COUNTIES: Allocation of library services tax revenues. Iowa Code §§ 256.69, ch. 336 (1995). A county is not required, outside of a contract, to allocate unincorporated county property tax revenues for library services to a municipal library located outside the county which provides library services to individuals living in unincorporated areas. (Crawford to Dinkla, State Representative, 3-6-96) #96-3-1(L)

March 6, 1996

The Honorable Dwight Dinkla
State Representative
Statehouse
L O C A L

Dear Representative Dinkla:

You have requested an opinion of the Attorney General as to whether a county must allocate unincorporated county property tax revenues for library services to a municipal library located outside the county under Iowa Code section 256.69 (1995). Your question arises because Adair County currently does not allocate such funds to the Stuart and Casey municipal libraries, which provide services to some Adair County residents but are located in Guthrie County. You also ask how the library services fund should be allocated if Adair County is required to fund the Stuart and Casey municipal libraries.

We conclude that the Adair County Board of Supervisors is not required, under section 256.69, to allocate library services funds to the Stuart and Casey municipal libraries. To reach this conclusion, section 256.69 should be read in conjunction with chapter 336, which also addresses county library funding issues.

You advise us that Adair County currently allocates its library services funds to three public libraries within Adair County: the Fontanelle, Greenfield, and Adair Municipal Libraries. It does not allocate funds to the Stuart or Casey municipal libraries because the libraries are located outside of Adair County, even though the cities of Stuart and Casey encompass a portion of both Adair and Guthrie Counties.

Local financial support for library services is mandated by Iowa Code section 256.69, which provides:

> Commencing July 1, 1977, each city within its corporate boundaries and each

> county within the unincorporated area of the county shall levy a tax of at least six and three-fourths cents per thousand dollars of assessed value on the taxable property or at least the monetary equivalent thereof . . . for the purpose of providing financial support to the public library which provides library services within the respective jurisdictions.

Section 256.69 is ambiguous insofar as it does not anticipate that a county's residents may be served by more than one public library. While the statute clearly requires that the entire library services fund be disbursed for the purpose of library services, the statute does not provide a formula for allocating the fund among a number of libraries.

In interpreting an ambiguous statute, the goal is to give effect to the legislature's intent. Iowa Federation of Labor v. Iowa Dep't. of Job Serv., 427 N.W.2d 443, 445 (Iowa 1988). If another statute is pertinent to the inquiry, the statutes should be considered together in an attempt to harmonize them. Net Midwest Inc. v. State Hygienic Laboratory, 526 N.W.2d 313 (Iowa 1995).

The provisions of the County Libraries chapter that deal with library funding are pertinent to this inquiry and should be considered in interpreting section 256.69. Chapter 336 indicates that a county may assume a contractual obligation to provide funding for a municipal library that provides library services to residents of unincorporated areas. Section 336.18 provides:

> 1. A school corporation, township, or county library district *may contract for the use of its residents of a city library*, but if a contract is made by a county board of supervisors or township trustees, it may only be for the residents outside of cities. . . .
>
> 2(a). Contracts shall provide for the amount to be contributed. They may, by mutual consent of the contracting parties, be terminated at any time.

Iowa Code § 336.18 (1995) (emphasis added). Thus, a county board of supervisors *may* contract for the use of a city library by residents in unincorporated areas. See Iowa Code § 4.1(30)(c) ("may" in statute normally confers a power). No statute makes it mandatory for a county to enter such a contract. If a county elects to enter such a contract, the contract must establish the

amount that the county is to contribute to support the municipal library. Iowa Code § 336.18(2)(a) (1995). Additionally, under 336.18(4)(a), electors residing in unincorporated areas of a county may petition the county board of supervisors to enter such a contract for library services.

A county also may incur an obligation to fund a municipal library with its library services tax revenues if a county library district is established. Chapter 336 permits county library districts to be established "composed of one county or two or more adjacent counties and may include or exclude the entirety of a city partly within one of the counties." Iowa Code § 336.2 (1995). A library district must be approved by qualified electors in the proposed district. Id. However, a city maintaining a free public library will not be included in the library district unless a majority of its electors favor its inclusion. Id.

Chapter 336 does not require a county to establish a county library district. However, if a county library district is formed, a board of library trustees must be appointed. Iowa Code § 336.4 (1995). The board of library trustees has exclusive control of expenditures for library purposes as provided by law. Iowa Code § 336.8(8) (1995). Thus, if a library district is formed, the board of library trustees has the exclusive right to allocate unincorporated property tax revenues for library services collected by a county under section 256.69. In addition, the board of library trustees is authorized to contract with a municipal library for library services. See Iowa Code §§ 336.9(4), 336.18(1) (1995). Because the library board of trustees would have the exclusive authority to allocate county funds for library services, the county would be bound by such a contract.

Thus, chapter 336 provides procedures that allow a county to enter a contract with a city for the use of a municipal library. If a county enters such a contract, the contract must specify the amount the county will pay for such services. See Iowa Code § 336.18(2)(a) (1995). Interpreted consistently with chapter 336, section 256.69 merely requires that a county allocate *all* of its library services revenues to libraries providing services to county residents. The statute does not require a county to allocate a portion of the fund to any municipal library which elects, outside of a contract, to provide services to county residents. This interpretation of section 256.69 and chapter 336 is consistent with our opinion advising that a city is not obligated by law to contract with a county to provide library services. See 1978 Op. Att'y Gen. 319.

Turning to your specific questions, it is our opinion that the Adair County Board of Supervisors is not required, absent a contract, to provide financial support to the Stuart or Casey municipal libraries under section 256.69. As long as Adair County allocates the entire fund to public libraries that provide library services within the county, the county is in compliance with section 256.69. The statute does not make it mandatory for a county to provide financial support to a particular municipal library that elects, outside of a contract, to provide services to residents who live in unincorporated areas.

We note, however, that absent a contract for such services, the Stuart and Casey municipal libraries are under no obligation to provide free library services to residents of the unincorporated areas of Adair County. If the cities were to discontinue free library services for residents of unincorporated areas of Adair County, Adair County could attempt to negotiate contracts with Stuart and Casey for such services. The residents of unincorporated Adair County would also have the right to petition the Adair County Board of Supervisors to contract with Stuart or Casey to provide them with library services. See Iowa Code § 336.18(4) (1995). As mentioned above, however, a city is not required to become party to such a contract. See 1978 Op. Att'y Gen. 319.

Because we believe that Adair County is not required to allocate a portion of its library services fund to the cities of Stuart or Casey, your second question is moot. As stated above, the Iowa Code provides that the fund must be used to finance library services in the county. See Iowa Code § 256.69 (1995). It does not impose additional conditions on a county's allocation of the library services fund.

Sincerely,

Susan M Crawford

SUSAN M. CRAWFORD
Assistant Attorney General

CRIMINAL LAW; COUNTY ATTORNEYS: Authority to seek injunctions to protect victims and witnesses. Iowa Code §§ 236.8, 331.756, 665.5, 719.3, 801.4, 910A.11 (1995). A county attorney may seek a restraining order to prohibit the harassment or intimidation of a victim or witness in a criminal case and may, but is not required to, represent the county in a contempt proceeding to prosecute a violation of such an order. (Tabor to Dunn, Hardin County Attorney, 3-6-96) #96-3-2(L)

March 6, 1996

Mr. Richard N. Dunn
Hardin County Attorney
P.O. Box 129
Eldora, IA 50627

Dear Mr. Dunn:

You have requested an opinion of the Attorney General concerning the authority and obligations of your office with respect to applying for injunctions to restrain the harassment of victims or witnesses. Specifically, your questions are as follows:

> (1) Whether the county attorney has authority to apply for a restraining order under Iowa Code section 910A.11?
>
> (2) Whether the county attorney has a duty to prosecute a contempt action if a restraining order issued under section 910A.11 is violated?

It is our opinion that a county attorney has authority to apply for a restraining order under section 910A.11 in the context of the criminal case and in the name of and on behalf of the county or state. It is further our opinion that a county attorney is authorized to represent the county in a contempt proceeding to prosecute the violation of such an order, but is not required to do so in the exercise of his or her prosecutorial discretion.

Section 910A.11 provides, in pertinent part:

> 1. Upon application, the court shall issue a temporary restraining order prohibiting the harassment or intimidation of a victim or witness in a criminal case if the court finds, from specific facts shown by affidavit or by verified complaint, that there are reasonable grounds to believe that harassment or intimidation of an identified

> victim or witness in a criminal case exists or that the order is necessary to prevent and restrain an offense under this chapter.
>
> A temporary restraining order may be issued under this subsection without written or oral notice to the adverse party or the party's attorney in a civil action under this section or in a criminal case if the court finds, upon written certification of facts, that the notice should not be required and that there is a reasonable probability that the party will prevail on the merits. . . .
>
> 2. Upon motion of the party, the court shall issue a protective order prohibiting the harassment or intimidation of a victim or witness in a criminal case if the court, after a hearing, finds by a preponderance of the evidence that harassment or intimidation of an identified victim or witness in a criminal case exists or that the order is necessary to prevent and restrain an offense under this chapter. . . .
>
> 3. Violation of a restraining or protective order issued under this section constitutes contempt of court, and may be punished by contempt proceedings.
> . . .

The portions of this provision which address who may apply for a temporary restraining order or petition the court for a protective order are written in the passive voice. See Iowa Code §§ 910A.11(1) ("upon application"), 910A.11(2) ("upon motion of the party"). Accordingly, while the plain language of the statute does not directly answer whether county attorneys may file an application or motion under section 910A.11, neither does it exclude county attorneys from the possible applicants.

To the extent that section 910A.11 is ambiguous as to who can initiate an action, we look to the rules of statutory construction. See Midland Sav. Bank FSB v. Stewart Group, LC, 533 N.W.2d 191, 193 (Iowa 1995). The ultimate goal in interpreting statutes is to ascertain and give effect to the legislative intent, looking to the object to be accomplished and evils to be remedied and construing the statute so as to best effect rather than defeat the legislative purpose. Iowa Fed. of Labor, AFL-CIO v. Iowa Dep't. of Job Service, 427 N.W.2d 443, 445

(Iowa 1988). The purpose of the Victim and Witness Protection Act in general, and section 910A.11 in particular, appears to be two-fold: (1) to protect individuals from harassment resulting from their role as a victim or witness in a criminal case and (2) to preserve the integrity and truthseeking function of the criminal justice system.

County attorneys have a general duty to diligently enforce state laws or county ordinances, violations of which may be commenced or prosecuted in the name of the state or county. Iowa Code § 331.756(1) (1995). In order to satisfy this general duty, county attorneys assume a keen interest in preserving the integrity of the criminal justice system and ensuring that witnesses in a criminal case are neither threatened nor induced not to testify. See generally Iowa Code § 719.3(2) (criminalizing obstruction of prosecution). Consequently, it would be consistent with both the statutory duty of county attorneys and the overall purpose of the Victim and Witness Protection Act to interpret section 910A.11 to allow county attorneys to seek an injunction or protective order in the context of a criminal case when he or she is able to present reasonable grounds to believe that a witness or victim is being harassed or intimidated. See H&Z Vending v. Iowa Dep't. of Inspections and Appeals, 511 N.W.2d 397, 398 (Iowa 1994) (Courts will construe statute in conformity with its dominating general purpose and will read text in light of overall context).

This interpretation is bolstered by the legislature's insertion of the words "or in a criminal case" in the second paragraph of section 910A.11(1). Acts 1991 (74 G.A.) ch. 181. If a restraining order is to be issued in the context of the criminal case, it would necessarily be at the behest of the county attorney, as neither victims nor witnesses are parties to the criminal case and could only seek a restraining order in a civil action under this section. See Iowa Code §§ 801.4(12) and (13) (defining prosecutor and prosecution). The fact that both civil and criminal proceedings are mentioned in section 910A.11 supports the proposition that the county attorney, as well as the subject of the harassment, may request a restraining order.

As for your question regarding a county attorney's duty to file an application for citation of contempt for violation of a protective order under section 910A.11, it is our belief that a county attorney may, but is not required to, pursue such a contempt prosecution. As with the language of subsections one and two, subsection three of section 910A.11 does not indicate who is to initiate the contempt proceedings. This office has previously opined that a county attorney has the authority pursuant to Iowa Code section 236.8 to prosecute contempt actions

arising under chapters 236 and 598. 1994 Op. Att'y Gen. 26 (#93-7-6). Similarly, we believe that section 910A.11(3) enables a county attorney to prosecute a contempt for violation of a protective order granted under that provision.

Concomitantly, we believe that a county attorney has the same discretion in determining whether to bring a contempt charge under section 910A.11 as he or she does in determining when to bring criminal charges. See State v. Iowa District Court for Jackson County, 463 N.W.2d 885, 886 (Iowa 1990). Iowa's general contempt chapter provides for initiation of a contempt action by persons other than the county attorney by simply filing an affidavit with the court. Iowa Code § 665.5 (1995). It is also possible for attorneys other than a county attorney to prosecute contempt proceedings. See 1994 Op. Att'y Gen. 26 (#93-7-6). Section 910A.11(3) does not require a county attorney to start contempt proceedings in the event that a restraining or protective order is violated.

In sum, it is our opinion that the legislature contemplated the possibility of a county attorney asking for a restraining or protective order under section 910A.11 in order to prohibit the harassment of a victim or witness in a criminal case. In addition, we believe that a county attorney may represent the county in a contempt proceeding to prosecute the violation of a an order under section 910A.11(3), but is not required to do so in the exercise of his or her prosecutorial discretion.

Sincerely,

MARY TABOR
Assistant Attorney General

CONSTITUTIONAL LAW; REAL PROPERTY: Limitation upon establishment of real estate improvement districts. Iowa Const. art. I, § 6; art. III, § 30 (1857); Iowa Code § 358C.2 (Supp. 1995). Iowa Code section 358C.2 (Supp. 1995), which ultimately limits the establishment of real estate improvement districts in a pilot program to communities within a maximum of six counties, does not offend state constitutional clauses generally requiring the passage of general laws having a uniform operation. (Kempkes to Black, State Senator, 3-7-96) #96-3-3(L)

March 7, 1996

The Honorable Dennis Black
State Senator
Statehouse
LOCAL

Dear Senator Black:

You have requested an opinion about the constitutionality of recently enacted legislation that provides for the creation of "real estate improvement districts" (REIDs), known in other states as "local improvement districts" (LIDs). See generally 14 E. McQuillin, The Law of Municipal Corporations § 38.11, at 21 (Supp. 1995) (LIDs permit private landowners to benefit from advantageous financing methods normally available to cities). You have provided a letter from private counsel that raises and discusses in some detail a single question: whether Iowa Code section 358C.2 (Supp. 1995), which ultimately limits the creation of REIDs to communities located within six of the state's ninety-nine counties, offends state constitutional clauses generally requiring the passage of "general laws" having a "uniform operation."

We must divine what the Supreme Court of Iowa would likely conclude if presented with this question of first impression. See 1992 Op. Att'y Gen. 139, 139-40; 1980 Op. Att'y Gen. 461, 462. We believe that the court would likely uphold section 358C.2 against such an attack. We note, however, that recently proposed legislation might render such a challenge moot. See H.F. 2018 (an act relating to the statewide application of REIDs).

I. Statutory background

The General Assembly passed House File 577 on May 31, 1995. It entitled chapter 358C "Real Estate Improvement District Pilot Project and Related Matters" and described the new legislation as

> [a]n act relating to the establishment of a pilot program for the creation of Real Estate Improvement Districts, authorizing the issuance of general obligation bonds and revenue bonds, the imposition of ad valorem property taxes, special assessments and fees, and other related matters.

1995 Iowa Acts, 76th G.A., ch. 200. Chapter 358C became effective on July 1, 1995. See Iowa Code § 3.7(1) (1995).

Section 358C.1(1) sets forth the legislative findings underscoring the passage of chapter 358C:

> (a). The economic health and development of Iowa communities is tied to opportunities for jobs in and near those communities and the availability of jobs is in part tied to the availability of housing in Iowa communities.
>
> (b). A need exists for a program to assist developers and communities in increasing the availability of housing in Iowa communities.
>
> (c). A shortage of opportunities and means for developing local housing exists. It is in the best interest of the state and its citizens for infrastructure development which will lower the costs of developing housing.
>
> (d). The expansion of local housing is dependent upon the cost of providing the basic infrastructure necessary for a housing development. Providing this infrastructure is a public purpose for which the state may encourage the formation of [REIDs] for the purpose of providing water, sewer, roads, and other infrastructure.

See generally Iowa Code § 358C.23 (chapter 358C "shall be liberally construed to facilitate the development of land for housing").

Among other things, section 358C.4 authorizes a REID to make specified public improvements to such matters as utility and sewer

systems, parks, and streets. Sections 358C.3, 358C.5, 358C.6, 358C.7, and 358C.8 set forth procedures for landowners petitioning to establish a proposed REID, for a city council and county board of supervisors considering such a petition, and for a county commissioner conducting an election on a proposed REID.

Section 358C.12 provides that, upon voter approval, a REID becomes a body corporate and politic. Section 358C.18 provides for enlargement of a REID by the annexation of additional land, section 358C.22 provides for the detachment of specific parcels of land from a REID, and section 358C.21 provides for dissolution of a REID.

Sections 358C.10 and 358C.13 provide for the selection of trustees to manage and control a REID's affairs and property. Section 358C.17 provides the trustees with the power to pay the cost of the public improvements by specially assessing benefited property up to a certain amount or by issuing special assessment bonds. Section 358C.14 provides the trustees with power to levy an annual tax, up to a maximum amount, upon property within a REID to pay its administrative costs or deficiencies in special assessments or both. Section 358C.15 provides the trustees with the power to establish equitable rates, charges, or rentals upon landowners within a REID for the utilities and services it furnishes to them. Section 358C.16 provides the trustees with the power to borrow money up to a maximum amount and, under certain conditions, to issue general obligation and revenue bonds for making the public improvements and for paying deficiencies in special assessments.

It is, however, section 358C.2 that has prompted your opinion request. Section 358C.2 indicates the experimental nature of chapter 358C by providing that the

> establishment of real estate improvement districts under this chapter shall be limited to six pilot counties, which shall be determined by the director of the [Iowa Finance Authority] so as to add to the diversity of the pilot program. A real estate improvement district shall not be established in a pilot county after two years from the effective date of this Act.

See generally Iowa Code § 16.2 (Iowa Finance Authority established in part to undertake programs regarding adequate housing for the poor, elderly, and disabled), § 16.6 (director of Iowa Finance Authority appointed on basis of administrative ability and knowledge in the field); Webster's Ninth New Collegiate Dictionary 864 (1979) ("pilot" signifies "serving as a . . . trial apparatus or operation").

II. Constitutional background

English common-law courts only took judicial notice of "general laws," which signified acts public in nature. 2 Sutherland's Statutory Construction § 40.02, at 190 (1991). Acts private in nature required evidentiary proof, because they essentially represented contracts between the Crown and the beneficiaries of the acts and thus could not bind strangers. Horack, "Special Legislation: Another Twilight Zone," 12 Ind. L.J. 109, 121-22 (1936). As used in state constitutions, the phrase "general laws" also signified acts public in nature; however, it applied to the scope of legislative power and not evidentiary rules. 2 Sutherland's, § 40.02, at 190.

In the nineteenth century, many state legislatures abused their newborn political systems by favoring private causes in passing legislation. Id. § 40.01, at 184; W. Dodd, Revision and Amendment of State Constitutions xx (1910); R. Pound, The Formative Era of American Law 39-40 (1950); J. Schouler, Constitutional Studies, State and Federal 207 (1904); see 1 The Debates of the [Iowa] Constitutional Convention 200-01 (W. Lord, rep. 1857); 2 The Debates of the [Iowa] Constitutional Convention 511-12, 532 (W. Lord, rep. 1857); see also Fragments of the Debates of the Iowa Constitutional Conventions of 1844 and 1846 193 (B. Shambaugh, ed. 1900). As one commentator has explained,

> The legislatures of the postrevolutionary period were often inclined to regard themselves as roving commissions to right private wrongs. They freely passed special bills to grant divorces, settle private controversies, or reverse the results of litigation.

Note, "Counterrevolution in State Constitutional Law," 15 Stan. L. Rev. 309, 312 n. 20 (1983); see Cloe & Marcus, "Special and Local Legislation," 24 Ky. L.J. 351, 355-58 (1936).

Abuse of the legislative process led to popular distrust of state legislatures, which in turn led to the inclusion in state constitutions of restrictions upon the passage of "special," "local," or "private" laws and corresponding commands for the passage of "general" laws. 2 Sutherland's, supra, § 40.02, at 190; see L. Friedman, A History of American Law 303 (1975); M. Horwitz, The Transformation of American Law, 1780-1860 260 (1977); J. Hurst, The Growth of American Law: The Lawmakers 6, 229-30 (1950); B. Schwartz, The Law in America 96 (1974). "Special" laws meant legislation granting "some special right, privileges, or immunity" or imposing "some particular burden" on a portion of the public. 1986 Op. Att'y Gen. 19, 23. See Eckerson v. City of Des Moines, 137 Iowa 452, 115 N.W. 177, 183 (1908); Hubbard, "Special

Legislation for Municipalities," 18 Harv. L. Rev. 588, 588 (1904); Winters, "Classification of Municipalities," 57 Nw. U. L. Rev. 279, 281 (1962); Note, 8 Drake L. Rev. 66, 73 (1958).

Such restrictions or commands sought to achieve greater uniformity in the operation of law and to prevent abuse of the legislative process. Eckerson v. City of Des Moines, 115 N.W. at 183; 2 Sutherland's, supra, § 40.02, at 190, § 40.07, at 226-27; Comment, 28 Iowa L. Rev. 696, 696 (1943). In addition, the constitutional clauses may have been viewed as a means to maximize local self-government "by making it necessary for legislatures to pass general enabling legislation under which matters which it may be desirable to handle differently in different localities can be dealt with by local authorities." 1 C. Sands, M. Libonati & J. Martinez, Local Government Law § 3.21, at 76 (1995). A legislature can thereby "concentrate its attention and energies on the affairs of the state at large, free of distractions of local problems." Id. See Clark, "State Control of Local Government in Kansas," 20 U. Kan. L. Rev. 631, 632 (1972); Winters, "Classification of Municipalities," 57 Nw. U.L. Rev., supra, at 283.

Regarding special legislation, the delegates to the Iowa Constitutional Convention of 1857 included both a restriction and a command in the draft of the state constitution ratified by the electorate. See generally Fleur de Lis Motor Inns v. Bair, 301 N.W.2d 685, 688 (Iowa 1981); 1986 Op. Att'y Gen. 19, 23; J. James, Constitution and Admission of Iowa into the Union 50-51 (1900). The Iowa Constitution may have been the first state charter employing language that "laws of a general nature" have a "uniform operation," and at least two states, California and Ohio, later adopted it for their own constitutions. See McGill v. State, 34 Ohio St. 228, 239-40 (1877). The delegates placed the language in two separate clauses within the Iowa Constitution, which also prohibited the General Assembly from granting divorces. See Iowa Const. art. III, § 27.

First, in its article entitled "Bill of Rights," the Iowa Constitution provides:

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

Iowa Const. art. I, § 6 (1857). See generally 1980 Op. Att'y Gen. 206, 208-09; 1 Sands, Libonati & Martinez, Local Government Law, supra, § 3.21, at 73-78; Note, Drake L. Rev., supra, at 74 ("operation" means "its practical working and effect"). The first

half of this clause appeared verbatim in the first state constitution. See Iowa Const. art. I, § 6 (1846).

Second, in its article entitled "Of the Distribution of Powers," the Iowa Constitution provides:

> The General Assembly shall not pass local or special laws in the following cases:
>
> For the assessment and collection of taxes for State, County, or road purposes;
>
> For laying out, opening, and working roads or highways;
>
> For changing the names of persons;
>
> For the incorporation of cities and towns;
>
> For vacating roads, town plats, streets, alleys, or public squares;
>
> For locating or changing county seats.
>
> In all the cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State . . . .

Iowa Const. art. III, § 30. See generally State Bd. of Regents v. Lindquist, 188 N.W.2d 320, 324 (Iowa 1971); 1980 Op. Att'y Gen. 206, 207-08; 1 Sands, Libonati & Martinez, Local Government Law, supra, § 3.24, at 83-85; Note, Drake L. Rev., supra, at 72-82. This clause did not appear in the first state constitution. See Eckerson v. City of Des Moines, 115 N.W. at 183-84.

