

RETIREMENT FUND FOR PUBLIC EMPLOYEES; Department of Administrative Services: Offsets against state employees' retirement fund. Iowa Code §§ 97B.39, 421.17(29) (2003), repealed and substantively reenacted as § 8A.504 by 2003 Iowa Acts, 80 G.A., ch. 148, § 86. Iowa Code section 8A.504 does not authorize the Iowa Department of Administrative Services to offset any amounts paid or payable from the IPERS fund under Iowa Code chapter 97B, except for purposes of enforcing child, spousal or medical support obligations or marital property orders, and then only to the extent the obligations are liabilities owed to a state agency, support debts enforced by the child support recovery unit pursuant to Iowa Code chapter 252B, or such other qualifying debts, and subject to the limitation regarding the maximum amount of allowable garnishment found in 15 U.S.C. §1673(b). (Hardy to Anderson, Director, Iowa Department of Administrative Services, 10-20-03) #03-10-1

October 20, 2003

Ms. Molly K. Anderson, Director
Iowa Department of Administrative Services
Hoover Building
State Capitol Complex
LOCAL

Dear Director Anderson:

An opinion has been requested from this office regarding the authority of the Iowa Department of Administrative Services (IDAS) to offset amounts payable to participants in the Iowa Public Employees Retirement System (IPERS) under Iowa Code chapter 97B against debts owed by such participants to the State of Iowa. Specifically, we were asked to address whether Iowa Code section 8A.504 authorizes the IDAS to offset monthly benefit amounts owed by IPERS to retirees, refunds owed by IPERS to vested participants, and/or refunds owed by IPERS to non-vested participants against debts owed to the state by retirees and other participants.¹ For the reasons stated below, we conclude that Iowa Code section 8A.504 does not authorize the IDAS to offset any amounts paid or payable under Iowa Code chapter 97B, including monthly benefit amounts owed to retirees, refunds owed to vested participants and/or refunds owed to non-vested participants, except for purposes of enforcing child, spousal or medical support obligations or marital property orders, and then only to the extent the obligations are liabilities owed to a state agency, support debts enforced by the child support recovery unit pursuant to Iowa Code chapter 252B, or such other qualifying debts, and subject to the limitation regarding the maximum amount of allowable garnishment found in 15 U.S.C. § 1673(b).

¹ Effective July 1, 2003, the offset function previously performed by the Iowa Department of Revenue and Finance was shifted to the newly created Department of Administrative Services. 2003 Iowa Acts, 80 G.A., ch. 148, § 86. The statutory provision authorizing offset, previously contained in Iowa Code section 421.17(29), was repealed and substantively reenacted as Code section 8A.504. Id.

Iowa Code section 8A.504 empowers the IDAS to establish and maintain a procedure, subject to certain limitations, “*to set off against any claim owed to a person by a state agency any liability of that person owed to a state agency . . .*” (Emphasis added). The very broad phrase “any claim owed to a person by a state agency,” viewed in isolation, would appear to authorize the Department to offset any and all IPERS benefit payments or refunds against any and all liabilities the recipient may owe to any state agency. However, this single provision cannot be construed in isolation. Rather, applicable provisions of Iowa Code chapter 97B, which govern the IPERS fund, must be considered as well in resolving the questions presented. Iowa Dept. of Transportation v. Soward, 650 N.W.2d 569, 571 (Iowa 2002) (“if more than one statute is relevant, we consider the statutes together and try to harmonize them”); Metier v. Cooper Transport Co., Inc., 378 N.W.2d 907, 912 (Iowa 1985) (statutes dealing with the same subject matter are considered together).

In this regard, we first note that the IPERS fund is a special legislatively created public employees’ retirement fund which consists of “all moneys collected under [Iowa Code chapter 97B], together with all interest, dividends and rents thereon, and shall also include all securities or investment income and other assets acquired by and through the use of the moneys belonging to this fund and any other moneys that have been paid into this fund.” Iowa Code § 97B.7(1) (2003). The IPERS fund is “separate and apart from all other public moneys or funds of this state.” Id. Further, Iowa Code section 97B.7(3) (2003) specifically states that all moneys paid or deposited into the IPERS fund are “to be used for the exclusive benefit of the members and their beneficiaries or contingent annuitants as provided in [chapter 97B].”

Moreover, there are certain additional statutory protections afforded to IPERS participants. Specifically, Iowa Code section 97B.39 (2003) provides, in relevant part:

The right of any person to any future payment under [Iowa Code chapter 97B] is not transferable or assignable, at law or in equity, *and the moneys paid or payable or rights existing under [Iowa Code chapter 97B] are not subject to execution, levy, attachment, garnishment, or other legal process*, or to the operation of any bankruptcy or insolvency law except for the purposes of enforcing child, spousal, or medical support obligations or marital property orders. For the purposes of enforcing child, spousal, or medical support obligations, the garnishment or attachment of or the execution against compensation due a person under this chapter shall not exceed the amount specified in 15 U.S.C. § 1673(b).

(Emphasis added). We believe that the term “garnishment” as used in Iowa Code section 97B.39 would be found to encompass an offset under section 8A.504. See Shine v. Iowa

Dep't of Human Serv., 592 N.W.2d 684, 688 (Iowa 1999) (holding that statute which exempts workers' compensation from "garnishment clearly embraces the concept of setoff" authorized by the predecessor to section 8A.504, section 421.17(29)(1997). Thus, it is our opinion that section 8A.504, which would appear on its face to authorize garnishment via offset of all IPERS payments or refunds, is in direct conflict with Iowa Code section 97B.39, which specifically prohibits garnishment of any and all moneys paid or payable or rights existing under Iowa Code chapter 97B, with only the enumerated and limited exceptions.²

Having so concluded, we are next required to look to applicable rules of statutory construction in order to resolve the conflict and answer the questions raised. We begin by recognizing that the "ultimate goal in construing statutes is to find the true intention of the legislature." Iowa Dept. of Transportation v. Soward, 650 N.W.2d at 571; American Home Products v. Iowa State Bd. of Tax Rev., 302 N.W.2d 140, 142 (Iowa 1981) (the sole "purpose of all rules of statutory construction is to ascertain the intent of the enacting legislature"). In this regard, the Iowa General Assembly has specifically instructed that "[i]f a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both," but that "[i]f the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision." Iowa Code § 4.7 (2003). This principle applies even if the general provision is the one most recently enacted. Lankford v. Allbee, 544 N.W.2d 639, 642 (Iowa 1996).³

² The IPERS fund is a qualified trust under 26 U.S.C. § 401(a). This means that all payments into the fund and all accruals to the fund are done on a tax deferred basis. In order for the fund to remain a qualified trust fund under the Internal Revenue Code, all moneys in the fund must be used solely for the exclusive benefit of participants and their beneficiaries. Id. The narrow and limited exceptions to this safe harbor rule which are presently found in Iowa Code section 97B.39 have their genesis in federal law. C.f. 42 U.S.C. §§ 666(b)(8); 666(c)(1)(G)(iii) (federally mandated procedures for withholding child support payments from income must provide for the attachment of public or private pension program payments). Therefore, those exceptions should not pose a threat to the qualified status of the IPERS fund. However, any expansion of the circumstances under which IPERS benefits may be used to offset debt could threaten the tax deferred status of the fund. See 26 U.S.C. §§ 401(a)(7); 401(a)(13); and 411(e).

