MUNICIPALITIES: Building Code Requirements; Condominiums. Iowa Code §§103A.3(3), 103A.3(14), 499B.20 (2003). When the state building code is not applicable, Iowa Code section 499B.20 requires compliance with all local building regulations, not merely those regulations labeled as a local "building code," prior to conversion of existing apartments to condominiums. (Sheridan to Greimann, State Representative, 2-17-04) #04-2-1(L)

February 17, 2004

The Honorable Jane Greimann
State Representative
1518 - 13th Street
Ames, IA 50010

Dear Representative Greimann:

You have requested our opinion regarding whether compliance with all local building regulations, not merely those expressly entitled or referred to as "building code requirements," is a prerequisite to conversion of apartments to condominiums pursuant to Iowa Code section 499B.20. We conclude that, when the state building code is not applicable, all local building regulations must be complied with prior to conversion of preexisting apartments to a condominium.

Iowa Code chapter 499B regulates the establishment of horizontal property regimes, i.e. condominiums. An owner who wishes to convert an existing structure to condominiums must file a declaration with the city in which the regime is located or with the county, if the property is not located within a city, at least sixty days prior to recording the declaration with the county recorder, to enable the city or county to establish that the converted structure meets appropriate building code requirements as provided in Iowa Code section 499B.20. Iowa Code § 499B.3 (2003). If the city or county does not have a building code, then the declaration must be filed with the state building code commissioner to enable the commissioner to establish that the converted structure meets the state building code. Id.

As to property conversion, section 499B.20 provides:

> After April 25, 2000, an existing structure shall not be converted to a horizontal property regime unless the converted structure meets local city or county, as applicable, building code requirements in effect on the date of the conversion or the state building code

> requirements if the local city or county does not have a building code. For purposes of this section, if the structure is located in a city, the city building code applies and if the structure is located in the unincorporated area of the county, the county building code applies.

Iowa Code § 422B.20 (2003) (emphasis added).

Iowa Code chapter 103A governs the establishment, administration and enforcement of the state building code. The state building code commissioner is authorized to formulate, adopt or amend by rule minimum safeguards in the erection and construction of buildings and structures. Iowa Code §§ 103A.7, 103A.11 (2003). The state building code applies in each governmental subdivision which has enacted an ordinance accepting the applicability of the code and filed a certified copy of the ordinance with the commissioner. Iowa Code § 103A.12 (2003). Cities and counties also may, at any time after one year has elapsed since the code became applicable, adopt an ordinance withdrawing from the application of the state building code. Id.

Cities and counties which have not accepted applicability of the state building code or have withdrawn from application of the state building code may adopt by ordinance their own "building code" as well as other regulations relating to the erection and construction of buildings, e.g. plumbing code, mechanical code, electrical code, fire code. See 1982 Iowa Op. Att'y Gen. 331 (#82-1-8(L)); Iowa Code § 103A.22 (2003) (recognizing power of governmental subdivisions to enact building regulations). The question then becomes whether additional local building regulations, not specifically referred to as "building code," must also be complied with as "building code requirements" prior to conversion of a structure to condominiums pursuant to Iowa Code section 499B.20.

The phrase "building code requirements," although used in section 499B.20, is not defined in Iowa Code chapter 499B. For purposes of the state building code, "local building regulations" are defined within Code chapter 103A as "building regulations adopted by a governmental subdivision." Iowa Code § 103A.3(14) (2003). "Building regulations" are defined broadly to include:

> any law, bylaw, rule, resolution, regulation, ordinance, or code or compilation enacted or adopted, by the state or any governmental subdivision, including departments, boards, bureaus, commissions or other agencies, relating to the construction, reconstruction, alteration, conversion, repair or use of buildings and installation of equipment therein. The term shall not include zoning ordinances or subdivision regulations.

Iowa Code § 103A.3(3) (2003).

Building code requirements, and the section 499B.20 requirement that a horizontal building regime must be in compliance with building code requirements prior to condominium conversion, are designed to regulate conduct for the public good and welfare. The articulated public policy behind the promulgation and enforcement of a state building code is to "insure the health, safety, and welfare of [Iowa] citizens." Iowa Code § 103A.2 (2003). The state building code is "designed to establish minimum safeguards in the erection and construction of buildings and structures, to protect the human beings who live and work in them from fire and other hazards, and to establish regulations to further protect the health safety and welfare of the public." Iowa Code § 103A.7 (2003). Local city or county building codes and regulations, adopted in lieu of the state building code, have the same remedial purpose.

Legislation that regulates conduct for the public good or welfare is ordinarily considered remedial and entitled to liberal construction. See e.g., McCracken v. Iowa Dep't of Human Services, 595 N.W.2d 779, 784 (Iowa 1999); First Iowa State Bank v. Iowa Dep't of Natural Resources, 502 N.W.2d 164, 166 (Iowa 1993). The phrase "building code requirements," as used within section 499B.20, should not be narrowly read to include only those regulations specifically entitled or referred to as part of a "building code." See 7A E. McQuillin, The Law of Municipal Corporations § 24.511, at 106 (3rd ed.1998) ("Building codes and ordinances, being remedial, ordinarily should be construed liberally to effect their purpose"). Other building regulations adopted by a city or county relating to the erection and construction of buildings and furthering the purposes of a building code to protect the public health, safety and welfare should be included.

Since Iowa Code section 499B.20 provides for application of the state building code where there is no applicable local city or county building code, examination of the terms of the state building code is instructive. The broad statutory mandate for formulation of a state building code includes the requirement that reasonable provisions be adopted for the installation of equipment; construction materials; manufacture and installation of factory-built structures; protection of the health, safety, and welfare of occupants and users; accessibility and use by persons with disabilities and elderly persons; and energy conservation. Iowa Code §§ 103A.7(1)-(6) (2003); see also Iowa Code § 103A.8(1)-(8) (2003). Adoption by reference of national codes where appropriate is expressly authorized. Iowa Code § 103A.8(1) (2003).

The state building code adopts and incorporates, unless in conflict with other provisions of the code, a wide variety of other building regulations including the Uniform Building Code, National Electrical Code, Uniform Mechanical Code, Uniform Plumbing Code, Model Energy Code, and energy efficiency design specifications. 661 Iowa Admin. Code 16.120(1)-(7). Moreover, the state building code refers to additional requirements adopted by other state agencies including, for example, the state fire marshal. 661 Iowa Admin. Code 16.123(1); see also 661 Iowa Admin. Code chapter 5.

