SANITARY DISPOSAL PROJECT: Solid waste transfer station. Iowa Code §§ 455B.301, 455B.305 (1999). Solid waste transfer stations are sanitary disposal projects within the meaning of Iowa Code section 455B.301(18) (1999) for which permits are required pursuant to Iowa Code section 455B.305 (1999). (Doff to Asell, Interim Director, Iowa Department of Natural Resources, 11-29-00) #00-11-6(L)

November 29, 2000

Lyle W. Asell, Interim Director
Iowa Department of Natural Resources
Wallace State Office Building
L O C A L

Dear Mr. Asell:

You have requested an opinion of the Attorney General concerning the requirements for operation of solid waste transfer stations in Iowa. Specifically, you ask whether solid waste transfer stations are required to obtain permits from the Department of Natural Resources (DNR) pursuant to Iowa Code section 455B.305 as "sanitary disposal projects" as defined in Iowa Code section 455B.301(18).

Iowa Code section 455B.305 provides that "[t]he director[1] shall issue, revoke, suspend, modify, or deny permits for the construction and operation of sanitary disposal projects." Iowa Code § 455B.305(1) (1999). The term "sanitary disposal project" is defined by statute as "all facilities and appurtenances including all real and personal property connected with such facilities, which are acquired, purchased, constructed, reconstructed, equipped, improved, extended, maintained, or operated to facilitate the final disposition of solid waste without creating a significant hazard to the public health or safety, and which are approved by the executive director." Iowa Code § 455B.301(18) (1999) (emphasis added).

The term "transfer station" is defined by Department rules as

[1] As used in Iowa Code chapter 455B, "'[d]irector' means the director of the department or a designee." Iowa Code § 455B.101(2) (1999). "'Department' means the department of natural resources created under section 455A.2." Iowa Code § 455B.101(1) (1999).

"a fixed or mobile intermediate solid waste disposal facility for transferring loads of solid waste, with or without reduction of volume, to another transportation unit." 567 IAC 100.2. You indicate in your letter that transfer stations ordinarily vary from semi-trailers that accept loads directly from other trucks, to permanent facilities that sort waste to remove recyclables, compact the solid waste, and reload it for transportation. The narrow issue then is whether transfer stations are facilities used to facilitate the final disposition of solid waste.

In interpreting statutes, the ultimate goal is to give effect to the legislature's intent. T & K Roofing Co. v. Iowa Department of Education, 593 N.W.2d 159, 162 (Iowa 1999); Bernau v. Iowa Department of Transportation, 580 N.W.2d 757, 761 (Iowa 1998). In the absence of a statutory definition or an established meaning in the law, words in a statute are given their ordinary and common meaning. Iowa Code § 4.1(38); T & K Roofing Co., 593 N.W.2d at 162. The Iowa Supreme Court has further held that environmental statutes should be given a liberal -- not a narrow -- construction. State ex rel. Miller v. DeCoster, 596 N.W.2d 898, 902 (Iowa 1999); State ex rel. Iowa Department of Natural Resources v. Grell, 368 N.W.2d 139, 141 (Iowa 1985).

In common parlance, the term "facilitate" means "to make easier." Matter of Kaster, 454 N.W.2d 876, 879 (Iowa 1990); Webster's Ninth New Collegiate Dictionary 444 (1983). Applying this definition, it seems clear that a fixed or mobile intermediate solid waste disposal facility for transferring loads of solid waste, with or without reduction of volume, to another transportation unit, is a facility which makes easier the final disposition of solid waste. Accordingly, we conclude that solid waste transfer stations are sanitary disposal projects within the meaning of Iowa Code section 455B.301(18), for which permits are required pursuant to Iowa Code section 455B.305.

Sincerely,

DAVID L. DORFF
Assistant Attorney General
Environmental Law Division
(515) 281-5351

STATE OFFICERS AND DEPARTMENTS: DEPARTMENT OF REVENUE AND FINANCE: Duration of authority to collect fee. House File 2545, 78th G.A., 2d Sess. § 28 (Iowa 2000). The authority of the director of revenue and finance to charge a fee to recover the cost of administering local option sales taxes, set forth following the appropriation of funds to the department of revenue and finance for the fiscal year ending June 30, 2001, in House File 2545, 78th G.A., 2d Sess. § 28 (Iowa 2000), continues in force until abrogated by future action of the legislature. (Mason to Bair, Director, Iowa Department of Revenue and Finance, 10-19-00) #00-10-1

October 19, 2000

G. D. Bair
Director
Iowa Department of Revenue and Finance
Hoover State Office Building
L O C A L

Dear Mr. Bair:

You have requested a formal opinion regarding your authority to charge a fee to recover the cost of administering local option sales taxes. That authority is set forth in the following provision of House File 2545, 78th G.A., 2d Sess. § 28 (Iowa 2000):

> The director of revenue and finance may charge a fee to recover the direct costs of administration related to the collection and distribution of a local sales and services tax imposed pursuant to chapters 422B and 422E. The fee revenue shall be treated as repayment receipts as defined in section 8.2 and shall be used to pay the direct costs of administering chapters 422B and 422E.

For the reasons stated below, it is our opinion that your authority to charge a fee to recover the cost of administering local option sales taxes continues in force until abrogated by future action of the legislature.

The differing opinions you have encountered as to whether you have continuing authority to charge the fee in question likely arise because section 28 of House File 2545 also contains the appropriations for your department for the fiscal year ending June 30, 2001. Also, the fee revenue collected is to be treated as "repayment receipts" as defined in section 8.2, meaning as "moneys collected by a department or establishment that supplement an appropriation made by the legislature." The language of section 28 does not, however, specify that the fee revenue is to supplement only the one year's appropriation made to the Department in that section.

There are numerous other provisions in the Iowa Code which authorize the collection of fees or other payments to be considered repayment receipts as defined in section 8.2. See, e.g., Iowa Code §§ 10A.107, 22.3A(2), 135.11A, 272C.6(6), 455B.203A(6), 475A.6, 505.7(7), 524.207(3), 533.67(3), and 546.10(4) (1999). They all appear to give continuing authority to collect the specified fees beyond the next fiscal year, regardless of the relationship between repayment receipts and an appropriation.

Unless a statute explicitly provides otherwise, it continues in force until abrogated by subsequent action of the legislature. Franconia Associates v. United States, 43 Fed. Cl. 702, 708 (Cl. Ct. 1999); 2 N. Singer, *Sutherland Statutory Construction* § 34.01, at 31 (5th ed. 1993).[1] "[L]egislative intent that a statute operate temporarily must be clearly stated in the act itself or in a related statute." *Sutherland* § 34.04, at 33. The Iowa Supreme Court often cites *Sutherland Statutory Construction* when interpreting statutes. See, e.g., Iowa Comprehensive Petroleum Underground Storage Tank Fund Board v. Shell Oil Company, 606 N.W.2d 376, 380 (Iowa 2000); Iowa Erosion Control, Inc. v. Sanchez, 599 N.W.2d 711, 714 (Iowa 1999); State v. Wagner, 596 N.W.2d 83, 88 (Iowa 1999). There is no clearly stated intent in House File 2545 that the authorization for the Department to charge a fee to recover certain administration costs is temporary. Indeed, the fact that the fee is to be "used to pay the direct costs of administering chapters 422B and 422E," implies that the legislature intended the authority to collect the fee to continue for as long as the Department incurs such costs. Therefore, section 28 of House File 2545 should be construed to give the Department continuing authority to charge the fee until such future time, if ever, that the legislature abrogates that authority.

This conclusion is further supported by the presence of other provisions in House File 2545 which appear to have continuing effect. For example, immediately following the provision authorizing the director of revenue and finance to charge the fee at issue is a provision stating that the director shall prepare and issue a state appraisal manual and its revisions without cost to a city or county. The reference to revisions of the manual indicates that the legislature intended for the manual and revisions to be free to cities and counties during more than just the one fiscal year for which the section 28 appropriations were made. Similarly, several other provisions in the House File 2545 appropriation bill appear to be effective past the single fiscal year for which the bill appropriates funds. These include the preference to be given to Iowa-based transportation businesses provided for in section 3, the license fee refunds authorized in section 5, the direction to submit an application for federal funding set forth in section 12, the payment of per diem and expenses to legislators serving on the deferred compensation advisory board intended in section 19, the filing fee refunds authorized in

[1]Section 28 of House File 2545 is a valid and binding law, whether or not the Code Editor decides to publish it in the Iowa Code. See Op. Att'y Gen. No. 97-7-1(L).

section 32, and the electronic bid notices required by section 35. Just as there is no indication of a legislative intent to limit these various provisions to one fiscal year, there is no reason to assume that the authority to collect a fee to recover the cost of administering local option sales taxes is so limited.

In summary, due to the absence of a clearly stated legislative intent to the contrary, section 28 of House File 2545 is construed to give the Department continuing authority to charge a fee to recover the costs of administering local option sales taxes. See 2 N. Singer, *Sutherland Statutory Construction* § 34.04, at 33 (5th ed. 1993).

Sincerely,

MARCIA MASON
Assistant Attorney General

MM:cml

COUNTIES; COUNTY OFFICERS; PUBLIC FUNDS: Creation of advisory board; acceptance of gifts by advisory board; transfer of county-owned funds to nonprofit corporation for expenditure and investment. Iowa Code §§ 12B.10, 12C.1, 28E.4, 331.401, 331.555, 350.4, 350.6, 350.7 (1999). A county conservation board has authority to create an advisory board for such tasks as finding facts, offering counsel, or making recommendations. An advisory board receiving gifts of money from private donors for general or specific conservation purposes must transfer them in a timely manner to the county conservation board. (Kempkes to Bjornstad, Dickinson County Attorney, 8-9-00) #00-8-2(L)

August 9, 2000

Mr. Edward W. Bjornstad
Dickinson County Attorney
832 Lake St.
Spirit Lake, IA 51360

Dear Mr. Bjornstad:

You have requested an opinion about money given by private donors for conservation purposes to an advisory board established by a county conservation board. The advisory board apparently accepted the gifts on behalf of the county, and the county treasurer placed the money in a separate account. You ask whether the county board of supervisors can directly transfer the money to a nonprofit organization, not yet created, which would bear substantially the same name as the advisory board, perform the same functions, perhaps share some or all of the same members, and invest the money in ways the county could not lawfully invest it.

Your question implicates Iowa Code chapters 12B, 12C, 331, and 350 (1999). Our examination of those chapters leads us to conclude that a court might void such a transfer.

I.

Chapter 350 is entitled County Conservation Boards. It provides for their establishment and authorizes counties to acquire public conservation areas and to provide adequate programs of public recreation. See Iowa Code §§ 350.1, 350.11; see also Iowa Code §§ 306.4(5), 331.321(1)(c), 350.2, 350.3, 350.7, 350.9. Section 350.4 "authorize[s] and empower[s]" conservation boards to accept gifts and bequests for conservation purposes. Upon their acceptance, gifts and bequests of money become public funds under the stewardship of the county. See generally 10 E. McQuillin, The Law of Municipal Corporations § 28.15, at 39-40 (1999).

Section 350.6 concerns the finances of conservation boards. See generally Iowa Code § 331.427(2)(d); 1990 Op. Att'y Gen. 3 (#89-1-3(L)). Section 350.6 provides that a county shall establish a reserve account for conservation land acquisition and capital improvement projects upon request by its conservation board. It further provides that money "credited to the reserve account shall remain in the reserve" until expended for projects and that interest "earned on moneys received

from bequests and donations in the reserve account which are invested pursuant to [chapter 12C] shall be credited to the reserve account." See generally Iowa Code § 4.1(30)(c) (word "shall" in statutes imposes a duty unless otherwise defined).

Chapters 12C is entitled Deposit of Public Funds. It governs the investment of county-owned funds. See 1992 Op. Att'y Gen. 86, 87, 89-91; see also Iowa Code § 12B.10. Counties do not have unlimited options for investing their funds: section 12C.1 provides that they may be deposited only in certain types of investments.

Chapter 331 is entitled County Home Rule Implementation. It generally governs the office of county treasurer, the county's chief financial officer. Section 331.555(1) charges the county treasurer with overseeing the county's separate accounts. Section 331.555(6) provides that a county treasurer may jointly invest county-owned funds with specified public entities and that "[a]ll investment of funds shall be subject to [chapter 12B] and other applicable law."

Chapter 12B is entitled Security of the Revenue. Under section 12B.10(1), county treasurers must invest unneeded county-owned funds pursuant to statutory requirements. Those requirements include section 12B.10(5), which restricts investments to eight specific types. See generally Iowa Code § 12B.10(2) (requiring investment of public funds to take into account safety of principal first, liquidity second, and rate of return third), § 12B.10(3) (prohibiting trading of securities, in which public funds invested, for purpose of speculation and realization of short-term trading profits), § 12B.10(5) (paragraph following "h") (prohibiting futures and options contracts).

II.

You have asked whether the county supervisors may directly transfer county-owned funds to the proposed nonprofit organization, which, instead of the county conservation board, would apparently invest them as well as expend the proceeds and perhaps the principal for conservation purposes. You indicate this transfer rests upon a belief that nonprofit organizations would not be subject to the statutory restrictions imposed on the investment of county-owned funds. It is the investment of these public funds, then, and not their expenditure for a legitimate public purpose, which requires analysis.

(A)

Conservation boards have authority under section 350.7 to "do any and all things necessary or convenient" for the implementation of chapter 350. We believe that this broad charter encompasses the creation of advisory boards for such purposes as finding facts, offering counsel, or making recommendations. Cf. 1996 Op. Att'y Gen. 96 (#96-5-1(L)) (county hospital trustees, authorized by statute to do "all things necessary" to further operations of county hospital, have authority approaching county home-rule authority).

We understand that the resolution establishing the advisory board provides it "shall act in an advisory capacity" on matters "relating to the construction, operation and improvement" of the county trail system. This enabling act appears to limit the advisory board's functions to such tasks as finding facts, offering counsel, and making recommendations about that system. See Donahue v. State, 474 N.W.2d 537, 539 (Iowa 1991) ("advisory boards" exercise no policy-making power and none of their factfindings bind parent agencies); 1994 Op. Att'y Gen. 1 (#93-1-3(L)); Webster's Ninth New Collegiate Dictionary 17 (1979) (verb "advise" means to give information or notice, to inform, or to take counsel; noun "advice" means a recommendation regarding a decision or course of conduct, counsel, or information or notice given). It does not appear to include the power to decide whether to accept gifts of money for conservation purposes -- a decision that may require an exercise of discretion when conditions attach to such gifts.

Obviously, private donors could choose to leave gifts of money on an advisory board's doorstep for general or specific conservation purposes. We point out that the advisory board in such instances would have the role of a mere conduit and the responsibility of delivering the money in a timely manner to the county conversation board for its acceptance or rejection.

(B)

"[A] long-standing state scheme restrict[s] the investment authority of [counties and other] political subdivisions." 1988 Op. Att'y Gen. 87, 88. The investment options available under this state scheme can be fairly described as conservative in nature and protective of principal. See generally Iowa Code chs. 12B, 12C. Although these investments normally generate a relatively low rate of return, they further a presumably more important legislative purpose: guarding against a loss, great or small, of public funds.

Regarding the investment as well as the expenditure of money privately donated for county conservation projects, chapters 12C and 350 in particular outline the duties of three public offices: county supervisors, county treasurers, and county conservation boards.

Under chapter 350, money credited to a conservation board's reserve account shall remain there until expended by the conservation board for conservation projects; and interest earned on donated money, placed in the reserve account and invested pursuant to chapter 12C, shall be credited to that account. Iowa Code § 350.6. Under chapter 12C, county treasurers have exclusive authority over the investment of county-owned funds; although county supervisors designate the depositories for these funds, they cannot create investment advisory committees to assist county treasurers in

making investments. 1992 Op. Att'y Gen. 86, 91. County supervisors, like county treasurers, must comply with chapter 12C in the management of county-owned funds. Iowa Code § 331.401(1)(n).

If the county supervisors cannot instruct the county treasurer on investing county-owned funds, and if the county treasurer cannot invest such funds inconsistent with chapter 12C, then a

court might void the county supervisors' direct transfer of county-owned funds to a nonprofit organization that would invest them in ways inconsistent with chapter 12C. To paraphrase an earlier opinion, "What cannot be lawfully done by a public agency cannot be delegated to a private entity." 1988 Op. Att'y Gen. 112 (#88-10-2(L)). Cf. 15 E. McQuillin, The Law of Municipal Corporations § 39.47, at 164 (1995) (legislature may regulate the holding of public funds, and local ordinance cannot change such regulation).

Investment of public funds must strictly follow legislative commands, 63C Am. Jur. 2d Public Funds § 5, at 229 (1997), and a court, mindful of the public protections underlying chapter 12C, would likely scrutinize such a direct transfer to a county's apparent alter ego, see 1998 Op. Att'y Gen. ___ (#98-1-3); see also 1980 Op. Att'y Gen. 317 (#79-8-2(L)) (quasi-state agencies "may often find themselves bound by restrictions prescribed in laws affecting state agencies"). Cf. Dyer v. City of Des Moines, 230 Iowa 1246, 300 N.W. 562, 566 (1941) (city forced to take custody of funds possessed by private entity, who, on city's behalf, collected fees for automobile testing and placed them in bank of its own choice: such city-owned funds must be "handled in the same manner as in which all other funds of the city are handled"). We point out that public funds do not necessarily lose their public character merely because a private entity happens to possess them. See 1994 Op. Att'y Gen. 71
(#93-12-3(L)); see also 1998 Op. Att'y Gen. ___ (#98-1-3).

A court will construe legislative acts so as to effect, rather than defeat, their underlying purposes. Iowa Fed. of Labor v. Iowa Dep't of Job Serv., 427 N.W.2d 443, 445 (Iowa 1988); 1996 Op. Att'y Gen. 83 (#96-3-2(L)). Chapter 12C obviously seeks to protect the integrity of public treasuries; accordingly, the General Assembly has instructed that ambiguities in applying section 12C.1 will "be resolved in favor of preventing the loss of public funds on deposit." Iowa Code § 12C.1(4). Although counties may cooperate with private entities, e.g., 1999 Iowa Acts, 78th. G.A., S.F. 51 (county conservation boards), and, under certain conditions, properly delegate the performance of statutory duties and powers to private entities, see 1992 Op. Att'y Gen. 104, 107-08; see also Iowa Code §§ 12B.10(5), 28E.5(2), such delegations cannot effectively defeat statutory prohibitions. In this vein, a court will consider the spirit as well as the text of a prohibition in determining a possible violation. E.g., Goodell v. Humboldt County, 575 N.W.2d 486, 515 (Iowa 1998); Kane v. City of Cedar Rapids, 537 N.W.2d 718, 721 (Iowa 1995); Hahn v. Clayton County, 218 Iowa 543, 255 N.W. 695, 697 (1934).

III.

In summary: A county conservation board has authority to create an advisory board for such tasks as finding facts, offering counsel, or making recommendations. An advisory board receiving gifts of money from private donors for general or specific conservation purposes must transfer them in a timely manner to the county conservation board. A court might void a county's direct transfer of county-owned funds to a nonprofit organization that, in addition to expending them on the county's behalf, would invest them in ways the county could not lawfully invest them.

Sincerely,

Bruce Kempkes
Assistant Attorney General

INCOMPATIBILITY: Natural Resources Commission; County Conservation Board. Iowa Code ch. 350; 455A; 456A; 461A; Iowa Code §§ 350.2, 350.4, 350.7, 350.11; 455A.5, 455A.19; 456A.19; 461A.32, 461A.79. The common law doctrine of incompatibility of office does not prohibit dual appointment to the Natural Resources Commission and to a county conservation board. Iowa Code section 455A.5(1) does not authorize a member of the NRC to serve on a county conservation board, but supports the conclusion that the common law doctrine of incompatibility does not prohibit these dual appointments. A person who is appointed to both public offices should be careful to avoid the conflicts of interest that will likely arise. (Pottorff to Black, State Senator, 9-15-00) #00-9-1

September 15, 2000

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

Dear Senator Black:

You have requested an opinion on whether a person can serve as a member of the Iowa Natural Resources Commission (NRC) and, at the same time, serve as a member of a county conservation board. We conclude that incompatibility does not prohibit dual appointments, but caution against dual appointments that will likely confront a person repeatedly with conflicts of interest.

The common law prohibits a person from occupying incompatible public offices. State *ex rel*. LeBuhn v. White, 257 Iowa 606, 608, 133 N.W.2d 903, 904 (1965). Incompatibility

> is not concerned with how a person performs in office or how a person executes the duties of the office. The doctrine of incompatibility is concerned with the duties of an office apart from any particular office holder. Consequently, the question of incompatibility can be resolved by comparing the respective duties of the two offices in question and examining how the duties relate. In contrast, when one discusses conflict of interest one must look to how a particular office holder is carrying out his or her official duties in a given fact situation.

1982 Op. Att'y Gen. 220, 221.

To determine whether two offices are incompatible, the courts look to the statutory powers and duties of the offices. If the statutes show a "definite and clear incompatibility exists," it is "contrary to public policy for one person to hold the offices concurrently." State *ex rel*. LeBuhn v. White, 257 Iowa at 611, 133 N.W.2d at 905-06; State *ex rel* Crawford v. Anderson, 155 Iowa 271, 136 N.W. 128 (Iowa 1912). This can occur, for example, where one office "is subordinate to the other and 'subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant'." Id. Iowa at 271,136 N.W. at 128, *quoting from* State v. Bus, 135 Mo. 325, 36 S.W. 636 (1896). This office narrowly construes the incompatibility doctrine and applies it cautiously to avoid infringing on the interests of those seeking to hold public office and to avoid infringing on the interests of those seeking to have their choice of public officials respected. 1994 Op. Att'y Gen.35(#93-9-1(L)); 1994 Op. Att'y Gen.1(#93-1-2(L)); 1982 Op. Att'y Gen. 16 (#81-1-8(L)). In keeping with these principles, we will conclude that two offices are incompatible as a matter of law only where definite and clear statutory inconsistencies will arise in performing important statutory functions of the offices.

The doctrine of incompatibility only applies to "public offices" and not mere positions of public employment. 1982 Op. Att'y Gen. at 224. If two public offices are incompatible a person ipso facto - "by the fact itself"- vacates the first public office held upon the acceptance of the second public office. State ex rel. LeBuhn v. White, 257 Iowa at 610-11, 133 N.W.2d at 905-06; 1994 Op. Att'y Gen. 35 (#93-9-1(L)); 1982 Op. Att'y Gen. at 221.

Based on our prior opinions, membership on the NRC and membership on a county conservation board are each "public offices" to which the doctrine of incompatibility applies. We have previously concluded that membership on the former Natural Resources Council, now part of the Environmental Protection Commission, constitutes a public office. See 1960 Op. Att'y Gen. 218 (#59-1-16(L)). Membership on the Natural Resources Commission includes the same attributes of a public office. See 1996 Op. Att'y Gen. 97 (#96-10-2(L)) (elements of public office generally include legislative creation of position; legislative delegation of sovereign power to position; legislative definition of position's duties; performance of duties independent and without control of superior power other than law; permanency and continuity in the position). See generally State v. Spaulding, 102 Iowa 639, 72 N.W. 288, 290 (1897). We have also previously concluded that membership on a county conservation board constitutes a public office. 1992 Op. Att'y Gen. 172, 175; 1970 Op. Att'y Gen. 763, 764. Accordingly, membership on the NRC and membership on a county conservation board are each "public offices."

In order to determine whether these two public offices are incompatible, we turn to the statutory duties of each position. County conservation boards are created either by passage of the proposition by a majority of the voters, or after January 1, 1989, by statute. Iowa Code §§ 350.2, 350.11 (1999). Members in either case are appointed by the board of supervisors. Iowa Code §§ 350.2, 350.11. The boards so formed

> shall have the custody, control and management of all real and personal property heretofore or hereafter acquired by the county for public museums, parks, preserves, parkways, playgrounds, recreation centers, county forests, county wildlife areas, and other county conservation and recreation purposes . . . .

Iowa Code § 350.4. A county conservation board, therefore, has the custody, control, and management of its county's conservation areas and facilities. See Iowa Code § 350.1.

The members of the NRC are appointed by the governor and are vested with authority over proposals for acquisition or disposal of state lands and waters relating to state parks, recreational facilities, and wildlife programs, submitted by the director. Iowa Code §§ 455A.5(1), 455A.5(6). Because the NRC shares conservation goals in common with the county conservation boards, the duties of the NRC members may intersect with the duties of the county conservation board members. The NRC participates in the transfer of state property to the county conservation boards. Iowa Code § 350.4(2). The NRC is also vested with authority over the distribution of grant funds to county conservation boards. Iowa Code §§ 455A.19, 456A.19. In order to determine whether the statutory duties preclude a member of the NRC from serving as a member of a county conservation board as a matter of law, we must examine the duties of each office more closely with respect to these functions.

Transfers of Land

An analysis of the respective statutory duties of the NRC and the county conservation boards in transferring public lands reveals related, but not necessarily incompatible, duties. As noted above, the Iowa Supreme Court has found public offices incompatible where one body is subordinate to, or has revisory decision making authority over, another body. In State ex rel. LeBuhn v. White, 257 Iowa at 610-11, 133 N.W.2d at 905-06, the Court concluded that membership on the local school board and on the county board of education were incompatible where the local school board was subordinate to, and subject to the revisory authority of, the county board of education on matters of curriculum,

transportation to school, merger of school districts and adjustment of district boundaries. In these matters, decisions of the local school board were subject to approval of, review by, or appeal to, the county board of education.

Applying the principles articulated in White, we do not believe the statutory duties of the county conservation boards are subordinate to, or subject to the revisory power of, the NRC to a degree which renders the offices incompatible as a matter of law. Upon request of a county conservation board, the NRC may transfer to the board land and buildings owned or controlled by the DNR and not devoted or dedicated to any other inconsistent public use. Iowa Code § 350.4(2). The decision whether to transfer any land and buildings to a county conservation board, however, rests in the discretion of the Executive Council.[1] The NRC may only recommend action to the Executive Council. Iowa Code § 461A.32 ("Upon request by resolution of any city or county or any legal agency thereof," the Executive Council "may, upon majority recommendation of the [NRC], convey . . . such public lands under the jurisdiction of the commission as in its judgment may be desirable for city or county parks."). Accordingly, the board requests and the NRC recommends, but the Executive Council decides, whether a request from a county conservation board for a transfer of land and buildings will be granted. Because decision making rests in a separate agency, we do not consider the roles of the NRC and the county conservation boards in this process to be incompatible.[2]

Allocation of Grant Funds

An analysis of the respective statutory duties of the NRC and the county conservation boards in allocation of grant funds similarly reveals related, but not necessarily incompatible, duties. Grant funds are allocated to the county conservation

[1] The Executive Council is composed of the Governor, the Secretary of State, the Auditor of State, the Treasurer of State and the Secretary of Agriculture. Iowa Code § 7D.1.

[2] The NRC and the county conservation boards have additional duties concerning certain land transactions which do not raise significant incompatibility issues. The NRC may enter into agreements with county conservation boards to share the costs of acquisition projects. Iowa Code § 461A.79. Further, the county conservation boards must file with the NRC "all acquisitions or exchanges of land within one year." Iowa Code § 350.4(3).

boards in two ways. First, the Department of Natural Resources (DNR) credits money from the Fish and Game Protection Fund to the County Conservation Board Fund to provide grants to county conservation boards to fund projects within the scope of chapter 350. Grant applications are then submitted by the boards to the NRC. Iowa Code § 456A.19. Second, the DNR credits money from the Iowa Resources Enhancement and Protection Fund to County Conservation Account to award competitive grants to the counties. Iowa Code § 455A.19(1)*b*(3). We consider these grant allocation processes in turn.

The county conservation boards may make grant applications to the NRC under Iowa Code chapter 456A for money from the County Conservation Board Fund. However, making applications for these grants is not a statutory duty of the county conservation boards. Rather, it is a discretionary power that may or may not be exercised by the boards. See Iowa Code §§ 456A.19, 350.4(1)-(10). We cannot conclude that the mere possibility that a discretionary grant application could be made by a county conservation board would, as a matter of law, prohibit someone from serving as a member of that board and the NRC on grounds of incompatibility. We recognize that a grant application from one body to another certainly could create divided loyalties for a person who serves on both bodies. See Wilson v. Iowa City, 165 N.W.2d 813, 819 (1969). This conflict of interest, however, may be resolved by abstention from participation in particular grant applications if the situation actually arises.[3] In this respect, the conflict presented is not unlike the conflict presented when any two public bodies contract with each other. Participation on both sides of the contractual relationship would not render the two public offices incompatible, but could create conflicts of interest.

As an alternative source of grant funds, twenty percent of the money deposited in the Iowa Resources Enhancement and Protection Fund by the Director of the DNR is allocated to the County Conservation Account. Of this twenty percent: thirty percent is allocated to each county equally; thirty percent is allocated to each county on a per capita basis; and forty percent is allocated to an account in the state treasury for the NRC to award to counties by a project selection committee on a competitive grant basis. Iowa Code § 455A.19(1)*b*(1)-(3). The committee, in turn, is composed of two DNR staff members and two county conservation board directors - all appointed by the Director of the DNR - and

[3] Rules promulgated by the NRC address conflicts of interest that may arise when projects are submitted to the NRC by a county conservation board. The rules require that an individual with a conflict of interest refrain from participating in discussions and abstain from voting. 571 IAC 33.21.

one person selected by a majority vote of the other appointees. The NRC is directed by statute to establish by rule "procedures for application, review, and selection of county projects submitted for funding."[4] Iowa Code § 455A.19(1)*b*(3).

The NRC award of competitive grants to the counties under Iowa Code section 455A.19(1)*b*(3) similarly fails to demonstrate incompatible statutory duties. Awards of grants by the NRC under section 455A.19(3)*b*(3) are made by a Project Planning and Review Committee. Iowa Code § 455A.19(1)*b*(3) ("Upon recommendation of the project planning and review committee, the director shall award the grants."). Although the NRC promulgates rules governing the grant procedures, neither members of the NRC nor members of the county conservation boards serve on this committee. The county conservation boards are represented on the Project Planning and Review Committee by county conservation board directors, not members. A county conservation board director is distinguishable from a county conservation board member in that the directors are employed by the boards to carry out board policies. Iowa Code § 350.4(6).

This statutory system for allocation of grants falls short of rendering the public offices incompatible. Although the grant money flows through the NRC to the counties, allocation by the Project Planning and Review Committee insulates the NRC from any incompatible statutory duty. In similar circumstances we have declined to opine that the public offices of state legislator and school board member are incompatible based on legislative control of appropriations to schools, where the funds are actually allocated by a specific formula and the legislature does not "directly control the amount of money allocated to an individual school district." 1994 Op. Att'y Gen. 1(#93-1-2(L)). Further, because the county conservation board directors who serve on the Project Planning and Review Committee are employed by the boards, the directors are "employees" and not "public officials" to which the doctrine of incompatibility applies. See 1982 Op. Att'y Gen. at 224.

Based on our review of the relevant statutes governing transfers of land and allocation of grants, we conclude that the common law doctrine of incompatibility does not prohibit dual appointment to the NRC and to a county conservation board. Two additional

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[4] Rules promulgated by the NRC provide, *inter alia*, for project selection criteria under the competitive grants program. 571 IAC 33.30 et. seq. NRC rules also address procedures for administration of private cost-sharing funds within the Open Spaces Account, the County Conservation Account, and the City Park and Open Spaces Account of the Resource Enhancement and Protection Fund. 571 IAC 33.1 et. seq.

statutory provisions support this conclusion. First, the enabling act for county conservation boards specifically addresses cooperation between the NRC at the state level and the county conservation boards at the local level. "Any county conservation board may cooperate with the federal government or the state government *or any department or agency thereof* to carry out the purposes and provisions of this chapter." Further, "the *natural resources commission*, county engineer, county agricultural agent, and other county officials shall render assistance which does not interfere with their regular employment." Iowa Code § 350.7(emphasis added). The legislature, therefore, anticipated that these bodies have a cooperative relationship, rather than a relationship in which the duties are "inherently inconsistent" or "repugnant." See 1982 Op. Att'y Gen. at 221.

Second, the legislature has expressly addressed the issue whether NRC members may simultaneously serve in other public offices. Under Iowa Code section 455A.5(1) the legislature expressly prohibited NRC members from holding "any other state or federal office," but failed to expressly prohibit NRC members from holding offices on the county conservation boards. Although this statute does not authorize membership on both bodies by negative implication, it is consistent with our analysis of the common law principles.

We have declined to construe statutes prohibiting dual appointments to public offices as completely superseding the common law, even though incompatibility is a matter which the legislature could address by statute and thereby displace common law principles. State ex rel. LeBuhn v. White, 257 Iowa at 612, 133 N.W.2d at 906 ("The legislature could provide that one person could serve on both boards . . . if it so desires, but in the absence of a statute expressing such intention the common law rule of incompatibility must be applied."). Rather, we have construed incompatibility statutes as complementing the common law. In 1993 our office declined to construe statutory language prohibiting elected officials, other than statewide elected officials and members of the General Assembly, from holding "more than one elective office at the same level of government at a time" as rendering other offices compatible by negative implication.[5] 1994 Op. Att'y Gen. 35(#93-9-1(L)).

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[5] In matters of incompatibility construction of these statutes differs from construction of statutes under general principles of statutory construction. Generally, when examining statutes we, like courts, are guided by the maxim "expressio unius est exclusio alterius," or "expression of one thing is the exclusion of another." Marcus v. Young, 538 N.W.2d 285, 289 (1995). "This expresses the well-established rules of statutory construction that 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." Id.

Nevertheless, we consider the legislative omission to be significant to our analysis. Where interaction between the NRC and the county conservation boards appears repeatedly in the governing statutes and dual appointment to these two bodies remains unaddressed in the incompatibility language of section 455A.5(1), the omission is consistent with, and thereby lends support to, our analysis of the common law and our conclusion that the statutory duties are not incompatible.

Although we conclude that the two public offices are not incompatible as a matter of law, we stress that the statutory duties thrust a person appointed to both public offices into situations in which conflicts of interest may arise. Our opinions have emphasized the distinction between incompatibility and conflicts of interest See 1982 Op. Att'y Gen. at 221 ("[T]his area is one which is characterized by a degree of confusion. Over recent years there has been a tendency by commentators to intertwine the concept of incompatibility with the concept of conflict of interest."). While we do not wish to blur the distinctions that have been drawn, we caution against the appointment of one person to two public offices that will likely confront the person repeatedly with conflicts of interest.

In summary, the common law doctrine of incompatibility of office does not prohibit dual appointment to the Natural Resources Commission and to a county conservation board. Iowa Code section 455A.5(1) does not authorize a member of the NRC to serve on a county conservation board, but supports the conclusion that the common law doctrine of incompatibility does not prohibit these dual appointments. A person who is appointed to both public offices should be careful to avoid the conflicts of interest that will likely arise. We caution against dual appointments that will likely confront a person repeatedly with conflicts of interest.

Sincerely,

JULIE F. POTTORFF
Deputy Attorney General

CONSTITUTIONAL LAW: Constitutional Amendment. Iowa Const. art. X, § 1. Proposed constitutional amendments which failed to pass may not be resubmitted to the voters without compliance with constitutional requirements that the amendments again pass both houses of two succeeding General Assemblies. (Pottorff to Blodgett, State Representative, 4-3-00) #00-4-1(L)

April 3, 2000

The Honorable Gary Blodgett
State Representative
State Capitol
L-O-C-A-L

Dear Representative Blodgett:

You have requested an opinion of our office concerning the legal requirements for submission of constitutional amendments to the voters of Iowa. Last year two constitutional amendments addressing state budget and accounting practices were submitted to the voters for approval. Prior to submission to the voters, these amendments passed both houses of two succeeding General Assemblies. At a special election called for that purpose in June, 1999, both amendments failed to pass.

You now ask our office whether these amendments may be resubmitted to the voters this year, before expiration of the current General Assembly and without requiring these amendments once more pass both houses of two succeeding General Assemblies. It is our opinion that these amendments may not be resubmitted to the voters, unless they are again presented to and passed by both houses of two succeeding General Assemblies.

The Iowa Constitution provides a very specific procedure for amendments. The Constitution may only be amended by a vote of the electorate. The following procedure must be followed in order to place amendments on an election ballot for consideration by the voters:

> Any amendment or amendments to this constitution may be proposed in either house of the general assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature to be chosen at the next general election, and shall be published, as provided by law,

> for three months previous to the time of making such choice; and if, in the general assembly so next chosen as aforesaid, such proposed amendment or amendments shall be agreed to, by a majority of all the members elected to each house, then it shall be the duty of the general assembly to submit such proposed amendment or amendments to the people, in such manner, and at such time as the general assembly shall provide; and if the people shall approve and ratify such amendment or amendments, by a majority of the electors qualified to vote for members of the general assembly, voting thereon, such amendment or amendments shall become a part of the constitution of this state. [Iowa Const. art. X, § 1]

Under this language only when proposed amendments have been passed by both houses of two succeeding General Assemblies "*then* it shall be the duty of the general assembly to submit such proposed amendment or amendments to the people. . . ." Iowa Const. art. X, § 1(emphasis added). Your question asks us to determine whether these procedural steps, once completed, may justify repeated submission of the same amendments to the voters.

Although we find no case that has addressed precisely the question which you pose, the Iowa Supreme Court has required strict adherence to the procedural steps set forth in the Constitution. In Koehler v. Hill, 60 Iowa 543, 15 N.W. 609, 624 (1883), the Court considered whether the constitutional obligation to enter proposed amendments on the journals of each house was satisfied where the journals set out the text of the proposed amendment that passed the House, but thereafter showed only that the Senate substituted an amendment and that the House concurred in the Senate substitute amendment. The Court ruled that the procedure was constitutionally flawed:

> The constitution makes three steps necessary for the adoption of an amendment, viz.: The proposal of an amendment in one general assembly, and its entry upon the journals; the agreement thereto by the next general assembly; and its submission to the people, and the approval and ratification thereof by the people. These steps are distinct, independent, and essential. No one of them can be dispensed with.

This language suggests that the procedural steps are sequential requirements. To resubmit failed amendments to the voters without repeating the first two steps, i.e.,

proposal and agreement by two succeeding General Assemblies, therefore, would be "dispensing with" constitutional requirements. See Koehler v. Hill, 60 Iowa 543, 14 N.W. 738, 744, *rehearing granted*, 60 Iowa 543, 15 N.W. 609 (1883)("We deem it sufficient to say that if there is any provision of the constitution which should be regarded as mandatory, it is where the constitution provides for its own amendment otherwise than by means of a convention called for that purpose."). Accord Blair v. Cayetano, 73 Haw. 536, 836 P.2d 1066 (1992)(strict compliance with procedures for amending the state constitution required); Coleman v. Pross, 219 Va. 143, 246 S.E.2d 613 (1978)(strict compliance with procedures for amending the state constitution required).

At least one jurisdiction has rejected efforts to resubmit a constitutional amendment to the voters without repetition of the full procedural steps required by the state constitution. In State ex rel. Montanans for the Preservation of Citizens' Rights et al. v. Waltermire, 231 Mont. 406, 757 P.2d 746 (1988), the Montana Supreme Court faced a somewhat analogous situation in which an amendment had been defeated by the electorate by the time officials discovered that constitutional requirements concerning publication of the proposed amendment had not been followed. Rebuffing the argument that the remedy for these errors was simply to resubmit the proposed amendment to the voters, the Court determined that "to permit the resubmission of constitutional initiatives to the electorate 'at succeeding elections'. . . would be inserting in the constitutional provisions language not otherwise to be found there." Id. at 411, 757 P.2d at 750. Accordingly, the Court concluded that the full procedural steps to amend the state constitution must be repeated.[1] Id. at 412, 757 P.2d at 750-51.

This result is consistent with state statutes that govern the resubmission of failed ballot issues to the voters. Special election statutes do not preclude resubmission of a failed ballot issues to the voters, except where a limitation is expressly provided by statute. Iowa Power & Light Co. v. Hicks, 228 Iowa 1085, 1090, 292 N.W. 826, 828 (1940). See, e.g., 1994 Op. Att'y Gen. 115, 118 (state law not a bar to resubmission of failed gambling proposition to the county electorate). For this reason, state statutes frequently specify a period of time within which a proposition may not be resubmitted to the voters. See, e.g., Iowa Code § 257.27 (1999) ("If the voters do not approve adoption of the instructional support program, the board shall wait at least one hundred twenty days following the election before taking action to adopt the program or resubmit the

[1] In Montana a constitutional amendment may be initiated by petition. State ex rel. Montanans for the Preservation of Citizens' Rights et al. v. Waltermire, 231 Mont. at 407 - 411, 757 P.2d at 747-750.

proposition."); Iowa Code § 331.207(5) (1999) ("A supervisor representation plan adopted at a special election shall remain in effect for at least six years."). In addition to compliance with any statutory waiting period, however, an effort to resubmit a failed ballot issue to the voters would necessitate renewed compliance with all statutory requirements to place the issue on the ballot. We are not aware of a statutory analog where initial compliance with requirements to place an issue on the ballot carries authorization to resubmit the issue more than one time if necessary to secure passage.