³ The predecessor to Iowa Code section 8A.504, section 421.17(29), was added to the Code in 1987. 1987 Iowa Acts, 72nd G.A., ch. 199, §§ 4-5 (eff. July 1, 1988). At that time, there were no exceptions to the blanket protection found in Iowa Code section 97B.39. The child, spousal, and medical support obligation exceptions were not added to Iowa Code section 97B.39 until 1992. 1992 Iowa Acts, 74th G.A., ch. 1195, § 501. The exception for marital property orders was not added until 1996. 1996 Iowa Acts, 76th G.A., ch. 1187, § 10. "When a material change is made in the language of a statute, it is presumed that the legislature intended to alter the law." Lankford v. Allbee, 544 N.W.2d at 641. Thus, it must be concluded that, prior to 1992, IPERS funds could not be reached even for the purpose of collecting child, spousal and

Applied here, this rule of construction means that the specific limitation upon the transferability of IPERS rights contained Iowa Code section 97B.39 must be read to prevail over the general section 8A.504 provision authorizing offset of claims owed by the state. Consequently, except for the limited purposes of collecting child, spousal or medical support obligations or marital property orders, the IDAS is specifically precluded by Iowa Code section 97B.39 from using the offset program to reach any “moneys paid or payable” Iowa Code chapter 97B. Such “moneys paid or payable” would clearly include all monthly benefits, refunds to vested IPERS participants and refunds to non-vested IPERS participants since these are all paid or payable under various provisions of Iowa Code chapter 97B. Moreover, even when IPERS funds can be reached for purposes of enforcing child, spousal, or medical support obligations or marital support orders, the limitation regarding the maximum amount of allowable garnishment found in 15 U.S.C. § 1673(b) applies. Finally, it should be noted that there are additional applicable constraints on the use of the offset procedure found in section 8A.504 itself, wherein it is stated that offset can be used only to collect debts which are owed to a state agency, which are support debts being enforced by the child support recovery unit pursuant to Iowa Code chapter 252B, or such other qualifying debt.

Our conclusion is further supported by the rule of construction which states that, where exceptions are stated in a statute, it must be presumed that no further exceptions apply. Marcus v. Young, 538 N.W.2d 285, 289 (Iowa 1995) (“legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned”). Iowa Code section 97B.39 contains specific exceptions from the safe harbor afforded IPERS funds thereunder. Under this section, the only circumstances in which moneys paid or payable under IPERS are subject to execution, levy, attachment, garnishment or other legal process is when the collection is for the purpose of enforcing child, spousal, or medical support obligations or marital property orders. It must be presumed, therefore, that the Iowa legislature intended to preclude the fund created under the authority of Iowa Code chapter 97B from being reached for any other purposes via offset.⁴

In conclusion, it is our opinion that section 8A.504 does not authorize the Iowa Department of Administrative Services to offset any amounts paid or payable from the IPERS fund under Iowa Code chapter 97B, except for purposes of enforcing child, spousal

medical support obligations or enforcing marital property orders. Id.; see also 1962 Op. Att’y Gen. 367.

⁴ The Iowa Department of Revenue and Finance, the agency which administered the offset program under section 421.17(29) prior to July 1, 2003, recognized in administrative rules that certain state funds are unavailable for offset since they are exempt from collection procedures and that IPERS “[is one of the] funds exempt from collection.” 701 Iowa Admin. Code 150.2(3).

Molly K. Anderson
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or medical support obligations or marital property orders, and then only to the extent the obligations are liabilities owed to a state agency, support debts enforced by the child support recovery unit pursuant to Iowa Code chapter 252B, or such other qualifying debts, and subject to the limitation regarding the maximum amount of allowable garnishment found in section 15 U.S.C. § 1673(b).

Sincerely,

LUCILLE M. HARDY
Assistant Attorney General

LMH:cml

WEAPONS: Possession of firearms by a felon following restoration of citizenship rights. Iowa Code §§ 724.26, 724.27 (2003). An executive order restoring citizenship rights to a felon does not authorize the felon to possess a firearm under current Iowa Code sections 724.26 and 724.27, unless the order expressly authorizes the possession of firearms. (Tauber to Arnold, State Representative, 9-17-03) #03-9-3(L)

September 17, 2003

The Honorable Richard D. Arnold
State Representative
Rt. 2, P.O. Box 156
Russell, Iowa 50238

Dear Representative Arnold:

You have requested an opinion from this office regarding the impact of a 1971 executive order restoring citizenship rights to an individual who was convicted of a felony in 1966. Specifically, you ask whether the individual's right to possess firearms has been restored, either (1) as a result of the general restoration of citizenship issued to her by Governor Ray in 1971, or (2) as a result of the passage of Iowa Code section 724.27. Upon review of controlling Iowa statutes and case law, we conclude that an executive order generally restoring citizenship rights to a felon does not authorize the felon to possess a firearm under current Iowa Code sections 724.26 and 724.27.

Based on material enclosed with your opinion request, we understand the following facts. In 1966 Ms. Seidenkranz, then Zoe Ann Rosenblatt, was convicted of forgery, a felony offense. On June 7, 1971, Governor Ray issued to Ms. Seidenkranz a document captioned "Restoration of Citizenship" which provided, in relevant part, as follows:

I do hereby restore the said Zoe Ann Rosenblatt to all the rights, privileges and immunities which were forfeited by reason of said conviction.

This Restoration of Citizenship shall not be considered as a Pardon or as a remission of guilt or forgiveness of the offense, and shall not operate as a bar to greater penalties for second offenses or subsequent convictions or conviction as a habitual offender.

This ORDER is granted upon the recommendation of the Iowa Board of Parole.

The Order did not expressly restore Ms. Seidenkranz' right to possess firearms.

The statutory provisions restricting firearms possession by felons are found in Iowa Code sections 724.26 and 724.27. In 1976 the Iowa Legislature passed Iowa Code section 724.26, which became effective January 1, 1978. The present version of that statute provides, in pertinent part: “[a] person who is convicted of a felony in a state or federal court . . . and who knowingly has under the person’s dominion and control or possession, receives, or transports or causes to be transported a firearm or offensive weapon is guilty of a class ‘D’ felony.” Iowa Code § 724.26 (2003).

In 1976 the Legislature also enacted Iowa Code section 724.27, which originally read: “[t]he provisions of section 724.26 shall not apply to a person who is pardoned or has had his or her civil rights restored by . . . the chief executive of a state and who is expressly authorized by . . . such chief executive to receive, transport, or possess firearms or destructive devices.” Iowa Code § 724.27 (Supp. 1978). In 1994 the Legislature amended Iowa Code section 724.27 to its current form, which provides: “The provisions of section . . . 724.26 shall not apply to a person who is eligible to have the person’s civil rights regarding firearms restored under section 914.7 and who is pardoned or has had the person’s civil rights restored by . . . the chief executive of a state and who is expressly authorized by . . . such chief executive to receive, transport, or possess firearms or destructive devices.” Iowa Code § 724.27 (2003), *see* 1994 Iowa Acts (75 G.A.), ch. 1172, § 57.

With this understanding of the facts and controlling law, we turn to your first inquiry: whether the general restoration of citizenship rights issued to Ms. Seidenkranz in 1971 restored her right to possess firearms under Iowa law. We conclude that a general restoration of citizenship rights does not restore the right to possess firearms.

The facts presented to the court in *State v. Hall*, 301 N.W.2d 729 (Iowa 1981), were strikingly similar to those underlying your inquiry. Mr. Hall was convicted of felony level robbery in 1972. He was paroled in 1974 and was granted a restoration of citizenship rights by the Governor on May 5, 1976. *Id.* at 730. The provisions of the executive order restoring Mr. Hall’s rights of citizenship were identical to the provisions of the order issued to Ms. Seidenkranz in 1971. In determining that the terms of Hall’s restoration order did not entitle him to possess firearms under then-current Iowa law, the court reasoned:

It is significant that the executive order was not a pardon nor was it intended to forgive the offense or minimize the consequences of it. For all practical purposes, the restoration to citizenship rights is immaterial. With or without such restoration, a former felon could have possessed firearms prior to January 1, 1978. Now no felon may do so unless permitted by executive order as directed in section 724.27. We presume, without deciding, that [Hall] could have asked the governor to amend the executive order to so provide. . . . Having failed to do so, [Hall], like every other felon, is

bound by section 724.26 for possession of firearms after January 1, 1978.

State v. Hall, 301 N.W.2d at 732.

