> 257.10 SPECIFIC POWERS AND DUTIES. It shall be the responsibility of the state board to exercise the following specific powers and perform the following duties:
>
> * * *
>
> 11. Constitute the board of educational examiners for the certification of administrative, supervisory and instructional personnel for the public school systems of the state; prescribe types and classes of certificates to be issued, the subjects and fields and positions which certificates cover and determine the requirements for certificates; establish standards for the acceptance of degrees, credits, courses, and other evidences of training and preparation from institutions of higher learning, junior colleges, or other training institutions, both public and private, within or without the state.
>
> * * *

(Emphasis added.)

These Code sections grant the Board of Public Instruction broad discretion in establishing standards regarding the presence of the supervising teacher during behind-the-wheel instruction. The Board could adopt rules which require the supervising teacher to be present at all times. Again, whether minute-by-minute supervision of the student teacher is necessary or even desirable from an educational view is, of course, a matter of debate. That issue is best resolved by those persons required to face it: the Board of Public Instruction.

IV.

Your fourth question, as those preceding, is directed to the requirements of a successful teacher education program and course accreditation by the Department of Public Instruction. Section 321.180 allows instruction permit holders to drive when in the presence of ". . . a prospective driver education instructor who is enrolled in and has been specifically designated by a teacher education institution with a safety education program approved by the department of public instruction, and who is actually occupying a seat beside the driver. . . ." (Emphasis added.)

Simply put, if the Department approves a teacher education program which allows a teacher education institution to designate persons to teach driver education, prior to the time they are otherwise eligible for student teaching, the school may allow such a person to conduct the behind-the-wheel training.

If you have any questions, please feel free to contact me.

Sincerely,

Craig Gregersen

CRAIG GREGERSEN
Assistant Attorney General

CRIMINAL LAW, BAIL: Chapters 804, 811, section 356.2, The Code 1981, Iowa Rules of Criminal Procedure 1(c), 2(1). Courts generally have the power to set bail, except as that power has been modified by statute, and bail statutes should be strictly construed. A proposed interim cash bond procedure permitting release of an arrested person between 11 p.m. and 7 a.m., pursuant to a preset schedule of cash bonds, is inconsistent with the statutorily mandated case-by-case determination of bail to be made at the initial appearance. A person lawfully arrested and committed to jail pending an initial appearance is "lawfully committed," no "warrant of commitment" issued by a magistrate is required, nor would a sheriff be civilly liable for false imprisonment. (Ryan to Carr, Assistant Clay County Attorney, 6/17/82) #82-6-9(L)

Mr. Patrick M. Carr
Assistant Clay County Attorney
Spencer, Iowa

June 17, 1982

Dear Mr. Carr:

You have asked several questions about the legal implications of proposed local court rules allowing the temporary release of an arrested person upon the posting of a cash bond pending an initial appearance before a judicial magistrate. Briefly, under the system you have proposed (hereinafter called the interim cash bond system), magistrates in the district would enter a general order setting a schedule of cash bonds that could be posted for various offenses. Between the hours of 11 p.m. and 7 a.m., when a magistrate would be unavailable for an initial appearance, a person arrested without a warrant (or with a warrant that did not state a cash bond) could post the cash bond specified in the schedule and obtain release until the initial appearance could be held the following morning.

You have asked three specific questions about the legitimacy of such a system. First, would persons who would be placed in jail pursuant to the interim cash bond system be "lawfully committed" within the meaning of section 356.2, The Code 1981? Second, is the interim cash bond system inconsistent with the initial appearance provisions of section 804.22, The Code 1981, and Iowa Rules of Criminal Procedure 1(c) and 2(1)? Third, might the sheriff be civilly liable for false imprisonment if a criminal defendant is jailed between 11 p.m. and 7 a.m. without a "warrant of commitment" issued by a magistrate?

Analysis of the questions you have posed preliminarily requires an examination of Iowa's statutory bail system. Under Iowa's system of bail, an initial

appearance must be held "without unnecessary delay," and at that initial appearance the magistrate must examine the individual circumstances to determine what bail is appropriate. See §§ 804.21-22, ch. 811, The Code 1981. Bail can include a cash deposit, although that is not the preferred method of bail. § 811.2, The Code 1981.

Courts generally have the power to set bail, except as that power has been modified by statute. See Wharton's Criminal Procedure § 305, at 172 (1972); 8 Am.Jur.2d Bail and Recognizance § 10, at 589 (1980). The proposed interim cash bond system is not contemplated in the Iowa statute, and the validity of such a system is therefore questionable. The proposed interim cash bond system is laudatory because it permits immediate release of an arrested person, which is preferred under the Iowa bail system. However, statutes permitting cash bond generally are strictly construed. See Wharton's Criminal Procedure § 305, at 176-77 (1972); 8 Am.Jur.2d Bail and Recognizance § 89, at 652 (1980). See also Trevathan v. Mutual Life Insurance Co., 166 Or. 515, 522, 113 P.2d 621, 624 (1941). No provision for interim cash bond is made in the Iowa statute. In addition, the Iowa statute makes it clear that the bail determination must be made on a case-by-case basis, and an interim cash bond schedule is inconsistent with that individualized determination. See § 811.2(2), The Code 1981. See also J. Moore, Moore's Federal Practice ¶ 46.05[2], at 46-49 (2d rev. ed. 1980). Moreover, it is not clear that the forfeiture and penalty provisions for failure to appear would apply to a person released pursuant to the proposed interim cash bond system because the person would not have been "released pursuant to" the statute, see §§ 811.2(7), 811.6, The Code 1981, nor is it clear whether the magistrate's determination as to bail at the initial appearance would constitute an amendment pursuant to section 811.2(5), The Code 1981.

Thus, although the proposed interim cash bond system offers many advantages and may advance some of the goals of Iowa's bail system, it would appear that the legislature must specifically provide for the adoption of such a system.

It appears that the proposed interim cash bond system is inconsistent with the statutory bail provisions and therefore does not satisfy the provisions governing an initial appearance before a magistrate, when, by statute, bail must be set. An arrested person might argue that commitment pursuant to a system that is contrary to

statute means that the person is not "lawfully committed" within the meaning of section 356.2. However, a person may be arrested, with or without a warrant, at any time of the day or night, and may be placed in jail for safekeeping. See §§ 804.1, 804.5, 804.7, 804.16, 804.28, The Code 1981. It is not an "unnecessary delay" for a person who is lawfully arrested to be kept in custody overnight until a magistrate is available for an initial appearance. See 8 Am.Jur.2d Bail and Recognizance § 29, at 606 (1980). Thus, a person who is lawfully arrested and committed to jail pending an initial appearance is "lawfully committed" and in that situation, no "warrant of commitment" issued by a magistrate is required, nor would the sheriff be civilly liable for false imprisonment if the commitment were lawful.

Sincerely,

Roxann M. Ryan

ROXANN M. RYAN
Assistant Attorney General

RMR:mlr

MOTOR VEHICLES: Powers of Local Authorities, §321.236; Posting Signs - Snow Routes, §321.237, Code of Iowa, 1981. A municipality may enact an alternate side parking ordinance for snow emergencies. (Lamb to O'Kane, State Representative, 6/17/82) #82-6-8(L)

June 17, 1982

The Honorable James D. O'Kane
State Representative
1815 Rebecca St.
Sioux City, IA 51103

Dear Representative O'Kane:

I am in receipt of your letter of March 25, 1982 requesting an opinion on a city alternate side parking ordinance for snow emergencies. Specifically the question is:

> Can a municipality enact an ordinance creating an alternate side parking plan that would call for notice of the ordinance to be posted on primary roads not part of the national interstate highway system at or near their points of intersection with the corporate limits of the city, and on exit ramps of interstate highways within the corporate limits of the city, the signs reading "Alternate Side Parking required during snow removal", in consideration of provisions 321.236(12) and 321.237, The Code.

Section 321.236, The Code states:

> Local authorities shall have no power to enact, enforce, or maintain any ordinance, rule or regulation in any way

in conflict with, contrary to or inconsistant with the provisions of this chapter, and no such ordinance, rule or regulation of said local authorities heretofore or hereafter enacted shall have any force or effect, however the provisions of this chapter shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from:

1. Regulating the standing or parking of vehicles.

* * *

12. Designating highways or portions of highways as snow routes.

Section 321.237, The Code states:

No ordinance or regulation enacted under subsections 4, 5, 6, 8 or 12 of section 321.236 shall be effective until signs, giving notice of such local traffic regulations as specified in the department manual on uniform traffic-control devices, are posted upon or at the entrances to the highway or part thereof affected as may be most appropriate and shall be erected at the expense of such municipality.

When a city has adopted an ordinance as authorized in 321.236, subsection 12, or an ordinance which prohibits standing or parking of vehicles upon a street or streets during any time when snow-removal operations are in progress and before such operations have resulted in the removal or clearance of snow from such street or streets, signs as specified in the above manual, posted as hereinabove provided, shall be deemed sufficient notice of the existence of such restrictions.

Both sections construed together allow cities to enact a special parking ordinance within the city limits during times of snow removal. The ordinance must, however, be enacted as part of the official action of the local authorities during a legal session of the governing body. Lemke v. Mueller, 166 N.W.2d 860 (Iowa 1969).

Signs giving notice of a snow removal-alternate side parking ordinance must conform with certain regulations. The Manual on Uniform Traffic Control Devices (1979) states: "Where special parking restrictions are imposed during heavy snowfall, Snow Emergency signs may be erected. The legend will vary according to the regulations, but the signs shall be vertical rectangles, having a white background with the upper part of the plate a red background." 2B-26. It is not necessary for such signs to be placed on the interstate highway. The message need only be short and general in its form.

In conclusion, it is our opinion that the city may enact an alternate side parking ordinance for snow emergencies with notice of such ordinance conforming to the standards described above.

Sincerely,

Susan E. Lamb

SUSAN E. LAMB
Assistant Attorney General

HIGHWAYS; COUNTIES: §§306.10-306.17, 306.22, §306.23 as amended by 1981 Session, 69th G.A. ch. 98, §306.24-§306.26, The Code 1981, 1981 Session, 69th G.A. ch. 117, §360(2). Vacation of a secondary road pursuant to §306.10-§306.17, The Code 1981, terminates the interest of the county in the right-of-way held by an easement for highway purposes. Right of way held by the county in fee title can be sold pursuant to §306.22, §306.23 as amended by 1981 Session, 69th G.A. ch. 98, §306.24-§306.26, The Code 1981, and 1981 Session, 69th G.A. ch. 117, §360(2) after vacation of the secondary road in order to terminate the interest of the county. (Mull to Soldat, Kossuth County Attorney, 6/17/82) #82-6-7(L)

Mr. Mark S. Soldat
Kossuth County Attorney
714 East Street
Algona, IA 50511

June 17, 1982

Dear Mr. Soldat:

You have requested an opinion of the Attorney General on the following question: "What action must the County Board of Supervisors take upon vacation of a secondary road if it desires to dispose of the property and divest itself of any and all interest in the vacated road right-of-way, whether the right-of-way be a fee or easement title?" In our opinion, vacation of a secondary road pursuant to §306.10-§306.17, The Code 1981, terminates the interest of the county in the right of way held by an easement for highway purposes. Right of way held by the county in fee title can be sold pursuant to §306.22, §306.23 as amended by 1981 Session, 69th G.A. ch. 98, §306.24-§306.26, The Code 1981, and 1981 Session, 69th G.A. ch. 117, §360(2) after vacation of the secondary road in order for the interest of the county to be eliminated.

Vacation of county roads is governed by §306.10 through §306.17, The Code 1981. These sections provide for notice, hearing and final order regarding vacation of roads. Your concern is what additional steps need to be taken after vacating the road to dispose of all interest of the county in the right of way. The phrase "right of way" for the purposes of your question and this opinion refers to the strip of land acquired for highway purposes.

The general rule is that when a highway is vacated, the easement is removed and absolute title to the right of way reverts to the owner of the fee without any further action of the highway authorities except where the fee title to the right of way has been acquired by the public. See Kitzman v. Greenhalgh, 164 Iowa 166, 170, 145 N.W. 505, 506 (1914); 39A C.J.S. "Highways" §137 at 858. The reason for this general rule is that an easement does not affect the title. The title exists subject to the easement. When the easement is eliminated, the title is

relieved of the easement. Polk County v. Brown, 260 Iowa 301, 149 N.W.2d 314, 316(1967). In Op.Att'yGen. #80-8-2, the effect of vacating a road on the easement was discussed as follows:

> Thus, when a street is vacated in an unincorporated area, title to the land covered by the street reverts to the owner(s) of the fee by operation of law, without any formal conveyance by the county. This is true whether the street was established by formal platting, dedication and acceptance or by dedication by prescription. After a street, road or highway in an unincorporated area is vacated, the county no longer has any interest in that land to convey. A county may, of course, quit claim any interest in the land from a vacated street, road, or highway, but this is not necessary for its interest to be terminated.

Accordingly, vacation of a secondary road pursuant to §306.10-§306.17 terminates the interest of the county in the right of way held by an easement for highway purposes. See Polk County v. Brown, 260 Iowa 301, 149 N.W.2d 314, 316 (1967).

If the right of way for the secondary road was acquired by fee title, vacation of the road would not affect the title held by the county. See Lake City v. Fulkerson, 122 Iowa 569, 98 N.W. 376, 377 (1904). Section 306.22, §306.23 as amended by 1981 Session, 69th G.A. ch. 98, §306.24-§306.26 and 1981 Session, 69th G.A. ch.117, §306(2) set forth procedures for a county to sell real property which is no longer required for highway purposes when the title has been acquired. When the right-of-way is held in fee title, the county can sell the land pursuant to §306.22, §306.23 as amended by 1981 Session, 69th G.A. ch. 98, §306.24-§306.26 and 1981 Session, 69th G.A. ch. 117, §306(2) after vacation of the secondary road. See Op.Att'yGen. #80-7-3; Op.Att'yGen. #80-8-2.

In conclusion, vacation of a secondary road pursuant to §306.10-§307.17, The Code 1981, terminates the interest of the county in the right of way held by an easement for highway purposes. Right of way held by the county in fee title can be sold pursuant to §306.22, §306.23 as amended by 1981 Session, 69th G.,A. ch. 98, §306.24-§306.26 and 1981 Session, 69th G.A. ch. 117, §360(2) after vacation of the secondary road in order to terminate the interest of the county.

Sincerely,

Richard E. Mull

Richard E. Mull
Assistant Attorney General

REM/plr

MUNICIPALITIES: Police and Fire Pension Systems. §§ 97B.3, 400.1, 400.2, 400.3, 411.2, and 411.6, The Code 1981. Provision for police and fire pension systems is predicated upon municipal participation in a Chapter 400 civil service system. A city having a population of less than eight thousand may, by ordinance, abolish its civil service system, and thus its police and fire pension systems. Such ordinance, however, shall not take effect until, after publication, it has been submitted to and approved by a majority of the voters at a regular municipal election. (Walding to Holt, State Representative, 6/17/82) #82-6-6(L)

June 17, 1982

The Honorable Lee Holt
State Representative
1502 Country Club Drive
Spencer, Iowa 51301

Dear Representative Holt:

You have requested an opinion of the Attorney General regarding the abolishment of police and fire pension systems. Specifically, you have asked:

> 1. Can a City that has dropped below 8,000 population in the 1980 census abolish its police and firemen pension systems pursuant to § 411.2, Code of Iowa, since it no longer is required to maintain a Civil Service system pursuant to § 400.1, Code of Iowa?
>
> 2. If the City can abolish its police and firemen pension systems, how should the City go about it?

Your two inquiries concern the propriety and procedure for the abolishment of police and fire pension systems. Our response will treat the two as one.

Section 411.2, The Code 1981, provides in pertinent part:

> In any city in which the firemen or policemen are or shall be appointed under the civil service law of this state, there are hereby created and established two separate retirement or pension systems for the purpose of providing retirement allowances only for firemen or policemen of said cities who shall be so appointed after the date this chapter takes effect, or benefits to their dependents. [Emphasis added]

Provision for police and fire pension is predicated upon municipal participation in a Chapter 400 civil service system. The focus of our attention thus becomes Chapter 400.

Municipal participation in civil service, under the provisions of Chapter 400, is either mandatory or optional.[1] Mandatory participation is required of cities with a population of eight thousand or more if they have a paid fire department or paid police department. See § 400.1, The Code 1981. In such cities, the mayor, with council approval, is required to appoint a three-member civil service commission. The qualifications of such commissioners, we should note, are provided for in § 400.2, The Code 1981. Optional participation is provided for cities with a population of less than eight thousand. See § 400.3, The Code 1981. The cities which choose to participate, however, must adopt the provisions of Chapter 400. The cities which opt to participate are required either to appoint a civil service commission or to provide the council with the powers and duties of the commission.

Turning from the establishment to the abolishment of a civil service system, Chapter 400 provides for such action. In particular, § 400.3, The Code 1981, provides in part:

> Whenever the city council appoints a commission, it may, by ordinance, abolish it, and the commission shall stand abolished sixty days from the date of the ordinance and the powers and duties of the commission shall revert to the city council except whenever a

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[1] Portions of § 411.2, The Code 1981, underscored above, make reference to Chapter 400. Specifically, the words "are" and "shall be" refer to optional and mandatory participation, respectively.

> city having a population of less than eight thousand provides for the appointment of a civil service commission, it may by ordinance abolish such office, but said ordinance shall not take effect until it has been submitted to the voters at a regular municipal election and approved by a majority of the voters at such election. The ordinance shall be published once each week for two consecutive weeks preceding the date of said election in a newspaper published in and having a general circulation in said city. In the event there is no newspaper published in such city, publication may be made in any newspaper having general circulation in the county. [Emphasis added]

Thus, a city having a population of less than eight thousand may, by ordinance, abolish its civil service system. Such ordinance, however, shall not take effect until, after publication, it has been submitted to and approved by a majority of the voters at a regular municipal election.

Abolishment of police and fire pension systems, because provision for such systems is predicated upon municipal participation in a Chapter 400 civil service system, is authorized by the Code. Accordingly, in order to abolish police and fire pension systems, a municipality need only to abolish its civil service system.[2]

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW:dy

cc: Maynard Mohn

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2 It should be noted that any member in service who has been a member of a police or fire retirement system fifteen or more years has a vested interest in a service retirement allowance. See § 411.6, The Code 1981. Such vested interests must be honored by a city regardless of the decision to abolish its police and fire pension system. The Iowa Department of Job Service, the agency charged with administering IPERS, see § 97B.3, The Code 1981, is responsible for retirement system conversions.

STATE AGENCIES/ENVIRONMENTAL QUALITY/INCORPORATION OF FEDERAL RULES BY REFERENCE: §§ 455B.139, 455B.132, The Code 1981; 42 U.S.C. 6926, 6929; 400 I.A.C. § 45.2; 40 C.F.R. 261. Iowa Department of Environmental Quality can interpret its rule identifying hazardous wastes differently than United States Environmental Protection Agency interprets its rule, even though Iowa rule incorporates federal rule by reference. (Ovrom to Ballou, Department of Environmental Quality, 6/17/82) #82-6-5(L)

June 17, 1982

Mr. Stephen W. Ballou
Executive Director
Iowa Department of Environmental Quality
Wallace State Office Building
L O C A L

Dear Mr. Ballou:

Larry Crane, former director of the Department of Environmental Quality, requested an opinion of this office interpreting a provision of Iowa's hazardous waste statute and a Department of Environmental Quality rule promulgated pursuant to that statute. DEQ is authorized by the federal Environmental Protection Agency to administer portions of the federal hazardous waste management program established by the Federal Resources Conservation and Recovery Act, 42 U.S.C. 6926(c). 46 F.R. 9948. DEQ is specifically authorized to identify and list hazardous wastes. 40 C.F.R. 123.121(b). DEQ's rule 45.2 identifying and listing hazardous waste adopts by reference the federal rule which identifies and lists hazardous wastes, as amended through January 16, 1981. See 400 I.A.C. 45.2(455B), adopting 40 C.F.R. 261 as amended through January 16, 1981.[1] You have asked three questions which are set forth below with the discussion of each question.

I

Can the Department of Environmental Quality interpret its rule 45.2 and conclude a waste is a hazardous waste, when the United States Environ-

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[1] 40 C.F.R. 261.3(a)(2)(ii), which defines when mixtures of listed hazardous wastes may be considered hazardous waste, was amended after January 16, 1981, hence the amendment was not adopted in DEQ rule 45.2. See 161 Env. Rep. 1852. However, the relevant portion of the rule is unchanged and the amendment does not affect this analysis.

mental Protection Agency has interpreted 40 C.F.R. 261 and concluded that the same waste is not a hazardous waste?

The federal regulation which DEQ has adopted by reference lists specific substances which are officially characterized as hazardous wastes. See 40 C.F.R. 261.30, et seq. The federal rule also defines as hazardous waste a mixture of a solid waste and one or more listed hazardous wastes if such mixture has not been specifically excluded from the list. 40 C.F.R. 261.3(a)(2)(ii).[2] In an informal letter to an industry EPA stated that a mixture containing three wastes specifically listed in 40 C.F.R. 261.31, cresylic acid, methylene chloride, and dichlorobenzene, was not a hazardous waste. DEQ disagrees with that opinion and thinks the mixture is a hazardous waste because it is a mixture of a solid waste and one or more hazardous wastes listed in the rule and it has not been excluded from the list. Therefore the Department's first question is whether it must follow EPA's informal interpretation.

The federal Resources Conservation and Recovery Act provides that each state must impose requirements at least as stringent as those imposed by federal regulations, and also provides that states may impose requirements more stringent than those imposed by federal regulations. 42 U.S.C. 6929. However, the Iowa statute states that rules adopted by the Iowa Environmental Quality Commission "shall be consistent with and shall not exceed the requirements of" the federal statute, rules and regulations adopted under it. § 455B.139, The Code 1981, as amended by 1982 Session, 69th G.A., ch. 151, § 12. Under the facts set forth in the Department's letter we do not think the informal advice from EPA is a "rule or regulation" within the meaning of § 455B.139. Thus DEQ is not required to follow the federal EPA's informal advice that the mixture of three listed hazardous wastes is not a hazardous waste.

Section 455B.139 as amended states:

> Rules adopted by the [Environmental Quality] commission under sections 455B.130 to 455B.140 shall be consistent with and shall not exceed the requirements of 42 U.S.C. 6921-6934 as

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[2] References to the subsections of 40 C.F.R. 261 are to those regulations as amended through January 16, 1981. See note 1, supra.

> amended to January 1, 1981 and rules and regulations adopted pursuant to those sections. (emphasis added).

It is obvious that DEQ rule 45.2 is consistent with the federal rule as amended through January 16, 1981, since 45.2 adopts the federal rule and amendments through that date. "Rule" is defined in the Iowa Administrative Procedure Act as each agency statement of general applicability that implements, interprets, or prescribes law or policy. § 17A.2(7), The Code 1981. Excluded from the definition are declaratory rulings and interpretations issued by an agency with respect to a specific set of facts and intended to apply only to that set of facts. § 17A.2(7)(b), The Code 1981. "Regulation" is defined as "a rule or order prescribed for management or government." Black's Law Dictionary p. 1451 (4th ed. 1968). Informal advice in a letter from EPA to an industry is not a rule or regulation within the meaning of § 455B.139, The Code, and that section does not require DEQ to be consistent with such informal advice. See also Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process, 60 Iowa L.Rev. 731, 810 (1975) (informal advice from an agency is not normally binding on the agency because of its informality and the possibility that the agency could change its mind).

II

> Is a mixture of hazardous wastes in rule 45.2 a hazardous waste when the mixture itself is not listed as a hazardous waste?

DEQ is authorized by the Iowa legislature to adopt rules identifying the characteristics of hazardous wastes and listing hazardous wastes. § 455B.131(2), The Code 1981. The rule adopted by DEQ incorporates by reference the federal rule which defines a statute as a hazardous waste "if it is a mixture of solid waste and one or more hazardous wastes listed in [the rule] and has not been excluded from this paragraph under §§ 260.20 and 260.22 of this Chapter." 40 C.F.R. 261.3(a)(ii). (Sections 260.20 and 260.22 provide for petitions to EPA to exclude specific wastes from the list of hazardous wastes.) This rule is consistent with the enabling statute. See § 455B.131(2), The Code 1981. Assuming that the wastes in question are not excluded from

the list of hazardous wastes in 40 C.F.R. 261, it would be included in DEQ's definition of a hazardous waste under 400 I.A.C. 45.2, incorporating 40 C.F.R. 261.3(a)(2)(ii).

III

Can DEQ list a hazardous waste under rule 45.2 that is not listed as a hazardous waste under 40 C.F.R. 261?

The Department further explained this question by asking if the Iowa Environmental Quality Commission could list this mixture as a hazardous waste under rule 45.2 which incorporates 40 C.F.R. 261.11(a)(3). That federal rule authorizes the administrator of EPA to list a solid waste as a hazardous waste if it contains any of the toxic constituents listed in Appendix VIII unless the administrator determines that it is not capable of posing a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed. 40 C.F.R. 261.11(a)(3). The Iowa rules provide that references in the federal rule to the "EPA Administrator" shall be deemed references to the "Executive Director" of DEQ. 400 I.A.C. 45.1(2) (455B). Thus DEQ is authorized to list wastes under rule 45.2, which incorporates 40 C.F.R. 261.11(a)(3). This is consistent with the legislative authorization for DEQ to adopt rules establishing criteria for identifying the characteristics of hazardous wastes and to adopt rules listing hazardous wastes. Section 455B.131(2), The Code 1981.

We do not think § 455B.139 of the Iowa Code prohibits DEQ from listing a hazardous waste under that provision when EPA has not listed it. RCRA requires states to impose requirements at least as stringent as federal regulations, and allows states to impose requirements more stringent than federal regulations. 42 U.S.C. 6929. While § 455B.139 evinces an intent of the Iowa legislature that DEQ rules not be more stringent than federal rules, we do not think it requires DEQ to adopt rules which are always identical to federal rules. In the first place, the legislature cannot require DEQ to automatically incorporate federal rules adopted after the DEQ rules were adopted. Such would be an unlawful delegation of state legislative powers to the federal government, and would also violate the notice and comment requirements for rulemaking under Iowa law. See Op.Att'yGen. 80-40-12 (Peterson to Schroeder, 4/21/80); Wallace v. Commissioner of Taxation, 289 Minn. 220, 184

N.W.2d 588 (1971); §§ 17A.4, 17A.5, The Code 1981. Rather, we think § 455B.139 directs DEQ to adopt rules which create a program consistent with but no more restrictive than the federal hazardous waste program. Iowa has done so and this office and EPA have agreed that Iowa's program is "substantially equivalent" to the federal program. See September 30, 1980 and December 15, 1980 letters from Attorney General Thomas J. Miller to DEQ Executive Director Larry E. Crane; EPA approval at 46 F.R. 9948.

Upon approval by EPA, the program becomes a state program, administered "in lieu of" the federal program. 42 U.S.C. 6926(c). DEQ can, under the rules it has adopted, list a solid waste as a hazardous waste if it contains any of the toxic constituents listed in Appendix VIII of 40 C.F.R. 261 unless DEQ determines it is not capable of posing a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed. 400 I.A.C. 45.2, incorporating 40 C.F.R. 261.11(a)(3). If DEQ adopted a rule listing a waste under this provision which was not listed by EPA, we do not think it would violate § 455B.139, The Code 1981.

Sincerely,

ELIZA OVROM
Assistant Attorney General

EO:rcp

COUNTIES: CONDEMNATION AUTHORITY: Iowa Code § 331.304(8) (Supp. 1981), Iowa Code §§ 471.4(1), 306.19, 306.27, 306.28-306.37. A county has no inherent authority to condemn a right-of-way for a road across state-owned property and the legislature has made no express or necessarily implied grant of such power. A county, therefore, has no authority to condemn a right-of-way across state-owned property. (Kniep to Wilson, Director, State Conservation Commission, 7/30/82) #82-7-13 (L)

Mr. Larry J. Wilson
Director
State Conservation Commission
Wallace State Office Building
L O C A L

Dear Mr. Wilson:

You have asked the opinion of this office as to whether a county has the authority to condemn a right-of-way across state-owned property. Specifically, you asked, "If the Iowa Conservation Commission refuses to allow Monona County to construct a road on the state-owned Loess Hills Wildlife Management Area, does the county have authority to condemn a right-of-way on said property?"

The general rule is that a governmental or political subdivision of a state does not possess any inherent power to condemn the property of the state itself. Any grant of such power must be made by the legislature either expressly or by necessary implication. See Annot., 35 A.L.R.3rd 1326.

The Iowa Supreme Court has not faced directly the issue of county authority to condemn State property, but has followed the closely-related principle that "property already devoted to a public use cannot be taken for another public use which will totally destroy or materially impair or interfere with the former use, unless the intention of the legislature that it should be so taken has been manifested in express terms or by necessary implication, mere general authority to exercise the power of eminent domain being in such case insufficient; and this is so whether the property was acquired by condemnation or by purchase." Lage v. Pottawattamie County, 232 Iowa 944, 5 N.W.2d 161, 166 (1942). Further, in determining the implications to be

drawn from the language of a statute granting eminent domain powers, the Court stated in Iowa State Highway Commission v. Hipp, 259 Iowa 1082, 1088, 147 N.W.2d 195, 198 (1966): "We are, however, committed to the rule that statutes delegating the powers of eminent domain are strictly construed and restricted to their expression and intention." 147 N.W.2d at 198.

It is clear, based upon these general principles, that an Iowa county cannot condemn property for use as a road inside a state-owned wildlife management area in the absence of express or necessarily implied statutory authority to do so. We find in our review of the Iowa Code no such statutory authority.

Iowa Code Section 331.304(8) (Supp. 1981) provides:

> The power to take private property for public use shall only be exercised by counties for public purposes which are reasonable and necessary as an incident to the powers and duties conferred upon counties, and in accordance with chapters 471 and 472. Sections 306.19 and 306.28 to 306.37 are also applicable to condemnation of right of way for secondary roads.

The power described in this section which is a part of the county home rule legislation enacted in 1981, is specifically limited to condemnation of private property for public use. Nothing in this section, nor in Chapters 471 and 472, nor in §§ 306.19, 306.28-.37 can be read as expressly or by necessary implication authorizing a county to condemn state-owned property.

Under Iowa Code Section 471.4(1) counties are granted the right to take only private property for public use. No express or implied power to condemn state property is contained in this statute or elsewhere in Chapters 471 and 472. In § 306.19 the agency having jurisdiction and control of a road is granted the authority to condemn the necessary right-of-way for such road. This is general authority to exercise the power of eminent domain such as that contemplated in Lage, and not the type of grant which, when the statute is strictly construed, would support county exercise of condemnation authority on state lands. Sections 306.28-306.37 provide alternative procedures to Chapters 471 and 472 which may be followed by the board of supervisors in condemnation of a right-of-way. Once again nothing in these sections in any way suggests that the state is a permissible condemnee.

Your opinion request mentions that there is currently a gravel road in the vicinity of the proposed road. If the board of supervisors proposes to change the course of this road, it might look to § 306.27 for authority. This section, among other things, grants boards of supervisors authority to change the course of any part of a secondary road "to avoid the construction and maintenance of bridges, or to avoid grades, or railroad crossings, or to straighten any road, or to cut off dangerous corners, turns or intersections on the highway, or to widen any road above statutory width, or for the purpose of preventing the encroachment of a stream, watercourse, or dry run upon such highway." The statute requires the board of supervisors to follow procedures for condemnation under §§ 306.28 to 306.37. Once again the statute seems to fit the category of a grant of general authority to the county to condemn for the stated purposes, without any express or implied authority to take state property. As indicated above, the condemnation procedures in §§ 306.28 to 306.37 also provide no grant of such authority.

In summary, the county has no inherent authority to condemn state-owned property for use as a road. The Iowa Legislature has made no express or necessarily implied grant of such authority to the counties. Therefore, Monona County has no authority to condemn a right-of-way across the state-owned Loess Hills Wildlife Management Area.

Sincerely,

Allan Kniep

ALLAN KNIEP
Assistant Attorney General

AK:rcp

STATE OFFICERS AND DEPARTMENTS: Iowa Board of Dental Examiners: Constitutional Law. U.S. Const., Amend 14; Iowa Const., art. I, § 6; §§ 147.2, 147.12, 147.14(4), 147.36, 147.76, Iowa Code (1981), 320 I.A.C. § 11.2(1)(2a) and 3. The practice of the Board of Dental Examiners of denying graduates of foreign dental colleges the opportunity to take the Iowa dental examination would likely be held constitutional on its face. Because the classification does not on its face distinguish between citizens and aliens, "strict scrutiny" would not apply. The classification would likely survive the traditional rational basis test for determining equal protection challenges. However, were it shown that the practice, although neutral on its face, was intended to discriminate against aliens, an equal protection violation would be established. Intent to discriminate is a fact question which cannot be resolved in an Opinion of the Attorney General, but only by a court. (Schantz to Doderer, 7/29/82) #82-7-12 (L)

July 29, 1982

The Honorable Minette Doderer
State Representative
State Capitol
L O C A L

Dear Representative Doderer:

Reference is made to your request for an opinion of the Attorney General concerning the authority of the Iowa Board of Dental Examiners to refuse graduates of foreign dental institutions the opportunity to sit for the Iowa dental examination. Specifically, you inquire:

> 1) Does the "equal protection clause" of article I, section six of the Iowa Constitution, or of section one of the fourteenth amendment to the Constitution of the United States prohibit the dental board of examiners from denying graduates of all foreign institutions the privilege of taking the Iowa examination?
>
> 2) May the dental board of examiners deny graduates of foreign institutions the privilege of taking the Iowa examination on the grounds that no organization evaluates the credentials of those institutions and that the board is unable to perform the evaluation itself?

I

The Iowa General Assembly has provided for licensing of dentists under the provisions of §§ 147.2 and 153.17, The Code 1981. Section 147.2 provides, in part, as follows:

> No person shall engage in the practice of . . . dentistry . . . unless the person has obtained from the state department of health a license for that purpose.

Section 153.17, The Code 1981, provides, in pertinent part, as follows:

> Except as herein otherwise provided, it shall be unlawful for any person to practice dentistry . . . in this state, other than: . . . 3. Those who may hereafter be duly licensed as dentists . . . pursuant to the provisions of this chapter.

The appointment of an examining board has been authorized by the general assembly for the purpose of giving examinations to applicants for licenses to practice dentistry in this state. Sections 147.12, 147.14(4), The Code 1981. Such examining board is authorized and required to establish rules for the conducting of examinations, and the grading of examinations and passing upon the technical qualifications of applicants as shown by such examinations. Section 147.36, The Code 1981.

Pursuant to this authorization and under § 147.76, The Code 1981, the Iowa Board of Dental Examiners has established certain rules pertaining to qualifications for licensure to practice dentistry in this state.

> Applications for licensure to practice dentistry in this state shall be made to the board on the form provided by the board and must be completely answered. Applications for licensure must be filed with the board along with: a. Satisfactory evidence of graduation from an accredited dental college approved by the board . . .
>
> The board may require additional information be provided by the applicant relating to education and experience as may be necessary to pass upon the applicant's qualifications. [Emphasis added]

320 I.A.C. §§ 11.2(1)(2a) and (3).

We are advised that the Iowa Board of Dental Examiners (hereinafter "the Board") approves only those dental colleges accredited by the American Dental Association, that the ADA purports to accredit only schools located in the United States and Canada, and that there is no comparable organization which accredits dental colleges located outside the United States and Canada. Taken together, these practices result in a classification, with respect to eligibility to sit for the Iowa dental licensing examination, between graduates of dental colleges located in the United States and Canada on the one hand and graduates of dental colleges located elsewhere in the world on the other. The central question is whether this classification is constitutionally permissible.

II

Article I, § 6, Iowa Const. provides that "all laws of a general nature shall have a uniform operation . . ." and is comparable to the federal equal protection clause, but may be more stringent in some circumstances. See Beitz v. Horak, 271 N.W.2d 755, 759 (Iowa 1978). Thus, we begin our analysis by reciting familiar principles:

> (i)f a state legislative enactment classifies commercial enterprises for purpose of regulation and such classification, as here, is neither premised upon a suspect criteria nor infringes a fundamental right, a presumption of constitutionality attaches and the statute will be set aside as violative of due process or equal protection only if it is arbitrary and without foundation in public policy, its means are unrelated to objectives, or the distinction drawn is invidious and lacks a rational basis incapable of jurisdiction under any conceivable set of facts.

Chicago Title Ins. Co. v. Huff, 256 N.W.2d 17, 28 (Iowa 1977). Moreover, a state is accorded wide discretion in defining classes involving a categorization of persons or things. Id.

As the Huff case indicates, the courts have articulated two or more tests or standards of review for classifications challenged under the equal protection clause. The "strict scrutiny" standard is invoked if a classification is inherently "suspect" or impinges upon a fundamental interest. To satisfy this standard, a classification must advance a "compelling state interest" and there must be no "less restrictive means" available

to protect that interest. Shapiro v. Thompson, 394 U.S. 618 (1969). This standard of review is generally fatal to a classification, L. Tribe, American Constitutional Law, 516-6 (1978), and would be if applicable here. Although strict educational requirements for dentists may protect a compelling public health interest, there is obviously available a means less restrictive than a classification based upon the geographic location of the dental school, to wit: affording applicants an individualized opportunity to demonstrate that their educational background is comparable to that obtainable from an accredited college. Thus, we turn to the question whether the "strict scrutiny" standard of review is applicable to this classification.

Although the interest in an opportunity to practice one's chosen profession is obviously substantial, it has not been characterized as "fundamental" for purposes of triggering "strict scrutiny." Williamson v. Lee Optical, 348 U.S. 483, 75 S.Ct. 461, 99 L.ed. 563 (1955). Nor is the classification in question inherently "suspect." A classification of applicants for licensure based upon alienage, i.e. upon the citizenship of the applicant, is suspect and subject to strict scrutiny. Examining Board of Engineers, Architects and Surveyors v. Otero and Noguerioro, 426 U.S. 572, 96 S.Ct. 2264, 49 L.Ed.2d 64 (1976); In re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1971). Here, however, the classification on its face relates to the location of the college rather than to the citizenship of the applicant.[1] Inasmuch as aliens may be trained in American dental colleges and American citizens may be trained in foreign dental colleges, the classification in question is facially neutral with

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[1] In this respect, we wish to note Section 147.3, The Code 1981, which provides, in part, as follows:

> An applicant for license to practice a profession under this title is not ineligible because of citizenship . . . or national origin, although the application form may require citizenship information . . . ."

See also 1976 O.A.G. 673.

respect to alienage and strict scrutiny does not apply.[2]

In our opinion, then, a court would evaluate an equal protection challenge to the Board's classification under the more deferential standards of the "rational basis" test. Under this test, the focus is upon the "fit" between the ends and the means reflected in the rule in question: is the classification reasonably related to a legitimate public purpose? As frequently formulated, for example in Huff, supra, and Williamson, supra, the rational basis test inquiry is whether there is any conceivable rational connection between the classification and a possible public purpose. When formulated in this manner, the inquiry is largely "facial" in nature and the court requires no evidentiary showing that the hypothesized purpose is the actual purpose or that the conceivable fit between ends and means exists in the real world. This formulation is "toothless" except when applied to wholly arbitrary classifications and we have little doubt that the Board's rule would survive an equal protection challenge analyzed in this manner. Assuming that the purposes of the rule are to insure that Iowa dentists possess adequate educational qualifications and to avoid the needless expenditure of administrative resources in making that determination on a case-by-case basis, it is "conceivable" that no foreign dental colleges provide an education that is the functional equivalent of that required for accreditation by the American Dental Association. On those assumptions, of course, there is a perfect "fit" between means and ends and the classification would be upheld.

We observe, however, that courts do not always apply the "conceivable rational basis" test, but rather require a "substantial relation" between means and ends. When proceeding in this fashion, a court may require some showing of the "actual" purpose of the law or entertain an evidentiary showing with respect to the degree to which the classification is overinclusive or underinclusive. Although this tension within the rational basis test is seldom explicitly acknowledged by the courts, it appears to be the only means of reconciling otherwise

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[2] Of course, if it were shown that a facially neutral rule were enacted for or administered with a discriminatory purpose, an equal protection violation would be established. Although a disparate impact on aliens would be alone insufficient to sustain a challenge, Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), a showing of disparate impact on aliens may be evidence from which in part intent to discriminate could be inferred. Flores v. Pierce, 617 F.2d 1386 (9th Cir. 1980). Whether such evidence exists cannot, of course, be determined in an Opinion of the Attorney General, but only in a judicial proceeding.

divergent decisions.[3]

We believe there is a slim basis for thinking an Iowa court would in fact apply the more "toothsome" substantial relation variant of the "rational basis" test. A recent article suggests that state courts generally have been more willing to scrutinize state economic regulations than the federal courts. "Developments in the Law--The Interpretation of State Constitutional Rights," 95 Harv. L.Rev. 1324, 1471 (1982). It further suggests that state courts have tended to scrutinize more closely classifications which, as here, tend to exclude persons from the pursuit of their chosen profession or tend to affect consumers by restricting the supply of professional services. Id. at 1474. See also D'Amico v. Board of Medical Examiners, 520 P.2d 10 (1974) (unconstitutional to deny medical licenses to all osteopathic graduates). City of Osceola v. Blair, 231 Iowa 770, 2 N.W.2d 83 (1942) (holding unconstitutional a city ordinance making practice of soliciting orders for goods, ware and merchandise a "nuisance").

Were an Iowa court to adopt this analytical approach and were the challengers able to present probative evidence 1) that the classification employed by the Board is significantly underinclusive, i.e. that a significant number of prospective applicants for the licensing examination attended foreign dental colleges which provide an education that is functionally equivalent to that provided by accredited dental colleges and 2) that other states have been able to assess the credentials of graduates of foreign dental schools on a less rigid basis without

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[3] Compare, respectively, (a) Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); (b) Goeseart v. Cleary, 335 U.S. 464 (1948); (c) Dandridge v. Williams, 397 U.S. 471 (1970); (d) Chicago Title Ins. Co. v. Huff, 256 N.W.2d 17 (Iowa 1977); with (a) F.S. Royster Guano Co. v. Virgina, 253 U.S. 412 (1920); (b) Reed v. Reed, 404 U.S. 71 (1971); (c) United States Dept. of Agr v. Moreno, 413 U.S. 528 (1973); (d) Bierkamp v. Rogers, 293 N.W.2d 577 (Iowa 1980).

an excessive administrative burden,[4] it might very well conclude that the Board's practice is unconstitutional. This office cannot provide a definite conclusion on this matter because the factual issues involved cannot be resolved in an Attorney General's Opinion.

However, although the matter is not free from doubt, we believe the Iowa Supreme Court would apply the comparatively toothless version of the "rational basis" test in these circumstances. We base this upon two recent decisions in the occupational licensing area. In Green v. Shama, 217 N.W.2d 547 (Iowa 1974), the Court upheld the constitutionality of statutes prohibiting any persons except licensed barbers, including licensed cosmetologists, from cutting hair of adult males and appeared to apply a very deferential standard of review. And, in MRM, Inc. v. City of Davenport, 290 N.W.2d 338 (Iowa 1980), the Court upheld a city ordinance imposing stringent licensing requirements for massage parlors. The Court expressly stated it was reviewing the provisions of the ordinance under the "traditional rational basis test" and declined an invitation to adopt a more demanding standard of review. Again, if this test is applied, the classification here at issue would almost certainly be upheld.

In this regard, we would note in conclusion that the General Assembly is in a position to make factual inquiries of the Board of Dental Examiners and to make policy judgments concerning the desirability of the current practice. The General Assembly did precisely this when it amended §§ 157.1 and 158.2 to authorize cosmetologists to cut the hair of adult males. And, of course, the General Assembly is in a position to provide the increased financing that might be required by a less restrictive approach.

Sincerely yours,

Mark E. Schantz

MARK E. SCHANTZ
Solicitor General

MES/nm

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[4] In this regard, it may be worthy of note that the Iowa Board of Medical Examiners has traditionally been less restrictive in dealing with graduates of foreign medical schools. See § 148.3, Iowa Code 1981 and 470 I.A.C. § 135.102(5). Of course, this could reflect differences between the professions with respect to the quality of foreign professional training.

CIVIL RIGHTS/STANDING TO FILE COMPLAINT: 601A.2(2), 601A.15(1), 601A.19, The Code 1981. Section 601A.15(1) does not grant standing to local civil rights agencies or their officials to file complaints with the state Commission alleging injuries to third parties. (Nichols to Reis, 7/29/82) #82-7-11 (L).

July 29,1982

Ms. Artis I. Reis
Executive Director
Iowa Civil Rights Commission
8th Floor - Colony Building
507 Tenth Street
Des Moines, Iowa 50319

Dear Ms. Reis:

You have requested an opinion from this office concerning whether § 601A.15(1), The Code 1981 authorizes local civil rights agencies or their directors to file complaints with the state Civil Rights Commission on behalf of third parties injured by alleged discriminatory acts. It is the opinion of this office that local agencies and directors lack standing to file such complaints.

Section 601A.15(1), The Code 1981 governs who is authorized to file a complaint with the Commission:

> Any person claiming to be aggrieved by a discriminatory or unfair practice may, by himself or his attorney, make, sign, and file with the commission a verified, written complaint in triplicate which shall state the

> name and address of the person, employer, employment agency, or labor organization alleged to have committed the discriminatory or unfair practice of which complained, shall set forth the particulars thereof, and shall contain such other information as may be required by the commission. The commission, a commissioner, or the attorney general may in like manner make, sign, and file such complaint.

The aforementioned provision identifies two categories of complainants. The first category consists of "any person" who claims to be injured by an alleged discriminatory act. Chapter 601A broadly defines "person" as:

> [o]ne or more individuals, partners, associations, corporations, legal representatives, trustees, receivers, and the State of Iowa and all political subdivisions and agencies thereof.

§ 601A.2(2), The Code 1981.

At first glance, it would appear that a local civil rights agency or director is a "person" who may file a complaint if the agency or director is aggrieved by an alleged discriminatory act. Such a complaint may be filed if the local agency or director is claiming to be the direct victim of unlawful discrimination. The question presented here, however, is whether a local agency or director indirectly injured[1] by the claimed discriminatory act may nonetheless file a state complaint on behalf of personally aggrieved third parties.

The legislature in § 601A.15(1) authorizes a second category of complainants consisting of "[t]he commission, a commissioner, [and] the attorney general . . . ." By commission and commissioner, the legislature is referring to the Iowa Civil Rights Commission and the gubernatorially-appointed members thereof. §§ 601A.2(8) and 601A.2(9), The Code 1981. These institutions and officials are authorized to file complaints on behalf of third parties without alleging any direct injury. This "automatic standing" position comports with the statewide responsibilities of the second category of complainants, as well as Chapter 601A's remedial purpose of correcting "a broad pattern of behavior." Estabrook v. Iowa Civil

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[1]A direct injury would include termination of employment and an accompanying economic loss, racial or sexual harassment suffered on the job, a discriminatory denial of a promotion opportunity, etc. A direct injury also includes being subjected to a discriminatory employment atmosphere in which the brunt of the abuse may be afflicted on third parties. See EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980). In contrast, a local agency's or director's knowledge or suspicion that an outside employer was subjecting third parties to a discriminatory practice could only be categorized as an indirect injury.

Rights Commission, 283 N.W.2d 306, 308 (Iowa 1979).

Local civil rights agencies and directors thereof are not expressly included among the narrow category of institutions and officials granted automatic standing by the legislature. Where the legislature has explicitly conferred automatic standing on a narrow class of institutions and officials possessing statewide responsibilities, it would be inappropriate to expand that category by administrative fiat or practice to include unnamed agencies and officials having only local, albeit important, responsibilities.

As a policy matter, the legislature's failure to include local agencies or officials in its automatic standing provision is consistent with the overall thrust of the Iowa Civil Rights Act. The legislature expressly declined to occupy the field to the exclusion of local ordinances and agencies designed to implement the Act's remedial purposes in their own jurisdictions. § 601A.19, The Code 1981; Dietz v. Dubuque Human Rights Commission, 316 N.W.2d 859 (Iowa 1982). Had it been so inclined, the legislature could have expanded the category of complainants having automatic standing under § 601A.15(1), The Code 1981 to include extant local agencies and their officials. But such an expansion might have actually discouraged local agencies from developing the requisite resources, expertise, and local prestige necessary to enforce civil rights compliance in their own jurisdictions. See § 601A.19, The Code 1981. Indeed, by filing a complaint with the state Commission, a local agency would be transformed from an active enforcer of its local civil rights ordinance to a passive complainant dependent on a state agency to resolve the dispute.

It should be noted that local governments may enact ordinances "not inconsistent" with the Iowa Civil Rights Act. § 601A.19, The Code 1981. This would allow a locality to accord its human rights agency with automatic standing to file complaints comparable to that enjoyed by the Commission, Commissioners and the Attorney General at the state level. Such provisions of automatic standing at the local level would better nourish the ability of those agencies to resolve civil rights disputes in their own backyard than would a legislative grant of automatic standing to file complaints with the state Commission.

CONCLUSION

In summation, it is the opinion of this office that § 601A.15(1), The Code 1981 does not grant local human rights agencies or their officials standing to file complaints with the Iowa Civil Rights Commission alleging injuries to third parties. This conclusion is bolstered by the legislature's encouragement of local human rights agencies able to monitor civil rights activities in their own jurisdictions.

Sincerely,

Scott H. Nichols

Scott H. Nichols
Assistant Attorney General

SHN:crn

SOCIAL SERVICES: 2½% rate reduction on supplies. Ch. 7, section 3, subsection 2, Acts of the 69th General Assembly, 1981 Session. SF 2304, § 98, 69th G.A., 1982. Because of the precisely drawn provisions of the statute, certain medical assistance payments are reduced including the reduction of supplies for optometrists and opticians. (Robinson to Reagen, Commissioner, 7/21/82) #82-7-9 (L)

Dr. Michael V. Reagen, Ph.D.
Commissioner
Iowa Department of Social Services
Fifth Floor, Hoover Building
LOCAL

July 21, 1982

Dear Commissioner Reagen:

You recently requested a formal opinion with regard to Senate File 2304, 69th General Assembly, 1982 Session, which amends chapter 7, section 3, subsection 2, of the Acts of the 69th General Assembly, 1981 Session. More particularly, our attention was drawn to section 98 of Senate File 2304 and a new unnumbered paragraph relating to the two and one-half percent reduction for certain payments pertaining to medical assistance (Medicaid). The section in question provides:

> NEW UNNUMBERED PARAGRAPH. Notwithstanding Acts of the Sixth-ninth General Assembly, 1981 Session, chapter 7, section 3, subsection 2, unnumbered paragraph 6, medical assistance payments for all mandatory and optional services, except for intermediate care facility services, intermediate care facility services for the mentally retarded, services provided to recipients in state mental health institutes, and medical transportation services other than ambulance services, shall be reduced by a factor of two and one-half percent. However, the two and one-half percent reduction shall not apply to reimbursement for the ingredient cost of prescription drugs or to physician reimbursements and shall not apply to hospital reimbursements beginning October 1, 1982.

In your opinion request, you point out:

> It is the interpretation of some optometrists/opticians that the intent of the Legislature was to apply the 2.5% reduction to the charge for professional service only and would not be applicable to their invoice cost for supplies. This group of providers feel that since the Department of Social Services requires that they separate their invoice cost from their professional charge for billing purposes whereby the invoice had always been paid in full, and the professional charge was subject to usual, customary and reasonable charge, that the invoice cost should not be affected by this 2.5% reduction. They feel this invoice cost is an actual cost to them that they have no control over. The pharmacists also have similar billing procedures whereby they submit a bill for the ingredient cost plus a dispensing fee. The ingredient cost, which is the wholesale cost for the prescription or wholesale cost of ingredients, is a fixed cost to pharmacists as is the material cost to optometrists/opticians. S.F. 2304 specifically exempts the 2.5% reduction from the ingredient cost on prescription drugs. The optometrists/opticians feel, therefore, that it was the intent of the Legislature to exempt any provider group who would fall into the same category of having a fixed cost in conjunction with their service which they have no control over.
>
> It is the Department's contention that claims were to be submitted in the normal manner and the reduction would be applicable to the total on the claim automatically deducted by the Fiscal Agent for all services except those services specifically exempted in S.F. 2304 which are intermediate care facilities, intermediate care facilities for the mentally retarded, services provided to recipients in State Mental Health Institutions, physicians after 7-1-82, medical transportation services other than ambulance and the ingredient cost of

> prescription drugs and shall not apply to hospitals beginning October 1, 1982.

The interpretation given this new statute by the Department of Social Services, in our opinion, is more susceptible to be sustained by an Iowa court than that opinion as expressed by the optometrists or opticians. We are aware that the Iowa Supreme Court has recently held that the manifest intent of the Legislature prevails over the literal import of the words used and that the courts are not bound by a legislative definition if it is arbitrary and results in an unreasonable classification. Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530 (Iowa 1981). Nevertheless, the Iowa court has also held that where certain exceptions are enumerated by statute, it is presumed that the Legislature intended no others to be created. Iowa Farmer's Purchasing Association, Inc. v. Huff, 260 N.W.2d 824 (Iowa 1977).

The United States Supreme Court recently ruled on a claim of a major distributor of equipment and supplies used in kidney dialysis that they were precluded from presenting their claim in the U.S. courts. While this involves part B of the Medicare statute and jurisdiction in the Federal courts, it is also instructive to the instant question and its possible impact on the Medicaid program in Iowa. The Court stated:

> Our lodestar is the language of the statute. Congress has specified in the Medicare statute that disputed carrier Part B determinations are to be subject to review in "a fair hearing by the carrier, in any case where the amount in controversy is $100 or more . . ." 42 U.S.C. § 1395u(b)(3)(C) (emphasis added).[7] See Schweiker v. McClure, ___ U.S. ___, 102 S.Ct. 1665, 71 L.Ed.2d ___. Congress also provided explicitly for review by the Secretary of "determination[s] of whether an individual is entitled to benefits under part A or part B, and [of] the determination of the amount of benefits under part A . . ." § 1395ff(a) (emphasis added)[by the court]. Individuals dissatisfied with the Secretary's decision on such matters are granted the right to additional administrative review,[8] together with a further option of judicial review,[9] in two instances only: when the dispute relates to their eligibility to participate in either Part A or Part B, and when the dispute

> concerns the amount of benefits to which they are entitled under Part A. § 1395ff(b).[10]
>
> Section 1395ff thus distinguishes between two types of administrative decisions: eligibility determinations (that decide whether an individual is 65 or over or "disabled" within the meaning of the Medicare program) and amount determinations (that decide the amount of the Medicare payment to be made on a particular claim). Conspicuously, the statute fails to authorize further review for determinations of the amount of Part B awards. In the context of the statute's precisely drawn provisions, this omission provides persuasive evidence that Congress deliberately intended to foreclose further review of such claims. See, e.g. Lehman v. Nakshian, 453 U.S. 156, 101 S.Ct. 2698, 2702-2703, 69 L.Ed.2d 548 (1981); Fedorenko v. United States, 449 U.S. 490, 512-513, 101 S.Ct. 737, 750, 66 L.Ed.2d 686 (1981). [United States v. Erika, Inc., U.S. ___, 102 S.Ct. 1650, 1653-1654 (1982)]. (Footnotes omitted.) (Emphasis added.)

In our opinion, the question which you raise comes from a statute with precisely drawn provisions which reduce payments to the optometrists and opticians, including a two and one-half percent reduction on the cost of their supplies.

Sincerely,

Stephen C. Robinson
Assistant Attorney General

SR/sm

COUNTY OFFICERS: County Engineer; COUNTIES: Plats; STATE OFFICIALS: Engineering Examiners. §§ 114.2, 114.16, 114.17; § 306.21; § 309.17; § 355.4; ch. 358A; ch. 409, The Code 1981. The review and approval of a subdivision plat by a county engineer pursuant to § 306.21, The Code, or a county ordinance implementing chapter 358A or chapter 409, The Code, is not necessarily the practice of land surveying under § 114.2, The Code. (Osenbaugh to Hanson, Iowa State Board of Engineering Examiners, 7/13/82) #82-7-4(L)

July 13, 1982

Mr. Thomas D. Hanson
Iowa State Board of Engineering Examiners
Blanchard, Cless, Hanson & Pundt
942 Insurance Exchange Building
Des Moines, Iowa 50309

Dear Mr. Hanson:

On behalf of the Board of Engineering Examiners, you have requested the opinion of this Office regarding whether a county engineer must be a registered land surveyor in order to review and approve subdivision plats. The Board, we are told, is of the opinion that the review and approval of plats prepared pursuant to chapter 409 is the practice of land surveying and that a county engineer must therefore be a registered land surveyor in order to review and approve such plats.

In a prior opinion (Norby to Kane, 1/30/81, #81-1-11(L)), this Office concluded that a county engineer may not practice land surveying without separately qualifying as a registered land surveyor. Section 309.17, The Code 1981, requires counties to hire one or more registered civil engineers who shall be known as county engineers. Section 114.17, The Code, states that a professional engineering certificate ". . . shall not carry with it the right to practice land surveying, unless specifically so stated in said certificate . . ." See 1931 Op.Att'yGen. 58.

The issue before us is whether a county engineer's review and approval of subdivision plats is itself the practice of land surveying. Section 114.2, The Code, defines "land surveying" as follows:

> The practice of "land surveying" within the meaning and intent of this chapter includes surveying of areas for their correct deter-

> mination and description and for conveyancing, or for the establishment or reestablishment of land boundaries and the platting of lands and subdivisions thereof.

The Iowa Supreme Court has defined surveying as follows:

> To survey land means to ascertain the corners, boundaries and divisions, with distances and directions, and not necessarily to compute areas included within defined boundaries.

Kerr v. Fee, 179 Iowa 1097, 1104, 161 N.W. 545, 547 (1917).

The actual surveying for the platting of subdivided land is clearly the practice of land surveying under this definition. Indeed §§ 409.1 and 409.31(19), The Code, require a registered land surveyor's plat for all subdivisions within its scope. See also § 355.4, as amended by S.F. 396 (69th G.A., 1982 Session), regarding surveyor's certificate on land surveys. Section 114.2, The Code, does not on its face extend the practice of land surveying to include governmental review of land surveying documents. Although the definition of "professional engineering" in the same section includes "evaluation" of projects affecting the public welfare "when such professional service requires the application of engineering principles and data," the practice of "land surveying" does not expressly include the evaluation of surveys.

The only explicit requirement in chapter 114 for governmental approval of land surveying documents is contained in § 114.16, The Code, which states in relevant part:

> No agency of this state and no subdivision or municipal corporation of this state, nor any officer thereof, shall file for record or approve any engineering document or land surveying document which does not comply with this section. [requiring certification by professional engineer or land surveyor]

Section 306.21, The Code, requires that all plats and field notes of rural subdivisions be approved by the county engineer. See Spencer's Mountain v. Pottawattamie County, 285 N.W.2d 166 (Iowa 1979). This indicates that the legislature did not envision that a county engineer need be a registered land surveyor to review plats or it would have

imposed additional qualifications in this section or in § 309.17, The Code. We do not believe that the legislature would intend to place county engineers in a position where carrying out their statutory duties violated chapter 114. See § 4.6(5), The Code; Anstey v. Iowa State Commerce Commission, 292 N.W.2d 380, 389 (Iowa 1980) (consequences of particular construction to be considered in statutory construction).

The function of the county engineer in reviewing and approving rural plats under § 306.21, The Code, is primarily to exercise his professional judgment to determine whether subdivision roads should be accepted into the secondary road system. See Spencer's Mountain v. Pottawattamie County, 285 N.W.2d 166 (Iowa 1979); 64 Op.Att'y Gen. 74. Another function of county engineer's review and approval under § 306.21 could be to ensure the adequacy of sewer and water lines. See also §§ 409.5, 409.14, The Code. A county engineer's review function might likely be similar under county ordinances implementing chapter 409 or chapter 358A, The Code. Where the county engineer's review function is to determine whether a subdivision would meet zoning, sewage, or road requirements, such would not constitute the practice of "land surveying."

The issue then becomes whether review of the actual survey work in the plat constitutes the practice of "land surveying." Some technical requirements for plat surveys could be checked for compliance with little or no surveying knowledge. See, e.g., § 409.31(2)-(9), The Code. Review of other requirements could require considerable surveying expertise, see, e.g., § 409.31(12), The Code (minimum unadjusted acceptable error of closure). Review of a survey does, however, differ from preparation of the survey itself. If the county engineer rejected a survey, any correction or re-survey would have to be done by a registered land surveyor. Because nothing in chapter 114 expressly defines review or evaluation of surveying documents as the practice of "land surveying," we are reluctant to construe the statute as including these activities within its requirements.