In summary, based on our analysis of case law in Iowa and other jurisdictions, we conclude that proposed constitutional amendments which failed to pass last year may not be resubmitted to the voters without compliance with constitutional requirements that the amendments again pass both houses of two succeeding General Assemblies.

Sincerely,

JULIE F. POTTORFF
Deputy Attorney General

COUNTY AND COUNTY OFFICERS; MUNICIPALITIES; SCHOOL DISTRICTS: Mileage reimbursement for conference board. Iowa Code §§ 279.32, 331.215, 331.401, 372.13, 441.2 (1999). County supervisors who serve as members on county conference boards have a statutory right to receive mileage reimbursement from the county for travel between their homes and conference board meetings. Other members who serve on conference boards may seek mileage reimbursement, to the extent provided by statute, from their respective governmental entities for travel between their homes and conference board meetings. (Kempkes to Bonnett, Taylor County Attorney, 8-9-00) #00-8-3(L)

August 9, 2000

Mr. Ronald D. Bonnett
Taylor County Attorney
402 Main St.
Bedford, IA 50833

Dear Mr. Bonnett:

You have requested an opinion on mileage reimbursement for travel incurred in the performance of official duties. You ask whether members of county conference boards may receive reimbursement for travel between their homes and conference board meetings. After reviewing Iowa Code chapters 279, 331, 372, and 441 (1999), we conclude that only county supervisors serving on conference boards have a right to reimbursement from the county and that other members serving on conference boards may seek reimbursement from their respective governmental entities.

I.

Chapter 441 is entitled Assessment and Valuation of Property. Section 441.1 establishes the office of the county assessor. Section 441.2 establishes conference boards, which, among other things, review the proposed budgets of county assessors. See Iowa Code § 441.16; 1998 Op. Att'y Gen. ___ (#97-7-3(L)). Section 441.2 also provides for the composition of each conference board: it "shall consist of the mayors of all incorporated cities in the county whose property is assessed by the county assessor, one representative from the board of directors of each high school district of the county, . . . and members of the board of supervisors."

Chapter 331 is entitled County Home Rule Implementation. Section 331.215(2) generally provides that a county supervisor "is entitled to reimbursement for mileage expenses incurred while engaged in the performance of official duties." See generally Iowa Code § 331.324(1)(b) (county supervisors shall grant claims for mileage and expenses). Section 331.401(1)(j) requires that county supervisors serve on conference boards.

Chapter 372 is entitled Organization of City Government. Under section 372.13(8), an elected city officer "is not entitled to receive any other compensation for any other city office or

city employment during that officer's tenure in office, but may be reimbursed for actual expenses incurred." See generally Iowa Code § 4.1(30)(c) (use of "may" in statutes confers a power unless otherwise defined).

Governing school corporations, chapter 279 is entitled Directors -- Powers and Duties. Section 279.32 provides that "[a]ctual and necessary expenses, including travel, [incurred by individual members of a school corporations' board of directors] in the performance of official duties may be paid or reimbursed."

II.

You have asked whether members of a county conference board may receive mileage reimbursement for travel between their homes and conference board meetings.

Although creating conference boards, chapter 441 does not expressly authorize or otherwise mention mileage reimbursement for their various members. We cannot imply such a statutory right. See 1980 Op. Att'y Gen. 814 (#80-9-6(L)) (legislature must "expressly and explicitly" authorize public officers and employees to collect mileage reimbursement). Moreover, other chapters establishing other governmental bodies expressly require such reimbursement. See, e.g., Iowa Code § 161A.6 (soil and water conservation district commissioners "[are] entitled to" reimbursement for mileage), § 257.48 (area education agency members "shall be reimbursed for" mileage incurred in the performance of their duties). Such circumstances suggest a legislative intent against creating a right to reimbursement within chapter 441. See 1998 Op. Att'y Gen. ___ (#98-1-3). Any such right, then, must lie outside chapter 441.

County supervisors have that right pursuant to section 331.215(2), which specifically authorizes this group of county officers "to be reimbursed for mileage incurred in traveling between home and the courthouse on county business." 1988 Op. Att'y Gen. 24, 24. Under chapter 331, then, the county must reimburse county supervisors for travel between their homes and conference board meetings. See generally 1986 Op. Att'y Gen. 125 (#86-11-1(L)) (prior opinions withstand subsequent review as long as they are not "clearly erroneous"); 1982 Op. Att'y Gen. 197, 198 (opinions should be relied upon as law until they are overruled, revised, withdrawn, or upset by court decision).

Even assuming they amount to "county officers or employees," see 1990 Op. Att'y Gen. 7 (#89-2-2(L)), other members serving on conference boards would not have the same right in chapter 331 to mileage reimbursement, see 1988 Op. Att'y Gen. 24, 24. They may, however, seek reimbursement from their respective governmental entities: in their use of the word "may," chapters 279 and 372 both permit cities and school corporations to provide for reimbursement if the travel arises out of the performance of official duties. See generally Iowa Code § 4.1(30)(c). This discretionary power has historical precedent. See, e.g., 1932 Op. Att'y Gen. 43, 44

(schools); 1926 Op. Att'y Gen. 241, 243 (cities). Accordingly, such members may seek mileage reimbursement, to the extent provided, from their respective governmental entities for travel between their homes and conference board meetings.

III.

In summary: County supervisors who serve as members on county conference boards have a right to receive mileage reimbursement from the county for travel between their homes and conference board meetings. Other members who serve on conference boards may seek mileage reimbursement, to the extent provided, from their respective governmental entities for travel between their homes and conference board meetings.

Sincerely,

Bruce Kempkes
Assistant Attorney General

JUVENILE LAW: Disposition of child found to have committed a delinquent act. Iowa Code ? 232.52(2)(e)(4)(1999). Section 232.52(2)(e)(4) provides two criteria for placement in a state training school: 1) the child must have been previously placed in a treatment facility outside the home, or 2) the child must have previously been placed in a supervised community treatment program as the result of a prior delinquency adjudication. The placement in a treatment facility outside the home need not have been because of a delinquency adjudication. (Phillips to Bozwell, Appanoose County Attorney, 1-18-00) #00-1-1(L)

January 18, 2000

Mr. Robert F. Bozwell, Jr.
Appanoose County Attorney
Appanoose County Courthouse
Centerville, IA 52544

Dear Mr. Bozwell:

You have requested an opinion of the Attorney General relating to Iowa Code section 232.52 (2)(e)(1999). This section sets forth the conditions that must exist before the juvenile court may place a child in the ?state training school or other facility.? Under this section the court may make a placement if any three of the four listed conditions are found to exist. Prior to 1997, Iowa Code section 232.52(2)(e)(4) read as follows:

> (4) The child has previously been placed in a treatment facility outside the child?s home.

In 1997, the section was amended to provide:

> (4) The child has previously been placed in a treatment facility outside the child?s home <u>or in a supervised community treatment program established pursuant to section 232.191, subsection 4, as a result of a prior delinquency adjudication.</u>

Iowa Code ? 232.52(2)(e)(4)(1997) *amended by* 1997 Iowa Acts, ch. 51, section 1 (amended language underlined).

Your inquiry focuses on the first part of the condition, the part allowing placement if the child has previously been placed in a treatment facility. You have inquired whether the meaning of that part has been changed by the addition of the second part allowing placement at the training school if the child has been previously placed ?in a supervised community treatment program established pursuant to section 232.191, subsection 4, as a result of a prior delinquency adjudication.? Specifically, you have inquired, whether ?the placement in a treatment facility outside the child?s home? must have been ?because of a prior delinquency adjudication,? or may have been ?for some other reason, such as a Child In Need of Assistance or mental health proceeding??

Resolution of this issue affects standards for admission to the training school. If the delinquency adjudication language is read to modify the first, original condition, then, to some extent, the amended language tightens standards for admission to the training school by requiring a delinquency adjudication prior to placement in a treatment facility, when an adjudication was not previously required as a condition precedent. If the language is not read to modify the original condition, then the amendment serves to expand admission standards by adding an additional or alternative condition justifying the placement of a juvenile at the state training school.

In our opinion the second interpretation described above is the more sound. Under this interpretation the amended language was intended to expand admission standards by providing a new alternative condition justifying admission to the training school and should not be viewed as modifying the original placement criteria.

On its face the amended statute can be read as either requiring or not requiring a child?s placement in a treatment facility to have been the result of a prior delinquency adjudication. The language of the amendment may fairly be said to have created an ambiguity in the statute. See State v. Rodgers 560 N.W.2d 585, 586 (Iowa 1997) (providing that a statute is ambiguous if it is susceptible to more than one meaning).

Because of this ambiguity, recourse may be had to the rules of statutory construction in interpreting the statute. Iowa Code ? 4.6 (1999); Rodgers, supra, 560 N.W.2d at 586. These rules suggest that the phrase, ?as a result of a prior delinquency adjudication? was meant to qualify only the phrase, ?supervised community treatment program? and not to qualify, ?a treatment facility outside the child?s home.? According to the ?doctrine of the last preceding antecedent?, qualifying words and phrases, ?ordinarily refer only to the immediately preceding antecedent.? State v. Kluesner, 389 N.W.2d 370, 371 (Iowa 1986). This doctrine suggests that the phrase, ?as a result of a prior delinquency adjudication,? should be read to refer only to the immediately preceding antecedent, ?a supervised community treatment program established pursuant to section 232.191, subsection 4,? and not to the first antecedent, ?in a treatment facility

outside the child?s home?. Thus, the type of placement described in that first antecedent need not have been the result of a prior delinquency adjudication.

Another rule of statutory construction supports this interpretation. The word ?or? was placed between the existing condition and the language of the amendment. ?When the word ?or? is used in a statute, it is presumed to be disjunctive unless a contrary legislative intent appears.? Kearney v. Ahmann, 264 N.W.2d 768, 769 (Iowa 1978). A contrary intent does not appear in this statute. Accordingly, the amendment should not be construed as altering the first phrase of the subsection.

We must acknowledge that at least one rule of statutory construction may suggest a different conclusion. Some courts have found that where a qualifying phrase is separated from its antecedents by a comma, that comma is evidence that the legislature intended all the preceding antecedents to be qualified by the phrase, not merely the immediately preceding one. State v. Lohr, 266 N.W.2d 1, 3-4 (Iowa 1978). Applying this rule to the statute, the amended statute would be read as requiring all the placements referenced therein to have been the result of a delinquent act. However, we believe it would be unwise to conclude that the amendment had the affect of changing the existing criteria based simply on the placement of a comma. ?[P]unctuation is seldom a highly persuasive factor in statutory construction and will not defeat evident legislative intent.? State v. Guardsmark, Inc., 190 N.W.2d 397, 400 (Iowa 1971). Additionally, the qualifying phrase in Iowa Code section 232.52(2)(e)(4) is separated from the antecedent phrase by not one, but two commas:

> (4) The child has previously been placed in a treatment facility outside the child?s home or in a supervised community treatment program established pursuant to section 232.191**,** subsection 4**,** as a result of a prior delinquency adjudication.

(emphasis added). The inclusion of the second comma after the phrase, ?subsection 4,? suggests that the commas were included to set off the phrase, ?subsection 4,? and not to mean that both antecedents should be qualified. This supports the conclusion that the amendment did not alter the existing law, but merely added an additional, separate criteria for admission.

Another helpful tool in statutory construction is the examination of legislative history. State v. Crone, 545 N.W.2d 267, 273 (Iowa 1996). The use of that tool has been endorsed by the legislature and by the courts. See Iowa Code section 4.6(3) (1999) (providing that the courts may consider the legislative history in determining the legislature?s intent); see also Rathmann v. Board of Directors, 580 N.W.2d 773, 782-783 (Iowa 1998) (considering explanation given for an amendment by the Senate Judiciary

Committee); Goodell v. Humboldt County, 575 N.W.2d 486, 494 (Iowa 1998) (considering comments and explanation to a House File recorded in the House Journal). According to the explanation written by the Iowa House Human Resource Committee in relation to the bill amending section 232.52(2)(e)(4):

> This bill adds an alternative to the criteria which are currently used by the Court to determine whether a delinquent child may be placed in the state training school or other facility. Previous placement in a highly structured delinquency day program is added in the bill as an alternative to the current requirement that a delinquent child must have been previously placed in a treatment facility outside the child?s home.

House File 545, 77th G.A., 1st Sess. (Iowa 1997). This indicates that the amendment to Iowa Code section 232.52(2)(e)(4) was meant as an alternative to the criteria already in use by the juvenile courts in determining whether a delinquent may be placed in a state training school. It was not meant to change the nature of the existing criteria.

The bill explanation is significant because changes made by revision of a statute will not be construed as altering the law unless the legislature?s intent to accomplish a change in its meaning is clear and unmistakable. State v. Osborn, 368 N.W.2d 68, 69-70 (Iowa 1985). It is clear that the legislature intended to *expand* the law by adding the alternative criteria that the child have been placed ?in a supervised community treatment program?as a result of a prior delinquency adjudication.? The bill explanation provides that this alternative is in addition to ?the criteria currently being used.? (emphasis added).

To construe the amended statute as a qualification of the existing criteria would change the meaning of the original portion of the statute. The consequence of construing the amendment in this manner would be to change the law without clear evidence that the legislature intended that construction. ?In construing statutes, our ultimate goal is to effectuate the intent of the legislature.? Iowa Southern Utilities Co. v. Iowa State Commerce Com?n, 372 N.W.2d 274, 277-278 (Iowa 1985). The construction that most reflects the legislative intent set forth in the explanation of the bill is one where the amendment is construed as merely adding an additional criteria for the Juvenile Courts to use in determining the disposition of a delinquent child. This additional criteria, and it alone, is modified by the phrase, ?as a result of a prior delinquency adjudication.? The consequences of this construction are the addition of another alternative condition and the persistence of the existing condition in its original form.

Accordingly, we conclude that under Iowa Code section 232.52(2)(e)(4), a child?s previous placement in a treatment facility outside the home need not have been because of a prior delinquency adjudication. The 1997 amendment merely added the option that the child have been previously placed in a ?supervised community treatment program?as

a result of a prior delinquency adjudication.? We believe the legislature did not intend to change the existing criteria.

Sincerely,

CHARLES K. PHILLIPS
Assistant Attorney General

PROFESSIONAL LICENSING BOARDS: Authority of pharmacists to administer prescription drugs; validity of proposed rules of Board of Medical Examiners and Board of Pharmacy Examiners governing administration of prescription drugs by pharmacists. Iowa Code §§ 124.101, 147.76, 155A.3, 155A.4 (1999). Chapter 155A authorizes pharmacists under certain circumstances to administer prescription drugs when they act as authorized agents of physicians who have delegated to them the responsibility of administering prescription drugs. The Board of Medical Examiners and the Board of Pharmacy Examiners have statutory authority to adopt rules to implement and interpret the provisions of chapter 155A. Their proposed rules on pharmacists administering prescription drugs fall squarely within the scope of the authority of the Boards to adopt rules, which would receive considerable deference from a court because they deal with matters uniquely within the expertise of the Boards. (Johnson and Kempkes to Bradley, Chair, Administrative Rules Review Committee, 11-29-00) #00-11-7

November 29, 2000

The Honorable Clyde E. Bradley
State Representative and
Chair, Administrative Rules Review Committee
Iowa General Assembly
State Capitol
L O C A L

Dear Representative Bradley:

On behalf of the Administrative Rules Review Committee, you have requested an opinion from this office about the authority of pharmacists to administer prescription drugs and the authority of the Iowa Board of Medical Examiners and the Iowa Board of Pharmacy Examiners to promulgate rules regarding such a practice. You state that, for a number of years, pharmacists have been administering immunizations for influenza and pneumonia pursuant to protocol arrangements with prescribing physicians. You further advise us that the Iowa Board of Pharmacy Examiners and the Iowa Board of Medical Examiners (hereinafter "the Boards"), acting in collaboration, have recently proposed identical sets of rules permitting pharmacists to administer influenza and pneumococcal vaccines pursuant to certain procedures. You have enclosed a copy of the proposed rules as part of your opinion request.

You have raised two specific questions: (1) May a licensed pharmacist administer immunizations (prescription drugs) to patients under a protocol order issued by a licensed physician? (2) May the Iowa Board of Pharmacy Examiners and the Iowa Board of Medical Examiners promulgate rules to establish standards for the regulation of this practice?

AUTHORITY OF PHARMACIST TO ADMINISTER PRESCRIPTION DRUGS PURSUANT TO WRITTEN PROTOCOL OF PHYSICIAN

The activity of pharmacists is governed primarily by Iowa Code chapter 155A (1999), the *Iowa Pharmacy Practice Act*. The purpose of chapter 155A is to regulate "the practice of pharmacy and the licensing of pharmacies, pharmacists, and others engaged in the sale, delivery, or distribution of prescription drugs. . . ." Iowa Code §155A.2(1). Chapter 155A also controls, to some extent, the conduct of physicians in prescribing and administering prescription drugs.

Section 155A.3(1) provides, in pertinent part, that a "practitioner or the practitioner's authorized agent" may administer a prescription drug by injection. A "practitioner" is defined to include a physician. Iowa Code § 153A.3 (28). The statute defines an "authorized agent" of a practitioner as "an *individual designated by a practitioner* who is under the *supervision* of the practitioner and for whom the practitioner assumes *legal responsibility*." Iowa Code § 155A.3 (2) (emphasis added).

Section 155A.4(2)(c) also recognizes the power of a physician to have his or her authorized agent administer prescription drugs: "A practitioner, licensed by the appropriate state board, [may] administer drugs to patients. *This chapter does not prevent a practitioner from delegating the administration of a prescription drug to a nurse, intern or other qualified individual . . . under the practitioner's direction and supervision." (*emphasis added*).*[1]

Reading sections 155A.3 (1), (2), and 155A.4 together, it is clear that a physician may appoint a pharmacist to be his or her authorized agent for purposes of injecting prescription drugs if : (1) the pharmacist is designated as an agent of the physician; (2) the pharmacist is a qualified individual; (3) the pharmacist is under the supervision and direction of the physician; and (4) the physician assumes legal responsibility for this delegation of authority. Iowa Code § 4.4(2) (entire statute is presumed to be effective); State v. Wiseman, 614 N.W.2d 66, 67 (Iowa 2000) (courts will interpret a statute in its entirety so as not to make any portion irrelevant or redundant).

You have noted in your opinion request that the type of "supervision" contemplated by the proposed rules would not require the physician to be physically present when the pharmacist administers the prescription drugs. There is no requirement in chapter 155A that the physician be physically present when the authorized agent is administering the prescription drug. This stands in sharp contrast to the somewhat similar statute governing controlled substances. Like section 155A.3(1), section 124.101(1) allows a "practitioner, or . . . the practitioner's authorized agent" to administer a controlled substance by injection. However, section 124.101(1)(a) only allows the authorized agent to administer the controlled substance "in the practitioner's presence." The omission of a similar requirement from section 155A.3(1)(a) indicates that the

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[1]There is no requirement that a prescription drug order be issued when a physician or his authorized agent "administers" the drug under these sections. In interpreting a similar statute governing the administration of controlled substances, this office opined that "a practitioner may delegate the administration of [a controlled substance] to a nurse or intern under his direction and supervision without a written prescription." 1972 Op. Att'y Gen. 308, 310.

legislature did not intend to require that a physician be present when an authorized agent is administering prescription drugs. See Bennett v. Iowa Dep't of Nat. Resources, 573 N.W.2d 25, 28 (Iowa 1997) (legislative intent is expressed by omission as well as inclusion, and express mention of one thing implies exclusion of other not so mentioned).

A review of other statutes demonstrates that, if the legislature had intended to require the physical presence of the physician when an authorized agent administers prescription drugs, the legislature certainly knew how to say so. Compare Iowa Code § 155A.3(2) ("under the supervision of the practitioner"), § 155A.4(2)(c) ("under the practitioner's direction and supervision") with Iowa Code § 147.107(2) (pharmacist or physician may delegate "nonjudgmental dispensing functions" to "staff assistants" only when verification of the accuracy and completeness of the prescription is determined by the pharmacist or physician "in the pharmacist's or [physician's] physical presence"), § 156.9(2) (1977) (under "immediate personal supervision"), 135I.1(3) (under "direct supervision"), § 355.7(15) (under "direct personal supervision"), § 356.3 (under "personal supervision"). See generally Estate of Smith v. Lerner, 387 N.W.2d 576, 580 (Iowa 1986) (physicians may, when appropriate, leave orders regarding the treatment of patients for trained personnel to administer).

This conclusion is further supported by a 1979 opinion of this office concerning the Controlled Substances Act. The statute in question was substantially identical to section 155A.4 and provided: "Nothing contained in this chapter shall be construed to prevent a physician, dentist, podiatrist, or veterinarian from delegating the administration of controlled substances under this chapter to a nurse, intern, or other qualified individual . . . under his or her direction and supervision." Iowa Code § 204.101(1) (1979). This office concluded :

> This paragraph [permits] those practitioners that are licensed physicians . . . to delegate the administration of controlled substances to a "nurse, intern, or other qualified individual." *Once delegation has occurred, there is no statutory or agency requirement that the physician subsequently be present or on the premises during actual administration of the drug to the patient*.

1980 Op. Att'y Gen. 124, 127 (emphasis added).

We conclude that "supervision" of an agent who is administering a prescription drug under the Iowa Pharmacy Practice Act does not necessarily require the physical presence of a physician. We assume, however, that the administration of some prescription drugs may require more direction and supervision than others; the administration of different prescription drugs may occur in a variety of situations and the requirements for the type of supervision that would satisfy the Iowa Pharmacy Practice Act might vary from case to case. We cannot, in this opinion, define what constitutes adequate supervision in all cases.

THE BOARDS' AUTHORITY TO PROMULGATE RULES TO ESTABLISH STANDARDS FOR THE REGULATION OF PHARMACISTS ADMINISTERING PRESCRIPTION DRUGS

Both the Iowa Board of Pharmacy Examiners and the Iowa Board of Medical Examiners are required to adopt rules "to implement and interpret" the statutes governing the conduct of physicians and pharmacists. Iowa Code § 147.76. Of course, any rules adopted by the Boards must be adopted pursuant to the procedures set forth in Iowa Code supplement chapter 17A (1999), the *Iowa Administrative Procedure Act*, and must be consistent with the statutes which are being implemented and interpreted by the Boards. Any rules adopted by the Boards which are contrary to statute or exceed their authority will be struck down as *ultra vires.* Iowa Code supplement §17A.19(10).

The proposed rules provide: "A physician may prescribe via written protocol adult immunizations for influenza and pneumococcal vaccines for administration by an authorized pharmacist if the physician meets these requirements for supervising the pharmacist." IAB Vol. XXII, No. 21, April 19, 2000, p. 1533, ARC 9786A; Id., p. 1534, ARC 9790A.

The proposed rules define who qualifies as an "authorized pharmacist" for purposes of administering these immunizations: the pharmacist must be licensed in the state of Iowa and must have successfully completed an educational program and certification process on vaccine administration, which is described in considerable detail in the rules. IAB Vol. XXII, No. 21, April 19, 2000, p. 1533, ARC 9786A.

The proposed rules define a "written protocol" as being a "physician's order for one or more patients" which contains, among other things, information about the identity of the physician who is authorized to prescribe drugs and who is responsible for the delegation of the administration of the drugs; the identity of the authorized pharmacist; an identification of the vaccines that may be administered by the authorized pharmacist, the dosages, and the route of administration; a description of the activities the authorized pharmacist shall follow in determining if a patient is eligible to receive the vaccine and determining the appropriate frequency of drug administration; procedures to follow in case of life-threatening reactions; and extensive procedures for record keeping and reporting to the physician on the administration of drugs. Id. at 1534, 1535.

The proposed rules require the physician to adequately supervise the authorized pharmacist and set forth standards for adequate supervision. "Physician supervision shall be considered adequate" under the proposed rules if the physician ensures that the authorized pharmacist is licensed and has met the required educational and certification criteria; provides an

updated written protocol at least annually; is available by direct telecommunication for consultation, assistance, and direction, or provides physician backup to provide these services when the physician supervisor is not available; and is an Iowa-licensed physician who has a working relationship with an authorized pharmacist within the physician's local provider service area. Id. at 1534, 1535.

As noted in the discussion above, chapter 155A authorizes pharmacists to administer prescription drugs under certain circumstances, even if no rules are adopted to interpret and implement the provisions of chapter 155A. The Boards' proposed rules do not create any rights which are inconsistent with or in addition to those inherent in chapter 155A. Rather, the proposed rules fall squarely within the statutory authority and duty of the Boards to adopt "all necessary and proper rules to implement and interpret" the statutes governing physicians and pharmacists. See Iowa Code § 147.76.

The proposed rules describing who constitutes an "authorized pharmacist" for purposes of administering prescription drugs certainly attempt to clarify who can be an "authorized agent" under section 155A.3(1)(a) or a "qualified individual" under section 155A.4(2)(c) for purposes of administering prescription drugs.

The requirement of the proposed rules that the physician "shall adequately supervise" the pharmacist is consistent with the requirements of section 155A.3(2) and section 155A.4(2)(c). The attempt by the Boards to set forth the requirements of a written protocol and to define what constitutes adequate supervision in the proposed rules appears to be well within their authority to implement and interpret the statutes governing the conduct of physicians and pharmacists.

While this office is not in a position to express an opinion on who is medically qualified to administer prescription drugs or what constitutes adequate supervision among health care professionals, it is noteworthy that the proposed rules are the result of a collaborative effort between the Iowa Board of Medical Examiners and the Iowa Board of Pharmacy Examiners, both of which have considerable expertise in regulating and determining appropriate standards of conduct for their professions. The Boards have attempted by these proposed rules to define when a pharmacist is medically qualified to administer influenza and pneumococcal vaccines. The Boards have also attempted to define what constitutes adequate supervision of pharmacists by physicians in these immunization programs and to define the limits of where one profession's responsibilities end and another's begin. If these proposed rules are adopted, there will be a presumption that they are valid. Dico, Inc. v. Iowa Employment Appeal Bd., 576 N.W.2d 352, 355 (Iowa 1998). The Supreme Court will give considerable deference to the expertise of the Boards in determining when a pharmacist is medically qualified to administer prescription drugs and what constitutes adequate direction and supervision of pharmacists by physicians. Id. at 354. "Notwithstanding the court's ultimate responsibility to decide issues of law, when a case calls for the exercise of judgment on a matter within the expertise of the agency, [the courts] generally leave such decisions to the informed judgment of the agency." Id.

We conclude that the proposed rules fall squarely within the statutory authority of the Boards to implement and interpret the provisions of chapter 155A.

CONCLUSION

It is our opinion that the provisions of chapter 155A authorize pharmacists to administer prescription drugs under certain circumstances. This may occur when the pharmacist is acting as the authorized agent of a physician because the physician has delegated to the pharmacist the responsibility for administering prescription drugs.[2]

We also conclude that the Iowa Board of Medical Examiners and the Iowa Board of Pharmacy Examiners have authority under section 147.76 to adopt rules to implement and interpret the provisions of chapter 155A. The proposed rules which have been promulgated by the Boards fall squarely within the scope of the Boards' authority to adopt rules, and the courts would give considerable deference to these rules because they deal with matters uniquely within the expertise of the Boards.

Sincerely,

Dennis W. Johnson
Solicitor General

Bruce L. Kempkes
Assistant Attorney General

[2] This opinion is limited to the administration of non-controlled prescription drugs only. We express no opinion herein on the administration of controlled substances.

CONSTITUTIONAL LAW; EQUAL PROTECTION; ELECTIONS; STATE FAIR BOARD; STATE OFFICERS AND DEPARTMENTS: Selection of State Fair Board District Directors, Apportionment of State Fair Board Districts – Iowa Code §§ 173.1, 173.2 (1999). The selection of district directors to serve on the State Fair Board is not subject to the constitutional principle of one person, one vote because the district directors are not popularly elected. Consequently, proportionate representation is not necessary when apportioning the districts from which the State Fair Board's directors are chosen. (Lundquist to Brauns, State Representative, 8-31-00) #00-8-7

August 31, 2000

Hon. Barry Brauns
State Representative
2264 Ridgeview Drive
Muscatine, IA 52761

Dear Representative Brauns:

This letter is in response to your request for an Attorney General's opinion as to "whether proportionate representation is necessary for allocating state fair board districts." The resolution of your inquiry is dependent upon answering whether the constitutional principle of "one person, one vote" is applicable to the selection of district directors to serve on the Iowa State Fair Board. The current statutorily mandated selection process does not provide for the popular election of the State Fair Board's district directors by the public at large. Accordingly, membership on the State Fair Board is not subject to the one person, one vote principle and proportionate representation is not necessary when apportioning the districts from which the State Fair Board's directors are to be chosen.

Having first established the "one person, one vote" principle in Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), the United States Supreme Court, has subsequently declared that:

> whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election.

Polk County Board of Supervisors v. Polk Commonwealth Charter Commission, 522 N.W.2d 783, 788 (Iowa 1994) (quoting Hadley v. Junior College Dist., 397 U.S. 50, 56, 90 S. Ct. 791, 795, 25 L. Ed. 2d 45, 50-51 (1970). The goal of the one person, one vote principle is to ensure that the votes of all individuals who participate in the election of bodies that perform governmental functions carry equal weight and significance. Polk County Supervisors, 522 N.W.2d at 788 (citing Reynolds v. Sims, 377 U.S. 533, 562-63, 84 S. Ct. 1362, 1382, 12 L. Ed.

2d 506, 527-28 (1964)).

In evaluating the applicability of the one person, one vote principle to the selection of a particular body's members, a threshold determination must be made as to whether that body performs governmental functions. Polk County Supervisors, 522 N.W.2d at 788. The Iowa State Fair authority is a public instrumentality of the State of Iowa, but is not considered a state agency except for specifically enumerated purposes. Iowa Code § 173.1(1999). The powers of the Iowa State Fair authority are vested in the Iowa State Fair Board. Id. The State Fair Board is charged by statute with exercising "custody and control of the state fairgrounds." Iowa Code § 173.14. The Board's authorized activities include:

1. Holding an annual fair and exposition on the state fairgrounds.
2. Preparing premium lists and establishing rules of exhibitors for the state fair.
3. Granting permission to persons to sell items on the state fairgrounds.
4. Appointing security personnel and peace officers to patrol the state fairgrounds.
5. Erecting and repairing buildings on the state fairgrounds.
6. Granting permission to persons to use the state fairgrounds when the state fair is not in progress.
7. Taking, acquiring, holding, and disposing of property by deed, gift, devise, bequest, lease or eminent domain.
8. Soliciting and accepting contributions from private sources for the purpose of financing and supporting the state fair.

See generally Iowa Code § 173.14. The corporate powers with which the Iowa General Assembly has vested the State Fair Board includes the authority to:

1. Issue negotiable bonds and notes.
2. Sue and be sued in its own name.
3. Have and alter a corporate seal.
4. Make and alter bylaws for its management.
5. Make and execute agreements, contracts, and other instruments, with any public or private entity.
6. Accept appropriations, gifts, grants, loans, or other aid from public or private entities.
7. Make, alter, and repeal rules.

See Iowa Code § 173.14A; see also Iowa Code § 173.14B (authorizing the State Fair Board to issue bonds subject to legislative approval); Iowa Code § 173.16 (authorizing the State Fair Board to request special capital improvement appropriations from the State of Iowa, emergency funding from the executive council for natural disasters, and maintenance services from the department of transportation); Iowa Code § 173.24 (exempting the State Fair Board from the state system of uniform purchasing procedures and authorizing the Board to develop its own purchasing system).

The State Fair Board has the authority to regulate access to the fairgrounds, collect

admissions, charge rent, enter contracts, purchase property, hire employees, and pass rules relating to the use of the grounds. The State Fair Board may retain the revenue generated from its management of the state fairgrounds to use as the Board deems necessary for the maintenance and improvement of the fairgrounds. See Iowa Code §§ 173.14(1), 173.16. The vast powers delegated by the Iowa General Assembly to the State Fair Board over the administration and governance of the state fairgrounds establishes the Board as the fairgrounds' defacto governing body. Unlike the Mayor's Commission in Polk County Board of Supervisors v. Polk Commonwealth Charter Commission that was only intended to serve an advisory role and could exercise no meaningful power over the legislative and executive functions of Polk County, the State Fair Board exercises sufficient substantive governmental functions to meet the threshold query for applying the one person, one vote principle to the selection of the Board's members. Compare Polk County Supervisors, 522 N.W.2d 783, 789-90 (describing the Mayors Council's "quiddity" as "advisory") with Board of Estimate of City of New York v. Morris, 489 U.S. 688, 694-96, 109 S. Ct. 1433, 1438-39, 103 L. Ed. 2d 717, 728-29 (1989) (finding that N.Y. Board exercised a "significant range of functions common to municipal government") and Hadley, 397 U.S. at 53-54, 90 S. Ct. at 794, 25 L. Ed. 2d at 49) (finding that junior college trustees exercised governmental functions of "sufficient impact" to apply one person, one vote).

Having met the threshold requirement, further analysis is necessary to determine if the State Fair Board qualifies for an exception to the one person, one vote rule. The one person, one vote principal is not applicable to the selection of any body exercising governmental functions if either of two circumstances exists. First, the principle does not apply to those governmental bodies whose members are appointed and not popularly elected. Polk County Supervisors, 522 N.W.2d at 788; see also Hadley, 397 U.S. at 54-56, 90 S. Ct. at 794-95, 25 L. Ed. 2d at 49-51 (expressing necessity that officials be elected by "popular vote" before applying one person, one vote). Second, the principle is not applicable to those governmental entities that exercise only narrow, limited governmental powers and their activities disproportionately affect a specific group of individuals. Polk County Supervisors, 522 N.W.2d at 788 (citing Ball v. James, 451 U.S. 355, 364, 101 S. Ct. 1811, 1817-18, 68 L. Ed. 2d 150, 158-59 (1981); Sayler Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 728, 93 S. Ct. 1224, 1229, 35 L. Ed. 2d 659, 666 (1973); Hadley, 397 U.S. at 56, 90 S. Ct. at 795, 25 L. Ed. 2d at 51; Cunningham v. Municipality of Metro Seattle, 751 F. Supp. 885, 890-91 (W.D. Wash. 1990)).

Membership on the Iowa State Fair Board is statutorily defined. The governor of the state, the secretary of agriculture, and the president of Iowa State University or their qualified representatives shall serve on the board. Iowa Code § 173.1(1). Two directors from each federal congressional district are elected to serve on the State Fair Board by a statewide convention of delegates appointed from each Iowa county. Iowa Code § 173.1(2). Lastly, a treasurer and a secretary selected by the Board shall serve as nonvoting members. Iowa Code §§ 173.1(4), 173.1(5).

The Iowa General Assembly has in effect delegated its authority to appoint the State Fair Board's district directors to a convention of county delegates. Under the current statutory scheme, the convention which selects the State Fair Board directors from the five federal congressional districts is composed of:

1. The members of the state fair board as then organized.
2. The president or secretary of each county or district agricultural society entitled to receive aid from the state, or a regularly elected delegate therefrom accredited in writing, who shall be a resident of the county.
3. One delegate, a resident of the county, to be appointed by the board of supervisors in each county where there is no such society, or when such society fails to report to the association of Iowa fairs in the manner provided by law as a basis for state aid.

Iowa Code § 173.2. The Legislature may properly delegate to county fair boards and agricultural societies the power to participate in the appointment of State Fair Board directors. See 1977 Op. Att'y Gen. 65 (#77-2-16). The statute provides, however, that delegates to the selection convention are only eligible to vote for the district directors from their own congressional district. Iowa Code § 173.4(2).

Neither the State Fair Board district directors nor the selection convention delegates are named through a general plebiscite of the eligible voters of the respective congressional districts. Consequently, for purposes of applying the one person, one vote principle to the selection of the district directors, the State Fair Board is properly considered an appointed and not an elected governing entity. See Sailors v. Board of Education of the County of Kent, 387 U.S. 105, 109-111, 87 S. Ct. 1549, 1553, 18 L. Ed. 2d 650, 654-55 (1967) (finding that county school boards elected by delegates appointed by local school boards were appointed governmental bodies); MacKenzie v. Travia, 286 N.Y.S.2d 965 (1968) (finding that the N.Y. Board of Regents, whose selection was delegated to a joint session of the legislature, was not an elected body). The principle of one person, one vote is not applicable to the selection of the State Fair Board's district directors so long as those directors are selected through a process other than a popular vote of each respective district's eligible voters.

Although the means through which the State Fair Board's district directors are appointed is dispositive of the question as to whether the one person, one vote principal is applicable, the State Fair Board arguably performs such a limited special function that the one person, one vote principal would not apply regardless of how the board members were selected. Entities that perform limited special governmental functions that disproportionately affect specific groups are exempt from the rule of one person, one vote. See, e.g., Ball v. James, 451 U.S. 355, 101 S. Ct. 1811, 68 L. Ed. 2d 150 (1981) (holding that agricultural and power district was special purpose entity exempt from one person, one vote); Sayler Land Co. v. Tulare Water District, 410 U.S. 719, 93 S. Ct. 1224, 35 L. Ed 2d 659 (1973) (holding that water district was special purpose entity exempt from one person, one vote); Plowman v. Massad, 61 F.3d 796 (10th Cir. 1995) (holding that dentistry board was special purpose entity exempt from one person, one vote); Goldstein v. Mitchell, 494 N.E.2d 914 (Ill. Ct. App. 1986) (holding that drainage district was limited purpose body exempt from one person, one vote); but see Board of Estimate, 489 U.S. at 696, 109 S. Ct. at 1439, 103 L. Ed. 2d at 728-29 (finding that a city management board had sufficiently general governmental functions to impact citizens throughout the entire city, thus requiring one person, one vote); Hadley, 397 U.S. at 56, 90 S. Ct. at 795, 25 L. Ed. 2d at 51 (finding that elected educational trustees perform vital governmental functions affecting all

citizens, thus requiring one person, one vote).

The State Fair Board is responsible for discharging numerous governmental functions, but the Board's broad authority is directed toward performing the special limited purpose of organizing and promoting an annual fair and other activities on the state fairgrounds. See Iowa Code § 173.1 ("The [Iowa State Fair] authority is established to conduct an annual state fair and exposition on the Iowa state fairgrounds and to conduct other interim events consistent with its rules.") The activities of the State Fair Board disproportionately affect those persons who participate in the annual state fair and other interim events on the state fairgrounds. Persons who attend events on the state fairgrounds would presumably have a much greater interest in the operations of the State Fair Board than those persons who do not visit the fairgrounds. Each individual county fair or agricultural society that participates in the director selection convention, however, would have a substantially identical interest in the State Fair Board's establishment of rules and premiums for competitions and exhibits, among other board activities, regardless of their respective county's population. See 371 IAC 6.1 (authorizing creation of competitive exhibits and competitions). Thus, the limited scope of the State Fair Board's purpose and the disproportionate affect the Board's activities has on identifiable groups, are additional grounds for excluding the selection of the State Fair Board from the requirements of one person, one vote.

The State Fair Board, not being a popularly elected body, is not subject to the one person, one vote principle. The State Fair Board's narrow purpose and disproportionate impact on specific groups also limits the applicability of the one person, one vote principle to the selection of the Board's district directors. The State Fair Board district directors may be selected from districts of disproportionate population.

Sincerely,

JOHN R. LUNDQUIST
Assistant Attorney General

SCHOOLS: Exclusive vendor contracts; competitive bidding. Iowa Code §§ 274.7, 279.8, 279.12, 297.7 (1999). The board of directors of a public school district may enter into exclusive contracts with vendors for the purchase of products sold on school premises or at school functions. Vendor contracts for non-educational goods are proprietary in nature and may extend beyond the term of current board members. A marketing firm may be employed to assist with the negotiation and oversight of vendor contracts. While statutory public bidding requirements are not applicable to school district contracts for the purchase of goods and services, public policy supports use of competitive bidding procedures for such contracts. (Scase to Chapman, 2-15-00) #00-2-4(L)

February 15, 2000

The Honorable Kay Chapman, Administrator
Professional Licensing & Regulation Division
Iowa Department of Commerce
1918 SE Hulsizer Road
Ankeny, Iowa 50021

Dear Ms. Chapman:

During your tenure as a State Representative, you requested an opinion of the Attorney General addressing a number of questions concerning the ability of public school districts to enter into exclusive long-term contracts with vendors for products sold on school premises or at school functions. In your request letter, you indicate that school districts may obtain certain goods at a reduced cost and may, in some cases, generate funding by entering into exclusive vendor contracts. In light of this potential, you present a number of inquiries regarding the propriety and methodology for such contracting.

