CONSERVATION: Hunting licenses. Iowa Code Supp. § 110.24 (1989); 1989 Iowa Acts, ch. 87. A farm owner and a member of the owner's family who operates the farm are not both eligible for free licenses to hunt deer or wild turkey. (Smith to Hagerla, State Senator, 1-18-90) #90-1-7(L)

January 18, 1990

The Honorable Mark R. Hagerla
State Senator
State Capitol
L O C A L

Dear Senator Hagerla:

You have requested an opinion of the Attorney General concerning the provisions of Iowa Code Supp. § 110.24 (1989) governing eligibility of Iowa farm owners and tenants for free licenses to hunt deer and wild turkey. Specifically, your question is whether both a farm unit owner and a member of the owner's family who is the farm unit tenant are eligible for free deer and wild turkey licenses. We conclude that the definition of the term "tenant" in the statute requires a negative answer to your question.

Before enactment of the 1989 amendment, Iowa Code § 110.24 authorized issuance of one free deer hunting license and one free wild turkey hunting license per Iowa farm unit. The license could only be issued to a person who resided on the farm unit, and eligibility was further restricted to the owner, a member of the owner's family, the tenant, or a member of the tenant's family.

The provision for free licenses was broadened by 1989 Iowa Acts, ch. 87 (H.F. 6). The relevant statutes are codified as Iowa Code Supp. § 110.24, subsections 2, 3, 4 and 7, which we set forth as follows:

> 2. Upon written application, the department [of natural resources] shall issue annually a deer or wild turkey hunting license, or both, to the owner of a farm unit

> or a member of the family of the farm owner and to the tenant or a member of the family of the tenant.
>
> 3. The deer or wild turkey hunting permit shall be valid only for hunting on the farm unit upon which the licensee to whom it is issued resides.
>
> 4. An owner of a farm unit or a member of the owner's family who resides with the owner and a tenant or a member of the tenant's family who resides with the tenant, who do not reside on the farm unit but who are actively engaged in farming the farm unit, are also eligible for a free deer license and a wild turkey license as provided in this section. The licenses are valid for hunting on the farm unit only. This paragraph applies to Iowa residents actively engaged in the operation of the farm units.
>
> 7. As used in this section a "farm unit" is all the parcels of land, not necessarily contiguous, which are operated as a unit for agricultural purposes and which are under the lawful control of the landowner or tenant, and a "tenant" is a person, other than the landowner or landowner's family, who resides on the farm unit and is actively engaged in the operation of the farm unit.

It is clear from subsections 2, 3 and 4 that both an owner and tenant are eligible for a free license if they either reside on the farm unit or are actively engaged in the operation of the farm unit. Moreover, the eligible owner's free license may be issued instead to a family member who resides with the owner, and the eligible tenant's free license may be issued instead to a family member who resides with the tenant.

However, the owner and the owner's family are expressly excepted from the definition of "tenant" in subsection 7. Therefore, although a member of the owner's family who operates the farm may be a tenant for other purposes, that family member is not a "tenant" for the purpose of qualifying for a free tenant's license to hunt deer and wild turkey on the farm unit.

The definition of "tenant" was not expressly changed by the 1989 amendment of § 110.24. The General Assembly may have inadvertently omitted to amend the definition of "tenant" in 1989

when making both an owner and tenant eligible for free licenses. However, the General Assembly could reasonably have decided not to amend the definition of "tenant" in order to retain a limitation of one free license per "family" (a term used repeatedly but not defined in the statute). Thus, there is not an irreconcilable conflict between the 1989 amendment and the restrictive definition of the term "tenant."

Amendments by implication are not favored, and if possible, statutes must be construed so as to be consistent with each other. Caterpillar Davenport Emp. Credit v. Huston, 292 N.W.2d 393, 396 (Iowa 1980); 1A Sutherland, Statutes and Statutory Construction § 22.13, at 212 (Sands 4th ed. 1985 rev.). In the absence of an irreconcilable conflict between the 1989 amendment and the previously enacted definition of the term "tenant," § 110.24 must be interpreted to give effect to both.

We therefore conclude that a farm unit owner and a member of the owner's family who operates the farm unit are not both eligible for free licenses to hunt deer or wild turkey due to the restrictive definition of "tenant" in Iowa Code Supp. § 110.24(7).

Sincerely,

Michael H Smith

MICHAEL H. SMITH
Assistant Attorney General

MHS:rcp

CRIMINAL LAW; CLERK OF COURT: Costs; expert witness fees; blood alcohol tests; OWI. Iowa Code §§ 321J.2(1); 625.14. Clerk of court is not authorized to tax cost of State's blood alcohol test against convicted OWI defendant unless court specifically so orders. (Ewald to Vander Hart, Buchanan County Attorney, 1-12-90) #90-1-6(L)

January 12, 1990

Allan W. Vander Hart
Buchanan County Attorney
Buchanan County Courthouse
Independence, IA 50644

Dear Mr. Vander Hart:

You have requested an opinion of the Attorney General concerning court costs in OWI prosecutions. Your specific question (paraphrased) is:

> Where a defendant pleads guilty to or is convicted of OWI in violation of Iowa Code section 321J.2(1) and the court taxes court costs against the defendant, may the clerk include the expense of the chemical analysis of the defendant's blood or urine performed by a private laboratory at the State's request?

You note that typically the laboratory technician who performs the test is listed as a witness in the minutes of testimony. We assume that the technician would be qualified to testify as an expert witness at trial.

Court costs are taxable only to the extent provided by statute. Schark v. Gorski, 421 N.W.2d 527 (Iowa 1988). The relevant statute is Iowa Code section 625.14, which authorizes the clerk to tax the "allowance of . . . witnesses" as a court cost. This statute, being in derogation of common law, must be strictly construed. Woodbury County v. Anderson, 164 N.W.2d 129 (Iowa 1969); City of Ottumwa v. Taylor, 251 Iowa 618, 102 N.W.2d 376, 378 (1960). The term "costs" has a well defined legal meaning, and includes sums ordinarily taxable for expenses incurred in an action as provided by statute, but does not include such allowances as those for the expenses of expert witnesses. City of Ottumwa, 102 N.W.2d at 378-379. The expense of performing a chemical analysis of blood or urine to determine the alcohol concentration appears

to be an expense incurred by the State's expert witness in preparation for testimony at trial. We therefore conclude that as such an expense it would not ordinarily qualify as a court cost. See 31A Am.Jur.2d Expert and Opinion Evidence § 25 (1965) (expert witness fees taxable as costs only pursuant to statute or rule); Comment, Expert Witness Fees as Taxable Costs in Federal Courts - The Exceptions and the Rule, 55 U.Cin.L.Rev. 1206 (1985); Kehm v. Procter & Gamble Co., 580 F.Supp. 890 (D.C. Iowa 1982) (under federal rule expert witness costs limited to attendance fee, mileage, and per diem allowance).

Some years ago this office opined that "the clerk may legally tax the doctor's fee and costs of analysis of the blood or urine sample as part of the costs in the [OMVI] case, if the Court awards or allows such costs" (emphasis in original). 1962 Op.Att'yGen. 186, 187. A clerk must comply with any order of the district court relating to costs, and may not list chemical test expenses as a cost absent a specific court order to that effect. See Dwyer v. Clerk of District Court for Scott County, 404 N.W.2d 167 (Iowa 1987) (clerk has duty to file and note all documents presented for filing without regard to validity or legal effect of such documents); 15A Am.Jur.2d Clerks of Court § 21 (1976) (ministerial character of acts).

We have considered the fact that under the current OWI statutes a blood alcohol test is indispensable in securing a conviction under the .10 per se alternative, Iowa Code § 321J.2(1)(b), and highly probative in a prosecution under the actual impairment alternative, Iowa Code § 321J.2(1)(a). However, this fact does not alter our conclusion.

Sincerely,

ROBERT P. EWALD
Assistant Attorney General

RPE:krd

GENERAL ASSEMBLY; HIGHWAYS: Titles; Fiscal Notes. Iowa Const; Art. III, § 29; Iowa Code §§ 25B.5, 313.2A. 1989 Iowa Acts, ch. 134. A statute titled "an act relating to roads" may constitutionally contain a provision altering the way in which the jurisdiction of certain highways is transferred. The failure of the Legislative Fiscal Bureau to prepare a fiscal note for this statute does not invalidate it. (Hunacek to Chambers, Beres, Coleman and Fuller, 1-12-90) #90-1-5(L)

January 12, 1990

Bridget A. Chambers
Hamilton County Attorney
721 Seneca Street
P.O. Box 186
Webster City, IA 50595

C. Joseph Coleman
State Senator
Statehouse
Des Moines, IA 50319

James Beres
Hardin County Attorney
P.O. Box 129
Eldora, IA 50627

Robert Fuller
State Representative
Statehouse
Des Moines, IA 50319

Dear Ms. Chambers, Mr. Beres, Sen. Coleman, and Rep. Fuller:

You have requested an opinion of the Attorney General regarding the validity of Iowa Code § 313.2A(4), a new statute added to the Code by § 5 of Senate File 408, 1989 Iowa Acts, Ch. 134. Specifically, you ask whether this new statute is void because the title does not give sufficient notice to the legislature of the actual contents of the bill, or because no fiscal note was prepared pursuant to Iowa Code Chapter 25B. For the reasons expressed below, we believe that a court would not invalidate this statute on either of these grounds. We consider each in turn.

I. Title of the Bill. Section 313.2A(4), which involves the transfer of a highway from the jurisdiction of the Iowa Department of Transportation to a county or city, appears in a chapter with the following title: "AN ACT relating to roads, including roads identified by the state transportation commission as a network of commercial and industrial highways, by establishing the purpose of the network, by providing the terms for the improvement of the network, and by altering concurrent jurisdiction of extensions of primary roads in municipalities." Your first question is whether this title is constitutionally adequate.

We assume that your question makes reference to Iowa Constitution Art. III, § 29, which, as explained in Western International v. Kirkpatrick, 396 N.W.2d 359, 364-66 (Iowa 1986), imposes two separate requirements on legislation: a "one subject" rule, designed to prevent logrolling and to facilitate orderly legislative procedure, and a title requirement, designed to give reasonable notice to legislators and the public of the inclusion of provisions in a proposed bill, thus preventing surprise and fraud. Since you do not suggest that the "one subject" rule has been violated, we do not consider that provision, most recently discussed by the Iowa Supreme Court in Miller v. Bair, 444 N.W.2d 487 (Iowa 1989). We instead consider the question of whether the title of the bill is constitutionally adequate. We believe that it is.

In making this determination, we apply the following legal standard:

> A title is sufficient, even though it is broad, if it gives fair notice of a provision in the body of an act. Streepy, 207 Iowa at 856, 224 N.W. at 43. The enactment is constitutionally valid as to the title unless matter utterly incongruous to the general subject of the statute is buried in the act. Witmer v. Polk County, 222 Iowa 1075, 1085, 270 N.W. 323, 328 (1936). In State v. Talerico, 227 Iowa 1315, 1322, 290 N.W. 660, 663 (1940), we stated, "[T]he title need not be an index or epitome of the act or its details. The subject of the bill need not be specifically and exactly expressed in the title." The title must, however, give fair notice of the act's subject and it must not deceive its reader. See State v. Nickelson, 169 N.W.2d at 834; N. Singer, Sutherland Statutory Construction § 18.10 (C. Sands 4th ed. 1985) (Generality of the title is not reason enough to strike the act unless the title is misleading or deceptive.). "In determining the sufficiency of a title, courts examine whether anyone reading the title of an act could reasonably assume that the reader would be apprised of all its material provisions." 1984 Op. Iowa Att'y Gen. 173.

State v. Iowa Dist. Court, 410 N.W.2d 684, 686-87 (Iowa 1987), quoting Western International, 396 N.W.2d at 365. In addition, a strong presumption of constitutionality applies. Keasling v. Thompson, 217 N.W.2d 687, 689 (Iowa 1974).

Judged by this standard, we believe that a court would uphold the constitutionality of § 313.2A. Although the title of that statute is broad, it makes specific reference to highways and their jurisdiction, and therefore the provision of the statute relating

to transfer of jurisdiction is certainly not "utterly incongruous" or "misleading or deceptive". We therefore believe that the title of § 313.2A passes muster under article III, § 29 of the Iowa Constitution.

II. Fiscal Note Requirement. You next ask whether Iowa Code § 313.2A is invalid because the Legislative Fiscal Bureau failed to prepare an estimate of any costs involved, which you contend is required under Iowa Code § 25B.5(2). We think not.

Assuming for the sake of argument that such a fiscal note is required, we do not believe that its absence would result in the invalidation of the statute. "The decisions are nearly unanimous in holding that an act cannot be declared invalid for a failure of a house to observe its own rules. Courts will not inquire whether such rules have been observed in the passage of the act. The legislature by statute or joint resolution cannot bind or restrict itself or its successors to the procedure to be followed in the passage of legislation." 1 Sutherland on Statutory Construction § 7.04 at 434 (4th Ed. 1985) (footnotes omitted). As Sutherland explains, this principle is rooted not only in the reluctance of the courts to consider anything beyond the legislation itself, but also in the Constitution. Invalidation of the statute on the grounds that the legislature did not follow its own procedure would violate the separation-of-powers rule. Id.

We believe that this principle applies here, and results in the conclusion that, even if the legislature failed to follow its own procedure by failing to obtain a fiscal note, the statute would not be invalidated for that reason.

Sincerely yours,

Mark Hunacek

MARK HUNACEK
Assistant Attorney General

MH:lbh

COUNTIES AND COUNTY OFFICERS: County Attorney and County Fair Society; Iowa Code §§ 174.2, 174.15, 331.756, 331.756(7). The County Attorney has no statutory duty to give legal service or advice to a county fair society. (Reno to Mertz, Marion County Attorney, 1-5-90) #90-1-4(L)

January 5, 1990

Ms. Martha L. Mertz
Marion County Attorney
P. O. Box 629
Knoxville, IA 50138

Dear Ms. Mertz:

You have requested an opinion as to the obligation of a county attorney to provide legal service and/or advice to a fair association (society) which acts as an independent body with management and control of the county-owned fairgrounds.

The powers of the county fair society are found at Iowa Code § 174.2 (1989) which states:

> Each society may hold annually a fair to further interest in agriculture and to encourage the improvement of agricultural products, livestock, articles of domestic industry, implements, and other mechanical devices. It may offer and award such premiums as will induce general competition.
>
> In addition to the powers granted herein the society shall possess the powers of a corporation not for pecuniary profit under the laws of this state and those powers enumerated in its articles of incorporation, such powers to be exercised before and after the holding of such fairs.
>
> No salary or compensation of any kind shall be paid to the president, vice president, treasurer or to any director of the association for such duties.

Even if the county, through its board of supervisors, takes title to the real estate upon which the fairground is situated, it appears that the county has no authority with regard to the control and management of the facility.

> Title to land purchased or received for fairground purposes shall be taken in the name of the county, but the board of supervisors shall place it under the control and management of an incorporated county or district fair society. The society may act as agent for the county in the erection of buildings, maintenance of grounds and buildings, or improvements constructed on the grounds. Title to new buildings or improvements shall be taken in the name of the county but the county is not liable for the improvements or expenditures for them.

Iowa Code § 174.15 (1989).

It is clear from this language that the society is to act as a non-profit corporation, that it has sole control and management of its facilities even though the real estate may be in the name of the county, and that the county is not liable for improvements or expenditures made by the society. In addition, chapter 174 of the Code sets forth no express or implied relationship between the fair society and the county attorney.

The duties of the county attorney are set forth at Iowa Code § 331.756 (1989). Eighty-two specific requirements of service are enumerated therein. None of these duties requires the county attorney to provide legal services and/or advice to or for a fair society. However, the county attorney must:

> 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.

Iowa Code § 331.756(7).

The situation may arise in which a member of the board of supervisors, county officer, school officer or township officer is also a member of the fair society, as there is no statutory bar to such membership. See 1968 Op.Att'yGen. 1006. Under these circumstances, the county attorney may have a duty to provide advice or written opinion under § 331.756(7) to that

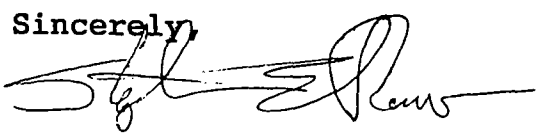
officer in his county, school or trustee capacity. Absent the foregoing, the county attorney has no statutory duty to provide such advice or opinion to the society.

With regard to the legal service issue you have raised, this office has previously opined that even when the county attorney has the duty to provide advice or written opinion, without compensation, under § 331.756(7), "that duty does not include the drafting of contracts or other similar documents, unless those documents are related to litigation involving the county [entity]." See, Op.Att'yGen. #89-2-2(L); 1982 Op.Att'yGen. 496. It would therefore follow that the county attorney, even when required by statute to give advice and written opinion without compensation, has no duty to draft contracts or other documents, unless those documents are related to litigation which, by statute, requires the assistance of the county attorney.

We would note that there is no authority requiring the county attorney to provide services to the fair society, nor is there authority prohibiting the county attorney from providing such services. Therefore, the county attorney may provide services at his or her own discretion. Presumably, the fair society has authority to hire outside counsel to assist it. In the event the county attorney is part-time, the fair society and the part-time county attorney need to clarify whether work being performed by the part-time county attorney for the fair society is without cost to the society or is being performed as private counsel for a fee prior to the commencement of such work.

In summary, the duties of the county attorney as set forth in § 331.756 do not require the county attorney to provide legal service and/or advice to the fair association (society). Further, chapter 174, relating to county fairs, imposes no express requirement upon the county attorney to provide such service and advise. In the event that county, school, or township officers might serve as members of the fair society, the county attorney may have a duty to then provide advice and written opinion; however, absent the foregoing, the fair society, as a non-profit corporation, may seek private counsel if the need arises.

Sincerely,



STEPHEN E. RENO
Assistant Attorney General
515/281-6634

SER:bac

SCHOOLS; Insurance: Iowa Code § 294.16. An employee of a school district has a statutory right to select the provider of an annuity contract made available by the school district for his or her benefit, even if the annuity is funded solely with school district monies. (Scase to Poncy, State Representative, 1-5-90) #90-1-3(L)

January 5, 1990

The Honorable Charles N. Poncy
State Representative
653 N. Court Street
Ottumwa, Iowa 52501

Dear Representative Poncy:

You have requested an opinion of the Attorney General addressing whether a school district employee has the right to designate the insurance company that will receive tax-sheltered annuity money inside of the fringe benefit package provided by a school district. As described by the information accompanying your opinion request, the funds utilized to purchase the annuities in question are those which the school district provides for the benefit of its employees.

The school district in question has, through collective bargaining, adopted a cafeteria-type insurance program. Pursuant to this program, each employee is allocated a certain amount of benefit credit. The employee has the option of utilizing this credit to purchase life, health, and dental insurance. The employee selects which of the available insurance options he or she wishes to obtain. If the cost of the selected options is less than the employee's benefit credit, the employee may opt to direct all or part of the remaining credit into an annuity contract.

In a letter opinion issued on June 5, 1989, this office reiterated its opinion that Iowa Code § 294.16 prohibits a school district from limiting the number of authorized annuity providers with which its employees may contract. Op.Att'yGen. #89-6-1(L). You are correct in noting that that opinion did not directly address whether the source of funding of the annuity would affect the applicability of Code § 294.16. We conclude that it does not.

"As a governmental agency, a school [district] has only those powers expressly granted or necessarily implied in

governing statutes." Sioux City Comm. School Dist. v. Iowa State Bd. of Public Instruction, 402 N.W.2d 739, 741 (Iowa 1987). This office has frequently identified Iowa Code § 294.16 (1989), as the sole source of a school district's authority to purchase annuity contracts for its employees. See Op.Att'yGen. # 89-6-1(L); Op.Att'yGen. # 87-6-2(L); 1976 Op.Att'yGen. 462, 464. This Code section provides as follows:

> **Annuity Contracts.**
> At the request of an employee through contractual agreement a school district may purchase group or individual annuity contracts for employees, from an insurance organization or mutual fund the employee chooses that is authorized to do business in the state and through an Iowa-licensed insurance agent or from a securities dealer, salesperson, or mutual fund registered in this state that the employee selects, for retirement or other purposes, and may make payroll deductions in accordance with the arrangements for the purpose of paying the entire premium due and to become due under the contract. The deductions shall be made in the manner which will qualify the annuity premiums for the benefits under Section 403(b) of the Internal Revenue Code, as defined in Section 422.3. The employee's rights under the annuity contract are nonforfeitable except for the failure to pay premiums.

Iowa Code § 294.16 (1989) (emphasis added). Our prior opinions have concluded that this section requires selection of an annuity provider by the employee. See Op.Att'yGen. #89-6-1(L); 1966 Op.Att'yGen. 211, 215.

While Code § 294.16 contemplates the funding of annuity contracts through employee payroll deductions, its provisions do not require such funding. Therefore it appears that employer funded annuity options are permissible. Code § 294.16 does not, however, provide for exception from the employee selection requirement in the case of employer funding. Because of this, we must conclude that an employee has the right to select the annuity provider even if the annuity in question will be funded by district moneys.

In summary, it is our opinion that an employee of a school district has a statutory right to select the provider of an annuity contract provided by the school district for his or her benefit, even if the annuity is funded solely with school district monies.

Sincerely,

CHRISTIE J. SCASE
Assistant Attorney General

CJS:rd

CONSTITUTIONAL LAW; REAL ESTATE: Interest on trust accounts. Ia. Const., Art. I §10, cl.1, Iowa Code Chapter 117.46 (1989), I.A.C. 193E 1.27(1), 1,27(4). A real estate buyer and seller can authorize the broker to pay expenses from the broker's trust account; the account must be interest bearing. The requirement that the broker transfer interest quarterly to the state treasurer for the title guaranty fund can be abrogated by the seller and the buyer, as long as the broker does not benefit from the interest received on funds in trust; the individual's right to contract is not violated. (Skinner to Harbor, State Representative, 1-3-90) #90-1-1(L)

January 3, 1990

The Honorable William H. Harbor
State Representative
Henderson, Iowa 51541

Dear Representative Harbor:

You have requested an opinion of the Attorney General concerning the real estate broker trust account obligations in Iowa Code § 117.46 (1989).

Specifically your first question is whether a buyer and seller can require a broker to deposit all funds paid and received in their transaction with the broker in a non-interest bearing bank account, and then authorize the broker to pay expenses of the transaction from those funds. Our review of Iowa Code § 117.46 indicates that the buyer and seller can agree to the payment of expenses from a trust account, but that the account must be interest bearing.

In every real estate transaction, attendant expenses must be paid by either the buyer or seller. For example, the real estate sales commission, if any, the property taxes, the closing costs, and other costs are paid before the transaction consummates. In addition, a potential buyer's earnest money may be held in a trust account. Some buyers and sellers may simply choose to place the funds they contribute toward these expenses in the broker's account, in trust, until the final accounting is made. The broker is required by statute and rule, however, to place the funds in an interest bearing account.

> Each real estate broker shall maintain a common trust account in a bank, a savings and loan association, savings bank, or credit union for the deposit of all down payments, earnest money deposits, or other trust funds received by the broker or the broker's salespersons on behalf of the broker's principal, except that a broker acting as a salesperson shall

> deposit these funds in the common trust account of the broker for whom the broker acts as salesperson. The account shall be an interest-bearing account. The interest on the account shall be transferred quarterly to the treasurer of state and deposited in the title guaranty fund and used for public purposes and the benefit of the public pursuant to section 220.91 unless there is a written agreement between the buyer and seller to the contrary. The broker shall not benefit from interest received on funds of others in the broker's possession. (Emphasis added.)

Iowa Code § 117.46(1).

> All money belonging to others and accepted by the broker or the broker's salesperson on the sale, purchase, or exchange of real property located in the state of Iowa, shall no later than the next banking day after acceptance of the offer, be deposited in one or more interest bearing checking accounts separate from the money belonging to the broker, except for funds deposited to cover bank service charges as specified in Iowa Code § 117.46. The name of the separate account(s) shall be identified by the word "trust."[1]

193E. I.A.C. 1.27(1)

Your second question is whether a requirement that individually owned trust funds held by the broker be sent to the State Title Guaranty Fund, contrary to the contractual agreement, violates an individual right to contract. (Emphasis added.)

As noted above, the interest on funds held by the broker are transferred to the Treasurer of State unless the buyer and seller establish some other arrangement. The public purpose of this transfer is stated in the same code section. Also stated is that "the broker shall not benefit from interest received on funds of others in the broker's possession." Iowa Code 117.46(1). Unjust enrichment is a principle in equity that arises where there is a receipt by one person from another of a benefit, the retention of

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[1]Property money and rental account funds may be deposited in a trust account separate from real estate transaction funds. If separately maintained, this account is not required to be an interest bearing account. 193E I.A.C. 1.27(4)

which would be contrary to right or justice. 30 C.J.S. Equity 983 (1965); 91 C.J.S. 490 (1965). Unjust enrichment to the broker is prevented if the buyer and seller choose to place money with the broker and do not otherwise specify who earns the interest. There is no limitation on the right of the seller and buyer to agree who earns the interest (except that the broker cannot benefit). There is a limitation as to whether the account is interest bearing or not; it must bear interest.

The targeting of interest bearing trust accounts for a special purpose is similar to that established for the legal profession in most states. Designed to support two legal objectives, the transfer enables: (1) the trust in the attorney-client relationship to be maintained when interest earned on otherwise unproductive trust funds is collected for a public purpose rather than for the benefit of the lawyer; and (2) the interest on lawyers "trust account" (IOLTA) program provides a fund for a variety of programs, such as Clients' Security Funds or legal aid societies.[2]

In considering whether the requirement to transfer funds to the state offends either the federal or state constitution, we first recognize the basic principle of the presumption of constitutionality. A statute will not be held invalid unless it is clear, plain and palpable that it contravenes a constututional provision. City of Waterloo v. Selden, 251 N.W.2d 506,508 (Iowa 1977).

The framework for considering whether the individual right to contract is violated is found in both the Federal and Iowa Constitution. U.S. Const., Art. I §10, cl.1 prohibits any state law, "...impairing the Obligation of Contracts...." Iowa Const. Art. I, §21 expressly states also that, "No bill of attainder, ex post facto law, or law impairing the obligation of contract, shall ever be passed."

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[2]ABA Model Rule 1.15 requires that attorneys hold the money in trust accounts separate from their own, and promptly deliver any money or property that belongs to clients. The IOLTA concept concerns client funds which are nominal in amount or which are to be held for a short period of time. Although individual client funds are constantly being deposited and withdrawn, the trust account, made up of commingled client funds, maintains an average daily balance capable of earning interest if the funds are held in a Negotiable Order of Withdrawal (NOW) account or in an account with similar features.

The test established by the Supreme Court to determine whether an economic regulation unconstitutionally impairs the obligation of contract is whether the statute is reasonable and appropriate to reach a legitimate end. [3]

Attacks on such programs on the theory of an "unconstitutional taking," even when the transfer to the state is mandatory, have been generally rebuffed. The American Bar Association's position that such programs do not deprive a client of property has been upheld in many state supreme courts and the 11th circuit.[4] Without showing a specific and legitimate "claim of entitlement" to the interest generated, no constitutionally cognizable property interest exists.[5] Other states have determined that no property interest exists on interest earned because the amount of interest earned is nominal and without net value to the individual; standing alone a deposit could not earn interest once the bank and administrative charges were deducted. The Minnesota Supreme Court however, determined that the crucial distinction is not the amount of interest earned, but that the cirucumstances lead to a legitimate expectation of earning interest.[6] The national acceptance of transferring interest to the state allows a group to act collectively to generate interest on otherwise unproductive client funds, and to use the interest to the benefit of the public.

The law supporting the creation and operation of such funds to collect interest from real estate brokers is analyzed in the

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[3] Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934); analyzed and applied in the context of the Iowa Mortgage Foreclosure Moratorium statute. 1984 O.A.G. 28.

[4] In re Interest on Trust Accounts, 402 So.2d 389 (Fla. 1981) (use of client money in this manner not a "taking" of the funds from client without compensation in violation of Fifth and Fourteenth Amendments); Cone vs. State Bar, 819 F.2d 1002 (11th Cir. 1987); Carroll vs. State Bar of California, 166 Cal. App. 3d 1193, 213 Cal. Rptr. 305, cert. denied, 106 S. Ct. 142 (1985); See also, 61 Wash. L.Rev. 823 (April 1986).

[5] Board of Regents v. Roth, 408 U.S.564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972); Perry v. Sinderman, 408 U.S. 593, 601-02, 92 S.Ct. 2694, 2700, 33 L.Ed. 2d 570 (1972); Cone v. St. Bar of Fla., 819 F.2d at 1004.

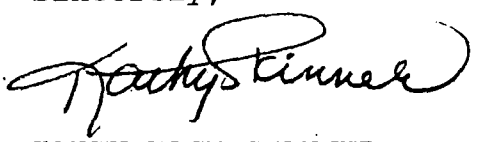
[6] Petition of Minnesota St. Bar Ass'n, etc., 332 N.W.2d 151, 158 (Minn. 1982).

same manner. The express statement of public purpose in the Iowa statute clarifies that the legislative intent is the same as that for lawyers' trust accounts. The power of the state to provide for the general welfare of its people authorizes it to prescribe regulations to that end. See, Green v. Shama, 217 N.W.2d 547 (Iowa 1974); Op.Att'yGen. 84-5-6(L).

The Iowa statute is written to effectively avoid the questions litigated in states which require, without exception, that the interest be transfered to the state. In Iowa the individual buyer or seller can contract so that one will obtain the generated interest. The individuals can abrogate the requirement of depositing trust funds in an interest bearing account and then transferring it to the state by developing a separate contract. The statute provides for, rather than denies the individual right to contract, thereby rendering the requirement of quarterly transfer ineffective.

In summary, the buyer and seller can agree to authorize the broker to pay expenses from the trust account; this account, however, must be interest bearing. The requirement that interest from the trust account be transferred to the state can be abrogated by an agreement between the seller and the buyer, as long as the broker does not benefit from the interest received on funds in trust belonging to others.

Sincerely,



KATHY MACE SKINNER
Assistant Attorney General

KMS:rd

SCHOOLS; Levy for cash reserve. Iowa Code §§ 442.13, 442.22 (1989); 1989 Iowa Code Supp. §§ 257.31, 257.34 (1989); 1989 Iowa Acts, ch. 135, §§ 31, 34. A school district may certify a cash reserve levy pursuant to Iowa Code § 298.10 to provide cash to replace withheld state aid and allow the district to meet authorized expenditures even though utilization of this levy will cause variation in the property tax rates among districts. (Scase to Pate, State Senator, 2-21-90) #90-2-9(L)

February 21, 1990

The Honorable Paul D. Pate
State Senator
State Capitol
LOCAL

Dear Senator Pate:

You have requested an opinion of the Attorney General regarding certification of cash reserve levies by local school boards. Specifically, you ask:

> Is it legal for a school board to certify a cash reserve levy pursuant to Iowa Code section 298.10, as amended by [1989 Iowa Acts, ch. 135, § 141][1], to provide cash to replace withheld state aid to enable the District to meet authorized expenditures where: (1) the withheld state aid will not later be realized, and (2) an unequal tax rate among districts is a necessary result?

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[1] 1989 Iowa Acts, ch. 135 (H.F. 535) contains a comprehensive revision of the state's school foundation finance program. Iowa Code ch. 442 (1989) is repealed and replaced by new Code ch. 257. Cross references in relevant portions of the 1989 Code are amended to reflect this change. New Code chapter 257, as well as the referenced amendment to Code § 298.10, are to take effect on July 1, 1990, for the purpose of computations required for the budget year beginning July 1, 1991. 1989 Iowa Acts, ch. 135, § 141. Several provisions of Code chapter 257 will be discussed within this opinion. Because the cash reserve levy in question could be utilized during the 1989-1990 or 1990-1991 budget years, references to corresponding provisions of Code chapter 442, which remains in effect during these budget years, will be provided in brackets following chapter 257 citations.

Analysis of your inquiry requires consideration of Code § 298.10, additional statutory provisions which require reporting of cash reserve funds utilized to replace withheld state aid and allow reduction of tax levies by the school budget review committee, and relevant constitutional principles. Iowa Code § 298.10, as amended, provides as follows:

> The board of directors of a school district may certify for levy by March 15 of a school year, a tax on all taxable property in the school district in order to raise an amount for a necessary cash reserve for a school district's general fund. The amount raised for a necessary cash reserve does not increase a school district's authorized expenditures as defined in section 257.7 [old § 442.5(2)].

The term "necessary cash reserve" is not defined within the Code nor in the administrative rules of the school budget finance committee. See 289 Iowa Admin. Code ch. 1. Further, while the final sentence of § 298.10 prohibits a school district from utilizing a cash reserve levy to increase its authorized budget expenditures, § 298.10 does not otherwise restrict a district's use of cash reserve funds. Rather, funds generated through a cash reserve levy are designated as part of the district's general fund and, as such, spending of the funds is limited only by the authorized spending limit of Iowa Code § 257.7 [old § 442.5(2)]. See 1982 Op.Att'yGen. 288, 289.[2]

Guidance for and control over usage of cash reserve funds is, however, provided by other sections of the Code. Iowa Code § 257.34 [old § 442.22], provides as follows:

> If a school district receives less state school foundation aid under section 257.1 than is due under that section for a base year and the school district uses funds from its cash reserve during the base year to make up for the amount of state aid not paid, the board of directors of the school district shall include in its general fund budget document information about the amount of the cash reserve used to replace state school foundation aid not paid.

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[2] In 1982 Op.Att'yGen. 288, this office construed Code § 298.10 as adopted in 1981, expressing concern for the absence of control over use of cash reserve funds. 1981 Iowa Acts, ch. 94, § 1. In 1982 the legislature amended § 298.10 to its pre-1989 amendment form and added the extrinsic controls upon use of cash reserve levy funds contained in Iowa Code sections 257.31 and 257.34 [old §§ 442.13 and 442.22] which are discussed below.

Clearly, the legislature anticipated that a school district might have a need to turn to cash reserve monies to fund authorized expenditures which withheld state foundation aid had been expected to fund. A school district's ability to so use cash reserve funds is not, however, without limitation.

As set forth above, Code section 257.34 requires school districts to report use of cash reserve funds to make up for withheld state aid. Correspondingly, Iowa Code section 257.31(2) [old § 442.13(2)] provides that "information about the amounts of property tax levied by school districts for a cash reserve" must be included in the state school budget review committee's annual report to the general assembly. In addition to this reporting function, Code § 257.31(17) [old § 442.13(15)] grants the school budget review committee the power to assess and reduce a school district's cash reserve levy.

> Annually the school budget review committee shall review the amount of property tax levied by each school district for the cash reserve authorized in section 298.10. If in the committee's judgment, the amount of a district's cash reserve levy is unreasonably high, the committee shall instruct the director of the department of management to reduce the district's tax levy computed under section 257.4 [additional property tax] for the following budget year by the amount the cash reserve levy is deemed excessive. A reduction in a district's property tax levy for a budget year under this subsection does not affect the district's authorized budget.

Iowa Code § 257.31(17) [old § 442.13(15)].

These statutory safeguards against overuse of cash reserve levies must be considered in addressing your concern about the inequality in tax rates which will result from utilization of cash reserve levies. Also relevant to this concern is the fact that the legislature has charged the school budget review committee to "take into account the intent of [chapter 257] to equalize educational opportunity, to provide a good education for all the children of Iowa, to provide property tax relief, to decrease the percentage of school costs paid from property taxes, and to provide reasonable control of school Costs." Iowa Code § 257.31(12) [old § 442.13(10].

With these principles in mind, we address the fact that certification of a cash reserve tax levy will necessarily result in unequal property tax rates among districts. While the source of funding differs, the legal analysis involved here is

strikingly similar to that used in 1982 Op.Att'yGen. 130 to assess the legality of Code provisions for an optional supplemental school income surtax. See Iowa Code § 442.43 (1989) (provisions for this supplemental school income surtax were adopted at the same time as the cash reserve levy provision of § 298.10 in 1981 Iowa Acts, ch. 94, § 17).

> In 1973, the U.S. Supreme Court decided the case of San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). In Rodriguez, the Texas system for financing public schools was challenged. The Texas system generally provided as follows: A total amount of money to be spent by all schools in the state for teacher salaries, operational expense, and transportation was established by statute, this total being designated by the Texas Minimum Foundation School Program. The state supplied 80% of this amount from general revenues. The remaining 20% of the Minimum Foundation was funded from local property taxes. The amount to be received by each district and the tax rate applicable in each district was determined by an economic index. Additionally, local Texas school districts had the ability to levy amounts beyond the Minimum Foundation Program amount. 411 U.S. at 61. The alleged defects in the Texas system involved the fact that the amount of revenue which could be produced by local districts varied widely according to the assessed valuation of property in a district, and in addition, the distribution of state aid actually benefited richer districts more than poorer districts.

1982 Op.Att'yGen. at 131. In upholding the Texas system, the Rodriguez court established that classifications for school financing drawn on the basis of district boundaries do not generally create a suspect classification for purposes of equal protection analysis and "that there is no fundamental right to education for purposes of equal protection analysis." Id. at 132, citing Rodriguez, 411 U.S. at 22-25, 35-36. Thus, the Supreme Court rejected an argument for application of the strict scrutiny test to determine whether the financing scheme at issue violated the equal protection clause.

> Having reached these conclusions, the Rodriguez majority proceeded to review the Texas system to determine whether, despite its "conceded imperfections", it had a rational relationship to a legitimate state purpose. 411 U.S. at 44. In concluding that the Texas system satisfie[d] the rational basis standard, the court primarily focuse[d]

> on the fact that the system further[ed] a legitimate policy of local control of schools. 411 U.S. at 49-53.

1982 Op.Att'yGen. at 133.

As we concluded in our 1982 opinion, the principles established in Rodriguez have essentially rendered futile challenges to public school funding programs based upon the federal equal protection clause.

> In light of Rodriguez, equal protection challenges have shown an attempt to incorporate state constitutional guarantees of education into a state equal protection analysis in an effort to establish a fundamental right to education. Weskill v. Horton, 332 A.2d 113, 119 (Conn. 1977); Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635, 646-47 (1975).[3] As the Iowa Constitution contains no provision guaranteeing education, this avenue is not available in Iowa equal protection analysis. See Lindquist, Developments in Education Litigation: Equal Protection, 5 Journal of Law and Education, 7 fn. 27 (1976).