We would note that the Board of Engineering Examiners has not defined the practice of "land surveying" by rule under section 114.6, The Code, nor formally considered whether certain activities by county engineers in the review of plats would constitute the actual practice of land surveying. See § 17A.9, The Code (declaratory rulings).

Although we conclude that review and approval of plats is not in itself the practice of "land surveying," it is possible that a factual basis exists for the Board of Engineering Examiners to reasonably define certain specific actions which might occur in such review as the actual practice of "land surveying." If the Board had a reasonable basis for so concluding, its construction would be entitled to some deference. § 4.6(7), The Code.

Because we conclude that review and approval of subdivision plats is not itself the practice of land surveying, this is distinguishable from our previous opinion (Norby to Kane, 1/30/81, #81-1-11(L)) holding that § 111.21, The Code, cannot be construed as authorizing a county engineer to engage in the practice of land surveying.

It is therefore our opinion that the actions of a county engineer in reviewing and approving a subdivision plat is not inherently the practice of land surveying so as to require that the county engineer be also registered as a land surveyor under chapter 114.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Assistant Attorney General

EMO:rcp

MOTOR VEHICLES - Inspection stations and operators-license revocation and suspension hearings. §321.238. The review hearing provided for in §321.238(21) is a de novo proceeding in which competent evidence not presented at an initial hearing can be admitted. An administrative procedure which, on appeal, exposes the appellant to more severe sanctions than those imposed after an initial hearing does not in itself unconstitutionally chill an appellant's due process rights. (Dundis to Swartz, State representative, July 12, 1982) 82-7-3 (L)

Mr. Tom Swartz
State Representative
1516 W. State
Marshalltown, Ia 50158

July 12, 1982

Dear Mr. Swartz:

In your letter of April 23, 1982, you requested an attorney general's opinion concerning hearing procedures under the Iowa Motor Vehicle Inspection Law, or §321.238, The Code 1981. You expressed concern about protection of inspection station operators' due process rights at license suspension and revocation hearings, and asked:

> Whether an administrative procedure which, in an appeal, exposes the appellant to more severe sanctions than those imposed by the original hearing officer chills the appellant's due process rights.
>
> Whether an administrative procedure wherein the first hearing is based on a specific incident and the appeal board, in its hearing, considers matters not connected with the original hearing is proper.

We will answer your questions in reverse order.

The current hearing procedure is outlined in §321.238(20) and (21) The Code 1981. Subsection 20 states:

> After an investigation and hearing conducted by a hearing officer designated by the director of transportation held in the county in which the inspection station is located, the director may, if the hearing officer finds that the inspection station is not properly equipped or it is not properly conducting inspections, issue a warning, suspend the vehicle inspection station's permit for a period not to exceed ninety days, or revoke the vehicle inspection station's permit and require the operator of the vehicle inspection station to surrender the permit issued to the operator.

Subsection 21 in part states:

> Notice of the suspension or revocation shall be by certified mail, return receipt requested, addressed to the operator of the vehicle inspection station for which the permit was issued. The suspension or revocation shall become effective ten days from the date of the mailing of the notice unless the permit holder files a written request for a review hearing of the suspension or revocation order. The review hearing shall be de novo and shall be conducted at the seat of government by a review board composed of the following persons:
>
> a. A senior officer of the Iowa highway safety patrol designated by the commissioner of public safety.
>
> b. The state car dispatcher or his designees.
>
> c. An employee of the state department of transportation experienced in automotive mechanics designated by the director.

You have asked whether the review board's consideration of "matters not connected with the original hearing is proper." You pose an example, i.e. an inspection station operator's past record is considered for the first time at the review board hearing.

Your question, as we understand it, addresses the consideration of such evidence for the first time at the review hearing level. Whether this is proper lies in a determination of the character of the de novo hearing conducted by the review board.

In Iowa, "A hearing de novo on appeal 'ordinarily signifies the case is heard anew, afresh, a second time . . .'" City of Webster City v. Draheim, 292 N.W.2d 406, 409(Ia. 1980) citing with approval Buda v. Fulton, 261 Iowa 981, 984, 157 N.W.2d 336, 338 (1968) and Mason v. World War II Service Compensation Board, 243 Iowa 341, 344-45, 51 N.W.2d 432, 434 (1952). This generally means that "a case shall be heard the same as if it had not been heard before," and "implies the right to offer any competent evidence." Mason, 51 N.W.2d at 434 [emphasis added].

Complicating the matter somewhat is that §321.238(21) speaks in terms of a "review hearing" although it is to be de novo. A review proceeding is usually confined to the record made below. Mason, 51 N.W.2d at 434.

However, §321.238(21) specifically authorizes the use of subpoenas by the review board "to compel the attendance of witnesses and the production of documents, papers, books, records and other evidence before it in any hearing conducted by it under this section." Certainly this indicates a legislative intent that new evidence may be heard.

It is our conclusion that the §321.238(21) review hearing is a de novo proceeding in which evidence not presented or considered at the initial §321.238(20) hearing can be admitted, subject to all other standard objections and notice requirements. The fact that a prior suspension or revocation of the operator was not raised at the first hearing would not preclude the Department from raising the issue before the review board.

Your other question asks whether the possibility of a more severe sanction imposed by the review board chills the exercise of appellant's due process rights, more specifically his or her appeal opportunity. Section 321.238(21) states that "the review board may sustain, modify, or reverse the director's order of suspension or revocation." [emphasis added]

Since the review hearing is conducted completely anew as if the subject matter had not been heard before, the logical inference is that the review board can reach a different decision on the type and severity of sanction to be imposed, as long as it is within statutory boundaries. "The proper judgment to be reached or action to be taken in accordance with the evidence or facts as thus viewed . . . would appear to be the essential element of a true trial or hearing de novo." 2 AmJur2d "Administrative Law," §698, p. 598.

As to the constitutional limits of such a system, there is an analagous situation in criminal procedure that arises when the accused secures a new trial. The United States Supreme Court has ruled on several occasions that there is no absolute constitutional bar to a more severe sentence upon reconviction. Due process simply requires that vindictiveness play no part in a harsher sentence. See North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969); Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed. 584 (1972); Ludwig v. Massachusets, 427 U.S. 618, 96 S.Ct. 2781, 49 L.Ed.2d 732 (1976). The Iowa Supreme Court has also found nothing in Iowa law to prohibit the imposition of a more severe sanction the second time around. State v. Kneeskerr, 203 Iowa 929, 210 N.W. 465 (1926); State v. Pilcher, 171 N.W.2d 251 (1969).

The U.S. Supreme Court cases cited above have analyzed the capacity of the particular procedural system in question for vindictiveness. As with the Colten and Ludwig cases dealing with two-tier systems for adjudicating less serious criminal cases, we are of the opinion that the two step administrative process under §321.238(20) and (21) has a negligible capacity for such vindictiveness. The de novo review board hearing essentially wipes the slate clean and commences the process anew. The review board is not asked to comment directly on the fairness or correctness of the findings and decision at the initial hearing level but to render findings and a decision based upon the evidence presented to it.

More importantly, the persons who hear the initial §321.238(20) proceeding, and later make a decision based upon the findings from that proceeding, do not sit on the review board at the second review hearing. As a matter of fact, two out of the three of the review board are not even employed by the same state agency. While the initial hearing is held and decided by personnel within the Iowa Department of Transportation, there is only one Department employee on the review board. The other two are associated with the Iowa Highway Patrol and the state Car Dispatcher. There is in short no readily apparent reason why the review board would tend to deal more strictly with persons who utilize their appeal rights. As the Court in Colten indicated, these are important factors in gauging the opportunity for vindictiveness in a procedural system.

We also believe, however, that to avoid any impression of an improper motive, the review board should affirmatively state the reasons for the harsher sanctions imposed in its decision, if this be the case. These reasons should be based on objective and identifiable facts and information.

It is our conclusion that there is no absolute due process bar to an individual being exposed to a more severe sanction with his or her appeal to the motor vehicle inspection review board. The appellant's rights to a de novo hearing after an initial §321.238(20) proceeding are not automatically chilled by such exposure.

Sincerely,

Stephen P. Dundis

STEPHEN P. DUNDIS
Assistant Attorney General

sa

CRIMINAL LAW, POSSESSION OF BEER BY MINOR: Section 123.47, The Code 1981. Mere occupation of a car containing beer with knowledge of its presence is not sufficient to constitute a violation of § 123.47 (possession of beer by minor). (Cleland to Wilson, Marion County Attorney, 7/12/82) #82-7-2(L)

July 12, 1982

Terry L. Wilson
Marion County Attorney
401 E. Robinson
Knoxville, Iowa 50138

Dear Mr. Wilson:

You pose two related questions for our consideration:

1. What constitutes individual or joint possession or control under § 123.47, The Code 1981?

2. Is being in a vehicle with the beer or alcoholic beverage alone sufficient to be in possession in violation of § 123.47, The Code 1981?

Section 123.47 provides as follows:

> No person shall sell, give, or otherwise supply alcoholic liquor or beer to any person knowing or having reasonable cause to believe him to be under legal age, and no person or persons under legal age shall individually or jointly have alcoholic liquor or beer in his or their possession or control; except in the case of liquor or beer given or dispensed to

> a person under legal age within a private home and with the knowledge and consent of the parent or guardian for beverage or medicinal purposes or as administered to him by either a physician or dentist for medicinal purposes and except to the extent that a person under legal age may handle alcoholic beverages and beer during the regular course of his or her employment by a liquor control license or beer permittee under this chapter.

(Emphasis added).

We have not addressed these questions before now. Nor has the Supreme Court squarely addressed these issues.

The term "possession" is a common word with a generally accepted legal definition. The term "possession" as used in § 123.47 means the having or keeping of alcoholic liquor or beer by the defendant. See II Iowa Uniform Jury Instruction: Criminal No. 3006. It must be a conscious possession of the alcoholic liquor or beer, and defendant must either exercise dominion and control over the substance or have actual care and management of it. Id. Nevertheless, possession may be in more than one person.

Possession may be established by proof that defendant had knowledge of its presence and that the defendant either had actual possession of or exercised dominion and control over the beverage. See II Iowa Uniform Jury Instructions: Criminal No. 3007. Of course, these facts may be established by either direct or circumstantial evidence. Id. "Possession may be either actual or constructive." Id.

> Actual possession occurs when the [alcoholic beverage or beer] is found on the person of the defendant, or in a place over which he has the exclusive use and control.
>
> Constructive possession occurs when the defendant maintains control or a right to control the place where the [alcoholic beverage or beer is] found, and may be inferred when the [beverage] is found in a place which is accessible to the defendant and subject to his dominion and control, or

> to the joint dominion and control of the defendant and other person(s).

Id.

Thus, in a technical sense, being in the vehicle containing beer or alcohlic beverages is not sufficient to be in "possession or control" under § 123.47. See Bunger v. Iowa High School Athletic Association, 197 N.W.2d 555, 559, 564-65 (Iowa 1972) (school boards may make and enforce rules regarding possession of beer but rule which punished "mere occupation of a car containing beer with knowledge of the presence of the beer" was unreasonable); People v. Millis, 44 Ill.2d 332, 252 N.E.2d 395 (1969). Otherwise, everytime a minor enters a car knowing it contains an alcoholic beverage or beer, he or she would violate the law, no matter what the circumstances.

The presence of alcoholic beverages and beer in a car with minor occupants will give the officer probable cause to arrest for a violation of § 123.47 unless there is reason to believe that the minors have no control or management of the beverages. The case should proceed to trial. At trial, the jury or the court must determine based on all the evidence whether defendant was in "possession" of alcoholic beverages or beer. Was defendant driving the car? Who owns the car? Is there evidence that the defendant was drinking? Where was the alcoholic beverage or beer found? Where was defendant located? These will all be important questions. The point is that this is a fact question that must be resolved at trial.

Sincerely,

Richard L. Cleland
RICHARD L. CLELAND
Assistant Attorney General

RLC:mlr

SCHOOLS: Schoolhouse Funds: School Bus Maintenance Building: §§ 278.1(7), 285.10(3), 297.5, The Code 1981. Construction costs of a new school bus maintenance building must be met from the Schoolhouse Fund. (Fleming to Husak, State Senator, 7/2/82) #82-7-1(L)

July 2, 1982

Senator Emil J. Husak
R. R. 2
Toledo, Iowa 52342

Dear Senator Husak:

You have submitted a request for our opinion on the following issue:

> When a school district builds a school bus transportation maintenance facility, does the Board have discretion to pay for it out of the General Fund under the "other transportation facilities" language of Section 285.10(3) or must the Board pay for the project out of the Schoolhouse fund under the "other buildings" language in Section 278.1(7) of the Code?

We conclude that the school district must pay for a school bus transportation maintenance building out of the Schoolhouse Fund and may not pay for it out of the General Fund.

Our conclusion is based on the express language of § 297.5, First paragraph., The Code 1981, the overall statutory system of funding Iowa elementary and secondary education, the powers granted to or withheld from district boards, and certain important principles relating to the operation of Iowa school corporations.

Your question was submitted in connection with the construction of a new school bus maintenance facility by the Dysart-Geneseo Community School District. The facility that gave rise to your request was built on land already owned by the district.

Our opinion that the new building must be paid for from the Schoolhouse Fund is based first on the express language of § 297.5, The Code 1981, which states in pertinent part:

> Any funds expended by a school district for new construction of school buildings or school administration buildings must first be approved by the voters of the district.

(Last sentence, First Unnumbered Paragraph).

This language was added to § 297.5 by the General Assembly in 1980. See 1980 Iowa Acts, Ch. 1089, § 1, p. 356. cf. § 297.5, The Code 1979. We believe that the legislative mandate is clear and unequivocal: permission to construct a new school building must be granted by the voters of the school district pursuant to § 278.1(7), The Code 1981, and the cost of the building must be met from the Schoolhouse Fund and not the General Fund.

Iowa school districts are subject to Dillon's rule: school districts are limited to the exercise of those powers expressly granted or necessarily implied in their governing statutes. See McFarland v. Board of Education, 277 N.W.2d 901, 906 (Iowa 1979); Barnett v. Durant Community School District v. Parker, 249 N.W.2d 626, 627 (Iowa 1977), Silver Lake Consolidated School District v. Parker, 238 Iowa 984, 990, 29 N.W.2d 214, 217 (1947). The Schoolhouse Fund and the General Fund must be kept in separate accounts as provided in § 291.13, The Code 1981. The Schoolhouse Fund consists of monies received from taxes or the sale of bonds authorized by the electors, §§ 278.1(7) and 296.1, The Code 1981. In addition, the Schoolhouse Fund includes funds collected pursuant to the authorization of a tax "for the purchase and improvement of sites or for major building repairs." § 297.5, first sentence, first unnumbered paragraph, The Code 1981. We note that the voters may transfer any surplus in the Schoolhouse Fund to the General Fund. See § 278.1(5), The Code 1981.

In contrast to the Schoolhouse Fund, the General Fund consists of money received by the district from the State pursuant to the School Foundation Program of Ch. 442, The Code 1981, and property taxes levied for the General Fund pursuant to §§298.1, 289.9, and 289.11, The Code 1981. Neither the school board nor the voters hold power to transfer General Funds to the Schoolhouse Fund. See 1980 Op.Atty'Gen. 267.

We do not believe that the language of § 285.10(3) which permits a district board to "[p]urchase or lease buses and other transportation facilities, and maintain same. . . ." (emphasis

added) may be construed as a grant of power to expend General Funds to defray the cost of a new building even though that new building is a school bus maintenance building. The long standing legislative policy to place in the electors the power to authorize the levy of taxes for new school buildings as reflected in the entire statutory system and in specific language cannot be defeated by such an expansive reading of the word "facilities" in a subsection of the school transportation chapter. Application of the principles of statutory construction in Ch. 4, The Code 1981, provide further support for this view.

In sum, a school district must pay for a new school building from the Schoolhouse Fund. We note that the letter accompanying your request for our opinion made no mention of a special election to approve the new building as required by the language of § 297.5, The Code 1981, set out above. Therefore, this opinion is limited to the question you submitted.

Sincerely,

Merle Wilna Fleming

MS. MERLE WILNA FLEMING
Assistant Attorney General

MWF/maw

CIVIL RIGHTS; AGE DISCRIMINATION IN HIRING. 601A.6(1)(a), 601A.13(1) 601A.13(3), The Code 1981. Sections 601A.6(1) and 601A.13 make it unlawful for employers to reject older applicants for employment because of their higher per capita pension or fringe benefit costs in comparison with younger applicants. (Nichols to Bowles, Commission on the Aging, 8/25/82) #82-8-17(L)

August 25, 1982

Mr. Glenn R. Bowles
Executive Director
Iowa Commission on the Aging
415 Tenth Street
Des Moines, Iowa 50319

Dear Mr. Bowles:

You have requested an opinion from this office concerning whether Chapter 601A permits an employer to reject applicants for employment based on age in order to avert higher pension and other fringe benefit costs associated with hiring older applicants. It is the opinion of this office that such age-based rejections are unlawful under §§ 601A.6(1)(a) and 601A.13, The Code 1981.

Section 601A.6(1)(a) provides, in relevant part, that:

> It shall be an unfair or discriminatory practice for any:
>
> a. Person to refuse to hire . . . any applicant for employment . . .because of the age . . . of such applicant. . . .

The obvious purpose of this provision "is to prevent age discrimination in hiring . . . workers." Loras College v. Iowa Civil Rights Commission, 285 N.W.2d 143, 148 (Iowa 1979). The question presented is whether an employer may reject older applicants for employment because of the increased pension or fringe benefit contributions which it might incur.

The legislature has created an exception to the broad prohibition of § 601A.6(1)(a) quoted supra:

> The provisions of this chapter relating to discrimination because of sex or age shall not be construed to apply to any retirement plan or benefit system of any employer unless such plan or system is a mere subterfuge adopted for the purpose of evading the provisions of this chapter.
>
> 1. However, a retirement plan or benefit system shall not require the involuntary retirement of a person under the age of seventy because of that person's age. . . .
>
> . . . .
>
> 3. An employee welfare plan may provide life, disability or health insurance benefits which vary by age based on actuarial differences if the employer contributes equally for all the participating employees or may provide employer contributions differing by age if the benefits for all the participating employees do not vary by age.

§ 601A.13, The Code 1981.

On its face, section 601A.13 concerns the effect of retirement plans and benefit systems on employees; it is silent as to hiring. However, a Commission rule provides that an employer with a bona fide retirement plan need not "hire an applicant for employment whose age is [or exceeds] the retirement age. . . ." 240 I.A.C. § 5.7(1). But there is no language in § 601A.13 to suggest that employers may reject older applicants because of their higher per capita pension and fringe benefit costs as compared to younger applicants. Such an exception could virtually swallow the general rule proscribing age discrimination in employment. Imputing such an intent to the legislature would flout the command that Chapter 601A be construed broadly to effectuate its remedial purpose. § 601A.18, The Code 1981.

CONCLUSION

In summation, it is the opinion of this office that §§ 601A.6 (1)(a) and 601A.13, The Code 1981, taken together, make it unlawful for employers to reject older applicants for employment because of their higher per capita pension or fringe benefit costs vis-a-vis younger applicants. This interpretation is consistent with the federal Age Discrimination in Employment Act. 29 U.S.C. § 693(f)(2).

Sincerely,

Scott H. Nichols

Scott H. Nichols
Assistant Attorney General

SHN:crn

TAXATION: The Propriety Of Assessing Property Taxes On Coal Leases. Iowa Code §84.18 (1981). Coal leases are assessed and taxed separately to the owner of such rights. (Kuehn to Van Maanen, State Representative, 8/25/82) #82-8-16(L)

August 25, 1982

Honorable Harold Van Maanen
State Representative
R. R. 5
Oskaloosa, Iowa 52577

Dear Representative Van Maanen:

You have requested an opinion of the Attorney General concerning whether or not property taxes can be assessed and taxed separately to the owner of coal leases in the same manner as property taxes are assessed against other real estate. Your question is answered by Iowa Code §84.18 (1981) which states:

> All rights and interests in or to oil, gas or other minerals underlying land, whether created by or arising under deed, lease, reservation of rights, or otherwise, which rights or interests are owned by any person other than the owner of the land, shall be assessed and taxed separately to the owner of such rights or interests in the same manner as other real estate. The taxes on such rights or interest which are not owned by the owner of the land shall not be a lien on the land. (emphasis added)

Based upon §84.18, it is the opinion of the Attorney General that coal leases should be assessed and taxed separately to the owner of such leases.

Very truly yours,

Gerald A. Kuehn
Assistant Attorney General

GAK:cmh

SCHOOLS; COUNTY TREASURERS: Direct Deposit of School Funds. Iowa Code § 298.13 (1981) as amended by 1982 Iowa Acts, Ch. 1195. County treasurers are required to make separate direct deposits in schoolhouse fund and general fund if the school district board designates a separate account for such fund. (Fleming to Daggett, State Representative, 8/25/82) #82-8-15(L)

August 25, 1982

The Honorable Horace Daggett
State Representative
812 East Ohio
Lenox, Iowa 50851

Dear Representative Daggett:

You have requested our opinion concerning the meaning of House File 2495 adopted by the 1982 General Assembly. That statute amended Iowa Code § 298.13 (1981) to provide as follows:

> DIRECT DEPOSIT OF TAX REVENUE. Before the fifteenth day of each month, the county treasurer shall send the amount collected for each fund through the last day of the preceding month for direct deposit into the depository and account designated by the school board. The county treasurer shall send a notice to the secretary of the school board stating the amount deposited, the date, the amount to be credited to each fund according to the budget, and the source of revenue. [Emphasis supplied.]

1982 Iowa Acts, Ch. 1195, § 1. The 1981 Iowa Acts, Ch. 117, § 552(18) was amended to read as follows:

> 18. Pay to the treasurers of the school corporations located in the county the taxes and other moneys due as provided in section 298.11 and send amounts collected for each fund of a school corporation for direct deposit into the depository and account designated as provided in section 298.13 in section 1 of this Act. [Emphasis supplied.]

1982 Iowa Acts, Ch. 1195, § 2.

You state that certain county treasurers are making only one direct deposit in a school district bank account rather than making a direct deposit in each school district fund, i.e., the account designated for the general fund and the account designated for the schoolhouse fund, as provided in Iowa Code § 291.13 (1981).

The question you submit for our consideration is:

> Should the treasurers be making a deposit for each fund, if separate accounts are designated, rather than just one deposit for the school district?

Our answer to your question is yes. In our opinion, the plain language of the statute grants authority to the school board to designate the bank account into which the county treasurer is to deposit amounts collected for each fund. There is nothing in the statute from which it may be inferred that a school board is permitted to designate only one account. See Iowa Code § 4.1(3), ("unless otherwise specifically provided by law the singular includes the plural, and the plural includes the singular.").

In the event that a county treasurer has mistakenly made only one direct deposit in a school district account, we do not believe that the school treasurer is prevented from transferring the appropriate amount into the correct account under any provision of the Code.

It is clear that the Code prohibits the expenditure of schoolhouse funds for general fund purposes[1] or the expenditure of general funds for schoolhouse purposes. See Iowa Code § 291.13 (1981). But the mere ministerial act of transferring funds to the correct fund is not an expenditure. Such transfers could be accomplished under the procedure of Iowa Code § 291.12 (1981). We note that an earlier opinion of this office expressed the view that the language of Iowa Code § 291.13 (1981) did not require a school treasurer to keep separate bank accounts but that it is a better practice to do so. 1966 Op. Att'y Gen. 317, § 14.35.

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[1] The electors of the district may direct the transfer of any surplus in the schoolhouse fund to the general fund pursuant to Iowa Code § 278.1(5) (1981).

In sum, if a school board designates a particular account in a particular depository for the general fund and another account in a particular depository for the schoolhouse fund, the county treasurer should make direct deposits accordingly.

Sincerely yours,

Merle Wilna Fleming

(MS.) MERLE WILNA FLEMING
Assistant Attorney General

MWF:sh

FIRE MARSHAL: PUBLIC SAFETY, DEPARTMENT OF. Smoke Detectors. 1981 Iowa Acts, Ch. 45 §1. The Fire Marshal may not require that smoke detectors be installed in dormitories prior to July 1, 1984. If a part of a dormitory is protected by a fire safety device within the exemption contained in 1981 Session, 69th G.A., Ch. 45, §1(4), the State Fire Marshal may approve its use under that provision and still require the installation of smoke detectors in the rest of the dormitory. (Hayward to Waldstein, State Senator, 8/25/82) #82-8-14(L)

Senator Arne Waldstein
319 East Ninth Street
Storm Lake, Iowa 50588

August 25, 1982

Dear Senator Waldstein:

You have asked this office for an opinion, concerning Iowa's smoke detector law, 1981 Iowa Acts, Chapter 45. (Hereinafter referred to as Chapter 45.) Specifically you have asked:

1. May fire authorities order that smoke detectors be installed pursuant to Chapter 45 prior to July 1, 1984, and

2. May fire authorities order that any smoke detectors be placed in dormitories equipped with heat detection devices or sprinkler systems with alarms on July 1, 1981, or currently equipped with automatic smoke detection systems.

Relevant provisions of Chapter 45 are §1(2), which states in pertinent part:

> Except as provided in subsection 4, multiple-unit residential buildings, the construction of which is begun on or after the effective date of this Act, shall include the installation of at least one smoke detector in the following areas of the designated multiple-unit residential building.

* * * * *

> b. In each sleeping room and in each corridor of a dormitory.
>
> * * * * *
>
> Except as provided in subsection 4, all multiple-unit residential buildings shall be equipped with at least one smoke detector in the areas enumerated in this subsection by the end of three years after the effective date of this Act.

and §1(4), which states:

> This section does not require the installation of smoke detectors in multiple-unit residential buildings which, on the effective date of this Act, are equipped with heat detection devices or a sprinkler system with alarms approved by the state fire marshal.
>
> This section does not require the installation of smoke detectors in hotels, motels, and dormitories equipped with an automatic smoke detection system approved by the state fire marshal.

The answer to your first question is in the negative. Chapter 45, §1(2), provides that existing buildings on the effective date of the Act need not be equipped with smoke detectors until three years after that date. Because Chapter 45 was approved prior to July 1, 1981, that day was the effective date of the Act. See, §3.7, Iowa Code (1981).

Your second question is a mixed question of law and fact. It is not susceptable to the same answer in all situations. As with any question of statutory construction, the answer is premised on the intent of the legislature manifest in the language of the statute. Chapter 45, §1(2)(b), requires smoke alarms in both corridors and sleeping rooms of dormitories. Obviously, the intent of the legislature in enacting that provision was to provide protection to dormitory residents from fires, whether occurring in their rooms or in the corridors. In §1(4), the legislature provided that exemptions could be created from the general re-

quirements of §1(2), if certain systems are or have been approved by the State Fire Marshal.

The first unnumbered paragraph of §1(4) is a grandfather clause exempting buildings with heat detection devices or sprinkler systems with alarms which were installed and approved by the State Fire Marshal prior to July 1, 1981.

The second unnumbered paragraph of §1(4) exempts hotels, motels and dormitories equipped with automatic smoke detection systems approved by the Fire Marshal. This exemption does not require installation or approval prior to July 1, 1981. The key phrase in the exemption is "approved by the state fire marshal." Chapter 45 requires smoke detection protection in both the corridors and sleeping rooms of dormitories. The State Fire Marshal may approve an automatic smoke detection system as a partial exemption from the requirements of Chapter 45. For example, if the dormitory is equipped with an appropriate automatic smoke detection system in its corridors, the State Fire Marshal may still require the installation of smoke detectors in the sleeping rooms, or vice versa. Similarly if a dormitory has an automatic smoke detection system in one floor or wing and not in another floor or wing, the State Fire Marshal may require the installation of smoke detectors in the unprotected corridors and sleeping rooms of the dormitory pursuant to Chapter 45. This is because the legislature mandated that all corridors and sleeping rooms of dormitories have smoke detection protection. It would not have intended, however, that duplicative systems be maintained, so long as each provided equivalent protection.

In summary, the question of whether a system falls within the exemption in Chapter 45, §1(4), to the requirement that smoke detectors be placed in corridors and sleeping rooms of dormitories is one generally left to the professional judgment of the State Fire Marshal. He need not approve any such system unless in that judgment he concludes that it provides protection from fire to the residents equivalent to that otherwise required by Chapter 45, §1(2)(b).

Respectfully yours,

GARY L. HAYWARD
Assistant Attorney General
Public Safety Division

GLH:dlk

STATE DEPARTMENT AND OFFICERS: REAL ESTATE COMMISSION. Exemption from real estate licensing requirements § 117.7(5), The Code 1981. Auctioneers who simply conduct auctions of real property without closing the sales are not required to be licensed as a real estate broker or salesperson. If an auctioneer engages in the usual activities constituting dealing in real estate then the auctioneer must be licensed. (Thomas to Johnson, Director, Iowa Real Estate Commission, 8/25/82) #82-8-13(L)

August 25, 1982

Eugene O. Johnson, Director
Iowa Real Estate Commission
1223 East Court
Des Moines, Iowa 50319

Dear Mr. Johnson:

You have requested an opinion of this office regarding the scope of the exemption granted auctioneers from the provisions of Chapter 117.

Specifically you have asked for an opinion "as to the activities in which an auctioneer can engage under the exemption in Section 117.7(5) of the 1981 Code of Iowa." You have also asked for illustration of those acts by an auctioneer that would subject them to needing a real estate license.

The specific provision is found at § 117.7(5), 1981 Code of Iowa, wherein it is stated:

> The provisions of this Chapter shall not apply to the sale, exchange, purchase, rental, or advertising of any real estate in any of the following cases:
>
> * * *
>
> 5. The acts of an auctioneer in conducting a public sale or auction.

This office was previously asked for an opinion relating to the licensure of auctioneers. That request dealt with the previous real estate licensing statute which exempted auctioneers "while selling real estate at public auction for any of the parties exempted under [1905.23,

Chapter 91.2, 1938 Code of Iowa]." 1944 Op.Att'yGen., p. 145

In the 1944 opinion this office stated that an auctioneer "whose authority extends to closing a sale of real estate which he cried and sold at public auction, is thereby converted into a real estate broker or a real estate salesman, as the facts may determine." 1944 Op.Att'yGen., p. 149. We do not find that opinion to be clearly erroneous and adopt the intent of that opinion relating to auctioneers.

The legislative history and intent can be readily discerned from the analysis of the 1944 opinion. At page 147 of the opinion, after discussion of exemptions and construction relating to statutes, the opinion writer stated:

> Applying these rules to the questions at hand, it is to be said, in considering questions 1 and 2, that the statute excepting an auctioneer is limited by the express terms of Section 1905.23, to sales by the auctioneer for any of the parties exempted under the said section. If it had been intended by the Legislature to exempt the auctioneer from the provisions of Chapter 91.2 in all transactions, the legislature could easily have said:
>
> * * *
>
> 'Nor shall it be held to include any auctioneer while selling real estate at public auction.'

1944 Op.Att'yGen., p. 147

As the current statutory section adopts language quite close to that suggested by the 1944 opinion, it seems evident that the Legislature saw fit to adopt that suggestion in modifying the real estate license law.

However, the current statutory language refers to "public sale or auction." Iowa currently has no statutory definition of auctioneers or public auctions as the statutes governing such were repealed. The 69th General Assembly repealed both Chapter 546, entitled "Auctioneers" and Chapter 546A, entitled "Public Auctions" by Chapter 117,

Section 1097, Acts of the 69th General Assembly.

At the time and place announced for an auction the auctioneer usually announces the terms and conditions of the auction sale. Auctions are then conducted by the auctioneer with the auctioneer calling for bids, eliciting same and recognizing the successful bidder for the particular property to be sold. Title to the property is rarely held by the auctioneer, whose function rather is that of a person who cries the goods (or property) to those interested, strikes the bargain and sells to the public. That, without more, would maintain the exemption granted auctioneers from real estate licensing requirements as contemplated by the legislature.

When, however, the auctioneer strays from the role of giving brief description of the property for bid, calling for bids and striking the bargain then the auctioneer may need a real estate license. Performing the auctioneering function, without more, for a real estate broker would not require that auctioneers be licensed.

Section 117.6, The Code, sets forth the acts constituting dealing in real estate and states:

> A person who, for another in consideration of compensation for a fee, commission, salary, or otherwise, or with the intention or in the expectation or upon the promise of receiving or collecting a fee, does, offer, attempts or agrees to do, engages in or offers or attempts or agrees to engage in, either directly or indirectly, any single act or transaction contained in the definition of a real estate broker as set out in Section 117.3, whether the act be an incidental part of a transaction or the entire transaction, is a real estate broker or real estate salesperson within the meaning of this Chapter.

Section 117.6, 1981 Code of Iowa

Notwithstanding the provisions of § 117.6, the auctioneer is merely serving the auction function if he does no more than establish time, place and method of conducting the auction and then cries the property at public sale. In such situation the auctioneer is merely acting as the overseer of the public sale. The auctioneer should not be engaged in the negotiation, terms or conditions or other activities in connection with the sale of the real property.

When an auctioneer chooses to do more than advertise the fact of a proposed auction, a brief description of the property for auction, and the time and place for auction then the auctioneer may need a real estate license. The auctioneer who chooses to list real property for sale as in usual real estate listings, or who has authority to close a real estate transaction, is dealing in real estate and is required to be licensed as a real estate broker or salesperson.

For our purposes a Memorandum of Sale issued by the auctioneer will be regarded as solely a memorial that a particular auction lot was bid and struck down at a certain price to a certain bidder. The memorandum is not a contract for sale of real property by and between the auctioneer and and the successful bidder. The auctioneer is the agent of the seller for purposes of eliciting the highest bid and the completion of the sale is left to the seller (or his other agent) and the successful bidder.

Thus, an auctioneer acting solely as such for conducting an auction at public sale would not be required to have a real estate broker's or salesperson license. The auctioneer who deals in real property, including closing the sale, as those acts are defined by Sections 117.3 and 117.6, is required to acquire and maintain a real estate broker's or salesperson license.

Sincerely yours,

Frank Thomas

FRANK THOMAS,
Assistant Attorney General

FT:jb

MENTAL HEALTH: Establishment of legal settlement by mentally retarded persons who have assumed independent living arrangements. §§ 252.16(1), (2), and (3), 230.1, The Code 1981. A person who is an inmate of or is supported by an institution is precluded from acquiring a legal settlement. The term "institution" is broadly defined and it includes a privately incorporated nonprofit agency established to meet the needs of the mentally retarded. The term "supported by an institution", within the meaning of § 252.16(3), is a phrase of general welfare and includes the provision of food, clothing, shelter, and other necessaries of life. (Mann to Andersen, Dickinson County Attorney, 8/16/82) #82-8-12(L)

Mr. Allen A. Anderson
Dickinson County Attorney
710 Lake Street
Spirit Lake, Iowa 51360

August 16, 1982

Dear Mr. Anderson:

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

> Whether an organization as "Exceptional Persons", which provides financial and/or emotional counseling to an individual residing by himself, is an institution for the purposes of Section 252.16(3), Code of Iowa, 1981, such that an individual's legal settlement would not change even though discharged from a State Institution and placed in a County other than the one of his legal settlement at the time of commitment?

Additionally, you provided the following background information:

> The two individuals involved were patients at the Woodward State Hospital-School, until they were placed in Black Hawk County for a Goodwill training program, and placed in hostels operated by Exceptional Persons. The persons also received counseling on a regular basis from Exceptional Persons. Since 1979, or before, both have been terminated from

> Goodwill and to the present neither is in a sheltered work facility, or living in the Exceptional Persons Hostel. Both individuals have since moved from the Exceptional Persons Hostels (they are there voluntarily) and have now assumed independent living arrangements away from the EPI hostel--although they still receive counseling on a regular basis from EPI. Both persons have also been terminated by Goodwill Industries with respect to their training (not because the training was completed, but because the clients had difficulties with the program which caused Goodwill to believe that they should be terminated). Exceptional Persons, Incorporated (sometimes referred to as Exceptional Persons or EPI) is a privately incorporated nonprofit agency established to meet the needs of MR/DD, mentally retarded/ developmentally disabled. The primary goal of Exceptional Persons, Incorporated is to assess need and facilitate the development of community-based services for the mentally retarded. Counseling is provided to mentally retarded adults who are encountering the every-day problems of living.

Legal settlement questions are resolved pursuant to the provisions of § 252.16, The Code 1981. In pertinent part, that section reads as follows:

> 252.16 Settlement--how acquired. A legal settlement in this state may be acquired as follows:
>
> 1. Any person continuously residing in any county in this state for a period of one year acquires a settlement in that county.
>
> 2. Any person having acquired a settlement in any county of this state shall not acquire a settlement in any other county until such person shall have continuously resided in said county for a period of one year.
>
> 3. A person who is an inmate of or is supported by an institution whether organized

> for pecuniary profit or not or an institution supported by charitable or public funds in a county in this state shall not acquire a settlement in the county unless the person before becoming an inmate in the institution or being supported by an institution has a settlement in the county. (emphasis added.)

Your query, as we view it, is whether the mentally retarded persons involved herein are being "supported by an institution... within the meaning of § 252.16(3), so as to preclude them from being able to establish a legal settlement.

In responding to this inquiry, it will be helpful to review the law applicable to legal settlement.

"Legal settlement" is a statutory concept that is ordinarily not the same as residence or domicile. County of Gordhue v. Rice County, 160 N.W.2d 657 (Minn. 1968). The terms "domicile", "residence", and "legal settlement" are not synonymous. State v. Peisen, 233 Iowa 865, 10 N.W.2d 645 (1943); In Re Newhouse, 233 Iowa 1007, 9 N.W.2d 372 (1943); State v. Story County, 207 Iowa 1117, 224 N.W. 232 (1929); Adams County v. Maxwell, 202 Iowa 1327, 212 N.W.2d 152 (1927).

"Domicile" is a broader term than "residence", which may be temporary, transient or permanent. Edmundson v. Milley Trailor Co., 211 N.W.2d 269 (Iowa 1973). Residence coupled with the required intent is necessary to acquire domicile, but actual residence is not necessary to preserve an established domicile. Edmundson. Domicile, once established, continues until supplanted by the acquisition of a new one. Edmundson. Every person has one and only one domicile but may have no residence, one residence or several residences. Edmundson.

"Residence" means the place of general abode; the place of general abode of a person means his/her principal, actual dwelling place in fact, without regard to intent. In Re Newhouse. It indicates permanency of occupation of one's abode as distinct from lodging, or boarding, or temporary occupation. Cass County v. Audubon County, 221 Iowa 1039, 266 N.W. 293 (1936); Cerro Gordo v. The County of Wright, 50 Iowa 439 (1879); Mrvica v. Esperdy, 376 U.S. 560, 84 S.Ct. 833, 11 L.Ed.2d 911 (1964); Chan Wing Cheung v. Hamilton, 298 F.2d 459 (5th Cir. 1962); 1909 Op.Att'yGen. 78.

"Legal settlement" means a continuous, uninterrupted residence in a county for a year or more. In Re Newhouse; Story County; Scott County v. Polk County, 61 Iowa 616, 14 N.W. 206,

reh. den. 61 Iowa 616, 16 N.W. 726 (1882); 1932 Op.Att'yGen. 165. Continuous residence in a given place does not always mean continually remaining in that place. Residence is not synonymous with immovability. Physical presence is not always necessary and exemptions for brief temporary absences where the intention of returning is clear are permitted. United States v. Curran, 11 F.2d 468 (2d Cir. 1926); In Re Fuchs, 15 F. Supp. 761 (S.D. N.Y. 1936); 1948 Op.Att'yGen. 21; 1932 Op.Att'yGen. 165. The word "continuous" means connected, extended, or prolonged without separation or interruption of sequence, unbroken; uninterrupted; unintermitted. Talbot v. Acheson, 110 F. Supp. 182 (D. D.C. 1951).

The statute requires then, for purposes of establishing legal settlement, continuous, unbroken residence in a county for one year or more, not continuous physical presence. In Re Fuchs; 1948 Op.Att'yGen. 21; 1932 Op.Att'yGen. 165.

Pursuant to § 230.1, The Code 1981, one's residence does not change during periods of commitment to state institutions. State v. Clay County, 226 Iowa 885, 285 N.W. 229 (1939); State v. Story County, 207 Iowa 1117, 224 N.W. 232 (1929); Scott County v. Townsley, 174 Iowa 192, 156 N.W. 291 (1916); Polk County v. Clark County, 171 Iowa 558, 151 N.W. 489 (1915). Pursuant to § 252.16 (3), an inmate of a state institution is precluded from accruing time to meet the one year residency requirement for establishing legal settlement. Audubon County v. Vogessor, 228 Iowa 281, 291 N.W. 135 (1940); 1976 Op.Att'yGen. 400; 1974 Op.Att'yGen. 51, 1964 Op.Att'yGen. 453; 1964 Op.Att'yGen. 457.

Further, pursuant to § 252.16(3), a person who is supported by an institution is precluded from establishing legal settlement in a county. Audubon County v. Vogessor; 1958 Op.Att'yGen. 157.

Having overviewed the law, we now turn to the underlying questions: (1) whether Exceptional Persons is an institution within the meaning of § 252.16(3), and (2) whether Exceptional Persons is providing support within the meaning of § 252.16(3) to the mentally retarded persons discussed in the facts that you provided.

With respect to the first question it seems clear that Exceptional Persons qualifies as an institution within the meaning of § 252.16(3). The term "institution" is not a defined term under the statute, but it has been defined by the Iowa Supreme Court as an established society or corporation, which may be private in character and designed for profit, or it may be public and charitable in purpose. National Bank of Burlington v. Huneke, 98 N.W.2d 7 (Iowa 1959); Samuelson v. Horn, 169 Iowa 208, 265 N.W.

168 (1936). It appears that Exceptional Persons is a privately incorporated nonprofit agency established to meet the needs of the mentally retarded and developmentally disabled. It is our opinion that this agency is an institution within the meaning of § 252.16(3).

With respect to the question of whether Exceptional Persons is providing support within the meaning of § 252.16(3), it is our opinion that it is not. The term "support" refers to the provision of the necessities of life, inclusive of food, clothing, shelter, and appropriate care. Moss v. Moss, 379 S.2d 1206 (La. App. 1980); Evans v. Evans, 263 Ark. 291, 564 S.W.2d 505 (1978); Child & Family Services of Syracuse v. Toia, 60 A.D.2d 999, 401 N.Y.S.2d 662 (1978); American Motorists Insurance Company v. Wilson, 256 S.2d 813 (La.App. 1972); Black's Law Dictionary, Rev. 4th Ed., 1609 (1968). It does not appear from the supplied facts that Exceptional Persons is providing any of life's necessities to the described persons. Rather, they have assumed independent living arrangements and only receive counseling from Exceptional Persons. This does not constitute support within the meaning of § 252.16(3).

Accordingly, there is no impediment to these persons establishing a legal settlement as a result of their independent living arrangement.

Sincerely,

Thomas Mann, Jr.

Thomas Mann, Jr.
Assistant Attorney General

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COUNTIES; COUNTY LAND USE; HISTORICAL PRESERVATION DISTRICTS: 1982 Iowa Acts, Senate File 2218; Iowa Code §§ 303.20-303.34 (1981). Once an historical preservation district is established, it may be recognized, subject to the discretion of the county, as a part of a S.F. 2218 land preservation and use plan and enforced accordingly. (Weeg to Tyrrell, State Representative, 8/16/82) #82-8-11(L)

August 16, 1982

The Honorable Phil Tyrrell
State Representative
North English, Iowa 52316

Dear Representative Tyrrell:

You have requested an opinion of the Attorney General concerning the interpretation of 1982 Iowa Acts, Senate File 2218 as it relates to the obligation of county government to support historical preservation districts established pursuant to Iowa Code §§ 303.20 through 303.34 (1981). In particular, you ask whether county government would be required by S.F. 2218 to prosecute violations of an historical preservation district commission's rulings. It is our opinion that the enforcement mechanisms of S.F. 2218 may be extended to historical preservation districts. Our reasons for this conclusion are as follows.

This opinion request arises out of the effort of concerned citizens in the Amana Colonies to seek an alternative method of controlling the growth and development of their community. This concern in turn arises out of the Iowa Supreme Court's recent opinion in Amana Society v. Colony Inn, Inc., 315 N.W.2d 101 (Iowa 1982), where the Court found the Amana Society's means of land use control in the Amana Colonies illegal. In that decision, the Supreme Court concluded by noting that alternative means of land use control, such as county zoning or incorporation, were available to the colonies:

> More important, chapter 303, The Code, contains provisions for establishment of historical preservation districts which would

> apply to the colonies. This chapter was drafted by the Society's attorneys . . . and the Society oversaw the successful presentation of the bill in the General Assembly. Obviously tailored to the needs of the Amana Colonies, this law provides protection for "areas of historical significance." See §§ 303.20-.34, The Code. It provides for preservation of areas such as the colonies through districts not exceeding 160 acres in size. The purpose of the 160-acre limitation was said to be to allow each of the colonies to decide for itself whether to become a district. Control of future development would be the responsibility of commissions in each district, rather than the Society, and the membership of the commissions would be elected by the residents of the districts . . .
>
> The draftsmen of a Society-ordered development plan, as well as many residents of the colonies, have urged the Society to implement the new historical-preservation law; however, it has failed to do it. One witness said this was because there was an omission in the statute to provide for funding the costs of the referendum elections necessary to establish the districts; another testified it was due to a lack of impetus within the colonies themselves. In any event, there was no evidence to show the Society has made any attempt to secure the necessary statutory amendments to cure the alleged deficiency or to encourage the residents of the colonies to get the project underway. If the Society's fear is well-founded that the colonies would self-destruct by allowing the unchecked growth of commercialism, other remedies are available to it through zoning or implementation of the very statute it conceived.

Amana Society v. Colony Inn, Inc., 315 N.W.2d at 119.

We additionally note that in §§ 303.27 to 303.32 the legislature established detailed procedures and guidelines for enforcement of an historical preservation district. In brief, once such a district is established and an historical

district preservation commission is elected, any proposed change in the exterior of a building, in a particular piece of property, or in the use of any structure or property within a district must be submitted to and approved by the commission. Finally, § 303.31 provides:

> The commission shall take action to enjoin any attempts to construct, reconstruct, alter, move, or demolish any exterior feature, or to change the use of the property, within the district without a certificate of appropriateness [issued by the commission pursuant to § 303.30].

This provision effectively authorizes the commission to take legal action against persons who refuse to comply with its rulings.[1]

However, through your opinion request you seek to determine whether additional enforcement measures are available to historical district commissions through the provisions of S.F. 2218, which was passed by the 69th General Assembly on April 24, 1982, was signed into law on May 14, 1982, and became effective on July 1, 1982. We note that this act was passed after the Supreme Court's decision in Amana Society v. Colony Inn, Inc.. In brief, this act provides new methods of land use planning and development.

Because our response to your question depends heavily on the interpretation of §§ 303.20 through 303.34 and S.F. 2218, we refer to relevant principles of statutory construction. First, we note that the polestar of statutory construction is to ascertain and give effect to legislative intent. American Home Products Corp. v. Iowa State Board of Tax Review, 302 N.W.2d 140 (Iowa 1981); Doe v. Ray, 251 N.W.2d 496, 501 (Iowa 1977). Further, in construing a particular statute, all provisions of that act and other pertinent statutes must be considered. Maguire v. Fulton, 179 N.W.2d 508 (Iowa 1970); Goergen v. State Tax Commission, 165 N.W.2d 782 (Iowa 1969).

Finally, we refer to Iowa Code Ch. 4 (1981), which governs construction of statutes. In particular, § 4.7

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[1] These provisions relating to historical districts do not apply within the limits of a city; instead, § 303.34 provides for creation of an area of historical significance in a city. In particular, § 303.34(3) provides a means of enforcing these provisions.

states:

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision.

(emphasis added) The Supreme Court has consistently reiterated that in construing a statute it must be harmonized, if possible, with other statutes relating to the same subject. Doe v. Ray, 251 N.W.2d at 501; France v. Bentes, 256 Iowa 534, 128 N.W.2d 268 (1964); Lint v. Bennett, 251 Iowa 1193, 104 N.W.2d 564 (1960) ("if by any fair and reasonable construction prior and later statutes can be reconciled, both should stand"); Fitzgerald v. State, 220 Iowa 547, 260 N.W. 681 (1935) (statutes relating to the same subject matter and not inconsistent should both be given effect, although they contain no reference to one another and were passed at different times).

Applying these principles in the present case, we conclude that the enforcement provisions of S.F. 2218 are applicable as well to Ch. 303 historical districts. First, we have already generally reviewed the provisions of Ch. 303 relating to historical preservation districts. As noted by the Supreme Court in the Amana Society decision, Ch. 303 is "obviously tailored to the needs of the Amana Colonies." Consequently, because of its specificity, it is our opinion that Ch. 303 provides the primary statutory authorization for establishment and enforcement of historical preservation districts.

Preservation of areas of historical significance is unquestionably one category of land use planning; Ch. 303 is a specific statute designed to establish historical preservation districts to serve this end. Senate File 2218 is a general land use planning statute, designed to preserve and protect many types of land use, including historic, and to provide for an orderly means of developing various types of land uses. This is most demonstrably reflected in the expansive "purposes" language in § 2 of S.F. 2218:

> It is the intent of the general assembly and the policy of this state to provide for the orderly use and development of land and related natural resources in Iowa for resi-

> dential, commercial, industrial, and recreational purposes, preserve private property rights, protect natural and historic resources and fragile ecosystems of this state including forests, wetlands, rivers, streams, lakes and their shorelines, aquifers, prairies, and recreational areas to promote the efficient use and conservation of energy resources, to promote the creation and maintenance of wildlife habitat, to consider the protection of soil from wind and water erosion and preserve the availability and use of agricultural land for agricultural production, through processes that emphasize the participation of citizens and local governments.
>
> The general assembly recognizes the importance of preserving the state's finite supply of agricultural land. Conversion of farmland to urban development, and other nonfarm uses, reduces future food production capabilities and may ultimately undermine agriculture as a major economic activity in Iowa.
>
> It is the intent of the general assembly to provide local citizens and local governments the means by which agricultural land may be protected from non-agricultural development pressures. This may be accomplished by the creation of county land preservation and use plans and policies, adoption of an agricultural land preservation ordinance, or establishment of agricultural land preservation ordinance, or establishment of agricultural areas in which substantial agricultural activities are encouraged, so that land inside these areas or subject to those ordinances is conserved for the production of food, fiber, and livestock, thus assuring the preservation of agriculture as a major factor in the economy of this state.

(emphasis added)

Thus, the general purpose of S.F. 2218 is clear: it is to preserve land, in particular, agricultural land, and to protect natural, historic, and environmental resources. To implement these purposes, S.F. 2218 subsequently provides

for the establishment of county land preservation and use commissions (Section 4), mandates these commissions to compile county land use inventories (Section 5), requires proposal of county land preservation and use plans (Section 6), provides for the creation of agricultural areas (Section 7), enumerates incentives for agricultural land preservation (Section 12), establishes a state interagency resource council (Section 14), and imposes numerous other related procedures and requirements (Sections 8-11, 13, 15-19). Enforcement of a county land preservation and use plan is provided for in Section 6.3, which states in part that:

> If the plan is approved by the county board [of supervisors], it shall be the land use policy of the county and shall be administered and enforced by the county in the unincorporated areas. The county [land preservation and use] commission shall review the county plan periodically for the purpose of considering amendments to it.

While later provisions establish that S.F. 2218 is in large part concerned with the preservation of agricultural land,[2] we believe this emphasis does not exclude the act's application to other expressly stated purposes, which include "protection of historic resources." See S.F. 2218, § 2. The land use provisions of S.F. 2218 are not inconsistent with, and are indeed complementary to, Chapter 303's historical preservation district provisions, and therefore we conclude that these two statutes may be read together.

It is our opinion that as a result of this reading it would be possible to establish a Ch. 303 historical preser-

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[2] For instance, beginning in the "purpose" section, the Act refers to "the importance of preserving the state's finite supply of agricultural land," the protection of agricultural land "from nonagricultural development pressures," the conservation of land "for the production of food, fiber, and livestock," and the "preservation of agriculture as a major factor in the economy of this state." See S.F. 2218, § 2. The county land preservation and use commissions, which are established to compile land use inventories and to propose a county land use plan, are to be comprised of, inter alia, a county agricultural extension council member, a district soil conservation commission member, and a farmer. See S.F. 2218, § 4.1. The state agricultural extension service is to provide each county commission with necessary assistance. See S.F. 2218, § 4.3.

vation district or districts, which could in turn be recognized as a part of a S.F. 2218 county land preservation and use plan. More specifically, an historical preservation district or districts would be established, and a commission for each district elected, pursuant to Ch. 303. In a separate action, a county land preservation and use commission would be appointed pursuant to S.F. 2218 § 4. This latter commission must then compile a land use inventory and propose a county land preservation and use plan to the county board of supervisors, who would then approve or reject the plan. See S.F. 2218 §§ 5 and 6. Each historical district would be included as part of the county land use inventory,[3] and could be recognized as part of the county land preservation and use plan.[4] Of course, the decision of whether to include historical preservation districts in the county land preservation and use plan would be left to the discretion of the land preservation and use commission, and ultimately, the county board of supervisors.

The practical effect of this arrangement would be to establish historical preservation districts as autonomous governmental entities. Consequently, an historical preservation district commission's case-by-case rulings would not be subject to the authority or control of any other governmental entity. This is so because the specific provisions of Ch. 303, which, inter alia, grant decision-making authority to the historical preservation commissions, preempt any other governmental entity from exercising any decision-making authority with regard to historical preservation districts.

However, in the event the county land preservation and use commission and the county board of supervisors approved of, and sought to promote, the purposes and goals of a particular historical preservation district, that district could be included in this county land preservation and use plan. Consequently, the historical preservation commission's rulings would be enforced by the county as any other part of

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[3] See S.F. 2218 § 5.1(b) (each county land use inventory is to contain: "The land used for public facilities, which may include . . . historical sites.")

[4] Because S.F. 2218 county land preservation and use plans apply only to unincorporated areas of the county, historical districts (§§ 303.20 to 303.33) could be included but "areas of historical significance" (§ 303.34) could not.

the county land preservation and use plan would be enforced.[5] Any disputes between the county and the historical preservation district would essentially be resolved in the political arena: disputes of a monumental proportion might ultimately result in the county's refusal to no longer include the historical preservation district within its county land preservation and use plan. See S.F. 2218 § 6.3.

In conclusion, Ch. 303 specifically creates and governs historical preservation districts. S.F. 2218 contains general land preservation and use provisions designed to protect, inter alia, agricultural, environmental, and historic resources. Because these two statutory provisions relate to the same subject matter, i.e., land use and development, and are not inconsistent, they may be read together. Consequently, once an historical preservation district is independently established, it may be recognized, subject to the discretion of the county, as a part of a S.F. 2218 land preservation and use plan and enforced accordingly.

Sincerely,

Theresa O'Connell Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

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[5] Historical preservation commissions would have primary jurisdiction pursuant to the specific provisions of § 303.31 to either enforce its rulings against a proposed change or enjoin attempts to make such a change without the commission's approval. However, if the historical preservation district was included as part of the county land preservation and use plan, the historical preservation commission could then choose to seek enforcement of the commission's position through the county. See S.F. 2218 § 6.3. Such a course of action would not be mandatory for the commission or the county.

CONSTITUTIONAL LAW: Constitutionality of legislation reducing an appropriation previously enacted for either a fiscal year not yet begun or the present fiscal year. U.S. Const. art. I, § 10; Iowa Const. art. I, § 21; Section 20.17(b). Legislation which reduces an appropriation previously enacted for either a fiscal year not yet begun or the present fiscal year does not violate the contract clauses of either the federal or state constitutions even if contracts based on these appropriations have been entered into; however, the state may be liable for breach of contract. (Hunacek to Holden, State Senator, 8/13/82) #82-8-10(L)

August 13, 1982

The Honorable Edgar H. Holden,
Iowa State Senator
State Capitol
Des Moines, Iowa 50319

Dear Senator Holden:

You have requested an opinion concerning possible constitutional infirmities in a state law reducing prior appropriations made to certain state departments. Specifically, you have asked:

1. Would appropriation legislation duly adopted by the State of Iowa run afoul of constitutional provisions if it:

   a. reduced an appropriation previously enacted for a state fiscal year which has not yet begun?

   b. reduced an appropriation previously enacted for a state fiscal year which has begun but which is not yet concluded?

2. If the answer to the foregoing is that in the abstract there is no constitutional infirmity in such actions, would appropriation legislation duly

adopted by the State of Iowa be unconstitutional or otherwise be violative of any statutory provision if it reduced a gross appropriation to an agency or department of the state for a state fiscal year which either has not yet begun, or which has begun but which has not yet concluded, which initial appropriation was designated in whole or in part to fund pay adjustments, expense reimbursements and benefits under a collective bargaining agreement for employees of the state if such amendment does not direct the reduction in any wages or benefits as negotiated for individuals, but which may necessitate reductions in the level of employment?

3. If your answer to the preceding is that such legislation would be constitutional, may such legislation amending the initial appropriation be in the form of:

a. an absolute revocation of the appropriation (i.e., reduce a fixed amount to zero)?; or

b. a reduction in the initial appropriation (i.e., reduce a fixed amount to some lesser amount)?; or

c. a conditional appropriation whereby a previously appropriated amount is reduced to some lesser amount if state revenues do not exceed a set amount on a specified date, or absolutely reduce a previously appropriated amount but providing that either the initial amount or some third amount if state revenues exceed a set amount on a specified date? There is precedent for conditional appropriation. I'd suggest the provision of Chapter 427A9.

I

The appropriation of money is essentially a legislative function. Walden v. Ray, 229 N.W.2d 706, 709 (1975). In a previous opinion of this office we noted that "the General

Assembly is not limited by the Constitution or by statute in making reductions in appropriations". Op.Att'yGen. #81-4-1. This opinion was not, however, concerned with the possible implications of the "contract clauses" of the state and federal constitutions. These provisions prohibit the legislature from adopting any act which has as its consequence the impairment of contracts. See, U.S. Const. art. I, § 10, Iowa Const. art. I, § 21. These provisions, in view of their close historical relationship, should receive a similar construction, though the Iowa Supreme Court has the power to interpret the state provision differently than the United States Supreme Court interprets the federal provision. Des Moines Joint Stock Land Bank of Des Moines v. Nordholm, 217 Iowa 1319, 253 N.W. 701 (1934).

The contract clauses are possibly implicated in any state law which reduces an appropriation because contracts may have been formed between the state agency to whom the money was appropriated and other parties. These contracts may then be impaired by the decrease in funding. See generally In re Opinion to the Senate, 108 R.I. 302, 275 A.2d 256 (1971). It is important to realize, though, that the appropriation is itself not a contract. See, e.g., City and County of San Francisco v. Beideman, 17 Cal. 443, 462 (1961) (distinguishing between appropriations and contracts, and calling the former "mere legislative regulation[s]"); State ex rel. Board of Regents of Normal Schools v. Donald, 163 Wis. 145, 147 N.W. 782 (1916) (noting that the legislature can repeal a statute carrying an appropriation, and thus put an end to the appropriation, so far as it is unexpended, at any time). Whether and to what extent a contract has been formed based on the appropriation is a question of fact. In re Opinion to the Senate, 275 A.2d at 258. There would appear to be, in Iowa, no statutory or judicial prohibition against entering into a contract calling for the expenditure of funds appropriated for a future fiscal year. Contrast, State ex rel. Point Towing Co. v. McDonough, 149 S.E.2d 302 (W. Va. 1966).

II

Another factor to consider in any contract-clause analysis is sovereign immunity. A state which does not allow itself to be sued forecloses a possible remedy for breach of contract and thus increases the likelihood that a legislative reduction of appropriations will result in an impairment of contract. See In re Opinion to the Senate, 275 A.2d at 258, noting that in such a state "one allegedly sustaining damages as a result of this state's repudiation must seek special legislation giving the

right to sue. Whether the General Assembly would grant such right in a given case is conjectural and this conceivably restricts the General Assembly from repealing an appropriation which [agencies] have already allocated to a contract which, by its terms, may not constitutionally be impaired." See also E & E Hauling, Inc. v. Forest Preserve District, Etc., 613 F.2d 675 (7th Cir. 1980):

> The Supreme Court in the context of the contract clause has drawn a distinction between a breach of a contract and impairment of the obligation of the contract. The distinction depends on the availability of a remedy in damages in response to the state's (or its subdivision's) action. If the action of the state does not preclude a damage remedy the contract has been breached and the non-breaching party can be made whole. If this happens there has been no law impairing the obligation of the contract. Hays v. Port of Seattle, 251 U.S. 233, 237, 40 S.Ct. 125, 64 L.Ed. 243 (1920). . .However, if a state or its subdivision passes a law and through enforcement of it prevents another party from fulfilling its obligations under the contract because the use of the ordinance precludes a damage remedy, the non-breaching party cannot be made whole. Instead, the law has impaired the obligation of the contract.