Both clauses encompass legislation that affects county government and counties in general as well as legislation relating to public improvements. See 2 Sutherland's, supra, § 40.10, at 254 & n. 1, § 40.14, at 277-78. They would thus govern section 358C.2.

III. Principles of review

You have asked whether section 358C.2, which ultimately limits the establishment of REIDs to communities within a maximum of six unspecified counties, is unconstitutional. "[A]ny law inconsistent with [the provisions of the state constitution] shall be void." Iowa Const. art. XII, § 1. Resolving a question of inconsistency imposes "the gravest and most delicate duty" we must perform,

Fullilove v. Klutznick, 448 U.S. 448, 472, 100 S. Ct. 2758, 65 L.E.2d 902 (1980), because such a question implicates the scope of both legislative and executive power. Several principles of review therefore limit our constitutional analysis.

Regarding legislative acts in general, the Supreme Court of Iowa has required a challenger to prove their unconstitutionality "beyond a reasonable doubt." E.g., Saadiq v. State, 387 N.W.2d 315, 320 (Iowa 1986), appeal dismissed, 479 U.S. 878. In its analysis, the court considers the entire act along with the surrounding circumstances, the reasons for its passage, and the purposes to be accomplished. 2 Sutherland's, supra, § 40.02, at 191 (1991). If possible, the court construes or interprets the act to avoid any constitutional deficencies. See Iowa City v. Nolan, 239 N.W.2d 102, 103 (Iowa 1976); see also Iowa Code § 4.4(1) (legislatively created presumption that compliance with constitutional requirements intended by legislature in enacting statutes). The court accords a strong presumption of constitutionality to a legislative act and requires challengers to show that it "clearly, palpably, and without a doubt" infringes upon the constitution. State v. McKnight, 511 N.W.2d 389, 391 (Iowa 1994); In re Kaster, 454 N.W.2d 876, 878 (Iowa 1990); see Iowa Code § 4.4(1); 2 Sutherland's, supra, § 40.02, at 191.

The strong presumption of constitutionality extends to legislative acts incorporating classifications. 1992 Op. Att'y Gen. 139, 141; see 1986 Op. Att'y Gen. 19, 23. Legislative classifications may "be interfered with only in cases so flagrant in character as to be repugnant in any fair sense to the Constitution." Eckerson v. City of Des Moines, 115 N.W. at 186. "The classification adopted may be inaccurate, unscientific, and even unjust, but that does not demonstrate that it is purely arbitrary." Berg v. Berg, 221 Iowa 326, 264 N.W. 821, 826 (1936). See Note, 8 Drake L. Rev., supra, at 75 (a legislature has "considerable discretion" in creating a classification, "and its reason for the classification may even be poor"). If an act imposes no sanctions or penalties, the General Assembly "possesses the greatest freedom in classification . . . ." 1978 Op. Att'y Gen. 153, 154.

Regarding the two constitutional clauses in particular, the court has acknowledged their flexible language: they merely "lay down the general principle of uniformity in laws" and do not set forth absolutes. Fleur de Lis Motor Inns v. Bair, 301 N.W.2d at 688. See McGill v. State, 34 Ohio St. at 247-48 (constitutional clause requiring passage of general law "not to be literally and strictly construed"). "It may be said that most of our legislation is special in the sense of the subject-matter to which it applies, and much caution should be exercised . . . to avoid any undue infringement of legislative power." Owen v. Sioux City, 91 Iowa 190, 59 N.W. 3, 3 (1894). The constitutional clauses thus do not

prohibit the General Assembly from designing laws to solve problems found only in certain areas of the state. See G. Frug, Local Government Law 191 (1988). In other words, a legislative act "does not have to apply to every place, circumstance, or thing under the sun to be a `general' law." 1 Sands, Libonati & Martinez, Local Government Law, supra, § 3.25, at 87.

Legislative classifications of local governments may take various forms. These forms may, for example, rest upon an amount of debt, taxable property, or population; physical location; type of government; presence or absence of a particular thing or facility; or total geographical area.

A classification of municipalities "is special if, by reason of its being made applicable to a particular municipality or group of municipalities, it arbitrarily grants privileges or imposes burdens upon less than all municipalities to which the particular law would not apply in the absence of the limitation." Winters, "Classification of Municipalities," 57 Nw. U.L. Rev., supra, at 279. Line-drawing, however, "is often the handiwork of non-lawyers whose expertise in planning matters should not be second-guessed by [a] court via prohibitions against special legislation." Clark, "State Control of Local Government in Kansas," 20 U. Kan. L. Rev., supra, at 644.

Last, the constitutional clauses do not sit in a vacuum. See Miller v. Boone County Hosp., 394 N.W.2d 776, 780-81 (Iowa 1987); L. Tribe, Constitutional Choices 187 (1985); Monaghan, "Our Perfect Constitution," 56 N.Y.U.L. Rev. 353, 363 (1981). Obviously, Iowa's demographics have not remained static since ratification of the constitutional clauses in 1857. See 65 Iowa Official Register 240-51 (1994). Changes in a state's demographics often produce changes in the legal framework within which local governments must operate and require close scrutiny of older cases construing or interpreting the constitutional clauses. Winters, "Classification of Municipalities," 57 Nw. U.L. Rev., supra, at 284.

IV. Analysis

In modern times, the Supreme Court of Iowa has held that the constitutional clauses place substantially the same limits upon legislation as the equal protection clause of the fourteenth amendment to the federal constitution. Compare Harden v. State, 434 N.W.2d 881, 885-86 (Iowa 1989), cert. denied, 493 U.S. 869; In re Chicago, Mil., St. P. & Pac. R.R., 334 N.W.2d 290, 294 (Iowa 1983); 1992 Op. Att'y Gen. 139, 140 with Williams, "Equality and State Constitutional Law," in Developments in State Constitutional Law 82 (B. McGraw, ed. 1985). As one commentator has observed, "underlying the labyrinth of their particulars, the limitations . . . have a fundamental notion of equality under the law" and encompass the idea that "the law knows not individuals, but only

classes or groups." Winters, "Classification of Municipalities," 57 Nw. U.L. Rev., supra, at 283.

According to the Supreme Court of Iowa, "Traditional equal protection analysis applies [to challenges premised upon the two constitutional clauses]: `Under the test the classification must be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate government interest.'" In re Chicago, Mil., St. P. & Pac. R.R., 334 N.W.2d at 294 (citation omitted). Frequently, the legislation under scrutiny in modern times affects the rights of private individuals or entities.

A rather long history of judicial decisions, however, predates modern pronouncements upon the constitutional clauses. Frequently, the legislation under scrutiny in earlier cases affected the rights, duties, or responsibilities of local governmental entities, because the constitutional clauses represented "a manifestation of the larger struggle between the forces of centralized government and the forces of local autonomy and decentralization." Horack, "Special Legislation: Another Twilight Zone," 12 Ind. L.J., supra, at 201.

Courts in those early cases struggled to identify principles or rules for distinguishing a "general" law from a "special" law. Indeed, in some states, special legislation "has been the focus of a century of confusing litigation" and "hopeless inconsistency." Clark, "State Control of Local Government in Kansas," 20 U. Kan. L. Rev., supra, at 631, 645. Accord Eckerson v. City of Des Moines, 115 N.W. at 185. One commentator has wryly observed:

> "When is a hen not a hen? When it's a rooster," was the answer to our childhood jingles. In a like manner the answer to when is a statute special has been, "When it's not general."
>
> . . .
>
> [Case law has only established that] special legislation is that legislation which the court calls Special.

Horack, "Special Legislation: Another Twilight Zone," 12 Ind. L.J., supra, 121, 123. See E. Stason & J. Tracy, The Law of Municipal Corporations 34 (1946); C. Elliot, Principles of the Laws of Municipal Corporations § 316, at 312 (1925).

More recently, another commentator has indicated agreement with this view: "Perhaps the one clear point emerging thus far is that no magic formula exists for completely resolving this considerable problem in the local government law of this country."

Sentell, "When is a Special Law Unlawfully Special?" 27 Mercer L. Rev. 1167, 1167 (1976). Resolving "this considerable problem" thus requires a consideration of the particular facts and circumstances of each case, which tends to limit the precedential value of prior cases and holdings. See McGill v. State, 34 Ohio St. at 238; 1 Sands, Libonati & Martinez, Local Government Law, supra, § 3.25, at 86-87; Hubbard, "Special Legislation for Municipalities," 18 Harv. L. Rev., supra, at 602.

One prohibition established in the early cases involving local government was targeted toward statutes classifying cities on the basis of population: it forbade legislatures from using population requirements to create a "closed class," which effectively prevented other cities from joining the class in the future as they increased their populations. Wary of legislative attempts to circumvent constitutional clauses against special laws, courts in that era tended to view closed classes as improper "identification" rather than proper "classification." Horack, "Special Legislation: Another Twilight Zone," 12 Ind. L.J., supra, at 131 & n. 54; Comment, 28 Iowa L. Rev., supra, at 696-97; see 1 Sands, Libonati & Martinez, Local Government Law, supra, § 3.28, at 107 n. 11. See generally Hubbard, "Special Legislation for Municipalities," 18 Harv. L. Rev., supra, at 592 ("[i]t is hard to see what advantages [the cumbrous system of targeting certain cities with statutory population requirements] has over legislation for municipalities by name").

In interpreting this state's constitutional clauses, the Supreme Court of Iowa long-ago adopted the prohibition that the General Assembly may not create a closed class in its statutes directed toward cities. See Comment, 28 Iowa L. Rev., supra, at 697. The court held that a statute must create an "open class" to allow future admission of other cities into the class:

> Even though . . . legislation at a given time operates as to only one city, if it is so drawn as to apply upon the same conditions, when and where it arises, to other cities which subsequently fall within the designated class, the constitutional requirement [of a general law having a uniform operation] is met, providing the class is reasonable. . . . [No legislation amounts to] a local or special law unless, according to its terms it can never operate upon any other city.

Knudson v. Linstrum, 233 Iowa 709, 8 N.W.2d 495, 499 (1943).

> It is not necessary . . . that the law should operate uniformly on all the people of the state, nor, when the legislation pertains to

> cities, is it important that it should operate uniformly on all cities throughout the state. But if the law is made to operate upon a particular condition as to persons or property, and is operative whenever and whereever the same conditions exist, affixing the same consequences, then it is a general law in its operation, even though it only operates on one of the conditions or classes specified. . . . General legislation looks not to the present, but to the future . . . .

State ex rel. West v. City of Des Moines, 96 Iowa 521, 65 N.W. 818, 820 (1896). Compare id. (act employing population-based classification only applied to one city; act considered a special law, because, according to its terms, it could never apply to any other city); State ex rel. Benton County Comm'rs v. Boyce, 39 N.E. 64, 64 (Ind. 1894) with State ex rel. Pritchard v. Grefe, 139 Iowa 18, 117 N.W. 13, 18 (1908); Tuttle v. Polk, 92 Iowa 433, 60 N.W. 733, 737 (1894) (act employing population-based classification only applied to one city; act not considered a special law, because, according to its terms, it was not "restricted to cities having the required population at the date it became a law"). See generally 2 Sutherland's, supra, § 40.06, at 218, § 40.09, at 236.

Unlike other constitutional clauses, however, the Supreme Court of Iowa has not had a recent opportunity to re-examine the general principle of an open class. See, e.g., State v. Mabry, 460 N.W.2d 472, 475 (Iowa 1990) (defect in title of legislative act held, for the first time, to be cured upon its codification; thus, any act attacked after codification cannot offend Iowa Const. art. III, § 29). The decisions announcing or applying the principle thus have not been overruled or modified in light of the court's current analysis. Moreover, the court has not indicated that the principle of an open class applies only to statutes using population as a basis for classification of cities. We must therefore consider the principle in examining the constitutionality of section 358C.2. See generally Traynor, "The Limits of Judicial Creativity," 63 Iowa L. Rev. 1, 6 (1977); Winters, "Classification of Municipalities," 57 Nw. U.L. Rev., supra, at 286.

Section 358C.2 grants authority to landowners and communties to establish REIDs and thereby improve property. Its subject matter is clearly appropriate: the General Assembly has "a traditional prerogative concerning the regulation and definition of property rights" within the state. 1980 Op. Att'y Gen. 461, 475.

In drafting section 358C.2, the General Assembly did not specifically name or otherwise identify the class of landowners, communities, and counties who might directly or indirectly benefit from the establishment of REIDs and their improvements to property.

When the governor signed chapter 358C into law, all landowners and all communities in all ninety-nine of the state's counties comprised the class that might benefit from the establishment of REIDs. All were eligible to participate in the pilot program. The General Assembly's creation of a theoretically open class thus complied with the constitutional clauses. See Iowa Railroad Land Co. v. Soper, 39 Iowa 112, 115-16 (1874) (curative act, which legalized taxes levied by certain municipal corporations upheld against special-legislation challenge, because it theoretically applied to all municipal corporations: "if the condition described in the act had existed in every [municipal corporation] in the State, the act would have been applicable to them"); Winters, "Classification of Municipalities," 57 Nw. U.L. Rev., supra, at 291 ("if the language creating the class permits the theoretical admission of altogether hypothetical cities with similar characteristics, the classification will be upheld").

Although the General Assembly provided in section 358C.2 for the eventual paring of this large class to a decidedly smaller class, we have not discovered any cases holding that an open class, once created in a legislative act, cannot be diminished or otherwise affected by subsequent actions, procedures, or conditions established pursuant to legislative prerogative in the same act. Cf. Eckerson v. City of Des Moines, 115 N.W. at 187 (if an act is complete in itself and requires nothing further to give it validity as legislative act, it is not vulnerable to constitutional attack on special-legislation grounds simply because the limits of its operation are made to depend upon a popular vote). See generally 1980 Op. Att'y Gen. 206, 207-08 (requirement that legislature may not pass special act where general one can be made applicable "is not so tightly applied as to tie the hands of the legislature unduly"); Winters, "Classification of Municipalities," 57 Nw. U.L. Rev., supra, at 290-91 (open class not a requirement; not every closed class equates with a constitutional violation).

Even if section 358C.2 were viewed as creating a closed class in its operation, strong support for a finding of its constitutionality can be found in the experimental nature of the pilot program for REIDs. An exception to the "requirement" of an open class established in early court decisions provides that a legislative classification may be based upon existing circumstances or limited to members of a class existing at the time where, like the pilot program for REIDs, "the object of the law is itself a temporary one." St. Louis County Bd. of Education v. Borgen, 259 N.W. 67, 69 (Minn. 1935). Accord Thorpe Bros., Inc. v. Itasca County, 213 N.W. 914, 915 (Minn. 1927); Alexander v. City of Duluth, 80 N.W. 623, 624 (Minn. 1899); Binney, "Restrictions upon Local and Special Legislation in the U.S.," 32 Am. L. Reg. 816, 828, 846 (1893); see Iowa Railroad Land Co. v. Soper, 39 Iowa at 115-16; Winters, "Classification of Municipalities," 57 Nw. U.L. Rev., supra, at 290.

In this vein, we note a legislature "may take one step at a time to remedy only part of a broader problem." Fullilove v. Klutznick, 448 U.S. at 485. Accord Midwest Mutual Ins. Ass'n v. DeHoet, 206 Iowa 49, 222 N.W. 548, 551 (1933) (the constitution "does not forbid the cautious advance, step by step," in addressing a particular subject by legislative act). We also note the General Assembly has established a number of other "pilot programs" to accomplish various purposes that also appear temporary in nature and that also encompass a limited number of counties or other governmental entities. See, e.g., Iowa Code § 15.272(2) (Department of Economic Development has responsibility to select sites for pilot project on statewide welcome centers), § 135.106(3) (Department of Public Health shall establish pilot project on healthy family program in three counties), § 159.29(3) (Department of Agriculture and Land Stewardship shall establish a pilot demonstration and research project for groundwater contamination in north central area of the state at a site determined by the department to be the most appropriate and demonstration project on sinkholes at a site in northeast area of the state). That the General Assembly has a history of drafting legislation in such a manner tends to support a finding of its constitutionality. See, e.g., McGill v. State, 34 Ohio St. at 249-52.

We therefore do not believe that section 358C.2, which ultimately limits the pilot program for REIDs to landowners and communities within a maximum of six counties, offends the flexible language of the constitutional clauses. Cf. 1986 Op. Att'y Gen. 19, 23 (law intended to serve some special need, meet some special evil, or promote some public interest not considered a special law); 1980 Op. Att'y Gen. 206, 206 (statute constitutional even though "it only pertains to a certain group of utilities and . . . only to a certain agreement of those utilities"; "the legislative judgment does not appear unreasonable"). Indeed, the General Assembly -- consistent with one of the purposes ostensibly leading to the ratification of the constitutional clauses -- drafted section 358C.2 in such a way as to eliminate any legislative favoritism in the implementation of its pilot program for REIDs. See 1 Sands, Libonati & Martinez, Local Government Law, supra, § 3.25, at 87 (guidance for resolving issues "can be found . . . by taking note of the evil sought to be remedied by means of constitutional provisions forbidding the enactment of local or special laws"). The General Assembly provided that the director of the Iowa Finance Authority -- who it undoubtedly believed to have the necessary expertise, see Iowa Code § 16.6 -- would determine the six diverse counties that could permit the establishment of REIDs within their borders. Unlike constiutionally suspect statutes, "there is no attempt [by the General Assembly] to make individual selection" of counties in section 358C.2. Eckerson v. City of Des Moines, 115 N.W. at 183.

We conclude that the Supreme Court of Iowa, in considering a challenge to section 358C.2 based upon the two constitutional clauses, would likely reject it and uphold the pilot program for REIDs. This conclusion primarily rests upon our analysis of chapter 358C in its entirety, the reasons for its passage, and the purposes it seeks to accomplish. It also comports with the strong presumption of constitutionality the court accords to legislation and with the high standard required for invalidating legislation. Section 358C.2, which provides no penalties or sanctions, does not clearly, palpably, and without a doubt offend the constitutional clauses. Rather, its constitutionality appears to fall "[w]ithin the zone of doubt and fair debate." Collins v. State Bd. of Social Welfare, 248 Iowa 369, 81 N.W.2d 4, 10 (1957) (Garfield, J., dissenting).

V. Conclusion

Section 358C.2, which ultimately limits the establishment of real estate improvement districts in a pilot program to communities within a maximum of six counties, does not offend state constitutional clauses generally requiring the passage of general laws having a uniform operation.[1]

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

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[1] Even if the Supreme Court of Iowa were to conclude section 358C.2 unconstitutionally excluded landowners and communities in ninety-three of the state's ninety-nine counties from the opportunity to establish REIDs, it could decide to sever section 358C.2 from the rest of chapter 358C. See Winters, "Classification of Municipalities," 57 Nw. U.L. Rev., supra, at 301-02. Severance would effectively open the class to all landowners and communities in every county. The question of severance, however, would hinge upon the court's analysis of legislative intent. See Iowa Code § 4.12; Motor Club of Iowa v. Iowa Dep't of Transp., 251 N.W.2d 510, 519 (Iowa 1977); State v. Monroe, 236 N.W.2d 24, 35 (Iowa 1975); 1980 Op. Att'y Gen. 533, 541.

COUNTY OFFICERS: Leave of absence for deputy sheriffs running for partisan elective office paying remuneration. Iowa Code § 341A.18 (1995). Section 341A.18 does not preclude deputy sheriffs on leave from responding to subpoenas to testify as material witnesses in a criminal case in which they have performed official duties relating to investigation or law enforcement. Section 341A.18 does not require deputy sheriffs to take a leave of absence before a primary election if they will have no opponents in the primary election, but will have opponents in the general election. (Kempkes to Anstey, Mills County Attorney, 4-3-96) #96-4-1(L)

April 3, 1996

Connie E. Anstey
Mills County Attorney
418 Sharp St.
Glenwood, IA 51534

Dear Ms. Anstey:

You have requested an opinion about a statute that, under certain circumstances, provides a leave of absence to deputy sheriffs subject to civil service. Noting that the district court has scheduled criminal trials for dates within thirty days before both primary and general elections, you ask whether the statute precludes deputy sheriffs on leave from testifying as material witnesses at those trials. You also ask whether deputy sheriffs who plan on running for partisan elective offices paying remuneration must take a leave of absence thirty days before the primary election if they will have no opponents in the primary election, but will have opponents in the general election.

These questions require an examination of Iowa Code section 341A.18 (1995), which the General Assembly enacted six years ago. See generally 1990 Iowa Acts, 73rd G.A., ch. 1119, § 2. Section 341A.18 addresses different subjects in eight unnumbered paragraphs, and these subjects include the political activities of deputy sheriffs. Similar to other statutes, see, e.g., Iowa Code §§ 19A.18, 55.4, the last paragraph of section 341A.18 provides:

> An officer or employee subject to civil service and a chief deputy sheriff or second deputy sheriff, who becomes a candidate for a partisan elective office for remuneration, unless running unopposed, shall automatically be given a leave of absence without pay, commencing thirty days before the date of the primary election and continuing until the

> person is eliminated as a candidate or wins the primary, and commencing thirty days before the date of the general election and continuing until the person is eliminated as a candidate or wins the general election, and during the leave period shall not perform any duties connected with the office or position so held. The officer or employee subject to civil service, or chief deputy sheriff or second deputy sheriff, may, however, use accumulated paid vacation time for part or all of the leave of absence required under this section. The county shall continue to provide health benefit coverages, and may continue to provide other fringe benefits, to any officer or employee subject to civil service, or chief deputy sheriff or second deputy sheriff during any leave of absence required under this section.

(emphasis added). See generally 16A E. McQuillin, The Law of Municipal Corporations § 45.49, at 325 (1992). A willful violation of section 341A.18 amounts to a simple misdemeanor. Iowa Code § 341A.21.

We conclude that section 341A.18 does not preclude deputy sheriffs on leave from responding to subpoenas to testify in a criminal case that has some connection with their performance of official duties relating to investigation or law enforcement. We also conclude that section 341A.18 does not require deputy sheriffs who run for elective offices to take a leave of absence before the primary election if they will have no opponents in the primary election, but will have opponents in the general election.

I.

Your first question appears targeted toward deputy sheriffs receiving subpoenas to testify as prosecuting witnesses in a criminal case in which they have performed official duties relating to investigation or law enforcement. See Iowa Code §§ 331.653, 331.903(4), 602.8102(97), 622.63, 622.76; see also Iowa Code §§ 80D.9, 331.652(1), 622.71, 622.81, 624.8. This question focuses upon the language in section 341A.18 providing that a deputy sheriff on leave "shall not perform any duties connected with the office or position so held."

We realize that section 341A.18, in its use of the words "shall" and "any," suggests a command without exception. See, e.g., Iowa Code § 4.1(30)(a) ("shall" in statutes normally imposes a duty); Iowa-Illinois Gas & Elec. Co. v. City of Bettendorf, 241 Iowa 358, 41 N.W.2d 1, 4-5 (1950) ("any" a synonym of "all" and

commonly means without limitation or restriction); see also 1996 Op. Att'y Gen. ___ (#95-10-1). Words in a statute generally link with their common meanings, and every word in a statute generally counts for something. Iowa Code § 4.1(38); City of Estherville v. Iowa Civil Service Comm'n, 522 N.W.2d 82, 86 (Iowa 1994).

On the other hand, the literal import of a statute does not necessarily end the inquiry about its application. See United Fire & Cas. Co. v. Acker, 541 N.W.2d 517, 519-20 (Iowa 1995) ("any person" in Iowa Code § 322.4(7) (1991) limited to "any consumer"). Where "adherence to the strict letter of the law [leads] to an unreasonable, unjust, impracticable, or absurd outcome or where a literal reading would cause provisions to contradict," other principles of interpretation may be taken into account. Holiday Inns Franchising, Inc. v. Branstad, 537 N.W.2d 724, 728 (Iowa 1995). Accord 1994 Op. Att'y Gen. 99, 101. For example: a reasonable interpretation of a statute should prevail over an unreasonable one, and an interpretation of a statute should avoid illogical or impractical results. Iowa Code §§ 4.1, 4.2, 4.4, 4.6; State v. Sullins, 509 N.W.2d 483, 485 (Iowa 1993); State v. Byers, 456 N.W.2d 917, 919 (Iowa 1990); State v. Sumpter, 438 N.W.2d 6, 8 (Iowa 1989); Wright v. City of Cedar Falls, 424 N.W.2d 456, 457 (Iowa 1988); In re Clay, 246 N.W.2d 263, 265 (Iowa 1976). In other words,

> If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense.
>
> If a statute is to be merged into a going system of law [through the process of statutory interpretation, it is necessary to] take account of the policy of the statute . . . .