1982 Op.Att'yGen. at 134-35; see Iowa Const., Art. IX.

Examination of the cash reserve levy provision of § 298.10 leads us to conclude that this provision bears a rational relationship to the legitimate state purpose of allowing local control of schools. The provision also provides a practical mechanism for local school districts to generate cash reserves which might otherwise be depleted by delayed or reduced state aid payments. While it is true that utilization of the cash reserve levy will result in some inequality in the property tax rate among school districts, Rodriguez made clear that this fact does not render the provision unconstitutional so long as a legitimate state purpose is served. Further, Iowa's statutory scheme includes oversight and control mechanisms to protect against overreliance upon the cash reserve levy by school districts. We would therefore conclude that the statutory scheme allowing levies for cash reserve is not unconstitutional on its face even though it may result in disparity among school districts.

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[3] This trend continues to date. C.f. Rose v. Council for Better Education, Inc., No. 88-SC-804-TG, ___ S.W.2d ___ (Ky. Sup. Ct. June 8, 1989, modified Sept. 28, 1989) (available on Westlaw as 1989 WL 60207); Helena Elementary School Dist. No. 1 v. State, 769 P.2d 684, 52 Ed.Law Rep. 342 (Mont. 1989); Edgewood Independent School District v. Kirby, 777 S.W.2d 391, 56 Ed.Law Rep. 663 (Texas 1989) and cases cited therein.

In summary, we conclude that a school district may certify a cash reserve levy pursuant to Iowa Code § 298.10 to provide cash to replace withheld state aid and allow the district to meet authorized expenditures even though utilization of this levy will cause variation in the property tax rates among districts.

Sincerely,

Christie J. Scase

Christie J. Scase
Assistant Attorney General

COUNTIES; COUNTY CONSERVATION BOARD; BOARD OF SUPERVISORS: Iowa Code § 331.434 (1989). After adopting a budget for the county conservation board and appropriating the budgeted amount, the board of supervisors does not have authority to disapprove payment of a claim for a budgeted conservation expenditure. To reduce an appropriation the board of supervisors must follow the procedure set forth in Iowa Code § 331.434(6). (Smith to Black, State Representative, 2-15-90) #90-2-8(L)

February 15, 1990

The Honorable Dennis Black
State Representative
State Capitol
L O C A L

Dear Representative Black:

You have requested an opinion of the Attorney General on the question whether a county board of supervisors may disapprove payment for a budgeted county conservation board purchase. Your request explained that the board of supervisors directed the county auditor not to pay $19,000 in claims for budgeted conservation board expenditures because another department's expenditures had exceeded its budget. It is our understanding that the board of supervisors neither amended the county budget nor published notice of intent to reduce the appropriation to the conservation board before directing the auditor to withhold payment of the budgeted conservation claims.

We have previously opined that a board of supervisors does not have authority to refuse payment of a warrant issued by the county conservation board if the warrant does not exceed the conservation board's budget and is for a legitimate purpose. Op.Att'yGen. #82-4-2(L). However, the statutes construed in our 1982 opinion were substantially revised by 1983 Iowa Acts, ch. 123 (popularly known as the County Finance Act). Thus, we consider the extent of the supervisors' authority to disapprove the conservation board's budgeted expenditures anew in light of amendments enacted since 1982.

Appropriations to the county conservation board and other departments are made by resolution of the board of supervisors after each department has submitted a budget estimate and the board of supervisors has adopted a county budget according to the process specified in Iowa Code §§ 331.433 and 331.434. This

statutory process was discussed in detail in 1986 Op.Att'yGen. 29 (#85-6-3) (concluding a board of supervisors could not disapprove the claim of an elected county officer which exceeded only a line item of the officer's approved budget).

Subsection 331.434(6) authorizes the board of supervisors to decrease an appropriation to a county department or officer by resolution without a budget amendment subject to the requirement that notice of a public hearing must be published for a proposed decrease which exceeds the lesser of $5,000 or ten percent of the affected department's budget. The board of supervisors cannot shortcut this statutory procedure by simply disapproving claims submitted to the county auditor for payment.

In conclusion, after adopting a budget for the county conservation board and appropriating the budgeted amount, the board of supervisors cannot disapprove payment of a claim for a budgeted conservation expenditure. To reduce an appropriation the board of supervisors must follow the procedure set forth in Iowa Code § 331.434(6) (1989).

Sincerely,

Michael H Smith

MICHAEL H. SMITH
Assistant Attorney General

MHS:rcp

ASSESSOR: Duties of Assessor. Iowa Code § 441.17(1)(1989). An assessor may not do eminent domain appraisals in the Assessor's assessment district. (Baty to Johnson, Auditor of State, 2-12-90) #90-2-7(L)

February 12, 1990

Mr. Richard D. Johnson
Office of Auditor
State of Iowa
State Capitol Building
Des Moines, IA 50319

Dear Mr. Johnson:

You have inquired whether a county or city assessor may appraise property for the purpose of acquisition for highway widening when state or federal funds are involved. You posed the question with two alternatives. First, may the assessor do an eminent domain appraisal as an additional duty of the assessor's office? Second, may the assessor do the appraisal outside normal business hours for a fee. Your questions indicate that both alternatives relate to appraisals in the city or county where the assessor is responsible for the assessments. Further, the appraisals will be done for municipalities that form the conference board that employs the assessor.

The duties of the assessor, as set forth at Iowa Code § 441.17 (1989), include the following:

> The assessor shall:
>
> 1. Devote full time to the duties of the assessor's office and shall not engage in any occupation or business interfering or inconsistent with such duties.

I. Your first question is whether the "full time" requirement or other legal principles would prohibit the assessor from doing eminent domain appraisals as extra duty of the assessor's office. The case of Board of Education of London Ind. Sch. Dist. v. Miller, 299 S.W.2d 626 (Ky. App. 1957), involved a school attendance officer who was required by statute to "Devote his entire time to the duties of his office; . . ." The attendance officer apparently had ample time to also be a school clerk. Despite the apparent compatibility of the jobs and the savings of public money by having one person do both jobs, the court prohibited the dual services. It did so on the basis of the "entire time" requirement of the statute. 299 S.W.2d at 628.

In the case of State Ex. Rel. Bird v. Apodaca, 91 N.M. 279, 573 P.2d 213 (1978), the New Mexico Court held that a statute requiring the state highway engineer devote his entire time to his office prevented the governor from transferring the official from that office despite a general statute allowing the governor to make such transfers.

In Polk County v. Parker, 178 Ia 936, 939, 160 N.W.2d 320, 321 (1916), it is said regarding a city assessor: "His duties are fixed by statute, and when these are performed, he is not required to do more." Regarding the right to separate compensation for a clerk of court appointed a referee by a court, the Court said, "The court could add nothing to the duties of the clerk, as such, over or beyond that for which the statute, expressly or impliedly provided." Burlingame v. Hardin County, 180 Ia 919, 928, 164 N.W. 115, 118 (1917).

Certain Iowa statutes now allow a county officer to assume additional duties. The following are examples. A presently employed county employee may be given the duty of county civil service commission personnel director. Iowa Code §341A.5 (1989). A deputy of the county auditor may serve as administrative assistant to the veterans affairs commission. Iowa Code §250.6 (1989). County offices, including that of assessor, may be combined pursuant to petition and election. Iowa Code §331.323 (1989). However, there is nothing in the statutory duties of the assessor requiring or suggesting an assessor has the additional duties of an eminent domain appraiser. Rather, the legislature has seen fit to require the assessor to devote his entire time to specified duties.

We conclude that the assessor may not make eminent domain appraisals as part of the duties of the office.

II. The next question is whether the assessor may take secondary employment during non-duty hours as an eminent domain appraiser for the city or county in which the assessor assesses property for taxation. The attorney general has opined, with certain caveats, that an assessor may take employment as an appraiser in another assessing jurisdiction, 1982 Op.Att'yGen. 119, or serve as county civil defense director, 1968 Op.Att'yGen. 370. In both instances it was held that if the work was done during non-business hours of the assessor, the additional occupation did not violate the "entire time" provision of § 441.17(1).

However, the assessor is subject to an additional statutory restriction. "The assessor. . .shall not engage in any occupation or business interfering or inconsistent with such duties." § 441.17(1). The attorney general has opined that each of the following activities violate that provision.

> 1. Acting as a private appraiser of real estate in the county where he is the county assessor.
>
> 2. Acting as a licensed real estate broker in the county where he is the county assessor.
>
> 3. Acting as an agent of a private individual for the purpose of negotiating an option to purchase real estate.
>
> . . .
>
> The likelihood of a conflict of interest arising between a private appraiser of real estate and the factual determination of value of property for purposes of assessment is patently evident.

1976 Op.Att'yGen. 744, 745.

In the first division of this opinion we concluded the assessor may not do eminent domain appraisals as part of the assessor's official duties. Therefore, such work, if undertaken, would be as a private appraiser. Unless the 1976 Opinion is modified, an assessor doing eminent domain appraisals would be in conflict with paragraph number 1. of that opinion.

The Iowa Supreme Court observed that the assessed value, which an assessor is required to ascertain by reason Iowa Code § 441.21, is the same fair market value standard used in eminent domain.

Vine Street Corp. v. City of Council Bluffs, 220 N.W.2d 860, 862 (Iowa, 1974). As to the valuation process itself a conflict is not "patently evident". Nevertheless, the potential for an interference or inconsistency between one's duties as assessor and as an eminent domain appraiser still exists.

In your letter requesting this opinion, you point out certain requirements for federally aided project appraisals. Federal Regulations define appraisal as a "written statement independently and impartially prepared by a qualified appraiser." 49 C.F.R § 25.103(a)(1988). The quoted language seems to prohibit the assessor from using the tax assessment as his eminent domain appraisal unless the assessor had personally and independently valued the property. In many cases, a deputy assessor or independent firm assists in tax assessment. If the Assessor doing the eminent domain appraisal then independently valued the property for eminent domain, there exists a likelihood that the eminent domain appraisal would differ, if only slightly, from the tax assessment. A difference between the two values could also occur because the dates for tax assessment and eminent domain valuation would differ. Different values, although explainable, are not likely to result in public confidence in the fairness of the property tax assessment system. Nor should the appraiser "have any interest, direct or indirect, in the real property being appraised for the agency that would in any way conflict with the preparation or review of the appraisal." 25 C.F.R. § 103(f)(1988). While that language seems directed toward an ownership interest in the land, the assessor's professional interest in the accuracy of the assessed valuation could affect the assessor's duty to make an independent evaluation for a federally funded eminent domain acquisition.

In addition to the possibility of interference and inconsistency between the two functions noted above, other conflicts of interest could occur. The assessor doing private appraisals in his assessment district might have, or be perceived by the public or other appraisers as having, an unfair advantage for private gain as the result of his office having accumulated the data necessary for the outside appraisal of real estate.

> We doubt if any rule of law has more longevity than that which condemns conflict between the public and private interests of governmental officials and employees nor any which has been more consistently and rigidly applied.

Wilson v. Iowa City, 165 N.W.2d 813, 822 (Iowa 1969).

In Iowa, potential conflict of interest between a government position and private employment is sufficient to overcome the assessor's interest in outside employment. The case of Borlin v. Civil Service Comm'n of Council Bluffs, 338 N.W.2d 146 (Iowa 1983), involved a city detective who was discharged for engaging in the off-duty occupation of a voice stress analyst. The detective argued that his constitutional rights were violated by the Chief's order prohibiting him from engaging in this secondary occupation. The Court upheld the firing on the common law ground that the Chief of Police could prohibit secondary employment potentially inconsistent with his public duties.

In summary, the potential exists for conflict, interference, and inconsistency between the office of assessor and the preparation of private eminent domain appraisals in the assessor's jurisdiction. The conference board may prohibit the Assessor from taking on such outside employment. An assessor taking such outside appraisal work may violate § 441.17 (1989).

You also asked whether the assessor preparing appraisals in the assessor's district outside normal business hours for a fee paid by the county violates either Iowa Code § 314.2 or 331.342. Our interpretation of § 441.17 should make your additional question moot. Further, we do not believe an opinion concerning violation of law under the facts is appropriate.

The office of the Attorney General has the statutory duty to give written opinions upon questions of law submitted by either members of the General Assembly or other state officers. Iowa Code § 13.2(4). No authority permits the office to function as an arbiter of factual disputes concerning implementation of state statutes or to determine whether an individual has violated the law. We do not ordinarily utilize the opinion process to determine specific violations of statute. See Op.Att'yGen. #81-7-4(L). Like factual disputes, a violation of statute is better determined in an enforcement proceeding.

Sincerely,

John W Baty

JOHN W. BATY
Assistant Attorney General

JWB:lbh

ELECTIONS: OPEN MEETINGS: Board of Supervisors, Canvasses. Iowa Code §§ 21.2, 21.3, 21.4; 43.49, 43.50, 43.62; 50.24, 50.26, 50.27, 50.45; 331.201, 331.212, 331.213; 349.16, 349.18. The Open Meetings Law is not applicable to a canvass of an election by a county board of supervisors. Other provisions of law, however, require canvasses under chapter 50 to be public and minutes to be kept. These minutes need not be published. (Pottorff to Martin, Cerro Gordo County Attorney, 2-8-90) #90-2-6(L)

February 8, 1990

Paul L. Martin
Cerro Gordo County Attorney
220 North Washington Avenue
Mason City, Iowa 50401

Dear Mr. Martin:

You have requested an opinion of the Attorney General concerning application of the Open Meetings Law to the county board of supervisors when the board conducts a canvass of a primary election pursuant to Iowa Code § 43.49 or other election pursuant to § 50.24. You point out that the Cerro Gordo Board of Supervisors has in the past posted a notice of the canvass consistent with provisions of the Open Meetings Law. You state, however, that minutes are not "published" as required by the Open Meetings Law. In light of the inconsistency in applying sections of the Open Meetings Law, you inquire whether the canvass of an election is, in any event, excluded from the Open Meetings Law as a purely ministerial action.

In our view the Open Meetings Law is not applicable to the canvass of an election by a county board of supervisors. Other provisions of law, however, require canvasses under chapter 50 to be public and minutes to be kept. We do, moreover, encourage boards of supervisors to post notices of canvasses and admit the public.

There is little doubt that the county board of supervisors is a governmental body subject to the Open Meetings Law. The Open Meetings Law applies to a "governmental body" as defined by statute. Iowa Code § 21.2 (1989). A "governmental body," in turn, includes a "board . . . expressly created by the statutes of this state . . . ." Iowa Code § 21.2(1)(a). County boards of supervisors are expressly created under Iowa Code chapter 331. See Iowa Code §§ 331.201, 331.212, 331.213. See, generally, 1982 Op.Att'yGen. 189 (#81-8-2(L)) (county board of supervisors must

hold meetings at places reasonably accessible to county residents).

A "meeting" of a governmental body triggers application of the Open Meetings Law. A "meeting" occurs when there is "a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties." Iowa Code § 21.2(2). A "meeting" under the Open Meetings Law, in turn, must meet certain procedural requirements. The governmental body, for example, must give notice of the time, date and place of the meeting and the tentative agenda. Iowa Code § 21.4(1). Minutes must be kept and are public record open to public inspection.[1] Iowa Code § 21.3.

Express exclusions make clear that some gatherings of a majority of the members do not constitute "meetings" and, therefore, do not trigger application of the Open Meetings Law. The definition of "meeting" specifically states that meetings "shall not include a gathering of members of a governmental body for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter." Iowa Code § 21.2(2).

This exclusionary language has been applied in several contexts. See, e.g., Hettinga v. Dallas County Board of Adjustment, 375 N.W.2d 293, 295 (Iowa App. 1985) (no deliberation or action where board of supervisors gathered to elicit clarification of law from county attorney); 1980 Op.Att'yGen. 164, 166-67 (no meeting where board of supervisors car pool to basketball game if no deliberation or action on matters within the scope of policy-making duties occurs). Neither the Iowa Supreme Court nor this office, however, has applied the exclusion for "purely ministerial" gatherings to this specific factual situation.

We have discussed briefly in opinions the scope of the exclusion of gatherings for "purely ministerial" purposes. In 1979 we opined that ministerial acts within the scope of this exclusion would mean "acts performed by a governmental body which do not involve an exercise of discretion or judgment." 1980 Op.Att'yGen. at 166. This conclusion was based on an Iowa

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[1]Your opinion request states that the Cerro Gordo Board of Supervisors does not "publish" minutes of the canvass as required by the Open Meetings Law. Publication of minutes, however, is not required by the Open Meetings Law. Minutes need only be kept and made available as public records.

Supreme Court decision which had characterized a ministerial act as "one which a person or board performs upon a given state of facts, in a prescribed manner, in observance of the mandate of legal authority and without regard to or the exercise of his own judgment upon the propriety of the act being done." Arrow Express Forwarding Co. v. Iowa State Commerce Commission, 256 Iowa 1088, 1091, 130 N.W.2d 451, 453 (1964).

The canvass of an election falls within this definition of a ministerial act. The canvass essentially consists of opening election returns from each voting precinct and making abstracts of the results. See Iowa Code §§ 43.49, 50.24. The abstracts are then signed, certified and filed. See Iowa Code §§ 43.50, 50.26. Performance of these acts are delineated by statute and do not involve the exercise of discretion or judgment.

The Iowa Supreme Court has long characterized this process of canvassing as ministerial. In Davis v. Wilson, 229 Iowa 100, 294 N.W. 288 (1940), in fact, the Court determined that the State Board of Canvassers must certify as the Republican nominee for Attorney General a candidate who died after the primary election but before the canvass. The Court explained that the duty of canvassing election returns "is the ministerial or administrative one of ascertaining and verifying that record and declaring the result as it was shown upon the face of the abstract returns . . . [T]he powers and duties of the canvassers are limited to the mechanical or mathematical function of ascertaining and declaring the apparent result of the election by adding or compiling the votes cast for each candidate as shown on the face of the returns before them, and then declaring or certifying the result so ascertained." Id. at 105, 294 N.W. at 290-91. See Bradfield v. Wart, 36 Iowa 291, 295 (1873). Based on our definition of a ministerial act and this precedent, we must conclude that a canvass is purely ministerial and, therefore, excluded from the Open Meetings Law.

Although the Open Meetings Law does not apply, it does not necessarily follow that the canvass is closed to the public. Canvasses of all elections conducted under chapter 49, except primary elections conducted under chapter 43, are made public expressly by statute. Section 50.45 states that "[a]ll canvasses of tally lists shall be public, and the persons having the greatest number of votes shall be declared elected." Iowa Code § 50.45. In addition, the results of each canvass are required to be published or announced. Iowa Code § 43.62 ("The published proceedings of the board of supervisors relative to the canvass shall be confined to a brief statement of: The names of the candidates nominated . . . and the offices for which they are nominated. The offices for which no nomination was made by a political party . . . ."); Iowa Code § 50.27 ("Each abstract of

the votes . . . shall contain a declaration of whom the canvassers determine to be elected.").

Publication of minutes of a canvass is affected by other sections of the Iowa Code. Separate statutory provisions require publication of proceedings of the board of supervisors. Under chapter 349 "[a]ll proceedings of each regular, adjourned, or special meeting of boards of supervisors . . . shall be published immediately after the adjournment of such meeting . . ." Iowa Code § 349.18. We have construed this requirement to include publication of the minutes of these meetings. 1982 Op.Att'yGen. 348, 350.

Application of the publication requirement in chapter 349 to a canvass is complicated by legislative changes. In 1911 the Iowa Supreme Court construed the statutory predecessor to § 349.18 to include a canvass as a "proceeding" subject to publication. In Index Printing Co. v. Board of Supervisors, 150 Iowa 411, 130 N.W. 401 (1911), the Court construed § 441 which provided that "all proceedings of the county board of supervisors . . . shall be published at the expense of the county during the ensuing year." Iowa Code § 441 (1907). Applying this language to a canvass, the Court concluded that a canvass is a "proceeding" of the board of supervisors and, therefore, subject to the publication requirement. Index Printing Co. v. Board of Supervisors, 150 Iowa at 414, 130 N.W. at 402-03. In 1933, however, a separate statute was amended to exclude canvasses of elections from the publication requirement. 1933 Iowa Acts, ch. 105, § 1. The current statute still contains this exclusion. Iowa Code § 349.16(1) (1989). ("There shall be published in each of said official newspapers at the expense of the county during the ensuing year: The proceedings of the board of supervisors, excluding from the publication of said proceedings, its canvass of the various elections . . ..").

Most recently § 50.24 was amended to provide specifically that, when clerical errors in the tally lists are corrected in the canvass by the board of supervisors, "[c]omplete records of any changes shall be recorded in the minutes of the canvass." 1989 Iowa Acts, ch. 136, § 49. This provision suggests that minutes of a canvass under chapter 50 should, indeed, be kept.

Attempting to reconcile the publication exclusion for canvasses under § 349.16(1) in light of the reference to minutes of the canvass under § 50.24, we are guided by principles of statutory construction. Statutes should not be construed to render any part superfluous. Sioux City Community School District v. Board of Public Instruction, 402 N.W.2d 739, 742-43 (Iowa 1987). Exclusion of canvasses in § 349.16(1) from the publication requirement of § 349.18 indicates that minutes of a

canvass need not be published. In order to give effect to the reference to minutes of the canvass in § 50.24, however, we must conclude that minutes of a canvass under chapter 50 should be kept.

We stress that the inapplicability of the Open Meetings Law should not be determinative of whether the public has access to an election canvass. The canvass is a significant step in the important process of electing governmental officials. Although not all canvasses are made public expressly by statute, there can be little purpose in excluding the public from observing. We encourage boards of supervisors to post notices of all canvasses and admit the public.

In summary, it is our opinion that the Open Meetings Law is not applicable to the canvass of an election by a board of supervisors. Other provisions of law, however, require canvasses under chapter 50 to be public and minutes of the canvasses to be kept. These minutes need not be published. We encourage boards of supervisors to post notices of all canvasses and admit the public.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP:mlr

TAXATION: Tax Sales; Notice of Expiration of Right of Redemption. Iowa Code § 447.9 (1989), as amended by 1989 Iowa Acts, ch. 66, § 1, and Iowa Code § 446.9(3) (1989). Mortgagees, vendors, lessors, and other persons with recorded interests in real property sold at tax sale are entitled to notice of expiration of right of redemption, without any further twenty-five dollar fee payment, if they have complied with the request for notice of tax sale as prescribed in § 446.9(3). (Griger to Murphy, State Senator, 2-5-90) #90-2-4(L)

February 5, 1990

The Honorable Larry Murphy
State Senator
State Capitol
L O C A L

Dear Senator Murphy:

You have requested an opinion of the Attorney General with respect to entitlement to notice of expiration of right of redemption from tax sale. First, you ask whether a mortgagee, vendor, lessor, or other person with a recorded interest in real property sold at tax sale must, under 1989 Iowa Acts, ch. 66, § 1, which amended Iowa Code § 447.9 (1989), pay a twenty-five dollar fee to be eligible to receive a notice of expiration of right of redemption. Second, you ask whether the payor of a twenty-five dollar fee to obtain notice of tax sale, in accordance with Iowa Code § 446.9(3) (1989), must pay a second twenty-five dollar fee under § 447.9, as amended, to obtain notice of expiration of right of redemption.

Concerning your first question, the mortgagee, vendor, lessor, or other person with a recorded interest must only pay an initial twenty-five dollar fee as provided in § 446.9(3) with a request for notice of tax sale. With respect to your second question, the payor of a twenty-five dollar fee to obtain notice of tax sale pursuant to § 446.9(3) is not required to pay another twenty-five dollar fee, under amended § 447.9, to be eligible to obtain notice of expiration of right of redemption.

Section 446.9(3) provides for notice of tax sale as follows:

> In addition to the notice required by subsection 1 and the publication required by subsection 2, the treasurer shall send, at least one week, but not more than three weeks, before the day of sale, a notice of sale in the form prescribed by subsection 1,

> by regular first class mail, to any mortgagee having a lien upon the real estate, a vendor of the real estate under a recorded contract of sale, a lessor who has a recorded lease or memorandum of a recorded lease, and to any other person who has an interest of record in the real estate, if the mortgagee, vendor, lessor, or other person having an interest of record has done both of the following:
>
> a. Has requested, on a form prescribed by the treasurer, that notice of sale be sent to the person.
> b. Has filed the request form with the treasurer at least one month prior to the date of sale, together with a fee of twenty-five dollars.
>
> The request for notice is valid for a period of five years from the date of filing with the treasurer. The request for notice may be renewed for additional periods of five years by the procedure specified in this subsection.

The amendment to § 447.9, with respect to service of notice of expiration of right of redemption, states in relevant part:

> Service of the notice shall also be made by mail on any mortgagee having a lien upon the real estate, a vendor of the real estate under a recorded contract of sale, a lessor who has a recorded lease or memorandum of a recorded lease, and any other person who has an interest of record, at the person's last known address, <u>if the mortgagee, vendor, lessor, or other person has filed a request for notice, as prescribed in section 446.9, subsection 3</u>, and on the state of Iowa in case of an old-age assistance lien by service upon the state department of human services. The notice shall also be served on any city where the real estate is situated.

(Amendment emphasized).

Section 446.9(3) provides for notice of a tax sale to be given to a "mortgagee having a lien upon the real estate, a vendor of the real estate under a recorded contract of sale, a lessor

who has a recorded lease or memorandum of a recorded lease, and to any other person who has an interest of record in the real estate" to be sold at tax sale, provided the mortgagee, vendor, lessor, or other person had requested such notice from the county treasurer, on a form prescribed by the treasurer, "at least one month prior to the date of sale, together with a fee of twenty-five dollars." The notice must contain the information specified in § 446.9(1).

The amended version of § 447.9 provides for service of notice of expiration of right of redemption upon those mortgagees, vendors, lessors, or other persons who had filed a request for notice of tax sale in accordance with § 446.9(3), including payment of twenty-five dollar fee. If such person did not request a notice of tax sale, as set forth in § 446.9(3), such person will not be eligible, under amended § 447.9, to obtain a notice of expiration of right of redemption.[1] Such is the reasonable import of the language in § 447.9.

Moreover, it is not clear what purpose would be served by requiring those mortgagees, vendors, lessors and others to file both a request for notice of tax sale and a request for notice of expiration of right of redemption before the tax sale occurred. The purpose of identifying those eligible, under § 447.9, to receive expiration of right of redemption is fulfilled by the requirement that they request notice of tax sale. The purpose of limiting those eligible, under § 447.9, to receive notice of expiration of right of redemption is attained by the requirement that they file a request for notice of tax sale. Where "a particular tax statute has not been construed previously, it is necessary to examine both the language used and the purpose for which it was enacted." American Home Products Corporation v. Iowa State Board of Tax Review, 302 N.W.2d 140, 143 (Iowa 1981).

Therefore, the amended version of § 447.9 identifies those mortgages, vendors, lessors, and others with recorded interests who are entitled to service of notice of expiration of right of redemption. It does not require them to pay any further twenty-five dollar fee for that notice.

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[1]Your request for an opinion did not ask any particular question concerning a specific issue of constitutional validity of such notice requirements and, therefore, such an issue will not be addressed in this opinion.

Very truly yours,

Harry M. Griger
Special Assistant Attorney General

HMG:cml

INSURANCE; Counties. Iowa Code Section 613A.7 (1989). A county, through a self-insurance risk pool, may bind itself to a commitment beyond the current fiscal budget year for the protection from tort liability as specified in section 613A.7. (Haskins to TeKippe, County Attorney, 2-5-90) #90-2-3(L)

February 5, 1990

Richard P. TeKippe
Chickasaw County Attorney
206 North Chestnut
New Hampton, Iowa 50659

Dear Mr. TeKippe:

You have asked our opinion regarding Iowa Code section 613A.7 (1989). Chickasaw County is in a self-insurance risk pool for their tort liability with nine other counties. You ask:

> Can a county, through a self insurance risk pool for their tort liability, bind itself on a commitment beyond the current fiscal budget year for the protection of tort liability insurance under Iowa Code Section 613A.7?

We believe that this question is answerable based on the language of section 613A.7 itself. Section 613A.7 states, in relevant part,

> The governing body of any municipality [which includes a county] may purchase a policy of liability insurance insuring against all or any part of liability which might be incurred by such

> municipality or its officers, employees and agents under the provisions of section 613A.2 and section 613A.8 and may similarly purchase insurance covering torts specified in section 613A.4. The governing body of any municipality may adopt a self-insurance program, including but not limited to the investigation and defense of claims, the establishment of a reserve fund for claims, the payment of claims, and the administration and management of the self-insurance program, to cover all or any part of the liability. The governing body of any municipality may join and pay funds into a local government risk pool to protect itself against any or all liability. The governing body of any municipality may enter into insurance agreements obligating the municipality to make payments beyond its current budget year to provide or procure such policies of insurance, self-insurance program, or [a] local government risk pool. The premium costs of such insurance, the costs of such a self-insurance program, the costs of a local government risk pool, and the amounts payable under any such insurance agreements may be paid out of the general fund or any available funds or may be levied in excess of any tax limitation imposed by statute.

[Emphasis added].

It is our view that the language "insurance agreements obligating the municipality to make payments beyond its current budget year" refers not simply to conventional insurance policies but also to a county's own self-insurance program or indeed to any "risk pool" authorized by section 613A.7 of which the county is a part.

The language of section 613A.7 quoted above was part of a comprehensive act relating to the availability of liability insurance, 1986 Iowa Acts, ch. 1211, section 34, whose provisions have been given a broad and remedial construction. See e.g 1988 O.A.G. 30. Essential to the financial integrity and viability of any insurance pool-like mechanism is the ability of its participants to make a financial commitment beyond the short run. This office had construed section 613A.7 prior to amendment in 1986 as precluding county self-insured risk pools entirely. See 1980 O.A.G. 688. An amendment substituting a new term or phrase for one previously construed indicates that the judicial or executive construction of the former term or phrase did not correspond with legislative intent and a different interpretation is to be given. See State ex rel. Palmer v. Board of Supervisors, 365 N.W.2d 35, 37 (Iowa 1985).

Whether or not it is fiscally wise for counties to be able to enter into risk pools which could have the effect of obligating them beyond the current fiscal year is a question for the legislature. In construing a statute, the clear language of the statute governs over policy considerations not expressed therein. See Albia Publishing Co. v. Klobnak, 434 N.W.2d 636, 640 (Iowa 1989); Lawse v. University of Iowa Hosp., 434 N.W.2d 895, 898 (Iowa App. 1988).

In conclusion, a county, through a self-insurance risk pool, may bind itself to a commitment beyond the current fiscal budget year for the protection from tort liability as specified in section 613A.7.

Sincerely,

Fred M. Haskins

FRED M. HASKINS
Assistant Attorney General

FMH/dh

COUNTIES; Auditor's duty to file claims. Iowa Code §§ 331.401(1)(p), 331.504(8) (1989). The county auditor acts as a ministerial officer when carrying out his or her duty to file claims against the county for presentation to the board of supervisors, the board is responsible for assessing the adequacy of proof supporting such claims, and the auditor may not refuse to file a claim for submission to the board. (Scase to Wilson, Jasper County Attorney, 2-2-90) #90-2-2(L)

February 2, 1990

Mr. James R. Wilson
Jasper County Attorney
301 Courthouse Building
Newton, Iowa 50208

Dear Mr. Wilson:

You have requested an opinion of the Attorney General regarding the scope of a county auditor's authority to demand itemization or otherwise "audit" claims against the county before filing them for presentation to the board of supervisors. In responding to this request, we will address the following question:

> Can the county auditor demand proof to support a claim submitted against the county before filing the claim for presentation to the board of supervisors?

The county auditor's duties with regard to the payment of claims against the county are set forth in Iowa Code § 331.504(8) (1989), as follows:

> **331.504 Duties as clerk to the board.**
> The auditor shall:
> * * * * *
> 8. File for presentation to the board all unliquidated claims against the county and all claims for fees or compensation, except salaries fixed by state law. The claims, before being audited or paid, shall be itemized to clearly show the basis of the claim and whether for property sold or furnished for services rendered or for another purpose. An action shall not be brought against the county relating to a claim until the claim is filed as provided in

> this subsection and the payment refused or neglected.

(emphasis added).

Iowa Code § 331.401(1)(p) (1989) grants exclusive power to approve or refuse claims against the county to the board of supervisors.

> **331.401 Duties relating to finances.**
> 1. The board shall:
> * * * * *
> p. Examine and settle all accounts of the receipts and expenditures of the county and all claims against the county, except as otherwise provided by law.

See 1950 Op.Att'yGen. 197, 198-99, citing Harrison County v. Ogden, 165 Iowa 325, 145 N.W. 681 (1914). While elected county officers are often statutorily vested with independence and discretion in the exercise of their duties (c.f. 1986 Op.Att'yGen. 29 1980; 1980 Op.Att'yGen. 664), the Supreme Court has held that the auditor's assigned duties relating to the payment of claims against the county are ministerial rather than discretionary functions.

> The board of supervisors are the financial agents of the county, charged, under the statute, with general care and management of the county property, funds, and business. ... The county auditor is but a ministerial officer in the matter of issuing warrants on the county treasury. He acts under the direction of the board in this matter.

Harrison County v. Ogden, 165 Iowa at 340, 145 N.W. at 687.

The statutory provisions set forth above limit the county auditor's authority to demand proof supporting a claim prior to submitting it to the supervisors. Under the terms of Code § 331.504(8), a claim must be "itemized" only to the extent necessary "to clearly show the basis of the claim and whether it is for property sold or furnished, for services rendered or for another purpose." While we believe that the county auditor may require that some indication of the basis for a claim accompany the claim, Code § 331.401(1)(p) clearly confers the power to determine the adequacy of such supporting documentation upon the board of supervisors. The auditor should not refuse to file a

claim for submission to the board on the basis of his or her belief that the supporting documentation is inadequate.[1]

Further, the Iowa Code does not provide authority by which the county auditor may refuse to file a claim or make payment when ordered to do so by the board of supervisors. Nor has such authority been judicially recognized. See Carl R. Miller Tractor Co. v. Hope, 218 Iowa 1235, 257 N.W. 312 (1934) (holding that unless the limit of collectible revenues had been reached, the county auditor had a duty to issue warrants on claims approved by the board of supervisors); 1932 Op.Att'yGen. 28 (recognizing that if there are funds in the particular fund charged, the county auditor has no discretion with respect to issuance of a warrant for a claim allowed by the board of supervisors).

In conclusion, the county auditor acts as a ministerial officer when carrying out his or her duty to file claims against the county for presentation to the board of supervisors, the board is responsible for assessing the adequacy of proof supporting such claims, and the auditor may not refuse to file a claim for submission to the board of supervisors.

Sincerely,

CHRISTIE J. SCASE
Assistant Attorney General

CJS:rd

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[1] As noted in your opinion request, Iowa Code § 331.506(5) (1989) provides that "[a]n officer certifying an erroneous bill or claim against the county is liable on the officer's official bond for a loss to the county resulting from the error." We do not, however, believe that the auditor, by performing his or her duty of filing claims against the county for presentation to the board of supervisors, in any way "certifies" the accuracy or propriety of the claims filed.

NEWSPAPERS: Official Publications. Iowa Code chapters 349 and 618; Iowa Code §§ 349.1, 349.3 and 349.16 (1989). A county board of supervisors is required to publish official proceedings in each of the designated official county newspapers. Selecting between the designated official county newspapers for publication will not satisfy the mandatory publication requirement. (Walding to Black, State Representative, 2-2-90) #90-2-1(L)

February 2, 1990

The Honorable Dennis H. Black
State Representative
State Capitol
L O C A L

Dear Representative Black:

We are in receipt of your letter of December 28, 1989, requesting an opinion of the Attorney General. Specifically, you have asked:

> Must a County Board of Supervisors publish their official minutes in all three of the designated official publications in the county each time they are required to publish? Or, may the Supervisors fulfill the publication requirements by publishing in only one of the three newspapers so designated?

A county board of supervisors is charged with responsibility for the selection of official county newspapers for mandatory publication of notices and reports of proceedings. Iowa Code § 331.303(6) (1989). The provisions governing the designation of official publication are found in Iowa Code chapters 349 and 618.[1]

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[1]Chapter 618 will not be the subject of review. Iowa Code § 618.3 provides the requirements for a newspaper to be eligible for designation for mandatory publications. Your request does not question whether the requirements of § 618.3 are satisfied.

A county board of supervisors is required, pursuant to Iowa Code § 349.1 (1989), to "select the newspapers in which the official proceedings shall be published for the ensuing year." [Emphasis added]. The number of newspapers to be selected is dictated by Iowa Code § 349.3 (1989). Two or three newspapers, depending on the population of a county and whether the county is divided into two court divisions, are to be selected for designation as official county newspapers.[2] Finally, Iowa Code § 349.16 (1989) sets forth the mandatory subjects for publication, and states that these subjects "shall be published in each of said official newspapers at the expense of the county during the ensuing year." [Emphasis added].

Because the statutory language requiring publication is clear and unambiguous, we conclude that mandatory publication of notices and reports of proceedings are to published in each of the designated official county newspapers. A county board of supervisors, therefore, may not elect to satisfy the mandatory publication requirement by publishing in only one of the designated official county newspapers.

In support of our conclusion, we refer to a recent decision of the Iowa Supreme Court. In Albia Publishing Company v. Klobnak, 434 N.W.2d 636 (Iowa 1989), the Court examined whether two publications were, for purpose of designating official county newspapers, two separately published newspapers or merely two editions of the same newspaper. Relying on the exception language in § 349.3(1) that requires two newspapers to be designated unless "there be but one published therein," the county board of supervisors had determined that the two publications were in fact two newspapers. The Court, quoting from an earlier decision, Ashton v. Story, 96 Iowa 197, 64 N.W. 804 (1895), restated the principle that:

> 'The reason for selecting the [news]papers having the largest number of subscribers is to secure as large a general circulation of the official publications of the county among its citizens as is practicable in two newspapers.' Ashton, 960 Iowa at 201, 64 N.W. at 805.

Albia Publishing Company, 434 N.W.2d at 638. The Court reached its conclusion with a view towards "the legislative goal of

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[2]The request presumes that the county in question is required to designate three newspapers for official publications. The advice we render is applicable regardless of the number of official county newspapers to be designated.

widely publicizing the county's official business." Albia Publishing Company, 434 N.W.2d at 639. Finally, the Court noted that, in the case at bar, the county board of supervisor's duty to designate official newspapers under § 349.3 was overshadowed by a desire to preserve county funds. The Court stated:

> This fiscal conservatism, though perhaps laudable, is not a permissible factor under the statute and, in fact, conflicts with the primary legislative purpose of section 349.3: to insure that official notices reach the largest number of county residents. The legislature has determined that in counties having a population of 15,000 or less, that goal is best achieved by publication in two newspapers.