Initially, you ask whether public school corporations have the authority to enter into arrangements with vendors, including soft drink vendors, whereby the vendor is given the exclusive right to provide products at the school and at school sponsored activities and to display its advertising logo on school property in exchange for cash or other payments. Public school districts, as creatures of statute, are not vested with home rule authority. Rather, the Iowa courts have consistently held that schools are subject to "Dillon's Rule." The only powers which may be exercised by a school board are those expressly conferred upon them by statute or necessarily implied from those express powers. See Sioux City Comm. School Dist. v. Bd. of Public Instruction, 402 N.W.2d 739, 741 (Iowa 1987); Barnett v. Durant Community School Dist., 249 N.W.2d 626, 627 (Iowa 1978); Silver Lake Consol. School Dist. v. Parker, 238 Iowa 984, 990, 29 N.W.2d 214, 217-18 (1947). Therefore, our analysis must begin with consideration of relevant statutory provisions relating to contracting by school districts and setting forth the powers and duties of boards of directors of public schools.

Iowa Code section 274.1 (1999) provides the following general description of the powers of school districts:

> Each school district shall continue a body politic as a school corporation, unless changed as provided by law, and as such may sue and be sued, hold property, and exercise all the powers granted by law, and shall have exclusive jurisdiction in all school matters over the territory therein contained.

The governing body of each school district is an elected board of directors. Iowa Code § 274.7 (1999). In addition to its other functions, the board of directors is authorized to

> . . . make rules for its own government and that of the directors, officers, teachers and pupils, and for the care of the schoolhouse, grounds, and property of the school corporation, and aid in the enforcement of the same, and require the performance of duties by said persons imposed by law and the rules.

Iowa Code § 279.8 (1999). The board is specifically charged with the duty to "make all contracts necessary and proper for exercising the powers granted and performing the duties required by law . . .." Iowa Code § 279.12 (1999).

The Iowa Supreme Court and this office have previously characterized these statutory provisions as granting public school boards of directors "broad discretion in the management of school affairs." 1980 Op. Att'y Gen. 114 [#79-4-32(L)], citing Kinzer v. Directors of Independent School Dist. of Marion, 129 Iowa 441, 444-45, 105 N.W. 686, 687 (1906) and Security Nat'l Bank of Mason City v. Bagley, 202 Iowa 701, 210 N.W. 947 (1926). As the Court indicated in Kinzer, "[i]t was plainly intended . . . that the management of school affairs should be left to the discretion of the board of directors, and not to the courts, and we ought not to interfere with the exercise of discretion on the part of a school board as to what is a reasonable and necessary rule, except in a plain case of exceeding the power conferred." 129 Iowa at 445, 105 N.W. at 687.

Within the scope of the general contracting authority of schools, the Iowa courts have held that public school boards may adopt a student savings plan, Security Nat'l Bank of Mason City v. Bagley, 202 Iowa 701, 201 N.W. 947 (1926); include in teacher contracts provisions for reimbursement of tuition expended on approved graduate courses, Barnett v. Durant Community School Dist., 249 N.W.2d at 630; and contract with teachers for payment of accrued sick leave benefits, Bettendorf Education Assn. v. Bettendorf Community School Dist., 262 N.W.2d 550, 552 (Iowa 1978). This office has previously concluded that this statutory authority empowers a school board to allow use of school facilities by music instrument retailers to display their wares and disseminate information to students and parents, 1980 Op. Att'y Gen. 580; and to engage a commercial photographer to take pictures of students at the school, 1980 Op. Att'y Gen. 114. We have also acknowledged that a public benefit may be derived from commercial use of school facilities, favorably citing a decision of the Ohio Supreme Court which held that the sale of

advertising space on the scoreboard of a publicly owned stadium served a public purpose. 1980 Op. Att'y Gen. 114, citing Bazell v. City of Cincinnati, 233 N.E.2d 864, 870 (Ohio 1968).

Review of the above-cited cases and opinions leads us to conclude that a school board may enter a contract by which the board agrees to limit the sale of products in vending machines or concession stands at school facilities to one manufacturer's product. In doing so, we recognize that these arrangements are not free of controversy. See Lawrence Hardy, "The Lure of School Marketing," American School Board Journal, October 1999, at 23; Chris Suellentrop, "This Government Brought to You By . . .," Governing, November 1998, at 43; Kathleen Vail, "Insert Coins in Slot," The American School Board Journal, February1999, at 28; Robert L. Zorn, "The Great Cola Wars," The American School Board Journal, February 1999, at 31. We limit our analysis to the legality of the proposed undertaking. The advisability of entering these contracts will depend upon the specific circumstances of each district and is a matter for local school board determination.[1]

Having answered your first question affirmatively, we proceed to address your second inquiry: whether there is a limitation on the length of time that such a contract may remain in force.

> [T]he general rule of law as set forth by the Iowa Supreme Court is that, absent an express statutory provision to the contrary, a local governmental body . . . may not bind its successors in matters that are essentially legislative or governmental in nature, as opposed to business or proprietary in nature.

1984 Op. Att'y Gen. 56 [#83-6-4(L) at p. 1] (citations omitted); see Board of Education in and for Delaware County v. Bremen Tp. Rural Independent School Dist., 260 Iowa 400, 408, 148 N.W.2d 419, 424 (1967) ("No citation of authority is needed for the proposition that one legislature cannot bind future legislatures upon . . . policy matters."). The general prohibition against one governing board binding its successors applies only to matters involving governmental policy decisions and is not applicable to business contracts. See Sampson v. City of Cedar Falls, 231 N.W.2d 609, 613 (Iowa 1975) (city council may contract to bind future councils with respect to procurement of an adequate supply of electricity for municipal electric utility); City of Des Moines v. City of West Des Moines, 239 Iowa 1, 9-11, 30 N.W.2d 500, 507

[1] A school district considering an exclusive vendor agreement which will include payments from the vendor to the district should be aware that this partnership with a private entity could have an impact upon the tax-free status of outstanding bonds and that payments received by the school under the agreement could be considered income to the district. It is also possible that an exclusive vendor contract could be structured so as to raise antitrust or restraint of trade concerns. Bond counsel and the school district's attorney should be consulted regarding these issues before the terms of an agreement are accepted.

(1948) (city council authorized to enter into twenty-year contract for use of sewage disposal system).

A contract with a vendor for the supply of non-educational goods to the school is a business contract which may extend beyond the term of the board entering the contract. V. L. Dodds Co. v. Consolidated School Dist. of Lamont, 220 Iowa 812, 263 N.W. 522 (1935) (successor school board bound by contract for the purchase of paper products executed by prior board). We find no general limitation upon the length of time for which a school board could approve an exclusive vendor contract for soft drinks or other non-educational goods for sale on school premises or at school functions.[2]

Next you ask whether a school could contract with a for-profit corporation for assistance in developing requests for proposals, considering proposals, negotiating contracts, and auditing the contracts in return for a percentage of the revenue the district receives from the underlying contract. You have provided a sample agreement for our consideration. Under the agreement provided, a school district would employ a marketing firm to advise and assist the board in evaluating, structuring, negotiating, auditing and overseeing management of the contract. In exchange for these services, the district would pay the firm a commission between fifteen percent and twenty-five percent of the revenue received under the contract, based upon the amount of per pupil funding generated. Although we do not use the opinion process to review the propriety of the specific terms of an agreement, we can provide advice in general terms.

As set forth above, Code sections 279.8 and 279.12 afford school boards broad discretion to enter contracts for the efficient operation of the school. We believe that this general contracting power, which provides a basis for school boards to enter into exclusive distribution contracts with vendors, would also allow a school board to contract with a for-profit corporation to negotiate and oversee the vendor contract. Some school boards may conclude that they, or school administrators and legal counsel, can directly provide the services offered, thereby avoiding the expense of engaging a marketing firm to represent the district. See Robert L. Zorn. "The Great Cola Wars," The American School Board Journal, February 1999, at 31 (detailing one superintendent's successful negotiation of an exclusive soft drink vendor contract). Other boards may conclude that the services which can be provided by an experienced marketing firm will give the district a sufficient advantage to justify the costs involved. As with the vendor contracts, although we believe that a school board may legally enter into a contract of this type,

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[2] A different issue would be presented if an exclusive vendor contract were proposed for the purchase of textbooks or other educational items by the school. The selection of such items is a policy-related function of the board of directors. See Iowa Code §§ 278.1 (voters at regular school election have the power to "[d]irect a change of textbooks regularly adopted), 301.1 (board of directors authorized to adopt textbooks) (1999); 1982 Op. Att'y Gen. 527 (addressing application of Code sections 278.1 and 301.1). Long-term exclusive vendor contracts for such items would appear to be inconsistent with these statutory provisions.

the wisdom of doing so is an issue which will depend upon the specific circumstances of each district and is a matter for local board determination.

You ask whether the duration of a management contract is limited by law. The analysis applied in response to your second inquiry is equally applicable here. A contract management agreement, similar to the one provided for our review, would constitute a proprietary or business contract. Because the contract does not involve legislative or governmental functions, a current school board could bind future school boards for whatever term they deem appropriate.

Finally, you ask whether there are any statutory or other requirements for receiving proposals from vendors or marketing firms hired to assist a school district. The public bidding requirements placed upon school districts by statute are applicable to the construction of public improvements. See Iowa Code §§ 73A.2, 73A.18, 297.7 (1999). Under these provisions, a school district must administer and use competitive bidding procedures and award to the lowest responsive bidder contracts for school building construction and repair projects exceeding twenty-five thousand dollars. No statutory requirement for competitive bidding prior to contracting for the purchase of goods and services is in place. The absence of a statute requiring use of a competitive process prior to the award of a contract does not negate the benefit which may be derived from use of a competitive bidding procedure and districts would be well-advised to consider such measures before entering into an exclusive vendor or marketing contract. See 1994 Op. Att'y Gen. 141 [#94-9-3(L) at p. 3] ("all public entities participating in the energy bank program would be wise to administer and use competitive-bidding procedures for implementing such energy conservation measures"); 1978 Op. Att'y Gen. 171, 171-72 ("this office has recommended that governing bodies of municipalities obtain bids on purchases as a matter of public policy, even when there is no statutory requirement that they do so in order to avoid purchasing procedures which might be questionable as capricious, arbitrary or fraudulent").

In summary, we conclude that the board of directors of a public school district may enter into exclusive contracts with vendors for the purchase of products sold on school premises or at school functions. Vendor contracts for non-educational goods are proprietary in nature and may extend beyond the term of current board members. A marketing firm may be employed to assist with the negotiation and oversight of vendor contracts. While statutory public bidding requirements are not applicable to school district contracts for the purchase of goods and services, public policy supports use of competitive bidding procedures for such contracts.

Sincerely,

Christie J. Scase
Assistant Attorney General

CITIES; CIVIL SERVICE: Consolidation of positions in fire department. Iowa Code §§ 20.7, 372.8, 400.7, 400.28 (1999). A civil service commission lacks statutory authority to review or approve consolidations of civil service positions in a fire department serving a city organized under Iowa Code section 372.7 when the city, acting in good faith, consolidates them for the purpose of improving economy or efficiency in the fire department. (Kempkes to Connors, State Representative, 2-15-00) #00-2-2

February 15, 2000

The Honorable John Connors
State Representative
Statehouse
LOCAL

Dear Representative Connors:

You have requested an opinion about the proper role of a civil service commission in a city governed by a mayor, a council elected from wards and at large, and an appointed city manager. See generally Iowa Code ch. 372 (1999) (Organization of Cities). You ask whether such a commission has statutory authority to review or approve a proposed reorganization of the city's fire department involving consolidations of civil service positions. The proposed consolidations would (1) merge three positions of assistant fire chief (fire suppression, training officer, and fire marshal) who have different job duties into a single position of assistant fire chief who will have responsibility for their former duties and (2) merge two positions of captain (fire suppression and fire inspector) who have different job duties into a single position of captain who will have responsibility for their former duties. According to the fire chief, these personnel reclassifications would improve economy and efficiency in the fire department.

Obviously, collective bargaining agreements may govern the manner and mode of effectuating changes in the civil service. See generally Iowa Code ch. 20 (1999) (Collective Bargaining). Your question, however, focuses solely upon whether any statute provides the civil service commission with authority to review or approve the proposed consolidations. We conclude that no law provides a civil service commission with such authority and that a city, acting in good faith, may consolidate the positions for the purpose of improving economy or efficiency in the fire department.

I.

Iowa Code chapter 400 is entitled Civil Service. It defines three general areas of responsibility for civil service commissions: establishing guidelines for examinations; certifying lists of qualified persons; and determining appeals from suspensions, demotions, and discharges.

See Iowa Code §§ 400.8, 400.9, 400.11, 400.18, 400.20, 400.23; City of Bettendorf v. Kelling, 465 N.W.2d 299, 302 (Iowa 1990).

The Iowa Constitution grants home rule authority to cities. See Iowa Const. amend. 25 (1968). In essence, home rule permits cities to exercise any power and perform any function they deem appropriate for improving the general welfare of their residents as long as such action does not offend state law. See Iowa Code §§ 364.1, 364.2(3), 364.3. Of importance to your question, cities may exercise their general powers subject only to limitations "expressly imposed" by a state or city law. Iowa Code § 364.2(2). See 1992 Op. Att'y Gen. 169 (#92-9-6(L)).

Pursuant to statute, cities have the specific duty to provide fire protection and the specific power to establish, staff, and maintain fire departments. Iowa Code § 364.16; 1992 Op. Att'y Gen. 169 (#92-9-6(L)). Fire chiefs have statutory authority to make appointments and promotions within their fire departments. Iowa Code § 400.15; Smith v. Civil Serv. Comm'n, 561 N.W.2d 75, 79 (Iowa 1997). No statute, however, requires that a fire department have a specific number of assistant fire chiefs or captains.

II.

You have asked whether a civil service commission has statutory authority to review or approve a proposed reorganization of the city's fire department involving consolidations of civil service positions.

(A)

For cities governed by a mayor, a council elected from wards and at large, and an appointed city manager, see Iowa Code § 372.7, section 372.8 grants power to a city manager to employ, reclassify, or discharge all employees and fix their compensation, "subject to civil service provisions . . . ." Chapter 400, which sets forth those provisions, does not expressly provide (or necessarily imply) any authority on behalf of civil service commissions to review or approve consolidations of civil service positions within fire departments. Civil service commissions possess only such duties and powers as expressly granted by statute. Bryan v. City of Des Moines, 261 N.W.2d 685, 687 (Iowa 1978); 3 E. McQuillin, The Law of Municipal Corporations §12.55, at 282 (1990); 2 A. Sands & M. Libonati, Local Government Law § 10.12, at 104 (1992).

On the other hand, chapter 400 -- as well as chapters 20 and 372 -- affirmatively indicates that civil service commissions lack authority to review or approve consolidations in fire departments. See, e.g., Iowa Code § 20.7 (public employers have right to hire, promote, demote, transfer, assign, and retain public employees in positions; maintain efficiency of governmental operations; and determine and implement methods, means, assignments, and personnel by which

public employer's operations conducted), § 372.8 (city manager shall take active control of city's police, fire, and engineering departments), § 400.7 (employee shall have full civil service rights in a position upon its reclassification "by the city"), § 400.28 (when required by the public interest, city may abolish an office and remove employees from their classification or grade or reduce the number of employees in any classification by suspension).

In addition, case law suggests that civil service commissions play no role in consolidations of civil service positions. In Helgevold v. Civil Service Commission, 367 N.W.2d 257, 261 (Iowa App. 1985), the Iowa Court of Appeals observed that "[a]mong the administrative duties of the city which have been recognized is the authority to establish different salary positions and grades; the ability to reclassify in furtherance of successful function of the service; and to reorganize within departments as long as the city is not attempting to avoid the purposes of the city service laws." See generally Bryan v. City of Des Moines, 261 N.W.2d at 687; Wood v. Loveless, 244 Iowa 919, 58 N.W.2d 368, 373 (1953); Kern v. City of Des Moines, 213 Iowa 510, 239 N.W. 104, 105 (1931); 1978 Op. Att'y Gen. 121, 121. When the Supreme Court of Iowa examined Helgevold v. Civil Service Commission in a later case, it did not indicate any disagreement with it. See McBride v. Sioux City, 444 N.W.2d 85, 88 (Iowa 1989).

As a matter of logic, the authority to create and abolish positions includes the authority to consolidate them. City of Miami v. Rodriquez-Quesada, 388 So.2d 258, 259 (Fla. App. 1980); 2 Sands & Libonati, supra, § 10.50, at 424. Cities possess this authority even though the persons affected by its exercise enjoy civil service status. 2 Sands & Libonati, supra, § 10.23, at 173. Cities "are not bound to keep [civil service employees] upon the payrolls if it is decided, in good faith, that the positions should be abolished, either because of financial necessity or the dictates of good and economical business management." Wood v. Loveless, 58 N.W.2d at 371. See 3 McQuillin, supra, § 2.76, at 381.

That cities may make good-faith modifications in the civil service for the purpose of economy or efficiency comports with their authority, in general, to exercise full control over all their officers and employees. See generally Misbach v. Civil Serv. Comm'n, 230 Iowa 323, 297 N.W. 284, 286 (1941); 3 McQuillin, supra, § 12.01, at 55, §12.55, at 276. Courts have viewed the creation or abolition of a position in city government as something more than a mere administrative act. Orange v. County of Suffolk, 830 F. Supp. 701, 705 (E.D.N.Y. 1993). The abolition of a position in the budgetary process is a "quintessential legislative function, reflecting [a governing body's] ordering of policy priorities in the face of limited financial resources." Rateree v. Rockett, 852 F.2d 946, 950 (7th Cir. 1988). See generally Iowa Code § 400.28. Civil service legislation thus does not completely restrict city government in the areas of personnel and fiscal management. See Gorecki v. Ramsey County, 437 N.W.2d 646, 650 (Minn.1989). We have observed:

> Although Civil Service statutes are designed to protect and safeguard against arbitrary actions of superior officers in removing

> employees, the overriding concern is always the protection of the public. As such, Civil Service legislation is not designed to prevent a department from being reorganized in the interest of efficiency and economy. Any reclassification, therefore, which conforms the civil structure to the realities of the agency prior to the reclassification is valid.

1978 Op. Att'y Gen. 119, 119-20. See Iowa Code § 4.4(5).

(B)

We have also issued a caveat against merely establishing a title and moving individuals into newly consolidated positions in order to establish a pay differential: "It should be shown that there is a substantial difference in the work performed and that the reorganization accords with realities." 1978 Op. Att'y Gen. 119, 120. A similar caveat was issued by the court in Helgevold v. Civil Service Commission:

> There are limits upon actions the city may take for administrative reasons. The municipality may not avoid the dictates of the civil service laws by merely labeling an action administrative. Reclassification or reorganization will not be permitted when its purpose is to avoid civil service laws. . . .
>
> Therefore, [a] court must balance the interests involved; those of the city in controlling the functions and administration of the [city], and of the employee in serving without threat of demotion or removal for improper or partisan reasons. The fulcrum in balancing these interests is the public good.

367 N.W.2d at 261 (citations omitted). See generally Annot., "Abolition of Civil Service Position," 87 A.L.R.3d 1165 (1978).

The limitations mentioned by these caveats would require factual findings. See Taylor v. City of New London, 536 N.W.2d 901, 903 (Minn. App. 1995); see also Kern v. City of Des Moines, 239 N.W. at 105 (challenger to city's reduction in civil service force, allegedly made to improve economy or efficiency, must show fraud, subterfuge, sham, or arbitrariness). The opinion process cannot resolve disputed issues of fact, and this opinion does not purport to do so. See 61 IAC 1.5(3)(c); 1994 Op. Att'y Gen. 146, 148.

III.

In summary: A civil service commission lacks statutory authority to review or approve consolidations of civil service positions in a fire department serving a city organized under section 372.7 when the city, acting in good faith, consolidates them for the purpose of improving economy or efficiency in the fire department.

Sincerely,

Bruce Kempkes
Assistant Attorney General

CITIES; ANIMAL FEEDING OPERATIONS: Authority of cities to regulate animal feeding operations within annexed territory. Iowa Const. art. III, § 38A; Iowa Code §§ 204.2(1), 204.2(3), 364.1,368.1(2), 414.1,414.3,414.23, 455B.172(4), 455B.173(13), 657.11. City ordinances which attempt to regulate the conduct of animal feeding operations would be preempted by state law. A city may enact a zoning ordinance pursuant to Iowa Code chapter 414 to prohibit animal feeding operations within city limits; however, enactment of a zoning ordinance to prohibit an existing animal feeding operation could adversely affect the rights of those who have a property interest in the animal feeding operation. (Benton to Frevert, State Representative, 1-19-00) #00-1-2

January 19, 2000

The Honorable Marcella R. Frevert
State Representative
3655 - 450th Avenue
Emmetsburg, IA 50536

Dear Representative Frevert:

You have requested our opinion concerning the extent to which a city may regulate livestock confinement operations in areas annexed by the city. Your letter states that residents of a rural, unincorporated area of Palo Alto County are concerned that the proliferation of these facilities threatens Five Island Lake. These residents are considering voluntary annexation into a nearby city so that the confinement operations could be subject to more stringent city ordinances. In light of these concerns, you ask whether a city ordinance may apply to an animal feeding operation within areas annexed by the city. It is our opinion that city ordinances which attempt to regulate the conduct of animal feeding operations would be preempted by state law. A city may enact a zoning ordinance pursuant to Iowa Code chapter 414 to prohibit animal feeding operations within city limits; however, enactment of a zoning ordinance to prohibit an existing animal feeding operation could adversely affect the rights of those who have a property interest in the animal feeding operation.

Iowa Code section 368.1(2) defines annexation as the addition of territory to a city. The procedure for voluntary annexation is set forth in Iowa Code section 368.7(1) which states in part that an annexation is voluntary when "[a]ll of the owners of land in a territory adjoining a city. . . apply in writing to the council of the adjoining city requesting annexation of the territory.' Agricultural land is subject to annexation. McQuillin. Mun. Corp., § 7.21, p.496 (3rd ed. 1996). Once annexed, agricultural land may be subject to regulation by city ordinances in two forms: city ordinances which regulate the conduct of animal feeding operations; and city ordinances which zone animal feeding operations.

GENERAL ORDINANCES

Like counties, cities have home rule powers "to determine their local affairs." Iowa Const. art. III, § 38A. The exercise of a home rule power by a city must not be "inconsistent with the

laws of the general assembly." Iowa Code § 364.1. The Iowa Supreme Court has employed the same analysis to determine whether a county ordinance is authorized under home rule, or is "inconsistent" with state law. Goodell v. Humboldt County 575 N.W.2d 486, 492 (Iowa 1998).

The requirement that the exercise of a home rule power by either a city or county not be "inconsistent" with state law gives rise to the doctrine of preemption. Preemption may be either express or implied. Goodell, 575 N.W.2d at 492. Express preemption occurs when the general assembly has specifically prohibited local action in an area. Id. Implied preemption may take two forms: where an ordinance prohibits an act permitted by statute or permits an act prohibited by statute, the ordinance is considered inconsistent with state law and preempted. Id. at 500-502. Implied preemption may also occur where the legislature has covered a subject in such a manner as to demonstrate a legislative intention to occupy the field and preclude local regulation. Id. at 498-500.

In Goodell the Court considered a challenge to four county ordinances which attempted to regulate livestock confinement operations. The Court in Goodell invalidated the four Humboldt County ordinances on the grounds of both express and implied preemption. For example, Ordinance 24 adopted by Humboldt County had prohibited large livestock confinement feeding operations from applying manure on any land in Humboldt County that drained into an agricultural drainage well. Id. at 490. The Court held that this ordinance conflicted with Iowa Code section 455B.172(5) which makes the Iowa Department of Natural Resources exclusively responsible for regulating the disposal of livestock waste from confinement facilities and was therefore expressly preempted.[1] Id. at 505.

The remaining Humboldt County Ordinances were struck down on the grounds of implied preemption. The Court noted that Iowa Code section 455B.173(13) invested the Environmental Protection Commission with authority to adopt rules "relating to the construction or operation of animal feeding operations," including, but not limited to, "requirements for obtaining permits." Id. at 502. The Court further noted that the DNR has provided by rule that certain animal feeding operations must obtain construction and operation permits under 567 IAC 65.3-6. Id.

Thus, the Court found that Ordinance 22, requiring persons seeking to construct a large livestock confinement feeding facility to obtain a county permit, was preempted as being inconsistent with state law. The Court reasoned that an operation could meet state law requirements for a permit but not the county's additional requirements. Id. at 503. Because the

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[1]Since 1998 counties have been expressly prohibited from adopting or enforcing any county ordinances regulating animal feeding operations, unless expressly authorized by state law. Iowa Code § 331.304A (1999). See 1998 Iowa Acts, ch. 1209 § 9. This statute does not preclude a city from adopting or enforcing city ordinances regulating animal feeding operations.

county ordinance in effect would prohibit what state law allowed, it conflicted with state law and was found invalid. Id.

Iowa Code sections 204.2(1) and (3) established a manure storage indemnity fluid for the purpose "of indemnifying a county for expenses related to cleaning up the site of the confinement feeding operation."[2] The Court in Goodell analyzed Humboldt County Ordinance 23 under this statute. Ordinance 23 made the operation of a regulated facility conditional on the posting of financial responsibility for site cleanup. Id. at 504. The Court found that this ordinance suffered from the same infirmity as Ordinance 22, because furnishing financial assurance was made a condition of lawful operation of a livestock confinement center. Therefore, a facility that would be authorized to operate under state law could be prohibited from operation by the county ordinance. Id. The ordinance was therefore irreconcilable with and preempted by state law. Id.

The Court in Goodell relied on Iowa Code section 657.11 in evaluating Humboldt County Ordinance *25.* This statute limited nuisance actions against animal feeding operations by creating a rebuttable presumption that an animal feeding operation which had received all permits under chapter 455B was not a public or private nuisance. Humboldt County Ordinance 25 restricted off-site emissions of hydrogen sulfide, and provided that the county could seek an order of abatement through a civil action in the event of a violation.

The Court held that there was a direct and irreconcilable conflict between the ordinance and section 657.11. Id. at 506. In the Court's view, the ordinance permitted what section 657.11 prohibited by allowing the county to seek injunctive relief against an animal feeding operation without meeting the conditions imposed by the state statutes. Id.

The ordinances analyzed in Goodell were adopted pursuant to the county's home rule authority. The Court's decision in Goodell provides guidance as to how a city ordinance adopted under home rule to regulate livestock feeding operations in annexed territory would be analyzed.

ZONING ORDINANCES

Imposition of city ordinances which zone animal feeding operations present different considerations. Under Iowa Code chapter 414 cities are given authority to zone. Iowa Code section 414.1 provides in part that "[for the purpose of promoting the health, safety, morals, or the general welfare of the community. . . any city is hereby empowered to regulate and restrict. . . the location and use of buildings, structures, and land for trade, industry, residence, or other purposes." Zoning ordinances must be made in accordance with a comprehensive plan, and with reasonable consideration for “encouraging the most appropriate use of land throughout the city.” Iowa Code § 414.3.

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[2]Iowa Code chapter 204 has now been transferred to Iowa Code chapter 455J. 1998 Iowa Acts, ch. 1209, § 2.

The distinction between a zoning ordinance and a general ordinance adopted under home rule was analyzed in Goodell. Iowa Code ch. 335 establishes zoning authority for counties. However, section 335.2 exempts land and structures used for agricultural purposes from zoning. Livestock confinement operations are exempt from county zoning under this statute. Kuehl V. Cass County, 555 N.W.2d 686, 689 (Iowa 1996). Rejecting the argument that the ordinances in Goodell were county zoning regulations and, therefore, subject to the statutory exemption, the Court noted that zoning regulations often take the form of "performance controls" to limit or control traffic, noise, dust, odors or like problems. Goodell v. Humboldt County, 575 N.W.2d. at 496. But the principal attribute of zoning is regulation of land use by district. Id. The ordinances in Goodell could not be considered zoning regulations, because even though the ordinances "may advance the health and general welfare of the community, they do not do so by regulating the usage of land by district." Id.

We find no statutes which prohibit a city from zoning animal feeding operations within the city limits. Iowa Code chapter 414 which governs city zoning does not contain any exemption for property used for agricultural purposes. Only statutes governing city zoning in *unincorporated areas* contain an exemption for property used for agricultural purposes. Iowa Code section 414.23 extends city zoning power to the unincorporated area up to two miles beyond the limits of the city, except where county zoning exists. This statute states in part that the "exemption from regulation granted by section 335.2 to property used for agricultural purposes shall apply to such unincorporated area." Iowa Code § 414.23 (emphasis added). Section 335.2, in turn, restricts county ordinances from application to land, buildings or structures "primarily adapted, by reason of nature and area, for use for agricultural purposes." An animal feeding operation is considered to fall within this exemption for "agricultural purposes." See Thompson v. Hancock, 539 N.W.2d 181, 183 (Iowa 1995). Accordingly, cities are prohibited from zoning land, buildings, or structures "primarily adapted, by reason of nature and area, for use for agricultural purposes," but only in unincorporated areas.

Under principles of statutory construction the prohibition against cities zoning land, buildings, or structures used for agricultural purposes in unincorporated areas supports the inference that this type of zoning is *not* prohibited within city limits. In interpreting statutes the expression of one thing is considered the exclusion of another. Bennett v. Department of Natural Resources, 573 N.W.2d *25,* 28 (Iowa 1997); Marcus v. Young, 538 N.W.2d 285, 289 (Iowa 995). Underlying this maxim is the principle “that 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.” Bennett v. Department of Natural Resources. 573 N.W.2d at 28, *quoting from,* Marcus V. Young, 538 N.W.2d *285* at 289. By prohibiting cities from zoning land, buildings, or structures used for agricultural purposes in unincorporated areas, therefore, the statutes may be construed to not prohibit cities from zoning land, buildings, or structures used for agricultural purposes within city limits.

Our construction of these statutes does not mean that a city has an unfettered right to

annex agricultural land and, thereafter, use its zoning authority to prohibit those animal feeding operations already in existence. Application of zoning ordinances in these circumstances could adversely affect the rights of the those who have a property interest in an ongoing animal feeding operation. See Nemmers v. City of Dubuque, 716 P.2d 1194 (8th Cir. 1983), *appeal after remand,* 764 F.2d 502 (8th Cir. 1985). For this reason, a city enacting a zoning ordinance to prohibit animal feeding operations on annexed land should consider whether application of the ordinance would adversely affect the rights of property owners whose property was annexed. Cf Iowa Code § 172D.4(e) ("A zoning requirement adopted by a city shall not apply to a feedlot which becomes located within an incorporated or unincorporated area subject to regulation by that city by virtue of an incorporation or annexation which takes effect after November 1, 1976 for a period of ten years from the effective date of the incorporation or annexation.").

In summary; city ordinances which attempt to regulate the conduct of animal feeding operations would be preempted by state law. A city may enact a zoning ordinance pursuant to Iowa Code chapter 414 to prohibit animal feeding operations within city limits; however, enactment of a zoning ordinance to prohibit an existing animal feeding operation could adversely affect the rights of those who have a property interest in the animal feeding operation.

Sincerely,

TIMOTHY D. BENTON
Assistant Attorney General
Environmental & Agricultural Law Division

TDB\cfb

CITIES: Smoking Prohibitions; Preemption. Iowa Const., art. III, §§ 38A, 39A. Iowa Code chapters 142B and 364. Iowa Code §§ 142B.1(3), 142B.2(2), 142B.6, 331.301, 364.2(3), and 364.3(3) (1999). A city ordinance enacted to prohibit smoking in any public place, as defined by Iowa Code § 142B.1(3), would not be inconsistent with or in conflict with Iowa Code chapter 142B, and would not be preempted. (St.Clair to Hammond, State Senator, 22-25-00) #00-11-5

November 14, 2000

The Honorable Johnie Hammond
State Senator
3431 Ross Road
Ames, Iowa 50014

Dear Senator Hammond:

You have requested an opinion of the Attorney General regarding the ability of local jurisdictions to adopt ordinances prohibiting smoking in certain public places under Iowa Code chapter 142B, entitled "Smoking Prohibitions." You posed this question:

> In view of subsection 142B.2(2) Code of Iowa, would a city ordinance enacted to prohibit smoking in any public place, as defined by subsection 142B.1(3) Code of Iowa be inconsistent with or conflict with Chapter 142B Code of Iowa?

For the reasons that follow, we conclude that such an ordinance would not be inconsistent with or in conflict with chapter 142B of the Code of Iowa. However, before addressing the specific question you have posed, it would be helpful to review some general background regarding the powers of cities and counties to regulate local affairs under Iowa law.

I. Home Rule Power of Cities and Counties

The home rule powers of Iowa municipalities[1] are rooted in the Iowa Constitution as well as in Iowa statutes. The Iowa Constitution provides that municipalities may pass ordinances governing their affairs as long as the particular enactment is "not inconsistent with the laws of the general assembly." Iowa Const., art. III, § 38A. Iowa Code chapter 364 (1999) sets forth the

[1] Although this opinion addresses the power of *municipalities* to prohibit smoking in certain public places, there are parallel provisions of the Iowa Constitution and the 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) ("[W]e cite to county home rule cases and city home rule cases interchangeably.")

Home Rule Amendments. Section 364.2(3) defines "inconsistent" as "[a]n exercise of . . . power [that] is irreconcilable with the state law."

In considering whether a particular municipal 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).

Although the Iowa Supreme Court strives to harmonize local regulations with state law, the Court has recognized the authority of the general assembly to preempt local regulation, that is, to restrict local authorities from regulating in designated subject areas. This preemption may be express or implied. *Goodell*, 575 N.W.2d at 492.

Local regulation is expressly preempted where the general assembly specifically prohibits such local action. *See* e.g., *Chelsea Theater Corp. v. City of Burlington*, 258 N.W.2d 372, 373 (Iowa 1977).

Local regulation is impliedly preempted in one of two ways. First, a local ordinance may be inconsistent with state law by prohibiting activity permitted by state law, or by permitting activity prohibited by state law. *Goodell*, 575 N.W.2d at 493. The second way in which local regulation may be impliedly preempted is where the general assembly has covered a subject area in a manner that demonstrates an intent to preempt. *Id.*, 575 N.W.2d at 493. This latter form of implied preemption is often referred to as "occupying the field." 62 C.J.S. *Municipal Corporations* § 141 (1999).

II. Effect of Chapter 142B on Home Rule Power

A. Express Preemption

On the question of whether the general assembly expressly preempted local regulation of smoking in public places, we turn to the language of the statute. Iowa Code section 142B.6 provides:

> Enforcement of this chapter shall be implemented in an equitable manner throughout the state. For the purpose of equitable and uniform implementation, application, and enforcement of state and local laws and regulations, the provisions of this chapter shall supersede any local law or regulation which is inconsistent with or conflicts with the provisions of this chapter.

The last sentence of this section specifically provides only that inconsistent or conflicting local laws are preempted. The more general statement of purpose ("equitable and uniform implementation, application, and enforcement") must be interpreted in the light of the specific prohibition of "inconsistent" regulations. *See Hamilton v. City of Urbandale*, 291 N.W.2d 15, 18 (Iowa 1980). This specific reference to "inconsistent" regulations reflects the same home rule principles embodied in the Iowa Constitution and in the Home Rule Amendments, and does not constitute an express statement of the general assembly's intent to preempt.

The general assembly has had no difficulty expressing its intent to preempt with unmistakable clarity in other contexts. For example, in the *Chelsea Theater* case the Supreme Court found that the following language expressed the general assembly's intent to occupy the field: "[N]o municipality, county or other governmental unit within this state shall make any law, ordinance or regulation relating to obscenity." *Chelsea Theater*, 258 N.W.2d at 373. Such language stands in stark contrast to section 142B.6, which does not by its terms purport to prohibit any county or municipal regulation beyond that which is "inconsistent" with the statute. *See also Bryan v. City of Des Moines*, 261 N.W.2d 685, 687 (Iowa 1978) ("Any limitation on a city's powers by state law must be expressly imposed."); *City of Clinton v. Sheridan*, 530 N.W.2d 690, 695 (Iowa 1995) ("If the general assembly intended to preempt . . . it could have done so by express and unambiguous statutory language.")

We conclude that the language of section 142B.6 does not constitute an express statement of legislative intent to bar municipalities from exercising home rule powers.

B. Implied Preemption

As noted above, implied preemption could arise from an overt conflict between chapter 142B and a local ordinance establishing more stringent standards for smoking in public places. In a broad sense, a locality that extends the ban on smoking by prohibiting the designation of smoking areas in certain public places[2] "prohibits an act permitted by a statute." *City of Des Moines v. Gruen*, 457 N.W.2d 340, 343 (Iowa 1990). However, this expansive approach would mean that a local jurisdiction could *never* establish more stringent standards, which is something localities are expressly permitted to do as a general matter. *See* Iowa Code § 364.3(3) (1999); *see also Goodell*, 575 N.W.2d at 492. Therefore, the issue must be whether the local ordinance prohibits an act expressly *sanctioned* by state law. Chapter 142B does not embody such an express sanction of smoking in designated public places. On the contrary, as the discussion below reveals, chapter 142B envisions the active involvement of local jurisdictions in expanding the smoking prohibitions of state law.

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[2] Note that we are confining this opinion to the ability of a locality to restrict smoking in a "public place" as defined by section 142B.1(3). This opinion does not address the ability or inability of a locality to modify the definition of "public place" as established by the general assembly.

The other consideration in assessing implied preemption is whether the general assembly indicated an intent to occupy the field. The mere fact that the general assembly has legislated extensively in a given area does not in itself establish legislative intent to occupy the field. *City of Council Bluffs v. Cain*, 342 N.W.2d 810, 812 (Iowa 1983); *Sheridan*, 530 N.W.2d at 695. Moreover, even where a statutory scheme addresses a subject area in a comprehensive manner, a municipality may set "standards more stringent than those imposed by state law, unless state law provides otherwise." *Gruen*, 457 N.W.2d at 343; *Sioux City Police Officers' Ass'n*, 495 N.W.2d at 694.

Thus, the Iowa Supreme Court has rarely found a statute to have "occupied the field." *But see City of Vinton v. Engledow*, 140 N.W.2d 857 (Iowa 1966). This reluctance reflects the strong public policy in favor of granting local jurisdictions the flexibility they need to address local problems; this policy is anchored in the home rule provisions of the Iowa Constitution and the Iowa Code. *See Bechtel v. City of Des Moines*, 225 N.W.2d 326, 332 (Iowa 1975).

As noted above, section 142B.6 requires "uniform implementation, application, and enforcement" of chapter 142B. In *Goodell*, the Supreme Court indicated in dicta that an intent to occupy the field might be found in a clear expression of the general assembly's desire to have uniform regulations statewide. *Id.*, 575 N.W.2d at 499-500. At least two aspects of chapter 142B militate against this interpretation, however. First, the general reference to uniform application in section 142B.6 is followed by the specific prohibition on inconsistent or conflicting provisions of local law -- clear recognition that there can be *consistent* local regulation in the field.. Second, the provision of chapter 142B highlighted in your request for an opinion, which is discussed below, makes it clear that any legislative desire for uniformity was not intended to prevent localities from regulating smoking in public places.

C. Effect of Section 142B.2(2)

With this background, we can turn to the specifics of your request for an opinion. The question you posed highlights section 142B.2(2), which provides:

> Smoking areas may be designated by persons having custody or control of public places, except in places in which smoking is prohibited by the fire marshal *or by other law, ordinance or regulation.*

(Emphasis supplied.)

This provision specifies the mechanics of designating smoking areas within public places. In so doing, it expressly recognizes the authority of local jurisdictions to pass ordinances prohibiting smoking in some public places in which state law would permit smoking. Thus, the

general assembly clearly acknowledged that localities retained the authority to establish more stringent prohibitions relating to smoking in public places than those embodied in state law.

Given the robust policies favoring home rule, embodied in the Iowa Constitution and enunciated repeatedly by the Iowa Supreme Court, the implications of section 142B.2(2) are especially compelling. The general assembly intended local jurisdictions to retain the power to expand the prohibitions on smoking in public places beyond the regulations embodied in state law, and Iowa Code § 142B.2(2) constitutes a clear expression of that intent.

III. Conclusion

In summary, a city ordinance enacted to prohibit smoking in any public place, as defined by Iowa Code § 142B.1(3), would not be inconsistent with or conflict with Iowa Code chapter 142B, and would not be preempted.