We believe the protection provided by the requirement in Iowa Code section 499B.20 that

condominium conversions comply with applicable city and county "building code requirements" should be no less comprehensive than the alternative requirement for compliance with the state building code when no local city or county building code is in place. Therefore, we conclude that, when the state building code is not applicable, Iowa Code section 499B.20 requires compliance with all local building regulations, not merely those regulations labeled as a local "building code," prior to conversion of existing apartments to condominiums.

Sincerely,

DAVID R. SHERIDAN
Assistant Attorney General
Environmental Law Division
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DRS/cj

COUNTY AND COUNTY OFFICERS; INCOMPATIBILITY OF OFFICES; CONFLICT OF INTEREST: County board of supervisors serving on governing board of 28E entity. Iowa Code § 331.216 (2003). The common law doctrine of incompatible offices is not applicable to dual service by county supervisors as self-appointed board directors of a city/county solid waste agency formed pursuant to Iowa Code chapter 28E. Iowa Code section 331.216 authorizes such dual service by county supervisors in self-appointed positions. We cannot determine in an opinion whether an impermissible conflict of interest has been created by participation of supervisors in zoning decisions affecting a city/county solid waste agency which they also serve as board members. (Smith to Lundby, State Senator, and Dandekar, State Representative, 11/24/04) #04-11-1(L)

November 24, 2004

The Honorable Mary Lundby
State Senator
P. O. Box 648
Marion, Iowa 52302

The Honorable Swati Dandekar
State Representative
2731 – 28th Avenue
Marion, Iowa 52302

Dear Senator Lundby and Representative Dandekar:

You have jointly requested an opinion from this office addressing whether the common law doctrine of incompatibility of offices is violated when two county supervisors serve as self-appointed members of the board of directors of a city/county solid waste agency. You have also asked whether the supervisors serving in such dual roles have an impermissible conflict of interest when participating, as county supervisors, in consideration of solid waste agency requests for zoning changes needed to enable expansion of its landfill.

I. Supervisors' dual service in appointive positions on a city/county solid waste agency board is authorized by Iowa Code section 331.216.

We do not determine whether the dual positions of county supervisor and city/county solid waste agency board member would be incompatible offices under common law precepts, as applicability of the common law of incompatible offices has been abrogated by a statute authorizing the type of dual service in question. Iowa Code § 331.216 (2003). Your opinion request acknowledges applicability of section 331.216. Our analysis assumes that the position of director on the board of the city/county solid waste agency is a public office. We need not determine whether that assumption is correct in light of the relationship between the common law doctrine of incompatibility of offices and section 331.216, which states:

> Unless otherwise provided by state statute, a supervisor may serve as a member of any appointive board, commission, or committee of this state, a political subdivision of this state, or a nonprofit corporation or agency receiving county funds.

Iowa Code § 331.216 (2003).

We have previously considered the relationship between section 331.216, the common law doctrines of incompatibility of public offices and conflict of interest. We have opined that enactment of section 331.216 effectively overruled the common law of incompatibility of public offices with regard to members of boards of supervisors serving in other appointive positions. We concluded that after enactment of section 331.216 county supervisors could appoint themselves as members of a county judicial nominating commission. 1986 Iowa Op. Att'y Gen. 15 (#85-3-5(L)). Similarly, we concluded that after enactment of section 331.216 county supervisors could appoint one of their own members to serve simultaneously on the county's conservation board without violating the doctrine of incompatible offices. Iowa Op. Att'y Gen. #01-4-4 (L) (2001 WL 34636269).

Thus, it is clear that after enactment of Iowa Code section 331.216, the common law doctrine of incompatibility of offices is not applicable to the appointment by a board of supervisors of two of its members to serve simultaneously on a city/county solid waste agency.

II. Where dual service is authorized it is likely that factors in addition to the dual service may be required to establish an impermissible conflict of interest.

Deputy Attorney General Julie F. Pottorff advised you in a letter dated August 27, 2004, that an opinion of this office could not resolve your questions concerning alleged conflicts of interest as such questions are dependent on facts that we are unable to determine through the opinion process. We referred you to the Linn County Attorney. Although we cannot answer your conflict of interest questions, we can identify principles relevant to resolution of the matter.[1]

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[1] Immediately prior to the release of this opinion we learned that a lawsuit has been filed by the City of Marion against the Linn County Board of Supervisors which alleges that the supervisors have a conflict of interest that disqualifies them from matters involving the city/county solid waste agency. We do not issue opinions on matters pending in litigation, because issuance of an opinion "could interfere with the authority" of the court to resolve the matter. *See* 61 Iowa Admin. Code 1.5(3)(a). Accordingly, in this circumstance, we leave to the court the application of conflict of interest principles. It is unlikely that our identification of the relevant principles in a conflict of interest analysis -- standing alone -- will interfere with the authority of the court to adjudicate the pending litigation.

Often conflicts of interest by government officials can be avoided by recusal. *See* Iowa Op. Att'y. Gen. #98-5-3 (1998 WL 289857). But, where two of the three-member board of county supervisors serve on the solid waste agency, a conflict of interest cannot easily be avoided by recusal of these officials from matters requiring action by the board of supervisors. Recusal under these circumstances would leave only one board member to make decisions in the matter.

The relevant authorities suggest that factors in addition to dual service may be required to establish a conflict of interest. The leading Iowa case on public officials' conflicts of interest is *Wilson v. Iowa City*, 165 N.W.2d 813 (Iowa 1969). The court affirmed a trial court judgment voiding city council actions on an urban renewal project because several of the participating council members had various conflicts of interest. One council member was determined to have a conflict of interest arising solely from his concurrent employment by the University of Iowa. The court noted that it was not necessary for a private financial advantage to create a prohibited conflict between the public duty of a council member and private employment. It was significant to the court that the University had "unusual and direct" interest in the urban renewal project and that the council member held a "position of influence as community development director" for the University. *Id*. 165 N.W. 2d at 822-23.

One year after the *Wilson* decision the Iowa Supreme Court rejected a claim that dual service by elected local officials as directors of a city/county solid waste agency constituted an unacceptable conflict of interest:

> Appellants further contend that the agreement creating the Agency is contrary to public policy to the extent that it permits elected officials of the member municipalities to serve on the governing board of the Agency. They argue that the integrity of representative government demands that the administrative officials should be able to exercise their judgment free from the objectionable pressure of conflicting interests. We agree with that proposition, but do not believe it appears here that these members of the Agency board are in such a position. It is conceded that there is nothing to indicate a personal pecuniary interest of those representatives is involved such as appears in *Wilson*.