In a more recent decision applying the current version of Code sections 724.26 and 724.27, the Court affirmed Hall, and again concluded that the prohibition upon possession of firearms remains applicable to a felon who had been granted a general restoration of his citizenship rights prior to the enactment of Code sections 724.26 and 724.27. State v. Swartz, 601 N.W.2d 348 (Iowa 1999), cert. denied 528 U.S. 1167, 120 S.Ct. 1189, 145 L.Ed.2d 1094 (2000). Unlike Hall, the Swartz decision directly addressed and rejected the argument “that, because [the defendant’s] convicted-felon status preceded the effective date of the law banning possession of firearms by a felon, application of [section 724.26] to him violate[s] the prohibition against ex post facto laws.” Id. at 350-351. This conclusion was based upon the court’s finding that section 723.26 does not impose additional punishment based upon past felony convictions, but rather is intended to regulate present conduct of all individuals previously convicted of felonies.

The Hall and Swartz decisions also resolve your second question regarding the impact of Iowa Code section 724.27. Both before and after the 1994 amendment, Iowa Code section 724.27 stated that the provisions of Iowa Code section 724.26 did not apply to a person whose civil rights had been restored and who had been “expressly authorized” by the chief executive of a state “to receive, transport, or possess firearms.” In Hall and Swartz the court found that the absence of an explicit reference to the ability to receive, transport or possess firearms from the orders restoring citizenship rights, took the orders outside of the 724.27 exception. See State v. Swartz, 601 N.W.2d at 352; State v. Hall, 301 N.W.2d at 731.

Nothing in Bell v. United States, 970 F.2d 428 (8th Cir. 1992), alters this conclusion. Bell was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Id. at 428. The government moved for an enhanced sentence pursuant to 18 U.S.C. § 924(e)(1), which imposed a mandatory minimum sentence on any person convicted under section 922(g)(1) who had three prior convictions for violent felonies or serious drug offenses. Id. The definition of “conviction” for purposes of these statutes was given in 18 U.S.C. § 921(a)(20), which provided in pertinent part:

Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(20) (emphasis added).

Bell had been convicted in Iowa of breaking and entering in 1969, of attempted breaking and entering in 1975, and of second degree burglary in 1982. Bell v. United States, 970 F.2d at 428. However, in 1978 Bell received from the governor of Iowa a general restoration of citizenship which restored “all the rights, privileges, and immunities which were forfeited by reason of [his 1975] conviction,” id. at 428, without expressly authorizing Bell to possess firearms. Id. at 430. The Court found that Bell’s 1975 conviction could not be considered a “conviction,” under the definition given in 18 U.S.C. § 921(a)(2), because Bell’s civil rights had been restored and the restoration had not expressly forbidden the possession of firearms. Id.

Thus, Bell holds that, when a defendant has been convicted of a felony and has received a general restoration of citizenship which does not expressly forbid the possession of firearms, the conviction may not be counted for purposes of sentence enhancement under 18 U.S.C. § 924(e)(1). This conclusion directly and necessarily follows from the definition of “conviction” given in 18 U.S.C. § 921(a)(20). This holding, which is based on the Court’s interpretation of federal statutes, has no logical bearing on the question whether a general restoration of citizenship is effective under Iowa law to restore a convicted felon’s right to possess firearms, if it does not expressly authorize possession of firearms.

The Iowa Supreme Court has repeatedly construed Iowa Code section 724.27 to mean that “the restoration to citizenship rights is immaterial” to the right to possess firearms, unless such possession is expressly “permitted by executive order as directed in section 724.27.” State v. Swartz, 601 N.W.2d at 352; see also State v. Hall, 301 N.W.2d at 732. Bell does not conflict with these holdings nor directly impact our analysis of Iowa law as applied to the facts presented here.

In summary, our review of controlling Iowa statutes and decisions of the Iowa Supreme Court leads us to conclude that an executive order restoring citizenship rights to a felon does not authorize the felon to possess a firearm under current Iowa Code sections 724.26 and 724.27, unless the order expressly authorizes the possession of firearms. The fact that the order restoring citizenship rights was issued prior to the enactment of Code sections 724.26 and 724.27 does not alter our analysis.

Sincerely,

Thomas S. Tauber
Assistant Attorney General

COUNTIES AND COUNTY OFFICERS; COUNTY ATTORNEY: County compensation board; salary range for county attorney. Iowa Code §§ 331.752, 331.907 (2003). A county compensation board which uses the current salary of a district court judge at the time the board makes its recommendation to determine the allowable range of the salary for the county attorney is in substantial compliance with Iowa Code section 331.907 (2003). (Grady to Black, State Senator, 9-17-03) #03-9-2(L)

September 17, 2003

The Honorable Dennis H. Black
State Senator
5239 E. 156th Street S.
Grinnell, IA 50112

Dear Senator Black:

You have requested an opinion to clarify the relationship between Iowa Code section 331.907, which requires county compensation boards to annually issue recommendations for the salary of the county attorney, and the county attorney salary range limitation set forth in Iowa Code section 331.752(5). Your specific inquiry points to a practical timing issue which arises from the interplay of these two statutes.

Pursuant to section 331.907, the compensation board meets early in the year and must issue the recommended compensation schedule for elected county officers to the board of supervisors prior to adoption of the county budget, which must be certified by March 15 of each year. With regard to the salary of the county attorney, section 331.752(2) provides, in relevant part, that “[e]xcept in counties having a population of more than two hundred thousand, the annual salary of a full-time county attorney shall be an amount which is between forty-five and one hundred percent of the annual salary received by a district court judge.” As your inquiry notes, however, the yearly salary of a district court judge, which is established by the legislature, becomes effective on July 1 of each year. Therefore, a judge is receiving a certain salary when the compensation board meets and the county budget is certified, but the judge’s salary may change effective the following July 1.

In light of these provisions, you ask whether the salary of district court judges which is used as a basis for the range of salary for a full-time county attorney should be the judicial salary in place at the time the compensation board meets, or an estimate of the judicial salary which will be established for the following fiscal year. Because we do not believe that the compensation board should speculate regarding future judicial salaries, we conclude that the board should consider the current judicial salary at the time the board meets.

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The apparent purpose of the compensation board statute “is to ensure that public officers who perform services substantially similar to those performed in other public offices and private industry receive substantially equivalent wages.” Norland v. Worth County Compensation Bd., 323 N.W.2d 251 (Iowa 1982). However, establishing such substantially equivalent wages is not an “exact science” and “substantial compliance” with the statute is all that is required of the compensation board. Id.

As your question makes clear, if the salary range for a full-time county attorney is determined based upon the salary of a district court judge at the time the compensation board makes its recommendations, that salary range for one fiscal year will always be based upon the actual salary for a district court judge for the previous fiscal year. However, as recent experience demonstrates, there is no guarantee that judicial salaries will increase each fiscal year. For example, judicial raises enacted for fiscal year 2003 did not go into effect at the beginning of the fiscal year on July 1, 2002, but were made “effective for the pay period beginning December 20, 2002 . . .” 2002 Iowa Acts, 79th G.A., ch. 1175, § 4. The Legislature could have eliminated the raises rather than delaying them, or even decreased the salaries.

Unlike its national counterpart, the Iowa judiciary no longer has a constitutional guarantee that judicial salaries will not be decreased. Compare U.S. Const. art. III, § 1 (which provides that judges shall be paid “. . . a Compensation, which shall not be diminished during their Continuance in Office”) with Iowa Const. art. V, § 9 (which until *repealed* in 1962 provided that judicial “. . . compensation shall not be increased or diminished during the term for which they shall have been elected”). Judicial compensation in Iowa is within the province of the Legislature, and salaries can be uncertain. Indeed, this uncertainty in judicial compensation may have been a factor in the Legislature’s decision in 2002 to change the judicial retirement system to tie retirement benefits to a judge’s *highest* three salary years rather than the *last* three salary years. 2002 Iowa Acts, 79th G.A., ch. 1135, § 54.

Given the uncertainty of judicial salaries, we must conclude that although the salary of a district court judge used by a county compensation board may often be lower than the salary in the next fiscal year, the current salary might also be higher than the salary of a district court judge during the next fiscal year. It does not seem reasonable to assume a higher number when a lower number is possible or vice versa, and we can conceive of no public policy reason to seek uncertain numbers when certain numbers are available for use. As the Iowa Supreme Court has noted in Norland, the county compensation procedure is not an “exact science” and all that is required is “substantial compliance.”