Sincerely,

Steve St. Clair
Assistant Attorney General

COUNTIES: Eligibility of an area of land incorporated as a recreational lake district to be designated a rural improvement zone. Senate File 2438, 78th G.A., 2d Sess., § 3 (Iowa 2000); House File 2541, 78th G.A., 2d Sess., §§ 1, 2 (Iowa 2000); Iowa Code §§ 357E.2(1), 357H.1 (1999). An area of the county incorporated or established as a recreational lake district is eligible for designation as a rural improvement zone so long as that area is established outside the boundaries or corporate limits of a city. However, the county board of supervisors should, prior to any such designation, consult with the county attorney to determine whether, under the particular facts and circumstances involved, such designation would contravene the rule (or the underlying public policy) against two distinct municipal corporations existing within the same territory and exercising the same powers, jurisdiction, and privileges. (Nelson to Larson, State Representative, 11-1-00) #00-11-2

November 1, 2000

The Honorable Chuck Larson, Jr.
State Representative
2214 Evergreen Street, N.E.
Cedar Rapids, IA 52402

Dear Representative Larson:

You have requested an opinion of the Attorney General concerning Iowa Code chapters 357E and 357H. Specifically, you ask whether an area incorporated as a "recreational lake district" pursuant to chapter 357E is eligible for designation as a "rural improvement zone" pursuant to chapter 357H. In your request letter, you indicate that the issue arises from language in section 357E.2(1), which provides that an "area may be incorporated as a benefitted recreational lake district," and language in section 357H.1, which provides that the area to be designated as a rural improvement zone must be in an "unincorporated area" of the county.[1]

The answer to your question turns principally on the meaning of the words

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1 Section 357E.2(1), as amended by Senate File 2438, states that "[i]f an area of contiguous territory is situated so that the acquisition, construction, reconstruction, enlargement, improvement, equipping, maintenance, and operation of recreation facilities for the residents of the territory will be conducive to the public health, comfort, convenience, water quality, or welfare, the area may be *incorporated* as a benefitted recreational lake district as set forth in this chapter. Senate File 2438, 78th G.A., 2d Sess., § 3 (Iowa 2000) (emphasis added). Section 357H.1, as amended by House File 2541, provides that "[t]he board of supervisors of a county with less than eighteen thousand five hundred residents, based upon the 1990 certified federal census, and with a private lake development shall designate an area surrounding the lake, if it is an *unincorporated area* of the county, a rural improvement zone upon receipt of a petition pursuant to section 357H.2, and upon the board's determination that the area is in need of improvements. House File 2541, 78th G.A., 2d Sess., § 1 (Iowa 2000) (emphasis added).

"unincorporated area" as used in section 357H.1 to describe the land area of a county. The General Assembly, however, has not defined the words "unincorporated area" in chapter 357H. In the absence of a statutory definition or an established meaning in the law, we give words in a statute their ordinary and common meaning. E.g., T&K Roofing Co. v. Iowa Dep't of Educ., 593 N.W.2d 159, 162 (Iowa 1999). We must construe words and phrases according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, must be construed according to such meaning. Iowa Code § 4.1(38) (1999). In this regard, we note there is a traditional meaning associated with the words "unincorporated area" when used to describe the land area of a county or territory. These words ordinarily mean that part of the county or territory outside the boundaries of incorporated cities. 43 Words & Phrases 474 (1969), citing City of Olivette v. Graeler, 338 S.W.2d 827, 833 (Mo. 1960). See Apple Creek Township v. City of Bismarck, 271 N.W.2d 583, 587 (N.D. 1978) ("unincorporated territory" means any territory not located within the boundaries of an incorporated city). This traditional meaning is consistent with the usage of the words "unincorporated area" in the context of other statutory provisions. See, e.g., Iowa Code §§ 336.16, 384.67, 422B.1(3), 468.585(2) (1999). Therefore, we conclude that an area of the county incorporated or established as a recreational lake district is eligible for designation as a rural improvement zone so long as that area is established outside the boundaries or corporate limits of a city.[2]

While the designation of a recreational lake district as a rural improvement zone is permissible under Iowa statutory law, there is a common law rule that should be considered by a county board of supervisors before making such a designation. There is a firmly established rule that there cannot be at the same time within the same territory, two distinct municipal corporations exercising the same powers, jurisdiction, and privileges. Aurora v. Aurora Sanitation Dist., 149 P.2d 662, 664 (Colo. 1944); 2 E. McQuillin, The Law of Municipal Corporations § 7.08, at 376 (1996).; 56 Am. Jur. 2d Municipal Corporations § 40 (1971). This rule does not prevent the formation of two municipal corporations in the same territory at the same time for different purposes. 2 McQuillin, supra, at 376. Generally, there is no objection to more than one municipal or quasi-municipal corporation coexisting in the same area if they perform different functions. Id.

The above-described rule "does not rest upon any theory of constitutional limitation, but

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2 The word "city" means a municipal corporation, but not including a county, township, school district, or any special-purpose district or authority. Iowa Code § 362.2(4) (Supp. 1999). When used in relation to land area, "city" includes only the area within the city limits. Id. By definition, the term "city" would not include a recreational lake district, a special-purpose district. Chapter 357E governing recreational lake districts is organized under title IX (local government), subtitle 2 (special districts) of the Iowa Code.

upon the practical consideration that intolerable confusion instead of good government, almost inevitably would attain in a territory in which two municipal corporations of like kind and powers attempted to function coincidentally." Aurora, 149 P.2d at 664. The application of this rule has usually been made in cases involving the validity of tax levies and cases involving the jurisdiction of corporate bodies. See People ex rel. Greening v. Bartholf, 58 N.E.2d 172, 180 (Ill. 1944). In addition, courts have applied this rule to special-purpose units and districts. See e.g., Aurora, 149 P.2d at 664 (sanitation district); Boise v. Bench Sewer Dist., 773 P.2d 642, 651 (Idaho 1989) (sewer district); Bellevue v. Eastern Sarpy County Suburban Fire Protection Dist., 143 N.W.2d 62, 63 (Neb. 1966) (fire protection district); People ex rel. Smerdon v. Crews, 92 N.E. 245, 247 (Ill. 1910) (drainage district). Accordingly, we believe this rule is applicable to recreational lake districts and rural improvement zones, which are special-purpose districts.

Applying this rule to a specific factual situation would necessitate an analysis of the particular facts and surrounding circumstances,[3] which prevents us from giving a definitive answer to your question through the opinion process. See 61 IAC 1.5(3)(c); 1998 Op. Att'y Gen. __ (#97-7-3(L)). Consequently, we recommend that, prior to designating a rural improvement zone in an area all or part of which has been incorporated as a recreational lake district, a county board of supervisors consult with the county attorney to consider this rule and the underlying public policy in light of the specific facts and circumstances involved. The county board of supervisors, with the assistance of its counsel, is in the best position to weigh all of the relevant facts and circumstances in order to determine whether the results of such designation, including the dual management and control of the same property by two separate boards of trustees and the potential imposition of multiple tax levies, would create a threat to "good government" or sound administration or create the potential for conflicting assertions of jurisdiction.

In summary, we conclude that an area incorporated as a recreational lake district pursuant to chapter 357E is eligible for designation as a rural improvement zone pursuant to chapter 357H so long as that area is established outside the boundaries or corporate limits of a city. However,

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3 We note that various facts and circumstances are relevant to the application of the rule, such as the degree of overlap between the boundaries of a recreational lake district and a proposed rural improvement zone. We also note that Iowa Code chapter 357E has been amended to permit a recreational lake district to combine with a water quality district. Senate File 2438, 78th G.A., 2d Sess., § 3 (Iowa 2000). A combined district would be authorized to perform various "water quality activities," such as dredging, that would improve the water quality of the lake. Senate File 2438, 78th G.A., 2d Sess., § 2 (Iowa 2000). A rural improvement zone is authorized to make very similar improvements, including dredging. House File 2541, 78th G.A., 2d Sess., § 1 (Iowa 2000). Thus, the combination of a recreational lake district with a water quality district would be relevant to a determination whether such district should be designated as a rural improvement zone.

we recommend that, prior to any such designation, the county board of supervisors consult with the county attorney to determine whether, under the particular facts and circumstances involved, such designation would contravene the rule (or the underlying public policy) against two distinct municipal corporations existing within the same territory and exercising the same powers, jurisdiction, and privileges.

Sincerely,

Jeffrey W. Nelson
Assistant Attorney General

MUNICIPALITIES: Agreements that landowner and any successor owners "submit" in the future to voluntary annexation. Iowa Const. amend 25 (1968); Iowa Code § 368.7 (1999). In general, a city may enter into agreements with private landowners in which they and any successor owners agree to "submit" to voluntary annexation if the land becomes adjacent to a city boundary within twenty-one years and if the city then desires annexation of the tract. Although this office cannot determine whether a particular annexation agreement binds any successor owners, we point out that persons buying land generally have constructive notice of any properly recorded encumbrances and must, upon accepting the deed, perform any covenant recited within it. (Kempkes to Larson, State Representative, 12-13-00) #00-12-1

December 13, 2000

The Honorable Chuck Larson
State Representative
State Capitol
LOCAL

Dear Representative Larson:

You have requested an opinion on the annexation of an undeveloped tract of land located within two miles of a city's boundaries, but not presently adjoining a boundary of the city. You indicate a developer wishes to enter into an "annexation agreement" (or, alternatively, a "pre-annexation agreement") with the city. Under this agreement, the developer and any successor owners of lots within the tract would promise to "submit" to voluntary annexation into the city at such time the tract becomes adjacent to a city boundary and if the city then desires annexation of the tract. You ask whether the agreement binds any successor owners if they have record notice of its terms and if the tract becomes adjacent to the city within twenty-one years.

I. Applicable Law

Iowa Code chapter 368 (1999) is entitled City Development and is the source of authority for the City Development Board, which oversees the annexation of land in an urbanized area. *City of Waukee v. City Development Bd.*, 590 N.W.2d 712, 713-14 (Iowa 1999). An "urbanized area" is any area of land within two miles of the boundaries of a city. Iowa Code § 368.1(15). Under chapter 368,

> (1). All of the owners of land in a territory adjoining a city may apply in writing to the council of the adjoining city requesting annexation of the territory. . . .
>
> (2). An application for annexation of territory not within an urbanized area of a city other than the city to which the annexation is directed must be approved by resolution of the council which receives the application. . . .
>
> (3). An application for annexation of territory within an

> urbanized area of a city other than the city to which the annexation is directed must be approved both by resolution of the council which receives the application and the [City Development Board] . . . .

Iowa Code § 368.7.

II. Analysis

As a preliminary matter, we need to determine whether a city acts *ultra vires* by entering into agreements with private landowners that require them and any successor owners to submit to voluntary annexation.

States may expressly authorize cities by statute to enter into such annexation agreements. 2 E. McQuillin, *The Law of Municipal Corporations*, § 7.13.50, at 415 (1996). Iowa law does not specifically authorize cities to do so. Under home rule, however, a city "may exercise its general powers subject only to limitations expressly imposed by a state or city law." Iowa Code § 364.2(2). *See* 2000 Op. Att'y Gen. __ (#00-8-5(L)). Although a city by ordinance certainly may prohibit annexation agreements, no statute expressly prohibits them. *See generally* Iowa Code § 364.2(3) ("[a]n exercise of a city power is not inconsistent with a state law unless it is irreconcilable with the state law"); Schiedler, "Implementation of Constitutional Home Rule in Iowa," 22 Drake L. Rev. 294, 311 (1973) ("[i]rreconcilable is a stronger term that inconsistent"). The authority granted to cities in sections 354.8 and 364.4(2) to establish extraterritorial jurisdiction for reviewing subdivisions and to provide extraterritorial services certainly seems consistent with a power to enter into annexation agreements in order to ensure orderly city development. *See generally City of Des Moines v. City Development Bd.,* 473 N.W.2d 197, 200 (1991) (chapter 368, which must be liberally construed in public's favor, demonstrates in its entirety an intent to have City Development Board oversee and approve orderly development of cities); Yeager, "City and Town Boundaries -- Incorporation, Consolidation, Annexation, and Severance," 19 Drake L. Rev. 1, 30 (1969) (unregulated urban development on the unincorporated edges of cities constitutes a serious problem for city planning).

We therefore conclude that, as a general proposition, cities may enter into annexation agreements with private landowners. *Cf. Johnson v. City of Le Grande*, 1 P.3d 1036, 1038-39 (Or. App. 2000) (Oregon's cities could enter into annexation agreements even before enactment of legislation that specifically sanctioned their use); Taub, "Reference Materials for Session on Development Agreements," C333 ALI-ABA Continuing Legal Educ. 655, 672 (1988) (Florida's cities have home-rule authority to enter into annexation agreements).

Persons buying land generally have constructive notice of any properly recorded encumbrances and must, upon accepting the deed, perform any covenant recited within it. *See McSweyn v. Inter-Urban Ry. Co.*, 256 Iowa 1140, 1146, 130 N.W.2d 445, 448 (1964) (citations

omitted); *see also* 76 Cal. Op. Att'y Gen. 227 (Oct. 13, 1993) (recording laws give successor owners constructive knowledge of recorded annexation agreements). Courts have upheld, against successor owners, annexation agreements in which the provision of extraterritorial services improved or otherwise benefitted their land. *See, e.g., Village of Orland Park v. First Fed. Savings & Loan Ass'n*, 481 N.E.2d 946, 950-51 (Ill. App. 1985); *City of Springfield ex rel. Burton v. City of Springfield*, 2000 WL 799727 (Ohio); *see also* 2 McQuillin, *supra*, § 7.13.50, at 416. *See generally Geralnes B.V. v. Greenwood Village*, 583 F.Supp. 830, 839-40 (D. Colo. 1984); *Greenwood Village v. Proposed City of Centennial*, 3 P.3d 427, 446 (Colo. 2000); 1993 N.C. Op. Att'y Gen. (Nov. 1993); Starritt & McClanahan, "Land Use Planning and Takings," 30 Land & Water L. Rev. 415, 455-56 (1995). We therefore conclude that, as a general proposition, persons who purchase land with constructive notice of an annexation agreement will be bound by that agreement to the same extent as the previous owner.

Notwithstanding these general propositions, we suggest that a city proceed with caution in this area. We cannot determine in an attorney general's opinion whether a *particular* annexation agreement binds successor owners, because annexation agreements may vary in their specific terms as well as in the circumstances surrounding their negotiation and execution. *See generally* 61 IAC 1.5(2), 1.5(3)(d); 1972 Op. Att'y Gen. 642, 643 (declining to speculate on court ruling when two municipalities seek to annex same territory under different statutory procedures); 1970 Op. Att'y Gen. 48, 51 (declining to speculate on all possible legal theories in theoretical suit against state).

Moreover, the existence of an annexation agreement does not mean that a city itself can institute a voluntary annexation or that such an annexation will automatically occur when the land subject to the agreement becomes adjacent to the city boundaries. A voluntary annexation can only occur when "[a]ll the owners of land in a territory adjoining a city . . . apply in writing to the council of the adjoining city requesting annexation of the territory." Iowa Code § 368.7(1). If the annexation agreement requires all landowners to submit to voluntary annexation, but a successor owner refuses to join in making a written application, the city or other landowners may have to initiate judicial proceedings in order to force compliance with the agreement. The success of such an action would depend, among other things, upon the specific terms of the annexation agreement.

We also caution that not every annexation agreement may survive judicial scrutiny. *See, e.g., City of Louisville v. Jefferson County Fiscal Ct.*, 623 S.W.2d 219, 225 (Ky. 1981) (annexation agreement requiring city to undertake certain legislative action, including zone changes, changes in street entrances, and flood control held invalid on ground that "[a] contract which binds a legislative body, present or future, to a course of legislative action is void against public policy"). *Cf.* 1988 Op. Att'y Gen. 50 (#87-10-1(L)) ("[a] waiver of either a statutory or constitutionally protected right must be a voluntarily and intentional act done with an actual knowledge of the existence of the right and the meaning of the rights involved, and with full understanding of the direct consequences of the waiver"; "absent an express statutory provision

to the contrary, a local governmental body [generally] may not bind its successors in matters that are essentially legislative or governmental, in nature").

Finally, more than one city may seek to annex the same tract of land. In such a case, the City Development Board could properly view an annexation agreement between a single city and a developer as merely one factor to weigh in fulfilling its statutory duty to consider the interests of all parties. *See generally* 1980 Op. Att'y Gen. 282 (#79-7-17(L)) ("the intent of the legislature in requiring approval by the [City Development] Board of voluntary annexations within urbanized areas was to provide a check by an impartial body on competition between cities for certain territories"). We seriously doubt that an annexation agreement between a city and a private developer can usurp the statutory role of the City Development Board. *Cf. Crescent Chevrolet v. Iowa Dep't of Job Serv.*, 429 N.W.2d 148, 150 (Iowa 1988) (statutory right enabling parties in contested cases to waive certain proceedings does not limit the statutory authority of governing state agency to review proceedings; a stipulation that effectively "prohibits [an] agency from performing its statutory obligations and functions will not be enforced"); *In re Kokomo Times Pub. & Printing Corp.*, 301 F. Supp. 529, 536 (S. D. Ind. 1968) ("the parties could not by agreement . . . bind [others] who were not parties to the agreement").

III. Summary

In general, a city may enter into agreements with private landowners in which they and any successor owners agree to "submit" to voluntary annexation if the land becomes adjacent to a city boundary within twenty-one years and if the city then desires annexation of the tract. Although this office cannot determine whether a particular annexation agreement binds any successor owners, we point out that persons buying land generally have constructive notice of any properly recorded encumbrances and must, upon accepting the deed, perform any covenant recited within it. We believe that passage of legislation specifically approving and detailing procedures for annexation agreements would provide cities and developers with greater certainty in their planning.[1]

Sincerely,

Bruce Kempkes
Assistant Attorney General

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[1] Although your question refers to a tract of land becoming adjacent to a city boundary within twenty-one years, you do not explain the significance of that time period. It presumably rests upon Iowa Code section 614.24, which governs stale uses and reversions. We limit this opinion to your specific question and do not consider the impact, if any, of section 614.24.

CITIES; CONFLICT OF INTERESTS: Council member also serving as chief of volunteer fire department. Iowa Code § 372.13(10) (1999). Section 372.13(10), which permits a city council to appoint one of its members as chief of its volunteer fire department "if the fire department serves an area with a population of not more than two thousand," contemplates that the city council may employ any reasonable method for estimating an area's population in the absence of definitive data from the last preceding certified federal census. (Kempkes to Lievens, Butler County Attorney, 8-9-00) #00-8-1(L)

August 9, 2000

Mr. Gregory M. Lievens
Butler County Attorney
Courthouse
P.O. Box 307
Allison, IA 50602

Dear Mr. Lievens:

You have requested an opinion on a statute prohibiting a person from simultaneously serving a city in two capacities -- as a council member and as chief of the volunteer fire department -- except under certain circumstances. One circumstance requires that the volunteer fire department serve an area of not more than two thousand in population.

You ask how a city with a known population of less than two thousand must proceed when it desires to appoint a council member as chief of its volunteer fire department that serves, in addition to the city, a rural area with an unknown population. We conclude that the city council may employ any reasonable method for estimating that area's population in the absence of definitive data from the last preceding certified federal census.

I.

Iowa Code chapter 372 (1999) is entitled Organization of City Government. Section 372.13 governs city councils. Section 372.13(10) provides:

> A council member, during the term for which that member is elected, is not precluded from holding the office of chief of the

> volunteer fire department if the fire department serves an area with a population of not more than two thousand, and if no other candidate who is not a city council member is available to hold the office of chief of the volunteer fire department.

(emphasis added). See generally 1990 Iowa Acts, 73rd G.A., ch. 1106, § 1; 1978 Op. Att'y Gen. 325, 326; 1972 Op. Att'y Gen. 594, 595.

II.

Cities and townships -- governmental subdivisions of counties required to provide fire protection services, Iowa Code §§ 359.42, 364.16; 1976 Op. Att'y Gen. 774, 775 -- may contract with volunteer fire departments to provide them. 1998 Op. Att'y Gen. ___ (#97-6-2(L)); 1978 Op. Att'y Gen. 791, 791; see Iowa Code § 357B.7; see also Iowa Code § 364.16. Indeed, volunteer fire departments constitute ninety percent of the firefighting units in this state. Fire Service Inst., Iowa State Univ. Extension, "A Profile of Iowa's Fire Service" 1 (December 1997).

Volunteer fire departments from multiple cities often serve a single county township, and in such instances section lines often define the boundaries of their respective service areas. Fire Service Inst., Iowa State Univ. Extension, "The Role of Townships in Iowa's Fire and Emergency Medical Services" 11, 14 (January 1998); see 1976 Op. Att'y Gen. 441, 442 ("trustees may divide [a] township into areas in order to contract with more than one agency for fire protection"); see also Iowa Code § 359.43. See generally Black's Law Dictionary 1214 (1979) ("section" of land is "[a] division or parcel of land, on the government survey, comprising one square mile or 640 acres," and each "township" is "[six miles square and] divided by straight lines into thirty-six sections"). Thus, the boundaries of an area served by a city's volunteer fire department may not be coterminous with the boundaries of a county, township, or other political subdivision covered by a census.

Pointing to this reality, you have asked how a city with a known population of less than two thousand must proceed when it desires to appoint a council member as chief of its volunteer fire department that serves, in addition to the city, a rural area with an unknown population.

(A)

Section 372.13(10) permits a member of a city council to serve as chief of the city's volunteer fire department if it serves "an area with a population of not more than two thousand." Statutes limiting their application to political subdivisions of a certain population size often refer to a census as the means for measuring the population. See, e.g., Iowa Code §§ 9F.6, 15E.192(2), 24.48(1), 42.2(2); see also Iowa Const. art. III, § 34 (1857). See generally 2 E. McQuillin, Municipal Corporations § 4.76, at 170 (1996). A "census" signifies an official count or finding. See Bisbee v. Williams, 317 P.2d 567, 568 (Az. 1957); State ex rel. Reynolds v. Jost, 175 S.W. 591, 596 (Mo. 1915); 1993 La. Op. Att'y Gen. 249; Black's Law Dictionary 203 (1979); Webster's Ninth New Collegiate Dictionary 178 (1979). An "enumeration" -- another word sometimes used for

demographical purposes, see, e.g., Iowa Code §§ 312.3(3)-(5), 405A.1(c) -- also suggests an official count or finding. Webster's, supra, at 378.

Section 372.13(10) does not refer to a census or enumeration for determining the population of an area served by a city's volunteer fire department; however, it does refer to an area having a "population" of not more than two thousand. Throughout the Iowa Code this word, if undefined, means "the population in the last preceding certified federal census . . . ." Iowa Code § 4.1(22). Section 372.13(10) thus requires use of the most recent certified federal census to determine the population of an area served by a city's volunteer fire department. See 1982 Op. Att'y Gen. 463, 467-68. See generally Hornby v. State, 559 N.W.2d 23, 25 (Iowa 1997) (legislature may act as its own lexicographer).

Nevertheless, the federal census may have limited utility for determining the population of rural areas served by a city's volunteer fire department. The federal census provides data for the population of Iowa's townships, but not for sections within those townships. See U.S. Dep't of Commerce, Economic and Statistics Admin., Bureau of the Census, 1990 Census of Population -- Iowa Table 76, at 251-69 (June 1992); see also Iowa Census Bd., Census of Iowa for 1856 (1857). Moreover, the smallest data product typically available from the federal census -- the block -- relies upon geographical features (e.g., roads and streams), which are visible, instead of section lines, which are not. See U.S. Dep't of Commerce, Bureau of the Census, "Census ABCs" 5-6 (1991);

U.S. Dep't of Commerce, Bureau of the Census, "1990 Census of Population and Housing, Tabulation and Publication Program" 11, 49 (1989); D. Myers, Analysis with Local Census Data 64-65 (1992); see also Iowa Code § 42.4(4)(a)(1); Askew v. City of Rome, 127 F.3d 1355, 1363 (11th Cir. 1997).

To the extent a city's volunteer fire department serves rural areas defined by such boundaries as section lines, data from the federal census simply cannot determine the population of those areas for purposes of section 372.13(10). We therefore conclude that section 372.13(10) necessarily permits an estimate of population in instances where the federal census does not provide an official count of the population within a given geographical area. See generally Iowa Code § 4.4(3) (legislature presumably intended just and reasonable result in passing statute); Stanley v. Fitzgerald, 580 N.W.2d 742, 747 (Iowa 1998) (statutory construction takes into account spirit of statute as well as text and tries to achieve a "sensible, workable, practical, and logical construction").

(C)

Section 372.13(10) expressly prohibits a city council member from simultaneously serving as chief of the city's volunteer fire department "if the fire department serves an area with a population of not more than two thousand." In arguing that section 372.13(10) allows such service as long as the population of the city itself does not exceed two thousand, you proffer practical reasons why the General Assembly must have intended this result.

We focus first and foremost, however, upon the statutory text. See United States v. Alvarez-Sanchez, 511 U.S. 350, 356, 114 S. Ct. 1599, 128 L. Ed. 2d 319 (1994). See generally 1976 Op. Att'y Gen. 774, 775 ("[t]he legislature is not as concerned with the simplicity of providing fire protection as with the necessity thereof"). In doing so, we can neither ignore the plain import of the phrase "serves an area" nor substitute the word "city" for "area" under the guise of statutory construction. See State v. Byers, 456 N.W.2d 917, 919 (Iowa 1990). See generally Iowa Code § 4.1(38) (words and phrases shall be construed according to approved English usage).

Either viewed in isolation or within chapter 372 as a whole, section 372.13(10) has no ambiguity for purposes of your question.

See State ex rel. Hilfiker v. Seaton, 191 Iowa 81, 181 N.W. 796, 797-98 (1921); see also Farmers Co-op Co. v. DeCoster, 528 N.W.2d 536, 537 (Iowa 1995). In turn, no opportunity arises to examine whether the General Assembly may have intended some special meaning for the language it employed in section 372.13(10): only an ambiguous statute implicates resort to principles of statutory construction to determine legislative meaning, State v. Wagner, 596 N.W.2d 83, 87 (Iowa 1999); Farmers Co-op Co. v. DeCoster, 528 N.W.2d at 537; see also Iowa Code § 4.6.

(D)

A statute, however, may suffer from other defects in drafting besides ambiguity. Here, the drafters of section 372.13(10) wrongly assumed that the federal census could always determine the population of an area served by a city's volunteer fire department and, given this assumption, did not specify any method to supplement the federal census or the public entity or officer authorized to choose the method (or combination of methods) for supplementing it. See 1979 Neb. Op. Att'y Gen. 113 (#76). Cf. 1996 Op. Att'y Gen. 83 (#96-3-1(L)) (in enacting statute that allocates property tax revenues for county library services, legislature did not anticipate that multiple libraries could serve county and thus provided no formula for allocating revenues among them). We must fill in those statutory gaps in order to effect legislative intent. See generally 2A Sutherland's Statutory Construction § 47.38, at 290-91 (1992).

Courts have commonly held that, when necessary, any "satisfactory," "competent," or "material" evidence may be used for supplementing a statutorily prescribed method of determining population. See, e.g., Pelzer v. City of Bellevue, 264 N.W.2d 653, 655 (Neb. 1978) ("[w]here the boundary lines between voting districts differ from the boundary lines of census enumeration districts, the census figures cannot be applied directly, but must be applied indirectly by interpretation or supplemented by other evidence"); 1985 Miss. Op. Att'y Gen. (July 2, 1985); Annot., "Use of Census Data," 56 A.L.R.5th 171, 203, 236-41 (1998).

We therefore believe that, when necessary, any reasonable method may be used to supplement the last preceding certified federal census for estimating rural populations served by a city's volunteer fire department. Cf. 1992 Op. Att'y Gen. 130, 131 ("[w]hen notice is [statutorily] required but no method is prescribed, the notice must only be a reasonable one under the

circumstances"). The method chosen must amount to something more than mere guesswork and represent an honest and good-faith effort to arrive at an accurate estimate. Pelzer v. City of Bellevue, 264 N.W.2d at 657; 1983-84 Mich. Op. Att'y Gen. 113 (#6153); see Reynolds v. Sims, 377 U.S. 533, 577, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964); Mandicino v. Kelly, 158 N.W.2d 754, 763 (Iowa 1968).

"Mathematical precision and exactness are impossible as a practical matter, and can be approached only within flexible limits." Pelzer v. City of Bellevue, 264 N.W.2d at 658. "There are a variety of population projections, a variety of census data, and any number of statistical approaches that may be utilized [for estimating population]." 1979 Neb. Op. Att'y Gen. 113 (#76). See State ex rel. Reynolds v. Jost, 175 S.W. 591, 596 (Mo. 1915) (population may be estimated from school and election returns, utility records, and other similar data sources); 11 Okla. Op. Att'y Gen. 425 (#79-270); H. Alterman, Counting People: The Census in History (1969); M. Andersen, The American Census: A Social History (1988); F. Yates, Sampling Methods for Censuses and Surveys (1981); Nat'l Research Council, Modernizing the U.S. Census (D. Edmonston & C. Schultze, eds., 1995); see also U.S. Dep't of Commerce v. House of Representatives, ___ U.S. ___, 119 S. Ct. 765, 782, 142 L. Ed. 2d 797 (1999) (discussing methods of estimating population); Brown v. Iowa Legislative Council, 490 N.W.2d 551, 552-53 (Iowa 1992) (describing computer software for estimating population); Pelzer v. City of Bellevue, 264 N.W.2d at 655 (discussing methods of estimating population). Ultimately, the validity of any method would depend upon the weight accorded to it upon judicial review. E.g., Pelzer v. City of Bellevue, 264 N.W.2d at 655-56.

The General Assembly, we note, has supplied a starting point for determining populations within township sections. In the chapter governing voter registration, it has required each voter registration form to include a space "for a rural resident to provide township and section number, and such additional information as may be necessary to describe the location of the rural resident's home." Iowa Code § 48A.11(1)(k). See generally Iowa Code § 256.55 (establishing State Data Center in State Library).

We also believe that the city council in such instances should establish the method for estimating the population of rural areas served by its volunteer fire department. Such discretion falls within its broad mandate under section 372.13(4) to prescribe the

"powers, duties, compensation and terms" of appointed city officers and employees. See generally In re Sale of Intoxicating Liquors, 108 Iowa 368, 79 N.W. 260, 261 (1899); 1985 Miss. Op. Att'y Gen. (July 2, 1985); Annot., supra, 56 A.L.R.5th at 203, 236-41. As indicated, however, the city council only has the discretion to choose a reasonable method; we therefore suggest that the city council seek legal advice before making its selection. See 1998 Op. Att'y Gen. ___ (#98-5-3); 1994 Op. Att'y Gen. 86 (#94-1-6(L)).

III.

In summary: Iowa Code section 372.13(10) (1999), which permits a city council to appoint one of its members as chief of its volunteer fire department "if the fire department serves an area with a population of not more than two thousand," contemplates that the city council may employ any reasonable method for estimating a rural area's population in the absence of definitive data from the last preceding certified federal census.

Sincerely,

Bruce Kempkes
Assistant Attorney General

MUNICIPALITIES; ZONING: Initiation of zoning amendments and moratoria on re-filing petitions. Iowa Code §§ 335.8, 414.4, 414.5, 414.6 (1999). Chapter 414 neither prohibits a city council from proposing amendments to city zoning ordinances nor prohibits it from imposing a one-year moratorium on re-filing petitions for zoning changes while imposing no such limitation on proposals initiated by the city council on its own motion or by the zoning commission. (Kempkes to May, State Representative, 8-22-00) #00-8-5(L)

August 22, 2000

The Honorable Dennis May
State Representative
3994 Thrush Ave.
Kensett, IA 50448

Dear Representative May:

In requesting an opinion on the process for amending city zoning ordinances, you have enclosed a copy of two ordinances from the Mason City Code:

> The City Council may, from time to time on its own motion, on petition or on the recommendation of the Planning and Zoning Commission . . . amend, supplement, or change boundaries or regulations [on zoning].
>
> . . . .
>
> Whenever any petition for an amendment, supplement or change of [zoning regulations] shall have been denied by the City Council, then no new petition covering the same property or the same and additional property shall be filed or considered by the City Council until one year shall have elapsed from the date of the filing of the petition.

Mason City Code §§ 12-31-1, 12-31-1(c).

Focusing upon the second ordinance, you ask about "the legality and ramifications of a city council's recommendation to initiate a proposed amendment to a zoning ordinance that would re-zone property that had been included in an unsuccessful petition filed by the property owner within the past year." We understand that the city council initiated the proposed amendment on its own motion and that the proposed amendment would undergo the same legal procedures that all other proposed amendments must undergo before the city council votes on its adoption.

Your question encompasses the interpretation of the city ordinance imposing the one-year moratorium on petitions. Our office does not provide opinions on the interpretation of city ordinances, which properly falls within the bailiwick of city attorneys. See 1994 Op. Att'y Gen. 7 (#93-1-7(L)); see also 61 IAC 1.5(3)(d). We thus proceed to determine only whether provisions in Iowa Code chapter 414 (1999) prohibit city councils from proposing amendments to city zoning ordinances on motion or from imposing a one-year moratorium on the re-filing of petitions for zoning changes by private parties while imposing no such limitation on proposals initiated by city councils or zoning commissions.

I. Applicable Law

Chapter 414 empowers any city

> to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

Iowa Code § 414.1.

Section 414.2 allocates the ultimate authority over zoning matters to the city council, which may divide the city into districts and may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land within these districts. Under section 414.4, the city council "shall provide for the manner in which the regulations and restrictions and the boundaries of the districts shall be determined, established, enforced, and from time to time amended, supplemented, or changed." Section 414.5 also provides that "the regulations, restrictions, and boundaries may, from time to time, be amended, supplemented, changed, modified, or repealed."

Similar to section 335.8, which governs counties, section 414.6 provides:

> In order to avail itself of the powers conferred by this chapter, the [city] council shall appoint a . . . zoning commission, to recommend the boundaries of the various original districts, and appropriate regulations and restrictions to be enforced therein. . . . After the adoption of such regulations, restrictions, and boundaries of districts, the zoning commission may, from time to time, recommend to the council amendments, supplements, changes, or modifications.

II. Analysis

(A)

Chapter 414 does not expressly authorize city councils to propose amendments to zoning ordinances. Nevertheless, under statutory home rule, a city may -- "if not inconsistent with the laws of the general assembly" -- exercise any power and perform any function it deems appropriate to further a public purpose. Iowa Code § 364.1; see Iowa Const. amend. 25 (1968) (establishing municipal home rule).

> The broad scope of power given the cities by . . . home rule, if in no way limited, would in effect give the cities full power to conduct their affairs. . . . "[T]he enumeration of a specific power of a city does not limit or restrict the general grant of home rule power conferred by the Constitution. A city may exercise its general powers subject only to limitations expressly imposed by a state or city law." [Iowa Code § 364.2(2) (emphasis added)].

1980 Op. Att'y Gen. 591, 593.

Under chapter 414, "[t]he governing body of a city, the council, may amend its zoning ordinances at any time it deems circumstances justify such action. . . ." Kane v. City of Cedar Rapids, 537 N.W.2d 718, 721 (Iowa 1995). "[S]uch an amendment is valid if statutory procedural requirements are followed, and the amendment is not unreasonable or capricious, nor inconsistent with the spirit of the zoning statute." Id. (citation omitted). The narrow question, then, is whether any procedural requirement in chapter 414 expressly precludes city councils from proposing amendments to city zoning ordinances.

Although section 414.6 authorizes zoning commissions to recommend amendments to city councils, we do not interpret that authorization as excluding city councils from also proposing amendments on their own initiative. Section 414.6 does not provide that zoning commissions shall constitute the sole public entity for initiating the amending process. Section 414.6 simply provides that zoning commissions "may" initiate the amending process by recommendation; it does not provide that zoning commissions "must" initiate the amending process.

The power of city councils to propose amendments certainly complements their power to reject amendments proposed or recommended by others. It coincides with their authority to propose amendments to ordinances in general, see Iowa Code ch. 380, and with the language in section 414.4 that city councils "shall provide for the manner in which [zoning ordinances undergo amendment,]"see Aurora Nat'l Bank v. City of Aurora, 402 N.E.2d 365, 368 (Ill. App. 1980) (proposing zoning amendment, unlike adopting it, "is strictly an internal administrative or

parliamentary procedure").

We therefore believe that city councils, operating under the broad shadow of home rule, may propose amendments to city zoning ordinances. At least one well-known commentator agrees:

> Despite the fact that petitions for rezoning are usually filed . . . by interested or affected property owners . . . , there is, in general, no bar against any citizen or group -- at least so long as they are municipal residents or property owners -- seeking a particular [zoning] change. This is because citizens have an undoubted right to petition their [city council] by any means available -- whether by public petition, correspondence, public appearances, and communications of all kinds -- and [the city council], upon learning of such a concern, has the undoubted prerogative to entertain the petition, or, alternatively, to itself take the initiative in adopting the rezoning.

3 Rathkopf's Law of Zoning and Planning § 27.03, at 10-11 (1999) (emphasis added).

(B)

The one city ordinance sets forth three ways in which a zoning amendment can be initiated: by "petition," by "a recommendation of the [zoning commission]," and by the city council "on motion." See Mason City Code § 12-31-1. The ordinance falls well-within the scope of section 414.4, which expressly authorizes city councils to "provide for the manner" in which zoning ordinances undergo amendment. This conclusion coincides with the "strong presumption of validity [that] accompanies zoning ordinances." F.H. Uelner Precision Tools & Dies, Inc. v. City of Dubuque, 190 N.W.2d 465, 469 (Iowa 1971) (citation omitted).

The other city ordinance places a one-year limitation on the reconsideration of a "petition" proposing to amend a zoning ordinance, see Mason City Code §12-31-1(c), but does not place a similar limitation upon a proposal by the zoning commission or by the city council. This ordinance also falls well-within the scope of section 414.1. Its differentiation in procedure purportedly gives the city council some control over its agenda and city resources by prohibiting persons whose initial petitions did not result in zoning changes from repeatedly re-filing their petitions within a one-year period, while ensuring that the city council and the zoning commission remain free to propose amendments as they see fit. See Seaboard System R.R., Inc. v. City of Atlanta, 330 S.E.2d 700, 704 (Ga. 1985) (recognizing purpose and validity of similar ordinance).

III. Summary

Chapter 414 does not prohibit city councils from proposing amendments to city zoning ordinances. It also does not prohibit city councils from imposing a one-year moratorium on the re-filing of petitions for zoning changes while imposing no such limitation on proposals initiated by city councils on their own motions or by zoning commissions.

Please note that this opinion does not purport to interpret or apply city ordinances to any particular factual situation and that it does not attempt to provide advice on the merits of any proposed zoning amendments or their effect upon the rights of particular property owners.

Sincerely,

Bruce Kempkes
Assistant Attorney General

The Honorable Dennis May
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3994 Thrush Ave.
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Dear Representative May:

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Focusing upon the second ordinance, you ask about "the legality and ramifications of a city council's recommendation to initiate a proposed amendment to a zoning ordinance that would re-zone property that had been included in an unsuccessful petition filed by the property owner within the past year." We understand that the city council initiated the proposed amendment on its own motion and that the proposed amendment would undergo the same legal procedures that all other proposed amendments must undergo before the city council votes on its adoption.

Your question encompasses the interpretation of the city ordinance imposing the one-year moratorium on petitions. Our office does not provide opinions on the interpretation of city ordinances, which properly falls within the bailiwick of city attorneys. See 1994 Op. Att'y Gen. 7 (#93-1-7(L)); see also 61 IAC 1.5(3)(d). We thus proceed to determine only whether provisions in Iowa Code chapter 414 (1999) prohibit city councils from proposing amendments to city zoning ordinances on motion or from imposing a one-year moratorium on the re-filing of petitions for zoning changes by private parties while imposing no such limitation on proposals initiated by city councils or zoning commissions.

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Section 414.2 allocates the ultimate authority over zoning matters to the city council, which may divide the city into districts and may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land within these districts. Under section 414.4, the city council "shall provide for the manner in which the regulations and

restrictions and the boundaries of the districts shall be determined, established, enforced, and from time to time amended, supplemented, or changed." Section 414.5 also provides that "the regulations, restrictions, and boundaries may, from time to time, be amended, supplemented, changed, modified, or repealed."

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Under chapter 414, "[t]he governing body of a city, the council, may amend its zoning ordinances at any time it deems circumstances justify such action. . . ." Kane v. City of Cedar Rapids, 537 N.W.2d 718, 721 (Iowa 1995). "[S]uch an amendment is valid if statutory procedural requirements are followed, and the amendment is not unreasonable or capricious, nor inconsistent with the spirit of the zoning statute." Id. (citation omitted). The narrow question,

then, is whether any procedural requirement in chapter 414 expressly precludes city councils from proposing amendments to city zoning ordinances.

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The power of city councils to propose amendments certainly complements their power to reject amendments proposed or recommended by others. It coincides with their authority to propose amendments to ordinances in general, see Iowa Code ch. 380, and with the language in section 414.4 that city councils "shall provide for the manner in which [zoning ordinances undergo amendment,]" see Aurora Nat'l Bank v. City of Aurora, 402 N.E.2d 365, 368 (Ill. App. 1980) (proposing zoning amendment, unlike adopting it, "is strictly an internal administrative or parliamentary procedure").