Goreham v. Des Moines Metropolitan Area Solid Waste Agency, 179 N.W.2d 449, 462 (Iowa 1970) (citation omitted).

Analyzing *Wilson* and *Goreham*, we have commented that the relevant conflict can be more accurately described as a conflict of duties. And we have observed that in *Goreham* the court appeared to emphasize the fact that a public official serving on two local public boards with somewhat differing interests or concerns does not necessarily benefit that public official personally. 1982 Iowa Op. Att'y Gen 156 (#81-6-12(L)) (legislator's dual service on local transit agency board does not constitute prohibited conflict of interest). Similarly, we have opined that a prohibited conflict of interest does not result from city council members sitting as fence viewers in a dispute between the city and another landowner. 1982 Iowa Op. Att'y Gen. 207 (#81-8-15(L)). More recently, we contrasted *Wilson* and *Goreham,* noting that a government official who represents a governmental body on a separate 28E entity's governing board does not have an impermissible conflict of interest, at least absent litigation between the two entities. Iowa Op. Att'y Gen #98-1-3 (1998 WL 213719). Accordingly, it appears that factors in addition to dual service may be required to establish a conflict of interest.

Conclusion

In summary, the common law doctrine of incompatible offices is not applicable to dual service by county supervisors as self-appointed board directors for a city/county solid waste agency formed pursuant to Iowa Code chapter 28E. Iowa Code section 331.216 authorizes dual service by county supervisors in self-appointed positions. We cannot determine in an opinion whether an impermissible conflict of interest has been created by participation of supervisors in zoning decisions affecting a city/county solid waste agency on which they also serve as board members. In light of *Goreham* and section 331.216, we believe a court would likely consider whether there are additional factors which impact dual service by the county supervisors to establish a conflict of interest.

Sincerely,

Michael H. Smith
Assistant Attorney General

TAXATION: PROPERTY TAX: Levee and drainage district taxes; administrative fee. Iowa Code §§ 331.553, 446.7, 468.39, 468.50-468.51 (2003). The five dollar administrative fee authorized by Iowa Code section 331.553(4) is applicable to each special assessment for levee or drainage district benefits certified to the county treasurer. The administrative fee is added to the lien of the unpaid assessment on each tract, parcel or lot on which the assessment is levied. If payment in the amount of the entire outstanding lien, including the administrative fee, is not made in a timely manner, the property is subject to sale at the annual tax sale. (Smith to Matthews, Louisa County Attorney, 7-12-04) #04-7-1

July 12, 2004

David L. Matthews
Louisa County Attorney
Louisa County Courthouse
Wapello, IA 52653

Dear Mr. Matthews:

You have requested an opinion concerning Iowa Code section 331.553(4), which authorizes the county treasurer to charge a $5.00 administrative fee on special assessments certified as a lien to the treasurer for collection. Specifically, you present a series of questions regarding application of this provision to levee and drainage district improvement and maintenance taxes.

Pursuant to Iowa Code section 331.553(4)

> The treasurer may . . . [c]harge five dollars, as an administrative expense, for every rate, charge, rental, or special assessment certified to the treasurer for collection. This amount shall be added to the amount of the lien, collected at the time of payment from the payor, and credited to the county general fund.

Iowa Code § 331.553(4) (2003). Your first question is whether the administrative fee is applicable to levee and drainage district improvement and maintenance taxes certified to the county treasurer, pursuant to Iowa Code chapter 468. Stated otherwise, your question is whether levee and drainage district taxes are "special assessments."

We look first at the constitutional provision authorizing creation of drainage and levee districts. Article I, section 18 of the Iowa Constitution expressly authorizes the general assembly to pass laws creating drainage and levee districts and vesting districts with power to construct and maintain facilities "by special assessments on the property

benefitted thereby." Iowa Const. Article I, §18 (as amended in 1908 by the 13th Amendment to the Iowa Constitution). Iowa Code chapter 468 establishes procedures for the creation and operation of levee and drainage districts, including a detailed process for the classification and reclassification of parcels of land within the district based upon the benefit received by each tract and the assessment of the costs of construction, repair, and maintaining of district improvements. Iowa Code §§ 468.38 - 468.53, 468.65, 468.126-468.127, 468.184 (2003); *see Fisher v. Dallas County*, 369 N.W.2d 426, 428 (Iowa 1985). Throughout this statute, drainage district improvement and maintenance taxes are consistently referred to as "assessments" levied by a district on benefitted tracts of land within the district. *See, e.g.*, Iowa Code §§ 468.3(5), 468.38, 468.50, 468.99, 468.121, 468.127, 468.189 (2003).

Drainage and levee district assessments are to be levied by the governing board as a tax and certified by the board to the county treasurer. Iowa Code §§ 468.50, 468.56 (2003). Upon receipt of certification of the special assessment from the board, the county treasurer is authorized to enter the assessment in the county property tax system for collection. Iowa Code §§ 445.11, 468.53 (2003). A special assessment levied by a drainage or levee district is made a lien on the benefitted parcel against all owners except the state. Iowa Code §§ 445.28, 468.51, 468.60 (2003). Thus, we conclude that drainage and levee district taxes certified to the county treasurer as liens are included in the term "special assessments" as used in section 331.553(4). This construction of the term "special assessments" is consistent with the purpose for authorizing the administrative fee, which is to offset the treasurer's expenses in administering the system for collection of various classes of assessments in the same manner as other taxes on real estate.

Your second question is whether an unpaid administrative fee subjects the real estate to potential tax sale. Section 331.553(4) expressly provides that the $5.00 administrative fee "shall be added to the amount of the lien" of a special assessment that is certified to the treasurer. Thus, the administrative fee added by the treasurer to a special assessment certified by a drainage or levee district is a lien against the tract, parcel or lot on which the special assessment was levied and included in the property taxes collected pursuant to Code chapter 445. *See* Iowa Code § 445.1(6), (7) (2003) (for purposes of tax collection statutes, the term "taxes" is defined to include "an annual ad valorem tax, a special assessment, a drainage tax, a rate or charge, and taxes on homes pursuant to chapter 435 . . .," and the "total amount due" is "the aggregate total of all taxes, penalties, interest, costs, and fees due on a parcel"). If any part of the combined amount is not timely paid, the tax becomes delinquent, and the tract, parcel or lot is subject to sale at annual tax sale. Iowa Code § 446.7 (2003).