Albia Publishing Company, 434 N.W.2d at 640. Accordingly, the recent decision provided guidance as to the legislative intent of § 349.3 and, in dictum, provided that publications of official proceedings be published in all of the designated official county newspapers.

In a prior opinion, we identified yet another purpose of the mandatory publication requirement. In 1986 Op.Att'yGen. 133 (#86-12-12(L)), we stated:

> The general objective of the publication requirement of county business in an official newspaper is to furnish the public a convenient method of ascertaining what business is being transacted by the board of supervisors and how it is being transacted, as well as to furnish a check upon extravagance and to prevent the presentation and allowance of trumped up or padded claims against the county.

1986 Op.Att'yGen. 133. See also 1910 Op.Att'yGen. 223. An interpretation which ensures that official proceedings reach a large county audience is consistent with the purpose identified by the prior Attorney General's opinion.

Accordingly, it is our judgment that a county board of supervisors is required to publish official proceedings in each of the designated official county newspapers. Selecting between the designated official county newspapers for publication will not satisfy the mandatory publication requirement. That conclusion is consistent with the legislative intent of § 349.3, as interpreted by the Iowa Supreme Court in Albia Publishing

Company, to ensure that official proceedings reach a large county audience.

Sincerely,

Lynn M. Walding by CWO

LYNN M. WALDING
Assistant Attorney General

LMW:cw

COUNTY HOSPITAL; COUNTIES. Iowa Constitution Act III, § 31; Iowa Code §§ 347.13(5); 347.14(10). The hospital board of trustees has authority to provide active staff physicians and dependents a discount in the cost of hospital services. Upon adequate findings that such a plan furthers the public interest, the plan would not violate Article III, § 1 of the Iowa Constitution. (McGuire to Swanson, 3-30-90) #90-3-9(L)

March 30, 1990

Mr. Mark D. Swanson
Montgomery County Attorney
Red Oak, Iowa 51566

Dear Mr. Swanson:

You had requested an opinion from this office concerning a proposed plan by the Montgomery County Memorial Hospital to discount the cost of hospital services to active medical staff physicians and their dependents. The Montgomery County Memorial Hospital operates pursuant to Iowa Code chapter 347. At issue is whether the hospital has the authority to provide this benefit to its physicians and whether the expenditure of the funds is for a public purpose as required by Article III, § 31 of the Iowa Constitution.

We will first address whether the hospital has the authority to employ this plan. The hospital board of trustees is governed by Iowa Code chapter 347 which gives the board a wide range of discretion in operating a ch. 347 hospital.

Iowa Code § 347.14(10) allows the board to "do all the things necessary for the management, control and government of said hospital . . ." Two prior opinions of this office concluded that it was within the authority of the board of trustees to expend hospital funds to recruit and retain physicians to utilize the county hospital facilities. See 1980 Op.Att'yGen. 338; 1982 Op.Att'yGen. 180 (#81-7-19(L)). Both of these opinions found that the expansive authority of the board of trustees as stated in ch. 347 allowed for these actions.

The proposed plan can be construed as an attempt to retain physicians to provide services to your county hospital. As such, in accordance with the above opinions, it would appear that the hospital board of trustees has the authority to enact the proposed plan.

The second issue is whether expenditure of funds for the plan is for a public purpose as required by Art. III, § 31 of the Iowa Constitution.

Article III, § 31 states:

> No public money or property shall be appropriated for local or private purposes, unless such appropriation compensation or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly.

The Iowa Supreme Court has stated that the concept of public purpose is to be given flexible and expansive scope in order "to meet the challenge of increasingly complex, social, economic, and technological conditions." John R. Grubb, Inc. v. Iowa Housing Finance Authority, 255 N.W.2d 89, 93 (Iowa 1977).

A recent Attorney General Opinion addressed this issue of determining a public purpose and stated the importance of the governmental entity making findings which adequately demonstrate that the particular program furthers the public interest. 1986 Op.Att'yGen. 113, 119. In your opinion request, you offered a number of reasons that supported the public purpose of this expenditure. This office cannot decide whether findings are sufficient, but if the board of trustees makes adequate findings, we believe a court would find that the public need to retain and compensate the physicians that staff the county hospital serves a public purpose.

Sincerely,

Maureen McGuire

MAUREEN McGUIRE
Assistant Attorney General

MM/sro

MOTOR VEHICLES: Safety Standards; 15 U.S.C. § 1392(d). The Federal Vehicle Safety Act, 15 U.S.C. § 1392(d) pre-empts state authority over motor vehicle safety standards where there are applicable federal standards. The State may enforce identical standards or impose higher standards for its own vehicles. (Peters to Rosenberg, State Representative, 3-14-90) #90-3-7(L)

March 14, 1990

The Honorable Ralph Rosenberg
State Representative
State Capitol
Des Moines, Iowa 50319

Dear Representative Rosenberg:

You have requested an opinion of the Attorney General concerning the applicability of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. §§ 1381 et seq.). Specifically you ask:

1. Does the Vehicle Safety Act and specifically provisions 15 U.S.C. § 1392(d) pre-empt state activity?

2. Can the state enact any legislation or administrative rule that is less restrictive than any of the provisions of the Vehicle Safety Act?

Your questions require interpretation of 15 U.S.C. § 1392(d). The starting point in any case involving interpretation of a statute is the statute itself. United States v. Hepp, 497 F. Supp. 348, 349 (N.D. Iowa 1980), aff'd 656 F.2d 350 (8th Cir. 1981). "When a statute is plain and its meaning is clear, we do not search for meaning beyond its express terms." State v. Tuitjer, 385 N.W.2d 246, 247 (Iowa 1986) (citations omitted).

The Federal Vehicle Safety Act, 15 U.S.C. § 1392(d) states:

(d) Supremacy of federal standards; allowable higher standards for vehicles used by Federal or state governments

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

I assume by your second question, that by "pre-emption of state activity," you refer to foreclosure of state legislative activity and not pre-emption of a state remedy. Some courts have held in specific fact situations that this legislation does not pre-empt state common-law claims. See e.g. Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989). However, other courts have foreclosed claims under state law based on this language. See e.g. Woods v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988), appeal filed. I will not be addressing pre-emption of state law claims.

In general, Article VI of the United States Constitution, the so-called "Supremacy Clause", establishes the supremacy of federal law over state law. "It is a familiar and well-established principle that the Supremacy Clause . . . invalidates state laws that 'interfere, or are contrary to' federal law." Hillsborough County v. Automated Laboratories, Inc., 471 U.S. 707, 713, 85 L.Ed.2d 714, 721, 105 S.Ct. 2371 (1985). This may occur in several different ways. First, when acting within constitutional limits, Congress may pre-empt state law by so stating in express terms. Id. In the absence of such express language, congressional intent to pre-empt state law may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary regulation. Id. Pre-emption of

a whole field will also be inferred where the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Id. Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. Moreover, it is now firmly settled that "state laws can be pre-empted by federal regulations as well as by federal statutes." Id.

Section 1392(d) clearly falls within the first situation listed in Hillsborough County. The statutory language provides that Federal standards control. However, section 1392(d) does not foreclose state legislation in this area. The state may enforce identical standards to a Federal safety standard or may impose a higher standard on vehicles purchased for state use.

The answer to your second question is also indicated by the language of § 1391(d).

> [N]o State or political subdivision of a State shall have authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

This pre-empts the State from enacting lesser standards.

In summary, the State's authority covering vehicle safety is pre-empted by 15 U.S.C. § 1391(d) where there are applicable federal standards. The State may enforce identical standards or impose higher standards for its own vehicle. But the State may not impose lesser standards.

Sincerely,

Merrell M. Peters

MERRELL M. PETERS
Assistant Attorney General

MMP:pjm

COUNTIES; SHERIFFS; MOTOR VEHICLES: Levies on exempt personal property. Iowa Code §§ 626.50 - .55, 627.6; 761 Iowa Admin. Code 400.11; Iowa R. Civ. P. 258, 260. Personal property exempt from execution is protected from a sheriff's levy. When a sheriff receives written notice of exemption, a valid lien no longer exists and the sheriff should release the levy unless the judgment creditor provides an indemnity bond. (Olson to Werden, Carroll County Attorney, 3-7-90) #90-3-5(L)

March 7, 1990

Mr. John C. Werden
Carroll County Attorney
Carroll County Courthouse
Carroll, Iowa 51401

You have requested an opinion of the Attorney General concerning a levy on a defendant's personal property once that property has been declared exempt from execution. Your specific question is, "After receiving an exemption notice, should the Sheriff release the levy?" The answer to your question requires examination of Iowa's execution and exemption statutes.

Once a plaintiff has obtained a final judgment, he may enforce it by levying on the defendant's real or personal property. This opinion will focus on levies on personal property only. Iowa Code § 626.50 sets forth an officer's duty with respect to a levy on personal property:

> An officer is bound to levy an execution on any personal property in the possession of, or that the officer has reason to believe belongs to, the defendant, or on which the plaintiff directs the officer to levy, after having received written instructions for the levy from the plaintiff or the attorney who had the execution issued to the sheriff, unless the officer has received notice in writing under oath ... from the defendant, that the property is exempt from execution. (emphasis added)

Iowa R. Civ. P. 258 also provides directions to the officer:

> An officer receiving an execution must execute it with diligence. He shall levy on such property of the judgment debtor as is

> likely to bring the exact amount, as nearly as practicable. He may make successive levies if necessary. He shall collect the things in action, by suit in his own name if need be, or sell them. He shall sell sufficient property levied on to satisfy the execution, paying the proceeds, less his own costs, to the clerk.

The preceding statute and procedural rule indicate that an officer has no discretion with respect to carrying out an execution. The officer must levy on personal property on which the plaintiff directs him.

Generally, a plaintiff must perfect his lien on personalty under an attachment or general execution by either method described in Iowa R. Civ. P. 260:

> (a) by the officer taking possession of the property . . .; or
>
> (b) if the creditor or his agent first so requests in writing, the officer may view the property, inventory its exact description at length, and append such inventory to the execution, with his signed statement of the number and title of the case, the amount claimed under the execution, the exact location of the property and in whose possession and the last known address of the judgment debtor; and, if the property is consumer goods or if the judgment debtor is not a resident of this state, file with the county recorder of the county where the property is located his certified transcript of such inventory and statement; and, in all other cases, file with the secretary of state his certified transcript of such inventory and statement. Such filing shall be accepted by the county recorder or the secretary of state as a financing statement and shall be marked, indexed and certified in the same manner, and shall be constructive notice of the levy to all persons. Whenever the writ is satisfied or the levy discharged the officer shall file a termination statement with the county recorder or secretary of state . . ..

When the property to be levied upon is a motor vehicle, however, separate rules for perfection apply. The Attorney General has opined that the general power in the sheriff outlined in Iowa R. Civ. P. 260 is ineffective to acquire a security interest in a motor vehicle because of the provisions of Iowa Code § 321.45(2). 1968 Op.Att'y.Gen. 489, 490-491. Iowa Code § 321.45(2) in relevant part provides:

> 2. No person shall acquire any right, title claim or interest in or to any vehicle subject to registration under this chapter from the owner thereof except by virtue of a certificate of title issued or assigned to the person for such vehicle or by virtue of a manufacturer's or importer's certificate delivered to the person for such vehicle; nor shall any waiver or estoppel operate in favor of any person claiming title to or interest in any vehicle against a person having possession of the certificate of title or manufacturer's or importer's certificate for such vehicle for a valuable consideration except in case of:
>
> (a) The perfection of a lien or security interest by notation on the certificate of title as provided in section 321.50. . ..

Pursuant to Iowa Code § 321.50(1), a security interest in a motor vehicle subject to the state's registration laws is perfected by the secured party's delivering to the county treasurer an application for certificate of title which lists the security interest. In the alternative, the owner of the vehicle may sign an application for notation of the security interest. When a sheriff levies on a motor vehicle, he may have the levy noted as a security interest on a certificate of title. 761 Iowa Admin. Code 400.11. Thus, a sheriff may perfect a levy on personal property in several different ways.

Once an officer receives written notice from a defendant that the property on which he is to levy or has levied is exempt from execution, however, Iowa Code chapter 627 comes into play. Section 627.6 allows a debtor to hold exempt from execution a wide variety of property. A common characteristic of exemption statutes is to shelter debtors from claims of otherwise unsecured creditors acting under a collection process. 31 Am. Jur. 2d Exemptions § 1, at 650 (1989). Exemption statutes allow debtors a fresh start by protecting them and their families "from deprivation of those things essential for education, culture and

spiritual upbuilding." Matter of Pettit, 55 B.R. 394, 397 (S.D. Iowa 1985), affirmed 57 B.R. 362 (S.D. Iowa 1985). Exemption laws provide a means of financial rehabilitation to the debtor by spreading the burden of his support from society to his creditors. Matter of Haun, 5 B.R. 242 (Iowa 1980). To these ends, exemption statutes are to be liberally construed in favor of a debtor, being careful not to depart substantially from the express language of the statute or to extend the legislative grant. Matter of Honomickl, 82 B.R. 92 (S.D. Iowa 1987); Frudden Lumber Co. v. Clifton, 183 N.W.2d 201, 203 (Iowa 1971).

As discussed previously, an officer has a duty to levy on any property belonging to the defendant or on which the plaintiff has directed him to levy "unless" the debtor has given him written notice that the property is exempt from execution. Iowa Code § 626.50. According to a court in another jurisdiction, a levying officer becomes a trespasser ab initio by refusing to recognize a debtor's right to property clearly exempt. Stern v. Riches, 111 Wis. 591, 87 N.W.2d 555, 556 (1901). If a sheriff refuses to set aside and deliver to the debtor his exempt property, upon demand therefore, the levy is "not made subject to, but in defiance of the exemption right," and the sheriff is "guilty of an abuse of process." Id. In Iowa, an officer is protected from all liability by reason of the levy "until" he receives notice of exemption. Iowa Code § 626.53.

Iowa Code §§ 626.52, 626.54 and 626.55 outline the procedure for an officer to follow once a notice of exemption has been received. When that has occurred, the officer may, pursuant to Iowa Code § 626.52, release the property unless the judgment creditor gives a bond. By use of the word "may," which confers a power, rather than "shall," which imposes a duty (Iowa Code § 4.1(36)), in our opinion the legislature meant that the officer is not required to release the property, but has discretion to do so. Since an officer is only protected from liability until a notice of exemption is received, however, the officer continues to hold the exempt property at his own risk, unless the plaintiff gives an indemnifying bond pursuant to Iowa Code § 626.54. If the bond is provided, the sheriff "shall" proceed to subject the alleged exempt property to the execution. Id. Conversely, if the plaintiff fails to give a bond "the officer may restore the property to the person from whose possession it was taken, and the levy shall stand discharged." Iowa Code § 626.55.

You have stated that sometimes the sheriff perfects a levy by one of the methods described previously, with no intention to sell the property to satisfy the judgment, but merely to prevent

the judgment debtor from selling the property to a third person. This method benefits judgment creditors by alerting them to a sales attempt, thereby allowing them to claim proceeds once the debtor converts the property to cash. For several reasons we believe that this procedure circumvents both the spirit and the letter of our exemption statute.

First, issuance of an execution is a prerequisite to obtaining a levy. Before a sheriff may levy on property, an execution must have been obtained by the creditor and presented to the sheriff. Iowa Code § 626.50; Iowa R. Civ. P. 258. If property is exempt from execution pursuant to chapter 627, it necessarily is also exempt from levy.

Second, even if a levy could be effected on exempt property, the purpose of a levy is to obtain money by seizure and sale of property to satisfy a judgment. Iowa R. Civ. P. 258; Black's Law Dictionary 1051 (rev. 4th ed. 1968). Simply perfecting a levy on property without intending to sell it is inconsistent with this purpose.

Third, exempt property, if specifically and absolutely exempt, may be sold after issue or levy of execution, as no lien is created by an execution on property that is exempt. 35 C.J.S. Exemptions § 97, at 147 (1960). Subject to a lien for the purchase price, exempt property may be conveyed free from liability for debts. Smyth v. Hall, 126 Iowa 627, 102 N.W. 520 (1905); Iowa Code § 627.5. In addition, when exempt personal property is exchanged for property in kind or like character, the property received in exchange is also exempt. 35 C.J.S. Exemptions § 59, at 114 (1960); Booth v. Martin, 158 Iowa 434, 139 N.W. 888 (1913) (proceeds of life insurance policy on spouse used to purchase homestead). Since a debtor may transfer exempt property free of liens, a judgment creditor receives no benefit from perfecting a levy on it. Furthermore, exemption statutes are for the benefit of debtors, not creditors.

We therefore conclude that property exempt from execution is protected from a sheriff's levy. When a sheriff receives written notice of exemption, a valid lien no longer exists and the sheriff should release the levy unless the judgment creditor provides an indemnity bond.

Sincerely yours,

CAROLYN J. OLSON
Assistant Attorney General

CJO:plr.

COUNTIES, COURTS, CLERK OF COURT OFFICES: Iowa Constitution Articles III § 1; V § 1; V § 4; V § 6; Iowa Code §§ 602.1303; 602.8102(9); 331.361(5); 4.1(22); Iowa R. Civ. P. 378, 379, A county or city which provides office space for a clerk of court or for other state court functions cannot determine when those offices will close. Other than statutorily mandated legal holidays, it is the court system under the supervision of the Iowa Supreme Court which decides when court offices will close. (Skinner to Royer, 3-7-90) #90-3-4(L)

March 7, 1990

The Honorable Bill D. Royer
State Representative
State Capitol
L O C A L

Dear Representative Royer:

You have requested an opinion of the Attorney General concerning the responsibilities of a county or city in providing facilities for the clerk of court. Specifically, you ask whether a county or city which provides office space for a clerk of court can close the county courthouse, and thus the office of the clerk, on other than legal holidays.

Both the court system and the county board of supervisors have obligations which affect this issue.

> The board [of supervisors] shall: (h) Provide facilities of the district court in accordance with section 602.1303.

Iowa Code § 331.361(5).

> A county shall provide courtrooms, offices, and other physical facilities which in the judgment of the board of supervisors are suitable for the district court, and for judicial officers of the district court, the clerk of the district court, juvenile court officers, and other court employees.

Iowa Code § 602.1303(1)(a).

> The counties within the judicial districts shall provide suitable offices and other physical facilities for the district court administrator and staff at locations within the judicial districts determined by the chief judge . . . .

Iowa Code § 602.1303(1)(b).

The responsibilities of judicial officials are too numerous to list here, but illustrative examples include:

> The chief judges shall exercise administrative supervision within their respective districts, shall fix times and places of holding court, shall supervise and direct the performance of all administrative business of the district court.

Iowa R.Civ.P. 378. (emphasis added).

> The chief judge shall provide for court sessions, announced in advance in the form of written or printed schedule.

Iowa R.Civ.P. 379. (emphasis added).

> The clerk shall: (9) Enter in the appearance docket a memorandum of the date of filing of all petitions, demurrers, answers, motions, or papers of any other description in the cause. A pleading of any description is considered filed when the clerk entered the date the pleading was received on the pleading. . . .

Iowa Code § 602.8102(9). (emphasis added).

The clerk has, in all, 164 statutory duties. Ia. Code § 602.8102(1-164). Many of these statutory duties involve filing documents; certifying payments, signatures, orders; collecting fees; issuing warrants, subpoenas, or summons which have statutory or rule time requirements.

Closing a courthouse on days other than legal holidays would directly interfere with the functions of the clerk of court and of the court system as a whole. Iowa Code section 4.1(22) extends mandatory filing deadlines where the deadline falls on a legal holiday, defined by statute to include specified days and

days appointed by the Governor or the President. There is no statute extending deadlines for a county-declared holiday. If the courthouse is closed and a party cannot file a document on the last available date, serious prejudice to litigants would occur. Variation in holidays among counties would also create difficult problems of lack of notice.

The concept of an independent judiciary is embodied in the provisions of the Iowa Constitution. Art. III, § 1 describes the powers of the government as divided into three separate branches--the Legislative, the Executive, and the Judicial. Art. V, § 1 states the "Judicial power shall be vested in the Supreme Court, District courts, and such other courts . . . as the General Assembly may . . . establish." Art. V, § 4, as amended: "The Supreme Court . . . shall have power to issue all writs and process necessary to secure justice to parties, and shall exercise a supervisory and administrative control over all inferior Judicial tribunals throughout the State." Art. V, § 6 provides: "The District Court shall be a court of law and equity, . . . and have jurisdiction in civil and criminal matters arising in their respective districts in such manner as shall be prescribed by law."

Each department has consistently recognized and guarded the separation of powers doctrine with the judicial department having the responsibility to determine whether any department has exceeded its constitutional parameters. See Luse v. Wray, 254 N.W.2d 324, 327 (Iowa 1977). If the judiciary is to play an undiminished role as an independent and equal coordinate branch of government, nothing must impede the immediate, necessary, efficient, and basic functioning of the courts. Webster County Board of Supervisors v. Flattery, 268 N.W.2d 869, 873 (Iowa 1978) (with other citations listed). The Iowa courts have similarly affirmed the inherent power of the district court for other purposes regarding the management of the court system.[1]

Other jurisdictions have recognized the inherent power of the courts to procure indispensable personnel, equipment and facilities. "On the failure of the county to provide sufficient facilities, the court itself, to insure the efficient administration of justice, has not only the right, but also the duty, to see that it is properly equipped in its accommodations and furnishings so as to be able to act effectively as a court." Castle v. State, 143 N.E.2d 570 (Ind. 1957); see also, Webster

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[1] Iowa Civil Liberties Union v. Critelli, 244 N.W.2d 564, 568-69 (Iowa 1976); Pottawattamie County Dept. of Social Serv. v. Landau, 210 N.W.2d 837, 840 (Iowa 1973), Committee on Professional Ethics v. Bromwell, 221 N.W.2d 777, 780 (Iowa 1974);

County, 268 N.W.2d at 876; In re Furnishings and Equipment for the Judge, Courtroom, and Personnel for Courtroom Two, 423 N.E.2d 86, 88 (Ohio 1981) ("Courts possess all power necessary to secure and safeguard free and untrammeled exercise of their judicial functions."); 59 A.L.R.3d 569 § 5 (1974).

In a previous opinion 1988 Op.Att'yGen. 67 (88-1-11(L)), this office addressed the question whether the county board of supervisors can designate smoking or no smoking areas within the portion of the courthouse used by the state court system. It was noted that the Judicial Department is an agency of the state of Iowa, Iowa code § 602.1102 and under the "supervisory and administrative control" of the Iowa Supreme Court. Iowa Code § 602.1201.

> While the counties are required to provide suitable facilities for the Courts, Iowa Code § [602.1303] (1987), nothing in the statutes reserves authority over the use of those facilities for the counties. This is consistent with the general proposition that home rule does not give cities and counties authority to regulate state agencies. See, e.g., Molitor v. City of Cedar Rapids, 360 N.W.2d 568 (Iowa 1985); City of Bloomfield v. Davis Co. Comm. School Dist., 254 Iowa 900, 119 N.W.2d 909 (1963) (Municipal zoning inapplicable to state property).

Op.Att'yGen. 88-1-11(L).

Therefore, we conclude that a county or city which provides office space for a clerk of court or for other state court functions cannot determine when offices will close. The county board of supervisors has some discretion in the methods used to meet its statutory obligation of providing suitable facilities for the district court, but this must be exercised so as not to impede an accessible court system.

Our conclusion is predicated upon constitutional, statutory and case law provisions upholding the power of the courts to function freely and independently. Other than statutorily mandated legal holidays, it is the court system, under the

supervision of the Iowa Supreme Court, which decides when court offices, including the clerk of court office, will close.

Sincerely,

KATHY MACE SKINNER
Assistant Attorney General

KMS:rd

STATE BOARD OF REGENTS; Appropriations; Statutory Construction: Iowa Code §§ 8.38, 8.39, 262.9, 262.12. The State Board of Regents may require the institutions it governs to reimburse the board office for services actually performed by the board office for that institution only if the service is within the scope of the appropriations made for the institution. If the Board uses appropriated funds for a purpose outside the scope of the appropriation, the transfer provisions of Iowa Code section 8.39 should be followed. (Barnett to Varn, State Senator, 3-5-90) #90-3-3(L)

March 5, 1990

The Honorable Richard J. Varn
State Senator
State Capitol
L O C A L

Dear Senator Varn:

You have requested an opinion of the Attorney General concerning whether the State Board of Regents may legally require the institutions it governs to use funds appropriated for the institutions to reimburse the Board's office for services provided to the institutions by the office.[1]

Iowa Code chapter 262 establishes the State Board of Regents and sets out the powers and duties of the Board. Among the powers of the Board are the powers necessary and convenient for the efficient operation of its office and the institutions its governs. Iowa Code § 262.12 (1989). The Board is specifically required to direct the expenditure of all appropriations made to the institutions. Iowa Code Supp. § 262.9(8) (1989). The Board is also authorized to perform all acts necessary and proper to execute its duties and powers. Iowa Code Supp. § 262.9(12) (1989).

It is our opinion that pursuant to these provisions the Board may direct the institutions it governs to reimburse its

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[1]This opinion addresses only reimbursement for services actually performed for the institution providing the reimbursement, as stated in your opinion request. This opinion does not, therefore, address whether the Board may seek proportional reimbursement from the institutions for general expenses of the Board or the Board office.

office for services provided by the office if appropriations exist which provide funds for these services. The Board of Regents may not, however, direct that funds appropriated for the institutions be used for a purpose not within the scope of the appropriations made for the institutions. While the Board has authority to direct the expenditure of appropriations, this authority must be exercised consistently with any legislative direction for the use of those appropriations.

To determine whether the funds appropriated for an institution may be used to pay for services provided to the institution by the office, it is necessary to identify the expenditures which the Legislature intended to be covered by the particular appropriation. The legislative intent is first sought in the plain language of the appropriation. If the appropriation bill is ambiguous the legislative intent is ascertained by considering the factors generally applicable to the construction of other legislation. See 81A C.J.S. States § 240, at 829 (1977). Among the factors to be considered are the object sought by the appropriation, the circumstances under which the appropriation was made, any legislative history, related statutory provisions, the consequences of a particular construction, the administrative construction of the legislation and any statement of policy accompanying the appropriation. See Iowa Code § 4.6 (1989).

Review of past appropriation bills indicates that in addition to various specific appropriations, the Board of Regents receives separate appropriations to be used for such items generally described as salaries, support, maintenance, equipment and miscellaneous purposes for its office and each of the institutions. 1989 Iowa Acts, ch. 319 § 19; 1988 Iowa Acts, ch. 1284 § 52; 1987 Iowa Acts, ch. 233 § 408. In view of the relationship between the office and the institutions, it may at times be difficult to determine which of the generally stated appropriations made to the Board is intended to cover the provision of a particular service. The appropriate source of funds must, however, be carefully determined as the use of appropriated funds for a purpose not within the scope of the appropriation may subject the user and persons consenting to the improper use to various sanctions. See Iowa Code § 8.38 (1989); See also 1978 Op.Att'yGen. 506 (discussion of the possible consequence of violating the provision of Iowa Code section 8.39).

The Board of Regents may not use the funds appropriated to it for a purpose other than the purpose of the appropriation unless the alternative use is specifically authorized by law. Iowa Code §§ 8.38 - .39 (1989). Iowa Code section 8.39 specifies the conditions and procedures applicable to intradepartmental and interdepartmental transfers of appropriated funds. These

transfers require prior notification to the chairpersons of the standing committees on budget of the senate and the house of representatives, the chairpersons of the subcommittees of these committees and the legislative fiscal committee. Iowa Code § 8.39(3)-(4) (1989).

In conclusion, the Board of Regents may require the institutions to reimburse the office for services rendered by the office for the institution in question only if the services are within the scope of the appropriations made for the institutions. If appropriated funds are used by the Board for a purpose other than the purpose for which they were appropriated, the Board must comply with the transfer procedures in Iowa Code § 8.39 to avoid sanctions arising from the misuse of appropriated funds.

Sincerely,

Sherie Barnett by EMO

SHERIE BARNETT
Assistant Attorney General

SB:mlr

COUNTIES AND COUNTY OFFICERS: Recovery of support to the poor; Iowa Code §§ 252.13, 252.14. The county may recover from the estate of a poor person if the claim has been timely filed even though not filed within the two years after the county made payment. (Robinson to Zenor, Clay County Attorney, 3-2-90) #90-3-2(L)

March 2, 1990

Michael L. Zenor
Clay County Attorney
201 East Fifth Street
Spencer, IA 51301

Dear Mr. Zenor:

You recently requested an opinion from the Attorney General regarding a question, which we have paraphrased:

> May the county recover from the estate of a poor person if the claim has been timely filed even though not filed within the two years after the county made payment?

We answer in the affirmative. Iowa Code § 252.13 provides in part:

> **RECOVERY BY COUNTY**
>
> Any county having expended any money for the relief or support of a poor person, under the provisions of this chapter, may recover the same. . . from such poor person should the person become able, or from the person's estate;. . . from such poor person by action brought within two years after becoming able, and from such person's estate by filing the claim as provided by law. . . .

Iowa Code § 252.13 authorizes a county to seek recovery of money paid for support of a poor person from three separate classes. The first of these classes is the person for whom the support was paid; the second class is the person's relatives; and the third class is the person's estate. Section 252.13 also imposes limitations on the county's right of recovery. Each limitation is set forth in a separate clause which specifies the class to which it is applicable, i.e., recovery may be sought:

> . . . from relatives by action brought within two years from the payment of such expenses, from such poor person by action brought within two years after becoming able, and from such person's estate by filing the claim as provided by law.

An action to recover from relatives must be commenced within two years after payment of support. In Bremer County vs. Schroeder, 200 Iowa 1285, 206 N.W. 303 (1925), and Wright County vs. Hagan, 210 Iowa 795, 231 N.W. 298 (1930), the Iowa Supreme Court held that the county may not recover from a poor person's relatives beyond the two years from the payment by the county. For obvious reasons the statute imposes a different limitation on an action to recover from the person for whom support was provided: the county has two years from the date when the person became "able." In 1938 Op.Att'yGen. 155 this office opined that the word "able" means "able to exist without relief" rather than "able to pay for past assistance furnished."

The last method of collection is from the person's estate. In that regard, Iowa Code § 252.13 should be read in conjunction with § 252.14 which provides:

> **HOMESTEAD-WHEN LIABLE**
>
> When expenditures have been made for and on behalf of a poor person and the person's family, as contemplated by section 252.13, the homestead of such poor person is liable for such expenditures when such poor person dies without leaving a surviving spouse or child, as defined in section 234.1.

Clearly, the intent of the legislature was to make the homestead of such poor person liable to repay the county when that person dies without leaving a surviving spouse or a child. There is no requirement here that the claim in probate must be within the two year period of payment by the county or after the person becomes able.

The Iowa Supreme Court has held that all parts of the legislative enactment should be considered together and undue importance should not be given to any single or isolated portion. Welp vs. Iowa Dept. of Revenue, 333 N.W.2d 481, 483 (Iowa 1983). Also, the usual and ordinary meaning is to be given to statutory language used but the manifest intent of the legislature will prevail over the literal import of the words used. Id.

When we read Iowa Code § 252.14 together with § 252.13 the manifest intent of the legislature, in our opinion, was to provide for the recovery from a person's estate beyond the two year statute of limitations that would otherwise be imposed on the recovery against the person while alive. This we believe is in recognition that many elderly persons need some assistance from time to time, as your letter states, to pay utility bills. To require reimbursement whenever they became "able" would cause undue hardship - perhaps forcing them back on public assistance the next heating season when their funds were inadequate for fuel. Reading § 252.13 in harmony with § 252.14, the county has the option not to recoup the assistance while such persons are alive but wait and collect from their estate.

A statute of limitations issue will inherently arise in litigation -- i.e., a probate proceeding. This office does not render opinions purporting to instruct a court as to how to rule on judicial questions. 61 Iowa Admin. Code 1.5(3)(a); 1968 Op.-Att'yGen. 544. To do so would interfere with the jurisdiction of the Court and with the adjudicative process by which the parties can be heard. However, you have advised us that counties need to know whether it is proper to pursue these claims and that this issue regularly affects the county officers' administration of their duties. We are therefore rendering this opinion to guide county officials in the performance of their duties, recognizing that the issue may ultimately be appropriately resolved by a court in individual probate proceedings.

Sincerely,

STEPHEN C. ROBINSON
Assistant Attorney General

SCR/sro

SCHOOLS: Sale of real property. Iowa Code § 297.22 (1989). The fourth unnumbered paragraph of Iowa Code section 297.22 applies to a transaction in which a community school district sells real property to a merged area school so long as the school district is within the jurisdiction of the merged area. (Scase to Nystrom, State Senator, 3-2-90) #90-3-1(L)

March 2, 1990

The Honorable John N. Nystrom
State Senator
Iowa State Capitol
LOCAL

Dear Senator Nystrom:

You have requested an opinion of the Attorney General regarding the applicability of the fourth unnumbered paragraph of Iowa Code section 297.22 (1989) to a sale of property owned by the Boone Community School District to the Des Moines Area Community College [DMACC]. Iowa Code section 297.22 sets forth provisions governing the sale, lease and disposition of real property owned by a school corporation. The fourth unnumbered paragraph of this section provides as follows:

> 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 a county, municipal corporation, school district, or township if the real property is within the jurisdiction of both the grantor and grantee. In this case sections 297.15 to 297.20, sections 297.23 and 297.24, and appraisal requirements of this section do not apply to the transaction.

DMACC is a merged area community college created pursuant to Iowa Code chapter 280A. The merged area served by DMACC includes Boone County and the Boone Community School District. The Boone Community School District is, by definition, a school corporation. Iowa Code § 274.1 (1989).

Iowa Code section 280A.16 (1989) provides that a merged area community college formed under the provisions of chapter 280A is also a school corporation which may "sue and be sued, hold property, and exercise all the powers granted by law and such other powers as are incident to public corporations of like character and are not inconsistent with the laws of the state."[1]

It is our view that the fourth unnumbered paragraph of Code section 297.22 clearly applies to a sale of property by the Boone district to DMACC. DMACC, the buyer, is a school corporation and the Boone Community School District, the seller, is a school district. The statutory provisions in question may be applied to this transaction as follows:

> The board of directors of a school corporation [DMACC] may ... accept any interest in real property ... from a ... school district [Boone Community School District] ... if the real property is within the jurisdiction of both the grantor and grantee.

This reading of the Code provision at issue appears consistent with both the plain language of the statute. See 1976 Op.Att'yGen. 107 (applying this provision of Code § 297.22 to a transaction in which a merged area school was the grantor of real property).

In conclusion, it our view that the fourth unnumbered paragraph of Iowa Code section 297.22 does apply to a transaction in which a community school district sells real property to a

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[1] Certain statutory provisions do, however, place limitations upon a merged area community college's power to acquire and hold real estate. See Iowa Code § 280A.25(6) (1989) (including in the duties of the director of the state department of education the function of approving or disapproving "sites and buildings to be acquired, erected, or remodeled for use by . . . area community colleges."); Iowa Code § 280A.35 (1989) (limiting the amount of land which a merged area may aquire by purchase). We have not been requested to, nor do we attempt to, determine the applicability of these provisions to the facts underlying the transaction upon which your inquiry is based.

merged area school so long as the school district is within the jurisdiction of the merged area.

Sincerely,

Christie J. Scase

CHRISTIE J. SCASE
Assistant Attorney General

CJS:rd

HIGHWAYS, COUNTIES: Farm Home Lanes. Iowa Code §§ 23A.2(1), 306.1, 306.4, 309.57; Iowa Code § 331.301. A county cannot spend public funds for the maintenance of privately owned farm home lanes. No legal obligation to maintain these lanes at public expense arises simply because the county has maintained these lanes in the past. The county may, however, after passing an appropriate ordinance, maintain these farm home lanes for a fee sufficient to cover operating costs. (Hunacek to Stream, 4-30-90) #90-4-5(L)

April 30, 1990

Mr. Charles A. Stream
Mahaska County Attorney
Box 16
Courthouse
Oskaloosa, IA 52577

Dear Mr. Stream:

You have requested an opinion of the Attorney General regarding county maintenance of privately owned farm lanes. In your opinion request, you note that Mahaska County has, for a number of years, maintained 102 privately owned farm lanes or farm drives. You further note that the Mahaska County Engineer has recently discovered that these lanes were not part of the county road system, and, after notice to the affected landowners and a public hearing, the Board of Supervisors determined that these lanes could no longer be legally maintained by the county. The Board's decision to cease maintenance was based in part upon a 1955 Attorney General Opinion, about which more will be said later.

With this as background, you pose the following four questions:

1. Are the conclusions of the 1955 Attorney General's Opinion cited above still valid?

2. Have these lanes become County Roads based upon voluntary County Maintenance for a number of years?

3. Would maintenance of these lanes by the County constitute an illegal expenditure of County funds?

4. Can the County legally provide minimum maintenance upon these lanes on a fee basis as outlined herein?

We answer these questions in the order posed.

1. In 1956 Op.Att'yGen. 9, we opined that farm lanes were not public roads, and that therefore a county could not legally spend public funds for their maintenance. We will depart from this opinion only if it is "clearly erroneous." 1980 Op.Atty'Gen. 51, 52. We believe it is not.

The 1955 opinion relied on statutes and judicial opinions which suggested that the term "highway" connotes a public thoroughfare, rather than a privately owned one. This conclusion appears correct, and is, in fact, buttressed by examination of other statutes, not referenced in that opinion. For example, Iowa Code § 306.4(2) gives the county jurisdiction and control over "secondary roads". This term, in turn, refers to roads that are classified as "trunk, trunk collector, and area service." Iowa Code § 306.3(4). These terms are defined in Iowa Code § 306.1(2)(d)-(f), and it is apparent from the definitions in these sections that they connote public roads. Other statutes also apparently contemplate the fact that the county will expend funds for the maintenance only of secondary roads. See, e.g., Iowa Code § 309.93-.97 (county secondary road budgets) and Iowa Code § 311.1 (authorizing the establishment of secondary road assessment districts). We see nothing in the statutes which authorize a county to spend public money on the maintenance of private roads. In addition, publicly funded maintenance of some private roads, but not others, might well provoke equal protection claims by landowners of private farm lanes that are not maintained by the county. We therefore answer your first question in the affirmative.