We therefore believe that city councils, operating under the broad shadow of home rule, may propose amendments to city zoning ordinances. At least one well-known commentator agrees:

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The one city ordinance sets forth three ways in which a zoning amendment can be initiated: by "petition," by "a recommendation of the [zoning commission]," and by the city council "on motion." See Mason City Code § 12-31-1. The ordinance easily falls within the

scope of section 414.4, which expressly authorizes city councils to "provide for the manner" in which zoning ordinances undergo amendment. This conclusion coincides with the "strong presumption of validity [that] accompanies zoning ordinances." F.H. Uelner Precision Tools & Dies, Inc. v. City of Dubuque, 190 N.W.2d 465, 469 (Iowa 1971) (citation omitted).

The other city ordinance places a one-year limitation on the reconsideration of a "petition" proposing to amend a zoning ordinance, see Mason City Code §12-31-1(c), but does not place a similar limitation upon a proposal by the zoning commission or by the city council. This ordinance, too, easily falls within the scope of section 414.4. Its differentiation in procedure purportedly gives the city council some control over its agenda and city resources by prohibiting persons whose initial petitions did not result in zoning changes from repeatedly re-filing their petitions within a one-year period, while ensuring that the city council and the zoning commission remain free to propose amendments as they see fit. See Seaboard System R.R., Inc. v. City of Atlanta, 330 S.E.2d 700, 704 (Ga. 1985) (recognizing purpose and validity of similar ordinance).

III. Summary

Chapter 414 does not prohibit a city council from proposing amendments to city zoning ordinances. It also does not prohibit a city council from imposing a one-year moratorium on the re-filing of petitions for zoning changes, while imposing no such limitation on proposals initiated by the city council on its own motion or by the zoning commission.

Please note that this opinion does not purport to interpret or apply city ordinances to any particular factual situation and that it does not attempt to provide advice on the merits of any proposed zoning amendments or their effect upon the rights of particular property owners.

Sincerely,

Bruce Kempkes
Assistant Attorney General

IOWA PUBLIC OFFICIALS ACT; COMMUNITY COLLEGES: Authority of the Iowa Ethics and Campaign Board over employees and officials of community colleges. Iowa Code §§ 68B.26, 68B.32; 68B.32B; 68B.35 (Iowa Code 1999). Status of community colleges as state agencies or political subdivisions; status of employees of community colleges as employees of the executive branch. Iowa Ethics and Campaign Disclosure Board has authority to process complaints against employees of community colleges to require personal financial disclosure statements of certain community college employees. (Johnson to McKinley, Iowa Ethics and Campaign Disclosure Board, 9-21-00) #00-9-3

September 21, 2000

Bernard McKinley, Chairman
Iowa Ethics and Campaign Disclosure Board
514 East Locust Street
Suite 104
Des Moines, IA 50309-1912

Dear Mr. McKinley:

On behalf of the Iowa Ethics and Campaign Disclosure Board (hereinafter "Board"), you have requested an Attorney General's opinion on the applicability of Iowa Code chapter 68B to employees and officials of community colleges. You have noted that community colleges are included in the definition of "state agency" in Iowa Code section 68B.2(2), although community colleges are treated as political subdivisions of the state in other bodies of law. In light of this apparently inconsistent classification of community colleges, you question whether complaints against employees or officials of community colleges should be filed with the Board pursuant to Iowa Code section 68B.32B(1), or with county attorneys pursuant to section 68B.26. You also question whether the financial disclosure requirements of section 68B.35 apply to personnel at the community colleges. Finally, you question whether this perceived inconsistent treatment in the governmental status of community colleges creates a "conflict of laws" which would invalidate any enforcement actions taken by the Board against community college employees or officials.

THE STATUS OF COMMUNITY COLLEGES

Before analyzing the applicability of specific sections of chapter 68B to community colleges, it is helpful to address your underlying concerns regarding the conflicting governmental status of community colleges under Iowa law. You are correct that community colleges are treated as political subdivisions of the State in some contexts. Community colleges are created by Iowa Code chapter 260C, and are operated by "merged areas" pursuant to that statute. Past opinions of this office have recognized that community colleges and merged areas are governmental subdivisions of the state. 1988 Op. Att'y Gen. 75 (#88-2-4(L))(community colleges and merged areas were subject to being audited as "governmental subdivisions" under former Iowa Code section 11.18); 1998 Op. Att'y Gen. ___ (# 98-7-2(L))(community colleges,

like local school districts, are "school corporations" under Iowa Code section 260C.16); 1998 Op. Att'y Gen. ___ (# 97-7-2(L)) (directors of community colleges are subject to Iowa Code section 279.7A prohibiting self-dealing by directors of a school corporation). Governmental subdivisions have been described as essentially local governmental bodies. 1988 Op. Att'y Gen. 100 (#88-7-6(L)). In some contexts it has been explicitly recognized that community colleges are not state agencies. Stanley v. Southwestern Community College Merged Area, 184 N.W.2d 29, 32 (Iowa1971)(merged area creating a community college not considered a state agency subject to constitutional restrictions on incurring debt); 1994 Op. Att'y Gen. 1 (#93-1-1(L)) (merged area "is not an agency of the State", nor is the word "department", which means institution or agency of state government, likely to encompass a community college).

However, community colleges are expressly classified as "state agencies" for purposes of chapter 68B, which contains definitions of both an "agency" and a "state agency". An "agency" is defined in section 68B.2(1) to encompass many entities, including "any department, division, board, commission, bureau, or office of a political subdivision of the state." In section 68B.2(2) an "agency of state government" or "state agency" is defined explicitly to include "community colleges", but does not mention political subdivisions of the state. The Legislature clearly did not intend to include all "political subdivisions of the state" within the definition of "state agency" for purposes of chapter 68B. The Legislature just as clearly intended that "community colleges" would be considered "state agencies" and not political subdivisions for purposes of that statute.

This disparate treatment of the governmental status of community colleges is not unusual. The Legislature has the power to create state agencies for varying purposes, with varying amounts of power, so long as the legislative action is within the bounds of the Iowa Constitution. Goreham v. Des Moines Metropolitan Area Solid Waste Agency, 179 N.W.2d 449, 454 (Iowa 1970). The Legislature can classify governmental entities as "state agencies" for some purposes, but not for others. 1988 Op. Att'y Gen. 100 (#88-7-6(L)) ("A state-authorized entity may be a state agency for some purposes but not others"); Alaska Commercial Fishing v. O/S Alaska Coast, 715 P.2d 707, 709 (Ak 1986). This was recognized by the Iowa Supreme Court in Graham v. Worthington, 146 N.W.2d 626 (Iowa 1966), which involved the applicability of the Iowa Tort Claims Act to political subdivisions. The Court noted that, although "ordinarily political subdivisions are classified as agencies or arms of the state", they were not so classified in the definition of state agency in the Iowa Tort Claims Act. Explaining that "the legislature may be its own lexicographer", the Court refused to apply the Iowa Tort Claims Act to political subdivisions. "[I]t is not for us to . . . extend, enlarge, or otherwise change the terms or plain intent and meaning of the statute." Id. at 855.

Other Iowa governmental entities are accorded this variable status. The Iowa State Fair Authority is a "public instrumentality of the State", but is "not an agency of state government." Iowa Code § 173.1. Yet the Iowa State Fair Authority is statutorily designated as a state agency for purposes of chapters 17A, 20, 91B, 97B, 509A, and 669. Id. The state universities are

considered agencies of the State for purposes of the Iowa Tort Claims Act. Vachan v. State of Iowa, 514 N.W.2d 442, 444 (Iowa 1994); Speed v. Beurle, 251 N.W.2d 217, 218 (Iowa 1977). These same universities are explicitly excluded from the definition of "State agency" in Iowa Code section 256.50, dealing with libraries and information services. A soil and water conservation district is a "governmental subdivision of this state" under Iowa Code section 161A.3(5) but is a "state agency" under Iowa Code section 669.2. Regional boards of library trustees created under Iowa Code chapter 256 and judicial district departments of correctional services created under Iowa Code chapter 905 are governmental subdivisions but are included within the definition of "state agency" in Iowa Code section 669.2.

Because the Legislature can create state agencies for varying purposes, with varying degrees of authority, and can classify them differently for different purposes, it does not appear that the disparate treatment accorded "community colleges" creates a conflict or poses any particular problem to the application of statutes that deal with community colleges. Even if there were a conflict, the specific classification of community colleges as state agencies in chapter 68B would control for purposes of that statute. See Iowa Code § 4.7.

APPLICABILITY OF CHAPTER 68B
TO COMMUNITY COLLEGES

Your questions regarding the applicability of chapter 68B to community colleges concern specific provisions contained in Division III of the statute. Division III establishes a legislative ethics committee to hear complaints against members of the general assembly or legislative lobbyists, while at the same time establishing the Board as the authority to hear complaints against members of the executive branch of state government, as well as other persons. Compare Iowa Code §§ 68B.31 and 68B.32B.

The authority of the Board to hear complaints against certain members of the executive branch and other persons is described in section 68B.32(1) as follows:

> . . . [T]he board shall . . . investigate complaints relating to, and monitor the ethics of officials, employees, lobbyists, and candidates for office in the executive branch of state government . . .

More specific provisions regarding the authority of the Board to hear complaints are set forth in section 68B.32B(1), which provides as follows:

> 1. Any person may file a complaint alleging that a candidate, committee, person holding a state office in the executive branch of state government, employee of the executive branch of state government, or other person has committed a violation of chapter

> 56 or rules adopted by the board. Any person may file a complaint alleging that a person holding a state office in the executive branch of state government, an employee of the executive branch of state government, or a lobbyist or a client of a lobbyist of the executive branch of state government has committed a violation of this chapter or rules adopted by the board. . . . (Emphasis added).

The statute goes on to describe the responsibilities of the board in reviewing and investigating complaints. Iowa Code § 68B.32B(2), et. seq. The statute provides for contested case proceedings before the Board. Id., § 68B.32(C). It authorizes the Board to impose a variety of civil penalties. Id., § 68B.32D(1).

The plain language of the statute clearly gives the Board authority to hear complaints concerning "employees of the executive branch of state government". The question, then, is whether employees of community colleges are considered employees of the executive branch for purposes of chapter 68B.

State agencies, which are created to implement and administer laws, are generally considered to be in the executive branch, as opposed to the legislative or judicial branches of government. 1978 Op. Att'y Gen.251. Iowa Code chapter 7E, which deals with "Executive Branch Organization and Responsibilities", states that the executive branch is comprised of, among other things, state agencies and departments. See Iowa Code §§ 7E.2, 7E.5.

Community colleges have been included within the definition of "state agency" and "agency of the state" in section 68B.2(2). Since the Legislature intended that community colleges be considered state agencies for purposes of chapter 68B, we believe the legislature intended to treat community college employees as "employees of the executive branch of state government" for purposes of chapter 68B.

If community college employees were not classified as employees of the executive branch for purposes of chapter 68B, there would be no enforcement mechanism against them for violations of that chapter. Community college employees, as such, certainly would not be considered members of the general assembly or legislative lobbyists for purposes of processing complaints under section 68B.31. See § 68B.2(13); (16). As will be discussed below, community college employees could not be classified as "local" employees or officials subject to prosecution under section 68B.26. Yet there is no doubt that, by including community colleges within the definition of state agency, the legislature intended that employees and officials of those institutions be subject to the provisions of chapter 68B.

In interpreting a statute, "our goal is to determine and give effect to the legislature's intentions. We seek a reasonable interpretation which will best effectuate the purpose of the statute . . . . We will consider all parts of an enactment together and will not place undue

importance on any single or isolated portion." Miller v. Westfield Insur. Co., 606 N.W.2d 301, 303 (Iowa 2000). In light of the legislature's clear intention that employees of community colleges be subject to the enforcement provisions of chapter 68B, we believe a reasonable interpretation of that statute is that community college employees must be considered employees of the executive branch for purposes of processing complaints under section 68B.32B(1).

You have noted that complaints against "local officials and employees" for violations of chapter 68B "shall be filed with the appropriate county attorney" under section 68B.26, as amended by House File 2431, 78th G.A., 2d Sess. § 1. (Iowa 2000). On the basis of this section, you question whether complaints concerning community college employees should be filed with county attorneys pursuant to section 68B.26 instead of the Board pursuant to section 68B.32B. We do not believe these two statutory provisions are inconsistent. Instead, we believe they complement each other, serving to allow county attorneys to handle complaints against local officials and employees and the Board to handle complaints against officials and employees of state agencies.

Sections 68B.2(14) and (15) define local employees and local officials to be employees and officeholders of "a political subdivision of this State." This office concluded in an earlier opinion that the Board does not have authority to impose penalties against "local officials and employees under chapter 68B." 1994 Op. Att'y Gen.46(#93-9-4(L)). However, since community colleges are defined as "state agencies" and not political subdivisions for purposes of chapter 68B, the Board has the authority to hear complaints against officials and employees of community colleges.

You have also questioned the applicability of section 68B.35 to certain employees of community colleges. That statute requires that certain persons file personal financial statements. Section 68B.35(2) requires such statements from executives, deputy executives, and administrative heads of state agencies, and from certain heads of major subunits of state departments or independent state agencies. As noted above, for purposes of chapter 68B, community colleges have been included in the definition of "state agencies". Therefore, we conclude that section 68B.35(2) applies to certain executives, deputy executives, or other administrative heads of community colleges who satisfy the criteria of section 68B.35(2). (For a discussion of the definition of "executive or administrative head", see 1998 Op. Att'y Gen. ___ (#97-7-4)).

Finally, you have questioned whether enforcement or compliance action by the Board against officials or employees of community colleges could be invalidated because of the conflicting classification of community colleges in Iowa law. For the reasons discussed above we do not believe there is a problem. Anyone challenging Board action on the basis of this perceived ambiguity in the governmental status of community colleges would have a difficult burden. The classification of community colleges as "state agencies" for purposes of chapter 68B is clearly set forth in the statute with "sufficient definiteness that ordinary people can

understand" the meaning of the statute. See State v. Hunter, 550 N.W.2d 460, 463 (Iowa 1966); State v. Bauer, 337 N.W.2d 209-210-11(Iowa 1983).

CONCLUSION

We believe that the Board has authority to process complaints filed against officials and employees of community colleges under Iowa Code section 68B.32B. We believe that the financial disclosure requirements of section 68B.35 apply to certain community college employees. We do not believe that the differential treatment of the governmental status of community colleges under Iowa law changes the clear and plain meaning of chapter 68B as it applies to community colleges. Nor do we believe that this disparate treatment of the status of community colleges would invalidate Board action against employees or officials of community colleges.

Sincerely,

DENNIS W. JOHNSON
Solicitor General

COUNTY AND COUNTY OFFICERS: Imposition of comprehensive hiring policy upon all county offices. Iowa Code §§ 331.903, 331.904 (1999). County supervisors lack authority to require another elected county officer to comply with their comprehensive hiring policy and may not unreasonably refuse to approve any appointments made by other elected county officers. (Kempkes to Mullin, Woodbury County Attorney, 2-15-00) #00-2-3(L)

February 15, 2000

Mr. Thomas S. Mullin
Woodbury County Attorney
300 Courthouse
Sioux City, Iowa 51101

Dear Mr. Mullin:

You have requested an opinion on the authority of county supervisors over the personnel policies of other elected county officers. You ask whether county supervisors may require another elected county officer to comply with their comprehensive hiring policy and, if so, whether they may withhold approval of any appointments made by other elected county officers who do not comply with that policy. You also ask about the meanings of "deputies, assistants, and clerks" and "extra help and clerks," which elected county officers may appoint pursuant to statute.

These questions primarily implicate Iowa Code chapter 331 (1999). After reviewing chapter 331, we conclude that county supervisors may not require another elected county officer to comply with their comprehensive hiring policy and may not unreasonably refuse to approve appointments made by other elected county officers. We cannot, however, provide any definite meanings for "deputies, assistants, and clerks" and "extra help and clerks," as used in chapter 331; whether a particular position would fall within any of these job titles would likely require a determination of facts, which we cannot do in the opinion process.

I.

Chapter 331 is entitled County Home Rule Implementation. It provides for the principal county officers who take office by election: supervisor, auditor, treasurer, recorder, sheriff, and attorney. It also provides for the appointment of various county personnel.

Chapter 331 sets forth the duties of the supervisors regarding personnel. Section 331.321(1) provides that the supervisors shall make appointments to various county positions, and section 331.322(3) provides that they "shall . . . [f]ill vacancies in county offices . . . and

make appointments" in accordance with state law. See generally Iowa Code §§ 331.322(2), 331.323.

Chapter 331 also sets forth the duties of the other elected county officers regarding personnel. Section 331.904(4) authorizes the county auditor, treasurer, recorder, sheriff, and attorney to appoint "extra help and clerks" and places with the county supervisors the duty to determine the compensation for these persons. See generally Iowa Code §§ 341.7, 341.8. In addition to this authority, section 331.903 provides in part:

> (1). The auditor, treasurer, recorder, sheriff, and county attorney may each appoint, with the approval of the board, one or more deputies, assistants, or clerks . . . . The number of deputies, assistants, and clerks for each office shall be determined by the board . . . .
>
> (2). When an appointment has been approved by the board, the principal officer making the appointment shall issue a written certificate of appointment . . . .

(emphasis added). Accord Iowa Code §§ 331.503(1), 331,553(2), 331.603(2), 331.652(7), 331.758(2). See Iowa Code § 331.321(3) ("[e]xcept as otherwise provided by state law, a person appointed to a county office may be removed by the officer or body making the appointment"), § 331.323(2)(g) (county supervisors "may . . . [e]stablish the number of deputies, assistants, and clerks" for the offices of county auditor, treasurer, recorder, sheriff, and attorney). See generally Iowa Code § 4.1(30) (unless otherwise defined, "shall" in statutes imposes a duty and "may" confers a power).

II.

(A)

You have asked whether county supervisors may require another elected county officer to comply with their hiring policy and, if so, whether they may withhold approval of any appointments made by elected county officers who do not comply with that policy.

Prior case law and opinions have answered these related questions. In McMurry v. Lee County Board of Supervisors, 261 N.W.2d 688, 689-90 (Iowa 1978), the Supreme Court of Iowa held that county supervisors lacked authority to require all persons serving as deputies in any county office to have two years' experience. In a 1984 opinion, this office explained:

> [Chapter 331] establishes a statutory scheme whereby elected county officials, such as the treasurer, auditor, and county

> attorney, have been delegated jurisdiction over their offices which is generally separate and independent of the general supervisory authority over other county matters to be exercised by the board of supervisors. . . .
>
> The Supreme Court [of Iowa recently] affirmed the principle that for the most part elected county officials are to exercise their statutory duties independently of the board of supervisors. In [McMurry v. Lee County Board of Supervisors, which involved] the validity of board resolutions concerning personnel matters in another elective county office, the Court began its opinion with the following statement:
>
> > The board [of supervisors] appears to have proceeded as though our system of county government consisted of central management with subsidiary departments. With few exceptions, however, our statutes establish autonomous county offices, under an elected head.
>
> 261 N.W.2d at 690. [See 1984 Op. Att'y Gen. 94 (#83-11-4(L))] (board of supervisors does not have authority to initiate discipline against employees of elected county officials).

1984 Op. Att'y Gen. 167, 169-70. We then concluded that county supervisors, without the county sheriff's permission, may not enter into intergovernmental agreements to share a radio receiving set or to employ persons to perform the duties of jailers: the county supervisors have a statutory duty to provide a radio receiving set to the county sheriff, and the county sheriff has the primary responsibility for hiring and supervising jailers. Id. at 168, 170.

In view of McMurry v. Lee County Board of Supervisors and our prior opinions, we must conclude that county supervisors lack authority to require another elected county officer to comply with their comprehensive hiring policy. See Polk County Conference Board v. Sarcone, 516 N.W.2d 817, 819 (Iowa 1994) ("no dispute that the county attorney has broad powers over his regular staff"); 1986 Op. Att'y Gen. 29, 30 ("Iowa law vests elected county officers with considerable autonomy, and holds those officers accountable to the electorate rather than to the board of supervisors"); 1984 Op. Att'y Gen. 94 (#83-11-4(L)) (county supervisors may not initiate discipline against employees of elected county officers).

In view of other opinions and case law, we also conclude that county supervisors may not unreasonably refuse to approve appointments made by other elected county officers by relying upon frivolous, trivial, minimal, arbitrary, or capricious grounds. See, e.g., Smith v. Newell, 254

Iowa 496, 117 N.W.2d 883, 887 (1962) (county supervisors may not unreasonably refuse to approve appointments of bailiffs and deputy made by county sheriff by relying upon frivolous, trivial, minimal, arbitrary, or capricious grounds; legislature intended that "common sense would be used by [them] in approving appointments made by other elected officers); 1992 Op. Att'y Gen. 37 (#91-7-3(L)); 1990 Op. Att'y Gen. 81 (#90-8-1(L)) (county supervisors should recognize and approve any reasonable and proper appointment made by an elected county officer and may not terminate the employment of any person so appointed); 1986 Op. Att'y Gen. 29, 32 ("even when the supervisors are given a certain degree of statutory approval authority over elected county officers' functions, that authority must be exercised in a limited and reasonable manner"); see also 1980 Op. Att'y Gen. 495, 496 (county supervisors may not "terminate any employment as a method of controlling department size" or "set employment prerequisites that are beyond [their] authority"; however, they may adopt a resolution "that freezes the hiring of new full-time personnel which would increase the size of any department").

(B)

Pointing to section 331.903(1), you have asked about the meaning of "deputies, assistants, and clerks": Which of these job titles properly encompasses such positions as secretary, office manager, cashier, administrative assistant, and bookkeeper? Similarly, you have asked about the meaning of "extra help and clerks" as used in section 331.904(4). Nothing in chapter 331 defines any of these titles or their corresponding duties and powers.

At the outset, we perceive a distinction between the positions mentioned in section 331.903(1) and those mentioned in section 331.904(4). See 1980 Op. Att'y Gen. 495, 496. See generally 3 E. McQuillin, The Law of Municipal Corporations § 12.27, at 189 (1990). The adjective "extra" in section 331.904(4) presumably modifies both "help" and "clerks" and suggests that an elected county officer can appoint a person or persons for relatively short duration to help handle unexpected increases in workload or other office emergencies. See Fullerton v. City of Des Moines, 115 N.W. 607, 611 (Iowa 1908) ("extra" commonly expresses an idea of something beyond, in addition to, or in excess of what is due, usual, or necessary); Webster's Ninth New Collegiate Dictionary 403 (1979) ("extra," probably short for "extraordinary," means more than is usual); see also Crabb's English Synonyms 330 (1917) ("extraordinary" signifies that which is out of the ordinary course and is not normally expected). In contrast, nothing in section 331.903(1) necessarily suggests that an elected county officer's deputies, assistants, and clerks serve on a temporary basis; at the same time, such personnel serve at the pleasure of the elected officers, 1990 Op. Att'y Gen. 97 (#90-12-5(L)).

Your question presumes that the positions mentioned in sections 331.903(1) and 331.904(4) have precise boundaries. See generally 3 McQuillin, supra, § 12.27, at 188-89. Nothing in their common definitions, however, necessarily signifies separate and distinct job responsibilities. See Webster's Ninth New Collegiate Dictionary 67, 206, 303 (1979). Indeed,

depending on the particular elected county officer, these subordinate positions may have overlapping responsibilities in certain areas.

Ordinarily, "deputies" have been authorized by principal officers to exercise their office or rights that they possess, for and in their place; as seconds-in-command, deputies may possess all the powers held by their principal officers. 3 McQuillin, supra, § 12.33, at 217-18; see Brown v. Overturf, 229 Iowa 329, 294 N.W. 568, 570 (1940). Ordinarily, "assistants" have been authorized, in part, to perform the duties and exercise the powers of their principal officers and rank higher than clerks. 3 McQuillin, supra, § 12.32, at 215-16; see Carson v. Chicago, M. & St. P. Ry., 181 Iowa 310, 164 N.W.747, 749 (1937); State ex rel. City of Cincinnati, 70 N.E.2d 881, 883 (Ohio 1947). Ordinarily, "clerks" have duties primarily clerical and lack any authority to exercise judgment and discretion of an administrative or executive character; however, they do not normally engage in manual labor. 3 McQuillin, supra, § 12.34, at 221-22; see First Jackson Sec. Corp. v. B.F. Goodrich Co., 176 So.2d 272, 278 (Miss. 1965); State ex rel. Edgerly v. Currie, 55 N.W. 858, 860 (N.D. 1893); Amyot v. Caron, 190 A. 134, 136 (N.H. 1937); State ex rel. City of Cincinnati, 70 N.E.2d 881, 883 (Ohio 1947); In re Walker, 144 A. 288, 289 (Pa. 1928).

In general, then, a deputy has greater job responsibilities than an assistant who, in turn, has greater job responsibilities than a clerk. Nevertheless, the broadly worded titles used in sections 331.903(1) and 331.904(4) simply do not lend themselves to the creation of neat classifications of the kind commonly used by business and government for such purposes as compensation, chain-of-command, and responsibility. Such classification would likely require a determination of facts, which we cannot do in the opinion process. See 1994 Op. Att'y Gen. 46, 47; see also 61 IAC 1.5(3)(c). It might, for example, involve a consideration of such matters as the type and number of duties and powers, the form of compensation, custom, and comparable positions within private business and government. See generally 7 C.J.S. Assistant 15-16 (1980); 26A C.J.S. Deputy 496 (1956).

We thus cannot say what the phrase "deputies, assistants, and clerks" means as a matter of law. Rather, the question which title attaches to a specific employee depends upon his or her specific job duties and "must be determined from the relation of the particular situation to the office or department with which it is connected." 3 McQuillin, supra, § 12.32, at 216. The responsibility to make that determination belongs within the province of the elected county officer. See 1998 Op. Att'y Gen. ___ (#98-2-2(L)). In this vein, we point out that all persons appointed by an elected county officer pursuant to sections 331.903(1) and 331.904(4) must necessarily serve as some type of deputy, assistant, or clerk, regardless of what other title (e.g., secretary, bookkeeper, or office manager) may attach to his or her job as a matter of custom or practice. A person can wear many hats, and an employee can have many titles. Stated otherwise, the common use of other titles within a particular office does not mean that county supervisors may subject these persons to a comprehensive hiring policy on the ground that they do not fall within the rubric of "deputies, assistants, and clerks." This rule also applies to persons appointed

by elected county officers pursuant to other statutes; those appointees remain subject to the authority of the elected county officer, not the county supervisors. See, e.g., 1984 Op. Att'y Gen. 167, 168 (county sheriff has duty to hire and supervise "jailer").

III.

In summary: County supervisors may not require another elected county officer to comply with their comprehensive hiring policy and may not unreasonably refuse to approve appointments made by other elected county officers. This office cannot provide any definite meanings for the phrase "deputies, assistants, and clerks" and "extra help and clerks," as used in Iowa Code sections 331.903(1) and 331.904(4) (1999); whether a particular position would fall within any of these job titles would likely require a determination of facts, which we cannot do in the opinion process.

Sincerely,

Bruce Kempkes
Assistant Attorney General

COUNTIES; TAXATION: Authorized Expenditures of School Infrastructure Tax Proceeds. Iowa Code § 422E.1(3) (1999). Section 422E.1(3) does not prohibit per se a school district from expending school infrastructure tax proceeds for salaries and benefits of school district employees who are engaged in school infrastructure activities authorized under chapter 422E. (Miller to Rants, State Representative, 4-24-00) #00-4-4(L)

April 24, 2000

The Honorable Christopher Rants
State Representative
Statehouse
L O C A L

Dear Representative Rants:

You have requested an opinion of the Attorney General concerning whether funds received by a school district from the sales and services tax under Iowa Code chapter 422E (1999) can be used to pay the salary and benefits of a school district employee who represents the school district in relations between the district, and the architects and contractors engaged by the district, for school infrastructure activities.

Iowa Code section 422E.1(1) provides that "a local sales and services tax for school infrastructure purposes may be imposed by a county on behalf of school districts as provided in this chapter." Under the specific situation outlined in this opinion request, the voters of Woodbury County approved the sales and services infrastructure tax on August 12, 1998. As a result, the Sioux City Community School District (District) will be embarking on a ten-year plan involving the construction of three new schools and extensive expanding and remodeling of between three and seven additional schools.

The District determined that the size and scope of the infrastructure plan necessitates the need for a full-time employee to serve as a "construction liaison." This person would serve as the District's representative in relations between the District and

the architects and contractors engaged in the various construction projects.[1] This person will report to the District's Board of Education, the Superintendent and the Building Oversight Committee. The District anticipates that the position will be in existence until the infrastructure plan is completed.

Iowa Code section 422E.1(3) provides that "[l]ocal sales and services tax moneys received by a county for school infrastructure purposes pursuant to this chapter shall be utilized solely for school infrastructure needs." (Emphasis added). Section 422E.1(3) defines "school infrastructure" as:

> those activities for which a school district is authorized to contract indebtedness and issue general obligation bonds under section 296.1, except those activities related to a teacher's or superintendent's home or homes. These activities include the construction, reconstruction, repair, purchasing, or remodeling of schoolhouses, stadiums, gyms, fieldhouses, and bus garages and the procurement of schoolhouse construction sites and the making of site improvements. Additionally, *"school infrastructure"* includes the payment or retirement of outstanding bonds previously issued for school infrastructure purposes as defined in this subsection, and the payment or retirement of bonds issued under section 422E.4.

The legislature provided that the Director of the Iowa Department of Revenue and Finance is to remit ninety-five percent of the estimated tax receipts to each school district within the county on or before August 31 of the fiscal year and on or before the last day of each following month. See Iowa Code § 422E.3(5)(b). Final payment of the tax money due the districts for the current fiscal year is due before November 10 of the

[1]According to the opinion request, the construction liaison's duties would include: reviewing all project plans and specifications and maintaining a working copy of the drawings for each construction site; maintaining a working relationship with the architects and contractors for each project; visiting the job sites daily to observe the work being done; keep the Director of Physical Operations informed of weekly progress and status of projects; meet with the Director of Physical Operations and the Building Oversight Committee as scheduled; prepare weekly reports on the progress of each construction project; create and maintain a file for each construction project, and maintain copies of all documents, video and still pictures for building archives and records; be available for reporting to the Board of Education and the public when needed; and perform any other duties assigned to that position.

next fiscal year. See Iowa Code § 422E.3(5)(c). The legislature, through section 422E.1(3), clearly imposes a duty upon each school district to utilize the tax receipts it receives exclusively on school infrastructure needs.

The question raised by your opinion request is whether chapter 422E allows for the tax moneys received by a school district to be spent on salaries and benefits paid to that district's employees who are engaged in school infrastructure activities defined under section 422E.1(3). When interpreting a statute, "what the legislature did not say may be just as important as what the legislature did say; legislative intent is expressed by omission as well as by inclusion." Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553, 556 (Iowa 1999). The legislature specified the type of activities which a school district may undertake, but it did not restrict the school district as to how it could accomplish those activities. Accordingly, chapter 422E does not prevent a school district from making a determination that district employees should carry out some or all of the activities allowed under section 422E.1(3). Once that determination is made, the school district is allowed to expend the tax receipts available to it on the salaries and benefits of those employees who are dedicated to work on the school infrastructure activities just as it would if those individuals were independent contractors or working for independent contractors.

This situation is analogous to a municipal corporation being allowed to use its own work force in performing public improvements. As stated in McQuillin on Municipal Corporations:

> In the absence of restrictions, the municipal corporation may itself do the work or have it done under its supervision, or let out the work by contract. But unless required by charter or statute, a municipal corporation is not bound to let out the work to be done on improvements to contractors.

13 E. McQuillin, The Law of Municipal Corporations, § 37.31, at 108 (3rd ed. 1997).

An example of legislative restrictions already in place involve the use of the school physical plant and equipment levy authorized under Iowa Code section 298.2 (1999). There, Iowa Code section 298.3 details the manner in which the funds raised from that levy may be expended and specifically prohibits expenditures for school district employee salaries. Section 298.3(11) specifically states, in part, that:

> Revenue from the regular and voter-approved physical plant and equipment levies shall not be expended for school district employee salaries or travel expenses, supplies,

> printing costs or media services, or for any other purpose not expressly authorized in this section.

(Emphasis added). The legislature in chapter 422E could have similarly prohibited the expenditure of the school infrastructure money from being used for school district employee salaries. However, up to this point in time, it has chosen not to do so.

We cannot determine in an opinion whether any particular employee or the activities of that employee are either necessary or cost effective in carrying out the various school infrastructure activities planned by a school district. However, from the description in footnote 1, the duties would certainly pertain to the school infrastructure activities outlined in section 422E.1(3). As such, chapter 422E does not per se prohibit the salaries and benefits of a school district employee whose activities are solely related to the infrastructure activities outlined in section 422E.1(3) from being paid with the tax proceeds received under chapter 422E.

Sincerely,

JAMES D. MILLER
Assistant Attorney General

JDM:cml

COUNTIES; PURCHASE OF SERVICE PROVIDERS; REIMBURSEMENT RATES: Obligations of counties to pay reimbursement rate increases to purchase of service providers negotiated by host counties. House File 2555, 78th G.A., 2nd Sess., § 3(2)(c) (Iowa 2000); Senate File 2452, 78th G.A., 2nd Sess., § 4 (Iowa 2000). Non-host county must pay reimbursement rate increase, up to five percent, negotiated by host county, unless provider exempts self from statute. (Johnson to Redwine, State Senator, 9-26-00) #00-9-4(L)

September 26, 2000

The Honorable John Redwine
State Senator
33533 S. Ridge Road
Sioux City, IA 51108

Dear Senator Redwine:

You have requested an opinion of the Attorney General on the requirements that are imposed on a county by House File 2555, 78th G.A., 2d Sess., § 3(2)(c) (Iowa 2000). Specifically, you ask if a county where a provider is located (host county) negotiates a rate increase for that provider which is not more than five percent, does this legislation require another county (non-host county) to reimburse that provider for services to its clients at the same rate that the host county negotiated? You also ask if the legislation controls whether a non-host county can avoid paying a higher rate to a provider by refusing to pay for a client in a facility located in another county.

ANALYSIS
I

H.F. 2555, as amended by Senate File 2452, 78th G.A., 2d Sess., § 4 (Iowa 2000), appropriated money to assist counties with limited funds available for mental health, mental retardation, and developmental disabilities services. The legislation identifies when a county must pay a purchase-of-service (POS) provider a higher rate for certain services and also identifies when a county is eligible for reimbursement from the risk pool created by the legislation for the costs of paying the provide the higher rate. A POS provider is one that provides sheltered workshop, work activity, supported employment, job placement, enclave services, adult day, transportation, supported community living services, or adult residential services paid for by the county mental health, mental retardation, and developmental disabilities services fund. H.F. 2555, § 3(1)(c); Iowa Code § 331.424A.

The legislation provides for a reimbursement rate increase for eligible providers. H.F. 2555, § 3(2)(a). To be eligible for the increased rate, the POS provider must demonstrate that its actual cost of providing a service for the fiscal year beginning July 1, 2000 is in excess of the reimbursement rate paid by the host county in the fiscal year ending June 30, 2000. The provider

additionally must be able to show that this increase is at least partially attributable to service staff compensation. H.F. 2555, § 3(2)(b).

If the POS provider demonstrates an adjusted actual cost of providing the service that is in excess of the reimbursement rate paid by the host county as of June 30, 2000, the statute mandates that the "host county shall increase the POS provider's reimbursement rate to the POS provider's adjusted actual cost, subject to a maximum of five percent over the reimbursement rates paid by the host county to that POS provider as of June 30, 2000." H.F. 2555, § 3(2)(c) (emphasis added); see Iowa Code § 4.1(30) (1999) ("unless otherwise specifically provided by the general assembly . . . [t]he word "shall" imposes a duty.") The statute does not give discretion to the host county regarding whether to pay this increase to an eligible POS provider, only the right to limit the increase to a maximum of five percent.

Your question specifically asks whether the reimbursement rate agreed to by the host county must be paid to the provider by non-host counties. We do not believe that the Act's language on this issue "is susceptible to more than one meaning." *State v. Rodgers*, 560 N.W.2d 585, 586 (Iowa 1997). The legislation states "[t]he reimbursement rate increase approved by the host county shall be accepted by all other counties that have an arrangement with the POS provider for provision of the program or service." H.F. 2555, § 3(2)(c). As explained in *State v. Rodenburg*, 562 N.W.2d 186, 189 (Iowa 1997), "[W]hen statutory language is not ambiguous, or when a statute is plain and its meaning clear, this court need not search for legislative intent or a meaning beyond the expressed language." See also *In re R.L.D.*, 456 N.W.2d 919, 920 (Iowa 1990). The language is clear that all non-host counties that have an arrangement with the POS provider for provision of the program or service shall pay the same reimbursement rate increase approved by the host county.

If an eligible provider had negotiated a reimbursement rate increase with a host county as of July 1, 2000, the legislation allows the POS provider the option of exempting itself from the provisions of the legislation. S.F. 2452, § 4. A host county is only required to provide a reimbursement rate increase, subject to the five percent limitation, to eligible providers. H.F. 2555, § 3(2)(a). If a provider exempts itself from these provisions, the provider would not be an eligible POS provider. The legislation does not mandate that a host county or non-host counties pay a reimbursement rate increase to a provider that is not an eligible provider as identified in the legislation.

II

You have asked whether H.F. 2555 allows a county to avoid paying higher reimbursement rates by refusing to enter into any arrangements with a POS provider for anyone living in a non-host county. The legislation does not address this specific issue. The broader issue regarding a county's responsibility for individuals living in facilities in non-host counties would be dependent upon numerous facts which have not been presented to us and which are beyond the scope of an attorney general's opinion. The provisions of H.F. 2555 and its amendments regarding POS providers address only the rate of reimbursement to be paid to eligible providers and the eligibility of counties for reimbursement from the risk pool if these

higher reimbursement rates are paid to eligible providers.

CONCLUSION

We conclude that H.F. 2555, as amended by S.F. 2452, requires that if a provider is an eligible POS provider and contracts with a host county for a rate increase of five percent or less, a non-host county must pay that rate to the provider for the services identified by the statute. There are provisions under the amendment allowing a provider to exempt itself from the provisions of the legislation and, if that occurs, neither the host county nor non-host counties must increase the rates paid to the provider for the services identified in the legislation. The statute does not address whether a non-host county may avoid paying higher rates by refusing to pay for anyone living in a facility in another county.

Sincerely,

Dennis W. Johnson
Solicitor General

COUNTIES; PUBLIC EMPLOYEES: County contributions to Iowa Public Employment Retirement System (IPERS). Iowa Code §§ 97B.1A, 97B.11, 97B.73B, 229.19 (1999 & Supp. 1999); S.F. 2411, 78th G.A., 2d Sess., § 69 (Iowa 2000). Counties must make IPERS contributions on behalf of their mental health advocates. (Kempkes to Riepe, Henry County Attorney, 11-3-00) #00-11-3(L)

November 1, 2000

Mr. Michael A. Riepe
Henry County Attorney
Courthouse
100 E. Washington
Mt. Pleasant, IA 52641

Dear Mr. Riepe:

You have requested an opinion on the Iowa Public Employment Retirement System (IPERS), which provides pension benefits to public employees. You ask whether counties must make IPERS contributions on behalf of their mental health advocates. After reviewing Iowa Code chapters 97B and 229 (1999 & Supp. 1999), as well as various documents you have provided to us, we conclude that they must make those contributions.

I. Applicable Law

Entitled "Iowa Public Employees' Retirement System (IPERS)," chapter 97B establishes IPERS within the Iowa Department of Personnel. Iowa Code § 97B.4.

> The purpose of [chapter 97B] is to promote economy and efficiency in the public service by providing an orderly means for employees, without hardship or prejudice, to have a retirement system which will provide for the payment of annuities, enabling the employees to care for themselves in retirement, and which will improve public employment within the state, reduce excessive personnel turnover, and offer suitable attraction to high-grade men and women to enter public service in the state.

Iowa Code § 97B.2. Under chapter 97B, each employer shall deduct from the wages of each employee a contribution of a specified percentage until the employee's retirement. Iowa Code § 97B.11. See Iowa Code § 97B.1A(26)(a) ("wages" means "all remuneration for employment").

Section 97B.1A(9) defines "employer" to mean "the state of Iowa, the counties, municipalities, agencies, public school districts, all political subdivisions, and all of their departments and instrumentalities . . . ." Section 97B.1A(8) generally defines "employee" to mean "an individual who is employed as defined in [chapter 97B] for whom coverage under

[chapter 97B] is mandatory." Section 97B.1A(8)(a) specifically defines "employee" to include eleven positions, and section 97B.1A(8)(b) specifically defines "employee" to exclude eight positions.