Your third question is whether it would be appropriate to charge the administrative fee per parcel of real estate or per individual taxpayer. Levee and drainage district special assessments are based upon the benefits received by individual tracts, parcels or lots of real estate. *See, e.g.*, Iowa Code §§ 468.39 (for purposes apportionment of benefits, all lands within the district are to be classified "in tracts of forty acres or less according to the legal or recognized subdivisions"); 468.49 (in the event any tract, lot, or parcel is divided into two or more tracts, "the classification of the original tract shall be apportioned to the resulting parcels . . ."") (2003). The board certifies to the treasurer the amount of the special assessment against a specific tract, parcel or lot. Iowa Code § 468.50 (assessment levied upon "tract, parcel or lot within the district") (2003). The authorization in section 331.553(4) is to add a $5.00 administrative fee to the amount of the certified assessment. The statute clearly makes the administrative charge applicable to the certified special assessment levied on each tract, parcel or lot.

In summary, we conclude that the five dollar administrative fee authorized by Iowa Code section 331.553(4) is applicable to each special assessment for levee or drainage district benefits certified to the county treasurer. The administrative fee is added to the lien of the unpaid assessment on each tract, parcel or lot on which the assessment is levied. If payment in the amount of the entire outstanding lien, including the administrative fee, is not made in a timely manner, the property is subject to sale at the annual tax sale.

Sincerely,

Michael H. Smith
Assistant Attorney General

CITIES: Home Rule; regulation of precursor substances. Iowa Const. art. III, § 38A; Iowa Code ch. 124B; Iowa Code § 364.1 (2003); 2004 Iowa Acts, 80th G.A., ch. 127. A city in Iowa may legitimately exercise its home rule power by enacting an ordinance requiring local retail vendors to record the name and address of persons who purchase identified methamphetamine precursor substances. (Scase to Van Haaften, Director, Office of Drug Control Policy, 6-9-04) #04-6-1

June 9, 2004

Marvin L. Van Haaften
Office of Drug Control Policy
Office of the Governor
State Capitol
Des Moines, Iowa 50319

Dear Mr. Van Haaften:

You have asked for a formal opinion from this office regarding the legality of Ordinance -02-03 proposed by the City of Hazleton. Specifically, you ask whether the city has authority to enact an ordinance that categorizes seven substances as methamphetamine precursors, imposes record keeping requirements on local retail vendors of products containing these substances, and levies fines for violations. As discussed below, we conclude that the proposed ordinance represents a legitimate exercise of the city's home rule power and is not preempted by state law.

In determining whether the City of Hazleton has the power to adopt this ordinance we focus upon two concepts: (1) the city's home rule authority to exercise police powers; and (2) the State's ability 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.

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"). "An action taken pursuant to this provision is an exercise of a city's police power." Home Builders Ass'n. Of Greater Des Moines v. City of West Des Moines, 644 N.W.2d 339, 345 (Iowa 2002). Police power refers to a municipality's "broad, inherent power to pass laws that promote the public health, safety, and welfare." Gravert v. Nebergall, 539 N.W.2d 184, 186 (Iowa 1995).

In order to constitute a legitimate exercise of police power, an ordinance "must have a definite, rational relationship to the ends sought to be served by the ordinance." Goodenow v. City Council of Maquoketa, 574 N.W.2d 18, 23 (Iowa 1998). Limitations on the exercise of police power were detailed by the United States Supreme Court more than a century ago.

> [T]he state may interfere whenever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Lawton v. Steele, 152 U.S. 133, 136-7, 14 S. Ct. 499, 501, 38 L. Ed. 385, 388 (1894). Reasonableness is the benchmark for assessing the scope of police power.

"There can be no question of the authority of the state in the exercise of its police power, to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs..." Whipple v. Martinson, 256 U.S. 41, 45, 41 S. Ct. 425, ___, 65 L. Ed. 819, 822 (1921). Similarly, statutes and municipal ordinances regulating the advertising, display, and sale of drug paraphernalia have been found to relate to the legitimate municipal goal of protecting the public

welfare. 7 E. McQuillin, Municipal Corporations § 24.240.50 (3rd ed. 1997); see Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982) (upholding city drug paraphernalia ordinance which prohibited sales to minors and required retailer to obtain a license, screen employees for drug offenses, and keep a record of each sale of a regulated item – including the name and address of the purchaser – to be open for police inspection). In light of the Flipside rationale, we believe a court would likely conclude that protecting the public by monitoring the sale of methamphetamine precursor substances is consistent with the proper goal of an exercise of police power – protection of the public health and welfare.[1]

We do not, however, address the reasonableness of the inclusion or exclusion of any particular substance from the list of methamphetamine precursors within the proposed Hazelton ordinance. This determination may be based upon the connection each substance has to the manufacture of methamphetamine – or likelihood that the substance may be used for this illegal purpose, the availability of the substance, and the extent to which the substance has legitimate uses. See Iowa Code § 124B.2(2) (2003) (setting forth the factors to be considered by the Board of Pharmacy Examiners in determining whether to add or remove a substance from the list of substances to which the state reporting requirement applies). These are fact-based inquiries which are not appropriately resolved through an opinion from this office. 61 Iowa Admin. Code 1.5(3)(c).

Having concluded that a city's home rule authority to exercise police power encompasses monitoring the sale of methamphetamine precursor substances, we now examine whether statewide regulation of this area preempts the proposed ordinance. See Goodenow v. City Council of Maquoketa, 574 N.W.2d at 25. 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, § 38A. "A local ordinance, however, is *not* inconsistent with a state law unless it is *irreconcilable* with the state law." BeeRite Tire Disposal/Recycling, Inc. v. City of Rhodes, 646 N.W.2d 857, 859 (Iowa 2002) (emphasis original), citing Goodell v. Humboldt County, 575 N.W.2d 486, 500 (Iowa 1998) and Iowa Code § 364.2(2). Preemption may be express or implied.

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[1] We caution, however, that although monitoring of the sale of precursor substances appears to be a legitimate use of municipal police powers, the purchase or possession of identified precursors is not in itself criminal activity. A person commits a crime only if the person possesses the substance "with the intent to use the product to manufacture [a] controlled substance." Iowa Code § 124.401(4) (2003); see United States v. Weston, 4 F.3d 672, 674 (8th Cir. 1993), accord State v. Baker, 666 N.W.2d 620 (table), 2003 WL 1971823 (Iowa App. 2003) ("It is not illegal to possess pseudoephedrine if there is no evidence of intent to use the pseudoephedrine to manufacture methamphetamine").