Id. at 679. In this connection it must be noted that Iowa has judicially abrogated the doctrine of sovereign immunity for breach of contract suits. Kersten Co. v. Department of Social Services, 207 N.W.2d 117 (Iowa 1973); Comment, Sovereign Immunity in Contract Suits: Victim of Judicial Abrogation in Iowa, 59 Iowa L.Rev. 360 (1973). Thus, even if a contract had been formed based on an appropriation which is subsequently reduced, the availability of remedies for its breach would suggest that no unconstitutional impairment of that contract had occurred.

A possible caveat to the above analysis occurs in the context of state securities. In Frost v. State, 172 N.W.2d 575, 583 (Iowa 1969) the Iowa Supreme Court noted that "It must be conceded, of course, that the bonds constitute a contract between the commission and the bond holders. It may also be conceded that the state may not impair the obligation thereof." The U.S. Supreme Court in United States Trust Co. of New York v. New

Jersey, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) invalidated a statute repealing a prior covenant which the Court found constituted a contract between bondholders and two states, New York and New Jersey. See also Arizona State Highway Commission v. Nelson, 105 Ariz. 76, 459 P.2d 509 (1969) (though "legislature retains full power to increase or decrease the rate of taxes earmarked for the State Highway Fund", taxes "cannot be decreased to such an extent that the bondholder's security is impaired"). The subject of taxes designed to secure a debt is discussed in Iowa Const. Art. VII, § 6; this section states that taxes imposed by a law authorizing a state debt "in proportion to the debt or liability . . . shall remain in force and be irrepealable, and be annually collected, until the principal and interest are fully paid."

III

With the preceding as background, we can now turn to the specific questions posed.

1. a) It would seem that the contract clauses of either the state or federal constitutions would not be violated by such legislation. A threshold question would be whether the sums in question have already been charged to some valid contract. Even if this were the case, the fact that there exists in Iowa appropriate remedies for breach of contract, even when the suit is against the state, would indicate under the preceding analysis that no unconstitutional impairment of the contract had taken place.

b) The answer here is the same as in part (a) above. The difference in circumstances reflects on the factual determination of whether the appropriations have been charged to some valid contract. In some states, as noted, appropriations made for a future fiscal year could apparently never be the subject of a contract made prior to that year. In such states the only possible constitutional problems could occur in the situation contemplated by part (b). However, that would appear not to be the case in Iowa.

2. In the particular context of this question (collective bargaining agreements) there are additional considerations affecting the factual question of the existence and validity of contracts. These considerations relate to the issue of potential breach of contract liability rather than to the constitutionality of the appropriations legislation.

Reduction of the level of employment does not necessarily constitute a breach of contract with an employee who has been terminated. Whether it does or not depends upon what contractual provisions exist regarding tenure of employment. In general, a promise by an employer to provide permanent employment requires independent consideration. Laird v. Eagle Iron Works, 249 N.W.2d 646, 647 (Iowa 1977). A fortiori, in the absence of such a provision one would not be implied.

In this regard the effect of § 20.7 should also be considered. This section gives public employers the right to, inter alia, "[r]elieve public employees from duties because of lack of work or for other legitimate reasons" and "[s]uspend or discharge public employees for proper cause". Whether or not these rights can be contracted away seems never to have been addressed by the Iowa Supreme Court. For a discussion of the effect of this section, see Pope, Analysis of the Iowa Public Employment Relations Act, 24 Drake L.Rev. 1, 9-11 (1974).

3. Such legislation could be in any of the forms described. With regard to question (c) it should be noted that the Iowa Supreme Court has held that our constitution does not require a specification of amount and funds. "The constitutional provisions here concerned require appropriation by the legislature, not necessarily an appropriation of a sum certain out of some 'earmarked' fund." Graham v. Worthington, 259 Iowa 845, 146 N.W.2d 626 (1966). If a legislature has the power to cancel an appropriation entirely, it would certainly have the power to make the appropriation conditional on some event, since in the absence of this contingent event the legislature could cancel the appropriation and pass a new appropriations statute.

Sincerely,

Mark Hunacek

Mark Hunacek
Assistant Attorney General

MH/kap17

STATE OFFICERS AND DEPARTMENTS: City Development Board, Acceptance of Gifts. Chapter 68B; §§ 68B.2(6), 68B.2(9), 68B.5, 68B.8, 68B.11(2), and 368.9, The Code 1981; Acts, 68th G.A., 1980 Session, Ch. 1015, § 6. Each member of the city development board is, for purposes of § 68B.5, The Code 1981, an "official," and thus subject to the fifty dollar gift limitation. Nevertheless, that limitation is restricted to the acceptance of a gift in an "official," not a private capacity. Any doubt as to which capacity a board member is acting should be resolved in favor of overinclusion. Finally, in the event that a gift is subject to the limitation, board members are advised that the gift should be reported pursuant to § 68B.11(2), The Code 1981. (Walding to Pogue, City Development Chairperson, 8/13/82) #82-8-9(L)

August 13, 1982

Mr. Thomas F. Pogue, Chairperson
City Development Board
Office for Planning and Programming
L O C A L

Dear Mr. Pogue:

You have requested an opinion of the Attorney General and state:

> Is it a violation of Iowa law (specifically Section 68B.5, Code of Iowa, or any related provision) for a newly-appointed member of the [City Development] Board to receive gifts in excess of fifty dollars, if the gift is a normal and customary part of the individual's vocation and not related to their official position? An example of such a gift might be a gift from a client for negotiating a business transaction.

The question you pose concerns Iowa's gift law found in Chapter 68B, the Iowa Public Officials Act. In particular, § 68B.5, The Code 1981, provides:

> An official, employee, local official, local employee, member of the general assembly, candidate, or legislative employee shall not, directly or indirectly, solicit, accept, or receive any gift having a value of fifty dollars or more in any one occurrence. A person shall not, directly or indirectly, offer or make any such gift to an official, employee, local official, local employee, member of the general assembly, candidate or legislative employee which has a value in excess of fifty dollars in any one occurrence. [Emphasis added]

Therefore, § 68B.5, The Code 1981, prohibits both the giving to or acceptance by a public official of a gift having a value of fifty dollars or more in any one occurrence.

The term "official," underscored in the aforementioned language, is defined in § 68B.2(6), The Code 1981, to include "any officer of the state of Iowa receiving a salary or per diem whether elected or appointed or whether serving full-time or part-time." [Emphasis added] Members of the city development board, it should be noted, are appointed by the governor subject to senate confirmation and receive from the state "actual and necessary expenses and forty dollars compensation for each day spent in performance of board duties." Section 368.9, The Code 1981. Accordingly, each member of the city development board is, for purposes of § 68B.5, The Code 1981, an "official," and thus subject to the fifty dollar gift limitation.

Nevertheless, it is our judgment that the gift limitation is restricted to the acceptance of a gift in an "official," not a private capacity. Our opinion is based on the legislative intent in enacting a state gift law, as reflected by certain exemptions from Chapter 68B. The term "gift," according to § 68B.2(9), The Code 1981, added recently by Acts, 68th G.A., 1980 Session, Ch. 1015, § 6, does not include:

> a. Anything received by a donor whose official action or lack of action will potentially have no material effect, distinguishable from material effects on the public generally, on the interests of the donor.

* * *

> d. Anything received from a person related within the fourth degree by kinship or marriage, unless the donor is acting as an agent or intermediary for another person not so related.
>
> * * *
>
> f. An inheritance.
>
> g. Anything available to or distributed to the public generally without regard to official status of recipient.
>
> * * *

Thus, Chapter 68B was not intended to prohibit the acceptance of any and all gifts. As exemplified by those exemptions, the legislature did not intend to require officials to abstain from accepting gifts in their private capacity. Accordingly, a board member has a status both as an "official" and as a non-official. Chapter 68B does not govern the acceptance of a gift by a board member in a private capacity.

In determining whether a board member is acting in an "official" or private capacity, we offer the following consideration. Chapter 68B is a penal statute. Section 68B.8, The Code 1981, makes it a serious misdemeanor to knowingly and intentionally violate the provision of § 68B.5, The Code 1981. Although it is well settled in Iowa that criminal statutes are to be strictly construed and any doubt resolved in favor of the accused, see State v. Nelson, 178 N.W.2d 434 (Iowa 1970), the fact that criminal sanctions may attach as a result of a statutory violation should lead board members to exercise caution, and any doubt as to which capacity a board member is acting should be resolved in favor of overinclusion.

Finally, in the event that a gift is subject to the gift limitation, members of the city development board are advised that the gift should be reported pursuant to § 68B.11(2), The Code 1981. Section 68B.11(2), The Code 1981, requires the governor to issue an executive order (Executive Order 36) relating to the reporting of gifts made to officials and employees of executive departments which exceed fifteen dollars in value in any one occurrence.

In summary, each member of the city development board is, for purposes of § 68B.5, The Code 1981, an "official," and thus subject to the fifty dollar gift limitation. Nevertheless, that limitation is restricted to the acceptance of a gift in an "official," not a private capacity. Any doubt as to which capacity a board member is acting should be resolved in favor of overinclusion. Finally, in the event that a gift is subject to the limitation, board members are advised that the gift should be reported pursuant to § 68B.11(2), The Code 1981.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW:dys

ADMINISTRATIVE AGENCIES. Historical Preservation Districts. Chapter 17A, §§ 17A.2(1), 303.20(1), 303.20(2), 303.21, 303.22, 303.24, 303.25, 303.26, 303.27, 303.28, 303.29, 303.30, 303.31, 303.34(1), 303.34(3), and 303.34(4), The Code 1981. An historical preservation district is not an "agency" within the meaning of the Iowa Administrative Procedure Act. Accordingly, the procedural provision of Chapter 17A are not applicable to historical preservation districts. A determination of an historical preservation district commission, however, must still be based upon procedural guidelines found in due process and § 303.30, The Code 1981. (Walding to Tyrrell, State Representative, 8/13/82) #82-8-8(L)

August 13, 1982

The Honorable Phillip E. Tyrrell
State Representative
222 North Mill St.
North English, IA 52316

Dear Representative Tyrrell:

You have requested an opinion of the Attorney General regarding historical preservation districts. Historical preservation districts are established pursuant to §§ 303.20-34, The Code 1981. A discussion of the procedure to establish a district, the review of the division of historical preservation of the Iowa state historical department, and the powers of an historical preservation district commission follows.

I. HISTORICAL PRESERVATION DISTRICTS

The procedure to establish an historical preservation district is simple. To initiate the process, voters in an area of asserted historical significance petition the division for a referendum. See § 303.21, The Code 1981. Section 303.20(1), The Code 1981, provides:

> "Area of historical significance" means contiguous pieces of property of no greater area than one hundred sixty acres under diverse ownership which:

> a. Are significant in American history, architecture, archaeology and culture, and
>
> b. Possess integrity of location, design, setting, materials, workmanship, feeling and association, and
>
> c. Are associated with events that have been a significant contribution to the broad patterns of our history, or
>
> d. Are associated with the lives of persons significant in our past, or
>
> e. Embody the distinctive characteristics of a type; period; method of construction; represent the work of a master; possess high artistic values; represent a significant and distinguishable entity whose components may lack individual distinction.
>
> f. Have yielded, or may be likely to yield, information important in prehistory or history.

Upon receipt of the petition, the division holds a hearing. See § 303.22, The Code 1981. Published notice of the hearing is required. Id. Following the hearing, if the division determines that the suggested district meets the criteria for establishment as a district, a referendum on the question of establishment of an historical preservation district is submitted to the qualified electors of the area embraced by the proposed historic district. See § 303.25, The Code 1981. The county commissioner of elections is required to post notice of the referendum. See § 303.24, The Code 1981. In the end, an historical preservation district is established if a majority of the persons voting at the referendum votes in favor of its establishment. See § 303.25, The Code 1981.

A separate procedure, however, is to be followed for a city to designate an area it deems to merit preservation as an area of historical significance.[1] The process is initiated either by the governing body of the city or by a petition of the residents therein. See § 303.34(1), The Code 1981. A description of the proposed area of historical significance is submitted to the

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[1]Note that a city merely designates an area of historical significance; a separate historical preservation district is not established.

division. Id. Following the division's review, enactment of an ordinance of the city is required before an area may be designated as an area of historical significance. See § 303.34(4), The Code 1981.

The review of the division of historical preservation of the Iowa state historical preservation department is limited in scope. At the hearing, the division hears interested persons, accepts written presentations, and determines whether the suggested district is an area of historical significance which may properly be established as an historical preservation district pursuant to § 303.20(1), The Code 1981. See § 303.22, The Code 1981. In addition, the division may determine the boundaries which shall be established for the district. Id. The division, however, is limited to recommendations concerning the proposed area of historical significance within the limits of a city. See § 303.34(1), The Code 1981. Finally, the division, if it determines that the suggested district meets the criteria for establishment as a historical preservation district, must indicate the owners of the property and residents included and forwards a list of such owners and residents to the county commissioner of elections. See § 303.22, The Code 1981. Once an historical preservation district is established or an area within the limits of a city is designated an area of historical significance, it should be observed that the division has no authority.

Finally, we address the powers of an historical preservation commission. A commission, a five-member body, is elected by the qualified electors in an historical preservation district. See §§ 303.20(2) and 303.26, The Code 1981. Suffice it to say, a city has greater discretion in the establishment of a commission to deal with matters involving areas of historical significance. See § 303.34(3), The Code 1981. The commissioners, with the exception of the initial members, served staggered five-year terms. See § 303.26, The Code 1981. A commission is charged with the issuance or denial of a certificate of appropriateness as to exterior features, see § 303.27, The Code 1981, and the use of any structure or property. See § 303.29, The Code 1981. A commission, however, cannot control the interior portion of a building in the district. See § 303.28, The Code 1981. Finally, a commission must take action to enjoin attempts to change the exterior features or use of any structure or property without a certificate of appropriateness. See § 303.31, The Code 1981. A city, upon establishment of a commission, must provide by ordinance for the powers and duties of the commission. See § 303.34(3), The Code 1981.

II. APPLICABILITY OF THE IOWA ADMINISTRATIVE PROCEDURE ACT

With the foregoing statutory analysis of historical preservation districts presented, we turn to your request. You state:

> The seven Amana Villages have no land use control presently, but are studying such a proposal. Since they are [considering becoming an historical preservation district pursuant to §§ 303.20-34, The Code 1981,] the question becomes: "Is an Historical Preservation District Commission subject to the [Iowa] Administrative Procedure Act, Chapter 17A of the Iowa Code?"

The applicability of Chapter 17A to governmental units turns on whether or not those units fall within the definition of "agency" within § 17A.2(1), The Code 1981. That section provides:

> "Agency" means each board, commission, department, officer or other administrative office or unit of the state. "Agency" does not mean the general assembly, the courts, the governor or a political subdivision of the state or its offices and units. Unless provided otherwise by statute, no less than two-thirds of the members eligible to vote of a multimember agency shall constitute a quorum authorized to act in the name of the agency. [Emphasis added]

A political subdivision of the state, as evidenced by the underscored portion of the aforementioned language, is not an "agency" within the meaning of the Iowa Administrative Procedure Act (IAPA). The exemption is explained by Professor Arthur Earl Bonfield. He writes:

> To make unmistakable the inapplicability of the IAPA to county or local governments, section 2(1) expressly excludes "a political subdivision of the state or its offices and units" from the term "agency". This was done to assuage the fears of those who worried that such local governmental units might otherwise be deemed a "unit of the state" within the first sentence of section 2(1). There can now be now doubt on this score. Local government agencies are not subject to the IAPA. The Act is limited to units of state government. [Footnotes omitted]

Bonfield, The Iowa Administrative Procedure Act, 60 Iowa L.Rev. 731, 762 (1975).

The issue you raise can thus be narrowed to whether or not an historical preservation district is a political subdivision of the state. It is our judgment that an historical preservation district is a political subdivision of the state. Our rationale

is threefold. First, an examination of the legislative scheme evinces a legislative intent that an historical preservation district is a local governmental unit, and not a unit of state government. Such an intent can be gleaned from § 303.34, The Code 1981. That section authorizes the governing body of a city to designate an area within the city as an area of historical significance upon enactment of an ordinance, rather than establishing a separate historical preservation district. By enabling cities to designate areas within their jurisdiction as areas of historical significance, the inference is clear that the legislature intended that historical preservation districts be considered local governmental units. Second, the attributes which are generally regarded as distinctive of a political subdivision are provided in McClanahan v. Cochise College, 25 Ariz. App. 13, 540 P.2d 744 (1975). In holding that a community college district was a political subdivision of the state and, thus, not subject to the Arizona Administrative Procedure Act, the Arizona Supreme Court found that a political subdivision exists for the purpose of discharging some function of local government, has a prescribed area, and possesses authority for subordinate self-government through officers selected by it. See McClanahan, 25 Ariz. App. at 16, 540 P.2d at 747. As noted in the first division, an historical preservation district is established to preserve an area of historical significance, has prescribed boundaries, and possesses a five-member commission which controls the exterior features and use of any structure or property within the district. An historical preservation district, therefore, is a political subdivision according to the McClanahan definition. Finally, it should be noted that a prior opinion of our office, 1980 Op.Att'yGen. 244, held that soil conservation districts are political subdivisions of the state. Soil conservation districts, provided for in Chapter 467A, resemble historical preservation districts in design and purpose. Accordingly, an historical preservation district, as a political subdivision of the state, is not an "agency" within the meaning of the Iowa Administrative Procedure Act. As such, the procedural provisions of Chapter 17A are not applicable to historical preservation districts.

III. PROCEDURAL GUIDELINES: DUE PROCESS AND SECTION 303.30

Given the necessity of issuing or denying a certificate of appropriateness under procedural guidelines, the question remains as to the source of those guidelines if Chapter 17A is inapplicable. The most obvious source would be those procedures required to comport with due process. An exact determination of what due process requires in a given context must involve an analysis of the private interest affected by a determination of a commission, the risk of erroneous deprivation, and the probable value of additional procedural safeguards, and the local commission's interest in the procedure employed. See Matthews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). A determination of a commission in issuing or denying a

certificate of appropriateness, therefore, must comply with the procedural guidelines of due process.

In addition, several procedural guidelines are found in § 303.30, The Code 1981. First, prior to the issuance or denial of a certificate of appropriateness, a commission is required to take reasonable action to inform persons likely to be materially affected by an application for a certificate. Further, a commission must grant an applicant and such persons an opportunity to be heard. Third, a public hearing, when deemed necessary, may be held. Finally, the criteria and deadline for a determination of a commission are stipulated in the section.

In summary, an historical preservation district is not an "agency" within the meaning of the Iowa Administrative Procedure Act. Accordingly, the procedural provisions of Chapter 17A are not applicable to historical preservation districts. A determination of an historical preservation district commission, however, must still be based upon procedural guidelines found in due process and § 303.30, The Code 1981.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW/maw

cc: Glenn Goetz

COUNTIES; COUNTY ATTORNEY; COUNTY CONSERVATION BOARD: Iowa Code §§ 111A.7 and 331.756 (1981); Iowa R.Civ. P. 2. The question of who is the real party in interest depends on the factual circumstances of each individual case. Further, the county attorney is required in the course of his or her official duties to give oral and written advice to the county conservation board and to represent the board in litigation unless faced with a conflict of interest with his or her duty to represent the county. (Weeg to Hovda, Hancock County Attorney, 8/10/82) #82-8-6(L)

August 10, 1982

Mr. Ted Hovda
Hancock County Attorney
395 State Street
Garner, Iowa 50438

Dear Mr. Hovda:

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

1. Can an action on a contract be maintained in the Iowa District Court in the name of the County Conservation Board as plaintiff?

2. If the answer to the issue above is in the negative, can the action be maintained by the county in the name of the county, and on behalf of the County Conservation Board?

3. Is the County Attorney required to represent the county or the board as the case may be or may the counsel pursue the action?

It is our opinion that the answer to this question can be determined first by reference to Iowa R.Civ. P. 2, which provides as follows:

> Real party in interest. Every action must be prosecuted in the name of the real party in interest. But an executor, administrator, guardian, trustee of an express trust; or a party with whom or in whose name a contract is made for another's benefit, or a party specially authorized by statute, may sue in his own name without joining the party for whose benefit the action is prosecuted.

The Iowa Supreme Court has said that the "real party in interest" rule is to be construed liberally, and further, that the purpose of the rule is to protect a defendant from a subsequent action by the party actually entitled to recover, as well as to insure that the effect of the judgment will be res judicata. City of Ames v. Schill Builders, Inc., 274 N.W.2d 708, appeal after remand 292 N.W.2d 678 (Iowa 1979).

Applying these principles in the present case, we conclude that the question of who the "real party in interest" is in a given situation depends on the facts of that particular situation. For example, if the county board of supervisors enters into a contract, and subsequently brings an action for failure to perform or breach of that contract, the county would be the real party in interest.

As further example, a situation may arise where the county conservation board enters into a contract involving monies budgeted from the county supervisors. We have previously held that once that money is budgeted to the conservation board, the board of supervisors exercises no control over the expenditure of that money unless such an expenditure exceeds the conservation board's budget or is not for one of the conservation board's legitimate purposes. See Op.Att'yGen. #82-4-2(L). Consequently, in the situation posited above, the conservation board would be the real party in interest.

We next address the question of whether the county attorney is required to represent the supervisors or the conservation board in a contract action involving either party. Iowa Code § 331.756 (1982) states that the county attorney shall, inter alia:

> 1. Diligently enforce or cause to be enforced in the county, state laws and county ordinances, violations of which may be commenced or prosecuted in the name of the state, county, or as county attorney, except as otherwise provided.
>
> 2. Appear for the state and the county in all cases and proceedings in the courts of the county to which the state or the county is a party . . .
>
> * * * *
>
> 5. Enforce all forfeited bonds and recognizances and prosecute all proceedings necessary

> for the recovery of debts, revenues, moneys, fines, penalties, and forfeitures accruing to the state or the county . . .
>
> 6. Commence, prosecute, and defend all actions and proceedings in which a county officer, in the officer's official capacity, or the county is interested or a party.
>
> 7. Give advice or a written opinion, without compensation, to the board and other county officers . . . when requested by an officer, upon any matters in which the state, county, school, or township is interested . . .
>
> * * * *
>
> 87. Perform other duties required by state law.

Further, Iowa Code § 111A.7, which is contained in the chapter governing county conservation boards, provides:

> The county conservation commission, county engineer, county agricultural agent, and other county officials shall render assistance which does not interfere with their regular employment.

(Emphasis added)

In 1962 Op.Att'yGen. 131, we held that the county attorney's duty to "perform other duties enjoined upon him by law" pursuant to § 336.2(1), which preceded § 331.756(87), included those duties specifically imposed by § 111A.7. We further stated that § 111A.7 required the county attorney to do no more than required by § 336.2, the statute which preceded § 331.756. It is our opinion that §§ 331.756(1), (2), (5), and (6) require the county attorney to represent the conservation board in litigation, and § 331.756(7) requires the county attorney to give advice or written opinions to the conservation board on matters in which the county is interested. The performance of additional legal duties is not required as part of the county attorney's official duties. See Op.Att'yGen. #82-5-17(L) (county attorney may, but is not required to, provide the supervisors with assistance in compiling county code of ordinances because responsibility for that compilation devolves

upon the supervisors pursuant to § 331.302(9)); 1962 Op.Att'yGen. 131 (county attorney not required to draft leases or pay travel expenses or phone tolls for work performed for conservation board).

In conclusion, the question of who is the real party in interest depends on the factual circumstances of each individual case. Further, the county attorney is required in the course of his or her official duties to give oral and written advice to the county conservation board and to represent the board in litigation. However, in the event the county attorney is faced with a conflict of interest with his or her duty to represent the county, for example, if a dispute arose between the board of supervisors and the conservation board, the conservation board would be required to obtain private legal counsel.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

COUNTIES; COUNTY CONSERVATION BOARD. Iowa Code Chapter 111A (1981); Iowa Code §§ 111A.4, 327G.81, and 331.506 (1981). 1) It is not improper for the county conservation board to agree to offset property taxes due from the purchase price it agrees to pay for certain property, and then, as the owner of the property, to assume liability for those taxes; (2) the owner of a railroad right of way is responsible for maintaining and repairing county road overpass bridges located on that property, but the board of supervisors may assume responsibility for those repairs; (3) it is not improper for a county conservation board to use funds budgeted for property acquisition to purchase a piece of property other than that which it originally intended to purchase at the time the board's budget was submitted; and (4) the auditor's failure to sign a county conservation board warrant approved by the board of supervisors does not invalidate that warrant. (Weeg to Tieden, State Senator, 8/10/82) #82-8-5(L)

August 10, 1982

The Honorable Dale L. Tieden
State Senator
Elkader, Iowa 52043

Dear Senator Tieden:

You have requested an opinion of the Attorney General concerning the lawfulness of various aspects of the Dubuque County Conservation Board's acquisition of a railroad right-of-way located in Dubuque County. Before turning to your specific questions, we initially note that the factual context from which your opinion request arises was also the subject of a recent opinion from our office. See Op.Att'yGen. #82-4-2(L), a copy of which is enclosed. Our conclusions in that opinion are relevant to responding to your opinion request, and further, provide us with factual background in addition to that which you have provided.

In brief, the events giving rise to your opinion request are as follows. A railroad operating in Dubuque County proposed to sell an abandoned right-of-way. Initially, the Conservation Board believed that federal revenue-sharing funds could be used to purchase the property, but the county board of supervisors refused to allow these funds to be used for that purchase. In order to procure the property, the Board decided to use its own land acquisition funds, budgeted by the county, to obtain the property. The Board ultimately

was able to purchase four-fifths of the right-of-way, and a private organization, Heritage Trail, Inc., purchased the remaining one-fifth.

Given this factual background, we turn now to your specific question, which you have phrased as follows:

> 1. In the Dubuque County Attorney's opinion of April 2, 1982, he speaks to waiving of property taxes for fiscal year 1981-1982. By what authority can the Dubuque County Conservation Commission legally relieve the railroad corp. of property taxes? I believe Chapter 427.19 addresses exceptions. I have also been informed that there was an Attorney General opinion on 6-18-80 regarding the Iowa Department of Transportation.
>
> 2. The Dubuque County Conservation Board is taking claim to all property, including three county road overpass bridges. Heritage Trail Inc. claimed at the Dubuque County Supervisor meeting of April 5th that they could get the two unsafe overpasses repaired at less cost than the County Engineer could. Would Heritage Trail Inc. or the Dubuque County Conservation Board have legal authority to deal with a county secondary road system?
>
> 3. At no time during the budget hearings of the Dubuque County Supervisors of 1981 or 1982 did the Dubuque County Conservation Board mention a railroad right-of-way purchase. They did state that the $75,000.00 to be received each of those years was to be used to purchase an Oglesby property which they had an option to purchase when it became available. This property is next to the Swiss Valley Park. In 1982 the Conservation Board stated to Supervisor Bill Bahl that the railroad purchase would be from the County's Federal Revenue Sharing Funds. On April 3, 1982 the Dubuque County Board of Supervisors voted unanimously to delay these funds. At a special meeting of the County Conservation Board on April 8, the Board voted to use their 1981-1982 land acquisition funds of $75,000.00, plus most of their fees and operating funds to purchase part of the railroad right-of-way. Does this constitute an illegal budget asking? If so, can the Board be

held responsible for misrepresenting their intent to spend this money? Can Budget items be switched? Can a Conservation Board be prohibited from making such expenditures?

4. The Dubuque County Supervisors are still signing warrants for money claims by their subordinate departments, including the Conservation Board. The County Home Rule Act (Senate File 130), Section 505, Issue of Warrants states: "Except as provided in Subsections 2 and 3, the auditor shall sign or issue a county warrant only after approval of the board by recorded vote." Is the Dubuque County of Supervisors in error, specifically approving the Dubuque County Conservation Board's down payment warrant of $23,500.00 for the rail property purchase and other warrant signings back to July 1, 1981? These questions are important to the point that they could seriously affect the contract signing to take place between the Dubuque County Conservation Board and the Chicago Northwestern Transportation Co.

We shall address each question in turn.

I.

Your first question refers to an April 1982 opinion by the Dubuque County Attorney, in which you state he mentions a waiver of property taxes granted by the Commission to the railroad. You question the legality of such an exemption.

We have reviewed the relevant portion of that opinion, and discussed it with its author, Fred McCaw, Assistant Dubuque County Attorney. Based on our investigation, it appears that there has simply been a misunderstanding in this matter. The Conservation Board has not granted or purported to grant any waiver or exemption of property taxes to the railroad. Instead, Mr. McCaw's opinion refers to the terms of the contract for sale of the property between the railroad and the Board. That contract apparently contains an agreement between the parties that the amount of property taxes the railroad will owe for fiscal year 1981-1982 (due and payable in 1982-1983) will be offset against the purchase price the Board will pay to the railroad; the Board will then assume liability for those taxes. Further, the contract

for sale appears to simply state that once the property is sold, the railroad will be relieved of liability for taxes on that property, and the Board, as the purchaser, will assume that liability.

Because no tax exemption was granted, we do not decide the question of the legality of such an exemption in these circumstances. Furthermore, there is nothing in Op.Att'yGen. #80-6-7 (the opinion referred to in your request) that dictates a contrary result.

II.

Your second question concerns responsibility for necessary repairs of the overpass bridges located on the right-of-way property to be sold to the Board and to Heritage Trail, Inc. You suggest that perhaps the Commission and Heritage Trail, Inc., may not have legal authority to deal with a county secondary road system. However, it is our opinion that as owners of the right-of-way property, the Board and Heritage Trails, Inc., as the railroad before them, have primary responsibility for repairs on their property.

Iowa Code § 327G.81 (1981) expressly provides for maintenance of improvements along rights-of-way in situations such as the present one. That section states:

> A person, including a state agency or political subdivision of the state, who acquires a railroad right of way after July 1, 1979 for a purpose other than farming has all of the following responsibilities concerning that right of way:
>
> 1. Construction, maintenance and repair of the fence on each side of the property, however, this requirement may be waived by a written agreement with the adjoining landowner.
>
> 2. Private crossings as provided for in section 327G.11.
>
> 3. Drainage as delineated in chapter 465.
>
> 4. Overhead, underground or multiple crossings in accord with section 327G.12.

> 5. Weed control in accord with chapter 317.
>
> This section does not absolve the property owners of other duties and responsibilities that they may be assigned as property owners by law. Subsection 1 does not apply to rights of way located on land within the corporate limits of a city except where the acquired right of way is contiguous to land assessed as agricultural land.

(emphasis added) This section clearly imposes responsibility on the owner of the right-of-way, be it Heritage Trail, Inc., or the Conservation Board, for maintenance and repairs of any county road overpass. Furthermore, while under home rule authority there is certainly nothing to prevent the county board of supervisors from assuming responsibility for these repairs should it so choose, there is no requirement that the county assume that responsibility.

III.

Your third question concerns the Board's use of money budgeted by the county to the Commission for the purpose of land acquisition in 1981-1982. The Board originally stated that it intended to use budgeted funds to purchase a certain piece of property. However, when the railroad right-of-way property became available, and the federal revenue-sharing funds which were originally to be used for the purchase became unavailable due to the actions of the supervisors, the Board chose instead to use its allotted funds to purchase the railroad right-of-way.

It is our opinion that the Board has not acted improperly in using its funds for purchasing property other than that which it originally intended to purchase at the time the Board's budget was initially submitted to the supervisors. In reaching this conclusion, we rely on our previous decision in Op.Att'yGen. #82-4-2(L). In that opinion we noted that the authority to purchase land for conservation purposes is included among a county conservation board's statutory powers and duties. See Iowa Code § 111A.4(2) (1981). Approval of each purchase must be obtained from the State Conservation Commission pursuant to § 111A.4(3), but there is no requirement that a conservation board secure the supervisors' approval for such a sale. Further, we held that once the conservation board's budget has been approved, the supervisors

have no authority to control how those funds are spent, so long as the expenditures are: 1) within the board's budget, and 2) for a legitimate purpose. Thus, once the conservation board's budget is approved and the above two requirements are satisfied, the mandatory provisions of Iowa Code §§ 331.424(3)(d) and 331.426(2) (1981) require the supervisors to sign any warrants issued by the conservation board.

Consequently, in the present case, the funds in question were clearly allocated for the purpose of land acquisition, one of the Board's lawful statutory duties. Although at the time the budget was submitted the Board intended to use the money to purchase one property, and later decided instead to purchase another, the decision of what property the funds would best be spent on lies at all times in the discretion of the Board. See § 111A.4(2).

IV.

Your fourth and final question appears to concern whether the supervisors have acted improperly in signing warrants for the Conservation Board's purchase of the railroad right-of-way. As you note in your opinion request, Iowa Code § 331.506 governs the auditor's duties regarding issuance of warrants. In particular, § 331.506(1) states:

> 1. Except as provided in subsections 2 and 3, the auditor shall sign or issue a county warrant only after approval of the board by recorded vote. Each warrant shall be numbered and the date, amount, number, and the name of the person to whom issued shall be recorded and filed in the auditor's office. Each warrant shall be made payable to the person performing the service or furnishing the supplies for which the warrant makes payment and the purpose for which the warrant is issued shall be stated on it.

This provision requires the board of supervisors to approve a warrant before the auditor signs it; once approved, signing the warrant is mandatory.[1] In interpreting this provision,

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[1] We note that in Section III, above, we stated that if a conservation board's warrant is within the board's approved budget and for a legitimate purpose, the supervisors must approve the warrant. See Op.Att'yGen. #82-4-2(L). In sum, if these two requirements are met, approval of the warrant is merely a formality.

we find nothing that would prevent the supervisors from signing a warrant before the auditor signs it, even though the supervisors' signatures are not required. Nonetheless, in the event the supervisors approve and sign a warrant, § 331.506(1) requires that the auditor sign the warrant as well.

In the event the auditor has failed to sign a particular warrant that was approved by the supervisors, that signature should be obtained to ensure compliance with § 331.506(1). However, it is our opinion that the auditor's failure to sign an approved warrant does not invalidate that warrant. The auditor's role in the issuance of county warrants is ministerial only, 1950 Op.Att'yGen. 199, and a failure to comply with technical requirements such as signing is not sufficient cause to invalidate a warrant which was previously approved by the supervisors. Cf. Long v. Boone County, 36 Iowa 60 (1872) (when supervisors authorize warrant to be issued, its validity is not affected by the failure of the clerk to record it); Clark v. Polk County, 19 Iowa 248 (1865) (mere clerical omission of the clerk of the board of supervisors to record an actual vote does not invalidate a county warrant approved by that vote). This is especially true when, as in the present case, the remedy to the technical violation, i.e., obtaining the auditor's signature, is simple.

V.

In conclusion: (1) it is not improper for the county conservation board to agree to offset property taxes due from the purchase price it agrees to pay for certain property, and then, as the owner of the property, to assume liability for those taxes; (2) the owner of a railroad right-of-way is responsible for maintaining and repairing county road overpass bridges located on that property, but the board of supervisors may assume responsibility for those repairs; (3) it is not improper for a county conservation board to use funds budgeted for property acquisition to purchase a piece of property other than that which it originally intended to purchase at the time the board's budget was submitted; and (4) the auditor's failure to sign a county conservation board warrant approved by the board of supervisors does not invalidate that warrant.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

COUNTIES: Plats; Rural Subdivisions; Dedication; Home Rule; Iowa Code §§ 306.21, 409.1, 409.12, 409.13, 409.18-409.26; 441.65-441.71; 558.65 (1981); Iowa Code § 331.301 (Supp. 1981). The vacation provisions of chapter 409 do not apply to rural plats; instead these are governed by chapter 306 and the common law of dedication. A county can adopt an ordinance authorizing the vacation of plats only so long as such is not inconsistent with state statutes and the common law. (Osenbaugh to Burk, Assistant County Attorney, 8/6/82) # 82-8-3(L)

August 6, 1982

Mr. Peter W. Burk
Assistant County Attorney
309 Courthouse Building
Waterloo, Iowa 50703

Dear Mr. Burk:

You have requested an opinion regarding whether a rural subdivision plat can be vacated pursuant to §§ 409.18 to 409.26 and, if not, whether a county could adopt a procedure for vacation of such plats by ordinance.

Section 409.1 requires a proprietor of specified tracts of land to have a registered land surveyor's plat made whenever the tract is subdivided into three or more parts. We have construed this section as including certain rural subdivisions, by the following underlined language:

> Every proprietor of any tract or parcel of land of forty acres or less or of more than forty acres if divided into parcels any of which are less than forty acres and every proprietor of any tract or parcel of land of any size located within a city or within two miles of a city subject to the provisions of section 409.14, who shall subdivide the same into three or more parts, shall cause a registered land surveyor's plat of such subdivision, with references to known

> or permanent monuments, to be made by a registered land surveyor holding a certificate.

Op.Att'yGen. #80-2-12 (Ovrom to Neighbor, 2/27/80. See also, Op.Att'yGen. #79-6-7 (Blumberg to Howell, 6/11/79).)

Prior to 1976, § 409.1 required platting by every proprietor who subdivided land for the purpose of laying out a town or city, city addition, or suburban lots. Thus, before the 1976 amendment, the statute required platting in areas outside the limits of incorporated cities but only in contiguous areas or areas of anticipated urban expansion. See 1970 Op.Att'yGen. 669. Although the 1976 amendment added the requirement for platting whenever rural land of less than 40 acres is subdivided into three parts, 1976 Iowa Acts, ch. 1190, § 1, that Act did not amend other provisions in chapter 409 which apply only to plats of land under the jurisdiction of cities. See, e.g., Iowa Code §§ 409.4-409.7 (1981).

The 1976 amendment specified that the plat required by § 409.1 was solely for taxation and assessment purposes by adding the following unnumbered paragraph to § 409.1:

> Prior to, or at the time of conveyance of the tract or a parcel thereof, the proprietor shall cause a certified copy of the plat to be recorded by the county recorder for assessment and taxation purposes, and the county recorder shall forward certified copies of the plat to the county auditor and assessor. The recording of a plat pursuant to this paragraph is in addition to any other requirement of this chapter, and the recording for assessment and taxation purposes shall not constitute a dedication or impose any liability upon the state or any of its political subdivisions.

Similar language appears in § 441.71 concerning auditor's plats; this section was also added by the 1976 amendment. 1976 Iowa Acts, ch. 1190, § 15. When the legislature added rural subdivisions to the requirements of § 409.1, this amendment imposed a platting requirement for assessment and taxation purposes only.

However, in 1977, the legislature again amended chapter 409 and in doing so deleted this paragraph from § 409.1. That section no longer states that the plat prepared there-

under is solely for taxation and assessment purposes. 1977 Iowa Acts, ch. 117, § 2. The same bill amended § 409.12, concerning acknowledgment and recording of plats, which had previously required the approval of "the council" so that that section now requires the approval of "the local governing body." Nevertheless, this 1977 Act did not amend the vacation provisions of chapter 409 which refer to cities nor, in our opinion, was it intended to amend other Iowa statutes concerning rural plats.

In construing chapter 409 and the 1976 and 1977 amendments thereto, it is appropriate to examine the statutory history, prior judicial construction, and the consequences of a particular construction. See Iowa Code § 4.6 (1981). The statute should also be construed in light of other statutes pari materia.

In determining the applicability of the vacation provisions of chapter 409 to rural subdivisions, it must be recognized that Iowa Code § 306.21 (1981) establishes a procedure for review of rural plats and road plans. That statute imposes a requirement of approval by both the county board of supervisors and the county engineer before roads within the plat become public roads within the county road system. Spencer's Mountain v. Pottawattamie County, 285 N.W.2d 166 (Iowa 1979). Vacation of county roads is governed by § 306.10 through 306.17 (1981).

Additionally, Iowa Code §§ 441.65 to 441.71 (1981) provide for the preparation of auditor's plats when a proprietor of a subdivision who has sold a part of the land fails to file for record a plat as provided in chapter 409. If the proprietor fails to record a plat upon request, the auditor is to prepare a plat "as the auditor deems appropriate in accordance with the provisions of chapter 409." Iowa Code § 441.65 (1981). The auditor's plat when filed "shall have the same effect as if executed, acknowledged, and recorded by the owners." Iowa Code § 441.66 (1981). Yet § 441.71 provides, "A plat recorded pursuant to this chapter is for assessment and taxation purposes only and shall not constitute a dedication or impose any liability upon the state or any of its subdivisions."

An additional statute of relevance is § 558.65 which prohibits the recording of plats of additions to cities or of subdivisions of lands lying within or adjacent to any city in which streets or grounds are dedicated to public use unless such plats include a certificate of approval of the city council.* Iowa Code Chapter 355 also contains certain

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* Section 558.65 governs entry on the auditor's transfer book and not recording. (Correction - EMO 9/17/82)

requirements for certain subdivision plats. The existence of these various statutes increases the confusion as to the applicability of specific provisions of chapter 409 to rural plats.

The long established law of this State in effect at the time of the 1976 and 1977 amendments distinguished sharply between incorporated and unincorporated areas in determining the consequences of subdivision platting. Although the predecessors to § 409.1 required platting not just of lots within cities but also of lots in city additions and of suburban lots, only plats within incorporated areas resulted in statutory dedication. Town of Kenwood Park v. Leonard, 177 Iowa 337, 340-343, 158 N.W. 655, 658-659 (1916); Henry Walker Park Ass'n v. Mathews, 249 Iowa 1246, 1252, 91 N.W.2d 703, 708 (1958); Note, Acquisition of Public Ways in Iowa, 32 Iowa L.Rev. 746, 748, 750 (1947). Section 409.13 has long provided that the filing of a plat is a conveyance in fee simple of all public grounds dedicated therein. Yet the Iowa Supreme Court held that dedication by plat had this effect only in incorporated areas. In unincorporated areas the acknowledgment and recording of the plat was the tender of an easement which could be accepted by public use. Henry Walker Park Ass'n, supra, 249 Iowa at 1252-1253, 91 N.W.2d at 708. If the area were later incorporated, the city council could accept the dedicated areas and, by such acceptance, would acquire fee simple title to those areas. Kelroy v. City of Clear Lake, 232 Iowa 161, 164-165, 5 N.W.2d 12, 16 (1942).

At common law, a proprietor can withdraw an offer of dedication in a plat only prior to the sale of lots or public acceptance, 1976 Op. Att'yGen. 126, or if public abandonment is shown. See Iowa State Highway Commission v. Dubuque Sand & Gravel, 258 N.W.2d 153 (Iowa 1977). Additionally, the State and not the county owns the easement created by a dedication and holds such in trust for the general public. See State v. F. W. Fitch Co., 236 Iowa 208, 211, 17 N.W.2d 380, 382 (1945).

We are reluctant to construe the 1976 and 1977 amendments to §§ 409.1 and 409.12 as silently repealing this body of law. Little theoretical distinction exists between the rural subdivisions now subject to § 409.1 and the "suburban lots" which were subject to those platting requirements for many years. Although the predecessor to § 409.1 required platting of "suburban lots," common law dedication and not the provisions of § 409.13 applied in such unincorporated areas. Town of Kenwood Park v. Leonard, 177 Iowa at 342,

158 N.W. at 658; Kelroy v. City of Clear Lake, 232 Iowa at 164-165, 5 N.W.2d at 16. While these cases did not discuss the relationship between §§ 409.1 and 409.13, the distinction between dedications in incorporated and those in unincorporated areas has become fixed in Iowa law. Absent clear expression of legislative intent, we are reluctant to construe the 1976 and 1977 amendments to chapter 409 as overturning this aspect of Iowa property law.

The question thus arises whether the chapter 409 vacation provisions apply to plats outside the authority of cities. Section 409.18, providing for vacation by the proprietor before sale, requires the consent of the city. If the subdivision is located beyond the distance where city council approval is required, see §§ 409.4-409.7, 409.14, the city has no control over, or interest in, the plat. The express requirement for the consent of the city strongly militates toward a construction that "any such plat" within the coverage of § 409.18 refers only to city plats. The sections immediately preceding § 409.18 are limited to lots subject to city council approval. Iowa Code §§ 409.14-409.17 (1981). It thus appears that § 409.18 refers to a plat subject to city council approval as in the immediately preceding sections. Section 409.22, establishing a procedure for vacation of plats by lot owners, applies only to plats "of any tract of land which has been platted into city lots." This express reference to city lots again indicates that the statutory provision excludes lots outside the jurisdiction of cities. The legislative failure to address the effect of vacation on lands dedicated to the public in unincorporated areas further supports the conclusion that the legislature did not intend to apply these provisions to rural plats. See § 409.25.

It is further asked whether, pursuant to home rule, a county could adopt procedures for the vacation of rural subdivisions if sections 409.18 to 409.26 are not applicable. The legislature has limited a county's home rule authority to generally exclude the power to govern civil relationships. 1981 Iowa Acts, ch. 117, § 300(1), states in relevant part:

> This grant of home rule powers does not include the power to enact private or civil law governing civil relationships, except as incident to an exercise of an independent county power.

Where vacation will not affect personal or public property rights, the county could provide for vacation of

plats by ordinance unless such were inconsistent with the laws of the General Assembly. Iowa Code § 331.301(1) (Supp. 1981). Neither chapter 409 nor § 306.21 addresses the question of vacation of plats in rural areas. We do not believe that the entire question of platting has been preempted by state law. See Op.Att'yGen. #80-2-9 (Peterson to Welsh, 2/26/80). A city may utilize its home rule powers to impose reasonable additional requirements for plats by ordinance. Oakes Construction Co. v. City of Iowa City, 304 N.W.2d 797, 804-807 (Iowa 1981); Op.Att'yGen. #80-2-9 (Peterson to Walsh, 2/26/80). A county does not have the same express power to impose additional plat requirements as does a city under § 409.14, see Oakes Construction Co., supra, 304 N.W.2d at 805-806, but does have authority to adopt zoning requirements under chapter 358A. The authority of a county to adopt zoning ordinances would seemingly carry with it the authority to require compliance with its zoning requirements as a condition of approval of the plat. See 1978 Op.Att'yGen. 774; Op.Att'yGen. #79-10-20 (Hagen to Criswell 10/30/79).

We would therefore conclude that a county could adopt a procedure for vacation of a rural subdivision plat by ordinance to the extent not inconsistent with any applicable statute or the common law of dedication.

Until chapter 409 is revised to clarify which sections apply to rural subdivisions, the wiser course for an owner wishing to vacate a plat prior to sale of lots would be to rescind the prior plat and dedication as under the common law and to obtain the consent of the county to the vacation by analogy to the vacation provisions of Iowa Code §§ 409.18 and 409.19. Where, however, lots have been sold or a dedication has been accepted by public use, a plat could be vacated only if such would not affect dedicated lands other than streets and highways, which may be vacated pursuant to chapter 306.

While it would certainly be desirable to have a consistent procedure for the vacation of subdivision plats created under § 409.1, a construction of chapter 409 which ignores the distinctions created therein between city and rural lots would result in significant changes in the law of dedication in rural areas. The 1977 amendment, which repealed the language limiting the effect of § 409.1 plats and expanded the requirement in § 409.12 from approval by the city council to approval by the local governing body, does create an argument that rural subdivision plats convey title to public lands in fee simple under § 409.13. Yet the

legislature did not amend chapter 306, the vacation provisions of chapter 409, or § 558.65 to accommodate such a major change in Iowa law, if such were intended. There is nothing in the legislative history or in any judicial decision of which we are aware to indicate that these amendments have changed the common law of dedication in rural areas. We are therefore unwilling to predict that the courts would so construe chapter 409.

We believe that legislation clarifying the various subdivision statutes is urgently needed.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Assistant Attorney General

EMO:rcp

ENVIRONMENTAL QUALITY COMMISSION: Rulemaking authority; anaerobic lagoons; sections 455B.10, 455B.12, and 455B.13, The Code 1981. 1982 Session, 69th G.A., S.F. 2243. The Environmental Quality Commission may adopt rules setting limits on the maximum sulfate content of the water supply for an anaerobic lagoon, except in regard to industrial anaerobic lagoons constructed before February 22, 1979. (Norby to Running, State Representative, 8/3/82) #82-8-1(L)

August 3, 1982

The Honorable Richard V. Running
1905 9th Avenue S.W.
Cedar Rapids, Iowa 52405

Dear Representative Running:

We have received your request for an Attorney General's opinion concerning a question of Environmental Quality Commission administrative rulemaking authority. Specifically, your question is whether the Commission now has any authority to adopt rules concerning the sulfate content of the water supply for an anaerobic lagoon after enactment of S.F. 2243 during the 1982 Session of the General Assembly.[1]

A review of S.F. 2243 and the rules concerning anaerobic lagoons provides the necessary background for your question. The Commission adopted rules effective June 21, 1978, which provided criteria for approval of permits for anaerobic lagoons. In 400 I.A.C. 4.5(3), criteria are specified for anaerobic lagoons used in connection with animal feeding operations, while 400 I.A.C. 4.5(4) concerned all other uses of anaerobic lagoons. In 400 I.A.C. 4.5(4), lagoons are classified based on whether they are designed to treat more or less than 100,000 gallons of wastes per day, and separate standards are applied to each in regard to three criteria: sulfate content of the water supply, minimum distance from residences or public use areas, and loading rate. Senate File 2243 provides for statutory minimum distances, which

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[1] Anaerobic lagoon is defined at 400 I.A.C. 1.2(7), as an impoundment to store and stabilize wastes designed in such a manner that the primary biological activity is anaerobic. Anaerobic biological activity is activity in the absence of free oxygen. See definitions of "anaerobic" and "anaerobe," Webster's Third New International Dictionary (1967), at p. 76.

clearly negates the distances formerly set by rule. In addition, S.F. 2243, § 1 addresses Commission authority to control sulfate content by rule.

As initially drafted, S.F. 2243, § 1, would have added a new paragraph to § 455B.12, The Code 1981, providing as follows:

> The commission may adopt rules establishing a maximum permissible sulfate content in the water supply of an anaerobic lagoon sited under section 455B.13, subsection 3, paragraph e. The rules establishing maximum permissible sulfate content shall not apply to an expansion of an industrial anaerobic lagoon facility which was constructed prior to February 22, 1979.[2]

Your amendment to this section, and the language finally enacted into law, provides as follows:

> Commission rules establishing maximum permissible sulfate content shall not apply to an expansion of an industrial anaerobic lagoon facility which was constructed prior to February 22, 1979.

Initially, it should be noted that ch. 455B, The Code 1981, provides no express authority for the Commission to adopt rules concerning the sulfate content of an anaerobic lagoon water supply. Section 455B.12(4), The Code 1981, provides authorization to adopt emission limitations or standards relating to maximum quantities of air contaminants. Section 455B.10(1), The Code 1981, defines "air contaminant" to include an "odorous substance." Section 455B.13(3)(e), The Code 1981, provides that an anaerobic lagoon is subject to permit requirements as a new air contaminant source. The Commission evidenced its construction of the statute as providing such authority through adoption of 400 I.A.C. 4.5(3)(d), 4.5(4)(b)(1) and 4.5(4)(c)(1). The original language of S.F. 2243, § 1, appears to have been based on an assumption that no Commission authority to adopt such rules existed, as this language provides an express authorization

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[2] February 22, 1979, was the effective date of the requirement that permits be obtained from the Commission prior to construction of anaerobic lagoons. See 400 I.A.C. 3.1(1).

to adopt such rules for certain lagoons: those "sited under" § 455B.13(3)(e). Lagoons "sited under" § 455B.13(3)(e) would appear to consist of all those used in connection with animal feeding operations but only those industrial lagoons constructed or expanded after the effective date of S.F. 2243. See S.F. 2243, § 2, second unnumbered paragraph, last sentence, ("These separation distances apply to the construction of new facilities and the expansion of existing facilities.")

If Section 1 of S.F. 2243 had been simply deleted, we might need to consider whether the Commission has implied authority to adopt sulfate content rules pursuant to ch. 455B. The language adopted, however, clearly assumes that the Commission has such authority. Furthermore, industrial lagoons constructed prior to February 22, 1979, are exempted from sulfate content rules. The legislature would presumably not provide an exception from rulemaking authority if such rulemaking authority was not intended to be provided.

The Commission has taken action to amend 400 I.A.C. 4.5(4) to remove the distance requirements formerly in effect and to specify that the sulfate content limits do not apply to industrial lagoons constructed prior to February 22, 1979. See Iowa Administrative Bulletin, July 7, 1982, p. 28. We believe this action properly carries out the mandate of S.F. 2243.

Sincerely,

STEVEN G. NORBY
Assistant Attorney General

SGN:rcp

BOARD OF PHARMACY EXAMINERS: Iowa Code § 217.38(9), Acts of the 69th General Assembly, Senate File 2304, Section 96. The Board of Pharmacy Examiners should adopt a rule to insure that pharmacists who reduce their charges to private benefit plans also reduce their charges by the same amount to the medical assistance (Medicaid) program and that co-payment requirements are applied equally to third-party payors and the Medicaid program. The Board would not be bound by the rule now found in 770 IAC § 79.1(4)(i). In our judgment, that Rule has been repealed by the new legislation. (Robinson to Johnson, 9/28/82) #82-9-26(L)

Mr. Norman C. Johnson
Executive Secretary
Board of Pharmacy Examiners
1209 E. Court
Des Moines, IA 50319

September 28, 1982

Dear Mr. Johnson:

You recently asked for an opinion of the Attorney General concerning the charges by certain pharmacies for prescription drugs to persons who have insurance or benefit plans that pay all but a small fixed amount of the cost and the effect of recent legislation pertaining to this practice vis-a-vis the medical assistance (Medicaid) program in Iowa. There are two prior pieces of legislation which we should consider.

In the 1980 Iowa Acts, Ch. 1001, Section 76(9), Iowa Code § 217.38(9), the legislature provided for the Department of Social Services (Department) to adopt rules:

> To provide for a fifty cent drug co-payment and to require that pharmacists who reduce the total cost, including the reduction of either the ingredient cost or the professional fee, or both, of a prescription drug or insulin to persons, as defined in section four point one (4.1), subsection thirteen (13) of the Code, participating in a private, third-party payor prescription drug insurance or benefit plan or to the insurance or benefit plan, also reduce by the same amount the total cost of the same prescription drug or insulin to persons participating in the medical assistance program established by chapter two hundred

> forty-nine A (249A) of the Code or to the program.

Pursuant to this legislation, the Department adopted what is now[1] 770 IAC § 79.1(4)(a) providing that a recipient would pay $.50 co-payment on each drug prescription. The Department also adopted a rule[2] in 770 IAC § 78.2(2)(c) which provided:

> c. The pharmacist's usual and customary charge to the medical assistance program shall not exceed the lowest total cost (ingredient cost plus professional fee) of a prescription drug or insulin charged to any private third party payer, prescription drug insurance or benefit plan, or person participating in such a plan.

In addition, the Department adopted what now appears as 770 IAC § 79.1(4)(i), viz:

> i. All providers are prohibited from offering or providing copayment related discounts, rebates, or similar incentives for the purpose of soliciting the patronage of medical assistance recipients.

This rule becomes a key factor in your question which we will consider shortly. You need to know the impact of this rule on the Board of Pharmacy Examiners in the adoption of their rule.

The 1981 Iowa Acts, Ch. 7, § 3.2(e), unnumbered paragraph 6 provided that the Board of Pharmacy Examiners rather than the Iowa Department of Social Services should adopt rules to insure that pharmacists reduce charges by the same amount to both third party payers and the medical assistance program. In recognition of this, the Department of Social Services rescinded[3] rule 770 IAC § 78.2(2)(c) pertaining to the usual and customary charge of the pharmacists and the Medicaid program. It left in effect, however, 770 IAC 79.1(4)(i) which prohibits providers from offering copayment discounts, rebates or incentives.

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1 Originally ARC 1188, 79.1(4)b, filed emergency 7/23/80.

2 ARC 1187, filed emergency 7/23/80.

3 ARC 2695, filed 2/17/82.

Finally, the 1982 Session of the Iowa General Assembly in S.F. 2304, Section 96, provided:

> Pharmacies in this state which reduce the charges of prescription drugs to persons participating in private, third-party payor prescription drug insurance or benefit plans or to the insurance or benefit plans shall also reduce by the same amount the charges to persons participating in the medical assistance program or to the program. For the purpose of this unnumbered paragraph, the reduction of charges includes the discounting of deductibles or coinsurance payable by plan participants or the distribution of free merchandise directly or indirectly through coupon or rebate programs to plan participants. The board of pharmacy examiners shall adopt rules under section 17A.4, subsection 2 and section 17A.5, subsection 2, paragraph b to insure that pharmacists reduce charges by the same amount to both third-party payors and the medical assistance program and that co-payment requirements are applied equally to both third-party payors and the medical assistance program. The rules shall become effective immediately upon filing, unless a later effective date is specified in the rules. (Emphasis added.)

As you pointed out, many private plans have a $ 2 co-payment provision, which the patient pays, while Medicaid has only $ .50. The question you raised is:

> Does the language in S.F. 2304, Section 96, which states 'co-payment requirements are applied equally' mean that co-payments on private, third-party payor prescription or benefit plans must be collected in full as per IAC 770, Chapter 79.1(4)(i), or can the Board, by regulation, determine how the term 'applied equally' shall be defined?

The consistent purpose throughout the legislation we have just reviewed is to prohibit price discrimination between private insurance plans and Medicaid.

The Iowa Supreme Court has often said that the intent of the legislature is the polestar of statutory interpretation. Shinrone Farms, Inc. v. Gosch, 319 N.W.2d 298 (Iowa 1982); State v. Whetstine, 315 N.W.2d 758 (Iowa 1982), the Court recognizes that the legislature may be its own lexicographer. State v. Thomas, 275 N.W.2d 422 (Iowa 1979); Cedar Rapids Comm. School District v. Parr, 227 N.W.2d 486 (Iowa 1975), which means it may define the terms used. Finally, while the Courts give deference to interpretations of a statute by the agency involved, the meaning of a statute is always a matter of law with final construction and interpretation for the Supreme Court. Armstrong's, Inc. v. Ia. Dept. of Revenue, 320 N.W.2d 623 (Iowa 1982).

In our opinion, the Board of Pharmacy Examiners may determine by rule how the term "applied equally" is defined. The Board should insure that pharmacists who reduce their charges to private benefit plans also reduce their charges by the same amount to the Medicaid program and that any reduction of charges are applied equally to persons covered by private insurance and Medicaid. The Board would not be bound by the rule now found in 770 IAC § 79.1(4)(i). As stated previously, the Department of Social Services has already rescinded rule 78.2(2)(c). The Board, under this new legislation, will want to adopt a similar rule as it provided adequate guidelines for the billing procedure. The stumbling block has been rule 79.1(4)(i), which we believe has been voided by the recent statutory amendment.

When the legislature, acting as its own lexicographer, defined the term "reduction of charges" to include "the discounting of deductibles or coinsurance . . . or the distribution of free merchandise . . . through coupons or rebate programs . . .", it recognized that all of these practices were occurring from time to time in the trade. The legislature did not prohibit this practice. It merely wanted to equalize the practice between the private sector and Medicaid.

A common co-payment situation can be illustrated as follows:

Total charge	$ 13.00		$ 13.00
Private co-pay	2.00	Medicaid	.50
	$ 11.00		$ 12.50

Under this example, the only way that the co-payment requirements can be applied equally to both third-party payors and the medical assistance program and adhere to rule 770 IAC § 79.1(4)(i) is not to allow any reduction in charges. This is clearly contra to the legislative mandate that "[t]he board of pharmacy examiners shall adopt rules . . . to insure that

pharmacists reduce charges by the same amount to both third-party payors and the medical assistance program . . .".

If the pharmacist reduces the co-payment amount to a private person which exceeds the medicaid co-payment (the usual case), that reduction must be passed to the Medicaid program. Otherwise the private program would pay less for the prescription than Medicaid. This, too, is contra to the legislative intent.

Our position remains the same if the "reduction in charges" is accomplished by the distribution of merchandise, which is clearly contemplated by the legislature. It is for the Board of Pharmacy Examiners through their rules, called for in this statute, to determine how the "value" of that merchandise is to be determined, whether wholesale value, fair market value, cost to pharmacist, etc. Whatever method of valuation and accounting is selected, that "value" must be applied equally to the co-payment requirement, thereby reducing the Medicaid contribution to a level no greater than the contribution of private third-party payer. Again, this result would not be possible under 79.1(4)(i). It is, however, the result we believe was intended by the legislature.

For purposes of clarity, we wish to stress that we question neither the statutory authority or the policy judgment of the Department of Social Services in enacting I.A.C. 770 § 79.1(4)(i) in 1980. A co-pay requirement is designed to save program funds in two ways: directly, by reducing the amount of reimbursement and, indirectly, by providing an incentive for the consumer to monitor overutilization of reimbursible services. Of course, the Department's rule also served to reduce effective price competition among providers, which may also be a force for containing the rapidly escalating prices of medical services. In any event, we conclude that the legislature, by enacting a statute that contemplates that discounts will be applied against co-pay requirements, repealed the former rule.