Chapter 229 is entitled "Hospitalization of Persons with Mental Illness." It governs the involuntary commitment of adults suffering from mental illness. Section 229.19 provides:

> The district court in each county with a population of under three hundred thousand inhabitants and the board of supervisors in each county with a population of three hundred thousand or more inhabitants shall appoint an individual . . . to act as advocate representing the interests of persons involuntarily hospitalized by the court, in any matter relating to the patients' hospitalization or treatment under [provisions of chapter 229].

After itemizing the various duties of an advocate, section 229.19 provides:

> The court or, if the advocate is appointed by the county board of supervisors, the board shall prescribe reasonable compensation for the services of the advocate. The compensation shall be based upon the reports filed by the advocate with the court. The advocate's compensation shall be paid by the county in which the court is located, either on order of the court or, if the advocate is appointed by the county board of supervisors, on the direction of the board. If the advocate is appointed by the court, the advocate is an employee of the state for purposes of chapter 669 [which governs tort claims against the State]. If the advocate is appointed by the county board of supervisors, the advocate is an employee of the county for purposes of chapter 670 [which governs tort claims against counties]. If the patient or the person who is legally liable for the patient's support is not indigent, the board shall recover the costs of compensating the advocate from that person. . . .

II. Analysis

You have asked whether counties must make IPERS contributions on behalf of their mental health advocates.

(A)

Chapter 229 neither identifies the "employer" of advocates nor sets forth which public entity may, among other things, review expense and travel claims or subject them to personnel

policies. Chapter 229, which establishes a bifurcated system that rests upon county population, provides just three administrative details: (1) depending upon the county, either the district court or the county supervisors may appoint the advocate and shall prescribe the compensation for his or her services; (2) advocates appointed by the district court constitute state employees for purposes of tort liability, while advocates appointed by county supervisors constitute county employees for purposes of tort liability; and (3) counties must pay the compensation of their advocates and recoup, when possible, some or all of that compensation from the patients or the persons legally liable for their support. Iowa Code § 229.19. These provisions suggest that advocates may serve more than one master. See generally 1984 Op. Att'y Gen. 136 (#84-6-9(L)) (advocate "primarily [aids] the district court"); 27 Am. Jur. 2d Employment Relationship § 5, at 557 (1996) (noting possibility of joint or dual employers).

In addition to providing for the appointment of advocates, chapter 229 provides for the appointment of judicial hospitalization referees who assist district courts in hearing involuntary commitment cases. In Loughlin v. Cherokee County, 364 N.W.2d 234 (Iowa 1985), the Supreme Court of Iowa considered the issue whether IPERS at that time encompassed a hospitalization referee. It held in part that the hospitalization referee, as a matter of fact, served as an independent contractor and not as an employee under county control and within IPERS coverage. Id. at 237.

(B)

Your question does not require us to resolve whether IPERS covers advocates, because legislation passed this year makes clear that it does. See S.F. 2411, 78th G.A., 2d Sess., § 69 (Iowa 2000) (amending Iowa Code § 97B.73B to provide for collection of unpaid IPERS contributions "for a person classified as a patient advocate appointed under section 229.19"). As such, they constitute employees, not independent contractors, for purposes of IPERS.

The question in Loughlin v. Cherokee County only involved IPERS coverage and required the court to determine whether, as a matter of fact, the hospitalization referee served as an independent contractor or as a county employee. See 364 N.W.2d at 237. The Supreme Court did not address the significantly different issue which public entity must make IPERS contributions when the General Assembly, as here, mandates IPERS coverage. This issue is a matter of law.

(C)

Chapter 97B places the responsibility for making IPERS contributions upon an "employer." It requires every employer to deduct IPERS contributions from the wages of every

covered employee, Iowa Code § 97B.11, and specifically defines "wages" as "all remuneration for employment," Iowa Code § 97B.1A(26)(a). These statutory definitions indicate that counties constitute the employers of advocates for purposes of IPERS, because only counties have the statutory obligation to remunerate advocates for their services. See Iowa Code § 229.19 ("compensation [of an advocate] shall be paid by the county"); Loughlin v. Cherokee County, 364 N.W.2d at 236. In other words, chapter 97B specifically links the making of IPERS contributions with the payment of remuneration. Cf. Boone County v. County Employees' Retirement Fund, 26 S.W.3d 257, 260-61 (Mo. App. 2000) ("source of salary" test determines which retirement fund court personnel can join).

Chapter 229 certainly does not suggest anything to the contrary by requiring counties to pay compensation to advocates. Although context often determines the precise meaning of a word, "compensation" in general denotes

> [r]emuneration and other benefits received in return for services rendered; esp., salary or wages.
>
> > "*Compensation* consists of wages and benefits in return for services. It is payment for work. . . . [*Compensation*] includes wages, stock option plans, profit sharing, commissions, bonuses, golden parachutes, vacation, sick pay, medical benefits, disability, leaves of absence, and expense reimbursement." Kurt H. Decker & H. Thomas Felix II, Drafting and Revising Employment Contracts § 3.17, at 68 (1991).

Black's Law Dictionary 277 (7th ed. 1999) (emphasis added). See 27 Am. Jur. 2d Employment Relationship § 52, at 597-98 (1996) (although "most commonly thought of in terms of monetary consideration given for work performed, the term [`compensation'] is also broad enough to include a range of employee benefits"); 63C Am. Jur. 2d Public Officers & Employees § 278, at 721-22 (1997) (fringe benefits "are as much a part of the compensation of office as a weekly pay check," and pension benefits received by public employees "constitute compensation in consideration of services rendered"). See generally Iowa Code § 4.1(38) (statutory words and phrases, if undefined, shall be construed according to context and approved English usage).

We see nothing in the context of chapter 229 that would suggest a narrow meaning for "compensation." See generally Thomas v. State, 241 Iowa 1072, 44 N.W.2d 410, 412 (1950) (statutes having beneficent purpose should be liberally construed). Indeed, we have a duty to construe language in chapter 229 in a way that harmonizes with provisions in chapter 97B. See generally State v. Dann, 591 N.W.2d 635, 638 (Iowa 1999); 3 E. McQuillin, The Law of Municipal Corporations § 12.143, at 691 (1990).

III. Summary

Counties must make IPERS contributions on behalf of their mental health advocates.

Sincerely,

Bruce Kempkes
Assistant Attorney General

PUBLIC FUNDS; COUNTIES: Repurchase and reverse repurchase agreements. Investment of idle cash in money market mutual funds having ability to participate in temporary reverse repurchase agreements. Iowa Code § 12B.10 (1999). A county (1) may exchange its idle cash for securities until such time the original holder reacquires them by paying the county a higher price; (2) may not exchange its securities for cash and later reacquire them for a higher price; and (3) may invest in a money market mutual fund that has the ability to exchange its securities for cash and later reacquire them for a higher price. (Kempkes to Sarcone, Polk County Attorney, 2-21-00) #00-2-6

February 21, 2000

Mr. John P. Sarcone
Polk County Attorney
Polk County Office Bldg., rm. 340
111 Court Ave.
Des Moines, IA 50309

Dear Mr. Sarcone:

You have requested an opinion on the proper investment of public funds. You ask whether a county has statutory authority "to invest in mutual funds that invest in temporary reverse repurchase agreements under the Investment Company Act of 1940 and operate in accordance with regulations promulgated [thereunder]." Upon our review of Iowa Code chapter 12B (1999), we conclude that a county (1) may exchange its idle cash for securities until such time the original holder reacquires them by paying the county a higher price; (2) may not exchange its securities for cash and later reacquire them for a higher price; and -- in answer to your specific question -- (3) may invest in a money market mutual fund that has the ability to exchange its securities for cash and later reacquire them for a higher price.

I.

Chapter 12B is entitled Security of the Revenue. Section 12B.10 -- formerly Iowa Code section 452.10 (1991) -- specifies the boundaries for the investment of public funds. See generally 1992 Op. Att'y Gen. 86, 88; 1988 Op. Att'y Gen. 87, 88.

Section 12B.10(1) grants county treasurers the power to place "any public funds not currently needed" in authorized investments. See Iowa Code § 12C.1(1); 1992 Op. Att'y Gen. 86, 88 (county treasurer "is vested with exclusive investment authority for idle county public funds"). See generally Iowa Code § 12.62 (state treasurer has the responsibility to adopt rules for providing technical information and assistance on the investment of public funds and provide such information and assistance to counties upon request, "including but not limited to technical

information regarding the statutory requirements for [their] investments [in order that they may] invest funds in accordance with state law"). Regarding that power, section 12B.10(2) requires county treasurers to "exercise the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use" in making investments and provides a priority of primary goals of investment prudence: the first being "[s]afety of principal," the second being "[m]aintaining the necessary liquidity to match expected liabilities," the third being "[o]btaining a reasonable rate of return."

Chapter 12B, in two provisions, also restricts counties from making certain investments. Section12B.10(3) prohibits counties from trading securities "in which any public funds are invested for the purpose of speculation and the realization of short-term trading profits." Section 12B.10(5) sets forth a laundry list of permissible and impermissible investments, even though it specifies that county treasurers "shall purchase and invest only in the following" investments:

> (a). Obligations of the United States government, its agencies and instrumentalities.
>
> (b). Certificates of deposit . . . at [approved] federally insured depository institutions . . . .
>
> (c). Prime bankers' acceptances [meeting certain requirements] . . . .
>
> (d). Commercial paper or other short-term corporate debt [meeting certain requirements] . . . .
>
> (e). Repurchase agreements whose underlying collateral consists of the investments set out in paragraph (a) if the [county] takes delivery of the collateral either directly or through an authorized custodian. Repurchase agreements do not include reverse repurchase agreements.
>
> (f). An open-end management investment company registered with the federal securities and exchange commission under the federal Investment Company Act of 1940, [ch. 686, 54 Stat. 789, codified as amended at] 15 U.S.C. §§ 80(a), and operated in accordance with [federal regulations codified at 17 C.F.R. § 270.2a-7.
>
> (g). A joint investment trust [meeting certain requirements]

. . . .

(h). Warrants or improvement certificates of a levee or drainage district.

Futures and option contracts are not permissible investments.

(emphasis added). See generally Iowa Code § 4.1(30)(a) (if undefined, "shall" in statutes imposes a duty).

II.

In essence, you have asked whether counties have authorization under chapter 12B to invest in mutual funds that, in turn, invest in temporary "reverse repurchase agreements." Before answering your question, we need to define these agreements and explain their role in financial markets. "To people who come upon [repurchase and reverse repurchase agreements] for the first time, they are the most confusing of all money market transactions." M. Stigum, The Money Market 312 (1978). They are "a very important, but often poorly understood, money market instrument." Handbook of Fixed Income Securites 238 (F. Fabozzi, ed., 1991).

(A)

Section 12B.10(5) provides counties with a list of authorized and unauthorized investments for their idle cash. See generally 1994 Op. Att'y Gen. 72, 74. Section 12B.10(5)(e) authorizes investment in repurchase agreements meeting certain requirements, but specifically excludes reverse repurchase agreements from the scope of the phrase "repurchase agreements." Section 12B.10(5)(e) thus prohibits investment in reverse repurchase agreements.

Chapter 12B does not, however, define either "repurchase agreement" or "reverse repurchase agreement." Our review of several lines of authority provides some insight into the legislative intent underlying these financial phrases. See, e.g., 11 U.S.C. § 101(41); Cal. Gov't Code § 16480.4 (1989); In re Bevill, Bresler & Schulman Asset Management Corp., 878 F.2d 742, 745-46 (3rd Cir. 1989); In re Comark, 124 B.R. 806, 809 nn. 4-6 (C.D. Cal. 1991); State v. Gaul, 691 N.E.2d 760, 762-63 (Ohio Ct. App. 1997); 1981 Conn. Op. Att'y Gen. (March 17, 1981); 1982 Ky. Op. Att'y Gen. 2-236 (# 82-209); 1989 Miss. Op. Att;y Gen. (June 13, 1989); 1989 Miss. Op. Att;y Gen. (February 8, 1989); 22 Okla. Op. Att'y Gen. 81 (1990); J. Downes & J. Goodman, Dictionary of Finance and Investment Terms 336-37 (1985); Government Accounting Standards Board, Statement No. 3: Deposits with Financial Institutions, Investments (including Repurchase Agreements), and Reverse Repurchase Agreements 9 (1986); E. Guttman, Modern Securities Transfers § 5.03[3][a] (1987); Handbook of Fixed Income Securites ch. 12 (F. Fabozzi, ed., 1991); G. Miller, Investing Public Funds 100, 104 (1986); M. Stigum, After the

Trade chs. 2, 13 (1988); M. Stigum, The Money Market 44-46, 575-82 (1989); Kolar, "Hammersmith Meets Orange County: "Wishing Upon a Star" with Taxpayer Money in the Municipal Bond Derivative Market," 49 Wash. U. J. Urb. & Contemp. L. 315, 318 n. 20 (1996); Schroeder, "Repo Madness: The Characterization of Repurchase Agreements Under the Bankruptcy Code and the U.C.C.," 46 Syracuse L. Rev. 999, 999-1004 (1996).

In industry practice, a standard repurchase agreement -- known as a repo, RP, or buyback -- describes a transaction from the perspective of a holder or dealer of securities, who, in return for cash, transfers them to a party and simultaneously promises to reacquire them (or their equivalent) at a higher price in the future. The higher price effectively incorporates a rate of interest calculated with reference to prevailing market rates for that period of time between the transfer of the securities and their reacquisition. In industry practice, a standard reverse repurchase agreement -- known as a reverse repo -- represents a mirror image of a repurchase agreement: it describes the same transaction from the perspective of the party who, in providing cash to the holder of the securities, later receives a higher price for them upon their reacquisition by the holder.

"[A] repurchase agreement and a reverse repurchase agreement are identical transactions. If someone "is seeking cash, he is involved in a repurchase agreement. Conversely, if he is seeking securities in exchange for cash, he is involved in a reverse transaction." Schatz, "The Characterization of Repurchase Agreements in the Context of Federal Securities Laws," 61 St. John's L. Rev. 290, 295 n. 20 (1987) (citations omitted). Accord M. Stigum, The Money Market 35 (1978). Thus, a repurchase agreement and a reverse repurchase agreement -- an "unnecessary" and "sometimes confusing" phrase, S.E.C. v. Miller, 495 F.Supp. 465, 471-72 n. 37 (S.D.N.Y. 1980) -- simply represent different sides of the same coin.

Accepted industry practice, however, may cause some confusion whenever such a cash-for -securities agreement involves a governmental entity as one of its parties: the definitions reverse. Thus, what private parties would call a "repurchase agreement" governmental entities would call a "reverse repurchase agreement," and what private parties would call a "reverse repurchase agreement" governmental entities would call a "repurchase agreement."

As the Oklahoma Attorney General concluded in an opinion involving that state's law, 22 Okla. Op. Att'y Gen. 81 (1990), we conclude that the General Assembly intended these "reversed definitions" to apply to section 12B.10(5)(e). See generally Iowa Code § 4.1(30) (words and phrases shall be construed according to context and approved English usage, but technical words and phrases shall be construed according to their peculiar and appropriate meaning). In other words, "repurchase agreement" in section 12B.10(5)(e) actually means a "reverse repurchase agreement" as private parties in the financial world would term it. A county thus has authority under section 12B.10(5)(e) to transfer its idle cash to a holder of securities, receive those securities as collateral for the cash, and receive a higher price for them upon their delivery back to the holder; conversely, a county does not have authority under section 12B.10(5)(e) to

exchange its securities for cash and later reacquire them (or their equivalent) for a higher price.

Apart from aligning with industry practice, this interpretation precisely aligns with the phrasing of section 12B.10(5)(e) in its entirety. Section 12B.10(5)(e) permits investment in a "repurchase agreement" only "if the [county] takes delivery of the collateral either directly or through an authorized custodian." (emphasis added). This requirement necessarily contemplates that the county holds idle cash and will take delivery of securities -- the collateral -- held by another party in return for that cash.

This interpretation of section 12B.10(5)(e) also aligns with section 12B.10(5) in its entirety. Section 12B.10(5) provides a county with a number of authorized investments in which to put idle cash; it does not provide a county with any means to obtain cash. A county seeking a place to invest its idle cash for the short-term will, in exchange for securities as collateral, provide that cash to their holder and reacquire them after a period of time at a higher price. Indeed, we understand that counties frequently participate in this type of transaction. See S.E.C. v. Miller, 495 F.Supp. at 471 ("[a]mong the important lenders in the repo market are large corporations and state and local governments"); M. Stigum, The Money Market 316 (1978).

Various authorities have differed on the proper characterization of repurchase agreements and reverse repurchase agreements; for example, some view them as sales and purchases of securities, others view them as secured debts. See generally S.E.C. v. Miller, 495 F.Supp. at 467 n. 2; Schatz, supra, 61 St. John's L. Rev. at 290-305, 310; Schroeder, supra, 46 Syracuse L. Rev. at 999-1004. Whatever their proper label, they rest upon sound economics: the Federal Reserve Board's Open Market Committee frequently uses them to regulate the amount of money in circulation, and they constitute one of the largest sectors of the U.S. money market. "The word `repo' may not exactly be a household term, but repo trading is one of the largest markets in the United States, with daily volume of over $600 billion," and may constitute "the single most important short-term credit (debt) market in the U.S." Schroeder, supra, 46 Syracuse L. Rev. at 1002, 1045 (footnote omitted). See M. Stigum, The Money Market 34, 316 (1978).

These financial instruments can provide a substantial benefit to each party to the agreement. See In re Bevill, Bresler & Schulman Asset Management Corp., 878 F.2d at 745-46. A holder of securities -- without needing to liquidate them before maturity -- can obtain short-term cash in order to, for example, cover shortfalls in cash accounts. A holder of large amounts of idle cash -- often an institutional investor or governmental entity -- has access to an instrument with an easily tailored maturity date in which to invest that cash for short periods of time, sometimes overnight, at an attractive rate of interest.

The exchange of idle cash for securities and a higher rate of return constitutes a relatively safe investment that serves a useful purpose in an organization's cash management. See Schatz, supra, 61 St. John's L. Rev. at 294 n. 18, 297 n. 35 (repurchase agreements carry risks inherent in the trading of securities; the dealer may prove uncreditworthy and default on the obligation to

repurchase; yet risk of default remains low, because the U.S. government guarantees the underlying collateral). If, however, governmental entities enter into these types of instruments for the purpose of leveraging their assets, they assume a very high degree of risk -- a lesson learned by Orange County, California, in late 1994 when its treasurer lost $1.7 billion of a $7.5 billion investment pool and bankrupted the county. See Bronfman & Ferguson, "Don't Ask, Don't Tell and Other Contracting Considerations," 21 J. Corp. L. 155, 161-62 (1995); Kolar, supra, 49 Wash. U. J. Urb. & Contemp. L. at 315-18, 332; Note, "State and Local Governmental Entities: In Search of . . . Statutory Authority to Enter into Interest Rate Swap Agreements," 63 Fordham L. Rev. 2177, 2211-16 (1995); Note, "Regulating Risk in Financial Markets: Private Insurance for Public Funds," 69 S. Cal. L. Rev. 1163, 1163, 1177 n. 69 (1996); see also S.E.C. v. Miller, 495 F.Supp. at 472-73.

(B)

Section 12B.10(5)(f) section effectively authorizes investment in "money market mutual funds" (or more simply, "money market funds"). See generally 15 U.S.C. § 80a-1 et seq.; 17 C.F.R. § 270.2a-7. Apart from its referral to federal law, section 12B.10(5)(f) does not otherwise define or describe this type of fund, which Congress has recognized as having "a peculiar role in the national economy." Comptroller of the Currency v. First United Bank & Trust, 578 A.2d 192, 197 (Md. Ct. App. 1990). In common parlance, however,

> [m]oney market mutual funds are . . . designed to return a market rate of interest, while maintaining a stable value, normally of $1 per share. Such funds invest in short-term debt instruments such as government securities, commercial paper, and large denomination bank certificates of deposits. The Investment Company Act of 1940 and the rules promulgated under it closely regulate money market mutual funds. . . . Tight governmental regulation and careful analysis by rating organizations provide substantial security in obtaining interest and repayment of principal. Of course, the funds cannot guarantee that the net asset value will remain stable at $1, but deviations from this norm are rare.
>
> Just as stability of the fund's net asset value cannot be absolutely guaranteed, all fixed-income securities are subject to price fluctuations based on interest rate movements, maturity, liquidity, and the supply and demand for each type of security. This is true of underlying obligations issued or backed by the federal government, as well as privately issued securities. . . . State funds will [thus] be vulnerable to interest-rate fluctuations both if the State invests in securities directly or if the State invests in mutual funds. Because of the diversification and active

> management designed to achieve stability of a money market fund, the interim
> risks are probably less than those of investing in individual, underlying securities.
>
> . . . .
>
> [T]hese investments involve minimal risk. The Investment Company Act requires that such funds only invest in stable securities that have received high stability ratings by nationally recognized statistical ranking organizations. Therefore, while not risk-free, these investments are exceptionally secure.

1996 Ind. Op. Att'y Gen. 3 (footnotes omitted). See 1988 Op. Att'y Gen. 87, 88; 1980 Tenn. Op. Att'y Gen. 80-208; Dictionary of Banking and Finance 335 (1982).

As indicated, money market mutual funds invest in short-term debt instruments such as government securities, commercial paper, and large denomination bank certificates of deposits. More important to your question, they also participate in repurchase agreements. J. Downes & J. Goodman, Dictionary of Finance and Investment Terms 235 (1985); see Schroeder, supra, 46 Syracuse L. Rev. at 1026 n. 107 (mutual funds constitute "significant class of repo participants"). Administrative regulations expressly mention the use of such agreements. See 17 C.F.R. §§ 270.2a-7(a)(5), 270.2a-7(c)(4)(ii)(A). In contrast, we have discovered no federal law permitting money market mutual funds to participate in reverse repurchase agreements.

(C)

We have concluded that section 12B.10(5)(e) does not authorize counties to exchange their securities for cash and later reacquire them for a higher price. Given the semantic morass surrounding "repurchase agreement" and "reverse repurchase agreement," we interpret your question as asking whether section 12B.10(5)(f) authorizes counties to invest in a money market mutual fund that, in turn, has the ability to exchange its securities for cash and later reacquire them for a higher price: Can counties do indirectly what they cannot do directly?

In the abstract, the law generally prohibits governmental entities from doing so. See, e.g., Schwarzkopf v. Sac County Supervisors, 341 N.W.2d 1, 5 (Iowa 1983); Independent School Dist. v. City of Burlington, 60 Iowa 500, 15 N.W. 295, 297 (1883);1984 Op. Att'y Gen. 167, 170; 2 Sutherland's Statutory Construction § 41.11, at 289-90 (1973). That principle, however, simply does not apply in this instance, because section 12B.10(5)(e) does not stand alone: its companion provision, section12B.10(5)(f), affirmatively authorizes investment in money market mutual funds and, in so doing, imposes no restriction relating to repurchase or reverse repurchase agreements. Thus, counties can invest in any money market mutual fund in compliance with 15

U.S.C. § 80a-1 et seq. and 17 C.F.R. § 270.2a-7, which section 12B.10(5)(f) by its terms incorporates. Section 12B.10(5)(f) expressly authorizes counties to do indirectly what section12B.10(5)(e) does not authorize them to do directly.

This analysis of section 12B.10(5) receives support from a 1998 opinion by the Maryland Attorney General. That opinion addressed the authority of the state to invest in money market mutual funds that held a substantial amount of commercial paper when a statute severely restricted the amount of commercial paper that the state could directly hold in its investment portfolio. See 1998 Md. Op. Att'y Gen. 002. Noting that the state had an affirmative, unrestricted, statutory authority to invest in money market mutual funds, the opinion concluded that the state could thus invest in such funds regardless of the amount of commercial paper in their portfolios. See id. The unrestricted statutory authority to invest in money market mutual funds -- one of several authorized investments -- was "separate and distinct" from the restricted statutory authority to hold commercial paper. Id. Cf. 1988 Op. Att'y Gen. 87, 89 (a bond and a mutual fund investing in bonds are different investments; statutory authority to invest in former thus does not include authority to invest in latter). The opinion emphasized that principles of statutory construction usually forbid engrafting a restriction onto a statute that sets forth a power. See 1998 Md. Op. Att'y Gen. 002.

Such analysis would apply to sections 12B.10(5)(e) and 12B.10(5)(f). Both represent separate and distinct types of investments. Had the General Assembly actually intended to restrict investment in money market mutual funds to those lacking the ability to exchange their short-term cash for securities and receive a higher price for those securities upon their reacquisition by the initial holder, it could have expressly imposed this restriction in section 12B10(5).

We must examine statutes as the General Assembly drafted them; we may not add words or phrases under the guise of statutory construction; we may not insert restrictions into grants of power. See Iowa R. App. P. 14(f)(13); Wyciskalla v. Iowa Dist Ct., 588 N.W.2d 403, 406 (Iowa 1998); State v. Byers, 456 N.W.2d 917, 919 (Iowa 1990); Clarion Ready Mix Concrete Co. v. Iowa St. Tax Comm'n, 252 Iowa 500, 107 N.W. 553, 559 (1961); Iowa Power & Light Co. v. Hicks, 228 Iowa 1085, 292 N.W. 826, 828 (1940). When a statute contains unambiguous language, we have no reason to resort to principles of statutory construction. See Iowa Dep't of Transp. v. Iowa Dist. Ct., 588 N.W.2d 102, 103 (Iowa 1998). "Unambiguous" means that "reasonable minds [cannot] disagree or be uncertain as to [the] meaning [of the language]. State v. Schlemme, 301 N.W.2d 721, 723 (Iowa 1981). We believe that section 12B.10(5) falls within that definition for purposes of your question.

III.

In summary: Under Iowa Code section 12B.10(5) (1999), a county (1) may exchange its idle cash for securities until such time the original holder reacquires them by paying the county a

higher price; (2) may not exchange its securities for cash and later reacquire them for a higher price; and (3) may invest in a money market mutual fund that has the ability to exchange its securities for cash and later reacquire them for a higher price.

Sincerely,

Bruce Kempkes
Assistant Attorney General

LAW ENFORCEMENT; STATE OFFICERS AND DEPARTMENTS: Scope of power granted to Iowa Law Enforcement Academy Council. Iowa Code § 80B.3 (1999). The Iowa Law Enforcement Academy Council has authority under section 80B.3(3) to determine who among those denominated as "peace officers" by statute are "law enforcement officers" and, therefore, obligated to meet the standards, training, and certification requirements in chapter 80B. Nothing in chapter 80B would empower the Council to confer peace officer status -- and the legal authority that is carried with this designation -- upon particular individuals. The Council could not determine to include as "law enforcement officers," upon whom standards, training, and certification requirements should be imposed, persons who have been improperly delegated the duties of peace officers. (Pottorff and Kempkes to Shepard, Director, Iowa Law Enforcement Academy, 2-21-00) #00-2-5

February 21, 2000

Mr. Gene W. Shepard, Director
Iowa Law Enforcement Academy
P.O. Box 130
Johnston, Iowa 50131

Dear Mr. Shepard:

You have requested an opinion on the scope of authority granted to the Iowa Law Enforcement Academy Council under Iowa Code chapter 80B (1999). Chapter 80B invests the Council with certain regulatory power over any "law enforcement officer" and defines that phrase in part to include any person who may be required to perform the duties of a peace officer. See Iowa Code § 80B.3(3). You state that throughout the Iowa Code there are various references to persons who are vested with the authority to act as peace officers while performing job duties. By contrast, some persons employed by public office holders are required by job description to perform the duties of peace officers although not denominated as peace officers by statute. You specifically ask whether, pursuant to Iowa Code section 80B.3, the Council may "confer `peace officer' status" upon those persons who, after appropriate inquiry, the Council determines are performing the duties of a peace officer. Our review of chapter 80B leads us to conclude that the Council does not have this authority.

Chapter 80B creates the Academy and the Council. The Academy, under the day-to-day administration of its Director, serves as a central law enforcement training facility. The Council generally oversees the Academy and consists of three state residents, a county sheriff, two police officers, a member of the Iowa Department of Public Safety, a state senator, and a state representative. See Iowa Code §§ 80B.4, 80B.6. See generally 1996 Op. Att'y Gen. 24 (#95-6-6(L)); 1980 Op. Att'y Gen. 882 (#80-12-4(L)).

Chapter 80B authorizes the Director, subject to the Council's approval, to promulgate rules

regarding such matters as (1) minimum entrance requirements, courses, attendance requirements, and equipment and facilities at law enforcement training schools; (2) minimum basic training requirements for law enforcement officers; (3) minimum standards of physical, educational, moral, and mental fitness; and (4) grounds for revoking law enforcement officer certification. See Iowa Code § 80B.11. See generally 501 IAC 2.1 et seq. Chapter 80B also authorizes the Council to issue certificates to law enforcement officers fulfilling various statutory requirements and to revoke their certificates. See Iowa Code § 80B.13.

You have asked whether the Council may "confer `peace officer' status" upon persons who, as determined by the Council, perform the duties of a peace officer. To address your question, we turn to the applicable statutory definition. Chapter 80B specially defines "law enforcement officer" to mean:

> an officer appointed by the director of the department of natural resources, a member of a police force or other agency or department of the state, county or city regularly employed as such and who is responsible for the prevention and detection of crime and the enforcement of the criminal laws of this state and all individuals, as determined by the council, who by the nature of their duties may be required to perform the duties of a peace officer.

Iowa Code § 80B.3(3) (emphasis added). The emphasized portion of this definition was added to section 80B.3(3) in 1970. 1970 Iowa Acts, 63rd G.A., ch. 1048, § 4. Under this definition a law enforcement officer includes numerous specifically described categories of persons as well as those individuals "determined by the council" to be law enforcement officers based on the nature of their duties. Your inquiry requires us to construe the scope of the authority of the Council to "determine" whether additional individuals are "law enforcement officers" based on requirements that these persons perform the duties of a "peace officer."

Those persons classified as "law enforcement officers" under chapter 80B must, inter alia, meet minimum entrance requirements, satisfy minimum physical and mental fitness requirements, undergo basic course training and complete certain in-service training. Iowa Code § 80B.11. Law enforcement officers are certified and may have their certification revoked following a hearing before the Council. Iowa Code § 80B.13.

In construing the scope of the Council's authority to determine which additional individuals are "law enforcement officers" subject to these requirements, we turn to principles of statutory construction. The polestar of statutory construction is legislative intent. Carlon Co. v. Board of Review, 572 N.W.2d 146, 154 (Iowa 1997); Harris v. Olson, 558 N.W.2d 408, 410 (Iowa 1997). The ultimate goal of statutory construction is to give effect to the legislative intent. McCracken v. Iowa Dep't of Human Services, 595 N.W.2d 779, 784 (Iowa 1999); Hornby v. Iowa Bd. of Regents, 559 N.W.2d 23, 25 (Iowa 1997). The intent of the legislature in creating the Academy and the

Council is set out expressly in chapter 80B. "It is the intent of the legislature in creating the academy and the council to maximize training opportunities for law enforcement officers, to coordinate training and to set standards for the law enforcement service, all of which are imperative to upgrading law enforcement to professional status." Iowa Code § 80B.2. Accordingly, we should construe the Council's authority to include additional persons as "law enforcement officers" pursuant to section 80B.3(3) with this legislative purpose in mind.

There are numerous statutes which authorize state officers and state agencies to designate particular employees to act as peace officers. See, e.g., Iowa Code § 7.10 ("[w]henever the governor is satisfied that a state of emergency exists . . . the governor shall designate any employee or employees of this state as peace officers"); § 29A.56 ("[t]he adjutant general may by order . . . commission one or more of the employees of the military division as special police" who "shall . . . exercise the powers of regular peace officers"); § 174.5 ("[t]he management of any society may appoint such number of special police as it may deem necessary" and "[s]uch officers are hereby . . . charged with the duties of peace officers"); § 203.13 ("[t]he department may designate by resolution certain of its employees in the warehouse bureau to be enforcement officers" who "shall have the authority of a peace officer"); § 262.13 ("[t]he board may authorize any institution under its control to commission one or more of its employees as special security officers" who "shall have the powers. . . of regular peace officers"); § 321.477 ("[t]he department may designate by resolution certain of its employees upon each of whom there is hereby conferred the authority of a peace officer"); § 328.12 ("general powers of peace officers are conferred upon the director, and officers and employees of the department designated by the director to exercise such powers"); § 330A.8(16) ("[a]n authority is granted the following rights and powers . . . [t]o designate employees upon whom are conferred all the powers of a peace officer").

Still other statutes designate particular positions as including the power of peace officers. See, e.g., Iowa Code § 147.103 ("[i]nvestigators authorized by the board of physician assistant examiners have the powers and status of peace officers"); § 147.103A ("[i]nvestigators appointed by the board have the powers and status of peace officers"); § 152.11 ("[i]nvestigators authorized by the board of nursing have the powers and status of peace officers"); § 153.33 ("[i]nvestigators authorized by the board of dental examiners have the powers and status of peace officers"); § 155A.26 ("[o]fficers, agents, inspectors, and representatives of the board of pharmacy examiners shall have the powers and status of peace officers"); § 507E.8 ("[b]ureau investigators shall have the power and status of peace officers"); § 907.2 ("[p]robation officers . . . are peace officers").

Analyzing the authority of the Council to determine whether individuals "by the nature of their duties may be required to perform the duties of a peace officer" in light of these statutes, we construe section 80B.3(3) to empower the Council to determine who among those denominated as "peace officers" by statute are "law enforcement officers" obligated to meet the standards, training and certification requirements under chapter 80B. "Peace officers" are not otherwise specifically included in the definition of law enforcement officers. Compare Iowa Code § 80B.3(3) with Iowa Code § 801.4(11). A legislative grant of discretion to the Council to determine which "peace

officers"must meet standards, training, and certification requirements under chapter 80B is consistent with the legislative intent of the chapter "to maximize training opportunities for law enforcement officers, to coordinate training and to set standards for the law enforcement service to centralize training and standards for law enforcement officers." Iowa Code § 80B.2.

We cannot determine through an opinion whether the Council additionally may include as "law enforcement officers" persons who have been delegated the duties of a "peace officer" in fact but without express statutory authorization. Resolution of this question would require legal analysis of the authority under which the duties of a peace officer were delegated and factual analysis of the actual duties being performed. The Council could not determine to include as "law enforcement officers," upon whom standards, training, and certification requirements should be imposed, persons who have been improperly delegated the duties of peace officers. Whether an individual may be legally delegated the duties of a peace officer without express statutory authority and whether the Council could determine that individual is a "law enforcement officer" based on performance of those duties must be determined on a case-by-case basis.

In response to your narrow question whether the Council may "confer `peace officer' status" upon persons who, as determined by the Council, perform the duties of a peace officer, we do not construe section 80B.3(3) to empower the Council to confer peace officer status upon any individual based on an audit of job duties. Chapter 80B is directed toward training, standards, and certification of law enforcement officers. See Iowa Code § 80B.2. Nothing in chapter 80B would empower the Council to confer peace officer status -- and the legal authority that is carried with this designation -- upon particular individuals. This power would be inconsistent with the express legislative intent of chapter 80B, see Iowa Code § 80B.2, to maximize training opportunities, to coordinate training, and to set standards. See McCracken v. Iowa Dep't of Human Services, 595 N.W.2d at 784; Hornby v. Iowa Bd. of Regents, 559 N.W.2d at 25. Rather, the Council may only determine who among those performing the duties of peace officers must undergo training, meet standards, and be issued certificates.

In summary: The Iowa Law Enforcement Academy Council has authority under Iowa Code section 80B.3(3) to determine who among those denominated as "peace officers" by statute are "law enforcement officers" and, therefore, obligated to meet the standards, training, and certification requirements in chapter 80B. Nothing in chapter 80B would empower the Council to confer peace officer status -- and the legal authority that is carried with this designation -- upon particular individuals. The Council could not determine to include as "law enforcement officers," upon whom

standards, training, and certification requirements should be imposed, persons who have been improperly delegated the duties of peace officers.

Sincerely,

Julie F. Pottorff
Deputy Attorney General

Bruce Kempkes
Assistant Attorney General

LAW ENFORCEMENT; STATE OFFICERS AND DEPARTMENTS: Certification of Iowa State Fair Board's appointees as law enforcement officers. Iowa Code §§ 80B.11, 173.14 (1999). Security personnel appointed by the Fair Board would typically perform different duties than those performed by peace officers appointed by the Fair Board. All persons appointed to either position must undergo timely certification by the Iowa Law Enforcement Academy if the Iowa Law Enforcement Academy Council determines they constitute "law enforcement officers." The Fair Board's authority to adopt the standards it deems necessary or appropriate for the appointment of security personnel and peace officers does not conflict with the Academy's authority to impose minimum standards and training requirements for all law enforcement officers. (Kempkes to Shepard, Director, Iowa Law Enforcement Academy, 4-24-00) #00-4-3(L)

April 24, 2000

Mr. Gene W. Shepard
Director, Iowa Law Enforcement Academy
P.O. Box 130
Johnston, IA 50131

Dear Mr. Shepard:

You have requested an opinion on the authority of the Iowa Law Enforcement Academy and the Iowa Law Enforcement Academy Council as it relates to the Iowa State Fair Board's appointment of "security personnel" and "peace officers." You ask (1) whether a distinction exists between these two job positions, (2) whether persons serving in them must undergo timely certification by meeting the Academy's minimum standards and training requirements, and (3) whether the Academy's authority to impose minimum standards and training requirements conflicts with the Fair Board's authority to adopt standards for the appointment of security personnel and peace officers. After reviewing Iowa Code chapters 80B and 173 (1999), we conclude that security personnel would typically perform different duties than those performed by peace officers, that all persons appointed to either position must undergo timely certification if the Council determines they constitute "law enforcement officers," and that the Fair Board's authority to adopt the standards it deems necessary or appropriate for their appointment does not conflict with the Academy's authority to impose minimum standards and training requirements for law enforcement officers.

I.

Chapter 80B is entitled Law Enforcement Academy. It generally pertains to the training and regulation of persons within the law enforcement community. By passing chapter 80B in 1967, the General Assembly intended to "maximize training opportunities for law enforcement officers, to co-ordinate training and to set standards for the law enforcement service, all of which are imperative to upgrading law enforcement to professional status." Iowa Code § 80B.2. Accord 501 IAC 1.2. See generally I Standards for Criminal Justice: The Urban Police Function ch.1, pt. 7 (1980).

Chapter 80B created the Academy, which serves as a central law enforcement training facility, and the Council, which consists of three state residents, a county sheriff, two police officers, a member of the Iowa Department of Public Safety, a state senator, and a state representative. See Iowa Code §§ 80B.4, 80B.6. See generally 1996 Op. Att'y Gen. 24 (#95-6-6(L)) (Academy performs crucial role in establishing uniform, minimum physical, educational, mental, moral, and training standards for law enforcement officers); 1980 Op. Att'y Gen. 882 (#80-12-4(L)). The Director of the Academy administers it on a day-to-day basis. See Iowa Code § 80B.5.

Chapter 80B authorizes the Director, subject to the Council's approval, to promulgate rules regarding such matters as (1) minimum entrance requirements, courses, attendance requirements, and equipment and facilities at law enforcement training schools; (2) minimum basic training requirements for law enforcement officers; (3) minimum standards of physical, educational, moral, and mental fitness; and (4) grounds for revoking law enforcement officer certification. See Iowa Code § 80B.11. See generally 501 IAC 2.1 et seq. Chapter 80B also authorizes the Council to issue certificates to law enforcement officers fulfilling various statutory requirements and to revoke their certificates. See Iowa Code § 80B.13.

Chapter 173 is entitled State Fair. It provides that the Iowa State Fair Authority "is a public instrumentality of the state," but adds that it "is not an agency of state government" except for the purposes of specified statutes. See Iowa Code § 173.1. With its powers vested in the Fair Board, the Authority "is established to conduct an annual state fair and exposition on the Iowa state fairgrounds and to conduct other interim events consistent with its rules." Iowa Code § 173.1. The Fair Board -- comprised of state officials and elected members -- elects one of its elected members to serve as president. Iowa Code § 173.1(3). Section 173.14(4) provides that the Fair Board

> has custody and control of the state fairgrounds, including the buildings and equipment on it belonging to the state, and may:
>
> . . . .
>
> Appoint, as the president deems necessary, security personnel and peace officers qualified according to standards adopted by the [Fair Board].

See generally Iowa Code § 4.1(30)(c) (if undefined, "may" in statutes confers a power).

II.

(A)

You have asked whether a distinction exists between security personnel and peace officers appointed by the Fair Board. Chapter 173 does not define "peace officers" or "security personnel" and does not identify the scope of their statutory duties and powers.