> Express preemption occurs when the general assembly has specifically prohibited local action in an area. Obviously, any local law 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 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 (internal citations and quotations omitted).

The Iowa general assembly enacted a statute requiring the reporting of certain sales of methamphetamine precursor substances in 1990. 1990 Iowa Acts, 73 G.A., ch. 1251, §§ 10-21. This statute, now codified as Iowa Code chapter 124B, requires a report to the Board of Pharmacy Examiners from anyone who "sells, transfers, or otherwise furnishes to any person" in Iowa one of the precursor substances listed in subsections 124B.2(2)(a) through (w). The list includes pseudoephedrine and red phosphorus, two substances which are also included on the list of products covered by the Hazelton ordinance. Prior to "selling, transferring, or otherwise furnishing" any of the listed substances, the vendor "shall require proper identification from the purchaser," which includes production of a driver's license and "motor vehicle license number of the vehicle owned or operated by the purchaser." Iowa Code § 124B.3(2)(a) (2003). This personal identifying information is then forwarded to the Board along with the report of the sale. The statute is not comprehensive and specifically exempts certain sales, including

> [a] sale, transfer, furnishing, or receipt of a drug containing ephedrine....pseudoephedrine or of a cosmetic containing a precursor substance if the drug or cosmetic is lawfully sold, transferred, or furnished over the counter without a prescription in accordance with chapter 126.

Iowa Code § 124B.6(4) (2003). Chapter 124B contains no express limitation on monitoring of the sale of methamphetamine precursors by political subdivisions. Therefore, this chapter does not expressly preempt local legislation on this subject.

In addition, during the past legislative session the general assembly enacted a statute regulating the retail display and sale of products containing pseudoephedrine as the sole ingredient. 2004 Iowa Acts, 80 G.A., ch. 127. The new provision, to be codified as Iowa Code section 126.23A, requires these products to be displayed "behind the counter," or within view of

the counter, or with an anti-theft devise; prohibits the sale or purchase of more than two packages of the products; requires retailers to post a notice regarding the two package limitation; and designates the sale or purchase of more than two packages of a product containing pseudoephedrine as the sole ingredient as a simple misdemeanor. Id. at § 1. Regarding local regulation, the act provides:

> Enforcement of this section shall also be implemented uniformly throughout the state. For purposes of uniform implementation, a county or municipality shall not set requirements or establish a penalty which is higher or more stringent than the requirements or penalties enumerated in this section.

Id., to be codified as Iowa Code § 126.23A(6)(b).

Subsection (6)(b) of new Code section 126.23A does expressly preempt local ordinances which impose requirements more stringent or penalties higher "than the requirements or penalties enumerated in [section 126.23A]" The new law does not, however, govern the same subject matter as the Hazelton ordinance. The ordinance imposes monitoring requirements, including verification of identity and maintenance of a log of sales, upon retailers who sell listed methamphetamine precursors. Section 126.23A will only regulate display and the quantity of sales and purchases of products containing pseudoephedrine as the sole ingredient. Because the activities regulated by the ordinance are different from the activities regulated by section 126.23A, we do not believe that the express limitation on local authority contained in section 126.23A(6)(b) would be interpreted by the Iowa Court as preempting the Hazelton ordinance. Compare Goodell v. Humboldt County, 575 N.W.2d at 494- 497 (concluding that expressed statutory prohibition upon the application of zoning regulations to land and buildings used for agricultural purposes did not expressly preempt other forms of county regulation of rural land use); with James Enterprises, Inc. v. City of Ames, 661 N.W.2d 150 (Iowa 2003) (holding that local ordinance prohibiting the designation of smoking areas in public places was expressly preempted by state statute regulating smoking in public places which expressly allowed the designation of smoking areas under certain conditions and preempted local regulation inconsistent or in conflict with the statute).

Having concluded that neither Iowa Code chapter 124B nor section 126.23A expressly preempts the proposed Hazelton ordinance, we must examine whether the statutes impliedly restrict local regulation. As noted above, implied preemption occurs in one of two ways: (1) if the state statute comprehensively covers a subject in a manner that shows legislative intent to preempt the field by state law; or (2) if the local regulation prohibits an act permitted by statute or permits an act prohibited by statute. Goodell v. Humboldt County, 575 N.W.2d at 492.

The proposed ordinance governs the transfer or sale of methamphetamine precursors. In section 2, the Hazleton City Council lists seven substances which are deemed to be "controlled substance precursors." Any person who sells, transfers or otherwise passes for consideration "any

substances containing the above described controlled substance precursors" must require the purchaser/receiver to produce photo identification and provide his or her name, address and telephone number. The vendor must keep this identifying information in a log "that shall be accessible to any law enforcement officer upon request." Although the ordinance does not apply to persons who "purchase one pre-packaged unit of substances containing pseudoephedrine," the vendor is authorized to require the identifying information when selling "only one package unit pseudoephedrine...". The ordinance contains remedies including a monetary fine and injunctive relief for violations.

We do not believe that Iowa Code chapter 124B addresses methamphetamine precursors in an all-encompassing or comprehensive manner that would indicate an intent to preempt or otherwise restrict local regulation on the same topic. The statute requires reporting of sales or transfers only to the Board of Pharmacy Examiners and does not expressly limit the authority of a political subdivision to enact regulations restricting the transfer of methamphetamine precursors or requiring the collecting of identifying information when a transfer of precursors occurs. We recognize that the statute and ordinance may both apply to a transaction involving the sale of a precursor substance. For example, pseudoephedrine or red phosphorus are identified as methamphetamine precursors by both the statute and the ordinance. This dual applicability does not necessarily creates an inconsistency between the ordinance and the statute. See BeeRite Tire Disposal/Recycling, Inc. v. City of Rhodes, 646 N.W.2d at 860-61 (upholding a city ordinance which imposed additional restrictions for tire recycling upon a corporation which was operating in the city under a DNR permit; noting that the ordinance merely enhanced already enforceable restrictions, did not attempt to bypass, contradict or override the state permitting process, and promoted the underlying policy of the state statutory scheme).