2. We next consider the question of what effect the county's voluntary (albeit mistaken) maintenance of these roads has on its current legal responsibility to maintain them. We assume that your question is not concerned with the issue of whether the county has, by adverse possession, actually taken title to the roads in question; it seems apparent from your opinion request that the owners of the land are interested in whether they may continue to receive free maintenance from the county, but do not wish to actually lose title to the property in question. In any event, the determination of whether title has passed by adverse possession

entails resolution of a number of factual inquiries. See Marksbury v. State, 322 N.W.2d 281, 287 (Iowa 1982) (specifying the elements of title by adverse possession). This office cannot resolve issues of fact in an Attorney General Opinion. 1972 Op.Att'yGen. 686.

The landowners' assertion that the county is obligated to continue maintenance of the farm lanes in question is apparently premised on some sort of estoppel theory, whereby the county, having maintained these lanes for some time in the past, is now estopped from failing to do so. However, there are a number of reasons why we believe estoppel is inapplicable here. In the first place, the doctrine of estoppel "is not generally applicable against a governmental body and, if applied, it is done so only in exceptional circumstances." City of Lamoni v. Livingston, 392 N.W.2d 506, 511-12 (Iowa 1986). Passing the threshold question of whether estoppel could be invoked against the county in any event, we note that the doctrine "requires proof of a false representation or concealment of material facts by the actor, lack of knowledge on the part of the other person, intention by the actor that the representation or concealment be acted on, and reliance by the other person to his prejudice." Henderson v. Millis, 373 N.W.2d 497, 505 (Iowa 1985). Although, as previously indicated, our office cannot resolve disputed issues of fact in an Attorney General Opinion, it appears clear from the facts recited in your opinion request that the county did not knowingly misrepresent or conceal material facts, and that the landowners in question have not been prejudiced. All that has happened is that they have received a benefit to which they had no statutory right.

We therefore believe that the county is not under any legal obligation to continue maintenance of these roads, simply because such maintenance has occurred in the past.

3. Your third question is whether maintenance of the farm lanes by the county constitutes an illegal expenditure of county funds. As we have explained in our reply to your first question, we believe the answer is yes.

4. Your final question is whether the county can provide minimum maintenance of these roads for a fee. We think it probably can.

The "home rule" statute, Iowa Code § 331.301, provides in relevant part that: "a county may, except as expressly limited by the Constitution, and if not inconsistent with the laws of the

General Assembly, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the county or of its residents, and to preserve and improve, the peace, safety, health, welfare, comfort, and convenience of its residents." Iowa Code § 331.301(1). As a result of the preceding discussion, a county may not expend public funds for the maintenance of private farm lanes, because this would conflict with other statutes. However, if the county charges a fee sufficient to cover its costs, so that no public funds are expended, there would appear to be no conflict with any other statutes. Therefore, in the absence of any statutes squarely prohibiting this endeavor, we believe that the county may provide minimum maintenance for a fee.

We call your attention, however, to the provisions of Iowa Code chapter 23A, the government anti-competition statute. In particular, Iowa Code § 23A.2 provides that a county shall not, "unless specifically authorized by statute, rule, ordinance or regulation" engage in the "dispensing, distributing, or advertising of goods or services to the public which are also offered by private enterprise unless such goods or services are for use or consumption exclusively by the state agency or political subdivision." Iowa Code § 23A.2(1)(a). While this statute does not prohibit the county from competing with private enterprise, it does require the adoption of an ordinance to authorize the competitive activity. We have previously opined that competitive activity is permissible when authorized by the kind of statute or regulation referenced in § 23A.2. See, e.g., Op.Att'yGen. #89-2-3.

Sincerely yours,

Mark Hunacek by EMD

MARK HUNACEK
Assistant Attorney General

MH:lbh

BEER AND LIQUOR; MUNICIPALITIES: Preemption. Iowa Code §§ 123.3(8), 123.3(33), 123.39, 123.47A and 123.49(2)(h) (1989). A city is authorized by Iowa Code § 123.39 to enact an ordinance which is at least as restrictive as § 123.49(2)(h) in regulating the sale of alcoholic beverages to persons under legal age. The violation of such an ordinance can, if the city elects, result in the suspension of a license or permit. (Walding to Putnam, Winnishiek County Attorney, 4-30-90) #90-4-4(L)

April 30, 1990

The Honorable Dale L. Putnam
Winneshiek County Attorney
518 Montgomery Street
P.O. Box 70
Decorah, IA 52101

Dear Mr. Putnam:

We are in receipt of your request for an opinion of the Attorney General regarding preemption of liquor control laws for the sale of alcoholic beverages[1] to persons under legal age.[2] Specifically, the questions you have posed, as restated, are as follows:

1. Is a city authorized to enact an ordinance which is more restrictive than the state law, § 123.49(2)(h), which prohibits the sale of alcoholic beverages to persons under legal age?

2. If a city is not preempted from enacting such an ordinance, may a city provide for the suspension of a liquor control license, wine permit or beer permit for a violation of the ordinance?

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[1]"Alcoholic beverage" is defined in Iowa Code § 123.3(8) (1989) to mean "any beverage containing more than one-half of one percent of alcohol by volume including alcoholic liquor, wine and beer."

[2]"Legal age" is defined in Iowa Code § 123.3(33) (1989) to mean "nineteen years of age or more." The sale of alcoholic beverages to persons age nineteen or twenty is governed by § 123.47A.

Iowa Code § 123.49(2)(h) (1989) provides that a liquor control licensee, wine permittee or beer permittee shall not:

> Sell, give, or otherwise supply any alcoholic beverage, wine, or beer to any person, knowing or having reasonable cause to believe the person to be under legal age, or permit any person, knowing or having reasonable cause to believe the person to be under legal age, to consume any alcoholic beverage, wine, or beer.

[Emphasis added]. That language is similar to the language found in the proposed ordinance, except that the proposed ordinance would strike the statutory language underscored above. The deletion of the phrase "knowing or having reasonable cause to believe the person to be" has the effect of making the proposed ordinance more restrictive than the state statute. The proposed ordinance would make a violation of the ordinance a misdemeanor and, apparently, result in the suspension of an affected license or permit.[3]

The state's power to regulate and restrict the sale, distribution and consumption of alcoholic beverages, based on the Twenty-first Amendment to the U.S. Constitution and the state's police power, is broad and comprehensive. Wright v. Huxley, 249 N.W.2d 672, 674-675 (Iowa 1977). See also 45 Am. Jur. 2d Intoxicating Liquors § 24 (1969). In regulating intoxicating liquor traffic, it has long been recognized that a state may empower municipalities to enact ordinances and adopt regulations to control, license or prohibit the sale of intoxicating liquors within their local limits. State ex rel. Witter v. Forkner, 94 Iowa 1, 62 N.W. 772 (1895); 45 Am. Jur. 2d Intoxicating Liquor § 27 (1969); 48 C.J.S. Intoxicating Liquors § 27.[4] (1981).

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[3]We note that the proposed ordinance would provide for strict liability. As we understand it, the proposed ordinance would only have civil penalties. We do not address the constitutionality of such a provision in the context of this opinion.

[4]A rationale for delegation of liquor regulations to local authorities was offered in State ex rel. Witter v. Folkner, 94 Iowa 1, 3, 62 N.W. 772, 775-776 (1895):

> It is entirely in accord with the principle of local self-government that the power to enact police regulations on matters so closely connected with the

(continued...)

In the exercise of that authority, broad discretion is vested in political subdivisions. Ordinances or regulations which restrict or prohibit local traffic of intoxicating liquors "are valid if they are fairly within the scope of the express or implied authority granted [a political subdivision], and are not unreasonable, unjust, or unduly oppressive, or unfairly discriminatory." [Footnotes omitted]. 48 C.J.S. Intoxicating Liquors § 28 (1981). Also, particular ordinances or regulations may be held to be preempted by the state where the legislature has retained exclusively the field of legislation relating to liquor traffic. Id. at § 30. Similarly, a municipality may not enact a liquor traffic ordinance or regulation which would contravene or be inconsistent with a state statute.[5] Id. at § 31.

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[4](...continued)
good order and prosperity of a city should be lodged with those best qualified to judge of measures adapted to meet the emergencies of these particular situations. And it is competent for the legislature, in its wisdom, to invest them with the authority necessary to the administration of the special purposes of their creation.

[5]It should be noted that a local ordinance and a state statute can operate concurrently to regulate liquor traffic. According to 48 C.J.S. Intoxicating Liquors § 30:

> A legislative grant of authority to a political subdivision to enact ordinances in relation to the liquor traffic does not repeal or supersede the general laws of the state on the same subject, but must be exercised in conformity therewith, unless the grant to the subdivision is explicitly made exclusive. A general law of the state in relation to the liquor traffic has been held not to repeal or supersede a legislative grant of authority to a political subdivision in relation to the same subject, unless it is clearly intended to be exclusive. Hence, a local ordinance and a state statute relating to liquor traffic may both be operative and effective, although they cover the same ground, define the same or similar offenses, or make similar regulations, if there is no irreconcilable conflict between them . . . .

(continued...)

Finally, a municipality's authority to punish a violation of a liquor traffic ordinance may be governed by state statute. McQuillin states:

> Punishment for violation of an ordinance prohibiting or regulating the sale of intoxicating liquors is governed by specific provisions, if any, in a grant of power relating thereto.
>
> * * *
>
> But apart from specific limitation in the grant of power, an intoxicating liquor ordinance may be valid although it provides for penalties greater or less than or different from those provided by state law for similar offenses . . . .

[Footnotes omitted]. McQuillin, Municipal Corporations § 24.185 (3rd Ed.). Elsewhere, McQuillin observes:

> The effect of an ordinance for a penalty different from or greater or less than provided by statute for an unlawful sale of intoxicating liquor with respect to the validity of the ordinance or the penalty therein provided depends on the law and statutes of the state in question.

[Footnotes omitted]. Id. at 24.170. Thus, in order for us to address the questions you have posed, we must examine the state

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[5](...continued)

[Footnotes omitted]. And, according to McQuillin, Municipal Corporations § 24.185 (3rd Ed.):

> [A]n act that violates both an ordinance and a statute can be punished both under the ordinance and under the statute, and this is true with respect to acts violating intoxicating liquor ordinances and statutes.

[Footnotes omitted].

statute, § 123.39, unnumbered paragraph 2, which empowers a municipality to regulate and punish local liquor traffic.[6]

Section 123.39, unnumbered paragraph 2, provides:

> Local authorities may suspend any retail wine or beer permit or liquor control license for a violation of any ordinance or regulation adopted by the local authority. Local authorities may adopt ordinances or regulations for the location of the premises of retail wine or beer and liquor control licensed establishments and local authorities may adopt ordinances, not in conflict with this chapter and that do not diminish the hours during which beer, wine, or alcoholic beverages may be sold or consumed at retail, governing any other activities or matters which may affect the retail sale and consumption of beer, wine, and alcoholic liquor and the health, welfare and morals of the community involved.

We conclude that the proposed ordinance is a proper exercise of authority under § 123.39. Additionally, we find that § 123.39 provides an express grant of authority for a city to impose a suspension on a licensee or permittee for a violation of a liquor traffic ordinance.

The proposed ordinance, we believe, is fairly within the broad discretion of authority with which cities are empowered to enact ordinances and adopt regulations affecting liquor traffic within their territory. In our judgment the proposed ordinance is not unreasonable, unjust, nor unduly oppressive, nor unfairly discriminatory. Nor is there anything in § 123.49(2)(h) that suggests that the state intended to preempt cities from regulating the sale of alcoholic beverages to person under legal age. Certainly, reviewing the language used in § 123.39, it is evident that the legislature did not intend to retain exclusive authority over such regulation. Finally, it is our judgment that the proposed ordinance neither contravenes, nor is inconsistent with, the provisions of § 123.49(2)(h).

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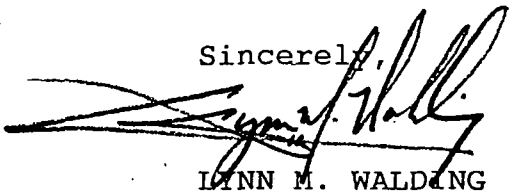
[6]In Wright v. Huxley, 249 N.W.2d 672, 675 (Iowa 1977), the Iowa Supreme Court held that § 123.39 was a "proper and valid delegation of authority to cities and towns."

Accordingly, it is our judgment that a city is authorized by Iowa Code § 123.39 to enact an ordinance which is at least as restrictive as § 123.49(2)(h) in regulating the sale of alcoholic beverages to persons under legal age. The violation of such an ordinance can, if the city elects, result in the suspension of a liquor control license, wine permit or beer permit.

Sincerely,



LYNN M. WALDING
Assistant Attorney General

LMW:cw

STATE OFFICERS AND EMPLOYEES, CONSTITUTIONAL LAW: Industrial Commissioner; Limitation on Political Activity: First Amendment, U.S. Constitution, Fourteenth Amendment, U.S. Constitution; Iowa Code Supp. § 86.2 (1989), Iowa Code § 86.4 (1989). Persons subject to prosecution under § 86.4 are the commissioner, chief deputy commissioner, and deputy commissioners, not other employees of the division of industrial services. The statute permissibly restricts "espousal of a candidate" at local, state, and national levels. "Hard core conduct" including active public solicitation of funds or support for a specific candidate can be successfully prosecuted under the language of the statute, while "lesser political involvement" could not be prosecuted under the existing language. Only "active partisan political campaigning" and "clearly partisan political activity" are subject to prohibition. (Donner to Linquist, Industrial Commissioner, 4-10-90) #90-4-2(L)

April 10, 1990

Mr. David Linquist
Industrial Commissioner
Department of Employment Services
Division of Industrial Services
1000 East Grand Avenue
Des Moines, Iowa 50319

Dear Commissioner Linquist:

You have requested an attorney general's opinion regarding Iowa Code section 86.4 (1989). Specifically you ask:

1. Does section 86.4 apply to chief deputy industrial commissioners, deputy industrial commissioners and all other employees of the Division of Industrial Services?

2. Does section 86.4 apply to local, state, and national political office?

3. Does section 86.4 apply to mere attendance to any of the following activities?

   a. A luncheon where a political office holder or a political candidate is a speaker. The price of a luncheon to the attendee is equivalent to the price of a meal.

   b. A political caucus.

   c. A fund raiser when there is no charge to attend.

   d. A fund raiser when there is a charge to attend.

4. Must a person actively advocate for a specific candidate in order for a violation of section 86.4 to occur?

I.

You first ask to whom other than the commissioner does § 86.4 apply. Section 86.4 (1989) provides:

> It shall be unlawful for the commissioner, or any appointee of the commissioner while in office, to espouse the election or appointment of any candidate to any political office, and any person violating the provision of this section shall be guilty of a simple misdemeanor. (Emphasis added.)

Also relevant is Iowa Code Supp. § 86.2 (1989):

> The commissioner may appoint:
>
> 1. Chief deputy industrial commissioners for whose acts the commissioner is responsible, who are exempt from the merit system provisions of chapter 19A, and who shall serve at the pleasure of the commissioner.
>
> 2. Deputy industrial commissioners for whose acts the commissioner is responsible and who shall serve at the pleasure of the commissioner.
>
> All chief deputies and deputies must be lawyers admitted to practice in this state.

(Emphasis added).

In this context, both chief deputy industrial commissioners and deputy industrial commissioners are literally "appointees of the commissioner," and are within the explicit terms of § 86.4. Your question, however, continues with the inquiry whether "all other employees of the Division of Industrial Services" are subject to this section.

Other employees of the Division may be "appointed" by the commissioner in the sense that they might be exempt from the state merit system provisions of Iowa Code Chapter 19A, and their employment is thus terminable at the pleasure of the commissioner. However, only those persons specifically identified in

§ 86.2 are clearly designated as "appointees" in the context of chapter 86.

Section 86.4 is a criminal provision affecting conduct within the scope of First Amendment activity. As such, the language will be narrowly construed to minimize restrictions while yet serving other compelling needs of society. Broadrick v. Oklahoma, 413 U.S. 601, 611-612, 93 S.Ct. 2908, 2915 (1973). Particularly because § 86.2 does itemize persons who may be appointed, extension of § 86.4 to employees not listed would arguably deprive them of the necessary notice of prohibited conduct. An "ordinary person exercising ordinary common sense" would understandably assume that the list of "appointees" in § 86.2 were the same "appointees" constrained by § 86.4. See, Id., 413 U.S. at 608, 93 S.Ct. at 2914.

This does not imply that the "other employees" are completely free from restrictions on political activities. Employees under the merit system are subject to the provisions of Iowa Code § 19A.18 and 581 Iowa Administrative Code Chapter 16 which restrict certain political activities. Additionally, all public employees are subject to Iowa Code chapter 721, which treats specified political activities as official misconduct.

II.

You ask whether § 86.4 applies to local, state, and national political office. The language of § 86.4 prohibits the espousal of "any candidate of any political office," with no explicit limit as to venue. With the literal answer to your question contained within the clear language of the Code, we read your implicit question to be whether it is constitutionally permissible for the statute to reach activities at all these levels.

In general, statutes restraining certain political activities of public employees have been sustained. See, United States Civil Service Comm. v. Nat'l Assoc. of Letter Carriers, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Limitations on public employees' First Amendment rights have been approved where the government has shown important interests sought to be served by the limitations. These important interests have included: ensuring impartial execution of the laws; preserving the public's confidence in the system by avoiding the appearance of practicing "political justice"; eliminating the possibility of the creation of a "powerful, invincible, and perhaps corrupt political machine"; and protecting public employees from a system of employment and advancement dependent upon political performance. Letter Carriers, 413 U.S.

at 565-66, 93 S.Ct. at 2890-2891; see also, Broadrick, 413 U.S. at 606, 93 S.Ct. at 2913.

Similarly, such statutes have withstood challenges of vagueness and overbreadth, where a statute is not so vague that "men of common intelligence must necessarily guess at its meaning," Broadrick, 413 U.S. at 607, 93 S.Ct. at 2913, and where a statute is not so broad as to have a real and substantial deterrent effect on protected pure speech (as contrasted to conduct). Id., 413 U.S. at 615, 93 S.Ct. at 2917-2918.

While the degree of state interests to be protected may be greater or lesser in regard to political activity on the local or national level as compared to the state level, the legislature has made a determination that the overall state interest would be best served by precluding certain political activities regarding "any" political office. However, as discussed below, the restrictions of § 86.4 would only be applicable to partisan activities, thus excluding nonpartisan candidacies. Further, in any specific case, it would be necessary to weigh the compelling state interest served by precluding activities at the level in question.

We conclude that the application of § 86.4 to local, state, and national political elections would likely withstand judicial scrutiny in terms of satisfying important state interests, providing adequately clear notice of its meaning, and providing a narrow restriction which presents no real and substantial deterrent to protected speech.

III.

Your third question asks about the application of § 86.4 to attendance at particular activities. The statute forbids the commissioner and the commissioner's appointees "to espouse the election or appointment of any political office . . ." [Emphasis added.] Your question, in essence, is what activities constitute forbidden espousal of a candidate.

Helpful in this analysis is 1980 Op.Att'yGen. 455, issued October 31, 1979, in which this office reviewed language which would have prohibited county assessors and their deputies from "tak[ing] an active part in a political campaign except to cast a vote, or to express personal opinions." Id.

Reviewing the Letter Carriers and Broadrick Supreme Court decisions, we opined that while the language was probably constitutional in so far as restricting partisan political activity (but unconstitutional if applied to nonpartisan

political activity), it would likely fail a due process-vagueness analysis by the courts. 1980 Op.Att'yGen. at 457.

The opinion's analysis of Letter Carriers focused on the Court's interpretation of language in the Hatch Act prohibiting federal employees from taking an "active part in political management or in political campaigns." 1980 Op.Att'yGen. at 457. The Court in Letter Carriers had considered the language in the context of numerous express exemptions within the statute itself and extensive rules by the Civil Service Commission interpreting the statute. Also important to the Court was the Commission's procedure by which an employer could obtain a declaratory ruling in regard to the law's application to a particular activity. See, Letter Carriers, 413 U.S. at 570-580, 93 S.Ct. at 2893-2898. The availability of this type of procedure was also noted in the Court's review of the Oklahoma Little Hatch Act in Broadrick. See, 413 U.S. at 608 n.7, 93 S.Ct. at 2914 n.7. In this context, the Court concluded that the Act was not unconstitutional on its face or as applied.

Our 1979 opinion concluded that:

> Because of the lack of more detailed exceptions and regulations and the absence of a declaratory mechanism, we believe that [the Iowa language] could not be constitutionally applied against assessors who engaged in comparatively limited activity because of its vagueness. While a due process attack on enforcement of [the language's] proscriptions would be unsuccessful where "hard core conduct" . . . is involved (conduct which, regardless of how the other boundaries or the statutes are established, is clearly proscribed), the statute does not appear sufficiently precise to allow criminal prosecution for lesser political involvement, such as participation in a partisan political caucus.

1980 Op.Att'yGen. at 458.

The prohibition in § 86.4 against "espousal of a candidate for political office" is no more specific as to what activities are forbidden than the language which would have prohibited "taking an active part in a political campaign." We concur with the 1979 opinion in that under § 86.4, "hard core conduct" could be validly prosecuted, while "lesser political involvement" could not, particularly without the adoption of more explicit rules. Arguably, Iowa Code § 17A.9 could supply the declaratory ruling

procedure noted as important in both Letter Carriers and Broadrick.

The question then becomes whether the examples you list in question three are "hard core conduct." We conclude that any active public solicitation of funds or support for a specific candidate is clearly proscribed "hard core conduct" and could be prosecuted under § 86.4. The general examples set out in question three are, however, "lesser political involvement" which could not be validly prosecuted on the basis of the language of § 86.4 alone.

The 1979 opinion specifically identifies "participation in a partisan political caucus" as "lesser political involvement." 1980 Op.Att'yGen. at 458. See also, Letter Carriers, 413 U.S. at 572-573 n.18, 93 S.Ct. at 2894-2895 n.18, (citing examples of conduct permitted and prohibited in practice under the Hatch Act, e.g., attending conventions as spectators is permitted.) As a caveat, there could be situations in which attending a fund raiser for a particular candidate would clearly be perceived as "espousal" of that candidate.

IV.

Your fourth question asks whether "active advocacy" is a prerequisite to a violation of § 86.4. We agree that "active" political involvement must occur. However, without undue speculation we are unable to conclude that all active political involvement equates to "advocacy." Guidance can be found in Broadrick, which approved state level interpretations of the Oklahoma Act, which on its face include restrictions on being a candidate "for any paid public office," forbade solicitation "for any political organization, candidacy or other political purposes," and forbade taking part "in the management of affairs of any political party or in any political campaign." 413 U.S. at 607, 93 S.Ct. at 2913. Through these interpretations, the statute was applied to restrict only "active partisan political campaigning" and "clearly partisan political activity." 413 U.S. at 617, 93 S.Ct. at 2918-2919.

While the prohibition in § 86.4 against "espous[al] . . . of a candidate" does not contain the explicit exception for private conduct, that exception must be implied to avoid facial unconstitutional overbreadth. Id. The political activity limited by the Iowa statute, "espousal of a candidate," is no broader than those political activities restricted by the Oklahoma Act. Section 86.4 should also be applied only to "active partisan political campaigning" and "clearly partisan political activity."

CONCLUSION

In summary, we opine that the persons subject to prosecution under § 86.4 are the commissioner, chief deputy commissioner, and deputy commissioners; the political offices for which these persons cannot "espouse a candidate" include local, state, and national offices; and "hard core conduct" including active public solicitation of funds or support for a specific candidate can be successfully prosecuted under the language of the statute, while "lesser political involvement," including the activities identified, could not be prosecuted under the vague language of the statute alone. Only "active partisan political campaigning" and "clearly partisan activity" are subject to prohibition.

Sincerely,

Lynette A. F. Donner

LYNETTE A. F. DONNER
Assistant Attorney General

LAFD:bac

COUNTY HOME RULE: Local boating, fish and wildlife regulations. Iowa Const. art. III, § 39A; Iowa Code chapters 106, 107, 109, 110 (1989). County home rule power does not authorize a county ordinance creating local boating registrations, fishing licenses, hunting licenses or habitat stamps and imposing fees. (Smith to Lytle, Van Buren County Attorney, 4-10-90) #90-4-1(L)

April 10, 1990

Mr. Richard H. Lytle
Van Buren County Attorney
905 Fourth Street
Keosauqua, IA 52565

Dear Mr. Lytle:

You have requested an opinion of the Attorney General on the question whether a county has authority to issue local habitat stamps and local licenses for activities such as hunting, boating and fishing, and whether a county may impose fees for such licenses. It is our opinion that an ordinance establishing such local license requirements would exceed the scope of county home rule authority and thus require an express grant of authority from the legislature.

Each activity mentioned in your request is regulated by legislative enactments of statewide applicability. Boats used on Iowa waters must be registered pursuant to Iowa Code ch. 106 (1989), which imposes registration fees, sets forth navigation regulations, and delegates to the Iowa Natural Resource Commission authority to adopt rules for the State boating regulatory program administered by the Department of Natural Resources.

Similarly, Iowa Code ch. 110 generally requires a fishing license to be obtained for fishing in Iowa, and a wildlife habitat stamp and hunting license for hunting in Iowa. Section 110.1 sets the fees for these licenses and the wildlife habitat stamp. Additional statutes relating to hunting and fishing are codified in Iowa Code chapters 107 and 109. The Natural Resource Commission is authorized by Iowa Code §§ 107.24(5) and 455A.5(6)(a) to adopt rules for the fishing and hunting regulatory programs administered by the Department. Receipts from the fees for boat registrations, fishing and hunting licenses and habitat stamps are used to fund the

Department's programs which regulate those activities. See Iowa Code §§ 106.52 and 107.17.

The statewide hunting, fishing and boating regulatory programs have long been in effect. Legislation requiring hunting licenses and imposing fees was first enacted in 1909; fishing licenses were first required and fees were imposed in 1933; registration of non-commercial boats has been required by statute since 1933; and fees have been imposed for boat registrations since 1961. 1909 Iowa Acts, chapter 154; 1933 Iowa Acts, chapters 29 and 30; 1961 Iowa Acts, chapter 87.

Although Iowa Const. art. III, § 39A grants extensive authority to counties in the matter of county affairs, the amendment contains four basic limitations which we have previously analyzed in 1980 Op.Att'yGen. 54. In 1982 Op.Att'yGen. 27 we focused on the two related limitations which prohibit exercise of county home rule power inconsistent with the laws of the General Assembly and limit home rule power to local or county affairs and not state affairs.

The latter opinion concluded that a county ordinance could impose a fine or other penalty for its violation only pursuant to express delegation of authority by the legislature. We concluded home rule power could not authorize such a local penalty because it would be inconsistent with the Iowa Criminal Code, the enactment of which had preempted the subject matter. We further reasoned that an historical demonstration of legislative intent to preempt an area of regulation indicates legislative belief that the matter in question is inherently a state, and not a local matter.

The preemption analysis in our previous opinions is applicable to local boat registrations and licenses for fishing and hunting. The statewide boating, fishing and hunting laws codified in Iowa Code chapters 106, 107, 109 and 110 reveal a legislative intent to preempt regulation of these activities. Legislative preemption is consistent with legislative belief that regulation of these activities is outside the scope of local affairs. It is not apparent what purpose, if any, other than local revenue would underlie local duplication of state registrations, licenses and fees. Such fees could be construed as unauthorized taxes imposed in violation of a third limitation on exercise of county home rule power. See Solberg v. Davenport, 211 Iowa 612, 232 N.W. 477 (1930).

In conclusion, a county's home rule power under Iowa Const. art. III, § 39A does not authorize a county ordinance creating local boating registrations, fishing licenses, hunting licenses or habitat stamps and imposing fees. Such an ordinance would

exceed county home rule power because the General Assembly has enacted statewide license and fee requirements which preempt the subject matter.

Sincerely,

Michael H Smith

MICHAEL H. SMITH
Assistant Attorney General

MHS:rcp

MOTOR VEHICLES: Road Maintenance Equipment. Iowa Code § 321.453. The exemption of road maintenance equipment from size, weight, and load restrictions in chapter 321 extends to equipment specifically designed for highway maintenance, although that need not be its sole or only use. The exemption applies when the equipment is being used for highway maintenance or some other use reasonably connected to its maintenance function. The exemption does not apply to standard, unmodified dump trucks. (Krogmeier to Rensink, 5-25-90) #90-5-4(L)

May 25, 1990

Mr. Darrel Rensink, Director
Iowa Department of Transportation
800 Lincoln Way
Ames, IA 50010

Dear Mr. Rensink:

You have requested an opinion of the Attorney General in response to the following questions:

1. What is meant by the statutory term "road maintenance equipment" as used in Iowa Code section 321.453? Does it mean "equipment designed for road maintenance purposes" or "equipment actually being used to maintain roads"?

2. Does the term "road maintenance equipment" include trucks carrying gravel or other materials to locations where highway maintenance is being conducted?

The pertinent part of Iowa Code § 321.453 to which you are referring reads as follows:

> The provisions of this chapter governing size, weight, and load do not apply to fire apparatus, to road maintenance equipment owned by or under lease to any state or local authority,. . . .

(Iowa Code § 321.453, emphasis added).

The above language "road maintenance equipment" was added to the Code in 1982. The specific language has not been interpreted or defined by the Iowa Supreme Court and is not defined anywhere else in chapter 321. Therefore, it is necessary that any court interpreting the phrase would need to engage in statutory construction. Willis v. City of Des Moines, 357 N.W.2d 567, 570 (Iowa 1984). The ultimate goal of statutory construction and interpretation is to ascertain and give effect to the intention of the legislature. A reasonable interpretation that will best effect the purpose of the statute and avoid an absurd result is

sought. Harden v. State, 434 N.W.2d 881, 884 (Iowa 1989). In interpreting a statute, other pertinent statutes are to be considered. Statutes relating to the same subject matter must be considered in light of their common purpose. State v. Rich, 305 N.W.2d 739, 745 (Iowa 1981).

Vehicle length limitations are enacted to promote public safety and welfare by keeping the highways safe for other motorists. State ex rel. Turner v. United-Buckingham Freight Lines, Inc., 211 N.W.2d 288, 290 (Iowa 1973). Motor vehicle width limitations are intended to make travel upon the highways as safe as can reasonably be made consistent with efficient highway use. Wood Brothers Thresher Co. v. Eicher, 231 Iowa 550, 560, 1 N.W.2d 655, 660 (Iowa 1942). Vehicle load and weight limitations are enacted to promote and protect public safety, facilitate highway maintenance, and preserve highways. State v. Sands, 280 N.W.2d 370, 371 (Iowa 1979). See also State v. Wehde, 258 N.W.2d 347, 352 (Iowa 1977). Since section 321.453 is an exemption statute it must be strictly construed against the one claiming exemption. State v. Ricke, 160 N.W.2d 499, 500-501 (Iowa 1968).

A prior exemption in section 321.453 for "road machinery" was construed by the Iowa Supreme Court in State v. Ricke, 160 N.W.2d 499, 500-501 (Iowa 1968), and in State v. McDonald, 197 N.W.2d 573 (1972). While the current language in section 321.453 of "road maintenance equipment" differs somewhat from the language interpreted in these cases, we find these previous cases helpful in interpreting the current statute.

In order to answer your first question and determine what the term "road maintenance equipment" actually means, we believe that State v. McDonald, 197 N.W.2d 573 (Iowa 1972) is on point. In State v. McDonald, the court stated:

> . . . the State, via its highway commission, contends 'road machinery' should be held to mean special equipment designed for road work, either construction or maintenance, while being so used at that time for those purposes at or in close proximity to the site of the road work.
>
> It is to us evident this definition, in actual applications, would be so restrictive as to be unreasonable. We cannot say the legislature intended any such result. See State v. Guardsmark, Inc., 190 N.W.2d 397, 400 (Iowa). In other words the State inceptionally argues, 'equipment specially designed for highway construction or maintenance' should signify

> machinery designed exclusively for road work. But there is little or no such equipment available on the market today. Even large mobile concrete paving equipment may conceivably be used for construction of airport runways and other like projects.

197 N.W.2d at 574.

With this in mind, we think that a court would determine that the exemption language in section 321.453 for road maintenance equipment would apply to equipment that is designed and manufactured in such a way that it can be used for highway maintenance purposes, although that may not be its exclusive or sole use.

In answering the second part of your first question of whether the term road maintenance equipment means "equipment actually being used to maintain roads," we again look at the previous statute construed in State v. McDonald. The statute construed in State v. McDonald contained additional language concerning the use of the road machinery not present in current section 321.453. That language limited the "road machinery" exemption to times when the road machinery was "temporarily moved upon a highway." State v. McDonald, 197 N.W.2d 573, 574, citing Iowa Code § 321.453 (1971). There is no such restriction in the road maintenance equipment exemption in current section 321.453. Therefore, we are of the opinion that a court would not interpret the current exemption to only be available when such equipment was in actual operation in road maintenance. This conclusion raises another question that could create absurd results, i.e., if there is no requirement that the equipment be in actual operation performing its intended maintenance function, then is the equipment exempt from the vehicle size, weight and load limits at any time when operating on the highways of Iowa? We think not. Such an interpretation would result in a motor grader being operated on the highway to transport passengers on shopping trips. We do not believe this was the legislative intent in adopting § 321.453. We conclude that the exemption only applies when the equipment is actually being used to maintain roads or some other use reasonably connected to its intended maintenance function.

In answering your second question, we are of the opinion that a court would not construe the road maintenance exemption in section 321.453 to include standard, unmodified dump trucks carrying gravel or other materials to locations that are involved in highway maintenance or construction. This specific question was addressed in State v. Ricke, cited above. There the Supreme Court stated:

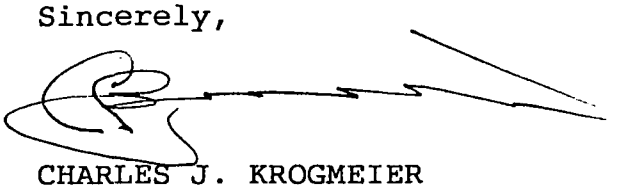
> Defendants claimed and the trial court held that dump trucks owned by the county and used to haul gravel and crushed rock were 'road machinery' and consequently exempt from compliance with the load limitations otherwise applicable. We disagree.
>
> * * *
>
> Section 321.453 refers to 'road machinery.' Nothing is said about road building or maintenance equipment. No mention is made of general purpose trucks used for maintenance of roads. We think the words 'road machinery' mean special equipment designed for road work either construction or maintenance. Dump trucks may be and are widely used in hauling material for road work. That fact does not convert a dump truck into 'road machinery.' If it did, it might exempt from the operation of the law every truck used or employed by a contractor to haul material to a road construction site. Dump trucks are used for many different purposes. There is nothing in the record before us to indicate that the trucks involved here were any different from others used for general hauling purposes.

160 N.W.2d at 500-501.

Taken together, State v. McDonald and State v. Ricke lead us to the conclusion that, in order for a dump truck to be exempt within the road maintenance equipment exemption in the current law, the dump truck has to be modified or have some special equipment attached to it that makes it the type of equipment designed for highway maintenance work, although that may not be its exclusive use. However, the extent of modification or adaptation that would have to take place in order to qualify as road maintenance equipment is essentially a factual question. The function of an opinion of the Attorney General is to decide a specific question of law or statutory construction; it cannot resolve issues which are dependent upon factual matters. 1972 Op.Att'yGen. 686. An opinion is intended to resolve a question of state law by the use of statutory construction or legal research. If resolution of a question is dependent on factors other than legal issues, it must be resolved by other entities as provided by law.

In summary, we are of the opinion that the exemption in § 321.453 for road maintenance equipment is for equipment that is designed and manufactured in such a way that it can be used for highway maintenance purposes. The equipment need not be in use as road maintenance equipment to qualify for the exemption, however, its use must have a reasonable connection to its maintenance function. Finally, we are of the opinion that standard, unmodified dump trucks do not qualify for the exemption.

Sincerely,



CHARLES J. KROGMEIER
Deputy Attorney General

/km

LABOR, DIVISION OF, STATUTORY CONSTRUCTION: Iowa Code § 92.17 (1989). Clear meaning of statute and application of rules of statutory construction yield interpretation that nonparental employers are prohibited from hiring persons under the age of fourteen for full-time or part-time seed production work such as detasseling. (Donner to Meier, 5-25-90) #90-5-3(L)

May 25, 1990

Mr. Allen J. Meier
Commissioner, Division of Labor
Department of Employment Services
1000 East Grand Avenue
L O C A L

Dear Commissioner Meier:

You have requested an Attorney General's opinion regarding the construction of Iowa Code section 92.17, subsection 3 (1989). Specifically, your question is, "Whether, under Iowa Code Chapter 92 and the administrative rules promulgated thereunder, a minor must be fourteen years of age or older to detassel corn in Iowa?" We conclude that the answer is "yes."

As you observed, Iowa Code chapter 92, entitled "Child Labor," governs when and where minors may work in the state of Iowa. Sections 92.1 through 92.8 in particular specify permitted occupations and non-permitted occupations for minors of varying ages. Exceptions to these limitations appear in § 92.17:

> Nothing in this chapter shall be construed to prohibit: . . .
>
> 3. Work in the production of seed, limited to removal of off-type plants, corn tassels and hand-pollinating during the months of June, July and August by persons fourteen years of age or over, and part-time work in agriculture, not including migratory labor.

You are, in substance, asking whether the latter portion of the subsection, "part-time work in agriculture, not including migratory labor," which does not contain any age qualifications, can be construed to allow part-time detasseling by persons under age fourteen.

In examining statutory provisions, the usual and ordinary meaning is to be given to the language. Iowa Code § 4.1(2) (1989); Welp v. Iowa Dept. of Revenue, 333 N.W.2d 481 (Iowa 1983). In this instance, grammatical construction provides two exemptions in the subsection. The first is for work in the production of seed, limited by the parenthetical to work

involving "removal of off-type plants, corn tassels and hand pollinating during the months of June, July and August by persons fourteen years of age or over." The second is for part-time work in agriculture, not including migratory labor. The exclusion of those under fourteen from these seed production activities is quite clear. In this context, the reference to permissible part-time agricultural work appears to not include "seed production." With this apparently clear and plain language, normally statutory construction is not employed. Id.; Casteel v. Iowa Dept. of Transportation, 395 N.W.2d 353 (Iowa 1986).

However, even if it is assumed that there is an ambiguity created in prohibiting those under fourteen from full-time "seed production" work but permitting part-time "work in agriculture," statutory construction also leads to the interpretation that persons under fourteen cannot perform "seed production" work, either full-time or part-time.