Llewellyn, "Remarks on the Theory of Appellate Decision," 3 Vand. L. Rev. 395, 400 (1950).

Section 341A.18, which restricts the political activities of deputy sheriffs only for the period immediately preceding contested elections, appears to have the purpose of ensuring the efficient and impartial performance of duties during that period by everyone in a county sheriff's office. See generally 1988 Op. Att'y Gen. 118 (#88-12-8(L)) (many county sheriff offices have few personnel, making the work environment "quite intimate"). Taking into account this assumed purpose, we should interpret the express language of section 341A.18 in a sensible manner. Id.

Giving testimony in court about the commission of a crime does not amount to the type of official duty performed by deputy

sheriffs that section 341A.18 apparently seeks to curtail; it does not implicate any exercise of discretion or judgment on their part that, unlike the decision to issue a speeding ticket, could possibly influence a voter in an upcoming election. In this context, deputy sheriffs are no different than other citizens with information about criminal activity: upon receiving a subpoena, they have an obligation to appear in court and testify about what they saw, heard, or otherwise learned. We therefore conclude section 341A.18 does not prohibit deputy sheriffs on leave from responding to subpoenas to testify in a criminal case that has some connection with their performance of official duties relating to investigation or law enforcement.

Moreover, such an interpretation of section 341A.18 does not elevate leave for deputy sheriffs over the multitude of important rights, duties, and responsibilities associated with the efficient and fair administration of criminal justice. An alternative interpretation of section 341A.18 would create troublesome and time-consuming issues of constitutional dimension for prosecutors, defense counsel, judges, and other personnel of the criminal justice system. See generally Iowa Code § 4.4(1) (legislative presumption that statute enacted in compliance with constitutional provisions); Holiday Inns Franchising, Inc. v. Branstad, 537 N.W.2d at 728. Delaying a trial for as many as thirty days in order to allow a deputy sheriff to testify in person would implicate constitutional and statutory guarantees of speedy trial and inevitably lead to motions and hearings on those matters. Any attempt to introduce into evidence a statement by a deputy sheriff in written rather than testimonial form would implicate the hearsay rule and the confrontation clause and similarly lead to more motions and hearings on those matters. At a minimum, delay would certainly upset trial schedules and thereby impede the public's strong interest in the speedy, efficient, and fair administration of justice in every criminal case.

II.

Your second question essentially asks whether the phrase "unless running unopposed" in section 341A.18 applies to primary elections, general elections, or both. This office in 1982 concluded that "section 341A.18 contemplates two leaves of absence for an employee successful at a primary election, one commencing thirty [days] prior to the primary and the second beginning thirty days before the general election." 1980 Op. Att'y Gen. 106, 107; see 1972 Op. Att'y Gen. 559, 559 (Iowa Code § 365.29 (1971) requires employee to take leaves of absence both thirty days before the primary and general elections).

We see nothing in the letter or spirit of section 341A.18, however, requiring a leave for deputy sheriffs running unopposed in either a primary or general election. Accordingly, deputy sheriffs

do not need to take a leave if they will have no opponent in a primary election, and, upon winning the primary election, they do not need to take a leave if they will have no opponent in the ensuing general election. For purposes of taking mandatory leave under section 341A.18, the existence of an opponent in the general election has no impact upon the primary election.

We note, however, the possible application of federal law to deputy sheriffs running for partisan elective office. The Hatch Act, codified at Title V, U.S.C. §§ 1501-08, prohibits certain state or local officers or employees from running for partisan elective office when their "principle employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a federal agency" and when they exercise "functions in connection with that activity." 5 C.F.R. §§ 151.111, 151.121. This law may have an impact upon deputy sheriffs running for such office. See Minnesota Dep't of Jobs v. MSPB, 875 F.2d 179, 183 (8th Cir. 1989) (Hatch Act applies to persons who run for partisan elective office even if on approved leave without pay); Simmons v. Stanton, 502 F. Supp. 932, 938 (W.D. Mich. 1980) (Hatch Act applies to deputy sheriff running for partisan elective office if federal funds directly paid his salary or paid for activities that constituted his principal employment responsibilities).

III.

Section 341A.18 does not preclude deputy sheriffs on leave from responding to subpoenas to testify in a criminal case that has some connection with their performance of official duties relating to investigation or law enforcement. Section 341A.18 also does not require deputy sheriffs who run for elective offices to take a leave of absence before the primary election if they will have no opponents in the primary election, but will have opponents in the general election.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

COUNTIES; HOSPITALS: Sales or leases of property; voter approval. Iowa Code §§ 347.7, 347.13, 347.14, 347.24, 347.28, 347A.1 (1995). County hospitals governed either by chapter 347 or by chapter 347A may, under certain circumstances, sell or lease buildings and operations to a privately operated nonprofit corporation for use in providing health-care services to the public. County hospitals governed by chapter 347 have such authority to sell or lease regardless of outstanding bonded indebtedness; however, county hospitals governed by chapter 347A have no authority to transfer their legal responsibility for payment of outstanding revenue bonds to a buyer, lessee, or other party. Voters need to approve those sales or leases of property acquired by condemnation or purchase, but not property acquired by gift, devise, or bequest. (Kempkes to Drake, State Representative, 5-3-96) #96-5-1(L)

May 3, 1996

The Honorable Jack Drake
State Representative
Statehouse
LOCAL

Dear Representative Drake:

You have requested an opinion regarding the powers and duties of county hospitals governed by Iowa Code chapters 347 and chapter 347A (1995). A number of county hospitals apparently have considered entering into "integrated health care delivery systems" with physician professional corporations. One proposal involves a new foundation that would buy the medical practices and assets of a physician professional corporation and lease or buy the operations of a county hospital. Afterwards, the new foundation would operate as a privately operated nonprofit corporation rather than as a county hospital in providing health-care services to the public.

You ask whether county hospitals may sell or lease their buildings and operations to privately operated nonprofit corporations for use in providing health-care services to the public. If so, you ask whether any outstanding bonded indebtedness affects this power and whether voters must approve proposed sales or leases in every instance. We conclude (1) county hospitals governed either by chapter 347 or by chapter 347A may, under certain circumstances, sell or lease buildings and operations to a privately operated nonprofit corporation for use in providing

health-care services to the public; (2) county hospitals governed by chapter 347 have such authority to sell or lease regardless of outstanding bonded indebtedness; however, county hospitals governed by chapter 347A have no authority to transfer their legal responsibility for payment of outstanding revenue bonds to a buyer, lessee, or other party; and (3) voters need to approve those sales or leases of property acquired by condemnation or purchase, but not property acquired by gift, devise, or bequest.

I. Statutory background

County hospitals may be established under either chapter 347 or chapter 347A. 1988 Op. Att'y Gen. 10, 13; 1980 Op. Att'y Gen. 464, 465. Chapter 347 is entitled County Hospitals, but some of its provisions apply to city hospitals, county memorial hospitals, area hospitals, county hospitals payable from revenue, and certain health-care facilities. See, e.g., Iowa Code §§ 347.23A, 347.24, 347.25, 347.26. See generally Iowa Code chs. 37, 135C, 145A, 347A, 392. Chapter 347, which dates at least to 1909, seeks in part to encourage and promote relationships between county hospitals and independent physicians. 1994 Op. Att'y Gen. 102 (#94-5-8(L)); 1980 Op. Att'y Gen. 388, 391. Chapter 347A, which dates to 1947, is entitled County Hospitals Payable from Revenue. 1994 Op. Att'y Gen. 102 (#94-5-8(L)). In enacting chapter 347A during the lean years of World War II, the General Assembly intended to provide "an alternative method of financing debt for establishment or improvement of county hospitals through sale of a hybrid species of revenue bond." 1994 Op. Att'y Gen. 102 (#94-5-8(L)). See generally Wickey v. Muscatine County, 242 Iowa 272, 46 N.W.2d 32 (1951).

Both chapters 347 and 347A provide for county supervisors to appoint initial boards of hospital trustees, who stand for election after fulfilling their initial terms of service. 1994 Op. Att'y Gen. 102 (#94-5-8(L)). Also, both chapters now provide for financing by general obligation bonds as well as by revenue bonds "with a back-up tax provision for operation and maintenance deficits." Id.

Section 347.24 provides that hospitals "organized under chapter 37 [county memorial hospitals] or chapter 347A may be operated as provided for in [chapter 347] in any way not clearly inconsistent with the specific provisions of their chapters." See 1994 Op. Att'y Gen. 35, 36; 1994 Op. Att'y Gen. 102 (#94-5-8(L)). See generally Iowa Code § 4.1(30)(a) (legislature's use of "may" in statute normally confers a power). This important provision has been in effect since 1962. Under section 347.24, the trustees of county hospitals governed by chapter 347 and the trustees of county hospitals governed by chapter 347A generally may control their respective property in the same manner. 1994 Op. Att'y Gen. 102 (#94-5-8(L)).

A. Specific provisions of chapter 347

Section 347.7 permits county supervisors to levy taxes for the erection and equipment of county hospitals and taxes for their improvement, maintenance, and replacements. See generally 1980 Op. Att'y Gen. 388, 394. Section 347.7 also permits certain counties to levy a tax if they have issued revenue bonds for county hospital improvement and maintenance. See Iowa Code § 331.461(2)(d). Any debt remains the liability of the county hospital itself and not the county. 1980 Op. Att'y Gen. 388, 398.

Section 347.9 requires voters to approve the establishment of county hospitals. Section 347.23A(1) provides that county hospitals governed by chapter 347A may become county hospitals governed by chapter 347 upon voter approval. Section 347.31 provides that county hospitals, when appropriate, shall enter into agreements pursuant to chapter 28E. See Iowa Code ch. 28E (Joint Exercise of Governmental Powers); see also 1988 Op. Att'y Gen. 10, 15; 1976 Op. Att'y Gen. 565, 566.

Chapter 347, and section 347.13 in particular, require the trustees to perform specific duties. Section 347.13(1) provides that the trustees shall purchase, condemn, or lease a site for the county hospital and provide and equip suitable buildings; and section 347.13(4) provides that they shall supervise and care for the buildings and grounds. Section 347.13(12) provides that the trustees shall accept property by gift, devise, or bequest and may sell or exchange such property. See Iowa Code § 347.29. Section 347.13(13) provides that the trustees shall

> [s]ubmit to the voters . . . a proposition to sell or lease any sites or buildings, excepting those [sites or properties acquired by gift, devise, or bequest under section 347.13(12)], and upon such proposition being carried by a majority of the total number of votes cast at such election, may proceed to sell such property at either public or private sale, and apply the proceeds only for:
>
> (a). Retirement of bonds issued and outstanding in connection with the purchase of said property so sold;
>
> (b). Repairs or improvements to property owned or for the purchase or lease of equipment as the . . . trustees may determine.

Chapter 347 also vests the trustees with various powers. See, e.g., Iowa Code §§ 347.7, 347.14, 347.28. Section 347.7, for

example, provides that they do not need voter approval to use unappropriated moneys from county hospital funds for erecting, equipping, and adding to buildings.

Although county hospitals do not enjoy home rule authority, section 347.14 provides the trustees with broad powers. 1988 Op. Att'y Gen. 10, 14; 1980 Op. Att'y Gen. 388, 390-91; see Koelling v. Board of Trustees, 259 Iowa 1185, 146 N.W.2d 284, 290 (1966); Phinney v. Montgomery, 218 Iowa 1240, 257 N.W. 208, 210 (1934). These powers "may be so broad as to be comparable to the home rule power of [a] county itself . . . ." 1988 Op. Att'y Gen. 10, 14; 1980 Op. Att'y Gen. 388, 391.

The trustees have general and specific powers under section 347.14. Section 347.14(11) generally provides that the trustees may "[d]o all things necessary for the management, control and government of said hospital . . . ." Section 347.14(15) specifically provides that the trustees may

> [s]ubmit to the voters . . . a proposition to sell or lease a county public hospital for use as a private hospital or as a merged area hospital . . . or to sell or lease a county hospital in conjunction with the establishment of a merged area hospital. . . .
>
> . . .
>
> If the proposition is approved by a majority of the total votes cast for and against the proposition at the election, the . . . trustees shall proceed to carry out the authorization granted.

Section 347.28 specifically provides that a city or county hospital "may lease or sell any of its property which is not needed for hospital purposes to any person, upon approval by the board of trustees." See 1996 Op. Att'y Gen. ___ (#95-10-1) (when a contemporaneous transaction with a city and a private corporation means a city hospital no longer has any real property, trustees may have power under section 347.28 to lease or sell all remaining property).

B. Specific provisions of chapter 347A

Section 347A.1 provides that certain counties may issue revenue bonds for county hospitals. See Iowa Code § 331.461 et seq. (revenue bonds), § 347A.3 (tax for maintenance and operation). Similar to the broad powers of "management, control and government" conferred upon their counterparts by section 347.14(11), the trustees managing such hospitals have the powers under section

347A.1 of "administration and management." In addition, the trustees may choose to exercise the powers conferred by section 347.13 upon their counterparts. 1978 Op. Att'y Gen. 464, 465.

Section 347A.1 also provides that the trustees shall fix charges for services so that the revenues

> will be at all times sufficient in the aggregate to provide for the payment of the interest on and principal of all revenue bonds issued and outstanding for the hospital, and for the payment of all operating and maintenance expenses of the hospital.

II. Analysis

Our task in answering your questions is to ascertain and give effect to the legislative intent underlying the applicable statutes. See Farmers Co-op Co. v. DeCoster, 528 N.W.2d 536, 537 (Iowa 1995). We are guided in this task by the analysis and conclusions of our prior opinions and by the familiar rules of statutory construction and interpretation. See id. at 537-38; see also Iowa Code §§ 4.1(38), 4.2, 4.4, 4.6.

To the extent that chapters 347 and 347A seek to promote the public health, we are aware they should be liberally construed to accomplish this purpose. See Shinerone Farms, Inc. v. Gosch, 319 N.W.2d 298, 302 (Iowa 1982); 3 Sutherland's Statutory Construction § 63.05, at 238 (1992). We are also aware that courts generally refuse to intervene in the sale or disposition of public property made under proper authority absent a clear showing of fraud or illegality. See C. Rhyne, Municipal Law 38 (1957).

A. Power to sell or lease

In 1993, this office considered the possible closure of a county memorial hospital having no bonded indebtedness through the disposition of its property by sale or lease pursuant to chapter 347. See 1994 Op. Att'y Gen. 35. We concluded the trustees, having the express power to control and manage hospital buildings and operations, inherently have "the power and authority to dispose of hospital buildings or operations under the provisions of chapter 347." Id. at 37.

> [S]ection 347.14(15) gives a hospital board the authority to sell or lease a county hospital for use as a private hospital or as a merged area hospital. Voter approval is required. Property may be included pursuant to section 347.13(12) [that which is acquired by gift, devise, or bequest] but the proceeds

> from the sale or lease of the property must be used consistent with [section 347.13(13)] or for the purpose of providing health care for residents of the county.

Id.

In 1976, we similarly concluded the trustees of a county hospital governed by chapter 347A may, pursuant to section 347.28, sell unneeded real property for use as a medical clinic or other health-related purpose. 1976 Op. Att'y Gen. 489, 489; see 1994 Op. Att'y Gen. 102 (#94-5-8(L)); see also 1996 Op. Att'y Gen. ___ (#95-10-1) (section 347.28 does not necessarily prohibit a city hospital, as part of contemporaneous transfer of real property by the city to a new privately operated nonprofit corporation for use in providing health-care services, from selling or leasing all its remaining property); Rhyne, Municipal Law, supra, at 378. We reasoned the trustees possess this authority under section 347.28, because section 347.24 provides that hospitals governed by chapter 347A may be operated pursuant to the provisions of chapter 347 in any way not clearly inconsistent with the specific provisions of chapter 347A. 1976 Op. Att'y Gen. 489, 489.

We have no reason to withdraw our prior opinions. See 1980 Op. Att'y Gen. 51, 52 (opinions will not be withdrawn unless they are "clearly erroneous"). Nor do we have a reason to limit them to county hospitals governed by chapter 347 that have no bonded indebtedness; the existence of such debt does not affect those opinions.

As you point out, however, chapter 347A involves an additional consideration with regard to outstanding bonded indebtedness. Section 347A.1 requires the trustees of county hospitals governed by chapter 347A to fix charges for services so that the revenues "at all times" will suffice to pay the principal and interest on all outstanding revenue bonds as well as all operating and maintenance expenses. Section 347A.1 obviously affects trustees who manage county hospitals that continue to provide health-care services to the public: as long as the county hospital operates as a county hospital governed by chapter 347A, the trustees shall ensure that its revenue suffices to pay the principal and interest on all outstanding revenue bonds as well as all operating and maintenance expenses.

Although we do not believe that section 347A.1 requires trustees to ensure the continued operation of a county hospital under every conceivable set of circumstances, we believe that it does not allow them to transfer the county hospital's legal responsibility for any outstanding revenue bonds to a privately operated nonprofit corporation. We reach this conclusion by examining the analogous situation in which a municipal corporation

with similar financial liabilities either reorganizes, consolidates, dissolves, or otherwise alters the scope of its operations.

A municipal corporation's debts "are not extinguished by the repeal of its charter, and continue to exist notwithstanding that repeal." 56 Am. Jur. 2d Municipal Corporations § 92, at 145 (1971). "On the dissolution of a municipal corporation, or the consolidation of its territory with that of another municipal body, the rights of its creditors are not destroyed . . . ." Id. § 96, at 151. "It has been said that neither a private nor a public corporation can avoid payment of its legal obligations by permitting its charter to expire or to be forfeited." 2 E. McQuillin, The Law of Municipal Corporations § 8.15, at 803 (1988). All contracts survive the dissolution of a municipal corporation, and creditors may enforce their claims in any manner permitted by law. Id. "The power to amend or repeal the charter of a municipal corporation cannot be used to take away the property rights which have been acquired by other parties under the operation of a charter." C. Elliot, Principles of the Law of Municipal Corporations 294 (1925). "A change of sovereignty does not affect the liability of a municipality upon its obligations. . . ." Id. at 310. See 3 E. Yokley, Municipal Corporations 526 (1958).

These principles suggest section 347A.1 precludes trustees of a county hospital from participating in a transaction purporting to transfer its legal responsibility for payment of outstanding revenue bonds to a privately operated nonprofit corporation that will provide health-care services to the public in lieu of the county hospital. The public debt on those bonds, which essentially represent a promise under corporate seal to pay a certain sum to order or to bearer, remains a public responsibility. Cf. 1980 Op. Att'y Gen. 388, 398 (certain counties have authority to levy a tax under section 347.7 if they have issued revenue bonds for county hospital improvement and maintenance; any debt remains the liability of the county hospital itself and not the county). Nevertheless, these principles do not foreclose participation in a transaction whereby the privately operated nonprofit corporation actually pays those bonds as they become due as part of its contractual duties with the county hospital. See generally 1996 Op. Att'y Gen. ___ (#95-10-1); Yokley, Municipal Corporations, supra, at 524-25. We issue a caveat in this regard: great caution should be exercised by trustees of a county hospital in participating in such a transaction, which may contravene bond covenants or affect requirements under federal law for tax-exempt financing.

Accordingly, we conclude trustees for county hospitals governed either by chapter 347 or by chapter 347A have the power and authority to sell or lease buildings and operations pursuant to either section 347.14(15) or section 347.28. County hospitals

governed by chapter 347 have such authority to sell or lease regardless of outstanding bonded indebtedness; however, county hospitals governed by chapter 347A have no authority to transfer their legal responsibility for payment of outstanding revenue bonds to a buyer, lessee, or other party.

B. Voter approval

In a 1995 opinion approving the transfer of city hospital property in its entirety to a privately operated nonprofit corporation for use in providing health-care services to the public, this office concluded that such a transfer could be accomplished without voter approval. See 1996 Op. Att'y Gen. ___ (#95-10-1). In reaching this conclusion, however, we emphasized that the General Assembly had not set forth any express statutory requirement for voter approval in the chapters governing city hospitals. See id.

In contrast, section 347.13(13) expressly requires voter approval for the sale or lease of any sites or buildings not acquired by gift, bequest, or devise; and section 347.14(15) expressly requires voter approval for the sale or lease of a county hospital for use as a private or merged area hospital. In our 1993 opinion, we observed that section 347.14(15) requires voters to approve sales or leases of property to private or merged area hospitals and that section 347.13(13) requires voters to approve other sales or leases involving property acquired by condemnation or purchase, but not dispositions of property acquired by gift, devise, or bequest. 1994 Op. Att'y Gen. 35, 37-38; accord 1974 Op. Att'y Gen. 523, 524. Those observations remain valid today.

Regarding county hospitals governed by chapter 347A, we again note that they may be operated as provided for in chapter 347 in any way not clearly inconsistent with the special provisions of chapter 347A. See Iowa Code § 347.24. Chapter 347A does not address voter approval for the sale or lease of property. We therefore believe that our 1993 opinion should also apply to county hospitals governed by chapter 347A: voters need to approve sales or leases of property to private or merged area hospitals, and for other sales or leases, voters only need to approve dispositions of property acquired by condemnation or purchase.

III. Summary

County hospitals governed either by chapter 347 or by chapter 347A may, under certain circumstances, sell or lease buildings and operations to a privately operated nonprofit corporation for use in providing health-care services to the public. County hospitals governed by chapter 347 have such authority to sell or lease regardless of outstanding bonded indebtedness; however, county hospitals governed by chapter 347A have no authority to transfer

their legal responsibility for payment of outstanding revenue bonds to a buyer, lessee, or other party. Voters need to approve those sales or leases of property acquired by condemnation or purchase, but not property acquired by gift, devise, or bequest.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

STATE OFFICERS AND DEPARTMENTS; PROFESSIONAL LICENSING BOARDS: Discipline of physicians and surgeons. Iowa Code §§ 7E.2, 135.11, 147.87, 147.88, 272C.1, 272C.3, 272C.4, 272C.5 (Iowa 1995). The Department of Public Health has no authority under Iowa Code section 147.87 (1995) either to review the process used by the Board of Medical Examiners and its staff to investigate and prosecute a licensee disciplinary case or to review compliance with that process in particular cases. (Kempkes to Atchison, Director, Department of Public Health, 5-22-96) #96-5-2(L)

May 22, 1996

Mr. Christopher G. Atchison
Director, Department of Public Health
Lucas State Office Building
L-O-C-A-L

Dear Mr. Atchison:

You have requested an opinion about the relationship between the Iowa Department of Public Health (the Department) and the Iowa Board of Medical Examiners (the Board) in the area of professional discipline. You ask whether the Department has authority under Iowa Code section 147.87 (1995) either to review the process used by the Board and its staff to investigate and prosecute a licensee disciplinary case or to review compliance with that process in particular cases. Our answer depends upon the legislative intent underlying section 147.87. See Schmitt v. Iowa Dep't of Social Serv., 263 N.W.2d 739, 746 (Iowa 1978); see also Iowa Code § 4.1. We conclude that section 147.87 does not grant the Department such powers of review.

Statutes governing the Board, the Department, and the discipline of physicians and surgeons weave an intricate web between Titles IV and VII of the Iowa Code. Title IV governs Public Health: Subtitle 2 covers Health-Related Activities and encompasses chapter 135, which is entitled Department of Public Health; and Subtitle 3 covers Health-Related Professions and encompasses chapter 147, which is entitled General Provisions, and chapter 148, which is entitled Medicine and Surgery. Title VII governs Education and Cultural Affairs: Subtitle 5 covers Educational Development and Professional Regulation and encompasses chapter 272C, which is entitled Continuing Education and Regulation -- Professional and Occupational.

Section 135.11 sets forth the Department's duties. Section 135.11(1) provides that the Department shall exercise general supervision over public health matters. Although section 135.11(17) provides that the Department shall administer various chapters, it does not include chapters 147, 148, or 272C within this group.

Section 147.90 provides that the Department shall establish rules necessary for carrying out the duties imposed by chapter 147. Section 147.87, with language dating to 1924, provides that the Department

> shall enforce the provisions of [chapter 147] and the following chapters of this subtitle, excluding chapters 152B [Respiratory Care], 152C [Massage Therapy], and 152D [Athletic Training], and for that purpose may request the department of inspections and appeals to make necessary investigations. Every licensee and member of an examining board shall furnish the [health] department or the department of inspections and appeals such evidence as the member or licensee may have relative to any alleged violation which is being investigated.