The Hazleton ordinance neither prohibits an act that is permitted by Iowa Code chapter 124B nor permits an act that is prohibited by the statute. Rather, the ordinance merely further regulates already regulated transactions, "thereby further promoting the underlying policy of [chapter 124B], but with greater force." BeeRite Tire Disposal/Recycling, Inc. v. City of Rhodes, 646 N.W.2d at 860. We do not believe that the ordinance is "irreconcilable with" Iowa Code chapter 124B. Similarly, as discussed above, new Iowa Code section 126.23A is not a comprehensive regulation or in direct conflict with the proposed ordinance. Therefore, we conclude that neither of these statutes impliedly preempts the proposed Hazelton ordinance.

Our conclusion is further supported by the strong policy on which Iowa courts rely to harmonize state and local regulatory schemes when public protection is at stake:

> In 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. 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.

Iowa Op. Att'y Gen. #00-11-5, at p. 2 (internal citations omitted). Hazleton Ordinance 02-03 by its express terms aims to protect the public against the "increase of crime, mental illness, and behavior contrary to the best interest of citizens" occasioned by the rampant production and use of methamphetamine.

In summary, we conclude that a city in Iowa may legitimately exercise its home rule power by enacting an ordinance requiring local retail vendors to record the name and address of persons who purchase identified methamphetamine precursor substances and that such an ordinance is not preempted by state law. We do not address the reasonableness of the inclusion or exclusion of any particular substance from the list of methamphetamine precursors within the proposed Hazelton ordinance.

Sincerely,

Christie J. Scase
Assistant Attorney General

GARNISHMENT: Effect of expiration or return of writ of execution for wage garnishment on levying. Iowa Code §§ 626.16, 626.27, 642.22(1)(b) (2003). Levying under a writ of execution for wage garnishment is possible until the earlier of (1) the writ's return, or (2) the seventy-day time frame prescribed by Iowa Code section 626.16 expires. Return of the writ does not prevent remaining acts or events involved in or attendant to disbursing or releasing the funds collected under that writ from continuing. Assuming the garnishor's underlying judgment is not fully satisfied from the funds collected under an initial writ, wage garnishment may continue by levying under a new writ or new series of writs-upon proper notice-until the judgment is satisfied or expires, whichever occurs first. (Vaudt to Walk, Mitchell County Attorney, 7-12-04)
04-7-2(L)

July 12, 2004

Mark L. Walk
Mitchell County Attorney
515 State Street
Osage, Iowa 50461-1249

Dear Mr. Walk:

You have requested an opinion from this office addressing when a writ of execution for wage garnishment ("writ") is no longer effective. Specifically, you cite a potential inconsistency between Iowa Code section 642.22(1)(b), providing that a notice of garnishment ("notice") remains effective only until a companion writ expires, and Iowa Code section 626.27, providing that "proceedings by garnishment on execution shall not be affected by its expiration or its return." In light of the potential conflict between these two statutes, you ask whether levying under a writ must cease when writ expires or is returned.

As detailed below, we conclude that levying under a writ must cease upon the earlier of (1) the writ's return, or (2) the expiration of seventy days from the date the writ issues. Return or expiration of the writ does not prevent remaining acts or events involved in or attendant to disbursing or releasing the funds collected prior to return or expiration of the writ from continuing. If the underlying judgment is not fully satisfied after those funds are applied, garnishment may continue under successive writs, upon proper notice, until satisfaction is complete or the judgment expires under the applicable statute of limitation.

Iowa Code section 642.22, which you reference within your request letter, includes the following provision regarding the validity of a garnishment notice:

> 1. A notice of garnishment served upon a garnishee is effective without serving another notice until the earliest of the following:
> a. The annual maximum permitted to be garnished under section 642.21 has been withheld.
> b. *The writ of execution expires.*

> c. The judgment is satisfied.
> d. The garnishment is released by the sheriff at the request of the plaintiff or the plaintiff's attorney.
> * * *
> 3. Expiration of the execution does not affect a garnishee's duties and liabilities respecting property already withheld pursuant to the garnishment.

Iowa Code § 642.22(1), (3) (2003) (emphasis added). As provided by section 626.16, a writ of execution expires on the seventieth day after the date of its issuance.

> Every officer to whose hands an execution may come shall give a receipt therefor, if required, stating the hour when the same was received, and shall make sufficient return thereof, together with the money collected, on or before the seventieth day from the date of its issuance.

Iowa Code § 626.16 (2003) (emphasis added).

Although no reported cases analyzing section 626.16 and its predecessors squarely address the question you raise, one consistent theme emerges from them: levying under a writ must occur within the time frame prescribed by section 626.16. See Cox v. Currier, et al., 62 Iowa 551, 554-55, 17 N.W. 767, 769 (1883) (sale of property after expiration of seventy days held valid as long as levy under writ occurred before expiration of seventy days); Merritt, et al. v. Grover, 57 Iowa 493, 495, 10 N.W. 879, 880 (1881) ("[A]n execution has sufficient life to sustain a sale made after the return-day, if the levy was made before."); Wright v. Howell, et al., 35 Iowa 288, 295, 1872 WL 392, *4 (1872) ("It being shown that a levy was made, this court will not presume that the officer entrusted with the execution of the writ, in violation of his duty, levied it after the return day." (emphasis added)); Moomey v. Mass, 22 Iowa 380, 386-87, 1867 WL 200, *4 (1867) (If a levy is made during a writ's lifetime, a sale thereunder will be valid, although made after the execution itself has been returned.).

After the seventieth day from the date a writ is issued, the writ becomes ineffective and the sheriff's ability to levy under it is lost. However, if the garnishor's judgment underlying that writ remains unsatisfied after applying the funds collected under that writ, levying may continue under a new writ or series thereof - upon proper notice -until the judgment is satisfied or expires, whichever occurs first. See Iowa Code §§ 626.2 ("executions may issue at any time before the judgment is barred by the statute of limitations"); 626.3 ("only one execution shall be in existence at the same time"); 642.14 (requiring ten-days' notice of garnishment proceedings); 642.19 ("docketing of the original case shall contain a statement of all the garnishments therein . . ." (emphasis added)); 642.22(1) (listing events which render notice of garnishment ineffective) (2003); see also Conklin v. Iowa Dist. Ct., 482 N.W.2d 444, 446 (Iowa 1992) (noting successive wage garnishments on defendant's employer); Lundy v. O'Connor, 246 Iowa 1231, 1233, 71 N.W.2d 589, 590 (1955) (same).