The function of statutory construction is to examine the language employed and the object to be accomplished in order to arrive at an interpretation that will effect the intended purpose. Iowa Code § 4.6 (1989); Iowa Federation of Labor, AFL-CIO v. Iowa Dept. of Job Service, 427 N.W.2d 443 (Iowa 1988); Havill v. Iowa Dept. of Job Service, 423 N.W.2d 184 (Iowa 1988). Words and spirit are considered to yield a sensible, workable, practical and logical construction, and to avoid absurdity. Harden v. State, 434 N.W.2d 881 (Iowa 1989); Emmetsburg Ready Mix Co. v. Norris, 362 N.W.2d 498 (Iowa 1985). Consequences of proposed interpretations must also be considered. State ex rel. Hager v. Iowa National Mutual Ins. Co., 430 N.W.2d 420 (Iowa 1988); Probasco v. Iowa Civil Rights Comm'n., 420 N.W.2d 432 (Iowa 1988).

To interpret the second portion of subsection 3 to permit part-time seed production work by those under fourteen would offend the words and spirit of the very specific instances under which minors are allowed to perform seed production work. The most workable and logical construction, taken in the context of the chapter's purpose of protecting minors from potentially harmful or exploitative workplaces, is that only minors age fourteen and over may perform seed production work.

The doctrine of "ejusdem generis" also can be applied -- a specific provision of a statute will control over a more general provision. Iowa Code § 4.7 (1989); Metier v. Cooper Transport Co., Inc., 378 N.W.2d 907 (Iowa 1985); Goergen v. State Tax Comm'n, 165 N.W.2d 782 (Iowa 1969). The limitations on those who may perform seed production work is more specific than the language permitting part-time "agricultural" work, and thus will control.

Finally, the order of enactment also confirms that the proper and intended interpretation of § 92.17(3) is to allow only those minors fourteen and over to work in seed production. The most recent enactment controls in cases of ambiguity. Iowa Code § 4.8; Doe v. Ray, 251 N.W.2d 496 (Iowa 1977). The original language of § 92.17(3), enacted in 1970, exempted only "[p]art-time work in agriculture, not including migratory labor." Iowa Code (1971). The language permitting work in seed production was added by Iowa Acts 1971, ch. 110, §1. The timing and placement of the amendment exhibit an intent to create an exclusive exemption relating to permitted seed production work by minors.

For the above-stated reasons, we conclude that nonparental employers are prohibited from hiring persons under the age of fourteen for full-time or part-time seed production work such as detasseling.

Sincerely,

Lynette A F Donner
LYNETTE A. F. DONNER
Assistant Attorney General

LAFD:bac

COUNTIES; Patient Payment: Iowa Code §§ 230.20, 230.20(6), 230.25,(1989); 441 Iowa Admin. Code § 79.6(2). For the limited number of Medicare and Medicaid eligible persons who receive services from a state mental health institution, a county may only recover costs from the patient for deductible or non-covered services. (Morgan to Saur, Fayette County Attorney, 5-11-90) #90-5-2(L)

May 11, 1990

Mr. W. Wayne Saur
Fayette County Attorney
120 East Charles
Oelwein, IA 50662

Dear Mr. Saur:

You have requested our review of an unresolved issue of personal liability of persons who receive care at a State mental health institute. From the materials you provide it is apparent that an issue has arisen regarding the State's representation to Medicare that it accepts payment in full from Medicare in light of the historic statutory payment responsibilities of counties and patients for mental health institute care.

Chapter 230 of the Iowa Code describes complex joint state, county, and patient responsibilities for payment for mental health institute care. Section 230.20 sets out the procedure for establishing the county's portion of that liability. Of the total costs for care within the institution the statute describes those units and functions to be charged to the counties with remaining costs paid by the state. Iowa Code § 230.20 (1989).

The statute states that the:

> superintendent shall certify to the director of revenue and finance the billings to each county for services provided to patients chargeable to the county during the preceding calendar quarter. . . . [A] county billing shall be decreased by an amount equal to reimbursement by a third party payor . . . .

The statute establishing the charge clearly anticipates a reduction of charges for patients by any amounts recovered from Medicare or Medicaid.

> All or any reasonable portion of the charges incurred for services provided to a patient, to the most recent date for which the charges have been computed, may be paid at any time by the patient or by any other person on the patient's behalf. Any payment so made, and any federal financial assistance received pursuant to Title XVIII or XIX of the federal Social Security Act for services rendered to a patient, shall be credited against the patient's account and, if the charges so paid have previously been billed to a county, reflected in the mental health institute's next general statement to that county.

Iowa Code § 230.20(6).

As a condition of participating in Part A of the Medicare program, a hospital must enter into a participation agreement. One condition of the participation agreement is the acceptance of Medicare's payment as payment in full. All four mental health units are participating facilities or are treated like participating facilities[1] in the Part A Medicare program and have agreed to accept the Medicare payment as payment in full.

Participation in Medicare is anticipated in the Code by § 230.20(6), which specifically names Title XVIII of the Social Security Act as a source of payment to offset amounts contributed by the county. The statute also sets out a right of recovery by the County Board of Supervisors against the patient for funds paid for care. Iowa Code § 230.25. The liability of an individual patient is limited to 100% of the cost of care and treatment at the mental health institute for 120 days regardless of the frequency or duration of admissions. After the 120 day full cost is reached, the patient is liable for $213/month for services provided by the state and county.

In order for the state to receive Medicare funds, it must accept the Medicare payment as payment in full. The same principle is true for the Medicaid program. Rules of the Department for Medicaid require providers (including the mental health institutes) to accept the Medicaid payment as payment in full. 441 Iowa Admin. Code § 79.6(2). However very few clients at the mental health units are eligible for Medicaid or Medicare

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[1] The Cherokee Mental Health Institute accepts an assignment of every Medicare eligible client and must not charge the client for more than Medicare pays.

reimbursement. Medicaid does not pay for any services provided in an institution for mental diseases for persons between the ages of 22 and 64. Medicare only pays for people who are aged, blind or disabled.

After a review of the materials you provided, the State statutes, policies of the Department and of Medicare law, we conclude the following:

1. The General Assembly clearly anticipated that the Department would apply for and receive Medicare and Medicaid funds for State institutions. In addition to § 230.20(6), the Department is authorized to seek Federal participation under the Social Security Act by § 234.6(1). Under the introduction to that section, the Department is admonished to develop the rules and policies which are necessary for the receipt of Federal funds.

2. The General Assembly also clearly anticipated that counties would share with the state the cost of operation of the mental health institutes. To the extent that costs are shared, the county is a partner or joint provider in operating the mental health institutes.

If we step back from internal state relationships and examine this question from the Federal government's point of view, the United States does not distinguish between funds paid by counties or by the state in meeting hospital costs.

3. Counties have enjoyed the pro rata reduction of what were previously 100% state-county expenses at the mental health units by participation in the cost of care since the State joined Medicare in the late 1970's.

The right of recovery by the county is couched in directory rather than mandatory language and is more correctly understood as an obligation of a county to make an examination of a patient's ability to pay. Iowa Code § 230.25. In the same way that the County Attorney does not have to prosecute every case referred, the Board of Supervisors does not have to collect from every patient eligible for care at the mental health institutes.

By requiring the Department to offset charges to counties to the extent that Federal funds are obtained, the statute limits the discretion of the Supervisors in determining which payments to recover. The county cannot act as an agent of its partner-provider, the mental health institute, and charge the patient

when the hospital would be prohibited from doing so. This would amount to the state acting indirectly (through the county) to accomplish what it could not do directly.

Sincerely,

Candy Morgan

CANDY MORGAN
Assistant Attorney General

CM:rm

TAXATION: Property Tax - Right to Refund or Compromise. Iowa Code §§ 331.301(13) (1989 Supp.), 441.19, 441.37, 441.38, 445.16, 445.60 (1989). Property tax paid on property assessed after the taxpayer erroneously listed the property pursuant to § 441.19 is not refundable under § 445.60 as being a tax "erroneously or illegally paid." The board of supervisors has no authority to compromise the tax paid on property which the taxpayer erroneously listed. The board of supervisors cannot waive the penalty or interest on the tax. (Mason to Short, Lee County Attorney, 5-10-90) #90-5-1(L)

May 10, 1990

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

Dear Mr. Short:

You have requested an opinion of the Attorney General regarding some issues arising from a situation where the same property (machinery and equipment) was listed and assessed, for property tax purposes, to two entities and both paid property tax thereon.

The years at issue are the 1982 and 1983 assessment years. The machinery and equipment were part of a manufacturing plant and, therefore, assessed and taxed as real property under Iowa Code § 427A.1(1)(e). The machinery and equipment were owned by Company A and the land was owned by Company B. The land, machinery and equipment were leased to Company C.

In the 1982 and 1983 assessment years, the county assessor received a report from Company A which listed certain machinery and equipment located at Company C in Company A's name. In the 1982 and 1983 assessment years, Company B erroneously reported that it was the owner of what now appears to be the same machinery and equipment reported by Company A. Neither taxpayer challenged its assessment with the local board of review pursuant to Iowa Code § 441.37. The taxes on the property have been paid by both Company A and Company B.

The first question you ask is whether the assessment of the machinery and equipment under the name of Company B was an "illegal or erroneous assessment." We understand this question to be asking whether the taxes paid were "erroneously or illegally paid" within the meaning of that phrase as used in Iowa Code § 445.60. Based on the following discussion, it is our opinion that the taxes were not "erroneously or illegally paid" within

the meaning of § 445.60. Therefore, Company B cannot receive a refund of the taxes it paid on the machinery and equipment owned by Company A,[1] because there is no right to a refund of voluntarily paid property taxes unless the refund is authorized by § 445.60. 1984 Op.Att'yGen. 137; Slimmer v. Chickasaw County, 140 Iowa 448, 118 N.W. 779, 780 (1908); The Dubuque & Sioux City R. Co. v. The Board of Supervisors of Webster Co., 40 Iowa 16, 17 (1874).

Iowa Code §§ 441.37 and 441.38 provide an administrative remedy for property owners or aggrieved taxpayers who are dissatisfied with an assessment. Section 441.37(1) requires that a protest be filed "with the board of review on or after April 16, to and including May 5, of the year of the assessment." The grounds upon which such a protest may be filed include that "the property is not assessable" and that "there is an error in the assessment."[2] Section 441.38 provides for an appeal to the district court from the action of the board of review. If the administrative remedy in § 441.37 should have been exhausted but was not, the taxpayer cannot receive a refund. Farmers Grain Dealers Ass'n v. Woodward, 334 N.W.2d 295, 300 (Iowa 1983).

The inclusion of nonexistent property in an assessment constitutes an "error" within the meaning of § 441.37(1)(d). White v. Board of Review of Polk County, 244 N.W.2d 765, 769 (Iowa 1976). Also, assessing property to the wrong person does not cause the tax to be "erroneously or illegally exacted or paid" so as to authorize a refund under § 445.60[3], where the administrative procedures in §§ 441.37 and 441.38 were not followed. See 1984 Op.Att'yGen. 137.

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[1]Because of our conclusion that no refund is allowed, we do not decide whether Company B has timely requested such a refund.

[2]Section 441.37(2) allows protests based on clerical or mathematical errors to be filed for previous years for which taxes have not been fully paid or otherwise legally discharged. It states, however, that the "board shall not correct an error resulting from a property owner's or taxpayer's inaccuracy in reporting or failure to comply with section 441.19 [requiring persons to make a complete listing of taxable property]." This provision was enacted in 1986 and would not be applicable, in any event, to the 1982 and 1983 assessment years. 1986 Iowa Acts, ch. 1028.

[3]Section 445.60 no longer contains the word "exacted." That deletion has no effect on our conclusion.

As with the factual situation involved in the 1984 Attorney General Opinion cited above, no question has been raised here as to whether the listed machinery and equipment were subject to tax. Therefore, the assessment was not without statutory authority. Duda v. Hastings, 389 N.W.2d 404, 406 (Iowa 1986); 1984 Op.Att'yGen. 137. Neither was it done by officers having no authority to levy it. A tax is "erroneously or illegally exacted or paid" only where it is levied (1) without statutory authority or (2) on property not subject to tax or (3) by some officer having no authority to levy it, or is in some other similar respect illegal. Jewett Realty Co. v. Board of Supervisors of Polk County, 33 N.W.2d 377, 380 (Iowa 1948); Griswold Land & Credit Co. v. County of Calhoun, 198 Iowa 1240, 201 N.W. 11, 13 (1924).

In Franklin Motor Company v. Alber, 196 Iowa 88, 194 N.W. 297 (1923), a property owner mistakenly included more than he had title to when he listed his personal property for taxation. Taxes were levied thereon, and the property owner acquiesced therein without protest or appeal until the mistake was discovered over a year after such listing. The Court held that the tax levied on the assessment could not be enjoined as being illegal and void. 194 N.W. at 299. The Court stated:

> It stands admitted that, being duly called upon to list its personal property subject to taxation, the plaintiff voluntarily listed each and all of the several items. This list was accepted and acted upon as correct by the assessor and by the board of equalization without objection, protest, or appeal by the plaintiff. Taxes for the current year were levied thereon, and more than a year had elapsed when plaintiff first discovered the alleged mistake; not the mistake of the assessor, or of the board of equalization, or of the officers levying the taxes, but its own, in having given in for taxation more than the law required at its hands.
>
> To hold that an assessment so made is illegal and void, and subject to be enjoined, would seem to involve a manifest absurdity. It has no parallel in a case where an assessment is arbitrarily made without the knowledge or consent of the alleged property owner. While the assessor is charged with the duty to discover and list for taxation all taxable property within his district, the statute clearly contemplates that the property owner is charged with a corresponding duty to

> "list for the assessor all the property subject to taxation in the state, of which he is the owner or has control of." Code, § 1312. And when the assessor in this instance called upon appellant's agent for this purpose, and the latter voluntarily made and delivered the list, the assessor, as well as the board of equalization, were justified in accepting the list so made and making the assessment accordingly. Surely it cannot be said that these officials had no jurisdiction or authority to treat the list so made as a verity. . . . [N]o claim of exemption or nonownership being made, it was no part of the business of the assessor or board to . . . ascertain whether by any mistake of law or fact they included any property on which the owner was not liable to taxation.
>
> . . . . Indeed, the irregularity or mistake, if any there was, is chargeable wholly to the plaintiff itself, and there is nothing unjust or inequitable in denying its demand that the court relieve it from the consequences.

194 N.W. at 298-99.

In Slimmer v. Chickasaw County, 140 Iowa 448, 118 N.W. 779, 781 (1908), the Court stated:

> Where one voluntarily hands in to the assessor a list of property which he represents is liable to assessment, and thereafter pays the taxes levied which are used and expended by the county, he cannot thereafter change front and say that the property was not assessable for any amount. . . . Section 1417 [allowing a refund of a tax "erroneously exacted or paid"] does not cover such a case. . . . On the theory of an estoppel the case is not difficult of solution.

Iowa Code § 445.60 was not intended to protect a taxpayer against errors or mistakes of law committed by himself, but against errors and illegalities committed by the officials authorized to assess and levy taxes upon property. Kehe v. Blackhawk County, 101 N.W. 281, 282 (Iowa 1904); Dubuque & Sioux City R. Co. v. Board of Supervisors of Webster Co., 40 Iowa 16, 18 (1874).

Based on the above discussion, we conclude that Company B is not entitled to a refund of tax it paid on property it listed which it did not actually own.

Your second question is whether there is any authority to compromise the taxes after they have been paid under the circumstances described in your request. The answer to this question is "no," the paid taxes may not now be compromised.

"The general rule is that the power to tax does not include the power to remit or compromise taxes. Where taxes are legally assessed, the taxing authority is without power to compromise, release or abate them except as specifically authorized by statute." 1972 Op.Att'yGen. 398, 399. Machinery and equipment used in a manufacturing establishment are taxed as real property. Iowa Code § 427A.1(1)(e). Iowa Code § 445.16 provides for the compromise of real property taxes under certain conditions. Among those conditions is the requirement that the tax be delinquent. Also, the property must be sold at a "scavenger" sale before boards of supervisors may compromise the tax. 1988 Op.Att'yGen. 93; 1972 Op.Att'yGen. 29. Because the tax in question has been paid and is not delinquent, the conditions set forth in § 445.16 can never be satisfied. Therefore, the tax cannot be compromised.

Your final question is whether the county may forgive any of the penalty or interest paid by Company B. The board of supervisors may waive a tax penalty or interest if a "clerical error" resulted in the penalty or interest. Iowa Code § 331.301 (13) (1989 Supp.). This authority to waive penalty or interest was enacted in 1989. 1989 Iowa Acts, ch. 101. It would not be applicable to taxes paid before its enactment. Moreover, it is our opinion that "clerical error" refers to an error by the taxing officials rather than an error by the taxpayer. This is supported by the fact that, for previous years, the board of review "shall not correct an error resulting from a property owner's or taxpayer's inaccuracy in reporting." Iowa Code § 441.37(2). For the same reasons discussed in response to your first question as to why Company B cannot receive a refund of the tax under § 445.60, it also cannot receive a refund under § 445.60 of the interest or penalty paid. In the absence of statutory authority, the penalty and interest on property taxes cannot be remitted. See 1968 Op.Att'yGen. 851, 857. There is no

statute authorizing the county to forgive the penalty or interest under the circumstances you described.

Sincerely,

Marcia Mason

Marcia Mason
Assistant Attorney General

MM:cml

SCHOOLS; CONSTITUTIONAL LAW: Limit on interscholastic participation with open enrollment transfer. Iowa Code Supp. § 282.18 (1989), 1990 Iowa Acts, Senate File 2306, § 1. The restriction on athletic participation placed upon students in grades ten (10) through twelve (12) who transfer to a non-resident school district under open enrollment is not violative of the equal protection or due process clauses of the 14th Amendment. (Scase to Spenner, State Representative, 6-11-90) #90-6-2(L)

June 11, 1990

The Honorable Gregory A. Spenner
State Representative
1303 Haynes Court, #5
Mt. Pleasant, Iowa 52641

Dear Representative Spenner:

You have requested an opinion of the Attorney General addressing the constitutionality of the limitation on athletic participation placed on high school students who transfer school districts under Iowa Code § 282.18, open enrollment. Unnumbered paragraph nine (9) of Code § 282.18, as amended by 1990 Iowa Acts, Senate File 2306, § 1, provides as follows:

> A student who participates in open enrollment for purposes of attending a grade in grades ten (10) through twelve (12) in a school district other than the district of residence is not eligible to participate in interscholastic athletic contests and athletic competitions during the first year of enrollment under this section except for an interscholastic sport in which the district of residence and the other school district jointly participate or unless the sport in which the student wishes to participate is not offered in the district of residence. However, a pupil who has paid tuition and attended school pursuant to a mutual agreement between the two districts, in a district other than the pupil's district of residence for at least one school year prior to the effective date of this Act, shall be eligible to participate in interscholastic athletic contests and athletic competitions under this section, but only as a member of a team from the district that the student had attended.

Administrative Rules implementing this Code provision have been adopted by the Department of Education. See 281 Iowa Admin. Code 17.5 and 17.8(2) [filed emergency, effective May 25, 1990].

Specifically, you inquire "is the restriction on athletic participation on students in grades ten (10) through twelve (12) that transfer to a different school district unconstitutional? Does it make any difference that the same restriction is not placed on participation in any other extracurricular activity?"

We begin our analysis of these questions by noting that, while the Iowa courts have not ruled on the constitutionality of this or similar athletic eligibility transfer rules, several federal courts and other state courts have reviewed such rules. The constitutional claims most commonly raised to challenge such rules have been based upon the fourteenth amendment due process and equal protection clauses. Cf. In Re U.S. ex rel Missouri State Activities Assn., 682 F.2d 147 (8th Cir. 1982); Simkins v. South Dakota High School Activities Assn., 434 N.W.2d 367 (S.D. 1989); see 1 Rudd Education Law, § 3.09[4][a][i] (1989). We will, therefore, limit our discussion to consideration of these two constitutional provisions.

The athletic eligibility transfer rule addressed by the Eighth Circuit Court of Appeals in the Missouri State High School Activities Association case, cited above, was highly analogous to the statutory provision in question here. The Missouri rule also applied only to athletics, providing "[s]tudents who transfer for reasons other than promotion are ineligible for 365 days." In Re U.S. ex rel Missouri State High School Activities Assn., 682 F.2d at 149. Several exceptions to this rule were in place, "most importantly, transfers accompanied by a corresponding change of residence of the student's parents and transfers ordered by the board of education or made necessary by school reorganization or closing." Id. at 149-150 (footnote omitted). Similarly, the Iowa statutory provision is not applicable to student transfers resulting from a change of parental residence or any circumstance other than voluntary participation in Iowa's open enrollment program.

The Eighth Circuit prefaced its analysis of the Missouri rule by noting that "federal courts have uniformly upheld comparable rules governing transfers against challenges based on both the due process and equal protection clauses." 682 F.2d at 151 (citations omitted). The Court then addressed the complainants' equal protection argument, finding that the rule in question did not significantly impinge a student's right to freedom of association and was neither unduly under-inclusive nor over-inclusive. Id. at 151-152. Having found that no

fundamental rights were implicated by the rule, the court proceeded with application of the rational basis test and concluded that the rule was not violative of equal protection. As the court stated, "[a] rational basis clearly exists for believing that the danger of incurring the harms involved in transfers motivated by athletics and attempts to induce such transfers is greater than the danger of parallel harms in other areas." Id. at 152.

The Eighth Circuit also concluded that due process protections were not violated by the rule. While questioning whether the due process clause was even applicable to the transfer rule[1], the court held that the rule was not arbitrary and that notice and hearing provisions included in the Association's bylaws satisfied any procedural due process requirements. 682 F.2d at 153.

We believe that, given the strong similarity between the Iowa statutory provision and the Missouri rule, similar conclusions are appropriate here. The obvious purpose of Iowa's rule is the same as that recognized for the Missouri rule, "to prevent the evils associated with recruiting of high school athletics and transfers motivated by athletics." 682 F.2d at 152. Clearly this justification serves as a rationale basis for the rule. Additionally, assuming that the appeal provisions contained in the Department of Education's athletic eligibility rules are available to students found ineligible because of an open enrollment transfer, any procedural due process requirements

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[1]As the Eighth Circuit recognized:

> [T]he due process clause of the fourteenth amendment extends constitutional protection to those fundamental aspects of life, liberty, and property that rise to the level of a "legitimate claim of entitlement" but does not protect lesser interests or "mere expectations."
>
> . . . A student's interest in participating in a single year of interscholastic athletics amounts to a mere expectation rather than a constitutionally protected claim of entitlement. . . .[I]t falls outside of the protection of due process.

682 F.2d at 153, fn 8, quoting Walsh v. Louisiana High School of Athletic Assn., 616 F.2d 152, 159-60 (5th Cir. 1980), cert. denied, 449 U.S. 1124, 101 S.Ct. 939, 67 L.Ed.2d 109 (1981).

found applicable would be satisfied. See 281 Iowa Admin. Code 36.16 and 36.17 (due process and appeal procedures).

In summary, it is our conclusion that the restriction on athletic participation placed upon students in grades ten (10) through twelve (12) who transfer to a non-resident school district under open enrollment is not violative of the equal protection or due process clauses of the 14th Amendment.

Sincerely,

CHRISTIE J. SCASE
Assistant Attorney General

CJS:rd

WORKERS' COMPENSATION: Industrial Commissioner, sanction and penalty authority, Chapters 86 and 87, and section 86.8 The Code. An administrative proceeding, provided for by rule, to determine compliance with the workers' compensation statutes may be used by the Industrial Commissioner as a sanction where the statutes do not specify another penalty or sanction. Sanctions for a failure to obey an Industrial Commissioner' order from a compliance proceeding under rule 343 IAC 4.3 may be sought from the Insurance Commissioner or the district court. (Kelinson to Linquist, 6-8-90) #90-6-1(L)

June 8, 1990

Mr. David Linquist
Iowa Industrial Commissioner
Department of Employment Services
Division of Industrial Services
1000 E. Grand Avenue
L O C A L

Dear Commissioner Linquist:

You have requested an Attorney General's opinion concerning the enforcement authority of the Industrial Commissioner. Specifically you ask:

1. Does the Industrial Commissioner have sanction or penalty power other than that specifically authorized by statute (e.g., Iowa Code sections 85A.27, 85B.15, 86.8 and 86.13) or by rule (e.g., I.A.C. 343-4.36)? For example, could the Industrial Commissioner impose a sanction or penalty against an insurance carrier or employer for payment of weekly workers' compensation benefits at an incorrect rate or for a delay in payment of benefits (other than the penalty found in Iowa Code section 86.13)?

2. Are the compliance proceedings provided for in I.A.C. 343-4.3 limited to the specific proceedings authorized by statute, more specifically Iowa Code sections 86.10, 86.12, 97.1 and 87.14-87.19?

It is long established that the "Industrial Commissioner possesses such powers as are expressly granted, together with those arising from implications because necessary to the full exercise of the granted powers." Comingore v. Shenandoah Artificial Ice, 208 Iowa 430, 226 N.W. 124, 126 (1929). See also Brauer v. J.C. White Concrete Co., 115 N.W.2d 202, 204 (Iowa

1962); Traveler's Insurance Co. v. Sneddon, 249 Iowa 393, 86 N.W.2d 870 (1958). The express grant of powers is found in Iowa Code Chapters 85, 85A, 85B, 86 and 87. Administrative agencies, including the Industrial Commissioner, do "not possess common law or inherent powers, but only the powers which are conferred by statute." Foley v. Iowa Dep't of Transportation, 362 N.W.2d 208, 210 (Iowa 1985) quoting Franklin v. Iowa Dep't of Job Service, 277 N.W.2d 877, 881 (Iowa 1979).

It was the intent of the legislature to place the administration of the workers' compensation laws very largely in the Industrial Commissioner. Tebbs v. Denmark Light & Telephone Co., 230 Iowa 1173, 300 N.W. 328, 330 (1941). Thus, while the Commissioner's powers are purely statutory, Tischer v. City of Council Bluffs, 231 Iowa 1134, 3 N.W.2d 166, 173 (1942), a reviewing court "should not restrict the terms and provisions of the statute or the implied power incident to the exercise of his (commissioner's) jurisdiction." Sneddon, 249 Iowa at 395, 86 N.W.2d at 872; Comingore, 208 Iowa at 435, 226 N.W. at 129.

With reference to these general principles, your specific inquiry concerns sanction or penalty power other than as set out in the Code. It is of note that you have cited sections 85A.27, 85B.15, and 86.8 as specifically authorizing sanction or penalty power. None of these provisions directly provides for any sanction, as compared with section 86.13 which allows the Commissioner to award additional benefits as a penalty. Sections 85A.27 and 85B.15 simply give the Industrial Commissioner jurisdiction over the occupational disease and occupational hearing loss chapters, respectively. Section 86.8 sets forth the duties of the Commissioner without specifically granting a sanction or penalty power.

Implicit in the law is the Commissioner's ability to implement the statutes; and section 86.8(1) specifically imposes a duty to adopt and enforce rules necessary to that implementation. Rule 343 IAC 4.36, providing for the dismissal of a contested case for failure to comply with the Commissioner's rules or orders (a sanction generally effective only against claimants), or the closing of the record in a case, would be such a rule. Yet an administrative agency cannot use the device of rule making, and then enforcement of the rule, to change or add to the legislative enactment. Iowa Power & Light v. Iowa State Commerce Comm., 410 N.W.2d 236, 240 (Iowa 1987); Holland v. State, 115 N.W.2d 161, 162 (Iowa 1962).

You have provided an example, in which you ask if a sanction other than that provided in section 86.13 could be applied. Clearly an enhancement of benefits under the last paragraph of that section would be appropriate if, as in your example, there

was a delay in payment of benefits without reasonable or probable cause or excuse. Less clear, but arguable, is whether payment at an incorrect rate is a "delay in commencement . . . of benefits" possibly justifying a penalty. More important, you have not suggested what other sanction you might wish to impose.

The Industrial Commissioner has the authority to examine the books and records of parties subject to the workers' compensation laws under sections 86.8(4) and 86.10. Employers or insurance carriers are required to submit a "first report of injury" under section 86.11. Section 86.12 is a mechanism for the enforcement of the record inspection and reporting provisions. A civil penalty--payable to the second injury fund--may be levied by the Commissioner under this section and enforced in the district court if necessary. The provision of a civil penalty here legally implies that there is no authority implicit in the Commissioner's general grant of power for assessing such a penalty in other situations. As section 86.12 does not apply to your example, such penalty would not be available in that case.

Contempt is a possible sanction, but it does not appear that the Iowa Industrial Commissioner has a direct power of contempt, as do the workers' compensation administrators in some other jurisdictions. See Cal. Labor Code § 134 (West 1989); R.I. Gen. Laws § 28-30-1 (1986); and Tex. Rev. Civ. Stat. Ann. art. 8307, § 4(c) (Vernon Supp. 1990). This authority would have to be specifically provided for by statute or the state Constitution. See generally, B. Schwartz, Administrative Law, § 30 (1976). Specific authority to seek contempt in the district court is provided for with regard to subpoenas (section 17A.13(1)) and through the Attorney General with regard to bonds and notices for places of hazardous employment (section 87.19). A party subject to the workers' compensation statutes cannot be found in contempt of the Industrial Commissioner.

This begs the question of a compliance proceeding pursuant to rule 343 IAC 4.3, which is the subject of your second question. An order to appear before the Industrial Commissioner to determine a person or entity's compliance with the workers' compensation statutes under that rule is a form of sanction in itself. An order for compliance following hearing and potential enforcement of that order are further sanctions under the rule.

You ask whether proceedings under rule 4.3 are limited to enforcement of sections 86.10, 86.12, 87.1, and 87.14-87.19. It should be noted that issues concerning bonds and notices for hazardous employments under sections 87.16, .17, and .19 would not be addressed in a compliance proceeding under the rule as you suggest. Section 87.19 provides that upon a failure to respond to a demand for compliance from the Commissioner the Attorney

General is to initiate suit in the district court. Similarly, violations of sections 86.10 and 86.11 are to be addressed through the procedure of section 86.12 and the compliance proceeding of the rule would not be used.

Rule 4.3 does allow the Industrial Commissioner, on his own motion and upon reasonable belief, to direct a person or entity to appear for a hearing to determine whether or not the person or entity has been in compliance with the workers' compensation law. The rule further provides that upon a finding of non-compliance, the Commissioner may order compliance within a specified time and under specified circumstances. As mentioned, there are specific enforcement procedures for failures to comply with sections 86.10, .11, 87.16 and .17. Also, sections 87.14 and .15 contain their own sanction and penalty provisions. These specific procedures would operate as opposed to the general procedure provided for in the rule. A rule 4.3 proceeding may be invoked where a statute or rule creates an obligation for which the Industrial Commissioner has no other specified enforcement procedure.

As an example, section 86.13 requires, in the first paragraph, that employers file a notice of the commencement of benefits with the Commissioner. A hearing to determine compliance with this provision could be brought under the rule. The Commissioner is authorized to enter orders concerning the payment of benefits and the posting of bonds under section 85.21. Again, compliance with such orders could be reviewed under rule 4.3.

All instances where a determination of compliance with the workers' compensation laws under rule 4.3 may be undertaken by the Commissioner cannot be listed. The general guideline is that if the statute or rule, or order entered pursuant to the statute or rule, imposes a specific obligation on a person or entity, and the statue or rule does not provide a specific sanction or penalty for a failure to comply, then the Industrial Commissioner has implicit authority to order compliance pursuant to the procedure established in rule 4.3.

This should be contrasted with the case of Stice v. Consolidated Indiana Coal Co., 228 Iowa 1031, 291 N.W. 452 (1940). The Supreme Court held that the Industrial Commissioner was without jurisdiction to have a rehearing of a deputy's decision in a case where the Commissioner had delegated his power to hear the case to the deputy. Such a procedure was not provided for in the statute. The Court concluded it should not inject a rehearing procedure by judicial construction, where to do so would defeat one of the primary purposes of the

legislation--an efficient and speedy tribunal to determine and award workers' compensation. Id., 228 Iowa at 1036, 291 N.W. at 456-57.

There is no specific statutory authority for a "compliance proceeding" in Chapter 86. But section 86.8(1) grants the authority to adopt rules necessary to implement the law. Contested cases and hearing procedures are provided for in sections 86.14, et. seq. Rule 4.3 may be reasonably construed to be necessary to the implementation of the statutes by providing a compliance mechanism when the statues do not. Further, this is consistent with the legislative intent of delegating to the Industrial Commissioner the administration of the workers' compensation laws. See Tebbs, 230 Iowa at 1175, 300 N.W. at 330.

In fashioning an order for compliance following a hearing under rule 4.3 the Commissioner cannot create substantive rights or extend substantive provisions beyond the scope of the underlying statutes. Quaker Oats Co. v. Cedar Rapids Human Rights Commission, 268 N.W.2d 862, 868 (Iowa 1978). In Quaker Oats the Supreme Court found that Chapter 601A, Civil Rights Commission, did not authorize the agency to grant class action relief. Id. Any order entered under the rule by the Commissioner should include a finding of non-compliance, if appropriate, and a direction for compliance with the particular statute, if warranted, directed to the specific party or parties who had notice of and participated in the proceeding.

Returning to the first question of "other" sanctions or penalties, a compliance proceeding under rule 4.3 can, as discussed, lead to an order for compliance. If the offending entity is covered or regulated by the Insurance Division of the Department of Commerce, the Industrial Commissioner may request action by that agency if there is non-compliance with the Commissioner's order. See Iowa Code sections 87.1, 87.4 and 87.20.

The rule also provides for the filing of the order with the appropriate district court. Section 86.42 of the Code allows for the filing of a final order or decision of the Commissioner with the district court. The court then shall render a decree or judgment that has the same effect as though rendered in a suit duly heard and determined by the court. This procedure under section 86.42 is available to "any party in interest." With regard to a compliance proceeding under rule 4.3 the Industrial Commissioner would be a party in interest. See Iowa Code section 17A.2(5) defining "party" under the Administrative Procedure Act to mean "each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party." Enforcement of such a decree or judgment would then be

by the usual means in civil cases, which could include contempt under Chapter 665 (see Iowa Rule of Civil Procedure 330, stating that violation of any temporary or permanent injunction is punishable as contempt).

Thus, while the Industrial Commissioner does not have direct authority to cite for contempt, through the procedure of a compliance proceeding under rule 4.3, and obtaining a judicial decree or judgment based on that proceeding pursuant to section 86.42, the Commissioner would be able to seek contempt as a sanction or penalty for the failure of employers or insurance carriers to comply with the workers' compensation laws.

In summary, the Industrial Commissioner has a limited sanction power in addition to the specific ones mentioned. The ability to hold a compliance proceeding under rule 4.3 is a sanction in itself and may be used where the statute does not otherwise provide a specific procedure for a particular transgression. Through the two-step process of a compliance proceeding and then referral to either the Insurance Commissioner or the district court the Industrial Commissioner may seek further sanctions. The actual imposition of these sanctions, however, would be at the discretion of the Insurance Commissioner or the court, as appropriate.

Very truly yours,

CRAIG KELINSON
Special Assistant Attorney General

CK:mj

HIGHWAYS: Condemnation of right of way for secondary roads; loss of access. Iowa Code §§ 306.19, 306.27, 306.28, 306.34. A county board of supervisors must pay the damages determined by appraisers appointed under § 306.28 or dismiss the chapter 306 proceedings. The board has no authority to reduce the amount of damages. Loss of a driveway is compensable under § 306.19 if the person is deprived of reasonable ingress and egress to the property. (Olson to Olesen, Adair County Attorney, 7-11-90) #90-7-7(L)

July 11, 1990

Willard W. Olesen
Adair County Attorney
222 Public Square
Greenfield, IA 50849

Dear Mr. Olesen:

You have requested an opinion of the Attorney General concerning a county's condemnation of right of way for secondary road purposes under Iowa Code chapter 306. The specific questions are set out and discussed below.

I

When appraisers have been appointed under § 306.28, is the board of supervisors required to either accept the damages determined by the appraisers or dismiss the proceedings, or may the board determine the damages to be awarded?

Your question requires examination of several sections of chapter 306. When interpreting a statute, all portions of the statute are to be considered, and when more than one statute is pertinent, the statutes should be considered together in an attempt to harmonize them. Harden v. State, 434 N.W.2d 881, 884 (Iowa 1989).

Section 306.27 provides that a county may conduct condemnation proceedings either under chapter 472 (eminent domain) or chapter 306, sections 306.27 - 306.37. By establishing an additional procedure under chapter 306, ". . . the legislature could reasonably have desired to establish an expedited condemnation procedure to aid in the efficient and economical establishment and alteration by the local authority of this important local road system." Cahill v. Cedar County, Iowa, 367 F. Supp. 39, 42 (1973).

If the board is unable to reach an agreement with the landowner to acquire right-of-way for the secondary road improvement, section 306.28 provides, ". . . three freeholders

shall be selected to appraise the damages consequent on the taking of the right-of-way. The board of supervisors shall select one of said appraisers. The owner or owners of the land sought to be taken shall select one of said appraisers. The two appraisers so selected shall choose the third appraiser." After proper notice has been served pursuant to sections 306.29 and 306.30, the appraisers, pursuant to section 306.31, assess the damages and make a written report to the board of supervisors. It is the effect of the appraisers' report which you question.

Sections 306.32 and 306.33 provide that the board must hold a hearing on objections to the proposed road change or assessment of damages of any owner, mortgagee of record, and the actual occupant of such land. If the objections to the proposed change are sustained the proceedings shall be dismissed unless the board finds that the objections may be avoided by a change of plans.

"When objections to the proposed change are overruled, the board shall proceed to determine the damages to be awarded to each claimant. If the damages finally awarded are, in the opinion of the board, excessive, the proceedings shall be dismissed; if not excessive, the board may, by proper order, establish such proposed change." Iowa Code § 306.34 (emphasis added)

If a claimant for damages is dissatisfied with the amount awarded, the claimant may appeal to the district court in the manner and time for taking appeals from orders establishing highways generally. Iowa Code § 306.35. See sections 472.18 - 472.21. There is no corresponding right of appeal from the award of damages either by the board or the county, however. If the damages as finally determined on appeal be, in the opinion of the board, excessive, the board may rescind its order establishing such change. Iowa Code § 306.36.