See generally Iowa Code § 2523 (1924). Section 147.88 provides that the Department of Inspections and Appeals "may perform inspections as required by [Subtitle 3], except for the Board of Medical Examiners, Board of Pharmacy Examiners, Board of Nursing, and the Board of Dental Examiners."

Section 147.13(1) establishes the Board of Medical Examiners. Section 135.31 provides that the Board shall be located within the Department of Health. Section 135.31 also provides that the Board shall have policymaking and rulemaking authority, and section 147.76 similarly provides that the Board shall adopt all necessary and proper rules to implement and interpret chapter 147. Section 135.11A provides that the the Department shall have a professional licensure division and that the Board may, unlike many other state boards, employ its own support staff for administrative and clerical duties. See 1988 Op. Att'y Gen. 43 (#87-7-3(L)).

Section 147.103A provides that the Board shall license physicians and surgeons and may appoint investigators. See generally Iowa Code §§ 147.10, 147.11, 147.36, 147.40, 147.80(3), 148.3. Section 147.103A(6) provides that disciplinary hearings held pursuant to section 272C.6(1) shall be heard by the Board. Section 148C.6(7) provides that the Board shall impose disciplinary measures for a violation of an act or offense specified in sections 147.55 or 148.6.

Section 147.55 sets forth the grounds for license revocation or suspension. Section 148.6(1) provides that the Board may issue an order to discipline a licensee "for any of the grounds set forth in section 147.55, chapter 272C, or this subsection." See generally Iowa Code § 272C.10 (rules for revoking or suspending license). Section 148.6(2) sets forth the grounds by which the Board may discipline a licensee.

Section 148.7 provides the procedures for license revocation or suspension. Section 148C.7(6) provides that the Board shall determine the charge or charges upon the merits on the basis of the evidence in the record before it. Section 148.7(8) provides that judicial review of an order by the Board may be sought in accordance with the IAPA, and section 148.7(9) provides that a Board order of revocation or suspension shall remain in force and effect until the determination upon the merits of any appeal.

Specified licensing boards, including the Board of Medical Examiners, also have disciplinary authority under chapter 272C. See Iowa Code § 272C.1(6)(l). Section 272C.4(1) requires each licensing board to

> a. Establish procedures by which complaints which relate to licensure or to licensee discipline shall be received and reviewed by the board.
>
> . . .
>
> f. Define by rule acts or omissions which are grounds for revocation or suspension of a license under section 147.55, 148.6
> . . . .

Section 272C.5 provides in part:

> 1. Each licensing board may establish by rule licensee disciplinary procedures. Each licensing board may impose licensee discipline under these procedures.
>
> 2. Rules promulgated . . .
>
> . . .
>
> b. Shall designate who may or shall initiate a licensee disciplinary investigation and a licensee disciplinary proceedings, and who shall prosecute a disciplinary proceeding and under what conditions, and shall state the procedures for review by the licensing board

> of findings of fact if a majority of the licensing board does not hear the disciplinary proceeding.

Section 272C.6 sets forth procedures applicable to disciplinary hearings, subpoenas, decisions, and appeals. Section 272C.6(1) provides that disciplinary hearings held pursuant to chapter 272C shall be heard by the licensing board.

Section 272C.3(1) provides:

> Notwithstanding any other provision of this chapter, each licensing board shall have the powers to:
>
> a. Administer and enforce the laws and administrative rules provided for in this chapter and any other statute to which the licensing board is subject;
>
> . . .
>
> c. Review or investigate, or both, upon written complaint or upon its own motion pursuant to other evidence received by the board, alleged acts or omissions which the board reasonably believes constitute cause under applicable law or administrative rule for licensee discipline;
>
> d. Determine in any case whether an investigation, or further investigation, or a disciplinary proceeding is warranted;
>
> e. Initiate and prosecute disciplinary proceedings;
>
> f. Impose license discipline;
>
> . . .
>
> i. Refer to a registered peer review committee for investigation, review, and report to the board, any complaint or other evidence of an act or omission which the board reasonably believes to constitute cause for licensee discipline. However, the referral of any matter shall not relieve the board of any of its duties and shall not divest the board of any authority or jurisdiction.

Section 272C.3(2) sets forth the types of discipline that may be imposed upon a licensee and, regarding physicians and surgeons, section 272C.3(2)(a) specifically refers to grounds for revocation or suspension set forth in sections 147.55 and 148.6.

Against this statutory background, you have asked whether the Department has authority under section 147.87 to review either the process used by the Board and its staff to investigate and prosecute a licensee disciplinary case or to review compliance with that process in particular cases. Authority for administrative action normally originates with a delegation from the General Assembly. An administrative agency such as the Department cannot act outside its delegated authority. 1 C. Koch, Administrative Law and Practice 1.22, at 39 (1985); see Schmitt v. Iowa Dep't of Social Serv., 263 N.W.2d 739, 745 (Iowa 1978); 1986 Op. Att'y Gen. 102, 103, 105. "In every instance of agency action, the doctrine of ultra vires applies: agency action is illegal if it is not expressly or impliedly authorized by the legislature (or by the executive authority or state constitution creating the particular agency in question)." A. Bonfield & M. Asimow, State and Federal Administrative Law § 7.2, at 422 (1989).

We begin our analysis of your question with the specific language of section 147.87, which the General Assembly last amended in 1994 by adding the reference to chapter 152D. See generally 1994 Iowa Acts, 75th G.A., ch. 1132, § 26. Section 147.87 simply provides that the Department "shall enforce the provisions" of chapter 147 and "may request the department of inspections and appeals to make necessary investigations" for that purpose and that any member of the Board shall furnish the Department or the Department of Inspections and Appeals "such evidence as the member . . . may have relative to any alleged violation which is being investigated."

We note that section 147.87 itself does not delineate any power of review on the part of the Department in licensee disciplinary cases. Section 135.11(17), which lists various areas over which the Department has administrative responsibility, similarly fails to delineate this power. We may not supply additional words or phrases under the guise of statutory interpretation. State v. Byers, 456 N.W.2d 917, 919 (Iowa 1995); 1996 Op. Att'y Gen. ___ (#95-10-1); see Iowa R. App. P. 14(f)(13) (in interpreting statute, court focuses upon what legislature wrote, not what it should or might have written).

In addition, we do not interpret section 147.87 by reading it in a vacuum. See 1986 Op. Att'y Gen. 102, 103. See generally Iowa Code § 4.6(4). We recognize that other statutes place the responsibility for determining the process for disciplinary investigation and prosecution of physicians and surgeons squarely upon the shoulders of the Board and its staff and do not suggest an

oversight role on the part of the Department in this process. See generally Iowa Code § 272C.3(3). Section 272C.1 provides that the Board shall have the power to determine in any disciplinary case the need for an investigation, prosecution, or sanction. Section 272C.4(1) provides that the Board shall establish procedures for reviewing complaints and define the grounds for license revocation or suspension. Section 272C.5 provides that the Board may establish licensee disciplinary procedures and the conditions for prosecuting a disciplinary proceeding. Section 272C.3(1) provides that the Board shall have the power to administer and enforce chapter 272C, accompanying administrative rules, "and any other statute to which the [Board] is subject."

At this point we take note of section 7E.2(5), which, as part of the 1986 reorganization of the executive branch, addresses the integration of each state agency into one of the state's various departments. We have previously observed that such integration "is not absolute but is to be pursued only 'as closely as the goals of administrative integration and responsiveness to the legislature and citizenry permit.'" 1988 Op. Att'y Gen. 43 (#87-7-3(L)); see Iowa Code § 7E.1(2)(d). Although the 1986 reorganization placed the Board within the Department, section 7E.2(5) allows the Board to "exercise its powers, duties, and functions as prescribed by law, including rulemaking, licensing and regulation, and operational planning within [its] area of responsibility . . . independently of" the Department. (emphasis added). By placing independent responsibility for "rulemaking, licensing and regulation" upon the Board, section 7E.2(5) thus suggests the absence of any review power on the part of the Department over either the process used by the Board and its staff in a licensee disciplinary case or their compliance with that process in particular cases.

We also note that the Board has promulgated administrative rules pursuant to chapter 272C detailing the grounds and procedures for the imposition of various disciplinary sanctions upon physicians and surgeons. See 653 IAC 12.2, 12.3, 12.4. Pursuant to chapters 147, 148, and 272C, the Board has also promulgated a broad range of administrative rules detailing the procedure for the discipline of physicians and surgeons. See 653 IAC 12.50 et seq.; see also Iowa Code ch. 17A. In contrast, the Department in dozens of chapters has not promulgated any administrative rules directed in any way toward the discipline of physicians and surgeons. See 641 IAC 1.1 et seq. We accord considerable weight to these apparently consistent administrative interpretations of chapters 147, 148, and 272C. See Iowa Code § 4.6(6); Office of Consumer Advocate v. Utilites Board, 486 N.W.2d 586, 587 (Iowa 1992).

Last, we note the General Assembly has recently changed the relationship between the Department and the Board regarding licenses for physicians and surgeons. See generally Iowa Code

§ 4.6(4) (statutory interpretation may take into account former statutory provisions). Those changes indicate more independence for the Board in that relationship. Compare Iowa Code § 148.7(7)(c) (1991) (Board "may direct the director of public health to restore and reissue a license to practice") with Iowa Code § 148.7(7)(c) (1995) (Board may "restore and reissue a license to practice"). Compare Iowa Code § 148.12 (1991) (Board may "direct the director of public health to issue an order to revoke, suspend, or restrict a license to practice") with Iowa Code § 148.12 (1995) (Board may "issue an order to revoke, suspend, or restrict a license to practice"). See generally 1992 Iowa Acts, 74th G.A., ch. 1183, §§ 16, 19.

Other current statutes apparently contemplate such a role for the Board. See, e.g., Iowa Code § 135.11A ("[e]ach board of examiners . . . except the state board of nursing, state board of medical examiners, state board of dental examiners, and state board of pharmacy examiners, shall receive administrative and clerical support from the [health department] and may not employ its own support staff for administrative and clerical duties"), § 147.88 (department of inspections and appeals "may perform inspections as required by [Subtitle 3] . . . except for the board of medical examiners, board of pharmacy examiners, board of nursing, and the board of dental examiners").

The foregoing thus suggests section 147.87 does not provide the Department with authority either to review the process used by the Board and its staff in investigating and prosecuting a licensee disciplinary case or to review compliance with that process in particular cases.

Sincerely,

Bruce Kempkes (JFP)

Bruce Kempkes
Assistant Attorney General

COUNTIES: PROPERTY TAX FREEZE; Aviation Authority. Iowa Code §§ 330A.15, 330A.16, 331.422, 331.424, 444.25A (1995). A county may not increase its aviation authority levy absent an unusual need for the additional funds. (Kempkes to Andersen, Audubon County Attorney, 5-23-96) #96-5-3(L)

May 23, 1996

Ms. Francine O'Brien Andersen
Audubon County Attorney
405 Tracy St.
Audubon, IA 50025

Dear Ms. Andersen:

You have requested an opinion involving the scope of a statutory prohibition against increases in property taxes. You mention that a county currently levies a tax of ten cents per thousand dollars of assessed value on all taxable property in its unincorporated areas to fund its participation in an aviation authority. You ask whether the statutory prohibition precludes the county from increasing this particular levy. In responding to your request, we conclude the county may not increase its aviation authority levy absent an unusual need for the additional funds.

I.

Your question implicates several statutes. They are set forth in Iowa Code chapters 330A, 331, and 444 (1995).

Chapter 330A governs aviation authorities established by "municipalities," which, under section 330A.2(6), includes counties. Section 330A.16 provides that

> [t]he effectuation of the authorized purposes of an [aviation] authority shall be in all respects for the benefit of the people of the state and the member municipalities, for the increase of their commerce and prosperity, and for the improvement of their welfare, health, and living conditions . . . .

See Iowa Code §§ 330A.3, 330A.6(2); see also Iowa Code §§ 331.382(1)(j), 330A.5, 330A.8. Section 330A.15 specifically provides a county with a taxing power:

> The governing body of a municipality after joining an authority and after determination by the authority pursuant to planning studies may by ordinance provide for the assessment of an annual levy not to exceed [27 cents per 1,000 dollars] of assessed value upon all the taxable property in such municipality for a period not to exceed forty years . . . . A county . . . may levy such tax only upon the property in the unincorporated area of such county. Such tax may be levied in excess of any tax limitation imposed by statute. . . . [emphasis added]

Chapter 331 generally governs counties. Section 331.422(2) permits a county to certify taxes upon the taxable property not located within its incorporated areas for rural county services. Under section 331.421(2), "rural county services" means services "primarily intended to benefit those persons residing in the county outside of the incorporated city areas . . . ." Section 331.424(2) permits a county under certain circumstances to fund its rural county services by certifying a supplemental levy to pay charges for an aviation authority to the extent the county contributes to the aviation authority under section 330A.15.

Chapter 444 governs tax levies and sets forth the most recent legislation pertinent to your opinion request. The governor approved section 444.25A (Supp. 1995) -- which implements a commonly described "property tax freeze" for the 1996 and 1997 fiscal years -- on May 2, 1995. See 1995 Iowa Acts, 76th G.A., ch. 206, at 605; see also 1994 Op. Att'y Gen. 39, 44. Section 444.25A fits within the middle of legislative enactments having an identical purpose and virtually identical language: section 444.25 implemented a similar freeze for the 1994 and 1995 fiscal years and section 444.25B (Supp. 1995) purports to implement one for the 1998 fiscal year.

With regard to the 1997 fiscal year, section 444.25A(1) sets forth a general prohibition:

> [T]he maximum amount of property tax dollars which may be certified by a county for taxes payable in the fiscal year beginning July 1, 1996, shall not exceed the amount of property tax dollars certified by the county for taxes payable in the fiscal year beginning July 1, 1995 [imposed by the levy to pay for] . . . :

* * * *

b. Rural county services under section [331.422(2)].

Section 444.25A(2) sets forth five exceptions to the general prohibition. The last, section 444.25A(2)(e), provides that the general prohibition does not apply to an "[u]nusual need for additional moneys to finance existing programs which would provide substantial benefit to county residents." In that case, the county may impose an increase in taxes up to a certain amount:

> The increase in taxes levied under this exception for the fiscal year beginning July 1, 1995, is limited to no more than the product of total tax dollars levied in the fiscal year beginning July 1, 1994, and the percent change, computed to two decimal places, in the price index for government purchases by type for state and local governments computed for the third quarter of calendar year 1994 from that computed for the third quarter of calendar year 1993. . . .

Section 444.25A(2)(e) also sets forth the procedure for seeking increased taxes under this exception.

II.

Section 444.25A(1), which generally prohibits the county from increasing property taxes, conflicts with sections 330A.15, 331.422(2), and 331.424(2), which effectively grant the county the power to increase the property tax up to a certain amount to fund its participation in the aviation authority. The question whether the county may increase its aviation authority levy thus requires a balancing of section 444.25A(1) on the one hand and sections 330A.15, 331.422(2), and 331.424(2) on the other in order to determine the intent of the General Assembly. See generally Citizens' Aide/Ombudsman v. Miller, 543 N.W.2d 899, 902 (Iowa 1996). We believe that the balance weighs in favor of section 444.25A(1) on two grounds.

First: The General Assembly enacted section 444.25A(1) after it enacted sections 330A.15, 331.422(2), and 331.424(2). A later enactment of the General Assembly normally prevails over an earlier one in the event they irreconcilably conflict. See Iowa Code § 4.8; Citizens' Aide/Ombudsman v. Miller, 543 N.W.2d at 902-03; State v. Iowa Public Service Co., 454 N.W.2d 585, 587 (Iowa 1990).

Second: Section 444.25A lists four specific levies that are express exceptions to the property tax limitation; however, a levy

for a county aviation authority is not among them. Iowa Code § 444.25A(2)(a)-(d) (Supp. 1995). Legislative intent is expressed by omission as well as inclusion. The express mention of certain things implies the exclusion of others. State ex rel. Miller v. Santa Rosa Sales and Marketing, Inc., 475 N.W.2d 210, 218 (Iowa 1991). Applying this principle, we conclude that the express mention of specific, levy exceptions to the property tax freeze implies the exclusion of a levy for a county aviation authority. Id. at 218. We have acknowledged the significance of exclusion in this section in a prior opinion involving an analogous question. See 1994 Op. Att'y Gen. 59 (#93-11-4(L)) (general prohibition in section 444.25 (1993) against increase in property taxes applies to county-wide special levy authorized by section 29C.17 to fund local emergency management commission).

Nevertheless, the county may still have a statutory basis for increasing its aviation authority levy. The fifth exception to the general prohibition against an increase in property taxes, section 444.25A(2)(e), provides that the general prohibition does not apply to an "[u]nusual need for additional moneys to finance existing programs which would provide substantial benefit to county residents." The county, we note, has some discretion in making the initial determination whether additional funds for the aviation authority falls within this exception. See 1996 Op. Att'y Gen. ___ (#95-6-1(L)). See generally Iowa Code § 444.25A(2)(e). We also note that the county may be able to pay its participation in the aviation authority by using funds with surpluses. See 1990 Op. Att'y Gen. 37 (#89-8-1(L)) ("It is impossible to anticipate every source of funding which may be available" to a county for its contributions to an aviation authority; using rural services fund "precludes using the County General Fund . . . but does not foreclose funds from other sources").

III.

In summary, a county may not increase its aviation authority levy absent an unusual need for the additional funds.

Sincerely,

Bruce Kempkes (GFP)

Bruce Kempkes
Assistant Attorney General

MOTOR VEHICLES: Renewal of motor vehicle registrations. Iowa Code § 321.40 (1995). Under Iowa Code section 321.40, unnumbered paragraph 4, a county treasurer may refuse to renew a motor vehicle registration only when the applicant owes delinquent restitution to the county in which the renewal is sought. (Olson to Ollie, State Representative, **8-2-96**) **#96-8-1(L)**

August 2, 1996

The Honorable C. Arthur Ollie
State Representative
413 Ruth Place
Clinton, IA 52732

Dear Representative Ollie:

You have requested an opinion of the Attorney General concerning the circumstances under which a county treasurer may refuse to renew the registration of a motor vehicle. Specifically, you ask for an interpretation of Iowa Code section 321.40 unnumbered paragraph 4. As amended by 1995 Acts, ch. 169, § 1 the paragraph states:

> The county treasurer shall refuse to renew the registration of a vehicle registered to a person when notified that the person has not paid restitution as defined under section 910.1, subsection 3,[1] to the clerk of the court located within that county. Each clerk of court subject to this section shall, by

---

[1]Iowa Code section 910.1(3) defines restitution as the "payment of pecuniary damages to a victim in an amount and in the manner provided by the offender's plan of restitution. Restitution also includes fines, penalties, and surcharges, the payment of crime victim compensation program reimbursements, court costs, court-appointed attorney's fees, or the expense of a public defender, and the performance of a public service by an offender in an amount set by the court when the offender cannot reasonably pay all or part of the court costs, court-appointed attorney's fees, or the expense of a public defender."

> the last day of each month, notify the county treasurer of that county of all persons who owe delinquent restitution. Immediately upon the cancellation or satisfaction of the restitution the clerk of court shall notify the county treasurer if that person's name appeared on the last list furnished to the county treasurer. This paragraph does not apply to the transfer of a registration or the issuance of a new registration. The provisions of this paragraph are applicable to counties with a population of twenty-five thousand or more. The provisions of this paragraph shall be applicable to any county with a population of less than twenty-five thousand upon the adoption of a resolution by the county board of supervisors so providing.

(emphasis added).

Your question, paraphrased, is whether a treasurer may apply the non-renewal sanction if the person owes restitution to any of the counties. We conclude that under Code section 321.40 unnumbered paragraph 4 a treasurer may refuse to renew the vehicle registration only if the person owes delinquent restitution to the county in which the renewal is sought.

By way of background information, the following statutes are among those pertaining to the registration of motor vehicles. (All statutory references are to the 1995 Code and supplement, unless otherwise indicated.) Iowa Code section 321.18 specifies that with limited exceptions, all motor vehicles driven or moved upon a highway are subject to the registration provisions of chapter 321. Iowa Code section 321.20 provides that to obtain a registration and certificate of title a vehicle owner is required to make application to the treasurer of the county where the owner is a resident. Iowa Code section 321.40 states that the registration must be renewed annually during the registration year assigned to the owner. The term "registration year" is defined in Code section 321.1(60).

Pursuant to Code section 321.40 the appropriate county treasurer mails the owner of record a statement of fees due

during the month that the vehicle registration expires, and upon receipt of payment renews the registration. However, the statute requires the treasurer to refuse to renew the registration in three situations: (1) when the person has not paid restitution to the clerk located within that county; (2) if the applicant has failed to pay local vehicle taxes due in that county on that vehicle or any other vehicle owned or previously owned by the applicant; (3) the treasurer knows that the applicant has a delinquent account, charge, fee, loan, taxes, or other indebtedness owed to or being collected by the state from information provided pursuant to section 421.17. See also §§ 321.30(13), 321.31.

With this statutory overview as background, we turn to your specific question regarding the meaning of section 321.40 unnumbered paragraph 4. When a statute is plain and its meaning is clear, we should not search for meaning beyond its express terms. State v. Tuitjer, 385 N.W.2d 246, 247 (Iowa 1986). It is inappropriate to resort to rules of statutory construction when the terms of the statute are unambiguous. Elliott v. Iowa Dept. of Public Safety, 374 N.W.2d 670, 672 (Iowa 1985). The statute here is unambiguous. It clearly states that a treasurer shall refuse to renew the registration when the person has not paid restitution to the clerk of court located within "that county." (Restitution payments are, under section 910.9, to be made to the clerk of court of the county where the defendant is sentenced.) Section 321.40 does not say that if a person owes restitution in any other county, a treasurer may refuse to renew the person's vehicle registration. To read this into the statute would amount to "creative interpretation" which the Iowa Supreme Court has refused to apply to other statutes. See e.g. State v. Martin, 383 N.W.2d 556, 559 (Iowa 1986).

The plain language of unnumbered paragraph 4 provides that the treasurer shall refuse to renew the vehicle registration if the applicant owes restitution to the clerk of court located within "that county." Similarly, unnumbered paragraph 5 states that the treasurer shall refuse registration renewal if the applicant owes local vehicle taxes in "that county" on "that vehicle or any other vehicle" owned or previously owned by the applicant. By using "that" as a modifier, in our opinion the legislature intended to limit the statute's application to one particular county. Had the legislature intended unnumbered

paragraph 4 to apply to unpaid restitution in any other county, it could have said so quite simply, as it did in unnumbered paragraph 5 when describing vehicles.

In summary, under Iowa Code section 321.40 unnumbered paragraph 4 a treasurer may refuse to renew the vehicle registration only if the applicant owes delinquent restitution to the county in which the renewal is sought.

Sincerely,

Carolyn J. Olson

CAROLYN J. OLSON
Assistant Attorney General

CJO:vr

SCHOOL BOARDS: Publication of Expenditures. Iowa Code § 279.35 (1995); 1987 Iowa Acts, ch. 224, § 49. A school board, in its publication of proceedings, is required to include, as part of the list of claims allowed, the "purpose of the claim". A school district which, as an issue of fact, fails to identify "the purpose of the claim" is not in compliance with the publication of proceedings requirement set forth in Iowa Code section 279.35. (Walding to Drake, State Representative, 8-9-96) #96-8-2(L)

August 9, 1996

The Honorable Jack Drake
State Representative
52462 Juniper Road
Lewis, IA 51544

Dear Representative Drake:

I am writing in response to your letter of April 17, 1996, in which you requested an interpretation of Iowa Code section 279.35 (1995). An issue has been raised by the publisher of a local newspaper whether the Riverside Community School District is in compliance with section 279.35 in publishing the district's list of claims; the district recently opted to omit an explanation of "the purpose of the claim" from its statutory publications.

A prior opinion of the Attorney General concerned the content of school board publications of expenditures. A decade ago, the Attorney General's office examined whether it was sufficient for a school board to publish "only the total amount of warrants issued for all employees. . . ." 1986 Op. Att'y Gen. 128 [#86-12-1(L)]. The opinion concluded that Iowa law required publication to include "the warrant, the name of the person receiving it, its amount and the reason it was issued." Id. That advice, however, was restricted to school districts under one hundred twenty-five thousand population as the statute had different publication requirements depending on the size of a district; the opinion did not offer a view as to the publication requirement for larger school districts.