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State Senator
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We believe that a compensation board which, in your words, uses “the salary in place at the time the Compensation Board makes its recommendation” is in substantial compliance with the compensation board statute, and that judicial salary, rather than an estimate of the salary for the following fiscal year should be used by the compensation board as a basis for the range of salary for a full-time county attorney.

Sincerely,

Peter J. Grady
Assistant Attorney General

EMINENT DOMAIN: Notice and hearing to owners of agricultural land. Iowa Const. art. I, § 18; Iowa Code §§ 6B.1A, 6B.2A (2001). An acquiring agency seeking to make a public improvement on agricultural land generally must provide notice and hearing to affected landowners. The acquiring agency may forgo providing notice and hearing if it plans to obtain necessary property or easements from all landowners by dedication or voluntary negotiation and purchase. If the acquiring agency finalizes its plans for the public improvement and then discovers it cannot acquire all necessary property or easements by dedication or voluntary negotiation and purchase, the agency should proceed with notice, public hearing, and condemnation proceedings. (Kempke and Scase to Lord and Behn, State Senators, 1-8-03)
#03-1-1

January 8, 2003

The Honorable David Lord
State Senator
1205 K Street
Perry, Iowa 50220

The Honorable Jerry Behn
State Senator
1313 Quill Avenue
Boone, Iowa 50036

Dear Senators Lord and Behn:

You have each requested an opinion on eminent domain, which generally means "[t]he power of a governmental entity to take private property for a public use without the owner's consent" Comes v. City of Atlantic, 601 N.W.2d 93, 95 (Iowa 1999). Courts have recognized such condemning of private property as "an inherent aspect of government, exercised through entities or individuals authorized by statute." Owens v. Brownlie, 610 N.W.2d 860, 865 (Iowa 2000).

In essence, you each ask whether an entity which may condemn private property has statutory authority to: (1) forgo provision of notice and hearing on a proposed public improvement if it plans to obtain easements across all affected agricultural land by dedication or voluntary purchase, and (2) institute condemnation proceedings, provide notices, and hold a hearing if, after finalizing its plans, it discovers that it cannot acquire every easement by dedication or voluntary purchase. These questions necessitate an examination of Iowa Code chapter 6B (2001).

Chapter 6B is entitled Procedure Under Eminent Domain. See generally Iowa Const. art. I, § 18. Section 6B.1A sets forth a general rule in its first sentence and an exception in the second:

The procedure for the condemnation of private property for works of internal improvement, and for other public projects, uses, or purposes, unless and except as otherwise provided by law, shall be in accordance with the provisions of [chapter 6B]. [Chapter 6B] shall not apply to the dedication of property to an acquiring agency or the voluntary negotiation and purchase of property by an acquiring agency.

(emphasis added). See Iowa Code § 6B.58 (2201) (defining "acquiring agency" as "the state of Iowa or any person or entity conferred the right by statute to condemn private property or to otherwise exercise the power of eminent domain"). An acquiring agency has the obligation to "make a good faith effort to negotiate with [owners] to purchase the private property . . . before filing an application for condemnation or otherwise proceeding with the condemnation process." Iowa Code § 6B.2B (2001); see also Iowa Code § 6B.3(1)(h) (condemnation application "shall set forth . . . [a] statement indicating the efforts made by the [acquiring agency] to negotiate in good faith with the owner to acquire the private property sought to be condemned"), § 6B.54(1) (2001) ("[e]very effort shall be made [by the acquiring agency] to acquire expeditiously real property by negotiation").

Unsuccessful negotiations for the purchase of private property may lead to condemnation proceedings. See Iowa Code §§ 6B.2B, 6B.54(7) (2001). However, before a condemnation proceeding which includes agricultural land may be initiated, an acquiring agency must comply with the public notice and hearing requirements of section 6B.2A:

An acquiring agency shall provide written notice of a public hearing to each owner and any contract purchaser of record of agricultural land that may be the subject of condemnation. The authority under this chapter is not conferred and condemnation proceedings shall not begin unless a good faith effort is made to mail and publish the notice as provided in this section on the owner and any contract purchaser of record of the property subject to condemnation. The notice shall be mailed by ordinary mail, not less than thirty days before the date the hearing is held . . . *The notice shall be given and the public hearing held before adoption of the ordinance, resolution, motion, or other declaration of intent to fund the final site-specific design for the public improvement, to make the final selection of the route or site location for the public improvement, or to acquire or condemn, if necessary, all or a portion of the property or an interest in the property for the public improvement.* If the location of the public improvement is changed or expanded

after the decision has been made to proceed with the public improvement, a notice shall be mailed by ordinary mail no less than thirty days before the adoption of the ordinance, resolution, motion, or other declaration of intent to proceed with a change in the location of the public improvement to the owner and any contract purchaser of record of the land to be acquired or condemned, if necessary, in the new location of the public improvement affected by the change. . . .

Iowa Code § 6B.2A(1) (emphasis added). See Iowa Code § 6A.21(1)(a) (2001) (defining "agricultural land" for purposes of chapter 6B).

First, you ask whether an acquiring agency may forgo providing notice and hearing on a public improvement if it plans to obtain easements across all affected agricultural land by dedication or voluntary negotiation and purchase. Section 6B.1A answers this question unambiguously. See Mier v. Sac & Fox Indian Tribe, 476 N.W.2d 61, 63- 64 (Iowa 1991) ("[w]hen the statutory language is plain and its meaning is clear, we should not reach for meaning beyond the statute's express terms or resort to rules of statutory construction"). The second sentence in section 6B.1A provides that chapter 6B "shall not apply to the dedication of property to an acquiring agency or to the voluntary negotiation and purchase of property by an acquiring agency." See Iowa Code § 4.1(30)(a) (unless otherwise defined, "shall" in statutes imposes a duty). Accordingly, the procedural requirements of chapter 6B do not apply and an acquiring agency may forgo providing the notice and hearing on a public improvement otherwise required by this chapter if it plans to obtain easements across all affected agricultural land by dedication or voluntary negotiation and purchase.

Assuming that an acquiring agency has forgone provision of notice and hearing on a proposed public improvement, you next ask whether an acquiring agency may institute condemnation proceedings, provide notice, and hold a hearing if it later discovers it cannot acquire every easement by dedication or voluntary negotiation and purchase.

Nothing within chapter 6B precludes an acquiring agency from preparing preliminary designs and studies and considering alternative sites or routes without providing notice and hearing on the proposed public improvement. However, as emphasized above, an acquiring agency is statutorily required to give notice and hold a hearing on a proposed public improvement

before adoption of the ordinance, resolution, motion, or other declaration of intent to fund the final site-specific design for the public improvement, to make the final selection of the route or site location for the public improvement, or to acquire or condemn, if

necessary, all or a portion of the property or an interest in the property for the public improvement.

Iowa Code § 6B.2A(1) (2001). If this statute is strictly construed and applied, an acquiring agency which desires to use condemnation proceedings to complete a public improvement after failing to obtain all necessary property or easements by dedication or voluntary negotiation and purchase, and which has finalized its plans or acquired a portion of the property or easements, cannot comply with section 6B.2A unless it can turn back the clock: section 6B.2A requires notice to be given and a hearing held *before* the agency has made a determination to fund a final site-specific design, selected a final route or site location, or acquired agricultural land for the project.

We do not believe that this construction is consistent with the clear intent of the legislature to encourage the acquisition of property through voluntary dedication and negotiated purchase. See Iowa Code §§ 6B.2B, 6B.3(1)(h), and 6B.54(1) (2001). Further, the legislature has included in chapter 6B the following provision addressing the failure of an acquiring agency to strictly comply with the procedural requirements of this chapter:

If an acquiring agency makes a good faith effort to serve, send, or provide the notices or documents required by [chapter 6B] to the owner and any contract purchaser of private property that is or may be the subject of condemnation, but fails to provide the notice or documents to the owner and any contract purchaser, such failure shall not constitute grounds for invalidation of the condemnation proceeding if the chief judge of the judicial district determines that such failure can be corrected by delaying the condemnation proceeding to allow compliance with the requirement or such failure does not unreasonably prejudice the owner and any contract purchaser.