Our opinion would be entirely different if the co-payment provisions were mandatory under the Social Security Act or the Federal Regulations adopted pursuant to it. In this event, the Supremacy Clause of the U.S. Constitution would require Iowa's adherence. Blum v. Bacon, ___ U.S. ___, 102 S.Ct. 2355, 2363-2364 (1982); Oberschachtsiek v. IDSS, 298 N.W.2d 302, 304 (Iowa 1980). The co-payment provisions under Federal law,

however, are discretionary upon the States. 42 USC § 1396a(a)(14) and 42 CFR §§ 447.50 - 447.59.

Sincerely,

Stephen C. Robinson
Assistant Attorney General

SCR/sm

IOWA CONSUMER CREDIT CODE: INCLUSION OF COMMENCEMENT DATE AND LAST DATE IN COMPUTATION OF LOAN TERM, §§ 537.2401 and 537.2510(4)(b), Iowa Code, 1981. Revised Regulation Z (12 C.F.R., Section 226, Appendix J). Under the Iowa Consumer Credit Code, a lender may not count both the first day and the last day of the loan for purposes of computing one loan term for accrual of the finance charge on a closed-end-consumer credit loan. (Lowe to Pringle, 9/28/82) #82-9-25(L)

Mr. John Pringle, Director
Financial Institutions Division
Office of Auditor of the State
Lucas State Office Building
L O C A L

September 28, 1982

Dear Mr. Pringle:

In your letter of July 7, 1982, you requested the opinion of this office on the issue of whether, under the Iowa Consumer Credit Code, Iowa Code Chapter 537, 1981, hereinafter referred to as the ICCC, a supervised financial institution may, in computing the loan term or period for the accrual of the finance charge on a closed-end-credit consumer loan, count both the commencement day or first day of the loan and the last day.

The answer to your question requires an interpretation of Article 4 of the ICCC, Consumer Loans: Maximum Finance Charges, Section 537.2401, Iowa Code, 1981, in pertinent part reads as follows:

> 1. ..., a lender may contract for and receive a finance charge not exceeding the maximum charge permitted by the laws of this state or of the United States for similar lenders, and, in addition, with respect to a consumer loan, a supervised financial organization may contract for and receive a finance charge, calculated according to the actuarial method, not exceeding twenty-one percent per year on the unpaid balance of the amount financed.
>
> * * *
>
> 3. ..., the term of a loan for the purposes of this section commences on the date the loan is made. Any month may be counted as one-twelfth of a year, but a day is counted

> as one-three hundred sixty-fifth of a year. Subject to classifications and differentiations the lender may reasonably establish, a part of a month in excess of fifteen days may be treated as a full month if periods of fifteen days or less are disregarded and that procedure is not consistently used to obtain a greater yield than would otherwise be permitted. The administrator may adopt rules not inconsistent with the Truth in Lending Act with respect to treating as regular other minor irregularities in amount or time.

Iowa Code Section 537.2401(1) and (3), 1981. [Emphasis Added]

According to the plain language of § 537.2401(3) of the ICCC, the loan term, for the purposes of calculating the maximum allowable finance charge, commences on the date of the loan confirmation (the first day). The remaining language of this section serves to supply the lender with guidelines for computing the amount of finance charge earned for fractional units of a month, provided that whatever method the lender uses does not lead to a finance charge in excess of the allowable annual percentage rate. Further analysis of § 537.2401, other related ICCC sections and of the applicable federal credit laws is necessary to more fully answer your question. In interpreting the ICCC, an examination of the several purposes of that statute is enlightening. The ICCC purposes (See § 537.1102) which are most pertinent to your question are the following:

> b. Provide rate ceilings for certain creditors in order to assure an adequate supply of credit....
>
> * * *
>
> f. Conform the regulation of disclosure in consumer credit transactions to the Truth in Lending Act.
>
> g. Make the law, including administrative rules, more uniform among the various jurisdictions.

Iowa Code Section 537.1102(2)(b), (f) and (g), 1981.

Each of these purposes will be discussed below in light of your questions.

The ICCC requires that certain lenders not exceed the rate ceilings provided in the statute in order to assure the availability of credit to consumers [See § 537.1102(b)]. While lenders are given some freedom in selecting the manner of computing interest or finance charges, the lender may not use a method

which effectively produces a finance charge in excess of the statutory rate ceiling.

An example of such a prohibited method is found in the case of American Timber & Trading Co. v. First National Bank of Oregon, 511 F.2d 980 [9th Cir. 1974], cert.denied, 421 U.S. 921, (1975), where the court found that the lender violated Oregon's usury law by using a method wherein the finance charge was computed based on a 360-day year. Such a method produced a finance charge which was in excess of the statutory limit and a higher yield than if the lender had used a method based on the true calendar year of 365 days use. In using the prohibited method, the lender divided the finance charge by 360 days (30 days for each month) to create a daily factor. The number of days the loan was outstanding was then multiplied by the daily factor.

Problems arise with methods such as the one described above (365 days/360 days) mainly because the method generates a finance charge in excess of statutory limits, but also because the ICCC requires, as do most state laws which regulate interest, that the lender's manner of disclosing the finance charge conform to the disclosure requirement of the federal Truth in Lending Act (15 U.S.C., Chapter 41, Subchapter 1, Title 1, the Consumer Credit Protection Act). (See ICCC §§ 537.1102(f) and 537.3201). The Truth In Lending Act and its implementing regulation, Revised Regulation Z, which are incorporated by reference in the ICCC, requires disclosure of the finance charge as a dollar amount and as an annual percentage rate. The annual percentage rate is that nominal annual percentage rate determined in accordance with the actuarial method of computation so that it is disclosed with an accuracy at least to the nearest quarter of one percent [See Truth In Lending Act, Revised Regulation Z, § 226.5(b)(1), 12 C.F.R.]. The rate which must be disclosed under the Truth In Lending Act and Regulation Z of the Truth In Lending Act is the actual yield which the loan will produce over a 365 day year. The lender most certainly may never collect a higher rate than the rate disclosed to the consumer.

The method referred to above, which was prohibited by the federal court as a usury and disclosure violation, is offered by way of example to demonstrate the effects of the use of certain types of computation methods which invariably, and perhaps sometimes intentionally, lead to finance charges which are in excess of statutory limits. Iowa lenders obviously should not use this particular method since the ICCC § 537.2401(3) makes it quite clear that for purposes of computing a finance charge, a "year is equal to 365 days" and therefore a day is equal to 1/365 of a year.

The above discussion of the 365/360 method demonstrates how crucial it is that the lender measure time units in accordance with statutory requirements. Guidance on the manner in which intervals of time should be measured in order to determine the actual term of the loan is offered in Revised Regulation Z:

> Unit-period.
>
> (i) In all transactions other than a single advance, single payment transactions, the unit-price shall be that common period, not to exceed 1 year that occurs most frequently in the transaction, except that (A) if two or more common periods occur with equal frequency the smaller of such common periods shall be the unit-period.
>
> * * *
>
> Number of Unit-Periods Between Two Given Dates.
>
> (i) The number of days between 2 dates should be the number of 24 hour intervals between any point in time on the first date to the same point in time on the second date.

C.C.H., Consumer Credit Guide, Vol. 1, Truth in Lending Act, Revised Regulation Z, Appendix J. Par. B(4) and (5).

The Truth In Lending Act language cited above, which applies to Iowa lenders for disclosure purposes, makes it clear that the lender cannot count both the first and last day for purposes of calculating finance charges. This analysis assumes that your question involves "unit-periods" of a day. Intervals between two dates must be measured by 24-hour intervals, which start and stop at the same time on each day, rather than by the mere passage of a calendar day. The language of the ICCC parallels the language of Revised Regulation Z, Appendix J, of the Truth In Lending Act. Under the ICCC, "interval" is defined as follows: "The 'interval' between specified dates means the interval between them including one or the other but not both of them." (Emphasis added). [See § 537.2510(4)(b).] This ICCC definition of interval, while used in the context of rebates of finance charges on precomputed loans, would also apply to the computation of the finance charge in the case of simple interest rather than precomputed charges.

Finally, the ICCC is a version of the Uniform Consumer Credit Code which has been adopted by ten jurisdictions including Iowa. Those states which have adopted the U.C.C.C. work to promote a uniform interpretation of that law [See ICCC §§ 537.1102(g) and 537.6104(3)]. An informal survey of the jurisdictions by this office as the administrator of the ICCC indicated that a majority of these states follow the rule that the lender may not count both the first day and the last day of the term of the loan for purposes of computing the finance charge.

In summary, under the ICCC, a lender may not count both the first day, or commencement day of the loan, and the last day of

the loan for purposes of computing the loan term for the accrual of the finance charge on a closed-end-credit consumer loan. This principal would apply regardless of whether the finance charge involved was precomputed or based on simple interest. As you requested, this answer assumes a loan term of sufficient duration such that the minimum finance charge of § 537.2510(3)(a) of the ICCC does not apply.

Sincerely yours,

Linda T. Lowe

LINDA THOMAS LOWE
Assistant Attorney General

cf

TAXATION: Correction Of Property Tax Assessment Errors. Iowa Code §§421.17(10), 443.6 and 445.60 (1981). If assessment errors are made by the assessor because of use of erroneous data in determining assessments for individual residential realty, the county auditor has no authority under §443.6 to correct such nonministerial errors. In addition, the board of supervisors has no authority, under §445.60, to order a refund of taxes paid upon such erroneous assessments. The director of revenue has authority, within the scope of §421.17(10), to consider such assessment errors. If the director corrects such errors, he/she can raise individual valuations but cannot reduce any valuation unless such reduction is recommended by the board of review. (Griger to Schwengels, State Senator, 9/28/82) #82-9-24(L)

September 28, 1982

The Honorable Forrest V. Schwengels
State Senator
R.R. 2 - Box 247
Fairfield, IA 52556

Dear Senator Schwengels:

You have requested an opinion of the Attorney General concerning correction of errors in the assessment of certain residential realty for property tax purposes.

Based upon the contents of your letter and further investigation by this office, the apparent factual situation is as follows: The county assessor's office, in compiling data for the 1979 property tax assessments, mismatched data in file cards concerned with the land and residential buildings located thereon. The "front" portion of the file cards denoting the names of the affected property owners, their addresses, and land value computations related to the correct taxpayer and property. The "back" portion of these cards contained information concerned with the description of a residential building and its characteristics. The buildings described on these cards were not located upon the land listed. To put it another way, assume affected property owners X and Y. The information associated with X's land correctly gives X's name and address in the file card. The card contains the assessor's determination of value of X's land. On the "back"

portion of X's file card is information purporting to describe X's residence, its characterstics, and a valuation. However, this information actually describes Y's residence. In addition, there is a file card correctly listing Y's name and address and also ascribing a land value to Y's land. The "back" portion of this card purports to describe Y's residence, its characteristics, and a valuation, but actually describes X's residence. The residential buildings of X and Y are not identical. Utilizing, by inadvertence, this mismatched data, the assessor determined the actual value of X's and Y's residential property and such values were placed upon the assessor's assessment books and assessment rolls.

The assessor's office sent assessment rolls to the affected property owners in 1979. The county board of review, on its own volition, corrected an error in the lot size of one of the affected property owners and the board reduced the assessor's determination of value upon the land by about $400. The affected property owners did not appeal to the board of review by reason of the assessment errors caused by mismatching residential building data upon the file cards or otherwise appeal to the board on the theory that the assessor's values were erroneous or too high.

For the year 1980, the assessor did not change the values of the properties in question. As a consequence, assessment rolls were not issued to the affected property owners.

For the 1981 assessment year, the assessor's office prepared an assessment roll which was sent to each affected property owner. The assessment errors contained in the 1979 assessments were continued with the 1981 assessments. One of the affected property owners did appeal the 1981 assessment to the local board of review, but the owner limited their appeal to the land value only. No assessment error associated with the mismatching of land and building data or excessive or insufficient valuation of the residential realty in question was appealed or alleged to the board of review or otherwise brought to the board's attention.

Apparently, these mismatching assessment errors were first discovered during this year. The thrust of your opinion request is this: Given the lack of appeal in 1979 and 1981 to the local board of review to correct these errors in the assessments, under Iowa law what recourse do the affected taxpayers have to rectify these errors for the 1979, 1980, and 1981 assessment years?[1]

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[1]For purposes of this opinion, it is assumed that these assessment errors clearly affected the valuation placed upon each affected taxpayer's residential realty by the assessor. Such errors were correctable by the local board of review in 1979 and 1981. Polk County v. Sherman, 99 Iowa 60, 68 N.W. 562 (1896); Iowa Code §§441.35 and 441.37 (1981). These assessment errors for 1979 would not have been appealable to or correctable by the board of review in 1980. James Black Dry Goods Co. v. Board of Review, 260 Iowa 1269, 151 N.W.2d 537 (1967), pet. dismissed, 390 U.S. 901, 19 L.Ed.2d 868, 88 S.Ct. 817 (1968).

There are three statutes which provide remedies that should be examined within the context of your opinion request. First, Iowa Code §443.6 (1981) authorizes the county auditor to correct errors in an assessment. Second, Iowa Code §445.60 (1981) requires the board of supervisors to direct the county treasurer to refund erroneously or illegally exacted taxes which have been paid. Third, Iowa Code §421.17 (10), second paragraph (1981), authorizes the director of revenue to correct errors in an assessment. Each of these statutory remedies will be discussed as to their applicability to your opinion request.

Section 443.6 provides:

> "The auditor may correct any error in the assessment or tax list, and the assessor or auditor may assess and list for taxation any omitted property."

Section 443.6 contains two distinct provisions. First, the auditor may correct errors in an assessment or tax list. Second, both the assessor and auditor may make an omitted assessment. Where, as here, the property was assessed, even if erroneously, an omitted assessment cannot be made. Talley v. Brown, 146 Iowa 360, 126 N.W. 248 (1910); Muscatine Lighting Co. v. Pitchforth, 214 Iowa 952, 243 N.W. 292 (1932).

The authority of the county auditor to correct errors in an assessment, pursuant to §443.6, has been construed by the Iowa Supreme Court to continue until the tax imposed upon the erroneous assessment has been fully paid. First National Bank v. Hayes, 186 Iowa 892, 171 N.W. 715 (1919); Elliot v. Rhoads, 203 Iowa 218, 212 N.W. 468 (1927). In the instant situation, the property taxes attributable to the 1979 and 1980 valuations have been fully paid, thereby rendering §443.6 inapplicable for those years. The property taxes attributable to the 1981 assessments, to our knowledge, have not been paid. Given this nonpayment assumption on our part, to the extent that the auditor now has authority to correct assessment errors for the 1981 assessment year, that authority must be examined in light of certain decisions of the Iowa Supreme Court to ascertain whether it exists within the context of your opinion request.

In Polk County v. Sherman, 99 Iowa 60, 68 N.W. 562 (1896), the assessor, in collecting data on property in his assessing district, used a "field book" in which he entered tentative valuations. The tentative valuation of the taxpayer's property was entered at $8,000. The assessor had intended to fix an assessed value of from $3,200 to $4,000. However, through an oversight, the $8,000 figure was entered into the assessment book. Although the decision was based upon other grounds, the Court took the opportunity to opine that an excessive or insufficient assessment, under these circumstances, must be appealed to or corrected by a local board of equalization (predecessor of present local boards of review) as the exclusive remedy, notwithstanding that the taxpayer was unaware of the assessment error. The Court stated in 99 Iowa at 65:

> "Doubtless there are other errors which may also be corrected by the auditor. But where an assessment has been made and returned to the board of equalization, and the amount is either too high or too low, but is not objected to by the property owner, and is not changed by the board, it cannot be said to be erroneous within the meaning of the section quoted. The statute has pointed out specifically the method of procedure by which an error in the amount of the assessment may be corrected, and, if that method is not adopted, the assessment is to be taken by the auditor as correct."

In Smith v. McQuiston, 108 Iowa 363, 79 N.W. 130 (1899), the assessor had fixed a value of $310 upon the taxpayer's realty. By some copying error, the assessment was recorded as $3,150. The Court distinguished the Sherman case and held that the auditor could correct this assessment error, even though the taxpayer had not appealed to the local board. The Court stated in 108 Iowa at 366:

> "The assessor neither fixed three thousand one hundred and fifty dollars as the valuation of the plaintiff's property, nor did he enter that amount. These figures got upon the roll through a clerical error in copying. Now, plaintiff does not complain of the amount that the assessor did in fact fix as the valuation of the property, viz. three hundred and ten dollars. The real ground of complaint is not of an assessment, but rather of a valuation which was never assessed."

In First National Bank v. Hayes, 186 Iowa 892, 171 N.W. 715 (1919), capital stock of a bank was assessed by the assessor at $38,357.38. The auditor, prior to tax payment, increased this value to $76,720.33. Under the statutory scheme taxing capital stock, the bank was required to submit a sworn statement containing information upon which the assessor exercised no judgment but merely mathematically computed the value. The Court stated in 186 Iowa at 901:

> "Enough has been said to indicate that the duty performed by the assessor in ascertaining the value of bank stock is merely ministerial in its nature. All exacted of him is accurate computation. In estimating the value of other property, he is required to determine its value according to his best judgment, and therein exercise a quasi judicial function."

The Court upheld the auditor's authority to correct the assessment error in this case.

In Muscatine Lighting Co. v. Pitchforth, 214 Iowa 952, 243 N.W. 292 (1932), the assessor valued the taxpayer's property at $8,000 and so notified the taxpayer. This valuation was approved by the local board of review. Under the law in effect at that time, this assessment was presented to the state executive council which raised the value by four percent to $8,320. The taxable value was one fourth of the assessed value or $2,080. Prior to the time for tax payment, the county auditor suspected that the valuation was too low. Thereafter, the assessor discovered that he meant to place a value of $80,000 rather than $8,000 upon the property. The auditor never attempted to correct this assessment error, but purported to authorize the county treasurer to make the correction. The Court held that the auditor could not delegate his power, if any, to the treasurer to correct assessment errors. However, the Court did not decide whether the auditor had the power to correct the error made in this case. The Court stated in 214 Iowa at 956-7:

> "In view of the fact that the auditor did not change or correct the valuation and assessment, it is not necessary to determine whether that official had the power or authority to correct the alleged error of the assessor. Hence, we do not determine that question. This case, therefore, will not be a bar to the authority and power of the auditor, if he has such, to correct the alleged error in the assessment and valuation, if any exists."

In Central Iowa Power Cooperative v. Cedar Rapids, 254 Iowa 1, 13, 116 N.W.2d 422, 429 (1962), the Iowa Supreme Court cited the Sherman case "as bearing on the kind of error subject to correction by the auditor." The auditor may not correct the assessor's determinations resulting in underassessments or overassessments. Polk County v. Sherman, 99 Iowa at 65. The Court has firmly held that assessment errors which §443.6 authorizes the auditor to correct "do not include errors of judgment on his [assessor] part or cases in which the exercise of judgment or discretion is involved." Fort Madison Security Company v. Maxwell, 202 Iowa 1346, 1350, 212 N.W. 131, 133 (1927).

In the situation posed in your opinion request, the assessor used erroneous data in assessing the two residential properties in question. But whether the assessor undervalued or overvalued both, albeit in different degrees, or undervalued one and overvalued the other would be speculative on our part. The residential realty (land and buildings) must be valued as one unit. Tiffany v. County Board of Review In And For Greene County, 188 N.W.2d 343 (Iowa 1971). Moreover, these residential units must be assessed on the basis of the willing buyer-willing seller method where that method would readily establish market value. Milroy v. Board of Review of Benton County, 226 N.W.2d 814 (1975).

In White v. Board of Review of Polk County, 244 N.W.2d 765, 769 (Iowa 1976), the Iowa Supreme Court noted that even if the assessor included a nonexistent item in an assessment, it "should not render that assessment void per se if the valuation as a whole is correct."

In the instant situation, the errors in affected property owners X's and Y's assessments were the attribution of the wrong building to them. Even so, the valution of X's and Y's residential units involved judgment and discretion. This is not a case of transposing or copying a wrong number or of making a mere clerical error. If the auditor attempts to correct these assessments, the auditor must find not only that the valuations placed upon the properties in question are too high or too low, but the auditor must also ascertain the correct values of such properties. Where the assessor uses erroneous data to assess property, the resultant assessment may very well be too low or excessive--or it may not. If the auditor could correct these assessments, then he seemingly could correct any assessment where the error alleged results from consideration of improperly described property. For example, suppose the assessor valued a residential property on the basis of it having four bedrooms and it only had three, suppose the assessor erroneously included a garage where none existed, or suppose the assessor miscalculated the size of the residence. The conclusion seems inescapable that if the auditor attempted to correct such errors, judgment would have to be exercised in ascertaining a different value. Such is the situation in your opinion request.

In 1928 Op. Att'y Gen. 358, the county assessor had valued property at $2,500 but subsequently decided he had erred and the property should have been valued at $1,000. The property owner had not appealed to the local board of review. The Attorney General opined that the auditor could not correct this assessment error. In order for the auditor to have the authority to correct an assessment error, the correction must be ministerial. Such condition does not appear in your opinion request. The situation in your opinion request is akin to that found in the Sherman case. Consequently, it is our opinion that the auditor lacks the authority under §443.6 to correct the assessment errors in question for the assessment year 1981.

The next statutory provision and remedy to consider is Iowa Code §445.60 (1981) which provides:

> "The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon."

The failure of an owner to have assessment errors corrected does not affect the legality of property taxes levied upon such assessment. See Iowa Code §443.19 (1981).

In the absence of a tax refund statute, taxes voluntarily paid are not refundable. Kraft v. City of Keokuk, 14 Iowa 86 (1862); Slimmer v. Chickasaw County, 140 Iowa 448, 118 N.W. 779 (1908). Therefore, in the situation posed by your opinion request, it is necessary to determine whether the voluntarily paid taxes attributable to valuation in effect for 1979 and 1980 are refundable under §445.60. See 1980 Op. Att'y Gen. 83, 86-7. The leading Iowa case on this subject is Griswold Land & Credit Company v. County of Calhoun, 198 Iowa 1240, 201 N.W.11 (1924). In Griswold, the taxpayer sought a tax refund based upon errors in the assessment which caused the tax to be excessive. The taxpayer could have complained to the local board of review, but did not do so. The Court stated in 198 Iowa at 1245:

> "The rule to be deduced from the various provisions of the statute [§445.60] and the decisions of this court is that, unless the tax is illegal because levied without statutory authority, or levied upon property not subject to taxation, or by some officer or officers having no authority to levy the same, or is in some other similar respect illegal, the exclusive remedy of the taxpayer is to complain to the board of review, and, in the event that he is denied relief, then to appeal to the district court. Of course, the board of review has jurisdiction to grant relief to the party aggrieved upon any of the grounds enumerated above. As to such or perhaps other similar grounds, its jurisdiction is not exclusive. In all other matters, it is."

In the instant situation, the residential property was taxable. See Iowa Code §427.13 (1981). The assessor and other local taxing officials have power to assess, levy, and tax residential property. The valuations on the residential properties in question may be in error, but taxes paid upon such valuations are not, as Griswold points out, "erroneous" or "illegal" within the meaning of §445.60. Therefore, any alleged overpayment of tax is not refundable under the circumstances of your opinion request.[2] See also Butler v. Cotton, 233 Iowa 1311, 11 N.W.2d 686 (1943).

Finally, the provisions of Iowa Code §421.17(10), second paragraph, (1981) should be considered. This paragraph states:

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[2]To the extent any taxes have been underpaid by reason of an incorrect valuation, there is no statutory authority to now readjust the valuations for years 1979 and 1980 and the taxes attributable thereto.

> "The director may correct errors or obvious injustices in the assessment of any individual property, but the director shall not reduce the valuation of any individual property except upon the recommendation of the local board of review and no order of the director affecting any valuation shall be retroactive as to any reduction or increase in taxes payable prior to January 1 of the year in which such order is issued, or prior to September 1 of the preceding year in cities under special charter which collect their own municipal levies. Judicial review of the actions of the director may be sought in accordance with the terms of the Iowa administrative procedure act."[3]

Section 421.17(10) grants statutory authority to the director of revenue to "correct errors or obvious injustices in the assessment of any individual property." The director can raise valuations in making such corrections, but cannot lower them except upon recommendation of the local board of review. In addition, the director cannot retroactively adjust a valuation where the adjustment would increase or decrease taxes payable prior to January 1 of the year in which the director issued an order for valuation adjustment. There is also a separate provision precluding retroactivity affecting special charter cities.

In addition, the Iowa Supreme Court, in construing the broad supervisory authority over property taxes granted to the director's predecessor, the Iowa State Tax Commission, held that such authority could not be retroactively exercised, after the taxes have been paid, to exact an additional amount of tax. Des Moines Elevator Company v. Greenwalt, 231 Iowa 1062, 3 N.W.2d 150 (1942). Thus, in the situation presented in your opinion request, the director could not issue any corrective orders affecting the 1979 and 1980 individual valuations at this time.

The taxes attributable to the 1981 valuations are first payable this year. Iowa Code §§441.46 and 445.36 (1981). The director, therefore, has the authority to correct errors in the 1981 assessments. This authority does not authorize the director to make an assessment, but only to correct errors or obvious injustices in assessments already made. The fact that the affected property owner failed to appeal an assessment error to the local board of review does not, per se, preclude the director from exercising the authority granted him/her under §421.17(10) to correct that error.

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[3]This statutory provision was enacted in 1947. See 1947 Iowa Acts, ch. 225, §2.

Whether the director will exercise the discretionary authority in §421.17(10) to correct 1981 assessment errors made in the context of your opinion request is a matter for the director to initially determine, subject to the proviso that the director cannot reduce the valuation of any individual property unless reduction is recommended by the local board of review. Obviously, we cannot speculate as to what action the director will decide upon or even whether the director will find that the valuations in question should be adjusted, in the event that the situation involved in your opinion request is brought to the director's attention.

By reason of the foregoing, it is the opinion of this office that the director has the authority to consider errors in individual assessments for the 1981 assessment year. In the correction of such errors, the director can increase the valuation of the affected property assessment. However, if the director concludes that the correction of such error would require a reduction in valuation of the affected property assessment, the director cannot reduce the valuation unless reduction is recommended by the local board of review.

Very truly yours,

Harry M. Griger
Special Assistant Attorney General

WP2

CRIMINAL LAW; UNIFORM CITATION AND COMPLAINT: Iowa Code Chapter 805. Unsecured appearance bond provisions apply where the offense is a scheduled violation because court appearance is required; available means by which a defendant can avoid a court appearance do not effect the applicability of the provision. (Baustian to Long, Wright County Magistrate, 9/27/82) #82-9-21(L)

William A. Long
Wright County Magistrate
Eagle Grove, Iowa

September 27, 1982

Dear Mr. Long:

We have received your request for an opinion from this office concerning the application of the unsecured appearance bond provision to scheduled offenses and the procedure for collecting such bonds. Specifically, you have inquired.

> 1. Does the statement on the bottom of the Uniform Citation and Complaint "If the offense is a simple misdemeanor and a court appearance is required . . ." exclude the possibility of scheduled violators being released by signing that line? Where a scheduled violator signed the bottom line and then did not appear, could he argue that the court could not "enter a conviction and render judgment against" him because in his case a court appearance was not "required"?
>
> 2. Where defendant does not appear and conviction is entered, what is the proper procedure for collecting the fine and costs?

The provision for release by signing the unsecured appearance bond on the Uniform Citation and Complaint does apply to scheduled violators because a court appearance is required unless and until the alleged offender complies with one of the options by which he either admits guilt or authorizes the entrance of conviction and judgment against himself. Iowa Code section 805.9(5) (1981).

The Uniform Citation and Complaint form is specifically provided as the means for charging all violations which are designated by Iowa Code section 805.8 to be scheduled violations. Iowa Code section 805.6(1)(2) (1981).

The Uniform Citation and Complaint form reflects the following statutory options for the immediate release of a cited person: (1) A cited person, "before the time specified . . . for appearance," may admit a scheduled violation by signing "the admission of violation on the citation and complaint" and delivering or mailing the form, together with the scheduled fine and five dollars costs, to an office designated in section 805.7. "Thereupon the defendant shall not be required to appear before the court. The admission shall constitute a conviction." Iowa Code section 805.9(1) (1981). (2) If "the officer does not deem it advisable to release the defendant" according to option one but "the defendant wishes to admit the violation, the officer may release the defendant upon observing the person mail the citation and complaint, admission, and minimum fine, together with five dollars costs," to the designated office. "The admission shall constitute a conviction and judgment in the amount of the scheduled fine plus five dollars costs." Iowa Code section 805.9(3)(a) (1981). (3) If "the officer does not deem it advisable to release the defendant" according to option one and the defendant does not wish to admit the violation, the officer may release the defendant upon observing the person mail the citation and complaint and the specified amount of money or a guaranteed arrest bond certificate" as bail together with the following statement signed by the defendant"

> I agree that either (1) I will appear pursuant to this citation or (2) if I do not appear in person or by counsel to defend against the offense charged in this citation the court is authorized to enter a conviction and render judgment against me for the amount of one and one-half times the scheduled fine plus five dollars costs.

Iowa Code section 805.9(3)(b) (1981). (4) If the officer does not elect any of the foregoing options and the offense is a simple misdemeanor, the defendant may be released upon signing the following statement:

> I hereby give my unsecured appearance bond in the amount of .....dollars and enter my written appearance. I agree that if I fail to appear in person or by counsel to defend against the offense charged in this citation the court is authorized to

> enter a conviction and render judgment against me for the amount of my appearance bond in satisfaction of the penalty plus court costs.

Iowa Code section 805.6(1)(b)-(d) (1981). This unsecured appearance bond is a written promise by the defendant to pay a sum certain [either (1) "an amount equal to one and one-half times the scheduled fine plus five dollars costs; or (2) if the offense is one for which a court appearance is mandatory (see option (5) below) the amount of one hundred dollars plus five dollars costs," Iowa Code section 805.6(1)(c)] in the future if he or she defaults on the obligation to appear. By this agreement, then, nonappearance results in conviction and judgment in the amount of the unsecured appearance bond. (5) Finally, if a scheduled violation involves aggravating circumstances as specified by section 805.10 ["accident or injury to person or property," use of a motor vehicle when defendant had no valid driver's license or permit, or creation of "an immediate threat to the safety of other persons or property"], a peace officer may release a cited person only upon execution of the unsecured appearance bond of option four above. The issued citation must be endorsed with the statement "Court appearance required" and the space in which the defendant may admit the violation must be stricken.

These procedures are designed to implement a uniform and expeditious system for the disposition of these relatively minor offenses. A person cited rather than arrested for committing a scheduled violation offense need never appear in court (except where the violation involves the aggravating circumstances listed in Code section 805.10) under these expedited procedures. A defendant who admits the offense and pays the fine and costs (options one or two) has submitted to the court's jurisdiction, has waived the right to be heard and other attendant rights, and obviously satisfied the penalty for the scheduled violation. To like effect, a defendant who forfeits bail upon nonappearance (option three) has admitted the offense, has waived his or her rights, and has also satisfied the penalty for the scheduled violation. The defendant under option four has also authorized judgment against himself should he fail to appear; collection of the amount of the bond is the only remaining concern.

The provision for an unsecured bond may be used in all instances except where the defendant immediately admits guilt and mails the amount of the fine and costs, or mails a secured bond.

Those options by which a defendant may avoid a court appearance do not mean the court appearance is not required; the defendant must act or be subject to a charge for Failure to Appear. See Iowa Code section 805.5 (1981).

If a cited person admits the scheduled offense and pays the fine plus costs or forfeits bail by nonappearance per the signed agreement, the person has constructively appeared and has satisfied the penalty for the scheduled violation. However, if a defendant is released on personal recognizance (option one) but does not timely admit the offense by mail and willfully fails to appear at the time and place designated in the citation, the offense of failure to appear will lie, as it will if defendant fails to appear where such appearance is required under option five. 1980 Op. Att'y Gen. 684.

Your second question concerns the proper procedure for collecting this fine.

Of course under the first two options -- admission of guilt and either payment of fine by mail before the appearance date or payment of the fine in the peace officer's presence -- collection of the fine is no problem.

Under the third alternative where defendant has not admitted guilt and has mailed an amount provided by code as bail, the accompanying statement provides a waiver of rights and authorization for the court to enter a conviction and render judgment against the defendant for the amount of the bail if he fails to appear.

It is under the fourth option -- that involving the appearance bond -- that difficulties arise. By the terms of the agreement nonappearance results in conviction and judgment in the amount of the unsecured appearance bond as specified in section 805.6(1)(c). The law relating to judgment liens, executions, and other process available to creditors for the collection of debts is applicable to such judgments. Iowa Code section 909.6 (1981). The contempt provisions of Iowa Code section 909.5 and chapter 665 (1981) are an additional means of enforcing payment. A separate prosecution for failure to appear is not viable in this circumstance, defendant having provided for entry of judgment against himself in that event. 1980 Op. Att'y Gen. 684.

Sincerely,

Teresa Baustian

TERESA BAUSTIAN
Assistant Attorney General

TB:mlr

COUNTIES; Community Action Programs; 28E Agreements. 1982 Iowa Acts, H.F. 2437; Iowa Code Chapter 28E (1981); Omnibus Budget Reconciliation Act of 1981 §§ 671, 673, 675. A 28E agreement entered into by several governmental bodies for the purpose of establishing a community action agency to serve the entire area would not affect that agency's qualification for federal community services block grant money, assuming that agency is otherwise qualified to receive that money under applicable state and federal law. (Weeg to Carr, State Senator, 9/27/82) #82-9-20(L)

September 27, 1982

The Honorable Robert Carr
State Senator
2030 Decorah Drive
Dubuque, Iowa 52001

Dear Senator Carr:

You have requested an opinion of the Attorney General concerning whether a 28E agreement among four governmental bodies would qualify for Community Services Block Grant funds pursuant to 1982 Iowa Acts, House File 2437, and §§ 671 et seq. of the federal Omnibus Budget Reconciliation Act of 1981. It is our opinion that a 28E agreement would satisfy both state and federal requirements.

We first briefly refer to the factual background from which this request arose. Since 1973, Dubuque, Delaware, and Jackson Counties, as well as the City of Dubuque, have agreed to jointly administer a community action program. A public agency titled "Operation: New View" was created to serve as the community action agency for the entire area, and Dubuque County was designated as the grantee for block grant money received directly from the federal government. At one time a formal agreement was entered into pursuant to Iowa Code Ch. 28E, but because it was not recognized by the federal government, it was set aside.

However, in 1981 Congress passed the Community Services Block Grant Act ("the Act") as part of the Omnibus Budget Reconciliation Act of 1981. See §§ 671 et seq. The new Act entirely revises the former federal block grant program, and has effectively shifted the primary burden of administering the program to the states. In accordance with this shift, detailed federal requirements for receiving federal funds

formerly imposed on community action agencies have been replaced with more general requirements which are now imposed on the states. In particular, § 675(c) states:

> As part of the annual application [for community services block grant money], the chief executive officer of each state shall certify that the State agrees to --
>
> * * *
>
> (2)(A)(i) use, for fiscal year 1982 only, not less than 90 percent of the funds allotted to the State under section 674 to make grants to use for the purposes described in clause (1) to eligible entities (as defined in section 673(1)) or to organizations serving seasonal or migrant farmworkers; and
>
> (ii) use, for fiscal year 1983 and for each subsequent fiscal year, not less than 90 percent of the funds allotted to the State under section 674 to make grants to political subdivisions of the State for the political subdivisions to use for the purposes described in clause (1) directly or to non-profit private community organizations which have a board which meets the requirements of clause (3), or to migrant and seasonal farm worker organizations . . .

Section 675(c) further details the purposes of the program (§ 675(c)(1)), establishes minimum requirements for the composition of a governing board of a public or private community action agency (§ 675(c)(3)), and imposes other general requirements regarding the administration of this block grant money.

Subsequent to the enactment of the new federal Act, and prior to the enactment of 1982 Iowa Acts, H.F. 2437, the Office of Planning and Programming requested advice from our office concerning whether Dubuque County qualified as an "eligible entity" within the meaning of § 673(1) and 675(c)(2)(A)(i) of the federal Act. In an informal opinion dated October 20, 1981, we responded that Dubuque County did qualify for block grant money for fiscal year 1982 under

those provisions. Our rationale was, in part, as follows:

> . . . Section 673(1), in pertinent part, defines "eligible entity" as "any organization which was officially designated as a community action agency or a community action program under the provisions of section 210 of the Economic Opportunity Act of 1964 for fiscal year 1981 . . .", found at 42 U.S.C. § 2790. According to the materials provided me, the Dubuque County Board of Supervisors has been designated as the community action agency for Dubuque, Delaware and Jackson counties and has been recognized as such since at least November 9, 1973. Such designation is expressly authorized by 42 U.S.C. § 2790(a) which provides, in pertinent part, that "a State or political subdivision of a State (having elected or duly appointed governing officials), or a combination of such political subdivisions" may be a community action agency. (Emphasis supplied.)

Since that opinion, the General Assembly enacted H.F. 2437, which became effective July 1, 1982. That act seeks to ensure continuation of community action programs by promulgating certain guidelines for their establishment and operation. Further, the Dubuque County Board of Supervisors now wishes to re-establish a 28E agreement designating Operation: New View as the community action agency for Dubuque, Delaware, and Jackson counties and the city of Dubuque. The board now questions whether this agreement qualifies Operation: New View as a recipient for community services block grant money under both H.F. 2437 and the new federal Act.

In response to this question, we believe that our informal opinion of October 1981, establishes that for fiscal year 1982 Operation: New View qualifies under the federal Act as an "eligible entity" for federal block grant money. See § 675(c)(2)(A)(i). However, for fiscal year 1983 and subsequent years, § 675(c)(2)(A)(ii) applies. This provision requires that any community action agency receiving block grant money must meet certain requirements regarding the composition of the governing board of that agency. However, the new state law enacted to implement the new federal provisions, H.F. 2437, enumerates similar purposes

and somewhat more specific requirements for the composition of governing boards. Consequently, we believe that once Operation: New View qualifies for block grant money under the relevant state law, it qualifies under federal law as well. Further, it is our opinion that nothing in H.F. 2437 disqualifies Operation: New View from receiving this money, so long as Operation: New View is designated as the area's community action agency and follows the new state requirements regarding establishment and operation of the agency.

House File 2437 was enacted in response to the new federal Act in order to assure the continuation of community action programs in the State of Iowa. In particular, § 9 of H.F. 2437 provides that:

> The director [of the Office of Planning and Programming] shall provide financial assistance for community action agencies to implement community action programs, as permitted by the community service block grant received in Iowa and other possible funding sources.
>
> If a political subdivision is the agency, the financial assistance shall be allocated to that political subdivision.

In order to determine eligibility for this funding, § 3 of the same act provides in part that "if a community action agency is in effect and currently serving an area," as Operation: New View is, "that agency shall become the designated community action agency for that area." In addition, § 4 sets forth requirements for the composition of an agency's governing board and advisory board or delegate agency, § 5 enumerates the statutory duties of these boards, and § 6 details the duties of a community action agency. Additional requirements are contained throughout this new chapter. We do not have before us sufficient factual information to determine whether Operation: New View complies with these various requirements, but once these requirements have been met, an agency is then qualified under state law to obtain federal block grant funds.

Finally, the fact that this arrangement is formalized by a 28E agreement does not change these conclusions. Iowa Code Ch. 28E (1981) is specifically designed to permit local governmental bodies to provide joint services, such as those contemplated in the present case, with other such bodies.

See Section 28E.1. Section 28E.2 first defines "public agency" as any political subdivision of the state. Later sections provide as follows:

> 28E.3 Joint exercise of powers. Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state having such power or powers, privilege or authority . . .
>
> 28E.4 Agreement with other agencies. Any public agency of this state may enter into an agreement with one or more public or private agencies for joint or co-operative action pursuant to the provisions of this chapter, including the creation of a separate entity to carry out the purpose of the agreement. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involved shall be necessary before any such agreement may enter into force.
>
> * * *
>
> 28E.12 Contract with other agencies. Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity, or undertaking which any of the public agencies entering into the contract is authorized by law to perform, provided that such conduct shall be authorized by the governing body of such party to the contract. Such contract shall set forth fully the purposes, powers, rights, objectives, and responsibilities of the contracting parties.
>
> * * *

House File 2437 now provides that communities shall establish, and the Office for Planning and Programming shall recognize, community action agencies designed to assist in the delivery of community action programs. See H.F. 2437, § 3. Therefore, because H.F. 2437 authorizes a governmental body to administer a community action program, and ch. 28E

authorizes governmental bodies to agree to jointly provide such services, it is our opinion that Dubuque County may make an agreement, or contract, with other counties and municipalities for the provision of a community action program by a designated agency in a particular area.

We find further support for our conclusion in the plain language of H.F. 2437, § 3, which clearly foresees the likelihood of such a joint agreement:

> . . . If a community action agency is in effect and currently serving an area, that community action agency shall become the designated community action agency for that area. If there is not a designated community action agency in the area a city council or county board of supervisors or any combination of one or more councils or boards may establish a community action agency and may apply to the office for planning and programming for recognition. The council or board or the combination may adopt an ordinance or resolution establishing a community action agency if a community action agency has not been designated. (emphasis added)

The language emphasized above evidences the legislature's intent that a community action agency serve a geographical area, as opposed to a particular county or municipality, and that such an agency could be established by a municipality or a county or any combination of one or more bodies.

In conclusion, a 28E agreement entered into by several governmental bodies for the purpose of establishing a community action agency to serve the entire area would not affect that agency's qualifications for federal community services block grant money, assuming that agency is otherwise qualified to receive that money under applicable state and federal law.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

COUNTIES; COUNTY OFFICERS: Clerk of Court. Iowa Code § 331.704 (1981). The requirement of Iowa Code § 331.704 (1981) that the clerk keep a record book of docket entries may be satisfied by keeping a set of loose cards in a bin or other container. These cards should at a later date be bound together in a more permanent fashion, but this latter requirement may be satisfied by either post-type, looseleaf, or formal stitched binding. (Weeg to O'Brien, Court Administrator, 9/27/82) #82-9-19(L)

William J. O'Brien
Court Administrator
State Capitol
L O C A L

September 27, 1982

Dear Mr. O'Brien:

You have requested an opinion of the Attorney General concerning the proper interpretation of Iowa Code § 331.704 (1981), which requires the district clerk of court to maintain "books." In particular, you ask:

1. Whether all "books" required under section 331.704 to be kept by district court clerks may be in the form of a set of loose cards kept together in a bin or other container.

2. Whether post-type or looseleaf bindings are permissible for the volume in which the cards are eventually collected or whether formal stitched binding must be used.

We believe it is permissible both to record required information on loose cards kept in bins and to later bind these cards in any of the ways you have described. Our reasons are as follows.

Iowa Code § 331.704 provides in part that:

1. The records of the court consist of the original papers filed in all proceedings.

> 2. The following books shall be kept by the clerk:
> a. A record book which contains the entries of the proceedings of the court and which has an index referring to each proceeding in each cause under the names of the parties, both plaintiff and defendant, and under the name of each person named in either party. [Emphasis added.]

* * *

You state in your opinion request that the practice in the past has been to keep the required records in large bound volumes, but that as part of an experimental program to improve recordkeeping methods, clerks in some counties will begin entering most case information on loose cards kept together in a bin. These cards could later be bound in a more permanent fashion.

You note in your opinion request that this office has previously held that a cardex file may satisfy the statutory requirement that the clerk of court keep a lien book. 1971 Op. Att'y Gen. 166. That requirement is now contained in § 331.704, subsection (2)(g). In the 1971 opinion, we state that, absent a statutory definition of the word "book," we would look to the common meaning of that term, which is "a set of written, printed, or blank sheets bound together in a volume . . . a volume of business records of any kind." We concluded by deciding that a cardex file could be maintained in order to meet the statutory requirement, but that at a later time the card file should be collected in a more permanent volume in order to fully comply with the statute.

We believe this opinion to be controlling in the present situation, particularly because the card filing system you describe is so similar to the cardex file that was the subject of the 1971 opinion. We also concur in the result that the cards should be bound in a more permanent manner at a future date.

In response to your second question, we can find no statutory requirement that expressly or impliedly dictates the manner in which a volume be permanently bound. The definition of the term "book" which is contained in 1971 Op. Att'y Gen. 166 simply requires that the sheets "be bound together in a volume." Further, there is case law that indicates formal stitched binding is not required. Foothill Ditch Co. v. Wallace

Ranch Water Co., 78 P.2d 215, 221, 25 Cal. App. 2d 555 (to constitute a "book" the pages must be fastened together with some degree of substantial permanency); Scoville v. Toland, 21 Fed. Cas. 863, 864 (a book is a volume, bound or unbound, written or printed). We are therefore of the opinion that a permanent volume of court records required to be kept by statute may be bound in a post-type, looseleaf, or formally stitched manner.

In concluding, we note one potential difficulty. As a result of a 1980 amendment, the final paragraph of Iowa Code § 606.7 (1981), the section which preceded § 331.704, stated as follows:

> The provisions of this section do not prohibit the storage of all the required records on computer, provided the records remain readily accessible.

However, in § 331.704 this provision was deleted, perhaps indicating that the Legislature intended to restrict the manner in which the records are kept by the district court clerk. While we do not believe this provision directly affects the result of this opinion, we suggest that legislative action be sought to remedy any confusion in this area of the law.

In sum, the requirement of Iowa Code § 331.704 (1981) that the clerk keep a record book of docket entries may be satisfied by keeping a set of loose cards in a bin or other container. These cards should at a later date be bound together in a more permanent fashion, but this latter requirement may be satisfied by either post-type, looseleaf, or formal stitched binding.

Sincerely,

Theresa O'Connell Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:sh

JUVENILE LAW: Confidentiality of Complaints Alleging Delinquency. Iowa Code Chs. 232.2(7), 232.2(33), 232.28, 232.147, 1981; 1982 Session, 69th G.A. HF 2460. The legislature intended to expand public assess to filed complaints alleging juvenile delinquency. However irrespective of age of the child or gravity of the delinquent act alleged, all complaints - alleging delinquency remain public records under Iowa Code Section 232.147, 1982. (Allen to Short, Lee County Attorney, 9/27/82) #82-9-18(L)

Mr. Michael P. Short
Lee County Attorney
609 Blondeau Street
Keokuk, IA 52632

September 27, 1982

Dear Mr. Short:

We have received your request for an opinion of the Attorney General concerning the exemption, if any, granted to initial complaints on juveniles alleging a delinquent act from the confidentiality provisions of Iowa Code Chapter 232, commonly referred to as the Juvenile Code. A 1979 Attorney General's Opinion concluded that complaints, as Official Juvenile Court records, as that term is defined in the statute, are public records and are exempt from the confidentiality provisions of Iowa Code Section 232.147. (1979 Op.Att'yGen. #79-9-20) During its 1982 session, the 69th General Assembly enacted House File 2460 to specifically provide that a juvenile delinquency complaint under certain circumstances shall not be confidential under § 232.147.

Iowa Code Section 232.28 now reads in relevant part:

> 1. Any person having knowledge of the facts may file a complaint with the court or its designee alleging that a child has committed a delinquent act. A written record shall be maintained of any oral complaints received.
> 2. The court or its designee shall refer the complaint to an intake officer who shall consult with law enforcement authorities having knowledge of the facts and conduct a preliminary inquiry to determine what action should be taken.
> NEW SUBSECTION. A complaint filed with the court or its designee pursuant to this

> section which alleges that a child fourteen years of age or older has committed a delinquent act which if committed by an adult would be an aggravated misdemeanor or a felony shall be a public record and shall not be confidential under section 232.147.

In light of this amendment adding the new subsection, you have asked the following specific question:

> Did the legislature by passing House File 2460 intend to restrict or expand public access to filed complaints alleging juvenile delinquency?

We have interpreted your question to be one of effect of the amendment as well as legislative intent.

Iowa Code Section 232.2(7), 1981, defines a complaint as follows:

> Complaint means an oral or written report which is made to the juvenile court by any person and alleges that a child is within the jurisdiction of the court.

House File 2460 to which your question is addressed also substituted: ". . . an oral . . ." for ". . . a verbal . . ." in this section. It is our opinion this amendment is irrelevant to the question you pose.

Iowa Code Section 232.2(33), 1981, defines official juvenile court records to include:

> "Official juvenile court records" or "official records" means official records of the court of proceedings over which the court has jurisdiction under this chapter which includes but is not limited to the following:
> . . .
> b. Complaints, petitions, . . .

"Complaint" and "petition" are different and distinctive. A complaint is the initial referral of a factual situation to the juvenile court. A petition formally initiates judicial proceedings in the juvenile court and may only be filed by the county attorney.

Iowa Code Section 232.147(2) states:

Official juvenile court records in cases alleging delinquency shall be public records, subject to sealing under § 232.150.

The 1979 Opinion of the Attorney General concluded, and we reiterate here, that juvenile court records in cases alleging delinquency are public records, and since complaints are part of official juvenile court records, all initial complaints on juveniles are public records.

Iowa Code Section 232.28, 1981, as amended by House File 2460, requires that a "written record shall be maintained of any oral complaint received". Nevertheless, the distinction between this written record and a complaint as statutorily defined is continued. As subsection 1 of Iowa Code Section 232.28, 1981, makes clear, the complaint, whether oral or written, is "filed" with the court while the written record of an oral report is "maintained". In our opinion then, the addition of the new subsection in Iowa Code Section 232.28, 1981, does not alter the basic definition of complaint, nor does it alter the definition of filing of that complaint with the juvenile court. The additional requirement that a written record be maintained, while administratively wise and justified, is in our opinion irrelevant to a determination of the confidentiality of that initial complaint.

Although House File 2460 amended Iowa Code Section 232.147, 1981, which, as noted, is the section dealing with the confidentiality of juvenile court records, the legislature nevertheless did not alter subsection 2 thereof. That subsection, in our opinion expressed in 1979 and continuing to this date, makes public records of all complaints alleging delinquency.

The Iowa Supreme Court has often said that the intent of the legislature is the polestar of statutory interpretation. Shinrone Farms, Inc. v. Gosch, 319 N.W.2d 298 (Iowa 1982). The Court also recognizes that the legislature may be its own lexicographer, defining its own terms. State v. Thomas, 275 N.W.2d 422 (Iowa 1979). In construing the language, we observe the principle that statutes should be given a construction which is sensible, practical, workable, and logical. Hansen v. State, 298 N.W.2d 263, 265-66 (Iowa 1980).

It is our opinion that the legislature by the passage of House File 2460 intended to expand public access to filed complaints alleging juvenile delinquency. Had the legislature intended to restrict public access, an amendment to Iowa Code Section 232.2(33), 1981, which defines official juvenile court records or an amendment to Iowa Code Section 232.147(2), 1981,

which makes all official juvenile court records in cases alleging delinquency public records, or optimally, both subsections would have been amended. House File 2460 left intact both subsections. We can only conclude that the legislature sought to remedy a perceived misunderstanding of their prior statute. The legislature in our view has now plainly and unquestionably placed juvenile delinquency complaints alleging that the child is at least fourteen years of age or older and that the act committed by the child would be an aggravated misdemeanor or felony if committed by an adult, in the public domain. This age and gravity offense distinction is consistent with similar distinctions drawn in other areas of Chapter 232, most notably right to counsel. However, in our opinion, juvenile delinquency complaints, irrespective of age or gravity of the offense, remain public records under Iowa Code Section 232.147, 1981.

Sincerely,

Gordon E. Allen
Special Assistant Attorney General

GEA/sm

CONSTITUTIONAL LAW: GOVERNOR: ITEM VETO. Art. III, § 16, Constitution of Iowa; Senate Files 2304 and 566, 69th G.A.. The Governor's attempted item veto of a condition in Senate File 2304 relating to an appropriation made in Senate File 566 is invalid. If the Governor desires to veto a legislatively imposed qualification upon an appropriation, he must veto the accompanying appropriation as well, even where the appropriation and the qualification appear in different bills. (Hunacek to Avenson and Weldon, State Representatives, 9/22/82) #82-9-17(L)

September 22, 1982

The Honorable Donald Avenson and Richard Welden
State Representatives
State Capitol
Des Moines, Iowa 50319

Dear Representatives Avenson and Welden:

You have requested an opinion concerning an item veto exercised by Governor Ray over § 93 of S.F. 2304, an act relating to and making supplemental appropriations for the fiscal year ending June 30, 1983. For the reasons expressed below, we think that this action was not within the scope of the Governor's veto power.

Senate File 2304 cannot be understood without reference to prior legislation. In S.F. 566, 1981 Iowa Acts, chapter 7, section 3, subsection 2, the legislature appropriated a sum of money to the department of social services for medical assistance, including reimbursement for medically necessary abortions. The aforementioned § 93 of S.F. 2304 amended this appropriation by inserting the following condition:

> . . . provided that the funds appropriated in this subsection shall not be transferred or used for any other purpose than specified in this subsection, notwithstanding § 8.39.

Section 94 of S.F. 2304 amended the appropriation of money for the 1982-83 fiscal year, raising the amount appropriated from $100,206,000 to $113,909,000. Section 93 was vetoed in its entirety by Governor Ray, who noted that the restriction on transfer would detract from the flexibility needed to effectively operate government during unsettled economic and federal budgetary times. Section 94 was not vetoed.

The veto power of the Governor derives from Iowa Const. Art. III, § 16. As originally written, this section allowed the governor only the option of vetoing an entire bill, not just isolated sections therein. However, as amended in 1968 (see Amendment 4 of the 1968 Amendments) the Governor now has the authority to "disapprove any item of an appropriation bill". In other words, he may exercise an "item veto". This authority was discussed by the Iowa Supreme Court in Welden v. Ray, 229 N.W.2d 706 (Iowa 1976). The court held in Welden that the Governor does not have the authority to veto a condition of an appropriation while leaving the appropriation itself intact:

> We thus hold that if the Governor desires to veto a legislatively-imposed qualification upon an appropriation, he must veto the accompanying appropriation as well. Id. at 713.

We believe that Welden controls here. It is true that this case differs from Welden in that Welden did not involve an attempted veto of a restriction on the transfer of funds. However, prior opinions of this office have stated that the Welden holding would apply in such cases. See Op.Att'yGen. #79-12-10, Op.Att'yGen. #75-6-5. The 1979 opinion of the Attorney General noted that one of the attempted vetoes invalidated in Welden was of a provision which was designed to insure that monies expended by various social service institutions could not be increased by § 8.39 transfers. That opinion went on to state:

> If the Governor may not item-veto a provision which purports to prevent augmentation of appropriations pursuant to the mechanism established in § 8.39, it logically follows that an attempt to veto a provision limiting transfer of appropriated funds for other purposes pursuant to § 8.39 is also invalid.

Nor is this veto saved by the fact that it is a veto of an entire section rather than of a condition within a section. One of the vetoes invalidated in Welden was of an entire section within a bill. See 229 N.W.2d at 709.

Neither is this a case like State ex rel. Turner v. Iowa State Highway Comm'n, 186 N.W.2d 141 (Iowa 1971). In that case an attempted veto was approved by the court because the veto was of a provision that was separate and severable from the rest of the bill.

> It should be noted Section 5 places no prohibition against the use of any moneys appropriated by the act . . . [State ex rel. Turner v. Iowa State Highway Comm., 186 N.W.2d, at 150, emphasis added, (Iowa 1971)].

As subsequently explained in Welden, "The appropriation did not appear dependent upon inclusion of [that section] in the bill." 229 N.W.2d at 714.

That is plainly not the case here. The vetoed section directly referred to and conditioned the appropriation of monies for medical services, and thus can hardly be said to be separate and severable from the appropriation.

Nor is this case similar to the one in Op.Att'yGen. #75-9-4, where an item-veto was approved by the previous Attorney General. There the veto was of an entire appropriation, not just a condition on that appropriation.

As noted in Op.Att'yGen. #79-12-10, and as asserted by the Governor as justification for the item veto discussed here, we are not unmindful of the potential difficulties for the Executive and the "need for flexibility in these unsettled economic and Federal budgetary times". Our task, however, is to interpret the law. We believe the language approved in Welden, supra, controls this case also:

> Where the Governor attempts to item veto language qualifying an appropriation or directing the method of its uses, he exceeds the constitutional authority vested in him, and his objection to such paragraph, or portion of a bill, or language qualifying an appropriation, or directing the method of its use, becomes ineffective. [Welden, supra, at 712, citing Furmore v. Lane, 104 Tex 499, 511-512, 140 S.W. 405, 412].

Applied to the present case, the Welden holding would require the Governor to veto not only the condition on the appropriation (§ 93) but also the appropriation itself (§ 94).

An analogous result was reached in Opinion of the Justices to the Governor, 370 N.E.2d 1350, 1352 (Mass. 1977):

> Item 1120-2000 is rewritten by § 2 of the present bill. No new money is added; the new item concludes, "prior appropriation continued." By § 5 the same item is "further amended" by inserting additional restrictive language. In our opinion, these provisions in substance and effect strike out item 1120-2000 in the precise form previously enacted and add a single new item under the same heading, incorporating the changes made by both § 2 and § 5. . . . The Governor can not remove restriction thus imposed unless he disapproves the entire new item.

We might mention, at this point, that we would have a different case if the legislature were ever, after making an appropriation, to subsequently pass an Act imposing a condition on the appropriation but not rewriting the appropriation itself. In such a case it would be literally impossible to follow the Welden holding since there would be no appropriation to veto along with the condition. It is the opinion of this office that such legislation would constitute a "legislative evasion of the governor's authority to veto distinct items". Cf. Welden, 229 N.W.2d at 714; though this discussion relates to a factually different legislative attempt to evade the Governor's item-veto power, we think it clear that it, nevertheless, indicates a general judicial disapproval of any such "legislative evasion". We think it equally clear that an attempt to insulate a condition on an appropriation from executive veto by passing it after the appropriation itself has passed beyond the veto power constitutes such an attempt at "legislative evasion":

> If the Governor could not veto such a new item the way would be open for evasion of the item veto by a two-step process. The Legislature could first make a noncontroversial appropriation. Once that was enacted, it could then insert the controversial restriction as a separate section in an essentially supplementary appropriation bill. The very vice of "log-rolling" against which the item veto is a safeguard would be reintroduced.

Opinion of the Justices to the Governor, 370 N.E.2d at 1352.

For the preceding reasons, this office concludes that Governor Ray's item veto of § 93 was not within his constitutional authority.

Sincerely yours,

Mark Hunacek

Mark Hunacek
Assistant Attorney General

MH/kap

TAXATION: Legal Assistance for the Assessor and Board of Review in Litigation Dealing with Assessments. Iowa Code §441.41 (1981). Taxing bodies, such as a school district, interested in the taxes received from a city assessing jurisdiction's assessments cannot be required to aid or assist the city legal department in litigation dealing with such assessments. (Kuehn to Mike Connolly, State Representative, 9/20/82) #82-9-16(L)

September 20, 1982

Honorable Michael W. Connolly
State Representative
State of Iowa
3458 Daniel
Dubuque, IA 52001

Dear Representative Connolly:

You have requested an opinion of the Attorney General concerning the responsibilities, if any, of the various taxing bodies (such as the Dubuque Community School District and Dubuque County) to aid or assist the Dubuque City Legal Department in litigation involving assessments made by the city assessor.

Iowa Code §441.41 (1981), states:

> 441.41 Legal counsel.
>
> In case of cities having an assessor, the city legal department shall represent the assessor and board of review in all litigation dealing with assessments. In the case of counties, the county attorney shall represent the assessor and board of review in all litigation dealing with assessments. Any taxing body interested in the taxes received from such assessments may be represented by an attorney and shall be required to appear by attorney upon written request of the assessor to the presiding officer of any such taxing body. The conference board may employ special counsel to assist the city legal department or county attorney as the case may be. (Emphasis added).

Iowa Code §4.1(2) (1981), provides that "words and phrases shall be construed according to the context and the approved usage of the language". Webster's New World Dictionary of the American Language, 307 (2nd College Ed. 1974), defines the word "context" as follows:

> 1. the parts of a sentence, paragraph discourse, etc. immediately next to or surrounding a specified word or passage and determining its exact meaning (to quote a remark out of context) 2. the whole situation background, or environment relevant to a particular event, personality, creation, etc.

It is clear that Iowa Code §441.41 requires the city legal department to represent the city assessor and board of review in all litigation dealing with assessments made by the city assessor. Furthermore, considering the entire context of §441.41, it is equally as clear that other taxing bodies interested in the taxes received from a city assessing jurisdiction's assessments, such as school districts, can only be required to appear during the litigation. If the legislature wanted other taxing bodies to do more than appear on their own behalf, the legislature would have used words other than "may be represented by an attorney and . . . . to appear by attorney" when describing the rights and obligations of such taxing bodies. If the situation arises whereby the city legal department does need assistance in representing the city assessor and board of review in litigation dealing with assessments made by the city assessor, then, the conference board can employ special counsel for this purpose.