Shortly after that opinion was issued, Iowa Code chapter 279 was amended to consolidate the publication requirements for all school districts, regardless of population, into a single statutory provision. 1987 Iowa Acts, ch. 224, § 49. The statute, Iowa Code section 279.35 (1995), has remained unchanged since the 1987 amendment.

Iowa Code section 279.35 provides:

> The proceedings of each regular, adjourned, or special meeting of the board, including the schedule of bills allowed, shall be published after the adjournment of the meeting in the manner provided in this section and section 279.36, and the publication of the schedule of the bills allowed shall include a list of claims allowed, including salary claims for services performed. The schedule of bills allowed may be published on a once monthly basis in lieu of publication with the proceedings of each meeting of the board. The list of claims allowed shall include the name of the person or firm making the claim, the purpose of the claim, and the amount of the claim. However, salaries paid to individuals regularly employed by the district shall only be published annually and the publication shall include the total amount of the annual salary of each employee. The secretary shall furnish a copy of the proceedings to be published within two weeks following the adjournment of the meeting.

[Emphasis added]. Thus, a school board is required to publish its proceedings, including a "schedule of bills allowed." Publication of the schedule of bills allowed must include a "list of claims allowed." Moreover, the content of the list of claims allowed must include, among other things, "the purpose of the claim."

The starting point in any case involving an interpretation of a statute is the statute itself. U.S. v. Hepp, 497 F. Supp. 348, 349 (1980). In interpreting statutes, one must take into account the language employed. Havill v. Iowa Department of Job Service, 423 N.W.2d 184, 186 (Iowa 1988). If the statutory language is plain and the meaning is clear, a search for legislative intent beyond the express terms of the statute is not permitted. State v. Monk, 514 N.W.2d 448, 450 (Iowa 1994). Unless ambiguous, a review of statutory language, should focus on what the legislature said rather than what it should or might have said. State v. Neary, 470 N.W.2d 27, 29 (Iowa 1991). A resort to rules of statutory construction, therefore, is not permitted when the terms of a statute are unambiguous. State v. Green, 470 N.W.2d 15, 18 (Iowa 1991).

The 1987 amendment, in crafting a uniform publication requirement, elected to adopt the publication requirement that had been in effect for the smaller school districts. Section 279.35 clearly mandates, in unambiguous language, that school boards include an explanation of "the purpose of the claim" in the publication of the list of claims allowed. Whether a particular publication satisfactorily identifies "the purpose of the claim," as statutorily required, is a factual issue. See 1982 Op. Att'y Gen. 353, 353-354 (appropriate purpose of an Attorney General opinion is limited to matters of law, not to engage in judicial fact-finding).

Accordingly, a school board, in its publication of proceedings, is required to include, as part of the list of claims allowed, the "purpose of the claim". A school district which, as an issue of fact, fails to identify "the purpose of the claim" is not in compliance with the publication of proceedings requirement set forth in Iowa Code section 279.35.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW:rd

cc: Donald L. Nielson, Publisher
The Herald
107 Main Street
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Tim White, President
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Riverside Community School District
P.O.Box 218
Carson, IA 51525

COUNTIES; PROPERTY TAX FREEZE: Constitutionality. Iowa Code §§ 331.301, 444.25A, 444.25B (1995). The county property tax freeze imposed by Iowa Code sections 444.25A and 444.25B (1995) does not appear to violate equal protection principles or conflict with county home rule authority. (Scase to Bailey, Page County Attorney, **8-19-96) #96-8-3(L)**

August 19, 1996

Verd R. Bailey
Page County Attorney
109 East Main
P.O. Box 478
Clarinda, Iowa 51632

Dear Mr. Bailey:

You have requested an opinion from this office addressing the constitutionality of the property tax limitations contained in Iowa Code sections 444.25 through 444.28. Specifically, you express concern that these limitations, commonly referred to as the county property tax freeze, may deny equal protection to the county in relation to city governments and school districts and may be in direct conflict with the home rule provisions of Code chapter 331. We do not believe that Code sections 444.25A and 444.25B violate equal protection principles or conflict with county home rule authority.

The Iowa legislature placed property tax limitations upon county and city governments with the enactment of Iowa Code section 444.25 in 1992. See 1992 Iowa Acts, 2nd Ex. Sess., ch. 1001, § 301. Code section 444.25, with some exceptions, limited the tax revenue certified by counties and cities during the fiscal years commencing July 1, 1993, and July 1, 1994, to the amount certified during the preceding fiscal year. In 1994 and 1995, the legislature enacted Code sections 444.25A and 444.25B, which extend the county tax limitations to the fiscal years commencing on July 1, 1995, July 1, 1996, and July 1, 1997. See 1994 Iowa Acts, ch. 1163, § 5; and 1995 Iowa Acts, ch. 206, § 27. The property tax limitation on cities was not extended past the fiscal year commencing July 1, 1994. No extraordinary tax limitation was placed upon school districts.

You ask whether the disparate treatment of counties, cities, and school districts by these legislative acts constitutes a violation of constitutional equal protection provisions. We begin our analysis by noting that neither the county nor its officers would have standing to bring a judicial action challenging the constitutionality of these statutes. The Iowa

Supreme Court has uniformly held that "a county lacks the ability to mount a constitutional attack upon State legislative enactments." Bd. of Supervisors of Linn County v. Dept. of Revenue, 263 N.W.2d 227, 232 (Iowa 1978) (rejecting attempt by county and its auditor and assessor to challenge the constitutionality of procedure for implementing property tax equalization order); see also Polk County v. State Appeal Bd., 330 N.W.2d 267, 271-72 (Iowa 1983) (holding county lacked standing to raise constitutional challenge to local budget law). Despite the county's lack of standing, it is possible that county taxpayers or employees could maintain a constitutional challenge to the property tax freeze. See Polk County v. Iowa State Appeal Bd., 330 N.W.2d at 273 (county employee had standing to bring suit on his own behalf and as local union representative to challenge local budget law); Bd. of Supervisors of Linn County v. Dept. of Revenue, 263 N.W.2d at 243 (individual taxpayers and property owners could challenge tax equalization order).

It does not appear, however, that an equal protection challenge to the property tax freeze would succeed. The Iowa Supreme Court, in a 1977 decision addressing tax limitations placed on cities, rejected a similar claim. In City of Waterloo v. Seldon, 251 N.W.2d 506 (Iowa 1977), the Court upheld a property tax limitation similar to the current property tax freeze. In rejecting the plaintiff's contention that the statute offended equal protection by unreasonably limiting the tax limitation to cities with a population greater than 750, the Court reasoned as follows:

> Enactment of the statute amounts to a contrary finding by the legislature. In evaluating plaintiff's challenge, we recognize the legislature's wide discretion in determining classifications to which its act shall apply. Moreover, in tax matters even more than in other fields legislatures possess the greatest freedom in classification. The differences upon which the classification is based need not be great or conspicuous. An iron rule of equal taxation is neither attainable nor necessary. [citing Dickinson v. Porter, 240 Iowa 393, 401, 35 N.W.2d 66, 72 (1949)].
>
> . . .
>
> [I]t is conceivable that the legislature believed the need for limitation on growth of budgets was greater in larger cities than in smaller cities. This judgment is wholly

> within the legislative prerogative. Equal protection assurances do not require dissimilar situations to be treated similarly. A classification imposing budget limitations on cities where the legislature may reasonably have perceived the problem to be greater rationally relates to a legitimate state interest. It bears a reasonable relationship to the purpose the legislature sought to accomplish.

City of Waterloo v. Seldon, 251 N.W.2d at 509-10. It is likely that, in light of the broad discretion afforded the legislature in developing classifications for taxation purposes, sections 444.25A and 444.25B would withstand an equal protection challenge.

You also question whether the property tax freeze conflicts with the home rule provisions of chapter 331. We advise that it does not. Initially, it must be noted that neither the home rule amendment to the Iowa Constitution nor chapter 331 purports to grant counties the power to levy a tax without express authorization from the general assembly. See Iowa Const., Art. III, § 39A; Iowa Code § 331.301(7) (1995). Secondly, the home rule authority of counties does not limit the power of the general assembly to define the functions of counties.

> The Home Rule Amendment allows counties to exercise power over local affairs in regard to which there is no overriding legislative directive. Counties remain the creatures of the legislature and, therefore, must accept as final the acts of their superior, the legislature.

Polk County v. Iowa State Appeal Bd., 330 N.W.2d at 272.

While we are cognizant of the fact that the county property tax freeze significantly limits the range of options available to counties to address budget matters, we do not believe that Code sections 444.25A and 444.25B violate equal protection principles or conflict with county home rule authority.

Sincerely,

Christie J. Scase

Christie J. Scase
Assistant Attorney General

CJS/cs

LANDLORD-TENANT: Uniform Residential Landlord and Tenant Act. Iowa Code § 562A.5 (1995). Iowa Code chapter 562A (1995) -- the Uniform Residential Landlord and Tenant Act -- provides several exclusions to its coverage, including two that relate to transient housing. Whether an arrangement between a Young Men's Christian Association and a man in its "transitional living facility" comes within one of the exclusions is a fact question that the Attorney General cannot resolve in an opinion. (Kempkes to Holvek, State Representative, **8-19-96) #96-8-4(L)**

August 19, 1996

The Honorable Jack Holvek
State Representative
2007-47th St.
Des Moines, IA 50310

Dear Representative Holvek:

You have requested an opinion involving Iowa Code chapter 562A (1995 & Supp. 1995), popularly known as the "Uniform Residential Landlord and Tenant Act." After providing us with some factual background, you ask whether chapter 562A encompasses a particular not-for-profit program of a Young Men's Christian Association (YMCA). Given our inability to make factual determinations regarding this program and its participants, we cannot provide you with a definite answer to your question. See 61 IAC 1.5. Thus, our opinion only concerns the legal construction or interpretation of chapter 562A. See id.

The YMCA, which has residential units, operates a program for men who would otherwise be homeless. Each man pays a weekly fee for a dormitory room, limited housekeeping service, and access to a shared bathroom in the YMCA's "transitional living facility." Approximately seventy to eighty percent of the men stay in this facility a "very short" period of time in order to avoid homelessness.

On occasion, YMCA staff must order men to vacate the transitional living facility on grounds relating to the physical safety or health of others. These orders have led to your opinion request, because chapter 562A essentially supplies the basic terms

and conditions of a landlord-tenant relationship in the absence of a valid rental agreement to the contrary. If chapter 562A applies to the YMCA, it appears the YMCA could no longer continue to operate its program.

I.

Chapter 562A does not apply to all persons who might conceivably come within the terms "landlord" and "tenant." See generally Iowa Code § 562A.6 (definitions). Section 562A.5 sets forth certain exclusions:

> Unless created to avoid the application of this chapter, the following arrangements are not governed by this chapter:
>
> . . .
>
> 3. Occupancy by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization.
>
> 4. Transient occupancy in a hotel, motel or other similar lodgings.
>
> . . .
>
> 8. Occupancy in housing owned by a nonprofit organization whose purpose is to provide transient housing for persons released from drug or alcohol treatment facilities and in housing for homeless persons.

Chapter 562A -- as well as chapter 562B (the "Mobile Home Parks Residential Landlord and Tenant Act") -- came into existence after the seminal case of Mease v. Fox, 200 N.W.2d 791 (Iowa 1972), which established a warranty of habitability for residential premises. See 1978 Iowa Acts, 67th G.A., ch. 1172. The General Assembly recently added section 562A.5(8) as an eighth exclusion, see 1995 Iowa Acts, 76th G.A., ch. 125, § 2; the uniform act providing the framework for chapter 562A does not contain anything similar, see 7B U.L.A., Residential Landlord and Tenant Act § 1.102, at 433-34 (1985).

II.

We do not have any detailed information regarding the contractual relationship between the YMCA and the men in its transitional living facility. Nor do we have any information about the YMCA itself or the men leaving that facility. We therefore

cannot provide you with a definite answer to your question, because, by necessity, such an answer depends upon an assessment of all the underlying facts and circumstances. In other words, applicability of chapter 562A to a particular set of facts and circumstances amounts to a question of fact or a mixed question of fact and law. See generally Cedar Rapids Inv. Co. v. Commodore Hotel Co., 205 Iowa 736, 218 N.W. 510, 512 (1928).

We can, however, construe or interpret the three exclusions in section 562A.5. To the extent one can find as a fact that the YMCA's program falls within any of these three exclusions, chapter 562A would not govern an arrangement between the YMCA and a man in its traditional living facility. See generally Bourque v. Morris, 460 A.2d 1251, 1254 (Conn. 1983) (defendant bears burden of proof to show exclusion from uniform act). In our analysis, we examine section 562A.5(4) first, section 562A.5(8) second, and section 562A.5(3) third.

Section 562A.5(4) excludes from the scope of chapter 562A "[t]ransient occupancy" in a "hotel, motel or other similar lodgings." We initially discuss the meaning of "transient occupancy."

The commentators to the uniform act have indicated this in transitu exclusion "applies to roomers and boarders [but not to persons in] transient occupancy." See 7B U.L.A., supra, § 1.202, comment at 439. This distinction, however, provides little if no insight. It compares apples with oranges by comparing available facilities with length of stay. Compare Iowa Code § 562A.5(12) ("roomer" means a person occupying a dwelling unit that lacks a major bathroom or kitchen facility in a structure where one or more "major facilities" (toilet, or bath or shower; or refrigerator, stove, or sink) are used in common with persons occupying other dwelling units) with Webster's Ninth New Collegiate Dictionary 1231 (1979) ("transient" means passing through or by a place with only a brief stay or sojourn). See generally Webster's, supra, 122, 997 ("boarder" means a person who regularly receives meals in exchange for compensation, and "roomer" simply means a lodger).

"[The word `transient'] is a relative term, which, in the absence of an inflexible statutory or legislative definition, may be the source of much vexation and uncertainty." City of Waukon v. Fisk, 124 Iowa 464, 100 N.W. 475, 477 (1904). As an adjective, transient commonly means "[p]assing across, as from one thing or person to another; passing with time of short duration; not permanent; not lasting; temporary." Black's Law Dictionary 1343 (1979); see Webster's, supra, 1231. See generally Iowa Code § 4.1(38) (in statutes, words and phrases shall be construed according to context and approved English usage). The common element between transient and its synonyms, which include "transitory" and "short-lived," is "lasting or staying only a short

time." Webster's, supra, at 1231. See generally Iowa Code § 562A.6(15) ("transitional housing" means temporary or nonpermanent housing).

As a noun, transient "is the opposite of `resident,'" which signifies a person at rest in a place. The Leontios Teryazos v. Teryazos, 45 F. Supp. 618, 621 (E.D.N.Y. 1942). "Transient guests" clearly covers "mere itinerants," Stout v. Bessemer YMCA, 404 F.2d 687, 689 (5th Cir. 1968), and a transient person has been described as "a wanderer ever on the tramp," Middlebury v. Waltham, 6 Vt. 200, 203 (1834). Several courts have interpreted "transient guest" for various purposes, but have not "agreed upon a precise length [of stay] which would distinguish a transient from a non-transient guest." Lyons v. Kamhoot, 575 P.2d 1389, 1391 (Or. 1978).

Thus, a person who rented a hotel room in Illinois on a weekly basis and kept it more than three months was a transient and not a permanent guest. Bullock v. Adair, 63 Ill. App. 30, 32 (1895). Also in Illinois, a person who rented a room on a weekly basis and kept it for nine months was a transient guest. Burdock v. Chicago Hotel Co., 172 Ill. App. 185, 186-87 (1912). A person who rented a motel room in New Jersey on a weekly basis for about two months and claimed it as his sole residence for an indefinite period was a transient guest. Francis v. Trinidad Motel, 618 A.2d 873, 876 (N.J. Super. 1993). A person staying in Connecticut for three months was a transient. Bourque v. Morris, 460 A.2d 1251, 1253 (Conn. 1983). A person renting an Oregon motel room for three months while she awaited the rebuilding of her house was a transient. Lyons v. Kamhoot, 575 P.2d at 1391 (interpreting Oregon's version of uniform act).

In contrast, a person who rented a hotel room in New York on a monthly basis for eleven months was a permanent and not a transient guest. Kaplan v. Stogop Realty Co., 233 N.Y.S. 113, 114 (App. Div. 1929). A person living in a New York motel for over two years was not a transient guest. A person renting a hotel room in the Panama Canal Zone for six months to pursue his business interests was not a transient. DeJan v. DeJan, 18 F.2d 690, 691 (5th Cir. 1927).

However convenient a factor, length of stay does not by itself divide transients from other members of a community; thus, depending upon the circumstances, a person living in a community for a considerable period of time may nevertheless remain a transient. A number of other factors, none decisive, may point to a stay transient rather than permanent in nature. Those factors include the type of lodgings, the extent to which they have been converted into a "home," the reasons for living in the particular area, an animus manendi (intent to remain) or animus revertendi (intent to return), as well as the absence of employment or other means, familial or other ties, and other abodes. See, e.g.,

Bourque v. Morris, 460 A.2d 1251, 1253 (Conn. 1983); Francis v. Trinidad Motel, 618 A.2d at 876-77. Perhaps the most important factor in determining a stay transient in nature is its indefiniteness, Annot., "Zoning -- `Hotel'," 28 A.L.R.3d 1240, 1242 (1969); thus, a transient guest "comes without any bargain for time, remains without one, and may go when he pleases," Shoecraft v. Bailey, 25 Iowa 553, 555 (1868) (emphasis deleted).

Regarding "hotel, motel, or other similar lodgings," we observe that this phrase largely coincides with the word "transient." Cf. Hubbell v. Higgins, 148 Iowa 36, 126 N.W. 914, 917 (1910) ("[w]e can hardly conceive of a hotel . . . which does not receive transient guests"). A "hotel" and a "motel" simply mean an establishment that provides "lodging," which, in turn, simply means "a temporary place to stay." Webster's, supra, at 549, 670, 745. See Hull Hosp. Inc. v. Wheeler, 216 Iowa 1394, 250 N.W. 637, 638 (1933); Annot., "Inn or Hotel," 19 A.L.R. 517 (1922). These common definitions also coincide in large part with ones employed by the General Assembly in other statutes. Under the Alcoholic Beverage Control Act, chapter 123, a hotel or motel includes any place licensed by the Department of Inspections and Appeals "regularly or seasonably kept open in a bona fide manner for the lodging of transient guests, and with twenty or more sleeping rooms." Iowa Code § 123.3(15). Under the Hotel Sanitation Code, chapter 137C, a hotel means any building or structure "where sleeping accomodations are furnished transient guests for hire." Iowa Code § 137C.2.

A number of factors point to the existence of a hotel or motel (a relatively new word combining "motor" and "hotel," Webster's, supra, at 744). Those factors include the use of "hotel," "motel," or "inn" in its title, brochures, stationary, advertisements, and other documents; the provision of accomodation, usually in the form of multiple rooms or suites with beds and other furnishings, to the public at large on a regular basis; the existence of a lobby, register, dining room, and parking facilities; the provision of daily or weekly charges and receipts; the provision of housekeeping and laundry services, telephones, bellboys, and desk services; the provision of "wake-up service" and food service in rooms and free advance registration; locality; and the classification by administrative agencies for purposes of licenses, inspections, fees, and taxes (e.g., Iowa Code ch. 422A (hotel and motel tax)). See Lyon v. Smith, 1 Iowa (E. Morris) 244, 246-47 (1943); McBurney YMCA v. Plotkin, 519 N.Y.S.2d 518, 520 (Civ. Ct. 1987). An important consideration is the establishment's "fundamental purpose" and not its "mere incidentals." Hull Hosp. Inc. v. Wheeler, 250 N.W. at 638 ("hotel" does not include hospital).

A New York court has held that a YMCA, which received and lodged transient guests, clearly amounted to a hotel for purposes of administrative regulation. See McBurney YMCA v. Plotkin, 519

N.Y.S.2d at 520. Even if the YMCA with the transitional living facility did not amount to a hotel or motel, we note that the General Assembly's decision to employ the words "or other similar lodgings" indicates an intent for section 562A.5(4) to have broad coverage. We also note that nothing suggests that "hotel, motel, or other similar lodgings" should receive a narrow construction. See Iowa Code § 4.2 (statutes shall be liberally construed with view to promote their objects and assist parties in obtaining justice). To the contrary, section 562A.2 provides that chapter 562A "shall be liberally construed and applied to promote its underlying purposes and policies," which include modernizing the law governing housing and maintaining and improving the quality of housing. See generally 7B U.L.A., supra, § 1.102, comment at 434 (liberal construction "will permit development by the courts in light of unforeseen and new circumstances and practices").

Section 562A.5(8) excludes from the scope of chapter 562A two alternatives that reflect the role of public service in providing housing to those persons who, for whatever reason, cannot otherwise obtain it. First, it excludes occupancy "in housing owned by a nonprofit organization whose purpose is to provide transient housing for persons released from drug or alcohol treatment facilities"; second, it excludes occupancy "in housing for homeless persons." If the YMCA in fact were a nonprofit corporation and were providing occupancy in its transitional living facility to men released from drug or alcohol treatment facilities or to men in need of housing, both of these alternatives would appear to apply to its program. See generally Dragan v. Department of Pub. Welfare, 396 A.2d 77, 80 (Pa. Commw. 1979) ("homeless" simply means without a place to live); Webster's, supra, at 542 ("homeless" means without a place of residence or house).

Section 562A.5(3) excludes from the scope of chapter 562A occupancy "by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization." One commentator has concluded that a YMCA, as a "fraternal or social organization," comes within this exclusion to the extent it provides occupancy to its members. See Lovell, "The Iowa Uniform Residential Landlord and Tenant Act," 31 Drake L. Rev. 253, 273-74 n. 90 (1981-82).

III.

In this opinion, we have not specifically determined whether chapter 562A governs any arrangement between the YMCA and a man in its transitional living facility. We have only addressed the legal construction or interpretation of section 562A.5. Thus, we can only conclude chapter 562A would not govern an arrangement between the YMCA and a man in its traditional living facility if, given the

specific facts and circumstances, any of the exclusions in section 562A.5 apply to that arrangement.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

COUNTIES: Official Bonds. Iowa Code chapter 64 (1995). A county board of supervisors may cancel an official bond and obtain a new bond from a different carrier prior to expiration of an official's term, provided that the provisions of chapter 64 are followed in procuring the new bond, and provided that no language in the original bond instrument prohibits such cancellation. (Adams to Zenor, 10-1-96) #96-10-1(L)

October 1, 1996

Mr. Michael L. Zenor
Clay County Attorney
2000 Highway Blvd.
P.O. Box 3028
Spencer, IA 51301

Dear Mr. Zenor:

You have requested an opinion regarding public official bonds and cancellation of those bonds. Specifically, you ask whether a county may procure a new carrier for official bonds and then cancel the bonds with the existing carrier prior to the expiration of a county official's term of office. We conclude that a county may do so, provided that nothing in the terms of the original bond state otherwise.

Iowa Code chapter 64 (1995) governs the requirements for official bonds, and Iowa Code chapter 65 governs the provision of additional security and discharge of sureties. Section 64.2 provides that all public officers, other than those specified in section 64.1, shall give bond with the following conditions:

> That as _____ (naming the office) in _____ (city, township, county, or state of Iowa), the officer will render a true account of the office and of the officer's doings therein to the proper authority, when required thereby or by law; that the officer will promptly pay over to the officer or person entitled thereto all moneys which may come into the officer's hands by virtue of the office; that the officer will promptly account for balances of

> money remaining in the officer's hands at the termination of the office; that the officer will exercise all reasonable diligence and care in the preservation and lawful disposition of all money, books, papers, securities, or other property appertaining to that office, and deliver them to the officer's successor, or to any other person authorized to receive the same; and that the officer will faithfully and impartially, without fear, favor, fraud, or oppression, discharge all duties now or hereafter required of the office by law.

Further, all bonds required by law are to be construed as impliedly containing the conditions required by the statute. Iowa Code § 64.5; see also State v. Overturff, 33 N.W.2d 405, 407 (Iowa 1948); 11 C.J.S Bonds § 34 (1995).