Iowa Code § 6B.57 (2001). This savings provision expressly provides for judicial relief when an acquiring agency fails to satisfy the notice provisions of chapter 6B, if the agency can establish a good faith effort to serve, send, or provide the notices or documents required by chapter 6B. Although not directed toward an acquiring agency's decision to forgo the delay and expense of compliance with the section 6B.2A notice and hearing requirements based upon a good faith belief that all of the property can be obtained through voluntary dedication and negotiated purchase, this section does reinforce the legislature's intent to forgive good faith procedural errors.

Nor do we believe that the rules for construction of eminent domain statutes require this interpretation. The Iowa court has long held that condemnation statutes must be construed “in view of the evident purpose and intent of the Legislature.” Butterworth v. State Highway Commission, 210 Iowa 1231, ___, 232 N.W. 760, 761 (1930); see also Hardy v. Grant Township Trustees, Adams County, 357 N.W.2d 623, 626 (1984). As the Court stated in Hardy:

We recognize that statutes delegating the power of eminent domain should be strictly construed and restricted to their expression and intension. [citations omitted]. An appropriate strict construction of these statutes must still be a reasonable and sound construction. See Iowa Code §§ 4.4(3), (5) (in enacting a statute, it is presumed that a just and reasonable result is intended and that a public interest is favored over any private interest).

357 N.W.2d at 626. Further, if the process utilized by an acquiring agency to initiate a public improvement is challenged, a “substantial compliance,” rather than strict compliance, standard will be applied upon review of the proceeding. See Burnham v. City of West Des Moines, 568 N.W.2d 808, 811-12 (Iowa 1997) (substantial compliance standard governs eminent domain procedure).

Finally, a property owner whose land is subject to eminent domain proceedings may obtain a permanent injunction halting the condemnation only under extreme circumstances.

First, the landowner must show ‘fraud, abuse of discretion, or other gross impropriety’ or that ‘the owner was illegally deprived of his rights in violation of the constitutional or statutory provisions governing the exercise of the power of eminent domain. Claims that a municipality’s action ‘is unwise, extravagant or a mistake in judgment’ will not support injunctive relief. In addition to a showing of fraud, oppression, illegality or abuse of power, the person seeking to enjoin a condemnation must demonstrate ‘irreparable injury and the inadequacy of any legal remedy.’

Comes v. City of Atlantic, 601 N.W.2d 93, 96 (Iowa 1999) (citations omitted).

In light of these authorities, and given the clear intent of the legislature to require and facilitate voluntary acquisition of property as an alternative to condemnation, we believe that chapter 6B should be interpreted to allow an acquiring agency which has a good faith belief that all property necessary for a public improvement can be obtained through dedication and voluntary negotiation to take advantage of the exception to procedure allowed by section 6B.1A, forego

Senator David Lord
Senator Jerry Behn
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chapter 6B procedures, and proceed with the acquisition of property. In the event that the agency later discovers that it cannot voluntarily acquire all of the needed property, the agency should step back to the beginning of the process and follow through the procedural requirements for condemnation.

An acquiring agency seeking to make a public improvement on agricultural land generally must provide notice and hearing to affected landowners. The acquiring agency may forgo providing notice and hearing if it plans to obtain necessary property or easements from all landowners by dedication or voluntary negotiation and purchase. If the acquiring agency finalizes its plans for the public improvement and then discovers it cannot acquire all necessary property or easements by dedication or voluntary negotiation and purchase, the agency should proceed with notice, public hearing, and condemnation proceedings.

Sincerely,

Bruce Kempkes
Assistant Attorney General

Christie J. Scase
Assistant Attorney General

CITIES; TAXATION: Tax increment financing. Iowa Code §§ 403.19, 428.24-.29, 441.26, and ch. 433, 434, 437, 437A and 438 (2003). Property centrally assessed under the authority of Director of the Department of Revenue, pursuant to Iowa Code sections 428.24 through 428.29, and Iowa Code chapters 433, 434, 437, 437A, and 438, is not listed on the assessment rolls maintained by the county assessor pursuant to Code section 441.26 and, therefore, is not included in determining the tax increment financing available to fund urban renewal projects under Code section 403.19. (Miller to Martin, Cerro Gordo County Attorney, 9-11-03) #-03-9-1

September 11, 2003

Paul L. Martin
Cerro Gordo County Attorney
220 N. Washington Avenue
Mason City, Iowa 50401-3254

Dear Mr. Martin:

You have requested an opinion from this office addressing three questions regarding the placement of centrally assessed property in tax increment financing (TIF) districts formed pursuant to Iowa Code section 403.19. We conclude that the value of centrally assessed property should be excluded from the calculation of the aggregate value of property in an urban renewal area for purposes of TIF.

Iowa Code section 403.19 allows a municipality, defined as a county or city, to provide by ordinance for the division and allocation of "taxes levied on taxable property in an urban renewal area." Iowa Code § 403.19 (2003) (first unnumbered paragraph). The Iowa Supreme Court, in Richards v. City of Muscatine, 237 N.W.2d 48, 61 (Iowa 1975), stated that the purpose of this section is to enable the "payment of urban renewal bonds out of the tax increment brought about by the project itself." The tax increment provided for in subsection 403.19(2) allows for the payment of loans, advances, indebtedness or bonds incurred for the project from the expected growth in property taxes attributable to the taxable property in the urban renewal area established under chapter 403.

You first ask whether property valued by the Iowa Department of Revenue (Department) or its Director under Iowa Code chapters 428, 433, 434, 437, 437A and 438 is included in the calculation of the TIF valuation pursuant to Iowa Code section 403.19. Subsection 403.19(1) provides that any determination of property taxes available for allocation in a TIF district is based "upon the total sum of the assessed value of the taxable property in the urban renewal area, as shown on the assessment roll as of January 1 of the calendar year preceding the first calendar year in which the municipality certifies [TIF debt] to the county auditor. . . ." Iowa Code § 403.19(1)

(2003) (emphasis added). Therefore, the answer to your question is dependent upon whether the property centrally assessed by the Director under the chapters identified above is property shown on the “assessment roll” as that term is used in section 403.19.

The “ultimate goal in interpreting statutes is to determine and give effect to legislative intent.” Holiday Inns Franchising, Inc. v. Branstad, 537 N.W.2d 724, 728 (Iowa 1995). Intent is determined “from what the legislature said, not from what it might or should have said. If the language is clear and unambiguous, we apply a plain and rational meaning in light of the subject matter of the statute.” Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co., 606 N.W.2d 376, 379 (Iowa 2000), citing Iowa R. App. P. 14(f)(13). Further, when more than one statute is relevant to statutory construction, a court must “consider the statutes together and try to harmonize them.” Iowa Dept. of Transportation v. Soward, 650 N.W.2d 569, 571 (Iowa 2002); see Metier v. Cooper Transport Co., Inc., 378 N.W.2d 907, 912 (Iowa 1985) (statutes dealing with the same subject matter are considered together).

Properties assessed under Code sections 428.24 to 428.29 (public utility plants and related personal property) and Code chapters 433 (telegraph and telephone company property), 434 (railway property), 437 (electric transmission lines), 437A (property used in the production, generation, transmission or delivery of electricity or natural gas), and 438 (pipeline property) are all centrally assessed by the Director of the Department of Revenue. Once these properties are assessed, the Director is required to certify the assessed values of these properties as attributable to each county to the respective county auditor where the properties are located. See Iowa Code §§ 428.29, 433.8, 434.17, 437.9, 437A.19 and 438.14 (2003). Pursuant to Iowa Code section 443.2, the county auditor then places these values on the tax list so that they can be included for purposes of computing the debt incurring capacity of the county or political subdivision. The Director is not authorized to list any centrally assessed property on the assessment rolls described in Iowa Code chapter 441.

An assessment roll only lists property which has been assessed by the city or county assessor. As directed by Iowa Code section 441.18,

Each assessor shall, with the assistance of each person assessed, or who may be required by law to list property belonging to another, enter upon the assessment rolls the several items of property required to be entered for assessment. The assessor shall personally affix value to all property assessed by the assessor.