The issue which you have presented has been addressed by Daniel v. Clarke County, 194 Iowa 601, 190 N.W. 25 (1922). At that time the current § 306.34 was included in § 2829 (Iowa Code 1919) which in relevant part provided:

> If the objections be overruled, the board shall then proceed to a determination of the damages to be awarded to each claimant who has filed such claim. If the amount of damages so awarded are, in the opinion of the board, excessive, the proceedings shall be dismissed. If such damages, in the opinion of the board, be not excessive, the board may, by proper order, establish such proposed change in the road or stream, as the case may be, and pay such damages as in the case of right-of-way secured by agreement.

The board of supervisors in Daniel argued that the statute contemplates an award of damages by the board, and that the action of the appraisers is advisory only. Id. at 26. The landowners argued that the statute contemplates that if damages awarded are, in the judgment of the board, excessive, the board is authorized to dismiss the proceeding. Id. They further pointed out that such damages could not be excessive in the judgment of the board if the board itself were to fix the amount thereof. Id.

The court described the § 2829 statutory language as "defective in phraseology and therefore obscure in meaning." Id. at 26. Nonetheless, the legislature has not, in seventy years, substantially changed this statutory provision.

The court in Daniel found that under the statute the board may allow greater damages than those fixed by the appraisers or they may accept the appraisers' damages. The board is not however, authorized to fix damages at any less than the amount of the appraisal. Id. at 27. The board's only remedy under the statute is to dismiss the proceeding, a result which the court characterized as "defective legislation." Id.

Other cases have also reached the same result as Daniel. "If the landowner claims more than the appraisers allowed, the board of supervisors must pass upon such claim. If the appraisers allow the claim, or if the amount fixed by the appraisers is acceptable to the landowner, the board cannot reduce it." Brown v. Davis County, 196 Iowa 1341, 1347, 195 N.W. 363, 365 (1923). The county must either pay the appraisal or abandon the proceeding. Id. A resolution by a board of supervisors reducing the appraisal amount is without authority and void. Burrow v. Woodbury County, 200 Iowa 787, 789, 205 N.W. 460, 461 (1925).

The answer to your first question, therefore, is that the board of supervisors must either pay the amount determined by the appraisers, award a greater amount, or dismiss the proceedings under chapter 306. The board may not reduce the amount of the appraisal.

II

Is the loss of a driveway, either temporarily or permanently, a compensable loss under the terms of section 306.19?

Section 306.19 (2) in relevant part provides:

> 2. Whenever the agency condemns or purchases property access rights or alters by lengthening any existing driveway to a road from abutting property, except during the time required for construction and maintenance of the road or highway, the agency shall:
>
> a. Compensate the owner for any diminution in the market value of the property by the denial or alteration by lengthening the driveway;
>
> * * *
>
> 5. For purposes of this section, the term "driveway" shall mean a way of ingress and egress located entirely on private property, consisting of a lane or passageway leading from a residence to a public road or highway.

A property owner abutting condemned property cannot be deprived of all access without just compensation. Jones v. Iowa State Highway Commission, 259 Iowa 616, 623, 144 N.W.2d 277, 281 (1966). The landowner must be allowed "reasonable and convenient access" Id. Circuity of travel to reach a landowner's property is not compensable in condemnation proceedings. Nelson v. Iowa State Highway Commission, 253 Iowa 1248, 1251, 115 N.W.2d 695, 697 (1962). Compensation must be paid an abutting landowner when his or her access is substantially interfered with or cut off by road vacation. Mulkins v. Board of Supervisors of Page County, 374 N.W.2d 410, 413 (Iowa 1985). A landowner whose property abuts upon a public highway is not entitled to access to his land at all points between it and the highway. Simkins v. City of Davenport, 232 N.W.2d 561, 564 (Iowa 1975). A landowner does, however, have a property right in the free and convenient ingress and egress from his property to the particular highway upon which the land abuts. Id. This property right cannot be entirely taken from him nor substantially impaired or interfered with by governmental action without just compensation. Id.

No definitive rule can be stated as to whether an abutting property owner has been denied reasonable access. Only after consideration of vital facts of a case can that be determined. In re Primary Road No. Iowa 141, 253 Iowa 1130, 1136, 114 N.W.2d 290, 293 (1962). An Attorney General opinion cannot resolve issues of fact but is limited to resolution of questions of law. The answer must be ascertainable by legal research or statutory construction. 1972 Op.Att'y.Gen. 686.

Whether or not the loss of a driveway is compensable depends on the specific facts of a given situation. The county must determine whether, under the above case law, access has been substantially interfered with to the extent that the person is deprived of reasonable ingress and egress to the person's property.

Because your second question involves a factual determination, we must decline to offer an opinion.

Sincerely,

Carolyn J. Olson

CAROLYN J. OLSON
Assistant Attorney General

CJO:pjm

MENTAL HEALTH: Liability for mental health care. Iowa Code § 230.15. Under Iowa Code § 230.15 liability of mentally ill persons or others obligated for their support, is initially limited to a monetary amount equal to 100 percent of the costs of care and treatment a mentally ill person would incur at a mental health institute during a 120 day period. This formula does not consider the number of days that the individual is actually hospitalized or the costs actually incurred in a county care facility. After this monetary limit is reached, liability is determined by a second formula. (McCown to Lievens, Butler County Attorney, 7-11-90) #90-7-6(L)

July 11, 1990

Gregory M. Lievens
Butler County Attorney
614 11th
Aplington, IA 50604

Dear Mr. Lievens:

You have requested an opinion of the Attorney General on the determination of liability of a mentally ill person or a person legally liable for that persons support to the county under 230.15. Your inquiry is whether the limit of liability is based on the amount of time a mentally ill person is hospitalized or an amount of money expended on behalf of the mentally ill person. Specifically you asked the following question:

> If a mentally ill person is under care for a period exceeding one hundred twenty days, is the limitation of liability determined by the cost of one hundred twenty days at a state mental health institute, or the actual costs for the care of the mentally ill person during the one hundred twenty day period?

The pertinent portion of Iowa Code § 230.15 reads as follows:

> The liability of the county incurred by a mentally ill person or a person legally liable for the person's support under this section is limited to an amount equal to one hundred percent of the cost of care and treatment of the mentally ill person at a state mental health institute for one hundred

> twenty days of hospitalization. This limit of liability may be reached by payment of the cost of care and treatment of the mentally ill person subsequent to a single admission or multiple admissions to a state mental health institute or, if the person is not discharged as cured, subsequent to a single transfer or multiple transfers to a county care facility pursuant to section 227.11. After reaching this limit of liability, a mentally ill person or a person legally liable for the person's support is liable to the county for the care and treatment of the mentally ill person at a state mental health institute or, if transferred but not discharged as cured, at a county facility in an amount not in excess of the average minimum cost of the maintenance of a physically and mentally healthy individual residing in the individual's own home, which standard shall be established and may from time to time be revised by the department of human services. A lien imposed by section 230.25 shall not exceed the amount of liability which may be incurred under this section on account of any mentally ill person. (Emphasis added).

The goal in construing a statue is to ascertain the legislative intent and, if possible, give it effect. Doe v. Ray, 251 N.W.2d 496 (Iowa 1977). In doing so, one must look to what the legislature said, rather than what it might have or should have said. Kelly v. Brewer, 239 N.W.2d 109 Iowa 1976); Steinbeck v. Iowa District Court, 224 N.W.2d 469 (Iowa 1974). In statutory construction, one must seek a meaning which is both reasonable and logical and try to avoid results that are strained, absurd, or extreme. State v. Berry, 247 N.W.2d 263 (Iowa 1976). In seeking the meaning of law, the entire act should be considered and each section construed with the act as a whole and all parts thereof construed together; the subject matter, reason, consequence and spirit of the enactment must be considered, as well as the words used, and the statute should be accorded a sensible, practical, workable and logical construction. Matter of Estate of Bliven, 236 N.W.2d 366 (Iowa 1975).

In light of the foregoing principles, examination of § 230.15 shows that the statute sets an initial limit on the amount of liability of the mentally ill person and persons legally liable for their support. In determining the limit on the amount of liability of the mentally ill person and persons

legally liable for the mentally ill person's support, the statute states that "the amount is limited to one hundred percent of the costs for the first 120 days of hospitalization at a mental health institute". (Emphasis added.) The statute then goes on to explain how the "limit of liability may be reached by payment of the cost of care and treatment" subsequent to single admission or multiple admissions to a state mental health institute or, if discharged as not cured a single transfer or multiple transfers to a county care facility.

We believe that it was the intent of the legislature to place a monetary cap on the amount of liability. If the legislature had intended to limit the amount of liability to the time that a mentally ill person was hospitalized at a mental health institute or a county care facility, it could have simply used the 120 day time period when it referred to care in a county care facility. Because the 120 day time period is only mentioned in determining the amount of the limit and not in determining how the limit may be reached, it is the opinion of this office that the 120 days is only used to determine a monetary rather than a time limit of liability. That is to say that the limit is based on a dollar amount and not on the number of days that a mentally ill person is hospitalized.

Problems are also created if the statute is interpreted to mean that the mentally ill person or those legally responsible for their support are liable to the counties for 120 days of hospitalization without a monetary limit. If for some reason the costs incurred at a county care facility are higher than those incurred at a mental health institute, the mentally ill person is made to pay more than others who have lower expenses at some other county care facility. Additionally, counties in which the cost at county care facilities is low would be reimbursed for a much smaller amount of the total mental health expenses. The legislature recognized the longevity of mental health conditions in Iowa Code Supp. § 229.1A (1989) when it stated the following:

> As mental illness is often a continuing condition which is subject to wide and unpredictable changes in condition and fluctuation in reoccurrence and remission, this chapter shall be liberally construed to give recognition to these medical facts.

In summary, under § 230.15 liability to a county by a mentally ill person or those legally liable for their support is initially limited to a monetary amount equal to 100 percent of the costs of care and treatment a mentally ill person would incur during a 120 day period at a mental health institute. This formula does not consider the number of days that the individual

is actually hospitalized or the costs actually incurred in a county care facility. After this monetary limit is reached, liability is determined by a second formula.

Sincerely,

Valencia Voyd McCown

Valencia Voyd McCown
Assistant Attorney General

VVM:rjm

CITIES: Indebtedness for public hospitals. Iowa Const., Art. XI, § 3; Iowa Code §§ 346.24, 384.24(4)(c), 384.24(4)(i), 384.24A. A loan constitutes city indebtedness if general tax revenues of the city are pledged as security for the repayment of the loan. A city pledge of tax revenues as security for a city hospital debt would count in determining whether a city exceeded its debt limitation ceiling. Section 384.24(4)(i) would permit a city council to conclude that operational expenses of a city hospital constitute "general corporate purposes" for which bonds could be issued. (Osenbaugh to Halvorson, State Representative, 7-9-90) #90-7-5(L)

July 9, 1990

The Honorable Roger A. Halvorson
State Representative
P.O. Box 627
Monona, Iowa 52159

Dear Representative Halvorson:

We have received your request for an opinion concerning borrowing money for operational expenses of a municipally owned hospital.

You first ask whether a municipally owned hospital can incur debt without that obligation being considered city debt. The enclosed opinion, #89-5-6, sets forth the applicable principles. A loan constitutes city indebtedness to the extent that general tax revenues of the city are pledged as security for the repayment of the loan. Thus, a city pledge of tax revenues to pay for a hospital loan would affect whether it exceeded the debt limitations of Iowa Constitution, Art. XI, Sec. 3, or Iowa Code § 246.24.

You then ask whether the city or hospital can incur debt to be guaranteed by the city when the loan proceeds would be used for operational purposes. Iowa Code section 384.24 defines "general corporate purposes" for which bonds may be issued. One subsection specifically authorizes the issuance of bonds for capital improvements of city hospitals. Section 384.24(4)(c) includes within that definition "[t]he acquisition, construction, reconstruction, enlargement, improvement, and equipping of city halls, . . . and hospitals . . .". This subsection would not, however, authorize bonds for operational expenses of city hospitals.

We believe, however, that another subsection, section 384.24(4)(i), permits a city council to conclude that operational expenses of a city hospital constitute "general corporate purposes" for which bonds could be issued. See Hamilton v. City

of Urbandale, 291 N.W.2d 15 (Iowa 1980) (special election requirement). That subsection provides:

> "General corporate purpose" means:
>
> * * *
>
> (i) Any other purpose which is necessary for the operation of the city or the health and welfare of the citizens.

(emphasis added). Prior to 1987 Iowa Acts, ch. 103, § 7, the underlined language of this section encompassed only "any other facility or improvements," and the specifically enumerated "general corporate purposes" were defined in terms of acquisition or improvement of specified facilities. This legislative change evidences intent to remove a limitation to capital expenditures and indicates that the city can issue bonds for operational, rather than solely capital, expenditures.

Section 384.24A, authorizing loan agreements, was enacted as part of the same 1987 act. This section authorizes loan agreements to borrow money "for any public purpose." Again, the legislature did not limit this borrowing power to capital acquisitions. Absent some provision which prohibits a city from borrowing or spending money for the operation of a city hospital, it would appear that such expenditures would meet the test of this section. See 1988 Op.Att'yGen. 10, 13 (continuing authority of cities to establish and regulate hospitals).

The attorney for the city and hospital is best situated to apply these general principles and statutes to the fact situation. That attorney can obtain the relevant facts and is familiar with the framework under which the hospital operates and with its current debt agreements.

This opinion confirms the advice orally given to Matthew J. Erickson, the Postville city attorney, on or about May 25, 1990.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:mlr

CONSTITUTIONAL LAW; STATE OFFICERS AND EMPLOYEES: Public Purpose, Service Club Dues, Ia. Const. Article III, § 31. Public funds may be used to pay for public employees' dues for service clubs only if directly related to an employee's duties. The governing body must determine that a public purpose is met and that the public purpose is not merely incidental to the private benefit to the employee. This test would not likely be met except in an unusual case. (Osenbaugh to Black, State Representative, 7-3-90) #90-7-3(L)

July 3, 1990

The Honorable Dennis H. Black
State Representative
Rt. 1
Grinnell, Iowa 50112

Dear Representative Black:

You have requested an opinion of the Attorney General as to whether tax revenue can be utilized to pay public employees' dues for service clubs. The relevant portion of the Iowa Constitution is Article III, § 31. Under specific instances, Article III, § 31, may allow tax revenue to be used to pay employee's dues for service clubs.

Article III, § 31 states, in part:

> No public money or property shall be appropriated for local or private purposes unless such appropriation, compensation, or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly.

In order to answer the question presented, it must be determined whether a public purpose is served through the payment of the club dues and whether any public purpose is merely incidental to the private benefit. 1984 Op.Att'yGen. 47. It is well settled that in order to be constitutional under Article III, § 31, an appropriation must not provide public funds for private purposes. Love v. City of Des Moines, 210 Iowa 90, 230 N.W.2d 373 (Iowa 1930); Dickinson v. Porter, 240 Iowa 393, 35 N.W.2d 66 (Iowa 1948); 1980 Op.Att'yGen. 102, 103; 1986 Op.Att'yGen. 113. Clearly, it would violate the Iowa Constitution to pay public employee's dues merely to allow them to become members of the clubs. See e.g., 1968 Op.Att'yGen. 357 (appropriation to

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*Editorial Note (8/29/90) -- This opinion and Representative Black's request address service clubs such as Rotary, Kiwanis, etc., and not other associations, such as professional or governmental associations.

a specifically named individual constitutes a private purpose); 1972 Op.Att'yGen. 395 (donating funds to a privately funded and operated recreation center constitutes a private purpose). A public body may not authorize a purely private use of public property as a fringe benefit. 1984 Op.Att'yGen. 47, 51. Therefore, a public purpose must be served through the payment of the dues.

The Iowa Supreme Court has not defined a "public purpose." Carrol v. Cedar Falls, 221 Iowa 277, 261 N.W. 652 (1936). Instead, public purpose is to be a flexible and broad concept. John R. Grubb, Inc. v. Iowa Housing Finance Authority, 255 N.W.2d 89, 93 (Iowa 1977). This office has decided that the proper inquiry is to determine if a public interest is served, regardless of whether incidental private purposes exist. 1984 Op.Att'yGen 47, 49; 1986 Op.Att'yGen. 113. However, when addressing mixed private and public usage of state vehicles by employees, we said that it would be wise for government bodies to follow a fairly restrictive interpretation whenever there exists "a close question of whether the public use involved is merely incidental to the primary private use . . . ." 1980 Op.Att'yGen. 160, 162; 1984 Op.Att'yGen. 47, 50.

This office has previously decided that appropriations from governmental agencies to private agricultural producers' associations could serve a public purpose. The associations were all "devoted to promoting and improving agrarian pursuits vital to the important agricultural industry of the state." 1968 Op.Att'yGen. 80, 83. Since Iowa depends so heavily on agriculture, appropriating money to these associations served a public purpose. Id., at 83.

Similarly, it is possible that a particular employee's membership in a service club could serve a public purpose. If, for example, the employee's job consisted of promoting employment in a small town, her membership in a service club could help accomplish that job, which in turn would fulfill a public purpose. See id., at 83.

However, unless the membership relates directly to the employee's job it would appear that payment of dues would not serve a public purpose. We have previously recommended that public bodies establish guidelines for the use of public property when there is a question concerning whether any private interest served constitutes more than an incidental benefit. 1984 Op.Att'yGen. 47, 50 (opinion on the use of state owned vehicles by state employees). See also, 1980 Op.Att'yGen. 701 (#80-5-7(L)). Guidelines help to ensure that public money is used for public purposes. See e.g., State Executive Council's Guidelines For Membership In Chamber Of Commerce Organizations.

Those who spend public money have a heavy responsibility to assure that the money is spent in a proper manner. There is a very real concern that the power of spending public money can be abused. See, e.g. 1980 Op.Att'yGen. at 105. Therefore, expenditures should clearly serve a public purpose and should have safeguards attached to prevent abuse.

In conclusion, tax revenue may be used to pay for public employees' dues for service clubs only if directly related to an employee's duties. The governing body must determine that a public purpose is thereby met and that the public purpose is not merely incidental to the private benefit to the employee. We believe that this test would not likely be met except, perhaps, in a very unusual case. However, resolution of this question is ultimately factual and cannot be resolved by an Attorney General's Opinion.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:mlr

SCHOOLS: School supplies. Iowa Code § 301.28 (1989). Advertising specialty and novelty items which are not used for instructional purposes are not school supplies to which Iowa Code § 301.28 is applicable. (Scase to Halvorson, State Representative, 7-2-90) #90-7-2(L)

July 2, 1990

The Honorable Rod Halvorson
State Representative
Apartment #2
1030 North 7th Street
Fort Dodge, Iowa 50501

Dear Representative Halvorson:

You have requested an opinion of the Attorney General addressing the applicability of Iowa Code § 301.28 (1989) to the sale of novelty items to school groups. Section 301.28 provides as follows:

> It shall be unlawful for any school director, officer, area education director or teacher to act as agent for any school textbooks or school supplies during such term of office or employment, and any school director, officer, area education director or teacher, who shall act as agent or dealer in school textbooks or school supplies, during the term of such office or employment shall be deemed guilty of a serious misdemeanor.

Your opinion request presents a series of questions regarding whether this section would prohibit a school teacher from serving as a contact person for the purchase of advertising specialty and novelty items by school activities organizations and other school groups from a business he owns with his wife.

You first ask, "[a]re these specialty items 'school supplies' as envisioned in Section 301.28?" The items in question are described in your request as "pep buttons, inscribed pen and pencils, etc." These are the type of items which are commonly purchased by school groups for resale, fund-raising purposes. We assume, for purposes of this opinion, that the items serve no direct educational purpose and that students are not required to purchase them.

While Code section 301.28 has remained essentially unchanged since its adoption in 1890 Iowa Acts (23 G.A.) ch. 24, § 11, no

reported decisions of the Iowa courts interpret the meaning of the term "school supplies" within this section. This office has, however, issued a number of opinions discussing definition of the term "school supplies" as used in this and other Code provisions. See 1986 Op.Att'yGen. 73 (#86-1-2(L)) (concluding that gym uniforms were not school supplies to which the competitive bidding requirement of Iowa Code § 301.7 (1985) is applicable); 1980 Op.Att'yGen. 580 (#80-2-2(L)) (deferring comment as to whether musical instruments were school supplies within the scope of section 301.28); 1980 Op.Att'yGen. 532 (#79-12-22(L)) (recognizing, in the context of considering imposition of a student fee for consumables, that "such items as pencils, pens, notebooks and paper customarily furnished by pupils for their own use could reasonably be considered as school supplies"); 1978 Op.Att'yGen. 328 (finding that "medical insurance does not properly come under the term 'textbooks and school supplies,' as used in section 301.28"); 1978 Op.Att'yGen. 830 (concluding "that the term 'school supplies' [in section 301.28] does not encompass services supplied to a school").

The most recent of the above cited opinions, #86-1-2(L), looked to court decisions from other jurisdictions and found only two cases defining "school supplies." The first of these cases, Affholder v. State, 51 Neb. 91, 70 N.W. 544 (1897), was decided shortly after enactment of the Iowa statute in question. The Affholder court addressed a single-subject/title challenge to a Nebraska statute which required the provision of textbooks and school supplies as public expense. In doing so, that court held that, "'[s]chool supplies,' as used in this act, means maps, charts, globes, and other apparatus necessary for use in schools . . . ." Affholder v. State, 51 Neb. at 93, 70 N.W. at 545. The second case, Brine v. City of Cambridge, 265 Mass. 452, 164 N.E. 619 (1928), adopted the definition of school supplies set forth in Affholder, in holding school supplies did not include athletic clothing. 265 Mass. at 455, 164 N.E. at 620.

Our research also reveals a 1985 opinion of the Wisconsin Attorney General which defines school supplies in the context of a statute prohibiting school officers and employees from acting as agents or solicitors for "school books, school supplies or school equipment." Op.Att'yGen. Wis. 5/21/85 (LeFollette to Grover). This opinion interpreted the phrase "'school books, school supplies or school equipment' to apply only to books, supplies and equipment which are or reasonably could become tied to a school's instructional process" and concluded that such items as "caps and gown, graduation announcements, class rings and other school jewelry, yearbook pictures and candy and other food products sold by students to the public" did not constitute school supplies.

We believe that the Iowa Code section 301.28, like its Wisconsin counterpart, was enacted "to prevent persons connected with the public school system from having their judgments warped by financial interest in the sale of school supplies." 1985 Wisconsin opinion. A related purpose of this statute would appear to be to prevent a school officer or employee from taking financial advantage of students by requiring the purchase of textbooks or supplies which are available only through that individual. Given these purposes, we concur with the view that, in the context of this statute, the term "school supplies" refers only to items which are tied to a school's instructional process. Assuming that the novelty items in question here are not used as a part of classroom instruction and that students are not required to purchase them, we are of the opinion that such items are not school supplies to which Code § 301.28 would apply.

Given this conclusion, we need not address your second and third inquiries. Your final question asks whether there are any other statutes or legal principles violated by a teacher acting as contact person for the sale of novelty items to school groups. We are not aware of any other statutory provision which directly applies to this situation. Whether the activity in question is consistent with local school policy is a matter which must be determined by the local school board.

In summary, it is our conclusion that advertising specialty and novelty items which are not used for instructional purposes are not school supplies to which Iowa Code § 301.28 is applicable.

Sincerely,

Christie J. Scase

CHRISTIE J. SCASE
Assistant Attorney General

CJS:rd

CORPORATIONS; SECRETARY OF STATE: Filing corporate documents. Iowa Code §§ 490.120, 490.125, 490.130. A document delivered by a corporation to the secretary of state for filing (other than an annual report which does not change the registered office or registered agent of the corporation) must be accompanied by a duplicate copy. The secretary of state should not file such documents unless a copy is provided or made for forwarding to the county recorder, (Hunacek to Noah and Davis, 7-2-90) #90-7-1(L)

July 2, 1990

Ronald K. Noah
Floyd County Attorney
Floyd County Courthouse
Charles City, IA 50616

William E. Davis
Scott County Attorney
Scott County Courthouse
416 West Fourth Street
Davenport, IA 52801

Gentlemen:

You have both requested an Attorney General Opinion regarding corporate filing requirements with the secretary of state. Specifically, you ask whether documents (other than an annual report which does not change the registered office or registered agent of the corporation) should be accepted and filed by the secretary of state if not accompanied by a copy of the document. Because both your requests involve the same legal issue, we will issue a joint reply. For the reasons specified below, we believe that the secretary of state should refuse to file such documents.

Iowa corporate law is governed by the Iowa Business Corporation Act, codified as chapter 490 of the Code. This act became effective December 31, 1989. See chapter 490, 1989 Iowa Code Supplement. Because this statute controls our answer, we begin our response by considering some of its specific provisions. In what follows, all statutory references are to the 1989 Code Supplement.

Iowa Code § 490.130 provides that: "A domestic corporation shall provide the secretary of state with a copy of each document, except an annual report which does not change the registered office or registered agent of the corporation, delivered by the corporation for filing with the secretary of state. . . The secretary of state shall stamp the copy or copies provided by the corporation or registered agent indicating receipt by the secretary of state and shall send the copy or copies to the county recorder." The statute, by its own explicit terms, therefore requires the filing of a copy of the articles of incorporation (and any other document other than an annual report which does not change the

registered office or registered agent of the corporation) with the secretary of state. At least one commentator has pointed this out specifically, and has noted that it represents a change from prior Iowa law. "Although the Revised Model Business Corporation Act contemplated that articles of incorporation would be filed only with the secretary of state, the 1989 Act continues to require that plus recording with the county recorder. It does deviate from prior Iowa practice by calling for submission of the articles plus a copy to the secretary." 5 E. Hayes Iowa Practice: Business Organizations § 271 at 60 (2d Ed. 1990 Pocket Part) (footnotes omitted) (original emphasis).

In addition, Iowa Code § 490.125 provides in relevant part that: "If a document delivered to the office of the secretary of state for filing satisfies the requirements of section 490.120, the secretary of state shall file it." Iowa Code § 490.125(1). If the secretary of state refuses to file a document, the secretary of state shall return it to the corporation or its representative within ten days after the document was received by the secretary, together with a brief, written explanation of the reason for the refusal. Iowa Code § 490.125(3). This duty is ministerial. Iowa Code § 490.125(4). 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). Thus, the secretary of state has no discretion in determining whether to file a document submitted to it. If the document complies with section 490.120, it must be filed.

Iowa Code § 490.120, in turn, specifies nine filing requirements. The very first of these is that "a document must satisfy the requirements of this section, and of any other section that adds to or varies these requirements, to be entitled to filing." Iowa Code § 490.120(1) (emphasis added). We believe that while this section does not specifically require the submission of duplicate copies, the highlighted language just quoted does incorporate by reference the requirements of section 490.130. A contrary conclusion would render the duplicate copy requirement of section 490.130 ineffectual, and thus violate the familiar principle of statutory construction that all portions of a statute should be read together and, if possible, harmonized. Harden v. State, 434 N.W.2d 881, 884 (Iowa 1989). Moreover, a contrary conclusion would lead to impractical consequences and fail to effectuate legislative intent, in contravention of another familiar rule of statutory construction that such consequences are to be avoided. Id. The legislative intent here is clear: the duplicate copy is to be sent by the secretary of state to the county recorder

for recording there. Iowa Code § 490.130. The legislature specifically rejected a proposed change in the Act which would have eliminated county recording. Hayes, supra (preface to 1990 Pocket Part). If the secretary is to accept documents without having a duplicate to send to the county recorder, the legislative intent to have such documents recorded will be thwarted. Nothing in Code section 430.130 would preclude the secretary of state from effectuating this legislative intent by voluntarily duplicating documents delivered without a copy and forwarding the copy so made to the county recorder.[1]

Therefore, submission of documents (other than an annual report which does not change the registered office or registered agent of the corporation) delivered by the corporation to the secretary of state without duplicate copies, does not comply with the statutory requirements for form and execution. The secretary of state should not file such documents unless a copy is provided or made for forwarding to the county recorder.

Sincerely yours,

Mark Hunacek

MARK HUNACEK
Assistant Attorney General

MH:lbh

[1]Please note that the legal status of a corporate filing does not hinge upon recording at the county level. Pursuant to Iowa Code § 490.123(1) (1989), a document accepted for filing is effective at the time of its filing by the secretary of state, or the time specified in the document as its effective time on the date it is filed, whichever is later.

Department of Justice

THOMAS J. MILLER
ATTORNEY GENERAL

ADDRESS REPLY TO:
HOOVER BUILDING
DES MOINES, IOWA 50319

August 31, 1990

Mr. William Sueppel
Attorney at Law
122 South Linn Street
Iowa City, Iowa 52240

Dear Bill:

Thank you for bringing to my attention the ambiguity concerning the meaning of "service clubs" in the opinion I drafted to Representative Black (#90-7-3(L)).

We will add the following clarifying note to our official copy of the opinion:

> Editorial note (8/29/90) -- This opinion and Rep. Black's request address service clubs such as Rotary, Kiwanis, etc., and not other associations, such as professional or governmental associations.

A copy of the opinion with this note is attached.

The opinion was not intended to address membership dues in professional or governmental associations. At the state level, the Executive Council generally approves membership costs for employees other than employees of the Governor, the Attorney General, etc. See Iowa Code § 421.38(2).

Although the opinion does not address it, my personal view is that a public employer could reasonably conclude that payment of dues for attorney membership in the bar association serves a public purpose, either because this is a standard benefit necessary to retain excellent staff in this profession (see

Op.Att'yGen. #85-10-5(L)) or because the benefits of membership are related to the public attorney's work performance. Of course, many public employers of attorneys lack adequate resources to pay bar association dues.

Sincerely,

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:mlr

Enclosure

cc: The Honorable Dennis Black
State Representative

COUNTIES AND COUNTY OFFICERS; Board of Supervisors' approval of appointments of deputy officers; Leaves of absence for deputy officers. Iowa Code § 331.903 (1989). The board of supervisors has the power to determine the number and full or part-time status of deputies, assistants, and clerks to be appointed by each of the county officers listed in Code § 331.903. Sole discretion to grant a deputy officer unpaid leave rests with the principal officer. (Scase to Beaman, 8-15-90) #90-8-1(L)

August 15, 1990

Mr. Jack Beaman
State Representative
RR #2, Box 69A
Osceola, Iowa 50213

Dear Representative Beaman:

You have requested an opinion of the Attorney General clarifying the role of a county board of supervisors in the appointment of deputy county officers. While this office cannot, through an opinion, resolve individual factual disputes, we can offer our interpretation of the controlling statutes. Because the questions presented appear to relate to a specific contraversy, they are restated in more general terms as follows:

1. May the board of supervisors deny a county officer a full-time deputy?

2. May the board of supervisors refuse to allow a county officer to grant an unpaid leave of absence to a deputy officer?

Our response to the first inquiry is guided by the terms of Iowa Code § 331.903(1) (1989), which provides as follows:

> The auditor, treasurer, recorder, sheriff, and county attorney may each appoint, with the approval of the board, one or more deputies, assistants, or clerks for whose acts the principal officer is responsible. The number of deputies, assistants, and clerks for each office shall be determined by the board and the number and approval of each appointment shall be adopted by a resolution in the minutes of the board.

This Code section directly grants the supervisors the power to determine the number of deputies, assistants, and clerks for each listed office. In a 1934 opinion this office interpreted an earlier version of this statute, which contained identical language, as authorizing the board of supervisors to order a county officer not to employ a deputy officer. 1934 Op.Att'yGen. 65. Given the board of supervisors' broad authority to determine the number of deputy officers employed by county officers, it follows that the supervisors may determine the part-time or full-time status of such deputies. It is advisable for the board to take into consideration the workload and budget parameters for each county office in making such determinations.

Iowa Code § 331.903(1) also requires the board of supervisors to approve individual appointments to deputy, assistant and clerk positions. This approval function may not be used to deny an officer a deputy, assistant, or clerk if the board has determined that such a position is justified. As this office stated in a 1935 opinion: "[W]e do not think the Board by arbitrarily withholding its approval of any and all appointments of deputy county officers may require the county officers to conduct the business of their respective offices without the aid of deputies." 1936 Op.Att'yGen. 149, 150. The board should "recognize and approve any reasonable and proper appointment made by the county officer." Id., see also 1984 Op.Att'yGen. 94 (#83-11-4(L)). After an appointment has been approved by the board, power to revoke the appointment rests exclusively with the principal county officer. See Iowa Code § 331.903(2) (1989); 1980 Op.Att'yGen. 495, 496.

With regard to your second inquiry, it is well established that "authority over personnel matters relating to [deputy officers] resides with the elected principals unless a statute expressly gives authority to the board." McMurray v. Bd. of Supervisors of Lee County, 261 N.W.2d 688, 691 (Iowa 1978), citing numerous prior cases and Attorney General's opinions. A decision to grant a leave of absence is clearly a personnel decision. See 1978 Op.Att'yGen. 777, 778 ("[I]t is our view that when a leave of absence is granted and no statement is made as to whether the leave is with or without pay, the determination as to whether or not pay is to be suspended rests with the principal officer granting the leave."). We find no statutory authority which would allow a board of supervisors to refuse to allow a county officer to grant his or her first deputy time off without pay. Absent such statutory authority, or a collective bargaining agreement provision to the contrary, sole discretion in this matter rests with the county officer.

In summary, it is our opinion that the board of supervisors has the power to determine the number and full or part-time status of deputies, assistants, and clerks to be appointed by each of the county officers listed in Code § 331.903. Sole discretion to grant a deputy officer unpaid leave rests with the principal officer and the supervisors have no legal authority to deny an officer's grant of such leave.

Sincerely,

Christie J. Scase

CHRISTIE J. SCASE
Assistant Attorney General

CJS:rd

NEWSPAPERS: Official Publications. Annual Tax Sale. Iowa Code §§ 446.9(2) and 618.7 (1989). 1989 Iowa Acts, Chapter 214, § 5. Publication of the annual tax sale notice, pursuant to amended § 446.9(2), must appear in an official newspaper. As such, the county treasurer may not publish notice of the annual tax sale, pursuant to § 618.7, in a newspaper other than an official county newspaper. (Walding to Danley, Fremont County Attorney, 10-23-90) #90-10-5(L)

October 23, 1990

Vicki R. Danley
Fremont County Attorney
806 Illinois Street
P.O. Box 488
Sidney, IA 51652

Dear Ms. Danley:

We are in receipt of your request for an opinion of the Attorney General regarding publication of the annual tax sale pursuant to Iowa Code § 446.9(2) (1989), as amended by 1989 Iowa Acts, Chapter 214, § 5. You indicated that the Fremont county treasurer, for fiscal reasons, is considering placing the tax sale publication in a newspaper other than an official newspaper designated by the board of supervisors.[1]

The question presented, as restated, is whether the county treasurer is required to publish notice of the annual tax sale, pursuant to amended § 446.9(2), in "an official newspaper" designated by the county board of supervisors. A review of the statutory framework for publication in official newspapers is required to respond to you question.[2]

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[1]The newspaper being considered by the county treasurer for the tax sale publication, you indicated, satisfies the requirements to be designated for mandatory publications as provided for in Iowa Code § 618.3 (1989). A general discussion of the § 618.3 requirements is found in Widmer v. Reitzler, 182 N.W.2d 177, 180 (Iowa 1970). See also, 1984 Op.Att'yGen. 48, 1984 Op.Att'yGen. 126 and 1974 Op.Att'yGen. 102.

[2]According to McQuillin, Municipal Corporations § 16.82 (3rd Ed.):

(continued...)

The authority of county officers to designate newspapers for publication of notices is found in Iowa Code § 618.7 (1989). That section provides:

> The clerk of the district court, sheriff, auditor, treasurer, and recorder shall designate the newspapers in which the notices pertaining to their respective offices shall be published and the board of supervisors shall designate the newspapers in which all other county notices and proceedings, not required to be published in official county newspapers, shall be published.

[Emphasis added]. The phrase "not required to be published in official county newspapers," in our judgment, modifies both clauses in that sentence. Accordingly, the absence of the publication requirement is a condition precedent to designation of a newspaper for publication of notices pertaining to a county office. Stated alternatively, § 618.7 permits county officers to designate newspapers for publication of notices pertaining to their respective offices provided that the publication is not required to be published in an official newspaper.

The county treasurer, therefore, has limited authority to designate the newspapers in which the notices pertaining to the treasurer's office shall be published. The narrower issue, for our review, is whether the annual tax sale notice is required to be published in an official newspaper.

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[2](...continued)

> The selection of a newspaper as the official organ of publication for the municipality, the designation of a newspaper in which publication of an ordinance is to be made, and the act of publishing an ordinance in a newspaper are matters subject, of course, to the governing charter and statutory provisions. Local law and practice determine which person or body shall make the selection.

[Footnotes omitted]. See also, 58 Am. Jur. 2d, Newspapers, Periodicals, and Press Associations, § 35; 66 C.J.S., Newspapers, § 10.

(continued...)

Notice of the annual tax sale is required to be provided by the county treasurer pursuant to Iowa Code § 446.9 (1989). The publication requirement of § 446.9(2), as amended, provides in pertinent part:

> Publication of the time and place of the annual tax sale shall be made once by the treasurer in an official newspaper in the county at least one week, but not more than three weeks, before the day of sale. . . .

[Emphasis added]. A description of the content of the notice to appear in the publication follows in that subparagraph.

Publication of the annual tax sale notice, pursuant to amended § 446.9(2), must appear in an official newspaper. As such, the county treasurer may not publish notice of the annual tax sale, pursuant to § 618.7, in a newspaper other than an official county newspaper.

Finally, we note that the basis for selecting a newspaper other than the newspaper designated by the Fremont county board of supervisors is, we have been told, fiscal in nature. The role of fiscal considerations in the designation of official newspapers was recently discussed in Albia Publishing Company v. Klobnak, 434 N.W.2d 636 (Iowa 1989). According to the Iowa Supreme Court:

> This fiscal conservatism, though perhaps laudable, is not a permissible factor under the statute and, in fact, conflicts with the primary legislative purpose of section 349.3: to insure that official notices reach the largest number of county residents. The legislature has determined that in counties having a population of 15,000 or less, that goal is best achieved by publication in two newspapers.

Albia Publishing Company, 434 N.W.2d at 640. Accordingly, fiscal savings is not to be considered in the designation of an official newspaper.[3]

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[3]It should be noted that § 446.10 sets the maximum compensation for publication. The costs of publication of the annual tax sale notice, pursuant to § 446.10, "shall be collected as a part of the costs of sale and paid into the county treasury."