The amount of each bond is determined by the board of supervisors, in a sum not less than twenty thousand dollars for members of the boards of supervisors, county attorneys, recorders, auditors, sheriffs, and assessors, and not less than fifty thousand for treasurers. Iowa Code §§ 64.8-64.9. Bonds for county officials are approved by the board, and must be approved or disapproved within five days after presentation to the board. Iowa Code §§ 64.20-64.21, 331.322(1). Further, the board may purchase an individual or a blanket surety bond to cover county officers: an elected official is deemed to have furnished surety if the officer is covered by a blanket bond. Iowa Code § 331.324(6).[1]

Hence, the Iowa Code provides that county officers must post a bond for the entire period of time they are in office. Iowa Code §§ 64.2, 64.25. There is no requirement in the Code, however, that the same carrier must provide the bond for the official's entire term.

Further, although the Code provides a method for cancellation of an official bond when the surety desires to be released from the bond obligation,[2]

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[1] In a 1964 opinion, the Attorney General opined that public officials were required to furnish individual bonds and that individual officers determined the type of bond and the carrier. 1964 Op. Att'y Gen. 101, 102. Following that opinion, the legislature enacted section 331.324, which provides a county board with the authority to purchase either an individual bond or blanket bond to insure the fidelity of county officers.

[2] Iowa Code chapter 65 provides a method for discharge of sureties when the surety desires to be relieved of a bond obligation. This chapter provides that the surety may petition the board for relief, and that, following a hearing, the board may order the officer to give a new bond, thereby discharging the surety's liability on the bond. Iowa Code §§ 65.4, 65.7. Upon discharge

the Code is silent on whether the county may cancel an official bond. The fact that the legislature has failed to specifically provide that the county may cancel an official bond does not, however, imply that the county has no authority to do so. Rather, we must look to the general powers of the county in light of the county Home Rule amendment, chapter 331, and relevant case law in making that determination.

In 1978, counties in Iowa attained home rule status by constitutional amendment. The county Home Rule Amendment grants counties "home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government[.]" See Iowa Const. art III, § 39A; see also Smith v. Board of Supervisors of Des Moines County, 320 N.W.2d 589, 592 (Iowa 1982) (upholding constitutionality of county Home Rule Amendment); 1980 Op. Att'y Gen. 54 (discussion of Home Rule Amendment and its impact).

In 1981, the Iowa legislature adopted chapter 331, which governs the options available for county government organization, the powers and duties of supervisors and other county officers, the county budget process, and other county functions. Section 331.301 broadly provides 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 § 331.310(1). Further, this section importantly provides that "the failure to state a specific power does not limit or restrict the general grant of home rule power conferred by the Constitution and this section. A county may exercise its general powers subject only to limitations expressly imposed by a state law." Iowa Code § 331.301(3).

Accordingly, a county board may cancel official bonds procured under chapter 64 and obtain new bonds if the board deems it appropriate to "protect and preserve the rights, privileges, or property of the county or its residents" or to "preserve and improve the peace, safety, health, welfare, comfort, or

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of a surety, the premium is refunded by the surety on a pro rata basis. Iowa Code § 65.11.

convenience of its residents" and if there is no limitation on this authority expressly imposed by state law. We assume from your letter that your county board has made the determination that it would be in the public interest to cancel the existing bonds and procure bonds with a new carrier. See Dickinson v. Porter, 35 N.W.2d 66, 80 (Iowa 1948) (discussing discretion granted to county boards in making this determination). Further, as mentioned above, there is no express provision either in chapter 64 or 65 which limits the county's authority to cancel these bonds. We therefore conclude that a county may cancel an official bond and obtain a new bond from a different carrier prior to expiration of an official's term, provided that the provisions of chapter 64 are followed in procuring the new bond and that no provision exists in the original bond prohibiting cancellation prior to the expiration of the official's term.

This conclusion is supported by a review of the purpose of the statute requiring official bonds. See generally Iowa Code § 4.6(1). The legislature has stated that the purpose of the bond requirement is to protect the public, not the sureties. Iowa Code § 64.18; see generally Iowa Code § 4.4(5). The public is protected so long as a bond is in effect, regardless of whether the same surety is providing the bond for the official's entire term of office.

Our conclusion is also supported by general bond law. A bond may generally be "canceled, rescinded, or revoked, following which action the bond is extinguished to all intents and purposes." 11 C.J.S. Bonds § 53 (1995). Accordingly, cancellation of the bond by the county both discharges the surety and the county's obligations on the bond. Id.

Finally, the county must look to the specific language of the bond at issue to determine if the county is prohibited from cancelling the bond prior to the expiration of an official's term of office. See generally 4 E. McQuillin, The Law of Municipal Corporations § 12.225, at 331 (1992) ("the time during which the bond is effective must be ascertained from the terms of the bond itself"); 12 Am.Jur.2d Bonds § 25 (1964); 11 C.J.S. Bonds § 45 (1995).

We conclude that a county board may cancel an official bond and obtain a new bond from a different carrier prior to expiration of an official's term, provided that the provisions of chapter 64 are followed in procuring the new

bond, and provided that no language in the original bond instrument prohibits such cancellation.

Sincerely,

Heather L. Adams

HEATHER L. ADAMS
Assistant Attorney General

INCOMPATIBILITY OF OFFICES; CONFLICT OF INTEREST: City employees and members of city councils serving as reserve police officers. Iowa Code §§ 80D.4, 80D.6, 80D.9, 80D.11, 372.5 (1995). For the purpose of the incompatibility doctrine, members of a city council hold a "public office" and city employees and reserve police officers do not; accordingly, city employees and council members may serve simultaneously as reserve police officers for the city. City employees and council members may face statutory and common-law conflicts of interest while serving as reserve police officers for the city; however, it is impossible to identify in an opinion every possible scenario in which a conflict might arise. Although council members should not vote on measures that increase the pay or provide additional monetary assistance to reserve police officers during the time they serve as reserve police officers, a city's decision to pay hourly compensation to its reserve police officers does not affect the ability of city employees and council members to serve simultaneously as reserve police officers. (Kempkes to Dillard, Linn County Attorney, **10-1-96**) **#96-10-2(L)**

October 1, 1996

Mr. Denver D. Dillard
Linn County Attorney
Linn County Courthouse
Cedar Rapids, IA 52401

Dear Mr. Dillard:

You have requested an opinion on incompatible offices and conflicts of interest with regard to officers or employees of a city having a commission form of government. In 1992, we highlighted the important difference between those two doctrines:

> The incompatibility and conflict of interest doctrines, while often confused, are distinct concepts. [T]he "doctrine of incompatibility is concerned with the duties of an office apart from any particular office holder." Conflict of interest issues, on the other hand, require examination of "how a particular office holder is carrying out his or her official duties in a given fact situation."

1992 Op. Att'y Gen. 150, 150-51 (citations omitted). An allegation of conflict involves evidentiary considerations; in contrast, an allegation of incompatibility -- which may have a constitutional, statutory, or common-law basis, 1994 Op. Att'y Gen. 11 (#93-4-8(L)) -- presents a purely legal question. 1982 Op. Att'y Gen. 220, 221.

You ask whether appointed full-time or part-time city employees and members of the city council may serve as reserve police officers for the city. You also ask whether payment of

hourly compensation to reserve police officers for performing certain duties affects the ability of city employees and council members to serve in this capacity.

You have provided a copy of the city's ordinance governing reserve police officers. Among other matters, this ordinance (1) defines a reserve police officer as a volunteer, non-regular, sworn member of the police department who has regular police powers while functioning as a representative of the police department; (2) explains that a reserve police officer shall have the same rights, privileges, obligations, and duties of any other peace officer, shall be subordinate to any regular peace officer, and shall serve in a supplementary capacity to the regular police department; (3) grants the city commissioner of public safety the power to appoint a reserve police officer; (4) grants the police chief the power, with the consent of the commissioner, to remove a reserve police officer for just cause or for any other reason which the police chief determines to be in the best interests of the city; and (5) provides that a reserve police officer shall be paid at the rate of one dollar per calendar year, and such additional assistance and benefits as authorized by statute.

Iowa Code chapters 80D and 372 (1995) primarily provide the statutory background for your questions. We conclude that the common-law doctrine of incompatibility does not preclude city employees and council members from simultaneously serving as reserve police officers for the city; we add, however, that such persons may face statutory and common-law conflicts of interest in their simultaneous service as reserve police officers. See generally Iowa Code § 68B.2A(1). We also conclude that payment of an hourly wage to reserve police officers does not, by itself, affect our conclusions.

I.

Chapter 372 is entitled "Organization of City Government." It permits a city to have a commission form of government. Iowa Code §§ 372.1, 372.2. This form of government generally has a council composed of a mayor and four members elected at large, each with one vote and each in charge of a city department. Iowa Code § 372.5. Although one council member administers the city's department of public safety, the mayor supervises the administration of all departments and reports to the council all matters requiring its attention. Iowa Code § 372.5. The mayor may take command of the police department during times of emergency. Iowa Code § 372.14(2). The superintendant of public safety, with the approval of the city council, appoints the police chief. Iowa Code § 400.13.

Chapter 80D, entitled "Reserve Peace Officers," creates the position of reserve peace officer. (Peace officers acting on

behalf of governmental entities were unknown under the common law. 16A E. McQuillin, The Law of Municipal Corporations § 45.06.10, at 31-32 (1992).) Chapter 80D permits cities and other public entities to "provide for the establishment of a force of reserve peace officers . . . ." Iowa Code § 80D.1. A "reserve peace officer" means

> a volunteer, non-regular, sworn member of a law enforcement agency who serves with or without compensation, has regular police powers while functioning as a law enforcement agency's representative, and participates on a regular basis in the law enforcement agency's activities including crime prevention and control, preservation of the peace, and enforcement of law.

Iowa Code § 80D.1A(3).

Appointments of reserve peace officers "are subject to the discretion of the chief of police, sheriff, or commissioner of public safety to whom application is made." Bahr v. Council Bluffs Civil Service Comm'n, 542 N.W.2d 255, 257-58 (Iowa 1996); see Iowa Code § 80D.4. Reserve peace officers "shall serve on the orders and at the discretion of the chief of police, sheriff, or commissioner of public safety or the commissioner's designee, as the case may be." Iowa Code § 80D.6. See generally Iowa Code § 4.1(30)(a) ("shall" in statutes normally imposes a duty).

> Reserve peace officers shall be subordinate to regular peace officers, shall not serve as peace officers unless under the direction of regular peace officers . . . . Each department for which a reserve force is established shall appoint a regular force peace officer as the reserve force co-ordinating and supervising officer. That regular peace officer shall report directly to the chief of police, sheriff, or commissioner of public safety or the commissioner's designee, as the case may be.

Iowa Code § 80D.9.

Reserve peace officers "shall be vested with the same rights, privileges, obligations, and duties as any other peace officers" while in the actual performance of official duties, Iowa Code § 80D.6, and "may carry a weapon in the line of duty only when authorized by "the chief of police, sheriff, or commissioner of public safety or the commissioner's designee, as the case may be,"

Iowa Code § 80D.7. See generally Iowa Code § 4.1(30)(c) ("may" in statutes normally confers a power).

Each reserve peace officer "shall be considered an employee of the governing body which the officer represents" while performing official duties and "shall be paid a minimum of one dollar per year." Iowa Code § 80D.11. The governing body shall provide hospital and medical assistance and benefits to reserve peace officers who sustain injury in the course of performing official duties as well as liability and false arrest insurance to reserve peace officers for their performance of official duties. Iowa Code §§ 80D.12, 80D.13. The governing body "may provide additional monetary assistance for the purchase and maintenance of uniforms and equipment used by reserve peace officers." Iowa Code § 80D.11. The governing body may not, however, permit a reserve peace officer to become eligible for participation in a pension fund or retirement system created under state law of which regular peace officers may become members. Iowa Code § 80D.14.

II.

You have asked whether city employees and council members may, consistent with the incompatibility doctrine, serve simultaneously as reserve police officers for the city. We have noted that under the common law an "issue of incompatibility arises only if it is determined that both of the positions in question are `public offices.' The incompatibility doctrine does not apply where the person holds one office and is merely employed by another public body." 1992 Op. Att'y Gen. 36, 36 (citations omitted). Accord 1992 Op. Att'y Gen. 150, 151 (incompatibility doctrine "does not apply if a person holds one office but is merely employed by another body"); 1912 Op. Att'y Gen. 276, 277; 63A Am. Jur. 2d Public Officers and Employees § 69, at 721 (1984). Accordingly, our analysis needs to determine whether city employees, council members, and reserve police officers each hold a "public office."

In State v. Spaulding, 102 Iowa 639, 72 N.W. 288, 290 (1897), the Supreme Court of Iowa set forth authority indicating that a public office had five elements: (1) the constitution, legislature, or legislatively conferred authority must create the position; (2) the constitution, legislature, or legislatively conferred authority must delegate a portion of sovereign power to the position; (3) the legislature or legislatively conferred authority must directly or indirectly define the position's duties and powers; (4) the person must perform the duties independently and without control of a superior power other than the law; and (5) the position must have some permanency and continuity and not be only temporary or occasional. See State v. Taylor, 260 Iowa 634, 144 N.W.2d 289, 292 (Iowa 1966) (recognizing guidelines set forth in State v. Spaulding and noting "that consideration is also given to such matters as the term of office, requirement of oath and

bond"). In prior opinions, we have used these five elements to determine the existence of a public office. See, e.g., 1992 Op. Att'y Gen. 36, 36; 1982 Op. Att'y Gen. 220, 224-25.

With these five elements again in mind, we address the three questions whether city employees, council members, and reserve police officers each hold a public office for the purpose of the incompatibility doctrine. Only the third question merits extended discussion.

First: City "employees," by definition, do not hold any public office for the purpose of the incompatibility doctrine. As we have explained, the incompatibility doctrine only applies to public officers who, by virtue of the duties accompanying their particular positions, hold a public office. See 1992 Op. Att'y Gen. 36, 36; 1992 Op. Att'y Gen. 150, 151. Stated otherwise, all public employees -- viz., those persons not public officers -- do not hold a public office and do not fall within the parameters of the incompatibility doctrine. 1992 Op. Att'y Gen. 36, 36; 1992 Op. Att'y Gen. 150, 151; 1978 Op. Att'y Gen. 325, 325.

Second: Council members do hold a public office for the purpose of the incompatibility doctrine. See 1978 Op. Att'y Gen. 875, 878; 1978 Op. Att'y Gen. 560, 561; 1978 Op. Att'y Gen. 325, 325-26; 1912 Op. Att'y Gen. 623, 624; 1986 Fla. Op. Att'y Gen. 25 (1986 WL 219742); 3 E. McQuillin, The Law of Municipal Corporations § 12.28, at 191 n. 1, § 12.31, at 207 (1990). See generally 1980 Op. Att'y Gen. 51, 52 (opinions will not be withdrawn unless conclusions are "clearly erroneous").

Third: Reserve police officers do not hold a public office for the purpose of the incompatibility doctrine. See generally Annot., "Policemen as Public Officers," 156 A.L.R. 1356 (1945); 67 C.J.S. Officers § 3, at 222 (1978). This conclusion rests upon chapter 80D, which defines the position of reserve police officers.

Chapter 80D does not provide any permanency or continuity to the position of reserve police officer; does not require reserve police officers to post a bond; and does not provide them with authority to direct or supervise others within the police department or to handle public funds for the city on a routine basis. See Jaeger Manufacturing Co. v. Maryland Cas. Co., 231 Iowa 151, 300 N.W. 680, 683 (1941); Heilinger v. City of Sheldon 236 Iowa 146, 18 N.W.2d 182, 187, 189 (1945); State v. Spaulding, 72 N.W. at 289-90. Moreover, the performance of duties by reserve police officers does not originate with chapter 80D itself, but with instructions or directions from the person in charge of the police department or a supervising officer. See State v. Spaulding, 72 N.W. at 290 ("[a]nother fact which is thought to be of importance in determining whether one is a public officer is . . . whether the duties of his position are devolved upon him by

a superior, or by the statute itself"); see also State v. Wright, 441 N.W.2d 364, 367-68 (Iowa 1989) (regular officers must supervise reserve officers); 1996 Op. Att'y Gen. ___ (#95-6-6(L)) (reserve peace officers "cannot act with the same independence or discretion" of regular peace officers). See generally Iowa Code §§ 80D.6, 80D.9. Until such a person instructs or directs reserve police officers to act, they have no duties to perform on behalf of the city. Thus, even if reserve police officers possess "wide latitude and discretion in the performance of [their] duties," that fact "does not convert [their] position of employment into a public office." 1982 Op. Att'y Gen. 220, 224. See State v. Pinckney, 276 N.W.2d 433, 436 (Iowa 1979) ("it is the unsupervised exercise of sovereign power which is the hallmark of a public office").

Our conclusion that reserve police officers do not hold a public office aligns with prior opinions concluding that volunteer firefighters and city attorneys do not hold a public office. See 1982 Op. Att'y Gen. 220, 225-26; 1978 Op. Att'y Gen. 325, 326; 1972 Op. Att'y Gen. 594, 594; see also Iowa Code § 372.13(10) (under certain circumstances, council member "is not precluded from holding the office of chief of the volunteer fire department"); 1980 Op. Att'y Gen. 699 (#80-5-4(L)). It also aligns with the express language in section 80D.11 that "[w]hile in the performance of official duties, each reserve peace officer shall be considered an employee of the governing body which the officer represents . . . ." (emphasis added). See 3 McQuillin, supra, § 12.30, at 202 (legislatively designated status a factor in determining existence of public office). Last, it aligns with this office's policy of "narrowly construing" and "cautiously applying" the incompatibility doctrine, see, e.g., 1992 Op. Att'y Gen. 172, 175; 1982 Op. Att'y Gen. 16 (#81-1-8(L)), a policy which suggests narrow constructions of "public officer" and "public office" in doubtful or questionable cases.

Even though no issue of incompatibility exists, city employees and council members may face statutory and common-law conflicts of interest when they serve simultaneously as reserve police officers. The existence of a conflict of interest, however, depends upon the particular case:

> An allegation of conflict of interest can only be decided through a sifting of the various facts surrounding a particular action or set of actions taken by an office holder. The allegation raises what can be characterized as an evidentiary question.

1982 Op. Att'y Gen. 220, 221. We thus cannot identify in an opinion every possible scenario in which a conflict would arise for city employees or, more likely, council members serving simultaneously as reserve police officers. We can, however, set

forth guidelines that may determine the existence of a conflict of interest.

Statutes and common-law rules on conflicts of interest

> are based on moral principles and public policy. They demand complete loyalty to the public and seek to avoid subjecting a public servant to the difficult, and often insoluble, task of deciding between a public duty and a private advantage.
>
> It is not necessary that this advantage be a financial one. Neither is it required that there be a showing the official sought or gained such a result. It is the potential for conflict of interest which the law desires to avoid.

Wilson v. Iowa City, 165 N.W.2d 813, 819 (Iowa 1969). See 1994 Op. Att'y Gen. 119, 121.

> Conflicts of interest may . . . arise indirectly when a city councilman has vested interests in social and community organizations. It appears that an interest in the general welfare of the community is not a disqualifying interest, but an interest in the improvement of a civic organization of which the councilman is a member may be disqualifying. . . . [For example, in a New Jersey case] the court held that a councilman who was a member of the volunteer fire department could not vote on the purchase by the city of property from the fire department.

Note, 55 Iowa L. Rev. 450, 452 (1969). See 1972 Op. Att'y Gen. 594, 594 (conflicts may arise for council member simultaneously serving as volunteer firefighter).

Under the common law, "any actions that are irreconcilable with the public welfare" generally constitute conflicts of interest. Note, 55 Iowa L. Rev., supra, at 451. "[T]he public is entitled to have their representatives perform their [official] duties free from any personal or pecuniary interest that might affect their judgment." Bluffs Dev. Corp. v. Pottawattamie County Bd. of Adjustment, 499 N.W.2d 12, 15 (Iowa 1993) (emphasis added). See 3 McQuillin, supra, § 12.67, at 343.

Under section 68B.2A(1), council members shall not engage in any outside activity "which is in conflict with [their] official

duties and responsibilities." According to section 68B.2A(1), an outside activity creates an unacceptable conflict of interest when, for example, it "is subject to the official control, inspection, review, audit, or enforcement authority of the person, during the performance of the person's duties of office or employment."

III.

Last, you have asked whether "payment of hourly compensation" to reserve police officers "for certain duties" affects the ability of city employees or council members to serve as reserve police officers. We assume that these unspecified duties are official ones and that the city is the payor.

Section 80D.11 governs this question. Section 80D.11 provides that a city must pay each reserve police officer "a minimum of one dollar per year" and that a city "may provide additional monetary assistance for the purchase and maintenance of uniforms and equipment." We do not see how section 80D.11 adversely affects the ability of city employees or council members to serve simultaneously as reserve police officers. We add, however, that council members should abstain from voting on measures increasing the pay or providing additional monetary assistance to reserve police officers during the time they serve as reserve police officers. See 1990 Op. Att'y Gen. 37 (#89-8-2(L)) (school board member, whose spouse works for school district, should abstain from voting on measures when actual or potential conflicts of interest exist). Cf. Iowa Code § 372.13(9) (council member not eligible for appointment during term of office to any city office if its compensation increased during term).

IV.

To summarize: For the purpose of the incompatibility doctrine, members of a city council hold a "public office" and city employees and reserve police officers do not; accordingly, city employees and council members may serve simultaneously as reserve police officers for the city. City employees and council members may face statutory and common-law conflicts of interest while serving as reserve police officers for the city; however, it is impossible to identify in an opinion every possible scenario in which a conflict might arise. Although council members should not vote on measures that increase the pay or provide additional monetary assistance to reserve police officers during the time they serve as reserve police officers, a city's decision to pay hourly compensation to its reserve police officers does not affect the

ability of city employees and council members to serve simultaneously as reserve police officers.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

ELECTIONS: Effective date of amendment to special charter; city central committees. Iowa Code §§ 43.112, 56.6, 372.13, 376.3, 420.41, 420.126, 420.287 (1995). After a city approves an amendment to its special charter to substitute nonpartisan elections for partisan ones, the mayor's proclamation on the passage of the amendment required all future elections -- including ones to fill vacancies in city offices held by persons previously elected on a partisan basis -- to take place on a nonpartisan basis. Although passage of the amendment effectively terminated the election duties of the various political parties' city central committees, it did not immediately change their reporting status for purposes of campaign finance and disclosure. (Kempkes to Williams, Executive Director, Iowa Ethics and Campaign Disclosure Board, **10-7-96) #96-10-3(L)**

October 7, 1996

Ms. Kay Williams
Executive Director
Iowa Ethics and Campaign Disclosure Board
LOCAL

Dear Ms. Williams:

Iowa Code chapter 372 (1995) permits six forms of government for cities. 1994 Op. Att'y Gen. 132, 133. These forms include "the special charter," which, before the Iowa Constitution of 1857, territorial or state governments had granted to forty cities and towns located along or near the Mississippi River. See generally Lemon v. City of Muscatine, 272 N.W.2d 430, 430 (Iowa 1978); Ulbrecht v. City of Keokuk, 124 Iowa 1, 97 N.W. 1082, 1083 (1904); Von Phul v. Hammer, 29 Iowa 222, 223 (1870); 1976 Op. Att'y Gen. 290, 291; 1974 Op. Att'y Gen. 87, 90; G. Robeson, The Government of Special Charter Cities in Iowa 5, 25-26, 33 (1923).

You have requested an opinion on campaign finance disclosure that involves a special charter city and its various political parties' "city central committees." City central committees have roots in partisan politics and help elect their respective party's candidates to office. Cf. 1990 Op. Att'y Gen. 61, 63 ("county central committees" pursue the private goals of their respective political parties). See generally Iowa Code §§ 43.1, 376.3, 420.126, 420.127, 420.128, 420.131, 420.132.

You ask whether a recent amendment to the special charter that substitutes nonpartisan elections for partisan ones requires the city to hold nonpartisan elections in all future elections, including those elections to fill vacancies in city offices

occupied by persons previously elected on a partisan basis. If so, you ask whether the amendment changed the status of city central committees to "regular" political committees. Your questions implicate chapter 56, which requires various political entities and organizations to file reports with the Iowa Ethics and Campaign Disclosure Board. You point out that chapter 56 establishes certain reporting deadlines for city central committees that differ from the deadlines for other political entities or organizations.

We understand that this city's special charter does not set forth the effective date of any amendments to it, and we note that the ballot did not specify any effective date for the amendment if the voters approved it. Cf. Iowa Const. art. III, § 26 (1857) (legislative acts passed at regular session take effect on July 1 following their passage unless different effective dates are stated); Iowa Code § 3.7 (establishing effective dates for legislative acts and resolutions); 16 Am. Jur. 2d Constitutional Law § 62, at 381 (1979) (ballot itself may postpone effective date of proposed amendment upon its passage). Given such circumstances, we conclude (1) the amendment to the special charter required all future elections, including ones to fill vacancies in city offices held by persons previously elected on a partisan basis, to take place on a nonpartisan basis after the mayor proclaimed its passage and (2) passage of the amendment effectively terminated the election duties of the various political parties' city central committees, but did not immediately change their reporting status for purposes of campaign finance and disclosure.