Iowa Code § 441.18 (2003) (emphasis added). Once the assessor has completed the assessment roll, it is submitted to the local board of review for approval. Iowa Code § 441.17(7) (2003). Neither the assessor nor the local board of review has any role in valuing or assessing centrally assessed property and we find no statutory provision

allowing the value of property which has been centrally assessed by the Director to be included on the assessment roll.

Section 441.26 requires the assessment roll to be used by the assessor “in listing the property and showing the values affixed to the property of all persons assessed.” The assessor is then responsible to return the completed assessment rolls to the county auditor. The county auditor then, as is the case with the centrally assessed property certified by the Director, transcribes the property shown on the assessment rolls to the tax list prepared pursuant to Code chapter 443. The tax list contains the aggregate actual value of all taxable property within the county and political subdivisions, including locally assessed property listed on the assessment rolls and centrally assessed property as certified by the Director. Iowa Code § 443.2 (2003).

As set forth above, TIF calculations are to be based “upon the total sum of the assessed value of the taxable property in the urban renewal area, as shown on the assessment roll . . .” Iowa Code § 403.19(1) (2003) (emphasis added). Because centrally assessed property is not listed on the assessment rolls, we must conclude that this property is not included in the calculation of the tax increment available to pay the various obligations attributable to the urban renewal area under Code subsection 403.19(2).

You next ask whether the adoption of Iowa Code chapter 437A had an effect on the inclusion of centrally assessed utility property in the calculation of the tax increment under section 403.19. We conclude that the enactment of this Code chapter did not alter the treatment of centrally assessed property for purposes of TIF.

Code chapter 437A, as enacted in 1998, creates a mechanism to replace property taxes imposed on electric companies, natural gas companies, electric cooperatives, and municipal utilities with an alternative system imposing generation, transmission and delivery taxes on these entities. Iowa Code § 437A.2 (2003). Property used in gas and electric operations which is subject to replacement tax is exempt from local property taxation.

All operating property and all other property that is primarily and directly used in the production, generation, transmission, or delivery of electricity or natural gas subject to replacement tax or transfer replacement tax is exempt from taxation except as otherwise provided by this chapter.

Iowa Code § 437A.16 (2003).

All property subject to a replacement tax under section 437A.16 is also subject to “an annual statewide property tax of three cents per one thousand dollars of assessed value.” Iowa Code § 437A.18 (2003). The statewide property tax is administered by the Director who is required to annually adjust the assessed value of the taxpayer’s

property and to report those values to the department of management and to the respective county auditor. Iowa Code § 437A.19 (2003). The result is that property subject to the replacement tax under chapter 437A is centrally assessed under the statewide property tax and does not appear on the assessment rolls.¹

You also ask whether property which is centrally assessed under chapter 437A is treated differently than other centrally assessed property as to its inclusion in the calculation of TIF under section 403.19. As discussed above, there is no provision in section 403.19 which allows for the inclusion of taxes attributable to property not shown on the assessment rolls in the tax increment calculation for a TIF district. Likewise, there is no provision in chapter 437A which would allow for the inclusion of property subject to the statewide property tax to be used in calculating a tax increment. Therefore, as with other centrally assessed property, the value of property which is centrally assessed under chapter 437A is not part of the tax increment for the urban renewal area.

Finally, you ask whether the references to Code section 403.19 which are contained in Code section 437A.15 were included in that section for the purpose of grandfathering or legitimizing situations in which gas or electric utility property was included, rightly or wrongly, in TIF calculations. We believe that they are.

When chapter 437A was enacted there were a limited number of TIF districts that included the tax attributable from gas and electric utility property located within the urban renewal area in the increment calculation. Even though such inclusion was in error, taxing entities had committed this tax revenue to pay the various obligations incurred from the urban renewal project. The legislature, in enacting chapter 437A, did not intend to remove this utility property from the tax increments already committed to pay these obligations. Therefore, provisions were made in Iowa Code subsections 437A.15(5) and (6) to allow these properties to remain in the tax increments of the TIF districts, and also to provide for their eventual removal.

Specifically, subsection 437A.15(5) allowed taxing entities, defined in subsection 403.17(1), which already had included certain gas and electric utility property in their TIF districts to continue dividing and allocating the replacement taxes attributable to those properties in the same manner as had been done for the property taxes previously attributable to those same properties. This subsection merely recognized that gas and electric utility property had been in the increment calculation in certain TIF districts and, as such, allowed municipalities to continue to receive a share of replacement tax revenues if this had occurred. Furthermore, subsection 437A.15(6)

¹ Several sections of Iowa Code chapter 437A were amended during the 2003 legislative session. 2003 Iowa Acts (80th G.A.) ch. 106 (Senate file 275). The amendments address new electric power generating plants and municipal utilities and make adjustment to the formula for calculation of assessed values by the Director. The changes do not impact the outcome of this opinion.

specifically provides that

In lieu of the adjustments provided in subsection 5, the assessed value of property described in section 403.19, subsection 1, may be reduced by the city or county by the amount of the taxable value of the property described in section 437A.16 included in such area as of January 1, 1997, pursuant to amendment of the ordinance adopted by such city or county pursuant to section 403.19.

This subsection allowed cities or counties to remove gas and electric utility properties from the tax increments of the TIF district once the assessed values of the locally assessed property shown on the assessment rolls has increased sufficiently to meet the various monetary obligations. In effect, subsection 437A.15(6) grandfathered in those TIF districts containing gas and electric property as of January 1, 1997, by allowing those properties to be removed from the tax increment once they are no longer needed to support the monetary obligations stemming from the urban renewal project.

In conclusion, it is our opinion that centrally assessed property, including property assessed under chapter 437A, is not property listed on the assessment rolls. Therefore, tax revenues generated from such property is not available for tax increment financing under section 403.19.

Sincerely,

JAMES D. MILLER
Assistant Attorney General

JDM:cml

MUNICIPALITIES; WEAPONS; PREEMPTION: Authority of city to impose restrictions upon carrying weapons. Iowa Code §§ 364.1, 724.4 and 724.28 (2003). The Iowa courts would likely construe the preemption provision contained in Iowa Code section 724.28 narrowly and find that the statute does not interfere with the authority of a city to exercise its home rule power to place restrictions upon the possession of weapons which apply only to buildings owned or directly controlled by the city. (Odell to Wise, State Representative, 4-6-03) #03-4-1

April 7, 2003

The Honorable Philip Wise
State Representative
State Capitol
LOCAL

Dear Representative Wise:

You have requested an opinion of the Attorney General regarding the validity of an ordinance approved by the West Burlington City Council restricting possession of firearms by non-law enforcement or military personnel within municipal buildings. Specifically, you posed the following questions:

- 1) Can the City of West Burlington enforce this weapons ban without contravening Iowa Code section 724.28?
- 2) Can the City of West Burlington enforce this ordinance against a person licensed to carry a weapon under Iowa Code section 724.4 and who possesses that weapon in compliance with Iowa Code section 724.4(4)?

Iowa Code section 724.28 includes an express limitation upon the ability of a political subdivision to regulate firearms. However, for the reasons that follow, we do not believe that Iowa Code section 724.28 would be interpreted as preempting a political subdivision from enacting and enforcing limitations upon the possession of weapons which are narrowly limited to buildings owned or directly controlled by the political subdivision.

Before addressing the questions you posed, it may be helpful to review two concepts which determine the validity of municipal legislation: (1) the city's home rule authority and (2) the state's power to preempt local action. These concepts and their interrelationship are set forth in the Municipal Home Rule Amendment of Iowa's constitution:

Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the General Assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the General Assembly.

The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state.

Iowa Const. art III, § 38A.¹

Iowa Code chapter 364 sets forth the powers and duties of cities. The statute essentially mirrors the municipal home rule amendment, providing that

[a] city 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 city or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents. . . .

Iowa Code § 364.1 (2003); see also Iowa Code § 364.2(2) (2003) (“A city may exercise its general powers subject only to limitations expressly imposed by a state or city law”).