In summary, publication of the annual tax sale notice, pursuant to amended § 446.9(2), must appear in an official newspaper. As such, the county treasurer may not publish notice of the annual tax sale, pursuant to § 618.7, in a newspaper other than an official county newspaper.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW

TAXATION: Local Option Sales and Services Tax. Iowa Code §§ 422B.1 (1989), as amended by 1990 Iowa Acts (73 G.A.) ch. 1256, § 21; 422B.10 (1989). A city or county in which the imposition of a local option sales and services tax has been approved, pursuant to Iowa Code § 422B.1, may not pledge anticipated revenues from the tax to pay the principal and interest on bonds or other long-term debt obligations. (Scase to Nystrom, State Senator, 10-22-90) #90-10-4(L)

October 22, 1990

The Honorable Jack Nystrom
State Senator
217 W. 5th
Boone, Iowa 50036

Dear Senator Nystrom:

You have requested an opinion of the Attorney General regarding the use of funds generated by a local option tax imposed pursuant to Iowa Code chapter 422B. You note that a local option sales and services tax was recently approved for the city of Boone. Specifically, you inquire whether the city has "authority to issue notes or obligations and pledge the future receipt of option tax revenues for payment of principal and interest on any such obligations."

A local option sales and services tax of up to one percent may be imposed by counties pursuant to the terms of Iowa Code chapter 422B. While this tax may not be imposed by a city, it may be imposed by a county for transactions in a specified city upon approval of a majority of voters within the incorporated area of that city. Iowa Code § 422B.1, as amended by 1990 Iowa Acts (73 G.A.) ch. 1256, § 21; see 701 I.A.C. 107.2. Iowa Code section 422B.1(4) provides that the ballot proposition presented to the voters must specify the type and rate of proposed local option tax, the date it will be imposed, the approximate amount of revenues from the tax that will be used for property tax relief and the purpose or purposes for which the remainder of the revenues will be used.[1] "The local option tax may be repealed or

[1] In addition, pursuant to amendment effective July 1, 1990, the county board of supervisors may direct that the question contain a sunset provision for the automatic repeal of the local sales and services tax on a specific future date. Iowa Code § 422B.1(4) and (5), as amended by 1990 Iowa Acts (73 G.A.) ch. 1256, § 21.

the rate increased or decreased after an election at which a majority of those voting on the question of repeal or rate change favored the repeal or rate change." Iowa Code § 422B.1(5), as amended. The question of repeal of a local sales and services tax must be presented to the electors upon receipt of a petition calling for such referendum signed by electors of the county equalling five percent of the total number who voted in the last preceding general election or motions from the governing body or bodies of the county and cities within the county representing at least one half of the population of the county. Iowa Code §§ 422B.1(3)(a) and (b), 422B.1(5); see 1986 Op.Att'yGen. 127 (#86-11-4(L)). Chapter 422B also allows for repeal of the local option sales and services tax upon motion by the board of supervisors or governing body of an incorporated area. Iowa Code Supp. § 422B.1(8) (1989).

Revenue generated from a local sales and services tax is remitted to the local governments from which it was generated pursuant to the formula contained in Iowa Code Supp. § 422B.10 (1989). Section 422B.10(5) provides: "Local sales and services tax moneys received by a city or county may be expended for any lawful purpose of the city or county."

While section 422B.10(5) allows for the use of local option tax revenues for any lawful purpose of a city, chapter 422B does not contain a provision allowing a city to pledge future option tax revenues to meet long-term obligations. Nor do we believe that the principle of municipal home rule may be relied upon to provide such authority. As we stated in 1974 Op.Att'yGen. 240, 242: "[T]he home rule power does not extend to taxing matters of a municipality. The power to tax must be expressed by the Legislature, and therefore should be strictly construed to be in line with the obvious legislative intent, that is to keep a rein on taxing matters." It is our view that, if the legislature had intended for cities and counties to have the power to encumber anticipated option tax revenues, the statute would so provide.[2]

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[2] See Iowa Code chapter 422A (Code chapter governing the imposition of local hotel and motel taxes, which includes specific provisions allowing a city or county to irrevocably pledge the revenue from this tax to the payment of bonds [Iowa Code § 422A.2(4)(c) (1989)], making such obligations subject to the provisions of Code chapter 76 relating to public bonds and debt obligations [Iowa Code § 422A.2(4)(d)], and limiting the electors ability to repeal or lower the rate of a local hotel and motel tax when the tax revenues have been so pledged [Iowa Code § 422A.1 (1989) (unnumbered ¶ 3)]).

It is our opinion that, absent statutory authorization, a city or county in which the imposition of a local option sales and services tax has been approved may not pledge anticipated revenues from the tax to pay the principal and interest on bonds or other long-term debt obligations.

Sincerely,

Christie J. Scase

CHRISTIE J. SCASE
Assistant Attorney General

cjs

CIVIL RIGHTS: Inmates as "Employees." Iowa Code §§ 246.701, 246.906, and 601A.2(5). An inmate is not an "employee" within the meaning of Iowa Code § 601A.2(5) if employed by the State or subdivision of the State but may be an "employee" within the meaning of the statute if employed through the work release or prison industry programs by employers who are otherwise subject to the Iowa Civil Rights Act. (Vaitheswaran to Langston, 10-16-90) #90-10-3(L)

October 16, 1990

Ms. Inga Bumbary-Langston
Executive Director
Iowa Civil Rights Commission
211 East Maple Street
Des Moines, IA 50309

Dear Ms. Bumbary-Langston:

You have requested an opinion of the Attorney General concerning whether inmates incarcerated in the Iowa correctional system who work in Prison Industries or Iowa's Work Release Program are "employees" within the meaning of the Iowa Civil Rights Act. We conclude that they are not, if employed by the state or subdivisions of the state, but that they may be "employees" within the meaning of the statute if employed through the work release program or prison industries program by employers who are otherwise subject to the Iowa Civil Rights Act.

Iowa Code section 601A.2(6) (1989) defines "employee" for purposes of the Iowa Civil Rights Act as "any person employed by an employer." The question thus becomes whether inmates working in prison industries or under the work release program are employed by "employers" within the meaning of Iowa Code chapter 601A. That chapter defines "employer" as "the State of Iowa or any political subdivision, board, commission, department, institution, or school district thereof, and every other person employing employees within the state." Under that section, the state and subdivisions of the state would be considered employers. However, Iowa Code section 601A.2(5) must be read in conjunction with the statutory provisions governing the prison industries program and work release programs.

The prison industries program is established and maintained by the Iowa Department of Corrections to make available to inmates opportunities for work. Iowa Code §§ 246.801, 802. The work release program is established in consultation with the

board of parole to allow inmates "the privilege of leaving actual confinement during necessary and reasonable hours for the purpose of working at gainful employment." Iowa Code § 246.901 (1989).

The provisions pertaining to each program expressly state that no employment relationship shall arise between the inmate and the state. Iowa Code section 246.701 states in pertinent part that any work performed by inmates either inside the institution or in an industries program "is a gratuitous payment and is not a wage arising out of an employment relationship." Further, section 246.906, which addresses the status of inmates on work release, states that ". . . there is no employer-employee relationship between the inmate and the state institution, the board of parole, or the judicial district department of correctional services." Therefore, given the express language of sections 246.701 and 246.906 that no employer - employee relationship is created between an inmate and the state, the state as creator and administrator of the prison industries and work release programs cannot be construed as an "employer" within the meaning of Iowa Code section 601A.2(5). Accordingly, inmates working for the state or its subdivisions in a prison industries program or in a work release program are not "employees" within the meaning of Iowa Code section 602A.2(5).

This conclusion is consistent with the language of other work related statutes. Under the Workers Compensation Act for example, an inmate injured while performing work in connection with the maintenance of the institution or in an industry maintained in the institution may receive only limited benefits and only as of the time of the inmate's release from the institution. See Iowa Code § 85.59 (1989); amended by Senate File 2413, p. 2-3.[1] Similarly, the Iowa Employment Security Law excludes from the definition of employment for a government

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[1] The 1990 amendment to Iowa Code § 85.59 authorizes weekly compensation benefits under this section to be determined and paid as in other workers compensation cases, if an inmate is performing service pursuant to an agreement between a public agency and the Iowa Department of Corrections under Iowa Code ch. 28E and Iowa Code § 246.703. See Senate File 2413, p. 3. Certain inmates working in a prison industries or work release program may perform services pursuant to such an agreement. However, the amendment states that these inmates are limited to weekly compensation benefits "under this section." Further, the amendment does not expand those benefits or delete the language that payment of benefits "shall commence as of the time of the inmate's release from the institution either upon parole or final discharge."

entity services performed by an inmate of a custodial or penal institution after December 31, 1977. See Iowa Code § 96.19(6)(a)(6)(f). Because these statutes either disallow or limit an inmate's entitlement to work-related benefits, they support the conclusion that inmates who work for the State either in prison industries or in work release programs are not employees within the meaning of the Iowa Civil Rights Act.

The conclusion that inmates working for the state or its subdivision in a prison industries program or in a work release program are not "employees" within the meaning of Iowa Code § 602A.2(5) is not consistent with the definition of "employee of the state" contained in the Iowa Tort Claims Act. See Iowa Code § 25A.2 amended by Senate File 2413, p. 2. That section defines as an employee of the state "an inmate providing services pursuant to a Chapter 28E agreement entered into pursuant to section 246.703." Certain inmates working in a prison industries program may perform their services pursuant to such an agreement. However, Iowa Code §§ 246.701 and 246.906 have not been amended to authorize the creation of an employer-employee relationship between an inmate and the state. Therefore, the definition of state employee contained in Iowa Code section 25A.2 is not controlling for purposes of determining whether an inmate is an employee under Iowa Code section 602A.2(5).

While the state or its subdivisions which administer the prison industries and work release programs are not "employers" within the meaning of the Civil Rights Act, an inmate's work release employer or private employer under the prison industry program may be an "employer" within the meaning of the Civil Rights Act if the employer would otherwise be subject to the Act. See Iowa Code § 601A.6(e)(5)(6) (excluding certain employers from the provision pertaining to unfair employment practices.) With respect to an inmate working for a work release employer, Iowa Code section 246.905 states that "[a]n inmate so employed shall be paid a fair and reasonable wage in accordance with the prevailing wage scale for such work and shall work at fair and reasonable hours per day and per week." Further, Iowa Code section 246.906 states in pertinent part:

> If an inmate suffers an injury arising out of or in the course of the inmate's employment under this Chapter, the inmate's recovery shall be from the insurance carrier of the employer of the project and no proceedings for compensation shall be maintained against the insurance carrier of the state institution, the State, the insurance carrier of the judicial district department of correctional services . . . .

Because employers must pay inmates in the work release program the prevailing wage and must compensate the inmate for injuries arising out of or in the course of employment, those employers have an employment relationship with the inmates. Therefore, assuming those employers are otherwise subject to the Civil Rights Act, they would be "employers" within the meaning of the Act. Accordingly, inmates working for work release employers who are otherwise subject to the Iowa Civil Rights Act would be "employees" within the meaning of that Act.

Similarly, an inmate working for private industry under the prison industry program would be an "employee" within the meaning of the Iowa Civil Rights Act, assuming the private industry is an employer subject to the Act. Iowa Code section 246.810 states that:

> [t]he state director with the advice of the prison industries advisory board may provide an inmate work force to private industry. Under the program inmates will be employees of a private business and eligible for all benefits and wages the same as other employees of the business engaged in similar work.

Further, with respect to a private industry operated on the grounds of correctional institutions, section 246.809(2)(c) states that the enterprise "shall be deemed a private enterprise and subject to all the laws and lawfully adopted rules of this state governing the operation of similar business enterprises elsewhere." Because the private industry must treat inmates working for the enterprise as it would treat other employees, it has an employment relationship with the inmates. Therefore, as the private industry would be an "employer" within the meaning of the Iowa Civil Rights Act, assuming that it is otherwise subject to the Act, an inmate would be an "employee" within the meaning of the Act.

Sincerely,

Anuradha Vaitheswaran
Assistant Attorney General

AV:ems

COUNTIES; INSURANCE. Stop-loss coverage affecting self-insurance status. Iowa Code sections 509A.14, .15 (1989). The existence of stop-loss coverage by a public body group benefit plan does not by itself mean that the plan is not self-insured for purposes of the requirement that a public body's self-insured group life or health insurance plan for its employees obtain an actuarial opinion as to the adequacy of the plan's reserves. (Haskins to Drew, Franklin County Attorney, 10-3-90) #90-10-2(L)

October 3, 1990

James M. Drew
Franklin County Attorney
320 Central Avenue East
Hampton, Iowa 50441

Dear Mr. Drew:

You have asked the opinion of this office as to whether a particular group insurance plan offered by a county for its employees is "self-funded" for purposes of statutes and rules administered by the Iowa Division of Insurance.

Iowa Code sections 509A.14 and 509A.15 (1989), as you point out, contain a number of requirements for "self-insurance plans" offered by public bodies of this state for their employees. (The benefits offered by the covered plans are life and health insurance.) Among these requirements is that of a "certificate of compliance", which must include an actuarial opinion as to the adequacy of reserves.

In your case, the plan is "self-funded" to an extent and provides for an aggregate stop-loss limit of 120% per year with an individual stop-loss of $15,000,000.

In Op. Att'y Gen. #86-10-1(L), this office indicated that the fact that an employee benefit plan has stop-loss coverage is not inconsistent with the plan being self-insured. In that opinion, the issue was whether a private self-insured employee benefit plan with stop-loss coverage could remain eligible for the exemption from state insurance laws, such as mandated benefits requirements, for self-insurance (referred to as an "uninsured plan") arising by virtue of the preemptive effect of the federal Employee Retirement Income Security Act. It was opined that the existence of stop-loss coverage did not necessarily mean that the plan was "insured" and thus subject to state law, but that the degree and threshold triggering level of the stop-loss coverage determined whether there was self-insurance. Likewise, merely because a government plan has stop-loss coverage does not mean that its plan is "insured" and thus no longer "self-insurance" under ch. 514A. The opinion noted that the stop-loss provision could have a high deductible and basically provide only catastrophic coverage. In that instance, the plan would remain self-insured. See Moore v. Provident Life and Accident Ins. Co., 786 F.2d 922, 927 (9th Cir. 1986) ("a 'stop-loss' policy which protects the trust or other employee benefit plan from catastrophic loss does not" [make the plan lose its "uninsured" status under ERISA]); Cuttle v. Federal Employers Metal Trade Council, 623 F. Supp. 1154 (D. Me. 1985); Hutchison v. Benton Casing Service, Inc., 619 F. Supp. 831, 838 (S.D. Miss. 1985).

Rules of the commissioner of insurance, whose office administers sections 509A.14 and 509A.15, provide support for the conclusion that stop-loss coverage is compatible with self-insurance. They specifically refer to stop-loss coverage, and, indeed, require the kind of coverage your plan possesses, thereby implying that, in the eyes of the administering agency, such coverage is fully consistent with a self-insured plan. See 191 Iowa Admin. Code section 35.20(2)(g) (requiring "aggregate excess loss" coverage which will limit a public body's total claims liability for each year to not more than 125% of the level of actuarially projected claims liability.) The construction of a statute by the agency which administers it is entitled to deference. See Loughlin v. Cherokee County, 364 N.W. 2d 234, 237 (Iowa 1985).

As indicated, the agency which is entrusted with the administration of sections 509A.14 and 509A.15 is the office of the commissioner of insurance. Obviously, it is within the expertise of the commissioner's office to determine when the threshold of a particular stop-loss policy is at such a low level that meaningful self-insurance does not exist, or at a sufficiently high level that significant risk of exposure still lies with the plan. Resolution must be made in light of all

relevant factors, including the claims experience of the particular plan. However, we reiterate our legal conclusion, and opinion, that the existence of stop-loss coverage by itself does not remove a plan from the legal status of self-insurance under sections 509A.14 and 509A.15.

Sincerely,

Fred M. Haskins

FRED M. HASKINS
Assistant Attorney General

FMH/dh
Enc.

COUNTIES: Civil Service. Iowa Code §§ 341A.6(1), 341A.8 and 341A.13 (1989). A county civil service commission, designing and administering competitive tests, has authority to conduct oral interviews of applicants for classified civil service positions and to reject applicants who are not qualified. A sheriff is subject to the requirements of chapter 341A, including rules promulgated by the county civil service commission and the statutory requirement to appoint or promote from a certified list. (Walding to Angrick, State Ombudsman, 11-5-90) #90-11-2(L)

November 5, 1990

Mr. William P. Angrick, II
State Ombudsman
Citizen's Aide Office
L O C A L

Dear Mr. Angrick:

We are in receipt of your request for an opinion of the Attorney General regarding the selection[1] of a deputy sheriff under county civil service, Iowa Code ch. 341A (1989). Specifically, the questions you have posed are:

> 1. Is it within the statutory authority of a county civil service commission formed under chapter 341A of the Iowa Code, to conduct oral interviews of applicants for the position of deputy sheriff and to remove those applicants not passing such interviews from further consideration?
>
> 2. Is a county sheriff subject to rules promulgated by a county civil service commission formed under chapter 341A of the Iowa Code, concerning the appointment of deputy sheriffs under section 341A.6(1) of the Iowa Code?

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[1]The opinion request does not clearly identify whether the vacancy is being filled by appointment or promotion. Although your second question refers to "the appointment of a deputy sheriff," it is not certain whether "appointment" is intended to mean "selection." While the distinction is important, it is not relevant to our review.

3. Is a county sheriff required under the provisions of chapter 341A of the Iowa Code, to provide an explanation, upon request, to the county civil service commission for the sheriff's rejection of a certified list of candidates for the position of deputy sheriff?

4. Under the provisions of section 341A.13 of the Iowa Code: "The Sheriff shall appoint one of the ten persons so certified, and the appointment shall be deemed permanent." Is a county sheriff required to make a selection from a certified list offered for the purpose of hiring a deputy sheriff, or may the sheriff reject the list in its entirety and request that the application and testing procedure be repeated?

It is our judgment that a county civil service commission, designing and administering competitive tests, has authority to conduct oral interviews of applicants for classified civil service positions and to reject applicants who are not qualified. A sheriff is subject to the requirements of chapter 341A, including rules promulgated by the county civil service commission and the statutory requirement to appoint or promote from a certified list. We base our response on the provisions of chapter 341A and prior opinions of this office.

Your first question concerns the authority of a county civil service commission to examine and reject applicants to classified civil service positions. The standard which a civil service commission must follow when designing an examination has been the subject of much review. The Iowa Supreme Court has stated that "a wide discretion must necessarily be allowed [a civil service commission] in the performance of its duties." Jenny v. Civil Service Commission, 200 Iowa 1042, 1044, 205 N.W. 958, 959 (1925). Of course, a civil service commission cannot act arbitrarily, capriciously or unreasonably. See Patch v. Civil Service Commission, 295 N.W.2d 460, 464 (Iowa 1980). In defining the limitations of a civil service commission's power, the actions of the commission must be upheld if there are any fair and reasonable grounds to sustain the action. See Zicherman v. Department of Civil Service, 40 N.J. 347, 351, 192 A.2d 566, 568 (1936); Walters v. Clark, 53 App.Div.2d 1012, 1013, 386 N.Y.S.2d 586, 587 (1976), as cited in Patch v. Civil Service Commission, supra. In that vein, this office has previously determined: "A civil service commission has a wide discretion in designing an examination to determine the qualifications of applicants for particular civil service positions." 1982 Op.Att'yGen. 283, 287.

Iowa Code ch. 341A governs county civil service for deputy sheriffs. Section 341A.8, in pertinent part, provides:

> All appointments to and promotions to classified civil service positions in the office of the county sheriff shall be made solely on merit, efficiency, and fitness, which shall be ascertained by open competitive examination and impartial investigations . . . .

(Emphasis added). The phrase "impartial investigations" was the subject of an earlier opinion. In 1984 Op.Att'yGen. 119 (#84-2-6(L), p. 4), this office stated:

> We do note, however, that there is no specific requirement in Ch. 341A that the commission conduct interviews of applicants. Section 341A does provide that appointments and promotions to civil service positions be made "solely on merit, efficiency, and fitness, which shall be ascertained by open competitive examinations and impartial investigations . . ." (emphasis added) There are no further guidelines in Ch. 341A for determining what such "impartial investigations" should consist of. We do note that the term "impartial" should not be overlooked.

In that opinion, examining whether a commission should adopt rules specifying the manner of conducting interviews, we concluded:

> Accordingly, it is our opinion that the [county civil service] commission should adopt rules which specify when, how often, and in what manner examinations should be administered and interviews conducted for civil service positions.

(Emphasis added). (Footnote omitted). 1984 Op.Att'yGen. 119 (#84-2-6(L), p. 2). Implicit in that opinion was the view that "impartial investigations" could include interviews to evaluate applicants' qualifications.

We buttress our reply by noting that, under the civil service provisions for cities, Iowa Code ch. 400, we have previously concluded that oral examinations could be used in evaluating applicants for civil service positions. In regard to on-the-job performance and oral examinations, we observed: "To the extent that such performance and examinations aid the civil service commission in determining applicants' qualifications for particular civil service positions, they may be made a part of the original entrance examination." 1982 Op.Att'yGen. 283, 287. Accordingly, it is our judgment a county civil service commission has the discretion to conduct, in an impartial manner, oral interviews to determine the qualifications of county civil service applicants.

Regarding the authority of a county civil service commission to reject an applicant, that issue was resolved by a prior opinion. In 1984 Op.Att'yGen. 119 (#84-2-6(L), p. 3-4), we concluded:

> It is our opinion that the [county civil service] commission does have the discretion to reject an applicant as unqualified when compiling an eligibility list of applicants for appointment or promotion.
>
> * * *
>
> Accordingly, a number of factors are to be considered by the commission when compiling eligibility lists, and the exercise of discretion on the part of the commission is clearly contemplated by these statutory provisions when viewed as a whole. In sum, the commission does have discretion to both set requirements for county civil service positions, subject to statutory guidelines, and to reject applicants for these positions for failing to meet these requirements.

Moreover, it is the duty of a county civil service commission: "To certify to the county sheriff when a vacant position is to be filled, on written request, a list of names of the persons passing the examination." Iowa Code § 341A.6(7) (1989). The name of an applicant who fails an examination which includes an oral interview, therefore, could be kept off a certified list. Thus, a civil service commission has the authority to conduct oral interviews, and to reject an applicant which the commission deems unqualified for a classified position.

The balance of your questions concern the subject of compliance. In response to the second inquiry, whether a sheriff is bound by commission rules, statutory guidance is provided. The general powers of a county sheriff are outlined in Iowa Code § 331.652 (1989). Subsection 7 provides: "Subject to the requirements of chapter 341A and section 331.903, the sheriff may appoint and remove deputies, assistants and clerks." (Emphasis added). In reliance on that subsection, we have previously advised: "Generally, the sheriff must comply with the provisions of Ch. 341A (civil service for deputy county sheriffs) . . . when appointing or removing deputy sheriffs. See § 331.652(7)." 1984 Op.Att'yGen. 119 (#84-2-6(L), p. 6). Furthermore, Iowa Code § 341A.6 sets forth the powers and duties of a civil service commission. These duties, pursuant to subsection 1, include the following:

> To adopt, and amend as necessary, rules pursuant to the provisions of this chapter, which shall specify the manner in which examinations are to be held and appointments, promotions, transfers, reinstatements, demotions, suspensions, and discharges are to be made. The rules may make such other provisions regarding personnel administration and practices as are necessary or desirable in carrying out the purposes of this chapter. The commission rules, and their amendments, shall be printed and made available without cost to the public.

Read together, these provisions authorize a civil service commission to adopt rules necessary for the appointment or promotion of deputy sheriffs, which the sheriff is required to follow in filling the position. Thus, a county sheriff is statutorily required to comply with the rules promulgated by the county civil service commission, pursuant to § 341A.6(1), which specify the manner of examining appointments and promotions of deputy sheriffs.

Your third question, concerning whether a sheriff must provide an explanation for rejecting all applicants on a certified list, is moot because of our response to your final inquiry.

Regarding selection from a certified list, we have previously concluded that the sheriff is limited to the names of persons on a certified list. In 1978 Op.Att'yGen. 130, the Attorney General's office opined that it is the duty of the county sheriff:

> [T]o make appointment from the list of ten candidates standing highest on the eligibility list certified to [the sheriff] by the county civil service commission. There is no provision in the statute for adding a person to the list of the ten highest candidates after the list has been certified to the sheriff.

Id. at 131. The basis of that opinion was the mandatory language in Iowa Code § 341A.13.[2] That section provides:

> Whenever a position in the classified service is to be filled, the sheriff shall notify the commission of that fact, and the commission shall certify the names and addresses of the ten candidates standing highest on the eligibility list for the class or grade for the position to be filled. The sheriff shall appoint one of the ten persons so certified, and the appointment shall be deemed permanent.

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[2]In regard to the applicability of § 341A.13, there appears to be a difference of opinion. In an earlier opinion, 1974 Op.Att'yGen. 193, 197, this office concluded that § 341A.13 "deals with promotions or filling classified positions from an eligibility list made up of deputy sheriffs who are already in civil service and seeking other positions," while, more recently, we expressed the opposite view that that section applies "only when the commission is attempting to fill a vacancy that will not be filled by promotion." 1984 Op.Att'yGen. 92 (#83-10-8(L), p. 3). This conflict appears to stem from the abiguity of § 341A.13 itself. As the ambiguity of the statute is more readily clarified by the legislature, we do not attempt to resolve the conflict on this occasion. Further, a resolution is not necessary in order to resolve the question posed. The view expressed in this opinion, and the analysis relied on from the earlier opinion, 1978 Op.Att'yGen. 130, are equally applicable whether the classified position is being filled by appointment or promotion. Sections 341A.8 and 341A.13, in nearly-identical language, require certification of a list of highest applicants and the mandatory selection from the certified list. Thus, the appointment and promotion distinction is extraneous to the issue of mandatory selection, and the treatment of the two selection procedures should be similar on this issue.

(Emphasis added). The mandatory language of § 341A.13, with the use of the word "shall," obligates the sheriff to select an applicant whose name is included on the certified list. No procedure is provided in that section for the rejection of all certified applicants and resubmission of a second certified list. Accordingly, we confirm our earlier advice, and conclude that a sheriff must appoint or promote from the certified list.

In summary, a county civil service commission, designing and administering competitive tests, has authority to conduct oral interviews of applicants for classified civil service positions and to reject applicants who are not qualified. A sheriff is subject to the requirements of chapter 341A, including rules promulgated by the county civil service commission and the statutory requirement to appoint or promote from a certified list.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW

LABOR: Minimum-wage law; STATUTORY CONSTRUCTION: Incorporation by reference. 1991 Iowa Code §_____ (1989 Iowa Acts ch. 14, § 2); 29 U.S.C. § 213; Public Law 101-157, § 3(C)(1), 103 Stat. 939. Repeal of a federal exemption by Congress does not affect Iowa minimum-wage law which had incorporated the exemption by reference. (McGrane to Meier, 11-1-90) #90-11-1(L)

November 1, 1990

Allen J. Meier
Labor Commissioner
Department of Employment Services
1000 East Grand Avenue
Des Moines, Iowa 50319

Dear Mr. Meier:

You have requested an opinion about the effect on the new Iowa minimum-wage law of the later repeal by Congress of a federal exemption which the Iowa legislature incorporated by reference in its law. It is our opinion the Iowa law is unchanged by the subsequent repeal.

The Iowa legislature in 1989 passed a minimum wage law. In doing so it incorporated by reference definitions, standards and exemptions of the federal minimum wage law. 1989 Iowa Acts, ch. 14. In one specific the Iowa statute adopts the federal "exemptions . . . in 29 U.S.C. § 213 . . . except that 29 U.S.C. § 213(a)(2) shall apply only to an enterprise which is comprised of one or more retail or service establishments whose annual gross volume . . . is less than sixty percent of the amount stated in 29 U.S.C. § 203(s)(2) . . . ." Id., § 2.

Congress has since repealed 29 U.S.C. § 213(a)(2). Pub. L. 101-157, § 3(c)1, Nov. 17, 1989, 103 Stat. 939. (See 29 U.S.C.A. § 213 (1990 pocket part).) The question is, does this affect the Iowa law which incorporated it. We believe it does not.

> A statute of specific reference incorporates the provisions referred to from the statute as of the time of adoption without subsequent amendments unless the legislature has expressly or by strong

> implication shown its intention to incorporate subsequent amendments with the statute . . . . Similarly, repeal of the statute referred to will have no effect on the reference statute unless the reference statute is repealed by implication . . . .

Sutherland, Statutory Construction § 51.08 (1984) (footnotes omitted); see also Curtis Ambulance v. Shawnee Cty. Bd. of Cty. Commissioners, 811 F.2d 1371, 1378-79 (10th Cir. 1987); Monarch Life Ins. Co. v. Legal Protective Life Ins. Co., 217 F. Supp. 210, 214 (S.D. New York 1963), reversed on other grounds, Monarch Life Ins. Co. v. Legal Protective LIfe Ins. Co., 326 F.2d 841 (2nd Cir. 1983), cert. denied, 376 U.S. 952, 84 S. Ct. 968, 11 L. Ed. 2d 971 (1964).

The intent of the Iowa legislature was to provide for minimum wages for employees in Iowa. The statute was not passed to enforce any federal statute referred to, but referred to those federal statutes only as shortcuts to avoid having to spell out the definitions, exemptions, etc.

There is nothing which indicates the legislature intended that the statute change with any change in the federal statutes incorporated in it.

It is therefore our opinion the exemption is to be applied as it existed when the Iowa statute was passed.

Sincerely,

THOMAS D. McGRANE
Assistant Attorney General

TDM/sks

TAXATION; ELECTIONS: Costs of local option tax elections. Iowa Code §§ 47.3, 422B.1. The costs of a special election for the imposition of a local option sales and services tax, called on the motion of a city or cities, should be apportioned among the county and the cities for which the election is held. (Osenbaugh to Westfall, 12-31-90) #90-12-11(L)

December 31, 1990

E. A. "Penny" Westfall
Pottawattamie County Attorney
227 South 6th Street
Council Bluffs, Iowa 51501

Dear Ms. Westfall:

You have requested an Attorney General's Opinion regarding who must pay the costs of an Iowa Code ch. 422B local option tax election. Your question specifically involves an option tax election held at the request of the City of Council Bluffs as a special election, not held in conjunction with any other election. The costs of elections, generally, are addressed in chapter 47. Iowa Code § 47.3 states, in part:

> The costs of conducting a special election called by the governor, general election, and the primary election held prior to the general election shall be paid by the county.
>
> The cost of conducting other elections shall be paid by the political subdivision for which the election is held.

The question of imposition of a local option tax may be submitted "at a state general election or at a special election held at any time other than the time of a city regular election." Iowa Code § 422B.1(4). Applying § 47.3, therefore, when the question is submitted at a state general election, the costs shall be paid by the county. When the question is submitted at a special election, the cost "shall be paid by the political subdivision for which the election is held." Iowa Code § 47.3. The issue then is whether the special election was held for the county or for the city of Council Bluffs or for both.

Chapter 422B sets out a unique election procedure for local option taxes. It does not, however, address the costs of special elections on local option taxes. Where the tax has not yet been imposed in any part of the county, the board of supervisors must direct the submission of the question of imposition of the tax upon receipt of a petition of five percent of the electorate. § 422B.3(a). Alternatively, the county commissioner must call an election upon receipt of motions adopted by the governing body of cities or of the county for the unincorporated areas if the population of the entities filing the motion totals over half of the county population. § 422B.3(b). Thus, the supervisors call the election for the county only upon receipt of a petition. Where the election is called upon motion of governing bodies, the supervisors act on behalf of only the unincorporated areas of the county.

Local option taxes do not always impact the county in a uniform way. The local sales and service tax is imposed only in the cities or unincorporated areas where a majority of those voting favor its imposition. § 422B.1(5). Revenues from local sales and services taxes are uniquely divided among the city and county government according to the areas of the county which vote favorably upon imposition of the tax. See Iowa Code Supp. §§ 422B.1(5), 422B.10. In cases where a local sales and service tax has been imposed in only part of the county, the question of repeal or imposition is voted on only by the qualified electors of the areas of the county where the tax has been imposed or not imposed, as appropriate. § 422B.1(5)(a). Alternatively, the board of supervisors can repeal the tax -- on its own motion in unincorporated areas or upon receipt of a motion adopted by the governing body of the incorporated city requesting repeal. § 422B.1(8).

The local sales and service tax can be seen as a county tax. The entire county votes at the first election. As a result of the election, a local option tax may be imposed in areas of the county other than or in addition to the city which adopted the motion requesting the election. § 422B.1(5)(a). Various provisions in Iowa Code ch. 422B (Local Option Taxes) refer to imposition of the tax being done by the county. See, e.g., §§ 422B.1(1) ("county may impose"), 422B.1(2) ("imposed by a county"), 422B.1(5)(a) ("governing body of that county shall impose the tax"), 422B.8 ("imposed by a county"), 422B.9 ("ordinance of a county board of supervisors imposing a local sales and services tax"). Also, the tax is repealed by the board of supervisors. § 422B.1(8).

However, the county has no control over the decision by cities having over half the population of the county to call an election. The county has no control over the repeal of the tax

in incorporated areas. The county board of supervisors is treated in significant part in this chapter as acting on behalf of the unincorporated areas rather than the entire county. The benefits of the tax, if imposed, are apportioned to those areas in which the tax is imposed.

Given the unique nature of the local sales and services tax under chapter 422B, we believe a court would likely construe § 47.3 so as to include the city which requests the election as a "political subdivision for which the election is held." In the absence of express legislative direction, it is reasonable to construe this phrase as imposing the costs of an election on all political subdivisions for whose benefit an election is held. In the case of the initial county-wide election on imposition of the tax, it may not be possible to apportion exactly the extent to which each subdivision benefits from the election. However, we believe a court would, after consideration of all of the facts, make a reasonable apportionment under all of the facts rather than impose all of the costs upon the county or the city, as the case may be. Indeed, we are advised that several jurisdictions in the State have divided the costs of such elections among the various taxing bodies.

We would urge the legislature to address the issue of costs so as to provide a precise method for the allocation of these election costs among the various governmental entities.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:mlr

COUNTIES: Joint 911 Service Board. Iowa Code §§ 357A.2, 357A.3, 477B.3(1). A city which contracts for the provision of fire fighting, police, ambulance, or emergency medical service does not lose its voting status on the joint 911 board unless it contracts for all of these public safety functions. The entity with which the city contracts is entitled to joint 911 board membership with its voting or non-voting status being dependent upon whether it is a public or private entity. Townships and benefited fire districts which provide fire fighting services to territory within the county are entitled to voting membership on the joint 911 board. Neither the formation of a nonprofit corporation by a city or township nor the tax levying authority of an entity directly affects 911 board membership or voting status. (Scase to Schroeder, 12-31-90) #90-12-10(L)

December 31, 1990

John E. Schroeder
Keokuk County Attorney
Keokuk County Court House Annex
101 1/2 South Jefferson
P.O. Box 231
Sigourney, Iowa 52591

Dear Mr. Schroeder:

You have requested an opinion of the Attorney General regarding the composition of a county joint 911 service board appointed pursuant to Iowa Code § 477B.3(1) (Supp. 1989). Specifically, you present the following inquiries:

> 1. Is a city which contracts with another entity to acquire fire, police or emergency medical services entitled to membership on the E911 Board and/or is that other entity entitled to membership on the Board, and in both instances, if so, would the membership be voting or non-voting?
>
> 2. ... [I]s a township which provides its own fire fighting protection or a fire district entitled to membership on the E911 Board, and if so, is that membership voting or non-voting?
>
> 3. Assuming a situation in which a city, township or combination thereof incorporate to form a [nonprofit] corporate fire fighting entity under Chapter 504A, is each one of the participating cities and townships entitled to membership on the E911 Board, or is the corporation entitled to membership, and in both instances, if so, is the membership voting or non-voting?

4. Finally, what effect, if any, does the tax levying authority of a public entity which has formed a corporation for the purpose of performing the function which qualifies it for membership on the E911 Board have on its voting or non-voting status, e.g., a fire district with tax levying authority is formed after which it then files articles of incorporation under chapter 504A?

Provisions regarding the membership and voting status of members of a county's joint 911 service board are set forth as follows in Iowa Code § 477B.3(1) (Supp. 1989):

> Joint 911 service boards to submit plans. The board of supervisors of each county shall establish a 911 service board not later than January 1, 1989. Each political subdivision of the state having a public safety agency serving territory within the county is entitled to voting membership on the joint 911 service board. Each private safety agency operating within the area is entitled to nonvoting membership on the board. A township which does not operate its own public safety agency, but which contracts for the provision of public safety services, is not entitled to membership on the joint 911 service board, but its contractor is entitled to membership according to the contractor's status as a public or private safety agency. ...

"Public or private safety agency" is defined in Code § 477B.2(2) (1989) as "a unit of state or local government, a special purpose district, or a private firm which provides or has the authority to provide fire fighting, police, ambulance or emergency medical services."

In a prior opinion concerning chapter 477B and joint 911 boards this office discussed board membership issues, concluding as follows:

> [Section 477B.3(1)] provides for voting membership status to each political subdivision having a public safety agency "serving territory within the county" and nonvoting membership status to private safety entities "operating within the area." Neither of these phrases require the agency or entity be headquartered in the county but require the agency serve territory or operating area within the area. Membership turns on service territory or operating area rather than headquarters. Whether that membership is voting or nonvoting turns on the public or private nature of the agency or entity providing service.

1988 Op.Att'yGen. 104, 110. With these general principles in mind, we will address your specific inquiries.

1. Cities contracting for service. A city may contract with another political subdivision or private agency to provide fire fighting, police, ambulance or emergency medical services to its citizens. If a city has contracted with other entities for the provision of all of these services, then the city itself would no longer have a public safety agency serving territory within the county and would not be entitled to membership on the joint 911 board. If, however, a city contracts for the provision of one or more, but not all, of the above listed services and continues to provide the non-contracted service to an area within the county, then the city would still have a public safety agency and would be entitled to voting membership on the joint 911 board.[1]

The entity with which a city contracts for services would, due to its operation within the county, be entitled to membership on the joint 911 board. As we noted in our 1988 opinion, "[w]hether that membership is voting or nonvoting turns on the public or private nature of the agency or entity providing service."

2. Townships and fire districts. In presenting your inquiry regarding townships and fire districts you correctly note that the administrative rules adopted to implement chapter 477B do not include townships or fire districts when defining political subdivisions. 607 I.A.C. 10.2 contains the following definition: "'political subdivision' means a county and incorporated city or town. Excluded from this definition are departments and divisions of state government and agencies of the federal government." In light of this definition you ask whether a township which provides its own fire protection or a fire district is entitled to membership on the joint 911 board.