Before proceeding to an analysis of your questions, we set forth the applicable provisions of chapter 420, which is entitled "Special Charter Cities."

I.

Chapter 420 governs the activities of city central committees -- whose members "shall hold office for a period of two years following the adjournment of the city convention," Iowa Code § 420.131 -- and other matters involving special charters. Sections 420.286 and 420.287 specifically govern the matter of amending a special charter by election. In particular, section 420.287 provides:

> If a majority of the votes cast [at the election] be in favor of adopting the amendment, the mayor shall issue a proclamation accordingly; and the amendment shall thereafter constitute a part of said charter.

See generally Iowa Code §§ 43.112, 376.3.

Section 420.41(1)(d) specifically governs the matter of filling a vacancy in a city office. It provides a limitation, however, in the filling of such a vacancy:

> No state law shall be deemed to impair, alter or affect the provisions of any . . . special charter or any existing amendment thereto . . . :
>
> . . .
>
> In respect of the election or appointment of a clerk, treasurer, police magistrate and marshal or in respect of the authority, functions, duties or compensation of any of these except that [section 372.13(2)] applies in respect to a vacancy in any of these elective offices and to a vacancy in any other city elective office.

Section 372.13(2) provides that a vacancy in an elective city office during a term of office may be filled by appointment for the period until the next pending election or by special election at the earliest practicable date to fill the office for the remaining balance of the unexpired term. See generally 1978 Op. Att'y Gen. 249.

II.

Your first question asks whether an amendment to a special charter that mandates nonpartisan elections requires the city to hold nonpartisan elections in all future elections, including those for filling any vacancies in city offices occupied by persons previously elected on a partisan basis. The answer to this question lies in the text of the ballot to amend the special charter, see 3 E. Yokley, Municipal Corporations § 321, at 122-25 (1956), as well as in the provisions of chapter 420.

The ballot asked, "Shall the method of city elections be changed from a partisan to a nonpartisan basis . . . ?" See generally Iowa Code §§ 49.43, 49.45, 420.287. The question thus did not indicate any delay in implementing the proposed change from partisan to nonpartisan elections or any exception to or condition upon its implementation. Read in context, the ballot plainly implies that if voters in fact approved the amendment, partisan elections would terminate in favor of nonpartisan elections, and all elections in the future would take place in conformance with the newly passed amendment. Cf. 16 Am. Jur. 2d, supra, § 33, at 347 (purpose of amendment is to work some change in old constitution), § 64, at 382-83 (obvious purpose of new constitution

is to supersede old constitution, and effect of constitutional amendment is to repeal or modify some existing provision).

Indeed, the ballot specifically asked whether the method of city elections "be changed." To "change" commonly means to "[put] another [thing] in its place"; it "consists simply in ceasing to be the same." Crabb's English Synonyms 151, 152 (1917). Accord Territory ex rel. Smith v. Scott, 20 N.W. 401, 422 (Dakota 1884) (Edgerton, C.J., dissenting); Black's Law Dictionary 210 (1979) ("change" means to alter, to make different in some particular, to put one thing in place of another); Webster's Ninth New Collegiate Dictionary 184 (1979) ("change" means to replace with another, to make a shift from one to another, to undergo transformation, transition, or substitution).

We need not, however, rest our analysis of your first question solely upon the text of the ballot, because chapter 420 addresses the effective date of an amendment to a special charter. Section 420.287 provides that if voters approve an amendment, "the mayor shall issue a proclamation accordingly; and the amendment shall thereafter constitute a part of" the special charter. (emphasis added). Compare Iowa Code § 420.287 with Iowa Const. art. X, § 1 (1857) ("if the people shall approve and ratify [a constitutional amendment, it] . . . shall become a part of the constitution of this state").

"Shall" commonly means "must" and expresses a command or exhortation. Black's Law Dictionary 1233 (1979); Webster's Ninth New Collegiate Dictionary 1056 (1979). It imposes a legal duty "[u]nless otherwise specifically provided by the [General Assembly]." Iowa Code § 4.1(30)(a); 1970 Op. Att'y Gen. 725, 728. "Thereafter" means "after that," E. Weiner & J. Hawkins, The Oxford Guide to the English Language 538 (1985), and signifies a time immediately after, or subsequent to, a particular date, event, or period, 86 C.J.S. Thereafter 774 (1954); Black's Law Dictionary 1325 (1979); Webster's, supra, at 1201; see State ex rel. Polk v. Galusha, 104 N.W. 197, 200 (Neb. 1905). See generally Iowa Code § 4.1(38) (words and phrases in statutes shall be construed according to context and approved English usage); State v. Bush, 518 N.W.2d 778, 780 (Iowa 1994) (absent legislative definitions, words and phrases in statutes should receive their common and ordinary meanings).

We believe that "thereafter" in section 420.287 must refer to the mayor's proclamation on the passage of an amendment to a special charter and that, under section 420.287, the amendment constitutes part of the special charter at that specific point in time. Cf. United States v. Chambers, 291 U.S. 217, 222, 54 S. Ct. 434, 78 L.E. 763 (1933) (federal constitutional amendment becomes effective at moment of ratification); 16 Am. Jur. 2d, supra, § 62, at 381 (state constitutional amendment usually held to take effect

at time of ratification; a governor's proclamation "as to the adoption of a constitutional amendment in some jurisdictions is conclusive of that fact, and the amendment thereby becomes eo instanti a part of the constitution"). The amendment to the special charter thus required all future elections in the city to take place on a nonpartisan basis, including any elections for filling vacancies in city offices occupied by persons previously elected on a partisan basis.

Your second question rests upon the assumption that the amendment did in fact require all future elections to take place on a nonpartisan basis. It asks whether the amendment "served to immediately change the status of the city central committees to `regular' political committees subject to the regular reporting deadlines in chapter 56."

For purposes of political campaigns, passage of the amendment to the special charter effectively terminated the duties of city central committees, because future elections would occur on a nonpartisan basis. Cf. 1 E. Yokley, Municipal Corporations § 50, at 99 (1956) ("[n]aturally, when a municipal corporation is dissolved, or its charter repealed, its powers and functions are thereby terminated"). City central committees exist for the purpose of partisan elections; the two go hand-in-hand; and when the electorate passed the amendment that terminated partisan elections in favor of nonpartisan ones, it necessarily terminated the election duties of the city central committees. Cf. Sueppel v. Iowa City, 257 Iowa 1350, 136 N.W.2d 523, 527 (1965) (city adopting commission-manager form of government may abolish park commission and thereby terminate park commissioners' terms of office; when voters elected to establish new form of city government, they vested power in it "and divested the authority of former officers and agencies").

We note parenthetically that section 420.131, which provides that members of city central committees "shall hold office for a period of two years following the adjournment of the city convention," necessarily presumes the existence of such committees having some election duties to perform. Passage of the amendment obviated any election role for city central committees, which, in turn, obviated any requirement for their members to serve the remainder of their two-year terms. Members of statutorily created committees have no absolute right to continue serving on them until the expiration of any statutorily defined term. See id. ("no one in possession of an office has a constitutional right to remain therein for the full period of the term for which he was elected"; in the case of a statutory office, the legislature "may even abolish [it]"); 1994 Op. Att'y Gen. 114 (#94-6-4(L) (approving 1972 Op. Att'y Gen. 267, 269, which noted that office abolished pursuant to law thereby terminates officeholder's term of office).

For purposes of campaign finance and disclosure, passage of the amendment to the special charter meant that city central committees effectively lost their designation as "statutory political committees." Under such circumstances, they could either dissolve, seek placement on inactive status, or amend their bylaws to become a "regular" political committee subject to the regular reporting deadlines in chapter 56. See Iowa Code § 56.6(5) (political committee may dissolve; statutory political committees may not dissolve, but may request placement on inactive status from Iowa Ethics and Campaign Disclosure Board when no officers exist and committees have ceased to function). See generally Iowa Code § 56.2 (definitions).

Passage of the amendment, however, did not immediately effectuate a change in the reporting status of city central committees. Although the city central committees had no reporting duties for future elections, they still had a duty to file their post-election reports on the amendment's passage. See Iowa Code § 56.6. Perhaps more important, they still had a duty to put in order or settle their affairs, records, and accounts that arosse out of past elections before dissolving, seeking placement on inactive status, or amending their bylaws to become a "regular" political committee. See Iowa Code § 56.6(5) ("[a] committee shall not dissolve until all loans, debts and obligations are paid, forgiven or transferred and the remaining money in the account is distributed according to the organization statement").

III.

The amendment to the special charter required all future elections, including ones to fill vacancies in city offices held by persons previously elected on a partisan basis, to take place on a nonpartisan basis after the mayor proclaimed its passage. Although passage of the amendment effectively terminated the election duties of the various political parties' city central committees, it did not immediately change their reporting status for purposes of campaign finance and disclosure.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

HEALTH; INSURANCE: Preemption. Iowa Code § 514B.14 (1995). The federal Employment Relations Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., which requires employee welfare benefit plans to establish a "claims procedure" providing for the review of denied claims for health care benefits, may preempt Iowa Code section 514B.14 (1995), which requires health maintenance organizations to establish a "complaint system" for the resolution of complaints concerning health care services. If applicable, ERISA provides employees with the opportunity to seek a full and fair review of their denied claims for health care benefits. (Kempkes to Jochum, State Representative, **10-10-96) #96-10-4(L)**

October 10, 1996

The Honorable Pam Jochum
State Representative
2368 Jackson
Dubuque, IA 52001

Dear Representative Jochum:

You have requested an opinion involving federal and state laws as they relate to health care. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., requires "employee welfare benefit plans" to establish a "claims procedure" that allow fiduciaries to review denials of claims for health care benefits. 29 U.S.C. § 1133. Iowa Code section 514B.14 (1995) requires "health maintenance organizations" (HMOs) to establish a "complaint system" for the resolution of complaints concerning health care services.

You ask whether "participants in a managed care plan licensed by the State under the HMO law have a grievance procedure available to them under ERISA when health care benefits are denied." You question whether ERISA preempts section 514B.14 with regard to claims procedures for reviewing denials of health care benefits.

I. Complaint systems under Iowa Code section 514B.14

Section 514B.9(5) requires an HMO to inform enrollees about its "method for resolving enrollee complaints." Section 514B.14 requires an HMO to

> establish and maintain a complaint system which has been approved by the [Iowa Insurance Commissioner] and which shall provide for the

> resolution of written complaints initiated by enrollees concerning health care services.

Section 514B.14 also requires an HMO to submit an annual report to the Insurance Commissioner that describes its complaint procedures, the number and causes of complaints, and the number of malpractice claims settled during the year.

The Insurance Commissioner has not promulgated administrative rules setting forth guidelines or standards with regard to HMO complaint systems. The Insurance Commissioner has, however, promulgated rules requiring each HMO to provide in its bylaws for "a system to resolve and record complaints" and each HMO complaint system to provide for the resolution of complaints about the quality of health care services "and the availability of such services." See 191 IAC 40.9(1), 40.9(2); see also 191 IAC 40.4. The Insurance Commissioner has approved HMO complaint systems on a case-by-case basis.

II. ERISA applicability

"The existence of an ERISA plan is a question of fact to be answered in light of all the surrounding facts and circumstances from the point of view of a reasonable person." In re Estate of Bickford, 549 N.W.2d 804, 806 (Iowa 1996). If the health care services provided by this HMO do not originate with an "employee welfare benefit plan," ERISA would appear to have no impact upon the HMO's claims procedures. See, e.g., Donovan v. Dillingham, 688 F.2d 1367, 1371 (11th Cir. 1982).

III. ERISA claims procedures

Section 1133 of Title 29 requires employee welfare benefit plans to establish a claims procedure, which "[is] at the foundation of ERISA." Weaver v. Phoenix Home Life Mutual Ins. Co., 990 F.2d 154, 157 (4th Cir. 1993). See generally Makar v. Health Care Corp., 872 F.2d 80, 83 (4th Cir. 1989). Under section 1133, every employee welfare benefit plan shall

> (1) provide adequate notice in writing to any participant . . . whose claim for benefits under the plan has been denied, setting forth the specific reasons for the denial, written in a manner calculated to be understood by the participant, and
>
> (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

See Annot., 128 A.L.R. Fed. 1 (1995). See generally Stock v. Share HMO, 18 F.3d 1419, 1422 (8th Cir. 1994). By filing such a claim, a participant exhausts administrative remedies and may proceed with a civil action pursuant to section 1132(a)(1)(B). See, e.g., Baxter v. C.A. Muer Corp., 941 F.2d 451, 453 (6th Cir. 1991); Moffit v. Whittle Communications, LP, 895 F. Supp. 961, 969 (E.D. Tenn. 1995); Annot., 54 A.L.R. Fed. 349 (1981).

Administrative regulations promulgated by the Secretary of Labor require the establishment of "reasonable claims procedures." Under regulation 2560.503-1(e), a notice of decision "shall be furnished to the claimant within a reasonable period of time after receipt of the claim by the plan," and "a period of time will be deemed to be unreasonable [absent special circumstances] if it exceeds 90 days after receipt of the claim by the plan." Regulation 2560.503-1(f) requires a written notice of denial of any claim, description of additional information necessary to perfect a claim, and information about the steps necessary for submitting the claim for review. Regulation 2560.530-1(g) sets forth the procedure for "a full and fair review" of denied claims by an appropriate named fiduciary of the plan, which can be an organization regulated under state insurance laws. Under regulation 2560.503-1(g)(3), a plan "may establish a limited period within which a claimant must file any request for review of a denied claim," but "[i]n no event may such period expire less than 60 days after receipt by the claimant of written notification of denial of a claim." Regulation 2560.503-1(h) provides that the fiduciary's decision "shall be made promptly, and shall not ordinarily be made later than 60 days after the plan's receipt of a request for review." According to regulation 2560.503-1(h)(3), the decision on review "shall be in writing and shall include specific reasons for the decision . . . as well as specific references to the pertinent plan provisions on which the decision is based."

IV. ERISA's general rule of preemption

Generally, a federal law preempts a state law if the intent "to occupy the field to the exclusion of the States," Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985), "was the clear and manifest purpose of Congress," Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977); see 1980 Op. Att'y Gen. 333, 334. Accordingly, there is generally a presumption against the preemption of state law by Congress. New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. ___, 115 S. Ct. 1671, 131 L. Ed. 2d 695, 704 (1995); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985). This presumption applies to the scope of preemption as well as to the fact of preemption. Medtronic, Inc.

v. Lohr, 518 U.S. ___, 116 S. Ct. 2575, 135 L. Ed. 2d 700, 715-16 (1996).

To achieve the goals of nationwide uniformity in the administration of employee benefit plans, Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987), Congress generally provided that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," 29 U.S.C. § 1144(a). Congress broadly defined "state laws" to "include all laws, decisions, rules, regulations, or other State action having the effect of law . . . ." 29 U.S.C. § 1144(c)(1).

The ERISA preemption provision does not serve as "a model of legislative drafting," Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. at 739-40, and which has a "sparse" legislative history, John Hancock Life Ins. v. Harris Bank, 510 U.S. 86, 114 S. Ct. 517, 126 L. Ed. 2d 524, 539 (1993). See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987). Indeed, "[p]erhaps no provision in ERISA has given rise to more litigation or more confusion than ERISA's preemption provision." M. Wald & D. Keaty, ERISA § 7.37, at 244 (1991).

The Supreme Court of Iowa has observed that at a minimum ERISA preempts state laws making "special reference" to employee welfare benefit plans or state laws passed with a "specific design to affect" such plans. See In re Estate of Bickford, 549 N.W.2d at 806; City of Des Moines v. Master Builders of Iowa, 498 N.W.2d 702, 705 (Iowa 1993). It appears the General Assembly did not pass section 514B.14, which makes no special reference to employee welfare benefit plans, with a specific design to affect them.

Preemption presupposes some type of clash or discord between federal and state law. See Fort Halifax Packing Co. v. Coyne, 482 U.S. at 10-14; Davis v. Line Constr. Benefit Co., 589 F. Supp. 146, 149 (W.D. Mo. 1984); Barske v. Rockwell Int'l Corp., 514 N.W.2d 917, 925 (Iowa 1994); see also Pilot Life Ins. Co. v. Dedeaux, 481 U.S. at 57. In the area of ERISA, however, the Court has found preemption when state law merely creates "[a] prospect of conflict" with the federal administrative scheme for employee welfare benefit plans. See, e.g., Fort Halifax Packing Co. v. Coyne, 482 U.S. at 10, 14, 19; Shaw v. Delta Airlines, Inc., 463 U.S. 85, 105 n. 25, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983).

On the one hand, "[t]he vast scope of [ERISA preemption] is surprising; indeed it is astonishing." City of Des Moines v. Master Builders of Iowa, 498 N.W.2d at 705. See Annot., 121 L. Ed. 2d 783 (1995). The United States Supreme Court has, for example, observed that ERISA preemption extends to state laws indirectly affecting employee welfare benefit plans and to state laws

consistent with ERISA. See Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990).

On the other hand, the Court has indicated that Congress did not intend ERISA to overrule all state laws on all subjects possibly having a peripheral connection to employee welfare benefit plans. See District of Columbia v. Greater Washington Board of Trade, 506 U.S. 125, 113 S. Ct. 580, 121 L. Ed. 2d 513, 520 n. 1 (1992); Shaw v. Delta Airlines, Inc., 463 U.S. at 100 n. 21. "Notwithstanding its breadth, we have recognized limits to [the ERISA preemption provision]." Ingersoll-Rand Co. v. McClendon, 498 U.S. at 139. See John Hancock Life Ins. v. Harris Bank, 126 L. Ed. 2d at 539 (dual regulation under ERISA and state law not impossible). Its phrase "relate to" is not infinite in scope. New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 131 L. Ed. 2d at 705.

The Court has not hesitated to find ERISA preemption when state law obligated an employer to satisfy "varied and perhaps conflicting requirements" that might "make administration of a nationwide plan more difficult" and might "produce considerable inefficiencies, which the employer might choose to offset by lowering benefit levels." Shaw v. Delta Airlines, Inc., 463 U.S. at 105 n. 25. Congress, the Court has observed, intended preemption "to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations." Fort Halifax Packing Co. v. Coyne, 482 U.S. at 11-12. See Ingersoll-Rand Co. v. McClendon, 498 U.S. at 143.

With these principles in mind, we now address whether ERISA, in section 1133, preempts section 514B.14. We begin our analysis by comparing the text of section 1133 with that of section 514B.14.

Section 1133 clearly speaks to a "claims procedure" for addressing denials of health care benefits. See generally Tolle v. Carroll Touch Inc., 23 F.3d 174, 180 (7th Cir. 1994) (section 1133 requires compliance with statutory procedures in order to deny claim for benefits). Among other things, section 1133 seeks to promote the consistent treatment of claims and decrease the time and expense associated with their settlement. Powell v. AT & T Communications, Inc., 938 F.2d 823, 826 (7th Cir. 1991); Amato v. Bernard, 618 F. 2d 559, 567 (8th Cir. 1980). Section 514B.14 speaks more broadly to an approved "complaint system" for resolving "complaints . . . concerning health care services." This language encompasses denials of health care benefits. See 191 IAC 40.9(2)(b). Thus, section 1133 and section 514B.14 each require the establishment of a procedure allowing individuals the opportunity to challenge, in an administrative forum, denials of claims for health care benefits.

The procedure required by section 514B.14, however, does not appear with any specificity in section 514B.14 or in its accompanying administrative rules. Thus, we cannot give a definite answer on ERISA preemption.

Preemption under ERISA would likely occur if an HMO's procedure, approved by the Insurance Commissioner pursuant to section 514B.14, did not equate with the procedure required by section 1133 and its accompanying regulations. See, e.g., Arkansas Blue Cross & Blue Shield v. St. Mary's Hosp., 947 F.2d 1341, 1348 (8th Cir. 1991), cert. denied, 504 U.S. 957 (existence of state law's interstate administrative impact is a factor strongly favoring preemption); Alabama Blue Cross and Blue Shield v. Nielsen, 917 F.2d 1532, 1536, 1537-38 (N.D. Ala. 1996) (ERISA preempts state law which, among other things, prescribed time limits by which claims submitted to insurers and other payors must be adjudicated). In contrast, no preemption under ERISA would likely occur if, for example, the Insurance Commissioner promulgated administrative rules for section 514B.14 that mirrored or effectively incorporated ERISA and its accompanying regulations for claims procedures. Accordingly, the Insurance Commissioner may wish to consider promulgating such administrative rules in order to avoid conflict and eliminate any possibility of ERISA preemption.

V. ERISA and the Public Health Service Act

ERISA claims procedures differ if a HMO is a "qualified HMO" under the Public Health Service Act, 42 U.S.C. § 300e-9(a). According to an ERISA regulation accompanying section 1133, 29 C.F.R. § 2560.503-1(j), claims procedures with respect to any benefits provided through membership in a qualified HMO shall be deemed to satisfy the requirements of section 1133 if those procedures meet the requirements of the Public Health Service Act and its accompanying regulations, see 42 C.F.R. § 417.1 et seq.

One of the regulations that implement the Public Health Service Act merely requires an HMO to provide "meaningful procedures" ensuring timely transmittal of grievances and complaints to appropriate decisionmaking levels and appropriate and prompt action on them. See 42 C.F.R. § 417.124(g). Again, we cannot give a definite answer to ERISA preemption, because the procedure required by section 514B.14 does not appear with any specificity in section 514B.14 or in its accompanying administrative rules.

No ERISA preemption would likely occur if the Insurance Commissioner, pursuant to section 514B.14, approved a qualified HMO's claim procedure ensuring timely transmittal of grievances and complaints to appropriate decisionmaking levels and appropriate and prompt action on them. Accordingly, the Insurance Commissioner may wish to consider promulgating administrative rules with regard to

claims procedures of qualified HMOs that mirror or incorporate the regulations implementing the Public Health Service Act. See generally 29 C.F.R. § 2560.503-1(j); 42 C.F.R. § 417.124(g).

VI. ERISA's savings clause

The question remains whether section 514B.14 falls within the ERISA savings clause. The savings clause encompasses a state law that "regulates insurance." 29 U.S.C. § 1144(b)(2)(A).

Section 514B.14, specifically directed toward HMOs, does not appear to regulate "insurance" within the scope of the ERISA savings clause. See R.I.A. Benefits Coordinator § 10,529 (1996) (although similarities exist between HMOs and insurers, "state regulation of HMOs, whether direct or indirect, is not entitled to insulation from preemption under ERISA's insurance savings clause"). Compare Physicians Health Plan, Inc. v. Citizens Ins. Co., 673 F. Supp. 903, 907-08 (W.D. Mich. 1987), with Alabama Blue Cross and Blue Shield v. Nielsen, 917 F.2d 1532, 1543 (N.D. Ala. 1996). See generally Iowa Code § 514B.32(1) (except as otherwise provided by chapter 514B, state laws regulating the insurance business and the operations of corporations organized under chapter 514 (as providers of accident and health insurance) "shall not be applicable to any [certified HMO]" with respect to its activities authorized and regulated pursuant to chapter 514B); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. at 740-43 (ERISA's savings clause applies to laws that fit within a commonsense definition of "insurance" and "to entities within the insurance industry").

Moreover, even if "insurance" encompasses the business of HMOs, section 514B.14 still may not fall within the scope of the ERISA savings clause: a state law that "regulates insurance" must have an effect of transferring or spreading risk. Alabama Blue Cross and Blue Shield v. Nielsen, 917 F.2d at 1539; see Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. at 740-43. Section 514B.14 does not appear to have such an effect; instead, it sets forth reporting requirements and procedures for processing claims for health care benefits. See Anschultz v. Connecticut General Life Ins. Co., 850 F.2d 1467, 1469 (11th Cir. 1988). To escape preemption, however, a state law must not merely govern procedural aspects of claim processing. Buehler Ltd. v. Home Life Ins. Co., 722 F. Supp. 1554, 1559 (N.D. Ill. 1989); Roberson v. Equitable Life Ins. Assurance Soc'y, 661 F. Supp. 416, 422 (C.D. Cal. 1987); M. Wald & D. Keaty, ERISA § 8.7, at 91 (Supp. 1995).