There is no need to probe legislative intent because statutory construction is properly invoked only when the statute contains such ambiguities or obscurities that reasonable minds may disagree or be uncertain as to their meaning. State v. Schlemme, 301 N.W.2d 721, 723 (Iowa 1981); Hartman v. Merged Area VI Community College, 270 N.W.2d 822, 825 (Iowa 1978); Iowa Nat'l Indus. Loan Co. v. Iowa State Dep't of Revenue, 224 N.W.2d 437, 440 (Iowa 1974). There are no ambiguities or obscurities concerning the responsibilities of the city legal department. It must represent the city assessor and board of review in all litigation dealing with assessments made by the city assessor and, further, the responsibility of the attorney for the other taxing bodies, such as the school district or county, is to appear on behalf of the taxing body that he or she represents, if requested to do so. There is no requirement that the attorney for other taxing bodies represent the city assessor or board of review or assist the city legal department in representing the city assessor or board of review.

In summary, Iowa Code §441.41 states that the city legal department must represent the city assessor and board of review in all litigation dealing with assessments made by the city

assessing jurisdiction. The county attorney must do the same for the county with regard to assessments made by the county assessing jurisdiction. If either the city legal department or the county attorney needs assistance, the conference board can employ special counsel for that purpose. Taxing bodies interested in the taxes received from such assessments are represented by their own attorney who makes an appearance on behalf of the taxing body.

Based upon the foregoing, it is the opinion of the Attorney General that taxing bodies (such as the Dubuque Community School District and Dubuque County) cannot be required to aid or assist the Dubuque City Legal Department in litigation involving assessments made by the city assessor.

Very truly yours,

Gerald A. Kuehn
Assistant Attorney General

CRIMINAL LAW: UNIFORM CITATION AND COMPLAINT: CRIMINAL PENALTY SURCHARGE: Iowa Code § 805.6 (1981); 1982 Iowa Acts, H.F. 2493, §§ 1-3. A criminal penalty surcharge shall be imposed on certain law violators who are subject to the uniform citation and complaint procedure. Thus the ten percent additional penalty should be added where applicable to the total amount of fines or forfeitures imposed and so designated on the Uniform Citation and Complaint. (Foritano to Meyer, Judicial Magistrate, 9/15/82) #82-9-15(L)

September 15, 1982

Vivian P. Meyer
Judicial Magistrate
Third Floor
Post Office Building
Keokuk, Iowa 52632

Dear Judge,

You have requested the opinion of this office concerning the application of the new criminal penalty surcharge, 1982 Iowa Acts, H.F. 2493, § 1-3. The question posed is whether the new surcharge should be totaled with the scheduled fines and forfeitures by officers in the field and included on the Uniform Citation and Complaint.

An answer to your question requires a brief analysis of the relationship between Iowa Code chapter 805 (citations in lieu of arrest) and the new criminal penalty surcharge. (For a more detailed analysis of chapter 805 see 1980 Op. Att'y Gen. 684 (Uniform Citation and Complaint: Willful Injury)). Chapter 805 establishes the authorization and mechanism for police citations as a substitute for arrest. The purpose of this chapter is to implement an expeditious system for the disposition of relatively minor offenses.

Oftentimes under this procedure a conviction is had without requiring the defendant to appear in court. The procedure established allows a defendant to be released on his or her own recognizance after making a written promise to appear and posting bond, Iowa Code § 805.6(1)(b-c) (1981), or signing an admission of the violation and mailing

"the citation and complaint, together with the minimum fine for the violation" plus costs to the appropriate office. Iowa Code § 805.9 (1981) (admission of scheduled violations). The failure to appear under the first alternative will result in the forfeiture of the bond posted "in satisfaction of the penalty plus court costs." Iowa Code § 805.6(1)(b) (1981). If the defendant admits the violation and pays the fine under the second alternative, he need not appear at all. Iowa Code § 805.9(1) (1981). Both the forfeiture and the admission constitute a conviction for the scheduled violation.

The criminal penalty surcharge is assessed whenever the "court imposes a fine or forfeiture for a violation of a state law, or of a city or county ordinance except an ordinance regulating the parking of motor vehicles." 1982 Iowa Acts, H.F. 2493, § 2. Because this penalty applies to certain traffic and scheduled violations to which the uniform citation and complaint procedure are applicable, and the defendant does not have to appear thereunder, the surcharge must be assessed by the officers issuing the uniform citation and complaint. This allows a defendant who admits the violation to pay the full penalty therefor and also gives notice of the total liability to those who may later forfeit their bond for nonappearance.

In conclusion, the ten percent criminal penalty surcharge should be incorporated into the total amount due and designated on the Uniform Citation and Complaint.

Sincerely,

Steven M. Foritano

STEVEN M. FORITANO
Assistant Attorney General

SMF:mlr

COUNTIES: Exchange of Property. Iowa Code § 331.361(2) (1981). A county may exchange real property owned by the county with any party, including a private individual or a governmental body, pursuant to Iowa Code § 331.361(2) (1981). A county may also exchange personal property with any party pursuant to its grant of home rule authority. (Weeg to Heitland, Hardin County Attorney, 9/15/82) #82-9-14(L)

September 15, 1982

Jon Heitland
Hardin County Attorney
P. O. Box 237
Iowa Falls, Iowa 50126

Dear Mr. Heitland:

You have requested an opinion of the Attorney General concerning the interpretation of Iowa Code § 332.3(13) (1981) relating to a county's authority to trade unneeded personal property. In particular, you ask whether this section authorizes the county to trade property with a private individual, or whether this section limits the county's authority to trade only with another governmental body. It is our opinion that a county is now authorized to trade county property that is no longer needed for county purposes with any party, be it private individual or other governmental body.

Section 332.3 formerly provided:

> The board of supervisors at any regular meeting shall have power:
>
> * * *
>
> When a building, real estate or other property is no longer needed for the purposes for which it was acquired by the county, to convert it to other county purposes, to trade it with another governmental body, or to sell or lease it. In disposing of an interest in real property by sale, by lease for a term of more than three years or by gift, the following procedures shall be followed:

> a. The board shall set forth its proposal in a resolution and shall publish at least one notice in a newspaper of general circulation in the county not less than four nor more than twenty days before the date set for the time and place of a public hearing on the proposal.
> b. After the public hearing, the board may make a final determination on the proposal by resolution. [Emphasis added.]

* * *

This section by its express terms authorized the county to, inter alia, trade unneeded county property, real or personal, with another governmental body. There was no authorization for trading that property with a private individual.

However, Iowa Code Chapter 331 (1981), the new County Home Rule Act, amended numerous provisions relating to county government, effective July 1, 1981. Specifically, in Part 4 of the new Act, which relates to the duties and powers of the supervisors relating to county property, the Legislature replaced § 332.3(13) with § 331.361(2), which provides:

> In disposing of an interest in real property by sale or exchange, by lease for a term of more than three years, or by gift, the following procedures shall be followed, except as otherwise provided by state law:
> a. The board shall set forth its proposal in a resolution and shall publish notice of the time and place of a public hearing on the proposal, in accordance with section 331.305.
> b. After the public hearing, the board may make a final determination on the proposal by resolution. [Emphasis added.]

While former § 332.3(13) contained an express limitation on the county's authority to trade county property, no such limits are contained in § 331.361(2). Consequently, it is our opinion that the county is authorized to exchange county property with any party it so chooses, provided that the procedural requirements contained in § 331.361(2)(a) and (b) are complied with.

However, we note that § 331.361(2) expressly applies only to the exchange of real property, while former § 332.3(13) applied to buildings, real estate, "or other property." We can find no other statutory provisions that relate to the procedures by which the county may dispose of items of personal property. Consequently, it is our opinion that the county is authorized, under the grant of home rule authority, to exchange unneeded county property with any party, including a private individual or a governmental body. See Iowa Constitution, article III, § 39A.

In conclusion, a county may exchange real property owned by the county with any party, including a private individual or a governmental body, pursuant to Iowa Code § 331.361(2) (1981). A county may also exchange personal property with any party pursuant to its grant of home rule authority.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:sh

COUNTIES; Taxation of real property, Certificates of purchase. Iowa Code Chs. 446, 447, and 448 (1981); Iowa Code §§ 446.18, 446.19, 446.29, 446.31, 446.37, 447.9, 448.1, 569.8 (1981). There is no statutory requirement that a county which holds a certificate of purchase for property obtained at a scavenger tax sale must act within a designated period of time to obtain a tax deed. However, in some circumstances a county's unreasonable delay in obtaining a tax deed in order to avoid liability for property which is not properly maintained may subject the county to tort liability. (Weeg to Maher, Fremont County Attorney, 9/15/82) #82-9-13(L)

September 15, 1982

Mr. Richard B. Maher
Fremont County Attorney
Sidney, Iowa 51652

Dear Mr. Maher:

You have requested an opinion of the Attorney General concerning a county's responsibilities under Iowa Code Chapters 446, 447, and 448 (1981). In particular, you ask whether a county which is required to purchase property at a scavenger tax sale pursuant to §§ 446.18 and 446.19 may indefinitely postpone obtaining a tax deed to that property, and in so doing avoid liability for accidents occurring on that property.

We first briefly review the relevant Iowa law concerning the sale of property on which taxes are delinquent. First, Ch. 446 establishes procedures by which a tax sale is held. Specifically, in the event a particular piece of property has been offered for sale for two years or more, a scavenger sale is held. Section 446.18. If no bid is received, or if that bid does not equal the total amount of delinquent taxes and costs due, the county is required to bid for the property in an amount equal to those taxes and costs. Section 446.19. No money is paid in the event of such a county bid. Id.

Following the tax sale, the treasurer is to deliver a certificate of purchase to the purchaser, which could be the county. Section 446.29. However, a tax sale certificate holder has no interest in the property sold, and obtains no title or right of possession to the property until a tax deed is issued. Currington v. Black Hawk County, 184 N.W.2d 675, 676 (Iowa 1971). Instead, the certificate holder, prior to the issuance of a tax deed, has only an inchoate right or lien which ripens into title upon compliance with subsequent statutory requirements. Moffitt v. Future Assurance Associates, Inc., 258 Iowa 1160, 1169, 140 N.W.2d 108, 113 (1966).

These requirements are found in part in Ch. 447, which contains procedures by which a property owner may redeem property sold at a Ch. 446 tax sale. In particular, after the expiration of nine months from the date of a scavenger sale, the certificate holder may serve upon the property owner a notice of expiration of right of redemption notifying the property owner that if the property is not redeemed within ninety days, the right of redemption expires and a tax deed may be issued to the certificate holder. Section 447.9. In order to redeem, the property owner is required by § 447.1 to pay all delinquent taxes and other costs due on the property.

However, if within five years from the date of any tax sale a certificate holder has not properly served the notice of expiration of right of redemption, the tax sale is cancelled pursuant to § 446.37. This cancellation provision clearly applies to private parties who are certificate holders. However, in 1946 Op.Att'yGen. 114 we held that if the county is the certificate holder, the sale shall not be cancelled. That opinion reasoned that the statutory cancellation provisions do not expressly apply to the state or its political subdivisions, and further, that:

> Purchase by the county at a public bidder sale is a method of collecting the tax. No money is paid, and the transaction is a mere bookkeeping item. In the acquisition by the county, the county acts as a trustee for all taxing bodies. To cancel such sale after an elapse of years according to the terms of the statute, would impede the county in the collection of its taxes and adversely affect not only the county but

> all taxing bodies by and through the county. . . .[1]

This opinion was recently affirmed in 1977 Op.Att'yGen. 233.

The final requirements for obtaining a tax deed, and consequently full legal title to the property, are contained in Ch. 448. Most importantly, after ninety days has passed from the date of completed service of the notice of expiration of right of redemption, the county treasurer must issue a deed for the property in question. Section 448.1.

In the present case, Fremont County was required by § 446.19 to purchase a piece of property at a scavenger tax sale. You describe that property as a "health hazard" which "presents a number of dangers to passersby," and state that the property owners refuse to repair these hazards. As a result of the sale and pursuant to § 446.29, the county holds a certificate of purchase to the property. However, the county is unwilling to take the further steps necessary to obtain a tax deed and relies on the fact that, as the certificate holder, the county has no legal liability for maintaining the property; instead that liability remains with the property owner until the county is issued a tax deed. Currington v. Black Hawk County, supra, 184 N.W.2d at 676 (county which held a certificate of purchase but not a tax deed to certain property was not liable under doctrine of attractive nuisance to child who sustained injury on that property). However, once the county obtains the deed, it assumes legal title to the property along with liability for damages incurred as a result of existing hazards.

Consequently, you ask whether the county may avoid liability by indefinitely postponing serving the notice of expiration of right of redemption pursuant to § 447.9, thereby postponing obtaining the tax deed pursuant to § 448.1. If such a delay is legal, you ask if there are any time limits for such a delay. It is our opinion that although

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[1] However, 1946 Op.Att'yGen. 114 concluded with the following statement:

> This Opinion is not to be taken as approving any delay upon the part of the Counties in converting their tax sale certificates secured under the public bidder law into tax titles.

there is no statutory requirement that the county serve notice and obtain a deed as set forth above, the county's failure to act within a reasonable period of time to secure a tax deed may subject the county to tort liability.

The provisions of §§ 446.18 and 446.19 relating to a county's purchase of property at a scavenger tax sale are mandatory in nature, but by comparison the language of § 447.9 relating to service of notice of expiration of right of redemption is permissive in nature. Consequently, there is no express statutory requirement that any certificate holder must take the additional steps necessary to obtain a tax deed; such action is discretionary. However, a separate statutory provision states that a certificate holder must serve notice within five years or else the tax sale is nullified. Section 446.37. This section thus effectively establishes a five year time period within which action to obtain a deed must be taken, but as we have previously noted, § 446.37 does not apply when the county is the certificate holder. 1946 Op.Att'yGen. 114; 1977 Op.Att'yGen. 233.

Thus, it is our opinion that as a matter of property law, the county is not obligated by statute to serve a redemption notice within any given time period, and therefore the county could, as a technical matter, indefinitely postpone obtaining a tax deed. However, a separate question arises as to whether a county's delay in obtaining that deed is so unreasonable as to give rise to a cause of action in tort against the county in the event the property is not maintained and injuries are subsequently sustained. While the original property owner retains legal title to, and therefore liability for, the property until a tax deed issues, Currington v. Black Hawk County, supra, there may be situations in which that rule is inapplicable, e.g., when the property has been abandoned. It is in such a case as this that the county risks the possibility of a tort action against it for its failure to act within a reasonable time in obtaining title to the property, particularly if it were shown that the county's failure to act was prompted solely by its reluctance to assume liability despite its knowledge of existing hazards on the property.

While we believe it is important to raise the possibility of tort action against the county in some circumstances, we are unwilling to speculate further on this matter, recognizing that any further questions would involve facts not at issue

in the present case. In concluding, however, we note that in the event the county does acquire a tax deed to the property in question, it may offer the property for sale at a public auction. Iowa Code § 569.8 (1981). Alternatively, § 446.31 authorizes the county to assign the certificate of purchase after the county holds the certificate for one year.

In sum, there is no statutory requirement that a county which holds a certificate of purchase for property obtained at a scavenger tax sale must act within a designated period of time to obtain a tax deed. However, in some circumstances a county's unreasonable delay in obtaining a tax deed in order to avoid liability for property which is not properly maintained may subject the county to tort liability.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

GARNISHMENT: Iowa Code section 642.21 (1981); Consumer Credit Protection Act, Title III, 15 U.S.C. § 1671. Amounts due to an independent contractor are not subject to the garnishment limitations of § 642.21 unless payment due is for personal services and payment is due pursuant to an employer/employee relationship. The actual substance of the relationship between the parties controls in determining whether an individual is an employee or an independent contractor, not the labels attached or words used to describe the relationship. (McFarland Lura, State Senator, 9/14/82) #82-9-12(L)

September 14, 1982

The Honorable Mick Lura
State Senator
911 S. Eleventh Avenue
Marshalltown, Iowa 50158

Dear Senator Lura:

You wrote on June 8, 1982, requesting an opinion from this office on whether the garnishment limitations found in Iowa Code section 642.21 (1981), apply to payments owed to independent contractors. Section 642.21 provides in full as follows:

> 1. The disposable earnings of an individual shall be exempt from garnishment to the extent provided by the federal Consumer Credit Protection Act, Title III. The term "Consumer Protection Act" means the Act of Congress approved May 29, 1968, 82 Stat. 163, officially cited as the "Consumer Credit Protection Act, Title III." The maximum amount of an employee's earnings which may be garnished during any one calendar year is two hundred fifty dollars for each judgment creditor, except as provided in section 627.21.
>
> 2. No employer shall:
>
> a. Withhold from the earnings of an individual an amount greater than that provided by law.
>
> b. Dispose of garnished wages in any manner other than ordered by a court of law.

> c. Discharge an individual by reason of his earnings having been subject to garnishment for indebtedness.
>
> d. Be held liable for an amount not earned at the time of the service of notice of garnishment or for the costs of a garnishment action.
>
> 3. For the purpose of this section:
>
> a. The term "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.
>
> b. The term "disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld. [Emphasis supplied].

The above statute applies only to earnings resulting from personal services performed in employer/employee relationships. If compensation flowing to an independent contractor involves items that are not compensation for personal services, such as reimbursement for equipment, return on capital, and payment for services performed by employees, that compensation does not fall within the ambit of section 642.21. See e.g., Coward v. Smith, 636 P.2d 793 (Kan. App. 1981), which construes a Kansas statute almost identical to section 642.21.

Similarly, if money due to an independent contractor does not result from an employer/employee relationship, those amounts are not subject to the protections of section 642.21. In determining whether an individual is an employee or an independent contractor, the actual substance of the relationship between the parties controls, not the labels attached or words used to describe the relationship. The Iowa Supreme Court has established a general test for distinguishing "employees" from "independent contractors" in a series of cases where employer liability for personal injury was in issue. Greenwald v. Meredith, (Iowa 1971). According to the Court, control of the physical conduct of the work is the determinative factor in distinguishing employees from independent contractors:

> If this control is vested in the person giving the service, he is an independent contractor; if it is vested in the employer, then the person rendering the service is an employee.

Id. at 905.

Although no reported Iowa decisions construe section 642.21 with regard to scope, several state and federal courts have construed the Consumer Credit Protection Act, Title III, 15 U.S.C. § 1671, which is incorporated by reference in 642.21. Courts have agreed after citing expressions of congressional intent that the primary purpose of that Act was to protect wage earners in employer/employee relationships by eliminating an essential element in the predatory extension of credit which often causes disruption of employment and an increase in personal bankruptcies. Kokoska v. Belford, 417 U.S. 642, 41 L.Ed.2d 574, 94 S.Ct. 2431, (1974); Gerry Elson Agency v. Muck, 509 S.W. 2d 750 (Mo. App. 1974).

In Muck, the Missouri Court of Appeals held that a judgment debtor who leased trucks from and contracted for hauling goods with the garnishee, did not "come within the descriptive ambit of a wage earner whose income and employment would be jeopardized by burdensome garnishments or bankruptcy." Muck, supra, at 755. In reaching that conclusion, the Court stated that the judgment debtor's relationship with the garnishee was neither a traditional employer/employee relationship nor a true lease or rental situation, and that their relationship partook of elements of an independent contractor relationship.

In conclusion, money due to an independent contractor would not be subject to the protections of section 642.21 unless payment is for personal services and payment is due pursuant to an employer/employee relationship.

Sincerely,

Patricia J. McFarland

PATRICIA J. McFARLAND
Assistant Attorney General

PJM:sh

STATE OFFICERS: Review of corporate public affairs leave of absence policy. Sections 56.29, 722.1, 722.2, 68B.2(9), 68B.5, Iowa Code (1981). Leave of absence or time-off policy under which employees are given leaves of absence or time off with benefits under certain circumstances to hold public office may be lawful, dependent upon a factual determination. (Swanson to Stromer, Speaker of the House of Representatives, 9/13/82) #82-9-11(L)

The Honorable Delwyn Stromer
Speaker of the House
House of Representatives
State Capitol
Des Moines, Iowa 50319
L O C A L

September 13, 1982

Dear Representative Stromer:

You have requested an opinion of the Attorney General regarding the legality of a corporate public affairs leave of absence policy.

The policy may be summarized as follows: For employees willing to make a personal sacrifice of working in political campaigns or of serving in elective or appointive public office, the company would accommodate the demands of such participation in accordance with certain time off or leave of absence practices. Such employees participating in the political process pursuant to the policy would not act for or on behalf of the company, and each employee so engaged would not purport to represent the company or speak for it.

For part-time elective offices which pay less than the amount an employee would lose on an "absent without pay basis" the company would make up the difference up to one-half day per week, not to exceed 20 days per year. Where the elective office pays more than the prorated basic company wages of the employee, the company would provide excused absence without pay.

For temporary full-time elective or appointive offices, the employee would receive salary from the company in an amount which when added to the compensation received as an office-holder would equal the basic wage the employee would have received had leave not been taken. Company employment benefits would continue during the period of leave, with certain exceptions.

The "make-whole" benefits described in the policy would not apply to full-time elective or appointive offices, such as Governor, U. S. Representative, State Labor Commissioner, etc.

We have examined the policy in light of several Iowa statutes which generally address themselves to this subject matter. Section 722.1, Iowa Code (1981) provides, in part, as follows:

> A person who offers, promises or gives anything of value or any benefit to any person who is serving or has been elected, selected, appointed, employed or otherwise engaged to serve in a public capacity . . . pursuant to an agreement or arrangement or with the understanding that the promise or thing of value or benefit will influence the act, vote, opinion, judgment, decision or exercise of discretion of such person with respect to his or her services in such capacity commits a class "D" felony.

Similarly, Section 722.2, Iowa Code (1981), prohibits the acceptance of such thing of value or benefit. It cannot be said here that the time-off or leave-of-absence policy in any way would constitute an agreement, arrangement, or understanding that any person's vote, opinion, judgment, decision or exercise of discretion will be influenced. A review of common law interpreting this statute has revealed no case which would declare the policy contrary to law in this regard.

Section 68B.5, Iowa Code (1981), provides as follows:

> An official, employee, local official, local employee, member of the general assembly, candidate or legislative employee shall not, directly or indirectly, solicit, accept, or receive a gift having a value of fifty dollars and more in any one occurrence. A person shall not, directly or indirectly, offer to make any such gift to an official, employee, local official, local employee, member of the general assembly, candidate or legislative employee which has a value in excess of fifty dollars in any one occurrence.

Violation of the provisions of this statute renders one guilty of a serious misdemeanor. Section 68B.8, Iowa Code (1981). Since this is a criminal statute, it is subject to strict construction. State v. Kool, 212 N.W.2d 518 (Iowa 1973). A penal statute must give a person of ordinary intelligence fair warning of what is prohibited, and in order to avoid arbitrary and discriminatory enforcement, it must provide an explicit standard to law enforcement personnel. State v. Price, 237 N.W.2d 813 (Iowa 1976), appeal dismissed, 426 U.S. 916, 96 S.Ct. 2619, 41 L.Ed.2d 370.

We find no clear prohibition of the arrangement described above. There is no "fair warning of what is prohibited" nor is there an "explicit standard", which would clearly bring an employer's leave of absence (with compensating pay) policy within the statutory prohibition.

The term "gift" is defined in Section 68A.2(9) as "a rendering of money, property, services, discount, loan forgiveness, payment of indebtedness, or anything else of value in return for which legal consideration of equal or greater value is not given and received."

Payment of a salary differential is not necessarily something "of value in return for which legal consideration of equal or greater value is not given and received." The employer may receive the benefit of retention of a trained and experienced employee. Further, the employer may receive an indirect benefit from the good will generated by allowing its employees to serve in public office under this arrangement. This can be compared to the paid leaves some employers provide for employees to work full time on charitable solicitation campaigns or other community projects. Another analogous situation is paid jury leave which many employers voluntarily provide. This policy is in the public interest and supports good citizenship by employees.

From a legal perspective, these types of benefits to the employer which would qualify as "consideration" within the meaning of the statute and, if present in a particular context, would mean that this arrangement is not a "gift" under § 68B.2(9). Whether these benefits are present in a particular context would be a question of fact to be determined in the particular circumstances involved. However, if the employer believes these benefits accrue to the firm and if, as in the example given, the policy applies to a broad cross section of employees and the employee is not expected to take positions on issues beneficial to the firm, we believe it quite unlikely that it could be established as a factual matter that no "consideration" to the firm supports the arrangement.

Having reviewed the policy and applicable law, we find no violation of Iowa law. However, a factual determination must be made in each instance. We would conclude by cautioning that any employee in this type of arrangement should be cognizant of the potential for the appearance of conflicts of interest and should disqualify himself or herself from action on policy matters directly affecting the employer, as opposed to the public generally.

Yours very truly,

Gary H. Swanson

GARY H. SWANSON
Assistant Attorney General

GHS:sh

MUNICIPALITIES: Zoning; Nonconforming uses. Iowa Code Chapter 135D (1981); Iowa Code §§ 414.1 and 414.2 (1981). A municipality has the power expressly granted by statute to enact ordinances regulating and restricting the location of mobile homes within its boundaries. Replacement of a mobile home, as a nonconforming structure which has become unusable from natural deterioration, is not permissible. But in the absence of any prohibitory provision, a mobile home may be restored after being damaged or destroyed by fire, storm, or other calamity. (Walding to Nystrom, State Senator, 9/7/82) #82-9-10(L)

September 7, 1982

The Honorable John N. Nystrom
State Senator
P.O. Box 177
Boone, Iowa 50036

Dear Senator Nystrom:

We are in receipt of your request for an opinion of the Attorney General regarding municipal zoning ordinances. As can be discerned from a letter addressed to you by the city attorney of the City of Boone, the focus of the request is twofold. First, we have been asked whether a municipality has the power to enact ordinances regulating and restricting the location of mobile homes within its boundaries. The second issue presented is whether a mobile home, as a nonconforming structure, can be replaced or restored.

The events which give rise to the request are as follows. The City of Boone passed an ordinance providing for mobile home park district standards. See CITY OF BOONE, IA ORDINANCES Art. X (1981). Section 3.1(b) of that ordinance states that, "No mobile home may be used for any residential purpose either transiently or permanently unless located in a mobile home park or in the R-4 District. Mobile homes set for occupancy must be placed in an approved mobile home park." Id. Mobile homes located outside approved mobile home parks at the time of the ordinance's enactment, because of the

nonconforming use doctrine, are not required to honor the foregoing provision. With the passage of time, however, the mobile homes excepted from coverage of the section will deteriorate. An owner of such a mobile home has indicated an intent to replace the original structure. The city questions the propriety of such action. At the same time, presumably in the hypothetical, the city questions the propriety of restoring an exempt mobile home damaged or destroyed by fire, storm, or other calamity.

I. REGULATION OF MOBILE HOMES.

Attention is now directed to your first question, whether a municipality can regulate and restrict the location of mobile homes within its boundaries. A response to that inquiry can be gleaned from a trilogy of caselaw, legislation, and a legal encyclopedia. First, the Iowa Supreme Court has held that municipalities are expressly granted by statute the power to enact ordinances regulating trailer parks. Huff v. City of Des Moines, 244 Iowa 89, 56 N.W.2d 54 (1952). Regulation and restriction of trailer parks by municipalities constitutes a legitimate exercise of police power. Id. Additionally, Iowa Code § 414.1 (1981), provides:

> For the purpose of promoting the health, safety, morals, or the general welfare of the community or for the purpose of preserving historically significant areas of the community, any city is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

Iowa Code § 414.2 (1981) authorizes a municipality to divide the city into districts. Inspection and regulation of mobile homes and parks are provided for in Iowa Code Chapter 135D (1981). Finally, 101A C.J.S. Zoning and Land Planning § 62 (1979) states that, "A municipality may regulate the location of trailers and mobile homes within its boundaries." [Footnotes omitted] Accordingly, it is our judgment that a municipality has the power expressly granted by statute to enact ordinances regulating and restricting the location of mobile homes within its boundaries.

It should be noted, however, that such ordinances are not without restrictions. A zoning ordinance which absolutely excludes the establishment of a mobile home within its borders is invalid. Id. Equally, the restriction of mobile homes to mobile home parks is not permitted if unrea-reasonable. Id.

II. NONCONFORMING USE.

An ordinance prohibiting a continuation of an existing use or structure within a zoned area is unconstitutional as taking property without due process of law and as an unreasonable exercise of the police power. See 82 Am. Jur.2d, Zoning and Planning, § 210 (1976). Thus, nonconforming uses are exempt from such ordinances. A "nonconforming use," in the law of zoning, describes a lawful use of premises existing on the effective date of a zoning regulation and continued thereafter, which does not conform to the regulations. See 82 Am. Jur.2d, Zoning and Planning, § 178 (1976). It should be emphasized that a "nonconforming use" comprehends the physical characteristic, dimensions, and location of a structure as well as the functional use thereof. Id.

Although it may be a constitutional requirement that nonconforming uses be protected from the retroactive effect of zoning regulations, such uses are not favored in the law. See 82 Am. Jur.2d, Zoning and Planning, § 179 (1976). The principal objection to nonconforming uses is that they detract from the effectiveness of a comprehensive zoning plan. Id. Thus, the policy of the law and the spirit of zoning favor the gradual and eventual elimination of nonconforming uses.

The elimination of nonconforming uses may be accomplished, among other methods, by curtailing the replacement and restoration of nonconforming uses and structures. Inquiry has been made as to whether a mobile home, as a nonconforming structure, can be replaced or restored. Attention is first drawn to the issue of replacement of a nonconforming structure.

A. Replacement of Nonconforming Structures.

The right of a nonconforming user to replace a structure is addressed by legal commentator Professor Robert M. Anderson. Initially, he discusses the rule restricting extension of nonconforming uses in these terms:

> The right to continue a nonconforming use does not include the right to extend or enlarge it. This appears to be the rule whether or not the municipal corporation has adopted an ordinance which specifically limits the right of a nonconforming user to enlarge or extend his use, since, without reference to express language, the courts have held that expansion of a nonconforming use offends the spirit of zoning regulations. [Footnotes omitted]

1 Anderson, American Law of Zoning, § 6.42 (2d Ed. 1976). In the succeeding section, Professor Anderson observes that:

> Construction of a new building is usually regarded as a prohibited extention or enlargement of a nonconforming use. A nonconforming use is extended when an old building is torn down and replaced with a larger building, one that is more modern than the old, or one erected on a different portion of the lot. A nonconforming building which collapses due to wear may not be replaced. To construct a new building would be to extend the use. [Footnotes omitted]

1 Anderson, American Law of Zoning, § 6.43 (2d Ed. 1976). Clearly then, Professor Anderson contends that replacement of a decayed, dilapidated, or absolute nonconforming structure would extend the use and, therefore, is not permissible.

The issue of replacement of a nonconforming structure is also addressed in 82 Am. Jur.2d, Zoning and Planning, § 209 (1976). It states that:

> Where the nonconformity consists in the character of the structure, apart from the use to which it is devoted, the right to make repairs has generally been limited to such as are merely routine or ordinary and which would not result in the extension of the normal life of the structure, and the replacement of a structure which has become unusable from natural deterioration has been held not permissible. Where the nonconformity consists in the use rather than in the structure, the right to the continuance of such use has in some cases been treated as the principal desideratum, and it has been held that such repairs or replacements as

> may be necessary to preserve such right are permissible where the nonconforming use is not thereby enlarged. [Footnotes omitted]

Id. A distinction is drawn, therefore, between a nonconforming structure, apart from the use, and nonconformity consisting is the use rather than the structure. In the former, replacement of a nonconforming structure which has become unusuable from natural deterioration is held not to be permissible. Replacements are permissible in the latter case.

It is our opinion that the nonconformity in question consists in the character of the structure, apart from the use. Our analysis is threefold. First, section 3.1(b) of the ordinance is restricted to the location of mobile homes. CITY OF BOONE, IA ORDINANCES Art. X, § 3.1(b) (1981). Second, the ordinance does not affect the use of the area. Id. For instance, if the area is zoned for single-family residents, that use continues after the elimination of the nonconforming structure. Finally, the Wisconsin Supreme Court, in a case concerning the replacement of a mobile home in lieu of a provision prohibiting structural alterations in excess of fifty percent of the assessed value, treated a mobile home as a structure. See County of Columbia v. Bylewski, 288 N.W.2d 129 (Wis. 1980). Accordingly, it is our judgment that replacement of a mobile home, as a nonconforming structure which has become unusable from natural deterioration, is not permissible.

B. Restoration of Nonconforming Structures.

A different result, however, is reached as to permissibility of restoring a mobile home which has been damaged or destroyed by fire, storm, or other calamity. According to 82 Am. Jur.2d, Zoning and Planning, § 210 (1976):

> [T]he effect of a casualty which substantially destroys a nonconforming structure, or a structure housing a nonconforming use, serves to sever the improvements from the real estate; thus, if the owner of a nonconforming use suffers the destruction of his improvements, he becomes the owner of unimproved property, which may be restricted as to use without a denial of due process. Where there is such a valid restriction, a nonconforming structure which is damaged by calamity to an extent beyond

> that specified in the restriction cannot be repaired or restored; the nonconforming use is thus terminated. The generally accepted doctrine that the law does not favor nonconforming uses forms a part of the logical foundation supporting zoning measures serving to inhibit the right to restore structures damaged by casualty, which are themselves nonconforming or which house nonconforming uses. But in the absence of any prohibitory provisions a nonconforming structure, or a structure devoted to a nonconforming use, may be repaired or rebuilt after damage thereto or the destruction thereof by fire or other casualty. Thus, where such a restriction is enacted or repealed after the damage or destruction of the nonconforming structure but before its restoration, such restoration is not precluded by the restriction. Essentially, therefore, the result in a given case is dependent upon such factors as the existence of a restoration-limitation provision, the precise wording of the restoration limitation when it exists, and the extent of the casualty loss. [Footnotes omitted]

In the same vein, Professor Anderson states that, "The right to continue the use of a nonconforming building which existed prior to the effective date of a restrictive zoning ordinance apparently includes the right to restore it in the event of its destruction." 1 Anderson, American Law of Zoning, § 6.58 (2d Ed.1976). Accordingly, it is our judgment that, in the absence of any prohibitory provision, a mobile home may be restored after being damaged or destroyed by fire, storm, or other calamity.

In summary then, a municipality has the power expressly granted by statute to enact ordinances regulating and restricting the location of mobile homes within its boundaries. Replacement of a mobile home, as a nonconforming structure which has become unusable from natural deterioration, is not permissible. But in the absence of any prohibitory provision, a mobile home may be restored after being damaged or destroyed by fire, storm, or other calamity.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW:ds

cc: Alan C. Schroeder

IOWA CONSUMER CREDIT CODE: Notice of Right to Cure, §§ 537.5110, 537.5111 and 537.7103(5)(e). It is not a prohibited debt collection practice under § 537.7103(5)(e) of the ICCC, Iowa Code 1981, for a creditor to send a mandatory notice of right to cure default under §§ 537.5110 and 537.5111 to the debtor in default even if the creditor knows the debtor is represented on the debt by an attorney whose name and address is known to the creditor. The creditor may change certain language in the form of the notice of right to cure contained in § 537.5111(2) when the debtor is represented by an attorney. (Lowe to Ellins, J.C. Penney Co., Inc., 9/7/82) #82-9-9(L)

September 7, 1982

Mr. Lynn J. Ellins
Midwestern Regional Counsel
J. C. Penney Company, Inc.
999 - 18th Street, #3200
Denver, CO 80202

Dear Mr. Ellins:

This office has received your letter of June 24, 1982, requesting an opinion of the Attorney General on the relationship between Iowa Consumer Credit Code, Article V, Notice of Right to Cure Provision, Iowa Code Section 537.5110, 1981, Iowa Consumer Credit Code, Article VII, Prohibited Practices (Iowa Debt Collection Practices Act), Iowa Code Section 537.7103(5)(e), 1981. Specifically, you asked whether following a default by the debtor, when the creditor knows the debtor is represented by an attorney in connection with the debt, whether the creditor should send the mandatory notice of right to cure to the debtor as is required by § 537.5110, or whether in order to comply with § 537.7103(5)(e), the creditor must send the notice of right to cure to the attorney for the debtor.

Any interpretation of the Iowa Consumer Credit Code (ICCC) must begin with the premise that the ICCC is a remedial statute which is to be liberally construed to effectuate its purposes. The ICCC which contains the Iowa Debt Collection Practices Act, Iowa Code Sections 537.7101 to 537.7103, has several stated purposes. See Section 537.1102(2). The two purposes which are most germane to your inquiry are:

> 1. Section 537.1102(2)(a) to "Simplify, clarify and modernize the law governing retail installment sales and other consumer credit."
>
> 2. Section 537.1102(2)(d) to "Protect consumers against unfair practices by some suppliers, solicitors or collectors of consumer credit, having due regard for the interests of legitimate and scrupulous creditors."

Article V of the ICCC which contains the default provisions at §§ 537.5109 through 537.5111 and which is entitled, "Limitations on Creditors Remedies," serves to protect the consumer-debtor against unfair collection and enforcement practices. As the official Uniform Consumer Credit Code commentary on the default provisions states, default is a term which by its nature is defined by the creditor, therefore its implications must be confined by the law in order to prevent abuse. See C.C.H. Consumer Credit Guide, Vol. 1, Uniform Consumer Credit Code, ¶ 6259.

If a consumer who is in default has a right to cure as defined by § 537.5110(3), then the creditor "shall give the consumer the notice of the right to cure provided in § 537.5111 before exercising any right he may have to enforce." (Emphasis added.) The recommended form of the notice of right to cure is set out in § 537.5111 which states in pertinent part at § 537.5111(3) that: "A creditor gives notice under this part when he delivers the notice to the consumer or mails the notice to him at his residence." (Emphasis Added) In other words, the creditor is not able to take any further action following a default until he has given notice to the consumer. If the creditor does not deliver notice of the right to cure to the consumer, the obligation of the consumer is not enforceable by the creditor. See Section 537.5110(1).

Certain provisions of Article VII of the ICCC, known as the Iowa Debt Collection Practices Act, appear on their face to be in conflict with the notice of right to cure default provisions of Article V of the ICCC. In particular, § 537.7103(5)(e) appears to conflict with § 537.5110 and § 537.5111. Accordingly, it is necessary to apply the general legal principal that code sections which are in pari materia, or related to one another, must be construed and examined in light of their common purpose so as to produce a harmonious body of legislation.

The notice of right to cure provisions of Article V and the prohibited practices provisions of Article VII share the dual purpose of protecting the consumer/debtor from unfair debt collection practices while at the same time providing collection guidelines for the scrupulous creditor. More specifically, §§ 537.5110 through 537.5111 require the creditor to provide the consumer with certain necessary information so that the consumer has sufficient notice that he is in default and sufficient information to remedy the default. In contrast, § 537.7103(5)(e) would ordinarily be directed to a post default situation in which the consumer would presumably already be aware that the obligation was in default.

The purpose of the entire prohibited practices section, § 537.7103, including the specific subsection in question, is to protect the consumer from debt collection methods which are coercive, oppressive, fraudulent, or which generally overreach. If this section of the credit code was read to prohibit the creditor from delivering the mandatory notice of cure to the consumer, then the plain language of the delivery requirements of

§ 537.5110 and § 537.5111 would be rendered meaningless. If the Legislature had intended that the notice of the right to cure be sent to the attorney for the debtor, then the language of § 537.5110 and § 537.5111 would have so stated.

In summary, when § 537.5110 and § 537.7103(5)(e) of the Iowa Consumer Credit Code are read together, it is clear that the mandatory notice of the right to cure should be sent by the creditor to the consumer. A cautious creditor might wish to amend the last line of the recommended form of the notice as set out in § 537.5111(2) to read as follows: "If you have any questions, write or telephone (the creditor) promptly;" however if you are represented by an attorney on this matter, then contact your attorney promptly. Additionally, the creditor could send a carbon copy of the notice to any known attorney for the debtor.

Respectfully submitted,

Linda T. Lowe

LINDA THOMAS LOWE
Assistant Attorney General

cf

MUNICIPALITIES: Police and Fire Pensions. Section 411.6(12)(a), The Code 1981; Acts, 1980 Session, 68th G.A., Ch. 1014, § 33, Acts, 1979 Session, 68th G.A., Ch. 34, § 16. Section 411.6(12)(a), The Code 1981, provides for a single computation of the annual readjustment of pensions, without regard to the date of a member's retirement. (Walding to Running, State Representative, 9/2/82) #82-9-8(L)

September 2, 1982

The Honorable Richard V. Running
State Representative
1905 9th Avenue S.W.
Cedar Rapids, Iowa 51404

Dear Representative Running:

You have requested an opinion of the Attorney General regarding the computation of the annual readjustment of pensions under Ch. 411. Specifically, we have been asked whether § 411.6(12)(a), The Code 1981, provides for separate computations based upon the date of a member's retirement.

Section 411.6(12)(a), The Code 1981, provides in pertinent part:

> Effective July 1, 1980, and on each July 1 thereafter, the monthly pensions authorized in this section payable to retired members and to beneficiaries, except children of a deceased member, shall be adjusted as provided in this paragraph. An amount equal to the following percentages of the difference between the monthly earnable compensation payable to an active member of the department, of the same rank and position on the salary scale as was held by the retired or deceased member at the time of the member's retirement or death, for July of the preceding year and the monthly earnable compensation pay-

> able to an active member of the department of the same rank and position on the salary scale for July of the year just beginning shall be added to the monthly pension of each retired member and each beneficiary as follows . . . .

An examination of the legislative history of § 411.6(12)(a), The Code 1981, is relevant. The section has been the subject of two recent amendments. In 1979, the section was amended to restrict application to members who retired on or after July 1, 1979. See Acts, 1979 Session, 68th G.A., Ch. 34, § 16. A 1980 amendment, however, struck that restrictive language and replaced it with the language as cited above. See Acts, 1980 session, 68th G.A., Ch. 1014, § 33. The effect of that amendment, therefore, was to expand the coverage of that section to all retired members. In addition, it should be noted that the term "retired members," as used in the section, is unqualified by date of retirement. Accordingly, it is our judgment that § 411.6(12)(a), The Code 1981, provides for a single computation of the annual readjustment of pensions, without regard to the date of a member's retirement.

Finally, we have enclosed a recent Attorney General's opinion interpreting § 411.6(12)(a), The Code 1981, for your convenience. The opinion, Op.Att'y.Gen. #81-12-1, is bifurcated. The method for computing the annual readjustment of pensions is presented in the first division; discussion of step increases based upon a reclassification of a salary scale follows.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW:ds

Enclosure

cc: Richard Hach

MUNICIPALITIES. Urban Revitalization Areas. Notice of Public Hearing. Sections 362.3, 404.2(4), and 404.2(6), The Code 1981. The notice requirement in § 404.2(4), The Code 1981, is twofold. A city is required to provide published notice in accordance with § 362.3, The Code 1981. In addition to notice by publication, notification shall be given by ordinary mail to all owners of record of real property and occupants of city addresses located within a proposed revitalization area at least thirty days prior to a public hearing. Published notice alone will suffice for a second public hearing, provided for in § 404.2(6), The Code 1981. (Walding to Pogue, City Development Board Chairperson, 9/1/82) #82-9-7(L)

Mr. Thomas F. Pogue, Chairperson
City Development Board
Office for Planning and Programming
L O C A L

September 1, 1982

Dear Mr. Pogue:

You have requested an opinion of the Attorney General regarding urban revitalization areas. Specifically, you have asked:

1. Section 404.2(4), Code of Iowa, appears to require a published notice of a public hearing in accordance with the time limits described in 362.3, Code, and a written notice to property owners and occupants at least 30 days before the hearing. Do you agree with this interpretation?

2. Under section 404.2(6), Code, which groups or agencies must be notified of a second public hearing? Would this depend upon the source of the request for a second public hearing?

3. Also under section 404.2(6), Code, are both published and written notice required for a second public hearing? If so, what requirements apply relative to timing of such notices?

Section 404.2(4), The Code 1981, requires a city, prior to the exercise of the authority conferred upon it in Chapter 404, to meet the following condition:

> The city has scheduled a public hearing and notified all owners of record of real property located within the proposed area, the tenants living within the proposed area and the city development board in accordance with section 362.3. In addition to notice by publication, notification shall also be given by ordinary mail to the last known address of the owners of record. The city shall also send notice by ordinary mail addressed to the "occupants" of city addresses located within the proposed area, unless the city council, by reason of lack of a reasonably current and complete address list, or for other good cause, shall have waived such notice. Notwithstanding the provisions of section 362.3, Code 1979, such notice shall be given by the thirtieth day prior to the public hearing.

In response to your first question, we are in accord with your interpretation. Section 404.2(4), The Code 1981, provides two mandatory conditions which a city must fulfill in order to exercise the authority conferred upon it in Chapter 404: schedule a public hearing and provide notice to specified parties. Our attention is focused on the notice requirement.

The notice requirement in § 404.2(4), The Code 1981, is twofold. First, a city is required to provide published notice. Section 404.2(4), The Code 1981, requires a city, in accordance with § 362.3, The Code 1981, to notify: (1) all owners of record of real property located within the proposed revitalization area, (2) the tenants within the proposed revitalization area, and (3) the city development board.[1]

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[1]While a city is only required to provide the city development board with notice by publication, in order to assure that the board is apprised of the city's urban revitalization efforts, it would be advisable to notify the board of the public hearing in writing. The city development board is unlikely to be alerted to a public hearing if notice is merely published in a local newspaper.

Section 362.3, The Code 1981, requires that notice be published not less than four nor more than twenty days prior to the public hearing in a newspaper published at least weekly and having a general circulation in the city. Provision is made in that section for posted notice under certain conditions. In addition to notice by publication, a city is required to give written notice. Section 404.2(4), The Code, 1981, provides that notification shall be given by ordinary mail to all owners of record of real property and occupants of city addresses located within a proposed revitalization area. Such notice must be given at least thirty days prior to a public hearing.

Your second and third inquiries concern notice of a second public hearing. A second public hearing, provided for in § 404.2(6), The Code 1981, is to be held if requested by: (1) the city development board, (2) property owners representing at least ten percent of the privately owned property within the proposed revitalization area, or (3) tenants representing at least ten percent of the residential units within the proposed revitalization area. It is our judgment that published notice alone will suffice for a second public hearing. While we are of the opinion that notice of a second public hearing is necessary, individual written notice is not required. If the legislature had intended a contrary result, provision for individual written notice of a second public hearing could have been provided for as in § 404.2(4), The Code 1981. The provisions of § 362.3, The Code 1981, are applicable to that publication.

In summary, the notice requirement in § 404.2(4), The Code 1981, is twofold. A city is required to provide published notice in accordance with § 362.3, The Code 1981. In addition to notice by publication, notification shall be given by ordinary mail to the owners of record of real property and occupants of city addresses located within the proposed revitalization area at least thirty days prior to the public hearing. Published notice alone will suffice for a second public hearing, provided for in § 404.2(6), The Code 1981.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW/maw

MUNICIPALITIES: Eminent Domain. Iowa Code Chapters 471, 472, 403A (1981). A city can legally enter into an agreement under which the city agrees to acquire, using its power of eminent domain if necessary, real property for the development of a public parking facility, and subsequently to convey to a private party, at that party's option, the air rights above the property for the development of a housing project for the elderly and the handicapped. (Stoffregen to Chiodo, State Representative 9/1/82) #82-9-6(L)

September 1, 1982

The Honorable Ned F. Chiodo
State Representative
3410 S. W. 12th Street
Des Moines, Iowa 50315

Dear Representative Chiodo:

You have requested an opinion of the Attorney General concerning the validity of a certain option agreement between the City of Des Moines ("City") and the First Baptist Elderly Housing Foundation ("Foundation"). Specifically, you have asked whether the option agreement is invalid because it provides that the City will acquire, using its power of eminent domain if necessary, real property for the development of a public parking facility and, following acquisition, will convey to the Foundation, at the Foundation's option, the air rights above the property for the development of a housing project for the elderly and the handicapped.

We have assumed for purposes of this opinion that the propriety of the City's exercise of its power of eminent domain to acquire property for the public parking facility is not at issue. Accordingly, the issue presented centers upon whether the conveyance of the air rights above the proposed parking facility to the Foundation for a housing project for the elderly and the handicapped would invalidate any taking of the property, and thus invalidate the option agreement that contemplates the taking and subsequent conveyance.

It is well-established that private property can constitutionally be taken by eminent domain only for a public use. R & R Welding Supply Co. v. City of Des Moines, 256 Iowa 973, 129 N.W.2d 666, 669 (1964); 2A NICHOLS' LAW OF EMINENT DOMAIN § 7.1, at 7-4.1 (rev. 3d ed. 1980)

[hereinafter cited as "NICHOLS"]. If the use for which property is taken is public, the taking is not invalid merely because an incidental private benefit will result. Sisson v. Buena Vista County, 128 Iowa 442, 104 N.W. 454, 459 (1905); 2A NICHOLS § 7.222, at 7-52. Similarly, a taking for a public use is not invalid where a byproduct of the property taken will be sold for private profit, even if the public use would not have been undertaken without the expected profit from the byproduct. 2A NICHOLS § 7.222[3], at 7-56; Wisconsin River Improvement Co. v. Pier, 137 Wisc. 325, 118 N.W. 857 (1908); In re Southern Wisconsin Power Co., 140 Wisc. 245, 122 N.W. 801 (1909). See also Diamond Jo Line Steamers v. City of Davenport, 114 Iowa 432, 87 N.W. 399, 402 (1901); Brown v. Sioux City, 49 N.W.2d 853, 857 (Iowa 1951).

Based upon these principles, we have concluded that the conveyance of the air rights above the proposed parking facility to the Foundation for the housing project would not invalidate any taking of the property. If the housing project is in fact a public use (as suggested by Iowa Code Chapter 403A (1981)) the taking would clearly not be invalidated by the subsequent conveyance of the air rights for that public use. Even if, on the other hand, the housing project constitutes a private use, it would appear properly characterized as merely incidental to, or a byproduct of, the primary public use of the property as a parking facility. Under either interpretation, the taking would not be invalidated by the subsequent conveyance of air rights for the housing project. Consequently, the option agreement contemplating the taking and subsequent conveyance would not be invalidated.

The case most factually similar to the present situation supports our conclusion despite its having reached an apparently different conclusion. In Baycol, Inc. v. Downtown Development Authority, 315 So.2d 451 (Fla. 1975), the court found that the acquisition of property by eminent domain for a parking facility was not for a public benefit, and thus was improper, where the primary purpose of the acquisition was to permit the private development of a shopping center in the air space above the parking facility, for which facility there would have been no public need in the absence of the shopping center. The court noted that it was continuing to adhere to the principle (also accepted in Iowa) allowing an incidental private use where the purpose was "clearly and predominantly" a public purpose. What

rendered the private use more than incidental, in the court's estimation, was putting the "cart before the horse" -- there was no public need for the parking facility without the private shopping center. This feature clearly distinguishes the Baycol case from the present situation. We are advised that the public need for the parking facility here arises independently of, and not as a result of, any use of the air rights above the facility as a housing project for the elderly and the handicapped.

In conclusion, the option agreement between the City and the Foundation is not invalid even though it provides that the City will acquire, using its power of eminent domain if necessary, real property for the development of a public parking facility and, following acquisition, will convey to the Foundation, at the Foundation's option, the air rights above the property for the development of a housing project for the elderly and the handicapped.

Sincerely,

Philip E. Stoffregen

PHILIP E. STOFFREGEN
Assistant Attorney General

PES:sh

COUNTIES; COUNTY ATTORNEY; Replacement when absent, sick, or under disability: Iowa Code §§ 331.754(1), 331.756, and 331.759 (1981). The statutory duties of the county attorney devolve solely on that office, subject to the exceptions found in Iowa Code §§ 331.754(1) and 331.759. These statutory exceptions are not applicable in cases such as the present one, where the disputed matter did not involve litigation pending before the district court; instead, home rule authority authorizes the county attorney to request the board of supervisors to appoint a replacement. Correspondingly, neither the board of supervisors nor any other county official is independently authorized to appoint a replacement for the county attorney. Finally, because such an appointment is illegal, the board of supervisors is not authorized to pay a claim by the county sheriff for legal fees incurred by a private attorney hired by the sheriff to represent him in a matter in which the county was already represented by the county attorney or a duly-appointed replacement. (Weeg to Soldat, Kossuth County Attorney, 9/1/82) #82-9-5(L)

September 1, 1982

Mr. Mark S. Soldat
Kossuth County Attorney
714 East State Street
Algona, Iowa 50511

Dear Mr. Soldat:

You have requested an opinion of the Attorney General concerning the scope of a county's liability for fees charged by outside counsel representing a county official. This request arises from events in Kossuth County, which began when the sheriff terminated his first deputy sheriff. The deputy sheriff subsequently filed an unemployment compensation claim against the county. You, as the county attorney, and your assistant withdrew as representatives of the county due to a conflict of interest, and the board of supervisors appointed a private attorney to represent the county in this matter. However, prior to the county's appointment and unbeknownst to the county, the sheriff hired yet another private attorney to represent him. The county has compensated the private attorney appointed to represent the county in this matter. In addition, the sheriff has now submitted a claim to the county for legal fees incurred by the attorney he hired.

I.

We turn now to your first three questions; we will address the last three questions in Part II of this opinion. Your first questions are as follows:

1. To what extent and under what circumstances may a board of supervisors seek, utilize, and rely upon the services of a substitute county attorney, even over the objection of a county attorney?

2. To what extent and under what circumstances may a county official seek, utilize, and rely upon the services of a private attorney? May that county official do so without the approval of the county attorney, board of supervisors, or any other county official?

3. If a county official acts upon the advice of his private attorney, to what extent must he cooperate with the county attorney or his substitute in protecting the county from liability? If he does not so cooperate, does he have a proper claim against the county for the expense of retaining his private attorney?

Iowa Code §§ 331.756(1) through (87) (1982) detail the numerous duties of the office of county attorney, which include the duty to:

1. Diligently enforce or cause to be enforced in the county, state laws and county ordinances, violations of which may be commenced or prosecuted in the name of the state, county, or as county attorney, except as otherwise provided.

2. Appear for the state and the county in all cases and proceedings in the courts of the county to which the state or the county is a party, except cases brought on change of venue from another county, and appear in the appellate courts in all cases in which the county is a party and in all cases transferred on change of venue to another county in which the county or the state is a party.

* * * *

6. Commence, prosecute, and defend all actions and proceedings in which a county officer, in the officer's official capacity, or the county is interested or a party.

> 7. Give advice or a written opinion, without compensation, to the board and other county officers and to school and township officers, when requested by an officer, upon any matters in which the state, county, school, or township is interested, or relating to the duty of the officer in any matters in which the state, county, school, or township may have an interest, but the county attorney shall not appear before the board at a hearing in which the state or county is not interested.
>
> * * * *

Section 331.756 clearly delineates the official duties of the county attorney, and effectively vests the office of the county attorney with sole responsibility for performing those duties. Consequently, we believe the general rule is that no county officer, including the board of supervisors or the sheriff, has independent authority to substitute a private attorney to perform any of the county attorney's duties designated in § 331.756.

However, there are several situations in which this general rule is inapplicable. One is found in Iowa Code § 331.759 (1981), the specific provisions of which are as follows:

> Appointment of private legal counsel. At any stage of legal proceedings in which a county attorney is authorized to represent a county officer acting in the officer's official capacity, the county attorney may apply to the court for permission to withdraw from representation of the officer for cause. If the court allows the county attorney to withdraw, it shall appoint an attorney to represent the county officer. The costs of representing a county officer acting in the officer's official capacity shall be paid from the court expense fund or the general fund of the county.

This section thus authorizes the district court to appoint an attorney to represent a county officer, in that officer's official capacity, in legal proceedings where the county attorney has withdrawn upon a showing of cause. Although § 331.759 would initially appear to directly apply to the facts of the present case, we conclude that the "legal

proceedings" language of that section, emphasized above, limits its applicability to those situations where there is ongoing litigation. This section does not apply to situations such as the present one, where there were no legal matters actually pending before the court.

Another situation in which the general rule does not apply is found in § 331.754(1) which provides as follows:

> In case of absence, sickness, or disability[1] of the county attorney and the assistant county attorneys, the court before which it is the duty of the county attorney or the assistant county attorneys to appear and in which there is official business requiring the attention of the county attorney or an assistant county attorney, may appoint an attorney to act as county attorney by an order of the court. The acting county attorney has the same authority and is subject to the same responsibilities as a county attorney.

(emphasis added)

Finally, the general rule does not apply in situations such as the present case, where neither the general provisions of § 331.754(1) or the more specific provisions of § 331.759 are relevant, i.e., where there is not a matter actually pending before the court. For example, there may be situations in which the county attorney is requested to advise the county on one particular matter in which a conflict of interest exists. Or, a matter may arise where litigation is not pending but may be imminent, and because of a conflict of interest the county attorney feels a professional responsibility to withdraw from the case immediately.

Consequently, it is our opinion that, absent other relevant statutory provisions, the board of supervisors is authorized pursuant to home rule authority to appoint a private attorney to serve as a replacement for the county attorney. See Iowa Constitution, article III, § 39A; Iowa Code Ch. 331 (1981). We believe this result is further supported by practical considerations. First, we recognize the need for flexibility in the day-to-day operation of the

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[1] See State v. Brandt, 253 N.W.2d 253, 262 (Iowa 1977) (conflict of interest constitutes disability within the meaning of Iowa Code § 336.3, the section preceding § 331.754(1)).

county attorney's office. Second, we do not believe the legislature intended that the authority of the district court be invoked in every instance where a private attorney must be appointed to replace the county attorney, or that the district court become intimately involved in the day-to-day operation of the county attorney's office, especially when the court may have no official involvement with a matter in which a private attorney is acting as representative of the county.

We further note that the responsibility for determining when a private attorney should replace the county attorney in a particular matter generally lies with the county attorney. For example, the question of whether a conflict of interest exists is left to the professional judgment of the county attorney. See Canon 5, Iowa Code of Professional Responsibility for Lawyers. In the event the county attorney concludes a conflict is present and §§ 331.754(1) and 331.759 are inapplicable, he or she should request that the board of supervisors appoint a replacement. We recognize that there may be limited situations, such as unexpected sickness, where the county attorney is unable to advise the supervisors regarding the need to hire a replacement and the supervisors must act alone. Nonetheless, it is our opinion that generally neither the board of supervisors nor any other county officer has independent authority to appoint a private attorney to serve as representative of the county. A contrary conclusion could effectively result in the supervisors interfering in the operation of the county attorney's office at their discretion, a result certainly not intended by the legislature.

Thus, in the present case the sheriff hired a private attorney even though the responsibility for commencing, prosecuting, and defending "all actions and proceedings in which a county officer, in the officer's official capacity . . . is interested or a party" lies with the county attorney or a duly-appointed replacement. See § 331.756. In this case the supervisors properly appointed another private attorney to replace the county attorney. Consequently, the attorney hired by the sheriff without the county's knowledge or approval could not be acting as a representative of the county, but only as representative of the private interests of the sheriff. Therefore the county is not liable for any claim for attorneys' fees by the sheriff.

Finally, when a county official hires a private attorney to represent him or her, as the sheriff did in the present case, that official is clearly allowed to act on the advice

of counsel. Of course, as an elected public official, that officer is accountable to the public for any unreasonable failure to cooperate with the county.

II.

We turn now to your last three questions, which are as follows:

> 4. What right or power does a board of supervisors have to authorize payment of such a claim regardless of whether it is proper or not?
>
> 5. In a similar vein, what obligation does a board of supervisors have to authorize payment of such a claim, given lack of prior approval, and the availability of and the lack of cooperation with the county attorney or his substitute?
>
> 6. If payment of the claim is authorized, from what fund should it be paid?

To partially reiterate our conclusions in Part I, it is our opinion that a county official has no independent authority to hire a private attorney to represent that official in his or her official capacity because the county attorney or a duly-appointed representative has sole responsibility for such representation. See § 331.756(6). Because the duty to represent the interests of the county in this and in many other situations devolves solely on the county attorney pursuant to § 331.756, it is our opinion that any contravention of this statutory scheme is illegal. Consequently, it is our opinion that the board of supervisors has no authority to pay a claim for the legal fees incurred by a private attorney representing the private interests of one of the county's elected officials.