While the concept of home rule clearly envisions the possibility that both the state and a city may regulate in the same area, a city’s power to govern its local affairs may be preempted by state law. The concept of “preemption” finds its source in the constitutional prohibition against the exercise of a home rule power that is “inconsistent with the laws of the general assembly.” Iowa Const. art. III, section 38A. An exercise of a city power is inconsistent with a state law only if it is “irreconcilable with the state law.” Iowa Code section 364.2(3) (2003); see Goodell v. Humboldt County, 575 N.W.2d at 492. Preemption may be express or implied.

Express preemption occurs when the general assembly has specifically prohibited local action in an area. Obviously, any

¹ Although this opinion addresses the power of municipalities to limit or prohibit the possession of weapons in certain municipally owned facilities, there are parallel provisions of the Iowa Constitution and Iowa Code that make the analysis virtually identical for counties. See Iowa Const., art. III, § 39A and Iowa Code § 331.301. See also Goodell v. Humboldt County, 575 N.W.2d 486, 492 (Iowa 1998) (“we cite to county home rule cases and city home rule cases interchangeably”).

ordinance that regulates in an area the legislature has specifically stated cannot be the subject of local action is irreconcilable with state law. Implied preemption occurs in two ways. When an ordinance prohibits an act permitted by a statute, or permits an act prohibited by a statute, the ordinance is considered inconsistent with state law and preempted. Implied preemption may also occur when the legislature has covered a subject by statutes in such a manner as to demonstrate a legislative intention that the field is preempted by state law.

Goodell v. Humboldt County, 575 N.W.2d at 492 (quotations and citations omitted).

The state statute at issue here is Iowa Code chapter 724, governing weapons. This chapter, comprehensive in scope, defines offenses related to the possession and carrying of weapons, details the procedures for obtaining a permit to carry or to acquire weapons for both professionals – persons employed in law enforcement or security related occupations – and nonprofessionals, and establishes “weapons free zones.” A nonprofessional person obtains a permit to carry a weapon, including a firearm, by applying to the sheriff of the person’s resident county. Iowa Code § 724.11 (2003). If issued, the permit identifies the holder and the reason for its issuance, and also details any limits on the authority granted by the permit. Id. A permit is issued for a definite period not to exceed twelve months. Id.

Except as specifically provided by Iowa Code section 724.4, “a person who goes armed with a dangerous weapon concealed on or about the person, or who, within the limits of any city, goes armed with a pistol or revolver, or any loaded firearm of any kind, whether concealed or not, . . . commits an aggravated misdemeanor.” Iowa Code § 724.4(1) (2003). However, a person who has a valid permit to carry weapons and whose conduct is within any limits specific in the permit, is not subject to the general prohibition upon carrying a concealed or loaded firearm. Iowa Code § 724.4(4)(i) (2003). A nonprofessional person with valid permit to carry a weapon is restricted only by any limits specified in the permit and by the “weapons free zones” established by the legislature which include public and private schools, the area within one thousand feet of public or private school, and public parks. Iowa Code § 724.4A (2003).

Iowa Code section 724.28 sets forth the following express limitation upon regulation of firearms by political subdivisions.

A political subdivision of the state shall not enact an ordinance regulating the ownership, possession, legal transfer, lawful transportation, registration, or licensing of firearms when the ownership, possession, transfer, or transportation is otherwise lawful under the laws of this state. An ordinance regulating

firearms in violation of this section existing on or after April 5, 1990, is void.

Iowa Code § 724.28 (2001).²

Although the language of this provision encompasses the local regulation of the ownership, possession, legal transfer, lawful transportation, registration, or licensing of firearms, the statute does not explicitly restrict all local regulation. Rather the limitation applies only to local regulation of the ownership, possession, legal transfer, lawful transportation, registration, or licensing of firearms which “is otherwise lawful under the laws of this state.” In essence, the statute incorporates the pre-existing constitutional and statutory restriction upon local legislation which is inconsistent with state law.

As stated in [Art. III, section 38A of the Iowa Constitution], municipal home rule power cannot be “inconsistent with the laws of the general assembly.” . . . A local ordinance, however, is not inconsistent with a state law unless it is irreconcilable with the state law. A local law is irreconcilable with state law when the local law prohibits an act permitted by statute, or permits an act prohibited by a statute.

Beerite Tire Disposal/Recycling, Inc. v. City of Rhodes, 646 N.W.2d 857, 859 (Iowa 2002) (citations omitted, emphasis original). Compare Chelsea Theater Corporation v. City of Burlington, 258 N.W.2d 372 (Iowa 1977) (statute providing that “no municipality, county or other governmental unit within this state shall make any law, ordinance or regulation relating to the availability of obscene materials” found to preempt all local regulation of obscene materials); with 2000 Op. Att’y Gen. ___ (#00-11-5) (concluding that statute expressly providing that Iowa Code chapter regulating smoking “shall supercede any local law or regulation which is inconsistent with or conflicts with [the] chapter” did not preempt all local regulation, but merely reflected the same limitations on home rule authority embodied in the Home Rule Amendments).

Your specific inquiries relate to an ordinance passed by the West Burlington City Council on September 23, 2002. The ordinance establishes “firearm/weapons free zones” in any

² We note that this limitation is applicable only to ordinances enacted by political subdivisions of the state. The statute does not affect the authority of the judicial branch to order the installation of metal detectors or similar security devices and restrictions upon the possession of weapons in county courthouses, as the judiciary has inherent power to adopt any measure to ensure the “immediate, necessary, efficient, and basic functioning of the courts.” Webster County Board of Supervisors v. Flattery, 268 N.W.2d 869, 873 (Iowa 1978). Nor does the statute address the authority of the various branches of state government to prohibit the possession of weapons in state-owned or controlled buildings.

municipal building, defined as every “structure, dwelling, garage or shelter owned, leased or otherwise occupied by the City of West Burlington, Iowa and used for any municipal or public purposes by the City.” Ordinance No. ___, § 3(1). In Section 2, the ordinance prohibits non-professional persons from carrying or possessing firearms or weapons in any municipal building, even if the persons are duly licensed to carry and comply with Iowa Code section 724.4(4), providing:

Municipal buildings owned, leased or occupied by the City of West Burlington, Iowa are declared to be firearm/weapon free zones. It shall be unlawful for any person, except a peace officer, member of the armed forces of the United States or the national guard, a person in the service of the United States, or correctional officer serving in an institution under authority of the Iowa [D]epartment of Corrections to carry, possess or display any weapon or firearm within any municipal building.

In defining “weapon,” the ordinance refers specifically to and incorporates the definitions in Iowa Code sections 724.1 and 724.4. Ordinance No. ___, § 3(2). The term “firearm” includes “pistols, revolvers, derringers, handguns, pellet guns, rifles, shotguns . . . or other devices which can expel or may be readily converted to expel any form of projectile so as to strike an object or person.” Ordinance No. ___ § 3(3).

Under the state statutory scheme, a nonprofessional person licensed to carry a firearm is authorized to carry and possess it within any limitations specified in the permit and in any place in the State other than the “weapons free zones” established by the legislature in Iowa Code section 724.4A. It could be argued that the statute allows a person with a valid permit to carry to possess a firearm in any privately or municipally owned building, provided that he or she produces the permit on demand by a peace officer. We doubt, however, that the legislature intended chapter 724 to limit the ability of a property owner to prohibit the possession of a weapon on their property. Further, we believe it is highly unlikely that chapter 724 would be interpreted by the Iowa courts as granting concealed weapon permit holders an absolute and unqualified right to be in possession of a firearm at any time or place.

We arrive at this conclusion for several reasons. First,

[i]n considering whether a particular ordinance violates the home rule provisions of the Constitution, the Supreme Court attempts to interpret state law to render it harmonious with the ordinance. Sioux City Police Officers’ Ass’n v. City of Sioux City, 495 N.W.2d 687, 694 (Iowa 1993). The Court appears especially likely to find harmony between the ordinance and the statutory scheme where the ordinance addresses the health and safety of citizens.

See e.g. Kent v. Polk County Board of Supervisors, 391 N.W.2d 220, 223 (Iowa 1986).