Levying a garnishee under an ineffective writ subjects a sheriff to potential liability

to the garnishee, defendant, intervenors, and others if they can show they have been harmed thereby. See, e.g., Musser & Porter v. Maynard, et al., 55 Iowa 197, 198, 6 N.W. 55, 55 (1880) ("If by reason of the [sheriff's] delay [in returning a writ] the plaintiffs were in any manner prejudiced, or hindered, prevented, or delayed, in the collection of their judgment, it is probable an action would lie."). Liability for levying under these circumstances includes but is not limited to claims for trespass, conversion, wrongful attachment, abuse of process and execution based upon wrongful garnishment. Similar concerns arise if the sheriff fails to return a writ, or returns it without attempting to levy under it. See, e.g., Erb-Kidder Co. v. Levy, 262 Mich. 62, 66, 247 N.W. 107, 108 (1933) (garnishment writ attempting to attach funds accumulated under prior writs, without prosecuting the prior writs, found to be "a clear perversion of civil process").

You question whether Code section 626.27 and the court's analysis in Dunham v. Bentley, 103 Iowa 136, 72 N.W. 437 (1897), suggest that levying can continue under an expired writ until the underlying judgment is satisfied. For the following reasons, we conclude that section 626.27 - when examined in the light of other statutes and court rules relating to garnishment - creates no conflict with section 626.16 and does not warrant the conclusion you suggest. See Iowa Dep't of Transp. 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).

Section 626.27 provides that "[p]roceedings by garnishment on execution shall not be affected by its expiration or return." Iowa Code § 626.27 (2003). The phrase "its expiration or return" refers to the expiration or return of a writ. "Proceedings by garnishment on execution" is undefined. What the legislature intended by this phrase must consequently be determined by resorting to a dictionary definition of the word "proceeding." See, e.g., American Legion v. Cedar Rapids Bd. of Review, 646 N.W.2d 433, 437-38 (Iowa 2002) (courts may employ dictionary definitions in interpreting undefined statutory terms). Black's relevantly defines proceeding as "[t]he regular and orderly progression of a lawsuit, *including all acts and events between the time of commencement and the entry of judgment*." Black's Law Dictionary 1221 (7th ed. 1999) (emphasis added). Applying this definition to section 626.27 by analogy, it becomes evident that the legislature intended the phrase "proceedings by garnishment on execution" to include all post-writ acts and events involved in or attendant to the ultimate disbursement or release of funds properly garnished under the writ. A writ's expiration or return does not prohibit these acts and events from continuing to conclusion.

We believe this is a reasonable, practical interpretation best effectuating the purpose of section 626.27 and the remedial purposes of garnishment statutes as a whole. We also believe this interpretation of section 626.27 is fully consistent with subsection 3 of section 642.22, which, as set forth above, provides "[e]xpiration of the execution does not affect a garnishee's duties and liabilities respecting property already withheld pursuant to the garnishment." Iowa Code § 642.22(3) (2003). A contrary interpretation of section 626.27 under a more expansive definition of proceeding would eviscerate sections 626.16 and 642.22(1)(b), defeat the intended remedial purpose of garnishment statutes, and impose an unnecessary burden conflicting with the legislative goals sought to be accomplished by these statutes. See, e.g., Albrecht v. General Motors Corp., 648

N.W.2d 87, 95 (Iowa 2002) (courts give statutes construction effecting purposes behind statutes); IBP, Inc. v. Harker, 633 N.W.2d 322, 325 (Iowa 2001) (courts strive to give statutes reasonable interpretations which serve statutory goals); Hopping v. Hopping, 233 Iowa 993, 1006, 10 N.W.2d 87, 94 (1943) (garnishment statutes are remedial and are construed liberally).

Further, a close reading of the Dunham case, which you cite in your request letter, supports this interpretation of sections 626.27 and 642.22. In Dunham, the garnishor was awarded a money judgment against the defendant. Successive writs ultimately were issued, timely levied upon by the sheriff, and timely returned. Funds encumbered under each writ were turned over to the clerk. Competing claims to the funds gathered under the second writ then arose and were litigated. On appeal the second writ was declared void for lack of a sufficient endorsement, and the funds encumbered thereunder were returned to the garnishee. The court found the defective second writ no impediment to continuing "the garnishment proceedings" commenced under the first writ to determine the proper disposition of the funds gathered under that writ.

> Nor did the return of the first execution in any way affect the garnishment proceedings. The proceeds thereof [encumbered under the valid first writ] may be readily appropriated, under the order of the court, to the satisfaction of the judgment, without the use of the original execution. No question is made as to the sufficiency of the [e]ndorsement on the first execution, and any property held by [the garnishee] . . . must be accounted for thereunder.

Dunham, 103 Iowa at 103, 72 N.W at 438 (citations omitted) (emphasis added). The first writ, issued August 19, 1893, was returned by the sheriff on October 4, 1893- approximately 46 days after it was issued. Return complied with Iowa Code section 3037 (1873), the functional equivalent of today's Iowa Code section 626.16:

> [e]very officer to whose hands an execution may legally come shall give a receipt therefore, if required, stating the hour when the same was received, and shall make sufficient return thereof, together with the money collected, on or before the seventieth day from such delivery.

Iowa Code § 3037 (1873) (emphasis added).

The Dunham court's statement that return of the first writ did not "affect the garnishment proceedings" was not a holding that levying could continue under an ineffective writ until the underlying judgment was satisfied. Rather, in context the observation meant that garnishment proceedings, instituted while the first writ was in place, were not stayed by the writ's subsequent return. In other words, distribution of the funds gathered under the writ, challenges to condemnation and distribution of the funds, and litigation regarding any other issues related to the encumbered funds can continue after a writ is returned. Legal process in the form of the writ and the authority to levy additional funds under it ends upon expiration or return of the writ, but the underlying

garnishment proceedings based upon this legal process can continue to completion.

In summary, levying under a writ of execution for wage garnishment is possible until the earlier of (1) the writ's return, or (2) the seventy-day time frame prescribed by Iowa Code section 626.16 expires. Section 626.27 and the Dunham holding support this conclusion and do not, by implication, permit levying a garnishee under an expired or returned writ. Return of the writ does not prevent remaining acts or events involved in or attendant to disbursing or releasing the funds collected under that writ from proceeding. Assuming the garnishor's underlying judgment is not fully satisfied from the funds collected under an initial writ, wage garnishment may continue by levying under a new writ or a new series of writs upon proper notice until the judgment is satisfied or expires, whichever occurs first.