The argument may be made that, in the absence of any express statutory provision prohibiting such payment, the supervisors may authorize this payment pursuant to home rule authority. However, an exercise of home rule authority is authorized only if, inter alia, that action is "not inconsistent with the laws of the general assembly." Iowa Constitution, article 3, § 39A. It is our opinion that § 331.756 manifests the legislature's intent to exclusively regulate the subject of the duties of the county attorney, and to vest sole responsibility for performing those duties with the office of county attorney. The state's exclusive regu-

lation of this area preempts the county's authority to act in a manner inconsistent with this state legislation. See § 331.301(1); § 331.301(3) (". . . A county may exercise its general powers subject only to limitations expressly imposed by a state law"). This conclusion is further supported by a past opinion of this office. 1979 Op.Att'yGen. 83 (supervisors are not authorized to legalize an illegal payment to county engineer, but the county attorney has considerable discretion in deciding whether to seek reimbursement of that illegal payment).

Finally, because the board of supervisors has no discretion to allow a claim for private attorneys' fees by a county official, we find it unnecessary to address your last question.[2]

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[2] We note that § 331.754(2) governs compensation for a replacement for the county attorney duly appointed under that section and designates from what fund that compensation should be paid:

> The acting county attorney shall receive a reasonable compensation as determined by the board for services rendered in proceedings before a judicial magistrate. If the proceedings are held before a district associate judge or a district judge, the judge shall determine a reasonable compensation for the acting county attorney. The compensation shall be paid from funds to be appropriated to the office of county attorney by the board.

Further, in the event that § 331.759 is applicable, it provides in part that:

> The costs of representing a county officer acting in the officer's official capacity shall be paid from the court expense fund or the general fund of the county.

It is our opinion that an inconsistency exists between these two provisions regarding the fund from which payments should be made. We take this opportunity to suggest that the legislature act to re-examine these provisions.

III.

In conclusion, the statutory duties of the county attorney devolve solely on that office, subject to the exceptions found in Iowa Code §§ 331.754(1) and 331.759. These statutory exceptions are not applicable in cases such as the present one, where the disputed matter did not involve litigation pending before the district court; instead, home rule authority authorizes the county attorney to request the board of supervisors to appoint a replacement. Correspondingly, neither the board of supervisors nor any other county official is independently authorized to appoint a replacement for the county attorney. Finally, because such an appointment is illegal, the board of supervisors is not authorized to pay a claim by the county sheriff for legal fees incurred by a private attorney hired by the sheriff to represent him in a matter in which the county was already represented by the county attorney or a duly-appointed replacement.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

MUNICIPALITIES. Civil Service. Examinations. Iowa Code sections 400.8, 400.8(1), 400.9, 400.11, and 400.13 (1981). Chiefs of police and fire must be appointed from their respective civil service eligible lists. To be placed on the lists, applicants must take an original entrance examination. A civil service commission is vested with the authority to prescribe, in advance, rules relating to the necessity of an applicant to resubmit to an original entrance examination. Four considerations in prescribing such rules are offered. (Walding to Fisher, Webster County Attorney, 9/1/82) #82-9-4(L)

September 1, 1982

The Honorable Monty L. Fisher
Webster County Attorney
Webster County Courthouse
Fort Dodge, IA 50501

Dear Mr. Fisher:

You have requested an opinion of the Attorney General concerning the appointment of a chief of a police department under Chapter 400, Civil Service. Specifically, we have been asked:

> May a Chief of Police who had previously been legally appointed pursuant to § 400.13 be reappointed without competitive examination once a new original examination and Chief's Civil Service Eligibility List have been called for, administered and certified when such previous Chief's name is not so certified?

A discussion of the procedure for appointing a chief of police in the City of Fort Dodge and the facts which give rise to your inquiry, as gleaned from an opinion of the city attorney attached to your request and a subsequent conversation with the solicitor, follows. First, the appointment procedure for a police chief in Fort Dodge follows the procedures found in Iowa Code section 400.13 (1981), to be discussed later in the opinion. In addition, the City of Fort Dodge has an unusual resolution restricting the appointment of the chief of police to a term of four years. Governed by a home rule charter form of government with a mayor-council format,

the appointment of the chief of the police department is made by the mayor with council approval. Upon the expiration of the term of a chief of police, two options avail the mayor in the selection of the chief: (1) reappointment of the current chief, without resort to a chief's civil service eligible list, to another term, or (2) appointment of a chief of police from the chief's civil service eligible list.

The facts which give rise to your inquiry commence in May of 1980 with the appointment of the previous chief to that position. That chief's term, however, expired on January 1, 1982. Upon the expiration of the previous chief's term, that individual was twice temporarily appointed for ninety days to fill the vacancy in accordance with Iowa Code section 400.11 (1981). Meanwhile, the Fort Dodge Civil Service Commission conducted an original entrance examination for a chief of the police department. The previous chief, who was then and remains the acting chief, made application for the position of chief of police but did not submit to the examination. Upon completion of the original entrance examination, the Fort Dodge Civil Service Commission certified the chief's civil service eligible list to the mayor. The previous chief's name was omitted from that list for failing to submit to the examination.

Attention is now directed to the provision in Iowa's civil service law concerning the appointment of a chief of a police department. Iowa Code section 400.13 (1981) provides, in pertinent part: "The chief of the fire department and the chief of the police department shall be appointed from the chiefs' civil service eligible lists. Such lists shall be determined by original examination open to all persons applying . . . ." As can readily be seen from that section, chiefs of police and fire must be appointed from their respective civil service eligible lists. To be placed on the lists, applicants must take an original entrance examination. Prior opinions of our office support that construction. See 1976 Op.Att'yGen. 382 (held that chiefs of police, in cities operating under civil service, must be appointed pursuant to § 400.13); 1976 Op.Att'yGen. 716 (held that police and fire chiefs under civil service must pass an original examination to be placed on civil service eligible list from which they shall be appointed).

It is to be observed that Iowa Code section 400.13 (1981) concerns the appointment to the positions of chief of police department and chief of fire department. An examination of Chapter 400 discloses an intent on the part of the legislature to differentiate between appointments and promotions. See Iowa Code sections 400.8 and 400.9 (1981). The terms are

not synonymous. As was stated in Daub v. Coupe, 9 A.D.2d 260, 265, 193 N.Y.S.2d 47, 52 (1959), cited in Dennis v. Bennet, 258 Iowa 664, 668, 140 N.W.2d 123, 126 (1966), "To appoint is to designate or assign to a position. To promote is to advance or progress to a higher grade, position or degree. Promotions cannot occur until there exists a condition or status from which there can be advancement or progress." Thus, an appointment necessarily precedes promotion and creates the condition upon which a promotion may be effected.

The appointment-promotion distinction is relevant in a determination of the longevity of a certified eligibility list. A certified eligible list for promotion expires two years following the date of certification. See Iowa Code section 400.11 (1981). No provision is made in Iowa Code section 400.8 (1981) as to the longevity of a certified eligible list for appointment. Nevertheless, a prior opinion of our office held that the chiefs' civil service eligible lists expire when an individual is chosen from them. See 1978 Op.Att'yGen. 8. Accordingly, once a police or fire chief is selected the chief's civil service eligible list expires.

To review then, under civil service an individual must pass an original entrance examination to be placed on a chief's civil service eligible list. A chief's civil service eligible list expires when an individual is appointed from the list. The expiration of a chief's civil service eligible list and an examination, however, do not necessarily coincide. The issue thus narrows to how long an examination remains in effect.

A case of first impression under Iowa's civil service law, as indicated by the city attorney to you in a letter dated June 15, 1982, is present by the issue. The longevity of an original entrance examination has not previously been examined, in part, because of the uncommon nature of the resolution limiting the appointment of a police chief to a term. The term concept disrupts the normal process whereby an individual, once appointed to the position of chief of a police department, need not again be certified on a chief's civil service eligible list. Thus, no judicial pronouncement of the Iowa Supreme Court or opinion of our office has previously addressed the issue.

A response to your question, however, can nevertheless be gleaned from the provisions of Chapter 400. In particular, Iowa Code section 400.8(1) provides, in pertinent part:

> The commission shall at such times as shall be found necessary under such rules, including minimum and maximum age limits, as shall be prescribed and published in advance by the commission and posted in the city hall, hold examinations for the purpose of determining the qualifications of applicants for positions under civil service, other than promotions, which examinations shall be practical in character and shall relate to such matters as will fairly test the mental and physical ability of the applicant to discharge the duties of the position to which the applicant seeks appointment. [Emphasis added]

A civil service commission, therefore, is required to hold examinations for the purpose of determining the qualifications of applicants for positions under civil service. Further, a commission is entrusted with the authority to prescribe rules necessary to administer the examinations. It should be emphasized that a rule which a commission would find necessary in the administration of an examination would relate to the necessity of an applicant to resubmit to an examination. Accordingly, it is our judgment that a civil service commission is vested with the authority to prescribe, in advance, rules relating to the necessity of an applicant to resubmit to an original entrance examination.

Our conclusion is supported by the discretion vested in a civil service commission in the performance of its duties and the exercise of its powers to examine applicants for public employment. According to the Iowa Supreme Court in Patch v. Civil Service Commission, 295 N.W.2d 460, 464 (Iowa 1980), a civil service commission must necessarily be allowed a "wide discretion" in the performance of its duties. See also 3 McQuillin, Municipal Corporations, § 12.78c (1965). In that case, the Court approved the following from 15A Am.Jur.2d Civil Service, § 40 (1976):

> The general proposition is well established that a commission with the powers conferred upon a civil service commission in the examination of applicants for public employment has a wide discretion with regard to the manner of performing its duties and exercising its powers, particularly in determining the mode and practicality of the examination. [footnote omitted]

Of course, a civil service commission cannot act in an arbitrary, capricious or unreasonable fashion. See Patch v. Civil Service Commission, 295 N.W.2d at 464. Thus, the vesting of a wide discretion in a civil service commission in the performance of its duties and the exercise of its powers in the administration of examinations strengthens our conclusion that a commission is authorized to establish rules pertaining to the necessity of an applicant to resubmit to an original entrance examination.

Finally, we offer four considerations for a civil service commission in determining the necessity of an applicant to resubmit to an original entrance examination. Before discussing those considerations, we note the purposes of civil service examinations. As was well stated by the Connecticut Supreme Court:

> The object of providing for civil service examinations is to secure more efficient employees, promote better government, eliminate as far as practicable the element of partisanship and personal favoritism, protect the employees and the public from the spoils system and secure the appointment to public positions of those whose merit and fitness have been determined by proper examination. [Emphasis added]

Ziomek v. Bartimale, 156 Conn. 604, 609, 244 A.2d 380, 384 (1968). Accordingly, the following considerations all relate to an examination's ability to demonstrate an applicant's merit and fitness for civil service hiring.

Perhaps the most obvious consideration is how recently an applicant submitted to a previous original entrance examination. While discussing a limitation upon the time during which an eligibility list remains effective, the words of the Connecticut Supreme Court again are noteworthy. According to the Court:

> The [civil service] act requires that the commission conduct competitive examinations from time to time in order to obtain a list of those who have manifested their qualifications for promotion. This requirement advances the cause of civil service, which insists that the public interest will be best served if promotions, as well as original

> appointments to municipal offices are made from those who, by examination, have shown themselves to be best qualified. It does not follow, however, that an individual acquires permanency of eligibility merely because he passed an examination held to obtain a list of those capable of qualifying for original or promotional appointment. One who could demonstrate his ability, say, in 1949, to perform the duties of an office higher than that he then held, might, for a wide variety of reasons, be incompetent to do so a few years later. [Emphasis added] [Footnotes omitted]

State v. Civil Service Commission, 81 Conn. 465, 468-69, 106 A.2d 713, 715 (1954). Accordingly, resubmission to an examination is in order if the prior examination fails to demonstrate an applicant's ability to perform the duties of the open position.

A second consideration is the changes in the content and format of an original entrance examination. Examinations provide a method of comparing the ability of applicants. If changes in the examination make comparison of the applicants impossible or impractical, resubmission to the examination may be in order. Acceptance of a prior examination may be proper, however, if minor revisions in the examination allow for juxtaposing applicants (e.g., the order of the examination content is merely altered).

Third, a civil service commission may want to consider available alternatives. In a city functioning with a chief of the police department hired for a term, for instance, the civil service commission is afforded an opportunity to examine the job performance of the chief if he reapplies. Thus, the original entrance examination is not the only means to determine the merit and fitness of an applicant for original appointment.

The final consideration we offer is the rate of change in the field of the position to be appointed. Resubmission to an examination for appointment to a position in a static field may be warranted for an extended period of time. To the contrary, a dynamic field requires a shorter passage of time before resubmission is in order. Of course, the field of law enforcement is ever-changing and, thus, a limited passage of time between examinations is warranted.

In summary then, chiefs of police and fire must be appointed from their respective civil service eligible lists. To be placed on the lists, applicants must take an original entrance examination. A civil service commission is vested with authority to prescribe, in advance, rules relating to the necessity of an applicant to resubmit to an original entrance examination. Four considerations in prescribing such rules are offered. The considerations include: how recently an applicant previously submitted to an examination, the changes in the content and format of an examination, available alternatives, and the rate of change in the field of the position to be appointed.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW/maw

ENVIRONMENTAL PROTECTION: Water Rights. Iowa Code §§ 455A.1, 455A.2, 455A.19-455A.30 (1981); 1982 Iowa Acts, House File 2463. Except for the "rights preserved" by Iowa Code § 455A.27 (1981), the provision in § 455A.1 concerning "absolute ownership" of "impounded or stored waters," does not exempt the storage of waters from the regulatory provisions of the statute. (Osenbaugh to Gallagher, State Senator, 9/1/82) #82-9-2(L)

September 1, 1982

Honorable James V. Gallagher
State Senator
4710 Spring Creek
Jesup, Iowa 50648

Dear Senator Gallagher:

You have requested the opinion of this office concerning the meaning of "absolute owner" as it appears in Iowa Code section 455A.1 (1981) (the last paragraph) and now appears in section 15(16) of House File 2463. This definitional subsection states:

> "Impounded or stored water" means that water captured and stored on the land by anyone taking it pursuant to this chapter, and the party impounding the water shall become the absolute owner of the stored water.

This definition was added to § 455A.1 by 1957 Iowa Acts, ch. 229, § 1, which adopted the water permit system contained currently in Iowa Code Chapter 455A (1981).

The phrase "absolute owner" is used in other contexts as equivalent to "one who has complete dominion of the property owned, as the owner in fee of real property." In re Estate of Bigham, 227 Iowa 1023, 1027, 290 N.W. 11, 12 (1940).

Section 455A.2 (H.F. 2463, § 16(2)) is directly contrary to the concept that any person can have full dominion over water occurring in a "watercourse." (See § 455A.1 (H.F. 2463, § 15(13).) This declaration of legislative

policy states:

> Water occurring in a basin or watercourse, or other natural body of water of the state, is public water and public wealth of the people of the state and subject to use in accordance with this chapter, and the control and development and use of water for all beneficial purposes is vested in the state, which shall take measures to encourage full utilization and protection of the water resources of the state.

§ 455A.2(2) (H.F. 2463, § 16(2)). Section 22 of the Act [§ 455A.25] imposes a permit requirement for storage of water in excess of 25,000 gallons per day. Section 27 of the Act [§ 455A.30] directly states that a permit "does not constitute ownership or absolute right of use of the waters."

The section in question, section 15(16) [§ 455A.1], applies only to water taken "pursuant to this chapter." If taken from a watercourse or pursuant to a storage permit, the provisions of the chapter impose limitations on use and control which are inconsistent with the concept of absolute ownership.

Except for nonregulated uses, persons must obtain a permit to divert, store, or withdraw waters in excess of 25,000 gallons per day. H.F. 2463, § 22(1)(b) [§ 455A.25(2)] The grant of a permit for storage of water would not authorize diversion or withdrawal of water unless this were expressly permitted. Section 19, H.F. 2463 [§ 455A.20] states that the department shall grant the permit on application for "diversion, storage, or withdrawal." The permit authority also includes the power to impose conditions. Section 20 [§ 455A.21]. Permits are limited to the beneficial use set forth in the application and permit. Section 26 [§ 455A.29] provides for termination of the permit if the water is not used for "the specific beneficial purpose authorized in the permit." Section 27 [§ 455A.30] states that ". . . the permit does not constitute ownership or absolute rights of use of the waters. The waters remain subject to the principle of beneficial use and the orders of the executive director or commission." Section 25(2)(a) [§ 455A.28] provides for modification or cancellation of a permit if there is a breach of "the terms of the permit." [See 455A.28(2)]

In our opinion, the "impounded or stored waters" over which a person has "absolute ownership" are limited to those

described in section 24 of the Act [§ 455A.27]. This section entitled "Rights preserved," directly addresses certain rights to impound waters. It now states:

> This part does not deprive any person of the right to use diffused waters, to drain land by use of tile, open ditch, or surface drainage, or to construct an impoundment on the person's property or across a stream that originates on the person's property if provision is made for safe construction and for a continued established average minimum flow when the flow is required to protect the rights of water users below.

This section provides landowners a right to capture diffused surface waters or to impound a stream that originates on the person's property so long as there is provided continued established average minimum flow when required to protect the rights of water users below.

If absolute ownership of impounded or stored waters is limited to the rights to use diffused waters protected by section 24 [§ 455A.27], the result would apparently be consistent with the common law predating the passage of chapter 455A. Dicta in several Iowa cases indicates that there was an absolute right to capture and use diffused surface water on one's land. Gors, The Law of Water Distribution in Iowa and South Dakota, 8 Drake L. Rev. 256, 276 (1971).

> Still, the principle seems to be correct that the owner of the higher land has an unqualified right to drain for agricultural purposes his surface water, i.e., water flowing in no regular and definite channel, and is not liable to an action by the lower proprietor for so draining it as to prevent any portion of those waters from reaching the land of the lower owner.
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> * * *
>
> This right of the higher owner thus to retain, and if he sees fit, to appropriate all of his surface waters to his own use, is based upon his dominion over the soil which extends indefinitely upwards and downwards, and is adopted as favoring the reclamation and improvement of wet and miry lands.

Livingston v. McDonald, 21 Iowa 160, 167 (1866). See also Pohlman v. Chicago, Milwaukee & St. Paul Company, 131 Iowa 89, 93, 107 N.W. 1025, 1026 (1906).

Extension of absolute ownership rights to waters impounded in a watercourse would, on the contrary, be inconsistent with the common law of riparian rights. As stated in 93 C.J.S. Waters § 145:

> The building of a dam on a nonnavigable stream does not change the status of the stream; hence a proprietor doing so does not acquire ownership of the waters stored behind his dam, and his rights thereto must be governed by the rules of law applicable to such rights as he had in the stream before he erected the dam.

See Gehlen Brothers v. Knorr, 101 Iowa 700, 704-710, 70 N.W. 757, 758-759 (1897). O'Connell, Iowa's New Water Statute--The Constitutionality of Regulating Existing Uses of Water, 47 Iowa L.Rev. 549, 614 (1962), describes the nature of riparian rights as follows: "In effect then a riparian right is a right to capture water, subject to a variety of rules which assure paramount rights for many purposes of the government and reciprocal rights of others who have access to water."

Given the purposes of chapter 455A to provide greater state control to ensure the full beneficial use of water and to prevent waste and the differing treatment of diffused waters at common law and in section 455A.30, it is our view that section 15(16) (§ 455A.1) cannot be read as overriding the principles of beneficial use and specific limitations imposed by the chapter on the storage of water.

> . . . We must examine both the language used and the purpose for which the legislation was enacted and consider all parts together without giving undue importance to one single or isolated portion. Wilson v. Iowa City, 165 N.W.2d 813, 822 (Iowa 1969).

State v. Schlemme, 301 N.W.2d 721, 723 (Iowa 1981).

We conclude that the "absolute ownership" language in section 15(16) does not exempt stored waters from the specific limitations on control imposed by the permit

requirements of the chapter. Section 15(16) defines "impounded or stored water" as only water taken "pursuant to this chapter," and the chapter imposes significant limitations. Furthermore the language that ". . . the party impounding the water shall become the absolute owner of the stored water" is tacked on to a definition of "impounded or stored waters." Yet we find no statutory use of the phrase "impounded or stored waters." Elsewhere the statute refers to permits for the diversion, withdrawal, or storage of water. In case of conflict, outside the ambit of section 24 [§ 455A.27], we believe that section 27 [§ 455A.30] would control. That section states:

> the permit does not constitute ownership or absolute rights of use of the waters. The waters remain subject to the principle of beneficial use and the orders of the executive director or commission.

The language concerning absolute ownership in section 15(16) creates confusion. We would therefore recommend that this language be deleted from the statute or that the statute be amended to clarify the legislative intent concerning rights in stored waters.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Assistant Attorney General

EMO:rcp

COUNTIES; DRAINAGE DISTRICTS: Iowa Code Chapter 455 (1981); Iowa Code §§ 24.22, 455.109, and 455.132. A county may re-establish an inactive drainage district by following the procedures set forth in § 455.132. The costs of maintaining and repairing the district incurred by the county prior to the re-establishment of the district may be assessed against members of the district pursuant to this same section. Finally, the county is not authorized to temporarily transfer money from county funds to a drainage district. (Weeg to Bruner, Carroll County Attorney, 9/1/82) #82-9-1(L)

September 1, 1982

Mr. Barry T. Bruner
Carroll County Attorney
225 East 7th Street
Carroll, Iowa 51401

Dear Mr. Bruner:

You have requested an opinion of the Attorney General concerning the procedures for reactivating an inter-county drainage district that became inactive almost sixty years ago. In particular, you ask the following questions:

> 1. Carroll County has a drainage district or drain that was declared illegal by the Court over 60 years ago. Nothing was ever done to re-establish the drainage district and the Board of Supervisors is desiring to reactivate, recreate or cure the illegality involved in the drainage district. May the Board of Supervisors, rather than proceeding under the provisions of Section 455.109 of the Iowa Code, simply create a new drainage district, rather than attempt to cure the illegality?
>
> 2. In reference to question # 1, how does the Board of Supervisors pay bills incurred in the illegal drain prior to the illegality being cured or a new district being created?
>
> 3. May the County government loan money to other governmental agencies, in particular, if a drainage district fund runs out of money, may the County lend money to the drainage

> district from the County Government Assistance Fund, to be paid back with interest after the drainage district is assessed and the money collected?

These questions arise as a result of an Iowa Supreme Court decision which held, inter alia, that the assessments for a drainage district on the petitioner's land were illegal because the boards of supervisors of the two counties in question were without jurisdiction to establish an inter-county drainage district. Hoyt v. Board of Supervisors of Carroll County, 199 Iowa 345, 202 N.W. 98 (1925). This jurisdictional problem was due to the fact that the original petition for establishment of the drainage district did not provide notice that the district would span two counties, as required by statute.

Apparently by the time the Hoyt decision was rendered, the drainage district had already been completed. After the decision, no further assessments were levied and no further governmental action was taken with regard to the drainage district, although the district remained operative. In recent years, the county has assumed responsibility for repairs and maintenance of the district, the costs of which totalled around one hundred dollars. The county now seeks to re-establish the district, and first questions the applicability of Iowa Code § 455.109. That section provides:

> Whenever any special assessment upon any lands within any drainage district shall have been adjudged to be void for any jurisdictional defect or for any illegality or uncertainty as to the terms of any contract and the improvement shall have been wholly completed, the board or boards of supervisors shall have power to remedy such illegality or uncertainty as to the terms of any such contract with the consent of the person with whom such contract shall have been entered into and make certain the terms of such contract and shall then cause a reassessment of such land to be made on an equitable basis with the other land in the district by taking the steps required by law in the making of an original assessment and relevying the tax in accordance with such assessment, and such tax shall

> have the same force and effect as though the board or boards of supervisors had jurisdiction in the first instance and no illegality or uncertainty existed in the contract.

It is our opinion that Iowa Code § 455.109 (1981) is inapplicable in the present case because that section applies only when a drainage district has been established and an assessment levied against a particular property owner is found to be illegal. Section 455.109 simply provides a procedure by which the supervisors may reassess the land in question as though there had been no illegality, i.e., this section allows the supervisors to correct the illegality without declaring the entire district illegal and beginning anew.

In the present case, while the Hoyt court found the assessment against the petitioner illegal, the effect of that illegality (i.e., the defective notice) was more far-reaching than the effect of a single illegal assessment: the jurisdictional defect in Hoyt effectively tainted the entire district and rendered it illegal. Consequently, we believe that Iowa Code § 455.132 (1981) instead provides the proper procedure for re-establishing the drainage district here in question. That section provides as follows:

> Unsuccessful procedure - re-establishment. When proceedings have been instituted for the establishment of a drainage district or for any change or repair thereof, or the change of a natural watercourse, and the establishment thereof has failed for any reason either before or after the improvement is completed, the board shall have power to re-establish such district or improvement and any new improvement in connection therewith as recommended by the report of the engineer. As to all lands benefited by such re-establishment, repair, or improvement, the board shall proceed in the same manner as in the establishment of an original district, using as a basis for assessment the entire cost of the proceedings, improvement, and maintenance from the beginning; but in awarding damages and in the assessment of

> benefits account shall be taken of the amount of damages and taxes, if any, theretofore paid by those benefited, and credit therefor given accordingly. All other proceedings shall be the same as for the original establishment of the district, making of improvements, and assessment of benefits.

We interpret this section as providing authority for a county board of supervisors to re-establish a failed drainage district, regardless of the reason for the failure and regardless of whether the district was completed at the time of the failure. In order to re-establish the district, § 455.132 in effect requires the supervisors to begin anew and follow procedures designated by Ch. 455 in originally establishing a new district, but further requires that in assessing landowners "account shall be taken of the amount of damages and taxes, if any, therefore paid by those benefits, and credit therefor given accordingly." Consequently, it is our opinion that § 455.132 authorizes the Carroll County Board of Supervisors to re-establish the intercounty drainage district that was rendered inactive by the Hoyt decision in 1925.[1]

You next ask how the supervisors are to pay for bills incurred by the county for maintaining the failed drainage district before it is re-established. We refer again to § 455.132, which provides:

> . . . As to all lands benefited by such re-establishment, repair, or improvement, the board [of supervisors] shall proceed in the same manner as in the establishment of an original district, using as a basis for assessment the entire cost of the proceedings, improvement, and maintenance from the beginning . . . [Emphasis added.]

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[1] We note that Iowa Code Ch. 457 (1981) (Intercounty Levee or Drainage District Act) provides separate procedures for the establishment of an intercounty drainage district. These procedures would apply in the present case. Further, § 457.28 incorporates numerous provisions of Ch. 455. We read § 457.28 to include § 455.132 among those provisions which apply to establishing (or, in the present case, re-establishing) an intercounty drainage district.

We interpret this section as authorizing the supervisors to assess the entire cost of re-establishing and repairing the drainage district, which includes the costs the district has incurred prior to its re-establishment. Consequently, upon the re-establishment of the drainage district here in question, the Carroll County supervisors may include the costs the county has recently incurred in repairing and maintaining the district in assessing the benefited property owners for the costs of the district.

Finally, you ask whether the county may loan money to the drainage district on the condition that the money be paid back after the drainage district is re-established. It is our opinion that the county may not transfer money from any county fund to a drainage district, subject to repayment once the district is re-established and funded by assessments levied on property owners. Iowa Code § 24.22 (1981) authorizes the temporary or permanent transfer of money from one fund of a municipality to another, subject to the approval of the State Appeal Board. However, § 24.2 expressly excludes drainage districts from the definition of "municipality" as used in Ch. 24, while counties are expressly included within that definition. Consequently, it is our opinion that the legislature clearly intended that a drainage district not be authorized to transfer funds pursuant to § 24.22, and further, that the county not be authorized to transfer funds to such a district.

In conclusion, a county may re-establish an inactive drainage district by following the procedures set forth in § 455.132. The costs of maintaining and repairing the district incurred by the county prior to the re-establishment of the district may be assessed against members of the district pursuant to this same section. Finally, the county is not authorized to temporarily transfer money from county funds to a drainage district.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

COUNTIES; Expenses of County Jail Prisoners. Iowa Code Chapter 356 (1981); Iowa Code §§ 331.303(7); 356.15; 356.30 (1981). It is irrelevant whether a prisoner held at the county jail is arrested without a warrant. The county is responsible for the charges and expenses of maintaining and safekeeping all prisoners housed at the county jail except those prisoners expressly excluded by the terms of § 356.15. The board of supervisors is responsible for setting these charges, and may exercise its discretion in determining the criteria to be used in setting those charges. (Weeg to Stream, Mahaska County Attorney, 10/25/82) #82-10-11(L)

October 25, 1982

Mr. Charles A. Stream
Mahaska County Attorney
Mahaska County Courthouse
Oskaloosa, Iowa 52577

Dear Mr. Stream:

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

> 1. When a person is arrested without a warrant upon a State charge (such as OMVUI) by the Oskaloosa City Police and placed in jail overnight pending his initial appearance before a Magistrate, who is responsible for the charges and expenses for the safekeeping and maintenance of those prisoners, the City or the County? (Reference Chapter 356.15)
>
> The Sheriff maintains that in a warrantless arrest a prisoner is not committed upon a State charge until such time that a Magistrate enters a warrant of commitment or a mittimus. The City's position is that any person arrested upon a State charge is a State or County prisoner, no matter who makes the arrest.
>
> 2. With regard to the issue of the daily rate for charges of safekeeping and maintenance of prisoners, who has the ultimate responsibility, the Sheriff or the local Board of Supervisors, and upon what criteria must this rate be computed?

First, it is our opinion that the county is responsible for the safekeeping and maintenance of prisoners arrested on state charges, regardless of whether the arrest was made pursuant to a warrant. Authority for this conclusion is

found in Iowa Code § 356.15, which provides as follows:

> All charges and expenses for the safekeeping and maintenance of prisoners shall be allowed by the board of supervisors, except those committed or detained by the authority of the courts of the United States, in which cases the United States must pay such expenses to the county, and those committed for violation of a city ordinance, in which case the city shall pay expenses to the county. (emphasis added)

We believe this provision requires the county to pay charges and expenses for all prisoners held at the county jail except in two situations, i.e., when a prisoner is "committed or detained" pursuant to federal court order or when a prisoner is "committed" on a municipal charge.[1]

Because of the existence of these express statutory exceptions, we refer to the principle of statutory construction which states that when certain exceptions are enumerated in a statute, it is to be presumed that the legislature intended that no others be created. Iowa Farmers Purchasing Association v. Huff, 260 N.W.2d 824, 827 (Iowa 1977); In re Estate of Wilson, 202 N.W.2d 41, 44 (Iowa 1972). Consequently, given this principle of statutory construction, and given the inclusive nature of the language of § 356.15, we are unwilling to find an exception to the general rule of county liability for situations involving a warrantless arrest.

Second, it is our opinion that pursuant to § 356.15 and Iowa Code § 331.303(7) (1981) that the county board of supervisors has responsibility for setting the charges for safekeeping and maintenance of prisoners in the county jail. Section 331.303 provides that:

> The board [of supervisors] shall:
>
> * * *
>
> 7. Adopt rules relating to the labor of prisoners in the county jail in accordance with sections 356.16 to 356.19, and

---

[1] Contrary to the Sheriff's assertion, the general rule that the county is liable for charges and expenses does not impose a requirement that the prisoner be formally committed. Such a requirement is expressly included in the language of the subsequent exceptions to this general rule.

> may establish the cost of board and provide for the transportation of certain prisoners in accordance with section 356.30.

Section 356.30 provides that "[e]very prisoner gainfully employed is liable for the cost of his board in the jail as fixed by the county board of supervisors." We find no authority in either Iowa Code § 331.653 (1981), relating to the general duties of the sheriff, or ch. 356, relating to county jails, that would allow the sheriff to establish these costs. Consequently, we believe that the responsibility for setting a daily rate for the charges of safekeeping and maintenance of prisoners devolves upon the board of supervisors.

These statutory provisions contain no criteria by which such a rate or similar charge should be calculated. Consequently, it is our opinion that pursuant to county home rule authority, the supervisors may exercise their discretion in determining what criteria should be used in setting those charges. See Iowa Constitution, Art. III, § 39A; Iowa Code § 331.301 (1981).

In conclusion, it is our opinion that it is irrelevant whether a prisoner held at the county jail is arrested without a warrant. The county is responsible for the charges and expenses of maintaining and safekeeping all prisoners housed at the county jail except those prisoners expressly excluded by the terms of § 356.15. The board of supervisors is responsible for setting these charges, and may exercise its discretion in determining the criteria to be used in setting those charges.

Sincerely,

Theresa O'Connell Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

CRIMINAL LAW, DANGEROUS WEAPON, NUNCHAKU: Iowa Code section 702.7 (1981). Whether a Nunchaku is a dangerous weapon constitutes a question of fact for the jury to decide. (Cleland to Heitland, Hardin County Attorney, 10/25/82) #82-10-10(L)

Jon E. Heitland
Hardin County Attorney
Woods Motor Inn
P.O. Box 237
Iowa Falls, Iowa 50126

October 25, 1982

Dear Mr. Heitland:

You have requested an Attorney General's Opinion as to whether a Nunchaku can be a dangerous weapon under Iowa Code § 702.7 (1981). Section 702.7 provides, in relevant part, as follows:

> A dangerous weapon is any instrument or device designed primarily for use in inflicting death or injury upon a human being or animal, and which is capable of inflicting death upon a human being when used in the manner for which it was designed. Additionally, any instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and which, when so used, is capable of inflicting death upon a human being, is a dangerous weapon.

I have found the following definition/description of Nunchaku:

> The nunchaku, a harmless-looking object, appearing more like a toy than a weapon, originated as a southeast Asian agricultural flail. The nunchaku user can subdue an enemy

> by making use of ensnaring actions, crushing and holding pressures, poking and jab-striking attacks, as well as defensive parrying, blocking, and deflecting actions . . . .
>
> The nunchaku is a double-pieced hardwood weapon. The separate pieces of wood are hinged by silk cords, end to end, by a universal point that permits freedom of swivel. Each piece is identical in shape, being about one foot to fifteen inches in length and of square, hexagonal, or octagonal cross section. Each piece may be of one diameter for its entire length, or may be tapered slightly. The nunchaku is used from te postures, and attacks are delivered during close infighting with the enemy. Held in one hand, it is supported by the other hand of the operator who employs appropriate actions, e.g., blocking, parrying, deflecting, or even striking or kicking. The nunchaku is especially effective against weak points on an enemy's body. The best targets for flaillike blows are the rib area, clavicles, forearms, wrists, back of hands, face and knees. For thrust-blows the best targets are the throat, groin, face, and midsection. A painful ensnaring action can be applied by catching the enemy's fingers, hand, or wrist in a nutcracker grip and closing the open ends of the wooden pieces with force. The enemy has no choice but to surrender.

D. F. Draeger and R. W. Smith, Asian Fighting Arts (1969).

Based on the definition set forth above, a Nunchaku could be a dangerous weapon. Nevertheless, this issue is a factual issue that the jury must decide in each case. See State v. Durham, 323 N.W.2d 243, 244 (Iowa 1982).

Sincerely,

Richard L. Cleland

RICHARD L. CLELAND
Assistant Attorney General

RLC:mlr

CRIMINAL LAW, OWI, GUILTY PLEAS, RECORD: Iowa Code § 602.60 (1981) as amended, 1982 Iowa Acts, Chapter 1167, Section 26; Iowa R.Crim.P. 8 does not allow for electronic recording of guilty pleas. No exception is made for guilty pleas to first offense violations of Iowa code § 321.281 (1981) taken before judicial magistrates, and the parties may not vitiate the requirements of rule 8 by agreement. (Cleland to Poppen, Wright County Attorney, and Heitland, Hardin County Attorney, 10/25/82) #82-10-9(L)

Lee E. Poppen
Wright County Attorney
P.O. Box 111
Clarion, Iowa 50525

October 25, 1982

John E. Heitland
Hardin County Attorney
Woods Motor Inn
P.O. Box 237
Iowa Falls, Iowa 50126

Dear Mr. Poppen and Mr. Heitland:

As amended, Iowa Code § 602.60 (1981) provides that judicial magistrates have jurisdiction of first offense violations of Iowa Code § 321.281 (1981) (OWI) in certain limited situations, including the jurisdiction to accept guilty pleas if the defendant is represented by legal counsel. 1982 Iowa Acts, Chapter 1167, Section 26. With regard to this amendment, you have requested an Attorney General's Opinion on the following questions:

1. Is an audible recording a verbatim record sufficient to satisfy the requirements of Iowa R.Crim.P. 8?

2. If the defendant and his attorney waive the requirement of a certified shorthand reporter and consent to an electronic recording record being made, can the magistrate take the guilty plea and sentence the defendant?

3. If the defendant's guilty plea was taken by the magistrate without the record of a certified shorthand reporter, could the defendant challenge the validity of that plea at a later time either as a direct challenge of that conviction or challenging the use of that conviction as a prior offense under a subsequent OWI conviction?

The answer to your first question is no. A judicial magistrate accepting a plea to a first offense violation of § 321.281 (OWI) is required to follow the procedures set forth in Iowa R.Crim.P. 8. See 1982 Iowa Acts, Chapter 1167, Section 27. In our opinion, by making Iowa R.Crim.P. 8 applicable, the legislature intended that a defendant pleading guilty to first offense OWI before a judicial magistrate is entitled to the same procedural protections as a defendant pleading guilty before a district associate or district court judge. Thus, the question presented is whether Iowa R.Crim.P. 8 allows for electronically recorded guilty pleas. We conclude that it does not.

Iowa R.Crim.P. 8(3) provides that a "verbatim record of the proceeding at which the defendant enters a plea shall be made." The literal language of rule 8(3) does not resolve this question since the words "verbatim record" have been defined as "the taking of the record word for word . . .", In Re D.L.F., 176 N.W.2d 486, 488 (Iowa 1970), and, conceivably, an electronic recording could be a "record word for word."

An examination of related criminal rules leads to the conclusion that where the legislature intended to allow electronic recording devices, it specifically provided for that option. See Iowa R.Crim.P. 2(4)(g) and 48(9). Since the legislature has expressly provided for the use of electronic recording devices in specific criminal proceedings, the implication arises that it intended these devices to be excluded from use in any other criminal proceeding for which it is not specifically provided. See Iowa Farmers Purchasing Association Inc. v. Huff, 260

N.W.2d 824, 827 (Iowa 1977); In Re Estate of Wilson, 202 N.W.2d 41, 42 (Iowa 1972).

We are impressed by the fact that at the time Chapter 1167 was passed the universal practice in this jurisdiction was to use shorthand reporters to record guilty pleas to indictable offenses. We assume that the legislature was aware of the existing practice and thus would have specifically allowed for electronic recording devices had it intended deviation from the present practice. As no specific provision was provided, it is our opinion that an electronic recording of a guilty plea to a first offense violation of § 321.281 does not satisfy the record requirement of rule 8.

We are aware of the practical difficulties involved. The code does not provide for shorthand reporters for judicial magistrates. There are several alternatives. Both district court judges and district associate judges may appoint a shorthand reporter. See Iowa Code §§ 602.33, 605.6 (1981). A reporter appointed pursuant to § 602.33 is a reporter for the judicial district. If available, either a district judge's or district associate judge's reporter could be used to record the pleas to first offense OWI before a judicial magistrate. In addition, Iowa Code § 605.8 (1981) provides for the employment of shorthand reporters on an emergency basis as necessary to conduct the court's business. It is noted also that a shorthand reporter fee may be taxed as costs. See Iowa Code § 605.12 (1981).

In any event, there would be certain practical difficulties if electronic recording devices were allowed since, because of the collateral consequences associated with a plea to first offense OWI, see Iowa Code § 321.281 (1981), the tape would have to be maintained for at least six years. It is the state's burden to preserve a complete record of the guilty plea proceeding and failure to do so may require that the judgment be vacated and the conviction reversed. See Rader v. State, 393 N.E.2d 199, 201 n.2 (Ind. Ct. of App. 1979) (1948 plea vacated in 1979 on postconviction action).

Your second question requires a brief look at the language of rule 8 and its purpose. The rule prohibits a court from accepting a guilty plea without first personally addressing the defendant and ascertaining his understanding of the specific subjects enumerated in the rule. See Iowa R.Crim.P. 8(2)(b); State v. Fluhr, 287 N.W.2d 857, 862-863 (Iowa 1980). A verbatim record of the colloquy between the court and defendant must also be made. By enacting these procedures the legislature established what it believed was the most efficacious means of demonstrating the knowing and volitional nature of a defendant's guilty plea. See Fluhr, 287 N.W.2d at 863-864.

This rule does not create in a defendant a right to specify how his plea should be taken or recorded. Rather, the rule is a command to the court to follow certain procedures as a necessary prerequisite for the acceptance of a guilty plea. Keeping in mind that a verbatim record does not allow for the use of an electronic recording device, defendant's consent to the use of such a device would contravene the command of the legislature to the court. Quite simply, a defendant is not in a position to allow a procedure which the legislature deemed inappropriate.

This situation should be distinguished from the substantive rights which a defendant waives during the plea taking process. The right to confront one's accusers and the right to a jury trial are personal rights which a defendant may waive, provided the waiver is a knowing, intelligent and voluntary one. Pursuant to this requirement the legislature enacted procedures which it believed necessary to demonstrate a constitutionally valid waiver. Rule 8 represents a procedural response to a constitutional mandate. It does not create an additional right for a defendant, i.e., the right to waive the use of a shorthand reporter.

In your last question you ask whether a defendant can successfully challenge a guilty plea on the ground that the plea proceeding was electronically recorded. Inherent in your question is the proposition that if a defendant

cannot challenge the guilty plea on this ground, there would be no harm in permitting the procedure. Indeed, the Iowa Supreme Court has in the past distinguished between the duty of the court to perform a specific duty and the duty of the defendant to preserve error for review. See State v. Rouse, 290 N.W.2d 911, 914 (Iowa 1980) (existence of duty on the part of the court does not relieve counsel of responsibility of urging proper objection or exception to preserve error). Nevertheless, given our opinion that rule 8 does not permit electronic recording devices to record guilty pleas, it would be inappropriate to suggest that, because a defendant may not be able to attack the plea proceeding, the court and the parties may ignore the requirements of rule 8 and agree to procedures that are contrary to the legislative intent. It is quite possible that an express or implied agreement between the parties and the court that the plea be electronically recorded would be void and the judgment unenforceable. See Cunningham v. Novak, 322 N.W.2d 60, 62 (Iowa 1982) (amending a rule by practice cannot be allowed); State v. Howell, 290 N.W.2d 355, 358 (Iowa 1980) (parties may not agree to illegal sentence). It may be that there is no other way to enforce the requirements of rule 8. Moreover, defendant's counsel's failure to object to electronic recording could be ineffective assistance of counsel, especially if the recording is lost or inaudible. See State v. Schoelerman, 315 N.W.2d 67, 72-73 (Iowa 1982) (failure to file motion in arrest of judgment did not preclude relief on appeal where defendant did not receive effective assistance of counsel).

In summary, Iowa R.Crim.P. 8 does not allow for electronic recording of guilty pleas. No exception is made for guilty pleas to first offense violations of § 321.281 taken before judicial magistrates, and the parties may not vitiate the requirements of rule 8 by agreement.

Sincerely,

Richard L. Cleland

RICHARD L. CLELAND
Assistant Attorney General

Michael Jordan

MICHAEL JORDAN
Assistant Attorney General

RLC:mlr

JUVENILE LAW: Application of Iowa's new drunk driving statutes to juveniles. 1982 Iowa Acts, House File 2369; 1982 Iowa Acts, Senate File 2197; Iowa Code Chapter 321, 321B (1981); Op.Att'y-Gen. #80-9-10; Op.Att'yGen. #82-1-6. A peace officer who has taken into custody a juvenile driver for operating while intoxicated and has obtained a breath specimen test of ten one hundredths or more, or has been refused permission to take said test, may seize the permanent license and issue a temporary driver's license to a juvenile in like manner as he or she would to an adult. (Hege to Anstey, Appanoose County Attorney, 10/25/82) #82-10-8(L)

October 25, 1982

Mr. Edward Anstey
Appanoose County Attorney
Appanoose County Courthouse
Centerville, IA 52544

Dear Mr. Anstey:

You have requested an opinion of this office relative to Iowa's new drunk driving laws and its application to juveniles. You posit the following question:

> Specifically, may the peace officer who has halted a juvenile driver for OWI and has obtained a breath specimen test of .10 one hundredths or greater or been refused permission to take said bodily specimen, proceed to issue the juvenile a temporary driver's permit and seize the permanent license of said juvenile in a matter similar to that which would be experienced by an adult in like circumstances.

After review of previous opinions of this office, House File 2369 and Senate File 2197, it is our considered opinion that the short answer to your inquiry is in the affirmative.

A previous opinion of this office indicated that the new Juvenile Justice Act did not exempt application of traffic offenses greater than a simple misdemeanor and ch. 321B, implied consent provisions, to juveniles. The opinion further held that the provisions of ch. 321B and the juvenile's right to counsel must both be applied and harmonized to effect the intent of both. The opinion concluded that the procedure for administering a chemical test for OMVUI to a juvenile would be similar to that done for an adult. Op.Att'yGen. #80-9-10.

In analyzing your inquiry, we are guided by the familiar principles of statutory construction.

In interpreting a statute we must look at the object to be accomplished, the evils sought to be remedied and the purpose to be served and place a liberal construction on the statute which will best serve the purpose rather than defeat it. Severson v. Sueppel, 152 N.W.2d 281 (Iowa 1967). A statute should be given a sensible, practical, workable and logical construction and a construction resulting in unreasonableness will be avoided. Krueger v. Fulton, 169 N.W.2d 875 (Iowa 1969). Finally, in construing a statute we must be mindful of the state of the law when it was enacted and seek to harmonize it with other statutes. Doe v. Ray, 251 N.W.2d 496 (Iowa 1977).

The underlying purpose of § 321.281 and ch. 321B is to prevent disaster on the highways by protecting the public from drivers operating a vehicle under the influence of intoxicants.

In enacting the new Juvenile Justice Code, Chapter 232, the Iowa Legislature exempted most traffic-related offenses from the delinquency adjudication provisions of the Act. Iowa Code Section 232.8(1) (1981). The legislature did not, however, exempt OWI violations, which are proscribed by § 321.281.

Consistent with that history, the legislature, in recent session, enacted the provision to which you referred. It provides in full:

JUVENILE OFFENDERS-LICENSE SUSPENSION

Senate File 2197

AN ACT
RELATING TO LICENSE AND PERMIT SUSPENSIONS AND REVOCATIONS BY CERTAIN JUVENILE OFFENDERS AND PERMITTING THE TAKING OF TESTS TO DETERMINE THE ALCOHOLIC CONTENT

OF BLOOD OF CERTAIN JUVENILES TAKEN INTO CUSTODY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. Chapter 321, Code 1981, is amended by adding the following new section in the division pertaining to cancellation, suspension, or revocation of licenses:

NEW SECTION. LICENSE SUSPENSIONS OR REVOCATIONS DUE TO VIOLATIONS BY JUVENILE DRIVERS. Upon the entering of an order at the conclusion of an adjudicatory hearing under section 232.47 that the child violated a provision of chapter 321 or 321A for which the penalty is greater than a simple misdemeanor, or that the child refused to submit to chemical testing under section 321B.3, the clerk of the juvenile court in the adjudicatory hearing shall forward a copy of the adjudication to the department. Notwithstanding section 232.55, a final adjudication in a juvenile court that the child violated a provision of chapter 321 or 321A constitutes a final conviction of a violation of a provision of chapter 321 or 321A for purposes of section 321.189, subsection 2, paragraph b, and sections 321.193, 321.194, 321.200, 321.209, 321.210, 321.215, and 321A.17. Notwithstanding section 232.55, the director shall revoke the license or permit of a child under section 321B.7 upon receipt of a copy of the final adjudication in a juvenile court that the child refused to submit to chemical testing under section 321B.3.

Sec. 2. Section 321B.2, Code 1981, is amended by adding the following new unnumbered paragraph:

NEW UNNUMBERED PARAGRAPH. As used in this chapter, "arrest" includes but is not limited to taking into custody pursuant to section 232.19.

The legislature is, of course, aware of the general dichotomy between juvenile proceedings and those of adult criminal

court. In seeking to apply the drunken driving statutes to juveniles, it was necessary to bridge that general dichotomy. In doing so, the statute first equates a juvenile "taking into custody" with an adult arrest. 1982 Iowa Acts, Senate File 2197, Section 2. Secondly, the provision also equates an "adjudication" of delinquency with a "final conviction" for purposes of application of OWI provisions. 1982 Iowa Acts, Senate File 2197, Section 1, second unnumbered sentence. Further, the provision mandates the clerk of the juvenile court to send a copy of such an adjudication order to the Department of Transportation for its use in the administrative process of license suspensions and revocations. 1982 Iowa Acts, Senate File 2197, Section 1, first unnumbered sentence. This portion of the statute is comparable to the requirement imposed upon the clerk of the district court by Iowa Code Section 321.207 and 1982 Iowa Acts, House File 2369, Section 5(5). Finally, the new enactment mandates the administrative revocation by the director of the Department of Transportation when a juvenile refuses to submit to chemical testing. 1982 Iowa Acts, Senate File 2197, Section 1, third unnumbered sentence. Again, this is analogous to the mandatory duty of revocation by the director upon adults in a similar circumstance. Iowa Code Section 321.209; 1982 Iowa Acts, House File 2369, Section 20.

Based upon the foregoing, it is the opinion of this office that the legislature, in the context of OWI statutes, intended that juveniles be treated similar to adults except, of course, any public offense violation must be adjudicated in juvenile court in lieu of prosecution in adult criminal court.

Moreover, in relation to your specific question, 1982 Iowa Acts, House File 2369, relating to the immediate revocation of license by the peace officer, does not provide for any disparate treatment between adults and juveniles. 1982 Iowa Acts, House File 2369, Section 13.

It is the opinion of this office that under the circumstances you described, the peace officer may issue the immediate notice of revocation of license and issue a temporary driver's license to a juvenile in like manner as he or she would to an adult. 1982 Iowa Acts, House File 2369, Sections 13 and 20.

Finally, none of the recent amendments alters the previous opinion relating to the juvenile's right to counsel in OWI

situations. That opinion continues to be the correct legal analysis harmonizing the juvenile's right to counsel in OWI situations. Op.Att'yGen. #80-9-10. Further, any detention of a juvenile pursuant to an alleged OWI offense must meet the requirements of Iowa Code Sections 232.22 and 356.3 and .4 (1981). See, generally, Op.Att'yGen. #82-1-6.

Sincerely yours,

Brent D. Hege

Brent D. Hege
Assistant Attorney General

BDH/kap20

CONSERVATION COMMISSION; LIQUOR, BEER & CIGARETTES; ADMINISTRATIVE RULES: Consumption of beer in state parks. United States Constitution, Fourteenth Amendment; Iowa Const. art. I, § 6; Iowa Code Chapters 17A, 111, 123 (1981); Iowa Code §§ 17A.19(8), 17A.19(8)(a), 17A.19(8)(b), 17A.19(8)(g), 111.3, 111.4, 111.11(1), 111.35, 111.47, 123.3(9), 123.46 (1981). If the Conservation Commission has a rational basis to conclude that regulating or banning keg beer is needed for proper public use of parks, it may adopt rules which are rationally related to this purpose. (Kniep to Wilson, Director, State Conservation Commission, 10/25/82) #82-10-7(L)

October 25, 1982

Mr. Larry J. Wilson, Director
State Conservation Commission
Wallace State Office Building
L O C A L

Dear Mr. Wilson:

You have requested the opinion of this office regarding the following questions:

1. Does the Commission have the authority to ban keg beer parties in state parks and recreation areas?

2. Can the Commission establish a system of requiring advance notice as is done by some counties?

3. Can the Commission require a payment of a fee or deposit, either refundable or non-refundable, for use of its facilities for keg beer parties?

4. Is the regulation of state park facilities for keg beer parties discriminatory by not regulating the use of the same facilities for parties involving beer in cans or bottles?

These questions relate to the authority of the Conservation Commission to manage the state parks placed under its jurisdiction in Iowa Code Chapter 111. Rules adopted by the Commission to ban or regulate consumption of keg beer in state parks would be entitled to the presumption of validity

supporting agency rules. Schmitt v. Iowa Department of Social Services, 263 N.W.2d 739, 745 (Iowa 1978). Any attack on these rules would necessarily be framed in terms of the tests in Iowa Code § 17A.19(8) (1981).

The first issue would be are the suggested keg beer rules in excess of the statutory authority of the agency. § 17A.19(8)(b). In determining whether such rules are within the authority of an agency, the Iowa Supreme Court has used a "rational agency" standard for review. "When a 'rational agency' could conclude that a rule is within its delegated authority, a reviewing court should not reach a contrary conclusion." Davenport Community School District v. Iowa Civil Rights Commission, 277 N.W.2d 907, 910 (Iowa 1979). Under this deferential standard, if the commission can rationally conclude that rules to ban or regulate keg beer parties in state parks are within the authority granted by Chapter 111, then the rules will not be held invalid as ultra vires or in excess of the statutory authority of the agency.

Under the authorizing statute, Iowa Code § 111.3, it is the duty of the Conservation Commission among other things "to establish, maintain, improve, and beautify public parks and preserves." (emphasis supplied) Further, the Commission is granted "the power to provide and operate facilities for the proper public use" (emphasis supplied) of such parks and preserves. While Chapter 111 contains no express grant of rulemaking power, such power is necessarily implied from the management duties and powers granted in § 111.3 as well as references to general rulemaking authority in §§ 111.4 (rules regulating construction, restriction, or removal of structures), 111.11(1) (general reference to rules adopted pursuant to ch. 111), and 111.35 (use of parks subject to "terms, conditions, limitations and restrictions" of the commission).

A ban on keg beer parties would not be in conflict with the authority granted to the Iowa Beer and Liquor Control Council under Chapter 123, the Iowa Beer and Liquor Control Act. Under § 123.46 it is unlawful to use or consume alcoholic liquors or beer upon the public streets or highways. In other nonlicensed public places (other than school property) only use or consumption of alcoholic liquors is prohibited. This statute effectively prohibits use or consumption of alcoholic liquors in state parks and preserves. It does not prohibit the use or consumption of beer as defined in § 123.3(9) except on park roads. However, nothing in the statute requires the Commission to permit

state park users to use or consume beer in the park if such use or consumption interferes with proper public use of the facilities. The primary thrust of the Iowa Beer and Liquor Control Act is to regulate the sale of beer and liquor and nothing in that act would preclude a ban on consumption of keg beer in state parks and preserves.

Therefore, the commission is the agency charged with the duty of maintaining and operating the state parks, and it has the power to adopt rules to fulfill that duty. Should the commission determine that problems such as underage drinking, litter, rowdiness, disturbance of other area users, safety hazards on park roads, and vandalism require either a ban on keg beer parties or a system of advance notice, responsibility agreement, and fee for such parties, the commission has statutory authority to institute such policy by reasonable rules adopted pursuant to Chapter 17A.

The second test applied to any keg beer rules would be whether the rules are unreasonable, arbitrary or capricious or characterized by an abuse of discretion. § 17A.19(8)(g). Your letter states several problems upon which the commission could determine that reasonable corrective rules are necessary. The question then arises whether there is a reasonable basis for regulating or banning only keg beer parties. While your letter does not state a reason for making the distinction between keg and bottle beer parties, we believe that a commission decision to make the distinction could have a rational basis and not be unreasonable, arbitrary or capricious. A commission determination to limit or ban only keg beer use could be supported by reasons such as the following: that rules regulating only keg beer would solve the most significant part of the problems; that there is a significant difficulty writing rules which distinguish the picnic bottle beer drinker from the bottle beer party; that all keg beer parties involve large quantities of beer and require regulation, while bottle or can beer often is possessed in the state parks in small quantities and in situations requiring little regulation; or that there is added litter with keg beer. We believe that rules regulating only keg beer could be supported by such reasons and would not be found to be inherently arbitrary or capricious.

A third test, unlikely to be reached by a reviewing court if the rules survive the first two tests, is whether the rules are in violation of constitutional standards. § 17A.19(8)(a). Once again the issue would be raised most clearly by a distinction in the rules between keg and bottle

beer parties. Such a distinction may be challenged on equal protection grounds under the 14th Amendment to the United States Constitution and Article I, § 6 of the Iowa Constitution.

Rules regulating or banning keg beer parties would involve neither a fundamental right nor a suspect classification; therefore, the test to apply in determining constitutionality is whether the rules are patently arbitrary and bear no rational relationship to a legitimate governmental interest. See Hodel v. Indiana, 452 U.S. 314, 331, 101 S.Ct. 2376, 69 L.Ed.2d 40, 55 (1981); Hawkins v. Preisser, 264 N.W.2d 726, 729 (Iowa 1978). A plaintiff challenging the rules would have the heavy burden of negating every reasonable basis upon which the classification system created by the rules (keg party versus bottle party) may be sustained. See Bierkamp v. Rogers, 293 N.W.2d 577, 580 (Iowa 1980). The most relevant principle in equal protection analysis of keg beer party rules is that reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The regulator may select one phase of one field and apply a remedy there, neglecting the others. See Cleland v. National College of Business, 435 U.S. 213, 220, 98 S.Ct. 1024, 55 L.Ed.2d 225, 231 (1978); Rudolph v. Iowa Methodist Medical Center, 293 N.W.2d 550, 558 (Iowa 1980).

The Commission may determine that rules that regulate only keg beer parties are addressed to the most acute phase of the problems associated with beer drinking in state parks; if otherwise reasonable, such rules would not violate equal protection rights of park users. We believe that reasonable rules to regulate or ban keg beer parties would pass constitutional muster.

Turning more specifically to your questions, based upon the analysis above we have reached the following conclusions:

1. If the Commission determines that a rule banning keg beer parties in state parks is reasonably related to maintenance and proper public use of those parks, it has authority under Chapter 111 to adopt such a rule.

2. The Commission, upon determining that rules requiring advance notice and a responsibility agreement before permitting a keg beer party in a state park are reasonably related to maintenance and proper public use of those parks, has authority under Chapter 111 to adopt such rules.

3. Under § 111.47 the Commission is "authorized to fix fees for camping and other special privileges which shall be in such amounts as may be determined by the Commission upon a basis of the cost of providing and reasonable value of such privileges." (emphasis supplied) If keg beer parties create extra management burdens, then allowing a keg beer party would be a special privilege for which the statute authorizes a fee. However, whether the fee is refundable or nonrefundable, the statute limits the amount which can be charged. Any fee must not exceed the amount determined by the Commission to be its cost in providing the facilities and the reasonable value of the use of the park facilities for a keg beer party.

4. Rules regulating only keg beer parties and not bottle or can beer parties would not on their face be impermissibly discriminatory. Nor would any of the rules you suggest be inherently unreasonable, arbitrary or capricious or deny equal protection to any class of park users.

Sincerely,

Allan Kniep (ab)

ALLAN KNIEP
Assistant Attorney General

AK:rcp

COUNTIES AND COUNTY OFFICERS: Official Misconduct: Public motor vehicles; Campaigns. Chapter 721: §§ 721.4, 721.6. A county sheriff may not use his official vehicle at county expense for transportation around the county when his prime purpose is to campaign for re-election. (Pottorff to Norland, State Representative, 10/21/82) #82-10-6(L)

October 21, 1982

Honorable Lowell Norland
State Representative
Kensett, Iowa 50448

Dear Representative Norland:

You have requested an opinion of the Attorney General concerning the use of county owned vehicles for campaign purposes. You point out that section 721.4 prohibits the use of publicly owned vehicles for certain political purposes. You further point out, however, that section 721.6 limits the application of section 721.4 with regard to officers or employees who are candidates for political office campaigning on their own behalf. In view of these two sections, you pose the following question:

> May a county sheriff use his official vehicle at county expense for transportation around the county when his prime purpose is to campaign for re-election?

In order to answer your inquiry, it is necessary to consider the full text of sections 721.4 and 721.6. Section 721.4 provides:

> Using public motor vehicles for political purposes. It shall be unlawful for any person to use or permit to be used any motor vehicle owned by the state of Iowa or any political subdivision thereof for the purpose of transporting any political literature or any person or persons engaging in a political campaign for any political party or any person seeking an elective office.

Under this language it is unlawful, in relevant part, for any person to use any motor vehicle owned by a political subdivision, which includes a county, for the purpose of transporting any person engaging in a political campaign for any political party or any person seeking an elective office.

The prohibitions of section 721.4 must be considered in light of section 721.6. This section provides:

> Exception to sections 721.3 to 721.5. The provisions of sections 721.3 to 721.5 shall not be construed as prohibiting any such officer or employee who is a candidate for political office to engage in campaigning at any time or at any place for himself or herself.

Under this language the provisions of section 721.4 should not be construed to prohibit an officer or employee who is a candidate for public office from campaigning at any time or at any place in his or her own behalf.