The phrase "peace officers" has no single, well-defined meaning,1994 Op. Att'y Gen. 141 (#94-9-2(L)), and the General Assembly has defined it in different ways for different purposes, see, e.g., Iowa Code §§ 80B.3(3), 321.1(50), 321J.1(7). In general, the phrase means "sheriffs and deputies, constables, marshals, city police officers, and other officers [such as state troopers] `whose duties require enforcement and preservation of the public peace'. . . ." 1994 Op. Att'y Gen. 141 (#94-9-2(L)). See generally Iowa Code § 4.1(31). Thus, among other things, peace officers may prevent and detect crimes as well as apprehend those persons allegedly responsible for committing them. In addition to issuing citations and executing search warrants, the special authority of peace officers includes the authority to arrest with a warrant, more expansive power to arrest without a warrant, and a different authority to use force. See Iowa Code chs. 804-06. See generally 29 CFR § 553.211; I Standards for Criminal Justice: The Urban Police Function §1-2.2 (1980).

The phrase "security personnel" also appears to have no single, well-defined meaning. The adjective "security"commonly suggests measures taken to protect, defend, or guard against crime, attack, or escape, and the noun "personnel" commonly suggests a body of persons usually employed by an organization. See Webster's Ninth New Collegiate Dictionary 849, 1037 (1979); Webster's Third New International Dictionary 2053-54 (1961). See generally Iowa Code § 4.1(30). Thus, in general, "security personnel"denotes persons who detect and defend against crimes. See, e.g., Gamerdinger v. Schaefer, 603 N.W.2d 590, 595 (Iowa 1999) (security personnel photographed accident scene); State v. Ortega, 418 N.W.2d 57, 58 (Iowa 1988) (security personnel confronted student on university grounds and seized contraband); State v. Jordan, 409 N.W.2d 184, 185 (Iowa 1987) (security personnel followed and apprehended

suspected criminal in mall); Martinko v. H-N-W Assoc., 393 N.W.2d 320, 321 (Iowa 1986) (security personnel patrolled parking lot of mall); Zohn v. Menard, Inc., 598 N.W.2d 323, 325 (Iowa App.1999) (security personnel detained, questioned, and searched customers and automobiles on store grounds); State v. Knudsen, 500 N.W.2d 84, 85 (Iowa App. 1993) (security personnel detained customers and assisted police in investigating alleged crime on store grounds). Depending upon industry practice and the terms of their employment contract, security personnel may perform a variety of functions. For example, they may inspect doors, windows, gates, fences, and other plant and equipment to ascertain if tampering has occurred; warn violators of infractions; watch for and report irregularities and incidents; sound alarms or call for law enforcement officers in case of fire or the presence of unauthorized persons; control traffic; and provide information. See generally Kolman v. Sullivan, 925 F.2d 212, 213 (7th Cir. 1991); U.S. Dep't of Labor, Dictionary of Occupational Titles § 372.667-034 (1991). Security personnel at the State Fairgrounds thus might function as guards on patrol or as gatekeepers or watchmen stationed at various entrances, parking areas, grandstands, and other places where either admission is charged or access by the public is restricted.

By using both "peace officers" and "security personnel" in section 173.14(4) and linking them with a conjunctive, the General Assembly presumably intended some difference in meaning for them. Legislative history supports that presumption: before an amendment in 1991, section 173.14(4) only provided for the appointment of security personnel by the Fair Board. See Iowa Code § 173.14(4) (1991). The amendment permitted the Fair Board to appoint peace officers in addition to security personnel. See 1991 Iowa Acts, 74th G.A., ch. 248. As a result, it seems clear that "security personnel" do not constitute "peace officers." See generally Iowa Code §§ 4.4(2), 4.6(4); State v. Ahitow, 544 N.W.2d 270, 273 (Iowa 1996) ("[w]e will not interpret a statute that renders a part of it irrelevant or redundant"); Civil Service Comm'n v. Iowa Civil Rights Comm'n, 522 N.W.2d 82, 86 (Iowa 1995) ("a statute [will not be construed] to make any part of it superfluous unless no other construction is reasonably possible").

(B)

You have asked whether the persons appointed by the Fair Board as security personnel and peace officers must undergo timely certification under chapter 80B.

Chapter 80B specially defines the phrase "law enforcement officer" to include "all individuals, as determined by the [C]ouncil, who by the nature of their duties may be required to perform the duties of a peace officer." Iowa Code § 80B.3(3). Those persons classified as "law enforcement officers" under chapter 80B must, inter alia, meet minimum entrance requirements, satisfy minimum physical and mental fitness requirements, undergo basic course training, and complete certain in-service training. Iowa Code § 80B.11. Law enforcement officers are certified and may have their certification revoked following a hearing before the Council.

A recent opinion addresses the scope of chapter 80B. See 2000 Op. Att'y Gen. ___ (#00-2-5). We therein acknowledged that the General Assembly has granted discretion to the Council to determine whether persons need to meet the standards, training, and certification requirements of chapter 80B by virtue of their status as "law enforcement officers." Id. In view of this opinion, we conclude that the Fair Board's peace officers and security personnel need to undergo timely certification if, pursuant to the terms of their employment contract, they may be required to perform the duties of a peace officer.

(C)

Section 80B.11 essentially requires the promulgation of rules by the Academy setting forth minimum standards and training requirements for certifying persons as law enforcement officers. Section 173.14(4) provides for the adoption of standards by the Fair Board for appointing qualified persons as security personnel and peace officers. We see no conflict in these two provisions.

Section 173.14(4) simply permits the Fair Board to determine the qualifications it deems necessary or appropriate for persons serving as its security personnel and peace officers, who may or may not constitute "law enforcement officers" for purposes of chapter 80B. Ante, Division II(B). As such, it does not restrict or otherwise affect the Academy's authority under section 80B.11 to set minimum standards and training requirements for all law enforcement officers. See generally Net Midwest, Inc. v. Iowa St. Hygienics Laboratory, 526 N.W.2d 313, 315 (Iowa 1995) (court must try to harmonize statutes to avoid any conflict); 1998 Op. Att'y Gen. ___ (#97-7-2(L)).

III.

In summary: "Security personnel" appointed by the Iowa State Fair Board would typically perform different duties than those performed by "peace officers" appointed by the Fair Board. All persons appointed to either position must undergo timely certification by the Iowa Law Enforcement Academy if the Iowa Law Enforcement Academy Council determines they constitute "law enforcement officers" for purposes of chapter 80B. The Fair Board's authority to adopt the standards it deems necessary or appropriate for their appointment does not conflict with the Academy's authority to impose minimum standards and training requirements for all law enforcement officers.

Sincerely,

Bruce Kempkes
Assistant Attorney General

TAXATION: Local Option Ballot Proposition. Iowa Code §§ 422B.1(5); 422B.1(6) (1999). The Board of Supervisors is allowed to paraphrase the language found in a "use change" petition prior to having the "use change" petition issue placed on the ballot in a local option tax election. The Board of Supervisors can, and in some instances must, paraphrase and supplement the language of the petition prior to having the issue placed on the ballot in a local option tax election. (McCown to Skilling, Kossuth County Attorney, 4-24-00) #00-4-2(L)

April 24, 2000

David C. Skilling
Kossuth County Attorney
111 S. Harlan Street
Algona, Iowa 50511

Dear Mr. Skilling:

You have requested an opinion of the Attorney General with respect to the local option tax law in Iowa Code chapter 422B. Specifically, you ask whether the Board of Supervisors is allowed to paraphrase the language found in a "use change" petition prior to having the "use change" petition issue placed on the ballot in a local option tax election. As explained below, we conclude that the Board of Supervisors can, and in some instances must, paraphrase and supplement the language of the petition prior to having the issue placed on the ballot in a local option tax election.

You state that the petition in question requested a "re-vote" on the local option sales tax referendum for the purpose of a change of use of the local option tax revenue for the unincorporated area. With your request, you enclose a copy of the petition. The language of the petition reads:

> We the eligible electors of Kossuth county petition the Board of Supervisors to call for a Referendum concerning the disbursement of the revenue collected from the 1% local option sales tax in the unincorporated area of Kossuth County and, if passed, to be changed from the current language, where only 20% is property tax relief to; 100% tax relief in the unincorporated areas.

As you indicate in your request, Iowa Code section 422B.1(6) provides that "The election at which the question of repeal or rate or use change is offered shall be called and held in the same manner and under the same conditions as provided in subsections 4 and 5 for the election on the imposition of the local option tax." Subsection 6 imposes a mandatory duty upon the board of supervisors to call an election when the conditions of the statute are met. Ordinarily the use of the term "shall"

is mandatory and imposes a legal duty. Iowa Code § 4.1(30)(a) (1993); Willett v. Cerro Gordo County Board of Adjustment, 490 N.W.2d 556, 559 (Iowa 1992).

In this instance, the Board was required to submit the question of use change upon receipt of a petition. The "question of use change" of a local sales and services tax must be presented to the electors upon receipt of a petition calling for such referendums in the same manner as is provided in subsection 4. Iowa Code §§ 422B.1(3)(a) and (b), 422B.1(4). See also 1990 Op. Att'y Gen. 93 and 1986 Op. Att'y Gen. 127. Section 422B.1(4)(a) requires that the Board direct the county commissioner of elections to submit the "question of imposition" of the local option tax to the electors upon receipt of a petition. Upon receiving direction from the Board, the county commissioner of elections submits the question of imposition in a ballot proposition according to the requirements of Iowa Code section 422B.1(5). Therefore, the question in this matter becomes what information is the board required, permitted or obligated to provide when it directs that the commissioner of elections submit the question of the use change of the local option tax to the electors.

Iowa Code section 422B.1(5) sets out what must be specified in the ballot proposition. Under section 422B.1(5) the proposition is required to be in a form prescribed by rules which are established by the state commissioner of elections. The ballot proposition presented to the voters must specify the type and rate of proposed local option tax, the date it will be imposed, the approximate amount of revenues from the tax that will be used for property tax relief and the purpose or purposes for which the remainder of the revenues will be used. Iowa Code § 422B.1(5); Op. Att'y Gen. #97-9-2(L); 1991 Op. Att'y Gen. 50 and 1990 Op. Att'y Gen. 93. Additionally, with respect to the question of use change, Iowa Code section 422B.1(6) requires that the ballot proposition "shall list the present use of the revenues, the proposed use, and the date after which revenues received will be used for the new use."

Plainly, the petition in this matter does not contain all the required information required to be placed in the ballot proposition by sections 422B.1(5) and (6). Section 422B.1 does not impose requirements concerning the contents of the petition or specific information to be included in petitions requesting that a local option tax be repealed, increased, decreased or the use changed. Nor does section 422B.1 directly or implicitly impose any criteria on the governing body as to information that should be included in the submission of the question of the use change other than the approximate amount of revenue that will be used for property tax relief and the purpose(s) for which the revenue otherwise will be expended.[1] We have found nothing

[1]Rules promulgated by the Secretary of State implementing 422B require the governing body to provide the county commissioner (1) the rate of the tax, (2) the date the tax will be imposed, (3) the amount of local option tax revenues that will be used for

in chapter 422B that prohibits governing authorities from determining the wording of a proposition.

It is reasonable to conclude that without the information required to be placed in the ballot proposition the commissioner of elections has no guidance as to how the ballot proposition is to be drafted. It is also reasonable to conclude that for the Board of Supervisors to fulfill its duty to notify the county commissioner of elections, it must provide the information necessary to introduce the proposition to the electorate. "Assuming the sufficiency of the petition, there then is imposed upon the county supervisors the same sacred duty to act legally as in meeting any other official requirement made of them by law. When performing this function, the supervisors should not evade or equivocate. Likewise their action in this regard must not be arbitrary or captious." O'Keefe v. Hopp, 230 N.W. 876, 878 (Iowa 1930).

It is the opinion of this office that the Board has discretion to determine the language that it includes in its directions to the commissioner of elections to submit the question of use change of a local option tax. However, that discretion is limited by its obligation to accurately identify the nature of the proposed use change of the local option tax. The subject matter for the ballot is obtained from the petition. O'Keefe v. Hopp, 230 N.W. 876, 878 (Iowa 1930). "[W]hile the governing body has discretion in determining the wording of a proposition; the proposition should constitute a fair portrayal of the chief features." See Blum v. Lanier, 997 S.W.2d 259, 261 (Tex. 1999). "[I]t is mandatory that 'the language of the ballot [be] so plain that there could have been no mistake as to the proposition submitted.'" O'Keefe v. Hopp, 230 N.W. 876, 878 (Iowa 1930) citing Lee Electric Co. v. City of Corning, 199 Iowa 680, 202 N.W. 585, 586. Such is true even though under the circumstances it shall not be necessary to submit the question "in haec verba." Enough should appear, at least, to indicate the proposition. O'Keefe v. Hopp, 202 N.W. 876, 879.

In summary, it is the opinion of this office that the Board of Supervisors is not required to place on the ballot in a local option election the proposition as stated in the petition. The Board can word the ballot issue. However, while the Board has

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property tax relief and (4) the specific purposes of the tax revenues other than property tax relief. 721 IAC 21.801(1).

discretion to determine the language, that discretion is limited by its obligation to accurately identify the nature of the proposed use change as stated in the petition.

Sincerely,

VALENCIA VOYD McCOWN
Assistant Attorney General

VVM:cml

SCHOOLS; AREA EDUCATION AGENCIES: Financing of services provided to children requiring special education. Iowa Code § 256B.15 (1999). The limitation upon retention of federally funded health care program reimbursements contained in Iowa Code subsection 256B.15(7)(b) applies to area education agencies which receive those funds as the result of the provision of direct services to children requiring special education. The limitation does not apply to Medicaid funding for AEA-based "administrative claiming" activities or to funding received under IDEA Part C, but does apply to Medicaid or other federally funded health care program reimbursement received by an AEA for providing direct services to infants and toddlers with disabilities under the Iowa Early ACCESS program, implementing Part C of the IDEA. (Scase to Stilwill, Director, Department of Education, and Rasmussen, Director, Department of Human Services, 12-26-00) #00-12-2

December 26, 2000

The Honorable Ted Stilwill, Director
Iowa Department of Education
Grimes State Office Building - 2nd Floor
LOCAL

The Honorable Jessie K. Rasmussen, Director
Iowa Department of Human Services
Hoover State Office Building - 5th Floor
LOCAL

Dear Directors Stilwill and Rasmussen:

You have jointly requested an opinion from this office addressing Iowa Code section 256B.15 (1999), entitled "Reimbursement for special education services," and the applicability of subsection (7)(b) of this section to certain services which may be provided by area education agencies [AEAs] in Iowa. Specifically, you ask:

1. Do the provisions of Iowa Code section 256B.15 prevent the AEAs from retaining 100 percent of the federal portion of their reimbursement for duties related to *Medicaid Administrative Claiming* (section 1903(a)(7) of the Social Security Act)?

2. Do the provisions of Iowa Code section 256B.15 limit the AEAs ability to retain 100 percent of reimbursement for direct care services provided to infants and toddlers with disabilities and their families served under the Early ACCESS program known as Part C of the Individuals with Disabilities Education Act?

Our review of section 256B.15 and the parameters of the federally funded programs at issue leads us to conclude that the subsection 256B.15(7)(b) fund retention limitation applies only to AEAs

which receive federally funded health care program reimbursements for the provision of direct services to children requiring special education. The limitation does not apply to Medicaid

funding for AEA-based "administrative claiming" activities or to funding received under IDEA Part C, but does apply to Medicaid reimbursement or other federal health care program funding received by AEAs as reimbursement for providing direct services to infants and toddlers with disabilities served under Part C.

We begin our analysis by review of relevant provisions of section 256B.15.

> 256B.15 Reimbursement for special education services
>
> 1. The state board of education in conjunction with the department of education shall develop a program to utilize federally funded health care programs, except the federal medically needy program for individuals who have a spend-down, to share in the costs of services which are provided to children requiring special education.
> . . .
>
> 3. The department of education, in conjunction with the area education agency [designated to develop the program], shall determine those specific services which are covered by federally funded health care programs, which shall include, but not be limited to, physical therapy, audiology, speech language therapy, and psychological evaluations. The department shall also determine which other special services may be subject to reimbursement and the qualifications necessary for personnel providing those services. If it is determined that services are required from other service providers, these providers shall be reimbursed for those services.
>
> 4. All services referred to in subsection 1 shall be initially funded by the area education agency and shall be provided regardless of subsequent subrogation collections. The area education agency shall make a claim for reimbursement to federally funded health care programs.
> . . .
>
> 7. b. The area education agencies shall, after determining the administrative costs associated with the implementation of medical assistance reimbursement for the eligible services, be permitted to retain up to twenty-five percent of the federal portion of the total

> amount reimbursed to pay for the administrative costs. Funds received under this section shall not be considered or included as part of the area education agencies' budgets when calculating funds that are to be received by area education agencies during a fiscal year.

Iowa Code § 256B.15(1), (3), (4), (7)(b) (1999). These provisions were enacted within 1988 Iowa Acts, 72nd G.A., chapter 1155, entitled "An Act requiring the area education agencies to utilize federally funded health care programs to share in the costs of services provided to certain children requiring special education . . . ." The articulated purpose of section 256B.15 is to ensure that area education agencies maximize their utilization of available federal health care program funding to share the cost of providing direct services to children requiring special education. Subsection 256B.15(7)(b) has the effect of limiting the portion of the funds received under this section which area education agencies may retain to the actual amount of administrative costs associated with obtaining the reimbursement, not to exceed twenty-five percent of the federal portion of the total amount reimbursed.

Within your request letter you indicate a belief that "section 256B.15 is only operational when the services are 'direct services' provided by the AEA to an individual identified as eligible for 'special education' who has an Individualized Education [Program] (IEP)." Although we agree that section 256B.15 is applicable only to direct services, we find nothing within the statute which limits its applicability to students who have an IEP in place. Our analysis is guided by familiar principles. 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).

By it terms, section 256B.15 is applicable to federally funded health care program reimbursement of "the costs of services which are provided to children requiring special education." In order to resolve your first inquiry, it is necessary to determine the nature of the services covered by this section. Subsection 256B.15(3) includes the following nonexclusive list of the services to which the legislature intended this section to apply: "physical therapy, audiology, speech language therapy, and psychological evaluations." Each item on this list is a service which may be reimbursable under a federally funded health care program only if it is directly provided to an eligible individual. As you indicate, "AEAs currently participate in direct services for Medicaid reimbursement. Direct services are services to provide care, are client specific, and involve an invoice fee for service." See 42 U.S.C. §§ 1396, et seq. [Title XIX of

the Social Security Act]. The subsection 256B.15(7)(b) limitation upon AEA retention of federally funded health care program reimbursement clearly applies to the federal portion of funds received by an AEA as reimbursement for client-specific medical services under the Medicaid program.

In addition to reimbursement for direct medical services, the Medicaid program provides for reimbursement of a portion of the costs associated with certain administrative activities "found necessary by the Secretary [of the federal Department of Health and Human Services] for the proper and efficient administration of the State [Medicaid] plan." 42 U.S.C. § 1396b(a)(7); see 42 C.F.R. Parts 74 and 95; OMB Circulars A87 and A122. You ask whether the subsection 256B.15(7)(b) limitation applies to the federal portion of reimbursement received under the Medicaid program for administrative activities. Medicaid program administration activities which may be eligible for federal reimbursement, frequently referred to as "administrative claiming," include outreach, information and referral, intake processing, eligibility determinations and re-determinations, and utilization review. See 42 C.F.R. Parts 74 and 95; M*edicaid School-Based Administrative Claiming Guide / Draft*, U.S. Department of Health and Human Services, Health Care and Financing Administration (Feb. 2000), at p. 11; *Medicaid and School Health: A Technical Assistance Guide*, U.S. Department of Health and Human Services, Health Care and Financing Administration (Aug. 1997). "[P]ayments for allowable Medicaid administrative activities must not duplicate payments that have been, or should have been, included as a part of a direct medical service" to a Medicaid eligible child. 42 C.F.R. Parts 74 and 95; M*edicaid School-Based Administrative Claiming Guide / Draft*,. at p. 10.

Administrative activities eligible for administrative claiming, by definition, exclude activities which are reimbursable as direct care services under the Medicaid program. In addition, reimbursable administrative activities may relate to non-disabled as well as disabled children. The fund retention limitation placed upon AEAs by subsection 256B.15(7)(b) applies only to "medical assistance reimbursement" received by AEAs. It appears that activities eligible for administrative claiming are not direct services provided to individual children requiring special education, as contemplated by section 256B.15. Therefore, we resolve your first inquiry by concluding that this limitation is not applicable to reimbursements received by AEAs under the Medicaid administrative claiming program.

Resolution of your second inquiry requires determination of whether infants and toddlers with disabilities who are served under Part C of the Individuals with Disabilities Education Act [IDEA], are "children requiring special education" and, if so, whether Part C constitutes a federally funded health care program. Part C of the IDEA, as amended in 1997, provides financial assistance to States

> (1) to develop and implement a statewide, comprehensive, coordinated, multidisciplinary, interagency system that provides early intervention services for infants and toddlers with disabilities and their families;
> (2) to facilitate the coordination of payment for early intervention services from Federal, State, local, and private sources (including public and private insurance coverage);
> (3) to enhance their capacity to provide quality early intervention services and expand and improve existing early intervention services being provided to infants and toddlers with disabilities and their families; and
> (4) to encourage States to expand opportunities for children under 3 years of age who would be at risk of having substantial developmental delay if they did not receive early intervention services.

20 U.S.C. § 1431(b). Early intervention services encompassed within the program include family training, counseling, home visits, special instruction, and a wide variety of social services, as well as health-related direct care services. 20 U.S.C. § 1432(4). Infants and toddlers under the age of three with disabilities and their families are eligible for early intervention services offered pursuant to Part C. 20 U.S.C. § 1434. To the extent that the early intervention services provided pursuant to Part C constitute direct health care services which are reimbursable to eligible individuals under the Medicaid program, the statewide Part C system must require providers to secure Medicaid reimbursement for the services. 20 U.S.C. §§ 1435(a)(12), 1440. Part C funds may be used to provide direct early intervention services only if the services "are not otherwise funded through other public or private sources." 20 U.S.C. § 1438(1).

You indicate a belief that "[i]f AEAs are restricted from fully accessing the funds available under Medicaid, they will not be able to fully implement and receive funding for services they need to provide under Part C." Although we understand this concern, we believe that the provisions of Code section 256B.15, including the fund retention limitation placed upon AEAs under subsection 256B.15(7)(b), are applicable to reimbursements received from Medicaid or other federal health care programs for direct care services provided to disabled infants and toddlers under Part C of the IDEA.

Section 256B.15 applies to reimbursement for the cost of "services which are provided to children requiring special education." The term "special education" is commonly used to refer to educational, support, and related services provided to children with disabilities pursuant to Part B of the IDEA. We cannot, however, rely upon this general use definition where, as here, the legislature has provided a definition applicable to the statute in question. See Seeman v. Iowa

Department of Human Services, 604 N.W.2d 53, 57 (Iowa 1999) ("the Iowa legislature acts as its own lexicographer"); Hornsby v. State, 559 N.W.2d 23, 25 (Iowa 1997) ("where the legislature defines its own terms and meanings in a statute, the common law or dictionary definitions which may not coincide with the legislative definition must yield to the language of the legislature"). For purposes of chapter 256B, the legislature has specifically defined the phrase "children requiring special education" to mean "persons under twenty-one years of age, including children under five years of age, who have a disability in obtaining an education because of a head injury, autism, behavioral disorder, or physical, mental, communication, or learning disability, as defined by the rules of the department of education." Iowa Code § 256B.2(1) (1999). This definition expressly includes children below the age of five and does not require a pre-determination of eligibility for special education services or an existing IEP. Rather, the definition includes all persons under the age of twenty-one who have a disability in obtaining an education. Application of this definition to interpretation of section 256B.15, requires us to conclude that the fund retention limitation within subsection 256B.15(7)(b) comes into play when an AEA receives federal health program reimbursement for the provision of a direct care service to a disabled infant or toddler under Part C of the IDEA (the Early ACCESS program in Iowa).[1]

We do not, however, believe that the section 256B.15 fund retention limitation is applicable to Part C funding itself. As detailed above, section 256B.15 is applicable only to federally funded health care programs. Although IDEA Part C funds may be used to provide direct early intervention services to infants and toddlers, these services may include health care services only if no alternate public or private funding source is available. We do not believe that IDEA Part C itself can fairly be characterized as a "federally funded health care program," as contemplated by 256B.15. The primary purpose of IDEA Part C is to "enhance the development of infants and toddlers with disabilities and to minimize their potential for developmental delay," thereby reducing "the educational costs to our society." 20 U.S.C. § 1431(a). Therefore, we conclude that the fund retention limitation contained in subsection 256B.15(7)(b) is not applicable to Part C funding received by AEAs.

In summary, we conclude that the limitation upon retention of federally funded health

[1] Although we have concluded that terms of section 256B.15 encompass Medicaid reimbursement for direct services provided to disabled infants and toddlers under Part C, we recognize that this outcome may place a financial hardship upon AEAs as they strive to provide early intervention services. We must, however, defer to the legislature as to the wisdom of applying section 256B.15 to early intervention services. You may wish to consider presenting your policy arguments in favor of allowing AEAs to retain federal funding received for these services directly to the legislature.

care program reimbursements contained in Iowa Code subsection 256B.15(7)(b) applies to AEAs which receive those funds as the result of the provision of direct services to children requiring special education. The limitation does not apply to Medicaid funding for AEA-based "administrative claiming" activities or to funding provided under Part C of the IDEA, but does apply to Medicaid or other federally funded health care program reimbursement received by an AEA for providing direct services to infants and toddlers with disabilities under the Iowa Early ACCESS program, implementing Part C of the IDEA.

Sincerely,

Christie J. Scase
Assistant Attorney General

COUNTY AND COUNTY OFFICERS; CIVIL SERVICE: Candidate leave of absence for deputy sheriffs. Iowa Code § 341A.18 (1999); 2000 Iowa Acts, 78th G.A., ch. 45, § 1. A request by the affected deputy is necessary to trigger the leave of absence provision contained within Code section 341A.18, as amended by 2000 Iowa Acts, 78th G.A., ch. 45, § 1. Nothing within this statute allows a sheriff to request the leave or require a deputy or civil service employee to take a leave of absence pursuant to this section. (Scase to Swanson, Montgomery County Attorney, 11-1-00) #00-11-4(L)

November 1, 2000

Mr. Bruce E. Swanson
Montgomery County Attorney
County Courthouse
105 Coolbaugh
Red Oak, Iowa 51566

Dear Mr. Swanson:

You have requested an opinion regarding application of the county civil service candidate leave of absence provision set forth in Iowa Code section 341A.18, as amended during the 2000 legislative session. Specifically, you ask whether the leave of absence contemplated by this section may be requested only by the individual running for office or may be requested by either the affected individual or the county sheriff. As discussed below, we find no basis to conclude that a sheriff may require a deputy or civil service employee to take a leave of absence pursuant to this section.

Prior to the recent amendment unnumbered paragraph eight of Iowa Code section 341A.18 provided that

> An officer or employee subject to civil service and a chief deputy sheriff or second deputy sheriff, who becomes a candidate for a partisan elective office for remuneration, unless running unopposed, shall automatically be given a leave of absence without pay, commencing thirty days before the date of the primary election and continuing until the person is eliminated as a candidate or wins the primary, and commencing thirty days before the date of the general election and continuing until the person is eliminated as a candidate or wins the general election, and during the leave period shall not perform any duties connected with the office or position so held. The officer or employee subject to civil service, or chief deputy sheriff or second deputy sheriff, may, however, use accumulated paid vacation time for part or all of the leave of absence required under this section. The county shall continue to provide health benefit coverages, and may continue to provide other fringe benefits, to any officer or employee

subject to civil service, or to any chief deputy sheriff or second deputy sheriff during any leave of absence required under this section.

This provision imposed a mandatory thirty-day unpaid leave of absence upon county civil service employees, as well as chief deputies or second deputies, when running opposed for a partisan elective office carrying remuneration. See 1996 Op. Att'y Gen. 84; 1980 Op. Att'y Gen. 748; 1980 Op. Att'y Gen. 106 (all recognizing the section 341A.18 leave provision as mandatory).

During the past legislative session, section 341A.18 was amended by Senate File 2215, entitled: "An Act striking a mandatory leave of absence for a civil service officer or employee, or a deputy sheriff who is a candidate for partisan public office, and providing an effective date." 2000 Iowa Acts, 78th G.A., ch. 45. Section one of this act revised unnumbered paragraph eight of section 341A.18, as follows:

> An officer or employee subject to civil service and a chief deputy sheriff or second deputy sheriff, who becomes a candidate for a partisan elective office for remuneration, ~~unless running unopposed~~ upon request, shall automatically be given a leave of absence without pay, commencing thirty days before the date of the primary election and continuing until the person is eliminated as a candidate or wins the primary, and commencing thirty days before the date of the general election and continuing until the person is eliminated as a candidate or wins the general election, and during the leave period shall not perform any duties connected with the office or position so held. The officer or employee subject to civil service, or chief deputy sheriff or second deputy sheriff, may, however, use accumulated paid vacation time for part or all of ~~the~~ any leave of absence ~~required~~ under this section. The county shall continue to provide health benefit coverages, and may continue to provide other fringe benefits, to any officer or employee subject to civil service, or to any chief deputy sheriff or second deputy sheriff during any leave of absence ~~required~~ under this section.

2000 Iowa Acts, 78th G.A., ch. 45, § 1. You ask whether under Code section 341A.18, as amended, a county sheriff may make the request triggering the automatic 30-day leave of absence.

Our analysis is guided by familiar principles. 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." Iowa Comprehensive Petroleum Underground Storage Tank Fund Board v. Shell Oil Company, 606 N.W.2d 376, 379 (Iowa 2000).

> If the language is clear and unambiguous, we apply a plain and rational meaning in light of the subject matter of the statute.

> However, if reasonable minds could disagree over the meaning of a word or phrase of a statute, the statute is ambiguous and we resort to the rules of statutory construction. When construing the statute, we read the language used, and give effect to every word.

Id. at 379-80 (citations omitted).

We find no ambiguity in section 341A.18, as amended. The statute provides, in relevant part, that a deputy sheriff who becomes a candidate for partisan elective office, "*upon request*, shall automatically be *given* a leave of absence without pay." Clearly, the object of this sentence is the deputy who must, upon request, be given the leave. Although the legislature could have eliminated any doubt on the issue by indicating the leave was to be given "upon request of the deputy," nothing within the terms of the statute provides a basis from which we can infer that the legislature intended for anyone other than the deputy to request the leave. In the absence of any language within the statute indicating that someone other than the affected deputy may request the leave of absence, we cannot find that the sheriff -- or any one other than the affected deputy -- may request the leave. If a sheriff were allowed to make the request triggering the automatic 30-day leave of absence, the sheriff would be in a position of unilaterally requiring the deputy to take the leave. In amending section 341A.18 the legislature twice stuck the term "required" from the statute. This change reinforces our conclusion that, under the plain meaning of this provision, no one may "require" a deputy to take the leave of absence.

We believe that a request by the affected deputy is necessary to trigger the leave of absence provision contained within Code section 341A.18, as amended by 2000 Iowa Acts, 78th G.A., ch. 45, § 1. Nothing within this statute allows a sheriff to request the leave or require a deputy or civil service employee to take a leave of absence pursuant to this section.[1]

Sincerely,

Christie J. Scase
Assistant Attorney General

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1 We note, however, that this conclusion does not lead to a conclusion that a deputy who remains in active service may conduct campaign activities while on duty. Unnumbered paragraph two of section 341A.18 precludes a county civil service employee from soliciting campaign contributions while on duty or engaging in "any political activity that will impair the employee's efficiency during working hours or cause the employee to be tardy or absent from work." In addition, Iowa Code section 55.4 (1999) contains a provision prohibiting any public employee who becomes a candidate for elective public office from campaigning while on duty.

COUNTIES; COUNTY CONSERVATION BOARD: Approval authority over decisions by director. Iowa Code § 350.4(6) (1999). The county conservation board has approval authority over employment and compensation decisions by its director regarding individual employees and assistants. The county conservation board may exercise its discretion to approve, deny, or modify the director's decisions regarding employment and compensation matters, but should give respectful consideration to the director's decisions on these issues. (Kuhn to Vander Hart, Buchanan County Attorney, 11-1-00) #00-11-1

November 1, 2000

Mr. Allan W. Vander Hart
Buchanan County Attorney
P.O. Box 68
Independence, Iowa 50644

Dear Mr. Vander Hart:

You have requested an opinion regarding the authority of a county conservation board to determine the compensation of its employees under Iowa Code section 350.4(6) (1999). Specifically, you ask: (1) "Does section 350.4(6) require that county conservation boards pass on the employment and/or compensation status of individual employees?" and (2) "If the answer to the above is in the affirmative, may boards go beyond simply either affirming or vetoing the hiring and compensation decisions of the director."

Iowa Code chapter 350 governs county conservation boards. The purpose of the chapter is to create county conservation boards and to authorize counties to maintain, develop, and acquire real and personal property for conservation of natural resources and recreational purposes. Iowa Code §§ 350.1, .4. A county conservation board is charged with the responsibility to manage and control county property such as museums, parks, preserves, recreational centers, playgrounds, county forests and wildlife areas. Id. § 350.4.

The powers and duties of the county conservation board are statutorily prescribed in section 350.4. Particular to your inquiry is section 350.4(6), which authorizes and empowers the county conservation board:

> To employ and fix the compensation of a director who shall be responsible to the county conservation board for the carrying out of its policies. The director, subject to the approval of the board, may employ and fix compensation of assistants and employees as necessary for carrying out this chapter.

I.

Your first question is whether the county conservation board has the authority to pass judgment on the director's decisions regarding the employment or compensation status of individual employees. For the reasons that follow we answer your question in the affirmative.

The county conservation board is empowered to employ a director who is directly responsible to the board. Id. § 350.4(6) (director "shall be responsible to the county conservation board"). The director is charged with the responsibility to carry out the policies established by the county conservation board. Id. The director, *subject to the approval of the board*, may employ and fix the compensation of assistants and employees. Id. Your question turns on whether the board has approval authority over the employment and compensation of each individual employee or assistant, or approval authority over only the total number of employees and assistants to be employed and the overall compensation budget.

The employment of assistants and employees is discretionary by the director. See Iowa Code § 4.1(30)(c) ("'may' confers a power"); State ex rel. Lankford v. Allbee, 544 N.W.2d 639, 641 (Iowa 1996) (use of "may" indicates act is discretionary but not required). That discretionary decision by the director is conditioned upon the county conservation board's approval. See Iowa Code § 350.4(6); Mayor of Ocean City v. Johnson, 470 A.2d 1308, 1313-14 (Md. App. 1984) (regulation established by police chief was subject to the mayor and city council approval which was a condition precedent to valid adoption). The director is not an independently-appointed official with policy making power separate and distinct from the county conservation board. The director is selected by the county conservation board and is directly responsible to the board to carry out its policies. Iowa Code § 350.4(6). We see nothing in the statute that would limit the board's approval authority to only the total number of employees that the director may employ or the total compensation budget. State

v. Schultz, 604 N.W.2d 60, 62 (Iowa 1999) (statutory construction focuses upon what the legislature said, not what it should or might have said). To find otherwise would not be in harmony with the director's statutory duty to carry out the policies of the county conservation board.

We find that the county conservation board has approval authority over its director's decisions regarding the employment and compensation status of individual employees and assistants.

II.

You also ask what is the scope of the county conservation board's approval authority in reviewing the director's decisions regarding hiring and compensation. Specifically, you ask whether the county conservation board is strictly limited to approving or disapproving the director's decision.

The legislature clearly provided that the director may employ and fix the compensation of employees and assistants. Iowa Code § 350.4(6). The director's discretionary decision is subject to the approval of the board. Id. Your question rests on the meaning of "approval."

The common definition of "approve" includes (1) "to judge and find commendable or acceptable" and "to express often formally agreement with and support of or commendation of as meeting a standard," Webster's Third New International Dictionary 106 (unabr. ed. 1993), and (2) "to give formal sanction to; to confirm authoritatively," Black's Law Dictionary 98 (7th ed. 1999). Statutes employing "approval" authority, unless otherwise limited by the context of the legislation, imports the use of discretion and the passing of judgment. Oahe Conservancy Subdistrict v. Janklow, 308 N.W.2d 559, 561 (S.D. 1981); see also Mayor of Ocean City, 470 A.2d at 1314 ("approve" implies "the act of passing judgment, the use of discretion, and the determination as a deduction therefrom"); 1986 Op. Att'y Gen. 107 (#86-8-6(L)) (implicit in the power to approve expense claims is the power to deny or allow to any extent the claims submitted).

The term "approval" is "susceptible of different meanings dependent upon the subject matter and context concerning which the term is employed and the object and purpose to be subserved or accomplished." Mayor of Ocean City, 470 A.2d at 1313 (quoting Powers v. Isley, 183 P.2d 880, 884 (Ariz. 1947)). In viewing the extent or scope of approval authority, the court will look at the overall

relationship between the entities at issue. See State ex rel Kuhlemeier v. Rhein, 149 Iowa 76, 127 N.W. 1079 (1910); Smith v. Newell, 254 Iowa 496, 502, 117 N.W.2d 883, 887 (1962); 1986 Op. Att'y Gen. 29 (#85-6-3).

The legislature did not place any limits on the county conservation board's approval authority. The role of the director is to carry out the policies established by the county conservation board. In providing the county conservation board with approval authority over the director's employment and compensation decisions, we believe the legislature intended that the county conservation board have the final determination regarding its employees and its compensation structure. Cf. Mayor of Ocean City, 470 A.2d at 1313 (not uncommon for statutes to require certain acts by subordinate public officials, such as setting compensation of staff, to be subject to approval by superior officials). Employment and compensation decisions necessarily involve budgetary concerns, and monetary expenditures are within the authority and power of the board. See Iowa Code §§ 350.4, 350.6.

Cases and opinions involving the approval authority by one officer or board over the appointments or budgetary decisions of another officer or board are distinguishable. In State ex rel Kuhlemeier v. Rhein, 149 Iowa 76, 79-81, 127 N.W. 1079, 1080-81 (1910), the Iowa Supreme Court concluded that although the board of supervisors was to approve the treasurer's decision as to the place of the deposit of funds, that approval authority did not permit the board of supervisors to select a depository, without the cooperation or consent of the treasurer. The Court found it was a clear division of power between the offices, with the treasurer, who was legally responsible for the funds, retaining the power of nomination and the board with only the power to approve. Id. at 80-81, 127 N.W. at 1081.

Some fifty years later, the Court relied upon its analysis in Rhein and indicated a board of supervisors' approval authority over a sheriff's appointment of a deputy was limited only to approval or disapproval. Smith v. Newell, 254 Iowa at 502, 117 N.W.2d at 887. The Court noted that the responsibility of the sheriff to keep the peace and to employ deputies to assist him was not a responsibility that rested in the board of supervisors. Id. We similarly found the Executive Council's approval authority over the use of appropriated funds by the Iowa Employment Security Commission, and a board of supervisors' approval authority over elected officials' appointments of deputies and assistants were circumscribed by Rhein. See 1962 Op. Att'y Gen. 384; 1962 Op. Att'y Gen. 169 (#61-8-26(L)).

The relationship between the county conservation board and its director is quite different from the relationship between independent elected officers or boards, which are entitled to more autonomy in decision making. There is nothing in chapter 350 that would remove the ultimate policy-making decision regarding employment and compensation from the county conservation board. The director is not autonomous from the board, but is employed by the board and is directly responsible for carrying out the board's policies. It is the ultimate responsibility of the county conservation board to fulfill its duties to control and manage the county property under its domain, including the work of its employees.

We have not ignored the fact that the board's approval authority, if exercised arbitrarily or capriciously, could effectively negate any purpose for the director to make the initial employment and compensation decisions. In approving or disapproving the director's hiring decisions, the county conservation board should keep in mind the admonition the Iowa Supreme Court gave to boards of supervisors when reviewing appointments made by elected officials pursuant to what is now section 331.903:

> In stating that such appointments were subject to approval by the Board of Supervisors, it was also the legislative intent that common sense would be used by the Board. In approving or failing to approve the Board could not reject an appointee on frivolous, trivial, minimal, arbitrary or capricious grounds. For example they could not reject the Sheriff's appointments because they did not like the color of the hair of the appointee, nor because of his politics, religious affiliation, nor age, unless the matter of age was contrary to statute.

McMurry v. Board of Supervisors, 261 N.W.2d 688, 691 (Iowa 1978) (quoting Smith v. Newell, 254 Iowa at 502-03, 117 N.W.2d at 887). While section 331.903 addresses approval authority over elected officials' appointments which is notably different than approval authority over the decisions of a board's employee, the exercise of discretion by any public officer should be driven by common sense, fairness, and the best interests of the public.