The definition of political subdivisions set forth in 607 I.A.C. 10.2 neither expressly includes nor excludes townships and fire districts. Nor does the rule purport to list all entities which are political subdivisions. We will, therefore, look to

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[1] This conclusion is consistent with the statutory provision regarding townships contained in Code § 477B.3(1). "A township which does not operate its own public safety agency, but which contracts for the provision of public safety services, is not entitled to membership on the joint 911 service board, but its contractor is entitled to membership according to the contractor's status as a public or private safety agency."

general principles when assessing whether or not townships and fire districts are political subdivisions. This office has issued several opinions assessing whether specific entities constitute political subdivisions. These opinions consistently rely on the following general rule: "A political subdivision of the state is a geographic or territorial division of the state rather than a functional division of the state." 1988 Op.Att'yGen. 100 (#88-7-6(L)); 1976 Op.Att'yGen. 823, 825. The 1976 opinion examines several cases from other jurisdictions with identify the following characteristics commonly associated with political subdivisions: (a) a defined geographic area; (b) responsibility for certain functions of local government; (c) public elections and public officers; and (d) taxing power. 1976 Op.Att'yGen. at 825-26.

Under this definition, we must conclude that a township is a political subdivision. As such, a township which provides fire fighting protection to territory within the county would be entitled to membership on the joint 911 board. Because a township is a public entity, this would be a voting membership.

Iowa Code chapter 357B governs benefited fire districts operating in Iowa.[2] Under the provisions of this chapter, fire districts encompass a defined geographic area and are under the control of a three member board of elected trustees (Iowa Code § 357B.2); the trustees have the power to purchase and maintain fire equipment and operate or contract for the operation of fire protection service (Iowa Code § 357B.3). The trustees may levy an annual tax for the purpose of executing their powers. Id. It appears that a fire district operating pursuant to Iowa Code chapter 357B is a political subdivision. If a fire district operates its own fire protection service, then it is entitled to voting membership on the joint 911 board. If, however, the district contracts for the provision of fire protection, then it is not entitled to representation on the board. (See footnote 1).

3. Nonprofit corporation status. Your third inquiry asks us to assume that a city, township or combination thereof incorporate under Code chapter 504A to form a nonprofit corporation to perform one or more public safety functions. You ask whether each of the participating cities and townships and the corporation itself is entitled to joint 911 board membership. Code § 477B.3(1) provides that a political subdivision which has

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[2] In examining the Iowa Code we find no other provisions authorizing the development of "fire districts," we therefore assume that your reference is to chapter 357B benefited fire districts.

an agency providing fire fighting, police, ambulance, or emergency medical service to territory in the county is entitled to voting membership on the joint 911 board. We do not believe that chapter 504A incorporation alters this basic principle. An individual city or township which forms a chapter 504A corporation to perform public safety functions would be entitled to voting membership on the joint 911 board. Because the resulting corporation would merely be performing public safety functions on behalf of, or as the alter-ego of, the city or township it would not be entitled to board membership.

If, however, by incorporating in combination with other cities or townships a city or township delegates its authority to control public safety functions to the corporation, it could be found that the city or township no longer has a public safety agency. In such a case, the city or township would no longer be entitled to joint 911 board membership. Because this finding would be dependent upon the specific terms of the articles of incorporation or by-laws of the corporation, we cannot render an opinion regarding the impact of incorporation of a combination of cities and/or townships on 911 board membership. Nor can we offer an opinion regarding the membership of the resulting corporation.

4. Tax levying authority. Finally, you inquire about the effect that the tax levying authority of a public entity which has formed a corporation to perform public safety functions has on its voting or non-voting status. As noted above, the tax levying authority of a public entity is a factor relevant to determination of whether the entity is a political subdivision. Beyond this, tax levying authority does not appear to be directly related to the voting or non-voting status of 911 membership. Rather, under Code § 477B.3(1), voting status is dependent upon the public or private nature of the entity. See 1988 Op.Att'yGen. at p. 110.

In summary, it is our opinion that a city which contracts for the provision of fire fighting, police, ambulance, or emergency medical service does not lose its voting status on the joint 911 board unless it contracts for all of these public safety functions. The entity with which the city contracts is entitled to joint 911 board membership with its voting or non-voting status being dependent upon whether it is a public or private entity. Townships and benefited fire districts which provide fire fighting services to territory within the county are entitled to voting membership on the joint 911 board. Neither

the formation of a nonprofit corporation by a city or township nor the tax levying authority of an entity directly affects 911 board membership or voting status.

Sincerely,

Christie J. Scase

CHRISTIE J. SCASE
Assistant Attorney General

RACING AND GAMING COMMISSION: Drug use in simulcast races. Iowa Code §§ 99D.7(19), 99D.25, 99D.25A, 714.8(10), 714.16. Simulcasting of horse and dog races which are run in states with more lenient medication standards for wagering purposes at an Iowa track is not a violation of Iowa Code §§ 99D.25 or 99D.25A or of Iowa Code § 714.8(10). Whether a licensee's failure to disclose drug use by horses running in a simulcast race violates the Consumer Fraud Act, § 714.16, involves factual issues and would require us to determine whether an individual is guilty of violation of law. This is beyond the scope of the opinion process. The responsibility of Iowa licensees to disclose facts concerning drug use is a question which can be addressed by the Racing and Gaming Commission through rulemaking or in its selection of the races to be simulcast. (Odell to Osterberg, State Representative, 12-31-90) #90-12-9(L)

The Honorable David Osterberg
State Representative
318 - 2nd Avenue N.
Mt. Vernon, Iowa 52314

Dear Representative Osterberg:

You have asked this office for its opinion on a series of questions on the relationship of the limitations and restrictions on the use of foreign substances in racing animals provided in Iowa Code §§ 99D.25 and 99D.25A (1989) and the simulcasting of races provided by Iowa Code Supp. § 99D.11(6)(b) (1989), as amended by 1990 Iowa Acts ch. 1175, § 5. For purposes of this opinion we have divided our response into two parts. First, we discuss whether the scenarios you describe violate Iowa Code chapter 99D or Iowa Code § 714.8(10). Second, we address whether the failure to inform the Iowa racing public of possible drugging or numbing of horses with drugs permitted in other states but not allowed in Iowa would violate the Iowa Consumer Fraud Act, Iowa Code § 714.16.

I. Iowa Code chapter 99D, Iowa Code § 714.8(10)

As to the application of Iowa code chapter 99D and Iowa Code § 714.8(1), it is our opinion that the medication restrictions applicable to races run in this State do not apply to races run in other states and telecast at Iowa tracks for wagering purposes.

The primary question to be answered in any exercise of statutory construction is the legislative intent behind the statutes. If at all possible, a statute is to be construed as consistent with that intent, which is derived primarily from the statute itself. Harden v. State, 434 N.W.2d 881 (Iowa 1989); State v. Peterson, 347 N.W.2d 398 (Iowa 1984). However, penal statutes are to be strictly construed. State v. Ortega, 418 N.W.2d 57 (Iowa 1988).

One question you ask is whether permitting wagering on telecast races from states with less stringent standards violated the intent of Iowa Code § 99D.25 (1989) as reflected in subsection two. Section 99D.25(2) clearly states the General Assembly's distaste for medication of racing animals. However, this is not a substantive provision, but one enacted to aid in the construction of the rest of § 99D.25. Nothing in that section prohibits or regulates wagering. Its substantive provisions only relate to backside activities. None of these activities in the case of a simulcast race take place in the State of Iowa. This is also true in regard to the substantive provisions of Iowa Code § 99D.25A (1989).

In regard to Iowa Code § 99D.7(19) (1989), the Racing and Gaming Commission is mandated to require publication of facts concerning use of lasix and phenylbutazone in the racing program for races run at Iowa tracks. The Commission has to date not adopted a rule requiring disclosure of these matters in the program.

In addition, Iowa Code § 714.8(10) (1989) is inapposite because there is no other provision of the Code stating the practice of simulcasting is a fraudulent act. An express statement of that kind is an essential element of any violation under § 714.8(10).

II. Iowa Consumer Fraud Act, Iowa Code § 716

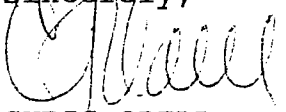
You ask whether the Iowa track's failure to disclose drug use by horses in a simulcasted race would violate the Consumer Fraud Act as a deceptive practice under Iowa Code §§ 714.16(1)(g) and 714.16(2)(a). The office of the Attorney General has the statutory duty to give written opinions upon questions of law submitted by either members of the General Assembly or other state officers. Iowa Code § 13.2(4). An opinion cannot, however, determine factual questions. The questions which you pose, moreover, would require us to determine whether a violation of statute has occurred. We do not ordinarily utilize the opinion process to determine specific violations of statute. See Op.Att'yGen. #81-7-4(L). This is particularly true where the statute in question has criminal penalties. See Lenertz v. Municipal Court of City of Davenport, 219 N.W.2d 513, 516 (Iowa 1974); Iowa Code § 701.8 (1989); 1972 Op.Att'yGen. 564. Like factual disputes, a violation of statute is appropriately determined in adjudicative proceedings.

We would additionally note that the Iowa Parimutuel Wagering Act provides administrative mechanisms to resolve the question whether, and to what extent, Iowa tracks must disclose drug use

by horses running in simulcast races conducted in another state. First, the Racing and Gaming Commission has rulemaking authority by which it could compel licensees to disclose drug use, or provide other appropriate disclaimers or warnings, as the Commission determines appropriate. Iowa Code § 99D.7. Second, the Commission actually selects the specific races which may be simulcast. Iowa Code Supp. § 99D.11(6)(b) (1989), as amended by 1990 Iowa Acts, ch. 1175, § 5. As part of this selection process, it may evaluate the drugging limitations applied for the race in question. This authority would also permit the Commission to impose disclosure requirements. Third, the Commission has authority to define corrupt or fraudulent practices in relation to racing. Iowa Code § 99D.24(1)(c).

For the foregoing reasons, we are of the opinion that simulcasting of horse and dog races which are run in states with more lenient medication standards than Iowa for wagering purposes at an Iowa track is not a violation of the Iowa medication standards or of Iowa Code § 714.8(10). Whether a licensee's failure to disclose drug use by horses running in a simulcast race violates the Consumer Fraud Act involves factual issues and would require us to determine whether an individual is guilty of violation of law. This is beyond the scope of the opinion process. Additionally, the responsibility of Iowa licensees to disclose facts concerning drug use is a question which can be addressed by the Racing and Gaming Commission through rulemaking or in its selection of the races to be simulcast.

Sincerely,



CHRIS ODELL
Assistant Attorney General

CO:mlr

SCHOOLS: Community Colleges, tuition remission, collective bargaining. Iowa Code §§ 20.9, 280A.23 (1989). An Iowa community college may offer tuition-free instruction as a benefit to its employees and their dependents. This benefit would be a permissive subject for collective bargaining. (Scase to Senator Boswell and Representative Daggett, 12-28-90) #90-12-6(L)

The Honorable Leonard L. Boswell
State Senator
RR 1, Box 130
Davis City, Iowa 50065

The Honorable Horace Daggett
State Representative
RR 1, Box 90
Kent, Iowa 50850

Dear Senator Boswell and Representative Daggett:

We have received separate opinion requests from you regarding whether community colleges in Iowa may provide tuition-free instruction as a benefit to employees, their spouses and dependents. In addition to this general inquiry, Senator Boswell has asked whether such a tuition waiver is an eligible topic for collective bargaining.

Iowa Code ch. 280A, which establishes and sets forth guidelines for the operation of community colleges, does not directly grant the directors of a community college authority to offer tuition-free instruction as an employee incentive or benefit. Nor do the provisions of this chapter directly preclude such a benefit. In the absence of a statute addressing this topic, we have examined ch. 280A to determine if it contains provisions from which the power to offer tuition-free instruction as an employee benefit may be implied. See Barnett v. Durant Community School Dist., 249 N.W.2d 626 (Iowa 1977) (holding that a local school board's statutory power to contract with teachers and include in these contracts "such other matters as may be agreed upon" implied authority "to agree to reimburse teachers for tuition expended on approved graduate studies in consideration of their agreement to teach during that contract year and the following year."); Bettendorf Ed. Ass'n. v. Bettendorf Comm. School Dist., 262 N.W.2d 550, 551-52 (Iowa 1978)

(holding that lump-sum benefits upon retirement for accrued sick leave were a form of teacher compensation over which the local school board had authority to contract); Op.Att'yGen. #90-3-9(L) (McGuire to Swanson) (finding that a county hospital board of trustees had authority to provide staff physicians and dependents a discount in the cost of medical services as an employee benefit).

Iowa Code § 280A.23, as amended by 1990 Iowa Acts, ch. 1253, § 35, includes the following provisions:

> The board of directors of each community college shall:
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> * * * * *
>
> 2. Have authority to determine tuition rates for instruction . . . .
>
> 3. Have the powers and duties with respect to community colleges, not otherwise provided in the chapter, which are prescribed for boards of directors of local school districts by chapter 279 . . . .
>
> 4. Have the power to enter into contracts and take other necessary action to insure a sufficient curriculum and efficient operation and management of the college . . . .
>
> 5. Establish policy and make rules, not inconsistent with law and administrative rules, regulations, and policies of the state board, for its own government and that of the administrative, teaching and other personnel, and the students of the college, and aid in the enforcement of such laws, rules, and regulations.
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> * * * * *

It is our opinion that the broad authority granted to community college directors to set tuition, enter into contracts, and establish personnel policy is sufficient to enable the directors to agree to provide tuition-free instruction to employees and their dependents.

In addition, we note that the provision of such a benefit is generally viewed as serving a recognizable public purpose. As the Utah Attorney General found in an opinion issued on December 14, 1981 (UTAG Opinion No. 82-30):

> It has been a long-standing practice in higher education nationally, as well as within the Utah System of Higher Education, for colleges and universities to provide for a reduction (or in some cases a total waiver) of tuition charges for employees and dependent members of their families who enroll in classes at such institutions. These programs of special tuition reduction are generally referred to in the applicable literature as tuition remission policies.
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> * * * * *
>
> The reason for the wide-spread use of tuition remission programs is that they permit the institutions to benefit their employees without increasing the employees' taxes[1] and at a very low cost to the institution as compared to the value of the benefit to the employee and his or her family.

This opinion of the Utah Attorney General concluded that the creation of employee benefit packages including tuition remission policies was expressly and impliedly authorized by a statutory grant of authority to the president of each institution to hire and contract with employees and set their compensation.

Having found that Iowa law would permit community colleges to adopt tuition remission plans, we turn to Senator Boswell's inquiry regarding collective bargaining. Iowa Code § 20.9 (1989) sets forth a listing of mandatory subjects for collective bargaining with public employees. The Iowa court has adopted a narrow view of this section, repeatedly holding that the legislature intended to restrict mandatory topics to those listed. See City of Fort Dodge v. Iowa P.E.R.B., 275 N.W.2d 393, 398 (Iowa 1979); Charles City Comm. School Dist. v. P.E.R.B., 275 N.W.2d 766, 772-73 (Iowa 1979); Professional Staff Ass'n. v.

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[1]We do not opine as to the effect a tuition remission policy would have upon employees' tax liability under current law. (Footnote added).

P.E.R.B., 373 N.W.2d 516 (Iowa App. 1985). Included in the § 20.9 list of mandatory bargaining subjects are wages and supplemental pay. "In Fort Dodge Comm. School Dist. v. P.E.R.B., 319 N.W.2d 181, 183-84 (Iowa 1982), wages are defined as a specific sum or price paid by an employer in return for the employee's services, and supplemental pay is pay for extra services relative to the time, skill and nature of the services." Professional Staff Ass'n. v. P.E.R.B., 373 N.W.2d at 518.

It is our view that a tuition remission plan such as you describe would not constitute wages or supplemental pay. See Professional Staff Ass'n. v. P.E.R.B., 373 N.W.2d at 518-19 (holding that reimbursements for unused sick leave were not wages or supplemental pay); Fort Dodge Comm. School Dist. v. P.E.R.B., 319 N.W.2d at 183-84 (holding that cash incentives for early retirement are not wages or supplemental pay); Charles City Ed. Ass'n. v. P.E.R.B., 291 N.W.2d 663, 666-69 (Iowa 1980). This conclusion does not preclude contract negotiations regarding tuition remissions as a permissive topic of bargaining subject to mutual agreement of the parties.

In summary, it is our opinion that an Iowa community college may offer tuition-free instruction as a benefit to its employees and their dependents and that this benefit would be a permissive subject for collective bargaining.

Sincerely,

Christie J. Scase

CHRISTIE J. SCASE
Assistant Attorney General

CJS:rd

cc: Richard Byerly
Superintendent/President
P.O. Box 458
1501 West Townline
Creston, Iowa 50801

COUNTIES AND COUNTY OFFICERS: County Attorney, Dismissal of Assistants. Iowa Code § 331.903 (1989). Assistant county officers, including assistant county attorneys, are employees at will who serve at the pleasure of the principal officer making the appointment. (Scase to Taylor, Jefferson County Attorney-Elect, 12-24-90) #90-12-5(L)

December 24, 1990

Ann Taylor
Jefferson County Attorney-Elect
60 W. Burlington, Ste. 203
Fairfield, Iowa 52556

Dear Ms. Taylor:

You have requested an opinion of the Attorney General addressing whether an assistant county attorney is subject to removal at the end of the county attorney's term. We will address whether, as a matter of state law, an assistant county attorney is removable at-will or only for cause. We do not, in this opinion, attempt to resolve the applicability of First Amendment principles concerning the discharge of assistants for political patronage reasons. See Rutan v. Republican Party of Illinois, 497 U.S. ___, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990); Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); and 1980 Op.Atty.Gen. 699. Nor do we address the possible implications of a county's collective bargaining agreement with its employees or potential civil service protection, as these issues were discussed at some length in Norton v. Adair County, 441 N.W.2d 347, 361-62 (Iowa 1989).

Provisions for the appointment and removal of assistant county officers are contained in Iowa Code § 331.903 (1989), which provides in relevant part as follows:

> 1. The auditor, treasurer, recorder, sheriff, and county attorney may each appoint, with approval of the board [of supervisors], one or more deputies, assistants, and clerks for whose acts the principal officer is responsible. The number of deputies, assistants, and clerks for each office shall be determined by the board and the number and approval of each appointment shall be adopted

by a resolution recorded in the minutes of the board.

2. When an appointment has been approved by the board, the principal officer making the appointment shall issue a written certificate of appointment which, shall be filed and kept in the office of the auditor. A certificate of appointment may be revoked in writing by the principal officer making the appointment, which revocation shall also be filed and kept in the office of the auditor.

* * * * *

3. Each deputy officer, assistant and clerk shall perform the duties assigned by the principal officer making the appointment. During the absence or disability of the principal officer, the first deputy shall perform the duties of the principal officer.

* * * * *

Section 331.903 does not establish a term for the appointment of assistant officers. Nor do we find any other Code provision setting a duration for such appointments.

Guidance may, however, be found in McQuillin's treatise on municipal law.

> It is a well-established rule of law that the power to appoint to an office or position without a defined term or tenure carries with it the power of removal. It is also a maxim of the law that where the time of holding is not fixed, the tenure of the office or position is at the pleasure of the appointing power.
>
> * * * * *
>
> Ordinarily, in contemplation of law, the position of assistants or subordinates ends with that of their superior officer, although if an assistant or subordinate is permitted to continue service undisturbed by the officer's successor, that person becomes the new officer's assistant at the pleasure of the new officer, and, if necessary, the law will presume that appointment.

3 E. McQuillin, Municipal Corporations, § 12.115, p. 546 (3d Ed. 1990). Rulings of the Iowa Supreme Court have been consistent with these general principles. See Norton v. Adair County, 441 N.W.2d at 361 (where the court noted that "an assistant, clerk, or deputy without civil service status . . . would clearly be an employee at-will, subject to discharge at any time for any reason."); Bowman v. Overturff, 229 Iowa 329, 294 N.W. 568 (1940); Young v. Huff, 209 Iowa 874, 227 N.W. 122 (1929). See also 1976 Op.Atty.Gen. 842 (interpreting §§ 341.1, 341.3 and 341.6 of the Iowa Code of 1978, now Code § 331.903, as allowing newly elected county officer to revoke the certificates of appointment of deputy officers and appoint replacements); 1932 Op.Atty.Gen. 175.

In light of the foregoing authority, it is our opinion that assistant county officers, including assistant county attorneys, are employees at will who serve at the pleasure of the principal officer making the appointment.

Sincerely,

CHRISTIE J. SCASE
Assistant Attorney General

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MUNICIPALITIES: Bond Elections. Resubmission of Proposition. Iowa Code §§ 75.1, 384.27(1), 422A.2(4)(d) and 422A.2(4)(f) (1989); 1990 Iowa Acts, ch. 1024, § 1. A period of six months from the date of an election is required to lapse prior to resubmission of a proposition providing for the issuance of hotel and motel tax bonds at a successive election. That proposition, or a proposal that "incorporates any portion" of that proposition, cannot be included in a successive election prior to the lapse of six months. (Walding to Palmer, State Senator, 12-21-90) #90-12-3(L)

December 21, 1990

The Honorable William D. Palmer
State Senator
1340 E. 33rd Street
Des Moines, IA 50317

Dear Senator Palmer:

You have requested an opinion of the Attorney General regarding a hotel and motel tax bond referendum. Specifically, the question we have been presented, as restated, is as follows:

> If a proposition providing for the issuance of hotel and motel tax bonds under Iowa Code § 422A.2 fails to gain approval by the required percentage of votes, does Iowa Code § 75.1 require passage of a period of six months from the date of the election prior to resubmission of the proposal?

The focal point of that issue is Iowa Code § 75.1. Unnumbered paragraph 3 of that section provides:

> When a proposition to authorize an issuance of bonds has been submitted to the electors under this section and the proposal fails to gain approval by the required percentage of votes, such proposal, or any proposal which incorporates any portion of the defeated proposal, shall not be submitted to the electors for a period of six months from the date of such regular or special election.

Thus, § 75.1 prohibits a proposition, or a proposal that "incorporates any portion" of that proposition, from being included in a successive election prior to the lapse of six months. See Harney v. Clear Creek Comm. School Dist., 154 N.W.2d 88 (Iowa 1967)(school bond election); Op.Att'yGen. #89-6-4(L) (reviewing the resubmission of a defeated proposal to issue school bonds under ch. 296).

The narrower issue, however, is whether § 75.1 is applicable to a proposition on the issuance of hotel and motel tax bonds. Authority for a city to collect a hotel and motel tax is found in Iowa Code ch. 422A. See Iowa Code § 422A.1, as amended by 1989 Iowa Acts, ch. 251, § 30 and 1989 Iowa Acts, ch. 294, §1. A city that collects a hotel and motel tax is authorized to use, and even required to spend, revenue derived from a hotel and motel tax for "recreation, convention, cultural, or entertainment facilities." Iowa Code § 422A.2(4)(a). Section 422A.2(4)(a) further authorizes the hotel and motel tax revenues to be used for "the payment of principal and interest, when due, on bonds or other evidence of indebtedness issued by the . . . city" for those purposes. Section 422A.2(4)(c) permits a city imposing a hotel and motel tax to "pledge irrevocably an amount of the revenues derived [from the hotel and motel tax] for each of the years the bonds remain outstanding to the payment of bonds which the city . . . may issue for one or more of the purposes set forth on [§ 422A.2(4)(a)]." Thus, a city is authorized to collect a hotel and motel tax and to use the revenues derived from that tax for the payment of bonds used for "recreation, convention, cultural, or entertainment facilities."[1]

The procedure for issuance of hotel and motel tax bonds is provided for in § 422A.2(4)(d). Pursuant to that provision: "The provisions of division III of chapter 384 relating to the issuance of corporate purpose bonds apply to the issuance by a city of bonds payable as provided in [422A.2(4)]." A city, therefore, is required to follow the ch. 384 authorization procedures in the issuance of ch. 422A bonds.

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[1]The issuance of hotel and motel tax bonds, if petitioned, is subject to referendum. Iowa Code § 422A.2(4)(f), as amended by 1990 Iowa Acts, ch. 1024, § 1.

Iowa Code § 384.27(1), a provision contained in division III of ch. 384, provides: "A city may sell general obligation bonds at public or private sale in the manner prescribed by chapter 75." Because "the provisions of division III of chapter 384 relating to the issuance of corporate purpose bonds" are applicable to hotel and motel tax bond issuance pursuant to § 422A.2(4)(d), the § 384.27(1) requirement that the bonds be sold in compliance with ch. 75 is equally applicable to bonds issued under ch. 422A. Accordingly, it is our judgment that the issuance of hotel and motel tax bonds are subject to any provisions of ch. 75 which are not directly inconsistent with ch. 422A. This would include the six-month period for resubmission of a proposition at a successive election.[2]

Thus, a proposition on the issuance of ch. 422A bonds, or a proposal that "incorporates any portion" of that proposition, cannot be resubmitted at a successive election prior to the passage of six months from the date of that election.

In summary, a period of six months from the date of an election is required to lapse prior to resubmission of a proposition providing for the issuance of hotel and motel tax bonds at a successive election. That proposition, or a proposal that "incorporates any portion" of that proposition, cannot be included in a successive election prior to the lapse of six months.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

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[2]The requirement in § 75.1 for a sixty-percent majority vote would not, however, apply as § 422A.2(4)(f), as amended by 1990 Iowa Acts, ch. 1024, § 1, requires only a majority vote in favor of these bonds. As the more specific and the later statute, § 422A.2(4)(f) would prevail in this case of direct conflict. See Iowa Code § 4.7 (1989).

COLLECTIVE BARGAINING AGREEMENTS; PAC checkoff. Iowa Code §§ 20.9, 20.26 (1989). Iowa Code § 20.26 precludes a public employee organization from using moneys it obtains through payroll dues deductions to make PAC contributions. The inclusion of a PAC contribution checkoff is not a mandatory subject of bargaining under Code § 20.9. (Scase to TeKippe, 12-20-90) #90-12-2(L)

December 20, 1990

Richard P. TeKippe
Chickasaw County Attorney
206 North Chestnut
New Hampton, Iowa 50659

Dear Mr. TeKippe:

You have requested an opinion of the Attorney General regarding the ongoing validity of one of our prior opinions, 1978 Op.Att'yGen. 375 (Nolan to Branstad, State Representative). In addition, you question the applicability of Iowa Code § 20.26 (1989) and the conclusion expressed in the 1978 opinion to a "reverse PAC [political action committee] checkoff" being proposed for inclusion in employee organization dues deductions and ask whether a reverse PAC checkoff is a "dues checkoff" and thus a mandatory subject of bargaining under Iowa Code § 20.9 (1989).

The 1978 opinion at issue addressed the use of funds obtained through dues deductions by public employee representative organizations for political contributions distributed by the political actions committee of the employee organization. In addressing the propriety of this use of employee organization dues, we noted that section 20.26 of the 1977 Iowa Code specifically prohibited "any direct or indirect contribution out of the funds of an employee organization to any political party or organization or in support of any candidate for elective public office." In light of this statutory prohibition, we came to the following conclusion:

> [T]he system of political contributions described in your letter [i.e. the use of money from employee organization dues deductions to fund political contributions by an employee organization PAC], may be effectively precluded by the provisions of

> chapter 20 of the Code unless the individual is making a 'personal contribution' of the type covered by § 20.26 and the union collector merely acts as his agent for that limited purpose.

1978 Op. at 375; see Iowa Code § 20.26, fourth unnumbered paragraph, which provides: "Nothing in this section shall be construed to prohibit voluntary contributions by individuals to political parties or candidates."

You ask whether this office has changed its position on this issue since 1978. It is the longstanding policy of this office not to overrule a prior opinion unless we find that the controlling law has changed or that the previous ruling was clearly erroneous. See Op.Att'yGen. #90-4-5(L) (Hunacek to Stream), citing 1980 Op.Att'yGen. 51, 52. Iowa Code § 20.26 has not been amended since we issued our 1978 opinion. Because the law governing this question remains unchanged, we must look to whether our prior opinion is clearly erroneous. Upon review, we conclude that it is not.

As you note in your inquiry, Iowa Code § 20.9, requires public employers and employee organizations to include in their negotiations "terms authorizing dues checkoff for members of the employee organization . . ., which shall be embodied in a written agreement and signed by the parties." This section further provides that "[i]f an agreement provides for dues checkoff, a member's dues may be checked off only upon the member's written request and the member may terminate the dues checkoff at any time by giving thirty days written notice." The fact that terms for a dues checkoff are a mandatory subject of bargaining does not alter the limitation which Code § 20.26 places upon an employee organization's use of its funds. Section 20.26 clearly states that an "employee organization shall not make any direct or indirect contribution out of the funds of the employee organization to any political party or organization or in support of any candidate for elective public office." We believe that our 1978 opinion was correct in finding this prohibition applicable to all employee organization funds, including those obtained by the employee organization through payroll deductions for dues. Because of this, we decline to disturb our previous opinion.

In addition to asking whether this office has changed its opinion from the conclusion stated in 1978 Op.Att'yGen. 375, you present the following inquiries:

> a. Does "dues checkoff" in Iowa Code section 20.9 include sums specifically designated for political contributions?
>
> b. Is [a] reverse PAC checkoff, being included as a part of the employee organization's dues amount, precluded by the provisions of Iowa Code section 20.26?

Iowa Code § 20.9 sets forth the mandatory subjects of bargaining upon which public employers and employee organizations must negotiate, including "terms authorizing dues checkoff for members of the employee organization." You ask whether this "dues checkoff" provision includes sums designated for PAC contributions. See Charles City Comm. School Dist. v. P.E.R.B., 275 N.W.2d 766, 773 (Iowa 1979) (adopting a restrictive approach to interpreting the bargaining subjects listed in § 20.9). We believe that it does not. As noted above, we interpret Code § 20.26 as precluding a public employee organization from using funds it collects through payroll dues deductions to make PAC contributions. If PAC contributions are characterized as employee organization membership dues for purposes of § 20.9, then they must also be characterized as membership dues for purposes of § 20.26. If so characterized, the funds may not be used for PAC contributions. Therefore, we do not believe that terms relating to a payroll deduction for PAC contributions are a mandatory subject of bargaining under Code § 20.9.

In your opinion request you provide the following description of a reverse PAC checkoff being proposed by employee organizations:

> An amount is added to the total membership dues on the [employee organization] membership form. Contributions to the PAC are described as "voluntary." . . . The employee organization has represented that the majority of the contributions will go to support candidates the PAC has identified as being supportive of the employee organization's legislative priorities, ...
>
> Members are advised that members have the option of choosing not to contribute initially, or to receive a refund if they later change their minds and notify the employee organization by December 15.
>
> The membership enrollment form includes the reverse PAC checkoff amount as part of the employee organization dues amount. If an employee does not want to contribute, the employee is assured in a separate notification that he or she must check an appropriate

box on a separate reply card, sign it, and return it to the employee organization representative. It is represented that the representative will adjust the dues deduction downward to eliminate the reverse PAC checkoff amounts.

Further, an employee is advised in the same separate notification that if the employee later changes his or her mind, the same reply card can be checked to request a refund, and the amount will be refunded so long as the notice is received by December 15.

Determination of the legality of this particular "reverse" dues deduction plan turns upon whether PAC contributions made pursuant to the plan are considered to be "voluntary contributions by individuals to political parties or candidates," which are specifically allowed pursuant to unnumbered paragraph four of Code § 20.26, or whether the contributions, because of the employee organization's involvement in the collection process become "funds of the employee organization" which the employee organization may not use to make direct or indirect contributions to any political party or organization or to support any candidate for elective public office. We cannot, through the opinion process, adequately explore the facts of this case as necessary to opine on the legality of the plan as described. See 61 I.A.C. 1.5(3)(c) ("The attorney general may decline to issue an opinion where appropriate, as in the following examples: c. The question calls for resolution of a question of fact and policy rather than a determination of a question of law or the legal question is dependent upon the facts of specific cases."). Because of the factual nature of the determination involved, we decline to offer an opinion at to whether Code § 20.26 precludes the "reverse PAC checkoff" described in your request.

In summary, we reaffirm our prior opinion that Iowa Code § 20.26 precludes a public employee organization from using moneys it obtains though payroll dues deductions to make PAC contributions and conclude that the inclusion of a PAC contribution checkoff is not a mandatory subject of bargaining under Code § 20.9.

Sincerely,

Christie J. Scase

CHRISTIE J. SCASE
Assistant Attorney General

CJS:rd

COUNTIES: E911 Service Fund. Iowa Code § 477B.7, as amended by 1990 Iowa Acts, ch. 1144, §§ 2 and 3. The amount in a county budget designated to fund E911 service may be reduced pursuant to a successful protest of the county budget. The E911 service fund itself, including county monies deposited therein, is not a county fund and may not be reduced through a protest to the county budget. (Scase to Schroeder, Keokuk County Attorney, 12-18-90) #90-12-1(L)

December 18, 1990

John E. Schroeder
Keokuk County Attorney
Keokuk County Courthouse Annex
101 1/2 South Jefferson
P.O. Box 231
Sigourney, Iowa 52591

Dear Mr. Schroeder:

You have requested an opinion of the Attorney General regarding the security of funds designated for operation of an enhanced 9-1-1 emergency telephone system. Specifically, you have asked:

1. Once funds are appropriated as a trust agency fund within the county budget to be administered by the county auditor as a part of her official duties, may those funds subsequently be reduced/removed from that budget as the result of a successful county budget protest/appeal?

2. To what extent does the source of the funds affect the foregoing answer, e.g. monthly telephone surcharge income, borrowed/loan money, county contributions from property taxation?

In order to adequately address your inquiries, it is necessary to review the provisions of Iowa Code chapter 477B which provide for the funding of E911 systems and the establishment and use of the E911 fund. Code chapter 477B requires the board of supervisors in each county to establish a joint 911 service board composed of representatives of each political subdivision having a public safety agency serving territory within the county and each private safety agency operating in the area. Iowa Code § 477B.3(1) (Supp. 1989). The initial function of the joint 911 service board is the development of an enhanced 911 service plan for the county. Id.

Code section 477B.7, unnumbered paragraph 1 (Supp. 1989) contains the following provisions for the funding of E911 service:

> When an E911 service plan is implemented, the costs of providing E911 service within an E911 service area are the responsibility of the joint E911 service board and the member political subdivisions. Costs in excess of the amount raised by imposition of the E911 service surcharge [a per telephone access line per month fee which may be imposed if approved by referendum] shall be paid by the joint E911 service board from such revenue sources allocated among the member political subdivisions as determined by the joint E911 service board. Funding is not limited to the surcharge, and surcharge revenues may be supplemented by other permissible local and state revenue sources. A joint 911 service board shall not commit a political subdivision to appropriate property tax revenues to fund an E911 service plan without the consent of the political subdivision. A joint 911 service board may approve a 911 service plan, including a funding formula requiring appropriations by participating political subdivisions, subject to the approval of the funding formula by each political subdivision. However, a political subdivision may agree in advance to appropriate property tax revenues or other monies according to a formula or plan developed by an alternative chapter 28E entity.

Iowa Code § 477B.7(4) (Supp. 1989) requires each joint E911 service board to establish and maintain as a separate account an E911 service fund. Monies remaining in this fund at the end of a fiscal year remain in the service fund, subject to the provisions of Code § 477B.7(5), as amended by 1990 Iowa Acts, ch. 1144, § 3, and do not revert to the general funds of participating political subdivisions. Iowa Code § 477B.7(4) (Supp. 1989). Use of monies in the E911 service fund is controlled by the provisions of Iowa Code § 477B.7(5), as amended by 1990 Iowa Acts, ch. 1144, § 3.

The administrative rules of the Disaster Services Division of the Department of Public Defense contain the following guidelines for administration of the E911 service fund:

> 10.5(1) The joint E911 service board has the responsibility for the E911 service fund.
> a. The E911 service fund shall be established in the office of the county treasurer.
> b. Collected surcharge monies and any interest thereon, as imposed in Iowa Code subsection 477B.6(1), shall be deposited into the E911 service fund. Surcharge monies must be kept separate from all other sources of revenue utilized for E911 systems.
> c. Withdrawal of monies from the E911 service fund shall be made on warrants drawn by the county auditor supported by claims and vouchers approved by the chairperson or vice chairperson of the joint 911 service board or the appropriate operating authority, so designated in writing, and the county board of supervisors.

607 I.A.C. ch. 10.

It is our view that, while the E911 service fund is held by the county treasurer with withdrawals being made on warrants drawn by the county auditor, the E911 service fund is not a county fund. Only a portion of the money in this fund is contributed by the county. Furthermore, once the county transfers monies into the E911 service fund, these monies are subject to the control of the joint 911 service board and must be used in accordance with the provisions of Code § 477B.7(5). The county retains no power to control these funds. Therefore, we conclude that once county monies have been paid over to the E911 service fund, they are beyond the reach of a county budget protest.[1]

This conclusion does not resolve the question of what affect a county budget protest would have upon a county's agreement to provide funds for future E911 operations. As noted above, Iowa Code § 477B.7 provides that a joint 911 service board may approve a 911 service plan, "including a funding formula requiring appropriations by participating political subdivisions, subject to the approval of the funding formula by each political subdivision." Assuming that a board of supervisors agrees to a

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[1]Similarly, funds coming into the E911 service fund from other sources, including surcharge monies, loans, and appropriations from other political subdivisions, are not technically county funds and are beyond the reach of a county budget protest.

funding formula included in a 911 service plan, obligating the county to provide operating funds for future years, the question becomes whether such an obligation may be reduced or removed upon successful protest to the county budget. The county's obligation to provide E911 funds to the joint service board would necessarily be included in the county budget. There is nothing in the provisions of Code chapters 24 (Local Budget Law), 331 (County Home Rule Implementation), or 477B (Enhanced 911 Emergency Telephone Communications Systems) which would appear to insulate future E911 funding from a budget protest. It would, therefore, appear that the E911 budget item, or the county fund from which monies are appropriated to the E911 service fund, could be subject to reduction through a budget protest.

In summary, it is our conclusion that while future county funding of E911 systems may be subject to reduction through a successful protest of the county budget, funds which have been paid over to the E911 service fund cease to be county funds and may not be removed pursuant to a county budget protest.

Sincerely,

Christie J. Scase

CHRISTIE J. SCASE
Assistant Attorney General

CJS:rd