Construing these two sections, we apply principles of statutory construction. The goal of all principles of statutory construction is to ascertain and give effect to the intent of the enacting legislature. American Home Products Corp. v. Iowa State Board of Tax Review, 302 N.W.2d 140, 142 (Iowa 1981). When the statute is penal, the language must be construed narrowly. Knight v. Iowa District Court of Story County, 269 N.W.2d 430, 437-38 (Iowa 1978). Rules of statutory construction are to be resorted to, however, only when the terms of the statute are ambiguous. Hartman v. Merged Area VI Community College, 270 N.W.2d 822, 825 (Iowa 1978). Applying these principles, we believe it is unnecessary to further construe the language of section 721.4. With respect to the specific question which you pose, we believe section 721.4, standing alone, is unambiguous. The language of section 721.4 clearly prohibits the use of publicly owned vehicles as transportation in a campaign for elective office. The sole issue for statutory construction, therefore, is the scope of the limitation set out in section 721.6.

In determining the intent of the legislature in enacting section 721.6, we point out that the legislature did not create an unequivocal exemption from section 721.4 for officers or employees who are candidates for political office. The legislature did not provide that section 721.4 is inapplicable to officers or employees who are candidates for political office. Rather, the legislature merely provided that section 721.4 "shall not be construed as probibiting any such officer or employee . . . to engage in campaigning at any time or at any place for himself or herself." We consider this language insufficient to support a legislative intent to wholly exempt officers and

employees who are candidates for public office from section 721.4 and, by negative implication, authorize the unrestricted use of publicly owned vehicles as transportation in a campaign for elective office.

Related principles of statutory construction support this conclusion. Statutory exceptions should be strictly construed. Heiliger v. City of Shelton, 236 Iowa 146, 153-54, 18 N.W.2d 182, 187 (1945). Applying this principle, we must construe the language of section 721.6 strictly. The failure to expressly provide that officers and employees who are candidates for political office are exempt from section 721.4 minimally renders section 721.6 ambiguous. The principle of strict construction militates against resolving this ambiguity by finding a wholesale exemption.

In our view a more reasonable construction of section 721.6 is that section 721.6 authorizes officials or employees to engage in campaigning incidental to official duties or employment obligations performed while utilizing publicly owned vehicles. For example, under section 721.6 a sheriff who is utilizing a county owned vehicle to serve legal documents would not be prohibited by section 721.4 from introducing himself as a candidate for re-election to those persons whom he encounters while serving the documents. In the absence of section 721.6, section 721.4 could be construed to prohibit a sheriff from engaging in such minimal campaign activities. We believe the legislature intended section 721.6 to insure that the statutes under chapter 721 were not applied to restrict candidates in this manner. By contrast, section 721.6 would not authorize a sheriff to utilize a county owned vehicle for the sole or prime purpose of attending a political fund-raiser. Whether any particular campaign activity is incidental to the performance of official duties is a question of fact that must be resolved on a case-by-case basis.

In answer to your specific inquiry, therefore, we conclude that a county sheriff may not use his official vehicle at county expense for transportation around the county when his prime rather than incidental purpose is to campaign for re-election.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP/jkp

TAXATION: Partial Payments of Delinquent Property Taxes. Iowa Code §§445.36 and 445.37 (1981). The county treasurer, in the exercise of sound discretion, can accept or reject partial payments of delinquent property taxes for partial satisfaction of delinquent amounts. (Griger to Spear, State Representative, 10/11/82) #82-10-5(L)

October 11, 1982

The Honorable Clay Spear
State Representative
1914 River
Burlington, IA 52601

Dear Representative Spear:

You have requested an opinion of the Attorney General concerning the county treasurer's authority to accept or reject a part payment of delinquent property taxes. Specifically, in your letter of September 7, 1982, you state the following:

> "A property owner in Burlington tried in July 1982 to pay the property tax installment due October 1, 1981, and was informed that he could not pay that installment without paying at the same time the installment due April 1, 1982. The family had fallen behind on the mortgage payments and there was not enough money in their property tax escrow account to pay an installment before the first of July.
>
> When I inquired of the Des Moines County Treasurer, she referred me to an employee who said it was too complicated to compute the penalty on one installment, and payment of one installment is not accepted after July 1.

> I inquired at the Treasurer's Office in Lee County and was told that such a payment would be accepted there.
>
> In your opinion, does the County Treasurer have the option of refusing to accept payment of the first installment after July 1 if the second installment remains unpaid?"

In the above situation you posed, the first and second installments of property taxes payable during the 1981-1982 fiscal year had become delinquent. See Iowa Code §§445.36 and 445.37 (1981). Therefore, the entire amount of property taxes levied upon the property in question was due and payable. It is the general rule that a tax official, responsible for collection of property taxes, cannot be required to accept partial payment of taxes, regardless whether timely payment by installment is authorized by statute, in the event that such taxes have become delinquent. Julien v. Ainsworth, 27 Kan. 446 (1882); City of Odessa v. Lea, 381 S.W.2d 153 (Tex. Civ. App. 1964); 1940 Op. Att'y Gen. 318.

In 1940 Op. Att'y Gen. 318, 319, the Attorney General opined as follows:

> "We find no prohibition in the statutes prohibiting the treasurer from accepting a partial payment of a delinquent personal property tax obligation, and we are therefore of the opinion that it would be in the province of the treasurer, in the exercise of his own sound discretion, to accept the partial payment for application upon the delinquent personal property tax obligation."

In Julien v. Ainsworth, supra, the Kansas Court took note of the fact that a county treasurer might wish to refuse a partial payment of a delinquent tax because of bookkeeping burdens and, instead, only accept full payment of all delinquent amounts.

It is our opinion that the county treasurer, in the exercise of sound discretion, can accept or reject partial payments of delinquent property taxes for partial satisfaction of delinquent amounts.

Very truly yours,

Harry M. Griger

Harry M. Griger
Special Assistant Attorney General

WP2

STATE CONSERVATION COMMISSION: Navigation Regulation Jurisdiction: Iowa Code Chapter 106 (1981); Iowa Code §§ 106.1, 106.2(4) as amended by 1982 Iowa Acts, Senate File 399, § 2, 106.2(5), 106.2(9), 106.2(13), 106.15(1), 106.17(1), (2), (3) (1981), as amended by 1982 Iowa Acts, Senate File 399, §§ 20-21, 106.31 (1981), as amended by 1982 Iowa Acts, Senate File 399, § 26, 111.18 (1981), Iowa Code Chapter 504A (1981). The navigation regulations of Iowa Code Chapter 106 apply on a lake located in and owned by a city. The city may regulate any boating it permits on the lake only within the limits established by Iowa Code § 106.17 (1981) as amended by 1982 Iowa Acts, Senate File 399, §§ 20-21. (Kniep to Kenyon, Union County Attorney, 10/11/82) #82-10-4(L)

October 11, 1982

Mr. Arnold O. Kenyon III
Union County Attorney
100 E. Montgomery
Creston, Iowa 50801

Dear Mr. Kenyon:

You have requested the opinion of this office concerning whether certain state navigation regulations imposed pursuant to Iowa Code Chapter 106 apply on McKinley Lake, which is located in and owned by the City of Creston, Iowa.

The issue posed is whether McKinley Lake constitutes waters under the jurisdiction of the State Conservation Commission for purposes of Chapter 106. See, e.g., § 106.15(1), 106.31 as amended by 1982 Iowa Acts, Senate File 399, § 26. This term is specially defined in § 106.2(4) and should not be confused with the Conservation Commission's jurisdiction over meandered lakes under § 111.18.

If the lake fits within the § 106.2(4) definition, boating on the lake is subject to the statewide navigation regulations contained in Chapter 106 and commission rules adopted to carry out that chapter. See, e.g., §§ 106.15(1), 106.31 as amended. In such case while arguably the city as sole owner could forbid all boating on the lake, any boating which the city permitted would be subject to the regulations in Chapter 106 and commission rules. The city's power to regulate such boating would be limited as provided in Iowa Code § 106.17 as amended by 1982 Iowa Acts, Senate File 399, §§ 20-21. Under § 106.17 local ordinances may be adopted relating to the operation or equipment of vessels, but such

ordinances are operative only so long as they are not inconsistent with Chapter 106 or commission rules including "special rules." (See § 106.17(2), (3) as amended regarding special rules.)

Iowa Code § 106.2(4) (1981) as amended by 1982 Iowa Acts, Senate File 399, § 2, states: "'waters of this state under jurisdiction of the state conservation commission' means any navigable waters within the territorial limits of this state, and the marginal river areas adjacent to this state, exempting only farm ponds and privately owned lakes." (emphasis added). The legislature dropped a third type of exemption, "waters specifically delegated to local authorities," with the 1982 amendment.

Apparently, the city attorney has reached the preliminary conclusion, based on the facts recounted below, that McKinley Lake is a privately owned lake as defined in Chapter 106 and, therefore, not "under the jurisdiction of the Conservation Commission" under Chapter 106. According to the city attorney's letters, the lake and surrounding McKinley Park were deeded to the city by the predecessor of the Burlington Northern Railroad around 1900, and have been governed by the city since then. Access to the lake has been limited, with boating only by permission of the lake's governing body which has been at various times either the city council or the park and recreation board. Among the limited users receiving permission has been the Creston Ski Club, which uses the lake for water skiing. Other boating uses have been canoe races and boating events for charity. However, the city has not allowed general boating on the lake, prohibits trespassing on the lake by ordinance, and enforces that ordinance on occasion.

Based upon those facts it is clear that McKinley Lake constitutes "navigable waters" as defined in Iowa Code § 106.2(9), since it can "support a vessel capable of carrying one or more persons during a total of six months period in one out of every ten years." Therefore, under Iowa Code § 106.2(4) as amended and § 106.17(1), the provisions of Chapter 106 and Commission rules govern boating on McKinley Lake unless it is a farm pond or a privately owned lake. Both "farm pond" and "privately owned lake" are defined in Chapter 106.

We have concluded that McKinley Lake is not a "privately owned lake" under the definition in Iowa Code § 106.2(13) (1981). That term "means any lake located within the boundaries of this state and not subject to federal control

covering navigation owned by an individual, group of individuals or a nonprofit corporation and which is not open to the use of the general public but is used exclusively by the owners and their personal guests." Because McKinley Lake is owned by the City of Creston, the ownership is not by an individual or group of individuals, but by the municipal corporation.

The next question then becomes, is the City of Creston a nonprofit corporation as that term is used in § 106.2(13). Nonprofit corporation is not defined in Chapter 106. While the term "corporation" may be sufficiently broad to include public entities such as municipalities, yet as used in constitutions and statutes it has frequently been held to refer only to private corporations as distinguished from those which are purely public. 18 Am.Jur.2d 55, Corporations § 2 (1965); Iowa Eclectic Medical College Ass'n v. Schrader, 87 Iowa 659, 55 N.W. 24, 27 (1893). This construction of "corporation" is particularly applicable when the statute involved is listing the owners of privately owned lakes. We conclude that "nonprofit corporations" as used in Iowa Code § 106.2(13) means private entities, for example, those corporations created under Iowa Code Chapter 504A, The Iowa Nonprofit Corporation Act, and not public entities such as municipal corporations. Additionally, we do not construe persons using publicly owned property by permit from a public body as "personal guests" of the owners. Because it is owned by the City of Creston and not "an individual, group of individuals or a nonprofit corporation," McKinley Lake is not a privately owned lake.

McKinley Lake is not a farm pond under Iowa Code § 106.2(5) which defines a farm pond as "a body of water wholly on the lands of a single owner or a group of joint owners, which does not have any connection with any public waters and which is less than ten surface acres." We base that conclusion on the fact that McKinley Lake is owned by the city and, as indicated above, is navigable public waters for purposes of Chapter 106. There is no need to look to the other parts of the definition, because McKinley Lake as public waters cannot be a farm pond under the definition in the Code.

Regulation of boating on McKinley Lake is within the jurisdiction of the conservation commission as defined in Chapter 106 because the lake constitutes navigable waters which are not exempted as a privately owned lake or farm pond. This opinion is in accord with the legislature's

declaration of policy found in § 106.1 to promote uniformity of laws relating to navigation. Boating on McKinley Lake is within the jurisdiction of the State Conservation Commission and subject to the statewide regulations contained in Chapter 106 and commission rules promulgated pursuant to that chapter. Regulation of boating thereon by the City of Creston is subject to the restrictions established by Iowa Code § 106.17 as amended in 1982.

Sincerely,

Allan Kniep

ALLAN KNIEP
Assistant Attorney General

AK:rcp

INSURANCE; LICENSING: Exempting nonresident insurance agents from continuing education requirements; cancelling existing insurance agents' licenses prior to the expiration of the term of those licenses. 1982 Iowa Acts, H.F. 846, sections 9, 10, 13; Iowa Code sections 4.1(1), 4.5, 4.7, 4.8, 4.13, 258A.1(1)(z), 258A.2(1), 258A.2(2)(a), 258A.2(3), 505.14, 508.13, 515.42, 522.1, 522.2, 522.4 (1981). Exempting all nonresidents from the Commissioner of Insurance's rules on continuing education for insurance agents is statutorily overbroad to the extent that it exempts a nonresident agent even when the nonresident's state has no continuing education requirement for agents. Insurance agents' licenses in effect prior to July 1, 1982, may not be cancelled by the commissioner for nonpayment of the fee required for licenses issued after that date, until the prior licenses by their terms expire. (Haskins to Harbor, State Representative, 10/1/82) #82-10-2(L)

October 1, 1982

Honorable William H. Harbor
State Representative
State Capitol
L O C A L

Dear Representative Harbor:

You have asked the opinion of our office on two questions, the first of which is as follows:

> May the Commissioner of Insurance (the "commissioner") legally require Iowa resident insurance agents to attend a continuing education course as a requisite for license renewal and at the same time exempt nonresident insurance agents from the continuing education courses?

The commissioner when licensing insurance agents (other than those selling only credit life and credit accident and health insurance) is deemed to be a "licensing board" under Iowa Code Ch. 258A (1981), relating to continuing professional and occupational licensing. See Iowa Code section 258A.1(1)(z) (1981). As such, he has the power and duty to require the professional licensees under his supervision to participate in continuing education. See Iowa Code section 258A.2(1) (1981). The commissioner has therefore adopted

rules setting forth minimum requirements for continuing education for insurance agents. See 510 I.A.C. ch. 11. These rules apply only to resident agents. See 510 I.A.C. §11.1(3). Hence, all nonresident agents are excepted from the continuing education requirements.[1,2]

The issue is whether excluding all nonresident agents is consistent with Iowa Code ch. 258A (1981). The key section is Iowa Code section 258A.2(3) (1981), which states:

> A person licensed to practice an occupation or profession in this state shall be deemed to have complied with the continuing education requirements of this state during periods that the person serves honorably on active duty in the military services, or for periods that the person is a resident of another state or district having a continuing education requirement for the occupation or profession and meets all requirements of that state or district for practice therein, or for periods that the person is a government employee working in his or her licensed specialty and assigned to duty outside of the United States, or for other periods of active practice and absence from the state approved by the appropriate board of examiners.

[Emphasis added]. Under the emphasized portion of this section, a nonresident licensee is exempt from continuing education requirements only when the nonresident's state has

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[1]The Iowa Real Estate Commission has created a similar exception for nonresident salesmen and brokers to its continuing education requirements. See 700 I.A.C. §3.6(5)(c).

[2]The commissioner's rules were based generally upon the "Agents Continuing Education Model Regulation" of the National Association of Insurance Commissioners. See 2 1978 Proceedings of the National Association of Insurance Commissioners 277 (1978). The "model" regulation does not cover nonresident agents.

a continuing education requirement for the nonresident's occupation or profession (and when the nonresident licensee meets all the requirements of his state for practice). The clause in the above section excepting a licensee "for other periods of active practice and absence from the state approved by the appropriate board of examiners" can refer only to absences by resident licensees. Otherwise, there would be no need for specific mention of nonresident licensees in the emphasized language. Thus, the above section means that a licensing board may exempt a nonresident licensee only when the nonresident's state has a continuing education requirement. But the commissioner's exemption is broader than that and applies even when the nonresident's state has no such requirement. Since the plain provisions of a statute cannot be altered by administrative rule, see Schmitt v. Iowa Dep't of Job Service, 263 N.W.2d 739, 745 (Iowa 1978), the commissioner's rules are overbroad to the extent that they grant a blanket exemption for nonresident agents regardless of whether a nonresident agent is from a state having a continuing education requirement.

It should be noted that the commissioner's rationale for making the exemption broader than authorized by Iowa Code section 258A.2(3) (1981) was to protect Iowa resident agents from retaliation by other states having the following type of statute:

> When by the laws of any other state any premium or income or other taxes, or any fees, fines, penal ties, licenses, deposit requirements or other obligations, prohibitions or restrictions are imposed upon Iowa insurance companies actually doing business in such other state, or upon the agents of said companies, which in the aggregate are in excess of the aggregate of such taxes, fees, fines, penalties, licenses, deposit requirements or other obligations, prohibitions or restrictions directly imposed upon insurance companies of such other state under the statutes of this state, so long as such laws continue in force

> the restrictions of whatever kind shall in the same manner and for the same purpose be imposed upon insurance companies of such other state doing business in Iowa.

Iowa Code section 505.14 (1981) (quoted in relevant part). The commissioner's concern is that if another state which did not have continuing education requirements for agents had the same, or a similar, statute, it might interpret it to mandate imposition on Iowa agents of special continuing education requirements--"retaliation"--on the ground that a continuing education requirement imposed by Iowa on the other state's agents could be deemed by that state to be an "obligation" imposed under Iowa law that was greater than that imposed on Iowa agents by the other state's law. (A question could be raised whether Iowa Code section 505.14 (1981) permits "retaliation" only against insurance companies, and not their agents, even though a basis for "retaliation" against companies may be requirements imposed on their agents).

The problem with this point is, however, that to whatever extent "retaliation" would actually take place, Iowa Code section 258A.2(3) (1981) does not allow the commissioner to create a broader exception to continuing education requirements in order to prevent it. It is true that, in connection with a licensing board's rules on continuing education, Iowa Code section 258A.2(2) (1981) does provide: "[s]uch rules shall . . . a. Give due attention to the effect of continuing education requirements on interstate . . . practice." But to the degree that this section might allow the commissioner to consider possible "retaliation" on resident agents in fashioning the scope of his continuing education requirements, it is superseded by the more specific and textually subsequent directive as to nonresident licensees contained in Iowa Code section 258A.2(3) (1981). See Iowa Code sections 4.7, 4.8 (1981). Thus, the commissioner must comply with the terms of the latter section and limit any exception for nonresident agents so as to exempt only those nonresident agents from states having continuing education requirements. Significantly, so narrowed, the exception would probably be immune from constitutional equal protection challenge by resident

agents. See State v. Garford Trucking, Inc., 72 A.2d 851, 856 (N.J. 1950) ("All those similarly circumstanced are treated alike").

Your next question is as follows:

> May the commissioner automatically cancel an insurance agent's license if a personal check, money order or cashier's check in the amount of $10.00 is not received in his office on or before September 20, 1982, even though the agent's license does not expire until April 30, 1983?

Effective July 1, 1982, the chapter governing licensing of insurance agents was changed. Prior to that time, each agent was issued a separate license (the "old license") for each company with which he or she was affiliated. See Iowa Code section 522.1 (1981). Afterward, a single license (the "new license") for each agent covering all companies with which the agent is associated is issued. See 1982 Iowa Acts H.F. 846, section 9, amending Iowa Code section 522.1 (1981). The fee for the old license was five dollars for life insurance agents and two dollars fifty cents for other insurance agents. See Iowa Code section 522.4 (1981). The fee for the new license is ten dollars for both life and non-life agents. See 1982 Iowa Acts, H.F. 846, section 13, amending Iowa Code section 522.4 (1981). Each insurance company certifies to the commissioner a list of the agents selling for it and pays a five dollar fee. Id. The term of the old license was defined by reference to the term of the certificate of authority of the insurance company for which it was issued, which is from May 1 of a given year to April 30 of the following year. See Iowa Code sections 522.2, 508.13, 515.42 (1981). The new license, on the other hand, is valid for an unspecified period of one year. See 1982 Iowa Acts, H.F. 846, section 10, amending Iowa Code section 522.2 (1981).

In an undated directive issued in June or July of 1982, agents were notified by the commissioner's staff that licensing procedures had changed. All agents, including those with existing licenses, were told to pay the ten

dollar fee for a new license by August 20, 1982 (later extended to September 20, 1982). Agents were informed that failure to pay the fee would result in cancellation of their existing licenses. The existing licenses, however, ran, by their terms, from May 1, 1982 to April 30, 1983 and had not yet expired as of the date of the directive.

It is clear that the above mentioned changes in the chapter governing licensing of agents could not affect the validity of the licenses previously issued thereunder. Iowa Code section 4.13 (1981) provides in pertinent part:

> The re-enactment, revision, amendment, or repeal of a statute does not affect:
>
> 1. The prior operation of the statute or any prior action taken thereunder;
>
> 2. Any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder;

[Emphasis added]. See also Iowa Code section 4.1(1) (1981). This statute preserves existing accrued rights or privileges. See Estate of Hoover, 225 N.W.2d 529, 531 (Iowa 1977). An insurance agent's license is plainly a legally recognized "right" or "privilege." See generally Green v. Shama, 217 N.W.2d 547, 554 (Iowa 1974). As a result, the prior licenses remain in effect until they, by their terms, expire. They may not be cancelled for non-payment of the ten dollar fee before that time. Of course, once they do expire on April 30, 1983, the commissioner may require the procurement of a new license and payment of the ten dollar fee.

All statutes are presumed to be prospective-only. See Iowa Code section 4.5 (1981); Cook v. Iowa Dep't of Job Service, 299 N.W.2d 698, 702 (Iowa 1980). The changes in the statutory scheme for licensing of insurance agents outlined above accordingly must be deemed to apply only to newly issued licenses, as well as to renewals occurring after existing licenses expire.

It should be pointed out that your second question may now be moot, because the commissioner, speaking of the present problem, recently indicated as follows:

> It is my conclusion that the current law does not provide for or allow an automatic cancellation of a license in such a situation. Therefore, it is my position that no agent license shall be automatically cancelled for failure to submit a fee to the Department by September 20, 1982, and existing licenses are to be considered valid through April 30, 1983, until they are replaced by a new single license.

We agree with the commissioner's conclusion. By the same token, the earlier directive represented a reasonable, if legally incorrect, view of when the changes in the licensing chapter should be adopted.

In sum, exempting all nonresidents from the commissioner's rules on continuing education for insurance agents is statutorily overbroad to the extent that it exempts a nonresident agent even when the nonresident's state has no continuing education requirement for agents. Insurance agents' licenses in effect prior to July 1, 1982, may not be cancelled by the commissioner for non-payment of the fee required for licenses issued after that date, until the prior licenses by their terms expire.

Very truly yours,

THOMAS J. MILLER
Attorney General of Iowa

Fred M. Haskins

FRED M. HASKINS
Assistant Attorney General

FMH/pk

STATE OFFICES AND DEPARTMENTS; Professional licensing boards; Dispensing of prescription drugs. 1980 Session Laws, 68th G.A., chp. 1036 § 33. Laws enacted by the legislature but printed only in the session laws and omitted from the permanent edition of the Code of Iowa because they are not of "a general and permanent nature" have full force and effect. The law enacted in section 33 of chapter 1036 of the 1980 Session Laws is effective "until legislation has been enacted to affirm or modify the attorney general's opinion" issued on July 5, 1979. The law enacted in section 33 of chapter 1036 of the 1980 Session Laws entitles any individual practitioner "to continue the practices" which all practitioners of the respective profession had generally followed under the laws of this state prior to issuance of the attorney general's opinion on July 5, 1979. The law enacted in section 33 of chapter 1036 of the 1980 Session Laws does not prohibit any licensing board from issuing a declaratory ruling on the subject of the standard of practice with respect to dispensing which was in effect prior to issuance of the attorney general's opinion on July 5, 1979. (Pottorff to Schwengels, State Senator, 11/30/82) #82-11-11(L)

November 30, 1982

Honorable Forrest Schwengels
State Senator
R.R. 2, Box 247
Fairfield, Iowa 52556

Dear Senator Schwengels:

You have requested an opinion of the Attorney General concerning legislation affecting practices with respect to dispensing of prescription drugs which was enacted by the legislature in 1980. Specifically, you pose the following questions:

> 1. Since the legislation enacted was made a part of the session laws only, and is not a part of the permanent Code, is the moratorium still in effect today? If you answer that in the affirmative, please then state how long, without modification by the General Assembly, will it remain in effect.
>
> 2. Does the moratorium allow any practitioner to delegate dispensing functions in violation of the law as interpreted by the Attorney General on June 5, 1979, or does the moratorium only allow those practitioners who were practicing

in violation of the law prior to the effective date of the moratorium to continue practicing in that fashion until the law is changed or modified?

3. Attached to this letter you will find a Declaratory Ruling rendered by the Board of Medical Examiners dealing with physician delegation of dispensing functions. Would you determine the legal effect and status of Declaratory Ruling specifically with regard to the authority of the Board of Medical Examiners to render such a ruling?

The legislation about which you inquire was enacted by the General Assembly in the 1980 Session Laws. See 1980 Session, 68th G.A., chp. 1036 § 33. This language provides:

> Practitioners licensed under chapters one hundred forty-eight (148), one hundred forty-nine (149), one hundred fifty (150), one hundred fifty A (150A), one hundred fifty-two (152), one hundred fifty-three (153), one hundred fifty-five (155) and one hundred sixty-nine (169) of the Code shall be entitled to continue the practices with respect to dispensing of prescription drugs, including controlled substances, which those practitioners had followed under the laws of this state as amended to July 1, 1979, and as generally interpreted prior to July 5, 1979, notwithstanding the opinion of the attorney general to the secretary of the board of pharmacy examiners rendered on that date, until legislation has been enacted to affirm or modify the attorney general's opinion.

This language is not included in the 1981 Code of Iowa but reference to the 1980 Session Laws is included under the title of each relevant chapter. See Iowa Code chps. 148, 149, 150, 150A, 152, 153, 155 and 169 (1981).

The omission of this language from the permanent edition of the 1981 Code of Iowa is expressly directed by statute. We point out that the items to be included in a permanent edition of the Code of Iowa are specifically delineated by statute. Chapter 14 provides, in part, that the Code "shall include" statutes "of a general and permanent nature." Iowa Code § 14.6(i) (1981). The language in issue, however, expressly provides that its terms are effective only "until legislation has been enacted to affirm or modify an attorney general's opinion" on dispensing issued on July 5, 1979. See 1980 Session Laws, 68th G.A., chp. 1036 § 33.

Since the language is effective only until the legislature acts, the language is not a statute of "permanent nature" designated for inclusion in the permanent Code of Iowa under chapter 14.

In a previous opinion this office concluded that laws enacted by the legislature but printed only in the session laws and not printed in the permanent edition of the Code of Iowa are as valid and effective as those laws enacted by the legislature and printed in both the session laws and the permanent edition of the Code of Iowa. 1938 Op.Att'yGen. 360, 360-61. This opinion was based on the reasoning that statutes omitted from the Code of Iowa because they were not of "a general and permanent nature" were omitted for reasons of style in the composition of the Code of Iowa. Id. at 361. We continue to adhere to the view expressed in this opinion.

We find no basis for distinguishing between practitioners who did not practice until after the effective date of the legislation and practitioners who were practicing before the effective date of the legislation in applying the language of this statute. The language specifically provides that practitioners licensed under one of several enumerated chapters "shall be entitled to continue the practices with respect to dispensing of prescription drugs, including controlled substances, which those practitioners had followed under the laws of this state" prior to the issuance of the attorney general's opinion on July 5, 1979. Interpreting this language, we follow principles of statutory construction. The goal of all principles of statutory construction is to ascertain and give effect to the intent of the enacting legislature. American Home Products Corp. v. Iowa State Board of Tax Review, 302 N.W.2d 140, 142 (Iowa 1981). Statutes, moreover, should be given a construction which is sensible, practical, workable, and logical. Hansen v. State, 298 N.W.2d 263, 265-66 (Iowa 1980). Utilizing these principles we believe the intent of the legislature was to maintain the status quo with respect to dispensing practices until legislation could be enacted. This intent is evidenced by specific reference to and neutralization of the attorney general's opinion issued on July 5, 1979.

In light of this intent, it would not be sensible, practical, workable or logical to differentiate between practitioners practicing before and practitioners practicing after the effective date of the legislation. This construction would maintain the status quo with respect to some but not all of each class of practitioners enumerated in the statute. For this reason, we believe the language must be construed to entitle any individual practitioner "to continue the practices" which all practitioners of the respective profession had generally followed under laws of this state prior to issuance of the opinion on July 5, 1979.

We find nothing in the statutory language which would prohibit any licensing board from issuing a declaratory ruling, upon request, on the subject of the standard of practice with respect to dispensing which was in effect prior to issuance of the opinion on July 5, 1979. All state agencies are empowered to issue declaratory rulings. See Iowa Code § 17A.9 (1981). The Board of Medical Examiners has promulgated rules governing the filing and disposition of declaratory rulings. See 135 I.A.C. §§ 10(1)-10(10). The declaratory ruling mechanism may be properly utilized in this and other circumstances to resolve ambiguities in agency enforced law. See Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process, 60 Iowa L.Rev. 731, 805-806 (1975).

In summary, in response to your specific inquiries, it is our opinion that:

1. Laws enacted by the legislature but printed only in the session laws and omitted from the permanent edition of the Code of Iowa because they are not of "a general and permanent nature" have full force and effect. The law enacted in section 33 of chapter 1036 of the 1980 Session Laws is effective "until legislation has been enacted to affirm or modify the attorney general's opinion" issued on July 5, 1979.

2. The law enacted in section 33 of chapter 1036 of the 1980 Session Laws entitles any individual practitioner "to continue the practices" which all practitioners of the respective profession had generally followed under the laws of this state prior to issuance of the attorney general's opinion on July 5, 1979.

3. The law enacted in section 33 of chapter 1036 of the 1980 Session Laws does not prohibit any licensing board from issuing a declaratory ruling on the subject of the standard of practice with respect to dispensing which was in effect prior to issuance of the attorney general's opinion on July 5, 1979.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP/jkp

DEPARTMENT OF SOIL CONSERVATION: Abandoned Mine Land Reclamation Program. 12 U.S.C. 1231 et. seq. Iowa Code §§ 83.21, 83.22 83.23. 780 I.A.C. ch. 27. The Department of Soil Conservation has the authority under Iowa law to conduct the Abandoned Mine Land Reclamation Program in accordance with federal law. The rules contained in 780 I.A.C. ch. 27 are in accordance with Iowa and federal requirements for the A.M.L. program. (Norby to Gulliford, Director, Department of Soil Conservation, 11/24/82) #82-11-10(L)

November 24, 1982

Mr. James B. Gulliford, Director
Department of Soil Conservation
Wallace State Office Building
L O C A L

Dear Mr. Gulliford:

You have requested an Attorney General's Opinion on the adequacy of proposed administrative rules concerning the State Abandoned Mine Lands (A.M.L.) Program. We note that rules were adopted by the State Soil Conservation Committee on October 7, 1982, as 780 I.A.C., ch. 27, concerning this program.

Initially, we note that 30 C.F.R. § 884.13(b) requires that each State reclamation plan submitted to the U.S. Office of Surface Mining include "a legal opinion from the State Attorney General or the chief legal officer of the State agency that the designated agency has the authority under State law to conduct the program in accordance with the requirements of Title IV of the Act (Pub.L. 95-87: 12 U.S.C. § 1231 et. seq.). It appears clearly to us that the Department has such authority. Iowa Code § 83.21(1) (1981) provides that the Department shall participate in the abandoned mine reclamation program under Title IV, Pub.L. 95-87. Iowa Code §§ 83.21, 83.22 and 83.23 (1981) provide the Department with all powers necessary to conduct the State program, including the power to accept federal funds (§ 83.21(1)), to condemn land (§ 83.22(3)), to acquire title to land in the name of the State (§ 83.22(4)), and to establish liens on reclaimed property (§ 83.23).

In addition, the State Soil Conservation Committee has enacted administrative rules, 780 I.A.C., ch. 27, which further describe the program. In large part these rules repeat provisions of the federal administrative rules found at 30 C.F.R. §§ 870, 872, 874, 875, 877, 879, 882 and 884. The Committee has authority to adopt these rules pursuant to Iowa Code § 83.21(5)(a) (1981). This has the effect of providing for administration of both federal and nonfederal reclamation funds in a manner consistent with federal regulations. In addition, these Iowa rules contain several instances of exercises of discretion by the Committee where specific requirements are not mandated by the federal statute or rules or by Iowa Code chapter 83. These provisions are discussed below.

In connection with the acquisition of land in connection with reclamation activities, 30 C.F.R. § 879.11(3) provides that only such interests as are necessary to accomplish the reclamation work may be acquired by the State. An exception is made allowing acquisition of greater rights if the customary practices and laws of a state do not allow severance of the interests necessary for reclamation from surface rights. 30 C.F.R. § 879.11(e)(1). Iowa law does allow severance of interests which will allow acquisition for reclamation without purchase of surface rights. Jensen v. Sheker, 231 Iowa 240, 1 N.W.2d 262 (1941). Accordingly, 780 I.A.C. 27.100(3) properly implements Iowa law by providing for acquisition of additional interests in land only if necessary for reclamation, post-reclamation use, or when adequate assurance as to future use cannot be obtained from the holder of the severed interest.

Provision is made in both the federal and the Iowa statutes for the creation of liens in the amount of the increase in the market value of private land brought about by reclamation activities, and for satisfaction of these liens. 30 U.S.C. § 1238; Iowa Code § 83.23; 30 C.F.R. §§ 882.13, 882.14; 780 I.A.C. 27.170, 27.180. The federal rules require any lien to be satisfied, to the extent of consideration received, at the time of transfer of ownership. 30 C.F.R. 882.14(a). The Iowa rules exempt testate and intestate transfers within the second degree of consanguinity or affinity if the entire parcel subject to the lien is transferred. 780 I.A.C. 27.180(1). The justification for this limited exception is that such instances are not voluntary transfers. This rule is also consistent with

the underlying purpose of the more limited federal rule in that the lien need not be satisfied until the landowner or his heirs liquidate the property and thus recover its increased value in cash or other assets. We understand that O.S.M. has approved a similar provision in the Kansas program submission.

In conclusion, we believe that the Department has the authority to conduct the A.M.L. program and that the rules contained in 780 I.A.C., ch. 27 are in accordance with Title IV of Public Law 95-87.

Sincerely,

Steven G. Norby

STEVEN G. NORBY
Assistant Attorney General

SGN:ds

HEALTH: Ambulances; Emergency Medical Services; Fees charged by tax-supported services. Iowa Code §§ 331.422(25), 347.14(13), 359.42, 384.24(3)(l) and 613.17, as amended by 1982 Iowa Acts, Ch. 1198, § 1. An emergency medical unit, funded with local property taxes may charge a fee to persons using the service. If the voluntary personnel or the unit itself receives more than a nominal compensation for these services, the volunteers or the unit would lose the coverage of the "Good Samaritan" law. A publicly funded unit may charge fees to non-residents who require the service. Fees charged should be deposited with the county general fund, the general fund of the city, the treasurer of the county hospital or the township clerk, depending on which entity operates the service. (Brammer to Krewson, State Representative, 11/19/82) #82-11-9(L)

The Honorable Lyle Krewson
Iowa State Representative
State Capitol
L O C A L

November 19, 1982

Dear Representative Krewson:

You have requested an opinion of the Attorney General regarding the authority of volunteer emergency medical units to charge fees for their services. Your letter raised three questions, each of which will be considered separately.

The first question posed was the following:

> If an emergency medical unit, funded with local property tax dollars and contributions, charges a fee to people using the services of the unit, will the unit and its volunteer personnel still be covered under the provisions of the 'Good Samaritan' law or will the unit have to purchase malpractice insurance?

As your letter points out, the "Good Samaritan" law was recently amended by the General Assembly to provide, in pertinent part, as follows:

> Any person, who in good faith renders emergency care or assistance without compensation shall not be liable for any civil damages for acts or omissions occurring at the place of an emergency or accident or while the person is in transit to or from the emergency or accident or while the person is at or being moved to or from an emergency shelter unless such acts or omissions constitute recklessness. For purposes of this section, if a volunteer fire fighter, a volunteer operator or attendant of an ambulance or rescue squad service, a volunteer paramedic, or a volunteer emergency medical technician receives nominal compensation not based upon the value of the services performed, that person shall be considered to be receiving no compensation.

Iowa Code Section 613.17, as amended by 1982 Iowa Acts, Chapter 1198, Section 1.

There are four statutory provisions which authorize the funding of ambulance services through local property taxes: Iowa Code Sections 331.422(25), 347.14(13), 359.42, and 384.24(3)(1) 1982. These statutes refer to ambulance services operated by counties, county hospitals, townships and cities respectively. None of the statutes involved would prohibit the charging of fees for using the ambulance services. If a fee is charged, however, it could jeopardize the applicability of the "Good Samaritan" law. This would depend on whether the compensation received by the voluntary personnel or the emergency medical unit could be considered "nominal." Although the Legislature did not define this term, "nominal" has been held to mean that which is small or slight in comparison with what might properly be expected. Application of Central Railroad Co. of New Jersey, 41 N.J.Super. 495, 125 A.2d 415, 418 (1956). You may be interested to note that Iowa Code Section 147A.10(3) provides an additional source of protection from civil liability in certain cases.

Your second question was:

> Can an emergency medical unit funded by property tax dollars charge a fee to non-district residents who require emergency assistance while in the district using public or private facilities since these residents do not contribute to the maintenance of the unit through property taxes?

Again, there appears to be nothing which would prohibit the publicly-funded emergency medical unit from charging non-resident users for its services. Certain residency restrictions have been declared unconstitutional as violative of the equal protection clause. E.g., Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). These cases, however, involved durational residency requirements whereas under the facts you have outlined the length of residency is not in issue.

The charging of disparate fees to nonresidents for the right to engage in activities such as hunting and fishing has been upheld whenever it can be shown that residents would otherwise bear a disproportionately high burden of the costs of enforcing the law. See Baldwin v. Fish & Game Commission, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978). It would seem, therefore, that the fees charged to nonresident users of public ambulance services must bear some reasonable relationship to the costs involved in serving these individuals.

The last question presented in your letter asked:

> If the emergency medical unit can charge a fee to nonresidents, does the money collected have to go directly to the emergency medical unit or can it be deposited in the general fund of the supporting institution.

The majority rule in the case of locally owned, revenue-producing enterprises is that, unless otherwise provided by statute, the revenues derived therefrom must be devoted to the payment of operating expenses and repairs of the enterprises. 56 Am.Jur.2d Municipal Corporations § 583 (1971).

None of the statutes which authorize the establishment of public ambulance services specifically address the question of where the revenues received from these operations must be deposited. Iowa Code Chapter 331, 1982, enumerates a number of mandatory as well as permissive county funds, but an emergency medical unit fund is not included in either list. Section 331.424 does state, however, that "except as otherwise provided by state law, moneys received from taxes and other sources shall be credited to the general fund . . . ." Similarly, Section 384.3 provides that "all moneys received for city government purposes from taxes and other sources must be credited to the general fund of the city, except . . . as otherwise required or authorized by state law." There is no other provision in the city finance statute which would authorize or require a separate emergency medical unit fund.

On the other hand, fees generated pursuant to the operation of an ambulance service by a county public hospital should be deposited with the treasurer of the hospital, pursuant to Iowa Code Section 347.12. If the service is operated by township trustees, any revenue produced thereby should be kept in the custody of the township clerk as directed by Section 359.21.

In conclusion, it is our opinion that an emergency medical unit, funded with local property taxes may charge a fee to persons who use the service. Whether the unit or its volunteers are covered by the "Good Samaritan" law will depend on the amount of compensation received by the volunteer personnel and the unit. If this amount is any more than a

"nominal" sum, the statute would not apply. A publicly-funded emergency medical unit may charge fees to nonresidents of the district who require the service while in the district provided that the fee charged bears a reasonable relationship to the added costs involved. If fees are charged, they should be deposited in or with the county general fund, the general fund of the city, the treasurer of the county hospital, or the township clerk, depending on which of these entities is responsible for operating the unit.

Sincerely,

Susan B. Brammer

SUSAN B. BRAMMER
Assistant Attorney General

SBB/mel

CRIMINAL LAW, RESTITUTION: 1982 Iowa Acts Chapter 1162. Restitution is no longer only imposed as a "condition of probation". Restitution must be ordered in addition to imposition of other sentencing alternatives. (Blink to Loebach, Judicial Magistrate, (11/19/82) #82-11-8(L)

The Honorable Marilyn Loebach
Judicial Magistrate
Emmet County Courthouse
Estherville, Iowa 51334

November 19, 1982

Dear Judge Leobach:

You have written this office requesting an opinion concerning the ability of a judicial magistrate to order restitution in addition to the various sentencing alternatives. Specifically, you have inquired:

(1) With the new restitution law, can we as part-time magistrates fine or jail the defendant and order restitution on a guilty plea or judgment?

(2) Or is restitution on checks still a condition of probation for part-time magistrates?

Under former Iowa law, provision for restitution was part of Iowa Code chapter 907, which deals with the sentencing alternatives of deferred judgment, deferred sentence, suspended sentence, i.e., probation. Thus, restitution existed only as a "condition of probation". Iowa Code section 907.12 (1981).

The new restitution act, 1982 Acts Chapter 1162, was enacted as a separate chapter of the code rather than as an aspect of Iowa Code chapter 907. Thus, under the new act, restitution is not limited to a condition of probation. Section 3 provides:

> RESTITUTION ORDERED BY SENTENCING COURT. In all criminal cases except simple misdemeanors under chapter 321, in which there is a plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction is rendered, the sentencing court shall order

> that restitution be made by each offender to the victims of his or her criminal activities . . . .

Because restitution is required in "all cases . . ." (emphasis added) it is clear that restitution is not intended to be a replacement for the various sentencing alternatives provided in the code, rather, restitution is a requirement which is to be imposed in conjunction with another sentence.

Section 5 specifically addresses the situation where commitment to a jail sentence is ordered in conjunction with restitution:

> . . . When the offender is committed by the court to be supervised by a judicial district department of correctional services, is committed to a county jail, or to an alternate facility, the judicial district department of correctional services shall prepare a restitution plan of payment taking into consideration the offender's income, physical and mental health, age, education, employment and family circumstances. The judicial district department of correctional services shall review the plan of restitution ordered by the court, and shall submit a restitution plan of payment to the sentencing court. When community service is ordered by the court as restitution, the restitution plan of payment shall set out a plan to meet the requirement for the community service. The court may approve or modify the plan of restitution and restitution plan of payment . . . .

In sum, chapter 1162 makes it clear that restitution must be ordered by the sentencing court notwithstanding imposition of an additional sentencing alternative.

Sincerely,

Mary Jane Blink

MARY JANE BLINK
Assistant Attorney General

MJB/cla

COUNTIES AND COUNTY OFFICERS - PRISONERS. SS 356.2, 356.15, Code of Iowa 1981. When an individual, arrested and charged with the commission of a felony, is temporarily detained in a municipal jail pending transfer to the county jail, the cost of his medical expenses is the responsibility of the county wherein the criminal charge was filed, rather than of the municipality. (Hunacek to Shirley, Dallas County Attorney, 11/19/82) #82-11-7(L)

November 19, 1982

Mr. Alan Shirley
Dallas County Attorney
Perry, IA 50220

Dear Mr. Shirley:

We are in receipt of your request regarding liability for medical expenses of an individual, charged with a felony, detained in a municipal jail awaiting transfer to county jail. Specifically, you asked:

> An individual was apprehended at the scene of a crime, and charged with a state felony charge by a municipal police officer. While incarcerated in the municipal jail awaiting transportation to the county jail, the individual charged became ill and required substantial medical treatment. Does the municipality where the individual charged with the felony was incarcerated bear the cost of medical treatment, or does the county wherein the criminal charge was filed bear the cost of medical treatment?

We think that under the above circumstances it is the county which bears the cost, though there are circumstances (apparently not present here) under which the municipality would do so.

Analysis begins with the observation that municipal and county liability for the care of prisoners is generally controlled by statute. 72 C.J.S. Prisons § 26 (1951). Iowa Code § 356.15 (1981) provides that:

> Expenses. All charges and expenses for the safekeeping and maintenance of prisoners shall be allowed by the board of supervisors, except those committed or detained by the authority of the courts of the United States, in which case the United States must pay such expenses to the county, and those committed for violation of a city ordinance, in which case the city shall pay expenses to the county.

Nothing in this section itself explicitly limits its applicability to prisoners in county jails only. Chapter 356 is simply entitled "Jails", not "County Jails". In addition, other sections of this Chapter, such as § 356.20 and § 356.3, apparently contemplate applicability to city jails, and 356.5(2), which requires that each prisoner be furnished with necessary medical aid, places this obligation on the "keeper of the jail" rather than the county sheriff. Moreover, sections of Chapter 356 such as § 356.1 and § 356.26 indicate that the legislature is capable of writing a statute applicable only to the county jail when it wishes to do so. Thus, it is strongly arguable that § 356.15 refers to prisoners held in city jails as well as county jails.

This contention is further supported by language in previous opinions from this office. In Op.Att'yGen. #68-1-37, interpreting the same statute, it was said:

> The Legislature and the Supreme Court have insured immediate medical and hospital care to every person found in this state in urgent need of such attention and care . . . and the financial responsibility in such cases is placed upon the county in which the emergency arises.

Under such an interpretation, the responsibility for a prisoner's medical expenses is put squarely on the county, with the city

liable for expenses only when the prisoner is committed, in either a city or county jail, for violation of a city ordinance. This is, of course, not the case here; hence, responsibility for the prisoner's medical expenses rests with the county.

Even if the statute is read as being applicable only to prisoners while being held in county jails, the above conclusion is still suggested, albeit not compelled, by the circumstances of the arrest you present. Under Iowa Code Section 356.15 (1981) the fact that prisoners in a county jail who have been charged with violation of a city ordinance are the financial responsibility of the city, indicates that the legislature has, in drafting this section, applied what some courts have referred to as the "nature of the offense" test in assessing liability. Cf. Washington Township Hospital District v. County of Alameda, 263 Cal.App.2d 272, 69 Cal.Rptr. 442, 446 (1968). Thus it would be logical to apply this reasoning in cases not directly controlled by statute. Since in the present case the offense is a violation of state law rather than city ordinance, it would seem that because of the "nature of the offense" the county is properly liable.

The preceding conclusion is not inconsistent with an old Iowa case, Miller v. County of Dickinson, 68 Iowa 102, 26 N.W. 31 (1885). Here, the county was held liable for the medical expenses of a prisoner charged with a public offense and held in a private home because he was so severely wounded that he could not be moved to county jail. The relevant statute provided that the county was liable for "expenses of safekeeping and maintaining . . . persons charged with public offenses, and committed for examination or trial to the county jail." The court found the county liable because from the time of arrest the prisoner was legally in the custody of the sheriff. Though the statutes have changed since 1885 and the factual situation is of course different than the one before us now, the case is nevertheless noteworthy because it illustrates that when a statute applies to county jail prisoners, the prisoner need not be physically present in the jail and can be held somewhere else, at the expense of the county.

Previous opinions from this office are also consistent with this non-statutory theory that the county is liable for the medical expenses at issue here. In Op.Att'yGen. #75-7-16 the county was held liable for medical expenses of a prisoner held awaiting extradition, and in Op.Att'yGen. #68-1-37 the county was held liable for the medical expenses of a parolee. The reasoning in both cases was that there is no statutory authorization for payment of such costs by the state demanding extradition or by the parole board. These situations are of course distinguishable

from the present one in that in the previous cases the prisoner was already in county jail, and so § 356.15 was more clearly applicable. Nevertheless, insofar as these opinions refer to the absence of statutory authorization of payment by a body other than the county, they are relevant here. There seems to be no statute other than § 356.15 which puts on a city or municipality the responsibility for payment of jail expenses. Iowa Code Section 384.24(4)(c) (1981) states that the "acquisition, construction, reconstruction, enlargement, improvement, and equipping of . . . jails" is a "general corporate purpose" for purposes of city finance. However, courts have stated that the establishment of a jail "has no reference to caring for the prisoners who, once the jail is established, might be confined therein." Grand Forks County v. City of Grand Forks, 123 N.W.2d 42, 47 (N.D. 1963). Thus § 384.24(4)(c) does not place upon a city the responsibility of paying for the medical expenses of any prisoner that might happen to be confined in the city jail. Nor does any other statute that we have been able to find. Section 356.15 places such a responsibility on the city only under certain circumstances, not present here.

It should also be noted that under either the statutory or non-statutory ("nature of the offense") theories of liability described earlier, the fact that the arrest was made by a municipal police officer has no significant affect on the analysis and conclusion. The statutes themselves do not make the status of the arresting officer relevant, and the nature of the offense is not changed by the identity of the arresting officer. Cf. Washington Township, 69 Cal.Rptr. at 446. Though it is stated in University Hospitals v. City of Cleveland, 276 N.E.2d 273, 276, 57 Ohio Ops 2d 208 (1971), that "it is nevertheless obvious, that if a person is arrested by a municipal officer . . . such person is a prisoner of the municipality and thus that municipality is responsible for his medical needs," this broad statement must be read in the context of the Ohio statutes (which are different from Iowa's) and the circumstances of the case (the prisoner was not incarcerated in either a county or municipal jail, but rather a hospital prisoner ward after being found with a self-inflicted gunshot wound; the crime he was charged with is not specified in the opinion). Read in this context, it would seem that nothing in University Hospitals changes the preceding analysis.

Opinions from other jurisdictions suggest circumstances under which a city or municipality might be liable for expenses, but none of these circumstances, it seems, apply here. In Pasadena v. Los Angeles County, 118 Cal.App.2d 497, 258 P.2d 28 (1953) a city was held to be unable to recover from a county the expense of maintaining county prisoners where the county

maintained a jail for the confinement of its own prisoners, the statute did not provide for the commitment of city prisoners to county jails, and no request was made by the county to have the prisoners kept in the city jail. Under such circumstances, the court held that the city had voluntarily agreed to bear the liability for expenses. The subsequent Washington Township case repeats this statement, 69 Cal.Rptr. at 444, but also goes on to cite with approval a California Attorney General opinion stating that liability for expenses rests with the county when a prisoner is being held in city jail "through necessity" pending transfer to county jail. 69 Cal. Rptr. at 446. Read in this context, Pasadena appears to apply only to those circumstances where the placement in city jail is a deliberate and unnecessary bypass of county jail incarceration. This does not seem to be the case here. Thus we need not and do not express an opinion as to whether the Iowa Supreme Court would follow the reasoning of Pasadena, but merely note this case as suggesting a circumstance where city or municipal liability might be possible.

Similarly, the circumstances described do not require an analysis of the possibility of a contract being formed between the municipality and the county calling for payment. Cf. Grand Forks County, 123 N.W.2d at 46 (city, which had the authority to contract for maintenance of its prisoners and accepted the benefits of having these prisoners held in county jail, had implicitly contracted to pay the county for such maintenance).

We conclude that under the circumstances described in your letter, it is the county rather than the municipality which bears the cost of medical treatment.

Sincerely yours,

Mark Hunacek

Mark Hunacek
Assistant Attorney General

MH/kap

ENVIRONMENTAL QUALITY: HAZARDOUS WASTES; Iowa Code § 455B.134 (1981); 1981 Iowa Acts Chapter 152, Sections 2(6), 3(1), 3(4); 42 U.S.C. 6921 et seq.; 400 I.A.C. § 45; 40 C.F.R. § 122.23. Iowa's hazardous waste site licensing law exempts facilities which existed on the effective date of the Department of Environmental Quality rule listing the waste and which have met certain other requirements. Existing hazardous waste facilities which have interim status under federal Environmental Protection Agency rules are likely to be exempt from Iowa's site licensing law. (Ovrom to Rapp, State Representative, 11/19/82) #82-11-6(L)

November 19, 1982

The Honorable Stephen J. Rapp
State Representative
State Capitol
L O C A L

Dear Representative Rapp:

You asked our opinion whether construction of a plant for the encapsulation of hazardous wastes requires a state site license under 1981 Iowa Acts, Chapter 152, (hereinafter "Chapter 152") if the plant was constructed at a sanitary landfill which had an interim permit for the disposal of hazardous wastes issued by the United States Environmental Protection Agency prior to the effective date of Chapter 152. Chapter 152 does not address the issue whether interim status under federal rules would exempt a hazardous waste facility from its requirement to obtain a site license. Rather, the act exempts hazardous waste facilities which existed on the effective date of the Department of Environmental Quality rule listing that hazardous waste, and which have met certain other requirements. Chapter 152, Section 3(4); Iowa Code § 455B.134(2) (1981). However, as explained below, it is very likely that a hazardous waste facility which has interim status under federal Environmental Protection Agency rules would be exempt from the site licensing requirements of Chapter 152.

There are two principal Iowa laws establishing requirements for hazardous waste disposal sites. The more recent of these laws establishes a procedure for choosing the site of a hazardous waste facility. 1981 Iowa Acts, ch. 152 (hereinafter "Chapter 152"). Chapter 152 requires anyone wishing to construct a hazardous waste facility to obtain a

license from the Environmental Quality Commission. Chapter 152, Section 3(1). The purpose of Chapter 152 is to protect the public health and environment by providing a procedure for selecting appropriate sites and properly designed facilities for the treatment, storage and disposal of hazardous waste. Ch. 152, Section 1. The criteria to be considered by the environmental quality commission in issuing a site license include the need for the facility, its impact on the area where it is to be located, the zoning classification of the area, population density, and geology. Ch. 152, Section 8. Four representatives of the local community may participate with the environmental quality commission in its deliberations on a site license. Ch. 152, Section 4.

Iowa's other major hazardous waste statute was passed in 1979 and authorizes the Department of Environmental Quality to establish standards for identifying, listing, and handling hazardous wastes, and requires persons who operate hazardous waste treatment, disposal or storage facilities to obtain a permit from the department. 1979 Iowa Acts, Chapter 111, codified in Iowa Code §§ 455B.130-.140 (1981). Like many environmental laws, it was modeled after a federal law - the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6921, et seq. See Iowa Code § 455B.139 (1981). The federal Environmental Protection Agency administers the RCRA program until such time as the state has implemented an equivalent hazardous waste program and has been delegated the authority to administer the program from the federal agency. 42 U.S.C. § 6926. At present, the Iowa Department of Environmental Quality has been delegated authority to identify and list hazardous wastes, 46 Fed. Reg. 9948, but has not been delegated authority to issue hazardous waste permits.

You asked whether construction of a plant for the encapsulation of hazardous wastes requires a Chapter 152 site license if the facility has interim authorization from the federal Environmental Protection Agency under the Resource Conservation and Recovery Act. That federal law provides that hazardous waste facilities which existed on October 21, 1976, which provided notice to EPA, and which applied for a permit from EPA will be granted interim status to operate until a final determination has been made on their permit applications. 42 U.S.C. § 6925(e). Iowa law contains a similar interim status provision. Section 455B.134(1) requires a permit for the treatment, storage, or disposal of any listed hazardous waste. Section 455B.134(2) provides that a facility for the treatment, storage or disposal of a

hazardous waste which existed on the effective date of the DEQ rule listing that hazardous waste and that is required to have a permit under Iowa Code §§ 455B.130 to 455B.140, is considered to have a permit until final determination is made if it has given notice to DEQ and has applied for a permit and the director has made certain determinations. Iowa Code § 455B.134(2) (1981). The effective date of the first DEQ listing of hazardous wastes was November 19, 1980, and the rule was amended and readopted January 20, 1981. See 400 I.A.C. § 45.2. Iowa DEQ rules provide that anyone who has filed a satisfactory notification with the federal Environmental Protection Agency will be deemed to have complied with the notification requirements of § 455B.133. 400 I.A.C. § 45.8 (455B).

Chapter 152 expressly exempts from the site licensing act hazardous waste facilities which are "subject to" § 455B.134(2) and which have obtained local zoning permits and for which contracts have been signed prior to January 1, 1982. Chapter 152, Section 3(4). A facility is "subject to" § 455B.134(2) if it was an existing facility for the treatment, storage, or disposal of a hazardous waste on the effective date of the rule listing that waste, here either November 19, 1980, or January 20, 1981. If an existing hazardous waste facility has interim status under federal rules, it must have existed on October 21, 1976, complied with federal notice requirements, and submitted an application to EPA. It will therefore almost certainly be "subject to" Iowa Code § 455B.134(2). As such it would be exempt from the site licensing requirements of Chapter 152. Chapter 152, Section 3(4).[1]

However, the inquiry does not end here. Your letter describes a situation where an existing hazardous waste site with federal interim status is going to add a new process for encapsulation of hazardous waste. Chapter 152 does not explicitly state whether changes in the method of treatment, volumes or types of waste would require a site license at an existing facility which is exempt from the act. However it appears that such changes would not require a site license at an existing facility.

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[1] We do not address the question whether a facility which is "subject to" § 455B.134(2) because it existed on the date listing the waste but which is later denied a permit would be exempt from the site licensing law under Section 3(4).

Again, Section 3(4) of Chapter 152 states that the act does not apply to a hazardous waste facility that is subject to § 455B.134(2) (it existed on the effective date of the rule listing the waste and is required to have a permit under §§ 455B.130 to 455B.140), provided it has obtained local zoning permits and for which contracts have been signed prior to January 1, 1982. Chapter 152, Section 3(4). Apparently if a facility fits within the exemption in Section 3(4), it may later make changes in the types of waste handled or the volume of waste processed without obtaining a site license.

This interpretation is supported by another section of Chapter 152. Section 3(1) requires anyone wishing to "construct" a new hazardous waste facility to obtain a site license. However the definition of "construct" is rather narrow:

> "Construct" means significant alteration of a site to install permanent equipment or structures but does not include activities incident to preliminary engineering, environmental studies, or acquisition of a site for a facility. "Construct" includes alteration to existing structures or a land disposal facility to initially accommodate hazardous waste <u>but does not include any alteration to increase the capacity or change the ability to accommodate hazardous waste</u>. However, any alteration to increase or change the ability to accommodate hazardous waste is subject to section 455B.132. (emphasis added)

Chapter 152, Section 2(6). Since "any alteration to increase the capacity or change the ability to accommodate hazardous waste" is excluded from the definition of "construct," such alteration does not require a site license under Chapter 152. The definition is somewhat ambiguous as to whether alterations which do not require a site license must be only to existing structures or to land disposal facilities. DEQ, the agency in charge of administering the statute, has not yet promulgated rules on the subject. Despite this ambiguity, the definition clearly shows a legislative intent to allow changes to existing hazardous waste facilities to occur without obtaining a site license under Chapter 152. Of course the facility desiring to make any changes would still be required to obtain the hazardous waste permits required by the federal Environmental Protection Agency and

the Iowa Department of Environmental Quality. 42 U.S.C. § 6925; Iowa Code § 455B.134(1) (1981); Chapter 152, Section 2(6).

We also note that both federal and Iowa rules prohibit changes to an existing hazardous waste facility during interim status if the changes require a capital investment in excess of fifty percent of the capital cost of a comparable entirely new facility. 40 C.F.R. 122.23(c)(5); 400 I.A.C. Section 45.9(4)(h).

Sincerely,

ELIZA OVROM
Assistant Attorney General

EO:rcp

TAXATION: Reasonable Cause Precluding Payment of Penalty. Iowa Code §§422.25(2), 422.68(1) (1981). The Department of Revenue has the responsibility to make case by case factual determinations of what constitutes reasonable cause under Iowa Code §422.25(2) (1981). (Schuling to De Groot, State Representative, 11/19/82) #82-11-5(L)

November 19, 1982

The Honorable Kenneth R. De Groot
State Representative
State House
L O C A L

Dear Representative De Groot:

You have requested the opinion of this office concerning the assessment of a penalty for failure to pay all tax on time pursuant to Iowa Code §422.25(2) (1981). Specifically, you asked the following:

> Is the Department of Revenue's interpretation that human mathematical error does not constitute a "reasonable cause" and is an indication that "ordinary business care and prudence" had not been exercised the correct interpretation?

In answer to your question, the interpretation of reasonable cause under §422.25(2) is within the authority of the Department of Revenue. Iowa Code §422.25(2) (1981), provides in relevant part:

> If any person fails to remit the tax due with the filing of the return on or before the due date, or fails to pay any amount of any tax required to be shown on the return, unless it is shown that the failure was due to reasonable cause, there shall be added to the tax a

> penalty of five percent of the tax due, if the failure is for not more than one month, with an additional five percent for each additional month or fraction of a month during which the failure continues, not exceeding twenty-five percent in the aggregate.

Iowa Code §422.68(1) (1981), provides:

> The director shall have the power and authority to prescribe all rules not inconsistent with the provisions of this chapter, necessary and advisable for its detailed administration and to effectuate its purposes.