We suggest that a county conservation board give respectful consideration to a director's decisions regarding employment and compensation

matters. See 1998 Op. Att'y Gen. __ (#98-3-2(L)) (board of supervisors should give respectful consideration to county veteran affairs commission's recommendation on director's salary increase). Because the director is responsible for the day-to-day implementation of the board's policies and the operation and oversight of the board's employees and assistants, the director may be in the best position to assess the need for changes in the workforce and in the compensation system.

III.

In conclusion, the county conservation board has approval authority over employment and compensation decisions by the director regarding individual employees and assistants. While the county conservation board may exercise its discretion to approve, deny, or modify the director's decisions, it should give respectful consideration to the director's decisions on these issues.

Sincerely,

Cristina Kuhn
Assistant Attorney General

CLERK OF COURT: Duties and powers in civil commitment cases. Iowa Code §§ 229.6, 229.7, § 229.44, 602.8102 (1999). District court clerks, by themselves, have no authority under either chapter 229 or chapter 602 to impose conditions upon a county that, pursuant to court order, has transferred civil commitment cases to their counties. (Kempkes to Vander Hart, Buchanan County Attorney, 8-31-00) #00-8-6(L)

August 31, 2000

Mr. Allan W. Vander Hart
Buchanan County Attorney
P.O. Box 68
Independence, IA 50644

Dear Mr. Vander Hart:

You have requested an opinion about the duties and powers of district court clerks regarding the civil commitment of indigent persons who suffer from mental illness. The clerk in a neighboring county has written that "we will not be doing [commitment cases transferred from your county]" unless your county agrees to the following:

> Any cases initiated or having residency in your county that have not been determined to be legally settled in [our] county at a prior time will be paid for by your [county]. Your county will be responsible for the commitment bills, research of legal settlement, and getting reimbursements from the appropriate county. Any state cases from your county will be paid by your county even if they do not go to [a state mental health institute after] hearing. Cases faxed to our clerk for hearing or transported for services from your county will be your responsibility, along with all legally settled individuals.
>
> . . . .
>
> It is not our first choice, but we will consider not continuing to do your hearings . . . if we are unable to reach a workable agreement. That would mean you send individuals to the hospitals in your region and you have your local sheriff transport them back to your county for hearing and make arrangements with your attorneys for payment.

The clerk explains that in the past transferring counties had sometimes refused to pay the attorneys appointed by the court after transfer and that, as a result, the neighboring county had experienced difficulty in retaining attorneys on its appointment list for commitment cases.

You ask one narrow question: "If the court in a mental health commitment case orders a change of venue to another county . . . , is the clerk of court in the receiving county able to impose conditions, fulfillment of which is a prerequisite before the receiving county will permit the case to go forward?" This question requires an examination of Iowa Code chapters 229 and 602 (1999).

Chapter 602 is entitled Judicial Branch. It encompasses the general duties of clerks. Dwyer v. Scott County Clerk, 404 N.W.2d 167, 169 (Iowa 1987). Section 602.8102(41) requires them to "[c]arry out duties relating to the involuntary commitment of persons with mental impairments as provided in chapter 229."

Chapter 229 is entitled "Hospitalization of Persons with Mental Illness." It sets forth detailed procedures for involuntary commitments. See Credit Bureau Enterprises, Inc. v. Pelo, 608 N.W.2d 20, 23-24 (Iowa 2000); In re Oseing, 296 N.W.2d 797, 799-00 (Iowa 1980). Adult commitment cases begin with the filing of verified applications with the clerks of the counties where the allegedly ill persons are presently located or their counties of residence. Iowa Code § 229.6; Rule 1, Iowa S. Ct. R. for Involuntary Hospitalization of Mentally Ill. The clerks shall assist the persons making the applications; obtain and reduce to writing any corroborative information, if necessary; and immediately notify the court of the applications after docketing the cases. Iowa Code §§ 229.6, 229.7. At the direction of the court, the clerks shall send copies of the necessary documents to sheriffs for immediate service upon the allegedly ill persons, to their counsel, and to the appropriate county mental health advocates. Iowa Code §§ 229.7, 229.9, 229.9A. If cases undergo transfer to other counties, the transferring court shall forward the necessary documents to the clerks of the receiving courts. Iowa Code § 229.44(3).

Section 602.8102(41) requires clerks to carry out the duties set forth in chapter 229. Nothing in chapter 229, however, expressly or impliedly authorizes clerks to impose terms or conditions upon counties of origin before processing commitment cases. Rather, their duties in commitment cases involve such tasks as receiving, copying, and sending various filings on behalf of the court. See, e.g, Iowa Code §§ 229.6, 229.7, 229.9, 229.9A, 229.10(2), 229.11(3), 229.44(3); Rules 26-27, Iowa S. Ct. R. for Involuntary Hospitalization of Mentally Ill. Clerks normally perform ministerial duties. 1982 Op. Att'y Gen. 126, 128. Accord 15A Am. Jur. 2d Clerks of Court § 1, at 139, § 21, at 155-56 (1976). They normally do not address or otherwise determine questions of financial responsibility involving public entities.

We therefore conclude that district court clerks, by themselves, have no authority under either chapter 229 or chapter 602 to impose conditions upon a county that, pursuant to court order, has transferred civil commitment cases to their counties.

Sincerely,

Bruce Kempkes
Assistant Attorney General

ELECTIONS; COUNTIES; SCHOOL DISTRICTS: Local option sales tax (LOST) for school infrastructure purposes; property tax relief. 1999 Iowa Acts, ch. 156, §§ 20, 23; Iowa Code §§ 28E.12, 422E.1, 422E.2, 422E.4 (1999). A LOST ballot proposition does not need to set forth any intergovernmental agreement between a school district and a city; these entities may enter into such an agreement after voters have approved a LOST ballot proposition. Equal-protection guarantees do not prohibit a LOST ballot from setting forth two propositions for separate school districts that would give property tax relief only to those taxpayers residing within one of the school districts. A LOST ballot proposition may include language premised upon the passage of future legislation. (Kempkes to Van Fossen, State Representative, 2-4-00) #00-2-1

February 4, 2000

The Honorable Jamie Van Fossen
State Representative
Statehouse
LOCAL

Dear Representative Van Fossen:

You have requested an opinion on a local option sales tax -- commonly known as a LOST -- imposed by a county on behalf of school districts for school infrastructure purposes. Referring to Iowa Code chapters 28E and 422E (1999), you pose three questions about the election preceding the imposition of such a LOST:

> (1) "Does [an intergovernmental agreement under chapter 28E between a school district and a city receiving a portion of the anticipated LOST revenues] have to be on a LOST ballot? Can the school district, at any time after voter approval, enter into such an agreement with the city to designate a portion of the anticipated LOST revenues to the city?"
>
> (2) "Is it constitutional for voters in a county to vote on a LOST ballot proposition involving two school districts that will give property tax relief only to those taxpayers living within a portion of one school district, thus treating like taxpayers differently?"
>
> (3) "Can a LOST ballot proposition include language premised upon the passage of future legislation?"

I.

Chapter 28E is entitled Joint Exercise of Governmental Powers. In general, it "permits state and local governments in Iowa to make efficient use of their powers by enabling them to provide joint services and facilities . . . ." Iowa Code § 28E.1. Any "public agency," Iowa Code § 28E.2 -- which includes a school district, 1998 Op. Att'y Gen. ___ (#97-9-2(L)) -- may enter into an intergovernmental agreement under chapter 28E with another public agency, Iowa Code § 28E.12.

Chapter 422E is entitled School Infrastructure Funding. It provides that, upon receiving voter approval, a LOST "for school infrastructure purposes may be imposed by a county on behalf of school districts" for a maximum of ten years throughout the county at a maximum rate of one percent and that LOST revenues "shall be utilized solely for school infrastructure needs." See Iowa Code §§ 422E.1(1)-(3), 422E.2(1). See generally Iowa Code § 4.1(30) (if undefined in statutes, "shall" imposes a duty and "may" confers a power). Chapter 422E also provides that a school district "in which a [LOST] for school infrastructure purposes has been imposed shall be authorized to enter into a chapter 28E agreement with one or more cities or a county whose boundaries encompass all or a part of the area of the school district." Iowa Code § 422E.4, as amended by 1999 Iowa Acts, ch. 156, § 20. It further provides that a city entering into 28E agreement "shall be authorized to expend its portion of the [LOST] revenues for any valid purpose permitted by this chapter or authorized by the governing body of the city." Iowa Code § 422E.4.

In 1999, the General Assembly amended chapter 422E by passing Senate File 469, which provided that school districts can also enter into 28E agreements with counties and that a county

> entering into a chapter 28E agreement with a school district in which a [LOST] for school infrastructure purposes has been imposed shall be authorized to expend its designated portion of the [LOST] revenues to provide property tax relief within the boundaries of the school district located in the county. . . .

1999 Iowa Acts, ch. 156, § 20 (amending Iowa Code § 422E.4).

II.

Local option laws provide a means of tailoring state policies to local conditions. See generally 2 E. McQuillin, The Law of Municipal Corporations ch. 4 (1996); Annot., "Schools -- Local Property Tax -- Validity," 41 A.L.R.3d 1220 (1972). We address your questions on the LOST authorized by chapter 422E ad seriatim.

(A)

You have asked: "Does a 28E agreement between a school district and a city have to be on a LOST election ballot? Can the school district, at any time after approval of the LOST by the electorate, enter into an agreement with the city to designate a portion of the anticipated LOST revenues to the city?"

Chapter 422E specifies the procedure governing LOST elections for school infrastructure purposes. Section 422E.2(3) sets forth two requirements for a LOST ballot: "The ballot proposition [1] shall specify the rate of tax, the date the tax will be imposed and repealed, and [2] shall contain a statement as to the specific purpose or purposes for which the revenues will be expended." Accord 720 IAC 21.803(3) (setting forth uniform LOST ballot for school infrastructure purposes). Section 422E.2(3) thus does not require a LOST ballot to set forth a 28E agreement between a school district and a city. See generally England v. McCoy, 269 S.W.2d 813, 815 (Tex. Civ. App. 1954) (when statute does not require ballot to set forth all details of a proposal, "[i]t must have been presumed that the voter would familiarize himself with the contents . . . before entering the ballot box, otherwise the legislature would have required a full copy on the ballot").

A school district may also enter into a 28E agreement with a city after voter approval of a LOST for school infrastructure purposes. Section 422E.4 clearly contemplates such an occurrence: it provides that school district "in which a [LOST] for school infrastructure purposes has been imposed shall be authorized to enter into a chapter 28E agreement . . . ." (emphasis added).

(B)

Originally, chapter 422E permitted school districts to expend LOST revenues for any school infrastructure purpose and permitted a city entering into 28E agreements with school districts to expend its portion of such revenues "for any valid purpose permitted by this chapter or authorized by the governing body of the city." See Iowa Code § 422E.4. The 1999 amendment to chapter 422E permitted school districts to enter into 28E agreements with counties as well and provided that, in such an instance, a county "shall be authorized to expend its designated portion of the [LOST] revenues to provide property tax relief within the boundaries of the school district located in the county. . . ." 1999 Iowa Acts, ch. 156, § 20 (amending Iowa Code § 422E.4).

You have a concern about a LOST ballot under chapter 422E that set forth two propositions mandating different uses for the anticipated LOST revenues within different school districts. The first proposed that a school district receive one hundred percent of its share of the LOST revenues for school infrastructure purposes; the second proposed that another school

district receive fifty percent of its share of the LOST revenues for school infrastructure purposes and that the remaining fifty percent "shall be expended for property tax relief pursuant to a chapter 28E agreement with one or more local governments which levy property taxes whose boundaries encompass all or part of the area of the school district." Against this background, you have asked: "Is it constitutional for voters in a county to vote on a LOST ballot proposition involving two school districts that will give property tax relief only to those taxpayers residing within one school district, thus treating like taxpayers differently?"

We provide opinions on precise legal questions. See 61 IAC 1.5(2), 1.5(3)(d). We do not use the opinion process to conduct generalized reviews of laws to identify issues. 1996 Op. Att'y Gen. 119 (# 96-10-11(L)); 1992 Op. Att'y Gen. 176, 177. This limitation has particular applicability when the subject matter involves a highly complex statutory scheme that can implicate a number of legal arguments premised upon a number of constitutional provisions. See generally Exira Community School Dist. v. State, 512 N.W.2d 787, 791 (Iowa 1994). Accordingly, we proceed to answer your question on the assumption that it rests solely upon equal-protection principles.

(1)

Preliminarily, we note that the first state constitution, ratified in 1846, specifically required the General Assembly to "provide for a system of common schools . . . ." Iowa Const. art. IX, § 3 (1846). Eleven years later, in 1857, Iowans ratified the second state constitution, which deleted this language. See Iowa Const. art. IX (1857).

The 1857 state constitution does not expressly guarantee the right to an education. 1982 Op. Att'y Gen. 130, 134-35. See generally "State Constitutional Law and State Educational Policy," in State Constitutions in the Federal System ch. 9 (July, 1989). Nor does it expressly require an equal distribution of any tax revenues to school districts. Compare Iowa Const. art. IX with Mont. Const. art. X, § 1(3).

(2)

The federal constitution expressly prohibits a state from taking action that denies any person equal protection of the law. See U.S. Const. amend. XIV (1868). This guarantee also reins in a state's political subdivisions. See Avery v. Midland County, 390 U.S. 474, 480, 88 S. Ct. 1114, 20 L. Ed. 2d 45 (1967); Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 294-96, 33 S. Ct. 312, 57 L. E. 510 (1912). It thus encompasses counties and school districts as political arms of the state.

The federal constitutional guarantee of equal protection also encompasses a state's conferring a benefit upon individuals as well as imposing a tax upon them. See Hooper v. Benalillo County Assessor, 472 U.S. 612, 618, 105 S. Ct. 2862, 86 L. Ed. 2d 487 (1985); J.

Nowak, R. Rotunda & J. Young, Constitutional Law 585 (1983). The state constitutional guarantee of equal protection appears to have a similar reach.. See Callender v. Skiles, 591 N.W.2d 182, 187 (Iowa 1999); Sherman v. Pella Corp., 576 N.W.2d 312, 317 (Iowa 1998); Exira Community School Dist. v. State, 512 N.W.2d at 792-93; 1982 Op. Att'y Gen. 130, 130 N.W.2d 1; Note, 67 Iowa L. Rev. 309, 309 (1982).

In order to succeed on an equal-protection claim, a challenger must initially show that the state action treats similarly situated persons or entities in a different manner. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S. Ct. 560, 64 L. Ed. 989 (1920); see Plyler v. Doe, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982). Upon making that showing, the challenger must normally show that all "legitimate state interests" underlying the different treatment do not outweigh the interests of persons adversely affected by the state action. Norland v. Grinnell Mutual Reinsurance Co., 578 N.W.2d 239, 242 (Iowa 1998), cert. denied, 142 L. Ed. 2d 282. For purposes of a taxpayer challenge to a LOST ballot proposing different uses of anticipated LOST revenues for different school districts, we believe that the "rational basis" standard applies to that balancing test: such a legislative distinction does not implicate a "fundamental right" or arise out of a "suspect classification," which would require a more heightened degree of scrutiny than the rational basis standard. See 1982 Op. Att'y Gen. 130, 132-33; see also Exira Community School Dist. v. State, 512 N.W.2d at 792, 794.

In Sperfslage v. City of Ames, 480 N.W.2d 47 (Iowa 1992), the Supreme Court of Iowa observed:

> We recognize a presumption favoring the constitutionality of [statutes. A statute creating a classification that does not adversely affect a fundamental right or rest upon suspect criteria will be] upheld under the rational basis standard if we find the legislature could reasonably conclude that the classification would promote a legitimate state interest. This standard is easily satisfied in challenges to tax statutes. We do not declare a statute unconstitutional unless it clearly, palpably and without doubt infringes on the constitution. Every reasonable doubt is resolved in favor of the statute's constitutionality.

Id. at 49.

With regard to imposing taxes, the U.S. Supreme Court has observed that the states

> are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are

> appropriate to reasonable schemes of state taxation. . . . That a state may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a real distinction, or difference in state policy.

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 526-27, 79 S. Ct. 437, 3 L. Ed. 2d 480 (1958) (citations omitted).

A state "has wide discretion in the allocation of tax burdens among its inhabitants . . . ." Gwinn Area Community Schools v. Michigan, 741 F.2d 840, 845 (6th Cir. 1984). See Exxon Corp. v. Eagerton, 462 U.S. 176, 194, 103 S. Ct. 2296, 76 L. Ed. 2d 497 (1983) (legislatures "have especially broad latitude in creating classifications and distinctions in taxing statutes"); Hudson Motor Car Co. v. City of Detroit, 136 F.2d 574, 576-77 (6th Cir. 1943) ("[a]bsolute equality in taxation is unattainable"). Accordingly, the U.S. Supreme Court "generally defers to the judgment of legislative bodies" in equal-protection challenges to state tax statutes. J. Nowak, R. Rotunda & J. Young, Constitutional Law 395 (1983).

(3)

Our state commonly makes classifications according to geography that result in different treatment. Depending on where we are or where we live, we may have very different rights. As the U.S. Supreme Court observed in 1964,

> there is no rule that counties, as counties, must be treated alike; the Equal Protection Clause relates to equal protection of the laws "between persons as such rather than between areas." . . . A State, of course, has a wide discretion in deciding whether laws should operate statewide or shall operate only in certain counties, the legislature "having in mind the needs and desires of each."

Griffin v. County School Bd., 377 U.S. 218, 230-31, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (1964) (citations omitted).

In addition, our state has chosen to delegate a large measure of its control over education to local communities. See 1990 Op. Att'y Gen. 65 (# 90-2-9(L)); see also Iowa Code ch. 257 (Financing School Programs); Exira Community School Dist. v. State, 512 N.W.2d at 792, 795; Annot., "Schools -- Local Property Tax -- Validity," 41 A.L.R.3d 1220, 1223, 1224-25 (1972). That delegation means, as a practical matter, that every school district has different needs. See generally San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 54-55, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973); San Rafael Elementary School Dist. v. California Bd. of Educ., 87 Cal Rptr. 2d 67, 73 n. 10 (App. 1999); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 144 (Tenn. 1993); Heise, "State Constitutions, School Finance Litigation, and the `Third Wave':

From Equity to Adequacy," 68 Temple L. Rev. 1151, 1151 (1995). Indeed, inherent in the power to create school districts "is the ability of the state to allow differences among [them]." Lafayette Steel Co. v. City of Dearborn, 360 F. Supp. 1127, 1130 (E.D. Mich. 1973).

When school financing originates in whole or in part with local taxes, as in Iowa, local control does not lend itself to exact equality in such financing. See Heise, "State Constitutions, School Finance Litigation, and the `Third Wave': From Equity to Adequacy," 68 Temple L. Rev. 1151, 1170 (1995); see also Exira Community School Dist. v. State, 512 N.W.2d at 792, 795, 796. A taxpayer challenging different allocations of LOST revenues to different school districts would thus have to acknowledge that differences in philosophy, preferences, priorities, abilities, and resources inhere in any fragmentation of control and financing.

In a suit brought on behalf of poor children, San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973), the U.S. Supreme Court identified the many advantages of local control over education:

> [Local control means] the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decision-making process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for education excellence . . . . No one area of social concern stands to profit more from a . . . diversity of approaches than does public education.

Id. at 49-50 (footnote omitted). Importantly, the Court held that local control amounted to a legitimate state interest, that a property-tax-based system of school finance bore a rational relationship to that interest, and that such a system thus did not offend the federal constitutional guarantee of equal protection. Id. at 54-55. See Lafayette Steel Co. v. City of Dearborn, 360 F. Supp. at 1130; Kukor v. Grove, 436 N.W.2d 568, 580-81 (Wis. 1989), reconsideration denied, 443 N.W.2d 314.

One commentator has observed that the Court in San Antonio Independent School District v. Rodriquez "[was essentially closing] the door to a federal constitutional basis for school finance litigation" (at least from the perspective of poor children) and was "disinclined to diminish local control over allocation decisions concerning local tax revenue." Heise, "State Constitutions, School Finance Litigation, and the `Third Wave': From Equity to Adequacy," 68 Temple L. Rev. 1151, 1156, 1157 (1995). See Joondeph, "The Good, the Bad, and the Ugly: An Empirical Analysis of Litigation-Prompted School Finance Reform," 35 Sta. Clara L. Rev. 763, 765-66 (1995) (within the sphere of local control over education "has rested the power of each community to determine how much of the local public fiscal budget should be devoted to

educating the community's children"). A federal appeals court has similarly observed that taxing and spending decisions go hand-in-hand in this area: "The one who pays the educational piper generally gets to call the educational tune . . . ." Kelley v. Metropolitan Bd. of Educ., 836 F.2d 986, 999 (6th Cir. 1987), cert. denied, 487 U.S. 1206. See Catalono & Modisher, "State Constitutional Issues in Public School Funding Challenges," 2 Emerging Issues in State Const. Law 206, 212 (1998); but see Tennessee Small School Systems v. McWherter, 851 S.W.2d at 155-56. See generally J. Nowak, R. Rotunda & J. Young, Constitutional Law 826 (1983).

After San Antonio Independent School District v. Rodriquez, this office issued two opinions on optional financing methods available to school districts. Both opinions, which addressed taxpayer concerns, noted the importance of the Court's conclusion that local control over education amounted to a legitimate state interest.

In 1982, we examined the statutory authority of school districts to call a special election for imposing a supplemental school income tax on individual state income. See 1982 Op. Att'y Gen. 130. If this local option levy received voter approval, "the taxable income of the residents of different districts will vary, as does the value of taxable property, [and so] the surtax rate which must be applied to produce a certain amount of revenue will vary among the districts." Id. at 131. In addressing whether such a disparity constituted a violation of equal protection, we reviewed San Antonio Independent School District v. Rodriquez and found "little difficulty" in concluding that the statute rationally serves the legitimate state interest of allowing local control over schools. Id. at 135.

In 1990, we examined the statutory authority of school districts to certify a cash reserve levy. See 1990 Op. Att'y Gen. 65 (#90-2-9(L)). We concluded that the levy

> bears a rational relationship to the legitimate state purpose of allowing local control of schools. [It] also provides a practical mechanism for local school districts to generate cash reserves which might otherwise be depleted by delayed or reduced state aid payments. While it is true that utilization of the cash reserve levy will result in some inequality in the property tax rate among school districts, [the Court in San Antonio Independent School District v. Rodriquez] made clear that this fact does not render the provision unconstitutional so long as a legitimate state purpose is served. . . .

Id. Compare Hubsch, "The Emerging Right to Education Under State Constitutional Law," 65 Temple L. Rev. 1325, 1334 (1992) with Dupree v. Alma School Dist., 651 S.W.2d 90, 93 (Ark. 1993).

Finally, in 1991, the Supreme Court of Iowa decided Scott County Property Taxpayers Association, Inc. v. Scott County, 473 N.W.2d 28 (Iowa 1991). There, a county proceeding

under the LOST provisions in chapter 422B allocated the revenues to its general fund, rather than to its rural services fund, to relieve property taxes throughout the county. Although this allocation tended to favor residents of the county's incorporated areas over those of the county's unincorporated areas, the court refused to declare the allocation as violative of equal protection. Id. at 30-31.

(4)

The foregoing authorities suggest that sound explanations could conceivably underscore an allocation of X percent in LOST revenues to one school district and an allocation of X-1 percent to another, with the difference applied to property tax relief. Accordingly, we conclude that equal-protection guarantees do not prohibit a county from providing voters with a LOST ballot proposition for separate school districts that would give property tax relief only to those taxpayers residing within one of the school districts. See Town of Ball v. Rapides Parish Police Jury, 746 F.2d 1049, 1061-62 (5th Cir. 1984) (taxpayers of one town within taxing district which received no sales tax revenues from the district, while other towns received shares of them, could not overcome rational basis standard in equal-protection challenge to the district's allocation: it was conceivable that the town, in comparison to the others, simply had no need for any of those revenues); see also Shofstall v. Hollins, 515 P.2d 590, 593 (Az. 1973) ("[w]e find no magic in the fact that [taxes are greater in some school districts] than in others"). See generally Livingston School Bd. v. Livingston Bd. of Educ., 830 F.2d 563, 572 (5th Cir. 1987), cert. denied, 487 U.S. 1223 ("[r]ough accommodations are constitutionally permissible, even where not wholly logical or scientific").

(C)

As previously indicated, school districts in which voters had approved LOST proposals for school infrastructure purposes originally had authority under chapter 422E to enter into 28E agreements with cities only. Compare Iowa Code § 422E.4 (school district in which LOST imposed for school infrastructure purposes has authority to enter into 28E agreement "with one or more cities") with Iowa Code §§ 28E.2, 28E.12 (school district, as "public agency," authorized to enter into 28E agreement with cities and counties); 1998 Op. Att'y Gen. ___ (#97-9-2(L)) (school district may enter into 28E agreement with cities or counties for performing governmental service, activity, or undertaking). See generally 1998 Iowa Acts, ch. 1130, § 4 (creating Iowa Code section 422E.4). Passage of the 1999 amendment to chapter 422E provided school districts with specific authority to enter into 28E agreements with counties as well. See 1999 Iowa Acts, ch. 156, § 20 (amending Iowa Code § 422E.4 by authorizing school district in which LOST imposed for infrastructure purposes to enter into 28E agreement "with one or more cities or a county").

You have a concern about a LOST ballot -- drafted before passage of the 1999 amendment authorizing school districts to enter into 28E agreements with counties -- specifying

that a portion of the anticipated revenues would be expended for property tax relief pursuant to a chapter 28E agreement with "one or more local governments" levying property taxes within the school district. You suggest that the drafters anticipated passage of the 1999 amendment and therefore, in their phrasing of this LOST ballot, eschewed the narrow phrase "one or more cities" in favor of the broad phrase "one or more local governments" in order to allow the county to participate in a future 28E agreement with the school district if, in fact, voters later approved the ballot. Against this background, you have asked: "Can a ballot proposition include language premised upon the passage of future legislation?"

In passing the 1999 amendment, the General Assembly made it retroactive to July 1, 1998. See 1999 Iowa Acts, ch. 156, § 23(3). We have discovered nothing in chapter 422E that prohibits premising the language of a LOST ballot proposition upon the passage of future legislation. In the most analogous Iowa case, Pennington v. Town of Sumner, 222 Iowa 1005, 270 N.W. 629 (1936), a ballot proposing to establish a municipal utility expressly mentioned a proposed contract to construct the facility if voters approved the ballot issue. The court held that when statutory provisions contemplate the existence of such a contract, it "[must] be the product of the future [and naturally] cannot be printed on the ballot [for the electorate]." 270 N.W. at 632.

That a law expressly takes effect upon the passage of future legislation or the occurrence of some other event is not unheard of. See, e.g., State v. Padley, 237 N.W.2d 883, 885 (Neb. 1976); State v. Dumler, 559 P.2d 798, 803-04 (Kan. 1977); XX Kan. Op. Att'y Gen. 14 (#86-35)); 2 Sutherland's Statutory Construction § 33.07, at 17 (1991); Annot., 171 A.L.R. 1070 (1947). See generally 1968 Op. Att'y Gen. 379, 381 (after gubernatorial approval, act may take effect when it specifies it shall take effect). The General Assembly has, for example, conditioned legislation to take effect only upon the passage of future federal or state legislation. See, e.g., 1997 Iowa Acts, ch. 139, § 18; 1987 Iowa Acts, ch. 120, § 11.

Although we conclude that a ballot proposition may include language premised upon the passage of future legislation, we do not comment upon the motive, if any, possibly underlying the wording of a particular ballot. See 1986 Op. Att'y Gen. 10, 12; see also 61 IAC 1.5. See generally Gray v. Taylor, 227 U.S. 51, 56, 33 S. Ct. 199, 57 L.E. 413 (1913). We can only examine the text of a ballot in an opinion to determine its lawfulness. See Pennington v. Town of Sumner, 270 N.W. at 631-32. In doing so here, we cannot agree on a purely textual level that the phrase "one or more local governments" necessarily supports a conclusion that the drafters of the LOST ballot anticipated a future 28E agreement between the school district and the county. See generally Iowa Code § 405A.1(1) ("local government" includes city and county); Black's Law Dictionary 846 (1979) ("local government" includes city and county); Cyclopedic Law Dictionary 562 (1912); Random House Dictionary of the English Language 840 (1971).

We agree as a general rule that ballot propositions should be drafted as precisely as possible; at the same time, we recognize that their phrasing encompasses some measure of

leeway and that inaccuracies in drafting do not always involve material matters. See Honohan v. United Community School Dist., 258 Iowa 57, 137 N.W.2d 601, 602 (1965) (minor defects in form of ballot do not affect election results); Pennington v. Town of Sumner, 270 N.W. at 632 (ballot should not be construed in technical manner). Ballot sufficiency thus hinges upon substantial, not strict, compliance with applicable legal principles. Honohan v. United Community School Dist., 137 N.W.2d at 602; Whiteside v. Brown, 214 S.W.2d 844, 847 (Tex. Civ. App. 1948); 4 Antieau's Local Government Law § 45.11, at 395 (1987); see O'Keefe v. Hopp, 210 Iowa 876, 230 N.W. 876, 879 (1930); Bickel v. City of Boulder, 885 P.2d 215, 225, 226 (Colo. 1994) cert. denied, 513 U.S. 1155. The test for the sufficiency of ballot language "is whether the electorate is afforded an opportunity fairly to express their will, that is, `whether the question is sufficiently definite to apprise the voters with substantial accuracy as to what they are asked to approve'." 3 E. McQuillin, The Law of Municipal Corporations § 12.12, at 119 (1990) (footnote omitted). See 2 E. Yokley, Municipal Corporations § 321, at 123 (1957) ("all that is required is that the proposition . . . be submitted with sufficient definiteness and certainty as not to mislead").

In general, a ballot will not undergo invalidation if it accurately and fairly states the intent of the proposition and does not, in its entirety, mislead or confuse the electorate. Bickel v. City of Boulder, 885 P.2d at 232. A court will not invalidate a choice of ballot language unless it is clearly misleading. Id. A post-election challenge to a ballot would require the challenger to carry the heavy burden of showing that it did not fairly portray the proposition, that the unfair portrayal involved a material matter, and that voter deception resulted. Gray v. Taylor, 227 U.S. at 58; Pennington v. Town of Sumner, 270 N.W. at 632; Bickel v. City of Boulder, 885 P.2d at 227; Whiteside v. Brown, 214 S.W. at 851; 4 Antieau, supra, § 45.11, at 396-97. See generally Henry v. City of Pontiac, 109 N.W.2d 835, 836 (Mich. 1961). As one court has observed: "Elections are solemn events of tremendous public significance. [A] concluded election will not be voided for an irregularity in the ballot unless it can be said that in all human likelihood it interfered with the full and free expression of the popular will and thus influenced the result." Two Guys from Harrison, Inc. v. Furman, 160 A.2d 265, 283 (N.J. 1960). Accord Hardy v. Ruhnke, 218 A.2d 861, 867 (N.J. 1966).

III.

In summary: Under Iowa Code chapter 422E (1999), a LOST ballot proposition does not need to set forth any intergovernmental agreement between a school district and a city; these entities may enter into such an agreement after voters have approved a LOST ballot proposition. Equal-protection guarantees do not prohibit a LOST ballot from setting forth two propositions for separate school districts that would give property tax relief only to those taxpayers residing

within one of the school districts. A LOST ballot proposition may include language premised upon the passage of future legislation.

Sincerely,

Bruce Kempkes
Assistant Attorney General

CITIES; COUNTIES: Iowa Code §§ 384.37, 384.38, 384.45 (1999). Cities may specially assess county property under chapter 384 for the cost of public improvements. (Kempkes to Whitacre, Mills County Attorney, 8-10-00) #00-8-4

August 10, 2000

Mr. C. Kenneth Whitacre
Mills County Attorney
Courthouse
418 Sharp St.
Glenwood, IA 51534

Dear Mr. Whitacre:

You have requested an opinion on the financing of public improvements by special assessments, which generally do not constitute ordinary taxes, but instead represent payments for benefits specially conferred upon property. See Newman v. City of Indianola, 232 N.W.2d 568, 573-74 (Iowa 1975); Sioux City v. Sioux City Indep. School Dist., 55 Iowa 150, 7 N.W. 488, 489-90 (1880); Hayes, "Special Assessments for Public Improvements in Iowa, Part I," 13 Drake L. Rev. 3, 4-5 (1962). In Iowa Code chapter 384 (1999), the General Assembly delegated to cities the authority to assess property for the making of certain public improvements. You ask whether this authority encompasses property owned by counties. We conclude that it does.

I.

Chapter 384 is entitled City Finance. In its division entitled Special Assessments, chapter 384 authorizes a city to establish districts in which it proposes to make certain public improvements. See Iowa Code § 384.45. Chapter 384 authorizes a city to assess against the state the cost of a public improvement adjacent to, extending through, or abutting upon state lands. See Iowa Code § 384.56; see also Iowa Code § 307.45. Section 384.38(l) specifically authorizes a city to assess to "private property within the city" the cost of construction and repair of the improvements. Under section 384.37(15), the phrase "private property" means "all property within the district, except streets."

Chapter 427 is entitled Property Exempt and Taxable. Among other things, it provides that the "property of a county" devoted to a public use "shall not be taxed." See Iowa Code § 427.1(2).

II.

The law of special assessments varies greatly from jurisdiction to jurisdiction. Annot., "Widening Street -- Special Assessment," 46 A.L.R.3d 127, 129 (1972). What property is subject to assessment and what property is exempt depends upon the specific language of state constitutional provisions or legislative enactments.

States have not uniformly provided cities with statutory authority to assess county property for the cost of public improvements. 14 E. McQuillin, The Law of Municipal Corporations § 38.73, at 258, § 38.74, at 264 (1998); 70A Am. Jur. 2d Special or Local Assessments § 60, at 1179, § 64, at 1182 (1987). In Iowa, however, it appears that cities have long had this authority.

In Edwards & Walsh Construction Co. v. Jasper County, 117 Iowa 365, 90 N.W. 1006 (1902), a city assessed the county courthouse for the cost of improvements to the surrounding streets. The county objected on the ground that the precursor to chapter 384, which generally permitted assessments against "lots or land,"did not specifically authorize the city to assess county property. Id. at 1008. On appeal, however, the Supreme Court of Iowa accepted the counter-argument that assessment of "all kinds of property is specifically authorized [by the broad terms of the statute]." Id. The court also contrasted the lack of a specific exemption for county property for purposes of assessment with the specific exemption for county property for purposes of taxes and concluded that this difference in treatment amounted to "strong evidence" of a legislative intent against exempting any county property from assessment. Id. at 1012. Last, the court noted that "[t]here is no reason why [a] county . . . should not pay for the benefits received by it the same as any other property owner." Id. at 1011.

Later, the court upheld an assessment against county property, see Madison County v. City of Winterset, 164 Iowa 223, 145 N.W 492, 493 (1914), and this office summarily concluded that cities had statutory authority to do so, see 1920 Op. Att'y Gen. 369, 369. More recently, one commentator has cited Edwards & Walsh Construction Co. v. Jasper County and Madison County v. City of Winterset in support of the proposition that "county-owned property is . . . subject to special assessment." Hayes, "Special Assessments for Public Improvements in Iowa, Part III," 14 Drake L. Rev. 3, 13 (1964). Cf. Sioux City v. Sioux City Indep. School Dist., 7 N.W. at 489-90 (upholding assessment against school district); 1909 Op. Att'y Gen. 295, 295-96.

We believe that chapter 384 continues to authorize assessments against county property for the cost of public improvements. Chapter 384 permits cities to assess "private property" located within their boundaries. See Iowa Code § 384.38(1). Although the phrase "private property" normally excludes public property, Black's Law Dictionary 1195 (1990), section 384.37(15) specially defines it to encompass "all property within the district, except streets." (emphasis added). We cannot ignore this statutory definition, because the General Assembly may serve as its own lexicographer. See Seeman v. Iowa Dep't of Human Servs., 604 N.W.2d 53, 57 (Iowa 1999). Statutory definitions are "not for us to question." Id. Commonly understood, the adjective "all" admits of no exception. Walters v. Bartel, 254 N.W.2d 321, 322 (Iowa 1977); Consolidated Freightways Corp. v. Nicholas, 258 Iowa 115, 137 N.W.2d 900, 904 (1965); Cedar Rapids Community School Dist. v. City of Cedar Rapids, 252 Iowa 205, 106 N.W.2d 655, 659 (1960). See generally Iowa Code §§ 4.1, 4.1(38). Accordingly, "all property" includes county property.

We also cannot ignore the effect of an express statutory exemption. "A11 property

covered by the general terms of [a] statute, and not specifically exempted, is subject to assessment for local improvement." 14 McQuillin, supra, § 38.30, at 135 (emphasis added). Section 384.37(15) only exempts streets from assessment. Chapter 384 contains no exemption for county property of any type, in contrast to chapter 427, which exempts certain county property from taxes. Had the General Assembly thus intended to exempt county property from assessment, it clearly knew how to do so in express language. See Iowa R. App. P. 14(f)(13). Indeed, according to Edwards & Walsh Construction Co. v. Jasper County, the General Assembly's provision of an express exemption for county property in chapter 427 precludes any implied exemption for county property in chapter 384. 90 N.W. at 1012.

III.

In summary: Pursuant to Iowa Code chapter 384 (1999), cities may specially assess county property for the cost of public improvements.

Sincerely,

Bruce Kempkes
Assistant Attorney General

COUNTIES; EMERGENCY MANAGEMENT: County's relationship to local emergency management commission. Iowa Code §§ 29C.9, 29C.17, 331.381 (1999). County supervisors lack statutory authority to place a local emergency management commission, comprised of representatives from the county as well as from cities within the county, under the control of the county sheriff or some other county office. (Kempkes to Wolf, Clinton County Attorney, 9-21-00) #00-9-2(L)

September 21, 2000

Mr. Michael L. Wolf
Clinton County Attorney
P.O. Box 2957
Clinton, IA 52733

Dear Mr. Wolf:

You have requested an opinion on local emergency management commissions. You ask whether the county board of supervisors may place such a commission under the control of the county sheriff or some other county office. Upon reviewing Iowa Code chapters 29C and 331 (1999 & Supp. 1999), we conclude that the county supervisors lack authority to do so.

Entitled County Home Rule Implementation, chapter 331 generally governs county government. Section 331.381(2) provides that the county supervisors "shall . . . [p]rovide for emergency management planning in accordance with sections 29C.9 through 29C.13."

Entitled Emergency Management, chapter 29C establishes the Iowa Emergency Management Division, which has responsibility "for the administration of emergency planning matters" in this state. Iowa Code § 29C.5. It provides support to local emergency management commissions, which oversee local emergency management agencies. See Iowa Code § 29C.9(1).

A local commission "shall be composed of a member of the board of supervisors or its appointed representative, the sheriff or the sheriff's representative, and the mayor or the mayor's representative from each city within the county." Iowa Code §§ 29C.9(2); see Iowa Code § 331.653(5). It governs itself through the passage of bylaws. Iowa Code § 29C.9(5).

A local commission shall (1) develop, adopt, "and submit for approval by local governments within the county" a comprehensive countywide emergency operations plan, Iowa Code § 29C.9(8); (2) adopt, certify, and submit an annual budget "to the county board of supervisors and the cities," Iowa Code § 29C.17(5); and (3) appoint an emergency management coordinator, who serves at its pleasure and has responsibility for developing the countywide emergency management plan, Iowa Code § 29C.10(1). A local commission may levy a special tax for funding its services after receiving approval from the county supervisors. 1998 Op. Att'y Gen. ___ (#98-7-1(L)).

A local commission constitutes a county-municipal hybrid, similar to some voluntarily created entities jointly exercising governmental powers, Iowa Code ch. 28E; a local emergency planning commission, Iowa Code ch. 30; a joint 911 service board, Iowa Code ch. 34A; or a conference board, Iowa Code ch. 441. Cf. Iowa Code § 29C.2(2) (local emergency management agency is a "countywide joint county-municipal public agency" that administers chapter 29C). Its members come from the county as well as from cities within the county; in any county with more than two cities, mayors will constitute a majority of the members.

Chapter 29C clearly places control of local emergency management with local emergency management commissions. Chapter 331 does not conflict with chapter 29C on this issue. Indeed, section 331.381(2) provides that the county supervisors "shall . . . [p]rovide for emergency management planning in accordance with sections 29C.9 through 29C.13." (emphasis added). See generally Iowa Code § 4.1(30)(a) (unless otherwise defined, "shall" in statutes imposes a duty). County supervisors have a duty to follow sections 29C.9 through 29C.13, which vests control of emergency management in local emergency management commissions and their coordinators.

We therefore conclude that the county supervisors cannot place a local emergency management commission under the control of the county sheriff or any other county office.

Sincerely,

Bruce Kempkes
Assistant Attorney General