That section 1133 and its accompanying regulations explicitly set forth requirements for claims procedures indicate ERISA preempts section 514B.14 even if it regulates insurance within the meaning of the savings clause. See Arkansas Blue Cross & Blue Shield v. St. Mary's Hosp., 947 F.2d at 1350 (that ERISA provision explicitly addresses a particular issue is a factor favoring

preemption of state law addressing same issue). In other words, a state law that regulates insurance within the meaning of ERISA's savings clause may still fall within ERISA's general preemption provision. See Buehler Ltd. v. Home Life Ins. Co., 722 F. Supp. 1554, 1562 (N.D. Ill. 1989) (even if state law "regulates insurance," preemption still exists if ERISA is exclusive on regulated subject); Roberson v. Equitable Life Ins. Assurance Soc'y, 661 F. Supp. 416, 424 (C.D. Cal. 1987). The savings clause thus does not truly "save" from preemption every state law that may happen to regulate insurance. See generally Pilot Life Ins. Co. v. Dedeaux, 481 U.S. at 51 (court must look to role of savings clause within whole context of ERISA).

VII. Conclusion

Determining preemption under ERISA implicates a case-by-case analysis that takes into account all pertinent facts and circumstances as well as the particular state law and its underlying purposes. See 29 C.F.R. § 2510.3-1; Arkansas Blue Cross & Blue Shield v. St. Mary's Hosp., 947 F.2d at 1348. Cf. Barske v. Rockwell Int'l Corp., 514 N.W.2d 917, 921 (Iowa 1994) (preemption of state law by federal Labor Management Relations Act occurs on case-by-case basis). Accordingly, such a question cannot be definitely resolved through the opinion process. See 61 IAC 1.5(3)(c).

We can only say that ERISA, when applicable, would likely preempt section 514B.14 to the extent of its inconsistency with ERISA regarding the establishment of claims procedures for reviewing denials of health care benefits and that ERISA permits employees the opportunity to seek a full and fair review of their denied claims for health care benefits under ERISA covered plans.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

COUNTIES AND COUNTY OFFICERS: Jails; prison labor. Iowa Code §§ 356.16, 356.17, 356.18, 356.19 (1995); Iowa Code Supp. 904.701 (1995). Iowa Code section 356.17, governing hard labor by county prisoners, does not restrict that labor to publicly owned property if the labor is in furtherance of a duty or power of a county and not for private purposes. Prison labor could be authorized by the Board of Supervisors and the Sheriff for services for which county employees or equipment could be utilized, such as weed control, abatement of nuisances, or care of abandoned cemeteries. (Osenbaugh to Ferguson, Black Hawk Co. Att'y, 10-16-96) #96-10-5(L)

October 16, 1996

Mr. Thomas J. Ferguson
Black Hawk County Attorney
B-1 Courthouse Bldg.
Waterloo, IA 50703

Dear Mr. Ferguson:

Your office has requested an opinion on the use of prison labor by county sheriffs. The specific question is whether they may require prisoners to perform hard labor on properties owned by private, nonprofit entities. Iowa Code chapter 356 (1995), entitled "Jails and Municipal Holding Facilities," governs this question. We conclude that county sheriffs may require prisoners to perform hard labor on such properties only if this serves a legitimate county function.

I.

Counties have statutory authority to establish and inspect jails. Iowa Code §§ 331.381(17), 331.332(10); accord 1996 Op. Att'y Gen. ___ (#95-8-1); see Mandicino v. Kelly, 158 N.W.2d 754, 758 (Iowa 1968). They may use their jails as prisons for the detention of arrestees; material witnesses; "persons under sentence, upon conviction for any offense, and of all other persons committed for cause authorized by law"; and "persons subject to imprisonment under the ordinances of a city." Iowa Code § 356.1(3)-(4).

County sheriffs have charge of jails and charge and custody of any prisoners. Iowa Code §§ 331.653(35), 356.1, 356.2; accord 1996 Op. Att'y Gen. ___ (#95-8-1); 1994 Op. Att'y Gen. 141 (#94-9-2(L)); 1948 Op. Att'y Gen. 92, 94. Section 356.16, which permits the use of prison labor, and sections 356.18 and 356.19 set forth several limitations upon its use.

According to section 356.16,

> Able-bodied persons over the age of sixteen, confined in any jail under the

> judgment of any tribunal authorized to imprison for the violation of any law, ordinance, bylaw or police regulation, may be required to labor during the whole or part of the time of their sentences, as hereinafter provided, and such tribunal, when passing final judgment of imprisonment, whether for nonpayment of fine or otherwise, shall have the power to and shall determine whether such imprisonment shall be at hard labor or not.

See generally Iowa Const. art. I, § 23 (1857) (there shall be no involuntary servitude "unless for punishment of crime"); Iowa Code § 4.1(30) (in statutes, "shall" normally imposes a duty and "may" normally confers a power).

Section 356.17 -- which dates from the early days of statehood, see 1870 Iowa Acts, 13th G.A., ch. 69, § 2 -- provides:

> Such labor may be on the streets or public roads, on or about public buildings or grounds, or at such other places in the county where confined, and during such reasonable time of the day as the person having charge of the prisoners may direct, not exceeding eight hours each day.

(emphasis added).

According to section 356.18, county sheriffs shall superintend the performance of labor performed by prisoners convicted for violating statutes. According to section 356.19, this is to be done pursuant to rules of the county board of supervisors.

> Such labor shall be performed in accordance with such rules as may be made by resolution of the [county] board of supervisors, not inconsistent with the provisions of this chapter, and such labor shall not be leased.

II.

Your office has asked whether county sheriffs may require prisoners to perform hard labor on the properties owned by private, nonprofit entities. It is clear that county sheriffs have a right to require prisoners to labor. Moore v. Murphy, 254 Iowa 969, 119 N.W.2d 759, 761 (1963). It is also clear that at

least seven significant limitations, actual or potential, attach to the exercise of this right.

First, the prisoners must be sixteen years of age and able-bodied. Iowa Code § 356.16. Second, the prisoners must be confined in jail under the judgment of any tribunal authorized to imprison for the violation of any law, ordinance, bylaw, or police regulation. Iowa Code § 356.16. Third, the judgment of imprisonment must set forth whether the prisoner shall labor. Iowa Code § 356.16. Fourth, counties must ensure that the labor, which may not exceed eight hours per day, take place during a reasonable time and in the county of incarceration. Iowa Code § 356.17; see State v. Welsh, 109 Iowa 19, 79 N.W. 369, 370-71 (1899). Fifth, county sheriffs must superintend the labor performed by prisoners convicted of violating statutes. Iowa Code § 356.18. Sixth, county supervisors may, by resolution, pass proper rules regarding the use of labor. Iowa Code § 356.19; see State v. Welsh, 79 N.W. at 70-71; 1996 Op. Att'y Gen. ___ (#95-8-1); 1948 Op. Att'y Gen. 92, 94-95. Seventh, the labor may not be leased. Iowa Code § 356.19.

We need to determine, however, if section 356.17 imposes another significant limitation upon county sheriffs with regard to the places at which prisoners can labor. We are asked whether prisoners can perform hard labor on private property or for private non-profit entities. Initially, this determination requires us to read the statutory language within its specific context and to focus upon the common, or dictionary, meanings of words and phrases. See Iowa Code § 4.1(38) (words and phrases shall be construed according to context and approved English usage); State v. Hennefent, 490 N.W.2d 299, 300 (Iowa 1992) (undefined words in statutes normally have their common meanings).

The original language of section 356.17 provided that prisoners' labor "may be on the streets or public roads, on or about public buildings or grounds, or at such other places in the county where confined, and during such reasonable time of day, as the person having charge of the prisoners may direct, not exceeding eight hours each day." 1870 Iowa Acts, ch. 69, § 2. The underlined comma in the original text is significant as it undermines the argument that the clause beginning "as the person having charge . . . may direct" was intended to modify only the time of day, and not also the place labor would be performed. The doctrine of the last antecedent provides that a qualifying phrase will generally be construed to refer only to the last antecedent, unless a contrary legislative intent is apparent. If that doctrine applied, the clause "as the person having charge . . . may direct" would apply only to determining the time of day for prisoner labor. However, the doctrine of the last antecedent generally does not apply if the immediate last antecedent is set

off by commas. "Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma." State ex rel. DOT v. General Electric Credit Corp., 448 N.W.2d 335, 345 (Iowa 1989), quoting 2A Sutherland, Statutes and Statutory Construction § 47.33, p. 245 (4th ed. 1984). Thus, here, as originally drafted, it appears the legislature intended the person in charge of the labor to determine not only the time of day for labor but also the places where labor could occur.

This intent is also indicated by use of the words "such other" preceding both places and time. The connecting phrase "such other . . . . as" is used frequently in the Code to authorize additional categories under the conditions specified. For example, Iowa Constitution, Article V, Section 18, states in relevant part:

> . . . Judges . . . shall be members of the bar of the state and shall have such other qualifications as may be prescribed by law. . . . Other judicial officers shall be selected in such manner and shall have such tenure, compensation and other qualification as may be fixed by law.

The legislature has imposed additional qualifications for judges, such as residency requirements. See Iowa Code §§ 602.6201(2); 602.6305. For other examples of the use of the language "such other [powers or duties] as" at the end of a statutory list, see Iowa Code § 2.49(6) (Legislative Fiscal Bureau to perform such other duties as assigned by general assembly); § 8.5(4) (powers and duties of Director of Department of Management); § 18.75(9) (Superintendent of Printing). Section 13.4 authorizes the Attorney General to appoint a first assistant attorney general "and such other assistant attorneys general as may be authorized by law . . ."

In the earliest years, prisoners were apparently hired out to earn money for the county. The Code has consistently provided that the sheriff would supervise prisoners for state offenses at the expense of the county where confined, "and such county shall be entitled to the earnings." Iowa Code § 356.18 (1995); Iowa Code § 4739 (1873). In 1886, the legislature amended section 4738 to authorize the board of supervisors to make regulations for the supervision of prisoners; that amendment further provided that ". . . such labor shall not be leased." 1886 Acts, ch. 153, § 1. The original statute thus contemplated that prisoners would

do work for other entities for pay.[1] That fact also suggests that the phrase "such other places" was not originally intended to be limited to publicly owned places.[2]

In 1995, the General Assembly enacted an act regarding hard labor by inmates under the control of the state Department of Corrections. That Act uses very similar language to describe the places at which hard labor can be performed. It amends section 904.701(1) to provide:

> An inmate of an institution shall be required to perform hard labor which is suited . . . in the institution proper, in the industries established in connection with the institution, or at such other places as may be determined by the director.

The underlined language was added by 1995 Iowa Acts, ch. 166, sec. 1. It was already clear from chapter 904 that state inmates could perform work for charitable as well as public facilities. Iowa Code § 904.703 (1995). The 1995 Act also refers to development of a plan in consultation with state and local agencies "and members of the private sector" to provide for implementation of the hard labor requirements for each able prisoner. 1995 Iowa Acts, ch. 166, sec. 2.

Although we conclude that section 356.17 does not expressly limit prison labor to publicly owned property, we do believe the labor must serve a legitimate public purpose of the county. As prisoners are maintained at public expense, their compelled labor should be regarded as belonging to the county just as the county owns the work output of public employees or equipment. See, e.g., 1991 S.C. Op. Atty.Gen. 61. Examples of county services which could be performed on private property include the abatement of nuisances and removal of diseased trees upon notice and assessment of costs to the property owner under Iowa Code

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[1]Section 4739 of the Code of 1873 provided that, for violations of municipal ordinances, each city or town was "entitled to the earnings of its convicts." This provision remains virtually intact at Iowa Code § 356.20 (1995).

[2]Iowa Code section 356.17 is now entitled, "Labor on public works." Because the title was not in the original enactment, it is not part of the statute. State v. Welsh, 245 N.W.2d 290, 293 (Iowa 1976).

§ 331.384, the destruction of weeds under Iowa Code §§ 317.5 and 317.6, or the protection and preservation of burial sites under Iowa Code § 566.33.

Additionally, a legitimate county purpose might be served if the prison labor provides useful vocational training for the prisoner. (The 1995 Act regarding hard labor for state prisoners provides that the program should provide "if possible, work providing an inmate with marketable vocational skills." 1995 Iowa Code Supp. § 904.71(3); 1995 Iowa Acts, ch. 166, sec. 1; also amended by 1996 Iowa Acts, House File 2472, § 33.)

The determination as to what services could be performed must be made pursuant to rules of the county board of supervisors under Iowa Code section 356.19 and by the person having charge of the prisoners under section 356.17.

In conclusion, Iowa Code section 356.17, governing hard labor by county prisoners, does not restrict that labor to publicly owned property if the labor is in furtherance of a duty or power of a county and not for private purposes. Prison labor could be authorized by the Board of Supervisors and the Sheriff for services for which county employees or equipment could be utilized, such as weed control, abatement of nuisances, or care of abandoned cemeteries.

Sincerely,

ELIZABETH M. OSENBAUGH
Solicitor General

EMO:cw

TAXATION; Local Option Tax: Iowa Code section 422B.10(3); 701 IAC 107.10. In determining the allocation of local sales and services tax revenue based on population, any increase in population attributable to a single jurisdiction as a result of a subsequent certified census must be considered in the total population base consisting of the jurisdictions within the county opting for the local sales and services tax. There is no authority to reduce the population of any particular jurisdiction without support of certified federal census data. (Miller to Richards, Story County Attorney, 10-22-96) #96-10-9(L)

October 22, 1996

Ms. Mary E. Richards
Story County Attorney
900 6th Street
Nevada, Iowa 50201

Dear Ms. Richards:

The Attorney General is in receipt of your opinion request regarding the method of distribution of local option tax money between governmental subdivisions by the Iowa Department of Revenue and Finance (Department). The specific question you ask is the following:

> If jurisdictions within a county have adopted a local option tax and one of the jurisdictions conducts an interim census which shows a population increase, how should the local option tax money be distributed?

Iowa Code section 422B.1(3) (Supp. 1995) provides that a local sales and services tax, commonly called a local option tax, may be imposed by a county only upon the "incorporated areas and unincorporated area of that county in which a majority of those voting in the area on the tax favors its imposition." Once the tax has been imposed by an area, the Department has the responsibility to collect and administer the tax, including remitting the collected tax

> to the county board of supervisors on behalf of the unincorporated area and to each respective city council in the county where the tax was imposed. Seventy-five percent of the countywide collections are divided between

> the unincorporated area of the county and its cities, based upon population. The remaining twenty-five percent is divided between the same groups, based upon the sum of property tax dollars levied by the board of supervisors and by the city councils where the tax was imposed. Iowa Code § 422B.10(3), (4). The allocation to each city and the unincorporated area is prorated, based upon its percentage of total population and total property tax dollars levied. *Id.*

Property Taxpayers v. Scott County, 473 N.W.2d 28, 29 (Iowa 1991).

The problem put forth in your opinion request only involves the Department's procedure for distributing the population based share of the collected tax when an incorporated area has received an interim or subsequent certified census from the United States Bureau of the Census which modifies the most recent decennial census for that area.

Currently in a situation where the incorporated area has experienced an increase in population shown by the interim census, the Department will increase that area's percentage of total population by taking that new population and dividing it by the total population as originally certified in the decennial census. Since the Department does not increase the total population, which acts as the denominator, it is forced to reduce the population of another area by a corresponding amount. In doing this, the Department assumes that any increase in population of an incorporated area is the direct result of a decrease in the population of the unincorporated area. Therefore, any increase in population attributable to an incorporated area comes solely at the expense of the unincorporated area. The rationale for this lies in the Department's interpretation of Iowa Code section 422B.10(3) (Supp. 1995) and Departmental rule 701 IAC 107.10, wherein it believes that the total population figure cannot be increased without a subsequent certified census involving the total county population.

Section 422B.10(3) provides that

> Seventy-five percent of each county's account shall be remitted on the basis of the county's population residing in the unincorporated area where the tax was imposed and those incorporated areas where the tax was imposed as follows:

> a. To the board of supervisors a pro rata share based upon the percentage of the above population of the county residing in the unincorporated area of the county where the tax was imposed according to the most recent certified federal census.
>
> b. To each city in the county where the tax was imposed a pro rata share based upon the percentage of the city's population residing in the county to the above population of the county according to the most recent certified federal census.

(emphasis added.) The statute does not define what is meant by "the most recent certified federal census." However, Departmental rule 701 IAC 107.10 defines the term to be "the final count from the most recent decennial census conducted by the United States Department of Commerce, Bureau of the Census, as modified by subsequent certifications from the United States Bureau of the Census." Rule 107.10 further describes the method for distributing the seventy-five percent share to the participating jurisdictions as follows:

> The part comprised of seventy-five percent of the total receipts to be distributed is further divided into an amount for each participating city or unincorporated area. This division is based upon the most recent certified federal census population. Population for each participating city and unincorporated area is determined separately and totaled. The population for each sales tax imposing city or unincorporated area is divided by the total population to produce a percentage for each city or the unincorporated area. The percentages are rounded to the nearest one-hundredth of a percent with the total of all percentages equal to one hundred percent. Each government's percentage is multiplied by seventy-five percent of the sales tax receipts to be distributed. Distributions are to be rounded to the nearest cent.

(emphasis added.) In determining this factor, the numerator consists of the population of each participating jurisdiction based upon that jurisdiction's most recent certified federal census as modified by any subsequent census certification. The denominator consists of the sum total of the population from all jurisdictions within the county opting for the local option tax based upon each jurisdiction's most recent certified census as modified by any subsequent census certification.

Under the Department's interpretation, the total population figure in the denominator is not changed unless there is a subsequent modification involving a certified census affecting the whole county. Consequently, absent such a modification, any increase in population shown by a single jurisdiction must be offset by a corresponding population decrease in another jurisdiction in order to prevent the sum total of all percentages from being greater than one hundred percent. There is no authority in either section 422B.10(3) or rule 107.10 for the Department to increase or decrease a participating jurisdiction's population for any reason other than for federally certified census data.

Furthermore, section 422B.10(3) does not prohibit a change in the total population figure absent a subsequent census certification affecting the whole county. Any reference in section 422B.10(3) to "the population of the county" can only refer to the total population of the jurisdictions opting for the local option tax as determined by the most recent certified federal census, not the population of the county as a whole. Rule 107.10 recognizes this distinction when it states that the "population for each participating city and unincorporated area is determined separately and totaled." (emphasis added.) Examples 1 and 2 of rule 107.10 also show the denominator to be comprised solely of the sum total of the population of the participating jurisdictions.

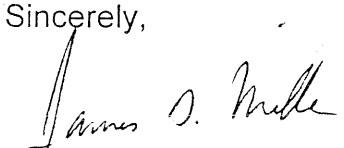
Section 422B.10(3) clearly requires the most recent certified federal census to be utilized in any formula determining the distribution of money back to the participating jurisdictions. The inclusion of subsequent certified census data only in the numerator but not the denominator of this factor will inevitably lead to absurd results. For instance, if the subsequent census certification for Ames had shown an increase in population greater than the total unincorporated population of Story County, then under the Department's methodology, the unincorporated area would have a negative population. One of the tenets of statutory construction is that such strained, impractical or absurd results should be avoided. Isaacson v. Iowa State Tax Comm., 183 N.W.2d 693, 695 (Iowa 1971).

The Department defined "the most recent certified federal census" in rule 107.10 to include any modification of the original decennial census resulting from subsequent census certifications made by the United States Bureau of the Census. If the Department did not consider these subsequent modifications, this problem would not arise as the original results of the decennial census would be applied to all jurisdictions for the entire decennial census period. However, defining "the most recent certified federal census" to include these subsequent modifications is not contrary to the statute if they are fully considered in the distribution formula. This purpose can only be accomplished by utilizing any subsequent certified increase or

decrease in population for a participating jurisdiction in both the numerator and denominator of that jurisdiction's distribution formula.

We therefore conclude that section 422B.10(3) prohibits any formula for distribution of local option tax money from increasing or decreasing a population of an incorporated or unincorporated area of the county that is not supported by the most recent certified federal census. Any subsequent modification of certified census data resulting in either an increase or decrease in population for a participating jurisdiction must be reflected in both the numerator and denominator of the factor utilized for determining the population percentage of that jurisdiction under the distribution formula described in rule 107.10.

Sincerely,



JAMES D. MILLER
Assistant Attorney General

JDM:cml

COURTS: Judicial nominating commission eligibility. Iowa Const., Art. V, § 16; Iowa Code §§ 46.4, 46.5 (1995). In order to be appointed to fill a vacancy on a district judicial nominating commission a person must satisfy two eligibility criteria: 1) the person must be a United States citizen and Iowa resident at least eighteen years of age , and 2) the person must not have served a previous six-year term on the commission. Neither the Iowa Constitution nor Code chapter 46 require a person to be a member of the bar in order to serve as a member of a judicial nominating commission. (Scase to Richardson, Clerk of the Supreme Court, 12-18-96) #96-12-1(L)

December 18, 1996

Mr. R. Keith Richardson
Clerk of the Supreme Court
Statehouse
L-O-C-A-L

Dear Mr. Richardson:

You have requested an opinion of the Attorney General interpreting the provisions of Iowa Code chapter 46 (1995) which govern the filling of a vacancy in the office of an elective district judicial nominating commissioner. Specifically, you ask whether a vacancy in the office of an elective district judicial nominating commissioner may be filled by an individual who is not a member of the bar. We conclude that membership in the bar is not an eligibility requirement for this position.

District judicial nominating commissions are established, pursuant to Article V, section 16 of the Iowa Constitution and Iowa Code chapter 46, to screen applicants and make recommendations to the Governor for filling vacancies in the district court. District commissions include five members appointed by the governor and five elected members chosen by resident members of the bar in the district. Iowa Code §§ 46.3, 46.4 (1995). As you note in your request letter, this office issued an opinion earlier this year concluding that a vacancy on a district judicial nominating commission caused by a commissioner-elect's rejection of a seat on the commission should be filled according to the procedure established in Iowa Code section 46.5 (1995). 1996 Op. Att'y Gen. ____ (#96-4-3). The third paragraph of section 46.5 provides:

> Vacancies in the office of elective judicial nominating commissioner of district judicial nominating commissions shall be filled consistent with eligibility requirements and

> by majority vote of the authorized number of elective members of the particular commission, at a meeting of such members called in the manner provided in section 46.13. The term of judicial nominating commissioners so chosen shall commence upon their selection.

You now ask whether a person who is not a licensed member of the Iowa bar may be appointed to fill a vacancy in an elective seat on a district nominating commission.

Pursuant to section 46.5, the appointee selected to fill the vacancy must meet the eligibility requirements for commission membership. Under the terms of Article V, section 16 of the Iowa Constitution, all members of district judicial nominating petitions "shall be electors of the district." This requirement is reiterated within section 46.4, which provides that "[t]he resident members of each judicial election district shall elect five eligible electors of the district to the district judicial nominating commission." (Emphasis added). The only additional eligibility requirement for commission membership is a prohibition upon serving a second six-year term. Iowa Const. art V., § 16.

Resolution of your inquiry turns upon definition of the terms "elector" and "eligible elector" as used in Article V, section 16 and Code section 46.4. As you note in your request letter, while only resident members of the bar may participate in the election of district judicial nominating commissioners, the term "eligible elector" is defined, for purposes of chapter 46, as having "the meaning assigned to that term by section 39.3." Iowa Code § 46.25 (1995). Section 39.3(6) defines "eligible elector" as "a person who possesses all of the qualifications necessary to entitle the person to be registered to vote, whether or not the person is in fact so registered." Voter qualifications, as set forth in Iowa Code section 48A.5(2), include: having United State citizenship, Iowa residency, and a minimum age of eighteen, and not claiming the right to vote elsewhere. Application of this definition of "eligible elector" to section 46.4 is required by section 46.25.

Therefore, we conclude that in order to be appointed to fill a vacancy on a district judicial nominating commission a person must satisfy two eligibility criteria: 1) the person must be a United States citizen and Iowa resident at least eighteen years of age , and 2) the person must not have served a previous six-year term on the commission. See 1982 Op. Att'yGen. 127, 128 (identifying these two factors as the eligibility criteria for service on the State Judicial Nominating Commission). Neither the Iowa Constitution nor Code chapter 46 require a person to be

a member of the bar in order to serve as a member of a judicial nominating commission.

Sincerely,

Christie J. Scase
Assistant Attorney General

CJS/cs