The Department of Revenue, pursuant to §422.68(1), has promulgated rules for the implementation of reasonable cause. Rule 44.8 provides in relevant part:

> 44.8 Request for waiver of penalty.
>
> * * *
>
> Any taxpayer who believes he or she has good reason to object to any penalty imposed by the department for failure to timely pay may submit a request for waiver seeking that the penalty be waived. If it can be shown to the director's satisfaction that the failure was due to reasonable cause, the penalty will be adjusted accordingly. The request must be in the form of an affidavit and must contain all facts alleged as reasonable cause for the taxpayer's failure to pay the tax as required by law.
>
> The following are examples of situations that may be accepted by the director as being reasonable cause:
>
> 44.8(1) Where the return or payment was filed on time, but filed erroneously with the Internal Revenue Service or another state agency.
>
> 44.8(2) A showing that the completed return was mailed in time to reach the department in the normal course of mails, within the legal period. If the due date is Saturday, Sunday or legal holiday, the following business day is within the legal period.

> 44.8(3) Where the delay was caused by death or serious illness of the taxpayer responsible for filing.
>
> 44.8(4) Where the delay was caused by prolonged unavoidable absence of the taxpayer responsible for filing.
>
> 44.8(5) Where the delinquency was caused by the destruction by fire or other casualty of the taxpayer's records.
>
> 44.8(6) A showing that the delay or failure was due to erroneous information given the taxpayer by an employee of the department.
>
> Where the taxpayer fails to remit the tax due with the filing of the return on or before the due date, penalty will be imposed on the unpaid balance unless it can be shown that reasonable cause for such failure existed.
>
> 44.8(7) If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then the delay is due to a reasonable cause. A failure to pay will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship if he paid on the due date.

730 I.A.C. 44.8.

Rulemaking is agency action within the meaning of Iowa Code §17A.2(a) (1981). A rule should be held to be within the agency's power when a rational agency could conclude that the rule is within its designated authority. Hiserote Homes, Inc. v. Riedemann, 277 N.W.2d 911 (Iowa 1979); Iowa Auto Dealers Assoc. v. Iowa Dep't of Revenue, 301 N.W.2d 760 (Iowa 1981); Bonfield, The Iowa Administrative Procedure Act: Background Construction, Applicability, Public Access to Agency Law, The Rulemaking Process, 60 Iowa L.Rev. 731, 908-909 (1975).

A party questioning a rule's validity must make a clear and convincing showing that it is ultra vires. Hiserote Homes, 277 N.W.2d

at 913. The burden of proof lies on the entity challenging the administrative rule due to the presumption of validity. Davenport Comm. School Dist. v. Iowa Civil Rights Comm'n, 277 N.W.2d 907, 909 (Iowa 1979). When an agency promulgates a rule in the area of its substantive expertise, that action may well be entitled to greater deference. Hiserote Homes, 277 N.W.2d at 913, n.3.

The exercise of an agency's expert discretion is limited by two boundaries, the language of the enabling act and the legislative intent. Hiserote Homes, 277 N.W.2d at 913. In this instance, §422.25(2) clearly establishes the legislative intent to allow the Department of Revenue to determine whether reasonable cause existed for failure to remit tax. Rule 44.8 does not exceed the authority granted to the Department of Revenue. Absent clear and convincing evidence that Rule 44.8 is ultra vires, the rule must be presumed valid.

This brings us to the crux of your question: Presuming that Rule 44.8 is valid, did the Department of Revenue properly determine that human mathematical error does not indicate ordinary business care and prudence and does not constitute reasonable cause? Since the Department of Revenue has no rule on human mathematical error, the Department of Revenue's interpretation raised in your question must have resulted from an actual taxpayer's request for waiver and not by rulemaking.

The Iowa Supreme Court has stated that reasonable cause should be determined on the basis of the facts of the particular case rather than on a per se rule. Armstrong's, Inc. v. Iowa Dep't of Revenue, 320 N.W.2d 623, 628 (Iowa 1982). Therefore, human mathematical error resulting in underpayment of tax does not per se constitute reasonable cause to preclude application of penalty. However, a finding of reasonable cause is not automatically foreclosed as human mathematical error may, within the context of a particular factual situation, constitute reasonable cause.

Rule 44.8 provides that a taxpayer who believes he or she has good reason to object to any penalty imposed by the Department of Revenue for failure to timely pay may submit a request for waiver. If it can be shown to the director's satisfaction that the failure was due to reasonable cause, the penalty will be adjusted.

If the Department of Revenue determined that on the basis of facts in a particular case that mathematical error did not constitute reasonable cause, their decision is within the scope of their power. A taxpayer's relief from an adverse decision is to initiate contested case proceedings pursuant to Iowa Code ch. 17A (1981) and 730 I.A.C. ch. 7.[1]

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[1]This office is incapable of reviewing a judgment on a question of interpretation which was determined on a factual basis of which this office has no knowledge.

Therefore, it is the opinion of this office that the Department of Revenue is operating within the scope of their authority in making case by case factual determinations of what constitutes reasonable cause under Iowa Code §422.25(2).

Yours truly,

Mark R. Schuling

Mark R. Schuling
Assistant Attorney General

WP2

ENVIRONMENTAL QUALITY/WATER AIR AND WASTE MANAGEMENT/DELEGATION OF POWERS; Iowa Const. art. III, § 1; 1981 Iowa Acts, Chapter 1199, Section 4; Iowa Code § 455B.5(3) (1981). Statutory provision that all rules enacted by Water, Air and Waste Management Commission to carry out a federal regulation must be no more restrictive than the federal regulation is an unconstitutional delegation of state legislative power to the federal government. (Ovrom to Ballou, Executive Director, Iowa Department of Environmental Quality, 11/12/82) #82-11-2(L)

November 12, 1982

Mr. Stephen W. Ballou
Executive Director
Iowa Department of Environmental Quality
Wallace State Office Building
L O C A L

Dear Mr. Ballou:

You asked our opinion concerning the constitutionality of Section 4 of 1982 Iowa Acts, Chapter 1199, (hereinafter "Section 4" and "Chapter 1199") which provides that a rule adopted by the new Water, Air and Waste Management Commission to carry out a federal regulation shall not become effective if the rule is more restrictive than required by the federal regulation unless it is approved by the general assembly. In our opinion, this provision is an unconstitutional delegation of legislative authority to the federal government.

Chapter 1199 created the Department of Water, Air and Waste Management. Section 4 amends Iowa Code § 455B.5(3) (1981) as follows:

> The commission shall:
>
> * * *
>
> 3. Adopt, modify, or repeal rules necessary to implement the provisions of this chapter and the rules deemed necessary for the effective administration of the department. A rule adopted under this chapter to carry out a federal regulation shall not

> become effective if the rule is more restrictive than required by the federal regulation unless the rule is approved by enactment of the general assembly. It is the intent of the general assembly that the commission exercise strict oversight of the operations of the department. The rules shall include departmental policy relating to the disclosure of information on a violation or alleged violation of the rules, standards, permits or orders issued by the department and keeping of confidential information obtained by the department in the administration and enforcement of the provisions of this chapter. Rules adopted by the executive committee before January 1, 1981 shall remain effective until modified or rescinded by action of the commission.

1982 Iowa Acts, Ch. 1199, Section 4.

In general a state legislature can incorporate existing federal laws and regulations but cannot incorporate future federal laws or regulations, because adoption of future federal actions would be a total delegation of state legislative authority to the federal government. Wallace v. Commissioner of Taxation, 184 N.W.2d 588, 593 (Minn. 1971); Presbyterian Homes of Synod of Florida v. Wood, 297 So.2d 556, 559 (Fla. 1974); Johnston v. State, 181 S.E.2d 42 (Ga. 1971); State v. Johnson, 84 S.D. 556, 173 N.W.2d 894 (1970); State v. Dougall, 89 Wash.2d 118, 570 P.2d 135, 138 (1977); People v. Kruger, 48 Cal. App.3d 15, 20, 121 Cal. Rep. 581, 584 (1975); People v. DeSilva, 32 Mich. App. 707, 189 N.W.2d 362, 364 (1971); People v. Mazzie, 78 Misc.2d 1014, 358 N.Y.S. 307, 310 (1974). See also 1 Sutherland, Statutory Construction § 4.12 (4th ed. 1972).

There is some authority that a state statute which is auxiliary in nature and seeks to achieve uniformity in implementation of a national program may incorporate future federal legislation. See, e.g., Minnesota Recipients Alliance v. Noot, 313 N.W.2d 584, 586-587 (Minn. 1981) (provision in State Aid to Dependent Children statute concerning disregarded income held consistent with subsequent federal legislation); Ex parte Laswell, 36 P.2d 678 (Cal. App. 1934) (state statute adopting future federal regulations under Industrial Recovery Act upheld), but see People v. Kruger, 121 Cal. Rep. at 584 (state statute incorporating future federal regulations under Tuna Conventions Act held uncon-

stitutional). This is not the majority rule, see 1 Sutherland, Statutory Construction § 4.12 (4th ed. 1972), and is not applicable to the provision under consideration here which is not auxiliary to any specified federal program. The language "to carry out a federal regulation" does not in our opinion make Section 4 auxiliary to a specific national program. The provision is set forth in the agency's general rulemaking section. The Department of Water, Air and Waste Management will administer regulations which are related to a number of federal statutes and regulations, including the Clean Air Act, the Water Pollution Control Act, and Resource Conservation and Recovery Act, the Safe Drinking Water Act, and the federal Flood Insurance Act. Moreover most of those federal laws provide that the state is to set up its own program and is to be the primary enforcer. See, e.g., RCRA, 42 U.S.C. 6926. In some situations there is strong need for national uniformity and little need for exercise of state administrative discretion. An example would be selection of standards for weights and measures or for life vests to be used in boating. The legislature or an agency could conclude in these cases that it is not appropriate to duplicate a federal standard which is understood and generally used by the regulated public. This rationale would not however support adoption of future federal regulations to limit the authority of a state agency to carry out its granted statutory police powers.

The provision of Section 4 in question provides that all rules adopted to "carry out a federal regulation" must be no more restrictive than the federal regulation. This in effect requires the agency to follow all existing and future federal regulations which are less restrictive than departmental rules. If the agency is acting within the scope of its authority, any rule it adopts will have been previously authorized by the state legislature. For the legislature to allow subsequent changes in federal regulations to dictate the effectiveness of the state agency's rules does indeed delegate power to the federal government. This violates Article III, section 1 of the Iowa Constitution, which vests the legislative powers in the Iowa legislature. Moreover, adoption of future federal laws and regulations would violate the notice and comment requirements for rulemaking under Iowa law. Iowa Code §§ 17A.4, 17A.5 (1981); See Op.Att'yGen. 80-4-12 (Peterson to Schroeder).

We do not think that the provision concerning approval "by enactment of the general assembly" cures the constitutional defect. It does no more than state existing law,

because the Iowa Constitution requires the legislature to act by bills which, before they become law, must be signed by the governor. Iowa Const. art. III, §§ 15, 16, 17. The legislature can at any time pass a bill overturning an agency rule.

Your letter also raises the question whether Section 4 could ever be invoked because other provisions of Chapter 455B require the commission's rules to be consistent with existing federal regulations. See, e.g., Iowa Code §§ 455B.12(4), 455B.32(3), 455B.139 (1981). Section 4 is broader than the specific sections cited which adopt particular existing federal statutes and rules as criteria for state pollution regulations. The ambiguity of the phrase "a rule . . . to carry out a federal program" could raise additional problems of statutory construction. Also, as you note, section 4 could arguably prevent a rule which is adopted consistently with the federal regulation established as the criteria by specific statute, such as § 455B.12(4) (air quality), from becoming effective because the federal regulation has been relaxed subsequent to the date specified by the legislature. The undue delegation problem is especially acute in such cases as the federal agency would be allowed not only to decide future Iowa rules but also to amend the state statute.

Sincerely,

Eliza Ovrom (ad)

ELIZA OVROM
Assistant Attorney General

EO:rcp

TAXATION: Mobile Home Tax Period. Iowa Code §135D.24 (1981), as amended by 1982 Iowa Acts, ch. 1251, §2. The semiannual tax periods for mobile home tax, as set forth in §135D.24, as amended, are March 1 through August 31 and September 1 through the last day of February. (Donahue to Bair, Director, Iowa Department of Revenue, 11/9/82) #82-11-1(L)

November 9, 1982

Gerald D. Bair
Director of Revenue
Iowa Department of Revenue
Hoover State Office Building
Des Moines, IA 50319

Dear Mr. Bair:

You have asked the Attorney General for an opinion concerning the effect of 1982 Iowa Acts, ch. 1251, §2 (hereinafter referred to as H.F. 2484) on mobile home tax periods as set out in Iowa Code ch. 135D (1981).

Specifically, you want to know if H.F. 2484, §2, which amended Iowa Code §135D.24 (1981), changes the semiannual tax period on mobile homes from January 1 through June 30 and July 1 through December 31 to March 1 through August 31 and September 1 through the last day of February. H.F. 2484 is effective on January 1, 1983. See H.F. 2484, §28.

House File 2484, §2, states in relevant part:

> 135D.24 COLLECTION OF TAX. The semiannual tax is due and payable to the county treasurer semiannually on or before March 1 and September 1 in each year; and is delinquent April 1 and October 1 in each year, after which a penalty of one percent shall be added each month until

> paid except that the limitation in section 445.20 applies. The semiannual payment of taxes may be paid at one time if so desired. A mobile home parked and put to use at any time after March 1 or September 1 is subject to the said taxes prorated for the remaining months of the tax period. (Emphasis added).

It is our opinion that under §135D.24, as amended by H.F. 2484, tax periods for purposes of the Iowa mobile home tax are March 1 through August 31 and September 1 through the last day of February. It is specifically stated in H.F. 2484 that the proration is based upon use after March 1 or September 1, which indicates that the tax periods commence on those dates. In light of the effective date (January 1, 1983) of H.F. 2484, it is our opinion that the first semiannual tax period which commences on March 1, is the one beginning March 1, 1983.

The language of §135D.24 is plain and unambiguous. Therefore, there is no need for statutory construction. See State v. Baker, 293 N.W.2d 568 (Iowa 1980); In Re Johnson's Estate, 213 N.W.2d 536 (Iowa 1973). But, even if construction was necessary because of ambiguity, if the tax periods remained January 1 through June 30 and July 1 through December 31, unjust results would occur. For example, if a mobile home was put to use on March 1, the mobile home owner would not be able to prorate taxes for January and February and, as a consequence, would pay the tax for a six month period, notwithstanding that the mobile home had been used for a four month period. Statutes should be construed, if possible, to avoid unjust results. Isaacson v. Iowa State Tax Commission, 183 N.W.2d 693 (Iowa 1971).

In conclusion, it is the opinion of this office that the semiannual tax periods for mobile home tax set forth in §135D.24, as amended by H.F. 2484, are March 1 through August 31 and September 1 through the last day of February.

Sincerely,

Thomas M. Donahue

Thomas M. Donahue
Assistant Attorney General

WP2

COUNTIES; CLERK OF COURT; Satisfaction of Judgments. Iowa Code §§ 624.20 and 624.37 (1981). The requirement of § 624.37 relating to proper execution of instruments attesting to satisfaction of judgments is applicable in all cases, including those where the judgment debtor has paid the judgment directly to the clerk of court instead of to the judgment creditor. (Weeg to Anderson, Dickinson County Attorney, 12/29/82) #82-12-8(L)

December 29, 1982

Allen A. Anderson
Dickinson County Attorney
710 Lake Street
Spirit Lake, Iowa 51360

Dear Mr. Anderson:

You have requested an opinion of the Attorney General as to whether it is necessary to acknowledge satisfaction of a judgment according to the terms of Iowa Code § 624.37 (1981) when the judgment debtor has paid the judgment to the clerk of court rather than directly to the judgment creditor. The payments by the judgment debtor are subsequently processed through the clerk's office and then disbursed by the clerk to the judgment creditor. You ask this question in light of the fact that a § 624.37 execution in this situation requires duplicative paperwork. Further, you note that Iowa Code § 624.20 allows the clerk to record the judgment as satisfied when paid.

It is our opinion that the procedures set forth in § 624.37 are mandatory in all cases, regardless of whether a judgment is paid through the clerk of court's office. Initial support for this conclusion is found in the actual language of the relevant sections, which provide as follows:

> 624.20. Where a judgment is set aside or satisfied by execution or otherwise, the clerk shall at once enter a memorandum thereof on the column left for that purpose in the judgment docket.
>
> * * *
>
> 624.37. When the amount due upon judgment is paid off, or satisfied in full, the party entitled to the proceeds thereof, or those acting for him, must acknowledge satisfaction thereof upon the record of such judgment, or by the execution of an

> instrument referring to it, duly acknowledged and filed in the office of the clerk in every county wherein the judgment is a lien. A failure to do so for thirty days after having been requested in writing shall subject the delinquent party to a penalty of fifty dollars, to be recovered in an action therefor by the party aggrieved. [Emphasis added.]

We have previously held that § 624.20 cannot be read in isolation, but must be read in conjunction with § 624.30. 1980 Op. Att'y Gen. 772; 1977 Op. Att'y Gen. 310. We believe this conclusion is supported by the plain language of § 624.20, which, as emphasized above, authorizes the clerk to note on the docket that judgment has been satisfied only where "a judgment is set aside or satisfied by execution." This language directly refers to the procedural requirements for executing a satisfaction of judgment contained in § 624.37. For these reasons, we have previously concluded that "a judgment is not completely satisfied [pursuant to § 624.20] until the judgment creditor acknowledges the satisfaction of the judgment [pursuant to § 624.37]." (emphasis in original) Id. We concur in these earlier opinions for the additional reason that the language of § 624.37 is mandatory by its very terms, and further, contains no exception to the requirement that payment of a judgment be acknowledged by execution and filing of an appropriate instrument in the clerk's office. See 1980 Op. Att'y Gen. 772. While uniform application of the § 624.37 requirement may in some cases require the clerk of court to virtually duplicate much paperwork in these matters, it also ensures protection of the judgment debtor.

Accordingly, it is our opinion that the requirement of § 624.37 relating to proper execution of instruments attesting to satisfaction of judgments is applicable in all cases, including those where the judgment debtor has paid the judgment directly to the clerk of court instead of to the judgment creditor.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:sh

SCHOOLS: Establishment Clause: Free Speech Clause: Use of School Facilities: First Amendment, U.S. Const.; Iowa Code §§ 278.1(4), 297.9 (1981). If a school district allows community organizations to use school facilities when those facilities are not in use for school purposes, it may not refuse to grant access to religious groups on the same terms and conditions that apply to other groups; the school district may not regulate the content of religious speech during such use. A school district should not grant permission to a religious group for the purpose of providing religious instruction to the pupils in a particular school immediately before or after school to avoid the appearance of official sanction or sponsorship. (Fleming to Doyle, State Senator, 12/29/82) #82-12-7(L)

December 29, 1982

Senator Donald V. Doyle
P.O. Box 941
Sioux City, Iowa 51102

Dear Senator Doyle:

You have submitted the following question for our consideration:

> Is a local school board which allows community organizations to use school facilities before or after school hours required to allow the use of school facilities before or after school hours for religious worship, religious services, religious instruction or prayer meetings? As a specific example, may a church use school facilities for consecutive Sundays to conduct religious services or religious instruction?

You state that a church has requested permission to use school facilities on a regular basis for religious services and/or religious instruction. Further, the school district has a policy that permits community groups to use school facilities before or after school hours. In effect, you request elaboration on our recent opinion on the subject of use of school facilities by religious organizations. In a word the answer to your question is, yes, but it merits further discussion.

As we indicated in our earlier opinion, Fleming to Baugher, April 29, 1982 (#82-4-17), if a school district allows community groups to use school buildings or grounds, it cannot exclude

religious groups. That opinion was based primarily on Widmar v. Vincent, ____ U.S. ____, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). The principle at stake is that a governmental body may not discriminate against religious groups. The Court, in deciding Widmar, engaged in a Free Speech Clause analysis as well as an Establishment Clause analysis.

I. The Establishment Clause

If a school district which permits community groups to use school facilities were to refuse to allow use of school facilities for church services, we believe a violation of The Establishment Clause would occur.

The Supreme Court has adopted the following test for use by courts when deciding Establishment Clause cases:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243, 20 L.Ed.2d 1060, 1065, 88 S.Ct. 1923 (1968); finally, the statute must not foster "an excessive government entanglement with religion." Walz, supra, at 674, 25 L.Ed.2d at 704.

Lemon v. Kurtzman, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 29 L.Ed.2d 745, 755 (1971). (Emphasis added.)

Iowa Code § 297.9 (1981) allows school districts to, in effect, rent school facilities to community groups when these facilities are not needed for school purposes, i.e. the board fixes the compensation and other terms and conditions of use by community groups. The statute clearly has a secular purpose, encouragement of community group meetings or activities, and this satisfies the first prong of the Lemon v. Kurtzman test. It would be unreasonable to conclude that renting of school facilities to a group or organization is also sponsorship of the group or organization by the school district. In other words, if a church rents a schoolroom or gym, the school district is not sponsoring a church or advancing religion any more than it sponsors a square dance club or local service club that rents space. It is clear that rental of school facilities may give an "incidental" benefit to religion but it is a "primary effect of advancing religion" that is proscribed. If, however, the school

district refuses to allow religious groups to use school facilities on an equal basis, such a rule, policy or specific decision would adversely "inhibit" religion in violation of the second prong of the Lemon v. Kurtzman test.

Finally, if a school district were to allow a church to rent space for a "public forum" but denied the church to rent space for "worship," or "religious instruction," a violation of the "entanglement" prong of Lemon v. Kurtzman would occur. Such a prohibition would entangle the school district "in the delicate task of defining religion, determining whether a proposed event involves worship or teaching, and then monitoring events to ensure that no prohibited activity takes place." Chess v. Widmar, 635 F.2d 1310, 1318 (8th Cir. 1980), affirmed by Widmar v. Vincent, supra.

In sum, under the Establishment Clause, if a school district permits community groups or organizations to use school facilities, it must allow religious groups to have access on the same terms and conditions. Moreover, the district may not monitor the religious activity that is undertaken during the period the religious group rents the facility.

II. The Free Speech Clause

As we noted in our earlier opinion, the school district is not required by the Constitution or state law to open its facilities to community groups. Voters of the district may direct the school board to make school facilities available for meetings or to prohibit such use. Iowa Code § 278.1(4) (1981). But having opened its facilities for use by community groups, the district cannot exclude groups because of "the content of their speech." Widmar v. Vincent, ____ U.S. ____, 102 S.Ct. 269, 70 L.Ed.2d at 449. To justify exclusion from use of a school facility based on the religion content of a group's intended speech, the district would be required to show that the exclusion is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Widmar, ____ U.S. ____, 102 S.Ct. 269, 70 L.Ed.2d at 448. See also Carey v. Brown, 447 U.S. 455, 461, 464-465, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980); Healy v. James, 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972); Tinker v. Des Moines Independent School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). In short, the Free Speech Clause prohibits the district from excluding a church group that wants to rent a school facility for holding a particular type of religious activity.

III. The McCollum v. Board of Education Issues

In stating that a school district may not exclude religious groups from use of school facilities on an equal basis with other

community groups, we do not wish to be understood to overlook the teaching of McCollum v. Board of Education, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948). The rule of McCollum is still in effect and a school district should be aware of the line between it and the requirements of Widmar set out above. In McCollum, the Court rejected a school district policy that allowed religious teachers, employed by private religious groups, to come weekly into the school buildings during the regular hours set apart for secular teaching and substitute the religious teaching, for a period of thirty minutes, for the secular education provided under the Illinois Compulsory Attendance law. The practice was held to be barred by the First Amendment because it was a utilization of the tax- established and tax-supported public school system to aid religious groups to spread their faith. Id. 333 U.S. at 210, 68 S.Ct. 461, 92 L.Ed. 649. Further, the school district "help[ed] to provide pupils for their religious classes through use of the state's compulsory public school machinery" which the Court said was "not separation of church and state." McCollum, 333 U.S. at 212, 68 S.Ct. 461, 92 L.Ed. 649. On the other hand, released time during school hours for religious instruction elsewhere was upheld. See Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952); Iowa Code § 299.2(4) (1981).

In our opinion, school districts should not grant permission to groups who wish to provide religious instruction on school premises immediately before or immediately after school hours to students who attend the particular school. Such a practice could lead to the school appearing to sponsor the views of the particular religious group. See Widmar v. Vincent, ____ U.S. ____, 102 S.Ct. 269, 70 L.Ed. at 449, n.10. The Court acknowledged that university students "are less impressionable than younger students and should be able to appreciate that the university's policy is one of neutrality toward religion." Id. n.14, 102 S.Ct. 269, 70 L.Ed.2d at 450. We believe that even though a school district rented a classroom to a religious group immediately before or after school for religious instruction to the pupils who attend the school, "the appearance of official sanction would be erected." Brandon v. Board of Education of Guilderland, 487 F.Supp. 1219, 1229, n.14 (N.D. N.Y. 1980) In other words, such a practice could have the effect of "advancing" religion in violation of the second prong of the Lemon v. Kurtzman test set out above. We recognize we have hereby encouraged school districts to engage in drawing fine distinctions. The protection of liberties guaranteed by the First Amendment requires no less. The specific example you present -- rental of school property by a church group on Sunday -- does not give rise to the problems addressed in McCollum or Brandon.

Conclusion

In sum, if a school district allows community organizations to use school facilities when those facilities are not in use for school purposes, it may not refuse to grant access to religious groups on the same terms and conditions that apply to other groups. The school district may not regulate the content of religious speech during such use by a religious group. On the other hand, a school district should not grant permission to a religious group for the purpose of providing religious instruction to the pupils in a particular school immediately before or after school to avoid the appearance of official sanction or sponsorship.

Sincerely yours,

Merle W. Fleming

MERLE W. FLEMING

MWF/jp

CIVIL RIGHTS/STANDING TO FILE COMPLAINT: 601A.2(2), 601A.15(1), The Code 1981. Section 601A.15(1) grants standing to private associations which file complaints with the Iowa Civil Rights Commission alleging either injury to themselves as entities or actual, or even threatened, injury to one or more of their members. (Nichols to Reis, Civil Rights Commission, 12/29/82) #82-12-6(L)

December 29, 1982

Ms. Artis I. Reis
Executive Director
Iowa Civil Rights Commission
8th Floor - Colony Bldg.
507 Tenth Street
Des Moines, Iowa 50319

Dear Ms. Reis:

You have requested an opinion from this office inquiring whether Iowa Code § 601A.15(1) (1981) allows the Iowa Civil Rights Commission to exercise jurisdiction over discrimination complaints filed by a private, non-governmental organization on behalf of individuals or groups of persons. It is the opinion of this office that the Commission can exercise jurisdiction over such complaints so long as the organizational complainant claims to be aggrieved by the alleged discriminatory practice.

Iowa Code § 601A.15(1) (1981) states as follows:

> Any person claiming to be aggrieved by a discriminatory act or unfair practice may, by himself or his attorney, make, sign, and file with the commission a verified, written complaint in triplicate which shall state the name and address of the person, employer, employment agency, or labor organization alleged to have committed the discriminatory or unfair practice of which complained, shall set forth the particulars thereof, and shall contain such other information as may be required by the commission. The commission, a commissioner, or the attorney general may in like manner make, sign, and file such complaint.

(Emphasis added).

The legislature's definition of a "person" sheds further light on this question:

> "Person" means one or more individuals, partnerships, associations, corporations, legal representatives, trustees, receivers, and the state of Iowa and all political subdivisions and agencies thereof.

Iowa Code § 601A.2(2) (1981).

A private, non-governmental association is deemed to be a "person" within the meaning of Iowa Code § 601A.2(2) (1981). It follows that if such a "person" "claim[s] to be aggrieved by a discriminatory or unfair practice. . . .", it may file a complaint with the Commission. Once the Commission receives such a complaint the agency is authorized "[t]o . . . investigate, and finally determine the merits" of the complaint. Iowa Code § 601A.5(2) (1981). The Iowa Supreme Court has noted that: "The complaint's main function is to trigger Commission investigation and, if probable cause is found, conference, conciliation and persuasion will follow." Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 766 (Iowa 1971).

Therefore, the Commission has jurisdiction over a complaint filed by a non-governmental association so long as it "claim[s] to be aggrieved. . . ." Iowa Code § 601A.15(1) (1981).

> There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy. . . .
>
> Even in the absence of injury to itself, an association may have standing solely as a representative of its members. . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action. . . .

Warth v. Selden, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). For purposes of ascertaining jurisdiction, the Commission "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Id., 422 U.S. at 501; Iowa Code § 601A.18 (1981). Thus, the Commission should exercise jurisdiction over a complaint filed by a non-governmental association so long as it alleges that it is itself injured as an entity or, alternatively, that one or more of its members is or will be injured by the alleged discriminatory act.

This office recently issued an opinion concluding that local civil rights agencies and their directors lack standing to file complaints on behalf of third parties injured by an alleged discriminatory act. See Op. Att'y. Gen. #82-7-11. The question presented here is distinguishable. First, the non-governmental organization must either allege injury to itself or actual or threatened injury to one or more of its members in order for the Commission to exercise jurisdiction over its complaint. This removes the private association from the realm of a mere "concerned bystander." United States v. SCRAP, 412 U.S. 669, 687, 93 S.Ct. 2405, 37 L.Ed. 2d 254 (1973). In the situation addressed in the prior opinion, the local civil rights agency's complaint alleged injury to third parties but not to itself. Second, the prior opinion concluded that local civil rights agencies are not among the institutions to which the legislature conferred "automatic standing" to file complaints. See Iowa Code § 601A.15(1) (1981), which authorizes the Iowa Civil Rights Commission, a Commissioner thereof, and the Attorney General to file complaints. The question presented here is not whether non-governmental organizations have automatic standing to file complaints under Iowa Code § 601A.15(1) (1981). Clearly they do not.

CONCLUSION

To reiterate, it is the opinion of this office that Iowa Code § 601A.15(1) (1981) confers jurisdiction upon the Iowa Civil Rights Commission over complaints filed by non-governmental associations so long as the private associations either allege injury to themselves as entities or actual--or even threatened--injury to one or more of their members. Finally, in evaluating such complaints for jurisdictional purposes the Commission must accept the allegations as true and construe the complaint liberally in favor of the complainant.

Sincerely,

Scott H. Nichols

Scott H. Nichols
Assistant Attorney General

SHN:crn

COUNTIES; Authority to tax: Iowa Code §§ 331.301(7), 331.422(26) (1981). Absent an express statutory provision, a county is not authorized to levy a tax for the operation of a wastewater management district created pursuant to home rule authority. However, a service fee imposed on users of the district would be permissible providing that fee is reasonable and related to the expenses of administration. (Weeg to Miller, Guthrie County Attorney, 12/27/82) #82-12-5(L)

December 27, 1982

Mr. Thomas H. Miller
Guthrie County Attorney
Guthrie County Courthouse
Guthrie Center, Iowa 50115

Dear Mr. Miller:

You have requested an opinion of the Attorney General concerning Guthrie County's authority with regard to the wastewater management district created by the county pursuant to its home rule authority. The district was not created as a sanitary district pursuant to Iowa Code Ch. 358 (1981). In particular, you ask:

> May the county levy a tax against property within the district to pay for the cost of the district administration's services and improvements? Is such a levy prohibited by the county home rule amendment and Section 331.301(7), The Code? Is such a levy a permissive tax levy under the provisions of Section 331.422(26), The Code?

It is our opinion that Guthrie County may not levy a tax to pay for the cost of the wastewater management district created by the county. Our reasons are as follows.

First, you state in your opinion request that the wastewater management district was created pursuant to the county's home rule authority, not pursuant to Ch. 358, which provides for the creation and operation of sanitary districts.[1] Chapter 358 does contain express authorization for the

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[1] Because the question is not before us, we assume for the purpose of answering your question that the county is not restricted or preempted by Ch. 358 from creating a wastewater management district pursuant to home rule authority. A discussion relevant to this problem may be found in 1980 Op.Att'yGen. 54.

sanitary district's board of trustees to levy a tax to pay the costs of the district, but this authorization of course does not extend to districts which may be similar in function to Ch. 358 districts but are not created and managed pursuant to Ch. 358.

Counties are limited in their authority to tax by the county home rule amendment. See Iowa Constitution, Art. III, § 39A. That amendment provides in part that:

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

This limitation is also contained in Iowa Code § 331.301(7) (1981), of the new County Home Rule Act. That section provides that:

> A county shall not levy a tax unless specifically authorized by a state statute.

Thus, we conclude that in the absence of an express statutory provision authorizing the county to levy a tax for the purpose of operating a wastewater management district, such a levy is prohibited.

Further, it is our opinion that such a levy would not constitute a permissive tax levy pursuant to Iowa Code § 331.422(26) (1981). Section 331.422 provides that:

> The board [of supervisors] may levy the following taxes each year on the assessed value of all taxable property in the county, except as provided by state law.
>
> * * *
>
> 26. For planning a sanitary disposal project as defined in section 455B.75, or for acquiring, constructing, operating, and maintaining sanitary land fills, not to exceed, in conjunction with levies for the debt service fund for the same purpose, six and three-fourths cents per thousand dollars on property outside of cities only.

As discussed above, the wastewater management district created by Guthrie County was established pursuant to home

rule authority, not pursuant to existing statutory authority. Further, the purpose of the district is wastewater management and not the operation of a sanitary landfill. Consequently, the provisions of § 331.422(26) are inapplicable.

However, you state that the wastewater management district ordinance provides that a service fee will be charged to recover the operating and administration costs of the district. We have previously held that a permit fee in similar circumstances is permissible as long as the fee is reasonable and related to the expenses of administration. See 1980 Op.Att'yGen. 154. However, if the purpose or effect of the fee is to raise revenues beyond these expenses, the fee would constitute an impermissible tax. Id.

In conclusion, absent an express statutory provision, a county is not authorized to levy a tax for the operation of a wastewater management district created pursuant to home rule authority. However, a service fee for users of the district would be permissible providing that fee is reasonable and related to the expenses of administration.

Sincerely,

Theresa D. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

OPEN MEETINGS LAW: Sections 28A.1 and 28A.2(1), Iowa Code (1981); Ch. 78, § 19, Acts 69th G.A. (1981). The county mental health and mental retardation coordinating board and advisory board are governmental bodies within the meaning of § 28A.2(1)(a) and § 28A.2(1)(b). (Munns to Krewson, State Representative, 12/27/82) #82-12-4(L)

The Honorable Lyle Krewson
State Representative
6403 Aurora, # 3
Des Moines, Iowa

December 27, 1982

Dear Representative Krewson:

You have requested the opinion of this office as to whether the proceedings of the county mental health and mental retardation coordinating board or the advisory board referred to in 1981 Session 69th G.A., ch. 78, § 19, are subject to Iowa Code ch. 28A (1981) pertaining to open meetings. Section 19 provides:

> 1. Sec. 19. NEW SECTION. COUNTY MENTAL HEALTH AND MENTAL RETARDATION COORDINATING BOARD.
>
> 1. A county board of supervisors, independently or in conjunction with one or more other county boards of supervisors, shall either establish a county or joint county mental health and mental retardation coordinating board or constitute the board or the joint boards of supervisors as the ex officio county mental health and mental retardation coordinating board. If a separate county mental health and mental retardation coordinating board is established, it shall be composed of persons who have demonstrated a concern for mental health and mental retardation services and its size shall be determined by the board or joint board of supervisors. One or more county supervisors may be named to serve on a separate county mental health and mental

> retardation coordinating board. If the board or joint boards of supervisors serve ex officio as the county mental health and mental retardation coordinating board, it shall establish an advisory board composed of persons who have demonstrated a concern for mental health and mental retardation services, and who are not governmental officials, to advise the coordinating board with respect to the coordinating board's functions under subsection 2.

Under § 19, the county boards of supervisors are mandated to either establish a mental health and mental retardation coordinating board or constitute the board itself as the ex officio county mental health and mental retardation coordinating board. If the board serves ex officio, then the statute directs the board of supervisors to establish an advisory board. Section 19 dictates the composition of the board and its duties. Only the size is left to the discretion of the board of supervisors.

Chapter 28A, pertaining to open meetings, applies only to "governmental bodies". Iowa Code § 28A.2(1) (1981) defines the terms as follows:

> 1. "Governmental body" means:
>
> a. A board, council, commission or other governing body expressly created by the statutes of this state or by executive order.
>
> b. A board, council, commission or other governing body of a political subdivision or tax-supported district in this state.
>
> c. A multimembered board formally and directly created by one or more boards, councils, commissions or other governing bodies subject to paragraphs "a" and "b" of this subsection.
>
> d. Those multi-membered bodies to which the state board of regents or a president of a university has delegated the responsibility for the management and

> control of the intercollegiate athletic programs at the state universities.

The issue is whether the "coordinating boards" and "advisory boards" in § 19 are "governmental bodies" within the meaning of Iowa Code § 28A.2. We conclude that these boards are governmental bodies, subject to the open meetings requirements. The statute, § 19, requires the existence of the boards and "expressly creates" the boards. § 28A.2(1)(a) (1981).

The language used in § 19 differs from the language which was the subject of scrutiny in 1980 Op.Att'yGen. 148. In that opinion, we were asked whether the peer review committees of the board of engineering came within the purview of the open meetings law. Chapter 258A authorized the board of examiners to form such committees. In determining that peer review committees were not governmental bodies within the meaning of § 28A.2(1)(a), we stated:

> A statute which does not "constitute" the board itself but merely permits the Board, in its discretion, to form peer review committees, does not "expressly create" them as those terms are employed in § 28A.2(1)(a).

1980 Op.Att'yGen. 148, 150.

Section 19 expressly creates the mental health and mental retardation coordinating board or advisory board. The board of supervisors merely implements this statutory mandate. A duty is imposed on the supervisor to establish the boards pursuant to the provisions of § 19. While the board of supervisors is granted a certain amount of discretion under the statute, the coordinating board is a creation of the statute, and not of the board of supervisors.

It also appears that the county mental health and mental retardation coordinating boards and advisory boards created by § 19, fall within the § 28A.2(1)(b) definition. See 1980 Op.Att'yGen. 270. First, it is clear that such boards are "boards. . . of a political subdivision," within the terms of the statute. Second, the boards are "governing bodies", in the sense of having been delegated policy-making authority.

The mental health and mental retardation coordinating board is directed by the statute to develop a plan for provision of mental health and mental retardation services § 19(2)(a), to

distribute the county's share of the general allocation of state services money, § 19(2)(b), to prepare an annual fiscal accounting of the use of state money, § 19(2)(c), and to nominate potential recipients of grant money, § 19(2)(d). These duties constitute significant policy and decision-making responsibilities. It is the legislative intent in passage of Iowa Code chapter 28A (1981) to assure that "...The basis and rationale of governmental decisions, as well as those decisions themselves, are easily accessible to the people." Iowa Code § 28A.1 (1981). The functions of the coordinating and advisory boards are clearly within the realm of governmental decisions. Even if the applicability of Iowa Code ch. 28A to § 19 were ambiguous, which it is not, such ambiguity is to be "resolved in favor of openness." Iowa Code § 28A.1 (1981).

Sincerely,

Diane Munns (ab)

Diane C. Munns
Assistant Attorney General

DCM/jaa

STATE OFFICERS AND DEPARTMENTS: State Licensing Boards. §§258A.2(2)(c)(d) and (g), 258A.1(2), 56.29, 56.9, 56.11(3), 553.5, Iowa Code (1981), 15 U.S.C. § 2. A licensing board may limit its approval of continuing education courses to those sponsored by professional colleges or non-profit organizations provided it follows statutory requirements pertaining to such education and establishes rules assuring maintenance of professional skills. Continuing education courses may not be used for means of raising money for a political action fund if non-profit corporation collects and transfers funds for use as contributions to political campaigns or candidates. It would not constitute antitrust violation for licensing board to approve courses sponsored only by colleges or non-profit associations, unless specific intent were shown to attempt to monopolize. Intent and market considerations are fact questions which cannot be resolved in an Opinion of the Attorney General, but only by a court. (Swanson to Priebe, State Senate, and Schroeder, House of Representatives, 12/27/82) #82-12-3(L)

Honorable Berl E. Priebe
Iowa Senate
State Capitol
Des Moines, IA 50319

December 27, 1982

Honorable Laverne E. Schroeder
Iowa House of Representatives
State Capitol
Des Moines, IA 50319

Dear Senator Priebe and Representative Schroeder:

You have requested an opinion of this office relating to mandatory continuing education for professional and occupational licensees. Specifically you have asked:

1. May a licensing board restrict its approval of continuing education courses to those sponsored by professional colleges or non-profit organizations?

2. May continuing education courses be used as a tool to raise money for a political action fund?

3. Is it a restraint of trade, violating the Iowa Competition Law, for a licensing board to approve only those continuing education courses sponsored by colleges or non-profit associations?

I.

The 67th Iowa General Assembly established certain continuing education requirements as a condition to license renewal. It authorized the various licensing boards to create continuing education requirements at a minimum prescribed by each board and to establish continuing education programs to assist a licensee in meeting such continuing education requirements. Section 258A.2, Code 1981.

Among other requirements, the rules must:

> "Attempt to express continuing education requirements in terms of uniform and widely-recognized measurement units.
>
> "Establish guidelines, including guidelines in regard to the monitoring of licensee participation, for the approval of continuing education programs that qualify under the continuing education requirements prescribed . . . . [and]
>
> . . .
>
> "Be promulgated solely for the purpose of assuring a continued maintenance of skills and knowledge by a professional or occupational licensee directly related and commensurate with the current level of competency of the licensee's profession or occupation . . . ." Section 258A.2(2)(c)(d)(g), Code 1981.

The various licensing boards in the state have been given broad authority to establish guidelines for the approval of continuing education programs that qualify under the continuing education requirements prescribed by each board.

No precedent has been found which would prohibit a licensing board from limiting its continuing education courses to those sponsored by professional colleges or non-profit organizations. So long as each licensing board follows the above guidelines and requirements pertaining to continuing education, and establishes rules assuring the maintenance of professional or occupational skills, it may limit its approval of such courses to those sponsored by professional colleges or non-profit organizations, if such limitation does not constitute a restraint of trade in violation of federal or state antitrust laws.

The question of whether such limitation is contrary to the antitrust laws will be considered subsequently in section III.

II.

In connection with your question number 2, you describe a brochure, offering a course in continuing education, which notes in bold lettering that all seminar fees will be donated to the professional society political action fund. You state that the course apparently serves the purpose of allowing a licensee to make campaign contributions while obtaining continuing education in exchange for that contribution. You ask whether this may properly be considered continuing education as defined in Chapter 258A, and whether it is appropriate for a board to approve a program that is not being held solely for the purpose of providing continuing education.

We assume for purposes of this opinion, that the course material itself was devoted solely for the purpose of assuring a continued maintenance of skills and knowledge by a professional or occupational licensee, and thus would meet the requirements of Section 258A.2(2)(g), Code 1981. So long as the board establishes continuing education programs to assist a licensee in meeting the minimum requirements as established by each board, the board has fulfilled its responsibility under Section 258A.2, Code 1981.

It is our understanding, however, that the professional society to which you refer is an Iowa non-profit corporation. Section 56.29, Code 1981, as amended by Chapter 35, section 14, Acts of the 69th General Assembly, provides, in part, as follows:

> ". . . it is unlawful for any . . . corporation organized pursuant to the laws of this state . . . whether for profit or not . . . to contribute any money . . . directly or indirectly, to any committee, or for the purpose of influencing the vote of any elector . . . ."

With exceptions not here relevant, this section by its plain terms clearly provides that any non-profit corporation shall not as an entity contribute any money, property, labor, or a thing of value, directly or indirectly, for the purpose of influencing any elector. Subsection 3 of section 56.29, Code 1981, does make it permissible for a non-profit corporation to use its money, property, labor or any other thing of value owned by it for the purpose of soliciting its stockholders, administrative officers and members for contributions to a committee sponsored by it.

If the seminar fees were collected by the non-profit corporation and transferred to a political action committee for use as contributions to political campaigns or candidates, such use would be in violation of Section 59.29, Code 1981.

A campaign finance disclosure commission was created under section 56.9, Code 1981. It was given authority by the general assembly to receive complaints from any eligible elector and to also initiate action on its own motion to investigate alleged violations of Chapter 56, Code 1981. It may conduct hearings, issue subpoenas, review records of a committee, and make findings of fact. In these matters it has primary jurisdiction. Section 56.11, Code 1981.

III.

You ask whether it is a restraint of trade, violating Section 553.5, Code 1981, for a licensing board to approve only those continuing education courses sponsored by colleges or non-profit associations.

Section 553.5, Code 1981, provides that:

> A person shall not attempt to establish or establish, maintain, or use a monopoly of trade or commerce in a relevant market for the purpose of excluding competition or of controlling, fixing, or maintaining prices.

For the purpose of achieving a uniform application of the state and federal laws prohibiting restraints of economic activity and monopolistic practices, the Iowa General Assembly has provided that Chapter 553 "shall be construed to compliment and be harmonized with the applied laws of the United States which have the same or similar purpose as [that] chapter." Section 553.2, Code 1981.

We must, therefore, examine federal statutes and common law for a construction of the Iowa statute. Section 553.5, Code 1981, is patterned after and similar to Section 2 of the Sherman Act. 15 U.S.C. §2. That provision provides, in part, as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty . . . .

In examining the question of whether an attempt to monopolize on the part of the examining board is present here, we look to federal common law. Generally, there are two elements that must be proved to show the offense: a specific intent to monopolize and a dangerous probability of success. Walker Process Equip. Inc. v. Food Mach. and Chemical Corp., 382 U.S. 172, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965); Central Sav. & Loan Assoc. v. Federal Home Loan Bank Bd., C.A. Iowa 1970, 422 F.2d 504.

The United States Supreme Court has indicated that the intent which must be shown to warrant a finding of attempt is not merely an intent to do acts which can be objectively analyzed as tending toward monopoly, but a specific intent to destroy competition or achieve monopoly. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953).

It should also be noted that Section 553.5, Code 1981, provides that a person shall not attempt to establish a monopoly "for the purpose of" excluding competition, language not found in Sherman §2.

"Purpose" is defined by Black's Law Dictionary, Fifth Edition, p. 1112, as "that which one sets before him to accomplish; an end, intention, or aim, object, plan, project." The use of the phrase "for the purpose of" by the Iowa General Assembly further indicates the need for a showing of intent for liability to be shown or found under Section 553.5, Code 1981.

The "relevant market" must also be examined in a determination of whether a "dangerous probability of success" exists in establishing a monopoly. In order to determine whether the "dangerous probability" is present, all methods, means and practices must be scrutinized, which would, if successful, accomplish monopolization. Knutson v. Daily Review, Inc., C.A. Cal. 1976, 548 F.2d 795, certiorari denied 97 S.Ct. 2977, 433 U.S. 910, 53 L.Ed.2d 1094. It can be established by a showing of either a significant amount of market power or by proof of a substantial restraint of trade. General Communications Engineering, Inc. v. Motorola, D.C. Cal. 1976, 421 F.Supp. 274. The relevant market is a basic issue in a case charging an attempt to monopolize. Merit Motors v. Chrysler, D.C. D.C. 1976, 417 F.Supp. 263, affirmed 569 F.2d 666.

Relevant and necessary inquiries would include such questions as what profit-making courses are available in the geographic market area where licensees might be expected to attend? What is the geographic market area where licensees would be expected to attend courses for continuing education? Is the licensing board alleged to have combined, or can it be shown that it combined, with the approved colleges or non-profit associations to intentionally and substantially restrain trade by excluding profit-making associations from the market? What share of the market or potential market do the approved colleges and non-profit associations maintain? What interest, if any, does any member of the licensing board have in an approved college or non-profit professional association?

The questions then of whether a licensing board possesses the requisite specific intent and whether a dangerous probability of success exists in establishing a monopoly in the situation which you describe, are questions of fact. This office cannot provide a definite conclusion here because the factual issues involved cannot be resolved in an Attorney General's Opinion.

Yours very truly,

Gary H. Swanson

GARY H. SWANSON
Assistant Attorney General

GHS/mel

MOTORCYCLE LICENSE. Iowa Code Section 321.177 and 321.189, 1981; Rule 820 Iowa Adminstrative Code [07,C] 13.7(1). Iowa Code section 321.189 does not authorize issuance of a "motorcycle only" license to a person under the age of eighteen who has not completed driver education. Rule 820 Iowa Administrative Code [07,C] 13.7(1) does not create a "de facto" motorcycle license. (Fitzgerald to Royce, 12/27/82) #82-12-2(L)

Mr. Joseph Royce
Staff Member
Administrative Rules Review Committee
Statehouse
Des Moines, Iowa 50319

December 27, 1982

Dear Mr. Royce:

You have requested an opinion from this office concerning the availability of a "motorcycle only" operator's license to a person under eighteen years of age. Specifically, your questions were as follows:

(1) Does the language of section 321.189, authorizing the issuance of a "motor vehicle license," preclude the department from issuing a license for motorcycle only?

(2) Does the department of transportation rule 820 I.A.C. (07,C) 13.7(1) create a "de facto" motorcycle license?

In response to your first question, § 321.189 does not preclude the Department of Transportation from issuing a license for a motorcycle only. Such a license is available under Rule 820 I.A.C. (07,C) 13.7(1) to persons eighteen years or older. However, this section does not authorize the issuance of a "motorcycle only" license to a person under the age of eighteen. Under the Iowa Code, a person under the age of eighteen may only obtain a valid motor vehicle operator's license by completing an approved driver education course. Section 321.177 provides:

> The department shall not issue any license hereunder
>
> 1. To any person, as an operator, who is under the age of eighteen years, without his or her having first successfully completed an approved driver education course, in which case, the minimum age shall be sixteen years.

The driver education requirements are provided in §321.178. Prior to the amendment of §321.189 (first unnumbered paragraph), a person under the age of eighteen who had successfully completed driver education could then have his operator's license validated for motorcycle operation. This could be done by passing a motorcycle skill test as required in Rule 820 I.A.C. [07,C] 13.7(1). The amendment to §321.189 changes this procedure by further requiring that persons under the age of eighteen complete a motorcycle education course. The relevant part of §321.189 provides:

> After July 1, 1981, a person under the age of eighteen applying for a motor vehicle license valid for the operation of a motorcycle shall be required to successfully complete a motorcycle education course approved and established by the department of public instruction or successfully complete an approved motorcycle education course at a private or commercial driver education school licensed by the department. A public school district may charge a student a fee which shall not exceed the actual cost of instruction.

The language of this section presupposes that the applicant already posesses a valid motor vehicle license. There is no indication that the legislature intended to change the requirement that all persons under the age of eighteen must complete driver education to obtain a valid motor vehicle license. The only purpose of the motorcycle education requirement is to make sure that operators under age eighteen possess a minimum level of skill and knowledge.

In your letter you suggested that this portion of §321.189 seemed to create another category of licenses besides those specified in subsection one. This is not the case. Motorcycle licenses are treated as a subcategory under motor vehicle licenses. A motor vehicle license may be validated for operation for a motorcycle under §321.189 and Rule 820 I.A.C. [07,C] 13.7(1). There is no separate provision for a motorcycle license under either the Iowa Code provisions or the administrative rules.

In response to your second question, Rule 820 I.A.C. [07,C] 13.7(1) does not create a de facto motorcycle license. As noted above, this rule deals with restrictions to motor vehicle licenses. Subsection (b) does not create a separate motorcycle license, but rather provides the method by which an individual may obtain a motor vehicle license restricted to motorcycles only. This section merely sets out the procedure and testing requirements for obtaining such a license.

In your letter you indicated that you believed that this rule "was tailormade for a student who has been trained to operate a motorcycle, but has not yet been trained to operate an automobile." This conclusion is incorrect. This rule does not apply to persons under the age of eighteen. As discussed above, §§321.177(1) and 321.178(1) provide the only method by which a person under eighteen may obtain a valid motor vehicle license. Section 321.189 sets out additional requirements which must be fulfilled before that license can be validated for motorcycle operation. Rule 820 I.A.C. [07,C] 13.7(1), on the other hand, applies to persons who are otherwise eligible for a motor vehicle license. This provision applies only to persons eighteen years or older.

In summary, §321.189 does not authorize the issuance of a "motorcycle only" permit to a person under the age of eighteen who has not completed driver education. Rule 820 I.A.C. [07,C] 13.7(1) does not create a separate category of "motorcycle only" licenses, but instead provides that persons over eighteen may obtain a motor vehicle license valid only for motorcycle operation. This rule does not authorize the issuance of a motor vehicle license valid for "motorcycle only" to a person who is under eighteen years of age.

Respectfully,

Michael C. Fitzgerald

MICHAEL C. FITZGERALD
Assistant Attorney General

MCF:dlc

EXTRADITION: FEES AND EXPENSES; SHERIFFS, COUNTY AND COUNTY OFFICERS: Iowa Code, §§ 820.7, 820.8, 820.9, 820.12, 820.24, 820.25 (1981); Supplement to the Iowa Code, §§ 331.652(b), 331.653(73), 331.902(1) (1981). 1. Under § 820.24, the State reimburses the county for the expenses incurred in returning a fugitive to Iowa when (1) requisition is made on the governor of the asylum state; (2) the statutory punishment of the crime with which the fugitive is charged shall be confinement in the penitentiary; and (3) the governor of Iowa certifies the expenses. 2. The costs and expenses which a county incurs in returning a fugitive must be paid from the sheriff's budget when a sheriff or deputy acts as the governor's agent in returning a fugitive. 3. When a county is reimbursed for extradition expenses, the amount received is paid into the general fund in accordance with Supplement to the Iowa Code § 331.902 (1981). (Hansen to Smith, Assistant Clinton County Attorney, 12/2/82) #82-12-1(L)

Lauren Ashley Smith
Assistant Clinton County Attorney
Clinton County Attorney's Office
103 Court House
Clinton, Iowa 52732

December 2, 1982

Dear Sir:

You have requested an opinion of the Attorney General as to whether the county sheriff's department budget is chargeable under Iowa Code section 820.24 (1981) for salary and expenses of Clinton County deputy sheriffs sent out of state to return fugitives from justice. You limit your question to situations where the cost is "chargeable to the county treasury." By this, we assume you mean to limit your inquiry only to those situations in which the county is not reimbursed by the State for expenses incurred.

We first examine Iowa Code section 820.24 (1981) which provides:

> 820.24 **Expenses--how paid.** When the punishment of the crime shall be the confinement of the criminal in the penitentiary, the expenses shall be paid out of the state treasury, on the certificate of the governor and warrant of the comptroller; and in all other cases they shall be paid out of the county treasury in the county wherein the crime is alleged to have been committed. The expenses shall be the fees paid to the officers of the state on whose governor the requisition is made, and all necessary and actual traveling expenses incurred in returning the prisoner.

Section 820.24 is an amended version of section 24 of the Uniform Criminal Extradition Act [Iowa code, chapter 820 (1981)]. Under section 820.24, the State pays the expenses when requisition is made on the governor of the asylum state and when "the punishment of the crime shall be the confinement of the criminal in the penitentiary."

It is our opinion that this phrase refers to the statutory punishment provided for the particular crime with which the fugitive is charged. We base our opinion on an examination of chapter 820 and on applicable principles of statutory construction.[1] We have found no caselaw interpreting this provision of section 24 of the Uniform Criminal Extradition Act.

Our conclusion is consistent with Iowa Code, sections 820.14 and 820.16 (1981), which govern arrest of fugitives without warrant and eligibility of an arrested fugitive for bail. In both sections, the statute conditions their application to each fugitive according to the statutory penalty for the offense or crime with which he is charged. The similar language of section 820.24 suggests that the legislature, in adopting chapter 820, intended that section 820.24 should be similarly interpreted. Robinson v. Dept. of Transportation, 296 N.W.2d 809, 811 (Iowa 1980) (in construing statute, court must consider statute in its entirety).

Furthermore the legislature is its own lexicographer, State v. Thomas, 275 N.W.2d 422, 423 (Iowa 1979), and can allocate responsibility for extradition expenses as it chooses. See Iowa Code, section 3282 (1851) (expenses paid by state); Iowa Code, section 5169 (1897) (expenses not paid by state if fugitive not tried unless shown that failure of trial not due to fault or neglect of those interested in prosecution); Iowa Code § 13499 (1935) (fees and expenses paid by county); Iowa Code, section 759.15 (1946) (expenses paid by state). If the legislature had intended that the State's responsibility for extradition expenses be dependent upon something other than the statutory punishment for the crime with which the fugitive is charged, it could have unambiguously said so.

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[1] Cf., 1972 Op. Att'y Gen. 519 (state not liable for expenses when person is extradited to another state and not confined in an Iowa institution).

Finally, the legislature must be presumed to have been aware of prior Iowa extradition statutes when it adopted the Uniform Criminal Extradition Act. State v. Fluhr, 287 N.W.2d 857, 862 (Iowa 1980) (legislature is presumed to be aware of existing state of the law). It could have chosen to make the counties ultimately bear the expenses of extradition, see Iowa Code section 13498 (1935), but did not do so.

Our interpretation is also consistent with the predecessor statutes to section 820.24. Traditionally, the state has assumed the expenses of extraditions, e.g., Iowa Code, section 3282 (1851); Iowa Code, section 4171 (1873); Iowa Code, section 5169 (1897); Iowa Code, section 759.15 (1946). The legislature experimented with assigning the liability to the counties, e.g., Iowa Code, section 13499 (1935). However, this experiment was abandoned and the expenses were again the responsibility of the state, subject to approval by the governor and at least two members of the executive council, e.g., Iowa Code, section 759.15 (1946). Section 820.24 continues this traditional allocation of responsibility in which the State assumes the primary responsibility for extradition expenses. Each claim is subject to the approval of the governor -- the executive primarily involved in extradition.

It is our opinion that when the sheriff or a deputy sheriff acts as governor's agents, costs and expenses which the county pays in returning out-of-state prisoners must be made from the sheriff's budget and not from the court fund (where one exists). We base this opinion on an examination of the statutory duties of the sheriff and the nature of the extradition procedure.

You suggest that when returning a fugitive, deputy sheriffs are acting outside of their "regular duty." An examination of the statutory duties of the sheriff convinces us that the return of fugitives under chapter 820 is within the statutory duties of the sheriff. Supplement to the Iowa Code, section 331.652(b) (1981) requires the sheriff to arrest a person who is liable to arrest. Supplement to the Iowa Code, section 331.653(73) (1981) requires the sheriff to carry out other duties provided by law. These duties would encompass the arrest of a fugitive on a governor's warrant under Iowa Code, section 820.8 (1981) and the return of the fugitive to Iowa under Iowa Code, sections 820.8 and 820.12 (1981). These duties would also include the return of a fugitive who waives extradition under Iowa Code, section 820.25 (1981). In both cases, the sheriff or his or her deputy would be arresting a person liable to arrest and carrying out a duty provided by law.

This is so even though the governor is not required to appoint a county sheriff or deputy sheriff as the governor's agent. Under Iowa Code, section 820.7 (1981), the governor may appoint "any peace officer or other person whom he may think fit to entrust with the execution [of the governor's warrant of arrest]," see Iowa Code, sections 820.8 and 820.9 (1981) ("peace officer or other person"). In normal practice, the agent(s) would be the person(s) recommended by the prosecuting attorney who submits the application for requisition to the governor of the demanding state. See Iowa Code, section 820.23 (1981) (application for requisition). A sheriff or deputy sheriff may be appointed, but this is not required. Iowa Code, section 820.7 (1981); 1928 Op. Att'y Gen. 42.

Because it is within the sheriff's statutory duties to return fugitives to Iowa, it is our opinion that the expenses incurred must come out of the sheriff's budget. See State v. Welsh, 109 Iowa 19, 24, 79 N.W. 369, 371 (1899) (sheriff not entitled to fees for employee acting as bailiff when bailiff duties were required of sheriff).

An examination of the nature of the extradition process supports our conclusion that the expenses incurred in returning a fugitive to Iowa are not properly chargeable to the court fund. Extradition is not a judicial proceeding; rather it is a summary executive proceeding by which a criminal accused can be brought before the appropriate tribunal in the demanding state. State v. Zylstra, 263 N.W.2d 529, 532 (Iowa 1978). Neither the guilt or innocence of an accused as to the crime charged nor liability under the demanding state's statutes is at issue. Id. It is our opinion that extradition is not part of the criminal trial process and, therefore, that the expenses incident to the return of a fugitive to Iowa under section 820.24 are not payable from the court fund.

In conclusion, it is our opinion that the fees and expenses incident to returning a fugitive to Iowa under section 820.24 are properly chargeable to the county sheriff's budget. This would include salary expenses incurred. Any reimbursement from the State under section 820.24 is payable to the county general fund, pursuant to Supplement to the Iowa Code, section 331.902(1) (198); Op. Att'y Gen. #82-4-12(L).

Sincerely,

Lona Hansen

LONA HANSEN
Assistant Attorney General

LH:djs