2000 Op. Att’y Gen. ___, ___ (#00-11-5 at p. 2). Without question, an ordinance prohibiting the possession of weapons in municipal buildings, which may include city hall, municipal offices frequented by the public, and city-owned auditoriums or events centers, is directly focused upon the health and safety of citizens.

Second, there is no provision included within Iowa Code chapter 724 which explicitly limits, or even addresses, the ability of a property owner to manage property owned or directly controlled by the person. Certainly, the state law does not preclude a private business owner from prohibiting persons from bringing concealed weapons onto the owner’s business premises. Nor do we believe that Iowa Code section 724.28 must be interpreted to limit the ability of a municipality to prohibit persons from bringing concealed weapons onto premises owned or directly controlled by the municipality. See Barrett v. Kunzig, 331 F. Supp. 266, 271-274 (N.D. Tenn. 1971), cert. denied 409 U.S. 914, 93 S.Ct. 232, 34 L.Ed.2d 1175 (1972) (holding that the “United States as a property owner can control entrance to [federal courthouses] by conditioning the entrant’s right of entry on his submitting his packages and briefcase to a visual inspection”); 1989 N.Y. Op. Att’y. Gen. (Inf.) 169 [# 89-75] (concluding that preemption provision within state firearms statute did not preclude a village from enacting a local law prohibiting a person from entering city hall with a firearm). As the Attorney General for the State of New York reasoned:

Although section 400.00(6) of the Penal Law [providing that a firearm license issued under state statutes shall be effective throughout the state, except in the city of New York] prohibits [a] village from regulating the licensing of firearms, there is support for the position that these provisions do not preclude [a] village from acting in its proprietary capacity for the safety of its property and persons present thereupon. In its proprietary capacity, like any private individual, [a] village can prohibit persons from entering its property while possessing a firearm, even if he or she has an unrestricted license to carry the firearm.

1989 N.Y. Op. Att’y. Gen. (Inf.) 169 [#89-75 at p. 2].

Further, the apparent intention of the legislature in enacting Iowa Code chapter 724, and particularly section 724.28, was to ensure uniform state-wide regulation of weapons. The purpose in doing so was likely to ensure that an individual who was familiar with state weapons laws could freely travel with a weapon from one jurisdiction to another in the state without inquiring as to whether local ordinances place additional limitations upon the ownership, possession, transfer, or transportation of the weapon. A locally enacted restriction upon the

possession of weapons within publically-owned or controlled buildings does not itself directly interfere with this purpose.

Finally, we have surveyed cases and opinions from other jurisdictions addressing preemption in the context of weapons regulation. The majority of courts addressing the narrow issue presented here – whether an express statutory preemption of firearms regulation by a municipality prohibits the municipality from regulating the possession of firearms on municipally-owned or controlled property – have recognized the inherent authority of a municipality to manage property which it owns or controls.

In McMann v. City of Tucson, 202 Ariz. 468, 472, 47 P.3d 672, 676 (Ariz. App. Div. 2002), a gun show promoter challenged a Tucson city ordinance “requiring instant background checks for prospective gun purchasers during gun shows held at the Tucson Convention Center.” The plaintiff argued that the ordinance was preempted by an Arizona statute which prohibited a political subdivision from enacting an ordinance “relating to the transportation, possession, carrying, sale or use of firearms.” Id. 202 Ariz. at 470, 47 P.3d at 674. The court, noting that it was “not clear that the legislature intended the statute to apply to the City’s control of its own property as opposed to the City’s attempt to control third parties,” rejected the plaintiff’s preemption claim. Id. 202 Ariz. at 471, 47 P.3d at 675.

Similarly, the Supreme Court of California rejected a claim that a state statute articulating legislative intent to “completely occupy the whole field of registration and licensing of . . . firearms,” compelled a county to allow their property to be used for gun shows. Great Western Shows, Inc. v. County of Los Angeles, 27 Cal.4th 853, 44 P.3d 120, 118 Cal. Rptr. 2d 746 (2002). As the Court observed, “[e]ven assuming arguendo that a county is prevented from instituting a general ban on gun shows within its jurisdiction, it is nonetheless empowered to ban such shows on its own property.” Id. 27 Cal.4th at 868, 44 P.2d at 129, 118 Cal. Rptr.2d at 757. See also 1989 N.Y Op. Att’y. Gen. 169 (supra); 25 Okl. Op. Atty. Gen. 245 (public library may ban patrons from bringing concealed weapons into libraries despite statute preempting “any order, ordinance, or regulation [of firearms] by any municipality or political subdivision); cf. Cherry v. Municipality of Metropolitan Seattle, 116 Wash.2d 794, 808 P.2d 746 (1991) (holding that city could restrict city employee with a concealed weapon permit to carry concealed weapon into the workplace despite statute which expressly pre-empted political subdivisions from all firearm regulation and indicated that municipalities could enact “only those laws and ordinances relating to firearms that are specifically authorized by state law and are consistent with [state law]”). But see Doe v. Portland Housing Authority, 656 A.2d 1200 (Maine), cert. denied 516 U.S. 861, 116 S.Ct. 171, 133 L.Ed.2d 112 (1995) (housing authority, as political subdivision, was preempted from regulating firearm possession by tenants of property owned by the authority; the court did not address the issue of property ownership); HC Gun & Knife Shows, Inc. v. City of Houston, 201 F.3d 544 (5th Cir. 2000) (concluding that city ordinance which regulated gun shows conducted on city property was preempted by state law which explicitly prohibited municipal regulation of the “transfer, private ownership, keeping, transportation, licensing, or registration of

firearms, ammunition, or firearms,” except in the context of specifically delineated areas. The Court rejected the city’s claim that the regulation was a proper exercise of the city’s ability to regulate the discharge of weapons within the city limits, but did not address the issue of property ownership).

We caution, however, that we believe the authority of a municipality to regulate weapons is narrowly limited to property owned or directly controlled by the municipality. Iowa Code section 724.28 directly preempts any local ordinance attempting to limit the right to possess or transport a weapon in other public areas pursuant to the terms of chapter 724. We believe the Iowa courts would conclude that a local ordinance imposing a jurisdiction-wide restriction upon the possession or transport of a weapon is preempted by section 724.28 and unenforceable. See Doe v. City and County of San Francisco, 136 Cal.App.3d 509, 186 Cal.Rptr. 380 (Cal. Ct. App. 1982) (holding that state legislature’s express statutory intent to “occupy the whole field of regulation of registration or licensing of . . . firearms” preempted ordinance prohibiting any person from possession a handgun within the city and county); National Rifle Ass’n of America, Inc. v. City of South Miami, 812 So.2d 504 (Fla. Ct. App. 2002) (city ordinance regulating firearms by establishing certain safety standards preempted by state statute); Montgomery County v. Atlantic Guns, Inc., 302 Md. 540, 489 A.2d 1114 (1985) (holding that statute governing wearing, carrying, and transporting of handguns regulates both loaded and unloaded handguns, and expressly preempts all local laws regulating the same subject); City of Portland v. Lodi, 308 Or. 468, 782 P.2d 415 (1989) (local ordinance prohibiting the carrying of any concealed knife found to be preempted by state statute which prohibited the carrying of only certain concealed knives); Ortiz v. Commonwealth of Pennsylvania, 545 Pa. 279, 681 A.2d 152 (1996) (city-wide ban on the possession of certain assault weapons found to be preempted by statute which prohibited any manner of local regulation of the lawful ownership, possession, transfer or transportation of firearms and ammunition).

Based upon these considerations, we conclude that Iowa courts would likely construe the preemption provision contained in Iowa Code section 724.28 narrowly and would recognize the authority of a city to exercise its home rule power to place restrictions upon the possession of weapons which apply only to buildings owned or directly controlled by the city. Therefore, we believe that the City of West Burlington could enforce its ordinance against a person who is authorized by Iowa Code section 724.4 to carry a firearm and may prohibit a nonprofessional person from possessing a firearm within a municipal building, even though the person has a valid permit to carry the firearm and carries it in compliance both with Iowa Code section 724.4(4)(i) and with any limitations specified in the permit.

Sincerely,

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Assistant Attorney General