Sincerely,

Jeanie K. Vaudt
Assistant Attorney General

INCOMPATIBILITY OF OFFICES: Mayor and deputy sheriff. Iowa Code §§ 331.652(7); 331.903(4); 372.14 (2003). A deputy sheriff does not hold a "public office" for purposes of the incompatibility doctrine. Accordingly, the mayor of a city could simultaneously serve as a deputy sheriff for the county in which the city is located. To the extent that the 1912 Op. Att'y Gen. 276 and 1978 Op. Att'y Gen. 325 conflict with this opinion by holding that the position of deputy sheriff is an office, they are overruled. (Odell to Whitacre, Mills County Attorney, 3-22-04) #04-3-1

March 22, 2004

C. Kenneth Whitacre
Mills County Attorney
Mills County Courthouse
418 Sharp Street
Glenwood, Iowa 51534

Dear Mr. Whitacre:

You have requested an opinion concerning a compatibility of office issue. Specifically, you ask whether the positions of mayor of a city and deputy sheriff of the county in which the city is located are compatible. As you note, an opinion of the Attorney General issued in 1911, 1912 Op. Att'y Gen. 276, concluded that these two positions were incompatible. Because we believe that the conclusion of the prior opinion is clearly erroneous, we overrule the prior opinion and conclude that the two positions are compatible.

In 1992, we highlighted the difference between the doctrines of "incompatibility" and "conflict of interest" as follows:

> 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 officer 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 the given fact situation.'

1992 Op. Att'y Gen.150, 150-151 (internal 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 -- presents a purely legal question. 1982 Op. Att'y Gen. 220, 221.

Because an issue of incompatibility arises only if there is inconsistency in the functions of two "public offices," resolution of your inquiry hinges on the initial determination whether the position of deputy sheriff is a "public office." See State ex rel. LeBuhn v. White, 257 Iowa 606, 609, 133 N.W.2d 903, 905 (Iowa 1965); 1982 Op. Att'y Gen. at p. 224 (the incompatibility

doctrine is applicable only if the two positions involved are both public offices). While there is no Iowa statute or case directly on point, two prior opinions of the Attorney General address the compatibility of the position of deputy sheriff with specific public offices. In 1912 Op. Att'y Gen. 276, the question you pose was presented and the Attorney General concluded, without analysis, that the position of deputy sheriff is incompatible with that of mayor. Similarly, in 1978 Op. Att'y Gen. 325, the Attorney General concluded, again without analysis, that the positions of deputy sheriff and city council member are incompatible.

More than a century ago, in State v. Spaulding, 102 Iowa 639, 72 N.W. 288 (1897), the Iowa Supreme Court set forth guidelines which it has consistently used to distinguish a public office from a mere position of public employment. These guidelines establish five essential elements required to make a public employment a public office. All of these essential elements must exist:

> (1) the position must be created by the constitution or legislature, or through authority conferred by the legislature;
> (2) a portion of the sovereign power of government must be delegated to that position;
> (3) the duties and powers must be defined directly or impliedly by the legislature or through legislative authority;
> (4) the duties must be performed 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 and occasional.

VanderLinden v. Crews, 205 N.W.2d 686, 688 (Iowa 1973), citing State v. Taylor, 260 Iowa 634, 639, 144 N.W.2d 289, 292 (Iowa 1966) and State v. Spaulding, 102 Iowa at 647, 72 N.W. at 290.

Although the position of deputy sheriff meets some of these elements, the position fails to meet at least two of the five elements. The position of deputy sheriff is created "through authority conferred by the legislature" and meets the first element of the public office analysis. See Iowa Code § 331.652(7) (2003) (county sheriff authorized to appoint "deputies, assistants and clerks," subject to the approval of the county board of supervisors and governing civil service law). A deputy sheriff, however, is not statutorily authorized to independently execute a portion of the sovereign power of government without control of a superior other than the law. Rather, a deputy sheriff performs duties as assigned by the sheriff, subject to the supervision and control of the sheriff. See Iowa Code §§ 331.903(4) (2003). The sheriff defines the role of a deputy sheriff who must perform the duties assigned by the sheriff. Iowa Code § 331.903(4) (2003). See 1996 Op. Att'y Gen. 97 (#96-10-2(L)) (concluding that a city reserve police officer is not a public office holder for purposes of the doctrine of incompatibility of offices). Thus, a deputy sheriff

does not exercise unsupervised sovereign power – the hallmark of a public office. See State v. Pinckney, 276 N.W.2d 433, 436 (Iowa 1979).

Further, the position of deputy sheriff has no permanency or continuity. It is within the initial discretion of the sheriff to determine whether a deputy sheriff should be appointed and to hire a specific applicant subject to the approval of the county board of supervisors and applicable civil service rules. Iowa Code §§ 331.652(7) and 331.903(1), and Iowa Code ch. 341A (2003). Subject to the civil service provisions of Iowa Code chapter 341A, the sheriff has authority to "remove" any specific deputy sheriff or, presumably, abolish the position of deputy at any time without legislation. See Iowa Code § 331.652(7) (2003); State v. Pinckney, 276 N.W.2d at 436. While the sheriffs of many larger counties in Iowa could not realistically perform their statutory duties without the aid of at least one deputy sheriff, the position of deputy sheriff is not a "public office" merely because it is necessary or of long-standing duration. A public office is "de jure in its creation. It is not established by de facto operation." State v. Pinckney, 276 N.W.2d at 436.

The position deputy sheriff fails to meet several of the elements of a public office, as defined by the Iowa Supreme Court. Therefore, we must conclude the position is not a public office for purposes of the incompatibility analysis and that the position of deputy sheriff cannot be "incompatible" with the office of mayor.

Although we conclude that the position of deputy sheriff is not incompatible with the office of mayor of a city in the county where the deputy is employed, we caution that conflicts of interest may arise as to specific issues which preclude a deputy sheriff, while serving as mayor, from acting upon matters directly impacting the sheriff's department. However, because allegations of conflict may only be resolved by considering the facts surrounding a particular action or set of actions, we make no attempt to identify every potential conflict which might arise. Rather, we caution that an individual serving in these two positions should remain vigilant for conflicts, abstain from acting as mayor when appropriate, and seek advice from the city attorney if in doubt regarding the existence of a conflict in a specific situation.

In summary, we conclude that a deputy sheriff does not hold a "public office" for purposes of the incompatibility doctrine. Accordingly, the mayor of a city could simultaneously serve as a deputy sheriff for the county in which the city is located. To the extent that the 1912 Op. Att'y Gen. 276 and 1978 Op. Att'y Gen. 325 conflict with this opinion by holding that the position of deputy sheriff is an office, they are overruled.

Sincerely,

Cristen C. Odell
Assistant Attorney General